The Right of Reply and Freedom of the Press: An International and Comparative Perspective

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In rejecting the right of reply[1] as incompatible with the First Amendment, Justice Byron White of the U.S. Supreme Court stated in 1974: "We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers."[2] It is not entirely clear whether his deep concern about the right of reply's impact on American print media was empirical or intuitive. In any event, Justice White's absolutist assumption that U.S. newspapers should be free from what he considered government editing explains his and other Justices' fears of what might happen when the government intrudes into actual or virtual high-walled newsrooms.

However, Justice White's assertion that the right of reply would give rise to a meddlesome government dictating news editing was overly sweeping. In fact, the news media in most free-press democra-

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1 The right of reply is often distinguished from the right of correction; the former compels a news-media outlet to publish a statement prepared by the injured, while the latter requires the media outlet to disseminate its own statement correcting its earlier statement. U.S. Agency for Int'l Dev., The Enabling Environment for Free and Independent Media: Contribution to Transparent and Accountable Governance 39 (2002), (Occasional Papers Series No. PN-ACM-006) *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm006.pdf.

2 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring).

cies do not appear to be fettered by their governments, even though the right of reply has been part of such democracies' press laws[3] since it was first established in French law in 1822.[4]

A representative of the United States toyed with the idea of a right of reply in 1947 when he proposed the right to counteract false news in international communication.[5] In 1949, U.S. delegates to the U.N. Convention on the International Transmission of News and the Right of Correction were pleased that the international right-of-correction proposals had been included in the convention. They hoped that "the correction provisions would provide a useful channel which, above all, would utilize the sense of professional responsibility of newspapermen themselves."[6] Moreover, the Commission on Freedom of the Press, a nongovernmental independent group in the United States, recommended legislation on the right of reply as a legal device to help free the press from the economic and commercial impediments of libel lawsuits.[7]

Over the years, however, access to the media in general, and the right of reply in particular, for individuals and the public[8] has been in

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3 FRANKLYN S. HAIMAN, CITIZEN ACCESS TO THE MEDIA: A CROSS-CULTURAL ANALYSIS OF FOUR DEMOCRATIC SOCIETIES 12 (1987).

4 IGNAZ ROTHENBERG, THE NEWSPAPER: A STUDY IN THE WORKINGS OF THE DAILY PRESS AND ITS LAWS 114 (1946). The book was first published in the United States under the same title in 1948.

5 U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Freedom of Info. & of the Press, Heading 3(c)(iii), U.N. Doc. E/CN.4/Sub.1/9 (May 16, 1947) (*proposal of* Zechariah Chafee).

6 *Assembly Adopts News Convention*, 6 U.N. BULL. 582, 586 (1949).

7 *See* THE COMM'N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 86 (1947).

8 Access to the news media and the right to reply to news reports are not identical to each other, although they are related in their concepts and raison d'etre. As Boston University School of Law Professor Pnina Lahav noted:

> It seems to me that there is a world of difference between the right of access and the right of reply. The right of reply is inherently limited and is reactive to market forces. It could be reduced to a right to a published retraction, important in itself, but not capable of major social changes.
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> The right of access, by contrast, is the product of a vigorous, robust vision of a healthy, vibrant system of freedom of expression. It is a part of civic society . . . . One needs to look for neglected ideas and highlight the needs of ignored social groups. This truth was valid then [in 1967, when Professor Jerome Barron published his seminal article, *Access to the Press—A New First Amendment Right*, in the *Harvard Law Review*] and is even more valid today. If I am right, then there exists an inherent tension between the right of access and the right of reply.

Pnina Lahav, Professor, Boston Univ. Sch. of Law, Right of Reply in the Comparative Context: A Comment on Professor Youm's Paper, Address at The George Washington Law Review Symposium: Access to the Media—1967 to 2007 and Beyond: A Symposium Honoring Jerome A.

a state of retrenchment in the United States.[9] Without a doubt, they are essentially moribund as First Amendment issues.[10]

The U.S. backpedaling on the right of reply stands out from other mostly civil-law countries in that the right of reply is increasingly recognized in foreign and international law. For instance, the American Convention on Human Rights, a treaty signed by several Central and South American countries, provides for a right of reply to those "injured by inaccurate or offensive statements or ideas."[11] The European Court of Human Rights ("ECtHR") reads a right of reply into the European Convention on Human Rights ("ECHR").[12] In 2004, the Council of Europe revised its 1974 right-of-reply resolution to reflect many major technological developments in the media.[13] Additionally, the U.N. Convention on the International Right of Correction[14] is not necessarily as "academic and largely ineffective" as it was dismissively described in 1980.[15] The number of the convention's signatories is growing, albeit slowly.

Further, the right of reply has been thriving in U.S.-influenced countries.[16] Some countries recognize it as a constitutional right,[17] while others treat it as a statutory regulation.[18] South Korea, which the United States has helped evolve into a vibrant constitutional de-

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Barron's Path-Breaking Article 12-13 (Oct. 11–12, 2007) (unpublished comment, on file with author).

9 For a concise overview of the media access and reply rights in U.S. law, see Jerome A. Barron, *Rights of Access and Reply to the Media in the United States Today*, 25 COMM. & L. 1, 2–12 (2003).

10 Samuel A. Terilli, Jr., *Access to the Media*, *in* 1 THE INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATION (forthcoming 2008) (manuscript at 13, on file with *The George Washington Law Review*). For a recent criticism of the First Amendment's blanket rejection of access to the media, see LAURA STEIN, SPEECH RIGHTS IN AMERICA: THE FIRST AMENDMENT, DEMOCRACY, AND THE MEDIA 49–65 (2006).

11 Organization of American States, American Convention on Human Rights art. 14, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 144, *available at* http://www.oas.org/juridico/english/treaties/b-32.html.

12 For a discussion of the European Court of Human Rights on the right of reply, see *infra* notes 62–66 and accompanying text.

13 For a discussion of the Council of Europe on the right of reply, see *infra* Part I.D.

14 For a discussion of the U.N. Convention on the International Right of Correction, see *infra* notes 44–46 and accompanying text.

15 INT'L COMM'N FOR THE STUDY OF COMMC'N PROBLEMS, MANY VOICES, ONE WORLD: COMMUNICATION AND SOCIETY, TODAY AND TOMORROW 249 (1980).

16 *See* Amit M. Schejter, *The Fairness Doctrine Is Dead and Living in Israel*, 51 FED. COMM. L.J. 281, 287–88, 298 (1999).

17 For a discussion of the right of reply in various constitutions, see *infra* Part II.A.

18 For a discussion of the right of reply in various statutes, see *infra* Part II.B.

mocracy,[19] exemplifies the statutory right of reply in a nation with a vociferous press. In June 2006, the Korean Constitutional Court unanimously reaffirmed the right of reply.[20] In addition, some nations with no constitutional or statutory right of reply have been trying to pass such laws.[21]

The right of reply is passé in American broadcasting law and has been a nonissue for American print media. Yet the debate about the right of reply in the United States is alive and well forty years after The George Washington University Law School Professor Jerome Barron sparked it with his landmark law review article *Access to the Press—A New First Amendment Right*.[22] Significantly, the debate is refreshingly enriched by taking a discerning look at other democratic legal systems that are more experienced on the right of reply[23]: the right of reply attracts a lot more in-depth attention from judges, lawyers, academics, journalists, and policymakers abroad. *Freedom of the Press and Personal Rights*,[24] the 2000 analysis of the Slovene media law on the right of reply, for example, epitomizes the unending discussion of the right's value in balancing journalistic freedom with social and individual interests.[25]

In the context of the growing acceptance of the right of reply in international and foreign law,[26] this Article is a modest attempt to review the right of reply abroad while risking the "nose-counting" sin.[27]

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19 Lawrence M. Friedman, American Law in the 20th Century 577–78 (2002).

20 For a discussion of Korean law on the right of reply, see *infra* Part II.B.5.

21 *See, e.g.*, Trevor Mason, *Stayaway MPs Scupper Backbench Bills*, Press Ass'n, Feb. 25, 2005 (noting Parliament's rejection of a right-of-reply bill in England); Phil. Press Council, Position on Right of Reply Legislation, http://pressinstitute.ph/council/position.html (last visited Mar. 6, 2008) (noting three right-of-reply bills introduced to the Congress of the Philippines in 2007).

22 Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

23 *See generally* Alexander Bruns, *Access to Media Sources in Defamation in the United States and Germany*, 10 Duke J. Comp. & Int'l L. 283 (2001) (comparing the laws of defamation in the United States and Germany); Charles Danziger, *The Right of Reply in the United States and Europe*, 19 N.Y.U. J. Int'l L. & Pol. 171 (1986) (comparing the right of reply in the United States and some European countries); John Hayes, *The Right to Reply: A Conflict of Fundamental Rights*, 37 Colum. J.L. & Soc. Probs. 551 (2004) (same).

24 Matev Krivic & Simona Zatler, Freedom of the Press and Personal Rights: Right of Correction and Right of Reply in Slovene Legislation (2000).

25 *See id.* at 31.

26 Although considerably related to the right of reply as a concept, access to the press as an *affirmative* right is beyond the scope of this Article. Nonetheless, due attention is paid to access to the press in expanding the right of reply beyond its original boundaries. *See generally infra* notes 66, 95, 141, 285, 287, and 292 and accompanying text.

27 *See* Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic*

This Article examines three questions as its main focus: (1) How do international and regional law approach the right of reply vis-à-vis freedom of the press?; (2) How is the right of reply recognized in various countries with free-press systems?; and (3) What is the impact, whether actual or perceived, of the right of reply on freedom of the press?

In conclusion, this Article examines the overarching question: given the chasm between U.S. law and foreign and international law on the issue of the right of reply, should the United States remain increasingly anomalous as a "great free speech laborator[y] of experiment" of the world?[28]

I. International and Regional Law

The right of reply and correction has been a focus of international law for nearly eighty years. An international right of reply was proposed in 1929 when the International Juridical Congress on Radio agreed to extend to broadcasting the right of reply, which had already been recognized by various national laws.[29] Two years later, the International Federation of League of Nations Societies recommended a right of reply on behalf of any state that objected to news reports that were inaccurate or designed to disturb international relations.[30] The International Federation of Journalists followed with a similar proposal in 1934.[31]

A. The United Nations

In pushing for the right of reply as an international right, the United Nations has played an important, but rarely noticed, role since its founding in 1945. In 1949, the U.N. General Assembly adopted a draft convention—the Convention on the International Transmission of News and the Right of Correction[32]—but the convention was never

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Constitutional Law Courses, 49 ST. LOUIS U. L.J. 671, 673 (2005) (noting the risks in solely counting the number of jurisdictions that adopt or reject a particular rule, without taking into account the global importance or the constitutional traditions of each jurisdiction).

28 RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 351 (1992) (internal quotation marks omitted).

29 John B. Whitton, Editorial Comment, *An International Right of Reply*, 44 AM. J. INT'L L. 141, 143 (1950).

30 *Id.* (citing *Moral Disarmament: Memorandum from the Polish Government*, League of Nations Doc. C.602.M.240 1931 IX app. 2, at 4 (1931)).

31 *Id.* (citing 7 LEAGUE OF NATIONS, SECTION OF INTERNATIONAL BUREAUX, BULLETIN OF INFORMATION ON THE WORK OF INTERNATIONAL ORGANISATIONS 50–51 (1935)).

32 *See Text of the Convention on the International Transmission of News and the Right of Correction*, 6 U.N. BULL. 592 (1949).

enforced. The convention aimed to prevent false or distorted news reports from being distributed or to reduce their pernicious effects.[33] Another of the convention's objectives was to promote a wide dissemination of news and to heighten a sense of responsibility among news professionals.[34] The convention avowed that a right of correction should be recognized internationally because certain national legislation provides no such right for false news information.[35]

The right of correction under the U.N. plan required that a news dispatch transmitted from one country to another by correspondents or by information agencies be published, that the dispatch be "capable of injuring its relations with other States or its national prestige or dignity," and that it be "false or distorted."[36] If these conditions were met, the complaining state could submit its version of the facts, called a communiqué, to the contracting states within whose territories the dispatch was published or dispatched.[37]

Within five days, the defendant state was required to forward the communiqué to the correspondents and information agencies that published or dispatched the original statement.[38] The defendant state was also required to transmit the communiqué to the headquarters of the information agency whose correspondent was responsible for originating the dispatch, if the agency's headquarters were within the state's territories.[39] Nonetheless, the defendant state was not required to publish the reply.[40]

If the defendant state did not carry out its obligations, the complaining state could submit the communiqué to the U.N. Secretary-General and notify the defendant state, which could send its own comments to the Secretary-General.[41] The Secretary-General had to, through available information channels, "give appropriate publicity" to the reply, in addition to the original dispatch and the defendant state's comments, if any.[42]

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33 *Id.* pmbl.

34 *Id.*

35 *Id.*

36 *Id.* art. 9.

37 *Id.*

38 *Id.* art. 10.

