

Human rights files No. 15

**The exceptions
to Articles 8 to 11
of the European Convention
on Human Rights**

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The exceptions to Articles 8 to 11 of the European Convention on Human Rights

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I. Introduction

While the scope and applicability of any right may be limited by the manner in which it is interpreted, most of the rights enshrined in the European Convention on Human Rights are also subject to more explicit restrictions which could be said to fall into four main categories.¹ First, “express definitional exclusions” attached to specific articles attempt to set out in relatively precise terms what a given right means. For example, Article 4, paragraph 3, lists various kinds of obligatory work, such as compulsory military service, which are excluded from the definition of “forced or compulsory labour”. Secondly, some provisions include statements of the relatively limited circumstances in which a given right does not apply. For example, the right to liberty under Article 5 is not infringed by, amongst other things, “the lawful detention of a person after conviction by a competent court”. Thirdly, certain classes of person with “special legal status” may be expressly denied full entitlement to certain rights. For example, Article 16 authorises states to impose restrictions on the political activities of aliens, Article 10, paragraph 1, entitles states to require the licensing of broadcasting, television and cinema enterprises, and Article 11, paragraph 2, permits the imposition of lawful restrictions upon freedom of association and freedom of peaceful assembly in the armed forces, the police and the civil service.

Fourthly, various kinds of public and private interest provide states with defences against interferences with certain rights. Three distinctions can be drawn within this category. First, Article 15 enables all but the absolute rights in the Convention to be suspended in “time of war or other public emergency threatening the life of the nation” provided this is “strictly required by the exigencies of the situation”.² However, although the underlying justification is clearly the “public” or “national” interest, the text does not make this explicit. Secondly, the “public interest” provides an explicit justification for interference by the state both with the right to peaceful

enjoyment of possessions – as long as “the conditions provided for by law and by the general principles of international law” are observed (Article 1 of Protocol No. 1) – and with the right of everyone lawfully within a territory to liberty of movement and freedom to choose residence (Article 2, paragraph 4, of Protocol No. 4). Article 1 of Protocol No. 1 also states that “the preceding provisions” shall not “in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . .”.

Thirdly, a wide range of specific restrictions, or “legitimate purposes”, of a public and private interest kind are attached to Articles 8 to 11 of the Convention.³ It is these which this study will examine.⁴ There is a complex relationship between Convention rights, types of interference, and the exceptions under discussion. Some of the limitations apply to each of the rights at issue, but others adhere only to a single provision. Even similar exceptions do not always appear in precisely the same form in different articles of the Convention and while some of these differences are incidental, others are subtle but significant.

Public safety, the protection of the rights and freedoms (or reputations) of others, and the protection of health, morals or public order/*ordre public* (or the prevention of disorder) can justify infringements of the right to respect for private and family life, home and correspondence (Article 8, paragraph 2), the right to freedom of thought, conscience and religion (Article 9, paragraph 2), the right to freedom of expression (Article 10, paragraph 2), and the right to freedom of peaceful assembly and association (Article 11, paragraph 2). The interests of “national security” and the “prevention of crime” also limit each of these rights except for the right to freedom of thought, conscience and religion. The right to freedom of expression may be restricted for the sake of the “reputation or rights of others”, whereas the phrase “the rights and freedoms of others” is the clause which appears in each of the other relevant provisions. The “economic well-being of the country” limits only the right to respect for private and family life, home and correspondence, while “territorial integrity”, “preventing the disclosure of information received in confidence”, and the maintenance of the “authority and impartiality of the judiciary” apply only to the right to freedom of expression.

Other features of some of the rights under discussion should be noted. Speculation concerning whether Article 8, paragraph 1, creates a right to respect for private and family life, home and correspondence *only* from public authorities, has been generated by the second paragraph which states that “there shall be no interference by a public authority with the exercise of this right except” in pursuit of the legitimate purposes listed.⁵ Article 10, paragraph 1, also makes reference to “interference by a public authority” with the right to freedom of expression, and permits the licencing of broadcasting, television and the cinema. Although the second paragraph refers to the “formalities, conditions, restrictions or penalties” which may be imposed, in practice the important issue is usually whether one of the stated exceptions can be successfully pleaded.⁶ Article 10, paragraph 2, also refers to the “duties and responsibilities” associated with the right to freedom of expression which vary according to the circumstances and may be related to the means of expression and to the profession of the person seeking to exercise it.⁷

The successful invocation of any of the legitimate purposes attaching to the second paragraphs of Articles 8 to 11 is contingent upon compliance with two vital conditions: that the interference, or limitation, is prescribed by, or is in accordance with, law (the “rule of law test”); and that it is necessary in a democratic society in pursuit of one or more of the second paragraph objectives (the “democratic necessity test”). Typically, therefore, the Strasbourg organs will address four key questions in cases where an exception is pleaded. First, was there an interference with the right in question? Secondly, if so, was it in accordance with, or prescribed by, law? Thirdly, was it genuinely in pursuit of one or more of the legitimate purposes at issue? Finally, taking all the relevant circumstances into account, was it necessary in a democratic society for these ends? However, although a largely effective interpretive framework for the “rule of law” criterion has been developed at Strasbourg, the content of the “democratic necessity” test remains highly fluid and indeterminate. This is largely due to the absence of a clear understanding of the relative importance of rights and exceptions in the case-law on Articles 8 to 11, in its turn a consequence of the variable “margin of appreciation” accorded to states in restricting the exercise of the rights in question. As Gearty suggests, Strasbourg judges tend to be more comfortable with textual interpretation and the requirements of procedural fairness than with the tangled issues of political philosophy which

the exceptions under discussion are capable of raising.⁸ Although there is much in the jurisprudence of Court and Commission to commend, it can be argued that a more coherent approach based upon a strict presumption in favour of the exercise of any given right and a narrower interpretation of the exceptions, is desirable.

II. The importance of legality and democracy

The purpose of the “prescribed by” or “in accordance with the law” clauses in the second paragraph of Articles 8 to 11 is to ensure that the scope for arbitrary tampering with rights by the executive is limited by domestic legislative or judicial authority. The concept of “law” in this context is not, however, confined to domestic legal processes and includes more abstract or general assumptions about the requirements of the “rule of law”, a basic Council of Europe ideal. The purpose of the “democratic necessity test” is to ensure that any specific interference with rights is judged against the “true”, rather than the alleged, needs of a democratic society.

A. The rule of law test

The phrase *prévues par la loi* appears in the French text of the Convention in the second paragraph of Articles 8 to 11. However, the English text translates this as “in accordance with the law” in Article 8, and “prescribed by law” in Articles 9, 10 and 11. In the *Sunday Times* case the Court held that since both versions of the Convention are equally authentic, these different expressions must be interpreted in a way which “reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty”.⁹

In *Huvig*¹⁰ and *Kruslin*¹¹ the Court identified four questions from earlier cases¹² which provide a test for deciding if any given interference with a specific right, or rights, has been “legal”: Does the domestic legal system sanction the infraction? Is the relevant legal provision accessible to the citizen? Is the legal provision sufficiently precise to enable the citizen reasonably to foresee the consequences which a given action may entail? Does the law provide adequate safeguards against arbitrary interference with the respective substantive rights? The last of these is particularly important since the ultimate purpose of the “legality” requirement is to enable the

Strasbourg organs to ensure that all legitimate interferences with the relevant rights are grounded, not merely in national law, but in standards which conform with the legal culture of the Council of Europe.

Although it may be possible to disagree with the way in which the Strasbourg institutions have applied this test in some cases, the development of an approach which goes beyond a mere attempt to discover if relevant domestic legal provisions exist should be welcomed. Diligent scrutiny of the adequacy of the safeguards provided by domestic law should also be encouraged.

Does the domestic legal system sanction the infraction?

Domestic legal provisions include, for this purpose, not only legislation but also judge-made law typical of common law jurisdictions,¹³ international legal obligations applicable to the state in question,¹⁴ and a variety of "secondary" sources, for example royal decrees, emergency decrees, and certain internal regulations based on law.¹⁵ The appropriateness of both "broad" and "narrow" definitions of "law" for this purpose has been the subject of some academic debate.¹⁶ However, the important question is not what elements of a given national decision-making system should be deemed strictly "legal", but the effectiveness of the domestic restraints upon abuses of executive power. On the grounds that they are best placed to judge, the Court and Commission permit national authorities a broad margin of appreciation in interpreting domestic law and in determining whether or not national law-making procedures have been followed.¹⁷

Is the legal provision accessible to the citizen?

In the *Sunday Times* case the Court held that accessibility means that the citizen "must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case".¹⁸ For example, in *Silver* the Court held that the Standing Orders and Circular Instructions which the British Home Secretary issues to prison governors failed the accessibility test since they were not published, were not available to prisoners, nor were their contents explained in cell cards.¹⁹ They were, therefore, not "law" for the purpose of Article 8, paragraph 2.

Is the legal provision sufficiently precise to enable the citizen reasonably to foresee the consequences which a given action may entail?

The Court has consistently recognised that many laws are framed in general terms the interpretation and application of which are matters of practice.²⁰ In a number of cases it has been held that the level of precision required of domestic legislation depends to a considerable degree on the content of the instrument in question, the field it is designed to cover, and the number and status of those to whom it is addressed.²¹ In *Groppera*, the Court confirmed that the predictability of consequences may require expert advice.²² Laws which confer discretion must indicate the scope of the discretion although this need not be found in the legal text itself.²³ Although not “law” themselves, administrative guidelines or instructions may be consulted in order to clarify the meaning and *modus operandi* of the strictly legal sources. For example, the Standing Orders and Circular Instructions deemed “non-legal” in *Silver* were nonetheless taken into consideration by the Court in respect of the foreseeability issue since they established guidelines to official practice and thus made the application of the Prison Rules, which had strict legal status, more determinate.²⁴ In the *Observer and Guardian* and the second *Sunday Times* cases the Commission stated that a rule which authorises prior restraint of a publication must specify the criteria with “sufficient precision” for such restraint to be compatible with the foreseeability criterion and,²⁵ according to *Huvig and Kruslin*, laws permitting tapping, and other forms of official interference with telephone conversations, must be particularly precise especially since the technology available is rapidly becoming more sophisticated.²⁶

The *Malone* and *Leander* cases provide good illustrations of the application of the foreseeability criterion. In *Malone*²⁷ the Court began by observing that although the exact legal basis for executive interception of communications in England and Wales was the subject of some dispute, it was common ground that the settled practice at the time was lawful. But, having reviewed the relevant legal materials, it was held that it could not be said “with any reasonable certainty” which elements of the power to intercept were incorporated in legal rules and which were within the discretion of the executive. Therefore, the Court concluded that “the law of England and Wales does not indicate with reasonable clarity the scope and manner of

exercise of the relevant discretion conferred on the public authorities" and, hence, with respect to the fourth element of the test, "the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking."²⁸ Therefore, although the practice in question was lawful by the national legal standard, the interference complained of lacked foreseeability and was, consequently, not "in accordance with the law". The practice of "metering", whereby all numbers dialled from a particular telephone were automatically recorded by the Post Office for the police, also failed the "legality" test since no legal rules effectively governed the scope and manner of the discretion available to the executive authorities.²⁹

In *Leander*³⁰ the Court had to decide if a secret process involving the collection of information by the Swedish police, subsequently used to bar the applicant from employment in a national security related post, was "in accordance with the law". This raised both the accessibility and foreseeability issues. The accessibility requirement was fulfilled by the fact that the system operated under published law, the Personnel Control Ordinance. But the Court held, referring to the *Malone* judgment, that the foreseeability requirement was not the same in this context as in others. Although the law had to be "sufficiently clear" to give the public "an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life",³¹ it was not necessary that the public should know the precise criteria by which information was stored and released. The Court concluded that the Swedish Personnel Control system was "in accordance with the law" because it was established by statute and the scope of the police discretion to enter and release information was sufficiently foreseeable and subject to various satisfactory statutory and governmental guidelines the nature of which will be considered in a subsequent section.

