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Title/Style of Cause:	Stephen Schmidt v. Costa Rica
Doc. Type:	Resolution
Decided by:	Chairman: Mr. César Sepúlveda; First Vice Chairman: Dr. Luis Demetrio Tinoco Castro; Second Vice Chairman: Dr. Luis Adolfo Siles Salinas; Members: Dr. Andrés Aguilar; Dr. Marco Gerardo Monroy Cabra; Dr. Gilda Maciel Russomano; Mr. Bruce McColm
Dated:	03 October 1983
Citation:	Schmidt v. Costa Rica, Case 9178, Inter-Am. C.H.R., Report No. 17/84, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1984-1985)
Represented by:	APPLICANT: Fernando Guier Esquivel
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BACKGROUND:

1. Mr. Stephen Schmidt, an adult, journalist, United States citizen, and resident of the State of Wisconsin, United States of America, citing as legal basis articles 1, 2, 13, 29 and 33, paragraphs a) and b); 41, 44, 46, 48, 50, 51 and 61, paragraphs 1 and 2; and 62, 63, 67, 68 and 69; and concordant articles of the American Convention on Human Rights, signed at the City of San Jose, Republic of Costa Rica, on November 22, 1969, articles 1 and 2 paragraph a); 16, 17 and 18 paragraphs a), b), c) and d); 19 and 23 of the STATUTE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS; and 2, 22, 23, 24, 25 and 28 and concordant articles of the STATUTE of the INTER-AMERICAN COURT OF HUMAN RIGHTS, approved through Resolutions 447 and 448 adopted by the OAS General Assembly in La Paz (Bolivia) at its Ninth Regular Session; and articles 1, 8, 10, 23, 24, 26, 27, 28, 29, 31 and 32 and concordant articles of the Regulations approved by the Commission at its 660th Meeting, 49th session, held on April 8, 1980, filed a formal petition asking that "the competent organization declare that restoration shall be made to me of the human right of freedom of expression and thought, established and protected--without any restraints or restrictions--by Article 13 of the American Convention on Human Rights, which was disregarded in the criminal case brought against me before the Second Criminal Court of the aforementioned city of San Jose for the nonexistent crime of illegal exercise of a profession, and which was not applied in the final decision handed down by the THIRD SECTION OF THE SUPREME COURT OF JUSTICE of the Republic of Costa Rica at 4:30 p.m. on June 3, 1983, which sentenced me to three months in prison and ordered my inclusion in that country's JUDICIAL REGISTRY OF OFFENDERS."

As causa petendi I state the following facts:

a) After ten years of residence in Costa Rica, duly authorized by that country's public agencies, he worked on The Tico Times, an English language weekly, as technical advisor, translator, and copy editor,

and he also wrote on various national and international subjects.

b) He studied at the Universidad Autonoma de Centroamerica at the suggestion of the Association of Journalists, and received a Bachelor's Degree in Journalism with honors, which was approved by the Ministry of Education.

c) In April 1980, the Association of Journalists reported him to the Costa Rican Attorney General for the crime of illegal exercise of a profession. He was penalized and punished under article 313 of the Penal Code, because according to Articles 22, 23, 24, 25, and 27 of the Charter of the Association of Journalists, the exercise of journalism is limited to persons members of that association who have been issued a journalist license.

d) After three years of proceedings, on January 14, 1983, at 5:15 p.m., the Second Criminal Court handed down a sentence finding him innocent and clearing him of all guilt and responsibility, on the grounds that under Article 13 of the American Convention on Human Rights, he was merely exercising freedom of thought and expression, which is not subject to restriction by national law, and

e) The Attorney General appealed the decision to the Supreme Court of Justice, and the Third Court, in a judgment on June 3, 1983, at 4:30 p.m. decided to hear the appeal reverse the acquittal, and declare him "guilty of the crime of illegal exercise of the profession of journalism to the detriment of public order. and therefore sentenced him to three months in prison, with credit for any previous time in detention, to be served in the penitentiary indicated by the pertinent regulations. This judgment is to be entered in the Judicial Registry of Offenders. The sentence is suspended for three-year's probation, and the accused is warned not to repeat the offense, under the legal admonitions that will be made known to him in due course. Hugo Porter M., President; Ulysses Valverde S.; Rafael Benavides; Emilio Villalobos V.; Armando Saborso V.; Gerardo Rojas Solano, Secretary.

2. Through Resolution No. 26 approved by the Commission at its 61th session, held on October 4, 1983, the petition filed by Mr. Stephen Schmidt was declared admissible because it meets the requirements established in the Inter-American Convention on Human Rights. It was directed that this resolution be conveyed to the Government of Costa Rica and to the petitioner.

3. In his response to Mr. Schmidt's petition, Dr. Carlos Jose Gutierrez, Minister of Justice and Representative of the Costa Rican Government, raised previous issue the failure to exhaust all remedies under domestic jurisdiction. He stated that Mr. Schmidt could have exercised the remedy of amparo, appeal against decisions of government offices, and unconstitutionality, provided for in Articles 48, 49, and 10 of the Costa Rican Constitution.

He also made the following basic assertions:

a) That in the Costa Rican juridical system, "according to the doctrine deriving from case law, in both the penal and the constitutional areas, the guarantee of freedom of thought and expression established in Article 13 of the American Convention on Human Rights and in article 29 of the Constitution of the Republic protects all inhabitants of the country, including foreigners, without reservation. Nevertheless, this does not mean revocation of any requirements may establish common law that may be established under to safeguard public order with regard to exercise of the various professions, and the profession of reporter-journalist cannot be regarded as being excluded."

b) That "Mr. Schmidt's claim as set forth constitutes a real disrespect for our country's sovereignty and a clear attempt at intervention in affairs that are essentially under the domestic jurisdiction of states. This is prohibited according to the doctrine derived from article 2, paragraph 7, of the United Nations Charter. The agencies for protecting human rights provided for in the American Convention are not competent to decide whether a ruling by a court of one of the states parties is or is not lawful, and they are even less competent to revoke or reverse a sentence of those courts," and.

c) That Mr. Schmidt's petition is not current, because he is not now residing in Costa Rica.

In his rejoinder, the petitioner's attorney, Dr. FERNANDO GUIER ESQUIVEL, held that remedies under domestic jurisdiction had been exhausted because, when the claim was admitted this aspect had already been analyzed; and furthermore, to foster the remedy of amparo "so that the claimant would be ordered to join the Association of Journalists would mean to give up the struggle, to turn one's back on the American Convention, and to disregard the unquestionable fact that the Pact of San Jose, Costa Rica, guarantees unrestricted freedom of expression through indirect channels or media and with the understanding that no provision of the aforementioned Convention can be interpreted or applied to allow the states parties, groups or individuals to suppress or restrict enjoyment and exercise of recognized rights and freedoms." He took the same position with regard to appeal against a decision of a government office, pointing out that Mr. Schmidt's conviction of the crime of illegal exercise of the profession of journalism was final. With regard to the remedy of unconstitutionality, he states that, in several cases, the court had already upheld the constitutionality of obligatory membership in an association. With regard to the merits of the case, he argued that Article 13 of the American Convention on Human Rights protects the freedom to seek, receive, and impart information and ideas, and it was not "legal to curtail this freedom by shackling it with the requirement prior authorization or permission".