39 *Id.*

40 *See id.* ("In the event that a Contracting State does not discharge its obligation under this article with respect to the communiqué of another Contracting State, the latter may accord, on the basis of reciprocity, similar treatment to a communiqué thereafter submitted to it by the defaulting State.").

41 *Id.* art. 11.

42 *Id.*

The U.N. draft convention on the right of reply was limited in its application because it did not provide for any enforcement mechanisms. Nonetheless, its value in improving the standards of international news reporting was indisputable: it "offer[ed] a practical means" of balancing the compelling need of states for reliable news with the desire of democratic societies for freedom of information.[43]

A French initiative led the U.N. General Assembly to adopt the Convention on the International Right of Correction in 1952. The key parts of the convention were identical to those of the draft Convention on the International Transmission of News and the Right of Correction, except the provisions regarding enforcement. The Convention on the International Right of Correction stipulated that "[a]ny dispute between any two or more Contracting States concerning the interpretation or application of the present Convention which is not settled by negotiations shall be referred to the International Court of Justice for decision unless the Contracting States agree to another mode of settlement."[44] The convention became effective on August 24, 1962, after six signatories had deposited their instruments of ratification.[45] As of August 2007, a total of twenty-three states, including France, had ratified it.[46] Montenegro was the latest to sign on to the convention in 2006.[47]

Nevertheless, the Convention on the International Right of Correction has rarely been enforced in the past forty-five years. Thus, it is not clear how effectually it has served its original purpose of providing

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43 Whitton, *supra* note 29, at 145.

44 Convention on the International Right of Correction art. 5, Mar. 31, 1953, 435 U.N.T.S. 192.

45 *Id.* at 192 n.1.

46 The countries that have ratified the Convention on the International Right of Correction are: Argentina, Bosnia and Herzegovina, Burkina Faso, Chile, Cuba, Cyprus, Ecuador, Egypt, El Salvador, Ethiopia, France, Guatemala, Guinea, Jamaica, Latvia, Liberia, Montenegro, Paraguay, Peru, Serbia, Sierra Leone, Syrian Arab Republic, and Uruguay. United Nations, Multilateral Treaties Deposited with the Secretary-General, Convention on the International Right of Correction, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVII/treaty1.asp (last visited Mar. 6, 2008).

47 *Id.* Professor Lahav cautions against giving too much credence to the increasing number of the convention's signatories:

> [W]ith the exception of France, no other Western country has signed this convention. Some of those who signed may tell you something about the nature of this right: Juan Peron's Argentina, Gamal Abdel Nasser's Egypt, and Fulgencio Batista's Cuba. This right, and the company in which it is kept, lead me to suspect that it is more about the denial of access than about access as understood and developed by Professor Barron.

Lahav, *supra* note 8, at 7.

the world with a balanced flow of news information. Professor Pnina Lahav of Boston University wonders whether the "convention is a relic of both the Cold War and authoritarianism or a bona fide international commitment to a well balanced right to freedom of speech," that is, "[w]hether it is an honorable permutation of the right of access or an instrument designed to water it down."[48]

B. The American Convention on Human Rights

As noted earlier, the American Convention on Human Rights recognizes the right of reply and correction. Article 14 states:

> 1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
>
> 2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.[49]

The Inter-American Court of Human Rights, in an advisory opinion, held that the right to reply and make a correction is an enforceable right under the American Convention, and it obliges state parties to take such legislative or other measures as may be necessary to effectuate the right.[50]

Relying on the advisory opinion of the Inter-American Court of Human Rights on the right of reply, the Argentine Supreme Court held that Argentina's ratification of the American Convention on Human Rights created a self-executing right of reply within Argentina.[51] The court, noting the extraordinary power and influence of "social communication media" over public opinion and human life, considered the right of reply "essential" to people in protecting their reputations.[52] The court further observed:

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48 *Id.* at 6–7.

49 American Convention on Human Rights, *supra* note 11, art. 14.

50 Enforceability of the Right to Reply or Correction, Advisory Opinion OC-7/85, Inter-Am. Ct. H.R. (ser. A) No. 7, at 9 (Aug. 29, 1986).

51 *See* Corte Suprema de Justicia [CSJN], 7/7/1992, "Ekmekdjian, Miguel A. v. Sofovich, Gerardo," La Ley [L.L.] (1992-C-543) (Arg.). For a discussion of the Argentine Supreme Court's opinion in *Ekmekdjian*, see Leon Patricios, Ekmekdjian v. Sofovich*: The Argentine Supreme Court Limits Freedom of the Press with a Self-Executing Right of Reply*, 24 U. MIAMI INTER-AM. L. REV. 541, 551–57 (1993).

52 Susana N. Vittadini Andres, *First Amendment Influence in Argentine Republic Law and Jurisprudence*, 4 COMM. L. & POL'Y 149, 170 (1999) (internal quotation marks omitted).

> In the analysis of the 'right of reply,' what is at issue is not only the protection of freedom of expression, or the right to print without prior censorship, but also the adequate protection of dignity, honour, feelings and privacy of human beings; consequently, there must be a jurisdictional guarantee that these values can be supported by an appropriate means of exercise through rectification, reply or other similar proceedings. The reply is meant to guarantee the natural, primary and elemental right to the legitimate defence of dignity, honour and privacy.[53]

In 2003, the Inter-American Commission on Human Rights took note of a continuing controversy surrounding the right of reply in conflict with freedom of the press.[54] On the one hand, the right of reply is criticized for limiting free speech because it requires the news media to provide time and space for information that is unacceptable to their editorial line.[55] On the other, it is viewed as expanding freedom of expression "by fostering a greater flow of information."[56] The obvious tension between the right of reply and freedom of the press led the Commission to conclude that the right of reply must be subject to strict scrutiny to prevent freedom of expression from being infringed.[57]

The sensitivity of the Inter-American Commission on Human Rights to freedom of expression was unmistakable when the Commission held that the right of reply applies only to statements of facts, not expression of opinion.[58] The Commission stated:

> [A] presumed victim may demand the right of correction or reply to obtain an immediate correction, using the same medium to publish or broadcast the demonstrable truth about a fact that may have been distorted by the reporter of the information in question. That action relates solely to information of a factual nature, not to commentary or opinion.[59]

The Commission explained, quoting a 2001 ECtHR decision, that requiring the truth of value judgments would lead to self-censorship

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53 THE ARTICLE 19 FREEDOM OF EXPRESSION HANDBOOK 165 (1993), *available at* http://www.article19.org/pdfs/publications/1993-handbook.pdf.

54 *See* Santana v. Venezuela, Case 453.01, Inter-Am. C.H.R., Report No. 92/03, OEA/Ser.L./V/II.118, doc. 70 rev. 2 ¶ 66 (2003), *available at* http://www.cidh.org/annualrep/2003eng/Venezuela.453.01.htm.

55 *See id.*

56 *Id.*

57 *Id.*

58 *See id.* ¶ 72.

59 *Id.*

by the news media and inhibit political debates based on purely subjective opinions.[60]

C. The European Convention on Human Rights

The ECHR does not mention the right of reply explicitly. The ECtHR, however, has recognized the right of reply under the convention's Article 10[61] on freedom of expression. The right of reply is "an important element of freedom of expression," the court held in 2005, because it meets the need of individuals to challenge untruthful information, and it also ensures a diversity of opinions relating to matters of general interest.[62] The court considered the right of reply to be a restriction on the news media's freedom to exercise their editorial discretion in deciding whether to publish articles from individuals.[63] The court, however, decided that exceptional circumstances require a newspaper to publish a retraction, an apology, or a judgment in a libel case.[64] The state may have a "positive obligation" to help an individual exercise free speech rights in media.[65] As the court noted, "the State must ensure that a denial of access to the media is not an arbitrary and disproportionate interference with an individual's freedom of expression, and that any such denial can be challenged before the competent domestic authorities."[66]

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60 *Id.* ¶ 76 (quoting Feldek v. Slovakia, 2001-VII Eur. Ct. H.R. 85, ¶ 75).

61 Article 10 of the European Convention on Human Rights provides:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . . .
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, . . . for the protection of the reputation or right of others . . . .

Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 (also known as the European Convention on Human Rights).

62 Melnychuk v. Ukraine, App. No. 28743/03, Eur. Ct. H.R., 6–7 (July 5, 2005), *available at* http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=6347189&skin=hudoc-en&action=request (follow "MEINYCHUK v. UKRAINE" hyperlink).

63 *Id.* at 7.

64 *Id.*

65 *Id.*

66 *Id.* Likewise, in 1989, the European Commission on Human Rights held that the right of reply would protect the public's interest in receiving information from a wide array of sources and thereby guarantee the "fullest possible access to information." Ediciones Tiempo S.A. v. Spain, App. No. 13010/87, 62 Eur. Comm'n H.R. Dec. & Rep. 247, 254 (1989). Consequently, the Commission stated, while a judicial order to publish an article under the Spanish right of reply law does interfere with the European Convention's guarantee of freedom of expression, the interference through the right of reply "was prescribed by law and necessary in a democratic

D. The Council of Europe and the European Union

One week after the U.S. Supreme Court repudiated the right of reply in toto in *Miami Herald Publishing Co. v. Tornillo*,[67] the Committee of Ministers of the Council of Europe adopted a right-of-reply resolution.[68] The resolution allowed individuals to effectively correct, "without undue delay," false facts about themselves and also to advance the interest of the public in receiving information from different sources, "guaranteeing that they receive complete information."[69] The right of reply could be used to rebut the publication of facts and opinions that infringed an individual's privacy and reputation. Nonetheless, it was unavailable when the challenged publication was (1) authorized by the individual, (2) consistent with general practice and law, (3) justified by "an overriding, legitimate public interest," or (4) a fair comment and criticism based on true facts.[70] The resolution further set forth six exceptions to the right of reply:

> If the request for a reply is not submitted "within a reasonably short time";
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> If the reply is excessively lengthy;
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> If the reply does not focus solely on correction of the facts challenged;
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> If the reply constitutes a punishable offense;
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> If the reply violates the legitimate interests of a third party; or
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> If the complainant cannot show a proper interest in requesting the reply.[71]

The resolution mandated that a right-of-reply dispute be brought before a court with the power to order the publication of a reply.[72]

The Council of Europe's 1974 right-of-reply resolution was followed in 1989 by the European Convention on Transfrontier Televi-

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society for the protection of the reputation and the rights of others" under the convention on abuse of free expression. Hayes, *supra* note 23, at 574–75 n.125 (discussing *Ediciones Tiempo*).

67 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

68 It seems that the Council of Europe's 1974 adoption of the right-of-reply resolution culminated four years of studying "the possibilities of harmonization of provisions of national press legislation such as the right of reply." COUNCIL OF EUR., DIRECTORATE OF HUMAN RIGHTS, COMPILATION OF LEGISLATION RELATING TO THE RIGHT OF REPLY IN MEMBER STATES, "Introduction" at 1 (1974) [hereinafter COMPILATION OF LEGISLATION].

69 Council of Eur., Comm. of Ministers, *Resolution (74) 26 on the Right of Reply—Position of the Individual in Relation to the Press*, pmbl., art. 1, at 83 (1974).

70 *Id.* art. 2, at 83.

71 *Id.* app., at 84.

72 *Id.*

sion ("Transfrontier Convention"), which applies only to transfrontier broadcasting. Article 8 provides:

> Each transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply . . . relating to programmes transmitted by a broadcaster within its jurisdiction . . . . In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised.[73]

The Transfrontier Convention served as the basis for the European Community's ("EC") Directive on Television Without Frontiers ("Television Directive") in 1989, which applies to both domestic and cross-border broadcasting in the EC member states. The Television Directive was more specific and detailed than the Transfrontier Convention. It borrowed substantially from the Council of Europe's 1974 right-of-reply resolution, but it was more sharply focused than the resolution. The Television Directive limited the right of reply to where "reputation and good name[s] have been damaged by an assertion of incorrect facts" in television broadcasting.[74] It does not apply to publication of facts or opinions that impinge on an individual's privacy, which the resolution included in its right of reply.

In December 2004, the Council of Europe amended its 1974 right-of-reply resolution to reflect the Internet and other major technological developments in communication. Its policy justifications for the right of reply remained intact. The Council of Europe's 2004 memorandum explaining the draft recommendation on the right of reply in the new media environment clarifies the scope of the right of reply and emphasizes the value of the right of reply in online communication. Because the right of reply should protect any person against publication of factual inaccuracy about that person, the newly revised right-of-reply recommendation rejects the dissemination of opinions as a ground for the reply.[75] In addition to the 1974 resolution's excep-

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73 European Convention on Transfrontier Television art. 8, May 5, 1989, Europ. T.S. No. 132 (amended Mar. 1, 2002), *available at* http://www.ebu.ch/CMSimages/en/leg_ref_coe_convention_transfrontiertv_consolidated_1989_1998_tcm6-4463.pdf (last visited Jan. 26, 2008).

