EXPRESSION - FREEDOM OF - MEDIA

III. JURISPRUDENCE

ICCPR

- *S. E. T. A v. Finland* (R.14/61), ICCPR, A/37/40 (2 April 1982) 161 at paras. 2.1-2.5, 9.1-9.3, 10.1-10.4, 11 and Individual Opinion by Mr. Torkel Opsahl, 166.

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2.1 The facts of the five cases are essentially undisputed. The parties only disagree as to their evaluation. According to the contentions of the authors of the communication, Finnish authorities, including organs of the State-controlled Finnish Broadcasting Company (FBC), have interfered with their right of freedom of expression and information, as laid down in article 19 of the Covenant, by imposing sanctions against participants in, or censuring, radio and TV programmes dealing with sanctions against participants in, or censuring, radio and TV programmes dealing with homosexuality. At the heart of the dispute is paragraph 9 of chapter 20 of the Finnish Penal Code which sets forth the following:

> "If someone publicly engages in an act violating sexual morality, thereby giving offense, he shall be sentenced for publicly violating sexual morality to imprisonment for at most six months or to a fine."
>
> "Anyone who publicly encourages indecent behaviour between persons of the same sex shall be sentenced for encouragement to indecent behaviour between members of the same sex as decreed in subsection 1."

2.2 In September 1976, Leo Rafael Hertzberg, a lawyer, was interviewed for the purposes of a radio programme entitled "*Arbetsmarknadens uteslutna*" ("The Outcasts of the Labour Market"). In the interview, he asserted on the strength of his knowledge as an expert that there exists job discrimination in Finland on the ground of sexual orientation, in particular, to the detriment of homosexuals. Because of this programme criminal charges were brought against the editor (not Mr. Hertzberg) before the Helsinki Municipal Court and, subsequently, before the Helsinki Court of Appeals. Although the editor was acquitted, Mr. Hertzberg claims that through those penal proceedings his right to seek, receive and impart information was curtailed. In his view, the Court of Appeals (decision No. 2825 of 27 February 1979) has exceeded the limits of reasonable interpretation by construing paragraph 9 (2) of chapter 20 of the Penal Code as implying that the mere "praising of homosexual relationships" constituted an offence under that provision.

2.3 Astrid Nikula prepared a radio programme conceived as part of a young listeners series in December 1978. This programme included a review of the book, "*Pojkar skall inte grata*" ("Boys Must Not Cry") and an interview with a homosexual about the identity of a young

homosexual and about life as a homosexual in Finland. When it was ready for broadcasting, it was censored by the responsible director of FBC against the opposition of the editorial team of the series. The author claims that no remedy against the censorship decision was available to her.

2.4 Uit Mansson participated in a discussion about the situation of the young homosexual depicted in Mrs. Nikula's production. The discussion was designed to form part of the broadcast. Like Mrs. Nikula, the author states that no remedy was available to him to challenge the censorship decision.

2.5 In 1978, Marko and Tuovi Putkonen, together with a third person, prepared a TV series on different marginal groups of society such as Jews, gypsies and homosexuals. Their main intention was to provide factual information and thereby to remove prejudices against those groups. The responsible programme director, however, ordered that all references to homosexuals be cut from the production, indicating that its transmission in full would entail legal action against FBC under paragraph 9 (2) of chapter 20 of the Penal Code.

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9.1 In considering the merits of the communication, the Human Rights Committee starts from the premise that the State party is responsible for actions of the Finnish Broadcasting Company (FBC), in which the State holds a dominant stake (90 per cent) and which is placed under specific government control.

9.2 The Committee wishes further to point out that it is not called upon to review the interpretation of paragraph 9 (2) of chapter 20 of the Finnish Penal Code. The authors of the communication have advanced no valid argument which could indicate that the construction placed upon this provision by the Finnish tribunals was not made *bona fide*. Accordingly, the Committee's task is confined to clarifying whether the restrictions applied against the alleged victims, irrespective of the scope of penal prohibitions under Finnish penal law, disclose a breach of any of the rights under the Covenant.

9.3 In addition, the Committee wishes to stress that it has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant, although such legislation may, in particular circumstances, produce adverse effects which directly affect the individual, making him thus a victim in the sense contemplated by articles 1 and 2 of the Optional Protocol. The Committee refers in this connexion to its earlier views on communication No. R.9/35 (*S. Aumeeruddy-Cziffra and 19 other Mauritian Women v. Mauritius*).