Does the law provide effective safeguards against arbitrary interference with the respective substantive rights?

In *Malone* the Court stated that the phrase "in accordance with the law" implies that there must be a "measure of legal protection in domestic law

against arbitrary interferences by public authorities with the rights safeguarded by", in this case, Article 8, paragraph 1.³² It also held that:

it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.³³

The Strasbourg organs have recognised that this is particularly necessary where a broad discretion is conferred upon the executive, especially where this is exercised in secret,³⁴ and in *Herczegfalvy* it was held that "if a law confers a discretion upon a public authority, it must indicate the scope of that discretion, although the degree of precision required will depend upon the subject matter."³⁵

Since assessing the efficacy of safeguards involves the exercise of judgment rather than the application of a mechanical test, any commentator will be able to find both "satisfactory" and "unsatisfactory" illustrations from the Strasbourg jurisprudence. Two decisions can, however, be cited as models of the kind of careful attention to this matter which the European Court and Commission should be encouraged to pay in all cases where this issue arises. In *Huvig* and *Kruslin* the Court held that, while not minimising the value of some of the seventeen safeguards cited by the government, the system under which official telephone tapping took place in France did not provide adequate protection against possible abuses. The categories of people liable to have their phones tapped by judicial order and the nature of the offences which could give rise to such an order were not defined. Nothing obliged a judge to set a limit on the duration of telephone tapping, and unspecified procedures governed the drawing up of summary reports containing intercepted conversations, the precautions to be taken in order to communicate the recordings for possible inspection by the judge and by defence lawyers, and the circumstances in which recordings had to be erased or the tapes destroyed. Although there was evidence of a settled official practice this was deemed to lack the necessary normative control which statute or case-law should have provided.³⁶

B. The democratic necessity test

The phrase “necessary in a democratic society” is arguably one of the most important clauses in the entire Convention since, in principle, it gives the Strasbourg organs the widest possible discretion in condoning or condemning interferences with rights which states seek to justify by reference to one or more of the legitimate purposes in the second paragraphs of Articles 8 to 11. One of the key tasks for the Court and Commission, and one of the most difficult, is to test the persuasiveness of any such defence to ensure that it complies with the genuine interests of democracy and is not merely political expediency in disguise. To assist in its discharge, the Court and Commission have developed a framework of interpretation, mostly in the *Handyside*,³⁷ *Silver*,³⁸ and *Lingens*³⁹ cases which consists of three principal elements: the nature of democratic necessity, the burden of proof/proportionality, and the margin of appreciation/European supervision. However, the implications of each of these elements remain obscure and, with some notable exceptions, the Strasbourg institutions have been reluctant to provide further clarification.

The nature of democratic necessity

The Court has held that the adjective “necessary” lies somewhere between “indispensable” and such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”,⁴⁰ and it is clear that mere expediency is not sufficient. The interference must be justified by a “pressing social need” relating to one or more of the legitimate aims.⁴¹ In determining whether such a need exists, attention must be paid to the particular facts of the case and to the circumstances prevailing in the given country at the time.⁴² The state’s action must also be based upon “an acceptable assessment of the relevant facts”.⁴³

The Commission and Court have made some attempt to identify the key features of a democratic society. Freedom of expression has consistently been held to be one of its “essential foundations” and, therefore, the legitimate purposes in Article 10, paragraph 2, must be narrowly construed. The Strasbourg organs must also determine not only that the state acted reasonably, carefully and in good faith, but that the restriction was proportionate and justified by relevant and sufficient reasons.⁴⁴ “Pluralism, tolerance and broadmindedness”⁴⁵ and the right to a fair trial have also

been singled out for special mention⁴⁶ and it has been held that “democracy does not simply mean that the views of a majority must always prevail”.⁴⁷ A balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.⁴⁸ But, beyond this, little attempt has been made to define the needs of democracy.⁴⁹ The Strasbourg institutions have instead chosen to concentrate upon the necessity of a given restriction in the context of the interference complained of. This is understandable since the Convention suggests that interferences with the right in question are permissible only if they are necessary in pursuit of one or other of the legitimate aims stated.⁵⁰ Nevertheless, given their vital role in the development of a European human rights culture it would not be unreasonable to expect the Court and Commission gradually to construct a deeper and more comprehensive “democratic needs” theory than they have to date.⁵¹

Burden of proof and proportionality

It has been held that interferences with rights must be “proportionate to the legitimate aim pursued”,⁵² and that this will vary from case to case, the background circumstances, the right in question and the type of interference concerned.⁵³ But it is not always clear which party has the burden of proving that the interference has been proportionate. Various phrases have been used by the Court and Commission from time to time to express the idea that the rights in the Convention should take priority with the state carrying the burden of justifying the interference.⁵⁴ For example, the grounds must be “relevant and sufficient”,⁵⁵ the necessity for a restriction must be “convincingly established”,⁵⁶ and the exceptions to Articles 8 to 11 should be narrowly construed.⁵⁷ However, other decisions refer to the need for a “balance” between rights and exceptions.⁵⁸ As a result choosing between the “priority to rights” or “balance” tests has become a key source of confusion between the scope of the domestic margin of appreciation and the boundaries of European review.

The margin of appreciation and European supervision

The “margin of appreciation” refers to the measure of discretion states are permitted in their observance of rights and, in particular, to the application of the various exceptions to the Convention. The doctrine, which derives from national case-law concerning judicial review of administrative action,

was first adopted by the Strasbourg organs in the context of derogations from the Convention in times of emergency under Article 15⁵⁹ and then applied by analogy to “extraordinary” situations which fall short of the kind of crises envisaged by this provision.⁶⁰ It has since “leaked” into every part of the Convention and now “constitutes one of the cardinal points of the Strasbourg case-law”.⁶¹

The Court and Commission have decided that, although the margin of appreciation must be respected, it is ultimately for them to determine, with reference to relevant legislation and the decisions of domestic institutions,⁶² whether both the aim and necessity of any given infringement of rights under one or more of the public interest exceptions is compatible with the Convention. In *Silver* the Commission stated that the failure of a democratic parliament to sanction a particular interference on public interest grounds – in this case interference with prisoners’ correspondence – “severely qualified” any arguments based on the margin of appreciation,⁶³ and in the *Sunday Times* case the Court held that supervision by the Strasbourg organs is not limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully, and in good faith, but that the interference complained of must be examined in the light of the case as a whole.⁶⁴

Van Dijk and Van Hoof distinguish four different approaches to the doctrine in the Strasbourg case-law: cases in which (a) no margin of appreciation has been allowed at all and a fully fledged review of state discretion has been conducted; (b) a narrow margin of appreciation has been permitted; (c) a reasonableness test has been applied and; (d) a “not unreasonable” test has been employed. As the authors argue, the difference between (a) and (b) is not always easy to determine because the Strasbourg organs sometimes refer to the state’s margin of appreciation yet carry out a full review themselves, while the key difference between (c) and (d) lies in the burden of proof. Under the former, the “reasonableness test”, the state has to prove that its decisions were reasonable, whereas under the latter, the “not unreasonable test”, the applicant has to prove that they were unreasonable, the benefit of any doubt being given to the state. The authors also claim that, although not all decisions neatly fit their hypothesis, two key factors tend to determine which mixture of state discretion and Strasbourg supervision prevails in any given case: (i) the nature of the alleged interfer-

ence, in its turn contingent upon the right involved and the justification pleaded and; (ii) the extent to which a European standard can be derived from the laws of member states. Van Dijk and Van Hoof conclude that the development of a “model margin of appreciation test” in the *Handyside*, *Silver* and *Lingens* decisions has “not provided clarity”, and that it is “still quite hazardous to try and foretell” whether in any given case the discretion national authorities are permitted will be wide or narrow.⁶⁵

III. The exceptions to Articles 8 to 11

The exceptions to Articles 8 to 11 are difficult to classify since they are capable of operating in a variety of ways according to context. However, although no sharp boundaries can be drawn, two broad categories can be distinguished: those which concern “public interests”, that is, the general interests of state and society; and those which concern “private interests”, in the sense that they are capable of benefiting distinct groups or individuals. In the first category can be placed “national security”, “the economic well-being of the country”, “territorial integrity”, the maintenance of “public safety”, the “protection of health or morals”, and the “prevention of disorder or crime”, while the protection of the “rights, freedoms and reputations of others”, and the non-disclosure of information received in confidence belong in the second category. Curiously, “maintaining the authority and impartiality of the judiciary” has been largely interpreted to refer to litigants’ rights or the right of judges not to be defamed, and, therefore, also belongs in the second category.

A. Public interests

The public safety defence has been interpreted in a variety of ways and, although capable of including the protection of health has tended, like the territorial integrity clause, to dissolve into either the national security or the prevention of disorder or crime exception.⁶⁶ The discussion here will, therefore, be confined to those exceptions which have featured most prominently in the Strasbourg case-law – namely, national security, the protection of the economic well-being of the country, the protection of health or morals, and the prevention of disorder or crime.

National security

The national security defence is available to states in relation to the right to respect for private and family life, home and correspondence (Article 8,

paragraph 2), the right to freedom of expression (Article 10, paragraph 2), and the rights to peaceful assembly and association (Article 11, paragraph 2). It should be remembered that in national security emergencies, which are beyond the scope of the present study, Article 15 entitles states to derogate from all but the absolute rights conferred by the Convention.⁶⁷

The national security exception has not often featured in litigation in Strasbourg. But the cases in which it has been raised have tended to be of fundamental importance. Although the Court and Commission have not taken it upon themselves to define what national security interests there are, the principal cases in which this defence has been raised indicate that it concerns the security of the state and the democratic constitutional order from threats posed by enemies both within and without.

Some of the most significant cases in which the national security defence has been pleaded have involved infringements of the right to respect for private and family life, home and correspondence occasioned by secret surveillance.⁶⁸ The Strasbourg organs accept that secret surveillance constitutes an interference with Article 8.⁶⁹ But they have also acknowledged that such practices can be justified provided they are "strictly necessary for safeguarding the democratic institutions".⁷⁰ In 1978 the Court observed in *Klass* that two then comparatively recent developments, technical advances in espionage and the development of European terrorism, had made secret surveillance particularly necessary.⁷¹

Therefore, in order for any given system, or specific instance, of secret surveillance to be judged compatible with the Convention the Strasbourg organs must be convinced that it is subject to satisfactory safeguards against arbitrary abuse. In the *Klass* case the Court held that "in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge".⁷² But judicial control, though preferable, is not essential provided other safeguards are considered adequate in the circumstances. In both *Klass* and *Leander*, having carefully scrutinised the supervision arrangements in two different types of surveillance system, the Court found each to be satisfactory though neither was open to judicial review.

In *Klass*⁷³ the applicants, a public prosecutor, a judge and three lawyers, claimed that Article 10, paragraph 2, of the Basic Law of the Federal Republic of Germany, and legislation passed under it (an Act of 13 August 1968, the "G 10") violated Article 6, paragraph 1, and Articles 8 and 13 of the Convention by making provision for interception of mail and telecommunications. There was no requirement that the person concerned had to be informed, nor provision for any significant judicial oversight. Nevertheless, having examined the Basic Law, the G 10 legislation, and the supervisory arrangements, the Court concluded that an adequate balance had been struck between the rights of the individual and the needs of a democratic society. A series of limiting conditions had to be satisfied under G 10 before surveillance could be conducted and the legislation laid down strict conditions regarding the implementation of surveillance measures and the processing of information thereby obtained. Initial control of surveillance was effected by an official qualified for judicial office while overall supervision was entrusted to an independent Board of five members appointed by the Bundestag on a proportional basis, and to the G 10 Commission which consisted of three members appointed by the Board for the duration of the legislature. The Court also accepted the government's argument that certain surveillance operations should be kept secret even when they had been discontinued because to do otherwise might compromise their long-term purpose and reveal the manner in which the surveillance system itself functioned. There was no evidence, the Court held, that the surveillance system in question had been improperly operated.