74 Council Directive on Transfrontier Television 89/552, art. 23, 1989 O.J. (L 298) 23, 30 (EC).

75 *See* Council of Ministers, Steering Comm. on the Mass Media, Abridged Report of the 62d Meeting, *Explanatory Memorandum to the Draft Recommendation on the Right of Reply in the New Media Environment*, app. IV, para. 11, CM(2004)206 (Nov. 17, 2004) [hereinafter *Right of Reply in the New Media Environment*].

tions,[76] the 2004 new-media right-of-reply recommendation allows media outlets to reject the reply when it is in a language different from that of the original article and when the challenged information is based on a "truthful report" on open government proceedings.[77]

More recently, the European Parliament and the Council of Europe's Committee of Ministers adopted a recommendation on the right of reply to online media. It introduces measures into the domestic law or practice of the member states "to ensure the right of reply or equivalent remedies" in relation to online media.[78] The European Parliament and the Council of Europe's 2006 right-of-reply recommendation is very similar to the 2004 revision of the Council of Europe's 1974 right-of-reply resolution. The 2006 recommendation, however, stresses the right of reply as a more effective means for those who feel aggrieved to respond to inaccurate factual allegations online: "The right of reply is a particularly appropriate remedy in the on-line environment because it allows for an instant response to contested information and it is technically easy to attach the replies from the persons affected."[79] Further, the right of reply is recommended not only as a legislative measure but also as a co-regulatory or self-regulatory measure.[80]

The European Union's ("EU") approach to the right of reply is expanding beyond the right's traditional scope. The Council of Europe's Committee of Ministers has recommended the right of reply as a way to combat hate speech.[81] It has also suggested that the accused in criminal proceedings be allowed to correct or reply to incorrect or defamatory media reports.[82] It is especially noteworthy that the Council has urged the right of correction for inaccurate press releases

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76 For a discussion of the exceptions to the 1974 Council of Europe resolution on the right of reply, see *supra* note 71 and accompanying text.

77 *Right of Reply in the New Media Environment*, *supra* note 75, app. IV, para. 29.

78 *Indicative Guidelines for the Implementation, at National Level, of Measures in Domestic Law or Practice so as to Ensure the Right of Reply or Equivalent Remedies in Relation to On-Line Media*, 2006 O.J. (L 378) (Annex 1) 76 (Recommendation of the European Parliament and of the Council) [hereinafter Recommendation of the European Parliament], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:378:0072:0077:EN:PDF.

79 *Id.* On the error-correcting power of the Internet, Professor Daniel Solove of The George Washington University Law School observes: "Errors [on the Internet] can get corrected quickly. The best thing to do when faced with a malicious rumor is to spread correct information as rapidly as possible." DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 37 (2007).

80 Recommendation of the European Parliament, *supra* note 78.

81 Council of Eur., *Recommendation No. R(97) 20 of the Committee of Ministers to Member States on "Hate Speech,"* app., Principle 2 (Oct. 30, 1997).

82 *Id.*

from courts or police.[83] Furthermore, the Council recommended the right of reply for political candidates or parties during the campaign period.[84]

II. National Constitutions and Statutes

The right of reply is often recognized as a statutory right. In certain countries, however, it is a constitutional right separate from—but equal to—freedom of speech and freedom of the press. Because of its explicit enumeration in the constitution, there is no room for quibbling about whether the right of reply should be an ancillary right to freedom of the press. When it comes to recognition of the right of reply as a constitutional right, countries in transition might heed Yale Law School Professor Owen Fiss's admonition: "In building a free press, the reformers should look to the American experience, but only selectively. They must create for the press a measure of autonomy from the state without delivering the press totally and completely to the vicissitudes of the market."[85] Slovenia showcases this outlook in that this Commonwealth of Independent States ("CIS") nation's transitional period and profound social changes made people aware that freedom of expression cannot be regulated only through a statutory mechanism.[86]

A. Constitutional Framework

The parallel guarantees of freedom of the press and the right of reply are common when the right of reply is expressly mentioned in constitutional text. Turkey is a good example. Article 28 of the Turkish Constitution protects the press against censorship.[87] At the same time, Article 32 stipulates, "The right of rectification and reply shall be accorded only in cases where personal reputation and honour is attacked or in cases of unfounded allegation and shall be regulated by

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83 Council of Eur., Comm. of Ministers, *Recommendation Rec (2003) 13: Principles Concerning the Provision of Information Through the Media in Relation to Criminal Proceedings*, app., Principle 9 (July 10, 2003).

84 Council of Eur., *Recommendation No. R (99) 15 of the Committee of Ministers to Member States on Measures Concerning Media Coverage of Election Campaigns*, app., art. III.3 (Sept. 9, 1999).

85 OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 157–58 (1996).

86 KRIVIC & ZATLER, *supra* note 24, at 38.

87 TURK. CONST. pt. 2, ch. 2, § X, art. 28, *translated in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: TURKEY 9 (Gisbert H. Flanz ed., Ömer Faruk Genckaya trans., 2003) [hereinafter CONSTITUTIONS OF THE WORLD: TURKEY].

law."[88] In a similar vein, the Venezuelan Constitution guarantees individuals "the right to reply and corrections when they are directly affected by inaccurate or offensive information."[89] Brazil,[90] Cape Verde,[91] Croatia,[92] Lesotho,[93] and Slovenia[94] also accord the right of reply and correction to an individual whose right or interest has been damaged by public communication.

The Constitution of Papua New Guinea does not provide for a right of reply or correction as a separate right. Instead, it authorizes the parliament to enact an access-to-the-media law that would allow interested people and associations to rebut false statements about their behavior, ideas, or beliefs.[95]

At least five countries are open-ended, to varying degrees, in their constitutional recognition of the right of reply. The Constitution of Macedonia is a good example: "The right of reply through the mass media is guaranteed. The right to a correction in the mass media is guaranteed."[96] Likewise, under the Constitution of Portugal, the right to reply and to make corrections is "equally and effectively" guaranteed for every person, whether legal or natural.[97]

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88 *Id.* pt. 2, ch. 2, § XI, art. 32, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 87, at 11.

89 VENEZ. CONST. tit. III, ch. III, art. 58, *translated in* 20 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: VENEZUELA 11 (Gisbert H. Flanz ed. & trans., 2000).

90 Constituição Federal [C.F.] [Constitution] tit. II, ch. I, art. 5(V) (Brazil), *translated in* 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: BRAZIL 2 (Gisbert H. Flanz ed., Keith S. Rosenn trans., 2006).

91 CAPE VERDE CONST. pt. II, tit. II, ch. I, art. 47(7).

92 CROAT. CONST. art. 38(4), *translated in* 5 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: CROATIA 44 (Gisbert H. Flanz ed., Gisbert H. Flanz, Katarina Deletis & Ognjen Martinovic trans., 2001).

93 LESOTHO CONST. ch. 2, art. 14(4), *translated in* 10 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: LESOTHO 30 (Gisbert H. Flanz ed., Inter-Univ. Assocs. trans., 1999).

94 SLOVN. CONST. pt. II, art. 40, *translated in* 16 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: SLOVENIA 9 (Gisbert H. Flanz ed., Inter-Univ. Assocs. trans., 2003).

95 PAPUA N.G. CONST. pt. III, div. 3, subdiv. C, art. 46(3), *translated in* 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: PAPUA NEW GUINEA 43 (Gisbert H. Flanz ed., Michael A. Ntumy trans., 1995); *see also* SERB. CONST. pt. II, § 2, art. 50, *translated in* 16 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: SERBIA 14 (Gisbert H. Flanz ed., Republic of Serb. trans., 2007) ("The law shall regulate the exercise of right to correct false, incomplete or inaccurately imparted information resulting in violation of rights or interests of any person, and the right to react to communicated information.").

96 MACED. CONST. art. 16, *translated in* 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: MACEDONIA 6 (Gisbert H. Flanz ed., Parliament of the Republic of Maced. trans., 2006).

97 PORT. CONST. pt. I, tit. II, ch. I, art. 37(4), *translated in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: PORTUGAL 26 (Gisbert H. Flanz ed., Port. Republic trans., 2005); *see also* GHANA CONST. ch. 12, art. 162(6), *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF

Meanwhile, as UCLA School of Law Professor Stephen Gardbaum pointed out, whether the right of reply is constitutionally guaranteed does not hinge entirely on the right's enumeration in the constitutional text.[98] "[B]ecause a statutory right of reply is, at least in some circumstances, constitutionally *required* and not merely constitutionally permissible," Gardbaum notes:

> [C]onstitutions may be the source of a right of reply in two different ways: (1) by granting an express constitutional right to this effect, as in Macedonia and Turkey, or (2) by imposing a positive constitutional duty on the state to protect the underlying speech, reputational, or dignitarian interests of individuals, normally fulfilled by enacting a statute, as in Germany.[99]

B. Statutory Framework

More than ever, the statutory right of reply is the rule, not the exception, around the world. As Gardbaum cautions, however, the right of reply in a statute that is not expressly stipulated in a constitution can still be a constitutional matter, not just a statutory protection.[100] Yet the right to reply or correct news stories tends to be increasingly accepted as a statutory matter, although it is often unclear whether the right is a legislative discretion or constitutionally mandated.[101] ARTICLE 19, the London-based free-speech organization, meanwhile, reported:

THE WORLD: GHANA 140 (Gisbert H. Flanz ed., Kofi Quashigah trans., 1998) ("Any medium for the dissemination of information to the public which publishes a statement about or against any person shall be obliged to publish a rejoinder, if any, from the person in respect of whom the publication was made."); MONT. CONST. sec. II, art. 36, *translated in* 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: MONTENEGRO 11 (Gisbert H. Flanz ed., Republic of Mont. trans., 2007) ("The right to a response and the right to rectification of incorrect published information or data . . . shall be guaranteed."); MOZAM. CONST. pt. II, ch. VI, art. 105(1), *translated in* 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: MOZAMBIQUE 44 (Gisbert H. Flanz ed., Carol Tenney trans., 1992) (stating that the Supreme Council for Mass Communication shall guarantee the right to reply).

98 *See* Stephen Gardbaum, *A Reply to "The Right of Reply*," 76 GEO. WASH. L. REV. 1065, 1065–66 (2008).

99 *Id.* at 1068 (citations omitted).

100 *Id.*

101 *See* MIKE JEMPSON, MEDIAWISE, RIGHT OF REPLY IN EUROPE (2005), http://www.mediawise.org.uk/files/uploaded/Right%20of%20reply%20in%20Europe.pdf (discussing the constitutional or statutory recognition of the right of reply in Austria, Denmark, France, Germany, Greece, Finland, Norway, and Spain, and the lack of recognition of the right of reply in the Netherlands and Sweden). The texts of media and libel laws on the right of reply in nearly twenty countries in Africa, Southeast Asia, Central Europe, Middle East Asia, and South Africa are posted on the International Journalists' Network website. International Journalists' Net-

> The right of reply is enshrined in the law of many countries with legal systems based on French, Spanish and German law. Countries with legal systems based on English law do not usually provide a right of reply, but rely rather on non-legal protection of the principle through self-regulating measures.[102]

A detailed comparative study in 1946 of the right of reply stated that "the press laws of most countries allow the insertion of an immediate reply" in the newspaper so that the targets of the news stories can use the "same weapon" as the one aimed at them.[103] An earlier study of press laws in sixty countries found that the right of reply was accepted in few U.K.-influenced common-law countries, but it was part of press statutes in the majority (thirty-three) of the civil-law nations studied.[104] The studies' findings on the recognition of the right of reply are still noteworthy and relevant.

The right of reply is a legal requirement in most countries in the CIS and Eastern Europe, as well as in Russia.[105] In Africa, all French-speaking and some English-speaking countries prescribe the right of reply as a statutory requirement.[106] In most Latin American countries, the right of reply is statutory.[107] In Asia, on the other hand, the right of reply is not accepted as widely as it is in continental Europe, Africa, and Latin America. South Korea, one of the right-of-reply nations in Asia,[108] has adopted the German law. Japan recognized a

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work, Media Laws, http://www.ijnet.org/Director.aspx?P=MediaLaws&cat=5 (last visited Jan. 26, 2008).

102 ARTICLE 19, INFORMATION FREEDOM AND CENSORSHIP: WORLD REPORT 1991, at 439 (1991).

103 ROTHENBERG, *supra* note 4, at 114.

104 EUGENE W. SHARP, THE CENSORSHIP AND PRESS LAWS OF SIXTY COUNTRIES 11 (1936). The thirty-three countries with right-of-reply statutes were Austria, Belgium, Bolivia, Brazil, China, Colombia, Czechoslovakia, Denmark, Egypt, El Salvador, Finland, Germany, France, Greece, Guatemala, Haiti, Hungary, Italy, Japan, Korea, Latvia, Morocco, Nicaragua, Norway, Palestine, Panama, Poland, Portugal, Romania, Spain, Syria, Uruguay, and Yugoslavia. *Id.*

105 E-mail from Andrei Richter, Director, Moscow Media Law and Policy Institute, to author (July 30, 2007, 00:34:55 PDT) (on file with author).

106 E-mail from Lyombe S. Eko, Associate Professor, School of Journalism and Mass Communication, University of Iowa, to author (Aug. 21, 2007, 12:17:14 PDT) (on file with author).

