THE SUNDAY TIMES *v.* THE UNITED KINGDOM

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

(*The President,* Judge Balladore Pallieri; Judges Wiarda, Mosler, Zekia, Cremona, O'Donoghue, Pedersen, Vilhjàlmsson, Ryssdal, Ganshof van der Meersch, Fitzmaurice, Bindschedler-Robert, Evrigenis, Teitgen, Lagergren, Liesch, Gölcüklü, Matscher, Pinheiro Farinha and García de Enterría.)

Series A, No. 30
26 April 1979

Distillers had marketed a drug, ' thalidomide ', which had been taken by a number of pregnant women who later gave birth to deformed children. Writs were issued by the parents and a lengthy period of negotiations followed without the cases proceeding to trial. A weekly newspaper, *The Sunday Times,* began a series of articles with the aim of assisting the parents in obtaining a more generous settlement of their actions. One proposed article was to deal with the history of the testing, manufacture and marketing of the drug, but the Attorney-General obtained an injunction restraining publication of the article on the ground that it would constitute a contempt of court. The injunction had been granted in the High Court, rescinded by the Court of Appeal but restored by the House of Lords.

The publisher, editor and a group of journalists of *The Sunday Times* filed an application with the European Commission of Human Rights claiming that the injunction infringed their right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights. The Commission, by a majority, concluded that there had been a breach of Article 10 and referred the case to the Court.

Held, by the plenary Court by 11 votes to 9, that the interference with the applicants' freedom of expression was not justified under Article 10 (2) which permits such restrictions ' as are prescribed by law and are necessary in a democratic society . . . for maintaining the authority and impartiality of the judiciary ', the Court deciding that, though prescribed by law and for the purpose of maintaining the authority of the judiciary, the restriction was not justified by a ' pressing social need ' and could not therefore be regarded as ' necessary ' within the meaning of Article 10 (2). Accordingly, there had been a violation of Article 10.

Contempt of court. Injunction restraining newspaper article discussing substance of pending litigation. Right to freedom of expression: Article 10 (1). Whether restriction ' prescribed by law and . . . necessary in a democratic society . . . for maintaining the authority and impartiality of the judiciary ': Article 10 (2).

1. (*a*) The word ' law ' in the expression ' prescribed by law ' covered unwritten law as well as statute law, since to hold

otherwise would deprive a common law State of the protection of Article 10 (2) [47].

(*b*) Two of the requirements that flow from the expression 'prescribed by law' are (i) that the law must be adequately accessible, *i.e.* the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case; and (ii) that a norm cannot be regarded as 'law' unless formulated with sufficient precision to enable the citizen to regulate his conduct [49].

(*c*) Of the two principles relied on to justify the intervention of the contempt law in the case, one, the so-called 'pressure principle'—the principle that a deliberate attempt to influence the settlement of pending proceedings by bringing public pressure to bear on one of the parties constituted contempt—was formulated with sufficient precision in English law [50-51].

(*d*) The second principle, the so-called 'prejudgment principle'—the principle that it was contempt to publish material which prejudged the issues raised in pending litigation—was also so formulated at the relevant time that the applicants were able to foresee to a reasonable degree that their draft article might constitute contempt on this ground [50 and 52].

(*e*) Accordingly, the interference with the applicants' freedom of expression was 'prescribed by law' within the meaning of Article 10 (2) [53].

2. (*a*) In the expression 'maintaining the authority and impartiality of the judiciary', the term 'judiciary' comprised the machinery of justice or the judicial branch of government as well as the judges in their official capacity; and the phrase 'authority of the judiciary' included the notions that the courts were the proper forum for ascertaining legal rights and obligations and settling disputes and that the public had respect for and confidence in the courts' capacity to fulfil that function, the maintenance of which was one of the purposes of the law of contempt [55].

(*b*) The reasons why the draft article was regarded as objectionable by the House of Lords all fell within the aim of maintaining the authority of the judiciary, so that the interference with the applicants' freedom of expression had an aim that was legitimate under Article 10 (2) [57].

3. (*a*) In the expression 'necessary in a democratic society', the word 'necessary' was not synonymous with 'indispensable', neither had it the flexibility of such expressions as 'inadmissible', 'ordinary', 'useful', 'reasonable' or 'desirable', but it implied the existence of a pressing social need [59].

(*b*) Article 10 (2) left to States a margin of appreciation, given both to legislators and to bodies called upon to interpret and apply the laws in force, but that power was not unlimited, the Court having the final ruling on whether a restriction was reconcilable with Article 10 [59].

(*c*) The Court's supervision was not limited merely to ascertaining whether a State exercised its discretion reasonably, carefully and in good faith [59].

(*d*) The scope of the domestic power of appreciation was not identical as regards each of the aims listed in Article 10 (2), so that while State authorities were, for example, in a better position to determine a question as to the 'protection of morals', the same could not be said of the far more objective notion of the 'authority . . . of the judiciary', resulting in a more extensive European supervision and correspondingly less discretionary power of appreciation [59].

(*e*) Although contempt of court was peculiar to common law countries and the concluding words of Article 10 (2) might have been designed to cover such a concept, the words provided only that the general aims of the contempt law should be considered legitimate, not every detail of them, so that the test of 'necessity' still fell to be applied in a particular case [60].

(*f*) It could not be concluded that the injunction was 'unnecessary' simply because it could or would not have been granted under a different legal system: the Convention did not require absolute uniformity and States remained free to choose the measures which they considered appropriate [61].

(*g*) It was necessary to decide whether the 'interference' complained of corresponded to a 'pressing social need', whether it was 'proportionate to the legitimate aim pursued', and whether the reasons given by the national authorities to justify it were 'relevant and sufficient under Article 10 (2)' [62].

(*h*) Publication of the article would not have added much to the pressure already on Distillers to settle out of court on better terms [63].

(*i*) Since the proposed article was couched in moderate terms and did not present just one side of the evidence, its publication would not have had adverse consequences for the 'authority of the judiciary' [63].

(*j*) The courts could not operate in a vacuum: while they were the forum for settling disputes, this did not mean that there could be no prior discussion of disputes elsewhere. It was incumbent on the mass media to impart information and ideas concerning matters that came before the courts just as in other areas of public interest [65].

(*k*) It was not sufficient that the interference belonged to that class of exceptions listed in Article 10 (2), nor that it was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms, but the Court had to be satisfied that it was necessary having regard to the facts and circumstances of the specific case [65].

(*l*) The thalidomide disaster was a matter of undisputed public concern and Article 10 guaranteed not only the freedom of the press but also the right of the public to be properly informed [66].

(*m*) The families of numerous victims of the tragedy had a vital interest in knowing all the underlying facts, which could be denied them only if it appeared absolutely certain that their diffusion would have presented a threat to the 'authority of the judiciary' [66].

(*n*) In view of all the circumstances, the interference did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression; the reasons for the restraint were not therefore sufficient under Article 10 (2); it was not proportionate to the legitimate aim pursued; and it was not necessary in a democratic society for maintaining the authority of the judiciary. Accordingly, Article 10 had been violated [67-68].

No injunction sought against other newspapers. Different rules governing debate in Parliament on sub judice matters. Whether discrimination in enjoyment of rights and freedoms contrary to Article 14. Whether violation of Article 10 taken in conjunction with Article 14.

4. (*a*) Article 14 safeguarded individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in the Convention [70].

(*b*) Failure to take steps against other newspapers was not sufficient evidence that the injunction against *The Sunday Times* constituted discrimination contrary to Article 14 [71].

(*c*) The press and Parliament were not ' placed in comparable situations ', since their respective ' duties and responsibilities ' were essentially different [72].

(*d*) There was thus no violation of Article 14 taken together with Article 10 [73].

Case referred to the Court by the European Commission of Human Rights arising out of an application against the United Kingdom lodged by Times Newspapers Ltd., publisher of *The Sunday Times*, that paper's editor, Mr. Harold Evans, and a group of its journalists, alleging that an injunction restraining publication of an article constituted a violation of Article 10 of the European Convention on Human Rights, which guarantees freedom of expression. The Commission decided by eight votes to five that the restriction on the applicants was in breach of Article 10. The chamber of seven judges appointed to hear the case decided under Rule 48 of the Rules of Court to relinquish jurisdiction in favour of the plenary Court as the case raised ' serious questions affecting the interpretation of the Convention '.

D. J. Anderson, Foreign and Commonwealth Office (Agent); *The Rt. Hon. Peter Archer, Q.C., M.P., Solicitor-General*, and *N. Bratza* (Counsel); and *R. Ricks*, Treasury Solicitor's Department and *M. Saunders*, Law Officers' Department (Advisers), for the Government.

Professor J. E. S. Fawcett (Principal Delegate); *J. Custers* and *J. Frowein* (Delegates); and *A. Lester, Q.C.* and *A. Whitaker*, Legal Manager, Times Newspapers Ltd., assisting the delegates under Rule 29 (1) of the Rules of Court, for the Commission.

Messrs. Archer, Fawcett, Frowein and Lester addressed the Court.

The following cases are referred to in the Judgments:

European Court of Human Rights

1. BELGIAN LINGUISTIC CASE (PRELIMINARY OBJECTION), 1967, Series A, No. 5.
2. BELGIAN LINGUISTIC CASE (MERITS), 1968, Series A, No. 6.
3. GOLDER *v.* U.K., 1975, Series A, No. 18.
4. HANDYSIDE *v.* U.K., 1976, Series A, No. 24.
5. IRELAND *v.* U.K., 1978, Series A, No. 25; 2 E.H.R.R. 25.
6. KJELDSEN, BUSK MADSEN AND PEDERSEN *v.* DENMARK, 1976, Series A, No. 23.
7. KLASS *v.* FEDERAL REPUBLIC OF GERMANY, 1978, Series A, No. 28; 2 E.H.R.R. 214.
8. KÖNIG *v.* FEDERAL REPUBLIC OF GERMANY, 1978, Series A, No. 27; 2 E.H.R.R. 170.
9. NATIONAL UNION OF BELGIAN POLICE *v.* BELGIUM, 1975, Series A, No. 19.
10. NEUMEISTER *v.* AUSTRIA, 1968, Series A, No. 8.
11. RINGEISEN *v.* AUSTRIA, 1971, Series A, No. 13.
12. STÖGMÜLLER *v.* AUSTRIA, 1969, Series A, No. 9.
13. WEMHOFF *v.* FEDERAL REPUBLIC OF GERMANY, 1968, Series A, No. 7.

English courts

1. ATT.-GEN. *v.* LONDON WEEKEND TELEVISION LTD. [1973] 1 W.L.R. 202, [1972] 3 All E.R. 1146, D.C.
2. ATT.-GEN. *v.* TIMES NEWSPAPERS LTD. [1973] Q.B. 710, D.C. and C.A., [1972] 3 W.L.R. 855, [1972] 3 All E.R. 1136, D.C., [1973] 2 W.L.R. 452, [1973] 1 All E.R. 815, C.A., [1974] A.C. 273, [1973] 3 All E.R. 54, H.L.
3. HUNT *v.* CLARKE (1889) 58 L.J.Q.B. 490, 61 L.T. 343, 5 T.L.R. 650, C.A.
4. VINE PRODUCTS *v.* GREEN [1966] Ch. 484, [1965] 3 W.L.R. 791, [1965] 3 All E.R. 58.

The Facts *

HISTORICAL

8. Between 1958 and 1961, Distillers Company (Biochemicals) Ltd. ('Distillers') manufactured and marketed under licence in the United Kingdom drugs containing an ingredient initially developed in the Federal Republic of Germany and known as thalidomide. The drugs were prescribed as sedatives for, in particular, expectant mothers. In 1961, a number of women who had taken the drugs during pregnancy gave birth to children suffering from severe deformities; in the course of time there were some 450 such births

* This section has not been edited. The original paragraph numbers have been retained, although paras. 1–7 and 38–41, dealing with procedural matters, have been omitted and their principal contents incorporated in the editorial matter which precedes this section.—*Ed.*

in all. Distillers withdrew all drugs containing thalidomide from the British market in November of the same year.

9. Writs against Distillers were issued, between 1962 and 1966, by the parents of 70 of the deformed children on their own and on their children's behalf. They contended that the cause of the deformities was the effect on the foetus of thalidomide administered to the mother during pregnancy, alleged that Distillers had been negligent in the production, manufacture and marketing of the drugs and claimed damages. Distillers denied negligence and put in issue the legal basis of the claims. A number of actions were also brought in respect of persons alleged to have suffered peripheral neuritis as a result of use of the drugs.

Of the 70 actions by parents, 65 were settled in 1968 following negotiations between the parties' legal advisers. In 62 of the cases, the children were still alive and the settlement therefore required court approval, which was obtained. The basis of the settlement was that each plaintiff, provided he withdrew his allegation of negligence, should receive from Distillers a lump sum equal to 40 per cent. of the amount he would have recovered had his action wholly succeeded. Further proceedings in the High Court in 1969 dealt with the assessment of damages in the cases settled on the above-mentioned basis and, in the event, Distillers paid out some £1,000,000 in respect of 58 cases. Two cases were otherwise disposed of and the amount of damages in the remaining two was still under negotiation in July 1973.

10. The 1968 settlement did not cover five of the original 70 actions, since the writs in those five cases had not been issued within the three-year limitation period prescribed by English law. Leave to issue writs out of time was subsequently granted *ex parte* by the court both in those five cases and in respect of a further 261 claims by the parents or guardians of other deformed children. A further 123 claims had also been notified to Distillers in correspondence but formal proceedings were not started by agreement between the parties. Thus, by 1971, 389 claims in all were pending against Distillers. Apart from a statement of claim in one case and a defence delivered in 1969, no further steps were taken in those actions where writs had been issued. Distillers had announced in February 1968 that they would provide a substantial sum for the benefit of the remaining 389 claimants and both sides were anxious to arrive at a settlement out of court. The case in fact raised legal issues of considerable difficulty under English law. Had any of the actions come on for trial, they would have been heard by a professional judge sitting without a jury.

In 1971, negotiations began on a proposal by Distillers to establish a charitable trust fund for all the deformed children other than those covered by the 1968 settlement. The proposal was made subject to

the condition that all the parents accepted, but five refused, one, at least, because payments out of the fund would have been based on need. An application, on behalf of the parents who would have accepted, to replace those five by the Official Solicitor as next friend was refused by the Court of Appeal in April 1972. During subsequent negotiations, the original condition was replaced by a requirement that ' a substantial majority ' of the parents consented. By September 1972, a settlement involving the setting up of a £3,250,000 trust fund had been worked out and was expected to be submitted in October to the court for approval.

