The Sunday Times Case: Freedom of the Press and Contempt of Court Under English Law and the European Human Rights Convention

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THE SUNDAY TIMES CASE: FREEDOM OF THE PRESS AND CONTEMPT OF COURT UNDER ENGLISH LAW AND THE EUROPEAN HUMAN RIGHTS CONVENTION

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On April 26, 1979, the European Court of Human Rights decided The Sunday Times case. That decision has served to dramatize the gradual development of a European convention law of human rights somewhat comparable to our Constitution's Bill of Rights. The case also illustrates the gulf between our constitutional law of freedom of the press and contempt of court, and the British common law on the same subject. The extent to which the growth of this European convention law will tend to ameliorate the differences between the English and American law can hardly be foretold from a single decision, especially when that decision is rendered by a court as closely divided as was the European Court in this particular instance. The vote of the court was eleven to nine, with three members of the majority writing separate opinions. Nevertheless, a close examination of those opinions, against the background of the common law applied by the English courts, may provide some insight into the potentialities of a convention law of human rights for the European community.

I. PROCEEDINGS IN THE ENGLISH COURTS

The Sunday Times case, popularly known as the

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1 Presently the judgment of the court is officially reported only in pamphlet form published by the Council of Europe, Strasbourg, April 26, 1979 [hereinafter cited as The Sunday Times case]. It is also reported in 18 INT'L LEGAL MATERIALS 931 (1979), but this report does not include the dissenting opinion or specially concurring opinions. This article includes parallel citations where possible.
“thalidomide case,” began in the English courts with an application by the Attorney-General for an injunction restraining the publication of an article strongly critical of Distillers Company (Biochemicals) Ltd.,\(^2\) the manufacturer and distributor of the drug thalidomide in the United Kingdom. The article alleged that Distillers had been niggardly in the settlements offered to deformed children of mothers who had taken thalidomide during their pregnancy. The injunction was granted by the Divisional Court of the Queen’s Bench on the grounds that the article was intended to influence the settlement of pending litigation and that the article’s publication would jeopardize Distillers’ freedom of action with respect to the litigation.\(^3\) The opinion made it clear, however, that the conclusion was not based on a finding that the article was inaccurate or even superficial. Rather, the opinion noted: “The Attorney-General has not suggested that the observations contained in the article are false in fact, and, accordingly, it seems to us that for the purposes of this application we ought to approach the article on the footing that its allegations are true.”\(^4\) The article, in effect, charged Distillers “with neglect in regard to their failure to test the product, or their failure to react sufficiently sharply to warning signs obtained from tests by others.”\(^5\) The fact that the charges were apparently supported by elaborate research may have helped to sustain the application of the principle regarded as controlling by the court, namely:

> [I]f a party is subjected to pressure by reason of unilateral comment on his case, and that pressure is of a kind which raises serious prospect that he will be denied justice because

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\(^3\) Id. As the divisional court put it:

> [t]his appears to us as a very simple case in which the newspaper is deliberately seeking to influence the settlement of pending proceedings by bringing pressure to bear on one party. Not only is the interference intended, but, having regard to public opinion, we have no hesitation in saying that publication of the article complained of would create a serious risk of interference with Distillers’ freedom of action in the litigation.

\(^4\) Id.

\(^5\) Id.
his freedom of action in the case will be affected, then a contempt of court has been established and may be the subject of prosecution or injunction.\(^6\)

Finally, it should be noted that the divisional court took account of what it called the main argument of counsel for The Sunday Times, who urged the court to balance the public's interest in protecting the orderly administration of justice against its interest in being informed on the grave and weighty issues of the day.\(^7\) This argument was rejected because the "balancing of competing public interests is an administrative rather than a judicial function"\(^8\) and because the court could not "see a public interest in immediate disclosure which could possibly outweigh the public interest in preventing the application of pressure to the parties to pending litigation."\(^9\)

The English Court of Appeal reversed, with a series of opinions so different in tone from those of the divisional court that it was difficult to believe the decisions concerned the same controversy.\(^10\) This variance between the courts may be due to the full-dress debate in the House of Commons on the "thalidomide children" which occurred subsequent to the decision by the divisional court. All three of the court of appeal judges, Lord Denning, Lord Phillimore, and Lord Scarman, seemed considerably troubled by the air of unreality enveloping an injunction designed to prevent newspaper comment on a subject which had been elaborately discussed in parliamentary debates, especially since the debates had in turn been fully reported in the press. This was not, however, the

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\(^6\) Id. at 1142.
\(^7\) The court summarized the argument in favor of a balancing test as follows: In cases like the present there are really two competing public interests: one the protection of the administration of justice and another the right of the public to be informed on the grave and weighty issues of the day, and . . . that . . . the publication should not be punished or restrained if, on balance, the latter interest is the more important, in the circumstances of the particular case.
\(^8\) Id. at 1145.
\(^9\) Id.
sole ground of decision in any of the three opinions. The lead opinion by Lord Denning emphasized the facts which in his judgment made this case practically unique:

Nearly twelve years ago an overwhelming tragedy befell hundreds of families in this country. Mothers when pregnant had taken thalidomide as a sedative to help them rest. All believed it was safe. The manufacturers had proclaimed it to be so. The doctors had accepted their assurances. But unknown to anyone, if a pregnant woman took it between the fourth and twelfth weeks it would affect the limbs of the foetus in the womb. In consequence some 451 babies were born deformed. Some without arms or legs. Others with gross distortions.¹¹

But the magnitude of the tragedy was not the only peculiar circumstance of the case. Another element emphasized by Lord Denning was the dormant character of the judicial proceedings and the court’s ignorance of the status of the negotiations. Sixty-two actions for damages were initiated within the three year period allowed by the statute of limitations and were settled in 1968 by a total payment of £1,000,000. Over the next several years, 266 plaintiffs received permission to file writs out of time. Another 123 of the known injured brought no proceedings at all, making a total of 389 persons not provided for in the settlement. Nevertheless, Distillers announced publicly that it would provide a substantial sum for the benefit of all other children not involved in the formal settlement. Later Distillers said it was planning to establish a charitable trust of £3,250,000 for the benefit of all the malformed children. So far as the court knew, nothing had been done to carry out the pledge because five of the parents would not accept the proposal as full settlement of their claims.¹²

¹¹ Id. at 818.
¹² One of the majority had even brought proceedings against the recalcitrant five to have the parents removed as the next friends of their children and replaced by the Official Solicitor, who it was believed, would agree to the settlement. This action failed as reported in In re Taylor’s Application, [1972] 2 Q.B. 369. See H. Teff & C. Munro, Thalidomide - The Legal Aftermath (1976) for a fascinating account of many aspects of the thalidomide controversy which are not relevant to this particular discussion, including details of the negotiations, issues of tort liability, and problems of the regulatory system.
Consequently, the court regarded the negotiations as quiescent.\textsuperscript{13}

It was this dormancy aspect that Lord Denning regarded as particularly important in reaching his decision.

[It is] undoubted law that, when litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind against a party to the cause.\textsuperscript{14}

Because these negotiations were at a standstill, the general rule of "no comment" on active litigation was viewed as inapplicable.

The litigation's dormant status was not the only concern Lord Denning regarded as controlling. Another was that "the interest of the public in matters of national concern, and the freedom of the press to make fair comment on such matters" was to be balanced against "the interest of the parties in a fair trial or a fair settlement of the case."\textsuperscript{15} Thus Lord Denning embraced the very balancing act that the divisional court had eschewed as inappropriate to the judicial role. Applying this approach to the particular circumstances of the case, Lord Denning noted that the public's interest in fair comment applied to all 451 of the thalidomide children, of which only 266 were involved in pending proceedings. In short, the public's interest in the entire problem of the thalidomide children outweighed the parties' interest in a trial or settlement of the pending cases insulated from the influence of public opinion.

Lords Phillimore and Scarman espoused substantially the same grounds as Lord Denning. Lord Phillimore was espe-

\textsuperscript{13} In the words of Lord Denning: 
So far as the Courts are concerned, these 266 actions have gone soundly to sleep and have been asleep for these three or four years. No one has awakened them . . . . So the litigation remained dormant . . . . So far as we know, it was still dormant when "The Sunday Times" started in September 1972 publishing its articles on the thalidomide children. It is still dormant today.


\textsuperscript{14} Id.

\textsuperscript{15} Id. at 822.
cially disturbed that the Attorney-General rather than Distillers applied for the injunction. He thought that the Attorney-General's action, generally inappropriate where civil proceedings were concerned, was all the more inappropriate in this particular case because there was no affidavit from any of the parties dealing with the facts. As a result the court was generally in the dark regarding the actual status of the negotiations and the likely effect of publication of the article. Lord Phillimore also had "no doubt that all this so-called litigation is somewhat unreal . . . . In a sense we are dealing with something akin to shadow boxing dressed up as litigation." Lord Scarman stated that "these writs are only a minor feature in a situation which deeply disturbs the nation, and in which the public has had a very great interest in freedom of discussion." He added that "even if I thought the Divisional Court to have come to a correct decision on 17th November, the state of public discussion following the Commons debate is such that I would have thought it right to discharge the injunction in the exercise of the court's discretion."

Despite this unanimity in the English Court of Appeal, the House of Lords unanimously reversed that court and reinstated the injunction of the divisional court, with certain significant qualifications. It is important to note that the majority of the participating Law Lords did not wholly adopt the view of the law taken by the divisional court or by the Attorney-General in his final argument. Thus it might be said that the law of contempt and freedom of the press as laid down by the House of Lords was somewhere in between the law as accepted by the divisional court and the law suggested by the court of appeal.

This careful compromise was well brought out in the lead opinion of Lord Reid. Lord Reid first disassociated himself, as did all the other Law Lords, from the court of appeal's criticism of the Attorney-General for having brought the con-

16 Id. at 824.
17 Id. at 825.
18 Id. at 827.
19 Id. at 828.
tempt proceedings, instead of leaving such action to the private parties concerned. He stated:

So, if the party aggrieved failed to take action either because of expense or because he thought it better not to do so, very serious contempt might escape punishment if the Attorney-General had no right to act. . . . It is entirely for him to judge whether it is in the public interest that he should act.\textsuperscript{21}

Proceeding to the merits, Lord Reid went on to explain how the Attorney-General’s submission of the case with respect to the applicable law of contempt was broader than justified by public policy or by the circumstances of the particular case. The Attorney-General had based his argument on a passage reported in *Vine Products Ltd. v. Green*\textsuperscript{22} which held that a newspaper never can comment on pending litigation if such comment would prejudice the case.\textsuperscript{23} After commenting that this proposition was “much too widely stated,”\textsuperscript{24} Lord Reid went on to explicate the exact difference between his view of the law and that of the Attorney-General and the divisional court as applied to the facts of this particular case. He stated:

The crucial question on this point of the case is whether it can ever be permissible to urge a party to a litigation to forego his legal rights in whole or in part. The Attorney-General argues that it cannot and I think the Divisional Court has accepted that view. In my view it is permissible so long as it is done in a fair and temperate way and without

\textsuperscript{21} *Id.* at 59.

\textsuperscript{22} [1966] Ch. 484.