In *Leander*⁷⁴ the applicant complained that information collected on a secret Swedish National Police Board register, to which he had been denied access, had implied he was a security risk. This, he claimed, had resulted in his dismissal from a temporary job as museum technician at the Naval Museum, Karlskrona Naval Base, and had prevented him from being offered a permanent post there. The Court decided that although there had been an interference with Article 8, paragraph 1, it could be justified under the national security exception in paragraph 2. Referring to the state's wide margin of appreciation in the national security context, and to the general principles of pressing social need and proportionality, it was held that the interference which the applicant had suffered did not constitute an obstacle to his leading the private life of his choice. Although it may have denied him access to employment in the public service, this was not a right pro-

vided by the Convention. The Court was also satisfied that the system of secret surveillance, which operated under statute (the Personnel Control Ordinance) was subject to adequate safeguards. Members of Parliament were on the National Police Board and the Chancellor of Justice, the Parliamentary Ombudsman and the Parliamentary Committee of Justice also had supervisory roles. The denial of any opportunity to challenge the accuracy of the information stored about individuals was deemed essential for the effective operation of the personnel control system.

In *Vogt*⁷⁵ the dismissal of the applicant from her civil service post as a secondary school teacher on account of active membership of the German Communist Party (the DKP) was defended by the German government under the national security, prevention of disorder, and the protection of the rights of others exceptions to the right to freedom of expression (Article 10) and the right to freedom of association (Article 11). Relevant legislation established an obligation on civil servants to dissociate themselves unequivocally from organisations seeking to undermine the constitution, and the German courts had declared that the purpose of the DKP, although a legal political party, was to overthrow the constitutional order and social structure of the Federal Republic. However, a narrow majority of the European Court of Human Rights (11 out of 20 judges) decided that the applicant's dismissal was disproportionate to the pursuit of the legitimate aims cited for three reasons. First, dismissal would effectively have denied her employment in the only profession for which she had been trained. Secondly, her post as a teacher of French and German did not intrinsically involve any security risks. Thirdly, the only threat she possibly represented was the indoctrination of her pupils, and all the evidence suggested that this had not occurred nor was it likely to. Although not a vital part of the decision, the nature of the obligation owed by civil servants under German law was also criticised by the majority as too absolute to be defensible. Notwithstanding Germany's uniquely unfortunate recent constitutional history, this was contrasted unfavourably with the much less strict obligations imposed on civil servants in other member states.

Seven of the nine dissentients considered that the applicant's dismissal was proportionate and could be considered necessary in a democratic society with the particular characteristics possessed by the German Federal Republic. Agreeing with the minority, Judge Jambrek delivered a separate,

and particularly well-reasoned, judgment which argued that a number of factors had not been given due weight by the majority. These were: Germany's historical experience and its unique situation, until the fall of the Berlin wall, as a divided country with a particular vulnerability since the eastern part lay in the Communist Bloc; the role of the KDP as a client party of the East German state, a declared enemy of the Federal Republic and the West; the applicant's increasingly active involvement in the KDP from 1980 onwards; the fact that disciplinary proceedings were only instituted against her following her rise to prominence as a KDP activist and involved a series of warnings requiring her to downgrade her involvement but not to resign from the party as such – an indication of restraint and flexibility on the part of the German authorities; that the obligation of political loyalty imposed on German civil servants was not “absolute” as the majority held because, according to the applicant's counsel, only some 1% to 1.5% of known extreme left-wing civil servants had been dismissed; the fact that the applicant had not been dismissed merely for being a member of a particular organisation, nor for expressing a particular point of view, but for the high profile she had chosen to take in a political party whose objectives were incompatible with her oath of loyalty to the constitution of the Federal Republic; that the arguments for and against her dismissal were, therefore, finely balanced and could only be resolved by the national authorities within the context of a wide margin of appreciation. In addition to Judge Jambrek the remaining two of the dissentients thought that Article 10 was not applicable since the real dispute concerned conditions of access to employment in the German civil service, which, as the Court had already held in *Kosiek*⁶⁶ and *Glaserapp*,⁷⁷ raises no issue under the European Convention on Human Rights.

The justification for a wide margin of appreciation is readily apparent in national security cases since this is a vital interest to all states, and the Court and Commission, remote from the specific context, may well be ill equipped to identify genuine threats to it. Yet secrecy by its very nature increases the risk of abuses and makes the availability of effective supervision all the more important. For this reason the Strasbourg organs adopt a less strict approach to admissibility permitting even “potential victims” to have their cases heard. The examination of the secret surveillance systems in Germany and Sweden conducted by the Court in *Klass* and *Leander* was wide-ranging and thorough. However, since the central issue should not

merely be the availability of domestic institutional controls but the effectiveness of the supervision provided, the appropriateness of the balance test is open to question. To say, as the Court did in *Klass*, that there was no evidence of impropriety is to place the burden of proof on the wrong party because, given the secrecy involved, such evidence will be virtually impossible to discover. Instead it should be incumbent upon the state to prove, subject to a wider margin of appreciation than may be permitted in other areas, not only that independent supervision arrangements are available but that they operate effectively. There should, secondly, be a stronger presumption in favour of domestic judicial supervision and, where this has not been provided, explanations should be required.⁷⁸ While the decisions in *Kosiek* and *Glaserapp* are difficult to reconcile with that in *Vogt*, the result in the latter is ultimately to be preferred over the alternative. A democratic state must be tolerant of the political affiliations of its servants. But it cannot be indifferent to the employment of those committed to its destruction. Determining which political organisations this might include, and which state and quasi-state institutions are to be considered part of the civil service, can only be determined by national authorities subject to review by the Strasbourg institutions. However, when the matter is as finely balanced as it was in *Vogt*, the presumption, contrary to the view of the minority should lie with the party claiming the right and not with the state invoking the exception since the damage to the Federal Republic likely to have been caused by Mrs Vogt retaining her job would, almost unquestionably, have been less than the damage likely to have been caused to her by losing it.

The protection of the economic well-being of the country

The legitimacy of interference with the rights to private and family life, home and correspondence, in order to protect the "economic well being of the country" under Article 8, paragraph 2, was not seriously considered at Strasbourg until the French cases of *Funke*, *Crémieux* and *Mialhe* in 1993.⁷⁹ During searches by customs officers investigating suspected irregularities in financial dealings with foreign countries, business documents were seized at the applicant's homes in Strasbourg, Bordeaux and Marseilles. Opting for a "priority to rights" approach the Court stated in *Funke* that "the exceptions provided for in Article 8, paragraph 2, are to be interpreted narrowly and the need for them in a given case must be convincingly established."⁸⁰ While recognising that house searches and the

seizure of documents could be justified in relation to exchange-control offences, it was held that the “relevant legislation and practice must afford adequate and effective safeguards against abuse”⁸¹ and that, for three reasons, this had not been the case here: the customs authorities had excessively wide powers, in particular exclusive competence to assess the expediency, number, length and scale of inspections; there was no requirement for a judicial warrant and the other alleged safeguards in the legislation were “too lax and full of loopholes”⁸² to satisfy the proportionality test; and finally, the customs authorities had never lodged a complaint against the applicant alleging an offence against the relevant regulations. The first two of these grounds also provided the basis for the decisions in *Crémieux* and *Miailhe* with the indiscriminate nature of the searches providing an additional reason for the decision in the latter.⁸³

The protection of health or morals

The right to respect for private and family life, home and correspondence (Article 8, paragraph 2), the right to freedom of thought, conscience and religion (Article 9, paragraph 2), the right to freedom of expression (Article 10, paragraph 2), and the right to freedom of peaceful assembly and to freedom of association (Article 11, paragraph 2) may be restricted for “the protection of health or morals”.⁸⁴ The few decisions on the protection of health have upheld compulsory participation by prisoners in cleaning cells,⁸⁵ the obligation upon soldiers to have their hair cut so that it does not touch their collars,⁸⁶ and the criminalisation of consensual adult sado-masochistic sexual practices where the harm inflicted was deemed severe.⁸⁷ The protection of morality has been most prominently pleaded in cases involving restrictions upon the expression of sexuality in publications and works of art, and interference with the right to respect for private life resulting from the criminalisation of homosexual conduct between consenting adult males.

In *Handyside* the Court considered the general nature of the “protection of morality” exception⁸⁸ and held that it was not possible to find a uniform conception of morals in the domestic law of the various Contracting States since there were variations both from place to place and from time to time, especially in “our own era”, characterised by a “rapid and far-reaching evolution of opinions on the subject”.⁸⁹ Because of their “direct and con-

tinuous contact" with the "vital forces of their countries", state authorities were said to be in a better position than an international judge to assess the "necessity" of a particular measure instituted in pursuit of the protection of morality by way of a "restriction" or "penalty" upon the right to freedom of expression. But it was held that the requirements of proportionality and pressing social need had to be satisfied and that domestic practice was subject to European supervision. In *Dudgeon* the Court added that where intimate aspects of private life are involved, "there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate" for the purposes of Article 8, paragraph 2.⁹⁰

However, moral standards in member states may not be as diverse as the Court in *Handyside* supposed. Here again a golden opportunity to conduct a thorough comparative survey and to attempt to set out some clear general principles forging a common European standard was missed. There may be a higher level of consensus in member states on certain moral issues, for example, that "soft pornography" can be obtained from newsagents, than on others, for example, the circumstances in which abortion is justified. The areas of trans-national consensus and disagreement need to be properly understood, and the areas where diversity can be tolerated and those where it cannot, more carefully spelled out.

Despite the emphasis placed upon the importance of freedom of expression in a democratic society, the *Handyside* and *Müller* cases indicate the reluctance of the Court to interfere with restrictions based upon the protection of morality, particularly where sexual matters are concerned. The appropriateness of a wide margin of appreciation may be easier to justify here than with respect to other forms of expression. Risks to the democratic nature of any society are undeniably posed by restrictions upon the expression of views about, for example, the economy and government, with the result that there is a clear need for a common European standard. But although sexual matters are fundamental to human well-being and, as such, all democratic societies must permit them to be discussed publicly, it is not so clear that any given society is less democratic than others because it places more restrictions upon, for example, the artistic expression of certain forms of sexuality.⁹¹ There may, in other words, be more room for different national standards here than in other areas. What matters most is the degree of consensus or lack of it within a given state about the issue in

question, the importance which ought to be attached to particular forms of sexual expression, how "pressing" the social need is and how proportionate the restriction or penalty is to the activity to which it has been applied. None of these questions figured as prominently in *Handyside* as they ought to have.

The applicant in *Handyside* had been convicted in England in July 1971 under the Obscene Publications Acts 1959 and 1964 for publishing and distributing an English-language edition of "The Little Red Schoolbook". Some 10% of his stock had also been seized. The book, originally published in Denmark but also freely available in translation in thirteen European countries, was targeted at schoolchildren between the ages of 12 and 18, was anti-authoritarian in tone, included sexually explicit information and advice, and encouraged the smoking of "pot". In October 1971 a revised English edition was published and distributed without interference.