11. Reports concerning the deformed children had appeared regularly in *The Sunday Times* since 1967, and in 1968 it had ventured some criticism of the settlement concluded in that year. There had also been comment on the children's circumstances in other newspapers and on television. In particular, in December 1971, the *Daily Mail* published an article which prompted complaints from parents that it might jeopardise the settlement negotiations in hand; the *Daily Mail* was ' warned off ' by the Attorney-General in a formal letter threatening sanctions under the law of contempt of court, but contempt proceedings were not actually instituted. On 24 September 1972, *The Sunday Times* carried an article entitled ' Our Thalidomide Children: A Cause for National Shame ': this examined the settlement proposals then under consideration, describing them as ' grotesquely out of proportion to the injuries suffered ', criticised various aspects of English law on the recovery and assessment of damages in personal injury cases, complained of the delay that had elapsed since the births and appealed to Distillers to make a more generous offer. The article contained the following passage:

> . . . the thalidomide children shame Distillers . . . there are times when to insist on the letter of the law is as exposed to criticism as infringement of another's legal rights. The figure in the proposed settlement is to be £3·25 million, spread over 10 years. This does not shine as a beacon against pre-tax profits last year of £64·8 million and company assets worth £421 million. Without in any way surrendering on negligence, Distillers could and should think again.

A footnote to the article announced that ' in a future article *The Sunday Times* [would] trace how the tragedy occurred '. On 17 November 1972, the Divisional Court of the Queen's Bench Division granted the Attorney-General's application for an injunction restraining publication of this future article on the ground that it would constitute contempt of court (see paras. 17 to 35 below for a summary of the draft article and particulars of the contempt proceedings).[1]

12. Although the proposed article was accordingly not published, *The Sunday Times* throughout October contained a number of

[1] ATT.-GEN. *v.* TIMES NEWSPAPERS LTD. [1973] Q.B. 710.

1979
—
The Sunday Times Case
—
European Court of Human Rights

features on ' the thalidomide children ' and the laws of compensation for personal injuries. There was also a considerable response from the public, the press and television. Some radio and television programmes were cancelled after official warnings about contempt but proceedings were not actually taken except as regards a television programme, shown on 8 October 1972, concerning the plight of the children. The Attorney-General claimed that that programme was calculated to bring pressure on Distillers to pay more. On 24 November 1972, the Divisional Court decided that there had been no contempt because it was not established that the television company deliberately intended to influence the pending proceedings and, in the circumstances, a single showing of the programme did not create ' a *serious* risk ' of interference with the course of justice.[2] The court distinguished the case concerning the proposed *Sunday Times* article on the basis that, there, the editor had made it plain that he was deliberately attempting to persuade Distillers to pay more.

13. In the House of Commons, the Speaker had repeatedly refused to allow any debate or questions on the issues raised by the thalidomide tragedy. However, on 29 November 1972, the matter was extensively debated in the House, which had before it a motion, *inter alia,* calling on Distillers to face up to their moral responsibilities and for immediate legislation to establish a trust fund for the deformed children. Shortly before the debate, Distillers had increased the value of their proposed trust fund from £3,250,000 to £5,000,000. Much of the debate was devoted to the question whether immediate legislation would or would not take pressure off Distillers and/or the parents and to a discussion of social services for the children and the disabled in general and of official scrutinising systems for new drugs. Tributes were paid to *The Sunday Times* campaign and various criticisms were made of the law and lawyers. The question of Distillers' legal, as opposed to moral, responsibility was not discussed, although references were made to facts—described as ' the danger flags flying '—of which little notice had been taken, and to the absence of a general practice of tests on the foetus when thalidomide was first marketed. Similar references appeared in the draft *Sunday Times* article. At the close of the debate, the House, ' disturbed about the plight of thalidomide children, and the delay in reaching a settlement ', recognised the initiatives taken by the Government to improve services for the disabled and welcomed the Government's undertaking to investigate any special cases of need and to ' consider, as soon as the cases are no longer *sub judice,* whether a trust fund needs to be established for thalidomide children '.

[2] ATT.-GEN. *v.* LONDON WEEKEND TELEVISION LTD. [1973] 1 W.L.R. 202.

14. The parliamentary debate was followed by a further wave of publications and there was a nationwide campaign in the press and among the general public directed to bringing pressure on Distillers to make a better offer. The campaign included a threat to boycott Distillers' other products and many of their shareholders publicly urged a speedy and satisfactory settlement. Two articles in the *Daily Mail* of 8 and 9 December 1972 referred, in particular, to many of the same test and research results as the enjoined *Sunday Times* article.

There were also, round about this time, a number of press articles denying Distillers' legal responsibility, but no further contempt proceedings were instituted. A public investigation of the causes of the tragedy was repeatedly demanded but never carried out; in fact, it was finally refused by the competent Minister in the summer of 1976.

Following the public criticism, the proposed settlement did not proceed and, in December 1972 and January 1973, Distillers came forward with new proposals which involved a further increase in the value of the trust fund to £20,000,000. Negotiations continued. In the meantime, following an appeal by Times Newspapers Ltd., the Divisional Court's injunction was discharged by the Court of Appeal on 16 February 1973, only to be restored in modified form on 24 August 1973 following the House of Lords' decision of 18 July allowing a further appeal by the Attorney-General (see paras. 24 to 34 below).[3]

15. On 30 July 1973, a single judge of the Queen's Bench Division approved, in the great majority of the cases, the terms of a settlement, after satisfying himself that they were in the true interests of the minors involved. Under the settlement:

(a) each plaintiff, provided he withdrew his action, was to receive a lump sum equal to 40 per cent. of the amount he would have received had the action been successful; and
(b) a charitable trust fund was to be set up for the deformed children, including those covered by the 1968 settlement.

Distillers maintained their denial of negligence on the part of themselves or their advisers; since not all the parents accepted the proposed settlement, this issue remained *sub judice*.

16. On application by the Attorney-General, the injunction against Times Newspapers Ltd. was discharged on 23 June 1976 (see para. 35 below). Four days later, the contentious article was published. It differed in a number of respects from the original draft; in particular, it omitted certain matters based on information which had been received in confidence by the parents' advisers during the thalidomide litigation. Disclosure of this information had been

[3] [1973] Q.B. 710, C.A.; [1974] A.C. 273, H.L.

forbidden by a further injunction of 31 July 1974 of which the applicants did not complain before the Commission.

By 23 June 1976, four of the parents' actions against Distillers remained outstanding: in one, the pleadings were closed but nothing had been done since 1974; in two, there had been only delivery of a statement of claim; in the fourth, only a writ had been issued. Moreover, there was still pending at that date litigation between Distillers and their insurers, which also involved the issue of negligence: the insurers had contested their liability to pay for the 1973 settlement on the ground, *inter alia,* that Distillers had not carried out adequate tests and research. This action had been set down for trial on 4 October 1976 but was, in fact, settled on 24 September 1976.

SUMMARY OF THE DRAFT ARTICLE

17. The unpublished article which was the subject of the injunction opened with a suggestion that the manner of marketing thalidomide in Britain left a lot to be desired. It stated 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 were not deflected by a warning from one of its own staff that thalidomide was far more dangerous than had been supposed;
- were 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 body of the article described how, after their apparently disappointing initial ventures into pharmaceutics, Distillers learned in 1956 that the German firm of Chemie Gruenenthal had developed a sedative considered harmless and unique—thalidomide. The very large market existing at the time for sedatives was becoming overcrowded and Distillers thought it necessary to act quickly. Their decision to market the drug was taken before they had seen technical information, other than the transcript of a German symposium, and before carrying out independent tests. Indeed, they seemed to believe that thalidomide would not need elaborate tests. Distillers put in hand a search of scientific literature but failed to discover the results of research in 1950 by Dr. Thiersch showing that a chemical related to thalidomide could cause monster births; opinions differed as to whether his work should have been found.

Sales of thalidomide began in Germany in October 1957 and Distillers were committed under their licensing agreement to commence marketing in April 1958. They put the programme for the drug's launch in hand even though clinical trials were behind. Results of the first British trials were published in January 1958: it had been found that thalidomide suppressed the work of the thyroid gland and that its method of action was unknown; the researcher warned that more tests were needed. Distillers did not rely on this advice, basing their decision on 'flimsy' evidence, namely, other trials in the United Kingdom and assurances concerning the results of research in Germany. The warning about anti-thyroid effects was particularly relevant since it was known that drugs affecting the thyroid could affect unborn children; it was reasonable to argue that Distillers should have delayed launching the drug pending further tests.

On 14 April 1958, continued the article, thalidomide went on sale in Britain, advertised as 'completely safe'. At the end of 1959, Distillers' pharmacologist discovered that thalidomide in liquid form was highly poisonous and that an overdose might be lethal, but his report was never published and the liquid product went on sale in July 1961. In December 1960, it was reported that patients who had taken thalidomide in the tablet form in which it had first been on sale showed symptoms of peripheral neuritis; this news had the result of holding up an application to market thalidomide in the United States of America where it was, in fact, never sold. Further cases of peripheral neuritis were reported in 1961, but Distillers' advertising continued to stress the drug's safety.

Early in 1961, children were born in the United Kingdom with deformities but there was at the time nothing to connect them with thalidomide. However, between May and October, a doctor in Australia discovered that the common factor in a number of monster births was that mothers had taken thalidomide during pregnancy. This was reported to Chemie Gruenenthal on 24 November who withdrew the drug two days later following newspaper disclosures. Distillers ended the public sale of thalidomide immediately afterwards. Tests on animals, published in April 1962, confirmed that thalidomide caused deformities, but sales to hospitals were not ended until December 1962.

The draft 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 until the drug had been on sale in Britain for two years; that testing for teratogenic effects was not general in 1958; that if tests had been done on the usual laboratory animals nothing would have shown because it is only in the New Zealand white rabbit that thalidomide produces the same effects as in human beings; and, finally, that in the one clinical report of thalidomide being given to pregnant women no serious results followed (because thalidomide is dangerous only during the first 12 weeks of pregnancy).

. . .

There appears to be no neat set of answers. . . .

DOMESTIC LAW

18. English law relating to contempt of court is described by the Report of the Committee on Contempt of Court (the 'Phillimore report', see para. 36 below)[4] as 'a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally' and as existing to protect not the dignity of the judges but 'the administration of justice and "the fundamental supremacy of the law".' Contempt of court is, with certain exceptions, a criminal offence punishable by imprisonment or a fine of unlimited duration or amount or by an order to give security for good behaviour; punishment may be imposed by summary process without trial by jury and the publication of facts or opinions constituting a criminal contempt may also be restrained by similar process. To some extent, contempt of court covers the same ground as various ordinary criminal offences against the administration of justice, such as perversion of the course of justice. Contempt of court is a creature of the common law and covers many forms of conduct. Lord Diplock remarked in his speech in the House of Lords in *The Sunday Times Case*:

> There is an abundance of empirical decisions upon particular instances of conduct which has been held to constitute contempt of court. There is a dearth of rational explanation or analysis of a general concept of contempt of court which is common to the cases where it has been found to exist.[5]

[4] Cmnd. 5794 (1974).
[5] [1974] A.C. at pp. 308-309.

The Phillimore report divides contempt of court into the following categories:

(*a*) ' contempt in the face of the court ', for example, throwing missiles at the judge, insulting persons in court, demonstrating in court;

(*b*) ' contempt out of court ', subdivided into:

(i) reprisals against witnesses after the conclusion of proceedings;

(ii) ' scandalising the court ', for example, abusing a judge *qua* judge or attacking his impartiality or integrity;

(iii) disobedience to court orders;

(iv) conduct, whether intentional or not, liable to interfere with the course of justice in particular proceedings.

The present case concerns the last-mentioned category which includes contempts in the form of publications, reports or comments on legal proceedings in progress. The Phillimore report states that there is a lack of a clear definition of the kind of statement, criticism or comment that will be held to amount to contempt. It adds that, until the House of Lords in *The Sunday Times Case* ' formulated a rather different test ', the tests of contempt for publications were all based on the concept of prejudice to, or improper interference with, the legal process and that the mischief which the law of contempt is and always has been designed to suppress is the risk of prejudice to the administration of justice.

It seems that a publication may constitute contempt of court not only if it appears after the issue of a writ but also if it appears when proceedings are ' imminent '.

19. The Attorney-General has a right, but not an obligation, to bring before the court any matter which he thinks may amount to contempt and which he considers should, in the public interest, be so brought. Save in certain cases, contempt proceedings may also be instituted by private individuals.

20. It should be noted, in this connection, that a House of Commons rule prohibits reference in debate to matters that are *sub judice*. Subject to certain exceptions, no reference at all, whether prejudicial or not, may be made to civil litigation once the case has been set down for trial or otherwise brought before the court; before that time (or after it in the exceptional cases) such matters may be referred to unless the Chair considers there to be a real and substantial danger of prejudice to the trial of the case. It was under this rule that the House held its debate of 29 November 1972 (see para. 13 above), a report of which was published.

THE DOMESTIC CONTEMPT PROCEEDINGS

(*a*) *Introduction*

21. Distillers made a formal complaint to the Attorney-General that *The Sunday Times* article of 24 September 1972 constituted contempt of court in view of the litigation still outstanding and, on 27 September, the Solicitor-General, in the absence of the Attorney-General, wrote to the editor of *The Sunday Times* to ask him for his observations. The editor, in his reply, justified that article and also submitted the draft of the proposed future article for which he claimed complete factual accuracy. The Solicitor-General enquired whether the draft had been seen by any of the parties to the litigation, as a consequence of which a copy of the draft was sent by *The Sunday Times* to Distillers on 10 October. On the previous day, *The Sunday Times* had been advised that the Attorney-General had decided to take no action in respect of the matter already published in September and October; Distillers also took no action. On 11 October, the Attorney-General's Office informed *The Sunday Times* that, following representations by Distillers, the Attorney-General had decided to apply to the High Court in order to obtain a judicial decision on the legality of the publication of the proposed article. On the following day, he issued a writ against Times Newspapers Ltd. in which he claimed an injunction 'to restrain the defendants . . . by themselves, their servants or agents or otherwise, from publishing or causing or authorising to be published or printed an article in draft dealing, *inter alia,* with the development, distribution and use of the drug thalidomide, a copy of which article had been supplied to the Attorney-General by the defendants'.