It is a contempt of this court for any newspaper to comment on pending legal proceedings in any way which is likely to prejudice fair trial of the action. That may arise in various ways. It may be that the comment is likely in some way or other to bring pressure upon one or other of the parties to the action so as to prevent that party from prosecuting or from defending the action, or to encourage that party to submit to terms of compromise which he otherwise might not have been prepared to entertain, or influence him in some way in his conduct in the action, which he ought to be free to prosecute or defend, as he is advised, without being subject to such pressure.

*Id.*

\textsuperscript{23} *Id.* at 495-96.

\textsuperscript{24} [1973] 3 All E.R. at 61.
any oblique motive.\textsuperscript{25}

Lord Reid then proceeded to illustrate the two views by applying them not only to the proposed article of The Sunday Times under consideration but also to a previous article actually published by The Sunday Times on September 24, 1972. He felt that the published article was clearly intended to bring pressure on Distillers to increase their offer of settlement. It undertook to do this, not by arguing or exploring the extent of Distillers’ legal liability, but by arguing that “there are times when to insist upon the letter of the law is as much exposed to criticism as infringement of another’s legal rights.”\textsuperscript{26} This article was not only intended to persuade Distillers “to do what they did not want to do,” but also seemed to Lord Reid “to have played a large part in causing Distillers to offer far more money than they had in mind at that time.”\textsuperscript{27} “If the view maintained by the Attorney-General were right,” said Lord Reid, “I could hardly imagine a clearer case of contempt of court.”\textsuperscript{28} Yet when this article was called to the attention of the Attorney-General by Distillers as a contempt of court, he decided to take no action. This decision, in Lord Reid’s view, was quite correct.

Turning then to the article under consideration, Lord Reid summarized it by saying that “it consists in the main of detailed evidence and argument intended to show that Distillers did not exercise due care to see that thalidomide was safe before they put it on the market.”\textsuperscript{29} Publication would introduce a new element into the public debate in contravention of what “is in this country a strong and generally held feeling that trial by newspaper is wrong and should be prevented.”\textsuperscript{30} Lord Reid then tried to express what he regarded as the underlying reasons for avoiding trial by press:

\textsuperscript{25} Id. at 61 (footnotes omitted).
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id. This feeling does not rest simply on the concern that “issues must not be prejudged in a manner likely to affect the mind of those who may later be witnesses or jurors” but rather on “the wider proposition that trial by newspaper is intrinsically objectionable.” Id.
I think that anything in the nature of prejudgment of a case or of specific issues in it is objectionable not only because of its possible effect on that particular case but also because of its side effects which may be far reaching. Responsible ‘mass media’ will do their best to be fair, but there will also be ill-informed, slapdash, or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth disrespect for the processes of the law could follow and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly. Most cases of prejudging of issues fall within the existing authorities on contempt. I do not think that freedom of the press would suffer and I think that the law would be clearer and easier to apply in practice if it is made a general rule that it is not permissible to prejudge issues in pending cases.31

Having thus arrived at a general principle suitable for the disposition of the particular case, Lord Reid added a few qualifications and some comments on the reasons given by the court of appeal for discharging the injunction. In some cases of technical contempt, he said, the fault might be so venial and the consequences so trifling that it would be wrong to impose punishment.32 Furthermore, “it would be wrong and contrary to existing practice to limit proper criticism of judgments already given but under appeal.”33 With respect to the issue of dormancy, he was content to say simply that “active negotiations for settlement were going on all the time” and “if there is no undue procrastination in the negotiations for a settlement I do not see how in this context an action can be said to be dormant.”34 One cannot help wondering whether some pains were taken in the course of the argument to dispel the impression of complete stalemate in the negotiations. Indeed Lord Reid went so far as to state that “[t]he information set before us gives us hope that the general lines of a settlement of the whole of this unfortunate controversy may soon emerge.”35 Finally, with respect to the significance attached

31 Id.
32 Id. at 65.
33 Id.
34 Id.
35 Id. at 66.
by the English Court of Appeal to the debate in the House of Commons, Lord Reid said: "so far as I have noticed there was little said in the House which could not have been said outside if my view of the law is right."\(^{36}\)

All of the participating Law Lords agreed with Lord Reid's conclusion with respect to the contemptuous character of the proposed article; they also joined with him in disapproving the court of appeal's criticism of the Attorney-General for having himself brought the proceedings. Nor were any of the five Law Lords impressed with the suggestion that the litigation was in fact dormant where there were live prospects of settlement. However, only two of the other Law Lords, Lord Morris of Borthy-Gest and Lord Cross of Chelsea, agreed with the significance Lord Reid attached to his distinction between the two articles: that the first article appealed only to the moral sense of Distillers, whereas the second argued as well their negligence and legal liability.\(^{37}\)

In his opinion, Lord Cross made it clear that while he proscribed discussion of all pending legal and factual issues, commentary on possible absolute liability for those who trade

\(^{36}\) Id.

\(^{37}\) Id. at 70. Lord Morris also added the observation that "[l]ikewise there could have been no objection to the forceful advocacy of a view that liability in such cases as those under consideration should not have to depend upon proof of negligence or fault." Id.

Lord Cross of Chelsea also expanded on what Lord Reid had stated as the underlying reasons for such a general rule against public discussion of the issues, stating:

It is easy enough to see that any publication which prejudges an issue in pending proceedings ought to be forbidden if there is any real risk that it may influence the tribunal — whether judge, magistrates, or jury, or any of those who may be called upon to give evidence when the case comes to be heard. But why, it may be said, should such a publication be prohibited when there is no such risk? The reason is that one cannot deal with a particular publication in isolation. A publication prejudging an issue in pending litigation which is itself innocuous enough may provoke replies which are far from innocuous but which, as they are replies, it would seem unfair to restrain. So gradually the public would become habituated to look forward to, and resent the absence of preliminary discussions in the 'media' of any case which aroused widespread interest. An absolute rule — though it may seem to be unreasonable if one looks only to the particular case — is necessary in order to prevent a gradual slide towards trial by newspaper or television.

Id. at 84.
in drugs or the adequacy of the customary methods for assessing damages in personal injury cases was not prohibited. It is not entirely clear from the discussion whether these broader questions could have become issues in the pending or prospective litigation. Apparently, it was assumed that they were not so involved.

The partially dissenting Law Lords, Lord Diplock and Lord Simon of Glaisdale, regarded the majority's view of contempt as too narrow. Lord Diplock set forth his stance in this forceful passage:

In my opinion, a distinction is to be drawn between private persuasion of a party not to insist on relying in pending litigation on claims or defenses to which he is entitled under the existing law, and public abuse of him for doing so. The former, so long as it is unaccompanied by unlawful threats, is not in my opinion contempt of court; the latter is at least a technical contempt, and this whether or not the abuse is likely to have any effect upon the conduct of that particular litigation by the party publicly abused. For the public mischief in allowing a litigant to be held up to public obloquy for availing himself in a court of justice of rights to which he is entitled under the law as it stands at the time, lies in the inhibiting effect which it might have upon all potential suitors if it were to become the common belief that to have recourse to the established courts of law for ascertainment and enforcement of their legal rights and obligations would make them a legitimate target of public abuse. If laws are unjust they ought to be changed . . . . A campaign to change them should be directed to persuading parliament of the need, not to vilifying individual litigants for exercising their rights under the law as it stands. If a campaign directed to the latter object were to succeed in deterring litigants from enforcing their legal rights in courts of law which are under a constitutional duty to enforce them, the practical result would be to substitute government by the 'media' for government by parliament in the particular field of legislation with which the campaign was concerned.

Lord Simon adopted Lord Diplock's view except for the

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38 Id. at 85.
39 Id. at 76.
latter's suggestion that private pressure on a litigant, as distinguished from public pressure, would never be contempt.\textsuperscript{40} Lord Simon also addressed the issue of balancing the public interest in freedom of discussion against the public interest in due administration of justice, stating that adoption of a case-by-case balancing process would not be satisfactory because it would not furnish sufficient advance guidance.\textsuperscript{41} This was provided, for example, by the major distinction that had been drawn between pending litigation and concluded litigation. Even with respect to this some qualifications were recognized. One exception was where the public debate pre-existed the litigation; even though the continued debate might interfere with the litigation, the law allows the debate to continue.\textsuperscript{42} Another qualification was where the case was pending in an appellate court.\textsuperscript{43}

Finally, Lord Simon took the occasion to comment on Attorney-General v. London Weekend Television Ltd.,\textsuperscript{44} decided by the same divisional court which had rendered the decision in The Sunday Times case. This case held that a television program discussing the proposed settlement in the thalidomide litigation was not a contempt of court. That pro-

\textsuperscript{40} Instead, Lord Simon stated that:

\begin{quote}
[pl]private pressure to interfere with the due course of justice will only be acceptable within narrow limits . . . . It is the fact of interference, not the particular form that it may take, that infringes the public interest . . . . The only difference is that private pressure on a litigant (in conra-distinction to violence or bribery or public execration) might sometimes be justifiable, while private pressure on the tribunal or witness never would be so. The justification for private pressure on a litigant might be such a common interest that fair, reasonable and moderate personal representations would be appropriate.
\end{quote}

Id. at 80.

\textsuperscript{41} To attempt to strike anew in each case the balance . . . would not be satisfactory. The law would then be giving too uncertain a guidance in a matter of daily concern, and its application would tend to vary with the length of the particular judge's foot. The law must lay down some general guide lines.

Id. at 81.

\textsuperscript{42} Id. at 82. "The situation of public debate involves that there is probably at stake some matter of which the public has a legitimate interest to be informed; and the law, in pragmatic judgment says that conditionally the debate may continue." Id.

\textsuperscript{43} Id. at 83.

\textsuperscript{44} [1972] 3 All E.R. 1146 (Q.B. Div'l Ct.).
gram had avoided any discussion of legal liability, but had emphasized that the settlement proposed by Distillers was considerably below the one made between the Swedish thalidomide distributor and Swedish victims. The court found that the comparison was in some respects inaccurate and unfair, but it also found that the inaccuracy was not deliberate. Taking this into account, and also considering the total impact of the program, the divisional court had concluded, with some hesitation, that "we find ourselves unable to say in this case, with that degree of conviction which we should demand, that this programme shown once only would result in the creation of a serious risk that the course of justice would be interfered with."\(^4\) Recognizing that the divisional court had actually seen and heard the television program, Lord Simon concluded "from its description in the judgment, I should have thought that there was at least a technical contempt."\(^4\) This was quite contrary to the view of the same program by Lord Reid, who stated in the course of his opinion:

So far as I can judge from the report it seems to have had much the same object and character as "The Sunday Times" article of September 24. If the view which I take about that article is correct, then I think that for similar reasons the television program was not in contempt of court.\(^4\)

The more limited view of contempt adopted by the majority of the participating Law Lords was reflected in the terms of the injunction approved by the House of Lords, which read:

That the defendants . . . be restrained from publishing . . . any article or matter which prejudges these issues of negligence, breach of contract or breach of duty, or deals with the evidence relating to any of the said issues arising in any actions pending or imminent against Distillers Co. (Biochemicals) Ltd. in respect of the development or use of the drug "thalidomide."\(^4\)

\(^4\) Id. at 1152.
\(^4\) Id. at 63.
\(^4\) Id. at 87.
The matter was not, however, to be concluded so simply.