The Court held that the domestic margin of appreciation embraced the question of whether those who exercised their freedom of expression had discharged the "duties and responsibilities" required of them by Article 10, paragraph 2, that the scope of these duties depended upon the prevailing circumstances and the technical means used to express the views in question, and that there were grounds for the view that conviction and forfeiture were necessary because the book could have damaged the morals of many of the children and adolescents for whom it was written. Particular importance was attributed to the fact that the publication was readily comprehensible and accessible to children and that, although containing a certain amount of accurate factual information, some of its contents could have been interpreted as encouragement to indulge in harmful "precocious activities" or even to commit criminal offences. The anti-authoritarian elements were not judged to be of primary importance but were seen as tending to aggravate the possibility of depravity and corruption stemming from the other offending passages. The Court rejected arguments that the necessity of the applicant's prosecution and the forfeiture of the original stock were undermined by the failure of the authorities in Northern Ireland and Scotland to take similar action, the free circulation of the book in other European countries, the reputedly routine evasion of prosecution by other more serious forms of pornography in England and Wales, and the failure of the relevant authorities to limit themselves to imposing restrictions upon

the book's distribution conditional upon the removal of the offending parts. The weight to be attributed to all these factors was held to lie within the domestic margin of appreciation.

In *Müller* the applicants, an artist and the organisers of a public exhibition of his work in Fribourg, Switzerland, complained that their conviction and fine for publishing obscene material violated their right to freedom of expression. The paintings, which depicted, amongst other things, "sodomy, fellatio, bestiality [and] the erect penis",⁹² were confiscated but returned eight years later. The Court held that the convictions "responded to a genuine social need" and that confiscation was necessary in a democratic society for the protection of public morals having regard to the domestic margin of appreciation and the fact that Müller could have applied earlier to have his works returned.⁹³ However, Judge Spielmann delivered a powerful and persuasive dissenting opinion which focused upon the importance of freedom of expression in a democratic society. It also stressed the need for the margin of appreciation to be exercised by national rather than local authorities, that it should be limited, and that the eventual return of the paintings cast serious doubt upon the necessity of the confiscation and convictions in the first place.

While it must be conceded that the *Handyside* and *Müller* cases each raise issues not easily resolved by a ready-to-hand formula, it can be argued that if the Court had placed the same emphasis upon freedom of expression in this context as it did in the *Sunday Times* case, the interferences in question would not have been excused.⁹⁴ It is not clear, however, that the expression of views about sexuality or its representation in artistic forms are as vital to a democratic society as the right of newspapers to carry stories about the appalling personal injuries caused to unborn children by drugs as in the *Sunday Times* case, nor that they must necessarily be treated differently. However, even if a trans-national standard is deemed inappropriate in this context, the reasoning of the Court in both *Handyside* and *Müller* can be criticised for having attached a higher priority to local rather than to national standards.

The principal litigation in Strasbourg under the morality exception to the right to respect for private life (Article 8) has concerned the criminalisation of homosexual activities between consenting adult males. In the late 1950s a general prohibition upon homosexual practices was accepted as legiti-

mate by the Commission for the sake of the protection of health and morals.⁹⁵ But the decision was not supported by reasons, the Commission apparently did not undertake an independent inquiry into the necessity and proportionality of the restriction, nor was the development of opinion in Europe on the subject considered. However, in more recent decisions the Court and Commission have shown their readiness to override national margins of appreciation in order to uphold, as a general European standard, the right of consenting gay adult males to have sex with one another in private without fear of prosecution.⁹⁶

In the *Dudgeon* case the applicant complained that his right to respect for private life had been interfered with by the law in Northern Ireland, which made homosexual activities in private between consenting adults criminal, and by a police investigation into his sex life in January 1976 which in the event led to a decision not to prosecute.⁹⁷ The cases of *Norris v. Ireland*⁹⁸ and *Modinos v. Cyprus*⁹⁹ were similar except for the fact that neither of these applicants had been the subject of a police investigation nor, unlike *Dudgeon*, was discrimination on the basis of sexuality alleged. The Court accepted in *Dudgeon* that vulnerable members of society need the protection of the criminal law from the sexual attentions of others, that the regulation of consensual sexual relations is also necessary for the protection of morality in any democratic society, and that there was widespread opposition in Northern Ireland to proposals by the United Kingdom Government to decriminalise homosexual activities between consenting males over 21, as was already the case in England and Wales. But in the Court's view public opinion could not dispose decisively of the necessity question since the test was what was "necessary in a democratic society", and a democratic society was characterised by, amongst other things, tolerance and broad-mindedness. The interference also had to be proportionate to the social need.

Three factors in particular persuaded the Court that the criminalisation of consensual adult male homosexual relations could not be justified by reference to the protection of morality in Northern Ireland. First, although prosecutions had not been publicly abandoned as a matter of policy, no criminal proceedings had been brought in respect of private sexual acts between consenting males over 21 in the 1972-80 period, indicating that there was no "pressing social need" for the law itself. No evidence had been adduced

either to show that moral standards in Northern Ireland had been adversely affected between these dates, nor that there was a public demand for stricter enforcement. Secondly, as far as proportionality was concerned, such justifications as there were for criminalisation were outweighed by the detrimental effects which the very existence of the relevant law could have had upon the private lives of gay adult males. The Court acknowledged that although other members of the public might be shocked, offended or disturbed by the knowledge that homosexual activities were being practised, this could not in itself warrant the threat of sanctions against consenting adults. Thirdly, while the age of consent was a matter for the national authorities, the fact that better understanding and increased tolerance had resulted in de-criminalisation in other member states could not be overlooked.

A particularly striking feature of the *Dudgeon*, *Norris* and *Modinos* cases, on the one hand, and the *Handyside* and *Müller* decisions on the other, is how similar issues, for example, concerning the position in other countries, “pressing social need”, and proportionality, were handled in different ways. Although there need not be uniformity of outcome in cases such as these, greater uniformity in method and reasoning is desirable.

The prevention of disorder or crime

This exception applies to the right to respect for private and family life, home and correspondence (Article 8, paragraph 2), the right to freedom of expression (Article 10, paragraph 2) and the right to freedom of peaceful assembly and to freedom of association (Article 11, paragraph 2). The right to freedom of thought, conscience and religion may be restricted “for the protection of public order” (Article 9, paragraph 2).

The “prevention of disorder or crime” has been invoked frequently. It has been successfully pleaded in cases involving the regulation of various aspects of prison life,¹⁰⁰ compulsory psychiatric examination,¹⁰¹ the secret surveillance of criminal suspects,¹⁰² searches for evidence of crime,¹⁰³ prohibition on consensual homosexual conduct within the armed forces,¹⁰⁴ the recording of journalists’ telephone conversations with a lawyer suspected of involvement in terrorism,¹⁰⁵ the regulation of broadcasting,¹⁰⁶ the arrest and brief detention of two protesters at a military parade in Vienna,¹⁰⁷ the compulsory disclosure of medical evidence that the applicant was HIV-positive

in criminal proceedings against her husband for manslaughter arising out of an alleged rape,¹⁰⁸ and the deportation of aliens convicted of serious crime.¹⁰⁹ It was rejected as a justification for: the interception of a letter from a lawyer to a remand prisoner in which the client was advised not to make a statement,¹¹⁰ the search of a lawyer's office in Germany where the procedural safeguards were deemed inadequate,¹¹¹ the banning of a military magazine critical of army life,¹¹² the expulsion and exclusion of a German MEP from French Polynesia (and her exclusion from New Caledonia) following her participation in pro-independence and anti-nuclear protests,¹¹³ the imprisonment and fining of Greek Jehovah's Witnesses following delays in their application to obtain permission to use private premises for religious purposes,¹¹⁴ and as a ground for preventing a Swiss electronics company from receiving Soviet television broadcasts via a Soviet satellite in order to demonstrate the technical prowess of one of its products, a home satellite dish aerial.¹¹⁵ However, in spite of this, the Court and Commission have made little systematic attempt to define the general features of this exception, with cases in which it has arisen characterised by reviews of the facts (sometimes detailed and painstaking as in the *Silver* case), reference to the rule of law and democratic necessity tests (usually brief), and a conclusion (often baldly stated with little supporting argument) that the interference complained of was, or less commonly was not, justified in pursuit of this aim.

States have frequently attempted to justify interference with prisoners' correspondence by reference to the prevention of disorder or crime. In *Golder* the Court had to decide if the Home Secretary of the United Kingdom had been justified in denying a prisoner access to a solicitor to discuss a libel action against a prison officer who had wrongly implicated him in a prison disturbance.¹¹⁶ The Court held that he had effectively been denied access to a fair and public hearing of his civil rights by an independent tribunal and that his right to respect for correspondence under Article 8, paragraph 1, had been infringed. Although no message from him had been stopped or censored, the fact that he had been impeded from initiating correspondence at all constituted a much more serious interference which could not be justified for the sake of "the prevention of disorder or crime". While it was recognised that this exception might justify wider measures of interference with respect to prisoners than in relation to persons at liberty, it was decided that it could not justify the complete refusal of access to a solicitor

in such circumstances since it was for a solicitor to advise the applicant upon his rights and for a court to decide if they had been violated and not for the Home Secretary to assess the success of the action contemplated.

In *Silver* the Court held that 57 out of 63 items of prisoners' correspondence had been unjustifiably intercepted.¹¹⁷ Both Court and Commission agreed that there was no justification for holding back any prisoner's letter unless it discussed crime or violence. This was held to justify official interference with a letter from a prisoner to his wife in which he identified two neighbouring prisoners by reference to the offences for which they had been convicted which had attracted media interest at the time,¹¹⁸ and four letters from a prisoner to his parents which contained threats of violence and used bad language.¹¹⁹ The Commission took the view that a letter to a solicitor from a prisoner serving a sentence for fraud, in which he invited the solicitor to be a party to a property deal, had been unjustly intercepted because no evidence had been given that it presented a risk of crime or an infringement of the rights and freedoms of others. However, taking the margin of appreciation into account, the Court considered that the prevention of crime defence could be invoked.¹²⁰

In *Campbell* the Court had to consider the legitimacy of interference with correspondence between a prisoner in the United Kingdom and both his solicitor and the European Commission on Human Rights itself.¹²¹ It was held, in accordance with the broad guidelines established in earlier cases, that although the lawyer-client relationship is, in principle, privileged, the opening of a letter from a lawyer to a prisoner could be justified if there were reasonable grounds for believing that the envelope contained "an illicit enclosure which the normal means of detection" had "failed to disclose".¹²² However, the reading of mail between a prisoner and his lawyer could only be permitted in "exceptional circumstances" when there was reasonable cause to believe that it "endangered prison security, or the safety of others" or was "otherwise of a criminal nature".¹²³ The Court added that, although every case would have to be judged in the context of all the relevant circumstances, "reasonable cause" presupposed "the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused".¹²⁴ The announcement by the prison authorities that correspondence between the applicant and his lawyer could be opened and read was held to have failed this test

and, therefore, constituted an unjustified interference with the prisoner's right to respect for his correspondence under Article 8, paragraph 1. The Court also held that the opening of letters from the Commission to the prisoner¹²⁵ could not be justified since the risk of them being forgeries containing illicit items was "so negligible that it must be discounted".¹²⁶

The "prevention of disorder or crime" has also been pleaded in relation to the official interception of telephone conversations. In *Malone* the Court accepted the Government's view that in Britain "the increase of crime, and particularly the growth of organised crime, the increasing sophistication of criminals and the ease and speed with which they can move about have made telephone interception an indispensable tool in the investigation and prevention of serious crime".¹²⁷ The Court also endorsed the United Kingdom Government's own warning that because of its inherent secrecy, the exercise of such powers carried with it the danger of abuse "which is potentially easy in individual cases and could have harmful consequences for democratic society as a whole".¹²⁸ However, as already indicated above, the Court held that the rules and official practice relating to telephone tapping then applicable in the United Kingdom were too obscure to be in accordance with the law as required by Article 8. This hurdle also prevented a more thorough consideration of telephone tapping as a justification for the prevention of disorder or crime in *Kruslin* and *Huvig*.¹²⁹

The *Silver* case, and in particular the Commission's report, is a model of thoroughness, attention to detail, and the careful consideration of the relevance of the prevention of disorder or crime to interference with specific items of prisoners' correspondence. The Commission's view that a balance needs to be struck between prison security and the rehabilitation of prisoners is appropriate,¹³⁰ and the burden placed upon the authorities to justify every interception is to be welcomed. However, while the *Malone* case indicates that telephone tapping is necessary in a democratic society for the prevention of serious crime, precisely when this can be justified under the Convention remains unclear. As with the national security exception the key issue is the provision of effective independent supervision of decisions to eavesdrop on private communications.