(*b*) *Decision of the Divisional Court*

22. The Attorney-General's application was heard by three judges of the Queen's Bench Division from 7 to 9 November 1972; on 17 November the court granted the injunction.[6]

In its judgment, the court remarked:

> The article does not purport to express any views as to the legal responsibility of Distillers . . . but . . . is in many respects critical of Distillers and charges them with neglect in regard to their own failure to test the product, or their failure to react sufficiently sharply to warning signs obtained from the tests by others. No one reading the article could . . . fail to gain the impression that the case against Distillers on the footing of negligence was a substantial one.[7]

The editor of *The Sunday Times* had indicated that any libel proceedings following publication would be defended by a plea that

[6] [1973] Q.B. 710.
[7] *Ibid.* at p. 720.

the contents of the article were true and the court approached the article on the footing that it was factually accurate.

23. The reasoning in the court's judgment may be summarised as follows. The objection to unilateral comment, prior to conclusion of the court hearing, was that it might prevent the due and impartial administration of justice by affecting and prejudicing the mind of the tribunal itself, by affecting witnesses who were to be called or by prejudicing the free choice and conduct of a party to the litigation. It was the third form of prejudice that was relevant to the present case. If a party was subjected to pressure of a kind which raised a serious prospect that he would be denied justice because his freedom of action in the case would be affected, then a contempt of court had been established. The test of contempt was whether, in all the circumstances of the particular case, the words complained of created a serious risk that the course of justice might be interfered with, irrespective of the writer's intention or the truth of the writing.

It was not for the court, as the defendants had contended, to balance the competing interests of the protection of the administration of justice on the one hand and the right of the public to be informed on the other: comment raising a serious risk of interference with legal proceedings should be withheld until the proceedings were terminated. However, even if this were not so, there was in this case no public interest in immediate disclosure which could outweigh the public interest in preventing pressure on the parties to the litigation.

There was no distinction in the present case between persuasion directed to a legal obligation and persuasion directed to a moral obligation. The undoubted motive of *The Sunday Times* was to enlist public opinion to exert pressure on Distillers and cause them to make a more generous settlement than might otherwise be the case. There was a deliberate attempt to influence the settlement of pending proceedings and, having regard to the power of public opinion, publication of the article would create a serious risk of interference with Distillers' freedom of action in the litigation and would be a clear contempt.

(*c*) *Decision of the Court of Appeal*

24. An appeal by Times Newspapers Ltd. against the Divisional Court's decision was heard by the Court of Appeal from 30 January to 2 February 1973. The court had before it an affidavit by the editor of *The Sunday Times* setting out developments in the intervening period both in the case itself and in public discussion thereof. With the leave of the court, counsel for Distillers made submissions on the contents of the proposed article, pointing to errors he said it contained. On 16 February, the Court of Appeal discharged the

1979
—
The Sunday Times Case
—
European Court of Human Rights

injunction.[8] Summaries of the judgments read by the three members of the court appear below.

25. Lord Denning said that the proposed article:

> . . . contains a detailed analysis of the evidence against Distillers. It marshals forcibly the arguments for saying that Distillers did not measure up to their responsibility. Though, to be fair, it does summarise the arguments which could be made for Distillers.[9]

After pointing out that the court had no affidavit from Distillers as to the effect of the proposed article on them and little knowledge of the state of the litigation and settlement negotiations, Lord Denning stated the law as follows:

> . . . when litigation is pending and actively in suit . . . 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 in general against a party to the cause. . . . Even if the person making the comment honestly believes it to be true, still it is a contempt of court if he prejudges the truth before it is ascertained in the proceedings. . . . [Further] None shall . . . bring unfair pressure to bear on one of the parties . . . so as to force him to drop his complaint, or to give up his defence, or to come to a settlement on terms which he would not otherwise have been prepared to entertain.[10]

'Trial by newspaper', continued Lord Denning, must not be allowed. However, the public interest in a matter of national concern had to be balanced against the interest of the parties in a fair trial or settlement; in the present case, the public interest in discussion outweighed the potential prejudice to a party. The law did not prevent comment when litigation was dormant and not being actively pursued. Moreover, since the law did not prevent comment on litigation which had ended or had not started, there was nothing to prevent comment on the 62 cases settled in 1968 or the 123 cases in which writs had not been issued. Even in September 1972, the proposed article would not have amounted to contempt: it was fair comment on a matter of public interest; it did not prejudice pending litigation because that litigation had been dormant for years and still was; and the pressure the article was intended to bring to bear was legitimate. In addition, it would be discrimination of the worst kind to continue to enjoin *The Sunday Times* alone when Parliament and other newspapers had discussed the matter since November 1972.

26. Lord Justice Phillimore pointed out that anyone could comment freely on the cases which had been settled or in which no writ had been issued. Unfair pressure to settle a case might constitute

[8] [1973] Q.B. 710.
[9] *Ibid.* at p. 736.
[10] *Ibid.* at p. 739.

contempt of court, but here there was no affidavit from Distillers and no evidence that there was a serious risk of the proposed article's compelling Distillers to settle for more or that the pressure was unfair. The position would have been different if there had been a real intention to bring the remaining cases to court since, in that event, an article designed to prejudice the public against a party or to put pressure on him so as to force a settlement could not have been countenanced. Moreover, since November 1972, the House of Commons had debated the matter and other newspapers, especially the *Daily Mail*, had commented; it would therefore be unreal to continue the injunction.

27. After indicating that he agreed with Lord Denning's judgment, Lord Justice Scarman pointed out that no one expected a trial; the writs were a move towards obtaining a settlement and the mere issue of a writ could not stifle all comment. Since there was no evidence of litigation actively in suit, it was unrealistic to treat the proposed article as constituting a real or substantial prejudice to the course of justice. Moreover, the public interest in freedom of speech on a matter of great public moment had to be considered. Finally, even if the Divisional Court had been right, the state of public opinion following the House of Commons debate was such that the injunction should now be discharged.

(d) Decision of the House of Lords

28. Following the Court of Appeal's decision, *The Sunday Times* refrained from publishing the proposed article so as to enable the Attorney-General to appeal. The Court of Appeal refused him leave to appeal but this was granted by the House of Lords on 1 March 1973. The hearing before the House of Lords was held in May 1973. On 18 July 1973, the House gave judgment unanimously allowing the appeal and subsequently directed the Divisional Court to grant an injunction in the terms set out in paragraph 34 below.[11] Summaries of the speeches read by the five Law Lords appear below.

29. Lord Reid said that the House must try to remove the uncertainty which was the main objection to the present law. The law of contempt had to be founded entirely on public policy: it was not there to protect the rights of parties to a litigation but to prevent interference with the administration of justice and should be limited to what was reasonably necessary for the purpose. Freedom of speech should not be limited more than was necessary but it could not be allowed where there would be real prejudice to the administration of justice.

Lord Reid turned first to the question of comment on pending proceedings which was likely to bring pressure to bear upon one of

[11] [1974] A.C. 273.

the litigants. Whilst comment likely to affect the minds of witnesses and of the tribunal had to be stopped, for otherwise the trial might well be unfair, the fact that a party refrained from seeking to enforce his full legal rights in no way prejudiced a fair trial, whether the decision was or was not influenced by some third party. Accordingly, where the only matter to be considered was pressure put on a litigant, fair and temperate criticism or urging him to forgo his legal rights was legitimate and admissible; thus, the article of 24 September 1972 did not constitute contempt. Publication in 1972 of the proposed further article, which consisted ' in the main of detailed argument and evidence intended to show that Distillers did not exercise due care ', would not have added much to the pressure already on Distillers.

On this basis, Lord Reid could agree with the decision of the Court of Appeal, though for different reasons. However, he then pointed out:

> The question whether Distillers were negligent has been frequently referred to but, so far as I am aware, there has been no attempt to assess the evidence. If this material were released now, it appears to me to be almost inevitable that detailed answers would be published and there would be expressed various public prejudgments of this issue. That I would regard as very much against the public interest.[12]

After noting that there was a strong and general feeling that trial by newspaper should be prevented, Lord Reid continued:

> 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 the freedom of the press would suffer, and I think that the law would be clearer and easier to apply in practice if it is made a general rule that it is not permissible to prejudge issues in pending cases.[13]

The Court of Appeal had wrongly described the actions as ' dormant ', since settlement negotiations were in hand and improper pressure on a litigant to settle could constitute contempt. As for the Court of Appeal's balancing of competing interests, Lord Reid said:

> . . . contempt of court has nothing to do with the private interests of litigants. I have already indicated the way in which I think that a balance must be struck between the public interest in freedom of speech and the public interest in protecting the administration of justice from interference. I do not see why there should be any dif-

[12] *Ibid.* at pp. 299-300.
[13] *Ibid.* at p. 300.

> ference in principle between a case which is thought to have news value and one which is not. Protection of the administration of justice is equally important whether or not the case involves important general issues.[14]

Lord Reid concluded that publication of the article should be postponed for the time being in the light of the circumstances then prevailing; however, if things dragged on indefinitely, there would have to be a reassessment of the public interest in a unique situation.

30. For Lord Morris of Borth-y-Gest, the law of contempt was designed to protect the authority of the courts and to prevent unjustifiable interference with recourse to them. The public interest in free speech had to be put in the balance and no limitations should be imposed beyond those which were absolutely necessary, but

> this does not mean that if some conduct ought to be stigmatised as being contempt of court it could receive absolution and be regarded as legitimate because it had been inspired by a desire to bring about a relief of some distress that was a matter of public sympathy and concern. There can be no such thing as a justifiable contempt of court.[15]

A court would find a contempt only if the risk of prejudice were serious, real or substantial. Not only had there to be no influencing of the court or of witnesses, but it was unseemly that there should be public advocacy in favour of one side in a cause awaiting determination by the courts. Lord Morris stressed that there should be no ' trial by newspaper ', remarking that:

> . . . the courts . . . owe it to the parties to protect them either from the prejudices of prejudgment or from the necessity of having themselves to participate in the flurries of pre-trial publicity.[16]

The actions against Distillers, he continued, were not ' dormant ' just because the parties preferred a settlement to a trial. Whilst there would have been no objection in 1972 to a comment on the amounts paid under the 1968 settlement or on the general principles of law involved or to a temperate moral appeal to Distillers, the proposed article went further. Its avowed object was to bring public pressure on Distillers to pay more. Negligence was one of the issues arising, and the draft article, though asserting no conclusions, showed that there was a considerable case against Distillers. The time had not yet arrived to discharge the injunction.

31. Lord Diplock said that contempt of court was punishable because it undermined the confidence of the parties and of the public in the due administration of justice. The due administration of justice required that all citizens should have unhindered access to the courts; that they should be able to rely on an unbiased decision based only on facts proved in accordance with the rules of evidence;

[14] *Ibid.* at p. 301.
[15] *Ibid.* at p. 302.
[16] *Ibid.* at p. 304.

that, once a case was submitted to a court, they should be able to rely upon there being no usurpation by any other person, for example, in the form of ' trial by newspaper ', of the function of the court. Conduct calculated to prejudice any of these requirements or to undermine public confidence that they would be observed was contempt of court. Lord Diplock stated that:

> . . . contempt of court in relation to a civil action is not restricted to conduct . . . calculated . . . to prejudice the fair trial of that action by influencing . . . the tribunal . . . or witnesses; it extends also to conduct that is calculated to inhibit suitors generally from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced in courts of law, by holding up any suitor to public obloquy for doing so or by exposing him to public and prejudicial discussion of the merits or the facts of his case before they have been determined by the court or the action has been otherwise disposed of in due course of law.[17]

The proposed *Sunday Times* article, Lord Diplock considered, fell into this latter category since it discussed prejudicially the facts and merits of Distillers' defence to the charge of negligence before the actions had been determined by a court or settled. The actions could not be ignored as ' dormant ', as the same protection had to apply to settlement negotiations as to the actual trial. Subsequent events did not justify dissolution of the injunction although, ' as [was] conceded ', the wording called for some amendment. The seriousness of the risk of interference with the due administration of justice was relevant only to the question whether the court should inflict punishment: once there was a real risk, there was at least technical contempt.

The passage quoted at paragraph 11 above from the article of 24 September 1972 was also, thought Lord Diplock, a contempt, though for a different reason, namely, that it held Distillers up to public obloquy for relying on a defence available to them under the law; however, those parts of the September article that dealt with general principles of law were unobjectionable, since, if discussion of such matters of general interest had the indirect effect of bringing pressure on a litigant, it had to be borne because of the greater public interest in upholding freedom of discussion on matters of public concern.

32. Lord Simon of Glaisdale agreed with Lord Diplock's statement of the law and with his views concerning the above-mentioned passage in the September article. He saw the proposed further article as a detailed discussion of one of the crucial issues in the actions and as designed to bring moral pressure on Distillers to settle on better terms. The law of contempt was the means by which the law vindicated the public interest in the due administration of justice. Most

[17] *Ibid.* at p. 310.

civil actions were settled and interference with settlement negotiations was no less contempt than interference with a procedural situation in the strictly forensic sense. The due course of justice included negotiation towards a settlement on the basis of the ordained law and the Court of Appeal had been wrong in saying that the article would not be contempt because the litigation was dormant. Even private pressure on a litigant was generally impermissible and could be justified only within narrow limits. The law had to hold in balance two public interests—in freedom of discussion and in the due administration of justice—but would be too uncertain if the balance were to be struck anew in each case. The law had to lay down some general guidelines; as regards particular litigation, the paramount public interest *pendente lite* was that the legal proceedings should progress without interference. An exception was that public discussion of a matter of general interest which had already started before litigation began did not have to stop if it was not intended to prejudice the litigation.

33. Lord Cross of Chelsea stated that ' contempt of court ' meant an interference with the administration of justice. The rules of contempt should not inhibit freedom of speech more than was reasonably necessary. The proposed article examined the question whether Distillers had been negligent and any ' prejudging ' of issues of fact or law in pending civil or criminal proceedings was in principle such an interference. He continued:

> 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. . . . 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.[18]

This rule, added Lord Cross, applied to the outcome of settlement negotiations as much as to the result of the actual trial.

Times Newspapers Ltd. had argued that there should be an exception to this rule when matters of great public concern were involved; however, the House was only concerned with discussion of the issue whether Distillers had been negligent and discussion of the wider issues, such as the scope of producers' liability and the assessment of damages, was not inhibited. Reliance had also been placed by the publisher on the lapse of time since the births and the absence of any public inquiry; however, neither side was to blame for the delay, the Court of Appeal had wrongly described the actions as ' dormant ' since settlement negotiations were being actively pursued and the absence of a public inquiry did not justify allowing the press to conduct an inquiry while proceedings were in progress. The position had not altered since the Divisional Court hearing: the House of Com-

[18] *Ibid.* at p. 323.

mons debate had concentrated on the moral issues and, although Distillers had come forward with an offer which made an overall settlement likely—so that publication of the article could not now harm them—it was not certain that no claims would come to court. Accordingly, the injunction should be restored but with liberty to apply for its discharge whenever Times Newspapers Ltd. considered that they could persuade a court that its continuation was not warranted in the light of the facts then existing.

