IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 8924/2004

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION LIMITED Applicant

and

MARK THATCHER First Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

THE DIRECTOR-GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Third Respondent

THE MAGISTRATE FOR THE DISTRICT OF WYNBERG MAGISTRATE'S COURT Fourth Respondent

THE ADDITIONAL MAGISTRATE FOR THE DISTRICT OF WYNBERG Fifth Respondent

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JUDGMENT: 31 AUGUST 2005

VAN ZYL J:

Introduction

[1] On 25 October 2004 the applicant sought leave, by way of an urgent application, to televise the proceedings instituted by the first respondent against the second to fifth respondents ("the proceedings").[1] The proceedings were set down for hearing the next day. After considering the documents filed and the submissions made by counsel, this court granted an order in the following terms, with reasons to be

1 Under case no 7672/2004, since finalised and reported as *Thatcher v Minister of Justice and Constitutional Development and Others* 2005 (4) SA 543 (C); [2005] 1 All SA 373 (C).

furnished in due course:

1. The applicant is granted leave to be present at, and to record, the hearing of the civil proceedings instituted by the first respondent against the second to fifth respondents under case number 7672/2004, which application is due to commence on Tuesday, 26 October 2004. This leave is subject to the following:
   1.1 The recording may be used only in the form of an edited daily highlights package for purposes of delayed broadcasting in television news bulletins and in programs relating to current affairs or matters of public interest.

1.2 The daily highlights package must constitute a balanced and fair reflection of the day's proceedings.

1.3 The Court may at any stage suspend the recording process should it regard such process as disruptive of the proceedings.

1.4 The Court may give such further directions as it deems appropriate, including that portions of the proceedings may not be recorded, or that already recorded portions of the proceedings may not be televised.

1.5 The applicant is directed to focus its recordings primarily on counsel arguing the matter and/or on the judges presiding.

1.6 The applicant is directed not to broadcast or televise matters of a private, confidential or privileged nature which may ensue between counsel, the attorneys and the parties.

1.7 Should the applicant record matters of the kind referred to in paragraph 1.4 and 1.6 above, it is directed to destroy same, to hold it as strictly confidential and not to disclose its contents to any third party.

1.8 Should the Court, either *mero motu* or on the application of any of the parties, request, prior to the finalisation of the highlights package, that a portion of the recorded proceedings not be televised, the applicant is directed to delete such material and not to televise same.

1.9 The applicant is directed, throughout the proceedings, strictly to uphold the right of privacy of the judges, the various parties, the legal representatives and members of the public present at such proceedings.

2. The applicant is given leave to set up its electronic equipment in the designated court after making the necessary arrangements with the Registrar of the Court and the head of security. This leave is subject to the following:
   2.1 The applicant may install two small man-operated television cameras and one small unmanned television camera, all on tripods and together with the necessary microphones, in the court prior to 10h00 on Tuesday 26 October 2004.

2.2 The cameras must be placed in a fixed and unobtrusive position in the court.

2.3 No external lighting may be used for the televising of the proceedings.

2.4 The microphones may be placed alongside the existing court microphones.

2.5 Only two camera operators may be present in court during the proceedings.

2.6 Any problems which may arise during the recording of the proceedings are to be attended to during adjournments only.

3. The applicant is directed not to make any live feed of the recordings available to broadcasters outside South Africa. This is subject to the following:

3.1 The applicant may make such live feed available to any South African broadcaster subject to the terms and conditions contained in this order and, further, subject to the constraints imposed on the applicants by the Broadcasting Act 4 of 1999, broadcaster's conditions and the code of the Broadcasting Complaints Commission of South Africa.

3.2 The applicant may make such live feed available to any offshore broadcaster provided it consists only of material which has already been screened by the applicant.

4. No order is made as to costs.

[2] The reasons for this order appear from what follows.

[3] Because of the urgency of the matter none of the respondents filed any affidavits, opposing or otherwise, in response to the notice of motion and founding affidavit of Mr K S T Matthews, the Chief Legal Advisor of the applicant. The first respondent, Sir Mark Thatcher, indicated through his counsel, Mr P B Hodes SC assisted by Mr A Katz, that he did not oppose the application and abided the decision of this court. The same applied to the fourth and fifth respondents, being the Chief Magistrate and Additional Magistrate of the Wynberg Magistrate's Court. Only the second and third respondents, namely the Minister of Justice and Constitutional Development and her Director General, opposed the application.

[4] Mr B K Pincus SC, assisted by Mr D Goldberg, represented the applicant while Mr M Donen SC, assisted by Ms N Bawa, appeared on behalf of the second and third respondents. The court expresses its appreciation to them for their respective presentations. Thanks are also due to Ms Nikki de Havilland, Research Assistant in the Cape High Court, for her extremely helpful comparative research.

The Proposed Recording Equipment

[5] For purposes of recording the proceedings the applicant sought leave to set up its electronic equipment in the court where the hearing was to be held. It gave the assurance that the equipment would be installed and set up as unobtrusively as possible with a view to causing minimal disruption to the court proceedings. The installation would, in any event, be subject to any conditions the court may reasonably wish to impose.

[6] In this regard three cameras would be installed, two of which would be manned by cameramen. A single fixed camera at the rear of the court would be unmanned and focussed on the court as a whole. The manned cameras, which could swivel from one area of the court to another, would be positioned on either side of the court, focussing in general on the Bench and on counsel making their respective representations. The installation of the cameras would take place before commencement of the proceedings and any problems arising during the proceedings

would be dealt with during adjournments. Microphones would be placed alongside the existing court microphones. The cables connecting the cameras to an outside broadcasting van would run across the floor alongside the existing cabling. The van would remain outside the High Court premises at all times and would be protected by the applicant's own security guards. No external lighting would be used and no extraneous noise would emanate from the cameras

[7] The applicant undertook to adhere to all applicable security arrangements required by the relevant court officials. This included removing the recording equipment at the end of the day's proceedings and setting it up again prior to the continuation of proceedings on the next day.

[8] The recordings or "feed" transmitted to the outside broadcasting van would be made available to any other broadcaster who might wish to broadcast the proceedings. In making such feed available, the applicant would charge a customary fee on the basis that the costs be shared without any cost burden being imposed on the public. The proceedings would then be broadcast on a delayed or edited basis.

The Basis of the Application

[9] The applicant undertook unequivocally to set up its recording equipment as aforesaid, subject to any conditions this court may impose. It likewise undertook to adhere to the relevant codes of conduct and to comply with the obligations imposed upon it by the applicable statutory provisions. It expressed the wish, however, to give members of the public an insight into how the judicial process actually functions in order to generate confidence in and respect for the legal system and in order to create understanding of the progress and ultimate outcome of the proceedings. This insight and understanding would come from broadcasting news events of immense national and international importance. Such broadcasts would clearly fall within the mandate of the applicant as being overwhelmingly in the public interest.

[10] In this regard the applicant pointed out that its national television network comprises three full spectrum channels which, combined, broadcast in eleven languages and reach a daily adult audience of approximately eighteen million people via its terrestrial and satellite distribution network. In view of the high level of illiteracy in South Africa, a substantial number of people receive their news and information primarily, if not solely, through the broadcast media. This is far in excess of the number of persons who read newspapers. In this regard the average circulation of urban daily newspapers throughout South Africa for the first six months of 2004 was only some one million six hundred thousand.

[11] The facts and circumstances giving rise to the present proceedings have, the applicant averred, been the subject of intense public scrutiny and debate. It has

evoked widespread national and international interest in view of the alleged involvement of the first respondent, Sir Mark Thatcher, the son of a former British Prime Minister, Dame Margaret Thatcher, in an attempted *coup* in Equatorial Guinea during March 2004. It was established that a number of South African mercenaries, including their leader, one Du Toit, were arrested and charged with various criminal offences. Since then Du Toit and certain of his co-accused have in fact been convicted and sentenced by an Equatorial Guinea court. Prior to that some seventy mercenaries, allegedly bound for Equatorial Guinea to participate in the attempted *coup*, were arrested, convicted and sentenced in Zimbabwe. They included one Simon Mann, who had allegedly communicated with the first respondent concerning the purchase of a military helicopter. In the meantime the first respondent was arrested and arraigned in South Africa on charges relating to the financing of the attempted *coup*. He was released on bail pending finalisation of the criminal case against him, but it has since transpired that the South African prosecuting authorities have accepted his plea of guilty on a lesser charge. He has accordingly been duly convicted and sentenced by this court. He has also been subjected to questioning by the Equatorial Guinea authorities, apparently without any earth-shattering consequences.

[12] Needless to say the aforesaid events have been dealt with extensively by all branches of the media, including the electronic media. Huge public interest has, quite predictably, been engendered both nationally and internationally. The interest has, of course, not been limited to persons with access to the printed media. Indeed, the human aspects of the electronic media, in the form of radio or television, serve as a stimulus to literate persons with access to the printed media. It was hence, the applicant averred, undeniably in the public interest that the proceedings be televised to the wider public, both in South Africa and beyond its borders.

[13] The applicant added that, in the light of the aforesaid facts and circumstances, and with reference to the relevant statutory provisions, it had the right and the obligation to be present at and to record the proceedings for delayed broadcasting on television. By doing so it would be fulfilling its role and function as a provider of news to the largest possible portion of the interested public. This included those persons who did not have access to the printed media or who were unable to read and hence relied primarily on television for purposes of acquiring the relevant information.

[14] The applicant submitted further that the right to televise the proceedings would be consonant with the constitutional right of members of the public to receive information through any form of media of their choice. This included the electronic media, particularly where it was proposed to broadcast information of public interest and of great national and international importance. It would also be consonant with the right to freedom of expression, including that of the press and other media, and the right to receive or impart information or ideas. Such rights were guaranteed by the Constitution and recognised by international law as a cornerstone of democratic society.

[15] In this regard the applicant suggested that televising the court proceedings would ensure openness and transparency by allowing the wider public, and not only the extremely limited number of members of the public who would be able to attend the proceedings personally, to have access thereto. Inasmuch as there was no constitutional or other legal prohibition against delayed broadcasting on television of such proceedings, this court had an unfettered discretion to grant the application in the

public interest.

[16] On the nature of the envisaged broadcast the applicant averred that it fell within its mandate as contained in the Act, its charter and its news editorial policy as set forth in a manual and on the applicant's website, which was fully accessible to the public. Although the applicant would be making use of delayed broadcasting on television, it would not be hampered by the somewhat "artificial" restrictions facing the media when seeking to convey what has transpired. Televising the proceedings would ensure the highest degree of accuracy and accountability.

[17] Regarding media coverage of the proceedings in general, the applicant submitted that, whereas the print media would be in a position to fulfil their functions by reporting in newspapers, the applicant would be able to add "a material dimension" by giving the most accurate and comprehensive account possible in relation to those matters which are broadcast on television on a delayed, or edited, basis. To refuse such televising would favour the print media and in fact discriminate against television reporters as representatives of the electronic media. In this sense, members of the electronic media function as "the eyes and ears of the public" in that they convey a comprehensive and accurate reflection of the proceedings on an open and transparent basis, thereby enabling the public to assess and understand it for themselves. By observing the televised proceedings they would be able to see the gestures and expressions of the role players and hear the tone, nuances and verbal emphasis of their arguments. In this regard the tools of the trade for the electronic media are not the traditional notebooks of newspaper reporters, but video cameras and microphones. This, the applicant averred, is the essence of broadcasting. It provides a unique form of access to the proceedings which the print media cannot emulate.