II. EUROPEAN COMMISSION AND COURT PROCEEDINGS

On January 19, 1974, six months after the decision of the House of Lords, the publisher of The Sunday Times, the newspaper's editor, Mr. Harold Evans, and a group of journalists on its staff lodged with the European Commission of Human Rights an application against the United Kingdom charging a violation of articles 10, 14, and 18 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In its March 21, 1975 decision, the commission declared the application admissible and accepted it. In its report to the European Court of Human Rights on May 18, 1977, dealing with the merits of the application, the commission expressed the opinion, by eight votes to five, that the restriction imposed on the applicants' right to freedom of expression was in breach of article 10 of the convention but reported unanimously that there had been no breach of articles


60 Article 28 provides that the commission's first responsibility is to determine whether an application meets the jurisdictional and procedural requirements of the convention. If it determines that these requirements are met, it then proceeds to hear and make a report on the merits unless it first succeeds in effecting a friendly settlement. According to article 31, the report of the commission is first submitted in confidence to the Committee of Ministers of European Community and to the states concerned. Under article 47, the court may deal with a case only after the commission has acknowledged its failure to effect a friendly settlement. A case may be brought before the court by (a) the commission; (b) a high contracting party whose nation is alleged to be a victim; (c) a high contracting party which referred the case to the commission; (d) a high contracting party against which the complaint has been lodged. EUR. CONV. ON HUMAN RIGHTS arts. 28, 31, 47. The Sunday Times case was referred to the court by the commission.
14 and 18. The court, like the commission, was unanimous in finding no violation of those two articles.\textsuperscript{51}

Article 10, the pivotal article for the purposes of both the court and the commission, reads as follows:

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

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.\textsuperscript{52}

Prior to the proceedings before the European commission and court, the public record in The Sunday Times litigation had been something like a production of Hamlet without the Prince of Denmark. The principal subject of the litigation, the proposed article, had been disclosed to the courts, but its contents had been only briefly summarized in the judicial opinions. On June 23, 1976, however, after the House of Lords decision, the Queen’s Bench Divisional Court granted an application by the Attorney-General for the discharge of the injunction. The reason for the discharge was that most of the claims against Distillers had been settled, leaving only four

\textsuperscript{51} Article 14 of the convention provides: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” \textit{Eur. Conv. on Human Rights} art. 14.

Article 18 provides: “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.” \textit{Eur. Conv. on Human Rights} art. 18.

\textsuperscript{52} \textit{Eur. Conv. on Human Rights} art. 10.
pending actions; these four could have been brought before the courts by then if they had been diligently pursued. Additionally, the terms offered by Distillers had been improved significantly since the issuing of the first injunction. When the injunction was lifted, however, the article as published was not quite the same as that originally proposed. This was because parts of the article had to be deleted in response to another injunction issued July 31, 1974, forbidding publication of certain matters based on information received in confidence by the parents' advisers during the thalidomide litigation.  

The published article, as quoted by the European Court of Human Rights, opened by asserting that Distillers:

— relied heavily on the German tests and had not completed full trials of its own before marketing the drug;
— failed to uncover in its research into medical and scientific literature the fact that a drug related to thalidomide could cause monster births;
— before marketing the drug did no animal tests to determine the drug's effect on the foetus;
— accelerated the marketing of the drug for commercial reasons, and was not deflected by a warning from one of its own staff that thalidomide was far more dangerous than had been supposed;
— was not deflected by the discovery that thalidomide could damage the nervous system, in itself a hint that it might damage the foetus;
— continued to advertise the drug as safe for pregnant women up to a month from when it was withdrawn.

The article then gave a more detailed history of the steps taken by Distillers, showing that the distribution and advertising of the new drug occurred at the same time that Distillers was conducting research and responding to inquiries with respect to the drug's safety and effectiveness. The article concluded as follows:

So the burden of making certain that thalidomide was safe fell squarely on [Distillers]. How did the company measure up to this heavy responsibility? It can be argued that:
1. [Distillers] should have found all the scientific literature about drugs related to thalidomide. It did not.
2. It should have read Thiersch's work on the effects on the nervous system of drugs related to thalidomide, have suspected the possible action on unborn babies and therefore have done tests on animals for teratogenic effect. It did not.
3. It should have done further tests when it discovered that the drug had anti-thyroid activity and unsuspected toxicity. It did not.
4. It should have had proof before advertising the drug as safe for pregnant women that this was in fact so. It did not.

For [Distillers] it could be argued that it sincerely believed that thalidomide was free from any toxicity at the time it was first put on the market in Britain; that peripheral neuritis did not emerge as a side effect
The opinion of the European Court of Human Rights, after stating the facts and summarizing the judgments of the English courts, described proposals for reform of the English law of contempt of court, particularly the Report of the Committee on Contempt of Court\textsuperscript{44} presented to Parliament by the Lord High Chancellor and Lord Advocate in December, 1974. This report, according to the court, emphasized both "the uncertainty of the present state of the law regarding publications dealing with legal proceedings" and also expressed "the opinion that the balance had moved too far against the freedom of the press. It therefore made various proposals for reform, both to redress the balance and in order to achieve greater certainty in the law."\textsuperscript{55} The European Court also noted, however, that "[o]ne member of the committee remarked that, despite the suppression of the \textit{Sunday Times} article, the campaign of protest and pressure over the thalidomide tragedy made a mockery of the law of contempt."\textsuperscript{56}

As to the claims asserted under article 10 of the European Convention, the court explained that the applicants alleged that the "violation arises by reason, firstly, of the injunction granted by the English Courts and, secondly, of the continuing restraints to which they are subjected as a result of the over-breadth and lack of precision of the law of contempt of court."\textsuperscript{757} The commission had confined its opinion, with respect to a violation of article 10, to the injunction itself. Nev-

\textsuperscript{44} This report was also known as the Phillimore Report. Lord Phillimore was one of the judges who participated in the decision of the English Court of Appeal.

\textsuperscript{54} The Sunday Times case at 17-18; 18 INT'L LEGAL MATERIALS at 946.

\textsuperscript{55} Id. at 18; 18 INT'L LEGAL MATERIALS at 946-47.

\textsuperscript{56} Id. at 20; 18 INT'L LEGAL MATERIALS at 949.
ertheless, the principal delegate of the commission, in his argument to the court, also urged that the English law of contempt had been left in such a state of uncertainty by the judgment of the House of Lords, that there was a continuing violation of article 10.

In response to these contentions, the court concluded that "[i]t is clear that there was an interference by public authority in the exercise of the applicants' freedom of expression which is guaranteed by paragraph 1 of Article 10." Apparently, the court meant to limit this particular statement to the exact terms of the injunction ordered by the House of Lords as distinguished from the principles of contempt of court as enunciated in the various judgments of the House of Lords. This is apparent partly because the court quoted the exact terms of the injunction and also because the court regarded its jurisdiction as limited by the scope of the application and the commission's decision on admissibility. In short, then, the injunction was the "interference" mentioned in section 1 of article 10, but the ultimate question was whether the rules of contempt of court as applied in the decision justified the interference under section 2 of article 10.

The European Court then addressed the question whether the interference was indeed "prescribed by law" within the meaning of paragraph 2. First, the court had no doubt that these words were not limited to legislation but included the common law as well. To hold otherwise "would deprive a common-law State which is Party to the Convention of the protection of Article 10 § 2 and strike at the very roots of

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58 Id. at 21; 18 Int'l Legal Materials at 949.
59 With respect to the second ground [the uncertainty of the English law of contempt of court] the Court recalls that "its jurisdiction in contentious matters is limited to applications which have first of all been lodged with and accepted by the Commission" . . . . In the present case, the Commission, in its decision of 21 March 1975 on the admissibility of the application, specified that the question before it was 'whether the rules of contempt of court as applied in the decision of the House of Lords granting the injunction are a ground justifying the restriction under Article 10 § 2.' The Commission's examination of the merits of the case was limited to that very question.

Id. at 20; 18 Int'l Legal Materials at 949.
that State's legal system." This did not, however, answer the applicants' argument that "legislation is required only if . . . the common-law rules are so uncertain that they do not satisfy . . . the principle of legal certainty." Responding to this argument, the court postulated two requirements that were deemed to flow from the expression "prescribed by law." These were that "the law be adequately accessible" and secondly that it be "formulated with sufficient precision to enable the citizen to regulate his conduct." In applying these tests to the present cause, the court recognized some complications because the various Law Lords had relied on different principles. Some seemed to adopt the principle applied by the Queen's Bench Divisional Court; namely, that a "deliberate attempt to influence the settlement of pending proceedings by bringing public pressure to bear on a party constitutes contempt of court (the 'pressure principle'; . . .)." But other Law Lords "preferred the principle that it is contempt of court to publish material which prejudices, or is likely to cause public prejudgment of, the issues raised in pending litigation (the 'prejudgment principle'; . . .)." The reader may recognize this analysis as consistent with the writer's rendering of the two principle views of the Law Lords, the "prejudgment principle" being espoused by the majority of three, and the "pressure principle" by the minority of two. The court also considered to what extent either or both of these principles had been foreshadowed in prior English case law. In this endeavor, less difficulty was experienced in finding clear authority for the "pressure principle" than for the "prejudgment principle." Nevertheless, some authority was found for both. As to the first principle, Mr. Justice Buckley, speaking in

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60 Id. at 21; 18 INT'L LEGAL MATERIALS at 950.
61 Id. at 22; 18 INT'L LEGAL MATERIALS at 950.
62 Id.; 18 INT'L LEGAL MATERIALS at 950-51.
63 Id.; 18 INT'L LEGAL MATERIALS at 951.
64 Id.
65 See text accompanying notes 30-31 supra for a discussion of Lord Reid's application of the "prejudgment principle."
66 See text accompanying notes 39-43 supra for a discussion of the minority view (the "pressure principle").
Vine Products v. Green\textsuperscript{68} was quoted; with respect to the latter, Lord Justice Cotton in Hunt v. Clarke\textsuperscript{69} was relied upon.

To this writer it seems that a more accurate statement of the English law laid down by the House of Lords would have been to recognize the prejudgment principle as a qualification of the pressure principle. In other words, Lord Reid and the two colleagues who agreed with him did not reject the pressure principle in its entirety; rather, they espoused the view that public pressure exerted against one of the parties to induce him to settle or abandon litigation was not objectionable if it was based on a discussion of issues not involved in the litigation; it was objectionable, however, if it was based on a discussion of issues that were to be determined in the litigation. If this is a correct analysis of the majority view, the publishers of The Sunday Times could not have been prejudiced by its adoption in preference to the minority view. Instead they were assured that they could continue with their so-called moral crusade against Distillers, so long as they did not contaminate it with discussion of the factual issues which would have to be resolved if the litigation proceeded to trial. This also seems to be consistent with the advice given The Sunday Times by its attorneys. The newspaper was apparently forewarned that it skated on thinner ice when it embarked on a discussion of the negligence issue, as contrasted with the moral aspects involved. Finally, it is difficult for this writer to understand why the prior uncertainty of the English law with respect to either or both of these principles of contempt of court should have been relevant in a case in which there was no prosecution for contempt committed prior to the decision of the House of Lords. If the principles espoused by the Law Lords in their judgments were sufficient to justify the injunction as prescribed, as they obviously were in the minds of all of the Lords, they should also have been sufficient to satisfy the requirement of "prescribed by law" in section 2 of article 10. An even more radical view, which also commends itself to the writer, would simply be to hold that the terms of

\textsuperscript{68} [1966] Ch. 484, 495-96.