B. Private interests

Maintaining the authority and impartiality of the judiciary

“Maintaining the authority and impartiality of the judiciary” provides a defence only to interferences with the right to freedom of expression (Article 10, paragraph 2). It has been pleaded most prominently in cases involving restraints imposed upon, or the prosecution of, journalists for allegedly prejudicial reporting of trials,¹³¹ and in respect of legal action taken in response to the alleged defamation of judges.¹³² The latter also falls within the protection of the “reputation or rights of others” exception and is discussed more fully in the following section.

In the *Sunday Times* case¹³³ the Court sought to explain what “maintaining the authority of the judiciary” means.¹³⁴ As well as referring to the judicial branch of government and the judges in their official capacity, the phrase assumes, it was held, that the courts are, and are accepted by the public as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes, and that the public have respect for and confidence in their capacity to fulfil this function.¹³⁵ Since the authority of the machinery of justice cannot be maintained unless protection is offered to all involved in it, or having recourse to it, the phrase “maintaining the authority of the judiciary” was said to extend to the protection of litigants’ rights, including those pertaining to interferences with negotiations towards an out-of-court settlement of a pending suit.¹³⁶ While such a definition is undeniably comprehensible, it is not entirely clear why a sharper distinction has not been drawn between the interests of the judicial system as an element of the constitutional order, and the interests of those members of the public who have recourse to it, since the latter are, in any case, embraced by the “rights and freedoms of others” restriction considered below. As already noted, the Court also held that the margin of appreciation in the application of the “authority of the judiciary” defence is comparatively narrow because the domestic law and practice of member states reveal a “fairly substantial measure of common ground”.¹³⁷

The *Sunday Times* case concerned the publication by the Sunday Times newspaper of an intended two-part series of articles about the births of seriously deformed children whose mothers had taken the thalidomide drug as a tranquilliser or sleeping pill during pregnancy. After the publication of

the first article the Attorney General obtained an injunction restraining the newspaper from publishing the second and from conducting certain other activities relating to the story, for example, editorial comment and passing the results of the research to Members of Parliament. This followed a formal complaint from the manufacturers, Distillers, alleging that the articles constituted, or would constitute, contempt of court since litigation for compensation on the part of the affected families was still in progress. The injunction was lifted by the Court of Appeal, re-imposed by the House of Lords, and finally discharged in 1976.

The European Court of Human Rights affirmed that, subject to certain limitations, the media had a responsibility to impart information and ideas concerning matters that come before the courts as in other areas, and that the public have a right to receive it. It was also stated that damage to the "authority of the judiciary" had to be "absolutely certain" to justify prior restraint of newspaper publications where this could deprive other potential litigants of information about possible legal action and that the necessity of the injunction imposed upon the Sunday Times hinged upon the importance ascribed to the public interest in media discussion of the thalidomide issue while litigation against the manufacturers had still not been resolved.¹³⁸

The Court concluded that the injunction was not necessary in a democratic society for the maintenance of the authority of the judiciary. The proper approach to be taken in such cases, it decided, was not to place interests in favour of, and those against disclosure in the balance, but to give priority to the right to freedom of expression and to interpret the exceptions narrowly. The thalidomide disaster was a matter of grave and powerful public concern and raised fundamental questions about where responsibility for such tragedies lay and how injuries from scientific developments could be avoided and compensation given to those who had suffered. In 1972 the litigation against Distillers was in a state of inertia and, in the Court's view, the publication of the article would probably not have added much to the pressure already being exerted for a settlement which had increased by 1973 when the matter had been debated in the House of Lords and a nationwide campaign in favour of the victims had begun. While publication could have pre-empted some of the arguments which the manufacturers had intended to use in the main trial it would also have brought certain

facts to light which could have reduced speculative and uninformed discussion. The risk of “trial by newspaper”, which the Court accepted could pose a threat to the “authority of the judiciary”, had, therefore, been exaggerated. The offending article had presented both sides of the argument and its impact would probably have varied from reader to reader. A query about whether restraint had ever been necessary was raised by the fact that the injunction had been lifted in 1976 when some actions by parents were still outstanding.

The *Sunday Times* case is in many ways a model decision. By ascribing a central place to the right to freedom of expression in a democratic society the Court rejected the “balance test” in favour of the “priority to rights” approach and construed the exceptions to Article 10, paragraph 2, narrowly. However, if this preference is to be limited to this particular provision, clear and coherent reasons need to be spelled out while at present they remain obscure. The Court also assumed that it was entitled to embark upon an extensive review of the need for the injunctions because the authority of the judiciary was said to have a more “objective” meaning in member states than, for example, the demands of morality. Although such a review was undoubtedly meritorious it would be better if evidence that there is a European consensus on given issues were to have been produced in the judgment.

The protection of the rights, freedoms and reputations of others

The right to respect for private and family life, home and correspondence (Article 8, paragraph 2), the right to freedom of thought, conscience and religion (Article 9, paragraph 2), and the right to freedom of peaceful assembly and to freedom of association (Article 11, paragraph 2) can be restricted for the “protection of the rights and freedoms of others”. The right to freedom of expression may be limited “for the protection of the reputation or rights of others” (Article 10, paragraph 2).

The “protection of the rights and freedoms of others” exception is a broad and diverse category which is often linked with “the protection of health and morals” and “the prevention of disorder or crime” defences. Like the other legitimate purposes it has also been applied in a highly casuistic manner by the Strasbourg organs and few general principles have emerged. Relevant cases have included the criminalisation of homosexual conduct of

those under 21,¹³⁹ the search of private residential premises in pursuit of videotapes suspected of being in breach of copyright,¹⁴⁰ the custody of, and access to, children,¹⁴¹ a woman's right to abortion without the father's consent when the pregnancy put her own health at risk,¹⁴² compulsory blood tests to establish paternity,¹⁴³ the dismissal of a government employee because of membership of a political party dedicated to the overthrow of the constitutional order,¹⁴⁴ the denial of a trading licence to a taxi driver who refused to join a taxi drivers' association,¹⁴⁵ a ban on lawyers advertising their services,¹⁴⁶ the compulsory disclosure of a journalist's sources concerning commercially sensitive information,¹⁴⁷ and the prosecution of an anti-abortion activist for illegally distributing leaflets identifying candidates' views on abortion in the run-up to the 1992 general election in the United Kingdom.¹⁴⁸

Two important themes in the Strasbourg jurisprudence on the limits upon freedom of expression permissible under the "reputation or rights of others" exception to Article 10 have concerned the protection of, respectively, reputations, and the sensitivities of others from unjustified offence.

As in domestic litigation the defamation cases have tended to turn upon the Court's judgment concerning whether the offending publication can be deemed in the circumstances to have overstepped the line separating unwarranted damage to the reputations of public figures¹⁴⁹ from legitimate comment upon their alleged behaviour. While no systematic flaws can be detected in the formulae used in these decisions, the outcomes cannot, by their nature, be demonstrated to be either "correct" or "incorrect". In the *Lingens* case an Austrian journalist complained that his right to freedom of expression had been violated by his conviction and fine following a private prosecution for defaming the Austrian Chancellor, Bruno Kreisky, in two magazine articles.¹⁵⁰ Lingens had accused Kreisky of protecting former members of the SS for political reasons and had criticised him for claiming that the Nazi hunter, Simon Wiesenthal, used "mafia methods". The European Court of Human Rights decided that the conviction was disproportionate and, therefore, unnecessary in a democratic society to protect the reputations of others. Citing the democratic necessity test discussed elsewhere in this study, it held that "freedom of political debate is at the very core of the concept of democratic society" and that the limits of acceptable criticism are wider with respect to politicians than private indi-

viduals.¹⁵¹ While this does not mean that politicians have no right to protection from defamation in their public lives, the requirements of such protection have to be weighed against the open discussion of political issues.

Although the content and tone of the articles were deemed to have been fairly balanced, some expressions were judged to have been likely to harm Mr Kreisky's reputation. However, since the controversy had occurred around the time of the general election of October 1975 amidst speculation that the Chancellor's party, the Austrian Socialist Party, would require the support of the Austrian Liberal Party whose leader, Friedrich Peter, had been exposed by Mr Wiesenthal as a former member of the SS, they were considered part of the permissible rough and tumble of political debate. The Court held that the "truth defence" provided by Austrian law to charges of this kind was impossible to fulfil in this instance since matters of opinion based upon undisputed facts were at issue, and that this requirement in itself was a violation of Article 10 of the Convention. The sentence imposed upon Lingens also amounted to a violation of Article 10, the Court concluded, since it could have discouraged both the applicant and other journalists from making similar criticisms in other contexts.

In *Prager and Oberschlick*¹⁵² the Court decided that the conviction of the applicants (respectively a journalist and publisher of an intellectual periodical) for defaming certain Austrian criminal court judges was justified under the "protection of the reputation or rights of others" clause of Article 10, paragraph 2. While discussion of judicial decisions was legitimate in democratic society it was necessary, it held, to protect public confidence in the judicial process against "destructive attacks that are essentially unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying"¹⁵³ to criticism. Mr Prager's offence lay not in criticising named members of the judiciary but in the excessive breadth of the accusations, the lack of support for them from his own research, and his failure to allow a right to reply. The opposite conclusion was reached in *De Haes and Gijssels*¹⁵⁴ where the Court found that successful defamation actions brought by three judges and an advocate general of the Antwerp Court of Appeal against two journalists breached their right to freedom of expression and could not be justified under the "protection of the reputation or rights of others" clause of Article 10, paragraph 2. The applicants had published a series of articles in the journal *Humo* alleging

that, in divorce proceedings, the judges and advocate general had, for political reasons, awarded custody of the couple's two children to their wealthy and well-connected father, ignoring substantial evidence that he had subjected them both to serious sexual abuse. The Court held that, unlike in *Prager and Oberschlick*, the opinions expressed by the applicants, though polemical and aggressive, were not excessive and appeared "proportionate to the stir and indignation caused by the matters alleged in their articles".¹⁵⁵

The boundaries between freedom of expression and the protection of the sensitivities of others have been considered in several cases. In *Jersild*¹⁵⁶ the applicant, a journalist, and the head of the news section of Danmarks Radio, were convicted for having aided and abetted the dissemination of racist remarks made by three members of an extreme youth organisation in the course of a recorded current affairs television programme. The Court reminded itself of the importance of press freedom in a democracy, the need enjoined by Article 10 upon those exercising their freedom of expression to do so responsibly, and Denmark's obligations under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. The majority (13 judges) held that, taken in context and as a whole, the broadcasting of the remarks was not intended to propagate racist views and that, on the contrary, its purpose was to expose the group concerned to public criticism. Consequently the conviction of the applicant constituted an unjustified violation of Article 10 since it was disproportionate to the need to protect the rights of the minorities in question and others who may also have been offended. The seven dissentients disagreed. They argued that, in order to avoid punishment, those involved in the dissemination of racist views must clearly and unequivocally dissociate themselves from the opinions expressed. While there was no suggestion that the applicant shared the outlook of the youths in the programme, the dissenting judges thought that he had not distanced himself sufficiently clearly from their remarks.

