Judicial Colloquium in Bloemfontein, South Africa
3-5 September 1993

Developing Human Rights Jurisprudence, Volume 6

Sixth Judicial Colloquium on The Domestic Application of International Human Rights Norms

Commonwealth Secretariat
interights

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Sixth Judicial Colloquium on The Domestic Application of International Human Rights Norms

Legal and Constitutional Affairs Division
Commonwealth Secretariat
Marlborough House, Pall Mall, London SW1Y 5HX

interights (International Centre for the Legal Protection of Human Rights)
Lancaster House, 33 Islington High Street, London N1 9LH

January 1995

This volume is dedicated to

the New South Africa and to

the affectionate

memory of

WALTER TARNOPOLSKY

who died shortly after the

Bloemfontein Colloquium

A tribute appears at page 214

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Contents

Preface

This volume contains the record of the sixth in a series of judicial colloquia on international human rights norms, held in Bloemfontein, South Africa, from 3 to 5 September 1993. The series began in Bangalore, India, in 1988, with subsequent meetings held at various Commonwealth venues: Harare, Zimbabwe (1989); Banjul, The Gambia (1990); Abuja, Nigeria (1991) and at Balliol College, Oxford, England (1992).

In all, there were over 50 participants. Senior Judges from sixteen Commonwealth countries and the Untied States of America joined leading South African judges and jurists at the colloquium, hosted by the Hon Mr Justice M M Corbett, Chief Justice of South Africa. The list of participants appears at page ix..

As on previous occasions, the colloquium was concerned with the broad theme of the domestic application of international human rights norms. Within this theme the colloquium concentrated on discrimination (on grounds of both gender and race) and freedom of expression, matters which are high among the contemporary concerns of South African lawyers. The colloquium was held in South Africa in response to the wishes of a broad spectrum of South African jurists who welcomed the opportunity to assist the transition process by furthering informed discussion on the implementation and application of international human rights norms amongst the Judiciary and senior lawyers, who will be called upon to interpret the human rights provisions in the new South African Constitution.

The concluding statement of the colloquium, referred to as the Bloemfontein Statement of 1993, is reproduced at page vi. The Statement reaffirms the principles accepted in the earlier judicial colloquia and welcomes the movement towards a non-racial and democratic South Africa with a constitution which guarantees the protection of fundamental human rights. Participants affirmed the importance of international human rights law and comparative case law in the interpretation of national constitutions, and confirmed their belief that the provision of justice requires a competent, independent and broadbased judiciary. The principle that public authorities may be required to take affirmative action where necessary to achieve equality and to address discrimination, and must eliminate indirect as well as intentional discrimination was broadly supported. Finally, participants recognised the special responsibility of judges to ensure the compliance by all branches of government at all times with the legal principles of a free society.

The Bloemfontein colloquium, as with the preceding ones in the series, was organised jointly by the Legal and Constitutional Affairs Division of the Commonwealth Secretariat and INTERIGHTS (the International Centre for the Legal Protection of Human Rights), with funding by a consortium of donors comprising the British Overseas Development Administration (ODA); the Kagiso Trust; the Canadian Embassy Dialogue Fund and the British Council whose generosity is gratefully acknowledged.

Legal & Constitutional Affairs Division
Commonwealth Secretariat
January 1995

INTERIGHTS

Judicial Colloquium on the Domestic Application of International Human Rights Norms: Freedom of Expression and Non-Discrimination Bloemfontein, South Africa 3 - 5 September 1993

The Bloemfontein Statement

1. Between 3- 5 September 1993, a significant event took place in Bloemfontein, South Africa, when for the first time senior judicial figures from around the Commonwealth and the United States of America joined with South African judges and jurists in a judicial colloquium on the domestic application of international human rights norms.

2. The colloquium, the sixth in a series, was held in South Africa in response to the wishes of a broad section of South Africans, who wished to use the opportunity it presented to assist the transition process by furthering informed discussion on the interpretation and implementation of human rights provisions.

3. The colloquium was administered by INTERIGHTS (the International Centre for the Legal Protection of Human Rights) with assistance from the Commonwealth Secretariat and with financial support from the British Overseas Development Administration, the Commission of the European Communities, the Kagiso Trust, the Canadian Embassy Dialogue Fund and the British Council.

4. The participants reaffirmed the general principles stated at the conclusion of the Commonwealth judicial colloquium in Bangalore, India in 1988, as developed by subsequent colloquia in Harare, Zimbabwe in 1989, in Banjul, The Gambia in 1990, in Abuja, Nigeria in 1991 and at Balliol College, Oxford, England in 1992.

5. The participants welcome the movement towards a non-racial democracy in South Africa devoid of apartheid and discrimination, with a constitution which guarantees the protection of fundamental human rights.

6. Participants were keenly aware that their own meeting, attended as it was by a large preponderance of males, itself reflected a legacy of discrimination against women over many generations and in many societies, and which needs urgent remedial action.

7. The participants believe that the provision of equal justice requires a competent and independent judiciary trained in the discipline of the law and sensitive to the needs and aspirations of all the people. They stressed their conviction that it is fundamental for a country's judiciary to enjoy the broad confidence of the people it serves; to the extent possible, a judiciary should be broadbased and therefore not appear (rightly or wrongly) beholden to the interest of any particular section of society. They saw this

as being of special relevance in cases involving complaints of discrimination in all their countries and so of being of the highest importance in the context of the judiciary which will interpret and enforce a new South African constitution with a justiciable Bill of Rights.

8. The Colloquium affirmed the importance both of international human rights instruments and international and comparative case law as essential points of reference for the interpretation of national constitutions and legislation and the development of the common law.

9. The specific subject matter of the Bloemfontein Colloquium was the effective protection through law of the fundamental rights to equal treatment without any discrimination and to freedom of expression.

10. There was substantial consensus that the principle of equality requires public authorities to take affirmative action to diminish and eliminate conditions which cause or perpetuate discrimination and to ensure equal access to and enjoyment of basic human rights and freedoms. Such affirmative action must be appropriate and necessary to achieve equality. Discrimination takes many forms in all societies. It may be indirect and unconscious as well as direct and deliberate. The principle of equal treatment forbids not only intentional discrimination. It also forbids practices and procedures which have a disparate adverse impact upon particular groups and which have no objective justification. It is essential to secure the elimination of indirect discrimination of this kind.

11. In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law. And it is the special province of judges to ensure that the law's undertakings are realised in the daily life of the people. In a society ruled by law, all public institutions and officials must act in accordance with the law. The judges bear particular responsibility for ensuring that all branches of government - the legislature and the executive, as well as the judiciary itself - conform to the legal principles of a free society. Judicial review and effective access to courts are indispensable, not only in normal times, but also during periods of public emergency threatening the life of the nation. It is at such times that fundamental human rights are most at risk and when courts must be especially vigilant in their protection.

12. Where derogations from fundamental human rights and freedoms are permissible they must be strictly construed so as to avoid weakening the substance of the rights and freedoms themselves, and only to the extent demonstrably necessary in an open and democratic society.

Bloemfontein
South Africa
5 September 1993

Participants

Australia	Hon Mr Justice Michael Kirby, AC, CMG, President of the New South Wales Court of Appeal
Botswana	Hon Mr Justice M D Mokama, Chief Justice
Canada	Hon Mr Justice W Tarnopolsky, Justice of the Court of Appeal for Ontario
India	Hon Mr Justice P N Bhagwati, Former Chief Justice
	Mr Soli Sorabjee, Senior Advocate, Supreme Court
Kenya	Hon Mr Justice Richard Kwatch, Justice of the Court of Appeal
Lesotho	Hon Mr Justice Brendon P Cullinan, Chief Justice
Malawi	Hon Mr Justice Richard Banda, Chief Justice
Namibia	Hon Mr Justice Ismail Mahomed, Chief Justice
New Zealand	The Rt Hon Sir Robin Cooke, KBE, President of the Court of Appeal
Nigeria	Hon Mr Justice P Nnaemeka-Agu, Former Justice of the Supreme Court
South Africa	Hon Mr Justice M M Corbett, Chief Justice
	Hon Mr Justice H J O Van Heerden, Judge of Appeal
	Hon Mr Justice J Smalberger, Judge of Appeal
	Hon Mr Justice A J Milne, Judge of Appeal
	Hon Mr Justice R J Goldstone, Judge of Appeal
	Hon Mr Justice C Howie, Actg Judge of Appeal
	Hon Mr Justice J C Kriegler, Actg Judge of Appeal
	Hon Mr Justice J Didcott, Judge of the Supreme Court
	Hon Mr Justice G Friedman, Judge President
	Hon Mr Justice P J J Olivier, South African Law Commission

	Hon Mr Justice L W Ackermann, Cape Provincial
	Mr Malcolm Wallis, SC, Durban
	Mr Lewis Skweyiya, SC, Durban
	Mr Pius Langa, Durban
	Mr Dikgang Moseneke, SC, Pretoria
	Professor Hugh Corder, Cape Town
	Professor Albie Sachs, Cape Town
	Professor Kadar Asmal, Bellville
	Dr Zola Skweyiya, Marshalltown
	Mr Arthur Chaskalson, SC, Johannesburg
	Mr Jeremy Gauntlett, SC, Cape Town
	Professor John Dugard, Johannesburg
Swaziland	Hon Mr Justice David Hull, Chief Justice
Tanzania	Hon Mr Justice Barnabas Samatta, Principal Judge of the High Court
Uganda	Hon Mr Justice S W W Wambuzi, Chief Justice
United Kingdom	The Rt Hon The Lord Browne-Wilkinson, Lord of Appeal in Ordinary
	The Rt Hon The Lord Woolf of Barnes, Lord of Appeal in Ordinary
	Lord Lester of Herne Hill, QC, United Kingdom
	Professor Jeffrey L Jowell, QC, United Kingdom
United States of America	Hon Judge Nathaniel R Jones, United States Court of Appeal for the Sixth Circuit
Zambia	Hon Mr Justice Matthew Ngulube, Chief Justice
Zimbabwe	Hon Mr Justice A Gubbay, Chief Justice
	Hon Mr Justice Enoch Dumbutshena, Former Chief Justice

Commonwealth Secretariat	Mr Jeremy Pope
	Mr Dominic Sankey
	Mr John Hatchard
Interights	Ms Emma Playfair
	Mr Chidi Odinkalu
South African Secretariat	Mrs Gill Siebert

PAPERS

Race and Sex Discrimination in English Law

By The Rt Hon Lord Browne-Wilkinson, Lord of Appeal in Ordinary, United Kingdom

Introduction

In the absence of any written Constitution guaranteeing human rights, English common law failed to develop any general law to protect the individual as such, from any adverse discrimination on the grounds of race, colour, creed or sex. In consequence, the modern law is based on statute, primarily the Race Relations Act 1976 and the Sex Discrimination Act 1975. (I ignore for present purposes the statutory provisions which make criminal acts of incitement to racial hatred and similar conduct which have had little practical impact.)

The two Acts are very similar in both their structure and their wording. They are, to a substantial extent, a statutory enactment of the discrimination law established by the Courts of the USA under its Constitution. English law has also been subject to a further important external influence. In relation to sex discrimination, the United Kingdom is subject to the law of the European Community as interpreted by the European Court of Justice. Article 119 of the Treaty of Rome (and directives made thereunder), prohibits discrimination on the grounds of sex. The European Court of Justice has been more activist than the English Courts in its approach to combating sexual discrimination. In consequence, the ambit of the protection afforded by the Sex Discrimination Act (and its sister statute, the Equal Pay Act 1970) has been much extended by decisions of the European Court of Justice. Since the structure and wording of the two statutes are very similar, a wide construction of the Sex Discrimination Act imposed on the English Courts by the decisions of the European Court of Justice is almost inevitably reflected by the same construction being given to the corresponding provision in the Race Relations Act.

In this paper I propose to give as short an account as possible of the English law in general and then consider the approach of English law to certain specific issues which are bound to arise in any jurisprudence dealing with discrimination.

Outline of English law

(a) Generally

Both Acts are structured in the same way. Each first defines the word "discrimination". Then it specifies in considerable detail the fields of conduct in which the Acts render it unlawful to discriminate. There is no general principle that it is unlawful to discriminate at all. Each Act establishes a Commission (the Commission for Racial Equality and the Equal Opportunities Commission) which is charged with the task of eliminating discrimination, and is empowered to conduct its own investigations and to assist individuals who have been unlawfully discriminated against to bring proceedings. Individuals who have been unlawfully

discriminated against can bring civil proceedings for damages and the Commission can in certain circumstances itself bring enforcement proceedings.

(b) "Discrimination"

The United States Supreme Court has identified two types of discrimination, "disparate treatment" and "disparate impact" which are faithfully reproduced by the draftsmen of the Acts and which are normally called in English law "direct" and "indirect" discrimination.