4. As provided in article 48.f of the American Convention on Human Rights, the Commission placed itself at the disposal of the parties concerned in order to see if it was possible to reach a friendly settlement. For this purpose, a hearing was ordered, which was held during the Commission's 62nd session. At that hearing, the petitioner's attorney contended that the law governing journalism in Costa Rica violates Article 13 of the American Convention on Human Rights, since that provision protects all persons, whether or not they are members of an association. He stated that obligatory membership is different in journalism because in that profession what is protected is the freedom to gather and publish information, while in other professions, a membership requirement is imposed because of the risks involved in exercising the profession.

The Government of Costa Rica, through its representative, Dr. Manuel Freer Jimenez, held that the Charter of the Association of Journalists is in keeping with the American Convention on Human Rights. He explained that a non-member journalist can express his opinion as a columnist, since the only thing from which he is barred is being a director or reporter, for which purpose he must be a member, and that the complainant had been found guilty of illegal exercise of the profession and not of exercising freedom of expression. At the hearing, both parties stated that they were not interested in a friendly settlement and reaffirmed their views.

5. The Commission appointed Dr. MARCO GERARDO MONROY CABRA, a member of the Commission, as rapporteur to prepare the report on the facts and conclusions it reached in this case.

OBSERVATIONS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

1. The Inter-American Commission on Human Rights is competent to hear and decide upon Mr. Stephen Schmidt's petition, under article 112 of the Charter of the Organization of American States and article 44 of the American Convention on Human Rights signed and ratified by Costa Rica, which state deposited the instrument of ratification on April 8, 1970, following approval by the Legislative Assembly through Decree Law No. 4534 of February 23, 1970. Costa Rica also deposited with the General Secretariat of the Organization of American States the instrument recognizing the competence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, under articles 45 and 62 of the American Convention on Human Rights.

2. Mr. Stephen Schmidt has exhausted all remedies under the domestic jurisdiction of Costa Rica. In fact, a final judgment has been handed down by the Third Section of the Supreme Court of Justice of the Republic of Costa Rica on June 3, 1983, sentencing Mr. Schmidt to three months in prison and ordering

his inclusion in the Judicial Registry of Offenders. The remedy of amparo established in article 48 of the Constitution, and implemented by Legislative Decree No. 1161 of June 2, 1950, is not pertinent because article 3, subparagraph b, of that provision states the following: "The remedy of amparo does not apply... b) against rulings and proceedings of the Supreme Court of Justice and the other tribunals and judicial officers in matters of their competence..."

Likewise, the complainant could not now join the Costa Rican Association of Journalists because the regulations under the Charter of the Costa Rican Association of Journalists, issued through Decree No. 4312-C of November 7, 1974, prohibits the membership of persons with penal records who are included in the Judicial Registry of Offenders. Article 6, subparagraph e), states the following: "Foreigners who wish to avail themselves of the provisions of subparagraph a) of Article 2 of the Charter must first meet the requirements of the migratory and labor laws and treaties. Compliance with these requirements shall be essential before requesting confirmation of the professional degree received from the University of Costa Rica. In order to join the Costa Rican Association of Journalists, they must meet the following requirements: ...e) Certification from the Judicial Registry of Offenders that they do not have a criminal record;..."

An appeal against a decision of a government office is not juridically feasible, precisely because Mr. Schmidt does not seek membership in the Costa Rican Association of Journalists, because he believes that, in keeping with Article 13 of the American Convention on Human Rights ratified by Costa Rica, this requirement cannot be demanded and therefore there is no administrative act that can be contested through such a procedure.

Neither was the remedy of unconstitutionality feasible, because the Supreme Court of Costa Rica has repeatedly ruled that obligatory membership is consistent with the Constitution's provisions (Full Court, ruling handed down at 1:00 p.m. on August 22, 1980, constitutional jurisprudence 1979-1982, pages 139 to 141); and it was reasonable to expect that this decision would be repeated, in which case, as international legal doctrine has held, there is no need to exhaust domestic remedies. Neither could he have argued that the Charter of the Association of Journalists was unconstitutional due to an alleged violation of article 13 of the American Convention on Human Rights, because the Supreme Court of Costa Rica accepts only this remedy under article 10 of the Constitution only if "the provisions of the legislative branch or the executive branch run contrary to the Constitution."

The foregoing leads to the conclusion that in this case all remedies under domestic jurisdiction of the Republic of Costa Rica have been exhausted, for which reason the previous issues raised by the government of the state in reference are inadmissible.

3. The Costa Rican Government argues that the petition "is not current because Mr. Schmidt is not now a resident in the Republic, as his brief shows." The Commission does not agree with this assessment, but believes on the contrary that Mr. Schmidt has a very serious, legitimate and current interest. This is because, when the alleged violation he claims occurred he had been living in Costa Rica for ten years and because, although he does not now reside in that country, it is due precisely to the fact that he could not exercise the profession of journalism fully because he was not a member of the Association. Moreover, the American Convention on Human Rights does not require that an individual alleging a violation by a state be in that country; and in the case in reference, it is obvious that Mr. Schmidt has an interest in exercising the profession of journalism in Costa Rica, as he stated in the hearings, because although he left that country, he did so precisely because of the criminal action brought against him there for not being a member of a professional association; and if he does not return, it will be for the same reason.

4. The Costa Rican Government is not correct in stating that Mr. Schmidt's claim constitutes a lack of respect for its sovereignty and an intervention in its domestic jurisdiction and that the Commission

cannot annul or reverse a judgment by a court of that country.

In fact, respect for human rights is an international obligation of Costa Rica because it has signed and ratified the American Convention on Human Rights, for which reason it cannot allege intervention in its internal affairs. Moreover, the Commission can verify whether a Costa Rican law or judgment violates the human rights that country undertook to respect in the American Convention on Human Rights. This is precisely the situation in this case, since Mr. Schmidt feels that Law 4420 and the judgment of the Supreme Court of Costa Rica against him violates Article 13 of the aforementioned Convention. Of course the Commission cannot reverse or set aside a judgment of a Costa Rican Court, but there is no doubt that the Commission can state that a rule of its domestic law or a court judgment in that country violate a human right which it undertook to respect in a treaty to which it is internationally bound.