The article of 24 September 1972 was not a contempt: prejudging an issue was contempt of court but a fairly and accurately expressed comment that might bring even great pressure on a litigant was not.

34. On 25 July 1973, the House of Lords ordered that the cause be remitted to the Divisional Court with a direction to grant an injunction in the terms set out in paragraph 44 below. The defendants were granted liberty to apply to the Divisional Court for discharge of the injunction. The Divisional Court implemented the above direction on 24 August 1973.

(e) Decision of the Divisional Court discharging the injunction

35. On 23 June 1976, the Divisional Court heard an application by the Attorney-General for the discharge of the injunction. It was said on behalf of the Attorney-General that the need for the injunction no longer arose: most of the claims against Distillers had been settled and there were only four extant actions which could by then have been brought before the courts if they had been pursued diligently. As there was a conflicting public interest in *The Sunday Times* being allowed to publish ' at the earliest possible date ', the Attorney-General submitted the matter to the court as one where the public interest no longer required the restraint. The court, considering that the possibility of pressure on Distillers had completely evaporated, granted the application.

PROPOSALS FOR REFORM OF THE LAW OF CONTEMPT OF COURT

36. One particular aspect of the law had been considered by the Interdepartmental Committee on the Law of Contempt as it affects Tribunals of Inquiry, which reported in 1969.[19] On 8 June 1971, the Lord Chancellor and the Lord Advocate appointed a committee under the chairmanship of Lord Justice Phillimore to consider whether any changes were required in the law of contempt as a whole. The Phillimore report was presented to Parliament in December 1974,[20] having been delayed by *The Sunday Times* contempt litigation. The report discussed the various judgments in that

[19] *The Law of Contempt in Relation to Tribunals of Inquiry*, Cmnd. 4078.
[20] *Report of the Committee on Contempt of Court*, Cmnd. 5794.

case and described is as well illustrating the uncertainty of the present state of the law regarding publications dealing with legal proceedings. Whilst it might be that the right to issue such publications had on occasion to be overridden by the public interest in the administration of justice, the committee was of 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. In particular, it doubted whether a ' prejudgment ' test such as that proposed in the House of Lords was the right one, considering that it went both too far and not far enough. The committee preferred the following test, to be applied in the light of the circumstances existing at the time of publication: ' whether the publication complained of creates a risk that the course of justice will be seriously impeded or prejudiced '. One member of the committee remarked that, despite the suppression of *The Sunday Times* article, the campaign of protest and pressure over the thalidomide tragedy made a mockery of the law of contempt.

The committee concluded, in particular, that the law of contempt was required as a means of maintaining the rights of the citizen to a fair and unimpeded system of justice and protecting the orderly administration of the law; however, the operation of that law should be confined to circumstances where the offending act was not within the definition of any other criminal offence and where the achievement of that law's objectives required a summary procedure. The law as it stood contained uncertainties impeding and restricting reasonable freedom of speech and should be amended and clarified so as to allow as much freedom of speech as was consistent with the achievement of the above-mentioned objectives.

The committee recommended, *inter alia,* that a publication should be subject to the law of contempt if it created a risk of serious prejudice (whether intentionally or not) but that this strict liability should only apply:

(*a*) if the publication created a risk that the course of justice would be seriously impeded or prejudiced;

(*b*) when, in the case of civil proceedings in England and Wales, the case had been set down for trial;

(*c*) subject to the availability of a defence that the publication formed part of a discussion of matters of general public interest and only incidentally or unintentionally created a risk of serious prejudice to particular proceedings.

It was also recommended that bringing influence or pressure to bear upon a party to proceedings should not be held to be a contempt unless it amounted to intimidation or unlawful threats to his person, property or reputation.

37. The recommendations contained in the Phillimore report have not yet been implemented and the Government have made no proposals for legislation. However, in March 1978, they issued a Green Paper, intended to provide a basis for parliamentary and public discussion, and invited comments which would be taken into account in a decision on policy.[21] The Green Paper, which draws no conclusions, rehearses the recommendations of the Phillimore Committee and sets out arguments for and against certain of them, for example, those relating to the provision of a defence of 'discussion of matters of general public interest' and to bringing influence or pressure to bear upon a party. The document does not call in question the suggestion that the 'prejudgment' test referred to in the House of Lords should be reconsidered.

JUDGMENT

I. ON ARTICLE 10

42. The applicants claim to be the victims of a violation of Article 10 of the Convention which provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The applicants allege that this violation arises by reason, first, 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.

The Commission, in its report, expresses the opinion that there has been a violation on the first ground. As regards the second ground, the Principal Delegate submitted also, at the hearing on 24 April 1978, that the injunction was not the only matter which the Court had to consider under Article 10 and that, despite the judgment of the House of Lords and indeed because of its ambiguities,

[21] *Contempt of Court: A Discussion Paper*, Cmnd. 7145.

the applicants and other media were continuing victims of the uncertainty of the law of contempt of court.

The Government maintain that there has been no breach of Article 10.

43. With respect to the second ground, 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 ': ' The Commission's decision declaring an application admissible determines the object of the case brought before the Court; it is only within the framework so traced that the Court, once a case is duly referred to it, may take cognisance of all questions of fact or of law arising in the course of the proceedings.' [22] 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.

The Court thus concludes that it has to examine only whether there has been a violation of the Convention by reason of the judgment of the House of Lords.

44. Originally, the injunction in question was granted by the Divisional Court and concerned only the draft *Sunday Times* article (see para. 21 above). It was discharged by the Court of Appeal (see para. 24 above) but the House of Lords restored it and considerably widened its scope by directing the Divisional Court to order

> That . . . Times Newspapers Ltd., by themselves, their servants, agents or otherwise, be restrained from publishing, or causing or authorising or procuring to be published or printed, any article or matter which prejudges the 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 . . . in respect of the development, distribution or use of the drug ' thalidomide '.

45. It 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. Such an interference entails a ' violation ' of Article 10 if it does not fall within one of the exceptions provided for in paragraph 2.[23] The Court therefore has to examine in turn whether the interference in the present case was ' prescribed by law ', whether it had an aim or aims that is or are legitimate under Article 10 (2) and whether it was ' necessary in a democratic society ' for the aforesaid aim or aims.

[22] IRELAND *v.* U.K. (1978), 2 E.H.R.R. 25 at pp. 76-77, para. 157.
[23] HANDYSIDE *v.* U.K. (1976), Series A, No. 24, p. 21, para. 43.

A. *Was the interference ' prescribed by law '?*

46. The applicants argue, *inter alia*, that the law of contempt of court, both before and after the decision of the House of Lords, was so vague and uncertain and the principles enunciated by that decision so novel that the restraint imposed cannot be regarded as ' prescribed by law '. The Government maintain that it suffices, in this context, that the restraint was in accordance with the law; they plead, in the alternative, that on the facts of the case the restraint was at least ' roughly foreseeable '. This latter test had been referred to by the Commission in its report, although there it merely proceeded on the assumption that the principles applied by the House of Lords were ' prescribed by law '. However, at the hearing on 25 April 1978, the Commission's Principal Delegate added that, in view of the uncertainties of the law, the restraint was not ' prescribed by law ', at least when the injunction was first granted in 1972.

47. The Court observes that the word ' law ' in the expression ' prescribed by law ' covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation. It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not ' prescribed by law ' on the sole ground that it is not enunciated in legislation: this 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 that State's legal system.

In fact, the applicants do not argue that the expression ' prescribed by law ' necessitates legislation in every case; their submission is that legislation is required only if—as in the present case—the common law rules are so uncertain that they do not satisfy what the applicants maintain is the concept enshrined in that expression, namely, the principle of legal certainty.

48. The expression ' prescribed by law ' appears in paragraph 2 of Articles 9, 10 and 11 of the Convention, the equivalent in the French text being in each case ' *prévues par la loi* '. However, when the same French expression appears in Article 8 (2) of the Convention, in Article 1 of Protocol No. 1 and in Article 2 of Protocol No. 4, it is rendered in the English text as ' in accordance with the law ', ' provided for by law ' and ' in accordance with law ', respectively. Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty.[24]

[24] See WEMHOFF *v.* GERMANY (1968), Series A, No. 7, p. 23, para. 8, and the Vienna Convention on the Law of Treaties of 23 May 1969, art. 33 (4).

49. In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

50. In the present case, the question whether these requirements of accessibility and foreseeability were satisfied is complicated by the fact that different principles were relied on by the various Law Lords concerned. The Divisional Court had applied the principle 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'; see para. 23 above). Certain members of the House of Lords also alluded to this principle, whereas others preferred the principle that it is contempt of court to publish material which prejudges, or is likely to cause public prejudgment of, the issues raised in pending litigation (the 'prejudgment principle'; see paras. 29 to 33 above).

51. The applicants do not claim to have been without an indication that was adequate in the circumstances of the 'pressure principle'. Indeed, the existence of this principle had been recognised by counsel for Times Newspapers Ltd., who is reported as saying before the Divisional Court: 'Even if it applies pressure to a party, the article is not contempt at all because [the higher public interest] overcomes any question of wrongdoing. Alternatively, if the article is prima facie contempt, the higher public interest provides a defence against what would otherwise be contempt.' Again, Lord Justice Phillimore in the Court of Appeal referred to 'the mass of authority . . . showing that an attempt to stir up public feeling against a party is a serious contempt'.

The Court also considers that there can be no doubt that the 'pressure principle' was formulated with sufficient precision to enable the applicants to foresee to the appropriate degree the consequences which publication of the draft article might entail. In

VINE PRODUCTS LTD. *v.* GREEN,[25] Mr. Justice Buckley had formulated the law in this way:

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

52. The applicants contend, on the other hand, that the prejudgment principle was novel and that they therefore could not have had an adequate indication of its existence. Support for this view is to be found in several authorities cited by the applicants, including the Phillimore report, which stated that the House of Lords ' formulated a rather different test ' (see para. 18 above). Nevertheless, the Court has also noted the following:

— in the applicants' memorial, it is submitted (para. 2.54): ' the " prejudgment principle " as applied by the House of Lords to the facts of the present case has never before constituted the *ratio* of an English judicial decision *in a comparable case* ' (emphasis added);

— in 1969, the Interdepartmental Committee on the Law of Contempt as it affects Tribunals of Inquiry (see para. 36 above) stated in paragraph 26 of its report: ' There is no reported case or anyone being found guilty of contempt of court in respect of comment made about the subject matter of a trial before a judge alone. . . . There are however dicta which support the view that such comment may amount to contempt ';

— the third edition (current in 1972) of *Halsbury's Laws of England* contains the following passages which are accompanied by references to previous case law:

> . . . writings . . . prejudicing the public for or against a party are contempts . . . there [is nothing] of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. . . . It is a contempt to publish an article in a newspaper commenting on the proceedings in a pending . . . civil action. . . . In such cases the mischievous tendency of a trial by the newspapers when a trial by one of the regular tribunals of the country is going on is to be considered. . . . On the other hand, the summary jurisdiction [to punish contempt] ought only to be exercised when it is probable that the publication will substantially interfere with a fair trial.[26]

[25] [1966] Ch. 484 at pp. 495-496.
[26] Vol. 8, pp. 7 *et seq.*, paras. 11-13.

As regards the formulation of the 'prejudgment principle', the Court notes that reference was made in the House of Lords to various authorities and, in particular, to HUNT *v.* CLARKE, where Lord Justice Cotton had stated the law in this way:

> If any one discusses in a paper the rights of a case or the evidence to be given before the case comes on, that, in my opinion, would be a very serious attempt to interfere with the proper administration of justice. It is not necessary that the court should come to the conclusion that a judge or jury will be prejudiced, but if it is calculated to prejudice the proper trial of a cause, that is a contempt, and would be met with the necessary punishment in order to restrain such conduct.[27]

Moreover, the editor of *The Sunday Times* said in his affidavit filed in the Divisional Court proceedings: '. . . I was given legal advice that the [proposed] article . . . was in a category different from that of the articles published hitherto in that in addition to presenting information which strengthened the moral argument for a fairer settlement, it included evidence which related to the issue of liability in the pending thalidomide proceedings.'

To sum up, the Court does not consider that the applicants were without an indication that was adequate in the circumstances of the existence of the 'prejudgment principle'. Even if the Court does have certain doubts concerning the precision with which that principle was formulated at the relevant time, it considers that the applicants were able to foresee, to a degree that was reasonable in the circumstances, a risk that publication of the draft article might fall foul of the principle.

53. The interference with the applicants' freedom of expression was thus 'prescribed by law' within the meaning of Article 10 (2).

B. *Did the interference have aims that are legitimate under Article 10 (2)?*

54. In the view of the applicants, the Government and the minority of the Commission, the law of contempt of court serves the purpose of safeguarding not only the impartiality and authority of the judiciary but also the rights and interests of litigants.

The majority of the Commission, on the other hand, whilst accepting that the law of contempt has the general aim of securing the fair administration of justice and that it thereby seeks to achieve purposes similar to those envisaged in Article 10 (2) where it speaks of maintaining the authority and impartiality of the judiciary, considered that it was not called upon to examine separately whether that law has the further purpose of protecting the rights of others.

55. The Court first emphasises that the expression 'authority and impartiality of the judiciary' has to be understood 'within the

[27] (1889) 58 L.J.Q.B. 490 at p. 492.

meaning of the Convention'.[28] For this purpose, account must be taken of the central position occupied in this context by Article 6, which reflects the fundamental principle of the rule of law.[29]

The term 'judiciary' (*'pouvoir judiciaire'*) comprises the machinery of justice or the judicial branch of government as well as the judges in their official capacity. The phrase 'authority of the judiciary' includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function.

It suffices, in this context, to adopt the description of the general purposes of the law of contempt given by the Phillimore report. As can be seen from paragraph 18 above, the majority of the categories of conduct covered by the law of contempt relate either to the position of the judges or to the functioning of the courts and of the machinery of justice: 'maintaining the authority and impartiality of the judiciary' is therefore one purpose of that law.

56. In the present case, the Court shares the view of the majority of the Commission that, in so far as the law of contempt may serve to protect the rights of litigants, this purpose is already included in the phrase 'maintaining the authority and impartiality of the judiciary': the rights so protected are the rights of individuals in their capacity as litigants, that is, as persons involved in the machinery of justice, and the authority of that machinery will not be maintained unless protection is afforded to all those involved in or having recourse to it. It is therefore not necessary to consider as a separate issue whether the law of contempt has the further purpose of safeguarding 'the rights of others'.