[18] The applicant submitted that there has been an international trend towards unlimited access being granted to the electronic media, as illustrated by the situation pertaining in a number of other countries. In South Africa both the Constitutional Court and the Supreme Court of Appeal have allowed their proceedings to be televised from time to time. The new Constitutional Court building in fact contains special facilities for this purpose.

[19] By way of analogy the applicant relied on the fact that parliamentary proceedings in South Africa, which frequently deal with matters of national importance, are regularly televised in an open and transparent way. There is in fact a special television channel reserved for this purpose. Similarly a number of judicial and other commissions, burdened with the investigation of matters of national importance and public interest, have granted unrestricted access to the media, including the electronic media, without any negative effects. Examples are the Truth and Reconciliation Commission, the Human Rights Commission, the King Commission (relating to alleged corruption in the sport of cricket) and, most recently, the Hefer Commission (relating to alleged corruption in commerce and politics).

[20] The applicant relied strongly on the unreported judgment handed down on 12 October 2004 by Squires J in the case of *Midi Television (Pty) Ltd t/a E-TV v Downer and Others*.[2] Although the learned judge refused an application to televise the proceedings before him, he did this on the basis that he did not wish witnesses to be subjected to scrutiny by television cameras. By way of an *obiter dictum*, however, he expressed the personal opinion that he might not object to the argument and delivery

2 Case No 15927/2004 (Durban and Coast Local Division).

of judgment being televised. In this regard he left the door open for a compromise order should he, at a later stage, be approached to give consideration thereto.

The Relevant Statutory Provisions

The Broadcasting Act 4 of 1999

[21] As a national broadcaster functioning for seven days a week and twenty-four hours per day, the applicant is expected, and indeed mandated, to present news of national and international importance and reflecting public interest. This is in line with the express object of the *Broadcasting Act* 4 of 1999 ("the Act")[3] "to establish and develop a broadcasting policy ... in the public interest". This would include the need to "ensure plurality of news, views and information" and to operate "in the public interest".[4] In doing so, however, the applicant would be required to comply with the provisions of its own charter.[5]

[22] Section 6(3) of the Act provides that the applicant, "in pursuit of its objectives and in the exercise of its powers, enjoys freedom of expression and journalistic, creative and programming independence as enshrined in the Constitution". Section 6(4) in turn requires the applicant to "encourage the development of South African expression" by providing wide-ranging programming that, *inter alia* "offers a plurality of views and a variety of news, information and analysis from a South African point of view" and "advances the national and public interest".[6]

The ICASA and BCCSA Codes of Conduct

[23] The applicant is required to comply with the policies and code of conduct of the Independent Communications Authority of South Africa (ICASA),[7] with the objectives (including news editorial policy) contained in the Act, and with its own licence conditions. In this regard it is likewise bound by the code of conduct of the

3 As stated in section 2 thereof.
4 Section 3(1)(*b*).
5 As set forth in chapter IV (sections 6-28) of the Act.
6 Sections 6(4)(*c*) and (*d*). Its objectives, as set forth in section 8 of the Act, are directed mainly at furnishing information, education and entertainment. See especially section 8(*a*), (*b*), (*l*) and (*p*).
7 In terms of section 6(5)(*a*) of the Act. ICASA is a body established in terms of section 3 of the *Independent Communications Authority of South Africa Act* 13 of 2000.

Broadcasting Complaints Commission of South Africa ("BCCSA").[8]

[24] The preamble to the BCCSA code is contained in clauses 4 to 8 thereof. Clauses 5 and 6 deal with the fundamental right to freedom of expression entrenched in section 16 of the Constitution, subject to the limitations imposed by section 36 thereof, while clauses 4 and 7 appear to constitute a policy statement:

> 4. Freedom of expression lies at the foundation of a democratic South Africa and is one of the basic pre-requisites for this country's progress and the development in liberty of every person. Freedom of expression is a condition indispensable to the attainment of all other freedoms. The premium our Constitution attaches to freedom of expression is not novel, it is an article of faith, in the democracies of the kind we are venturing to create.
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> 7. The outcome of disputes turning on the guarantee of freedom of expression will depend upon the value the courts are prepared to place on that freedom and the extent to which they will be inclined to subordinate other rights and interests to free expression. Rights of free expression will have to be weighed up against many other rights, including the rights to equality, dignity, privacy, political campaigning, fair trial, economic activity, workplace democracy, property and most significantly the rights of women and children.

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[25] Clause 34 sets out guidelines for reporting news "truthfully, accurately and fairly". In terms of clause 35 licensees are "entitled to broadcast comment on and criticism of any actions or events of public importance" provided such comment is perceived to be "an honest expression of opinion ...made on facts truly stated or fairly indicated and referred to". Where "controversial issues of public importance" are discussed in a programme, clause 36 requires the licensee to "make reasonable efforts to fairly present opposing points of view" and to give the right to reply to criticism of views entertained by any person on such controversial issues. In this regard licensees are required, by clause 38, to "exercise exceptional care and consideration in matters involving the private lives and private concerns of individuals, bearing in mind that the right to privacy may be overridden by a legitimate public interest".

The South African Constitution

[26] For present purposes the relevant provisions of the *Constitution of the*

8 Being appendix II of that body's constitution. This code came into operation on 7 March 2003.

Republic of South Africa, Act 108 of 1996 ("the Constitution") are those relating to equality, privacy and freedom of expression (including freedom of the press). They may be found in sections 9(1), 14 and 16(1)(a) and (b) respectively:

9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
14. Everyone has the right to privacy …
16(1) Everyone has the right to freedom of expression, which includes -
a) freedom of the press and other media;
b) freedom to receive or impart information or ideas ...

[27] All these rights, however, are subject to the constitutional provisions relating to the limitation of rights as contained in section 36(1):

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

[28] The applicant has suggested that, for present purposes, where an order is being sought to televise the proceedings in a court of law, section 16 of the *Supreme Court Act* 59 of 1969 should be considered:

Save as is otherwise provided in any law, all proceedings in any court of a Division shall, except insofar as any such court may in special cases otherwise direct, be carried on in open court.

[29] This is, of course, subject to the inherent power of superior courts "to protect and regulate their own process … taking into account the interests of justice" and is likewise subject to the court's power, when deciding a constitutional matter within its jurisdiction, to make "any order that is just and equitable".[9]

9 Sections 173 and 172(1)(b).

The Relevant Legal Principles

[30] In South Africa there is no legislative ban on televising or otherwise recording court proceedings, but a number of courts have, by virtue of their inherent power to regulate their own procedures, allowed their proceedings to be televised wholly or partially. This has been done routinely in the Constitutional Court and Supreme Court of Appeal, and has recently enjoyed the attention of a number of divisions of the High Court.

[31] Cognisance must, of course, be taken of the statutory provisions dealt with above, in which regard it is clear that the applicant bears the responsibility of acting in the public interest, while taking into account the interests of justice. The court, on the other hand, must exercise its discretion to issue a just and equitable order while taking cognisance of its inherent power to regulate its own proceedings. This means, in the present context, that the right of privacy of the various parties to the application must be weighed up and balanced against the right of freedom of expression which, in the case of the media, translates into freedom of the press. An exercise of this nature must be undertaken with due regard to any reasonable or justifiable limitation on the right or rights in question, as stated in the classic *dictum* of Chaskalson P in *S v Makwanyane and Another*:[10]

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.[11]

[32] In interpreting the relevant provisions the court should, generally speaking, adopt a generous and purposive construction as suggested by Lord Wilberforce in the matter of *Minister of Home Affairs (Bermuda) v Fisher.*[12] In that matter, after discussing the influence of certain international conventions on the constitutions of former British colonies, the learned Law Lord opined that such constitutions (including that of Bermuda) required "a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights referred to". In this regard Lord Wilberforce stated that the relevant constitution called for "principles of interpretation

10 1995 (3) SA 391 (CC) in par [104] at 436C.
11 See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) in par [33]-[35] at 30F-31E.
12 [1979] 3 All ER 21 (PC) at 26*a-e* (also in [1980] AC 319 (PC) at 329B-G).

of its own" and proceeded to say:[13]

This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

This approach was cited with approval by the Appellate Division in *S v Marwane*[14] and by the Constitutional Court (*per* Kentridge AJ) in *S v Zuma and Others*.[15]

[33] On the importance of the fundamental right to freedom of expression reference may be made to the following *dictum* of O'Regan J in the case of *South African National Defence Union v Minister of Defence and Another*:[16]

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

[34] Justice O'Regan found support for this observation in *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*.[17] In that matter the court (*per* Mokgoro J) stated[18] that the right to freedom of expression is "part of a web of mutually supporting rights enumerated in the Constitution, including the right to 'freedom of conscience, religion, thought, belief and opinion', the right to privacy, and the right to dignity." With reference to these rights O'Regan J observed:[19]

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13 At 26*d-e*; 329E-F.
14 1982 (3) SA 717 (A) at 748H-749D.
15 1995 (2) SA 642 (CC) par [14] at 651A-D.
16 1999 (4) SA 469 (CC) par [7] at 477C-D.
17 1996 (3) SA 617 (CC).
18 In par [27] at 631A-B.
19 In par [8] at 477F-H.

These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.

[35] A similar approach appears from the following *dictum* of Kriegler J in the case of *S v Mamabolo (E TV and Others Intervening)*:[20]

Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set out as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.

[36] As long since recognised by our courts, the media, with their particular role and function, are essentially directed at exercising the right to freedom of expression. This is clearly demonstrated in the following *dictum* by Hefer JA, in *National Media Ltd and Others v Bogoshi*,[21] on the effect of false and erroneous statements of fact:

All this is very true. But we must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion ... The press and the rest of the media provide the means by which useful, and sometimes vital, information about the daily affairs of the nation is conveyed to its citizens - from the highest to the lowest ranks ... Conversely the press often becomes the voice of the people - their means to convey their concerns to their fellow citizens, to officialdom and to government.

[37] The learned Judge of Appeal found support for this view in the following

20 2001 (3) SA 409 (CC) in par [37] at 428J-429C.
21 1998 (4) SA 1196 (SCA) at 1209I-1210A.

dictum of Lord Bingham of Cornhill CJ in the English Appeal Court case of *Reynolds v Times Newspapers Ltd and Others*:[22]

As it is the task of the news media to inform the public and engage in public discussion of matters of public interest, so is that to be recognised as its duty. The cases cited show acceptance of such a duty, even where publication is by a newspaper to the public at large ... We have no doubt that the public also have an interest to receive information on matters of public interest to the community.

[38] The Constitution has given full recognition to the important role of the media as instruments of democracy, as appears from the *dictum* of Cameron J in *Holomisa v Argus Newspapers Ltd*:[23]

In a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognised. The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed also, if those criticisms are to be effectively voiced ... It is for this very reason that the Constitution recognises the especial importance and role of the media in nurturing and strengthening our democracy.