"Direct discrimination" ("disparate treatment") consists in a person "on racial grounds" or "on the grounds of sex" treating another less favourably than he would treat others of a different racial group or different sex. Direct discrimination therefore covers the classic instances with which we are all familiar: the withholding of some benefit because a person is of the "wrong" race or sex. Of this, segregation is an obvious example: in addition, the Race Relations Act specifically renders segregation unlawful. A person can be guilty of direct discrimination even if he has no desire to injure the person discriminated against: an education authority which had no desire to treat girls less favourably than boys, but which in fact provided fewer school places for girls, was held liable for direct discrimination. If the defendant adopts a criterion for selection which is based on sex or race, that constitutes direct discrimination whatever the discriminator's intention may have been. A recent House of Lords decision (*Jones v Eastleigh Borough Council* 1992 AC 751) has taken this principle one step further. In the United Kingdom, women qualify for their pension at the age of 60, men not until they are aged 65. A local authority wished to benefit pensioners by allowing them free admission to a local swimming pool. Mr Jones, who was over 60, but under 65, was charged for admission to the pool. The House of Lords held that this constituted direct discrimination against Mr Jones because a woman of the same age would have got in free. The criterion for free admission was inherently linked to the sex of the person seeking admission and was, therefore, unlawful: "but for" Mr Jones' sex he would have been a pensioner and was, therefore, being treated less favourably on the grounds of his sex than his wife who was the same age as him.

"Indirect discrimination" (or, in the American terminology, "disparate impact") is concerned with a different problem. If one class of the community (an ethnic minority or women) because of their circumstances or because of discrimination in the past, has had less opportunity of obtaining, for example, educational qualifications, that class will be adversely affected if an employer makes it a requirement that his employees must possess certain educational qualifications if they are to be employed or promoted. This requirement of an educational qualification perpetuates the status of members of that class as second class citizens. To meet this type of case, the Acts provide that a person discriminates against another if he applies to him a requirement (which he also applies to others) which (1) is such that the proportion of members of that race or sex who can comply with that requirement is considerably smaller than the proportion of those who are not of that racial group or sex who can comply with it, (2) operates to the detriment of the complainant, and (3) the person imposing the requirement cannot show to be "justifiable". The application of this complicated formula has given rise to much litigation, most of which turns on the wording of the individual statute. Much the most important aspect, as a matter of principle, is what constitutes sufficient justification for imposing such a condition: I consider this separately below at 3(a).

The other aspect of indirect discrimination which calls for mention is that, because of the way in which the Acts are worded, an employer who takes into account in selecting for employment or promotion a number of different factors, one of which has a disparate impact on a particular racial group but none of which is by itself decisive, is not guilty of indirect discrimination. The racial discriminatory factor does not have to be satisfied but is merely one which is taken into account: it is, therefore, not a requirement or condition of the employment. This substantially limits the scope of indirect discrimination.

(c) The Fields

As I have said, English law does not make every manifestation of race or sex discrimination unlawful. Such discrimination is only actionable in certain defined areas or fields. The fields in which it applies are employment, education, the provision of goods and services and (in relation to racial discrimination) membership of associations and the exercise by local authorities of their planning functions.

Of the cases which have come before the Courts, the vast majority have been in the employment field. Practically all aspects of discrimination in the employment field are unlawful: discrimination in selection for employment, in the terms of service, in opportunities for promotion, in access to training, in membership of trades unions, in membership of partnerships and in relation to the award of professional qualifications, are all outlawed. There are certain very limited exceptions where the possession of a particular racial quality or membership of a particular sect is a genuine occupational requirement for the job, for example, it is not unlawful to require that the part of a woman in a play should be accessible only to a woman actress.

(d) Enforcement

Any individual who has been unlawfully discriminated against can bring proceedings. If the discrimination is in the employment field, the proceedings must be brought in an Industrial Tribunal. Industrial Tribunals are not part of the ordinary Court system: they were designed to give speedy informal redress in labour disputes. Their decisions on questions of fact cannot be challenged, an appeal being on a point of law only. In cases of direct discrimination, the Industrial Tribunal can order compensation to be paid (including compensation for injury to feelings) but subject to a maximum figure which is currently £10,000. In cases of indirect discrimination, the Industrial Tribunal cannot order compensation to be paid if the employer shows that he had no intention of treating the claimant unfairly on the grounds of race or sex. The Industrial Tribunal can make recommendations as to the employer's future conduct but cannot grant an injunction. No legal aid is available in the Industrial Tribunal.

An individual can bring proceedings in the County Court for unlawful discrimination in fields other than employment. Unlimited damages can be awarded for direct discrimination but, again, no damages are payable for indirect discrimination if the employer shows that he had no intention to discriminate. See also at (e) below as to enforcement by the Commission.

(e) The Commissions

The Commissions are established for the general promotion of good race relations and equal opportunities. They are given wide powers to conduct formal investigations, including compulsory powers to obtain information. The Commissions can issue non-discrimination notices which require an individual or organisation to cease discriminatory practices: in the event of non-compliance, the Commissions can apply to the Court for an injunction. These wide, and necessary, powers were plainly directed to counteracting widespread discriminatory practices which claims by individuals are unable to stop. Unhappily, the statutory procedures prescribed are so convoluted and long drawn out that the powers have proved to be of little practical impact.

Much more practically relevant is the power of the Commission to assist individuals to bring individual complaints before the Courts and Tribunals. Given that most cases have been brought in the employment field and therefore in the Industrial Tribunals where legal aid is not available, most of the important decided cases have been funded by the Commission.

(f) The State

Although the Crown is bound by the statutes, discriminatory acts done under statutory authority are not unlawful. The English Courts, therefore, have no power to challenge discriminatory legislation. On the other hand, it has now been established that in order for this exemption to apply, it is not enough simply to show the act complained of was done in pursuance of a statutory power: the act must have been done in the necessary performance of an express obligation contained in a statutory enactment.

Specific Issues

(a) Justifiability

In cases of direct discrimination, it is not possible for the defendant to escape liability on the grounds that his discriminatory conduct was necessary in order to achieve some other purpose. For example, in the *Eastleigh Borough Council* case (see 2(b) above), the local authority was using the test of pensionable age as an easy method of discovering whether those seeking admission to the pool were, by reason of retirement, short of money. That factor was irrelevant, since the criterion it had adopted was sex related and, as such, unlawful. The only defences to claims of direct discrimination are those narrowly and specifically defined by the Statutes, eg genuine occupational requirements for the job.

In cases of indirect discrimination the position is quite different. Say an employer makes it a requirement for an appointment to a job that the applicant should have a university degree. This would, in the United Kingdom, probably have the effect of excluding more Caribbean immigrants than other members of the population. Therefore, it would constitute indirect discrimination unless the employer is able to show that the requirement of a degree is justifiable. It is, therefore, of crucial importance to decide what is the test of justification, the more so because the question whether a requirement is justifiable is one fact on which, in the employment field, the decision of the Industrial Tribunal is final and conclusive.

For a long time the law of England was unsatisfactory, a number of different tests having been propounded. At one extreme it was suggested that the employer had to show that the requirement was "necessary" for the job and that there was no other way in which the employer's aim could be achieved. At the other extreme, it was said that it was enough if the employer showed that he had imposed the requirement for reasons which were "acceptable to right thinking people as sound and tolerable reasons". This latter test is wholly unacceptable since some "right thinking people" might take the view that running an efficient business was more important than eliminating discrimination. Happily, the test has now been established as requiring the employer to show that (objectively, and not merely in his own view) the requirement reflects a real need of the employer's business, is appropriate with a view to satisfying that need and is reasonably necessary to satisfy that need: *Hampson v Department of Education and Science* (1990) 2 All ER 25, applying the decision of the European Court of Justice in *Bilka-Kaufhaus GMBH v Hartz* (1989) 2 CMLR 701.

Reverting to the example of an employer who requires his employees to have a degree, the justifiability of such a requirement will depend upon the nature of the job. If the job is sweeping floors, it would be impossible to justify since, objectively, the job does not require the skills of a graduate. If the job is a university lectureship, the requirement is plainly justifiable since an academic must have a degree in the subject which he is to teach. Very difficult cases are those which lie somewhere in between. For example, if the job is in higher management of a technical business, the employer would have to show more than that it was his policy only to use graduates in such positions; he would have to show that the nature of the work did in fact require the skills of a graduate.

(b) Stereotyping

Few cases now come before the Courts in which either the defendant accepts or it is proved that he intentionally acted with a view to excluding someone on the grounds of his race or sex. Far more common is the case where the defendant genuinely thinks that he acted on non-discriminatory grounds for a non-discriminatory purpose, but acted on the assumption that a person of that race or sex would not have the necessary qualities. For example, in one case a restauranteur employed a waitress. When he discovered that she had children, he dismissed her on the grounds that reliability in attendance was crucial to his business, that he had found that in practice women (unlike men) put their responsibilities to their children before their responsibilities to their jobs, and for that reason he did not employ women with children. In the United Kingdom today, the assumption made by the defendant is probably correct. *Most* women do put their children before their jobs: but not *all*. It is the essence of anti-discrimination law that individuals are to be treated as individuals and not stereotyped as all possessing or having characteristics which, rightly or wrongly, their race or sex is generally thought to manifest. The defendant was found liable in that case for unlawful discrimination: if he had investigated the particular waitress he would have found that her record of reliability was exceptional and that she had made arrangements covering any crisis in her children's affairs.

(c) Positive discrimination

In a number of jurisdictions, Courts and other institutions which find the existence of long term discriminatory practices against a particular racial group seek to rectify the continuing

effects of such past discrimination by providing that in the future a given proportion of future employees or future persons promoted must come from members of that racial group, even though there are others better qualified for selection. Only by so positively discriminating in their favour, it is said, can a fair balance between the racial groups be established.

The problems raised by positive discrimination of this kind have not arisen in the United Kingdom since, with very limited exceptions, such action would itself be unlawful as being discriminatory. Any requirement, however meritorious in other respects, which gives a preference to members of one group must by definition discriminate adversely against all others competing for the same benefit. Moreover, such discrimination would be on the grounds of race, ie that they are not members of the racial group which has been given preference.

(d) Proof of discrimination

The burden of proving discrimination lies on the complainant. Experience has shown that it is an onerous task. In cases of direct discrimination, the case often requires the proof without documentary assistance, that the grounds on which the defendant denied the complainant the benefits which he sought were based on race or sex, a fact that lies wholly within the mind of the defendant. To meet this difficulty English law now provides the complainant with two forms of assistance.

First, the complainant can serve on the defendant a questionnaire designed to elicit the grounds on which the defendant took the decision complained of. The defendant is not bound to reply: if he does so, his answers are admissible in evidence; if he does not do so, the Tribunal can draw adverse inferences from such failure.

Second, and more important, the Courts have adopted a special approach in discrimination cases. Take as an example, a black applicant for promotion who fails to obtain promotion. If he can demonstrate that he had better qualifications or experience for the promotion than the successful (white) applicant, in the absence of satisfactory evidence from the defendant that he did not make his decision on racial grounds, the Court can and should draw the inference that it was made on racial grounds: see *King v Great Britain - China Centre* 1991 IRLR 513. Although the Courts deny that they are adopting a special approach to proof in such cases, in fact they do recognise the special difficulties of proof and draw inferences which, in ordinary litigation, they would not draw.

(e) Statistical evidence and discovery

Given the difficulty of proving discrimination, statistical evidence can be of great importance. In cases of direct discrimination a complainant who can demonstrate by reference to the employer's records a pattern of discrimination in the past is obviously in a strong position. In cases of indirect discrimination, statistical evidence as to the number of members of the complainant's racial group as compared with members of the other racial groups to which a requirement is attached by the employer is almost essential.

The obtaining and proof of such statistical evidence present problems of expense and oppression to the defendant, bearing in mind that normally the claim is brought by one

complainant only and the case is conducted in a low level of court. Experience in large class actions in the United States shows that the scale and complication of the statistics necessary to make a sound statistical analysis can be formidable: moreover, to require an employer to produce the necessary information can, in itself, impose on him an enormous financial burden.

English law has not solved the problem satisfactorily. It has been said that full statistical evidence is not always necessary to prove indirect discrimination. In claims for discovery of an employer's documents, discovery must not be ordered if it would be oppressive in that it would require the employer to produce documents not readily available, or to take steps which would add unreasonably to the length or cost of the hearing.

The effectiveness of English law

The anti-discrimination statutes have had only a limited impact in the United Kingdom. They have been valuable in "setting the tone", ie in establishing the principle that discrimination on the grounds of race or sex is not acceptable. For the most part, blatantly anti-racial or sexually biased language and behaviour no longer occur.

But the impact of the law in the United Kingdom has been far less than, for instance, in the United States. This is due to a number of inter-connected factors:

(a) Comparatively few cases have been brought before the courts and tribunals. The reasons for this are set out below;

(b) Most cases relate to the employment field where the cases have to be brought in the Industrial Tribunal. An Industrial Tribunal cannot grant an injunction. No compensation is recoverable for indirect discrimination. Even in cases of direct discrimination the compensation is comparatively small, being limited to £10,000.

(c) The adverse consequences to an employer of being found guilty of discriminatory conduct, therefore, do not provide a sufficient inducement to him to eradicate such discriminatory procedures.

(d) The difficulty of proof in discrimination cases means that the lack of legal aid in Industrial Tribunals is a serious shortcoming: the funds available to the Commissions to aid individual complaints are inadequate.

(e) In cases of indirectly discriminatory practices which are deeply rooted, the statistical evidence and complication of litigation requires the procedures and machinery only available in the High Court. But cases cannot be brought in the High Court.

(f) Given the complexity of such litigation, it cries out for a class action in which the claims of all members of the racial group adversely affected can be adjudicated upon. If this were possible, the disproportion between the sum at stake in the litigation and the cost of obtaining and deploying the necessary statistical and other evidence would be diminished.