5. Law No. 4420 of September 22, 1969, is the Charter of the Costa Rican Association of Journalists. Article No. 1 established the Costa Rican Association of Journalists, based in San Jose, "as a corporation consisting of professional journalists authorized to exercise their profession in the country." The purposes assigned to the association in this article are the following:

- a. To support and foster the mass communication sciences;
- b. To protect the interests of its members individually and collectively;
- c. To support, foster and encourage culture and all activities aimed at the betterment of the Costa Rican people;
- d. To arrange for and agree upon, when possible, the pertinent assistance or medical and social assistance to protect its members when they are in difficult situations due to illness, old age, or death of close relatives; or when their family members, due to one of these events, are in difficulties--family members being understood for the purposes of this law to be wife, children and parents;
- e. To cooperate with all public cultural institutions, whenever possible, if they so request or the law so orders;
- f. To maintain and encourage the spirit of union among professional journalists.
- g. To help improve the republican and democratic system and protect national sovereignty and the nation's institutions; and
- h. To state positions on public problems when it so deems advisable.

According to Article 2, the membership of the Association is as follows:

- a. Those holding master's and bachelor's degrees in journalism from the University of Costa Rica or from equivalent universities or institutions abroad and who have joined the Association in keeping with laws and treaties in force;
- b. In the event of a shortage of professional journalists, the association may authorize individuals with a journalistic calling to exercise the profession, after an assessment of merits, technical knowledge and moral character.

Article 22 provides that: "Only members of the Association may work as journalists."

Article 23 defines journalists as "those whose main, regular or paid occupation is exercise of his profession on a daily or periodical publication or on a radio or television news show, or in a news agency, and who receive therefrom the main resources for their subsistence."

Article 24 provides that persons not belonging to the Association may be directors, managers or administrators of newspapers or of other information media, but they must comply with the professional, ethical and moral duties established by Law 4420.

Article 25 states that "permanent and occasional columnists and commentators in all the communication media, whether paid or not, may perform their duties freely without having to belong to the Association, but they must confine their activities to those jobs and may not work as reporters, whether specialized or not."

The above provisions lead to the conclusion that to perform the duties of journalist in Costa Rica one must be a member of the Association of Journalists, but that even persons not belonging to the Association may work as newspaper directors, managers and administrators and as permanent or occasional columnists and commentators in all communications media, whether paid or not.

6. Article 13 of the American Convention on Human Rights, to which Costa Rica is a state party, provides as follows:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of international borders, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. Respect for the rights or reputations of others; or
 - b. The protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of children and adolescents.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin, are prohibited by law.

Freedom of thought and expression has been recognized by the following international declarations and agreements: article 19 of the Universal Declaration of Human Rights of December 10, 1948; article 4 of the American Declaration of the Rights and Duties of Man; article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedom; article 19 of the International Covenant on Civil and Political Rights; and article 13 of the American Convention on Human Rights.

The above provisions and, of course, the American Convention on Human Rights, govern what is currently called the right to information, which consists essentially in seeking, receiving and distributing information and ideas. This right comprises the freedom of access to information sources, equality for all in the free use of transmission facilities, freedom of transmission and dispatch of news without prior censorship of any kind, the right to transmit the truth to others, and the right to be informed and to seek all information desired according to each one's understanding.

It must be observed that this right is not absolute, since Article 32 of the Convention provides that "the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society." Moreover, Article 13 quoted above, establishes responsibility in keeping with domestic laws in order to guarantee "a. respect for the rights or reputations of others; or b. the protection of national security, public order or public health or morals." This implies that the press is free, but responsible under the laws in the cases mentioned.

It must be pointed out that the exercise and regulation of freedom of thought is not restricted as long as there is no prior censorship or official direct or indirect control mechanisms aimed at hindering the free circulation of information or at manipulating it with a specific political purpose.

The Commission believes that obligatory membership of journalists or the requirement of a professional card does not restrict the freedom of thought and expression established in Article 13 of the American Convention on Human Rights as long as the associations protect the freedom to seek, receive and distribute information and ideas of every kind without imposing conditions leading to the restriction or curtailment of that right, do not impose controls on information or prior censorship thereof, and are not limited to government officials, but are actually participated in by journalists. The associations of journalists originate in exercise of the right of association, which may serve as advisory agencies of the government, have control over journalists' ethics and over standards for qualifying degrees, and seek social and professional improvement of their members. There is nothing against having the exercise of professions monitored and controlled either directly by official agencies or indirectly through authorization or delegation by the pertinent statute to a professional organization or association under the state's supervision and control, because it must always be subject to the law in carrying out its mission. Membership in an association or requirement of a card to exercise the profession of journalist does not restrict anyone's freedom of thought or expression but is rather a regulation incumbent on the Executive Branch of the suitability of degrees, as well as supervision of the exercise of these freedoms as a requirement for social security and a guarantee of the best protection of human rights.

Professional associations grow out of professional groups that are recorded in the Registry, which, according to legal doctrine, constitute institutions in the juridical-technical sense. Sociologically speaking, such an institution has the features of a necessary community whose members have common interests to pursue and safeguard through the efforts of all, since the efforts of one would not be enough to attain that end. Such interests, although they are sectorial in nature, are also relevant to the state due to its recognition of the social function of specific professions like journalism, which it has regulated through special provisions. The members of the group are interconnected through an organizational link that provides them with incentives and compels them to conform to certain patterns of behavior, such as faithfulness, loyalty, comradeship, mutual confidence and solidarity, which can be considered common interests in the overall concept of membership in an association.

This means that associations perform a social function, have disciplinary power for breaches of ethics, and seek improvement of the profession as well as the social security of their members. Compulsory membership does not restrict, but rather regulates, freedom of thought and expression, but it must be kept in mind that the Convention's intention was "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." This means that membership in an association cannot be an instrument to control information officially. Rather it enables those practicing the profession of journalism to exercise it freely and responsibly within the bounds of ethics and its social functions.

7. Applying these concepts to the case in reference, the Commission finds that Law No. 4420, the Charter of the Costa Rican Association of Journalists and Decree No. 43120 of November 7, 1974, do not involve any restriction on the freedom of thought and expression established in Article 13 of the American Convention on Human Rights. In fact, the purposes of the Costa Rican Association of Journalists are in keeping with the exercise of freedom of information. Membership is required only of persons engaged in journalism and excludes permanent or occasional columnists and commentators in the communications media of every kind, as well as directors, managers and administrators of newspapers and other information media. Prior censorship is not established and there is no control over the transmission of information. This means that the Government of Costa Rica has not violated Article 13 of the American Convention on Human Rights by issuing rules to regulate the exercise of the profession of journalism, nor has the Costa Rican Supreme Court of Justice done so by handing down a judgment imposing a penalty on Mr. Schmidt for illegal exercise of the profession.

For the foregoing reasons,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, RESOLVES:

1. TO DECLARE that Law 4420 of September 18, 1969, the Charter of the Costa Rican Association of Journalists, as well as the provisions that govern it and the judgment handed down by the Third Section of the Costa Rican Supreme Court of Justice on June 3, 1983, whereby Mr. STEPHEN SCHMIDT was sentenced to THREE MONTHS IN PRISON for illegal exercise of the profession of journalism, as well as the other facts established in the petition, are not a violation of Article 13 of the American Convention on Human Rights.
2. That this decision is to be transmitted to the petitioner and to the Costa Rican Government.
3. To publish this resolution in the Annual Report of the Inter-American Commission on Human Rights.