57. It remains to be examined whether the aim of the interference with the applicants' freedom of expression was the maintenance of the authority and impartiality of the judiciary.

None of the Law Lords concerned based his decision on the ground that the proposed article might have an influence on the 'impartiality' of the judiciary. This ground was also not pleaded before the Court and can be left out of account.

The reasons why the draft article was regarded as objectionable by the House of Lords (see paras. 29 to 33 above) may be briefly summarised as follows:

— by 'prejudging' the issue of negligence, it would have led to disrespect for the processes of the law or interfered with the administration of justice; it was of a kind that would expose

[28] See, *mutatis mutandis*, KÖNIG *v.* GERMANY (1978), 2 E.H.R.R. 170, para. 88.
[29] See, *e.g.*, GOLDER *v.* U.K. (1975), Series A, No. 18, p. 17, para. 34.

Distillers to public and prejudicial discussion of the merits of their case, such exposure being objectionable as it inhibits suitors generally from having recourse to the courts;

— it would subject Distillers to pressure and to the prejudices of prejudgment of the issues in the litigation, and the law of contempt was designed to prevent interference with recourse to the courts;

— prejudgment by the press would have led inevitably in this case to replies by the parties, thereby creating the danger of a 'trial by newspaper' incompatible with the proper administration of justice;

— the courts owe it to the parties to protect them from the prejudices of prejudgment which involves their having to participate in the flurries of pre-trial publicity.

The Court regards all these various reasons as falling within the aim of maintaining the 'authority . . . of the judiciary' as interpreted by the Court in the second sub-paragraph of paragraph 55 above.

Accordingly, the interference with the applicants' freedom of expression had an aim that is legitimate under Article 10 (2).

C. *Was the interference 'necessary in a democratic society' for maintaining the authority of the judiciary?*

58. The applicants submit and the majority of the Commission are of the opinion that the said interference was not 'necessary' within the meaning of Article 10 (2). The Government contend that the minority of the Commission was correct in reaching a contrary conclusion and rely, in particular, on the margin of appreciation enjoyed by the House of Lords in the matter.

59. The Court has already had the occasion in its above-mentioned HANDYSIDE judgment to state its understanding of the phrase 'necessary in a democratic society', the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions.

The Court has noted that, whilst the adjective 'necessary', within the meaning of Article 10 (2), is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' and that it implies the existence of a 'pressing social need'.[30]

In the second place, the Court has underlined that the initial responsibility for securing the rights and freedoms enshrined in the Convention lies with the individual Contracting States. Accordingly, 'Article 10 (2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator . . .

[30] Series A, No. 24, p. 22, para. 48.

1979

The Sunday Times Case

European Court of Human Rights

Judgment

and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force '.[31]

' Nevertheless, Article 10 (2) does not give the Contracting States an unlimited power of appreciation '. ' The Court . . . is empowered to give the final ruling on whether a " restriction " . . . is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision ' which ' covers not only the basic legislation but also the decision applying it, even one given by an independent court '.[32]

The Court has deduced from a combination of these principles that ' it is in no way [its] task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation '.[33]

This does not mean that the Court's supervision is limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court's control as regards the compatibility of its conduct with the engagements it has undertaken under the Convention. The Court still does not subscribe to the contrary view which, in essence, was advanced by the Government and the majority of the Commission in the HANDYSIDE CASE.[34]

Again, the scope of the domestic power of appreciation is not identical as regards each of the aims listed in Article 10 (2). The HANDYSIDE CASE concerned the ' protection of morals '. The view taken by the Contracting States of the ' requirements of morals ', observed the Court, ' 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 '.[35] Precisely the same cannot be said of the far more objective notion of the ' authority ' of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention, including Article 6, which have no equivalent as far as ' morals ' are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.

In the different, but to a certain extent comparable, contexts of Articles 5 (3) and 6 (1), the Court has on occasion reached conclusions different from those of the national courts on matters in respect of which the latter were also competent and qualified to make the initial assessment.[36]

[31] *Ibid.*
[32] *Ibid.* at p. 23, para. 49.
[33] *Ibid.* at p. 23, para. 50.
[34] *Ibid.* at pp. 21-22, para. 47.
[35] *Ibid.*, p. 22, para. 48.
[36] NEUMEISTER *v.* AUSTRIA (1968), Series A, No. 8, pp. 9-15 and 38-40; STÖGMÜLLER *v.* AUSTRIA (1969), Series A, No. 9, pp. 11–24, 39 and 43–44;

60. Both the minority of the Commission and the Government attach importance to the fact that the institution of contempt of court is peculiar to common law countries and suggest that the concluding words of Article 10 (2) were designed to cover this institution which has no equivalent in many other member States of the Council of Europe.

However, even if this were so, the 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 make that law the standard by which to assess whether a given measure was 'necessary'. If and to the extent that Article 10 (2) was prompted by the notions underlying either the English law of contempt of court or any other similar domestic institution, it cannot have adopted them as they stood: it transposed them into an autonomous context. It is 'necessity' in terms of the Convention which the Court has to assess, its rôle being to review the conformity of national acts with the standards of that instrument.

In addition, the Court exercises its supervision in the light of the case as a whole.[37] Accordingly, it must not lose sight of the existence of a variety of reasoning and solutions in the judicial decisions summarised at paragraphs 22 to 35 above, of extensive debates in England on the law of contempt of court and of proposals for reform. As regards the latter, the Court observes that, although the Government Green Paper sets out arguments for and against certain of the recommendations of the Phillimore Committee, it does not call in question the suggestion that the 'prejudgment' test referred to in the House of Lords should be reconsidered (see para. 37 above).

61. Again, the Court cannot hold that the injunction was not 'necessary' simply because it could or would not have been granted under a different legal system. As noted in the BELGIAN LINGUISTIC CASE, the main purpose of the Convention is 'to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction'.[38] This does not mean that absolute uniformity is required and, indeed, since the Contracting States remain free to choose the measures which they consider appropriate, the Court cannot be oblivious of the substantive or procedural features of their respective domestic laws.[39]

62. It must now be decided whether the 'interference' complained of corresponded to a 'pressing social need', whether it was

RINGEISEN *v.* AUSTRIA (1971), Series A, No. 13, pp. 24-34 and 42-44; KÖNIG *v.* GERMANY (1978), Series A, No. 27, pp. 16 *in fine*, 22, 23-24 and 33-40, 2 E.H.R.R. 170.

[37] HANDYSIDE *v.* U.K., Series A, No. 24, p. 23, para. 50.

[38] (PRELIMINARY OBJECTION) (1967), Series A, No. 5, p. 19.

[39] See, *mutatis mutandis*, the BELGIAN LINGUISTIC CASE (MERITS) (1968), Series A, No. 6, pp. 34-35.

1979

The Sunday Times Case

European Court of Human Rights

Judgment

' proportionate to the legitimate aim pursued ', whether the reasons given by the national authorities to justify it are ' relevant and sufficient under Article 10 (2) '.[40] In this connection, the Court has examined the subject-matter of the injunction, then the state of the thalidomide case at the relevant time and, finally, the circumstances surrounding that case and the grant of the injunction.

63. The injunction, in the form ordered by the House of Lords, was not directed against the draft *Sunday Times* article alone (see para. 44 above). The applicants allege that it also prevented them from passing the results of their research to certain Government committees and to a Member of Parliament and from continuing their research, delayed plans for publishing a book and debarred the editor of *The Sunday Times* from commenting on the matter or replying to criticism aimed at him. In fact, the injunction was couched in terms wide enough to cover such items; its very breadth calls for a particularly close scrutiny of its ' necessity '.

The draft article was nonetheless the principal subject-matter of the injunction. It must therefore be ascertained in the first place whether the domestic courts' views as to the article's potential effects were relevant in terms of the maintenance of the ' authority of the judiciary '.

One of the reasons relied on was the pressure which the article would have brought to bear on Distillers to settle the actions out of court on better terms. However, even in 1972, publication of the article would probably not have added much to the pressure already on Distillers (see para. 29, second sub-para., above). This applies with greater force to the position obtaining in July 1973, when the House of Lords gave its decision: by that date, the thalidomide case had been debated in Parliament and had been the subject not only of further press comment but also of a nationwide campaign (see paras. 13 and 14 above).

The speeches in the House of Lords emphasised above all the concern that the processes of the law may be brought into disrespect and the functions of the courts usurped either if the public is led to form an opinion on the subject-matter of litigation before adjudication by the courts or if the parties to litigation have to undergo ' trial by newspaper '. Such concern is in itself ' relevant ' to the maintenance of the ' authority of the judiciary ' as that expression is understood by the Court (see para. 55 above). If the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts. Again, it cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious con-

[40] HANDYSIDE *v.* U.K., Series A, No. 24, pp. 22-24, paras. 48-50.

sequences for the acceptance of the courts as the proper forum for the settlement of legal disputes.

Nevertheless, 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; although it analysed in detail evidence against Distillers, it also summarised arguments in their favour and closed with the words: ' There appears to be no neat set of answers. . . .' In the Court's opinion, the effect of the article, if published, would therefore have varied from reader to reader. Accordingly, even to the extent that the article might have led some readers to form an opinion on the negligence issue, this would not have had adverse consequences for the ' authority of the judiciary ', especially since, as noted above, there had been a nationwide campaign in the meantime.

On the other hand, publication of the proposed article might well have provoked replies. However, the same is true, to a greater or lesser extent, of any publication that refers 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. Moreover, although this particular reason for the injunction might possibly have been ' relevant ' under Article 10 (2), the Court cannot decide whether it was ' sufficient ' without examining all the surrounding circumstances.

64. At the time when the injunction was originally granted and at the time of its restoration, the thalidomide case was at the stage of settlement negotiations. The applicants concur with the Court of Appeal's view that the case was ' dormant ' and the majority of the Commission considers it unlikely that there would have been a trial of the issue of negligence. For the Government and the minority of the Commission, on the other hand, such a trial was a real possibility.

An assessment of the precise status of the case during the relevant period is not needed for the Court's decision: preventing interference with negotiations towards the settlement of a pending suit is a no less legitimate aim under Article 10 (2) than preventing interference with a procedural situation in the strictly forensic sense. The same applies to the procedure for judicial approval of a settlement (see para. 9 above). What is to be retained is merely that the negotiations were very lengthy, 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.

Nevertheless, the question arises as to how it was possible to discharge the injunction in 1976—by reference, incidentally, to the ' pressure principle ' rather than the ' prejudgment principle ' (see

1979
—
The Sunday Times Case
—
European Court of Human Rights
—
Judgment

para. 35 above). At that time, there were still outstanding not only some of the parents' actions but also an action between Distillers and their insurers involving the issue of negligence; the latter action, moreover, had been set down for trial (see para. 16 above). Discharge of the injunction in these circumstances prompts the question whether the injunction was necessary in the first place.

65. The Government's reply is that it is a matter of balancing the public interest in freedom of expression and the public interest in the fair administration of justice; they stress that the injunction was a temporary measure and say that the balance, on being struck again in 1976 when the situation had changed, fell on the other side.

This brings the Court to the circumstances surrounding the thalidomide case and the grant of the injunction.

As the Court remarked in its HANDYSIDE judgment, freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.[41]

These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.[42]

To assess whether the interference complained of was based on 'sufficient' reasons which rendered it 'necessary in a democratic society', account must thus be taken of any public interest aspect of the case. The Court observes in this connection that, following a balancing of the conflicting interests involved, an absolute rule was formulated by certain of the Law Lords to the effect that it was not permissible to prejudge issues in pending cases: it was considered that the law would be too uncertain if the balance were to be struck

[41] *Ibid.* at p. 23, para. 49.
[42] See, *mutatis mutandis*, KJELDSEN, BUSK MADSEN AND PEDERSEN *v.* DENMARK (1976), Series A, No. 23, p. 26, para. 52.

anew in each case (see paras. 29, 32 and 33 above). Whilst emphasising that it is not its function to pronounce itself on an interpretation of English law adopted in the House of Lords,[43] the Court points out that it has to take a different approach. The Court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.[44] In the second place, the Court's supervision under Article 10 covers not only the basic legislation but also the decision applying it.[45] It is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10 (2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.

66. The thalidomide disaster was a matter of undisputed public concern. It posed the question whether the powerful company which had marketed the drug bore legal or moral responsibility towards hundreds of individuals experiencing an appalling personal 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.

As the Court has already observed, Article 10 guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed (see para. 65 above).

In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the 'authority of the judiciary'.

Being called upon to weigh the interests involved and assess their respective force, the Court makes the following observations:

In September 1972, the case had, in the words of the applicants, been in a 'legal cocoon' for several years and it was, at the very least, far from certain that the parents' actions would have come on for trial. There had also been no public enquiry (see para. 14 above).

The Government and the minority of the Commission point out that there was no prohibition on discussion of the 'wider issues',

[43] See, *mutatis mutandis*, RINGEISEN *v.* AUSTRIA (1971), Series A, No. 13, p. 40, para. 97.
[44] See, *mutatis mutandis*, KLASS *v.* GERMANY, 2 E.H.R.R. at p. 214, para. 42.
[45] See HANDYSIDE *v.* U.K., Series A, No. 24, p. 23, para. 49.

such as the principles of the English law of negligence, and indeed it is true that there had been extensive discussion in various circles especially after, but also before, the Divisional Court's initial decision (see paras. 11, 12 and 14 above). However, the Court considers it rather artificial to attempt to divide the 'wider issues' and the negligence issue. The question of where responsibility for a tragedy of this kind actually lies is also a matter of public interest.

It is true that, if *The Sunday Times* article had appeared at the intended time, Distillers might have felt obliged to develop in public, and in advance of any trial, their arguments on the facts of the case (see para. 63 above); however, those facts did not cease to be a matter of public interest merely because they formed the background to pending litigation. By bringing to light certain facts, the article might have served as a brake on speculative and unenlightened discussion.

67. Having regard to all the circumstances of the case and on the basis of the approach described in paragraph 65 above, the Court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary.

68. There has accordingly been a violation of Article 10.

II. ARTICLE 14

69. The applicants also claim to be victims of a violation of Article 10, taken in conjunction with Article 14, which 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.

They maintain that such violation arose by reason of:

— the fact that allegedly similar press publications were not subjected to restraints similar to those imposed on the applicants' publications or activities;
— the difference between the rules applied in Parliament in relation to comment on pending litigation and the rules of contempt of court applied to the press.

In the view of the Government and the Commission, there was in this case no breach of Article 14 read in conjunction with Article 10.

70. According to the Court's established case law, Article 14 safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in the other normative provisions of the Convention and Protocols.[46]

71. The fact that no steps were taken against other newspapers, for example the *Daily Mail,* is not sufficient evidence that the injunction granted against Times Newspapers Ltd. constituted discrimination contrary to Article 14.