(g) Formal investigations by the Commissions (which might well have proved a satisfactory alternative to elaborate class actions) have proved to be largely unworkable.

In sum, in my view, the experience of English law demonstrates that an effective law designed to eradicate discrimination cannot be run on the cheap. If the law is to be an effective weapon in producing fundamental changes in social behaviour, it must be recognised that it requires in all but the simplest cases the deployment of legal machinery, money and forensic skills (including judicial skills) appropriate to the most difficult areas of civil litigation.

Non-discrimination in International Human Rights Law[1]

By Lord Lester of Herne Hill QC[2]

Discrimination, inequality, and prejudice are problems that occur throughout the world. They can involve the most insidious human rights problems, especially if historically, and even unconsciously, they are rooted in a population's psyche. Slavery in the United States, the Holocaust, and South African apartheid are among the countless tragic episodes that show how discrimination can engender gross human rights abuses, affronting human dignity.

In recognition of the devastating consequences of discrimination, the international community has adopted important legal measures. General guarantees of non-discrimination for protected rights, on a wide range of non-exhaustive grounds, are contained in the International Covenant of Civil and Political Rights (ICCPR)[3], the European Convention of Human Rights (the ECHR)[4], the American Convention on Human Rights 1969[5] and the African Charter of Human and Peoples' Rights.[6] European Community Law forbids only certain types of discrimination, notably on grounds of nationality[7] (but not colour or race), and sex.[8] Similarly, the UN Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) are aimed at eliminating specific types of discrimination. In view of their nature as fundamental constituents of international human rights law, the principles of equality and non-discrimination may be regarded as part of the *jus cogens*[9].

This paper concentrates upon the jurisprudence of the Human Rights Committee, the treaty body which monitors the ICCPR, as a potentially significant source of international legal standards. However, the ICCPR jurisprudence is rudimentary and undeveloped compared with that of the European Court of Justice and of the European Commission and Court of Human Rights, to whose case law reference will also be made. The paper will not attempt to summarise the abundant comparative case law on non-discrimination at national level.

The Meaning of "Discrimination"

The Human Rights Committee, in its General Comment no. 18[10] on "Non-Discrimination", defined discrimination in broad terms as including:

> "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[11]

The jurisprudence of the ECHR organs is similarly broad. The concept of discrimination includes cases where an individual or a group are treated less favourably, without sufficient justification, than a comparable individual or group, even when the Convention does not

require the more favourable treatment to be provided.[12] Less favourable treatment may arise where an individual or group is given less choice than a comparable individual or group.[13]

The principle of equal treatment, viewed as a general principle of European Community law[14], requires[15] that similar situations must not be treated differently and that different situations must not be treated in the same manner unless such differentiation is objectively justified.

Content of Non-Discrimination Obligations under International Law

The ICCPR contains three Articles which expressly forbid discrimination, Articles 2(1), 3, and 26. Other Articles of the ICCPR also include a non-discrimination proviso, such as the derogation provision, Article 4, which may not be implemented in a discriminatory fashion against certain groups. It has been suggested that "equality and non-discrimination constitute the dominant single theme of the Covenant."[16]

Article 2(1) states that:

> "Each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 3 states that:

> "The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

It is arguable that Article 3 is superfluous, and serves only to underline the prohibition on discrimination on the basis of sex.[17]

Article 26 states that:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The Human Rights Committee has observed in General Comment no. 18 that:

> "[T]he application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant."[18]

In its landmark decision of *Zwaan-de-Vries v Netherlands*[19], the Human Rights Committee held that the denial of equal rights to married women as compared to married men under Dutch social security law, on the basis of the assumption that men are the breadwinners,

breached Article 26 as impermissible sex discrimination. The Committee reached this conclusion even though the ICCPR guarantees no right to social security payments as such.

The guarantees in Articles 2(1) and 3 (unlike those in Article 26) are expressly limited to discrimination in the enjoyment of the Covenant's enumerated rights[20].

General Comment no. 18 continues:

> "Article 26 ... prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligation imposed on states parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content not be discriminatory."[21]

Article 26 obliges States not to adopt or maintain discriminatory legislative standards and trends, thus ensuring "equal protection of the law"; and not to apply that legislation in a discriminatory manner, thus ensuring "equality before the law". The guarantee of the equal protection of the law secures de jure equality, so that the law itself dispenses rights and benefits to all equally. Equality "is a principle above the law", circumscribing the legitimacy of laws themselves.[22] This obligation is imposed on legislators and lawmakers. The guarantee of equality before the law secures de facto equality, so that the law is applied correctly and consistently no matter who the parties may be. This obligation applies to all public officers, such as judges and police, prison, immigration, and customs officers. A third limb of the Article 26 obligation arguably involves a duty to prohibit, or protect against, discrimination.[23] This obligation is discussed below in the context of obligations to take positive measures.

Zwaan-de-Vries established that the scope of Article 26 extends to non-discrimination in the enjoyment of economic rights, and probably social and cultural rights. However, an HRC minority prefers to minimise the HRC's competence to question discriminatory aspects of a State party's economic and social policy.[24] The HRC consensus incorporated some of the minority's language when it specifically noted in obiter in *J.H.W. v the Netherlands*[25] that "social security legislation and its application usually lag behind socio-economic developments in society",[26] possibly implying that at least a small hiatus is allowed before an outmoded distinction regarding welfare rights can be considered to violate Article 26. This concession was not expressly made in *Zwaan-de-Vries*.[27] In any case, there is no doubt that Article 26 maintains a significant impact in the field of social, economic and cultural rights.

Both the ICERD and CEDAW Conventions prohibit discrimination in relation to civil, political, economic, social and cultural rights.[28] In *Yilmaz-Dogen v The Netherlands*[29], the Committee on the Elimination of Racial Discrimination (CERD) found a breach of Article 5(e)(i) of ICERD, which guarantees the right to work without discrimination. However, CERD has also recognised[30] that the rights protected by Article 5(1)(e) are:

> "of programmatic character, subject to progressive implementation. It is not within the Committee's mandate to see to it that these rights are established; rather, it is the Committee's task to monitor the implementation of these rights, once they have been granted on equal terms."

Grounds of Discrimination

Articles 2(1) and 26 of the ICCPR contain identical lists of prohibited grounds of discrimination : race[31], colour, sex[32], language[33], religion[34], political[35] or other opinion[36], national or social origin,[37] property, and birth, or "any other status". The reference to "sex" has been interpreted as including "sexual orientation".[38]

The following grounds have been found to constitute "other status" by the Human Rights Committee: nationality[39], marital status[40], a distinction between "foster" and "natural" children[41], a difference in funding between public and private schools,[42] and a difference between employed and unemployed persons.[43] The latter two distinctions do not relate to any personal characteristic of the complainant, unlike the specifically enumerated grounds, so it seems to widen the applicability of the phrase, "other status".[44]

However, the non-exhaustive nature of permissible grounds of Articles 2(1) and 26 does not mean that every distinction, no matter how obscure, raises an issue of discrimination.[45] Messrs Aguilar Urbina and Wennergren, in a separate opinion in *Vos v the Netherlands*[46], explained that "whenever a difference in treatment does not affect a group of people but only separate individuals, a provision cannot be deemed discriminatory as such; negative effects on one individual cannot then be considered to be discrimination within the scope of Article 26." This comment gives no guidance as to when a group of separate individuals qualifies as a distinct group. The Human Rights Committee have not defined when an "other status" arises, preferring to develop its jurisprudence in this area on a case-by-case basis.[47]

Direct and Indirect Discrimination

Direct discrimination[48] involves the less favourable treatment of the complainant than of someone else on prohibited grounds and in comparable circumstances. Indirect discrimination[49] traditionally arises when a practice, rule, requirement or condition is neutral on its face but hits disproportionately at particular groups, and does so without any objective justification. In other words, it has the effect of impairing the rights of members of that group unjustifiably. For example, minimum height requirement may hit disproportionately at women and Asians, and may be an unjustifiable job requirement.

European Community law has the most developed case law about the important concept of indirect discrimination.[50] For example, Article 119 of the EEC Treaty and the Equal Pay and Equal Treatment Directives forbid indirect as well as direct discrimination. The ECJ, in *Enderby v Frenchay Health Authority*,[51] agreeing with Advocate-General Lenz's liberal approach towards the concept of "indirect discrimination" in his *Enderby* Opinion, found that a prima facie case of discrimination is established if unequal treatment (ie. substantial disadvantage) can be shown to occur without objective justification; there is no need to show any additional factor, such as the means by which such inequality occurs (such as the application of a discriminatory "requirement").[52] Proof of direct discrimination is therefore determined by a comparison between individuals, whereas proof of indirect discrimination involves a comparison between groups.[53] Advocate-General Lenz's view also diminishes the importance of the formalistic characterisation of discrimination as either direct or indirect in favour of a "practical result-orientated" approach.[54] Indeed, the ECJ itself did not specify

whether direct or indirect discrimination was involved on the facts in *Enderby*. The characterisation is only important if different consequences flow from such characterisation.[55]

The Human Rights Committee's definition of "discrimination" in General Comment no. 18[56] proscribes certain acts which have a discriminatory "purpose or effect". The reference to "effect" makes it unnecessary prove a discriminatory intention or "purpose", and indicates that indirect discrimination is also forbidden under the Covenant.[57]

Case law also indicates that indirect discrimination is prohibited. In *Singh Bhinder v Canada*,[58] the law complained of required that all persons wear hard hats in certain jobs. This rule indirectly prejudiced Sikhs, whose religion requires the wearing of a turban. The Committee rightly did not dismiss the complaint because of the indirectness of the alleged discrimination; rather, the rule was found to be justified for reasons of worker safety.[59] The Singh Bhinder decision indicates that obvious instances of indirect discrimination will breach the ICCPR.[60]

However, the Committee's case law regarding indirect, or less obvious, discrimination is inconsistent. In the recent decision of *Oulajin & Kaiss v the Netherlands*[61] the Committee noted that the complainants had not substantiated their claim that the law, which differentiated between foster and natural children vis-a-vis eligibility for child benefit, affected migrants more than Dutch people. This indicates that claims of indirect discrimination may be examined if adequate proof of actual discrimination is adduced. However, in *Oulajin*, the Committee reaffirmed[62] that "the scope of Article 26 of the Covenant does not extend to differences resulting from the equal application of common rules in the allocation of benefits". However, indirect discrimination traditionally occurs precisely when the equal application of a rule in a formal sense has a disproportional adverse impact on a group or groups of individuals. In *A.P.L.-v.d.M. v the Netherlands*[63] and *Vos v the Netherlands*,[64] the result of the "uniform application" of certain rules caused the author in each case, a woman, to receive a lesser amount of benefit than a man would have received in exactly the same circumstances. In those cases, it is submitted that the Committee should have focused on the discriminatory result of the application of the legislation at issue.

More recently, the Committee expressly noted a claim of "indirect discrimination" by the author in *Cavalcanti Araujo-Jongens v the Netherlands*[65] but found the distinction concerned to be justifiable. However, the Committee seemed only to examine the legitimacy of the direct distinction made, between employed and unemployed people, rather than the legitimacy of the consequent adverse impact on women.

In contrast to the Human Rights Committee's uncertain approach to the question of the proscription of indirect discrimination, its fellow UN body, the Committee on the Elimination of Racial Discrimination (CERD), has confirmed its proscription by Article 1(1) of ICERD in a General Comment:[66]

> "In seeking whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin." [67]

The European Court of Human Rights has not had occasion to develop the concept of indirect discrimination in interpreting Article 14 of the ECHR. However, the Commission has recently recognised that a rule which is not formally discriminatory can nevertheless be discriminatory in its practical application.[68]

Permissible Differentiation

In General Comment no. 18, the Human Rights Committee indicated[69] that

> "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."

A differentiation is "objective" if it has a legitimate aim, whereas it is "reasonable" if it has a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[70] Unfortunately, the Committee have accompanied findings of "reasonableness" and "objectivity" with sparse reasoning. For example, the Committee rarely analyse the two parts of the test separately.[71] Ultimately, such criteria are established on a case-by-case basis,[72] so it is hard to use existing cases as pointers for future decisions.

It must be noted that the Committee have found breaches of the Covenant in only a minority of Article 26 cases, indicating that it is difficult for authors to show that the laws and/or practices at issue are not "reasonable and objective".

The following are examples of the HRC's "reasonable" and "objective" test as applied in practice. Tax laws which treated married and unmarried couples differently were found to be legitimate in *Sprenger v the Netherlands*[73] and *Danning v the Netherlands*,[74] as were differences in state funding for public as opposed to private schools in *Blom v Sweden*[75] and *Lindgren et al v Sweden*.[76] In *Gueye et al v France*,[77] the Human Rights Committee found French legislation which had frozen the pensions of Senegalese veterans of the French army, resulting in smaller pensions for these veterans as opposed to French veterans, was not legitimate. The legislation was aimed at alleviating administrative difficulties in preventing pension abuse in Senegal. The Human Rights Committee observed that "mere administrative inconvenience ... cannot be invoked to justify unequal treatment." However it seems that administrative convenience may have justified a difference in the length of national service between performers of military service and conscientious objectors performing alternative service (who had to serve four months longer) in *Jarvinen v Finland*.[78]

When considering the State's justification of a given difference of treatment, the European Court of Human Rights expressly interprets the ECHR as a living instrument, and requires the State to keep the justification for the measure under review in the light of present-day conditions.[79] Some of the Human Rights Committee's decisions regarding social security[80] reveal a similar attitude by rejecting the outmoded "breadwinner" argument in sex discrimination cases.