107 E-mail from Leonardo Cesar Ferreira, Associate Dean and Director of Graduate Studies, School of Communication, University of Miami, to author (Aug. 28, 2007, 15:19:05 PDT) (on file with author).

108 Indonesia and Vietnam are among the other Asian countries that recognize the right of reply and correction. *See* Press Act No. 21 of 1982 art. 15a (1982), *in* MASS MEDIA LAWS AND REGULATIONS IN INDONESIA 9 (2000); Broadcast Law No. 24, art. 54 (1997), *in* MASS MEDIA LAWS AND REGULATIONS IN INDONESIA, *supra*, at 35; Law No. 12/1999/QH10 Amending and Supplementing a Number of Articles of the Press Law art. 9 (1999) (Vietnam).

right of correction under its 1909 Press Law[109] until 1945, when General Douglas MacArthur, Supreme Commander for the Allied Powers, abolished the law.[110]

1. France

The French Press Act of 1881, which is still in force, delineates the right of reply in two ways: *droit de rectification* (right of rectification) for government officials (Article 12) and *droit de reponse* (right of reply) for ordinary individuals (Article 13):

> [Article] 12. The publisher (editor: Ord. 26 Aug. 1944, art. 15) shall be required to insert free of charge, on the first page of the next issue of the journal or periodical, any corrections sent him by the public authorities concerning *inaccurate reporting* of the exercise of their functions in the aforesaid journal or periodical.
>
> Such corrections shall not, however, be more than twice the length of the article to which they refer.
>
> In the event of failure to comply with these provisions, the publisher shall be liable to a fine of 360 to 3,600 FF.[111]
>
> [Article] 13. (L. 29 Sept. 1919) The publisher (editor: Ord. 26 Aug. 1944, art. 15) shall be required to insert, within three days of receipt, replies by anyone named or cited in the journal or periodical, on pain of a fine of 1,000 to 2,000 FF, without prejudice to any other penalties or damages to which the article may give rise.
>
> In the case of journals or periodicals other than daily papers, the publisher (editor) shall be obliged, under the same penalties, to insert the reply in the issue following the day after its receipt.
>
> The reply shall be inserted in the same place and in the same type as the article which gave rise to it and without any interpolations.
>
> Disregarding the address, conventional courtesies and signature, which shall never be counted as part of it, the reply shall be limited to the length of the offending article. It

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109 Press Law No. 41 of May 6, 1909, arts. 17, 18 (Japan), *in* THE PRESS LAWS OF FOREIGN COUNTRIES WITH AN APPENDIX CONTAINING THE PRESS LAWS OF INDIA 159–60 (M. Shearman & O. Rayner eds., 1926).

110 *See* LAWRENCE WARD BEER, FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY 75 (1984).

111 Press Act of July 29, 1881, Appendix to the Penal Code art. 12 (Fr.) (emphasis added). For the English text of the French Press Act on the rights of reply and rectification, see COMPILATION OF LEGISLATION, *supra* note 68, "France" at 3–4.

> may, however, run to fifty lines, even if the article was shorter, and may not exceed 200 lines, even if the article was longer. The above provisions also apply in respect of rejoinders to further comments by the journalist on the initial reply.
>
> The reply shall always be inserted free of charge. Persons requesting that their replies be inserted may not exceed the limits laid down in the previous paragraph by offering to pay for additional lines.
>
> Only the publication or publications in which the offending article appeared shall be required to insert the reply.
>
> Printing a special issue, for distribution in the area covered by the aforesaid publication or publications, which omits the reply which the corresponding issue of the newspaper was required to reproduce shall be regarded as tantamount to refusal to insert the reply and subject to the same penalties, without prejudice to actions for damages.
>
> The court shall give its decision within ten days of summons in respect of proceedings concerning refusal to insert a reply. It may decide that the order for insertion, in respect of insertion only, shall be enforceable immediately, regardless of any objection or appeal. If an appeal is lodged, it shall be decided within ten days of notification to the clerk of the court.[112]

The right of reply under Article 13 is available to anyone mentioned, whether natural or juristic, including government officials, regardless of whether the original statement was defamatory.[113] "In short," the First Amendment scholar Zechariah Chafee said in 1947, "if the person named by the newspaper wants to reply, that is all there is to it."[114] The French reply law makes no distinction between expressions of opinion and statements of fact. Clearly, its primary aim is not to assert the public interest in truth but to protect the interests of individuals.[115] The right of reply in France can be denied, however, if the request exceeds the statutory length and has nothing to do with the initial article.[116] Also, exceptions are allowed for the publication of official government documents such as statutory and administrative materials, court decisions, elections results, and reports on legislative

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112 Press Act of July 29, 1881, Appendix to the Penal Code art. 13 (Fr.).

113 Dominique Mondoloni, *France*, *in* INTERNATIONAL LIBEL & PRIVACY HANDBOOK 221, 225 (Charles J. Glasser, Jr. ed., 2006).

114 1 ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS 149 (1947).

115 *Id.*

116 Mondoloni, *supra* note 113, at 225.

proceedings.[117] The right of reply has a one-year statute of limitations.[118]

The right-of-reply requirements during elections are stricter. During elections, the French law on the right of reply provides for a shorter period of time for publication of replies and for heavier penalties for refusal to publish the replies:

> During any election period, the three-day limit laid down in the first paragraph of this section [Article 13] for insertion of the reply shall, for daily papers, be reduced to twenty-four hours. The reply must be submitted at least six hours before the paper in which it is to appear goes to press. At the opening of the election period, the publisher (editor) of the paper shall be required to notify the Attorney General's Department, subject to the penalties laid down in paragraph 1, of the hour at which his newspaper is to go to press. The period for serving a summons in connection with the refusal to insert a reply shall be reduced to twenty-four hours, no allowance being made for distance, and the summons may even be served from one hour to the next on special order by the president of the court. The order for insertion shall, in respect of insertion only, be enforceable immediately (L. 5 Oct. 1946). In the event of failure to comply with the order within the time limit laid down in this paragraph, which shall run from the issue of the order, the editor shall be liable to a prison sentence ranging from six days to three months and a fine of 300 to 6,000 FF.[119]

The French right of rectification, Article 12, is narrower than the right of reply because rectification is only applicable to statements of fact, not opinion. Also, it is limited to news stories where the press publishes incorrect statements concerning a government official's conduct relating to his official duties.[120] The news media cannot reject the government's rectification on the grounds that its factual assertions are untrue because the law mandates publication of "official truth" in the media.[121] Yet the press can refuse to publish the rectification if it violates the law, morality, the legitimate interests of others, or "the

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117 Maître Philippe Solal, *The 'Droit de Réponse' and the 'Droit de Rectification' in France*, *in* THE RIGHT OF REPLY IN EUROPE: POSSIBILITIES OF HARMONIZATION 193 (Martin Löffler et al. eds., 1974) [hereinafter RIGHT OF REPLY IN EUROPE].

118 *Id.*

119 Press Act of July 29, 1881, Appendix to the Penal Code art. 13 (Fr.).

120 1 CHAFEE, *supra* note 114, at 152.

121 Solal, *supra* note 117, at 193.

honour of the journalist."[122] No time limit is prescribed for the right of rectification.[123]

No right of reply for the publication of photographs exists in French law.[124] There is a separate right of reply, however, for the broadcasting media.[125] The 1982 law, as amended in 2004, extends the right of reply to television and radio broadcasting.[126] This law is different from the French Press Act of 1881.[127] The broadcasting law permits replies only "if the initial communication on the air is considered as defamatory," a stipulation not specified under the print and Internet statutes.[128] Further, the right of reply in French law is "available to all those who have been charged [with criminal violations] and [then] acquitted."[129]

In March 2007, the French government submitted to the European Commission a draft decree for enforcement of the digital economy law on the right of reply that implemented the EU e-commerce directive.[130] The draft decree stipulates that the right of reply is granted if a challenged Internet site refuses an opportunity for direct reply through forums or chat rooms.[131] However, it does not cover the right of reply for the general public or for third-party claimants.[132] The decree also contains two "debatable provisions" related to (1) the claimant's option to forgo the right of reply in exchange for the webmaster's agreement to modify or eliminate the complained-of article and (2) the maximum length of the reply, which is equal to the length of the complained-of article (but not exceeding 200 lines).[133]

2. Germany

Although it is one of the countries most strongly committed to the promise of a free press,[134] Germany does not have an absolute,

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122 *Id.*

123 *Id.*

124 Mondoloni, *supra* note 113, at 232 n.5.

125 *Id.*

126 *Id.*

127 *See id.*

128 *Id*.

129 EMMANUEL E. PARASCHOS, MEDIA LAW AND REGULATION IN THE EUROPEAN UNION: NATIONAL, TRANSNATIONAL AND U.S. PERSPECTIVES 79–80 (1998).

130 *French Draft Decree Regarding the Right to Reply on the Internet*, EDRI-GRAM, Mar. 28, 2007, http://www.edri.org/edrigram/number5.6/right-to-reply-france.

131 *Id.*

132 *Id.*

133 *Id.*

134 Freedom House, a nongovernmental organization that supports freedom around the

constitutionally guaranteed freedom of the press.[135] Under the Basic Law for the Federal Republic of Germany ("Basic Law"), press powers "find their limits in the provisions of general laws . . . and in the right to personal honor."[136] "The right of reply under German law is derived from the basic rights of personality and identity as guaranteed by" the Basic Law, as well as from the press law.[137] Nonetheless, the "Basic Law still prohibits the 'essential content' of basic rights from being restricted by application of the general laws."[138]

The German right of reply, which is "central to the rules of the state press laws,"[139] was "transplanted from the French press law of 1822 into the Baden Press Law of 1831 and then into the Imperial Press Law of 1874 as a demand for 'correction.'"[140] Similar to the French law, the purpose of the right of reply in Germany is "not so much to provide the public access to the media as to protect individuals from false defamation."[141]

> The German right of reply is regulated by the press law of each individual German state, which details the rights and

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world, places freedom of the press in Germany in exactly the same rank as the United States in its legal, political, and economic environment. *See* FREEDOM HOUSE, FREEDOM OF THE PRESS 2007: DRAFT COUNTRY REPORTS AND RATINGS 71–72, 203–05 (2007), *available at* http://www.freedomhouse.org/uploads/fop/2007/fopdraftreport.pdf.

135 *See* Grundgesetz [GG] [Constitution] art. 5(1) (F.R.G.), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY 39 (Gisbert H. Flanz ed. & trans., 2003) [hereinafter CONSTITUTIONS OF THE WORLD: GERMANY] ("The freedom of the press and the freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.").

136 *Id.* art. 5(2), *translated in* CONSTITUTIONS OF THE WORLD: GERMANY, *supra* note 135, at 40.

137 Kyu Ho Youm, *Right of Reply Under Korean Press Law: A Statutory and Judicial Perspective*, 41 AM. J. COMP. L. 49, 56 (1993). Article 1 of the Basic Law on human dignity states in pertinent part:

> (1) Human dignity is inviolable. To respect and protect it is the duty of all state authority.
>
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the foundation of every human community, of peace and justice in the world.

Grundgesetz [GG] [Constitution] art. 1 (F.R.G.), *translated in* CONSTITUTIONS OF THE WORLD: GERMANY, *supra* note 135, at 39. Article 2 on personal freedoms provides as follows:

> (1) Everyone has the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
>
> (2) Every person has the right to life and physical integrity. Freedom of the person is inviolable. These rights may only be interfered with on the basis of a law.

Id. art. 2, *translated in* CONSTITUTIONS OF THE WORLD: GERMANY, *supra* note 135, at 39.

138 Youm, *supra* note 137, at 56.

139 URS SCHWARZ, PRESS LAW FOR OUR TIMES 81 (1966).

140 Youm, *supra* note 137, at 57 (quoting SCHWARZ, *supra* note 139, at 81–82).

141 Youm, *supra* note 137, at 57.

> responsibilities of the press in accordance with the Basic Law. There are more similarities than differences between the state laws of Germany. The right of reply, as stipulated in the press law of Germany's "publishing center" Hamburg, illustrates how the right of reply is recognized as a statutory concept in German law.[142]

Under the Hamburg Press Law (Hamburgischen Pressegesetz),[143] the right of reply is restricted to a statement of fact.[144]

> The Hamburg Press Law states: "The responsible editor and publisher of a periodical printed work are obliged to publish the reply of a person or body concerned in a *factual* statement made in the work. This obligation extends to all subsidiary editions of the work in which the statement has appeared." In other words, opinion and subjective expression of value judgments are excluded from the right of reply. . . .
>
> Every person or authority affected by a statement in the press can request a reply. Included in the "deliberately wide" scope of the law are private individuals, associations, companies, and public authorities, both German and foreign. Among the periodical printed works, which are subject to the right-of-reply provisions, are newspapers, magazines, and other mass media such as radio, television, and films, appearing "at permanent if irregular intervals of not more than six months."
>
> The content of the reply cannot include matters punishable by law such as defamatory charges. Also, the length of the reply must not exceed that of the original statement complained of. If the reply is disproportionately long, the editor and publisher can reject it. The reply must be asserted "immediately and at latest within three months" of the publications.
>
> The Hamburg statute also requires that the reply be published in the next issue if the issue is not yet typeset for printing. . . . [T]he news periodical must publish the reply in the same section of the periodical and in the same type as the challenged statement. In the case of broadcasting media, the reply must be broadcast immediately to the same receiving

142 *Id.*

143 Hamburg Press Law of 29th January 1965, *in* SCHWARZ, *supra* note 139, at 103–12. The discussion of the Hamburg Press Law in this Article refers to the 1965 version that is reprinted in *Press Law for Our Times* by Urs Schwarz.