Approved by: Dr. Cesar Sepulveda

Dr. Luis Adolfo Siles

Dr. Gilda Russomano

Dr. Andres Aguilar

Dr. Marco Gerardo Monroy Cabra

Dissenting vote by Dr. Bruce McColm, the text of which is included as an appendix.

Dr. Luis Demetrio Tinoco Castro disqualified himself in this case.

THE DISSENT OF DR. BRUCE MCCOLM
ON CASE 9178 (Costa Rica)

For over three hundred years, a struggle has been fought in this hemisphere for the fundamental right of people to speak, write, print and now broadcast information, ideas and opinions freely, uncensored, unfettered, unlicensed and unafraid. Although we live with revolutionary new technologies and a growing awareness of our interdependency, this struggle still confronts age-old adversaries. The democratic project of our hemisphere, which shows steady success in the growing number of representative governments, is still marred in some countries by the unrestrained harassment, intimidation and control of the media. Where the victory of free expression has been won, there are new thinly disguised threats which challenge the preservation of this rights. To not defend an imperilled right is to forfeit it.

On June 3, 1983 at 4:30 p.m., the Third Chamber of the Supreme Court of the Republic of Costa Rica reversed the decision of the Second Penal Court and found Mr. Stephen Schmidt "guilty of the criminal offense of the Illegal Exercise of the Profession of Journalism, endangering the Public Order." For this alleged crime, Mr. Schmidt was sentenced to three months in prison to be served immediately upon the completion of the provisional detention. Although the Court found him a man of impeccable character and suspended the prison sentence, he was entered into the Judicial Criminal Register, thereby branding him with a criminal record for the rest of his life. As a consequence, Mr. Schmidt is permanently prohibited from practicing his journalistic craft in Costa Rica, a country where he did so with great distinction for 11 years. Furthermore, the national courts have taken steps to prevent him from pursuing his profession in Costa Rica on threat that he would be judged a habitual convict and thus be declared a dangerous person.

Technically, Mr. Schmidt should never have been tried. According to Article 23 of Law No. 4420, known as the Organic Law of the College of Journalists of Costa Rica, a journalist is "one whose main, regular or

salaried occupation is the exercise of his profession for a daily or periodical publication, or in the televised or radio broadcast news media, or for a news agency, from which he earns the major portion of his living." (Emphasis added)

While residing in Costa Rica, he worked for the English-language weekly *The Tico Times* as "technical consultant, translator and style editor" and occasionally wrote articles on various national and international topics for *The Tico Times* and *La Nacion*, both of which are based in San Jose. During the trial before the Second Penal Court of San Jose, it was established that Mr. Schmidt earned his primary living as a commodities analyst. Under cross-examination, both the personnel manager of *La Nacion*, Alvaro Mora and Saul Arias, *The Tico Times* accountant, testified that Schmidt did not earn a salary at either newspaper as a reporter.

Presiding Judge Jeanette Sanchez, while calling Mr. Schmidt "a born journalist", said: "In a legal sense, if we base ourselves on the *Colegio de Periodista* law, Mr. Schmidt is not a journalist, because he does not fulfill the formal requisite of making this activity his principal means of livelihood."

However, despite the manifest deficiencies in the legal definition of a journalist, to which I will return, there exist a group of activities which both experience and common sense tell us are journalistic in nature. Whether Stephen Schmidt is a good, bad or indifferent journalist is irrelevant in ascertaining whether Law No. 4420 is in conflict with Article 13 of the American Convention of Human Rights. However, it is important background for considering the *Colegio's* claim that one of its primary tasks, according to its former President Carlos Morales, "is to protect society from the harm that unlicensed journalists can do."

By all and any reasonable criteria, Mr. Stephen Schmidt has demonstrated his ample ability and qualifications to practice journalism. The collection of his writings submitted to the Commission demonstrate a wide-range of subjects and issues of public importance on which Mr. Schmidt brought his unusual sensitivity, specialist's knowledge in economics and respect for his adopted country.

In 1977, the judge, who ruled against the government of Costa Rica in its law suit against Mr. Schmidt for his series of articles on land reform, praised not only his ability but also his public service in bringing critical issues before the attention of the citizenry. At no time, during the proceedings before the Commission, were the talents and qualifications of Mr. Schmidt doubted. In fact, the representatives of the government of Costa Rica said that Mr. Schmidt's writings in no way threatened the public order, the rights or reputation of others, national security or public health and morale.

At the suggestion of the *Colegio de Periodistas*, Mr. Schmidt enrolled in the Autonomous University of Central America and under the Director of the newspaper *La Nacion*, Lic. Guido Fernandez, earned a graduate degree with honors in interpretative journalism. During this time, Alvarado Madrigal, an officer of the *Colegio*, signed a letter authorizing Schmidt to continue his journalism work as a student and invited him to join the *Colegio* upon graduation. His *licencia* was authenticated by both the Ministry of Education and the *Colegio de Periodistas*.

However, Mr. Schmidt's graduating class was not allowed to join the *Colegio* since the organization refused to recognize degrees from the Autonomous University. This occurred despite legislation ordering professional associations to revise their statutes to admit graduates of private universities.

On January 14, 1983, the Second Penal Court of San Jose handed down a sentence declaring Mr. Schmidt innocent and absolving him of all guilt and responsibility. Judge Jeanette Sanchez' decision was the first time the Universal Declaration of Human Rights and the American Convention of Human Rights have been used as a basis for a court decision in our hemisphere. As the first country to ratify the American Convention on Human Rights, known as the San Jose Pact, the court acknowledged that its treaty

obligations took precedence over domestic legislation.

In so ruling, Lcda. Jeannette Sanchez made a distinction between the journalist profession as a discipline that inherently involves a fundamental human right and other professions regulated by colegios. Since journalism involves exercising the fundamental right of expression, the governing covenants, statutes or treaties in this case are the American Convention of Human Rights, the Costa Rican Magna Carta and the constitutional guarantees of basic liberties.

Consequently, Judge Sanchez argued:

There is no doubt that in journalistic activity there exists an essential difference from the other professions. It is the only one among them in which the practice and discipline directly affects a basic rights of human beings: freedom of opinion and expression, which of necessity requires the possibility to exercise that freedom. Our country subscribed to, and later promoted to a law higher than other laws, the Universal Declaration of Human Rights, as provided for in Article 7 of the Political Constitution. Article 19 of Law 4229, dated December 11, 1968, states: 'Every individual has the right to freedom of opinion and expression: this right includes that of not being harassed because of one's opinions, of investigating and receiving information and opinions and disseminating them, without limitation by frontiers, through any medium of expression.'

In the same manner, the American Convention on Human Rights was signed, being integrated into our legal principles through Law No. 4534, dated February 13, 1970. Article 13, Section 1), states: 'every individual has the right to freedom of thought and of receiving and disseminating information and ideas of any kind, without consideration of frontiers, whether orally, in writing or in printed or artistic form, or through any other procedure of his choosing'; and paragraph 3) adds: 'The right of expression must not be restricted by indirect methods or means, such as the abuse of official or private control of paper for newspapers, radio frequencies, or of equipment and apparatus used in the diffusion of information or through any other means designed to obstruct the communication and circulation of ideas and opinions.'