This passage was cited with approval in the *Bogoshi* case.[24]

[39] I agree with Mr Pincus, in his argument on behalf of the applicant, that the right of the electronic media to exercise freedom of expression in covering court proceedings should be no less than that enjoyed by the print media, subject to the limitations of section 36 of the Constitution. Inasmuch as section 16 of the Constitution does not distinguish between the press and other media, any distinction made by this court would offend the equality provisions of section 9(1) thereof.

[40] Support for this argument may be found in *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO and Others*,[25] where Brand J said:[26]

It is almost self-evident in my view that the prohibition of the direct radio transmission of proceedings by a radio broadcaster constitutes a limitation on what is essential to the activities of that medium of communication. I have heard no argument and I can see no reason in logic why a limitation on what constitutes the very essence and distinguishing feature of the radio broadcaster's medium of communication does not constitute an infringement of the radio broadcaster's freedom which is enshrined by s 16(1)(*a*). It is not without reason, so it appears to me, that s 16(1)(*a*) of the

22 [1998] 3 All ER 961 (CA) at 1004 *e-f*.
23 1996 (2) SA 588 (W) at 608J-609D.
24 Cited in n 21 above, at 1217C-D.
25 2000 (4) SA 973 (C).
26 In par [43] at 986J-987D.

Constitution does not limit its guarantee to the freedom of the press, but specifically extends this freedom to other media of communication and expression as well. In modern times there are many forms of communication. Each of these media of communication and expression has its own distinguishing features and each of them can be limited in a different way. The video camera most probably provides the ultimate means of communication. But radio also has its advantages over the print media. Not only the words spoken, but the emphasis, the tone of voice, the hesitations, etcetera can be recorded and communicated. To prevent the radio broadcaster from recording the evidence is to deprive him of that advantage over the print media.

[41] The learned judge then continued in the same vein:[27]

Consequently, the argument that a prohibition of a radio broadcaster's right to broadcast directly does not interfere with the rights of that medium because it still has the same rights as the print media, in my view, amounts to a *non sequitur*. The equivalent of the newspaper journalist's shorthand notes to the radio broadcaster is *not* shorthand notes, but an audio recording. I do not think it can be argued that a prohibition against a newspaper journalist taking shorthand notes would not constitute an infringement of that journalist's rights under s 16(1)*(a)*. I believe that, by the same token, to prevent a radio broadcaster from utilising its broadcasting and recording equipment constitutes an infringement of its rights contemplated by s 16(1)*(a)* of the Constitution.

From these *dicta* it seems clear that the learned judge would, by parity of reasoning, have applied this approach also to the television journalist and his television camera. There is no logical reason to distinguish the audio from the visual medium.

[42] In the *Dotcom* case[28] the court voiced its approval of *R v Squires*,[29] a Canadian decision of the Ontario Court of Appeal relating to the prohibition on filming persons entering or leaving a courtroom. Although the issue to be decided in the *Dotcom* case related to radio broadcasting, the learned judge clearly accepted that the reasoning applicable to televising also applied to radio broadcasts. In his argument Mr Pincus submitted that such reasoning indeed applied in the present matter, subject thereto that it should be extended to the courtroom scenario.

[43] In the recent case of *Midi Television (Pty) Ltd t/a E-TV v Downer and Others*,[30] E-TV brought an application to televise the proceedings in *S v Shaik and Others*.[31] This was a controversial case involving charges of fraud and corruption

27 In par [45] at 987D-F.
28 In par [43] at 986H-987D.
29 (1992) 78 CCC (3d) 97. See par [79] below, in the discussion of Canadian law.
30 Unreported Case No 15927/04 (Durban and Coast Local Division, 12 October 2004).
31 Since reported as [2005] 3 All SA 211 (D).

against a wealthy businessman, Mr Shabir Shaik, whose name was closely associated with that of a former Deputy President of South Africa, Mr Jacob Zuma. In refusing the application Squires J stated:[32]

The video camera may be the necessary tool of the television journalist but its visible presence, in this courtroom at any rate, would be undoubtedly a visible operation, with both its presence and its operation being conspicuously intrusive. To most people it would be a potentially distracting feature, even if they were not giving evidence. But I think the argument also overlooks an important difference between the fleeting moment of communication by word of mouth, given only as part of the normal narrative of evidence and given in answer to a question when, if spectators may be paying attention, what is said may be reported in print the next day but will soon be forgotten. Contrast that with a permanently-captured moment of inadvertent folly, embarrassment or humiliation that will appear time after time, if thought desirable, in the living rooms of the country's television watchers when every pause, every frown, every hesitation, every unguarded response or unavoidable disclosure of some private fact is preserved on tape or film for as long as thought desirable, and especially when that frown or hesitation is not part of the evidence or the reason for it; but is caused by the witness's realisation that he is being exposed to television scrutiny. No one but the witness could tell what the cause was. Nor would he waive or limit his right to privacy by being subpoenaed to give evidence in court.

[44] The right to privacy of each individual witness was hence, in the view of Squires J, the overriding factor in refusing the application. Infringement thereof by televised proceedings could lead to an unfair trial and conflict with "the public interest in a democratic criminal justice system" which brings wrongdoers to book while ensuring that justice is done to them. Unless both the State and the defence witnesses consented to the televising of their evidence, the court would not accede to their being prejudiced, intimidated, inhibited or prevented from communicating sensibly by the thought of having to appear on television.

[45] Inasmuch as this would inevitably constitute an infringement of the applicant's right to freedom of speech (in the sense of freedom of the press), such right should, on a proper weighing and balancing of the competing claims and conflicting interests of the parties, yield to the rights of the witnesses. In this regard Squires J observed:[33]
Nor do I eventually think that it is necessary for court proceedings to be broadcast to

32 At p 8-9 of the typed judgment.
33 At p 11-12.

the public at large to meet the requirement that these be in open court to which the public has access. That requirement is certainly part of our procedure to ensure publicity and transparency in the administration of justice in a democratic society. But that is achieved by ordinary access to the court's proceedings by the public and the media. Disallowing television cameras in a trial is not going to detract from that. All it means is that the public at large will not have the instantaneous knowledge and the greater clarity that television can present. I think that is a small sacrifice against the public's need to have this trial conducted expeditiously and free of possible controversy and eventual negation.

[46] The learned judge qualified this statement by observing that it did not preclude a judge from exercising his discretion to direct the procedures in his own court. He could, therefore, rule that a part of the proceedings be televised, such as the argument of counsel or the delivery of judgment. Squires J was at pains, however, to point out that he was speaking for himself and would not presume to suggest any fixed approach that other judges, even in his own division of the High Court, should feel constrained to follow.[34]

[47] Shortly after the unsuccessful E-TV application, E-TV was joined by Radio 702 and Cape Talk as applicants in the case of *Midi Television (Pty) Ltd t/a E-TV and Others v Downer and Others*.[35] In this matter the applicants sought leave to record and broadcast the proceedings in the Shabir Shaik case by means of audio (as opposed to television) recording for purposes of news broadcasts and actuality programmes. Substantially the same, or strikingly similar, arguments were raised in this application as in the first, and Squires J dealt with them substantially as he had done in the prior application. He placed particular emphasis on the right of an accused person to a fair trial, which he described[36] as "the paramount objective in the administration of justice in a democratic society". Even an audio recording, which was likely to be broadcast later, could seriously inhibit witnesses and cause them embarrassment and even humiliation. This led the learned judge to say:[37]

Weighing up the competing claims against each other, I am in the first place abundantly satisfied that radio broadcasting is not necessary to ensure that the trial proceedings are a useful adjunct to ensuring that there is fairness, transparency and accountability in the administration of justice. That is achieved by the unfettered access to the Court and the constant presence, or possible presence in it, of media reporters or other interested spectators from the public at large. That factor is the greatest ensurer of publicity and fair play in the society we have. Broadcasting, even

34 At p 14. Although this qualification was *obiter*, it would later prove to be of singular significance.
35 Unreported Case No 17190/04 (Durban and Coast Local Division, 16 November 2004).
36 At p 14 of the typewritten judgment.
37 At p 21.

live, is not going to improve that.

[48] In the event the learned judge held[38] that the limitation of the rights of the applicants, in regard to their "taking the tools of their trade into the Court to record and broadcast proceedings", was reasonable under the circumstances. In doing so he relied on the provisions of section 36(1) of the Constitution.

[49] With reference to section 16 of Act 59 of 1969, concerning the requirement that all proceedings should be conducted in open court,[39] Mr Pincus submitted that the provisions of this section supported the applicant's case in that the principle of open justice was of ancient origin, forming the cornerstone of all major legal systems. In this regard he relied on the *Mamabolo* case,[40] where Kriegler J stated:[41]

> Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts. And, ultimately, such free and frank debate about judicial proceedings serves more than one public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important aspirational attributes prescribed for the Judiciary by the Constitution.[42]

[50] As correctly submitted by Mr Pincus, the mere fact that proceedings are being held in open court is not sufficient to justify a ban on television, in that the access given to the public and the media is restricted. The capacity of courtrooms is usually such that only a limited number of members of the public or, for that matter, of the media, may enter it and find a seat. Television coverage would ensure maximum coverage throughout South Africa and in any number of foreign countries, in which a more flexible approach to allowing access to the electronic media was being experienced.

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38 At p 24.
39 Cited in par [28] above.
40 Referred to in par [35] above.
41 In par [29] at 426A-C.
42 A reference to section 165(4) of the Constitution.

A Comparative Survey of Developments in Other Countries

[51] The highly publicised and controversial trials of O J Simpson, the USA sporting hero, and Louise Woodward, the British nanny, have recently brought to the fore the long-standing issue of broadcasting and televising court proceedings. It has for some time been the focus of media law experts and the relevant authorities in a number of common law countries, such as the United Kingdom, the United States, Canada, Australia and New Zealand, all of which have addressed, and attempted to resolve such issues. There have also been important developments in many other countries throughout the world, including European countries such as France, Germany and Italy. For present purposes it will not be possible to deal with all these countries. It will, however, be useful to give a survey of developments in the said common law countries, followed by a brief reference to the situation in Europe.

United Kingdom

[52] In England and Wales there has been a statutory prohibition against televising proceedings in courts since 1925. This appears from section 41(1) of the *Criminal Justice Act* of 1925,[43] the relevant portion of which reads as follows:

> No person shall -
> (a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a witness in or a party to any proceedings before the court, whether civil or criminal or,
> b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproductions thereof …

[53] This provision clearly precludes the use of camera or television equipment in any court whatever. Thus in the *St. Andrew's* case of 1977[44], the Chancellor, Judge

43 Section 29 of the *Criminal Justice (Northern Ireland) Act* of 1945 contains identical restrictions.
44 *In Re St. Andrew's, Heddington* [1978] Fam 121 (also in 1977 WL 59953 (Cons Ct) and [1977] 3 WLR 286). See also *J Barber & Sons v Lloyd's Underwriters* [1987] 1 QB 103.

Ellison, sitting in the Salisbury Consistory Court, had no hesitation in holding that the prohibition on photographs also applied to television. He gave due consideration to the fact that televising the proceedings might engender beneficial publicity of the particular parish's problems in maintaining its church, but nevertheless felt constrained to say:[45]

> The purpose of the section is clearly to afford necessary privacy to judges and others concerned from unwelcome intrusions or feelings of such which is an essential for the proper conduct of legal proceedings. Justice could not be properly administered if judges or witnesses suffered the pressures, embarrassment and discomfort of being photographed whilst playing their particular role in court with the expectation that every sign, mood, mannerism or observation should later be displayed on the public media.