In *Otto-Preminger Institute*¹⁵⁷ the applicant (a private cinema association) complained that its freedom of expression had been violated by the seizure and confiscation of a film, *Council in Heaven* by Werner Schroeter, which depicted God, Christ and the Virgin Mary in an unflattering and sometimes obscene manner, and portrayed them conspiring with the Devil to infect the

human race with syphilis. The Court reaffirmed that freedom of religion and freedom of expression are amongst the essential foundations of a democratic society characterised as it should be by tolerance of criticism, of dissent and of views which may shock, offend or disturb.¹⁵⁸ However, it held that one of the obligations implied by the “duties and responsibilities” requirement of Article 10, paragraph 2, is to avoid infringing the rights of others by expressing views which cause gratuitous offence and which make no contribution to debates capable of furthering progress in human affairs. Given the absence of a uniform European conception of the significance of religion in society a certain, though strict, margin of appreciation must be permitted which, in the circumstances, the Austrian authorities were deemed not to have exceeded since Roman Catholics constitute some 87% of the Tyrolean population, there were restrictions upon admission to the cinema and there was a pressing social need to preserve the peace.¹⁵⁹

While *Jersild* and *Otto-Preminger Institute* were settled on different grounds from *Handyside* and *Müller*¹⁶⁰ there are obvious similarities which are not as clearly set out in the judgments of the Court as they might have been. Arguably, the most important distinction lies not in which legitimate purpose applies, but in determining what harm has been, or would have been caused to others by the offending form of self-expression, and what consequences have been, or should be, suffered by the offending party. A conviction stemming from the exercise of freedom of expression requires a particularly cogent justification, which does not seem to be available when the offence caused to others is both negligible and unintended as in *Jersild*. Banning a particular publication or work of art may be justified where the offence caused is substantial, gratuitous, and likely to be widespread as in *Otto-Preminger Institute*. But it can be argued that, as infringements of the right to freedom of expression, both banning and prosecution can only be justified when there is a serious risk of other kinds of harm in addition to “mere” offence, as there may have been in *Handyside*, and possibly, but less obviously in *Müller*.

Preventing the disclosure of information received in confidence

According to the text of the Convention this exception pertains exclusively to Article 10, paragraph 2.¹⁶¹ But it has ironically received fullest consideration in the *Gaskin* case where it was interpreted as embracing the “pro-

tection of the rights and freedoms of others" exception to Article 8.¹⁶² The applicant sought access to official information collected about him while he had been in care in his childhood and teenage years claiming that it could shed light upon severe psychological problems he suffered as an adult. There was no allegation that the data in question had been used for a purpose detrimental to his interests and the only issue was whether he had legitimately been denied access to it. The United Kingdom Government resisted disclosure on the grounds that it would compromise the confidentiality of those who had compiled the information, some, but not all of whom, remained opposed to it being released.

As in other cases, the Court expressly declined the opportunity to outline the general principles governing, in this instance, rights of access to personal data and information. The applicant's complaint was not that the state had acted in a manner which infringed the right to respect for his private and family life, but that this consequence had ensued from its failure to release the information sought. Requiring the release of such information would, therefore, place positive obligations upon the state whereas those arising under Article 8 were *prima facie* negative. The Court held that states enjoy a wide margin of appreciation with respect to positive obligations arising under the Convention and that the question for the Strasbourg institutions in determining whether this discretion has been properly exercised was to decide if a fair balance had been struck between competing interests, including reference to the legitimate purposes listed in Article 8, paragraph 2. This involved, in this case, balancing the public interest in the needs of children in care and the efficient functioning of the child care system, which was enhanced by confidentiality of case files, against the applicant's interest in access to a coherent record of his personal history.

The Court held that a system like that in the United Kingdom which made access to such records dependent upon the consent of the contributor could be justified under Article 8. But, when a contributor to the records is either unavailable or improperly refuses consent, the interests of the party seeking access had to be secured by an independent agency and, since no such procedure was available to the applicant, Article 8 had been breached. As far as Article 10 was concerned, the Court repeated the view expressed in *Leander* that, although the freedom to receive information prohibits a government from preventing persons obtaining it from those who wish to

provide it, this does not mean that the state has a general obligation to supply information of the type in question to those who want it.¹⁶³

Two observations can be made about the *Gaskin* case. First, it is particularly regrettable in an age when information technology is proliferating, that the Court expressly declined to consider general guidelines governing access to personal data and information, and, in particular, the grounds upon which this might be denied in order to protect confidentiality. Secondly, the adoption of a “balance”, rather than a “priority to rights” test, provides further evidence of how the Court seems to pick and choose between these two alternatives with little discernable reason.

IV. Conclusion

A cursory reading of the Convention for the Protection of Human Rights and Fundamental Freedoms might suggest that what it gives with one hand it takes away with the other since most of the rights which the High Contracting Parties have agreed to respect are subject to so many broad, and often vague, exceptions, restrictions and qualifications. But closer inspection reveals two things. First, these limitation clauses fall into a variety of categories. Four have been identified here. Secondly, as a result of the jurisprudence of the European Court of Human Rights and the European Commission of Human Rights, the circumstances in which rights can be circumvented by states are not so open-ended as might appear from the face of the text. This is not to say that an entirely satisfactory relationship between rights and exceptions has been established by the Strasbourg organs but merely that certain guidelines have been developed since the treaty first came into effect.

This monograph has been concerned with the “legitimate purposes” or “public and private interest” limitations to Articles 8 to 11, some of the key provisions in the Convention. The relationship which has emerged in the Strasbourg jurisprudence between the relevant rights, the exceptions attached to them, and particular kinds of interference, is complex. The Court and Commission have tended to develop only those general principles deemed necessary to dispose of the cases before them with the result that it is difficult to say much about each exception which transcends context. As judicial and quasi-judicial institutions they cannot be criticised for being reactive. But their responsibility for the development of a European human rights culture is onerous and can only be properly discharged if more systematic attention is paid to deeper principles capable of giving the operation of the exceptions greater predictability without sacrificing flexibility.

While the Court and Commission have developed an effective “rule of law” test, a clear and coherent “democratic necessity” test is still lacking. It would be churlish not to acknowledge the progress which has been made in the elaboration of a framework of interpretive principles which has given this notion greater definition. But a key problem remains: the ambiguous relationship between the domestic margin of appreciation and European supervision. This, in its turn, reflects a reluctance to clarify, at the most general level, the relative importance of rights and exceptions. The decisions of the Strasbourg institutions have been uneven in the scope of the discretion accorded states, in whether a “balance test” or a “priority to rights test” has been adopted, in the thoroughness with which reviews where they have been deemed appropriate have been undertaken, in the reference made to the practice in other member states, and in the consistency with which similar concepts, for example, “pressing social need”, have been used.

States have been allowed a wide margin of appreciation with respect to positive rather than negative obligations and matters of national security, such as secret surveillance, although this has not prevented thorough reviews from being conducted when these have been considered appropriate. Broader margins of appreciation have also been permitted with respect to the “protection of morals” than in relation to “maintaining the authority of the judiciary” on the grounds that “the authority of the judiciary” has a much clearer commonly understood meaning whereas the societal moralities of member states are said to be diverse. Yet little evidence has been provided to substantiate either of these claims, nor has adequate consideration been given to the possibility that there may be a higher level of consensus in Europe on certain moral issues but less on others. The priority given to the right to freedom of expression and the attempt by the Court and Commission to forge a common European moral standard in respect of the decriminalisation of homosexual conduct between consenting adult males are commendable and offer a model which could be followed in other areas.

It would be preferable if, following the model set by the *Sunday Times* case, the Strasbourg institutions made a much clearer presumption in favour of all the rights contained in the Convention with all the exceptions to Articles 8 to 11 construed narrowly. States should have a clear burden of

proving that the right in question ought to be restricted in the circumstances at issue for the sake of the legitimate aim claimed. But if there is to be a “hierarchy of rights”, with some deemed more central to democratic society than others, it must be established more thoroughly and systematically than is currently the case. Where the issue, as in the surveillance and data protection areas, is the effectiveness of domestic institutional controls, there should be a clearer presumption in favour of judicial supervision and where this is not available the respondent state should be required to explain why.

At root the tension between the margin of appreciation doctrine and stronger European review is an indirect expression of unresolved tensions between deeper intra and trans-national processes in contemporary Europe; between the demands for pluralism, national sovereignty and national identity on the one hand, and on the other, for common European standards and for the transfer of power from the nation state to supra-national institutions. It also represents tension between the view that vital decisions affecting the distribution of rights and responsibilities in any society, be it national or supra-national, should be made by publicly accountable elected institutions rather than remote, unelected, and largely unaccountable judicial or quasi-judicial bodies. However, although democracy, at whatever level, clearly requires effective representative government, there can be no substitute, either in the Council of Europe or in its member states, for adjudication founded upon a deeply rooted human rights culture and a clearer and more thoroughly developed set of principles for the interpretation of the Convention. Although the Strasbourg organs have made considerable progress in this direction the present study has sought to indicate where further developments are needed and to suggest some guidelines as to how they might be achieved.

Notes

1. Only four rights in the European Convention on Human Rights are absolute in the sense that their suspension or restriction can never be justified: the right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3); the right not to be held in slavery or servitude (Article 4, paragraph 1); the right not to be convicted for conduct which was not an

offence under national or international law at the time it occurred (Article 7, paragraph 1) and the right not to have a heavier penalty imposed for an offence than the one applicable at the time the offence was committed (Article 7, paragraph 1).

2. See note 1. Certain rights in the Convention may be said to be “non-absolute” but “practically non-derogable” because of the unlikelihood of circumstances arising in which they could legitimately be suspended in accordance with the requirements of Article 15, for example, Article 1 of Protocol No. 4, which prohibits depriving people of their liberty for inability to fulfil a contractual obligation.
3. These have been referred to elsewhere as “accommodation clauses”, in T.A. O’Donnell, “The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Convention of Human Rights” (1982) *Human Rights Quarterly* 474, 477. Some of these also enable the public and press to be excluded from trials (Article 6 paragraph 1). Their application here, however, raises issues beyond the scope of the present study.
4. An attempt has been made to include all relevant decisions of the European Court of Human Rights delivered up to the end of March 1997, and the principal decisions of the Commission where necessary.
5. Van Dijk P. and Van Hoof G.J.H., *Theory and practice of the European Convention on Human Rights*, 2nd ed., Deventer – Boston: Kluwer, 1990, p. 372.
6. *Ibid.*, p. 420.
7. See *Handyside* judgment of 7 December 1976, A 24; , report of 11 May 1984, B 88; *Engel* judgment of 8 July 1976, A 22; *Sunday Times* judgment of 26 April 1979, A 30; *Lingens* judgment of 8 July 1986, A 103.
8. See C.A. Gearty, “The European Convention on Human Rights and the Protection of Civil Liberties: An Overview” (1993) 52 *Cambridge Law Journal* 89, 98-99, 116.
9. *Sunday Times* judgment, *op. cit.*, paragraph 48.
10. Judgment of 24 April 1990, A 176-B.
11. Judgment of 24 April 1990, A 176-B, paragraphs 27-36.