Our Magna Carta, in Article 7, stipulates, in Paragraph 2: 'Public treaties, international agreements and concords duly approved by the Legislative Assembly, shall from time of their acceptance have authority higher than of the laws.'

Applying the above to the concrete case, we see that Stephen Schmidt "was seeking out, receiving or disseminating information...in written form." His conduct therefore corresponds with the exercise of what may be called that higher right, which is freedom of expression, as stated, must not be restricted by any indirect means. The foregoing demonstrations that the legal nature of a College of Journalists cannot be the same as is essential to other professional colleges, since in the former activity use is made of one of the most precious public freedoms of human beings, that is, to express their thoughts. The accused, then, acted in the legitimate exercise of these rights..."

In June 3, 1983 the Supreme Court reversed the judgment of the Second Penal Court and annulled the acquittal. The Court's Judgment was based on a perceived threat that upholding the decision would undermine the various laws of the different professional Colleges, since membership in each of these corporations would not be indispensable. The justices argued:

The Organic Laws of the various Professional Colleges establish absolute prohibitions for the exercise of the profession to persons who do not have the pertinent title; and fundamentally, 'if it is true that the Colleges were established and organized for the protection of their members, there is another fact of special importance in such cases, which is the public interest involved in the general exercise of the professions, which interest serves as a legitimate reason for the protectionist intervention of the State in

view of the necessity for such activities to be performed by highly qualified persons, that is, those with abilities derived from university studies and the professional titles obtained in the manner stipulated in the law or regulations... (Jurisprudencia Constitucional 1979-82, pp. 139 ff.).

It is a sociological fact of life professional associations perform a vital role in the maintenance of ethical and professional standards in this hemisphere. These associations, as my esteemed colleague Dr. Monroy Cabra points out, stem from the exercise of the right of free association and the safeguarding through collective effort the integrity and standards of one's vocation. To the degree they fulfill these functions, professional associations serve to enhance the well-being of their members and, as a consequence, that of their fellow citizens.

The public interest, as a priority of the associations, is embodied in the strict observance of the standards of professional ethics, both because of the importance of the activity itself and because of the confidence that the community must have in those who exercise this activity. It is naturally in the interest of the State to see that the exercise of the professions is efficaciously performed as a guarantee for the entire community. For that reason, the State delegates to the association in our societies the authority to ensure the proper exercise of the profession. In principle, these professional associations are non-governmental public interest institutions. Generally, the public interest is served in this regard and there is no undermining of the freedom of association.

However, by that very nature professional associations lack a certain public interest insofar as there exists a certain degree of dominance by private interests, whether individuals or groups. While these associations may act in the interest of their members, that is no guarantee that such actions are in the interest of the society at large. By no means can the public interest be invested in any one of these groups or any other private organization.

It is natural then for both the Supreme Court of Costa Rica and the Commission to rule that there is no direct conflict between Article 13 of the American Convention and the Organic Law of the College of Journalists. In most freedom of expression cases in this hemisphere there exists a presumption of constitutionality of government action. Normally, the Court as in this case, starts with the presumption that a legislative action is constitutional. If there is a reasonable argument that the law serves a purpose within the legislature's mandate, it is rare for any court to challenge it. The Court will generally avoid any ruling on a challenged piece of legislation by adopting, as is the case here, an alternative interpretation of the case. This inevitably leads to the Court deciding a case on the narrowest of grounds.

In this case, it is unfortunate because the two court decisions and argumentations are so diametrically opposed to one another's that there exists no well-defined legislative or legal standards to adjudicate between the right of the Colegio de Periodistas to exist and perform its social functions and the claims by an individual to exercise his most fundamental rights.

In *Schneider v. Irvington*, American Supreme Court Justice Owen Roberts in 1939 admonished the lower courts in the United States to follow the following principle:

"Where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences...may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

This case deserves a more definitive resolution and an establishment of legal standards to say where the individual's freedom ends and the State's or a designated agency of the state's power begins. Since the Commission accepted Stephen Schmidt's petition on October 4, 1983, litigation has begun in Bolivia and

the Dominican Republic challenging those countries' licensing laws. Controls in these countries as well as Costa Rica now parallel similar laws in Brazil, Colombia, Ecuador, Haiti, Panama, Peru and Venezuela. These laws are unusual in the wide array of press controls in this hemisphere because they are supported in many instances by reporters and broadcasters in the country. This happens to be the case here. The hemispheric debate over media control has heated up and will continue to be acrimonious until the inter-American system established clear guidelines on where and when fundamental human rights are being trampled on and when and how professional standards are being upheld.

Crucial to this debate is whether Judge Jeanette Sanchez' distinction between journalism and other professions is valid. If journalism is a profession which inherently involves the exercise of a fundamental human right, then no government or government-approved agency is entitled to prevent an individual from being a journalist. Conversely, do journalists become a special class of persons, not subject to the full exercise of their rights, when they receive monetary compensation for their work? And, if journalists can be subjected to the same obligatory membership or authorization by a government-approved and mandate professional organizations as practitioners of other professions, what constitutes a journalist?

These may seem trivial questions to the laymen and lawyer alike. After all, as pointed out above, common sense and experience allow us to make a judgment about what constitutes a journalistic activity. However, attempts such as the Organic Law of the College of Journalists to codify such definitions into law are inevitably doomed to fail. As indicated during the trial before the Second Penal Court, those not subject to the authorization of the Colegio were specifically spelled out--columnists and free-lance journalists, for example. Those subjected to the authority of the Colegio were defined purely in terms of their socio-economic position in the business of journalism and not according to the performance of any concrete activities, which one could properly call journalism.

In a telling exchange during the trial, Attorney Ricardo Harbottle, representing the Colegio, attempted to establish that Mr. Schmidt was practicing journalism in his writings. Questioning Schmidt's professor, Lic. Guido Fernandez, about the nature of an article about a trip down the Reventazon River, Attorney Harbottle maintained the article was "reportaje" and therefore Schmidt was a journalist. Lic. Fernandez maintained that the story was a "chronica" and therefore could be classified as commentary, which would be outside the jurisdiction of the Colegio. On other occasions during the trial, the prosecution tried to establish that the act of taking notes at a press conference qualified as a journalistic activity, regardless of what one did with those notes, and that interviewing public figures was also a journalistic act. What was unclear in all this was whether an individual could commit a "journalistic act" without being considered a journalist. At a meeting at the UNESCO headquarters in Paris in 1980, both the International Federation of Journalists and the International Organization of Journalists adopted, in a protocol approved by both organizations, the following definition:

This profession of journalism consists in seeking out, receiving or communicating information and opinions destined for daily publications, press agencies, information services, etc."