144 *See id.* ¶ 11(1), at 106.

> area and at an equivalent time to the precipitating broadcast. No interpolations or omissions of the reply are allowed under the law. The reply is printed free of charge "unless the text complained of appeared as an advertisement." A letter to the editor cannot be a substitute for the reply. The news medium can publish its own editorial comment on the reply in the same issue so far as it focuses on factual statements.
>
> The Hamburg Press Law exempts fair and accurate reports of the open proceedings of the three branches of federal government and local and state governments. The rationale of this provision consists in "preventing political opponents from continuing in the press the debate which took place in Parliament." The right of reply is not recognized for purely commercial expression.
>
> If the news media refuse to comply with the reply request, the reply claim can be enforced through an ordinary judicial process. On application of a legitimate complainant, the civil court of the place of the periodical in question may issue a provisional injunction to have the reply published.[145]

In January 1998, the Constitutional Court of Germany unanimously rejected a challenge to the Hamburg Press Law on the right of reply and correction.[146] In upholding the Hamburg law, the court weighed freedom of the press against an individual's reputation and his right of personality. The court stated that freedom of the press includes "freedom of starting and formulating press publications" as its central element.[147] The news media's editorial decisions include determining what topics to report and which articles to publish, as well as news media decisions regarding how to present the articles and where to place them within the particular issue.[148] The Hamburg right-of-reply law is a "general statute" under the constitution because it does not restrict freedom of opinion or a particular type of opinion.[149] Rather, the law protects the general right of personality, which is guaranteed by the Basic Law.[150] Further, the court did not consider

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145 Youm, *supra* note 137, at 57–59.

146 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 14, 1998, 1 BvR 1861/93, (F.R.G.), *available at* http://www.bverfg.de/entscheidungen/rs19980114_1bvr186193.html. The author's analysis of the German Constitutional Court's 1998 ruling on the Hamburg Press Act is based on the English translation of the court's opinion, on file with the author, as provided by Raymond Youngs, senior research fellow at the Institute of Global Law, University College London, and senior lecturer at Kingston University in England.

147 *Id.* ¶ 71.

148 *Id.*

149 *Id.* ¶ 78.

150 *Id.*

the Hamburg right-of-reply statute disproportionate in limiting freedom of the press while protecting the individual against press-related dangers to the person's right of personality.[151] The court took note of the inherent challenge facing individuals when their personal matters are incorrectly reported by the news media.[152]

Given the scope and influence of news reporting, the individual cannot, as a rule, counter the news media with the prospect of the same publicity.[153] In an effort to equalize the playing field for individuals, the court wrote that lawmakers have a duty under the right-of-personality principle to safeguard individuals against the media's impact on their personal sphere.[154] One legislative option is the legal guarantee that those affected by news reporting can respond through their own words.[155] This legal opportunity of reply for individuals contributes to the "free, individual and public formation of opinion [under Article 5(1)] of the Basic Law," according to the court, because "besides the information from the press, the reader is informed from the point of view of the person affected as well."[156]

Regarding the question of whether the right of reply is superfluous in protecting an individual's personality as a right, the constitutional court answered no.[157] The reply can, under certain circumstances, supplement an injunction, a correction, a retraction, or compensation, in addition to punishing those responsible for the precipitating statement.[158] Nevertheless, none of the civil or criminal remedies permits the person affected to reply to the media story.[159] Moreover, retraction and correction are not as prompt as the claim to a right of reply because they require a time-consuming finding of the untruth of the original stories.[160]

According to the constitutional court, protection of an individual's personality through the right of reply is not a terrible handicap to freedom of the press.[161] The court cited three reasons. First, given that the right of reply must always be tied to the original news story,

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151 *Id.* ¶ 79.

152 *Id.*

153 *Id.*

154 *Id.* (citation omitted).

155 *Id.* (citation omitted).

156 *Id.* (citation omitted).

157 *Id.* ¶ 80.

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* ¶ 81.

only the person who was the object of the press discussion can demand a reply.[162] Second, the reply is limited to factual communications; statements of opinion are excluded.[163] Finally, the reply claim will be qualified by the subject matter and scope of the original article within a reasonable framework.[164]

The constitutional court found no merit in the objection that the right of reply requires no injury to one's honor, no proof of falsity of the original news article, and no proof of the truth of the statement in reply.[165] The court distinguished reputation from the right of personality as a basis for the right of reply.[166] Personal honor as a justification for restricting freedom of the press constitutes "an important component" of the right of personality.[167] The court said, however, that a person's personality can still be impaired by media representations while his honor remains intact.[168]

The constitutional court characterized as inconsequential in constitutional law the news media's assertion that a reply should be denied when the media believe in their challenged articles. The court reasoned:

> The fact that a statement in reply is independent of the truth is a consequence of the requirement which follows from the state duty of protection for the right of personality to guarantee the same publicity. The speedy realisation of the claim to give an answer would fail if the proceedings were burdened with the elucidation of the question of truth.[169]

Meanwhile, the constitutional court found that the right of correction, which has evolved through case law on the right of reply, raised few constitutional issues.[170] The court drew a parallel between the correction claim and the reply request because the right of correction is based on the right of personality, and it protects an individual from being misrepresented in the press to the injury of his personality image,[171] a concept in harmony with the principle of equal publicity.

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162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.* ¶ 82.

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.* ¶ 83.

170 *Id.* ¶ 86.

171 *Id.* (citation omitted).

The court said protection of the right of personality through the right of correction does not impinge unreasonably on freedom of the press because the claim for correction is available only when the factual news stories are proved to be untrue *and* the individual's personality right has been violated.[172] The court recognized the news media's right to publish stories after careful research even though the stories have not been fully verified; the court wondered, however, if there is any justification for leaving news stories uncorrected even after their untruthfulness has been established and an individual's personality right continues to be infringed.[173]

The constitutional court disagreed with the petitioner that freedom of the press requires the claim for correction to hinge on the fault of the press.[174] The court acknowledged the right of correction's possible chilling effect on the press when it is enforced even when the press has fulfilled its duty of care in news reporting.[175] But the court doubted that the press's ordinary function would be jeopardized so severely by correction claims to justify requiring individuals to face false news reports without a right of correction.[176]

3. Denmark

Denmark is one of a number of countries that have been influenced by the German reply law. Denmark's 1998 Media Liability Act[177] states that requests for replies to factual assertions must be allowed if the complainant might suffer from "significant financial or other damage" and if the accuracy of the challenged information is not entirely indisputable.[178] The requests for reply may be submitted by the person to whom the original story related or, upon his death, by the next of kin.[179] The substance of the reply, however, must, "in all essentials," be factual and must not be unlawful.[180] Unlike German law, Danish media law subjects advertisements to the right of reply requirements.[181]

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172 *Id.* ¶ 88.

173 *Id.*

174 *Id.* ¶ 89.

175 *Id.*

176 *Id.*

177 Consolidating Act 1998-02-09 No. 85: The Media Liability Act, *amended by* L 2000-05-31 No. 433 and L 2005-12-21 No. 1404 (Den.).

178 *Id.* § 36(1).

179 *Id.* § 36(2).

180 *Id.* § 38(1).

181 *See id.* § 36(4).

4. Hungary

Perhaps one of the most illuminating constitutional law discussions of the right of reply is the 2001 opinion of the Constitutional Court of Hungary.[182] In that opinion, the court determined that the right of reply is a worthwhile means of balancing freedom of the press with protection of an individual's reputation but that the particular proposed right-of-reply amendment lacked such balance.[183]

Hungary is rated a "free" press system.[184] Its constitution guarantees individuals a right to express their opinions freely and to access and distribute "information of public interest."[185] It also expressly states that Hungary "recognizes and protects the freedom of the Press."[186] Freedom House's 2007 survey of press freedom reports that the government of Hungary does not interfere with the operation of wide-ranging competitive media outlets.[187]

At issue in the Hungarian Constitutional Court's case was the proposed 2001 amendment of the Civil Code on the right of reply:[188]

> (1) If a daily newspaper, a magazine (periodical), the radio or the television publishes or disseminates false facts or distorts true facts about a person, the person affected shall be entitled to demand, in addition to other actions provided by law, the publication of an announcement identifying the false or distorted facts and indicating the true facts (rectification).
>
> (2) If any opinion or evaluation published in a newspaper, magazine (periodical), the radio or the television violates the inherent rights of a person, he may—in addition to other actions provided by law—demand the publication of his own opinion or evaluation (reply).
>
> (3) The rectification or reply shall be published within eight days of receipt of the relevant demand in the case of

182 Decision 57/2001 (XII.5) (Dec. 4, 2001) (AB) (Hung.), *available at* http://www.mkab.hu/content/en/en3/05830104.htm.

183 *Id.* Part II.12.

184 FREEDOM HOUSE, *supra* note 134, at 83.

185 A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 61(1) (Hung.).

186 *Id.* art. 61(2).

187 FREEDOM HOUSE, *supra* note 134, at 83.

188 The proposed revision of the 1959 Civil Code clearly was not the first time Hungary had recognized the right of reply. The 1914 press statute of Hungary provided for the right. *See* Act of Parliament XIV of 1914 Concerning the Press, arts. 20–23 (Hung.), *in* THE PRESS LAWS OF FOREIGN COUNTRIES WITH AN APPENDIX CONTAINING THE PRESS LAWS OF INDIA 135–37 (M. Shearman & O. Rayner eds., 1926). It is not clear whether the 2001 amendment to the Civil Code was inspired by the 1914 press law of Hungary.

> daily papers, in the next issue of a magazine (periodical), in the same manner, and in the case of the radio or the television, within eight days, at the same time of the day as the time of broadcasting the objectionable communication.[189]

The proposed Civil Code revision provided for imposition of an obligatory fine for violation of the right of reply:

> (2) If the amount of damages that may be imposed is disproportionate to the gravity of the actionable conduct, the court shall also be entitled to penalise the perpetrator by ordering him to pay a fine usable for public purposes. If the violation of rights was performed through a daily paper, magazine (periodical), the radio or the television, the court shall also order the perpetrator to pay a fine usable for public purposes. The amount of the fine usable for public purposes shall be fixed at a level suitable for preventing the perpetrator from committing further acts of violation.[190]

The proposed right-of-reply provisions related to the "general personality right."[191] The personality right as a "mother right" in constitutional law is part of the "right of human dignity."[192] Article 54(1) of the Constitution of Hungary provides for the right to human dignity and prohibits human dignity from being arbitrarily denied.[193] The right of reply is also connected to an individual's constitutional right to good reputation.[194]

The Hungarian Constitutional Court noted a possible conflict between the right of reply and freedom of the press. Whereas no statute can limit the "essential contents" of a fundamental right like freedom of the press, the court said, the fundamental right may be constitutionally restricted when restriction is necessary and when the objective of

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189 Amendment of Act IV of 1959 on the Civil Code, § 79 (May 29, 2001) (Hung.), *quoted in* Decision 57/2001 (XII.5) Part I.2 (Dec. 4, 2001) (AB) (Hung.), *available at* http://www.mkab.hu/content/en/en3/05830104.htm.

190 Amendment of Act IV of 1959 on the Civil Code, § 84(2) (May 29, 2001) (Hung.), *quoted in* Decision 57/2001 (XII.5) Part I.2 (Dec. 4, 2001) (AB) (Hung.), *available at* http://www.mkab.hu/content/en/en3/05830104.htm.

191 Decision 57/2001 (XII.5) Part II.1 (Dec. 4, 2001) (AB) (Hung.), *available at* http://www.mkab.hu/content/en/en3/05830104.htm.