[54] In his discussion of the use of television in British courts, Martin Dockray, a legal academic from Kings College in London, has adopted a severely critical stance to section 41(1). Referring to Lord Phillimore's description thereof, in the House of Lords, as "almost comical",[46] Dockray opined that it was absurd because it was not made after a careful consideration of the advantages and disadvantages of permitting proceedings to be televised.[47] He pointed out[48] that, in modern times, television was justifiably regarded as the single most important source of news for the general public, particularly because of its ability to provide a personal experience of current events rather than furnishing "a merely second-hand reported version". This gave it the potential to play an important role in education and politics by developing a more extensive public knowledge of the law and its operation and by making public scrutiny of the law and its institutions more informed and more effective. It was unlikely that professional judges would be embarrassed, intimidated or distracted by

45 At p 125 of the report in [1978] Fam 121.
46 In House of Lords Debates vol 62 col 1032.
47 M Dockray "Courts on Television" in *Modern Law Review* 51 (1988) 593-604 at 593.
48 At 598-601.

video cameras, provided there was control over any potential physical disruption to the proceedings. Jurors, litigants or witnesses might well be distracted, but not to such an extent that television coverage should be banned. In this regard he concluded[49] that the advantages of permitting controlled television coverage of courtroom proceedings outweighed the possible dangers it may cause.

[55] Despite this criticism section 9(1) of the *Contempt of Court Act* 1981, applicable to England, Wales and Northern Ireland, still prohibits the recording of sounds emanating from a court, except with the leave of the court, as set forth in the 1974 report of the Committee on Contempt of Court.[50] In addition recordings "should normally only be used for the purpose of the litigation, by the parties, or for compiling newspaper reports of the proceedings, or a wireless or television report to be read by a reporter or announcer".

[56] The next initiative came in 1989, when a working party of the Bar Council, chaired by Jonathan Caplan, published a report on the feasibility and desirability of televising court proceedings in England and Wales.[51] The report does not appear to have formulated any radical recommendations, but it did suggest that the law should be amended to permit the televising of courts on an experimental basis.[52]

[57] The decision to allow parliamentary proceedings to be televised as from 1989 inevitably had the effect that the proceedings of the Judicial Committee of the House of Lords were likewise televised. This appears to have been acceptable on the basis that such proceedings were almost always in the form of appeals from lower courts and dealt with disputed points of law rather than fact. In the event it was extremely rare for witnesses to be called. It was hence envisaged that the current televising of its proceedings would continue once the Constitutional Reform Bill was passed and the Judicial Committee of the House of Lords was replaced by a Supreme Court.[53]

[58] An important step in the process to introduce television into courts in the United Kingdom was the Hutton Inquiry of 2003 into the circumstances surrounding the death of Dr David Kelly CMG, the United Nations weapons inspector. At the outset, its chairman, Lord Hutton, announced that he would allow only the opening and closing statements, and the addresses of counsel, to be televised. This prompted the media (ITN, BSkyB, Channel 4, Channel 5, ITV and IRN Radio) to launch a joint application for leave to broadcast the proceedings in their entirety. They relied on the common law principle of open justice requiring that television would inform the public of the proceedings better than the press alone would do. Reliance was also placed on the right to freedom of expression as provided in article 10 of the *European Convention on Human Rights* and incorporated into the law of the United Kingdom

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49 At 603-604.

50 Set up in 1971 by the Lord Chancellor, Lord Hailsham, and chaired by Sir Henry Phillimore.

51 *Televising the Courts: Report of a Working Paper of the Public Affairs Committee of the General Council of the Bar* (1989).

52 The Bar Council endorsed this, but a Private Member's Bill (1991), though debated, was not carried.

53 House of Lords Bill 30, Session 2003-2004.

by the *Human Rights Act* 1998. Lord Hutton rejected both arguments, holding that the inquiry, to be open, did not require to be televised. He held that this would place undue strain on witnesses. In any event the European Court of Human Rights in Strasbourg allowed only the first few minutes of each party's submissions, and the whole of the judgment, to be televised.

[59] In making his decision Lord Hutton placed substantial reliance on the unreported decision of Dame Janet Smith in the Shipman Inquiry, in which Dame Janet refused leave to Cable News Network (CNN) to broadcast the entire public proceedings to be held before her. She was, however, prepared to allow the evidence of particular witnesses to be televised, namely persons who were professionally qualified or who were public servants or had clearly defined statutory duties. In making this ruling she held that article 10 of the *European Convention on Human Rights* "does not bear upon the right of access to information that another holds but has not made accessible and does not wish to impart …" In her view the media were entitled to no more and no less information than any member of the public. In any event, she stated, inasmuch as it was an established rule that courts and inquiries have an inherent right to govern their own proceedings, giving access to the media was not a matter of law, but of discretion, which was to be exercised by the chairman of the inquiry or by the presiding judge. 54

[60] It should be noted that, although Scotland forms part of the United Kingdom, there is no statutory bar to the presence of television cameras in Scottish courts, subject thereto that sound recording is prohibited by the provisions of section 8 of the *Contempt of Court (Scotland) Act* 1981. Nevertheless the courts have adopted a conservative approach, banning all electronic media access until 1992, when Lord President Hope issued a practice note allowing television cameras to televise appeal proceedings before the Court of Session and the High Court of Justiciary. This was subject to strict conditions and directed mainly at facilitating the production of programmes of an educational or documentary nature.55

[61] The issue of television access to Scottish courts became particularly prominent in 2000, when the British Broadcasting Corporation (BBC) requested leave to televise the Lockerbie trial arising from the planting of a bomb that exploded on Pan Am flight 103 as it was passing over Lockerbie in Scotland.56 The trial, involving two accused, was subsequently held at Camp Zeist in the Netherlands in accordance with Scots law. The petitioners argued that the trial was unique and that the televising thereof was consistent with the guidelines set down by the Lord President in his aforesaid notice, in that there would be no risk to the administration of justice. In addition it would accord with the BBC's rights under article 10 of the *European Convention on Human Rights*. Lord Macfadyen rejected these arguments and dismissed the petition.57 A further petition, directed at upsetting his decision, was likewise dismissed. A subsequent application by the BBC for leave to televise the appeal of Al Megrahi,58 who had been convicted and sentenced by the Scottish Court sitting in the Netherlands, was, however, allowed, subject to certain restrictions.

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54 See par 45, 52 and 58 of her decision.

55 Notice of 6th August 1992, the Parliament House Book, volume 2 page C2023.

56 *British Broadcasting Corporation, Petitioners (Petitions to the Nobile Officium)* 2000 SCCR 533.

57 *Her Majesty's Advocate v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhima* SCCR [2002] 177.

58 *Abdelbaset Ali Mohmed Al Megrahi v Her Majesty's Advocate* SCCR [2002] 503.

[62] The next step in the process was the decision by the Department for Constitutional Affairs, in consultation with the judiciary and the media, to run a six-week pilot filming exercise in the Royal Courts of Justice towards the end of 2004. Only appeal cases would be filmed, provided judicial consent was obtained and subject to compliance with a protocol containing specific and explicit guidelines.
[63] Most recently the Department for Constitutional Affairs arranged a "Broadcasting Courts Seminar" to be held in January 2005 on the basis of Consultation Paper 28/04 produced in November 2004. In his foreword Lord Falconer of Throroton, the Lord Chancellor, who is also the Secretary of State for Constitutional Affairs, made the following important statement:

> Justice must be done and justice must be seen to be done. That notion exactly catches the argument about television and the courts.
> The justice system exists to do justice. If it does not do justice in public it risks slipping into unacceptable behaviour, and losing public confidence. With a few exceptions, our courts are open to the public, but very few people who are not involved in cases ever go near a court. Most people's knowledge and perception of what goes on in court comes from court reporting and from fictionalised accounts of trials. The medium which gives most access to most people, television, is not allowed in our courts.
> Should that change? Is there a public interest in allowing people through television to see what actually happens in our courts in their name? In a modern, televised age, I think there is a case to be considered here.

[64] With these views the Lord Chancellor, who was the opening speaker at the Seminar, set the tone of what proved to be a significant exchange of expertise and ideas. This appears with great clarity from the address of Lord Justice Judge, the Deputy Chief Justice for England and Wales. His starting point was that the system of justice in its fullness belongs to the community at large and was not the private domain of judges and lawyers. Although a strong proponent of open justice, he did not believe that courts become closed or "secret" because their proceedings did not “fill the airways and television screens". Like the Lord Chancellor, he believed that the paramount, indeed the exclusive, concern of any system of justice was to ensure that justice was done. He was firmly of the view, however, that "the blanket prohibition against broadcasting in court should be re-examined, and where we can be entirely satisfied that justice will not be inhibited, the prohibition should be

relaxed".[59]

[65] It is clear that there has been substantial and ongoing development in the United Kingdom in the field of electronic media and the courts. There remains a fundamental reluctance, however, simply to open up the courts to cameras and it may take some time before a more flexible approach is accepted. This appears with eminent clarity from the report of the Department of Justice, dated 30 June 2005, on the various responses to Consultation Paper 28/04.[60] After summarising such responses, the report concluded that support for widespread broadcasting was limited, and that there was grave concern about the potential impact on participants, particularly witnesses and jurors, and on the trial process. Many respondents did, however, believe that broadcasting could increase understanding of court processes and make courts more accessible. The Department was hence exploring whether there were options which might achieve such benefits without risking harm to participants or negatively impact upon the administration of justice. Any proposals for change would be subject to further public consultation and amendments to primary legislation would be required in order to permit any broadcast of court proceedings.

The United States

[66] In the United States the proceedings in a number of court cases have recently been televised or recorded for radio broadcasting as a result of overwhelming public interest, nationally and internationally. This included the controversial O J Simpson and Louise Woodward trials. In a comparative overview of camera access to courts, Andrea Biondi described the O J Simpson case of 1995 as "probably the most sensational legal trial in history and surely, because of the live TV coverage, the most seen".[61] It was preceded, however, by other so-called "TV trials", such as that of Bruno Hauptmann, who was indicted for the kidnapping and murder of the Lindbergh baby in 1935. Hauptmann appealed against his conviction on the basis that he had been denied a fair trial, in that the courtroom had been packed with some one hundred and thirty cameramen and any number of journalists and photographers, all of them bustling for position. The appeal was dismissed by the New Jersey Court of Appeals, which held that the public had been entitled to reports on the court proceedings.[62] The media abuses were so blatant, however, that in 1937 a special committee of the American Bar Association (ABA) recommended a complete ban on cameras in court. This was embodied in canon 35 of the Code of Judicial Conduct, which reads: Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create

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59 Other speakers included Justice Robert French of the Federal Court of Australia, Mr Daniel Stepniak of the Law School of the University of Western Australia and Sir Louis Blom-Cooper SC, a leading public law silk who has chaired a number of inquiries.

60 Department for Constitutional Affairs: *Broadcasting Courts: Response to Consultation carried out by the Department for Constitutional Affairs* (CP(R) 28/04)(30/06/2005).