Article 19 of Universal Declaration of Human Rights (December 10, 1948), Article 4 of the American Declaration on the Rights and Duties of Man, Article 19 of the International Pact on Civil and Political Rights and Article 13 of the American Human Rights Convention all regulate what we have come to call the right to information, which includes seeking out, receiving and disseminating information and ideas with no prior censorship in any media. This right is also affirmed in Article 29 of the Political Constitution of Costa Rica, which declares:

"Every individual may communicate his thoughts in oral or written form and publish them without prior censorship; but they will be responsible for any abuses that they commit in exercising this right, in such cases and in such manner as established by law."

Therefore, as Judge Jeanette Sanchez rightly ruled, the substance and nature proper to the exercise of the profession of journalism coincides totally and absolutely with the spirit and letter of Article 13 of the American Human Rights Convention with regard to the expression and communication of thought. The proper exercise of the fundamental freedoms expressed in Article 13 reinforces the security of individuals and the just requirements of the general good as expressed in Article 32 of the American Convention in such a way as to consolidate democratic institutions by preventing the shackling of freedoms by the government or any other agency within the society.

A free and unimpeded press contributes handily to the ideals of the American Convention to "consolidate on this continent, within the framework of the democratic institutions, a format of personal freedom and social justice based on respect for the essential rights of man." American Supreme Court Justice Powell, dissenting in *Saxbe v. Washington Post* (417 U.S. 843) (1974), eloquently described the fundamental role the press plays in a democratic society:

An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which people secure that free flow of information and ideas essential to the intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the social purpose of the First Amendment (of the Constitution of the United States.)"

Because the practice of journalism is so intertwined with the exercise of the freedom of expression as guaranteed by the conventions mentioned above, it is fundamentally different in nature from the legal or medical professions. In the professional exercise of medicine or law, for example, official control exists due to the risks created by an uninformed practitioner, who might eventually harm a third party. In the case of journalism, the risk is of an opposite kind. When a journalist or press organ is bound by prior permission or license by a government-approved or sanctioned body, there brings with such regulations a serious and dangerous limitation of a right that is inalienable.

As James Madison warned:

"A Popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arms themselves with the power which gives." (To W.T. Baray, August 4, 1822).

The necessary distinction between journalism and other professions was made by Lic. Guido Fernandez in *La Nacion* (October 27, 1979), when he wrote:

"The preparation of journalists, their competence as communicators and their independence of thought in regard to their employers, does not necessarily depend on the existence of professional guilds, and even less on permits issued by the government or by syndical associations. The university centers should be responsible for their solid background of knowledge, and the publications themselves for the broadness and maturity of their experience. If the universities are bad, then not even the most closed and medieval guild will be able to make journalists more dependable or more efficient or more independent.

The lawyer, the doctor, the chemist or the engineer do not exercise professions which involve a basic human right such as freedom of expression or of information. Public faith, public health and public safety

are individual or social values which demand guardianship, but the tasks of informing and expressing opinions are activities so intimately associated with all human beings that any restriction or limitation could endanger (if not destroy) that which is the essence of democracy: the right to dissent."

This does not mean that a journalist is judged in a superior or special category of citizenship. The criteria for the maintenance and regulation of the professional standards and integrity of journalism come not from the laws of a professional organization but are derived from a series of wide-ranging legislation in our countries governing the media as a whole. This body of legislation in each of our countries is more than adequate to prevent any abuse of the journalist profession.

Dr. Monroy Cabra argues that Article 13 of the American Convention of Human Rights which establishes the internal responsibility for guaranteeing: a) respect for the rights and reputation of others, and b) protection of national security, public order and public health and morals implies that while the press is free, it must conform with the law in these cases. This is correct as far as it goes.

Since Article 13 deals with a public exercise of a fundamental right and journalists are the habitual practitioners of that right, journalism is therefore already regulated by laws governing the public exercise of the freedom of expression. There exists, in fact, an alternative legal mechanism in our republics to control unprofessional conduct of journalists without limiting the freedom of the press and ultimately hurting the public more. In the case of Costa Rica, the basic laws affecting the media are the Constitution of 1949; the Press Law of 1902; the Radio Law of 1954, which was later amended for television, and the law presently being discussed. The Constitution contains a series of exceptions to freedom of expression such as the aforementioned restrictions contained in Article 13.

The Press Law provides for prison sentences of up to six months for the defamation of character. An offense to someone's honor may call for a retraction in the press. It also makes punishable the intentional subversion of friendly relations with another nation. A related law establishes a censorship board through the Ministry of Interior, which requires the screening of all printed and graphic material consisting of "obscene or pornographic texts...the dissemination of antisocial customs, and the presentation of scenes which may lead to vice, criminality, sexual aberrations, and the use of drugs or which are contrary to the country's social values." The laws governing the electronic media are similar in scope, governing many of the prohibitions against libel and defamation of character.

As made clear in the preamble to the American Convention, these essential rights of man "are not derived from one's being a national of a certain state, but are based upon attributes of the human personality and that they therefore justify international protection" and, therefore, every individual...with no discrimination for reasons of...political opinion or any other kind..."is entitled to the free and full exercise of these rights, which include freedom of expression. It is clear that the freedom of expression is guaranteed to all human beings, without exception, and can not be the exclusive reserve of any single group of individuals, state-approved organization and/or public agency of the government. It is a right that belongs to everyone.

The Organic Law of the College of Journalists as presently constituted and applied represents an attempt to define a "right to communicate". This would qualify and limit the aforementioned international covenants that guarantee the freedom of expression. To specify who should have this right and under what conditions is itself a restriction of what is universally entitled to everyone. Therefore, the limitation created by denying the right to practice journalism to those who do not enjoy the approval of the Colegio de Periodistas since they are not members, or to deny them in advance the right to disseminate information or ideas without permission or prior authorization, is a violation of Article 13 of the American Convention. The fact that an individual exercises his freedom of expression gratis or for a salary is irrelevant to the discussion.

In a communication to the Commission dated May 15, 1984, the Government of Costa Rica maintained that Mr. Stephen Schmidt was convicted "...not for expressing his thoughts or for publishing information or ideas but because the Court found him to be guilty of illegally exercising the profession of journalism and putting the order at risk..." As has been made clear, Mr. Stephen Schmidt at no time violated those laws regulating the press that covered the conventional limitations on the freedom of expression. Nor, did he ever challenge the public order. The substance of Mr. Schmidt's alleged crime is that he published information and ideas in a printed form without prior authorization or permission of the Board of Directors of a public corporation. Members of this public corporation, the Colegio de Periodistas, have through legislative approval been given the exclusive monopoly to practice journalism in Costa Rica. This monopoly constitutes a form of prior restraint on the journalists.

Proponents of the New World Information Order have argued that the licensing of journalists would elevate the standards of reporting and also would be a means to protect correspondents in dangerous situations. The decision by the Supreme Court of Costa Rica to convict Stephen Schmidt was seen by the local Colegio as formally recognizing the licensing of journalists and a recognition that the profession was "of limited access."