10.1 Concerning Leo Rafael Hertzberg, the Committee observes that he cannot validly claim to be a victim or a breach by the State party of his right under article 19 (2) of the Covenant.

The programme in which he took part was actually broadcast in 1976. No sanctions were imposed against him. Nor has the author claimed that the programme restrictions as applied by FBC would in any way personally affect him. The sole fact that the author takes a personal interest in the dissemination of information about homosexuality does not make him a victim in the sense required by the Optional Protocol.

10.2 With regard to the two censored programmes of Mrs. Nikula and of Marko and Tuovi Putkonen, the Committee accepts the contention of the authors that their rights under article 19 (2) of the Covenant have been restricted. While not every individual can be deemed to hold a right to express himself through a medium like TV, whose available time is limited, the situation may be different when a programme has been produced for transmission within the framework of a broadcasting organization with the general approval of the responsible authorities. On the other hand, article 19 (3) permits certain restrictions on the exercise of the rights protected by article 19 (2), as are provided by law and are necessary for the protection of public order or of public health or morals. In the context of the present communication, the Finnish Government has specifically invoked public morals as justifying the actions complained of. The Committee has considered whether, in order to assess the necessity of those actions, it should invite the parties to submit the full text of the censored programmes. In fact, only on the basis of these texts could it be possible to determine whether the censored programmes were mainly or exclusively made up of factual information about issues related to homosexuality.

10.3 The Committee feels, however, that the information before it is sufficient to formulate its views on the communication. It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.

10.4 The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. According to article 19 (3), the exercise of the rights provided for in article 19 (2) carries with it special duties and responsibilities for those organs. As far as radio and TV programmes are concerned, the audience cannot be controlled, in particular, harmful effects on minors cannot be excluded.

11. Accordingly, the Human Rights Committee is of the view that there has been no violation of the rights of the authors of the communication under article 19 (2) of the Covenant.

Individual Opinion by Mr. Torkel Opsahl

Although I agree with the conclusion of the Committee, I wish to clarify certain points.

This conclusion prejudges neither the right to be different and live accordingly, protected by article 17 of the Covenant, nor the right to have general freedom of expression in this respect, protected by article 19. Under article 19 (2) and subject to article 19 (3), everyone must in principle have the right to impart information and ideas - positive or negative - about homosexuality and discuss any problem relating to it freely, through any media of his choice and on his own responsibility.

Moreover, in my view the conception and contents of "public morals" referred to in article 19 (3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority. Therefore, even if such laws as paragraph 9 (2) of chapter 20 of the Finnish Penal Code may reflect prevailing moral conceptions, this is in itself not sufficient to justify it under article 19 (3). It must also be shown that the application of the restriction is "necessary".

However, as the Committee has noted, this law has not been directly applied to any of the alleged victims. The question remains whether they have been more indirectly affected by it in a way which can be said to interfere with their freedom of expression, and if so, whether the grounds were justifiable.

It is clear that nobody - and in particular no State - has any duty under the Covenant to promote publicity for information and ideas of all kinds. Access to media operated by others is always and necessarily more limited than the general freedom of expression. It follows that such access may be controlled on grounds which do not have to be justified under article 19 (3).

It is true that self-imposed restrictions on publishing, or the internal programme policy of the media, may threaten the spirit of freedom of expression. Nevertheless, it is a matter of common sense that such decisions either entirely escape control by the Committee or must be accepted to a larger extent than externally imposed restrictions such as enforcement of criminal law or official censorship, neither of which took place in the present case. Not even media controlled by the State can under the Covenant be under an obligation to publish all that may be published. It is not possible to apply the criteria of article 19 (3) to self-imposed restrictions. Quite apart from the "public morals' issue, one cannot require that they shall be only such as are "provided by law and are necessary" for the particular purpose. Therefore I prefer not to express any opinion on the possible reasons for the decisions complained of in the present case.

The role of mass media in public debate depends on the relationship between journalists and their superiors who decide what to publish. I agree with the authors of the communication

that the freedom of journalists is important, but the issues arising here can only partly be examined under article 19 of the Covenant.

The following members of the Committee associated themselves with the individual opinion submitted by Mr. Opsahl: Mr. Rajsoomer Lallah, Mr. Walter Surma Tarnopolsky.