12. *Malone* judgment of 2 August 1984, A 82, paragraphs 66-68; *Leander* judgment of 26 March 1987, A 116, paragraphs 50-52; *Silver* judgment of 25 March 1983, A 61, paragraphs 85-88; *Sunday Times* judgment, *op. cit.*, paragraphs 46-49.
13. *Malone* judgment, *op. cit.*, paragraph 66; *Sunday Times* judgment, *op. cit.*, paragraph 47. *Tolstoy Miloslavsky* judgment of 13 July 1995, A 316-B, paragraph 37. However, this is not by any means confined to common law jurisdictions. See the extensive discussion about French case-law in *Kruslin* judgment, *op. cit.*, paragraphs 28-29 and about German case-law in *Barthold* judgment, A 90, 25 March 1985, and *Markt Intern* judgment, A 165, 20 November 1989.
14. See *Groppera* judgment of 28 March 1990, A 173, and especially the dissenting opinion of Judge Bernhardt.
15. See *De Wilde, Ooms and Versyp* (the "Vagrancy cases") judgment of 18 June 1971, A 12, paragraph 93; Appl. No. 101761, *X v. the Netherlands*, Coll 8 (1962) 1, 4; Appl. No. 1983/63, *Wallace v. the Netherlands*, Yearbook VIII (1965) 228, 246 and 264; Appl. No. 7736/76, *X v. Switzerland*, DR 9 (1970) 206, 207; Appl. No. 7308/75, *X v. the United Kingdom*, DR 16 (1979) 32, 34-35.
16. Alkema takes the view that "law" should refer only to legislation – see E.A. Alkema, *Studies over Europese Grondrechten* ("Studies on European Human Rights") (Deventer, 1978) p. 42 – while Van Dijk and Van Hoof argue that it should be more broadly defined to include decisions of "all organs which have been vested with legislative power" (*op. cit.*, p. 580). This would include courts in the common law system since their function as law-makers is implicitly endorsed by the legislature.
17. *Kruslin* judgment, *op. cit.*, paragraph 29; *Barthold* judgment of 25 March 1985, A 90, paragraph 48; *Hadjianastassiou* judgment of 16 December 1992, A 252-A, paragraph 42; *Chorherr* judgment of 25 August 1993, A 266-B, paragraph 27; *Kokkinakis* judgment of 25 May 1993, A 260-A, paragraph 40. In *Campbell* the Court held that "it is not, in principle, for the Court to examine the validity of secondary legislation. This is primarily a matter which falls within the competence of national courts. . ." judgment of 25 March 1992, A 233.

18. *Sunday Times* judgment, *op. cit.*, paragraph 49.
19. *Silver* judgment, *op. cit.*, paragraphs 87 and 93.
20. *Ibid.*, paragraph 88; *Kokkinakis*, *op. cit.*, paragraph 40; *Tolstoy Miloslavsky*, *op. cit.*; *Goodwin* judgment of 27 March 1996, Appl. No. 17488/90, paragraphs 31-34.
21. E.g. *Malone* judgment, *op. cit.*, paragraph 68; *Sunday Times* judgment, *op. cit.*, paragraph 49; *Chorherr* judgment, *op. cit.*; *Vogt* judgment of 26 September 1995, A 323, paragraph 48; *Wingrove* judgment of 25 November 1996, Appl. No. 17419/90, paragraphs 40-44.
22. *Groppera* judgment, *op. cit.*, paragraph 68.
23. *Silver* judgment, *op. cit.*, paragraph 88; *Herczegfalvy* judgment of 24 September 1992, A 242, paragraph 89.
24. *Silver* judgment, *op. cit.*, paragraph 88.
25. Reported in the *Observer and Guardian* judgment of 26 November 1991, A 217, paragraph 65 and in the *Sunday Times* judgment of 26 November 1991, A 217, paragraph 63.
26. *Kruslin* judgment, *op. cit.*, paragraph 33.
27. Judgment, *op. cit.*
28. *Ibid.*, paragraph 79.
29. *Ibid.*, paragraph 87.
30. Judgment, *op. cit.*
31. *Ibid.*, paragraph 51.
32. Judgment, *op. cit.*, paragraph 67.
33. *Ibid.*, paragraph 68. See also *Vereinigung Demokratischer Soldaten Österreichs and Gubi* judgment of 19 December 1994, A 302, paragraph 29; *Calogevio Diana* judgment of 15 November 1996, Appl. No. 15211/89, paragraphs 32-33; *Domenichini* judgment of 15 November 1996, Appl. No. 15943/90.
34. See also *Leander* judgment, *op. cit.*, paragraph 51.

35. Judgment, *op. cit.*, paragraph 89. The Court held that such specifications were particularly important where, as in this case, a psychiatric patient under detention alleged improper interference with correspondence since such persons were "frequently at the mercy of the medical authorities so that their correspondence is their only contact with the outside world", paragraph 91.
36. *Kruslin* judgment, *op. cit.*, paragraph 35.
37. Judgment, *op. cit.*, paragraphs 48-50.
38. Judgment, *op. cit.*, paragraphs 97-98.
39. Judgment, *op. cit.*, paragraphs 37-41.
40. *Sunday Times* judgment, *op. cit.*, paragraph 59; *Glazenapp*, report of 11 May 1984, paragraph 90.
41. See for example, *Observer and Guardian* judgment, *op. cit.*, paragraph 71.
42. *Lingens* judgment, *op. cit.*, paragraph 43. *Ezelin* judgment of 26 April 1991, A 202, paragraph 51.
43. *Oberschlick* judgment of 23 May 1991, A 204, paragraph 60.
44. *Vogt* judgment of 26 September 1995, A 323, paragraph 52. See also e.g. Appl. No. 18714/91, *Brind*; Appl. No. 18759/91, *McLaughlin*.
45. *Handyside* judgment, *op. cit.*, paragraph 49; *Manoussakis* judgment of 26 September 1996, Appl. No. 18748/91, paragraph 44..
46. *Delcourt* judgment of 17 January 1970, A 11.
47. *Young, James and Webster* judgment of 13 August 1981, paragraph 63.
48. *Ibid.*
49. A notable exception has been the *Schermers* opinion in the Commission's decision in Appl. Nos. 14234/88 and 14235/88 *Open Door Counselling Ltd and Dublin Well Woman Centre*, report of 7 March 1991, A 246, pp. 64-66.
50. See however *Young, James and Webster* judgment, *op. cit.*, paragraphs 58-66, where, without any of the specific exceptions having been discussed, a union "closed shop" was held not to be "necessary in a democratic society". However, none had been pleaded by the respondent state.

51. See Gearty, *op. cit.*
52. See for example, *Observer and Guardian* judgment, *op. cit.*, paragraph 72; *Tolstoy Miloslavsky* judgment, *op. cit.*
53. *Lingens* judgment, *op. cit.*, paragraph 43.
54. See Appl. No. 22414/93, *Chahal*, paragraph 136, and the partly dissenting opinion of Judge Martens in *Observer and Guardian* judgment, *op. cit.*, paragraph 11.2.
55. *Observer and Guardian* judgment, *op. cit.*, paragraph 72.
56. *Autronic* judgment of 22 May 1990, A 178, paragraph 61; *Weber* judgment of 2 May 1990, A 177, paragraph 47; *Barthold* judgment, *op. cit.*, paragraph 58.
57. See *Klass* judgment, *op. cit.*, paragraph 42; *Sunday Times* judgment, *op. cit.*, paragraph 65.
58. See for example, *Klass* judgment, *op. cit.*, paragraph 59; *Gaskin* judgment of 7 July 1989, A 160, paragraph 40; *Barfod* judgment, *op. cit.*, paragraph 29; *B. v. France* judgment of 25 March 1993, A 232-C, paragraph 63; *Murray* judgment of 28 October 1994, A 300-A, paragraph 91; *Piermont* judgment of 27 April 1995, A 314, paragraph 77.
59. See *Greece v. the United Kingdom*, Yearbook II (1958-59) 174; *Lawless*, report of 19 December 1959, B 1 (1960-61).
60. See *Belgian Linguistics* judgment of 23 July 1968, A 6, and also Judge Martens in *Brogan* judgment of 29 November 1988, A 145-B.
61. Van Dijk and Van Hoof, *op. cit.*, pp. 588 and 605. See also C. Feingold, "The doctrine of margin of appreciation and the European Convention on Human Rights" [1977] *Notre Dame Lawyer* 90; R. J. MacDonald, "The margin of appreciation in the jurisprudence of the European Court of Human Rights" in *International Law and the time of its codification: Essays in honour of Robert Ago* (Milan, 1987) p. 187; T. A. O'Donnell, *op. cit.*; H. C. Yourow, "The margin of appreciation doctrine in the dynamics of European Human Rights jurisprudence" (1988) 3 *Connecticut Journal of International Law* 111.
62. *Handyside* judgment, *op. cit.*, paragraph 48; *Sunday Times* judgment, *op. cit.*, paragraph 59.

63. *Silver*, report of 11 October 1981, B 51 (1987) p. 43, paragraph 121.
64. *Sunday Times* (1992) judgment, *op. cit.*, paragraph 50.
65. Van Dijk and Van Hoof, *op. cit.*, p. 589.
66. See e.g. Appl. No. 21318/93 *Ochsenberger* and *Piermont*, *op. cit.*
67. See notes 1 and 2.
68. See also Appl. No. 21318/93, *Ochsenberger*, where the Commission held that the prohibition of Nazi views in Austrian law was justified under Article 10, paragraph 2, in the interests of national security, territorial integrity and the prevention of disorder and crime; and *Vereinigung Weekblad "Bluf!"* judgment of 9 February 1995, A 306-A where the Court held that the banning of an issue of a left-wing magazine containing an out-of-date confidential security service report could not be justified under the national security exception to Article 10, paragraph 2.
69. See for example, *Klass* judgment, *op. cit.*, paragraph 41.
70. *Ibid.*, paragraph 42; See also Appl. No. 8290/78 A, B, C and D v. *the Federal Republic of Germany* DR 18 (1980) p. 176; Appl. No. 18601/91, *Esbester*.
71. Judgment, *op. cit.*, p. 23, paragraph 48.
72. *Ibid.*, p. 26, paragraph 56.
73. *Op. cit.*
74. *Op. cit.*
75. Judgment of 26 September 1995, A 323
76. Judgment of 28 August 1986, A 105.
77. Judgment of 28 August 1986, A 104.
78. Cf. also the Commission's decisions on the admissibility of Appl. No. 10439/83 etc., *Mersch and Others v. Luxembourg*, DR 43 (1985) 34; No. 10628/83, *X v. Switzerland*, DR 44 (1985) 175; No. 11811/85, *Spillman v. Switzerland*, DR 55 (1988) 182; Appl. No. 12175/86, *Hewitt and Harman v. the United Kingdom*, 12 May 1988; No. 12327/86, *N. v. the United Kingdom*, DR 58 (1988) 85 (Commission reports on these two cases confirmed by Committee of Ministers Resolution DH (90) 36, 13 December 1990); No. 12015/86 X v.

the United Kingdom, DR 57 (1988) 108; report on Appl. Nos. 14084/88 etc., *R., V. and Others v. the Netherlands*, 3 December 1991; decision on Appl. No. 18601/91, *Esbester v. the United Kingdom*, 2 April 1993; Appl. No. 20271/92, *Vanessa Redgrave v. the United Kingdom*, 1 September 1993.