However, UNESCO's International Commission for the Study of Communication Problems concluded in 1980 that such licensing would open the door to restrictive governmental regulation. The Commission concluded: "Although problems concerning the protection of journalists are real and preoccupying, we share the anxiety aroused by the prospect of licensing and consider that it contains dangers to freedom of information."

Such an anxiety has been at the root of the nearly three and a half centuries of legal history that lies behind Article 13's discussion of "prior censorship". John Milton's classic defense of free speech, the *Areopagitica*, was itself a pamphlet printed in 1644 to protest a number of licensing acts passed in Great Britain. Such acts by the Crown required printers to have a license before publishing. In the days of hand-presses, more often than not the printer was also the journalist or pamphleteer. This strategy of press repression, along with taxes on newsprint and newspapers, was explicitly rejected in the American Constitution by the First Amendment, which states: "Congress shall make no law...abridging freedom of speech or of the press." The unconstitutionality of such licensing, which the American courts referred to as "previous" or "prior restraint" was decided upon as early as 1825.

Shortly after Costa Rican independence from Spain, the new government insisted on the creation of a vigorous and critical press. In the early 1830, the Government of Costa Rica passed a law that became tradition in that country and paralleled American prohibitions on "prior restraint". It stipulated:

"Liberty of thought and expression is so absolute that no prior censorship, no regulation, no special or common tribunal shall restrict it. Neither the very overthrow of the constitutional order, armed rebellion nor civil war shall be a motive to repress it."

As this case is the first in which the American Convention has been invoked as domestic law, it is necessary to determine whether and how the provisions of the Convention or the San Jose Pact have become part of the State's own domestic law. In other words, are the obligations undertaken by the Republic of Costa Rica on an international plane transformed into obligations owed those individuals within its own legal system?

While there exists a long-standing debate over the superiority of international law over domestic statutes, in the case of Costa Rica, this problem is easily answered. Some states provide in their constitutions certain provisions of international law, which become self-executing and are immediately enforceable by

domestic courts. Costa Rica has gone even further by not only making international law self-executing, but assigning it to a rank superior to all prior and subsequent legislation. Its Magna Carta in Article 7, Paragraph 1 stipulates: "Public treaties, international agreements and concords duly approved by the Legislative Assembly, shall from the time of their acceptance have authority higher than that of the laws." This is again affirmed by virtue of a constitutional amendment approved by Law No. 4123 on May 30, 1968.

Specifically regarding the American Human Rights Convention, Costa Rica accepted and ratified it in its entirety and without reserve, as approved by its Legislative Assembly under Law No. 4534 dated February 23, 1970. The law held that thereafter the Convention would be the Law of the Republic "...upon whose observance the National Honor depends."

Therefore, Judge Jeanette Sanchez of the Second Penal Court of San Jose was quite proper in arguing that there was a direct conflict between Article 13 of the Convention and Articles 22, 23, 24 and 25 of the Organic Law of the Colegio de Periodistas and that the Convention was of superior weight to the act by the Legislative Assembly. The Inter-American Commission, likewise, is competent to decide if a law passed by the Legislative Assembly and a sentence handed down by the Third Chamber of the Supreme Court of Justice are or are not incompatible with a fully ratified ruling of international Law.

Although the licensing of journalists by an exclusive corporation is in direct conflict with Article 13 of the Convention, that does not mean that a ruling to this effect would jeopardize the existence of all professional associations in Costa Rica or even the Colegio de Periodistas. Making the distinction between journalism and other professions, the challenge to the present law comes where there are unwarranted restrictions on the freedom of expression. In the case of other professional associations, this is not a realistic concern.

Since other countries are facing similar litigation over the licensing issue and obligatory membership to press colegios, there exist basic guidelines that would ensure no conflict with international covenants protecting the freedom of expression. In May, 1981, leaders of independent news organizations from 21 countries met in France and issued the Declaration of Talloires, which provides a summary of proposals that are immediately applicable to this hemisphere.

The purpose of these basic principles is to uphold individual rights and deepened the commitment of journalist associations to the consolidation of democratic institutions. The right of freedom of expression as contained in Article 13 of the American Human Rights Convention cannot be qualified by an attempt to develop a counter right to communicate. This would severely limit access to persons desiring to be journalists. Neither state-approved bodies nor private agencies should have the legal power to restrict access, by the people and press, to all sources of information, both official and unofficial. Journalist associations must make sure that censorship and other forms of arbitrary control of information and opinion be avoided. Codes of journalistic ethics should be formulated by the press itself and should be voluntary in its application. They cannot be formulated, imposed or monitored by government or governments' agencies without becoming instruments of press control.

There should be no restriction on any person's freedom to practice journalism. Press freedom is a basic human right. As in the case of Mr. Stephen Schmidt, fine journalists often come from other disciplines. Journalists should be free to form organizations to protect their professional interests. But these associations should be inclusive, not exclusive and should not discriminate against graduates of various educational institutions within a country or abroad.

Licensing of journalists by any national bodies should not be sanctioned, nor should special requirements be demanded of journalists in lieu of licensing them. In addition, to legislate or otherwise mandate

responsibilities for the media is to destroy its independence. The ultimate guarantor of journalistic responsibility is the unfettered, free exchange of ideas. Consequently, members of the media should enjoy the full protection of national and international law without seeking special protection or any special status.

As the late Alexander Meiklejohn wrote in "The First Amendment is an Absolute" (1961 Sup. Ct. Rev. 245)," Public discussions, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, in a deeper sense, govern them. Over our governing, they have no power. Over their governing, we have sovereign power."

In the final analysis, the litmus test of whether Law No. 4420, the Organic Law of the Colegio de Periodistas as well as Decree 43120, dated November 7, 1974 of Costa Rica, "constitute no restriction of freedom of thought or expression", as my colleagues have found, rests with the behavior of the Colegio in applying those statutes. At issue is whether Law No. 4420 empowers the Colegio to regulate only its membership or the entire free flow of information in the country. Does the Colegio view its role as controlling all aspects of Costa Rican society that are somehow information-related?

Prior to the trial and conviction of Mr. Schmidt, Mr. Joe Phillips, an American with a journalism degree from the University of Texas, was sued by the Colegio, convicted under Law No. 4420 and given a suspended sentence in 1978. Considered one of the finest practicing journalists in Costa Rica, Mr. Phillips founded the San Jose News, an English-language weekly in 1973 and eventually was forced to suspend publication in 1979 after he was convicted of the same alleged crime as Mr. Schmidt.

Since Mr. Schmidt's conviction, according to the English-language newspaper The Tico Times (February 17, 1984), the Board of Directors of the Colegio established a permanent commission to investigate persons, who without prior approval and authorization by the Board, are exercising activities which constitute "full journalistic activities."