61 Andrea Biondi "TV Cameras Access into the Courtroom: A Comparative Note" in (1996) 2 *Yearbook of Media and Entertainment Law* (ed Eric Barendt) 133-150 at 133.

62 *State v Hauptmann* 115 NJL 412; 180 A 809, cert. denied; 296 US 649 (1935).

misconceptions with respect thereto in the mind of the public and should not be permitted.[63]

[67] The ban was extended to television cameras as from 1957[64] and was likewise made applicable to all Federal Courts, with the result that television cameras were prohibited in all states except Oklahoma, Colorado and Texas.[65] It was the Texan case of prominent businessman Bill Sol Estes, a close friend of former President Lyndon B Johnson, however, which prompted the Supreme Court to make a ruling on its constitutionality during 1965[66]. The trial, in which Estes was found guilty of embezzlement (the criminal felony of "swindling"), was widely covered (and sensationalised) by the electronic media. This caused the Supreme Court to set aside the conviction on appeal, because the presence of the media had violated his right of due process, even though he had failed to prove that he had been prejudiced by such media coverage.

[68] In the course of time the reasonableness of the complete ban on cameras began to be questioned. As a result of intensive lobbying by media corporations, canon 35 aforesaid was revised in 1972 by canon 3A(7) to allow electronic coverage solely for educational purposes under strict guidelines from a judge.[67] It prohibited broadcasting, televising, recording or photographing in courtrooms, except under rules prescribed by a supervising appellate court or other appropriate authority. It provided further:

A judge may authorise broadcasting, televising, recording and photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto consistent with the right of the parties to a fair trial and subject to express conditions, limitations and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants and will not otherwise interfere with the administration of justice.

[69] As from 1976 some states initiated experimental projects which authorised television coverage of certain trials. In 1981 the Supreme Court was requested to

63 62 *ABA Rep*. 1134-1135 (1937).
64 77 *ABA Rep.* 110-111 (1952).
65 On the banning in Federal Courts see the *Federal Rules of Criminal Procedure* p 53.
66 *Estes v Texas* 381 US 532 (1965).
67 Canon 3A(7) of the *Code of Conduct for United States Judges*.

review the constitutionality of the State of Florida experiment in the case of *Chandler v Florida.*[68] In that case two policemen had been convicted of burglary and other crimes, thereby attracting considerable media attention. They attempted to have their convictions quashed on appeal on the basis that they had been denied their right to a fair trial arising from undue influence of the jury. The Supreme Court dismissed the appeal, holding that they had failed to demonstrate a failure of due process. Significantly, however, the presence of television cameras was not held to constitute an infringement of constitutional rights, hence leaving states free to authorise television coverage of trials should they so wish.

[70] Not unpredictably the vast majority of USA states thereafter allowed television coverage of trials, be it permanently or experimentally.[69] This reflected the need to ensure that all aspects of litigious issues requiring resolution be dealt with in an open and transparent manner. As a result court proceedings in various states have been televised and journalists from the electronic media have been accorded the same rights as print journalists. In this regard the said states have doubtless been guided by the aforesaid canon 3A(7), which was approved by the ABA in 1982 and appears to have become of general application. Of singular importance in this context, however, was the role played by the First and Fourteenth Amendments to the Constitution of the USA, in terms of which provision is made for the right of the public and the press to attend criminal trials.[70]

[71] One of the states, which played a prominent role in the development of a new approach to electronic media in the courts, was North Carolina. In 1987 its Supreme Court adopted experimental rules permitting electronic and still camera coverage of court proceedings in both trial and appellate courts. Of some significance was that the consent of the parties was not required and that the presiding judge had an unfettered discretion to permit or reject electronic media coverage. On 25 June 1990 the North Carolina Supreme Court adopted permanent rules[71] allowing cameras into the courtrooms. The trial judge retained his discretion, on prior permission being sought, to permit or reject electronic media coverage. Leave would generally be refused in cases relating to juveniles, child custody, adoption, divorce, alimony, the suppression

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68 449 US 560 (1981).

69 In 1996 the only states that did not allow television coverage were District of Columbia, Indiana, Mississippi and South Dakota. See the authorities cited by Biondi (n 72 above) at p.135-136 n.10. In 2001 South Dakota also resolved to admit cameras into its courtrooms.

70 See *Richmond Newspapers Inc. v Virginia* 448 US 555 (1980). See also *United States v Criden* 648 F2d 814 (1981), concerning judicial discretion in an application for access to video and audio tapes. The wideness of this discretion was considered in *United States v Antar* 38 F3d 1348 (3rd Cir. 1994), in which the press sought the unsealing of a jury *voir dire* transcript after a criminal trial.

71 In terms of rule 15 of the *General Rules of Practice for the Superior and District Courts*.

of evidence, trade secrets, *in camera* presentations and the like.

[72] In California the broadcasting of court proceedings was banned from the 1950s to the late 1970s, when it was permitted on an experimental basis. In 1984 rule 980 of the *California Rules of Court* was enacted to permit film and electronic media coverage of court proceedings. In terms of the rules governing broadcast compiled by the Californian Committee on the Media and the Courts, it was allowed in both trial and appellate courts, subject to the sole discretion of the presiding judge after considering a written request submitted in advance of the case. Pursuant to the O J Simpson trial in 1995, however, the Governor of California called for a complete ban on electronic and television media coverage of judicial proceedings. A Task Force was set up to conduct a survey of the views of trial and appellate judges in California. Despite a number of negative findings, the Task Force recommended maintaining camera access to trial and appellate courts. As a result rule 980 was amended to include a prohibition on the coverage of jury selection, conferences between counsel and courtroom spectators observing the proceedings.

[73] In the State of New York section 52 of the *Civil Rights Law* of 1952 banned audio-visual coverage of court proceedings. In 1987 it was relaxed to permit a ten-year experiment in televising proceedings in accordance with newly enacted rules governing broadcasting. In terms thereof filming was allowed in civil and criminal trials and in appellate court proceedings, subject to the discretion of the presiding judge on consideration of an application submitted at least seven days before the proceedings.[72] A committee was subsequently set up to evaluate the experiment in conjunction with a Marist Institute Poll.[73] Despite concerns expressed particularly by members of the public, the Committee recommended that cameras should be allowed in courtrooms on a permanent basis.[74] The experiment was not, however, renewed, and since 1997 cameras have been permitted only in appellate courts. In 2001 the New York State Bar Association raised the issue once again in a survey of judges with direct experience of cameras in the courtroom.[75] State authorities are, however, still debating the issue and television coverage remains limited to appellate courts.

[74] Strangely enough canon 3A(7) aforesaid effectively excluded television cameras from federal courts until 1991, when it was amended to permit a three-year experiment ("pilot program") with televising civil proceedings in certain federal courts, namely six district courts and two courts of appeals. This was subject to the presiding judge's discretion after due notice had been given.[76] Subsequently, during 1994, the Federal Judicial Center conducted an evaluation of the experiment in such courts and recommended that cameras be allowed in courtrooms on a permanent basis.[77] The United States Judicial Conference, however, with its overriding authority, rejected this recommendation and voted against continued camera access to

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72 Section 218 of the *Judiciary Law* of 1987, read with Part 131 of the Rules of the Chief Administrative Judge on *Audio-Visual Coverage of Judicial Proceedings*.

73 New York State Committee to Review Audio-Visual Coverage of Court Proceedings.

74 In a report entitled *An Open Courtroom: Cameras in New York Courts 1995-1997.*

75 *Cameras in the Courtroom*: *Report by the Special Committee of the New York State Bar Association on Cameras in the Courtroom* (2001).

76 *Guidelines for the Pilot Program on Photographing, Recording and Broadcasting in the Courtroom*, approved by the Judicial Conference of the United States in September 1990 and revised in June 1991.

77 Federal Judicial Center *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals* (1994).

courtrooms. This gave rise to a strong judicial reaction, which led to a renewal of the experiment and an eventual acceptance by the Conference that each federal appeals court should decide the issue individually.

[75] As matters stand currently, cameras are indeed permitted, but only in appellate courts. In 2000 the House of Representatives passed a bill allowing cameras to be used in federal trials, subject to a right of veto accruing to any named party in the case.[78] Since then, however, a bill proposing the use of cameras in the United States Supreme Court has been repeatedly rejected by the Senate.[79]

[76] The Supreme Court of New Jersey adopted a refreshingly novel approach in October 2003, when it approved revised guidelines for the use of still cameras, video cameras and sound recording equipment in covering proceedings in the courts of New Jersey.[80] Judges were empowered to permit broadcasting, televising, recording or taking photographs in the courtroom or in immediately adjacent areas only in accordance with such guidelines and subject to the restrictions contained therein. This was the culmination of a pilot program, which had commenced in two courtrooms in 1979 and had become generally applicable to all courts in 1986. The revised guidelines were based on canon 3A(9) of the Code of Judicial Conduct and were adopted by the Supreme Court of New Jersey in September 1994. The primary goal of the guidelines as revised was to provide access to the *bona fide* media to photograph, televise or broadcast court proceedings while ensuring the fair administration of justice and maintaining appropriate court decorum in accordance with satisfactory security measures. Clear and unambiguous procedural requirements were hence laid down in the seven guidelines furnished. The consent of the parties was not required for electronic televising, recording or broadcasting. The presiding judge, however, had an overriding discretion to order all such activity to cease if at any time he should determine that it was interfering with the proceedings.

CANADA

[77] The issue relating to the televising of court proceedings was of little or no consequence in Canada prior to the early 1980s, when the Canadian Constitution and the *Canadian Charter of Rights and Freedoms* appear to have stimulated both discussion and litigation. Although only the Province of Ontario had, in 1974, explicitly banned the broadcasting of court proceedings, there was, generally speaking, virtually no electronic coverage of such proceedings anywhere to be encountered. This included the Supreme Court, which banned any form of broadcasting between 1981 and 1993.

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78 *Sunshine in the Courtroom Act*, HR 1280, 105th Congress.

79 *A Bill to Allow Media Coverage of Court Proceedings* S 554, 108th Congress (6 March 2003).

80 *Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey* [approved October 2003].

[78] In 1987 the Law Reform Commission of Canada recommended that electronic media coverage of appeals in criminal matters be admitted and that audio recordings of criminal proceedings be allowed "as a substitute for, or in addition to, handwritten notes".[81] In addition it suggested that a "national experiment" be undertaken, over a significant period of time, to investigate the effects of electronic media coverage of ordinary criminal trials. In the same year (1987), Judge T G Zuber recommended, as part of a larger review of the Ontario court system, that the relevant statute be amended so as to allow electronic media into the courtroom for a period of two years. This would enable the long-term viability of such access to be assessed.[82] Almost simultaneously the Canadian Bar Association accepted the majority recommendation of its special committee on cameras in the courts, namely that television and photographic media be given access to the judicial system for a two-year period, subject to certain restrictions.[83]

[79] Of particular significance was the attempt, by proponents of televising court proceedings, to make use of the provisions of section 2(b) of the *Canadian Charter of Rights and Freedoms* ("the Charter") to gain a foothold for electronic media in the courtrooms. Thus in the case of *Regina v Squires*[84] the accused, a television reporter from the Canadian Broadcasting Corporation, was charged with violating section 67(2)(a)(ii) of the *Judicature Act* RSO 1980, c.223. This arose when she instructed her cameraman to film a witness as he left the courtroom after testifying at a preliminary inquiry. The relevant part of the section provides:

2) Subject to subsection (3), no person shall,
   a) take or attempt to take any photograph, motion picture or other record capable of producing visual representation by electronic means or otherwise
      i) …
      ii) of any person entering or leaving the room in which the judicial proceeding is to be or has been convened.