\textsuperscript{69} [1889] 58 L.J.Q.B. 490.
the injunction, so long as it was issued in accordance with es-

tablished legal procedure, would satisfy the requirement of
“prescribed by law.” The reasons or principles espoused by
the Law Lords would be relevant only in appraising the vari-
ous interests which must be served by the injunction in order
to satisfy one or more of the other requirements mentioned in
section 2 of article 10. It is that aspect of the opinion to which
we now turn.

Among the interests explicitly mentioned in section 2 of
article 10 as possible justification for interference with free-
dom of expression are “protection of the rights of others” and
“maintaining the authority and impartiality of the judici-
ary.” The applicants, the government of the United King-
dom, and the minority of the commission all took the view
that both of these protected interests were relevant to the
type of interference involved. The European Court of Human
Rights, however, accepted the view of the majority of the
commission that interests of litigants were included within the
phrase “maintaining the authority and impartiality of the ju-
diciary” and consequently did not have to be considered sepa-
ately as part of “the protection of . . . the rights of others.”
The court then listed the various reasons given by the Law
Lords in reaching their decision, including both prejudgment
of the issues through public discussion and pressure on the
litigants which might inhibit their recourse to the courts. The
court regarded all of the reasons listed as “falling within the
aim of maintaining the ‘authority of the judiciary’” and con-
sequently legitimate under article 10 section 2. The “imparti-
ality” of the judiciary was deliberately omitted from this lit-
any of permissible aims, because all of the Law Lords
assumed that the impartiality of judges was not threatened.

This analysis left as the crucial issue for decision whether
the interference was properly regarded as “necessary in a
democratic society” for maintaining the authority of the judi-
cracy. In pursuing this issue, the court first addressed the
meaning of the term “necessary,” in a manner somewhat rem-

70 See text accompanying note 52 supra for a full statement of article 10.
71 The Sunday Times case at 25; 18 INT’L LEGAL MATERIALS at 954.
iniscent of Chief Justice Marshall's exposition of the necessary and proper clause in *McCulloch v. Maryland*. "Necessary" was not considered synonymous with "indispensable," but neither was it so flexible as the words "admissible," "ordinary," "useful," "reasonable," or "desirable." Rather it implied the existence of a "pressing social need." Apparently it was not to be regarded as quite as flexible as our "necessary and proper" clause.

The court recognized that article 10 section 2 leaves to the contracting states "a margin of appreciation." This is language occasionally used in European Court opinions to indicate an area of discretion accorded to the governing bodies of the members of the convention and to emphasize a measure of respect that is to be accorded their judgments regarding domestic problems. Yet the court was unwilling to concede

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72 17 U.S. (4 Wheat.) 316 (1818).
73 The Sunday Times case at 25; 18 Int'l Legal Materials at 594.
74 Id.
75 For example, compare the majority and partially dissenting opinions in "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" Case, [1963] Y. B. Eur. Conv. on Human Rights 24-26, 65-68. This case involved a challenge to the validity of language regulations in primary and intermediate education in Belgium schools, a challenge primarily based on article 14 (the anti-discrimination provision) of the convention. See note 51 supra for the full text of article 14. For the most part, but not entirely, the regulations were sustained.

The majority opinion in an introductory passage stated:

In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention.

Id. at 866.

The dissenters agreed with the general principles but thought that they had not been properly applied because, "the judgment has not sufficiently taken account of the rule according to which the national authorities, who must appreciate the requirements implied by the factual and legal features in issue, remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention." Id. at 982.

Attention should also be directed to the judgment of the court in "Ireland against The United Kingdom" case, [1978] Y. B. Eur. Conv. on Human Rights 62. One of the issues concerned the application of article 15, which provides in part:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its
that its "supervision is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith." The court also suggested that the margin of appreciation was not necessarily the same as regards each of the aims listed in article 10 section 2. For example, it might be greater in a case involving the regulation of morals.

The court rejected the argument urged by the minority of the commission and the government that the concluding words of article 10 section 2 were especially designed to protect the common law of contempt of court as recognized by the English courts. In this connection, and perhaps in deroga-

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obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Eur. Conv. on Human Rights art. 15.

In the course of upholding under this article the emergency measures with respect to arrest, custody and detention which were taken for the purpose of controlling terrorism in Northern Ireland, the court stated:

It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 leaves those authorities a wide margin of appreciation.


76 The Sunday Times case at 26; 18 Int'l Legal Materials at 955.

77 The court referred to Richard Handyside v. United Kingdom, [1976] Y.B. Eur. Conv. on Human Rights 506. This citation only provides a summary of the case. References to the text of the opinion are from the pamphlet form [hereinafter cited as Handyside]. The case, decided on December 7, 1976, involved a conviction under the British Obscene Publications Act, for distribution of a book partly designed for the sex education of school children. In speaking of Handyside, the court said the view taken by the Contracting States of the 'requirements of morals', ... 'varies from time to time and from place to place, especially in our era', and 'State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements.'

Id. The same could not be said of the "far more objective notion of the 'authority' of the judiciary." Id. For a detailed discussion of Handyside, see notes 159-79 infra and accompanying text.

78 Rather the opinion reads:

[T]he Court considers that the reason for the insertion of those words would have been to ensure that the general aims of the law of contempt of court should be considered legitimate aims under Article 10 § 2 but not to
igation of the persuasiveness of the English law, the court took special note of both "the existence of a variety of reasoning and solutions in the judicial decisions,"79 and the proposals for reform or at least reconsideration of the English law set out in the Phillimore Report and Government Green Paper commenting on it.

It is not entirely surprising that general observations such as the foregoing should have been the springboard for intensive examination of the peculiarities of the thalidomide litigation itself. The court noted, for example, that while public pressure on Distillers to make more generous offers of settlement was one of the grounds relied upon by the English judges, even in 1972 the article would not have added much to the pressure already existing. This was particularly so in July of 1973 when the House of Lords rendered its decision, after the thalidomide case had been the subject of debate in Parliament and also of a nationwide campaign in the press. In so far as the speeches in the House of Lords emphasized the "prejudgment principle," the court thought it relevant that "the proposed Sunday Times article was couched in moderate terms and did not present just one side of the evidence or claim that there was only one possible result at which a court could arrive."80

The court recognized that the "publication of the proposed article might well have provoked replies." However, the same would have been true of any publication that referred to the "facts underlying or the issues arising in litigation. As items in that category do not inevitably impinge on the 'authority of the judiciary,' the Convention cannot have been intended to permit the banning of all of them."81 Consequently, one could not decide whether this reason was sufficient without examining all of the surrounding circumstances. Such facts included that "the negotiations were very lengthy, con-

make that law the standard by which to assess whether a given measure was "necessary."

Id. at 27; 18 INT'L LEGAL MATERIALS at 955.

79 Id.; 18 INT'L LEGAL MATERIALS at 956.

80 Id. at 28; 18 INT'L LEGAL MATERIALS at 957.

81 Id.
continuing for several years, and that at the actual moment when publication of the article was restrained the case had not reached the stage of trial." Likewise, when the injunction was discharged, an action between Distillers and their insurers involving the issue of negligence was still outstanding. "Discharge of the injunction in these circumstances prompts the question whether the injunction was necessary in the first place." 

Apparently the government had already responded to that question in its argument. It had argued that it was "a matter of balancing the public interest in freedom of expression and the public interest in the fair administration of justice; . . . that the injunction was a temporary measure and . . . that the balance, on being struck again in 1976 when the situation had changed, fell on the other side." Perhaps this reply encouraged the court to do some balancing on its own account. After recalling its previous remarks in the Handyside judgment regarding the significance of freedom of expression as "one of the essential foundations of a democratic society," the court elaborated:

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

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82 Id. at 29; 18 INT'L LEGAL MATERIALS at 958.
83 Id.
84 Id.
85 Id.
receive them . . . 86

From this statement of general principle the court drew the conclusion that "account must thus be taken of any public interest aspect of the case." 87 It took note of the fact that some of the Law Lords, after balancing the conflicting interests, concluded that there should be an absolute rule making it impermissible to prejudge issues in pending cases and that the law would be too uncertain if the balance were to be struck anew in each case. But the court concluded that it had to take a different approach because it was "faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted." 88 It also had "to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it." 89

Thus the court came back to the peculiarities of the thalidomide litigation:

It posed the question whether the powerful company which had marketed the drug bore legal or moral responsibility towards individuals experiencing an appalling tragedy or whether the victims could demand or hope for indemnification only from the community as a whole; fundamental issues concerning protection against and compensation for injuries resulting from scientific developments were raised and many facets of the existing law on these subjects were called in question. 90

The court recognized that both the government and the minority of the commission had emphasized that there was no prohibition on discussion of the "wider issues," such as the principles of the English law of negligence. But the court also considered that the attempt to divide the wider issues and the negligence issue was artificial. "The question of where responsibility for a tragedy of this kind actually lies is also a matter

86 Id.
87 Id.
88 Id. at 30; 18 INT'L LEGAL MATERIALS at 959.
89 Id.
90 Id.
Thus, the court concluded, “the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention.” The restraint was not “proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary.”

The dissenting opinion of the nine judges of the European Court was directed to the ultimate question whether “the contested interference with freedom of expression was contrary to the Convention because it could not be deemed necessary in a democratic society for maintaining the authority and impartiality of the judiciary within the meaning of Article 10 § 2 of the Convention.” In approaching this question, the dissenters emphasized that

it was clearly with a view to covering this institution [contempt of court], which is peculiar to the legal traditions of the common-law countries, that the restriction on freedom of expression aimed at maintaining the authority and impartiality of the judiciary was introduced into the Convention. A similar restriction is unknown in the law of most of the member States; absent in the original draft of the Convention, it was inserted on the proposal of the British delegation.