The Committee's test of "reasonableness" and "objectivity" leaves wide scope for subjective interpretation and application of equality principles. The problems of subjectivity are

aggravated at the international level by the existence of substantial cultural differences. Though some human rights norms are readily capable of common universal interpretation, such as the right not to be tortured or arbitrarily executed, the determination of the legitimacy of alleged discrimination is made much more difficult where there are conflicting cultural attitudes about what is reasonable or objective - for example, religious attitudes about the status of women, or traditional hostility to private homosexual behaviour between consenting adults.[81]

The Margin of a State's Appreciation

The European Court of Human Rights has held that States parties enjoy a "margin of appreciation" in determining whether differential treatment is justifiable. The boundaries of this margin, within which Contracting states possess discretion to implement potentially discriminatory policies[82], are not clear or fixed. They "vary according to the circumstances, the subject matter and its background."[83] If an allegedly discriminatory practice departs from the common practice in most or perhaps many States parties, the European Court or Commission are more likely to condemn it. Conversely, an area of law or practice in which no common European practice exists will be more likely to come within a State's "margin of appreciation".[84] Thus, the emergence of a common European practice will shift the boundaries of the margin of appreciation in a given area.[85]

Unlike the ECHR organs, the Human Rights Committee has only rarely alluded to the elastic and elusive doctrine of a margin of appreciation. The HRC minority in *Oulajin* allowed States parties a wide margin of appreciation in implementing social and economic policies; the opinion did not seem to affect a State's margin of appreciation in the sphere of civil and political rights. However, the Committee's cautious case law, even in relation to civil and political rights, indicates that in practice it often allows a wide margin of appreciation.

In the Optional Protocol case of *Hertzberg et al v Finland*[86], the Human Rights Committee majority found that the censorship by the State's broadcasting authorities of television programmes about homosexuality did not breach Article 19 of the ICCPR (protecting freedom of expression), noting that "public morals differ widely. There is no universally applicable standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities"[87]. Though *Hertzberg* was not a discrimination case, its reasoning might well be used in determining the legitimacy of a certain distinction.

However, it is submitted that habitual deference to a State's margin of discretion or appreciation by the Human Rights Committee would be inappropriate in situations where no common international pattern exist, because it is often impossible to identify a common international practice among the highly diverse parties to the ICCPR.

The Human Rights Committee, as a quasi-judicial body monitoring human rights on a world-wide scale, confronts more acute cultural differences than does a regional body like the European Court of Human Rights. How then should the Human Rights Committee proceed in determining the "reasonableness" and "objectivity" of a distinction in the absence of universal standards if the grant of a large margin of appreciation to States is not satisfactory?

There is a difficult dilemma. If the Human Rights Committee were to develop regional standards, paying great heed to the attitudes of domestic populations, this would fragment the essential universality of fundamental human rights and freedoms. A similar problem would arise if the Committee were to do as has been suggested[88] and replace the practice of adopting consensus opinions with a system of majority voting. The Committee's jurisprudence might become fragmented.

On the other hand, the Committee's consensus opinions often represent a watered-down compromise gleaned from the true views of HRC members, and the search for a consensus within such a diverse body of jurists results in the lowest common denominator of opinion being reflected in the Committee's published views. It is noteworthy that recently the Committee has increasingly resorted to the formulation of individual opinions, which are appended to the majority views, instead of insisting on the achievement of consensus.[89]

Suspect Distinctions and Stricter Scrutiny

Some grounds for differences in treatment are inherently suspect and call for stricter scrutiny, so that the State's margin of appreciation is correspondingly narrower. Racial distinctions are particularly suspect, as is indicated by the existence of CERD, and a body of cases in the International Court of Justice, which suggest that non-discrimination on the bases of race, colour, descent, national or ethnic origin has become a norm of customary international law.[90] The European Commission of Human Rights has found that racial discrimination against citizens (but not apparently non-citizens) of a Contracting State amounts to an affront to human dignity and constitute degrading treatment in breach of Article 3 of the ECHR.[91]

Since progress towards sex equality is an important objective of the Member States of the Council of Europe, only very strong reasons could justify a difference of treatment based on sex under the ECHR.[92] European Community law is particularly active in countering sex discrimination. The notion that this approach extends beyond Europe is strengthened by the existence of CEDAW, numerous other international treaties concerned with women's rights[93], and the arguably superfluous inclusion of Article 3 of the ICCPR. Of course, it must be acknowledged that the treatment of women varies considerably between States at the international level; and that the domestic practice of States regarding sex and race discrimination often diverges from the lip service paid to the notion at the international level.[94] It must be noted that the Committee, by consensus, has consistently found distinctions based on sex to violate the ICCPR.[95] However, as noted above, the Committee have been unwilling to delve beneath the surface of complex and apparently neutral social security laws which have caused women to be treated worse than men in the same position. This may be due to the Committee's relatively unsophisticated approach to laws which are not blatantly discriminatory, rather than any manifest tolerance of sex discrimination on the part of the Committee.

Some commentators have argued that religion has also become an internationally suspect category, in view of the adoption by the General Assembly in 1981 of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.[96]

The decision of the European Court of Human Rights in *Inze v Austria* indicates that distinctions made on the basis of illegitimacy may have joined the group of "suspect distinctions", at least under the ECHR, in the light of the 1975 European Convention on the Legal Status of Children born out of Wedlock.[97] In that case, the Court rejected the Austrian government's argument that the law reflected the population's "traditional outlook".[98] Here, the State's margin of appreciation in this area had been narrowed by the development of a European pattern of tolerance regarding illegitimate births, and the Court followed that lead by obliging the Austrian government to update its attitudes. It seems likely the Human Rights Committee would similarly treat distinctions based on illegitimacy as suspect, at least in a European context.

Special Measures and Affirmative Action

It is generally accepted in international human rights law that[99]

> "the provision of special measures of protection for socially, economically or culturally deprived groups is not discrimination, so long as those special measures are not continued after the need for them has disappeared .... The other type of protective measure which is permissible is the provision of special rights for minority groups to maintain their own languages, culture and religious practices and to establish schools, libraries, churches and similar institutions ....
>
> "'Discrimination' is defined under international law to mean only unreasonable, arbitrary or invidious distinctions, and does not include special measures of protection of the two types described above .... The principle of equality of individuals under international law does not require mere formal or mathematical equality but a substantial and genuine equality in fact."[100]

The Human Rights Committee has confirmed in its general comments that affirmative action is sometimes required by States in order to combat discrimination. In General Comment no. 18, the Committee pointed out "that the principle of equality requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions."[101] General Comment no. 3 (on Article 2) states that "the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by States parties to enable individuals to enjoy their rights."[102] General Comment no. 4 (dealing with Article 3) states that "Article 3, as Articles 2(1) and 26 ... requires not only measures of protection but also affirmative action to ensure the positive enjoyment of those rights."[103]

The gist of these General Comments is that positive measures to implement the ICCPR's non-discrimination obligations are mandatory, though the content of those positive measures, and the situations in which positive measures must be taken, are unclear.[104]

General Comment no. 18 confirms that such positive "action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."[105] It is not clear when a duty to take affirmative action against structural discrimination arises.[106] The alleged discrimination in *Stalla Costa v Uruguay*[107] was found to be permissible affirmative action in favour of a formerly disadvantaged group (the admission to the public service of former public officials who had been unfairly dismissed on ideological, political, or trade union grounds).

Affirmative action is an exception to or derogation from the fundamental right of equal treatment without discrimination. It is well established under European Community law that special protective measures must be construed strictly, and in accordance with the principle of proportionality, so that the derogations remain within the limits of what is appropriate and necessary for achieving the aim in view.[108] Derogations from the principle of equal treatment are construed strictly even though their purpose is to promote the interests of women by reducing past or existing inequalities. Similarly, measures for the protection of women, particularly as regards pregnancy and childbirth have a benevolent purpose, but must nonetheless be strictly construed to avoid undermining the principle of equality itself[109].

Measures to Combat Private Discrimination

Positive action may be required to protect a particular group against discrimination by other groups. Such action may take the form of legislative measures to combat discrimination or promotional extra-legal measures.[110] The ICCPR prohibits discrimination by State agencies, but it is as yet uncertain whether and to what extent the ICCPR obliges States to prevent and punish discrimination by private persons. If discrimination at a private level is allowed to flourish, a society will not give full effect to the norms of non-discrimination and equality. On the other hand, the forbidding of discrimination by individuals and private bodies potentially interferes with their rights, such as those of expression, choice, thought, and association.

The existence of a general duty upon States to take positive action to combat private discrimination has been the subject of much scholarly debate.[111] Such a duty can be derived from the Article 2 obligation to "ensure to all individuals ... the rights recognised in the Covenant", and from the Article 26 obligation to prohibit or protect against, discrimination.[112] It is submitted that States parties do have a duty to prevent discrimination by private persons in the public sphere where such discrimination adversely affects the rights - whether civil, political, economic and social - of the person discriminated against.[113] However, the prohibition of discrimination in the purely domestic sphere would interfere unduly with the discriminator's right to personal privacy, and would, in any case, be virtually impossible to enforce.[114]

General Comment no. 18 states that:

> "the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by

persons or bodies. The Committee wishes to know the legal provisions and administrative measures directed at diminishing or eliminating such discrimination."[115]

This comment may imply that States parties are under a duty to tackle some forms of private discrimination.

The ICERD and CEDAW texts[116] go further than the ICCPR text as regards private discrimination. These instruments confirm that UN treaty bodies are willing to actively enter the private sphere to eliminate discrimination. For example, in the CERD decision in *Yilmaz-Dogan v the Netherlands*[117], the Committee decided that the State party had not sufficiently protected the complainant's right to work under Article 5(e)(i) of the Convention, as an employment tribunal had not properly taken into account discrimination against the complainant by her private employer.[118]

Another CERD decision, *L.K. v the Netherlands*[119], suggests the direction of future ICCPR jurisprudence. Article 4(a) of the Convention, which obliges States parties to prohibit incitement to racial hatred and discrimination,[120] gives greater definition to Article 20(2) of the ICCPR, which provides more generally as follows:

> "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

In *L.K.*, the CERD Committee found a violation of Article 4(a), CERD, because domestic anti-racist legislation had not been properly enforced against persons who had made racist remarks and threats against the complainant[121]. The Committee stated[122] that it could not

> "accept any claim that the enactment of law making racial discrimination a criminal act in itself represents full compliance with [article 4(a)]."

Furthermore[123]

> "When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition."

Thus, Article 4(a), CERD (and, by implication, Article 20 of the ICCPR) require not only the enactment of anti-racist laws (and, under the ICCPR, laws to counter extreme forms of nationalist and religious discrimination), but also their effective implementation by the State party's organs of justice, such as the police and courts.

The CERD precedents are likely to encourage the Human Rights Committee to overcome its hesitancy in extending the reach of the ICCPR non-discrimination provisions to some "private" acts of discrimination in the public sphere[124].

Conclusion

International human rights law is not fully developed as regards the relevant principles guaranteeing equality of treatment and non-discrimination. However, it provides some useful persuasive authority for national courts in interpreting constitutions and ordinary legislation. This body of law is likely to become more significant as the jurisprudence develops on issues such as the meaning of direct and indirect discrimination, the nature of the comparisons called for in discrimination cases, the burden and standard of proof, the nature of the justification of directly and indirectly discriminatory measures, the need for effective remedies, and the proper approach towards exceptions, including affirmative action.

Endnotes

1. The main research for this paper has been done by Sarah Joseph, Airey Neave Research Fellow in the Department of Law at the University of Nottingham to whom I am greatly indebted. A fuller version was delivered at a conference under the auspices of the University and the Airey Neave Trust on 29th September 1993, and will be published in a volume of essays by Oxford University Press in early 1995.

2. Practising member of the English Bar; Honorary Professor of Public Law, University College London; President of Interights.

3. Articles 2(1), 3, and 26.

4. Article 14.

5. Article 24.

6. Articles 2 and 3.

7. Article 7 of the EEC Treaty provides that within the scope of application of the Treaty, and without prejudice to any special conditions contained therein, any discrimination on grounds of nationality shall be prohibited. Article 7 is a specific expression of the general principle of equality : Case 36/75, Rutili v Minister for the Interior [1975] ECR 1219, at 1229.

8. See Article 119 of the EEC Treaty and various sex equality directives on equal pay, and on equal treatment in employment, occupational pensions, and social security.

9. McKean, Equality and Discrimination under International Law, 1983, p. 283. See also Brownlie, Principles of Public International Law, 4th ed., 1990, pp. 598-601.

10. Published in UN doc HRI/GEN/1, 4 September, 1992, p. 25.

11. Ibid; this definition draws upon the definitions of racial discrimination and sex discrimination given, respectively, in Article 1 of ICERD, and Article 1 of CEDAW.

12. Abdulaziz, Cabales and Balkandali Case, Series A No. 94, p. 39, paragraph 82.

13. Paragraph 48 of the Commission's Report of 14 January 1993 in Application no. 13580/88, Karlheinz Schmidt v Germany, pending before the European Court of Human Rights.