The accused argued that such section infringed upon the right of freedom of expression, including the freedom of the press, as guaranteed by section 2(b) of the Charter, which reads:

2) Everyone has the following fundamental freedoms:
   a) …
   b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

The trial court (Vanek J) rejected this argument. An appeal by the accused to the

81 Law Reform Commission of Canada *Public and Media Access to the Criminal Process* (Working Paper 56) (Ottawa 1987)
82 T G Zuber *Report of the Ontario Courts Inquiry* (Ministry of the Attorney General) (Toronto 1987).
83 Canadian Bar Association *Report of the Canadian Bar Association's Special Committee on Cameras in the Courts* (Final Report) (Ottawa, 22 July 1987).
84 *R v Squires* 78 CCC (3d) 97 (1992).

Provincial Offences Appeal Court (Mercier J) was dismissed on the basis that, while the said section 67(2)(a)(ii) did violate section 2(b) of the Charter, it constituted a reasonable limit within the meaning of section 1 thereof. This section reads:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

A further appeal, to the Ontario Court of Appeal, was likewise dismissed, Tarnapolsky and Krever JJA dissenting. The majority of the Court (Houlden, Dubin and Osborne JJA) agreed with Mercier J in the court *a quo* that section 67(2)(a)(ii) of the *Judicature Act* indeed violated section 2(b) of the Charter, but that it constituted a reasonable limit within the meaning of section 1.

[80] In *New Brunswick Broadcasting Corporation Co v Nova Scotia (Speaker of the House of Assembly)*[85] Cory J adopted a more flexible approach in his dissenting judgment on whether or not cameras should be banned in the House of Assembly. After accepting that a ban on cameras necessarily infringed upon the freedom of the press in terms of section 2(b) of the Charter, the learned Judge held that such infringement could not be justified under the limitations provision in section 1 of the Charter. In this regard he stated:[86]

The television media constitute an integral part of the press. Reporting in all forms has evolved over the ages. Engraved stone tablets gave way to baked clay tablets impressed with the cuneiform writing of the Assyrians and the papyrus records of the Egyptians. It was not so long ago that the quill pen was the sole means of transcribing the written word. Surely today neither the taking of notes in shorthand nor the use of unobtrusive tape recording devices to ensure accuracy would be banned from the press gallery. Nor should the unobtrusive use of a video camera. The video camera provides the ultimate means of accurately and completely recording all that transpires. Not only the words spoken but the tone of voice, the nuances of verbal emphasis together with the gestures and facial expressions are recorded. It provides the nearest and closest substitute to the physical presence of an interested observer.

So long as the camera is neither too pervasive nor too obtrusive, there can be no good reason for excluding it. How can it be said that greater accuracy and completeness of recording are to be discouraged? Perhaps more Canadians receive their news by way of television than by any other means. If there is to be an informed opinion in today's society, it will be informed in large part by television reporting. Nor should we jump to the conclusion that if the media are granted broader rights, those rights will be abused. Hand in hand with increased rights go increased responsibilities. The responsibility of the press is to report accurately, fairly and completely, that which is

85 13 CRR (2d) 1 (SCC) (1993).
86 At 61, with conclusion at 64.

relevant and pertinent to public issues. It may be argued that the television media will only broadcast that which is sensational. That same argument could be advanced with regard to all forms of media. Yet no one would consider barring the print media from a public session of the Assembly on the grounds that they tended to be sensationalist. The public today is too intelligent, too discerning and too well informed to accept unfairly slanted or sensational reporting.

[81] It is not improbable that approaches such as that of Cory J prompted the government of Nova Scotia to commence a two-year pilot filming programme in the Court of Appeal during 1996.[87] Limitations and restrictions were placed on the media in accordance with specified rules and guidelines, which were revised from time to time, most recently in 2003.[88] A Court and Media Liaison Committee was subsequently set up to undertake an evaluation at the end of the pilot project. It found that the judiciary was generally positive about cameras in the courtroom, while counsel, although initially wary, became more positive as they grew accustomed to it. The Committee concluded that television in an appeal court was nothing to be feared and that the decorum of the court had not been negatively affected by its use. There had been no embarrassing incidents and no attempts by the media to abuse the privilege they had been granted.[89]

[82] The Supreme Court of Canada followed suit in 1998 by renewing a pilot project relating to the broadcasting of its hearings by the Canadian Parliamentary Affairs Channel (CPAC), a subscription television channel covering parliamentary proceedings, in accordance with certain rules and restrictions.[90] This was subject to an approval process involving the parties to the cases that the CPAC wished to broadcast, with restrictions at the discretion of the presiding judge. The CPAC was required to broadcast the selected cases in their entirety and to ensure that those sections of the recording used on news programmes were balanced and fair.

AUSTRALIA

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87 *Notice to the Media Re: Pilot Project - Cameras in the Court of Appeal* 7 December 1995.
88 *Pilot Project - Cameras in the Nova Scotia Court of Appeal - Rules and Guidelines, Revised* 1 March 2003.
89 Court and Media Liaison Committee *Report at Conclusion of Two-Year Camera Pilot Project.*
90 See letter dated 31 August 1998, from the Registrar of the SCC to the CPAC Director of Programming, *Re: Renewal of Pilot Project Governing CPAC Broadcasts of SCC Hearings*.

[83] In Australia broadcasting by the electronic media has not been high on the socio-political agenda, which may explain the absence of statutory prohibitions, be they specific or general, on the recording and televising of court or legal proceedings. It may likewise be explained by the generally held perception that the broadcasting of sound or television recordings of such proceedings is a matter falling within the court's exclusive and inherent power to control and regulate its own procedure.

[84] This approach does not differ substantially from that followed in other common law countries, as Linton has pointed out in a comparative exercise on the subject.[91] He suggests that the main determinant in this regard is the relative emphasis on the values of "free press" and "fair trial". There are also differences in philosophy, societal values and political cultures of the three countries in question. This revolves mainly around the role and effect of media in society as compared with (or opposed to) the function and operation of the respective justice systems. Proponents of cameras in the courtroom emphasise the benefit of keeping the public well-informed, while the opponents denigrate the disruptive and adverse effect of such cameras as interfering with the decorum and efficient operation of the courts.

[85] The New South Wales Law Reform Commission (the "Commission") was responsible for important initiatives in developing the use of electronic media in the courts. In the early 1980s, after receiving a submission by a newspaper publisher that reporters should be permitted to tape-record court proceedings, the Attorney General of New South Wales referred the matter to the Commission for its opinion. The Commission broadened the scope of the investigation by including the issue of televising court proceedings.

[86] In general the Commission found that the media were in favour of more flexible media access to legal proceedings, but that the legal profession, especially the judiciary, resisted any such development. Its 1984 report was hence limited to sound recording in court and commission proceedings.[92] This report received little media attention, thereby prompting the Commission to produce an issues paper dealing generally with the electronic media (television filming, sound recording and public broadcasting) and with the use of photographs and sketches.[93] According to the latter report there had been some instances of court proceedings having been recorded and later broadcast on television. In one such, segments had been recorded for

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91 James M Linton "Camera Access to Courtrooms: Canadian, U.S., and Australian Experiences" in *Canadian Journal of Communications* 18.1 (1993) 15-32. More recently Ms Prue Innes, the Courts Information Officer at the Supreme Court in Melbourne and the 1998 Churchill Fellow, undertook research on the courts and media in the United States, Canada and the United Kingdom. The title of her subsequent report (June 21, 1999) was *The Courts and the Media: Report of 1998 Fellowship.*

92 New South Wales Law Reform Commission (1984a, March): *Sound Recording of Proceedings of Courts and Commissions: The Media, Authors and Parties* (Community Law Reform Program – Fourth Report) (Sydney 1984).

93 New South Wales Law Reform Commission (1984b, March): *Proceedings of Courts and Commissions: Television Filming, Sound Recording and Public Broadcasting, Sketches and Photographs* Community Law Reform Program – Issues Paper (Sydney 1984).

incorporation in a commercial film, while others had related to the transmission of court proceedings, more particularly in the High Court of Australia in Canberra, by way of closed circuit television for use by news media. This has, however, occurred on an *ad hoc* basis by virtue of the decisions of individual judges or commissioners exercising their inherent power to regulate their own proceedings.

[87] After a relatively brief period, during which the issues paper received substantial media attention, it appears to have been removed from the public agenda without generating any significant public response. As a result the Commission has moved it down on its list of priorities, predicting that it is unlikely to be resuscitated in the near future because of a lack of interest and budgetary considerations.

[88] More recently, during 1990, an interest in the topic emanated from a different source, namely the New South Wales Independent Commission against Corruption (ICAC), which held hearings to establish whether or not its public proceedings should be televised. In its report[94] it concluded that hearings should not be televised "in favour of ensuring the right of ICAC witnesses to a fair trial at any future proceedings arising out of an ICAC investigation". It did, however, recommend that a "working party" be established with a view to reporting on measures to improve the electronic media coverage of court proceedings in New South Wales. There was no immediate response to this recommendation by the New South Wales government and it was certainly not given any priority.

[89] In his address at the Broadcasting Courts Seminar held in London during early 2005,[95] Justice Robert French of the Federal Court of Australia sought to explain the Australian recalcitrance in the sphere of electronic media coverage of court proceedings. He pointed out at the outset that only a small proportion of electronically recorded court proceedings was ever used, and then continued:

> In the Australian context, pressures to provide access to television and radio broadcasters arise in the context of news or current affairs programs and to a lesser extent, educational documentaries. The demand is necessarily episodic and, for the most part, limited to cases of significant public interest or notoriety. It is quantitatively manageable and can be accommodated by a process of individual decision-making by the relevant judicial officer. Some may call this process ad hoc and subject to the vagaries of particular judicial preferences or prejudices. Some may describe it, more charitably, as incremental. Some may say it reflects the traditions of the common law, building conventions and practices on a case-by-case basis and in that process building mutual trust, confidence and predictability. [96]

[90] The learned Justice described this approach as the "essentially pragmatic character of Australian decision-making about these matters". In ceremonial proceedings, for example to welcome new judges or to take leave of retiring judges, television coverage was generally permitted, thereby providing file footage to be used

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94 Committee on the ICAC: *Report of an Inquiry into a Proposal for the Televising of Public Hearings of the Independent Commission against Corruption* (Parliament of New South Wales, Sydney, June 1990).

95 See par [63]-[64] and n 59 above.

96 See p 2-3 of his speech.

on a later occasion. This could, of course, be "hazardous" if the footage, indicating the judge smiling at some or other witticism uttered during the televising of a ceremony, should later be "reproduced as a tasteless smirk in the context of a horrific crime", in the hearing of which that judge was subsequently presiding.