- *Gauthier v. Canada* (633/1995), ICCPR, A/54/40 vol. II (7 April 1999) 93 (CCPR/C/65/D/633/1995) at paras. 2.1, 13.3-13.6, 15 and Individual Opinion by Rajsoomer Lallah (partly dissenting), 110.

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2.1 The author is publisher of the National Capital News, a newspaper founded in 1982. The author applied for membership in the Parliamentary Press Gallery, a private association that administers the accreditation for access to the precincts of Parliament. He was provided with a temporary pass that gave only limited privileges. Repeated requests for equal access on the same terms as other reporters and publishers were denied.
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13.3 The issue before the Committee is...whether the restriction of the author's access to the press facilities in Parliament amounts to a violation of his right under article 19 of the Covenant, to seek, receive and impart information.

13.4 In this connection, the Committee also refers to the right to take part in the conduct of public affairs, as laid down in article 25 of the Covenant, and in particular to General Comment No. 25 (57) which reads in part: "In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion." 36/ Read together with article 19, this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members. The Committee recognizes, however, that such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access. However, any restrictions imposed by the State party must be compatible with the provisions of the Covenant.

13.5 In the present case, the State party has restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament, to those media representatives who are members of a private organization, the Canadian Press Gallery. The author has been denied active (i.e. full) membership of the Press Gallery. On occasion he has held temporary membership which has given him access

to some but not all facilities of the organization. When he does not hold at least temporary membership he does not have access to the media facilities nor can he take notes of Parliamentary proceedings. The Committee notes that the State party has claimed that the author does not suffer any significant disadvantage because of technological advances which make information about Parliamentary proceedings readily available to the public. The State party argues that he can report on proceedings by relying on broadcasting services, or by observing the proceedings. In view of the importance of access to information about the democratic process, however, the Committee does not accept the State party's argument and is of the opinion that the author's exclusion constitutes a restriction of his right guaranteed under paragraph 2 of article 19 to have access to information. The question is whether or not this restriction is justified under paragraph 3 of article 19. The restriction is, arguably, imposed by law, in that the exclusion of persons from the precinct of Parliament or any part thereof, under the authority of the Speaker, follows from the law of parliamentary privilege.

13.6 The State party argues that the restrictions are justified to achieve a balance between the right to freedom of expression and the need to ensure both the effective and dignified operation of Parliament and the safety and security of its members, and that the State party is in the best position to assess the risks and needs involved. As indicated above, the Committee agrees that the protection of Parliamentary procedure can be seen as a legitimate goal of public order and an accreditation system can thus be a justified means of achieving this goal. However, since the accreditation system operates as a restriction of article 19 rights, its operation and application must be shown as necessary and proportionate to the goal in question and not arbitrary. The Committee does not accept that this is a matter exclusively for the State to determine. The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members. The denial of access to the author to the press facilities of Parliament for not being a member of the Canadian Press Gallery Association constitutes therefore a violation of article 19 (2) of the Covenant.

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15. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Gauthier with an effective remedy including an independent review of his application to have access to the press facilities in Parliament. The State party is under an obligation to take measures to prevent similar violations in the future.

Individual Opinion by Rajsoomer Lallah

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It seems to me that articles 22 and 26 are, in the particular circumstances of this communication, particularly relevant in deciding whether there has been a violation of the author's right under article 19 (2) of the Covenant to seek, receive and impart information, in relation to Parliamentary proceedings which are matters of interest to the general public. It is to be noted that access to parliamentary press facilities in this regard is given exclusively to members of an association which has so to say a monopoly over access to those facilities.

Freedom of association under article 22 inherently includes freedom not to associate. To impose membership of an association on the author as a condition precedent to access to Parliamentary press facilities in effect means that the author is compelled to seek membership of the association, which may or may not accept the author as a member, unless he decides to forego the full enjoyment of his rights under article 19 (2) of the Covenant.

The rights of the author, in respect of equality of treatment guaranteed under article 26, have been violated in the sense that the State party has, in effect, delegated its control over the provision of equal press facilities within public premises to a private association which may, for reasons of its own and not open to judicial control, admit or not admit a journalist like the author as a member. The delegation of this control by the State party exclusively to a private association generates inequality of treatment as between members of the association and other journalists who are not members.