14. The general principle of equality of treatment is derived not merely from the specific terms of the Treaties of the European Communities but from a broader general principle of law: see e.g., Case 199/84, Procuratore della Repubblica v Tiziano Migliorini [1985] ECR 3317, at 3331. The earliest cases in which the European Court of Justice defined the meaning of the concept of discrimination did not arise in a human rights context. They involved the interpretation of the European Coal and Steel Community Treaty : see e.g., Joined Cases 7 and 9/54, Industries Sidérurgiques

Luxembourgeoises v High Authority [1954-6] ECR 175, at 197; Joined Cases 32 and 33/58, Société Nouvelle de Pontlieue Aciéries du Temple v High Authority [1959] ECR 127, at 143; Joined Cases 17 and 20/61, Klöckner v High Authority [1962] ECR 325, at p. 345. See generally, Richard Plender QC, "Equality and Non-Discrimination", paper given at a seminar at University College London on 2nd November 1992, on Developments in European Administrative Law.

15. Case 147/79, Hoechstrass v Court of Justice [1980] ECR 3005 t 3019; Case C-217/91, Spain v Commission [1993] ECR.

16. Ramcharan, B., "Equality and Non-Discrimination", in Henkin, L. (ed), The International Bill of Rights: the Covenant on Civil and Political Rights, 1981, p. 246.

17. Ibid p. 251, at 253, suggests that Article 3 does not add anything to Article 2(1); see McKean, op. cit., n 9, p. 182 for opposite view.

18. Loc. cit., n 10, paragraph 12.

19. Communication no. 182/84. See also, to the same effect, Communication no. 172/84, Broeks v The Netherlands.

20. Article 14 of the ECHR provides that the enjoyment of the rights and freedoms set forth in the ECHR:

"shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Like Article 2(1) and 3, but unlike Article 26 of the ICCPR, the guarantee in Article 14 of the ECHR has no independent existence in the sense that it relates solely to discrimination in the enjoyment of matters covered by other Convention rights and freedoms : Marckx Case, Series A No. 31, pp. 15-16, paragraph 32. This does not mean that Article 14 is without meaning. It complements the other substantive guarantees, and is to be read together with them: Inze Case, Series A No. 126, p. 17, paragraph 36. For example, Article 6 of the ECHR (which guarantees a right of access to courts) does not compel States to institute a system of appellate courts. A State which does set up appellate courts goes beyond its obligations under Article 6. However, it would violate Article 6 read with Article 14 if it were to debar certain persons from those remedies, without a legitimate reason, while making them available to others : Belgian Languages Case (merits), Series A No. 6, pp. 33-34, paragraph 9. In Schuler-Zgraggen v Switzerland, Series A No. 263, the Federal Insurance Court was held to have discriminated on grounds of sex in breach of Article 14 by rejecting the applicant's claim to an invalidity pension on the basis of an assumption that women give up work when they give birth to child.

21. Loc. cit., n 10, paragraph 12.

22. Opsahl, T. "Equality in Human Rights Law with Particular Reference to Article 26 of the International Covenant of Civil and Political Rights", Festschrift für Felix Ermacora, 1988, p. 51, at pp. 53, 61.

23. Ibid, p. 52; Nowak, M., U.N. Covenant on Civil and Political Rights: CCPR Commentary, 1993, p. 459.

24. See minority opinion in Sprenger v the Netherlands (Communication no. 395/90) and Oulajin & Kaiss v the Netherlands (Communication nos. 406/90, 426/90). Such a limitation upon the justiciability of economic, social and cultural rights conforms to the more conventional view of the nature of these rights.

25. Communication no. 501/1992.

26. Paragraph 5.2, compare minority opinion in Sprenger.

27. The State party raised an argument at paragraph 8.3 that social security legislation tended to lag behind societal developments, to which the Committee did not expressly respond. A.W. Heringa interpreted this as a rejection of the State party's argument that the Article 26 obligations were not always of immediate application - see "Article 26 CCPR and Social Security", Newsletter, 6 NQHR (1988) 19, at 20, 24.

28. See Article 5, ICERD, and Parts I to IV of CEDAW.

29. CERD Communication no. 1/1984 (racially discriminatory termination of the employment of a Turkish national living in The Netherlands).

30. Diop v France, CERD Communication no. 2/1989. The Committee therefore considered a complaint to be ill-founded made by a Senegalese citizen living in France, who was excluded from the Bar of Nice on the basis of his nationality. There are, of course, limits as to what can be achieved by the judicial process, at a domestic as well as international level, in implementing the principle of equality of treatment without discrimination. Courts cannot provide a remedy for every social injustice or economic malady. Judges lack the constitutional authority as well as the expertise to make political decisions about the raising and disposition of public revenue on economic and social programmes, or about how those programmes should be planned and carried into effect. The judicial branch of government cannot take the place of the legislative and executive branches. Even an "activist" American Supreme Court, under Chief Justice Berger's leadership, was understandably unable to use the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution to tackle alleged "wealth discrimination" in the system of local property taxation in Texas, which had an adverse impact upon the educational opportunities of children of the poor : San Antonio School District v Rodriguez, 411 U.S. 1 (1972). See generally, Michaelman F., "On protecting the Poor through the Fourteenth Amendment", 83 Harv L. Rev. 7, 1969. However, it is submitted that it is well within the proper province of the CERD Committee to decide a case of the kind raised by Diop, and that its decision is too narrowly restrictive.

31. See e.g., E.H. v Finland (Communication no. 170/1984) (unsubstantiated claim to have been sentenced more heavily on the ground of belonging to the Romany minority in Finland; the "ground" here could also have been "national or social origin").

32. See e.g., Zwaan-de-Vries, above.

33. See e.g., T.K. v France (Communication no. 220/1987) and M.K. v France (Communication no. 222/1987)(complaints about the French courts' refusal to allow the use of the Breton language).

34. See e.g., Singh Bhinder v Canada (Communication no. 208/1986). In Hoffman v Austria Series A No. 255C, the European Court held that Article 8 read with Article 14 of the ECHR had been breached, where a mother was refused the custody of her children in the course of divorce proceedings mainly on the ground that she was a Jehovah's Witness and on account of the principles applied and the practices followed by that group.

35. See , eg., Bahamonde v Equatorial Guinea (468/1991).

36. See Jarvinen v Finland (295/1988), (distinction between those performing military service and conscientious objectors whose beliefs meant they had to perform alternative civilian service).

37. see above, n31.

38. Toonen v Australia (Communication no. 488/1992), paragraph 8.7.

39. Gueye et al v France (Communication no. 196/1985); "nationality" refers to one's administrative status as a certain State's citizen, whereas "national origin" refers to one's ethnic background.

40. Danning v the Netherlands (Communication no. 180/1984); and Sprenger v the Netherlands (Communication no. 395/1990).

41. Oulajin & Kaiss v the Netherlands (Communication nos. 405, 426/1990).

42. Blom v Sweden (Communication no. 191/1985) and Lindgren et al v Sweden (Communications no 298-99/1988).

43. Cavalcanti Araujo-Jongens v Netherlands (418/1990). However, a similar complaint in A.P.L.v.d.M. v the Netherlands (478/1991) was found inadmissible. It seems the Cavalcanti admissibility decision was influenced by the State party's failure to raise objections to admissibility.

44. Bayefsky, A., "The Principle of Equality or Non-Discrimination in International Law", 11 HRLJ 1, 1990, at p. 6.

45. See, e.g., B.d.B. v the Netherlands (Communication no. 273/1989).

46. Communication no. 218/1986, paragraph 1 of separate opinion.

47. The grounds of forbidden discrimination specifically mentioned in Article 14 of the ECHR, are also by way of example, rather than exhaustive. Any difference of treatment between individuals or groups in comparable circumstances, in an area covered by other Convention rights and freedoms, is capable of being discriminatory : Sunday Times Case (No. 2), Series A No. 217, p. 32, paragraph 58. One does not therefore have to establish membership of a "group" in order to ground a claim of

discrimination under the ECHR, as long as one can show that comparable individuals are being treated better than oneself. The test of "other status" may therefore be easier to satisfy under the ECHR than under the ICCPR.

48. Known in American legal parlance as "disparate treatment" discrimination.

49. Known in American legal parlance as "disparate impact" discrimination.

50. European Community case law was influenced by the decision of the U.S. Supreme Court in Griggs v Duke Power Co. 401 U.S. 424 (1971), and its progeny. That case law was effectively overruled in Wards Cove Packing Co. v Antonio 490 U.S. 642 (1989), where the Supreme Court severely weakened the degree of judicial scrutiny of employment practices which are fair in form but discriminatory in their effect. The Congress in turn overruled Wards Cove in the Civil Rights Act 1991. However, the Supreme Court has unfortunately ruled that disparate impact discrimination is not covered by the Equal Protection Clause of the Fourteenth Amendment to the American Constitution, even in cases of indirect racial discrimination, so that under the Equal Protection Clause, as distinct from Title VII of the Civil Rights Act, what is required is a racially discriminatory purpose: see e.g., Washington v Davis 426 U.S. 229 (1976).

51. [1994] 69 CMLR 8.

52. At 33-34; see Advocate-General Lenz at 26.

53. Advocate-General Lenz at 26.

54. At 22.

55. Eg. in UK law and maybe EC law (the ECJ was silent on the issue), direct discrimination is unjustifiable whereas indirect discrimination is capable of justification. Advocate-General Lenz took the view that both types of discrimination were capable of justification at 24. See generally Hepple, B., "Can direct discrimination be justified" EOR No. 55, May/June 1994, 48.

56. Loc. cit. n 10.

57. Advocate-General Lenz pointed out at 22 in his Enderby opinion that direct discrimination could be unintentional and unconscious; see also James v Eastleigh B.C. [1990] 2 AC 751, HL.

58. Communication no. 208/1986.

59. Paragraph 6.2.

60. See also Bayefsky, loc. cit., n44, p. 10.

61. Communication nos. 406/1990 and 426/1990), paragraph 7.5.

62. See also P.P.C. v the Netherlands (Communication no. 212/1986), paragraph 6.2), Vos v the Netherlands (Communication no. 218/1986), paragraph 11.2, H.A.E.d.J. v the

Netherlands (Communication no. 297/1988, paragraph 8.2), and A.P.L.-v.d.M. v the Netherlands (Communication no. 478/1991), paragraph 6.4.

63. Communication no. 478/1991.

64. Communication no. 218/1986.

65. Communication no. 418/1990, paragraph 7.4.

66. Adopted on 24th March 1993; paragraph 2.

67. This accords with the interpretation given to the Convention by Meron T., in "The Meaning and Reach of the International Convention on the Elimination of all Forms of Racial Discrimination", 79 AJIL 283, 1985, at p. 289: "facially neutral policies or practices that have a disparate impact on some racial groups should be prohibited, despite the absence of discriminatory motive."

68. Application no. 17175/90, D.S. v The Netherlands, Admissibility Decision of 12 October 1992.

69. Loc. cit., n 10, paragraph 13.

70. See Belgian Linguistics Case, A/6 (1968), paragraph 10, and commentary thereon by Eissen, M. "The Principle of Proportionality in the European Court of Human Rights", in MacDonald R., Matscher F., and Petzold H. (eds.), The European System for the Protection of Human Rights, 1993, 141. The Human Rights Committee based their test on the Belgian Linguistics test (Nowak, op. cit., n 23, 473, n 77), so it is submitted that the test has the same meaning as under the ECHR.

71. Oulajin & Kaiss v Netherlands (Communication nos 406/1990 and 426/1990) is a rare case where the Committee considered the questions of "objectivity" and "reasonableness" separately; see paragraph 7.4.

72. Nowak, op. cit., n 23, p. 473.

73. Communication no. 395/1990.

74. Communication no. 180/1984.

75. Communication no. 191/1985.

76. Communications no. 298-99/1988.

77. Communication no 196/1985.

78. Communication no. 195/1988.

79. Cossey Case, Series A No. 184, p. 17, paragraph 42.

80. E.g., Zwaan-de-Vries, Pauger v Austria (Communication no. 415/1990).

81. Compare the liberal approach of the Human Rights Committee in Toonen v Australia (Communication no. 488/1992) and the European Court of Human Rights in Dudgeon v United Kingdom Series A No. 45 with the illiberal approach of the U.S. Supreme Court, in Bowers v Hardwick 106 S. Ct. 2841 (1986).

82. The margin of appreciation applies in the enjoyment of other ECHR rights : see, e.g., Rees Case, Series A No. 106 at pp. 14-15, paragraphs 35-36 concerning Article 8, ECHR.

83. Inze Case, Series A No. 126, p. 18, paragraph 41.

84. See Rasmussen Case Series A No. 87, which concerned alleged discrimination against men in paternity litigation, at p. 15, paragraphs 40 and 41.

85. See Marckx Case, Series A. No. 31, p. 19, paragraph 41.

86. Communication no. 61/1979.

87. Ibid, paragraph 10.3.

88. See Schmidt. M., "Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform", 41 ICLQ 645 (1992), at 657.

89. Ibid, p. 657.

90. See judgment of Judge Tanaka in South West African Cases (Second phase), ICJ reports, 18 July 1966, at 293, and ICJ advisory opinion in Namibia Case [1971] ICJ Reports 3, 57; see also the ECHR decisions in Abdulaziz, Cabales and Balkandali v UK, Series A No. 94, p. 40, paragraph 85; and Schuler-Zgraggen v Switzerland, Series A No. 263, paragraphs 64-67.