The dissenters then stated pithily: “The difference of opinion separating us from our colleagues concerns above all the necessity of the interference and the margin of appreciation which, in this connection, is to be allowed to the national

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91 Id.
92 Id. at 31; 18 INT’L LEGAL MATERIALS at 960.
93 Id.
94 The dissenters were Mr. Wiarda, Mr. Cremona, Mr. Thor Vilhjalmsson, Mr. Ryssdal, Mr. Ganshof van der Meersch, Sir Gerald Fitzmaurice, Mrs. Bindschelder-Robert, Mr. Liesch and Mr. Matscher. The members of the majority were Mr. Balladore Pallieri, President, Mr. Mosler, Mr. Zekia, Mr. O’Donoghue, Mr. Pedersen, Mr. Evriginis, Mr. Teitgen, Mr. Lagergren, Mr. Gölcükli, Mr. Pinheiro Farinha and Mr. Garcia de Enterría.
95 The Sunday Times case at 35.
96 Id.
authorities."\textsuperscript{97} With reference to the part of the question dealing with the necessity of the interference, the dissenters considered it significant that "the Law Lords put this very question to themselves when applying the rules on contempt of court."\textsuperscript{98} The dissenters noted that when the Law Lords addressed the question, they did so for the purpose of applying national law, while when "our Court deals with this question, it does so with reference to Article 10 of the Convention."\textsuperscript{99} Nevertheless, as was brought out in both the \textit{Handyside}\textsuperscript{100} and \textit{Klass}\textsuperscript{101} judgments, "it is for the national authorities to make the initial assessment of the reality of the pressing social need implied in each case . . . accordingly, Article 10 § 2 leaves to the Contracting States a margin of appreciation."\textsuperscript{102} The dissent also notes:

This margin of appreciation involves a certain discretion and attaches primarily to the evaluation of the danger that a particular exercise of the freedom safeguarded by Article 10 § 1 could entail for the interests listed in Article 10 § 2 and to the choice of measures intended to avoid that danger . . . . For the purposes of such an evaluation . . . the national authorities are in principle better qualified than an international court.\textsuperscript{103}

Up to this point, there is little difference between the generalities relied upon by the majority and dissenting opinions. However, further into the opinion, differences begin to appear. For example, the dissenters state that the domestic margin of appreciation "goes hand in hand with a European supervision," but they also state that this "supervision" is concerned, in the first place, with determining whether the "national authorities have acted in good faith, with due care and in a reasonable manner when evaluating those facts and circumstances, as well as the danger that might thereby be oc-

\textsuperscript{97} Id. at 36.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 37.
\textsuperscript{100} [1976] Y. B. EUR. CONV. ON HUMAN RIGHTS 506.
\textsuperscript{101} [1978] Y. B. EUR. CONV. ON HUMAN RIGHTS 622.
\textsuperscript{102} The Sunday Times case at 37.
\textsuperscript{103} Id.
casioned for the interests listed in Article 10 § 2 . . . "104 The dissenters then interject this reminder:

[T]here can be no democratic society unless "pluralism, tolerance and broadmindedness" . . . find effective expression in the society's institutional system, and unless this system is subject to the rule of law, makes basic provision for an effective control of executive action to be exercised, without prejudice to parliamentary control, by an independent judiciary . . . and assures respect of the human person.105

More specifically, the dissenters note that the majority takes the view that the margin of appreciation as to issues concerning the maintenance of the authority of the judiciary should be narrower than that allowed in relation to issues concerning the protection of morals because the "authority of the judiciary" is a more objective standard than the protection of morality. This is a view the dissenters are unable to share.

Even though there might exist a fairly broad measure of common ground between the Contracting States as to the substance of Article 6 [dealing with judicial procedures] it nevertheless remains the fact that the judicial institutions and the procedure can vary considerably from one country to another. Thus, contrary to what the majority of the Court holds, the notion of the authority of the judiciary is by no means divorced from the national circumstances and cannot be determined in a uniform way.106

This was particularly pertinent with respect to the law of contempt of court in the United Kingdom which "the authors of the Convention had . . . in mind when they introduced the notion of maintaining 'the authority and impartiality of the judiciary.' "107 Consequently, the dissenters concluded that the House of Lords was "better qualified to decide whether, in factual circumstances which are for the House to assess, a given form of restriction on freedom of expression is necessary for maintaining, in a democratic society, the judiciary's au-

104 Id. at 38.
105 Id.
106 Id. at 39.
107 Id.
authority within the United Kingdom itself."\textsuperscript{108}

The dissenters went on to consider the particular circumstances and grounds of decision to determine whether the House of Lords had in fact overstepped its margin of appreciation. They emphasized the special character of this particular article, which the Law Lords had seen as deriving from the large amount of previously unpublished material dealing with the issue of Distillers' negligence. This increased the likelihood of the article giving rise to "prejudgment."\textsuperscript{109} The dissenters concluded:

This is why we consider that the House of Lords, acting on the basis of the factors which it was evaluating, was "entitled to think" that the publication of the article in question would have repercussions on pending litigation that would prejudice the due administration of justice and the authority of the judiciary.\textsuperscript{110}

Similarly, in the view of the dissenters, the House of Lords was entitled to think that in view of the circumstances then existing the litigation could not be regarded as "dormant."\textsuperscript{111}

The dissenters also recognized that even if the domestic court's evaluation of the risk involved was reasonable, whether or not the particular restraint imposed was proportionate to the legitimate end pursued still had to be considered. In responding affirmatively to this question, the dissenters emphasized that the scope of the restraint was limited as to both its subject-matter and its duration. With respect to the first, it related only to the issue of negligence and the evidence in the pending cases. Thus, it left open continued discussion of the English law of products liability and the moral side of the case. The dissenters could not see why this distinction was artificial. With respect to duration, it was clear that the House of Lords "foresaw the possibility that the situation might change, that even before the proceedings had been finally terminated the balance between the interests of justice

\textsuperscript{108} Id.
\textsuperscript{109} Id. at 40.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 41.
and those of freedom of the press might shift, and that the injunction might be discharged." This was indeed the way it worked out in practice; the injunction was discharged on the application of the Attorney-General when a settlement had been reached between Distillers and the great majority of the claimants, and it had become clear that the few remaining actions were not being actively pursued. Finally, the dissenters noted that the applicants had not themselves sought an earlier dissolution.

The three concurring judges expressed the view that the English law of contempt of court, as illustrated in this case, was so uncertain that it did not satisfy the requirement of "prescribed by law" contained in article 10 section 2. This point was first set forth by Judge Zekia, in an opinion joined by Judge O'Donoghue. Judge Zekia argued that this uncertainty flowed both from the variety of tests and criteria applied and from their subjective character. He found a "glaring example of the uncertainty and the unsatisfactory state of the law of contempt touching pending civil proceedings vis-a-vis press publications in the conflicting opinion, expressed by the Law Lords on The Sunday Times article of 24 September 1972 about the thalidomide tragedy." This view was also supported by the evidence given by Lord Denning and Lord Salmon before the Phillimore Committee and in the Phillimore Committee Report. This uncertainty was especially disturbing both because contempt of court was a criminal offense and because the right of freedom of expression cannot reasonably be achieved if it is "handicapped and restricted by legal rules or principles which are not predictable or ascertainable even by a qualified lawyer." Judge Zekia also suggested that even if the House of Lords did settle the law by its judgment in The Sunday Times case, the clarification came too late because the crucial date was the time the article was submitted to the divisional court. Finally, in the opinion of Judges Zekia and O'Donoghue, the prejudgment principle as announced by the House of Lords did not provide "a reasonably safe

112 Id. at 42.
113 Id. at 45.
114 Id. at 46.
guide. . . . In a matter of public concern . . . it would be very difficult to avoid . . . reference to the issues and evidence involved in a pending case. 11 In a separate concurring opinion, Judge Evriginis also expressed the view that the "prejudgment principle," as enunciated by the House of Lords, did not satisfy the requirement of "prescribed by law" in article 10 section 2. As already indicated in discussing the majority opinion, the writer does not find these arguments very impressive in the context of this particular case.

III. IMPACT OF THE EUROPEAN COURT DECISION ON THE BRITISH LAW OF CONTEMPT OF COURT

The ultimate impact of the European Court decision upon the British law of contempt of court can hardly be foretold at this early date. Its immediate impact was, of course, very slight. It will be recalled that even the injunction had been discharged before the decision of the European Court was rendered. The only practical effect on the parties was that it substantially reduced The Sunday Times' share of the costs of litigation. 116 Furthermore, the European Convention, in the absence of legislation so proclaiming, was not incorporated into the domestic law of the United Kingdom according to the established English law of treaties. 117 This bare statement,

115 Id. at 47. In a separate concurring opinion, Judge Evriginis expressed similar views. Id. at 51.
116 Article 50 of the convention provides:
If the Court finds that a decision taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

 Eur. Conv. on Human Rights art. 50.

The applicants requested that the government should pay them a sum equivalent to the costs and expenses which they had incurred in connection with the contempt litigation in the English courts and before the commission and the court. The Solicitor-General assured the court that it would not have to consider this issue. The Sunday Times case at 32-33.

however, may be regarded as something of an over-simplification. There are statements in the opinions of judges of considerable stature to the effect that the convention, although not controlling, may in some circumstances be persuasive. Determining when this may be so is not an easy task.

For example, in *Waddington v. Miah*¹¹⁸ the issue presented to the House of Lords was whether a person could be convicted under the Immigration Act of 1971, which came into force on January 1, 1973, for an act occurring in 1970. Lord Reid, speaking for a united House of Lords, stated that counsel had informed them that he had found no authorization for proceedings for an offense which was not an offense when the act was committed. Lord Reid then remarked: “That is what I would have expected because there has for a very long time been a strong feeling against making legislation, and particularly criminal legislation, retrospective.”¹¹⁹ However, Lord Reid also called attention to the facts that both article 11(2) of the Declaration of Human Rights of the United Nations and article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by the United Kingdom in 1951, prohibited criminal punishment for an act which was not a crime under either national or international law at the time it was committed. His Lordship then added: “So it is hardly credible that any government department would promote or that Parliament would pass retrospective criminal legislation.”¹²⁰ After these introductory remarks, Lord Reid closely examined the legislation and concluded that it was not intended to be retrospective.¹²¹

More directly in point, although not of such high authority, are the opinions of Lord Denning, Roskill, L.J., and Geoffrey Lane, L.J. for the English Court of Appeal in *R. v. Chief Immigration Officer*.¹²² This too was a case arising under the Immigration Act of 1971, but it involved the right of entry of the wife and children of a Pakistani citizen who was a resident

¹¹⁹ Id. at 379.
¹²⁰ Id.
¹²¹ Id. at 380.
of England. The wife and children were refused entry, pursuant to a rule of the department, because they did not have an entry certificate and because the immigration officer did not believe that they intended to stay only for the two-week period requested. When the husband had first come to the United Kingdom he was a Commonwealth citizen as well as a citizen of Pakistan. Since the husband’s arrival, Pakistan had withdrawn from the Commonwealth, and the husband had lost his Commonwealth citizenship. The judges of the court of appeal were satisfied that the decision of the immigration officer was justified under the statute and applicable rule. However, counsel had also argued that the woman and her children should have been admitted because of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Attention was called particularly to the provision of article 8, paragraph (1) providing: “Everyone has the right to respect for his private and family life, his home and his correspondence.” Attention was also directed to the fact that the government of the United Kingdom had officially declared, in accordance with article 25 of the convention, that the European Human Rights Commission was competent to receive petitions from persons complaining that rights set forth in the convention had been violated by the United Kingdom. In response to this argument, Lord Denning made this careful statement:

The position as I understand it, is that if there is any ambiguity in our statutes or uncertainty in our law, then these courts can look to the convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it. Furthermore, when Parliament is enacting a statute or the Secretary of State is framing rules, the courts will assume that they had regard to the provisions of the convention and intended to make the enactment accord with the convention, and will interpret them accordingly. But I would dispute altogether that the convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament. I desire, however, to amend one of the statements I made in

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R. v. Secretary of State for Home Affairs, ex parte Bhajan Singh. I said then that the immigration officers ought to bear in mind the principles stated in the convention. I think that would be asking too much of the immigration officers. They cannot be expected to know or to apply the convention. They must go simply by the immigration rules laid down by the Secretary of State and not by the convention. I may also add this. The convention is drafted in a style very different from the way which we are used to in legislation. It contains wide general statements of principle. They are apt to lead to much difficulty in application; because they give rise to much uncertainty. They are not the sort of thing which we can easily digest. Article 8 is an example. It is so wide as to be incapable of practical application. So it is much better for us to stick to our own statutes and principles, and only look to the convention for guidance in case of doubt.124

Substantially the same view was expressed on this point by the other two judges of the court of appeal. Roskill, L.J. was even more emphatic in rejecting aid from the convention. He said in part: "Suffice it to say that a treaty does not become part of the municipal law of this country unless and until it is the subject of legislation in the ordinary way. This is axiomatic; it has been laid down for many years."125 Lord Roskill then called disapproving attention to dicta by Scarman, L.J. in R. v. Secretary of State for the Home Department, ex parte Phansopkar126 and Pan-American World Airways, Inc. v. Department of Trade,127 including especially the following statement made after reference to the Magna Carta:

This hallowed principle of our law is now reinforced by the European Convention for the Protection of Human Rights 1950 to which it is now the duty of our public authorities in administering the law, including the Immigration Act 1971, and of our courts in interpreting and applying the law, including the Act, to have regard.128

125 Id. at 848.
Roskill, L.J. claimed this was "obiter" and also "somewhat too wide and may call for reconsideration hereafter."  