I conclude, therefore, that the author has been a victim of a violation of his rights under article 19 (2) by the State party's recourse to measures, designed to provide access to journalists reporting on Parliamentary proceedings, which are themselves violative of articles 22 and 26 of the Covenant and which cannot be justified by the restrictions permissible under article 19 (3) of the Covenant.

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36/ General Comment No. 25, paragraph 25, adopted by the Committee on 12 July 1996.

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- *Kankanamge v. Sri Lanka* (909/2000), ICCPR, A/59/40 vol. II (29 July 2004) 71 at paras. 2.1, 2.2, 9.4, 10 and 11.

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2.1 The author is a journalist and editor of the newspaper “Ravaya”. Since 1993, he has been indicted several times for allegedly having defamed ministers and high-level officials of the police and other departments, in articles and reports published in his newspaper. He

claims that these indictments were indiscriminately and arbitrarily transmitted by the Attorney-General to Sri Lanka's High Court, without proper assessment of the facts as required under Sri Lankan legislation, and that they were designed to harass him. As a result of these prosecutions, the author has been intimidated, his freedom of expression restricted and the publication of his newspaper obstructed.

2.2 At the time of the submission of the communication, three indictments against the author, dated 26 June 1996 (case No. 7962/96), 31 March 1997 (case No. 8650/07), and 30 September 1997 (case No. 9128/97), were pending before the High Court.

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9.4 So far as a violation of article 19 is concerned, the Committee considers that the indictments against Mr. Kankanamge all related to articles in which he allegedly defamed high State party officials and are directly attributable to the exercise of his profession of journalist and, therefore, to the exercise of his right to freedom of expression. Having regard to the nature of the author's profession and in the circumstances of the present case, including the fact that previous indictments against the author were either withdrawn or discontinued, the Committee considers that to keep pending, in violation of article 14, paragraph 3 (c), the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left the author in a situation of uncertainty and intimidation, despite the author's efforts to have them terminated, and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression. The Committee concludes that the facts before it reveal a violation of article 19 of the Covenant, read together with article 2(3).

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10. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 14, paragraph 3 (c), and article 19 read together with article 2 (3) of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

- *Marques v. Angola* (1128/2002), ICCPR, A/60/40 vol. II (29 March 2005) 181 at paras. 2.1-2.3, 2.6, 2.8, 2.10, 6.7, 6.8, 7 and 8.

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2.1 On 3 July, 28 August and 13 October 1999, the author, a journalist and the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President *dos Santos* in an independent Angolan newspaper, the *Agora*. In these articles, he stated,

inter alia, that the President was responsible "for the destruction of the country and the calamitous situation of State institutions" and was "accountable for the promotion of incompetence, embezzlement and corruption as political and social values."

2.2 On 13 October 1999, the author was summoned before an investigator at the National Criminal Investigation Division (DNIC) and questioned for approximately three hours before being released. In an interview later that day with the Catholic radio station, *Radio Ecclésia*, the author reiterated his criticism of the President and described his treatment by the DNIC.

2.3 On 16 October 1999, the author was arrested at gunpoint by 20 armed members of the Rapid Intervention Police and DNIC officers at his home in Luanda, without being informed about the reasons for his arrest. He was brought to the Operational Police Unit, where he was held for seven hours and questioned before being handed over to DNIC investigators, who questioned him for five hours. He was then formally arrested, though not charged, by the deputy public prosecutor of DNIC.

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2.6 On 25 November 1999, the author was released from prison on bail and informed of the charges against him for the first time. Together with the director, A. S., and the chief editor, A.J.F., of *Agora*, he was charged with "materially and continuously committ[ing] the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney General of the Republic…by arts. 44, 46 all of Law no 22/91 of June 15 (the Press Law) with aggravating circumstances 1, 2, 10, 20, 21 and 25, all of articles 34 of the Penal Code." The terms of bail obliged the author "not to leave the country" and "not to engage in certain activities that are punishable by the offence committed and that create the risk that new violations may be perpetrated - Art 270 of the Penal Code". Several requests by the author for clarification of these terms were unsuccessful.