72. With respect to the rules applicable in Parliament (see para. 20 above), the Court notes that the members of the Court of Appeal mentioned the undesirability, and perhaps even dangers, of there being a substantial difference, as regards the treatment of matters *sub judice,* between the practice of Parliament, whose proceedings are published, and the practice of the courts. Nevertheless, the Court is of the opinion that the press and parliamentarians cannot be considered to be 'placed in comparable situations' since their respective 'duties and responsibilities' are essentially different. Furthermore, the parliamentary debate of 29 November 1972 (see para. 13 above) did not cover exactly the same ground as the proposed *Sunday Times* article.

73. There has thus been no violation of Article 14 taken together with Article 10.

III. ON ARTICLE 18

74. Before the Commission, the applicants had additionally raised a claim based on Article 18, which 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.

However, they did not maintain this claim before the Court: in their memorial of 10 February 1978, they accepted the Commission's opinion that there had been no breach of Article 18 taken in conjunction with Article 10.

Neither the Government nor the Commission adverted to this matter during the oral hearings, although the latter did refer to it in its request bringing the case before the Court.

75. The Court notes the position taken by the applicants and, in the circumstances of the case, does not consider that it is necessary for it to examine this question.

[46] See the BELGIAN LINGUISTIC CASE (MERITS), Series A, No. 6, p. 34, para. 10; NATIONAL UNION OF BELGIAN POLICE *v.* BELGIUM (1975), Series A, No. 19, p. 19, para. 44.

IV. ON ARTICLE 50

76. Under Article 50 of the Convention, if the Court finds ' that a decision or a measure taken ' by any authority of a Contracting State ' is completely or partially in conflict with the obligations arising from the . . . Convention, and if the internal law of the said [State] allows only partial reparation to be made for the consequences of this decision or measure ', the Court ' shall, if necessary, afford just satisfaction to the injured party '.

The Rules of Court specify that when the Court ' finds that there is a breach of the Convention, it shall give in the same judgment a decision on the application of Article 50 of the Convention if that question, after being raised under Rule 47 *bis*, is ready for decision; if the question is not ready for decision, the [Court] shall reserve it in whole or in part and shall fix the further procedure '.[47]

77. In their memorial of 10 February 1978, the applicants requested the Court to declare that the Government should pay to them a sum equivalent to the costs and expenses which they had incurred in connection with the contempt litigation in the English courts and the proceedings before the Commission and the Court. However, the applicants did not quantify their claim and, at the hearing on 24 April 1978, their counsel stated that they hoped that the amount of damage suffered by them could be agreed ' without troubling the Court '.

At the hearing on the following day, the Court, pursuant to Rule 47 *bis*, invited the Government to present their observations on the question of the application of Article 50 in the present case. The Solicitor-General's closing submission was that this was an issue which the Court would not have to consider.

78. The Court notes that the applicants limit their claim to the above-mentioned costs and expenses but do not for the moment indicate their amount. In these circumstances, the question of the application of Article 50 of the Convention is not ready for decision; the Court must therefore reserve the question and fix the further procedure, taking due account of the eventuality contemplated in Rule 50 (5) of the Rules of Court.

For these reasons, THE COURT *holds*:

1. by 11 votes to nine, that there has been a breach of Article 10 of the Convention;

2. unanimously, that there has been no breach of Article 14 taken together with Article 10;

3. unanimously, that it is not necessary to examine the question of a breach of Article 18;

4. unanimously, that the question of the application of Article 50 is not ready for decision;

[47] r. 50 (3), first sentence, read in conjunction with r. 48 (3).

accordingly,

(*a*) *reserves* the whole of the said question;

(*b*) *invites* those appearing before the Court to notify it, within three months from the delivery of this Judgment, of any settlement at which the Government and the applicants may have arrived;

(*c*) *reserves* the further procedure to be followed on this question.

The Joint Dissenting Opinion of Judges Wiarda, Cremona, Thor Vilhjàlmsson, Ryssdal, Ganshof van der Meersch, Fitzmaurice, Bindschedler-Robert, Liesch and Matscher and the Concurring Opinions of Judges Zekia, O'Donoghue and Evrigenis follow.

Joint Dissenting Opinion of Judges Wiarda, Cremona, Thor Vilhjàlmsson, Ryssdal, Ganshof van der Meersch, Sir Gerald Fitzmaurice, Bindschedler-Robert, Liesch and Matscher *

1. With respect, we are unable to share the opinion of the majority of our colleagues that 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.

2. The House of Lords restrained publication of the draft article in question because it considered that by publishing the article *The Sunday Times* would be committing a contempt of court.

It should be noted that it was clearly with a view to covering this institution, 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.

We would recall, as both the majority and the minority in the Commission acknowledged, that the general aim of the law on contempt of court is to ensure the due administration of justice.

This law involves, amongst other things, the possibility of restraining or punishing such conduct, in particular on the part of the press, as is likely to interfere with the course of justice whilst proceedings are still *sub judice*.

* Translated by the Court.

Whatever differences of opinion might exist as to the objectionable character of a publication, it is often considered that there should be a prohibition on the kind of publication that threatens to engender so-called ' trial by newspaper '.

The law of contempt is intended to prevent, in relation to *sub judice* litigation, the growth of an attitude which finds expression in a prejudgment arrived at without the benefit of the guarantees of impartiality afforded in judicial proceedings and which, consequently, brings about a climate of opinion liable to prejudice the due administration of justice. On the other hand, the aim of the law of contempt is not to make the judiciary immune from all criticism. Thus, it was hardly necessary to state in this connection, as does the Judgment, that ' the courts cannot operate in a vacuum ' (see para. 65 above). No one has ever thought of putting this in doubt.

Account must be taken of the above in the interpretation and application of the restriction made on freedom of expression for the purpose of maintaining ' the authority and impartiality of the judiciary ' within the meaning of Article 10 (2).

3. The Law Lords gave a variety of reasons why they considered the article should be banned.[1] For the majority of their Lordships, the principal reasons were, in our opinion, the following:

— the proposed article introduced into the press campaign on the thalidomide affair a wealth of facts concerning the issue as to whether Distillers had been guilty of negligence in the development, distribution and use of thalidomide;
— the article did so in a manner whereby the information given painted a picture clearly suggesting that Distillers had in fact been negligent;
— hence, through publication of the projected article, the issue of negligence, crucial for the outcome of the actions then pending between the parents of the deformed children and Distillers, would be prejudged, that is to say, judged by the press although the court of law hearing the case had not yet given a ruling attended by the guarantees afforded to the parties in judicial proceedings;
— such prejudgment by the press, which would inevitably provoke replies from the parties and give rise to the risk of a ' trial by newspaper ', is incompatible with the due administration of justice;
— the courts owe it to the parties to protect them from the prejudices of prejudgment and from the resultant necessity of having themselves to participate in the flurries of pre-trial publicity.

[1] See, *e.g.*, the speeches of Lords Reid, Morris, Diplock, and Cross in the House of Lords: paras. 29-31 and 33 of the Court's Judgment, above; the judgment of Lord Denning in the Court of Appeal: para. 25, above; the Phillimore report, para. 110; and the Green Paper, para. 11.

These reasons are consistent with the aim embodied in the guarantee of the due administration of justice, which guarantee is expressed in the Convention by the notion of the maintenance of ' the authority and impartiality of the judiciary '.

It must also be noted that, in so far as these reasons concerned the protection of the interests of the parties, they were in conformity with the aim of ' the protection of the rights of others ', an aim likewise provided for in Article 10 (2).

4. 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 authorities.

5. With reference to the question whether, in order to guarantee the due administration of justice, it was necessary to restrain publication of the contested article and of other articles of the same kind, it can be seen from the reasoning of the House of Lords that the Law Lords put this very question to themselves when applying the rules on contempt of court. Thus, Lord Reid stated: ' [The law on contempt of court] is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for that purpose '.[2] Similarly, Lord Cross of Chelsea made the following observation: ' When the alleged contempt consists in giving utterance either publicly or privately to opinions with regard to or connected with legal proceedings, whether civil or criminal, the law of contempt constitutes an interference with freedom of speech, and I agree with my noble and learned friend [Lord Reid] that we should be careful to see that the rules as to "contempt" do not inhibit freedom of speech more than is reasonably necessary to ensure that the administration of justice is not interfered with.'[3]

6. When the House of Lords addressed itself to the question of the necessity of the restraint, it did so with a view to applying the national law. When, on the other hand, our Court deals with this question, it does so with reference to Article 10 of the Convention, which pursues two objectives relevant for the present case. Those two objectives are ' freedom of expression ', guaranteed as a fundamental principle in a democratic society, and ' the authority and impartiality of the judiciary ', guaranteed in so far as their maintenance proves necessary in such a society. The Court must take account of these two objectives in connection with the respect of the principle of proportionality.

In order to ascertain whether in the circumstances it was necessary for freedom of expression, guaranteed by the first paragraph of Article 10 of the Convention, to be limited in the interests of justice,

[2] [1974] A.C. at p. 294.
[3] *Ibid.* at p. 322.

mentioned in the second paragraph of that Article, one should therefore weigh, on the one hand, the consequences for the freedom of the press of restraining the publication in question or similar publications and, on the other hand, the extent to which this publication could prejudice the due administration of justice in relation to the actions pending at the time. In the context of Article 10, this means that a balance must be sought between the exercise by the press of the right guaranteed to it under paragraph 1 and the necessity under paragraph 2 to impose a restriction on the exercise of this right in order to maintain ' the authority and impartiality of the judiciary '.[4] There is surely no need to recall the essential rôle that the judiciary play in English law in the protection of fundamental rights and freedoms.

7. The Court has already had the occasion, notably in HANDYSIDE *v.* U.K.,[5] to state the correct approach to the interpretation and application of the phrase ' necessary in a democratic society ', within the meaning of Article 10 (2), and to indicate both what its obligations are when faced with issues relating to the interpretation or application of this provision and the manner in which it means to perform those obligations.

The Court stated in that judgment that it was for the national authorities to make the initial assessment of the reality of the pressing social need implied in each case by the notion of necessity and that, accordingly, Article 10 (2) leaves to the Contracting States a margin of appreciation which ' is given both to the domestic legislator . . . and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force '.[6]

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.[7] For the purposes of such an evaluation—to be made with due care and in a reasonable manner, and which of necessity will be based on facts and circumstances prevailing in the country concerned and on the future development of those facts and circumstances—the national authorities are in principle better qualified than an international court.

8. Nevertheless, Article 10 (2) does not give the Contracting States an unlimited power of appreciation. The Court, which with the Commission is responsible for ensuring the observance of those States' engagements (Art. 19), is empowered to rule on whether a

[4] See, *mutatis mutandis*, KLASS *v.* FEDERAL REPUBLIC OF GERMANY (1978), 2 E.H.R.R. 214, para. 59 *in fine*.
[5] 1976, Series A, No. 24.
[6] *Ibid.*, p. 22, para. 48.
[7] See KLASS *v.* FEDERAL REPUBLIC OF GERMANY (1978), 2 E.H.R.R. at p. 232, para. 49.

'restriction' or a 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.[8] 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 occasioned for the interests listed in Article 10 (2); further and above all, it seeks to ensure that, in a society that means to remain democratic, the measures restricting freedom of expression are proportionate to the legitimate aim pursued.[9]

We wish to recall at this juncture that there can be no democratic society unless 'pluralism, tolerance and broad-mindedness'[10] 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,[11] and assures respect of the human person.

Accordingly, although it is in no way its task to take the place of the competent domestic courts, the Court must review under Article 10, so construed, the decisions delivered by those courts in the exercise of their power of appreciation.[12]

9. In the HANDYSIDE CASE, which concerned a publication whose prohibition was adjudged by the national courts to be necessary 'for the protection of morals', the Court considered that the competent domestic courts 'were entitled . . . to think' at the relevant time that this publication would have pernicious effects on the morals of the children or adolescents who would read it.

In the instant case, the Court has to examine whether the House of Lords was 'entitled to think' that publication of the article in question would have detrimental effects upon the due administration of justice in relation to actions pending before the courts at the relevant time.

For the majority of our colleagues, the national authorities' margin of appreciation as to issues concerning the maintenance of the authority of the judiciary should be narrower than the margin of appreciation which, according to the HANDYSIDE judgment, has to be allowed to them in relation to issues concerning the protection of morals. Our colleagues maintain that the notion of the 'authority of the judiciary' is far more objective than the notion of 'morals'; that the domestic law and practice of the Contracting States reveal a fairly broad measure of common ground as regards the former

[8] See HANDYSIDE *v.* U.K., Series A, No. 24, p. 23, para. 49.
[9] See *ibid.* and KLASS *v.* GERMANY, 2 E.H.R.R. at p. 214, para. 49.
[10] See HANDYSIDE *v.* U.K., Series A, No. 24, p. 23, para. 49.
[11] See KLASS *v.* GERMANY, 2 E.H.R.R. at p. 214, para. 55.
[12] See HANDYSIDE *v.* U.K., Series A, No. 24, p. 23, para. 50.

1979

The Sunday Times Case

European Court of Human Rights

Joint Dissenting Opinion

notion; and that this common ground is reflected in a number of provisions of the Convention, including Article 6, which have no equivalent as far as morals are concerned (see para. 59 above).

We are unable to share this view.

Even though there might exist a fairly broad measure of common ground between the Contracting States as to the substance of Article 6, 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 national circumstances and cannot be determined in a uniform way. It is, moreover, to be noted that the instant case does not bear upon a matter governed by Article 6, but is concerned with whether or not the publication of certain specific appraisals and statements regarding *sub judice* litigation could interfere with the due administration of justice. The due administration of justice depends, in addition to what is mentioned in Article 6, upon other rules of procedure and upon the satisfactory functioning of the judicial institutions.

The above reasoning is no less valid for acts or situations capable of prejudicing the proper functioning of the courts—acts or situations which can only be appraised at a given moment in the national context. It is thus for the national authorities to make the initial assessment of the danger threatening the authority of the judiciary and to judge what restrictive measures are necessary to deal with that danger. The relevant restrictions may vary according to the legal system and the traditions of the country in question. Within the limits reconcilable with the requirements of a democratic society, the State concerned is free to determine what method is most suitable for maintaining the authority of the judiciary.[13]

10. In the United Kingdom, the law of contempt constitutes one of the means designed to safeguard the proper functioning of the courts. As has been said above, the authors of the Convention had this law in mind when they introduced the notion of maintaining ' the authority and impartiality of the judiciary ' (see para. 2 above).