91. See Report of the Commission in East African Asians v United Kingdom, 14 December 1973, 3 E.H.R.R. 76.

92. Abdulaziz, Cabales and Balkandali Case, Series A No. 94, pp. 37-38, paragraph 78. In Schuler-Zgraggen v Switzerland, Series A No. 263, the Court held that a judicial decision based upon an assumption that many married women give up their jobs when they gave birth to a child involved unjustifiable sex discrimination in breach of Article 14 read with Article 6 of the ECHR.

93. See Bayefsky, loc. cit., n 44, p. 21, n 100.

94. For example, only Belgium has entered a reservation to Article 3 of the ICCPR.

95. See, e.g., Zwaan-de-Vries, Broeks v the Netherlands (Communication no. 172/1984), Avellanal v Peru (Communication no. 202/1986), Mauritian Women's Case (Communication no. 35/1978), Pauger v Austria (Communication no. 415/1990).

96. See Bayefsky, loc. cit., n 44, p. 23.

97. Inze Case, Series A No. 126, p. 18, paragraph 41; see also Vermiere Case Series A No. 214C.

98. Ibid, p. 19, paragraph 44.

99. McKean, op. cit. n 9, p. 288.

100. See the Advisory Opinion of the Permanent Court of International Justice in the case concerning Minority Schools in Albania, 6 April 1935, P.C.I.J. Series A/B No. 64, p. 19; and the Dissenting Opinion of Judge Tanaka in the South West Africa Cases (Second Phase), [1966] ICJ Rep. 6, at pp. 250 and 284 et seq. The European Court of Human Rights has recognised that "certain legal inequalities tend to correct factual inequalities", and are compatible with the principle of non-discrimination : Belgian Languages Case (Merits), Series A No. 6, p. 34, paragraph 10. Accordingly, such policies are permissible provided that they do not undermine the principle of non-discrimination itself.

101. Loc. cit., n 10, paragraph 10. Emphasis added.

102. loc. cit., n 10, p. 3, paragraph 1.

103. loc. cit., n 10, p. 4, paragraph 2. Emphasis added.

104. See Nowak, M., op. cit., n 23, pp. 476-478.

105. Loc. cit., n 10, paragraph 10.

106. Nowak, M., op. cit., n 23, p. 477.

107. Communication no. 198/1985, paragraph 10.

108. see e.g., Johnston v Royal Ulster Constabulary [1987] Q.B. 129, ECJ, paragraphs 36 and 38.

109. In Case 345/89, Ministère Public v A. Stoeckel, decision of 25th July 1991, the ECJ held that the Equal Treatment Directive obliges the Member States not to prohibit night work from being done by women.

110. Non-legal measures are envisaged in the HRC's General Comment no. 4 (on Article 3), paragraph 2, loc. cit., n 10.

111. see, in favour of a duty to proscribe private discrimination, Ramcharan, op. cit., n 16, p. 261ff, Nowak, op. cit., n 23, p. 475ff, and, arguing the opposite view, Tomuschat, C., "Equality and Non-Discrimination under the International Covenant of Civil and Political Rights", in Festschrift fur Hans-Jurgen Schlochauer, 1981, at 691.

112. See also Kabaalioglu, H., "The Obligations to "Respect" and "Ensure" the Right to Life", in Ramcharan, B., (ed.), The Right to Life in International Law, 1985, 160, 161-2.

113. See Nowak, M., op. cit., n 23, p. 478; UN doc. A/C3/SR 1098 at paragraphs 6, 25; SR 1099, paragraph 2, and SR 1101, paragraphs 18, 52, where various State members of the Third Committee of the General Assembly suggested that, under the draft Article 26, States were obliged to eliminate discriminatory practices among private

parties in the sectors of education, employment, transportation, access to hotels, restaurants, theatres, parks and beaches; see also HRC member Mr Tarnopolsky at CCPR/C/SR 170, paragraph 82.

114. See McKean, op. cit., n 9, p. 139; UN docs. A/C3/SR 1097, 187; A/C3/SR 1098, 191; A/C3/SR 1099, 194; A/C3/SR 1100, 198; A/C3/SR 1101, 202; A/C3/SR 1102, 209.

115. Paragraph 9, loc. cit., n 10.

116. Article 2(1)(d) of ICERD and Article 2(1)(e) of CEDAW specifically oblige States parties to take all appropriate measures to eliminate race or sex discrimination, respectively, by any persons, group, or organisation.

117. CERD Communication no. 1/1984.

118. Ibid, see paragraph 9.3.

119. CERD Communication no. 4/1991.

120. Article 4, ICERD, reads, in part, as follows:

"States parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, ...

(a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof".

121. See paragraph 6.3.

122. Paragraph 6.4.

123. Paragraph 6.6.

124. The European Court of Justice has interpreted the non-discrimination provisions of the EEC Treaty as having direct effect upon individuals : see Case 36/74, Walrave and Koch v Association Union Cycliste Internationale [1974] ECR 1405 (discrimination based on nationality); and Case 43/75 Defrenne v SABENA (No. 2) [1976] ECR 455 (equal pay without sex discrimination). The equality directives are directly binding only upon public authorities : Case 152/84, Marshall v Southampton and South West Hampshire Area Health Authority [1986] ECR 723. However, the ECJ has also held that the objective of such directives is "to arrive at real equality and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed .... [T]hose measures must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the [private] employer." Case C-271/91, Marshall v Southampton and South West Hampshire Area Health

Authority (No. 2), decision of 2nd August 1993, paragraph 24. Furthermore, where a member State has not correctly transposed a directive into domestic law, so that a victim of discrimination has no remedy against his or her private employer, the victim may be able to obtain compensation from the State for the failure to take the necessary legislative measures : Joined Cases C-6/90 and C-9/90, Francovich and Others v Italian Republic [1991] ECR I-5357.

Discrimination and the African Charter on Human and Peoples' Rights

By The Hon Mr Justice P Nnaemeka-Agu, Former Justice of the Supreme Court of Nigeria

Introduction

Up to the end of the second world war in 1945, the concept and scope of human rights suffered from definite conceptual and structural defects. They were not differentiated from civil rights and were regarded as individualistic and, at best parochial, in scope. Such palpable backdrops of popular upheavals as the Magna Carta in England (1215), the French Declaration of the Rights of Man (1789) and the American Bill of Rights (1791) were looked upon as the exclusive concerns of the countries concerned. Even the founding of the League of Nations after the first world war did not quite completely obliterate these limitations. It was only as a result of the enormity of human sufferings during the second world war and the creation of the United Nations as a forum for regular discussion of international problems hostile to international peace and harmony, the main objective of the UN Charter, that foundations for universality of human rights norms were laid. That spirit of universality found expression not only in the Universal Declaration of Human Rights which was passed by the General Assembly in 1948, followed by the two Covenants (1966) one on Economic, Social and Cultural Rights and the other on Political and Civil Rights. About the same period, similar developments were taking place in different Regions of the world, leading to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), European Social Charter (1961), the Inter-American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (1981).

It is important for purposes of this paper to bear in mind the fact that all these international instruments were somehow connected, being all from a common motivation, to wit: the promotion and protection of human rights. Also, to a large extent, they have identical contents, though with some minor difference in places.

International Human Rights Norms

One of the most significant achievements of the maiden colloquium and precursor of this, which was held in Bangalore, India, in 1988, was, in my opinion, a recognition of the fact that although international human rights norms are not usually directly enforceable in national courts exercising their respective domestic jurisdictions, yet those courts are expected to have due regard to such norms while deciding cases whenever their domestic law - constitutional, statutory, or common law - is uncertain or incomplete.

Another point which must be mentioned in this introduction is the principle of universality of human rights norms. Before 1945, these rights were regarded as the exclusive problem of affected individuals or localities. By the United Nations Charter, 1945, and the Universal Declaration, 1948, they ceased to be so regarded. These norms are usually stated in international or regional instruments, customary international law, principles of the common

law for those within the common law jurisdictions and now internationally developing human rights jurisprudence. Sometimes they are expressed in constitutions and other legislations of different countries. But as was noted from the preamble to the Universal Declaration of Human Rights, that change of attitude was initiated by a realization that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Hence it was proclaimed therein that the "Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction". Hence it proceeded to declare in Art 1 as follows:

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

So, although the Declaration was not intended to be a universal and enforceable code binding on all member states as such, it was designed to set a uniform standard for all member states. It was intended that the entire humanity should aspire to their attainment. The norms are, therefore, universal. To that intent, the underlying concept is that subject to express provisions to the contrary in the domestic laws of any particular state, they are the entitlement of all members of the human family as they are "the foundation of freedom, justice and peace in the world". So they deserve universal and effective recognition by all. One corollary of the universality of these norms is that, subject to express provisions in the domestic laws of a particular state, there cannot be in concept or essence any separate version of any of these norms in Britain or the United States and yet another for Russia, or India, or Nigeria, or South Africa. Indeed recognition and respect of these international norms of human rights make the difference between a civilized society and a barbaric one. They are rights which all civilized societies ought to aspire to. They are rights which are conceptually antecedent to the political society itself and are therefore regarded as "primary condition to a civilized existence."[1] It is from the above general and broad principles that I shall now examine more closely two of such norms, to wit: freedom from discrimination and freedom of expression and the press under the African Charter.

Discrimination

One of the cherished norms guaranteed under the African Charter is equality of all human beings before the law and equal protection of law to all persons: Article 3 of the Charter provides as follows:

Article 3

1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law.

This Article, which is a clear reflection of Art 1 of the Universal Declaration, provides for what is usually referred to as freedom from discrimination. It is important to observe that in this context the African Charter deals with two distinct situations, namely equality of all persons before the law and equal protection of all persons by the law. Although they have the same fundamental objective, to treat all persons alike, it would be wrong to ignore the essential difference between the two. The first which relates more to social organization and association entrenches fundamental equality of all individuals before the law. It proscribes preferential treatment of any person or class merely because of his class. The second which looks rather like the supportive weapon of the first, like the equal protection clause in the Fifth and Fourteenth Amendments to the United States Constitution, is designed to deal a death blow to racial discrimination, but is not limited to it. Both arms of the Article, taken together, deal with discrimination in a very wide context. Both take all the citizens of a state as a group of equals and proscribe any arbitrary classification of them and preferential treatment to any group therein merely because they belong to the group.

It is necessary to begin with, to get a clear idea of what is meant by discrimination. For lack of a clear idea as to its meaning and implication has often led to its being confused with freedom of association which is dealt with in Art 11, or of movement, dealt with in Art 12 and which are basically different.

It is important to note that the word "discrimination" suffers a good deal from imprecision. For not only are there *de jure* and *de facto* discriminations but also it must be admitted that not all legislations, if any at all, apply universally and deal with all persons equally. Discrimination is therefore used in the loose sense and in the strict sense. In the loose sense of the word, it can be said that a Children's and Young Persons Law discriminates against adults. A refugee law discriminates against non-refugees. A law on aliens necessarily discriminates against indigenes. Such examples can be multiplied indefinitely. But that is the loose sense of the word and, fortunately, not the sense in which it is used in the African Charter or any other international convention or instrument. Discrimination in the Charter or any other similar covenant always arises with reference to persons of the same class. Citizens of a state are supposed to be all of the same class. If a law or a policy seeks arbitrarily to classify them or give preferential treatment to a section therein on the basis of race, ethnic ancestry, gender, colour, circumstances of birth, that is discrimination. The opposite of it is the equal protection clause under the Fourteenth Amendment to the United States Constitution, the basis being unjustifiable classification.

Discrimination in the eye of the law, therefore, means the effect of a statute or established practice which confers particular privileges on a class (or a person) arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favoured reasonable distinction cannot be found. It implies "unfair treatment or denial of normal privileges to persons because of their race, age, nationality, or religion, and a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured".[2] Not less prominent are discriminations on grounds of sex, the so-called gender discrimination - and one on ground of colour - the notorious colour bar. Taking a clue from the position in the United States, in essence discrimination operates among persons of the same class or group. This is why the whole gamut of later decisions of courts in the United States go to show that discrimination against the negroes on no other ground but their race and colour is unconstitutional.[3] But let me emphasize that it does not bar all types of classification. It

certainly permits of such on reasonable grounds. The United States Supreme Court in my view put the principle right when it stated:

> as a general proposition (it) is undeniably true that it is not within the scope of the Fourteenth Amendment to withhold from the States the power of classification"[4] but it must appear that (a classification is) based upon some reasonable ground - some difference which bears a just and proper relation to the attempted classification.

The same court reiterated the *rationale* in the *Slaughter House Cases* and in *Williams v Fears*, 179 US 270, p 274 thus:

> The "evil" to be remedied (by the Fourteenth Amendment) was "the existence of laws in the States where the newly emancipated negroes resided, which discrimininated with gross injustice and hardship against them as a class."

It was subsequently held, in *Brown v Board of Education* 347 US 483 obviously over-ruling the doctrine of "separate but equal" approved in *Plessy v Ferguson* 163 US 537 that there would be no legal distinction among all those born or naturalized in the United States and so to separate negro children from others equally born or naturalized in the United States on no other ground but because of their race and colour was inherently unequal and, therefore, unlawful discrimination. It must be repeated that discrimination may be *de jure* when it is by express enactment or *de facto* when it is by established practice. Both of them are odious but it is, perhaps, more reprehensible when it is entrenched as a matter of law, ie *de jure*.