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2.8 By reference to article 46 2/ of Press Law No. 22/91 of June 15 1991, the Provincial Court ruled that evidence presented by the author to support his defence of the 'truth' of the allegations and the good faith basis upon which they were made, including the texts of speeches of the President, Government resolutions and statements of foreign State officials, was inadmissible. In protest, the author's lawyer left the courtroom, stating that he could not represent his client in such circumstances. When he returned to the courtroom on 25 March, the trial judge prevented him from resuming his representation of the author and ordered that he be disbarred from practising as a lawyer in Angola for a period of six months. The Court then appointed as *ex officio* defence counsel an official of the General Attorney's Office working at the Provincial Court's labour tribunal, who allegedly was not qualified to practise as a lawyer.

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2.10 On 31 March 2000, the Provincial Court convicted the author of abuse of the press 3/ by defamation 4/ finding that his newspaper article of 3 July 1999, as well as the radio

interview, contained "offensive words and expressions" against the Angolan President and, albeit not raised by the accusation and therefore not punishable, against the Attorney-General in their official and personal capacities. The Court found that the author had "acted with intention to injure" and based the conviction on the combined effect of articles 43, 44, 45 and 46 of Press Law No. 22/91, aggravated by item 1 of article 34 of the Penal Code (premeditation). It sentenced the author to six months' imprisonment and a fine of 1,000,000.00 Kwanzas (Nkz.) to "discourage" similar behaviour, at the same time ordering the payment of NKz. 100,000.00 compensatory damages to "the offended" and of a court tax of NKz. 20,000.00.

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6.7 The...issue before the Committee is whether the author's arrest, detention and conviction, or his travel constraints, unlawfully restricted his right to freedom of expression, in violation of article 19 of the Covenant. The Committee reiterates that the right to freedom of expression in article 19, paragraph 2, includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment. 19/

6.8 The Committee refers to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in paragraph 3 of article 19: it must be provided for by law, it must serve one of the aims enumerated in article 19, paragraph 3 (a) and (b), and it must be necessary to achieve one of these purposes. The Committee notes that the author's final conviction was based on article 43 of the Press Law, in conjunction with section 410 of the Criminal Code. Even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, 20/ the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition. In addition, the Committee considers it an aggravating factor that the author's proposed truth defence against the libel charge was ruled out by the courts. In the circumstances, the Committee concludes that there has been a violation of article 19.

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7. The Human Rights Committee...is of the view that the facts before it reveal violations of article 9, paragraphs 1, 2, 3 and 4, and of articles 12 and 19 of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an

effective remedy, including compensation for his arbitrary arrest and detention, as well as for the violations of his rights under articles 12 and 19 of the Covenant. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

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2/ Article 46 of the Press Law reads: "If the person defamed is the President of the Republic of Angola, or the head of a foreign State, or its representative in Angola, then proof of the veracity of the facts shall not be admitted."

3/ The crime of abuse of the press is defined as follows in article 43 of the Press Law: "(1) For purposes of this law, an abuse of the press shall be deemed to be any act or behavio[u]r that injures the juridical values and interests protected by the criminal code, effected by publication of texts or images through the press, radio broadcasts or television. (2) The criminal code is applicable to the aforementioned crimes as follows: (a) The court shall apply the punishment set forth in the incriminating legislation, which punishment may be aggravated pursuant to general provisions: (b) If the agent of the crime has not previously been found guilty of any abuse of the press, then the punishment of imprisonment may be replaced by a fine of not less than Nkz. 20,000.00."

4/ Article 407 of the Criminal Code describes the crime of defamation as follows: "If one person defames another publicly, *de viva voce*, in writing, in a published drawing, or in any public manner, imputing to him something offensive to his hono[u]r and dignity, or reproduces this, then he shall be condemned to a prison term of up to four months and a fine[…]."

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19/ See communications Nos. 422/1990, 423/1990 and 424/1990, *Aduayom et al. v. Togo*, Views adopted on 12 July 1996, at para. 7.4.

20/ See Human Rights Committee, general comment No. 25 [57], 12 July 1996, at para. 25.

- *Jong-Choel v. Republic of Korea* (968/2001), ICCPR, A/60/40 vol. II (27 July 2005) 60 at paras. 2.1, 2.2, 8.2, 8.3 and 9.