192 *Id.*

193 A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 54(1) (Hung.).

194 *See id.* art. 59(1) ("In the Republic of Hungary everyone is entitled to the protection of his or her reputation . . . .").

the restriction is balanced against the "gravity of the injury" to the fundamental right involved.[195]

Citing its 1998 ruling on hate speech, the constitutional court held that freedom of expression may be limited to protect human dignity and reputational right.[196] The court elaborated:

> [T]he restriction of the freedom of the press in general is not contrary to the Constitution if [a right-of-reply] provision is necessary and the importance of the desired objective is proportionate to the injury caused to the fundamental right, and that the State obligation to protect another fundamental right may constitute a ground for restricting the freedom of the press.[197]

The decisive impact of its country's international treaty obligations on freedom of the press and other fundamental rights led the court to factor in the dictates of the International Covenant on Civil and Political Rights ("ICCPR") and the ECHR, as well as the principles that the ECtHR and the European Commission on Human Rights have developed.[198]

The ICCPR and the ECHR both allow restrictions on freedom of the press and freedom of expression in order to protect an individual's reputation. At the same time, however, the court noted the ECtHR guidelines for states in restricting freedom of expression: the essential elements of free expression should not be violated, and an "appropriate balance" should be struck between an individual or public interest and freedom of expression.[199] The Hungarian Constitutional Court also paid close attention to several key ECtHR cases on freedom of expression that extend protection to offensive opinions and require strict interpretations of exceptions to the right of freedom of speech.[200] But the Hungarian court pointedly quoted the ECtHR as stating that "freedom of the press means, among others, the community's right to receive adequate information."[201]

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195 Decision 57/2001 (XII.5) Part II.2 (Dec. 4, 2001) (AB) (Hung.) (citation omitted), *available at* http://www.mkab.hu/content/en/en3/05830104.htm.

196 *See id.*

197 *Id.*

198 *Id.* Parts II.3–4.

199 *Id.* Part II.4 (citing Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium," 6 Eur. Ct. H.R. (ser. A) at 32 (1968)).

200 *Id.* (citing Sunday Times v. United Kingdom (*Sunday Times II*), 217 Eur. Ct. H.R. (ser. A) at 29 (1991); Sunday Times Case (*Sunday Times I*), 30 Eur. Ct. H.R. (ser. A) at 30 (1979); Handyside Case, 24 Eur. Ct. H.R. (ser. A) at 23 (1976)).

201 *Id.* (citing *Sunday Times I*, 30 Eur. Ct. H.R. (ser. A) at 41).

Referring to the "significant impact" of U.S. free-speech jurisprudence on ECtHR case law, the Hungarian Constitutional Court discussed *New York Times Co. v. Sullivan*[202] in considerable detail as a landmark case that defined the contemporary American approach to freedom of speech and the press.[203] The court saw a similarity between European practice and the principal elements of freedom of expression under the U.S. Constitution.[204] Yet the ECHR is different from the First Amendment in two important ways, according to the court: (1) while the First Amendment has no "abuse" clause, the ECHR expressly enumerates restrictions on freedom of expression; and (2) punitive damages are barred in European law but accepted in American law.[205] The differences between American and European practices in freedom of expression have exerted a "decisive effect" on speech regulations.[206] The constitutional court observed that the First Amendment protection of hate speech and cross burning stands in contrast to the ECHR's punishment of speech inciting racial discrimination and dictatorship.[207]

The international treaties and various ECHR principles have led the constitutional court to be wary of restricting freedom of speech. Also, keenly aware of the political history of its country, the court opted for an open marketplace of ideas and eschewed criminal punishment of abusive speech.[208] At the same time, the court differentiated politically oriented restrictions on freedom of expression from those restrictions designed to protect private individuals' reputation or human dignity.[209] Freedom to engage in political debates and to criticize the government may be restricted only to a limited extent, but the court said that a businessman's defamation of his competitor for selfish purposes is subject to greater restraints.[210] According to the Hungarian court, when a private individual's reputation is at stake, the state should secure favorable conditions for creating and maintaining democratic public opinion of the individual.[211]

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202 N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

203 Decision 57/2001 (XII.5) Part II.5 (Dec. 4, 2001) (AB) (Hung.), *available at* http://www.mkab.hu/content/en/en3/05830104.htm.

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.* Part II.6.

209 *Id.*

210 *Id.* Part II.8.

211 *Id.*

Against the backdrop of the free-speech jurisprudence of Hungary in relation to international law, the court viewed the right of reply as a constraint on freedom of the press in general and on editors' freedom in particular. The court's analysis of what the right of reply entails for the press is strikingly similar to the U.S. Supreme Court's concern in *Miami Herald Publishing Co. v. Tornillo*[212]:

> This [compulsory publication of replies] may cause the press to abstain from publishing any opinion in the case of which the possibility of the obligation of publishing a reply could be expected. This way, it is possible for the restriction of the freedom of expression as part of the freedom of the press to occur in an indirect manner. In addition, the obligation to publish a reply puts a burden on the press in the form of costs and loss of profits, therefore the possibility of such a disadvantage may cause the press to abstain from publishing opinions. Consequently, . . . the obligation to publish a reply qualifies as restricting the freedom of the press and—indirectly—the freedom of expression as well.[213]

In assessing the necessity and proportionality of the right of reply against the restriction of press freedom, the constitutional court took into account the asserted role of the right of reply.[214] This right offers those who were exposed to information harmful to a person's reputation and human dignity an opportunity to learn the true facts as well as opinions of the person affected.[215] The court found that, in addition to protecting reputation and human dignity, the "full-scale information supply is also justified by the need to inform the public" and that "freedom of the press includes the right to gain information necessary for the formulation of an opinion."[216]

In balancing the right of reply with freedom of expression, the constitutional court stated:

> [T]he laws restricting the freedom of expression are to be assigned a greater weight if they directly serve the realisation or protection of another individual fundamental right, a lesser weight if they protect such rights only indirectly

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212 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254–58 (1974) (holding that the right of reply restricts the editorial freedom of the press).

213 Decision 57/2001 (XII.5) Part II.9 (Dec. 4, 2001) (AB) (Hung.), *available at* http://www.mkab.hu/content/en/en3/05830104.htm.

214 *See id.*

215 *Id.*

216 *Id.* (citation omitted).

> through the mediation of an institution, and the least weight if they merely serve some abstract value as an end in itself.[217]

Because human dignity and reputation are constitutionally protected rights of individuals, the court added, they "may constitute the outer limit" of freedom of expression, and thus criminal sanctions may not be unconstitutionally disproportionate.[218] The court noted, however, that human dignity and reputation are not the same as a justifiable ground for limiting the freedom of expression. They both can be violated by the freedom of expression and the freedom of the press, but independently from each other.[219]

Based on its survey of foreign experience with the right of reply, the constitutional court determined that the right of reply is generally supported.[220] Among the "many countries" with right-of-reply regulations that the court examined were France, Germany, Spain, and Switzerland.[221]

In reference to the United States, the court gave a skewed impression of the right of reply. The court noted that although the United States has yet to ratify the American Convention on Human Rights, "the right of reply is not unknown" in U.S. law.[222] Its analysis of the U.S. Supreme Court's decisions in *Red Lion Broadcasting Co. v. FCC*[223] and *Tornillo*[224] leaves the erroneous impression that the U.S. Supreme Court in *Tornillo* recognized the right of reply while distinguishing *Tornillo* from *Red Lion*. The constitutional court's reading of *Tornillo* was clearly misplaced when concluding that *Tornillo* did not follow the *Red Lion* holding because *Tornillo* concerned the right of reply in an election campaign.[225] Equally incorrect is the court's explanation of *Tornillo*'s holding: "[A] person engaged in an election

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217 *Id.* (citation omitted) (internal quotation marks omitted).

218 *Id.* (citation omitted) (internal quotation marks omitted).

219 *Id.*

220 *Id.* Part II.10.

221 *Id.*

222 *Id.*

223 Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). In *Red Lion*, the Supreme Court upheld the personal attack rule of the FCC's fairness doctrine, which required broadcast licensees to provide reply time for individuals who were attacked during the discussion of a controversial issue of public interest. *Id.* at 392. The fairness doctrine was abolished in 1987 in *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5057–58 (1987), and its corollaries, the personal attack and political editorial rules, were eliminated in 2000 in *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000).

224 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

225 *See* Decision 57/2001 (XII.5) Part II.10 (Dec. 4, 2001) (AB) (Hung.), *available at* http://www.mkab.hu/content/en/en3/05830104.htm.

campaign had possibilities beyond the limits other people had [in utilizing various channels of communication]."[226]

On an international level, the constitutional court approvingly noted the American Convention on Human Rights' recognition of the right of reply and the European Commission on Human Rights' reading of the right into the ECHR.[227] Likewise, the court viewed the 1974 resolution of the Council of Europe's Committee of Ministers as an international case of the evolving right of reply. It highlighted the "minimum rules" of the right of reply recommended by the Committee of Ministers, which included the specific exemptions to its enforcement.[228]

The constitutional court accepted the right of reply as a legal means of balancing freedom of the press with protection of reputation or human dignity. Although the obligatory reply restricts freedom of the press and especially freedom of editing, it is a necessary tool for the injured party in presenting his side of the story to those who have read and heard the original story.[229] The right of reply also acts as the "equality of arms"[230] for those who are in a weak position to challenge mass media.[231] No less important is the right of reply's role in expanding and enriching the open marketplace of ideas. The court invoked the Council of Europe on the right of reply:

> In cases where the statement did not violate any fundamental right, the purpose of the reply is to provide information to the public on the true facts and the affected person's own opinion; therefore, the obligation to publish the reply is justified by the need to inform the general public on the broadest possible basis and to use diverse sources of information. The requirement specified by the Council of Europe also supports the right of reply (obligation to publish the reply).[232]

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226 *Id.* (citation omitted).

227 *Id.* (discussing decision of the European Commission on Human Rights in Ediciones Tiempo S.A. v. Spain, App. No. 13010/87, 62 Eur. Comm'n H.R. Dec. & Rep. 247 (1989)).

228 *Id.* For a discussion of the 1974 right-of-reply resolution of the Council of Europe, see *supra* notes 68–72 and accompanying text.

229 *See* Decision 57/2001 (XII.5) Part II.11 (Dec. 4, 2001) (AB) (Hung.), *available at* http://www.mkab.hu/content/en/en3/05830104.htm.

230 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 14, 1998, 1 BvR 1861/93, ¶ 13 (F.R.G.), *available at* http://www.bverfg.de/entscheidungen/rs19980114_1bvr186193.html.

231 Decision 57/2001 (XII.5) Part II.10 (Dec. 4, 2001) (AB) (Hung.), *available at* http://www.mkab.hu/content/en/en3/05830104.htm.

232 *Id.*

The court stressed that the right of reply does not necessarily mean that all reply provisions are constitutionally valid.[233] The right-of-reply law should be scrutinized for its intended objective in proportion to its general application.[234] The court concluded that the proposed Hungarian right-of-reply law lacked the requisite balance between protecting human dignity and reputation on the one hand and restricting freedom of the press on the other hand.[235]

Among the most problematic features of the proposed right-of-reply statute, the court said, was that the right of reply was unlimited.[236] The court continued:

> [I]n general not even a court could set the limits of exercising one's right [of reply] (e.g., the reply itself may be of an offensive nature, it may be of a much bigger size than the original statement, its contents may extend beyond those of the original statement, and in the case of more than one affected persons, each of them may reply on his own and without restriction).[237]

The court said that the law's proportionality would be further undermined by the mandatory imposition of a fine in addition to the open-ended exercise of the right of reply.[238] Thus, the court declared that the compulsory right of reply, with the exception of the right of correction, would significantly infringe on freedom of the press and editing due to its vagueness and overbreadth.[239] In addition, the court warned that the uncertain consequences of the news media's compliance with the law's undefined requirements would lead the press to forgo publishing opinions.[240]

5. South Korea

South Korea first recognized the right of reply in 1980. The Basic Press Act provided for the right of individuals who suffered injury from a news story to request a correction of the story by way of a right of reply and created a press arbitration commission to enforce the

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233 *See id.* Part II.12.

234 *See id.*

235 *Id.*

236 *See id.*

237 *Id.*

238 *Id.*

239 *Id.*

240 *Id.*

right of reply.[241] South Korea wholly imported its right of reply from then-West Germany in 1980. According to the Constitutional Court of Korea,[242] the right of reply in Korea has its genesis in the 1964 Land Press Law (Gesetz über presse) of Baden-Württemberg, Germany.[243]

After the "people's power" revolution in Korea in 1987, the mostly restrictive Basic Press Act enacted by General-turned-President Chun Doo-hwan's authoritarian regime (1980–1987) was replaced with two laws: the Act Relating to Registration, etc. of Periodicals ("Periodicals Act")[244] and the Broadcast Act.[245] These new liberal press statutes of 1987 retained the right-of-reply provisions from the Basic Press Act.[246] In 2005, the Korean National Assembly enacted the Act on Press Arbitration and Remedies, etc., for Damage Caused by Press Reports ("Press Arbitration Act")[247] as a comprehensive legal framework for news media-related complaints. Thus,

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241 Basic Press Act, Law No. 3347 (1980), arts. 49, 50, *amended by* Law No. 3786 (1984) (repealed 1987) (S. Korea) (on file with author).

242 Judgment of Sept. 16, 1991, 89 Honma 165, 3 HONBOP CHAEPANSO PANRAEJIP (Constitutional Court) 518 (1992). It is noteworthy, meanwhile, that the right of correction had been recognized in the early twentieth century. The Korean Press Law, as part of the Japanese press statutes of 1907, stated:

> In case request is made for correction of any article or for publication of a correction or refutation by any person involved in the matter published, it shall appear in the following issue of the paper concerned;
>
> In case of a letter of correction or refutation exceeding the original article by more than twice its length the matter in excess may be charged for at the same rate as that charged for ordinary advertisements;
>
> Requests framed in language and ideas prohibited by the Press Law and not bearing the name and address of the writer may be refused.