Worthy of consideration in this regard is discrimination in many countries against illegitimate children. It is true that illegitimacy derives from the act of such a child's parents, and not from any fault of the child himself. As the United States Supreme Court pointed out in the case of *Weber v Aetna Casualty & Surety Co* 406 US 164 "visiting condemnation upon the child in order to express society's disapproval of the parents' liaison is illogical and unjust." Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of law that legal burdens should bear some relationship to individual responsibility or wrongdoing. So, the law has usually disapproved of discrimination against children merely on grounds of illegitimacy.

Much more important for our consideration is discrimination based on gender. In many parts of the world laws are passed and policies formulated which clearly discriminate against women for no other reason but that they are females. Britain and some countries of Western Europe are virtually free of this - thanks to the effect of the suffragette movement of late 19th and early 20th centuries. In the United States the attitude of the courts was basically different for a start. In 1873, in the case of *Bradwell v Illinois* 83 US 130 the Supreme Court of the United States approved a law which discriminated against women in the practice of law. This attitude continued in many subsequent cases.[5] But the trend of approval of discriminatory legislation on no other ground but gender was later broken, as shown by the case of *Orr v Orr* 440 US 268 which disapproved of an Alabama legislation which provided for alimony for women and not for male spouses.

In most parts of Africa, the story is not rosey: women are still regarded as underdogs.

In Nigeria, as far back as 1935, the Chief Secretary to Government, in a reply to Lady Abayomi's representation that "both sexes must be equally and fairly educated" and equally paid said:

> Women don't make good saleswomen and since women don't have the financial responsibilities as men, they should not receive equal salaries.[6]

This is clearly a classic example of discrimination. Discrimination against women on grounds of their sex runs through the classical era during which a woman's domestic position was completely subordinated to that of the man, *(patria potestas)* whether he was the father, brother or husband. Women had rather little, if any at all, legal personality. The Hebrews demonstrated their discrimination against women by their usual morning prayer to God by Jewish men:

> Blessed art thou who has not made me a Gentile, a slave or a woman.[7]

Most tribal groups in Nigeria, and in fact most of Africa, regard women as inferior to men. The truth is that this deep rooted prejudice against women was such that in 1957 the United Nations thought it fit to adopt a "Convention on the Elimination of All Forms of Discrimination Against Women." This was one of the ideological backgrounds which informed the insertion of Art 3 already set out above in the African Charter.

Were the African Heads of Government merely content to just enunciate the abstract norm? No. They went further to prescribe their duty in that respect. Hence in Chapter 2 - Duties, they provided in para 3 of Art 18 as follows:

> 3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions.

In most African communities there are many instances of discrimination against women in their substantive laws, in spite of this and the express provision in Art 16(1) of the Universal Declaration of Human Rights for equal rights of men and women. These discriminatory enactments relate to marriage, rights during coverture, and rights over their pre-nuptually and post-nuptually acquired properties. Even parental rights over their children bear out this discrimination. In fact in the traditional concept of most African communities, a wife is part of her husband's properties and in real terms she is only a shade higher than a chattel. In short quite apart from positive enactments, the position of women is made worse by custom and customary concepts.

This brings me to the case of discrimination against children. By many international declarations, covenants and instruments, the need for special case for children has been recognized. Mention may be made of the Geneva Declaration on the Rights of the Child 1924, the UN Declaration of the Rights of the Child 1959; Art 24 of the International Covenant on Civil and Political Rights (1960), Art 10 of the International Covenant on Economic, Social and Cultural Rights (1966), the United Nations Convention on the Rights of the Child and several other international declarations on Social and Legal Principles relating to the Protection and Welfare of children. All of them recognize the fact that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding"[8] and completely free

from discrimination. So, because of his or her special circumstance, the child deserves special care and assistance. Yet, in many countries, particularly in the African Region, the child is discriminated against in laws on many theatres of life. All the rights of the child set out in 45 out of the 54 Articles in the UN Convention on the Rights of the Child are trampled upon at will. Even their right to education in any part of their country is sometimes restricted or denied some children of the same country.

In Nigeria, right to freedom from discrimination is an entrenched right under s. 39 of the 1979 Constitution and s. 41 of the 1981 Constitution. Hence in *Adewole v Jakande*[9], a circular which sought to restrict certain children to only public schools was held to be unconstitutional. Similar provisions exist in many African Countries.

The last type of discrimination that I wish to touch upon is that with respect to voting. Experts on the United States Constitution regard the right to vote as an aspect of human rights[10] As it is so, several legislation that tended to dilute the right to vote by every citizen of the State or to weight the value of a vote higher or lower than others, or deprive a section of the populace of their right to franchise, or restrict the free exercise of the right to vote by any section of the people are denials of human rights and therefore unconstitutional.

Back to The African Charter

One might have been wondering why I have gone so far afield in my discussion of general principles and, particularly in the consideration of decided cases and examples - far away from the African Region to which the African Charter more directly relates. This is deliberate, for the following reasons:

(i) As I tried to show in the introduction, the Universal Declaration and the different Regional Covenants on Human Rights are connected not merely in their historical setting but more relevantly in their motivation and concept. Also, the norms are universal. The result is that decisions on any of them in one country or region will have a persuasive effect on a court in the African Region faced with the same problem in similar circumstances.

(ii) There is no supranational court on human rights in the African Region and, most of the national constitutions in the Region are nascent, in fact post-colonial, resulting in a dearth of precedents. The Magna Carta which laid the palladium for the so much hallowed British liberty, for an example, was forced on the Crown in 1215. American courts have been interpreting human rights norms for over 200 years. While it is conceded that these norms are universal, courts in the African Region ought, in my view, to be freely guided by reference to experiences in similar situations in England, America and elsewhere. In fact, there can be no better guide on any issue of discrimination in the African Charter than decisions of, and precedents by, courts in the United States, for historical reasons.

(iii) It is clear from the text of the African Charter itself that it never intended an isolationist interpretation. It is clear from the preamble that it set out, like other international and regional instruments "to promote and protect human and peoples' rights on the basis of freedom, equality and justice". Like those other international and regional conventions and instruments it was designed "to promote international

co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights". It also reiterates the need for international protection of human rights and for "adherence to the principles of human and peoples' rights and freedoms, contained in the declarations, conventions and other instruments adopted by (*inter alia*) . . . the United Nations." After statements of principles which are in language and essence identical with those of other international and regional instruments, it ennunciates the corresponding duties of member states and individuals. Then it creates the Commission as the enforcement organ and specifically charges it to draw inspiration from the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of various instruments adopted within the specialized agencies of the United Nations of which the state parties to the Charter are members. Thus there is a clear intention in the Charter itself that in its interpretation and application of the African Charter these other human rights instruments could be regarded.

A close look at Art 10 of the Charter set out above shows that discrimination, whether *de jure* or *de facto*, in all its ramifications is contrary to the letters and spirit of the Charter. In other words, to discriminate against any person or group by legislation or practice and policy because of his or their gender, race or ethnic origin, age, circumstances of his or her birth[11], colour, nationality or religion as such, as well as failure to treat all persons equally where no reasonable distinction can be found between persons favoured and those not favoured are all discrimination which runs contrary to the provisions of the Charter. So is the provision of public facilities in such a way as to favour some members of the community and put others at a disadvantage. So also is a legislation which is such as to bar from or diminish the right of any section or group in the community of exercising their full right to vote with equal opportunity. But I must also point out that, like in cases decided on equal protection clause under the United States Constitution[12] it may not be possible to avoid some classification altogether. But where there must exist one it must be based upon some reasonable ground and not a mere arbitrary classification based on the fact that the affected group belongs to a particular class or group that must be singled out.

As I have stated, there is no separate supra-national court of human rights charged with responsibility for enforcing these rights. But this does not mean that there is an absence of appropriate forum for their enforcement. True, the whole s. 4, (Arts 38-56) of the European Convention is devoted to the establishment, organization and powers of the European Court of Human Rights. So does s. 11 (Arts 81-82) of Chapter XI of the Inter-American Convention make provision for a similar Court for the Inter-American regional human rights system. There are no such provisions in the African Charter. But Art 7 of the Charter provides as follows:

Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

So, even though the African Charter differs from both the European and Inter-American Conventions each of which has provided for a Court of Human Rights, power has been given to the Courts in the region, in exercise of their respective domestic jurisdictions, to enforce human rights. Furthermore, the written constitutions of all of them expressly give judicial

power to the judicature. An example is in s. 6 of the Constitution of Nigeria 1978 and 1979. This is a great power. Read together with Art 7 of the African Charter it is clear that the responsibility and power of interpreting and enforcing the provisions on freedom from discrimination both in the Charter and in their domestic jurisdictions, are those of the judges in the region.

Other Specific Provisions

It is from the above general principles that the Courts in the African region, in exercise of their respective domestic jurisdictions, and in the spirit of Art 7 of the Charter, are now expected to interpret and enforce the other specific provisions of the Charter. The following are particularly relevant:

1. *Discrimination against non-nationals of member states:* Paragraphs 4 and 5 of Art 12 provide against discrimination against non-nationals of states parties to the Charter. Mass expulsion of non-nationals on grounds of nationality, racial, ethnic or religious considerations is expressly prohibited. [Art 12(5)].

2. *Non-discrimination with respect to access to the public service of the country:* Every individual is guaranteed equal access to the public service of his or her country. The Constitution of Nigeria, 1979, provides for Federal Character in appointments to the public service. This is a form of affirmative action which should be enforced by the courts. But it is, regrettably, declared by the Constitution to be an element of the Fundamental Objectives and Directive Principles of State Policy which is non-justiciable.

3. *Non-discrimination with respect to access to public property:* Every individual is guaranteed the right to equal access to public property and facilities in the state under Art 13(3). This means that there is no room for separate facilities on grounds of race or ethnic origin even if the facilities were equal. It is gratifying to note that Apartheid laws in South Africa are being repealed.

4. *Equal right to assemble with all citizens:* Similarly, under Art 11, every individual is guaranteed the right to assemble freely with others. This right, however, is not absolute as it could be restricted or derogated from by law enacted in the interests of national security or the safety, health, ethics and rights and freedoms of others.

5. *Non-discrimination with respect to conditions of similar employment:* Every individual is guaranteed equal conditions of employment for similar jobs. S/He shall, under Art 15, receive equal pay for equal work.

6. *Non-discrimination on grounds of sex:* Article 18 guarantees the elimination of all discrimination against women on grounds of their sex and assures every woman of all her rights as guaranteed by international declarations and conventions.

7. *Provision for special care for the Child:* similarly, the child is guaranteed all the protection provided for him/her in all international conventions [Art 18(3)].

Conclusion

The only question is whether judges in Africa can rise to the occasion. In trying to drive home this challenge, I would like to cite a line of cases decided by the United States Supreme Court on racial discrimination. Please pardon my constant reference to the United States. After all, though Great Britain was the father and maker of all constitutions in Commonwealth Africa, the United States was their precursor and remains, somehow, a model for the interpretation and application of written constitutions. Now to the cases:

In *Scott v Sanford* 60 US (19 How), 393 (1857), the United States Supreme Court, in exercise of its interpretative jurisdiction, refused to free Dred Scott, a slave, describing him as property, the subject of a right not capable of having rights. This contributed to the Civil War and was one of the causes of the Fourteenth Amendment. By the exercise of the same jurisdiction even after the Fourteenth Amendment, the same Court approved the doctrine of "separate but equal" in schools and public facilities which became the constitutional mainstay of segregation in *Plessy v Fergusson* 163 US 537 (1896).

Then in the historic case of *Brown v Board of Education* 347 US 438 (1954), the same court, taking into account social and economic factors, decided that segregation in schools was a breach of the constitution because the principle of separation per se, even if the facilities were equal, was inherently unequal. *Brown's* sister case, *Bolling v Sharpe* 347 US 497 (1954), held that segregation in public schools in the District of Colombia, was a breach of Due Process. Thus the court dealt a death knell on segregation, that is, discrimination on grounds of racial origin or colour in schools.

After considering these and other cases, who can doubt that judges and their co-ordinates, lawyers, do change society? It is therefore left to judges and lawyers in the African region to decide whether to follow suit. It is my belief that if they apply the principle of purposeful interpretation with wisdom, knowledge and courage, balancing sociological factors with the purposes of these human rights norms, they will not only make the mark but also save their respective societies from turmoil. Only thus can our societies reap the full benefit of judicial review.

Endnotes

1. Per Eso, JSC, in Ransome-Kuti v A-G of the Federation (1985) 2 NWLR 211.

2. See Baker v California Land Title Co DC Cal, 349 F Sup 235, 239, also Black's Law Dictionary (5th Edn).

3. See Hernandez v Texas, 347 US 475.

4. See Gulf, C & S F Ry v Ellis, 165 US 150.

5. See eg Reed v Reed 404 US 71.

6. See Mba: Nigerian Women Mobilized: Woman's Political Activity in Southern Nigeria 1900-1965 Institute of International Studies, University of California.

7. See Ayo Ayojobi: Journal of Human Rights Law & Practice Volume 1, May 1991 at pp 77-78.

8. See: Preamble to the UN Convention On The Rights of The Child.

9. See Adewole v Jakande (1981) NCLR 262.

10. See Lockhart, Kamisar & Choper: Constitutional Law Cases, etc. (5th Edn) p 1414 et seq.

11. See Dabiri v Gbajumo (1961) All NLR 225; Ebiriukwu v Ohanyerenwa (1955) 4 FSC 212.
Also: Developing Human Rights Jurisprudence, Volume 4 pp 65-79 per Karibi Whyte, JSC.