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2.1 On 11 December 1997, the author, a journalist, published an article in a national weekly publication, reporting on opinion polls, between 31 July and 11 December 1997, for the Presidential election of 18 December 1997. In February 1998, he was charged by the District Attorney for violating section 108 (1) of the Election for Public Office and Election

Malpractice Prevention Act (hereinafter the "Election Act"), which prohibits publication of public opinion polls during the electoral campaign period 1/. According to article 33 (1), the presidential campaign period is 23 days. The Election Act imposes criminal liability for the disclosure of political opinion polls for the 23-day period running up to and including election day 2/. On 16 July 1998, the author was found guilty as charged by the Seoul Criminal District Court Collegiate Division and fined 1,000,000 won (approx. US$ 445).

2.2 The author appealed this decision and at the same time challenged the constitutionality of the related provisions of the Election Act before the Constitutional Court. On 28 January 1999, the Constitutional Court declared the relevant provisions of the Election Act constitutional, finding that the length of the ban suppressing the publication of polls during the electoral campaign period was reasonable to ensure a fair and undistorted election result. In its judgement, it referred to a study which allegedly demonstrates that a public opinion poll may encourage voters to move toward a candidate with a stronger chance of winning (so-called "bandwagon effect"), or may add sympathy votes to the underdog (so-called "underdog effect"), thereby distorting the will of voters. On 13 April 1999, the High Court upheld the District Court's decision, and on 20 August 1999, the Supreme Court dismissed the author's appeal.

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8.2 The Committee notes that the issue before it is whether the author's conviction, under section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act, for having published an article on the results of opinion polls during the campaign period of the Presidential election, violates article 19, paragraph 2, of the Covenant. Article 19, paragraph 2, of the Covenant guarantees the right to freedom of expression and includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media". The Committee considers that through his articles, the author was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

8.3 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address the aims enumerated in paragraph 3 of article 19, and must be necessary to achieve the purpose. The restrictions were provided for by law, under section 108 (1) of the Election for Public Office and Election Malpractice Prevention Act. As to whether the measures addressed one of the aims enumerated in paragraph 3, the Committee notes that the State party maintains that the restriction is justified in terms of the protection of public order (para. 3 (b)). The Committee considers that, to the extent that the restriction relates to the rights of Presidential candidates, this restriction may also fall within the terms of article 19, paragraph 3 (a) (necessary for the respect of the rights of others). The Committee notes the underlying reasoning for such a restriction is based on the wish to provide the electorate with a limited period of reflection, during which they are insulated

from considerations extraneous to the issues under contest in the elections, and that similar restrictions can be found in many jurisdictions. The Committee also notes the recent historical specificities of the democratic political processes of the State party, including those invoked by the State party. Under such circumstances, a law restricting the publication of opinion polls for a limited period in advance of an election does not seem *ipso facto* to fall outside the aims contemplated in article 19, paragraph 3. As to the issue of proportionality, the Committee notes that, while a cut-off date of 23 days prior to the election is unusually long, it need not pronounce itself on the compatibility *per se* of the cut-off date with article 19, paragraph 3, since the author's initial act of publishing previously unreported opinion polls took place within seven days of the election. The author's conviction for such publication cannot be considered excessive in the context of the conditions obtaining in the State party. The Committee also notes that the sanction visited on the author, albeit one or criminal law, cannot be categorized as excessively harsh. It is not, therefore, in a position to conclude that the law, as applied to the author, is disproportionate to its aim. Accordingly, the Committee does not find a violation of article 19 of the Covenant in this regard.

9. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

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Notes

1/ It stipulates that "No person may publish or quote in a report the details and result of a public opinion poll (including a mock voting or popularity poll) making a degree of support to a political party or a successful candidate anticipated, in connection with an election, from the day the election period commences to the time the voting is closed on the election day."

2/ According to article 256 (1), as amended, "any person who discloses the details and result of a survey of public opinion, or makes a report citing them or makes another person do so, in contravention of the provisions of article 108 (1)…with imprisonment for not more than two years, or a fine not exceeding four million won."

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For dissenting opinion in this context, see Jong-Choel v. Republic of Korea (968/2001), ICCPR, A/60/40 vol. II (27 July 2005) 54 at Individual Opinion of Ms. Christine Chanet and Messrs. Abdelfattah Amor, Prafullachandra Natwarlal Bhagwati, Alfredo Castillero Hoyos, Ahmed Tawfik Khalil, and Rajsoomer Lallah, 66, and Individual Opinion of Ms. Ruth Wedgwood, 67.