79. Judgments of 25 February 1993, A 256-A, B and C respectively. See also Appl. Nos. 9278/81 and 9415/81, *G. and E. v. Norway* DR 35 (1984) 30, where the Commission held that a minority's lifestyle (in this case of nomadic Lapps) fell, in principle, under the protection of Article 8 but that the submersion of land as a result of the construction of a hydro-electric plant could be justified for the sake of the economic well-being of the country; *Buckley* judgment of 25 September 1996, Appl. No. 20348/92 where an enforcement notice for the removal of gypsy caravans from private land for failure to obtain planning permission was deemed within the domestic margin of appreciation and, therefore, not disproportionate for the sake of the economic well-being of the country; *López Ostra* judgment of 9 December 1994, A 303-C where the Court decided that pollution caused by an unlicensed waste treatment plant could not be justified in the interests of the "economic well-being of the country".
80. Judgment of 25 February, A 256-A, paragraph 55.
81. *Ibid.*, paragraph 56.
82. *Ibid.*, paragraph 59.
83. Several thousand documents were seized and then returned to the applicant on the grounds that they had no relevance to the investigation. *Miaillhe* judgment, *op. cit.*, paragraph 39.
84. Where the protection of morals defence has been pleaded in relation to, for example, the moral well-being of specific children, it becomes difficult to distinguish from the protection of the rights and freedoms of others (see Appl. No. 2306/64, *X v. Austria*, Coll 21 (1967) 23 and Appl. No. 6564/74, *X v. the United Kingdom*, DR 2 (1975) 105).
85. Appl. No. 8231/78, *X v. the United Kingdom*, DR 28 (1982) 5.
86. See, for example, Appl. No. 8209/78, *Peter Stutter v. Switzerland*, DR 16 (1979) 166.

87. *Laskey, Jaggard and Brown judgment* of 19 February 1997, Appl. Nos. 21627/93, 21826/93 and 21794/93.
88. *Handyside judgment, op. cit.*; See also *Open Door Counselling and Dublin Well Woman Centre judgment* of 29 October 1992, A 246, paragraphs 64-76.
89. *Handyside judgment, op. cit.*, paragraph 48.
90. Judgment, *op. cit.*, paragraph 52.
91. See "The protection of the rights, freedoms and reputations of others", pp. 5-39.
92. *Müller judgment* of 24 May 1988, A 133.
93. *Ibid.*, p. 10, paragraph 14.
94. See "The protection of the rights, freedoms and reputations of others", pp. 5-39.
95. Appl. No. 104/55, *X v. the Federal Republic of Germany*, Yearbook I (1955-57) 228.
96. See generally, L.R. Helfer, "Finding a consensus on equality: the homosexual age of consent and the European Convention on Human Rights" (1990) 65 *New York University Law Review* 1044; "Homosexuality and the European Convention on Human Rights: what rights?" (1988) 11 *Hastings International and Comparative Law Review* 447.
97. Judgment, *op. cit.*
98. Judgment of 26 October 1988, A 142.
99. Judgment of 22 April 1993, A 259. The justifications for interference with the applicant's rights found in Article 8, paragraph 2, of the Convention were not discussed in *Modinos* because the government based, and lost, its case on the grounds that there had been no interference.
100. Appl. No. 8231/78 *X v. the United Kingdom*, DR 28 (1982) 5, pp. 29-30. See for example, Appl. No. 8231/78, *X v. the United Kingdom*, DR 28 (1982) 5 (prevention of disorder and the preservation of public safety justified the compulsory wearing of prison clothes); Appl. No. 1753/63 *X v. Austria*, Yearbook VIII (1965) 174, 184 (protection of public order justified the com-

pulsory shaving of a Buddhist and constituted a legitimate interference with the right to freedom of thought, conscience and belief; Appl. No. 1860/63, *X v. the Federal Republic of Germany*, Yearbook VIII (1965) 204 (prevention of crime justified refusal of prison authorities to make copy of provisional execution of penalties available to prisoner who wanted it for a discussion with the press); Appl. No. 5442/72, *X v. the United Kingdom*, DR 1 (1975) 41 (prevention of disorder justified Buddhist prisoner being prohibited from sending an article to a Buddhist journal); Appl. No. 5270/72, *X v. the United Kingdom*, Coll 46 (1974) 54 (prevention of disorder justified the prison rule that no journal from outside the United Kingdom was to be permitted in prison).

101. Appl. No. 8355/78 *X v. the Federal Republic of Germany* (unpublished). See Van Dijk and Van Hoof, *op. cit.*, p. 373 note 892; Murray judgment of 28 October 1994, A 300-A
102. Appl. No. 8170/78, *X v. Austria*, Yearbook XXII (1979) 308.
103. Appl. No. 5488/72, *X v. Belgium*, Yearbook XVII (1974) 222; Appl. No. 530/59, *X v. the Federal Republic of Germany*, Yearbook III (1960) 184; Murray judgment, *op. cit.*
104. Appl. No. 9237/81, *B v. the United Kingdom*, DR 34 (1983) 68.
105. Appl. No. 8290/78, *A, B, C and D v. the Federal Republic of Germany*, DR 18 (1980) 176.
106. *Groppera* judgment, *op. cit.*; Appl. No. 17505/90, *Nydahl*. But in *Informationsverein Lentia* judgment of 24 November 1993, A 276, a public monopoly of broadcasting in Austria was held to be disproportionate for the prevention of disorder under Article 10, paragraph 2.
107. *Chorherr* judgment, *op. cit.*
108. *Z v. Finland* judgment of 25 February 1994, Appl. No. 22009/93.
109. *Boughaniemi* judgment of 24 April 1996, Appl. No. 22070/93; *C. v. Belgium* judgment of 7 August 1996, Appl. No. 21794/93; *Bouchelkia* judgment of 29 January 1997, Appl. No. 23078/93. In *Nasri* judgment of 13 July 1995, A 324 the decision went the other way due to special features of the case.
110. *Schönenberger and Durmaz* judgment of 20 June 1988, A 137.
111. *Niemetz* judgment of 16 December 1992, A 251-B.

112. *Vereinigung Demokratischer Soldaten Österreichs and Gubi* judgment of 19 December 1994, A 302.
113. *Piermont* judgment, *op. cit.*
114. *Manoussakis* judgment, *op. cit.*
115. *Autronic* judgment, *op. cit.*
116. *Golder* judgment of 21 February 1975, A 18.
117. *Silver* judgment, *op. cit.*, paragraph 105.
118. *Silver*, report, *op. cit.*, paragraph 418.
119. *Ibid.*, paragraph 105.
120. *Silver* judgment, paragraph 101.
121. *Campbell* judgment of 25 March 1992, A 233.
122. *Ibid.*, paragraph 48.
123. *Ibid.*
124. *Ibid.*
125. There was no evidence of interference with correspondence from the applicant to the Commission.
126. *Campbell* judgment, *op. cit.*, paragraph 62.
127. *Malone* judgment, *op. cit.*, paragraph 81.
128. *Ibid.*, paragraph 81.
129. See also I. Pogany, "Telephone tapping and the European Convention on Human Rights" (1984) *New Law Journal* 175; J.K. Bentil, "Individual rights and telephone tapping by the police" (1980) 124 *Solicitors Journal* 451, 472.
130. *Silver*, report, *op. cit.*, paragraph 290.
131. *Sunday Times* judgment, *op. cit.*, plus *Guardian and Observer* judgment, *op. cit.*, and second *Sunday Times* judgment, *op. cit.*; Appl. No. 22714/93, *Worm*.
132. *Barfod*, *op. cit.*; *Prager and Oberschlick* judgment of 26 April 1995, A 313.
133. *Op. cit.*

134. The question of judicial impartiality had not been raised.
135. *Sunday Times* judgment, *op. cit.*, paragraph 55. See also *Prager and Oberschlick*, *op. cit.*, paragraph 34.
136. *Sunday Times* judgment, paragraphs 56 and 63.
137. *Ibid.*, 1979, paragraph 59.
138. *Ibid.*, paragraph 66.
139. *X v. the United Kingdom*, DR 19 (1980) 66.
140. *Chappell*, report of 14 October 1987, A 152-A (1989).
141. A substantial case-law on children's rights has been developed under this exception by the Strasbourg institutions. See, for example, Appl. No. 2699/65, *X v. the Federal Republic of Germany*, Yearbook XI (1968) 366; Appl. No. 5486/72, *X v. Sweden*, Coll 44 (1973) 128; Appl. No. 5132/71, *X v. Denmark*, Coll 43 (1973) 557; *Rieme* judgment of 22 April 1992, A 226; *Keegan* judgment of 26 May 1994, A 290; Appl. No. 22597/93, *Thorbergsson*; *Hokkanen* judgment of 23 September 1994, A 229-A; *Johansen* judgment of 7 August 1996, Appl. No. 17383/90; *Ahmut* judgment of 28 November 1996, Appl. No. 21702/93.
142. Appl. No. 8416/79, *X v. the United Kingdom*, DR 30 (1983) 232.
143. Appl. No. 8278/78, *X v. Austria*, DR 18 (1980) 155.
144. *Kosiek* judgment, *op. cit.*; *Glaserapp* judgment, *op. cit.*; *Vogt* judgment, *op. cit.* See also pp. 21-23.
145. *Sigurjónsson* judgment of 30 June 1993, A 264.
146. *Casado Coca* judgment of 24 February 1994, A 285.
147. *Goodwin* judgment of 27 March 1996, Appl. No. 17488/90.
148. Appl. No. 24839/94, *Bowman*. See also *Vogt* judgment, *op. cit.*
149. See also *Jacobowski* judgment of 23 June 1994, A 291 where the Court ruled that a court order, issued against the former editor of a news agency prohibiting him from circulating a letter and press cuttings amongst fellow professionals criticising his former employer and inviting business from the addressees,

was justified under the "rights of others" clause of Article 10 paragraph 2, in order to protect the employer's commercial interests from unfair competition.

150. *Lingens* judgment, *op. cit.* See also *Oberschlick* judgment of 23 May 1991, A 204, where the issues were substantially the same.
151. *Lingens* judgment, *op. cit.*, paragraph 42; *Oberschlick* judgment, *op. cit.*, paragraph 59.
152. Judgment of 26 April 1995, A 313. See also *Barfod* judgment of 22 February 1989, A 149.
153. *Prager and Oberschlick* judgment, *op. cit.*, paragraph 35.
154. Judgment of 24 February 1997, Appl. No. 19983/92.
155. *Ibid.*, paragraph 48.
156. Judgment of 23 February 1994, A 298.
157. Judgment of 20 September 1994, A 295-A.
158. In the *Kokkinakis* judgment of 25 May 1993, A 260-A, the Court drew a distinction between bearing witness to a religious faith, protected under Article 9, and "improper proselytism" (paragraph 48) which, it held, could justify restrictions upon the manifestation of belief in order to protect the rights and freedoms of others.
159. A similar verdict was reached in respect of an erotic video based on the ecstatic religious experiences of St Teresa of Avila in the *Wingrove* judgment of 25 November 1996, Appl. No. 17419/90.
160. See "The protection of health or morals" section, pp. 24-29.
161. See Appl. No. 4274/69, *X v. the Federal Republic of Germany*, Yearbook XIII (1970) 888.
162. Judgment of 7 July 1989, A 160.
163. Judgment of 26 March 1987, A 116.

Appendices

Appendix A: Articles 8 to 11 of the Convention

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

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

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

Article 11

1. Everyone has the right to freedom of peaceful assembly and freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Appendix B: Table of cases

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Between the rights guaranteed under the European Convention on Human Rights and the types of control and exception to which they are subject there is a complex relationship. Conflicts inevitably arise between the implementation of the rights guaranteed under Articles 8 to 11 and the limitations which may be imposed, for the purposes of protecting either the general interest of the State or the interests of sections of society or of individuals. This monograph studies the case-law covering such exceptions, addressing aspects of the fundamental philosophy of the Convention such as the rule of law, the concept of "democratic necessity", and the confrontation between the states' margin of appreciation and the checks provided by the Strasbourg organs.

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