[91] According to Justice French, a positive development in electronic media coverage of court proceedings was the increasing frequency with which judges have allowed the commencement of proceedings, exciting significant public interest, to be filmed. In the high profile case of the Norwegian container ship "Tampa", which had rescued a number of Middle-Eastern asylum seekers from a foundering smuggler's vessel, leave was granted for all the *habeas corpus* and judicial review proceedings at first instance to be filmed. On appeal, however, the Full Court of the Federal Court allowed only the commencement of the proceedings and the summarised reasons for judgment, as read by the Chief Justice, to be televised.

[92] Of some significance was the Federal Court's appointment of a media law expert, Mr Daniel Stepniak, as a consultant on the televising of court proceedings. He worked in conjunction with a Steering Committee appointed by the Chief Justice and submitted a final report in March 1998.[97] It dealt in some depth with the situation, and attendant issues, relating to electronic media access to court proceedings in a number of jurisdictions. Stepniak proposed an experimental programme of electronic coverage in the Federal Court, to be followed up by a process of evaluation. The Steering Committee and the judiciary appear to have endorsed this recommendation, and to have accepted the Chief Justice's proposal that an evaluation project be undertaken in accordance with specified guidelines. No development of any substance has, however, ensued since then and, as Justice French has rightly observed, it will probably occur only incrementally and on a case-by-case basis.

[93] Probably the most progressive of Australian states, in the field of electronic media access to the courts, has been Victoria. The courts of Victoria have, in many instances, taken the lead in adopting a reformist and innovative stance with regard to the promotion of effective court reporting by means of electronic media access to court and legal procedures. In April 1994 judges of the Victoria Supreme Court agreed to permit the filming of judges in courtrooms for purposes of acquiring file footage for later use.[98] Between 1994 and 1996 television cameras were permitted in Victorian magistrates' courts. In one particular case the court gave leave for the entire proceedings to be recorded for purposes of a radio broadcast.

[94] In 1995 the Supreme Court of Victoria became the first Australian Superior Court to specifically consider the legality of courtroom televising. Justice Cummins adopted a flexible approach in holding that objections to electronic media coverage should be sustained only in exceptional circumstances. This approach appears to have been endorsed by other Supreme Court judges who demonstrated a willingness to

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97 D Stepniak *Electronic Media Coverage of Courts: A Report Prepared for the Federal Court of Australia* (1998). An updated version appeared more recently as D Stepniak "Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions" (2004) 12 *William and Mary Bill of Rights Journal* 791-823. .

98 This was largely due to the efforts of Prue Innes - see n 91 above.

facilitate television camera access in important civil cases generating significant public interest.

[95] As might be expected, it was not all plain sailing. In May 1995 a controversial and highly publicised instance of electronic media coverage took place when Justice Teague permitted television coverage of his sentencing of the convicted child murderer, Nathan John Avent. He ruled that it should take place under strict guidelines based on those governing the experimental televising of the courts in New Zealand. Despite this ruling, his sentence was taken on appeal on the basis that he had allowed himself to be "overwhelmed by the celebrity nature of the case", causing him to impose an excessively harsh sentence. The Court of Appeal rejected this argument, but accepted the possibility that a fair-minded lay observer might have entertained a reasonable apprehension that the judge could have been unconsciously influenced by the attention directed to the case by the media.

[96] Although this case gave rise to wide-ranging debate on the wisdom of televising court proceedings, the main thrust of the debate was not whether or not it should be permitted, but to what extent it should be regulated. Its primary benefit was that it undoubtedly served in creating the perception that justice was being seen to be done. On the other hand, allowing proceedings to be televised on an *ad hoc* basis could lead to the opposite perception, namely that justice was not in fact being done.

[97] Of some importance was the involvement of the Parliament of Victoria in mandating its Law Reform Committee ("the Committee") to prepare a report and make recommendations on the subject. In its report dated May 1999, the Committee dealt with the televising of court proceedings with special reference to Stepniak's research.[99] At the outset the Committee stated that the electronic media have "enormous potential to educate and inform people of their legal rights".[100] It accepted, however, that, despite the obvious benefits of televising certain proceedings, guidelines should be formulated and approved before any general recommendation could be made. Although it anticipated that it would be only a matter of time before court proceedings were televised over the Internet, it was essential that the protection of an individual's privacy should be "carefully balanced with the public benefit gained by televising proceedings on a case by case basis".[101]

NEW ZEALAND

[98] New Zealand appears to have adopted a fairly low profile approach to electronic media in the courts before 1995. Although there was no legal prohibition on broadcasting, cases were rarely televised. According to Mr Daniel Stepniak,[102] however, the New Zealand judiciary, during the early 1990s, drew parallels between the *Bill of Rights Act* of New Zealand and the *Canadian Charter of Rights and*

99 Parliament of Victoria, Law Reform Committee: *Technology and the Law 1999: Final Report* (Melbourne, May 1999): *Televising Court Proceedings* (par 12.27 to 12.31).

100 Par 12.27 at p 219 of the Report.

101 Par 12.31 at p 220 of the Report.

102 At p 4 of his address during the Broadcasting Rights Seminar - see par [63]-[64] and n 59 above.

Freedoms. In doing so it accepted that a blanket prohibition on televising court proceedings was not consistent with the provisions of the *Bill of Rights Act* and was likewise not sustainable on common law principles. It was hence clear that a new approach was called for, particularly if the courts were not to be left behind in the international race to introduce electronic media into the courtroom scenario.

[99] The New Zealand Courts Consultative Committee thereupon appointed a Working Party to investigate the various issues relating to electronic media coverage of court and legal proceedings. The Working Party embarked on an extensive study of overseas experiences regarding the advantages and disadvantages of televising court proceedings and recommended a three-year pilot program of court televising. The program commenced on 1 February 1995 and was extended to June 1996 to include the use of radio and photography in courtrooms.

[100] The pilot program was governed by strict rules evolved for each of the three forms of media. Advance notice (four days) of electronic media coverage of particular proceedings had to be given to the presiding judge, who was called upon to grant written authorisation for broadcasting in his or her courtroom. The program was confined to four courts, with no filming being permitted in family or youth courts or in cases involving sexual offences. The identities of parties and witnesses were strictly protected and no visual coverage of members of a jury, or of members of the public attending the proceedings, was allowed. The judge was empowered to impose further conditions should he or she so wish. The use of any electronic recording was restricted to news items, unless specially sanctioned by the judge. Any footage broadcast had to be at least two minutes in length with no editorial comment.[103]

[101] The pilot program was closely monitored and evaluated through case-based research and surveys of public perceptions conducted by UMR Insight in each of the pilot years.[104] A team from Massey University undertook a case-by-case evaluation.[105] The primary findings of the pilot program accorded largely with those of pilot programs conducted in other countries, namely that neither the proceedings as such nor the participants were adversely affected, to any significant extent, by the electronic media coverage. A negative finding, however, was that the majority of judges were distracted by the cameras. Even more disturbing was that the pilot program apparently had little success in familiarising New Zealanders with the workings of their judicial system. The vast majority (some 67%) did not believe that the program had any educational value, while a majority (some 58%) indicated that they would be less than willing to appear as witnesses should cameras be present. Nevertheless public opposition to electronic media coverage of court proceedings fell from 58% in 1996 to 37% in 1998.

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103 *Rules Regulating Coverage by the Electronic Media of Court Proceedings* (1995).

104 UMR Insight Ltd *Department of Courts - A Quantitative Summary* February 1996; February 1997; February 1998.

105 Massey University, Department of Human Resource Management, *Report Prepared for the Department of Courts: The Impact of Television, Radio and Still Photography on Coverage of Court Proceedings - Final Report* (April 1998).

[102] This negative sentiment might have been attributable to the restrictive rules governing the coverage, particularly those relating to the consent of participants. As a result the New Zealand public has remained divided on the desirability of television coverage of court proceedings and significant concern is still expressed at the perceived impact it may have on witnesses. The media have also been negatively influenced by the strictness of the guidelines, which have not been consistently interpreted by the courts and have exposed the media to cumbersome and time-consuming procedures. On occasion they have even opted to rely on "traditional" media coverage rather than risk this form of exposure.

[103] In December 1997 the Courts Consultative Committee recommended that, pending a decision as to future television coverage consequent upon the evaluation of the pilot program, electronic media coverage in the four pilot courts should, subject to one rule modification, continue. In other courts it would be left entirely to the discretion of the presiding judge. All electronic media reporting would, however, still be subject to the rules of the pilot program.

[104] In August 1998 the Committee published a Discussion Document "to facilitate a consultative process to determine the best option for the future of television, radio and still photography coverage of court proceedings, on the basis of the experiences of the 3-year pilot and of the research findings".[106] The effect of these recommendations was that, on completion of the trial period, cameras were admitted on a permanent basis, but still in accordance with strict conditions and restrictions. In May 2000 general guidelines were drawn up for electronic media coverage of court proceedings. These were revised in 2003.[107]

[105] Despite this apparent progress, the said guidelines have been criticised as being too rigid in that they have severely restricted judicial discretion in allowing television coverage of court proceedings. This appears from the following general observation made by Ms Prue Innes, the Australian Courts Information Officer who did research in New Zealand during 1996, in her 1998 Churchill Fellowship report:[108]

However, it is essential that judges be given sufficient discretion and not to have their hands tied by rigid rules. They should also retain control of camera access. In other words, access should be discretionary, rather than a right, but a discretion which I would hope judges would exercise in appropriate cases. I would also add that rules that are too rigid are fairly pointless. They almost ruined the New Zealand pilot because of inflexibility and not enough discretion for judges, and rigid rules made television access in Scotland very limited.

This led the learned author to suggest that "ultimately, judicial discretion, fairly exercised, would be preferable to legislation either to ban or admit cameras as a right".

[106] In November 2003 New Zealand's TV3 launched a series of courtroom dramas

106 This appears from p 4 of the Federal Court of Australia's executive summary of the *TV in Courts Report* based mainly on the Stepniak Report (n 97 above).

107 *The In-Court Media Guidelines* (2003).

108 At p 17-19 of her Report. See n 91 above.

under the title "Crime and Punishment", an NBC America series in which real court cases were presented as fictional courtroom drama. In an interview[109] with radio journalist, Russell Brown, soon after the launch, Stepniak observed that the use of television in courts was becoming increasingly prevalent throughout the world, although cultural differences prompted the countries involved to do so in different ways. Nevertheless there was a general appreciation of the need to open public institutions to the public by providing the transparency expected of them. Of course there had to be proper control and appropriate guidelines, but over-regulating, as had been the case in New Zealand, had to be avoided. The situation in New Zealand had, however, improved, despite a continuing measure of resistance to it.