The task of ensuring that the law of contempt is observed falls to the domestic courts. In this respect, it would appear undeniable to us that the House of Lords is in principle better qualified than our Court 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 authority within the United Kingdom itself.

This cannot be taken to the point of allowing that every restriction on freedom of expression adjudged by the domestic courts to

[13] *Cf., mutatis mutandis,* THE BELGIAN LINGUISTIC CASE (MERITS) (1968), Series A, No. 6, pp. 34–35.

be necessary for observance of the law of contempt must also be considered necessary under the Convention.

While the domestic courts' assessment of the prejudicial consequences that a given publication might have on the due administration of justice in the United Kingdom should in principle be respected, it is nevertheless possible that the measures deemed necessary to avert such consequences overstep the bounds of what is ' necessary in a democratic society ' within the meaning of Article 10 (2) (see para. 7 above). The Court, in its consideration of the matter, must pay particular heed to this fundamental factor in the Convention system.

11. As emerges from the facts set out at paragraphs 11 to 14 of the Judgment, the banned draft article was one of a number of reports on the tragedy of deformed children, published at intervals since 1967 by *The Sunday Times* and other newspapers. These reports were intended partly to inform the public and partly, at least as far as *The Sunday Times* was concerned, to bring pressure on Distillers to improve their offer of compensation to the victims.

Although a certain number of actions brought by the parents against Distillers to recover damages were pending at the relevant time, this press campaign did not provoke any reaction leading to restrictions or penalties ordered by the courts. The sole injunction to be granted was that made in respect of the article—the subject of the present proceedings—which was communicated in draft by *The Sunday Times* to the Solicitor-General for the purpose of making sure that its publication would not constitute contempt of court. According to the House of Lords, which sat as the court of last instance, it was because of the very special character of this article —an article differing in this respect from the earlier reports—that its publication had to be deemed objectionable as a contempt of court. In the opinion of the Law Lords, this special character derived from the fact that the article mentioned a wealth of previously unpublished facts concerning the issue whether Distillers had been guilty of negligence. The article tended to review the evidence and did so in such a manner that conveyed an impression clearly suggesting that Distillers had been negligent. Thus, publication of the article was liable to give rise to ' prejudgment ' of this issue crucial to *sub judice* litigation. Such ' prejudgment ', which would inevitably provoke replies from Distillers and bring about a ' trial by newspaper ', would interfere with the normal course of proceedings pending before the courts.

According to certain of the Law Lords, the article would likewise have constituted an act of contempt on the separate ground that it brought pressure to bear on Distillers with a view to persuading them to settle the case and to refrain from relying on a defence available to them under the law. Several of their Lordships also

expressed the opinion that during the pendency of litigation, any ' prejudgment ' would be objectionable, quite apart from the concrete prejudice that such ' prejudgment ' could actually cause. We do not deem it necessary to examine these grounds because, in our view, they do not seem to have been decisive for the judgment. In the present case, the publication in question dealt especially with factual issues material to the determination of the charge of negligence and to the evidence adduced in support of that allegation. It is notably publications of this kind that constitute the risk which it was the object of the decision of the House of Lords to avoid.

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. The national judge is certainly better placed than the Court to determine whether, in a given instance, a publication concerning *sub judice* litigation involves a ' prejudgment ' and the risk of ' trial by newspaper '.

12. The applicants submitted before the Court that the actions brought by the parents against Distillers were ' dormant ' at the relevant time. In its report on the present case, the European Commission of Human Rights considered firstly that it was somewhat improbable that the great majority of the actions, then subject to negotiation, would eventuate in a court judgment and secondly that, as regards the actions brought by the parents who as a matter of principle were not willing to opt for settlement, no court decision could be anticipated in the foreseeable future.

Assessment of the state of the actions in question depended on what could be expected at the relevant time in relation to the development of the negotiations, on the probability of a settlement, on the eventuality that certain of the parents would accept a settlement and discontinue their actions whilst others would pursue them, and in general on what were the more or less immediate prospects either of a settlement or of judgment in court.

For the purposes of such an assessment, which covered a wealth of contemporary facts and points of procedure, the national judge must, in this respect also, be taken as being in principle in a better position than the Court.[14] In our view, the House of Lords was ' entitled to think ' that in the circumstances then obtaining the actions concerned could not be regarded as ' dormant '.

13. The considerations set out above lead us to conclude that the domestic courts' evaluation of the risk of seeing the article concerned interfere with the due administration of justice, as well as their assessment of the necessity of the measure to be taken within the context of the domestic law, must be regarded as reasonable.

[14] See HANDYSIDE *v.* U.K., Series A, No. 24, p. 22, para. 48.

As has already been pointed out (see paras. 8 and 10 above), it is nevertheless for the Court to determine whether, on the strength of this evaluation, the restraint on the publication was proportionate to the legitimate aim pursued and can be deemed necessary in a democratic society for the maintenance of the authority and impartiality of the judiciary, within the meaning of Article 10 (2).

This determination involves that the Court should take into account not only the interests of justice, which according to the domestic courts made it necessary to impose the restraint at the relevant time, but also the consequences of this measure for the freedom of the press, a freedom which figures amongst those guaranteed by the Convention as one of the essential foundations of a 'democratic society' and as one of the basic conditions for that society's progress and development.[15]

The object of the banned publication related to a tragedy affecting in the highest degree the general interest. As the Commission rightly pointed out, in such a situation assessment of negligence becomes a matter of public concern: the examination of the responsibilities involved and the process of informing the public undoubtedly constitute legitimate functions of the press.

However, it cannot be overlooked that the restriction on the freedom of the press consequent upon the decision of the House of Lords did not amount to a general restraint on discussing the thalidomide disaster. The scope of the restraint was limited as to both its subject-matter and its duration.

14. The subject-matter of the restraint imposed on *The Sunday Times* was an injunction against publishing articles that 'prejudged' the issue of negligence or dealt with the evidence relating to the actions then pending.

Freedom to publish other information or to pass judgments on other aspects of the case remained unaffected, and there was nothing to prevent *The Sunday Times* from continuing its publications while refraining from making any 'prejudgment' of the issue of negligence or from dealing with the evidence related thereto. In particular, this applied both to criticism of the English law of products liability and to appreciation of the moral side of the case. It would seem difficult to sustain the view expressed in the Judgment that this limitation is artificial (see para. 66 of the Judgment).

Moreover, the suggestion contained in the Judgment to the effect that the publication of *The Sunday Times* article was needed as being the only way in which the families of the victims could be fully informed of the facts seems to us incorrect, since it appears that they were advised by a firm of solicitors who must have been aware of most of what was essential. Indeed, there is good reason to

[15] See, *mutatis mutandis*, *ibid.*, p. 23, para. 49.

1979

The Sunday Times Case

European Court of Human Rights

Joint Dissenting Opinion

think that *The Sunday Times* itself obtained its information from these solicitors (see para. 16 of the Judgment).

15. As regards the duration of the restraint, it should be noted that the sole aim of the injunction granted was to ensure that for a certain time premature publications should not be able to prejudice the due administration of justice in relation to specific litigation. According to the House of Lords, the necessity to restrain publication of the article stemmed from the state, at the time of its decision, of the actions pending. Their Lordships foresaw the possibility that the situation might change, that, even before the proceedings had been finally terminated, the balance between the interests of justice and those of the freedom of the press might shift, and that the injunction might be discharged.

In this connection, the statement of Lord Reid is instructive:

> The purpose of the law is not to prevent publication of such material but to postpone it. The information set before us gives us hope that the general lines of a settlement of the whole of this unfortunate controversy may soon emerge. It should then be possible to permit this material to be published. But if things drag on indefinitely so that there is no early prospect either of a settlement or of a trial in court then I think that there will have to be a reassessment of the public interest in a unique situation.[16]

Note should also be taken of the observation by Lord Cross of Chelsea that ' the respondents [*The Sunday Times*] will be at liberty to apply to have [the injunction] discharged if they consider that in the light of the facts then existing they can persuade the court that there is no longer any warrant for continuing it '.[17]

It does not appear from the evidence that *The Sunday Times* made any such application before the injunction was actually discharged at the request of the Attorney-General on the ground that the public interest no longer required the restraint. In fact, the situation regarding the thalidomide affair had changed by then. Following the approval of the settlement between the majority of the parents and Distillers, the injunction had remained in force only in relation to the few extant actions, but it had become clear after a certain time that these actions were no longer being actively pursued.

We have no sufficient reason to suppose that the situation would have justified the injunction being discharged earlier. As has already been pointed out, it does not seem that the applicants themselves sought a decision to this effect.

16. In the light of the considerations set out above, we conclude that the interference with freedom of expression, adjudged by the national courts in the instant case to be necessary according to the law of contempt in the interests of the due administration of justice,

[16] [1974] A.C. at p. 301.
[17] *Ibid.* at p. 325.

did not overstep the limits of what might be deemed necessary in a democratic society for the maintenance of ' the authority and impartiality of the judiciary ' within the meaning of Article 10 (2).

On the basis of the material before the Court, we consider that no infringement of the requirements of Article 10 has been established.

Concurring Opinion of Judge Zekia

First part

[1] In the instant case, in interpreting and applying Article 10 (1) and (2) of the Convention to the intended publication of the proposed article of *The Sunday Times* relating to the plight of the thalidomide drug victims, we have to lay emphasis on the object and scope of the relevant provisions contained in the Convention.

[2] Full account of the facts was given before us. Relevant documents were produced. Reference was made to the relevant legal points and judicial decisions. The views of the parties participating in the proceedings were exhaustively put forward in their memorials and counter memorials as well as in their submissions in the oral hearings. The Court had this advantage before embarking on the discharge of its judicial task.

[3] The basic issues under Article 10 which have to be determined are two. I propose to formulate them in two questions.

Question 1. Was the restriction, imposed by an injunction, on the right to freedom to publish the draft article in *The Sunday Times* ' prescribed by law ' within the ambit and object of the Convention in general and of Article 10 in particular?

Question 2. Was such restriction ' necessary ', as required by Article 10 (2), in a democratic society for maintaining the authority and impartiality of the judiciary and/or for protecting the reputation or rights of others?

[4] An answer in the affirmative to question 1 is a *sine qua non* for a possible similar answer to question 2.

Question 1

[5] My answer to question 1 is in the negative. I proceed to give as briefly as possible my reasons.

[6] (1) Article 1 of the Convention reads: ' The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' In Section I, Article 10 (1) reads: ' 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. . . .'

[7] In ascertaining the meaning, scope and object of restrictions to be *prescribed by law* occurring in paragraph 2 of the same Article

10, one must not lose sight of the fact that the right to freedom of expression accorded to everyone by the previous paragraph has to be reasonably secured, enjoyed or exercised. Both paragraphs are interdependent. Any restriction affecting the exercise of the right to freedom of expression must be reasonably foreseeable or predictable. You cannot enjoy or exercise the right to freedom of expression if the enjoyment of such right is made conditional and subject to a law or a rule or principle abounding in uncertainties. This would be tantamount to an undue restriction, even to a denial, of such freedom of expression. I am of the opinion therefore that the phrase *prescribed by law* or *prévues par la loi* in French means a law imposing restrictions which is reasonably ascertainable. The enactment might be made by statute or by common law consistently established.

[8] I am in agreement with the applicants that the branch of the common law of contempt of court dealing with publications relating to pending civil proceedings is not prescribed by law within the framework and object of paragraphs 1 and 2 of Article 10 of the Convention. I note that the Commission in its report merely proceeded on the assumption that the restriction imposed on the applicants was prescribed by law and that doubt was cast on this assumption by the Commission's Principal Delegate during the oral hearings.

[9] (2) Whether or not a particular publication in the press and other mass media amounts to a contempt of court in relation to pending civil proceedings depends on the criteria or test to be applied. There are a number of criteria and kinds of tests available. There is no settled or uniform practice as to which criterion is to be adopted in a given case and the result may differ according to the test applied.

[10] (3) The tests and criteria applied in the enforcement of the law of contempt against publications in the press are so varied and subjective in nature that it is very difficult to foresee in a particular case what test is going to be applied and with what result.

[11] A glaring example of the uncertainty and the unsatisfactory state of the law of contempt touching pending civil proceedings *vis-à-vis* press publications is to be found in the conflicting opinions expressed by the Law Lords on *The Sunday Times* article of 24 September 1972 about the thalidomide tragedy.

[12] According to Lord Diplock and Lord Simon, the offence of contempt of court was committed, whereas Lord Reid and Lord Cross held, on the contrary, that there was no contempt of court.

[13] Disputable legal points might arise even in the interpretation of a statute law as well as in the case of a rule of common law. But the position is not the same when we are dealing with a branch of the common law—contempt of court—which is not established to

the extent of being reasonably regarded as a settled part of the common law. We have a number of principles referring to such a branch of the law. These principles might be useful to interpret an existing law but not to substitute a law which is not enacted or established at common law. But I doubt very much whether the principles alone put together would amount to a law.

[14] (4) Eminent judges of high standing in England describe the branch of the common law that concerns contempt of court as being uncertain, inconsistent and lacking the clarity badly needed. Lord Reid in his judgment in the present case in the House of Lords stated: 'I cannot disagree with a statement in a recent report of Justice on *The Law and the Press* (1965) that the main objection to the existing law of contempt is its uncertainty.' [1]

[15] Lord Denning M.R., in giving evidence before the Phillimore Committee in connection with the starting point of pending civil proceedings affecting publications in the press, stated: 'I am all in favour of it being clarified. At present the press hesitate when they ought to make comment in the public interest. The reason is that they are apprenhensive because the law is so uncertain. I think they ought to know where they stand.' [2]

[16] Lord Salmon, when asked about the point at which contempt should start to apply in civil proceedings, stated: 'Nowhere, because I would not have any contempt. I say never. Certainly never in a judge-alone case. I think the law of libel takes care of anything you may say about a civil case, and if a judge is going to be affected by what is written or said, he is not fit to be a judge.' [3]

[17] In Part V of the Phillimore Committee report, dealing with the summary of conclusions and recommendations, it is stated: '(4) The law as it stands contains uncertainties which impede and restrict reasonable freedom of speech. . . . (5) One area of uncertainty concerns the period of operation of the law of contempt, as to whether publications are at risk when proceedings are imminent and, if so, what period that expression covers.' [4]

[18] At what stage of civil proceedings the subject matter in dispute is to be considered as *sub judice* or the trial of the matters in dispute is to be considered as imminent are questions which cannot be answered with accuracy owing to lack of clarity in the law of contempt.