More recently, in *Gleaves v. Deakin*, a case decided by the House of Lords, one of the speeches seized the occasion to refer to the European Convention. This was an application by certain publishers to quash an order of a magistrate committing them to stand trial in the criminal court for publishing a defamatory libel in violation of the Libel Act of 1843. The criminal proceedings had been instituted by an information filed by the subject of the libel in accordance with the statute. The question presented to the House of Lords was whether the committing magistrate had erred in refusing to permit the appellants to present evidence of the bad reputation of the respondent, before making the order of committal. Their Lordships seemed to have little difficulty in unanimously reaching the conclusion that the committing magistrate was correct. As Viscount Dilhorne put it:

> It would indeed be extraordinary if publishers of defamatory libels could avoid committal for trial by giving evidence of the bad character of the prosecutor when, even if it was published for the public benefit, that would not avail them before the examining magistrate and enable them to avoid committal.  

Yet all of their Lordships seemed especially sensitive to the unsatisfactory state of the law on this subject and to the need for some reform, including, for example, the requirement of obtaining the Attorney-General's consent for the prosecution of a criminal libel. It was, however, only Lord Diplock who interjected into the discussion consideration of the European Convention. He stated in part:

> My Lords, under Art 10.2 of the European Convention, the exercise of the right of freedom of expression may be subjected to restrictions or penalties by a contracting state, only to the extent that those restrictions or penalties are necessary in a democratic society for the protection of what

131 Id. at 502.
(apart from the reputation of individuals and the protection of information received in confidence) may generally be described as the public interest. In contrast to this the truth of the defamatory statement is not in itself a defence to a charge of defamatory libel under our criminal law; so here is a restriction on the freedom to impart information which states that are parties to the Convention have expressly undertaken to secure to everyone within their jurisdiction. No onus lies on the prosecution to show that the defamatory matter was of a kind that is necessary to suppress or penalise in order to protect the public interest. On the contrary, even though no public interest can be shown to be injuriously affected by imparting to others accurate information about seriously discreditable conduct of an individual, the publisher of the information must be convicted unless he himself can prove to the satisfaction of a jury that the publication of it was for the public benefit. This is to turn Art 10 of the Convention on its head.\(^\text{132}\)

Lord Diplock endorsed the suggestion that a step in the right direction would be to require the consent of the Attorney-General to be obtained for the institution of any prosecution for criminal libel. Then he added this pregnant comment, of particular significance for *The Sunday Times* case: "In deciding whether to grant his consent in the particular case, the Attorney-General could then consider whether the prosecution was necessary on any of the grounds specified in art 10.2 of the Convention and unless satisfied that it was, he should refuse his consent."\(^\text{133}\)

Another recent opinion which is especially pertinent to the problems that might arise in the wake of *The Sunday Times* case is that of Sir Robert Megarry, V.C. in *Malone v. Commissioner of Police*.\(^\text{134}\) This was an application for an injunction against wire-tapping carried on by the Post Office pursuant to a warrant from the Home Secretary and for an order requiring the police to return to the plaintiff recordings of the conversations which had been forwarded to the police by the Post Office. In an elaborate opinion, the Vice-Chancel-

\(^{132}\) *Id.* at 498-99.

\(^{133}\) *Id.* at 499.

\(^{134}\) [1979] 2 All E.R. 620.
lor first concluded there had been no violation of established English common or statutory law. In reaching this conclusion, he was not significantly impeded either by "the celebrated article on 'The Right to Privacy' by Samule D. Warren and the future Brandeis J in the Harvard Law Review"135 or by the decision of the United States Supreme Court in Katz v. United States,136 interpreting the fourth amendment to apply to wire-tapping. After disposing of these obstacles, the Vice-Chancellor turned to the argument based on articles 8 and 13 of the European Convention. Article 8 provides:

(1) Every one 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 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 rights and freedoms of others.137

Article 13 provides: "Every one whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."138

The Vice-Chancellor explained that counsel's argument, based on these articles, had what he called "two limbs."139 The first was that the convention conferred direct rights on citizens of the United Kingdom; the second was that the convention's provisions should be applied as a guide in interpreting and applying English law in so far as it was ambiguous or lacking in clarity. But before discussing these contentions, the Vice-Chancellor thought it worthwhile to examine at some length a recent decision of the European Court in the Klass

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135 Id. at 631. The article referred to can be found in 4 HARV. L. REV. 193 (1890).
137 EUR. CONV. ON HUMAN RIGHTS art. 8.
138 EUR. CONV. ON HUMAN RIGHTS art. 13.
case, decided on September 6, 1978. The complaint in that case was that a statute of the Federal Republic of Germany permitted surveillance of the post and telecommunications without either requiring the authorities in every case to notify those concerned after the event, or providing any remedy in the courts against the ordering or execution of the surveillance. After careful examination of the unanimous opinion of the European Court which sustained the German statute, the Vice-Chancellor concluded that the court had made it clear that a statute permitting such surveillance must contain significant safeguards. Among the safeguards provided was the establishment of special board of five MPs to which the Minister authorizing surveillance had to report and to which individuals concerned could appeal. If unsuccessful before the commission, an individual could then apply to the Constitutional Court which could require the authorities to supply information or produce documents, even if secret, and decide whether they could be used. The European Court decided that these safeguards were sufficient to satisfy the requirements of articles 8 and 13.

Returning to what he had described as the two limbs of counsel's argument, the Vice-Chancellor had little difficulty in cutting off the first; he simply held that the convention did not "confer any direct rights on the plaintiff that he can enforce in the English courts." To the second limb of the argument, "based on the convention and the Klass case as assisting the court to determine what the English law is on a point on which authority is lacking or uncertain," the Vice-Chancellor paid considerably more respect. He asked the question: "Can it be said that in this case two courses are reasonably open to the court, one of which is inconsistent with the Convention and the other consonant with it?"

The answer was a resounding "No." This was partly because in Malone, unlike the Klass case, there was no applica-

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140 Y. B. EUR. CONV. ON HUMAN RIGHTS 622.  
141 2 All E.R. at 635-36.  
142 Id. at 647.  
143 Id. (citation omitted).  
144 Id.
ble legislation to construe. Furthermore, the Vice-Chancellor found it "impossible to read the Klass case without it becoming abundantly clear that a system that has no legal safeguards whatever has small chance of satisfying the requirements of that court, whatever administrative provisions there may be."\footnote{Id. at 648. (citation omitted) The Vice-Chancellor's conclusion in this respect seems to be a correct reading of the Klass opinion. The court indicated that it was considerably disturbed that the surveillance could be instituted without prior judicial approval and need never be revealed to the individual concerned. However, the court concluded that these objections were overcome by other considerations. In accordance with the requirements of the statute and in actual practice, the initiation of a surveillance, its continuation after a specified period, and a decision not to inform the individual after the surveillance was terminated were all closely and regularly monitored by the entirely independent commission appointed by the Parliamentary Board.} As compared with the independent commission and board of MPs under the German system, the Vice-Chancellor said:

[the English] system in operation provides no such independence and contains no provision whatever for subsequent notification. Even if the system were to be considered adequate in its conditions, it is laid down merely as a matter of administrative procedure, so that it is unenforceable in law, and as a matter of law could at any time be altered without warning or subsequent notification. Certainly in law any "adequate and effective safeguards against abuse" are wanting. In this respect English law compares most unfavorably with West German law; this is not a subject on which it is possible to feel any pride in English law.\footnote{Id.}

At first blush, it might seem as though the Vice-Chancellor was encouraging the plaintiff to carry his case all the way to the European Court, if he could afford to risk the time and money. He had in mind, however, a more immediate conclusion for his own purposes. This conclusion was that the job of bringing English law into consonance with the convention in this particular area was not an appropriate one for the courts. As the Vice-Chancellor put it:

Various institutions or offices would have to be brought into being to exercise various defined functions. The more complex and indefinite the subject-matter, the greater the

\footnote{Id. at 648. (citation omitted) The Vice-Chancellor's conclusion in this respect seems to be a correct reading of the Klass opinion. The court indicated that it was considerably disturbed that the surveillance could be instituted without prior judicial approval and need never be revealed to the individual concerned. However, the court concluded that these objections were overcome by other considerations. In accordance with the requirements of the statute and in actual practice, the initiation of a surveillance, its continuation after a specified period, and a decision not to inform the individual after the surveillance was terminated were all closely and regularly monitored by the entirely independent commission appointed by the Parliamentary Board.}
difficulty in the court doing what is really appropriate, and only appropriate, for the legislature to do. Furthermore, I find it hard to see what there is in the present case to require the English courts to struggle with such a problem. Give full rein to the convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision.  