Korean Press Law, Applied to Koreans, art. 29 (1907) (amended 1909) (Japan). There is little written evidence that the statutory right of correction in Korean law three years prior to Japan's forced annexation of Korea in 1910 exerted any real or imagined impact on the Korean press and that it was factored into the Korean government's adoption of the right of reply in 1980.

243 For the English text of the Land Press Law (Gesetz über presse) on the right of reply in Baden-Württemberg, Germany, as enacted on January 14, 1964, see COMPILATION OF LEGISLATION, *supra* note 68, "Federal Republic of Germany" at 3–4.

244 Act Relating to Registration, etc. of Periodicals (Periodicals Act), Law No. 3979 (1987), *amended by* Law No. 4183 (1989), art. 16, *in* 4 CURRENT LAWS OF THE REPUBLIC OF KOREA 2541 (1997).

245 Broadcast Act, Law No. 3978 (1987), *amended by* Law No. 4183 (1989) and Law No. 4263 (1990), *in* 4 CURRENT LAWS OF THE REPUBLIC OF KOREA 2571 (1997).

246 For a discussion of the effect of the Periodicals Act and the Broadcasting Act on the right of reply in Korea, see Kyu Ho Youm, Current Development, *South Korea: Press Laws in Transition*, 22 COLUM. HUM. RTS. L. REV. 401, 419–23 (1991).

247 Act on Press Arbitration and Remedies, etc., Act No. 7370 (2005) (S. Korea) (on file with author). For a thoughtful discussion of the right of reply and correction law in Korea, see OKCHO KIM, MEDIA LAW (Korean) 598–642 (2005).

the Press Arbitration Act supersedes the right-of-reply provisions of the new Act on the Freedom of Newspapers, etc., and Guarantee of Their Functions ("Newspapers Act")[248] and the revised Broadcasting Act.[249] The Press Arbitration Act stipulates the right of correction as the following:

> A person who suffers any damage due to the falsity of a press report on a factual allegation . . . may, within three months after that press report comes to his/her knowledge, require the relevant press organization to report a corrected statement of the contents of the press report: *Provided*, That this shall not apply in any case in which six months have elapsed since that report.[250]

The request for correction of inaccurate factual news does not depend on the news media's intent, negligence, or illegality in publishing the news.[251] Government agencies can ask for correction of false news reports relating to their official acts.[252] In addition, the right of correction is available to organizations, even those not recognized as parties under the Civil Procedure Act, if they constitute a social unit of life and have a direct interest in the news reports in question.[253]

The Press Arbitration Act requires that a requested correction be published or broadcast within seven days after receipt.[254] However, the correction provision does not apply:

> If the complainant has no legitimate interest in requesting a corrected report;
>
> If the requested correction clearly contradicts facts;
>
> If the requested correction contains contents that are clearly illegal;
>
> If the requested correction is only for commercial advertising; [or]
>
> If the requested correction relates to factual reports on the open meetings of the central government, local govern-

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248 Act on the Freedom of Newspapers, etc., and the Guarantee of Their Functions, Law No. 7369 (2005) (S. Korea) (on file with author).

249 Broadcasting Act, Law No. 6139 (2000) (S. Korea) (on file with author).

250 Act on Press Arbitration and Remedies, etc., Act No. 7370, art. 14(1) (2005) (S. Korea) (on file with author). "Press report" under the Press Arbitration Act applies to "any broadcasting, periodical, news communications or Internet news." *Id.* art. 2(1).

251 *Id.* art. 14(2).

252 *Id.* art. 14(3).

253 *Id.* art. 14(4).

254 *Id.* art. 15(3).

> ments, or public organizations, or the public court proceedings.[255]

The Press Arbitration Act states that the corrected news story must be disseminated in such a way as to create the same effect as the original story so that the public might form an "impartial opinion" about the subject of the disputed article.[256]

The Korean law separately provides for a right to reply to factual assertions if the individual has been damaged by the allegations.[257] The request for a response to news reports is not conditioned on whether the original reports were true or false.[258]

The Korean statute also stipulates a right to demand a follow-up story to a previous report about a suspect in criminal proceedings. Article 17 states:

> A person who is reported or announced to be a suspected offender or to suffer a criminal punishment by the press may, if the criminal procedure with respect to him/her is terminated by the final and conclusive judgment of acquittal or on equal terms therewith, require the relevant press organization to make a further report on the fact within three months after that fact comes to his/her knowledge.[259]

The Press Arbitration Commission, an independent government agency, is in charge of resolving disputes between individuals and media organizations relating to news reporting.[260] It uses conciliation and arbitration in carrying out its statutory functions. The commission, if necessary, can "advise" the news organization to correct stories if it finds national, social, or personal interests damaged.[261]

The claim for corrections or replies may be taken to a three-judge panel of the district court having jurisdiction over the media defendant.[262] Although it can appeal, the news organization must obey a court order to publish a correction, a reply, or a follow-up to the original story. The Korean law addresses the possible quandary the news

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255 *Id.* art. 15(4).

256 *Id.* art. 15(6).

257 *Id*. art. 16(1).

258 *Id.* art. 16(2). The ex post facto provision of the Korean right-of-reply law is based on the 1982 Austrian press law. *See* KYU HO YOUM, PRESS LAW IN SOUTH KOREA 352 n.36 (1996) (citation omitted).

259 Act on Press Arbitration and Remedies, etc., Act No. 7370, art. 17(1) (2005) (S. Korea) (on file with author).

260 *Id.* art. 7.

261 *Id.* art. 32(1).

262 *Id.* art. 26.

media outlets face in being forced to publish a court-mandated reply before successfully challenging it on appeal:

> An appellate court must announce that its decision to reverse the trial court's original reply order may be published, when requested by the press organization that has already carried the corrected statement or reply or the *ex post facto* report. If requested, the appellate court must order the claimant to compensate for the expenses that the media organization had paid for its compliance with the now reversed judicial order and also for the expenses that result from the appropriate publication of the court judgment on appeal. The compensatory payments to the media entity shall not exceed the advertising fees the media charge ordinarily.[263]

The Korean law stipulates the punishment for those who violate the right-of-reply provisions. The statute authorizes a fine not exceeding 30 million *won* (US$30,000) for failing to publish or broadcast a correction, reply, or ex post facto story.[264]

The right of reply under the Korean press law has been challenged on the grounds that it violates freedom of the press as a constitutional right, but the Constitutional Court of Korea has upheld the right.[265]

> [W]hen an individual has his reputation injured by a news organization, the Court said, he should be given a prompt, appropriate, and comparable means of defense. In order to counter the effect of the offending article, the right of reply guarantees the injured party an opportunity for defense through the same news organization . . . . [T]he right-of-reply requirement can contribute to the discovery of truth and formation of correct public opinion. Readers often depend on information provided by the news media; and cannot make a sound judgment until they hear the opposing arguments of the other parties.
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> The [Constitutional] Court looked to several provisions of the Constitution which protect an individual's personality. The Court asserted: "[T]he claim for corrected reports as a right of reply is based on the constitutionally guaranteed

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263 *Id.* art. 28(3). The Korean law on the media's recovery from the unwarranted publication of replies is somewhat similar to the Austrian right of reply law. *See* Leonidas Martinides, *The 'Entgegnungsrecht' in Austria*, *in* RIGHT OF REPLY IN EUROPE, *supra* note 117, at 198–99.

264 Act on Press Arbitration and Remedies, etc., Act No. 7370, art. 34(1)2 (2005) (S. Korea) (on file with author).

265 *See* Judgment of Sept. 16, 1991, 89 Honma 165, 3 HONBOP CHAEPANSO PANRAEJIP (Constitutional Court) 518 (1992).

> right of character. By allowing the injured an opportunity to respond to factual allegations, it protects their right of character." The Court added that the right of reply would make the press more responsible by permitting the injured party to challenge the accuracy of news reports.
>
> Dismissing the petitioner's argument that the reply provisions would violate the "essential aspect" of freedom of the press, the Court emphasized that other constitutional rights, i.e., reputation, privacy, *and* press freedom, were protected by the . . . right of reply. The court concluded that reasonable limitations on the right of reply functioned as "a safety mechanism to prevent the unwarranted encroachment on freedom of the press."[266]

In rejecting another frontal challenge to the right of reply, the Constitutional Court of Korea stated in 2006 that the civil and criminal remedies for libel are futile if the plaintiff fails to meet the requisite burden of proof, which leaves the plaintiff with no means to recover from the serious injury inflicted by the false news.[267] One appropriate method of fixing this loophole in civil and criminal law, the court held, is to recognize the victim's right to correct the original story through the same news media in an equally prominent way by declaring the story incorrect.[268] The court found that the right of reply alone is insufficient because it only provides an equal opportunity to "counter-speak."[269] Because the veracity of the original statement is not a determining issue, the right of reply does not necessarily help correct false stories.[270]

The constitutional court disagreed with the petitioners that the right of correction would restrict freedom of the press because it affords the press no immunity from its requirements.[271] The court stated:

> It, of course, is very important that the press should carry out its original function relating to freedom of speech and the press by promptly reporting the important matters of public interest without being chilled. But the discovery of truth is

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266 Kyo Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J. INT'L L. 1, 16–17 (1994) (citation omitted).

267 Judgment of June 29, 2006, 18-1(B) KCCR 337, 2005 Hun-Ma 165 (2006) (S. Korea), *available at* http://www.ccourt.go.kr/home/eng_view/xml_content_view.jsp?seq=222366&eventNo=2005Hun-Ma165&pubflag=2%eventnum=.

268 *Id.*

269 *Id.*

270 *Id.*

271 *Id.*

> equally strongly required of justice. It is against justice to leave a false story uncorrected while the rights of the story's subject continue to be violated. To impose silence on truth unilaterally cannot be justified in the name of freedom of speech and the press.[272]

The court continued that the right of reply, in its substance and methods, does not restrict freedom of the press beyond what is necessary.[273] The right of reply permits the press to deny a reply under certain circumstances, limits the period within which the right must be exercised, and limits the burden on the press by requiring only that the reply appear in the same position and in an equal length as the original story.[274]

III. The Impact of the Right of Reply on Freedom of the Press

Professor Chafee, whose majestic book *Government and Mass Communications* propounds a free *and* responsible press in the United States while lamenting the inertia of American libel law in outgrowing its entrenched procedural limitations, suggested in 1947 that Americans "can learn" from foreign experience with the right of reply to find "a more civilized way" of resolving private libels.[275] In the nineteenth century, European law broke decisively from the past, Chafee wrote, and "it displayed a great deal of resourcefulness in devising new remedies to meet new evils . . ., including falsehoods in the press."[276]

One year earlier, Ignaz Rothenberg, the author of the definitive comparative book on the right of reply and other press law issues, concluded that the right of reply and correction "ha[ve] stood the test."[277] He maintained that countless errors had been corrected by replies and rectifications and that the number of lawsuits against the news media was decreasing because many lesser cases could be settled by a reply.[278] More importantly, Rothenberg stated:

> The general appreciation of the right of reply is shown by the fact that the relevant regulations have been retained almost everywhere and, moreover, were accepted by countries in which they had not been known before. . . .

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272 *Id.*

273 *Id.*

274 *Id.*

275 1 CHAFEE, *supra* note 114, at 146.

276 *Id.* at 145–46.

277 ROTHENBERG, *supra* note 4, at 139.

278 *Id.*

> Efforts to reform the law of reply can be observed in many countries. Their aim is to remove some abuses in its application and to introduce clear legal regulations in matters of a right of defence open to everyone who is attacked by a paper.[279]

The Commission on Freedom of the Press in the United States, on which Chafee served as a member, also noted the right of reply in its "what can be done" list to free the press from various influences that prevent it from disseminating the kind of news and ideas American society needs.[280] "As an alternative to the present remedy for libel," the commission observed, "we recommend legislation by which the injured party might obtain a retraction or a restatement of the facts by the offender or an opportunity to reply."[281]

The observations of Chafee, Rothenberg, and the Commission on Freedom of the Press read as well today as they did sixty years ago, testifying to the enduring value of the right of reply to freedom of the press. In a provocative criticism of American libel law, media law scholar Donald Gillmor chided the U.S. media by calling it "an arrogant and self-righteous press that idealizes a free flow of information but has yet to learn how to provide space and time for reply to those it savages."[282]

A 1986 study of the right of reply found France and Germany not entirely successful and rather unsuccessful, respectively.[283] Nevertheless, the study called the European statutes "noteworthy."[284] It then suggested that the United States adopt the European right of reply because it would provide individuals with access to the press, require no admission of wrongdoing from the news media, and offer an alternative to explosive libel litigation.[285]

In response to the U.S. Supreme Court's stated fear in *Tornillo* about the right of reply's inhibiting impact on freedom of the press, the leading British human rights lawyer Geoffrey Robertson argued in 2003: "[The right of reply] has operated in Europe as a Council Directive since 1974, and there's no evidence from Europe that it has chilled the press."[286] More instructive is the French experience with the

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279 *Id.*

280 *See* THE COMM'N ON FREEDOM OF THE PRESS, *supra* note 7, at 79, 86.