[19] (5) It has to be borne in mind that the contempt of court under consideration is a criminal offence, a misdemeanour which entails imprisonment and fine and/or an order to give security for good behaviour. This being so, the fundamental principle requiring

[1] [1974] A.C. at p. 294.
[2] See Part V, p. 98.
[3] *Ibid.*
[4] *Ibid.*, p. 92.

1979

The Sunday Times Case

European Court of Human Rights

Concurring Opinion (Judge Zekia)

clear and unambiguous definition of an offence or crime applies also to the offence of contempt of court under review. The summary procedure adopted in contempt of court cases creates another difficulty, namely, to what extent this procedure is compatible with Article 6 of the Convention.

[20] (6) The right of the press to freedom of expression is undoubtedly one of the fundamental characteristics of a democratic society and indispensable for maintaining freedom and democracy in a country. Under Article 1 of the Convention, the High Contracting Parties undertook to *secure to everyone* within their jurisdiction the rights enumerated in Section I of the Convention, and the liberty of the press is covered in the said Section. The exercise and enjoyment of this right cannot reasonably be attained or achieved if they are handicapped and restricted by legal rules or principles which are not predictable or ascertainable even by a qualified lawyer.

[21] The prejudgment principle evolved by the House of Lords in this case does not solve the problem we face under Article 10 of the Convention. There are two reasons:

[22] (*a*) Even if we assume that the House of Lords settled the law, the material date for ascertaining whether the branch of the common law that concerns contempt of court was *prescribed by law* or not is the date *The Sunday Times* draft article was put before the Divisional Court and not before the Law Lords. In the oral submissions made by the parties during the hearings, reference was made to the authority of the House of Lords in dealing with the case as a final court of appeal. According to the applicants' submission, the Law Lords, by their judgment in the present case, gave to the branch of the law of contempt of court concerning pending civil proceedings a definition which was quite novel. The respondent Government did not agree.

[23] It is not the business of this Court to enquire whether the House of Lords, sitting as a final court of the land, has the power to amend, supplement, consolidate, shape or improve the common law according to the demands of the time and circumstances.

[24] It is not admitted that the Law Lords make laws but claimed that they simply declare the law. However, the applicants' counsel in his submission said that this was a fiction and that the House was making new law.

[25] It may, however, become our business to find out whether the House of Lords, by their judgment in the present case, have amended or supplemented the branch of the common law of contempt of court we are dealing with. This is because, if the judgment in effect amounted to an amendment or supplementing of such law, then Article 7 of the Convention becomes relevant for consideration. Personally, I incline to the view expressed by the applicants, but I am content to refer to this aspect of the case as

another source of uncertainly in the branch of contempt of court under review and nothing more.

[26] (*b*) The prejudgment principle does not provide the press with a reasonably safe guide for their publications. The absolute rule indicated by Lord Cross in applying the prejudgment test—not taking into account whether a real risk of interference with or prejudice to the course of justice exists—inhibits innocuous publications dealing incidentally with issues and evidence in pending cases in order to avoid a gradual slide towards trial by newspapers or other mass media. This appears to me to be a very restrictive absolute rule which is difficult to reconcile with the liberty of the press. In a matter of public concern such as the national tragedy of thalidomide, it would be very difficult to avoid, in one way or another, reference to the issues and evidence involved in a pending case.

[27] The diversity of the criteria adopted in this case by Lord Chief Justice Widgery in the Divisional Court and Lord Denning and his colleagues in the Court of Appeal and the criterion evolved by the majority of the House of Lords illustrate the unsatisfactory and unsettled state of the rules or principles of contempt of court dealing with press publications in pending civil matters. This is especially so when such publications are made in good faith without misrepresentation and are not calculated to interfere with or prejudice the course of justice and, furthermore, when factual accuracy is claimed and the subject matter is of public concern.

Conclusion as to question 1

[28] In my view, the branch of the common law that concerns contempt of court dealing with publications in the press and other media in connection with pending civil proceedings was—at any rate on the material date—uncertain and unsettled—and unascertainable even by a qualified lawyer—to such an extent that it could not be considered as a prescribed law within the purview and object of Articles 1 and 10 (1) and (2) of the Convention. The phrase ' prescribed by law ' in its context does not simply mean a restriction ' authorised by law ' but necessarily means a law that is reasonably comprehensive in describing the conditions for the imposition of restrictions on the rights and freedoms contained in Article 10 (1). As we said earlier, the right to freedom of the press would be drastically affected unless pressmen, with a reasonable degree of care and legal advice, can inform and warn themselves of the risks and pitfalls lying ahead owing to the uncertainties of contempt of court.

Second part

Question 2

[29] Was the injunction restraining *The Sunday Times* from publishing the draft article ' necessary ' in a democratic society for

maintaining the authority and impartiality of the judiciary and/or for protecting the rights of others?

[30] Independently of any answer to question 1, my answer to this question is also a negative one. I have, however, less to say on the second issue because I respectfully associate myself with the main reasons enunciated in the majority Judgment of the Court.

[31] As I have already stated, the right of the press to freedom of expression is indispensable in a democratic society; equally, it is of paramount importance to maintain the authority and the impartiality of the law courts and to safeguard the rights of the parties who have recourse to such courts. On this aspect, I can usefully quote from the judgment of Lord Morris in the House of Lords:

> In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted that their authority wanes and is supplanted. But as the purpose and existence of courts of law is to preserve freedom within the law for all well disposed members of the community, it is manifest that the courts must never impose any limitations upon free speech or free discussion or free criticism beyond those which are absolutely necessary.[5]

[32] While I am in agreement with the above statements of Lord Morris, in applying the directions contained therein to the facts of the instant case I, as a member of this Court, arrive, however, at a different conclusion.

[33] The criteria of the European Court of Human Rights in weighing the necessity required for imposing restrictions on the rights to freedoms enumerated in Article 10 of the Convention might differ at times from those adopted by national courts.

[34] Undoubtedly, the principle of margin of appreciation already embodied in the jurisprudence of this Court has to be borne in mind and applied in favour of the national judicial system. But the gap between the two systems and the standards adopted for the exercise of the rights to freedoms covered by the Convention might be too wide to be bridged by the aforesaid principle.

[35] Whenever it considers it reasonable and feasible, this Court should work out a uniform international European standard for the enjoyment of the rights and freedoms included in the Convention. This could be done gradually when the occasion arises and after giving the appropriate full consideration to national legal systems.

[36] The Preamble to the European Convention on Human Rights and Fundamental Freedoms contains references to this end. It states that the Governments signatory thereto:

[5] [1974] A.C. at p. 302 (emphasis added).

Considering that [the Universal Declaration of Human Rights] aims at securing the universal and effective recognition and observance of the Rights therein declared;

. . .

Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved as the Government of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration;

Have agreed as follows . . .

— then follow the articles of the Convention.

[37] In the legal systems of those Continental States which are the original signatories of the Convention, there is, as far as my information and knowledge go, nothing similar to the branch of the common law of contempt of court—with its summary procedure—touching publications which refer to pending civil proceedings. Notwithstanding this fact, these countries manage to maintain the authority and impartiality of their judiciary. Am I to accept any submission to the effect that conditions in England are different and that they have to keep alive unaltered the common law of contempt of court under discussion, which is over two centuries old, in order to safeguard the authority and impartiality of the judiciary? My knowledge and experience gained from long years of association with English judges and courts prompt me to say unreservedly that the standard of the judiciary in England is too high to be influenced by any publication in the press. I confess I may be considered as biased in making this statement. In the present case, we are in all probability only concerned with a professional judge. In this connection, I associate myself with the remarks made by Lord Salmon quoted above.

[38] Undoubtedly, the supreme judicial authority in England is fully entitled to judge about the legal measures to be taken in order to secure the independence and the authority of the courts and rights of the parties and to keep the streams of justice clear and pure, but, in the light of the criteria and tests applied, I feel unable, as a judge of the European Court, to agree that the grant of an injunction to restrain publication of the draft *Sunday Times* article was necessary under Article 10 (2) of the Convention.

[39] Publication of the proposed article was not intended or calculated to interfere with or prejudice the course of justice or the rights of the parties involved. The article was admittedly written for publication in good faith and with a proper motive. Factual

accuracy of the facts stated therein was claimed by the publisher and this was not in effect disputed. The subject-matter of the article was the thalidomide drug victims. The magnitude of their plight was amply described as a national tragedy. The imputation of negligence to Distillers for not properly testing the drug before marketing it was made in the article and, in fact, the most objectionable part of the article seems to be this aspect. However, discussions and comments relating to the issue of negligence were directly or indirectly ventilated in the press for ten years and had recently been commented on in Parliament, which did not treat the issues involved as *sub judice*. I do not therefore accept that Distillers would have been improperly brought under pressure to desist from their defence if the proceedings had come on for trial. If there had been a proper testing of the drug before marketing, they could easily have proved it and rebutted the allegation of negligence.

[40] Whether the trial in the pending proceedings was imminent or not, having regard to the long inactivity in the proceedings, is a matter open to serious doubts.

[41] Measures for the prevention of a slide towards trial by newspaper should no doubt be taken when necessity arises. But, in the absence of evidence of an existing trend towards such a slide, I would not agree to be guided by abstract possibilities or to act for the sake of a principle when no sufficient grounds exist to make its application expedient. Furthermore, as is stated in the summary of Lord Denning's judgment in the Court of Appeal (para. 25 of the Court's Judgement, above): '"Trial by newspaper" must not be allowed. However, the public interest in a matter of national concern had to be balanced against the interest of the parties in a fair trial or settlement; in the present case the public interest in discussion outweighed the potential prejudice to a party.... Even in September 1972, the proposed article would not have amounted to contempt: it was fair comment on a matter of public interest. . . .' If the intended publication of the article in question was likely to create a real and substantial risk of interference with or prejudice to the administration of justice, my answer to question 2 would have been in the affirmative.

[42] No doubt one has, when circumstances so require, to strike a balance between the freedom of the press and other mass media and maintaining the authority and impartiality of the judiciary. Both are fundamental organs in a democratic society and vital for the public interest. Any clash between them should be avoided. The primary duty to avoid such a clash and keep the balance lies with the judiciary and on the criteria to be indicated by law and enforced by the courts. This is why I lay emphasis on the tests applied for the enforcement of the branch of common law of contempt of court that concerns the press.

[43] I may be repeating myself in saying that this Court should not hesitate to lay down when the occasion requires a set of principles to serve as guidlines and a common denominator in the observance of the freedoms and the permissible limitations on such freedoms within the terms and ambit of the Convention.

[44] I cannot restrain myself from stating that the traditional standard of the newspaper publishers in England, in discharging their duties and responsibilities towards the public and the national authorities and in imparting accurate information to their readers, can safely by compared with that of their Continental colleagues. Therefore, it is difficult to understand the expediency of imposing a greater degree of limitation on the liberty of the press in England by keeping an anachronistic branch of the law of contempt alive.

[45] Again going out of my way, I venture to take the liberty and conclude my separate opinion with the following remarks:

[46] The birthplace of the Magna Carta, the Bill of Rights and the basic principles of justice—embodied in the Anglo-Saxon judicial system and the substantial part of them already incorporated into the articles of the European Convention on Human Rights and Fundamental Freedoms—in my humble opinion can easily afford either to do away altogether with the branch of the common law of contempt of court under review or to amend this part of the law of contempt of court on the lines indicated in the Phillimore Committee report.

Concurring Opinion of Judge O'Donoghue

I agree with the conclusions of the Separate Opinion of Judge Zekia and with his reasoning on questions 1 and 2.

Concurring Opinion of Judge Evrigenis *

[1] Although I voted with the majority of the Court on all the items in the operative provisions of the Judgment, I consider that the interference, as grounded in law by the decision of the House of Lords, could not be regarded as 'prescribed by law' within the meaning of the Convention.

[2] The restrictions on the right to freedom of expression which are provided for in paragraph 2 of Article 10 constitute exceptions to the exercise of that right. As such, they not only must be narrowly interpreted,[1] but also presuppose a definition in domestic law which is sufficiently clear and unambiguous, thus permitting anyone exercising his freedom of expression to act with reasonable certainty as to the consequences in law of his conduct.

* Translated by the Court.

[1] KLASS *v.* GERMANY, 2 E.H.R.R. at p. 214, para. 42, cited at para. 65 of the Court's Judgment, above.

1979
—
The Sunday Times Case
—
European Court of Human Rights
—
Concurring Opinion (Judge Evrigenis)

[3] It would be difficult to affirm that the action taken against the applicants fulfilled this condition. In the United Kingdom, the uncertainty of the law of contempt of court often gives rise to criticism in literature and judicial decisions, as well as in the reports of various commissions of enquiry or reform; [2] this feature was highlighted by the application of that law by the House of Lords in the present case, through the ' prejudgment principle ' (see the direction issued by the House following its judgment). It is significant, first, that the majority of the Commission hesitated to give a direct ruling on the merits of this question [3] and, secondly, that the references appearing in the Court's Judgment in support of the view that the interference based on the decision of the House of Lords was ' prescribed by law ' are not very convincing. The Court's Judgment cites, in particular, two precedents (see paras. 51 and 52). The first, VINE PRODUCTS LTD. *v.* GREEN,[4] which was based on the ' pressure principle ', was criticised several times by the Law Lords in the context of the present case. The second, HUNT *v.* CLARKE,[5] does not appear to have motivated the decision of the House of Lords when defining the ' prejudgment principle '. Again, it is striking that the latter principle was not the legal basis for any of the decisions rendered in this case by the other English courts, including the decision of the Divisional Court which in 1976, three years after the judgment of the House of Lords, discharged the injunction. If, consequently, one has to conclude that the principle justifying the interference under domestic law appears new,[6] its implementation by the highest national court proves to be incompatible with the requirements of Article 10 (2) of the Convention.

[4] Of course, no one can disregard the special features of a domestic legal system in whose formation case law is traditionally called upon to play a prominent rôle; neither can anyone lose sight of the fact that the delimitation of the restrictions mentioned in Article 10 (2) of the Convention employs indeterminate concepts which do not always sit well with the existence of legal rules of conduct that are quite precise, certain and foreseeable in their identification by the judge. Nevertheless, there was an obligation on the Court to be more prudent before adopting a generous interpretation of the phrase ' prescribed by law '; the consequence of such an interpretation would be to weaken the principle of the rule of law and to expose a fundamental freedom, which is vital to the democratic society envisaged by the drafters of the Convention, to the risk of interferences that cannot be reconciled with the letter and spirit of that instrument.

[2] See Phillimore report, para. 216 (4)-(5).
[3] Commission's Report, para. 205.
[4] [1966] Ch. 484.
[5] (1889) 58 L.J.Q.B. 490.
[6] See C. J. Miller (1974) 37 M.L.R. 98.