In light of this brief survey of recent English cases on the domestic application of the convention, what can be ventured with respect to the prospects for the incorporation of the principles of The Sunday Times decision into English law? In the first place, it might be thought that the closeness of the vote within the court might detract somewhat from its persuasiveness. However, this close vote must be compared with the division of opinion among the English judges and with the considerable criticism the House of Lord's decision received from influential sources. This criticism particularly was evident in the testimony before the Phillimore Committee and in that committee's report. Addressing the text of contempt adopted by the majority of the House of Lords, the report stated in part:

The test of prejudgment might well make for greater certainty in one direction—provided a satisfactory definition of prejudgment could be found—but it is by no means clear that it is satisfactory in others, for instance, in the case of the 'gagging' writs referred to in paragraphs 84 and 96. It can be arbitrary in its application. For example, an opinion expressed on a legal issue in a learned journal would fall within the description of prejudgment given by Lord Cross of Chelsea. Again, there has been much discussion and expression of opinion in scientific journals as to the manner in which thalidomide operates to produce deformities. These, too, would fall within the test of prejudgment and would

147 Id.
therefore be contempts. Furthermore, the scope and precise meaning of the words “prejudge” or “prejudgment” as used in the House of Lords are no easier to determine in practice than the phrase “risk of prejudice.” At what point does legitimate discussion or expression of opinion cease to be legitimate and qualify as prejudgment? This may depend as much upon the quality and the authority of the party expressing the opinion as upon the nature of the opinion and the form of its expression. A dictum of Ulpian will carry more weight from its origin alone than a dozen judgments of as many long-forgotten but doubtless worthy praetors. Further, the expression of opinion and even its repetition can be framed as to disclaim clearly any intention to offer a concluded judgment and yet be of highly persuasive and influential character. The simple test of prejudgment therefore seems to go too far in some respects and not far enough in others. We conclude that no satisfactory definition can be found which does not have direct reference to the mischief which the law of contempt is and always has been designed to suppress. That mischief is the risk of prejudice to the due administration of justice.

On this point the ultimate conclusion of the committee was: “We recommend in relation to publications which are alleged to affect particular proceedings a statutory definition on the following lines; ‘The test of contempt is whether the publication complained of creates a risk that the course of justice will be seriously impeded or prejudiced.’”

It is noteworthy that this test is closer to the one adopted by the judges of the English Court of Appeal and by the European Court than it is to either one of the tests adopted by the House of Lords. It obviously calls for an examination of all the circumstances of the particular case, which is what both the English Court of Appeal and the European Court of Human Rights seemed to require. A question might be raised as to whether this proposed rule would satisfy the test of certainty or foreseeability implied by the European Court from the requirement of “prescribed by law.” It seems that the Eu-

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148 Report of the Comm. on Contempt of Court 48 (1947) [hereinafter cited as REPORT].

149 Id. at 49.
ropean Court could hardly refuse to hold as it did because the guiding principles adopted by the majority of the court, although not exactly the same as those recommended by the Phillimore Committee, were subject to similar uncertainties in actual operation. In this connection it may be recalled that the European Court held that it had "to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it."150 It was in this context that the court reached the conclusion that the "interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention."151

One other aspect of the Phillimore Report, which is closely related to the decision of the European Court, should be noted. After making the recommendation quoted above, the report added:

Finally, even if liability to proceedings for contempt is restricted to those cases where there is risk of serious prejudice, there may be cases where for reasons of public policy it is better not to bring proceedings. Contempt is peculiarly a field where it is legitimate to exercise a discretion in deciding whether to take proceedings. For example, it is often better not to give further and greater prominence to an undesirable publication by bringing proceedings against it. We return to this point when we consider the role of the Attorney-General.152

In discussing the role of the Attorney-General, the report expressed this view: "We are sure that the Attorney-General must retain his right to act in the public interest where he thinks fit to do so."153 The committee did not believe that this should be an exclusive jurisdiction, but it did state: "We believe however that the normal practice should be, especially where the alleged contempt is in relation to criminal proceedings, that the attention of the Attorney-General should be

150 The Sunday Times case at 30.
151 Id. at 31.
152 Report, supra note 148, at 49.
153 Id. at 80.
drawn to the matter before any private proceedings are begun.”

To the extent that the Attorney-General continues to play an important role in the initiation of such proceedings, it would seem that the opinion of the European Court in *The Sunday Times* case would be especially significant. It will be recalled that Lord Diplock, in *Gleaves v. Deakin*, expressed the opinion that the consent of the Attorney-General should be required for any prosecution for criminal libel and that the Attorney-General should not give consent unless satisfied on one of the grounds specified in article 10 section 2 of the convention. It would seem even clearer that the Attorney-General should not initiate contempt proceedings if he thought it could not be justified under the principles announced in *The Sunday Times* case.

Until very recently, there had been no indication that the recommendations of the Phillimore Report would soon be reflected in legislation. In fact, the government, in a “Green Paper on Contempt of Court” issued in March of 1978, expressed misgivings with respect to some of the specific recommendations and some sympathy for the view that they would “tip the balance too far against the interests of justice.” However, in the course of a debate in the House of Lords in May of 1980 on the findings of the Phillimore Committee, the Lord Chancellor promised that the Contempt Reform Bill would be acted upon early next session and could then be introduced into the House. The Lord Chancellor also indicated that the basis of the bill must be the Phillimore Report and that he personally accepted the decision of the majority of the European Court in *The Sunday Times* case.

Meanwhile, the differences between the views expressed by the House of Lords and those expressed by the European Court will continue for the immediate future. In the long run, however, it seems that the balance is bound to shift toward

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154 *Id.*


156 See M. Rosen, *The Sunday Times Thalidomide Case: Contempt of Court and Freedom of the Press* 46 (1979). I am indebted to this publication of the Writers and Scholars Education Trust and the British Institute of Human Rights for calling my attention to many of the recent English developments in this area.

the position of the European Court unless the United Kingdom withdraws from the convention or the European Court retreats from its position.¹⁵⁸

IV. The Sunday Times Case and the Law of the European Convention

For the purpose of assessing the significance of The Sunday Times decision in the development of the law of the European Convention, the most comparable judgment of the European Court is the one rendered in the Handyside case,¹⁵⁹ on December 7, 1976. Handyside involved the criminal conviction of the proprietor of a publishing firm, accompanied by the seizure and destruction of numerous copies of the book in question, under the British Obscene Publications Act. The book, entitled The Little Red Schoolbook, was deliberately aimed at school children aged twelve and older. The statutory definition of obscenity was stated in section 1 as:

1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant

¹⁵⁸ See Mann, Contempt of Court in the House of Lords and the European Court of Human Rights, 95 L.Q. REV. 348 (1979) for a severe criticism of the judgment rendered by the European Court in The Sunday Times case. This article suggests that the "revising function" of the European Court of Human Rights may be carried too far:

There will be no alternative but to do what the majority of countries have done, which have supplied the judges of the European Court of Human Rights, that is to say, to refuse to make or confirm the declaration under Article 25 of the Convention submitting this country to individual applications and thus to the jurisdiction of the European Court.

Id. at 352. When one considers how close the attitude of the European Court was to the position taken by the Phillimore Committee, it is difficult to understand this alarm.

A more promising approach suggested in the same article is that "this country should at long last incorporate and, indeed, entrench the Convention into the law of the United Kingdom and have its implementation supervised by its own judicial body." Id. at 353.

¹⁵⁹ See Denning, The Due Process of Law 49 (1980) for a more favorable view of the judgment of the European Court.

circumstances, to read, see or hear the matter contained in it.\textsuperscript{160}

The Act also contained these provisions in section 4:

1) A person shall not be convicted of an offense against section 2 of this Act and an order of forfeiture shall not be made under the foregoing section if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interest of science, literature, art or learning, or of other object of general concern.

2) It is hereby declared that the opinion of experts may be admitted in any proceedings under this Act either to establish or negative the said ground.\textsuperscript{161}

The case was first heard, with the defendant's consent, before a magistrate's court without a jury and on appeal to the Inner London Quarter Sessions Court was again heard without a jury. That court decided that expert witnesses could be heard on the question whether the book was obscene in the sense that it would tend to deprave the children to whom it was addressed, as well as whether its publication could be justified under section 4. As a result, seven expert witnesses were heard on behalf of the prosecution and nine on behalf of the defense. The judge discounted the evidence for the defense:

The views of the applicant's witnesses had been those approaching the extreme of one wing of the more broadly varied outlook on the education and upbringing of children, whereas the evidence given on behalf of the prosecution tended to cover those who, although clearly tending in the opposite direction, were less radical. Looking at the book itself, the Court reached the conclusion that on the whole, and quite clearly through the mind of a child, the Schoolbook was inimical to good teacher-child relationships; in particular, there were numerous passages that it found to be subversive, not only to the authority but to the influence of the trust between children and teachers.\textsuperscript{162}

\textsuperscript{160} The Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 1.

\textsuperscript{161} The Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 4.

\textsuperscript{162} Handyside, supra note 77, at 10.
With respect to the tendency to corrupt or deprave, the court pointed to a passage headed "Be yourself":

Maybe you smoke pot or go to bed with your boyfriend or girlfriend—and don’t tell your parents or teachers, either because you don’t dare to or just because you want to keep it secret.

Don’t feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are “approved of.”

The judge then made the point that there was no reference in the passage to the illegality of smoking pot, although one could be found many pages later in an entirely different part of the book. He further observed that no reference at all was made to the illegality of sexual intercourse between a boy who was only fourteen years old and a girl not yet sixteen. The judge conceded that there were a good many passages in the book, particularly those dealing with venereal diseases, contraception and abortion, which contained dispassionate, sensible, and on the whole, completely accurate advice that should not be denied to young children. On the balance of probabilities, however, these passages could not outweigh those which the court was convinced had a tendency to deprave and corrupt. Consequently, the court “regretfully came to the conclusion that the burden on the appellant to show that ‘publication of the article in question is justified as being for the public good’ had not been discharged.”

After the decision of the Inner London Quarter Sessions Court, a revised edition of the Schoolbook, which had been prepared before the decision, was published. This edition softened some of the criticized passages and eliminated others; however, some remained the same. Distribution of the revised edition was not prosecuted.

In his application lodged with the commission, Mr. Handyside asserted violation of a number of the articles of the

163 Id. at 11.
164 Id. at 12.
convention, but the commission declared the application admissible only with respect to article 10 and article 1 of protocol 1. The latter provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." In its report of September 30, 1975, the commission expressed the opinion, by eight votes to five, that there had been no violation of article 10 and by nine votes to four, no violation of article 1 of protocol 1.

Nevertheless, the judgment of the European Court was unanimous, except for a very limited dissent by Judge Mosler. With respect to morals, the court was inclined to afford the domestic authorities a generous "margin of appreciation." It also attached particular importance to the intended readership of the schoolbook, saying:

It was aimed above all at children and adolescents aged from about twelve to eighteen. Being direct, factual and reduced to essentials in style, it was easily within the comprehension of even the youngest of readers. The applicant had made it clear that he planned a widespread circulation. He had sent the book, with a press release, to numerous daily papers and periodicals for review for advertising purposes. What is more, he had set a modest sales price (thirty pence), arranged for a reprint of 50,000 copies shortly after the first impression of 20,000 and chosen a title suggesting that the work was some kind of handbook for use in school.