281 *Id.* at 86.

282 DONALD M. GILLMOR, POWER, PUBLICITY, AND THE ABUSE OF LIBEL LAW ix (1992).

283 Danziger, *supra* note 23, at 187, 192.

284 *Id.* at 196.

285 *Id.*

286 Transcript of Mock Oral Argument at 66, Media Law Resource Center London Confer-

right of reply. Franklyn Haiman, a noted scholar of communications law at Northwestern University, echoes Robertson when reporting on his field study of the French right of reply:

> [T]hese fears [of the right of reply's chilling effect on press freedom] seem quite unfounded. Not only is the right infrequently invoked—thus consuming an infinitesimal portion of space in any newspaper or magazine—but it appears to have had no discernable effect on journalistic vigor. On the positive side, its presence on the books may well have been a contributing stimulus to the generous amount of space in the French press devoted to Letters to the Editor, guest opinion columns, and other modes of voluntarily granted direct and mediated access. It has certainly helped to provide a livelier and more diverse reading bill of fare for the public.[287]

Haiman did not know empirically whether the right-of-reply law reduced libel litigation in France.[288] In England, where the right of reply is not recognized as a legal right, however, an editor of the *Guardian* newspaper pointed out the practical value of granting replies: limiting libel actions by allowing those aggrieved by factual allegations to opt for a quick correction.[289]

Most appealing about the right of reply as a concept is its inherent fairness for those disadvantaged in the structurally skewed arena of mass communications.[290] Evidence indicates that the Korean right-of-reply law has accomplished its intended purpose: "mak[ing] the freedom of the press compatible with public responsibilities thereof" by leveling the playing field.[291] It has facilitated more access to the news media for ordinary Koreans and has helped the public influence the media since the right of reply was introduced into Korea in 1980.[292]

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ence: Developments in UK, European and International Libel, Privacy & Newsgathering Laws (Sept. 23, 2003) [hereinafter Mock Oral Argument], *available at* http://www.medialaw.org/Template.cfm?Section=Archive_by_Date1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=2593.

287 HAIMAN, *supra* note 3, at 42–43.

288 *Id.* at 43.

289 Mock Oral Argument, *supra* note 286, at 66 (quoting Alan Rusbridger, editor of the *Guardian*).

290 British lawyer Geoffrey Robertson described the right of reply as the "basic . . . human right of self-defense" that allows a victim of serious allegations "a right, no matter how powerless or inarticulate, to say they got it wrong." *Id.* at 65.

291 Act on Press Arbitration and Remedies, etc., Act No. 7370, art. 1 (2005) (S. Korea) (on file with author).

292 Jae-Jin Lee & Sung-Hoon Lee, *The Right of Reply System for the Last Two Decades in*

According to a 2003 survey of the right-of-reply law in Korea, the news media and the public agree on the need for and role of press arbitrations. Complainants and the media respondents in the right-of-reply arbitration cases report their "strong faith" in using press arbitrations before resorting to court litigation.[293] The study has found that in protecting the individual's basic right and in recovering from the injury by the news media, most respondents to the survey considered press arbitrations necessary as a mechanism to implement the right of reply.[294]

As The George Washington University Law School Professor Jerome Barron said in 1993, the right of reply exemplifies "elementary fair play," and thus it is "an indispensable condition for full, fair, and free debate."[295] Thus, few dispute the individual and societal value of the right of reply and related concepts in free speech jurisprudence. The most vociferous objections to the right of reply involve not whether it should be recognized but how it is practiced.

In their study of what enables "free and independent" media in societies in transition from their authoritarian pasts, U.S. law professors Monroe Price and Peter Krug suggested that in addressing "perceived abuses" of journalistic freedoms, the right to rebut and correct news media stories is less threatening than libel lawsuits.[296] They advised, however, that if such reply and correction obligations on the news media are overly sweeping and intrusive, they will impede the advancement of an enabling environment.[297] Their limitations on the right of reply were more or less similar to various international and foreign right-of-reply laws while reflecting U.S. libel law principles.[298] This media-sensitive approach to the right of reply might have been motivated by the authors' willingness to tip the scale in favor of free-

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South Korea, KOREAN J. OF JOURNALISM & COMM. STUD. 409 (special English ed. 2001) (citation omitted).

293 *2003 Study of the Satisfaction with Operation of the Press Arbitration System*, PRESS ARB. Q. (Korean), winter 2003, at 75 (translation on file with author).

294 *Id*. at 77.

295 Jerome A. Barron, *The Right of Reply to the Media in the United States—Resistance and Resurgence*, 15 HASTINGS COMM. & ENT. L.J. 1, 20 (1992).

296 U.S. AGENCY FOR INT'L DEV., *supra* note 1, at 39.

297 *Id.*

298 *See id.* at 39–40. Price and Krug stated that the size and prominence of a reply should not exceed those of the original statement; the right of reply and correction should be limited to factual news statements; the right should be allowed only to those "who can prove that the statement in question was false, and perhaps also that they have suffered an injury to their legal rights"; and the right should allow a news media outlet to reject a reply if it would "lead to a legal violation." *Id.* at 40.

dom of the press in transitional societies, where such freedom is more fragile than in stable democracies.

Accordingly, ARTICLE 19's five criteria for limiting the right of reply as an alternative to libel lawsuits are worth noting:

> (a) A reply should only be available to respond to incorrect facts or in case of breach of a legal right, not to comment on opinions that the reader/viewer doesn't like or that present the reader/viewer in a negative light.
> (b) The reply should receive similar, but not necessarily identical[,] prominence to the original article.
> (c) The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast.
> (d) The media should not be required to carry a reply which is abusive or illegal.
> (e) A reply should not be used to introduce new issues or to comment on correct facts.[299]

The "equality of arms" principle underlying the right of reply in general serves as a powerful incentive to an increasing number of nations to accept the right, whether constitutionally or statutorily.[300] The principle's widely accepted appeal is more apparent when it is viewed as a ready tool for European nations to bypass their divergent, culture-bound libel laws in balancing more expeditiously freedom of the press with protection of personal interests.[301]

IV. Summary and Conclusions

The right of reply as a legal concept is more widely accepted than in the past. It is increasingly clear that the right of reply is evolving into an important component of freedom of the press in international and foreign law. International law and the domestic laws of many democratic countries recognize the right of reply as a pragmatic remedy for reputational injury from the news media, albeit not necessarily as a convenient route to the open marketplace of ideas.

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299 ARTICLE 19, MEMORANDUM ON THE DRAFT COUNCIL OF EUROPE RECOMMENDATION ON THE RIGHT OF REPLY IN THE NEW MEDIA ENVIRONMENT 5–6 (2003), *available at* http://www.article19.org/pdfs/analysis/council-of-europe-right-of-reply.pdf.

300 *But cf.* Int'l Freedom of Expression Exch., *Venezuelan Supreme Court Ruling Alarms Press Freedom Organisations*, June 26, 2001, http://www.ifex.org/en/content/view/full/28954 (noting that the Supreme Court of Venezuela, denying the right of reply to journalists, held that "the right of reply [guaranteed in Venezuela's Constitution] was intended for individuals who do not have access to a public forum, rather than media professionals and others who express themselves via the media").

301 *See* DAVID I. FISHER, DEFAMATION VIA SATELLITE: A EUROPEAN LAW PERSPECTIVE 102–03 (1997).

From an international and regional law perspective, the U.N. Convention on the International Right of Correction is the only international treaty incorporating a version of the right of reply. The French-inspired right of correction was designed to establish a right of correction for officials, not for private individuals. Whereas more than twenty nations have ratified the U.N. Convention to date, the majority of them have not set the right-of-reply standard for freedom of speech and the press, given that their transnational experience with the right of reply tends to be aspirational. The result is that the right of reply as an international right has yet to be embraced as broadly as its U.N. proponents wished in the early 1950s. One might ascribe the lack of success of the international right-of-reply convention to the divergence in the media law around the world.

Two regional human rights conventions, the American Convention on Human Rights and the ECHR, recognize the right of reply. Since 1974, the Council of Europe and the EU have adopted various conventions and resolutions on the right of reply that apply to domestic and cross-border broadcasting. Most recently, the right of reply was extended to online factual allegations. The experience of European countries with the right of reply, individually and collectively, seems to prove that the right of reply is not fundamentally at odds with freedom of expression. It indeed shows that the right of reply promotes freedom of information.

The right of reply varies from country to country. While a limited number of countries provide for it as an express constitutional right, many others treat it as a statutory matter. France and Germany are the most influential countries around the world supporting the right of reply. The most significant difference between France and Germany is that the French law makes no distinction between factual statements and opinion, whereas the German law is limited to statements of fact. The judicial interpretations of the right of reply in Germany, Hungary, and South Korea take a broad look at the right of reply in connection with its possible contribution to public opinion.

The right of reply's impact on the press can be positive, especially when it is viewed as contributing to the open marketplace of ideas and equalizing the relationship between the news media and the subjects of their news stories. Little shared evidence is available indicating that the right of reply has a pervasive chilling effect on the news media.

Overall, the growing acceptance and success of the right of reply outside U.S. borders substantiates what Professor Barron has argued

trenchantly since 1967: the right of reply should become a new First Amendment right. Furthermore, the widespread embrace of the right of reply challenges the conclusory assumptions of the U.S. Supreme Court in *Tornillo* that the First Amendment offers absolute protection to the press when it comes to editorial judgments.

The gap between U.S. law and international and foreign law on the right of reply derives from the differing concepts of freedom of the press in conflict with individual and societal interests. Freedom of the press occupies a preferred position in American society. By contrast, individual reputation is not as highly valued, and it is not a constitutional right. In most countries, however, reputation as part of one's human dignity is accorded as high a value as freedom of the press, if not higher. Furthermore, international law, almost without exception, recognizes legal protection of reputation in the same way it recognizes the right to a free press. Thus, reputation and other individual interests come into play in international and foreign law when the right of reply is at issue.

When France and Germany made the right of reply a legal obligation in the nineteenth century and other countries followed them during the first half of the twentieth century, they intended it to enable the defamed to respond to the defamer, i.e., the news media. In many of those right-of-reply countries in Africa, Asia, Europe, and Latin America, reputation and related personal interests continue to be an important consideration in enforcing the right of reply.[302]

The dichotomy between freedom of the press and reputation alone, however, cannot explain why the right of reply has been increasingly embraced in international and foreign law. As freedom of the press and its concomitant responsibility emerged as an international issue after World War II, the right of reply focused more on how to help the aggrieved vindicate themselves expeditiously. Conceptually, therefore, the right of reply has been connected to the marketplace of ideas since the 1940s. This has been noticeably important to the right of reply's development in international and foreign law by creating a nexus between the right of reply and freedom of the press: the right of reply internationally or domestically is likely to be argued

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302 Of course, as Professor Lahav remarked cogently, there still remains a question: does the right of reply serve the reputational interests of ordinary individuals, who have little access to the news media or public relations agencies that could help them to counter the media's misinformation? Relevantly, an empirical, comparative study of the right of reply's impact on freedom of expression—or lack thereof—would help to answer whether the right of reply "is not truly compatible with a mature democracy." Lahav, *supra* note 8.

as an important contributor to a wider dissemination of information and to a more robust public debate. The decisions of the ECtHR and the constitutional courts in Germany, Hungary, and South Korea since the early 1990s are illustrative, as are the conventions and resolutions from the EU and the Council of Europe since 1974.

The contrast between the United States and other countries regarding the right of reply is also related to the diverging visions of the state's role in defining the news media's freedom to exercise editorial control. The right-of-reply countries recognize the positive role of the state: they consider the government an enhancer of freedom of the press as well as a constrainer. The government, according to right-of-reply countries, can help to protect the media from themselves in a democratic society. As an English judge stated in a different context: "The press is not above the law. Blackstone was concerned to prevent government interference with the press. The times of Blackstone are not relevant to the times of Mr. Murdoch."[303] The libertarian attitude of the *Tornillo* Court toward the right of reply could not have been more strikingly different from the English jurist's view of the state in furthering freedom of the press rather than denying it.

More often than not, the United States still engages in a one-way trade with the rest of the world in freedom of speech and the press. It exports most of the time rather than imports largely because of its exceptionally rich experience with freedom of expression. But the right of reply is not for export from the United States. Indeed, that counts as one of the growing areas in international and foreign law in which Americans could learn from other free-press countries that accept the right of reply to expand freedom of information while protecting freedom of personality. If the late Justice White took international and foreign law as a guide now, he would likely find that the right of reply is not as repugnant to freedom of the press as he thought in 1974. He also would learn that the right of reply in many democratic systems is rarely abused as an invidious tool of suppression against the media. Hence, when American judges and lawmakers revisit the right of reply in the future, it will be helpful to draw on international and comparative law.

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303 Schering Chems. Ltd. v. Falkman Ltd., [1981] 2 All E.R. 321 (EWCA) (Eng.).