A direct consequence of this new vigilantism was the protest by the National Union of Journalists and the Board of Directors of the Colegio of the publication of an interview with President Don Luis Alberto Monge by Lic. Enrique Benavides, whose La Columna in La Nacion is considered a national institution. In their letter to Lic. Don Eduardo Ulibarri, the Director of La Nacion, they complained:

Both the National Union of Journalists and the College of Journalists of Costa Rica have taken note of this evident violation of Law 4420, which, in consideration, of your status as a Colegio member and citizen respectful of the law, we are sure you will make certain it does not occur again. (Emphasis added)

After the Spring 1984 meeting of the Commission, the Colegio established new restrictions on the media in Costa Rica. Declaring itself "the only entity charged by the Government and by law to watch over the practice of journalism by Costa Rica", the Colegio enlarged its mandate to license not only journalists but also five new categories of media personnel. Among these are public relations agents, graphics reporters, journalism students, foreign correspondents and communicologists, the latter being a profession, which as yet remains undefined. In issuing these new decrees in July 1984, Jimen Chan, the President of the Colegio, announced the organization's monopoly on issuing press credentials and identifications for press vehicles. While presumably autonomous from government control, the Colegio interprets its legal status to mean it has law enforcement powers. For example, it summarily announced: "Police authorities will proceed to confiscate unauthorized credentials and report the incident to the Colegio within 24 hours."

This claim to expanded authority stimulated a blue ribbon group of 23 Costa Rican leaders to petition the Commission this past August. In this group were Jose Trejos Fernandez, former President of the Republic, Rodrigo Odio, the President of the Bar Association, and Maximo Acosta Soto, former Supreme

Court magistrate. They urged the Commission to find for Mr. Schmidt because the rights of free expression, thought and information "cannot and should not be monopolized in benefit of a specific group nor limited to a few persons."

They presented the following request:

As Costa Ricans who have exercised various public functions, we wish to express our profound concern about the above-mentioned limitation of a fundamental and inalienable right to individuals, and we request that you declare the conflict in Costa Rica legislation that denies any human being freedom of information, limiting it to an obligatory College authorization subject to a public agency. We consider this extremely dangerous to the democratic system which fortunately prevails in Costa Rica, and we strongly believe it to be a harmful example to the rest of the continent, threatening to weaken freedom of expression...

The Colegio's recent actions go far beyond the original intent of Law No. 4420 to stimulate a more professional press in Costa Rica. Instead, they demonstrate a clear and present danger to the exercise of freedom of expression in Costa Rica. The Colegio's present regulations now govern any person--foreign or Costa Rican citizen-- who claims they are "attending press conferences, covering public spectacles, participating in interviews or reporting on accidents, ceremonies or other activities of 'public interest or any other journalistic activity whatsoever..." This is a clear restraint on the freedom of access to information.

Even those individuals, who are journalists but are not engaging in their professional duties in Costa Rica, are subject to control. For example, journalist Mr. Paul Ellman of The Guardian of London was told by immigration officials to register with the Colegio within 24 hours after his arrival in July for a vacation. In another case, Ms. Suzanne Bilello, the Mexico City Bureau Chief and Central American correspondent for the Dallas Morning News, was ordered by immigration to report to the Colegio, where she was subjected to an interrogation by a non-journalist about the duration of her stay in Costa Rica and the nature of her stories. She was warned by Colegio personnel not to seek appointments at the Foreign Ministry "unless you have proper credentials from the Colegio."

In all the cases mentioned, there is clearly a deliberate policy by the Colegio to control the access and dissemination of information in Costa Rica. As Alexis de Tocqueville wrote, "It would see that if despotism were to be established among the democratic nations of our days...It would be more extensive and more mild; it would degrade men (and women) without tormenting them." So, it would seem that the Colegio acting as a monopoly or closed shop which can authorize a human being to seek out, receive and disseminate information or ideas poses a serious and dangerous limitation to an inalienable right.

The Commission's decision is more than a narrow upholding of the rights of colegios to exist at the expense of the livelihood and profession of one individual. Rather, it is a clear signal that a class of individuals whose profession is so closely identified with the exercise of the freedom of expression must fear the onslaught by government and private agencies to regulate, control and eventually suppress them.

It is also a clear signal that the public's right to know is being eroded. The record in this case is replete with weighty affidavits from responsible news organizations and distinguished Costa Ricans from all professions urging the Commission to recognize how important the ability of journalists to practice their trade is to the very survival and strengthening of the democratic project in this hemisphere. As Justice William Douglas wrote in *Branzburg v. Hays* (408 U.S. 665) (1972), "...effective self-government cannot succeed unless the people are immersed in a steady robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination."

The people and Government of Costa Rica recognized the fundamental role the free flow of ideas and information plays in preserving a democratic system when through Decree No. 14,803-G, dated September 13, 1983, they established "Freedom of Expression Day". They said:

Information and communication are fundamental elements of our system of life in liberty; from the dawn of our republican life, freedom of opinion, freedom of press and freedom of expression have been exercised with vigor, and it is valuable to call upon the public to ponder, at least during one day each year, the value of freedom of expression...

Article 13 of the American Convention on Human Rights must be understood within the greater framework of the "intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." Freedom of expression, as defined by the Convention, is explicitly an activity pursued in a social, rather than private context. In this manner, to attempt, as the Supreme Court of Costa Rica has done, to separate the regulation of the journalistic profession as an issue from the freedom of expression is to ignore the real meaning of Article 13 and its applicability to this case.

Freedom of expression is not an abstract idea to be achieved when the suitable political and economic structure for a country is actualized or social conditions are tranquil and prosperous. It is a concrete, living right that is the basis and core of a democratic society. It presumes an equality of citizens and their right to participate in the shaping of their own society as an everyday phenomenon and a continual process.

The underlying issue in this case is whether a professional elite has an inherent right to dictate the direction of a society above and against the fundamental rights of the average citizen to inform and be informed by fellow citizens. That this case involves a country which uniquely enjoys the moral shield of being the vanguard of democratic change in this hemisphere is, indeed, unfortunate and unexpected.

As the first nation to ratify the Pact of San Jose and the first nation to accept the jurisdiction of the Inter-American Court of Human Rights, Costa Rica could perform another service for the inter-American system by asking the Court for an advisory opinion on this matter. The 1969 law authorizing the Colegio de Periodistas to regulate the profession of journalism is sufficiently in conflict with Article 13 of the American Convention of Human Rights as to warrant its re-examination by both the Supreme Court of Costa Rica and the National Assembly. Such a reconsideration, contrary to various parties' assertions, does not mean that all professional associations are jeopardized or even that of the journalists. Rather, the concrete application of this law, since the Schmidt conviction, in the example given above, should warrant concern about its present and future abuse.

As the representatives of the Government of Costa Rica testified before the Commission, Mr. Stephen Schmidt is a man of impeccable character, a fine journalist, and never in his 12 years in Costa Rica posed a threat to the public order or showed anything but a high regard for the Costa Rican people and government. His conviction and sentence for the illegal exercise of the Profession of Journalism should be reserved, pending reform of the Colegio Law, and he should be allowed, if he so desires, to return to Costa Rica and again practice his profession without prejudice, criminal record or harassment.