Obviously, the applicant sought to present a different picture. He argued that the obscenity prosecution was a pretext and that the real reason for the prosecution was political in nature. The European Court responded to this argument by

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105 EUR. CONV. ON HUMAN RIGHTS art. 1, protocol 1.
106 The vote on article 10 was actually closer: two additional dissents were later recorded. REPORT OF THE EUR. COMM. ON HUMAN RIGHTS, Application No. 5493/72, Richard Handyside v. United Kingdom, 3 n.1 (1975).
107 Handyside, supra note 77, at 18-19.
108 Id. at 19. He maintained that the "demands of the protection of morals" and the "war against publication likely to 'deprave and corrupt'" were specious arguments. He said:
stating:

For its part the Court finds that the anti-authoritarian aspects of the Schoolbook as such were not held in the judgment of 29 October 1971 to fall foul of the 1959/1964 Acts. Those aspects were taken into account only insofar as the appeal court considered that, by undermining the moderating influence of parents, teachers, the Churches and youth organizations, they aggravated the tendency to "deprave and corrupt" which in its opinion resulted from other parts of the work. It should be added that the revised edition was allowed to circulate freely by the British authorities despite the fact that the anti-authoritarian passages again appeared there in full and even, in some cases, in stronger terms . . . . As the government noted, this is hard to reconcile with the theory of a political intrigue.\textsuperscript{169}

There was no dissent from this aspect of the court's opinion. It is interesting to note, however, that several members of the commission, both in the majority and in the dissent, took much more seriously than the court the argument that this was in reality more of a prosecution for subversive advocacy than for obscenity. For example, three members of the majority stated:

We are prepared to go further than our colleagues forming the majority in this case and assert that the action of the United Kingdom authorities was justified as a necessary measure taken in a democratic society in the interest of national security or public safety within the framework of Article 10(2).

The Little Red Schoolbook, although it contains a section of some 20 pages on sex, is not a book about sex as such. It is a book which is, in essence, subversive, tending as it does to instill into young children an anti-authoritarian

\textsuperscript{169} Id.

\textsuperscript{169} Id.

The truth of the matter . . . was that an attempt had been made to muzzle a small-scale publisher whose political leanings met with the disapproval of a fragment of public opinion. Proceedings were set in motion . . . in an atmosphere little short of hysteria, stirred up and kept alive by ultra-conservative elements. The accent in the judgment of 29 October 1971 on the anti-authoritarian aspects of the Schoolbook showed . . . exactly what lay behind the case . . . .
attitude not merely against parent and teacher but also against the established institutions of the State.\textsuperscript{170}

Two members of the dissent also addressed the question of subversion, but from a different point of view:

What is perhaps the base of opposition to the book is that it is said to be subversive of parental and school discipline and authority; and this description is directed particularly at those sections which are devoted to conduct and activities in school, "We have identified a number of passages which can fairly be said to encourage challenges to or defiance of the authority of teachers, and perhaps, indirectly, of parents, though it is curious how little parents are mentioned in the book . . . ."

It is plain that the book has Maoist inspiration. "Stage one" as the publisher, grown-ups as "paper tigers," "democracy from below," "clashes of interest," "solidarity and struggle" are all too familiar. But it is not the ideals, aims or intentions of the publisher that are at issue under Art. 10. The issue is whether the actual effects of the book as it stands on teenagers could be such as to justify its suppression under one or more of the clauses in Art. 10(2).\textsuperscript{171}

Similarly, three other dissenting members of the commission commented on this aspect of the controversy.\textsuperscript{172}

In the light of this difference of opinion within the commission on the subversive aspect of the book, it is not surprising that both the commission and the government of the United Kingdom chose to defend the conviction only on the ground that it was "necessary . . . for the protection of morals," without any reference to any of the other possible justifications for interference with freedom of expression.

\textsuperscript{170} REPORT OF THE EUR. COMM. ON HUMAN RIGHTS, Application No. 5493/72, Richard Handyside v. United Kingdom at 43.
\textsuperscript{171} Id. at 48-49.
\textsuperscript{172} We do not think that the book's views encourage children to reject the role of parents and teachers in their lives. There is no evidence that it does so. Moreover, we find that the views expressed are consistent with the mainstream educational philosophy, as the Inner London Quarter Session hearing acknowledged. Education is no longer based on relationships of authority, rigid discipline and fear but on respect, reasonableness and the establishment of a dialogue between the educator and the pupil.

\textit{Id.} at 52.
under article 10(2), such as the "interest of national security, territorial integrity or public safety [and] the prevention of disorder or crime." So viewed, probably the hardest question in the case was whether the suppression of this particular book made any sense in the light of the general standards apparently applied to the distribution of obscene or pornographic publications in England. As the court summarized the argument of the applicant and the minority of the commission on this point:

The treatment meted out to the Schoolbook and its publisher in 1971 was . . . all the less "necessary" in that a host of publications dedicated to hard core pornography and devoid of intellectual or artistic merit allegedly profit by an extreme degree of tolerance in the United Kingdom. They are exposed to the gaze of passers-by and especially of young people and are said generally to enjoy complete impunity, the rare criminal prosecutions launched against them proving . . . more often than not abortive due to the great liberalism of juries. The same was claimed to apply to sex shops and much public entertainment.

The court's response to this argument was:

In principle it is not the Court's function to compare different decisions taken, even in apparently similar circumstances, by prosecuting authorities and courts; and it must, just like the respondent Government, respect the independence of the courts. Furthermore and above all, the Court is not faced with really analogous situations: as the Government pointed out, the documents in the file do not show that the publications and entertainment in question were aimed, to the same extent as the Schoolbook . . ., at children and adolescents having ready access thereto.

The partially dissenting opinion of Judge Mosler was partly related to this point since he suggested that the measures actually taken by the authorities were not necessary for the protection of morals because they were so ineffectual. Only ten percent of the Schoolbook's first impression was

173 See text accompanying note 52 supra for a full statement of article 10.
174 Handyside, supra note 77, at 21.
175 Id.
taken out of circulation; nothing was done or attempted against the other ninety percent. Consequently, "the result of the action taken was the punishment of Mr. Handyside, in accordance with law, but this result does not by itself justify measures that were apt to protect the young against the consequences of reading the book."\textsuperscript{176}

At first blush, it may appear quite difficult to reconcile the attitude shown by the European Court towards the domestic "margin of appreciation" in Handyside with that exhibited in The Sunday Times case. The idea that there is naturally a greater variety in standards of morality among the European nations than there is in standards for the maintenance of judicial authority does not seem any more self-evident to the writer than it did to the dissenters in The Sunday Times case. There was, however, another difference in the nature of the problem presented. The definition of obscenity generally has presented a problem that defies intellectual analysis. In the Handyside case no particular objection was directed to the statutory definition "such as tend to deprave or corrupt." Thus the objection had to be directed to the judgment of the Inner London Quarter Sessions Court in applying the definition to the particular publication. One is reminded of the struggles of the United States Supreme Court with definitions of obscenity from Roth v. United States\textsuperscript{177} to Miller v. California,\textsuperscript{178} which ended with the Court itself either viewing movies in the basement of the Supreme Court building or else entrusting to judge or jury the responsibility of determining whether "the average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest."\textsuperscript{179} It is not surprising that the European Court did not wish to go very far down either of those roads.

In The Sunday Times case, on the other hand, the court was presented by the House of Lords with a principle or group of principles which were subject to challenge and intel-

\textsuperscript{176} Id. at 28.
\textsuperscript{177} 354 U.S. 476 (1957).
\textsuperscript{178} 413 U.S. 15 (1973).
\textsuperscript{179} Id. at 24.
lectual analysis. The question was whether those principles were necessary for the maintenance of the authority of the judiciary. The reasons given for believing that they were necessary seemed strained and removed from reality. The Law Lords themselves assumed that the impartiality of judges would not be impaired by public debate. Since no jury was involved, the only immediate effect could be on the parties themselves. Yet a majority of the House of Lords did not think that the parties should be protected from public debate with respect to the morality of their positions. It is safe to hazard the guess that the parties would be just as subject to pressure from arguments based on moral grounds as from arguments addressed to the legal issues alone. That left the principal objection, as expressed by Lord Reid, that open public debate about the very issues to be determined by the court would itself breed disrespect for the courts in general. Yet the proceedings would be public and could be reported. Anyone sufficiently interested would be free to discuss the issues with others and to form his own opinion. It is hard to see why similar public discussion would be any more likely to breed disrespect for the courts or why public discussion after the litigation is over would be any less likely to breed such disrespect. Thus, if consideration is limited to the justifications given by the majority of the House of Lords, the judgment of the European Court seems to be almost inescapable.

Nevertheless, an evaluation of the significance of The Sunday Times case simply on the basis of a comparison of the majority position in the House of Lords and the majority position in the European Court would be a curiously fore-shortened view of the whole affair. This is so, partly because the broader position taken by two of the Law Lords — that the parties should not be subjected to the pressures of public debate on either moral or legal issues involved in pending litigation — might commend itself to some people not impressed with the reasoning of the majority of the Law Lords. Perhaps too, the bland assumption of all the English opinions that no worthy judge would be shaken in his impartiality by public debate on the issues involved in litigation before him should not be accepted without reservation. When the evils of trial by
newspaper as frequently practised on the American scene are contrasted with the virtues of trial in complete insulation from public debates as supposedly practised on the British scene, the concern is not limited to the possible effects on jurors or party litigants.\footnote{For enlightening comparisons of the English and American systems, see the dissenting or concurring opinions of Mr. Justice Frankfurter in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950); Craig v. Harney, 331 U.S. 367, 384 (1947); Pennekamp v. Florida, 328 U.S. 331, 350 (1946); Bridges v. California, 314 U.S. 252, 279 (1941); R. Goldfarb, The Contempt Power 77-100 (1963); Cowen, Prejudicial Publicity and Fair Trial: A Comparative Examination of American, English and Commonwealth Law, 41 IND. L.J. 69 (1965); Goodhart, Newspapers and Contempt of Court in English Law, 48 HARV. L. REV. 885 (1935); Jaffe, Trial by Newspaper, 40 N.Y.U.L. REV. 504 (1965).} The comparative merits of the two systems, if indeed there still are two systems, are beyond the scope of this modest exercise. However, one cannot help wondering what might emerge from the House of Lords if that august body were pressed into a full-dress reconsideration of its whole position on contempt of court and freedom of the press, in light of the European Human Rights Convention and the opinions of the European Court of Human Rights. And finally, what would be the response of the European Court if it were presented with a coherent restatement of the English position, not plagued with the internal inconsistencies of The Sunday Times opinions? Is it too much to hope that a continued dialogue between the English courts and the European Commission and Court might eventually produce a happy medium between the American tolerance for “trial by newspaper” and the English penchant for trial in splendid isolation? For example, the English courts might abandon the rather strained conceptions that the parties, as well as the courts, are entitled to be free from the pressures of public opinion, and that public debate about issues pending before a particular court promotes disrespect for the judicial process in general. They might also follow to its logical conclusion their own assumption that English judges are substantially immune from the pressures of public opinion and thus confine their concern to comments about pending jury trials in criminal cases.\footnote{This is substantially the position adopted by Lois G. Forer in her 1953 Ross Prize Essay, A Free Press and a Fair Trial, 39 A.B.A.J. 800 (1953), except that she would apparently confine “pending” to the time extending from the empanelling of}
short, the fascination of *The Sunday Times* litigation lies not so much in elucidation of the law that has been established, as in the vistas it suggests for further exploration and development.

the jury to the return of the verdict, and would also permit the press to "draw inferences and make evaluations" based on the evidence introduced. *Id.* at 846. This is certainly not the English rule and I doubt that it should be imposed by the European Court. Instead the ban might well be allowed to run from the time of indictment or issuance of a warrant until return of the verdict, and press coverage might be restricted to objective reporting during that period.