EUROPE

[107] In her comparative note on television access to courtrooms, Andrea Biondi gave a brief historical overview of the situation in Europe.[110] She pointed out that Germany has statutorily banned the use of any audio or video recording in trials since 1964.[111] In France a similar situation pertained in terms of the Criminal Procedure Code of 1959, which likewise banned the use of any such recordings.[112] A law of 1981, however, allowed the televising of court proceedings with leave of the presiding judge and the parties, but subject thereto that the televising be restricted to the preliminary stages of such proceedings.[113] In 1985 leave was granted by statute to film trials, but only those of historical interest destined for the historical archives.[114] A further extension occurred in 1990 when a law provided for the broadcasting of trials concerning crimes against humanity, where the decision of the court in such trial was final.[115]

[108] Italy has been characterised by a particularly liberal approach to televising

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109 The interview may be found on the website at http://www.mediawatch.co.nz/archive.
110 See her contribution (cited in n 61 above) at 137-138.
111 Article 11(5) of the Law of 19 December 1964 amended article 169 of the Law relating to the administration of courts (*Gerichtsverfassungsgesetz*).
112 Articles 308 and 403 of the *Code de procédure pénale.*
113 Article 39 *bis* of the Law of 2 February 1981.
114 Law 85-699 of 11 July 1985. On the debate relating to this law Biondi referred (at 137 n 19) to the article of J Verin "Televiser les débats judiciaires" in *Revue des sciences criminelles* (1984) 813.
115 Article 15 of Law 90-615 of 13 July 1990 ([1990] Jo 8333).

court and legal proceedings. As early as 1946 the trial of an alleged fascist collaborator was televised. It was only in the 1970s, however, that there were regular television broadcasts of the conclusion of trials. In some instances the entire proceedings were televised or broadcast on radio, such as those concerning the Red Brigade terrorist group and the trial of Ali Agca, who attempted to murder Pope John Paul II.[116] In 1987 a serious debate commenced on whether or not television cameras should be permitted in courtrooms. It was inspired by the launch of a programme entitled *Un giorno in pretura* ("a day in the prefecture"), the Italian court of first instance. After in-depth consideration of the issue, the Italian Parliament introduced a provision into the new Code of Criminal Procedure specifically allowing camera-access to court proceedings.[117] Since then both criminal and civil trials are routinely televised.

[109] It is significant that article 6(1) of the *European Convention on Human Rights* provides that, inasmuch as all persons are entitled to a fair and public hearing, the press and the public may be excluded from the proceedings if their presence should prejudice the interests of justice. On the other hand the International Court of Justice ("World Court"), situated in The Hague, Netherlands, allows its proceedings to be televised. The same applies to international criminal tribunals such as that constituted for the erstwhile Yugoslavia, which in fact recorded and televised its own proceedings and made footage available to media networks.

Consideration of the Facts and Circumstances of the Present Case

[110] It is not in dispute that the *Thatcher* matter was of great public interest, both in South Africa and elsewhere. It was thus the kind of matter that would, and should, inevitably elicit media attention, as envisaged by the relevant provisions of the *Broadcasting Act* and the ICASA and BCCSA codes of conduct.[118] It is consonant with the fundamental democratic values of the Constitution and relates specifically to the protected human rights of equality, privacy and freedom of expression, subject to the limitations applicable when competing interests are weighed up in an assessment based on proportionality.[119]

[111] The manner in which the relief is sought is in line with statutory open court provisions and the order sought and granted by this court is clearly just and fair within

116 On the historical background to these, and similar proceedings, Biondi, at p 138 n 22, cites chapter VII of the work by G P Voena *Mezzi audiovisivi e pubblicità delle udienze penali* (Giuffrè, Milan 1984).
117 Art 147 *Codice procedura penale* (1989).
118 See par [21]-[25] above.
119 Sections 9(1), 14, 16(1)(a) and (b) and 36(1) cited in par [26]-[27] above.

the context of the court's inherent power to protect and regulate its own process.[120] After weighing up and balancing the competing rights in accordance with the principle of proportionality, this court must needs find that the limitation placed on the right of privacy in the present instance is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In coming to this conclusion the court has, in considering the relevant constitutional and other statutory provisions, applied a generous and purposive interpretation thereto. In this regard it has been guided by the cases in which full rein has been given to the importance of the right to freedom of expression, in the sense of freedom of the press and hence of the media.

[112] In the context of the present matter this court was called upon to give leave to televise only the arguments of counsel and the delivery of judgment. This is because the issue was to be decided as an opposed application without the necessity of calling witnesses on either side. As correctly pointed out by Mr Pincus, this would put paid to the "traditional" arguments raised against recording and broadcasting court proceedings, most of which are directed at the negative influence it might have on witnesses and jurors.

[113] There is always the possibility that the legal representatives may abuse the situation by advertising themselves or by indulging in "showboating" or "grandstanding". Under normal circumstances the presiding judge would not countenance such conduct and it may very well turn out to be prejudicial to the lawyer and his or her client. In our own experience in the present matter there was no question of any such abuse. The senior counsel addressed the court with their customary dignity, erudition and helpfulness. They created the impression of being oblivious of the cameras and other recording equipment around them. The guidelines set forth in the court's order were meticulously followed and there was no suggestion of any breach of privacy, confidentiality or privilege. As mentioned in our judgment in the main application,[121] "the recording process did not disrupt the proceedings, while the televised highlights packages appear to have constituted a balanced and fair reflection of such proceedings".

[114] Although the television cameras were, at first sight, an unusual part of the courtroom scenario we were accustomed to, the proposed recording equipment could not be regarded as obtrusive, disruptive or intrusive in any respect. In my view such equipment was not, in the case before us, substantially more conspicuous than the recording equipment presently used in our courts for the official recording of proceedings. The same applied to the cameramen, who performed their respective functions quietly, inconspicuously and unobtrusively. They might just as well have been members of the ordinary courtroom staff, be they ushers, clerks, security personnel or official recording employees. At no stage did the court feel called upon to place any further restrictions on the media than those already contained in some detail in the order issued on 25 October 2004.

[115] The restricted nature of the televising and recording in the present matter clearly falls squarely within the purview of the *obiter dictum* of Squires J in the first *E TV* case (par [43] above). The survey of developments in South Africa and elsewhere has, however, provided a valuable insight into the full spectrum of issues arising

120 Section 16 of Act 59 of 1969 and sections 172(b) and 173 of the Constitution (par [28]-[29] above).

121 In par [8] at 548H (379*a-b*) of the *Thatcher* matter cited in n 1 above.

should the electronic media be given access to the courts. This includes the case where a request has been directed at recording and televising the entire proceedings, which may well include the testimony of witnesses. Although this court was not required to give any decision on this issue, I believe that a flexible approach should be adopted in considering any such issue. Of course there will be cases where television coverage should not be permitted, but there will be many others where such coverage will not be prejudicial to anyone and will in fact have extremely beneficial effects. On a case-by-case basis the court should feel free, within its inherent power to arrange its own procedures, to allow, wholly or partially, the recording and televising of its proceedings. In the exercise of its discretion it will obviously take all relevant facts and circumstances into consideration before making its decision one way or the other.

[116] I have taken cognisance of all the relevant statutory provisions and have likewise taken into account the applicable legal principles as evolved in South Africa and elsewhere, particularly in the United States of America, the United Kingdom, Canada, Australia and New Zealand. In my respectful view it would be unwise to support the promulgation of legislation or the introduction of fixed rules and regulations governing electronic media coverage of court proceedings. Each case should be considered on its own merit with reference to its exclusive facts and circumstances. Judges should, however, have an unfettered discretion to grant or refuse the electronic media leave to record, televise and broadcast legal proceedings. And if leave should be granted, they should likewise have the discretion to specify any restrictions or conditions they may deem appropriate in the circumstances. In this regard I would respectfully associate myself with the eminently lucid and practical observations made by Cory J, when advocating a flexible approach in his minority judgment in the Canadian *New Brunswick Broadcasting Corporation* case.[122] I likewise concur with the observations and suggestions, from an Australian perspective, of Justice Robert French in his seminar speech and Prue Innes in her comparative report.[123]

[117] From this point of view there should be no question of any binding precedent excluding or restricting the exercise of a judicial discretion. The judge would in fact be acting within his constitutionally entrenched inherent power to protect and regulate the process to be followed in his or her court. The order granted by this court should hence be regarded as no more than an example of the kind of order that a court may consider in accordance with the facts and circumstances of the case before it. Each case would still have to be considered on its own merit, on the assumption that no two cases can ever be identical, however similar they may be.

[118] The facts and circumstances of the case in question will determine the nature and ambit of the order granted. However wide or restricted it may be, it should, in my view, always be consonant with the ageless values of justice, fairness and reasonableness. In this way justice will be done, and will also be seen to be done.

Concluding Observations

[119] In considering the development of electronic media coverage of court

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122 Par [80] above.

123 See par [89]-[91] and [105] above.

proceedings in South Africa, as compared with the similar development, or the lack thereof, in a number of other countries, it seems clear that the electronic media, and their associated issues, are here to stay. It is likewise apparent that a more flexible approach than has hitherto been demonstrated in the majority of countries confronted with such issues, will be required in dealing with the highly predictable increase in litigation in which electronic media coverage is called for. Of course cognisance will always have to be taken of statutory provisions and, more particularly, of competing rights, such as the right to privacy as opposed to the right of freedom of expression (freedom of the press) and the right to equal protection and benefit of the law. In deciding whether the one should take precedence over the other, limiting factors will have to be carefully considered.

[120] Pilot programmes and other experimental projects, directed at identifying acceptable approaches to electronic media access to courts, are undoubtedly extremely useful. Much can be learned, and has indeed been learned, from having regard to the results of such projects elsewhere in the world. Our legal systems, be they common-law based or members of other legal families, have more in common than is frequently realised. Fundamental values, such as justice, fairness (equity), reasonableness, good faith (*bona fides*) and good morals (*boni mores*) (better known as "public policy"), are encountered in virtually all legal systems. Similarly most legal systems are directed at resolving issues in as practicable a way as possible, without undue regard being given to substantially theoretical solutions, however interesting they may be.

[121] There will probably be general *consensus* on the proposition that the paramount consideration, in deciding whether or not to permit any form of media access to court proceedings, must necessarily be the interests of justice. In the case of a criminal trial this will usually mean a fair trial, but in proceedings of any kind the parties, and their competing claims or interests, must be given equality of treatment. That is what concepts like objectivity, impartiality and fair play are made of.

[122] In this regard a heavy responsibility is placed on the media, a third party not directly involved in the proceedings but responsible for conveying a just, fair and reasonable reflection of what the proceedings are about and how the respective litigants are progressing. The courts are entitled to expect full co-operation from the media when conditions or restrictions concerning media coverage require meticulous compliance. Without such co-operation the courts will rarely be able to adopt the flexible approach they may opt for.

[123] It goes without saying that the same requirement of responsibility, and accountability, is expected of the lawyers who conduct prosecutions or defences in

high profile and frequently controversial criminal matters, or appear on behalf of the respective parties in important civil matters. The temptation to advertise or otherwise abuse the situation by melodramatic "grandstanding" or “showboating” will inevitably be a source of irritation to judges, who may then tend to resist rather than support a flexible approach.

[124] What is hence required is well co-ordinated teamwork from the media and legal profession with a view to satisfying the public that their primary aim is, and will remain, the achievement of justice for all. This is the substance on which the community's trust and confidence in the legal system and judiciary of any country is based. It constitutes an unequivocally positive reflection of the way forward.

[125] It is for these reasons that this court granted the order appearing at the commencement of this judgment.

D H VAN ZYL
Judge of the High Court

I agree.

E MOOSA
Judge of the High Court

I agree.

D V DLODLO
Judge of the High Court