12. Eg Gulf, C & S F Ry v Ellis, 165 US.

Racial Discrimination and Freedom of Expression in the United States

By The Hon Mr Justice Nathaniel R Jones, Circuit Judge, United States Court of Appeals for the Sixth Circuit

Introduction

There are lessons to be learned from the American experiment with inserting democratic values into the nation's institutions. Even with imperfections and errors, human rights and individual liberties have been advanced as a result of guarantees built into the Bill of Rights. The thrust of this paper is to assess that part of the American experiment that deals with efforts to end racial discrimination through the use of guarantees in the Bill of Rights. Without the freedom to engage in protest speech, to assemble and associate, to write and publish freely, neither slavery nor its legacy could be effectively challenged. After all, the essence of American slavery and its legacy involved the curtailment of legal, political and social rights of the black minority.

The United States was founded back in 1776 upon principles of democracy and liberty - of fundamental inalienable rights belonging to all persons, secure against majoritarian rule. Yet at the time of its founding, blacks, as a racial minority, were afforded no such rights. Although the language of the Constitution and the Bill of Rights seemed to exclude no one,[1] black Americans were seen as having no rights. The dominant white culture, in fact, denied the very humanity of black Americans.

From that darkest of beginnings, the Constitution now has been transformed to contain the present day guarantees of equal protection and fundamental fairness for all regardless of race. The transformation was tragically slow, taking the better part of two centuries, and was characterized by starts, stops, and even relapses. I would like to discuss that transformation today - how the Constitution, a document that originally tolerated slavery and racial oppression, was expanded to grant equal rights to persons originally left out of its protections.

The transformation was due to people who fought and sometimes died for an end to discrimination. But, as I should like to emphasize today, the success of their efforts depended in part upon the constitutional guarantee of freedom of expression. It has been through the exercise of the freedoms of speech, assembly, and petition that black Americans have been able to consistently challenge the system of segregation and racial inequality that has stained the nation.[2] Black Americans, early in their struggle for equality, realized that the exercise of their First Amendment freedoms through unfettered political and social discourse was essential in their struggle.

I will begin by describing the development of the Constitution and federal civil rights guarantees in the United States, and focus on how freedom of expression has proved to be an indispensable tool for the promotion of racial equality. I will then discuss the problems that arise in dealing with expression that promotes racism. Due to a recent resurgence of racist incidents in the United States, concerned legislature and public institutions have responded

with a variety of regulations designed to arrest racist speech or related activities. These measures have, interestingly, been met with opposition on the grounds that they trample over First Amendment rights. The apparent clash between the mandate for racial equality contained in the Fourteenth Amendment and freedom of expression as enshrined in the First Amendment has caused some to wonder how freedom of expression and the right to be free from discrimination can be reconciled.

A Brief History of the Development of the Constitution and Federal Civil Rights Protections

At the outset, I would like to dwell a bit on the development of the Constitution and federal civil protections. The Constitution of the United States, adopted in 1787, contained no listing of individual freedoms. Soon after it was adopted, it became apparent that it was a serious political mistake to omit reference to fundamental human rights. Thus, four years later, after a lively debate, Article V of the original Constitution was invoked for the purpose of adding the Bill of Rights.

The Bill of Rights has been praised and celebrated. Despite its genius, it offered no solace to black Americans, who were flatly excluded from its protections. As Justice Taney stated in a 1857 Supreme Court case declaring that Congress had no authority to prohibit slavery in states or territories where it did not already exist, blacks were "subordinate and inferior beings" who "had no rights which the White man was bound to respect."[3]

Four years later the Civil War began.

Within six months after the end of the war, the Thirteenth Amendment became part of the Constitution. It abolished slavery and involuntary servitude, finally resolving the contradiction - slavery in the land of liberty - that was long ignored. Soon thereafter, the Fourteenth Amendment, which guaranteed equal protection to all regardless of race,[4] and the Fifteenth Amendment, which granted blacks the vote, were adopted.

In addition to the incredibly important equality provisions of the Fourteenth Amendment, the amendment's Due Process Clause also was of far-reaching importance. Prior to the adoption of the Fourteenth Amendment, the Bill of Rights was held to place limitations only on the federal government. Given that the Bill of Rights did not impose behavioral restrictions on the states, they felt free to limit the rights and freedoms specified in the Bill of Rights, such as freedom of expression, in any manner they saw fit. The ratification of the Fourteenth Amendment changed this. Under its Due Process Clause, the first ten amendments, in time, were held to bind the states as well. Thus, through the Due Process Clause of the Fourteenth Amendment, freedom of expression and all other rights and freedoms granted in the first ten amendments were held to apply to the states. The incorporation of the Bill of Rights into the law of the states through the Due Process Clause is one of the most profound and far reaching developments of American constitutional law.[5] Following the Civil War, the southern states wasted no time in enacting "black codes" to maintain the subjugation of the newly free blacks. Due to the legal segregation in the South, and the absence of laws prohibiting segregation in the North, discrimination and economic subjugation prevailed. The promises of the Civil War amendments remained empty for nearly a century.[6]

As Justice Thurgood Marshall noted on the 1987 bicentennial celebration of the adoption of the Constitution, it was only through suffering, struggle, and sacrifice that these awesome defects in the original document were overcome. He stated that "[t]he government [the framers] devised was defective from the start, requiring several amendments, a civil war and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today."[7]

The social transformation that occurred in the 20th century started long before the famous civil rights "movement" of the 1960s, with its Montgomery bus boycott, the sit-ins, or the 1963 March in Washington with Dr Martin Luther King's moving "I Have a Dream" speech. The National Association for the Advancement of Colored Persons (NAACP), as well as the American Civil Liberties Union (ACLU), of the twenties sought to attain equality, with a new, and very effective, strategy - the use of litigation as a tool for social change. They systematically and carefully constructed legal cases to maximize their potential for meaningful legal victories.

This strategy proved brilliant. Perhaps the culmination of this effort was the case of *Brown v Board of Education,* in which the Supreme Court unanimously ruled that segregated schools were inherently unequal, and therefore a violation of the Fourteenth Amendment. The "separate but equal" doctrine that had been used to justify state-enforced segregation was never to gain validity again. The *Brown* case unleashed the power of the Fourteenth Amendment to break down the legal caste system in the South.

Immediately after the *Brown* decision, there was much resistance to school desegregation, some of it violent and much of it encouraged by public officials.[8] But in addition to resistance by white segregationists, the *Brown* decision instilled hope in black people. Demonstrations, demanding an end to all forms of segregation, became louder and more insistent; the calls for equal treatment under law reached a crescendo all across the states of the old confederacy and beyond. The direct action demonstrations dramatically confronted segregation at its very source, in the streets, on buses, in restaurants, the neighbourhoods, campuses, in city halls, court houses and state houses.[9] These actions reached a moving climax, when 250,000 people - of all races - assembled in 1963 in the nation's capital to demand legislation designed to achieve racial justice.

New legislation was enacted, including the Civil Rights Act of 1964,[10] the 1965 Voting Rights Act,[11] and the 1968 Omnibus Civil Rights Act with its Fair Housing provisions.[12] The very sobering report of a presidential commission in 1968, which described "two increasingly separate Americas" also spurred responsiveness to change.[13] Change did occur. Remedies began to take root. New opportunities opened up. However, negative reactions also began to set in. They were fueled by distortions, buzzwords, and effective use of the media by majority groups to shift the attention away from the historic constitutional transgressions visited upon blacks dating back to the colonial times. The new issues were whether children should be bused to schools, whether affirmative action stigmatizes blacks, whether the remedies benefitted black persons with no direct injury, and whether these remedies resulted in "reverse discrimination" against whites. Ultimately, these race-conscious remedies came under massive political and legal attack by a combination of forces.[14]

Those forces came together with such energy as to prove to be an overpowering political factor. In 1989, the seamless web of civil rights remedies that was spun in the post-*Brown* period began unraveling. The Supreme Court, which had repeatedly approved of affirmative

action in principle as a remedy for discrimination, began to cripple the civil rights enforcement machinery.[15] In addition to these judicial decisions, other factors contributed to the dilution of civil rights progress. Primary among these other factors was that minorities lost the art of shaping public debates. They forfeited to their adversaries the formulation of issues. Furthermore, they permitted them to seize and dominate the instruments of public persuasion once used so effectively by civil rights advocates, notably, the platform, radio, television, and editorial pages. Into that vacuum stepped adversaries fully prepared to recast issues so that victims of historic discrimination appeared to be modern day villains.

Life has now been restored to the civil rights enforcement mechanisms through the enactment of the 1991 Civil Rights Act. The Civil Rights Act of 1991 has a rejuvenating effect on enforcement of federal discrimination laws, including the fair employment provisions of Title VII of the Civil Rights Act of 1964. The new Act encourages victims of discrimination to file lawsuits by heightening the potential for success and by permitting increased monetary awards.[16]

What this says is that rights enshrined in the First Amendment have played a very significant role in advancing the civil rights movement. America has witnessed a revolution in which blacks, as well as women and other minorities, have won the right to equality under the law.

The Significance of the First Amendment in the Struggle for Civil Rights

I now move on to examine, in an historical context, the ways in which the First Amendment aided in bringing about change. The demands for racial equality, as mentioned above, began at the time when the first slaves arrived at Jamestown, Virginia in 1619. Those demands, first by the slaves, then by the abolitionists, and later by the descendants of the slaves themselves, were largely communicated through the spoken or written word.[17] The First Amendment, with its protection of freedom of speech, petition, assembly, association, and the press, played an important role in the struggle for minority rights. Although these guarantees were sometimes denied to persons challenging slavery and discrimination, they nevertheless remained essential to the campaign to rid this nation of this evil of slavery and its vestiges.

The campaign to vindicate rights guaranteed under the Thirteenth, Fourteenth, and Fifteenth Amendments relied intensely on the First Amendment. *Brown* spurred recognition that an essential part of the civil rights strategy was to seek the most effective use of the Fourteenth Amendment. Minorities also recognized that remedial legislation might, according to the circumstances, be required to enforce the guarantees of the Fourteenth Amendment.[18] To compel action to provide remedial legislation, a direct action campaign of non-violence, including boycotts, marches, civil disobedience, and group organization, proved to be the indispensable strategy for the post-*Brown* period. That necessarily required resort to the First Amendment guarantees of assembly, speech and petition.

Relying on the exercise of the freedoms of speech, assembly, and petition, black Americans in the early 1960s challenged the system of segregation and racial inequality that stained the nation. However, just as blacks realized that the exercise of First Amendment rights were essential to effect change, public officials and private groups knew that the most effective way to thwart change was to frustrate blacks as they attempted to exercise these rights. Thus, boycotts, marches, and other forms of nonviolent protest were throttled by injunctions, other legal obstacles, and violence. Clashes over the rights of blacks to express their opposition to

racial discrimination through a variety of nonviolent means soon developed into litigation - in which the legal system once again became a formidable barrier to advancement.

There are several cases dating from the post-*Brown* era that dramatically demonstrate how vigorous protection of free expression served as a necessary catalyst to the social transformation in which blacks gained recognition of their rights. The case of *NAACP v Button* serves as a good example.[19]

In that case, state and local laws banning the "improper solicitation of any legal or professional business' were used to try to stop the NAACP from instituting lawsuits that challenged racial discrimination. Justice Brennan delivered the landmark opinion of the Supreme Court, which held that the activities of the civil rights organization and its legal staff were forms of expression and association protected by the First and Fourteenth Amendments. These activities could not be regulated by a state under the guise of regulating the legal profession. The NAACP, said the Supreme Court, could assert its own right and that of its members and lawyers to associate for the purpose of assisting persons who sought legal redress for the infringement of their constitutionally protected rights. The First Amendment thus protects more than theoretical discussion: it protects the right to assemble and associate for the purpose of advocating for change. The *Button* decision thus illustrates the interrelationship between the First and Fourteenth Amendments.

Here is another. The First Amendment also played an essential role in frustrating the State of Alabama in its repeated attempts to oust the NAACP from the state. In *NAACP v Alabama ex rel Patterson,* the state of Alabama alleged that the NAACP's activities in Alabama were causing irreparable injury to citizens.[20] The state ordered the NAACP to produce its membership list. When the organization refused to comply, the state adjudged the NAACP in contempt and imposed a fine of $100,000. The Supreme Court overturned the latter and ruled that the United States Constitution permitted members of the NAACP to be protected from having their affiliation with the organization disclosed. The opinion states that:

> Immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of its members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have. Accordingly, the judgment of civil contempt and the $100,000 fine which resulted from [the NAACP's] refusal to comply with the production order in this respect must fall.[21]

That decision didn't stop the State of Alabama from trying to stop the NAACP. In fact, the right of the NAACP to operate in Alabama reached the Supreme Court four times. In the fourth case, Alabama had complained that the civil rights organization had continued to carry out its activities in "violation of the Constitution and laws of the state relating to foreign corporations" and that its activities violated "other laws of the state of Alabama . . . and [were] detrimental to the state . . .."[22] A decree was entered enjoining the NAACP from doing "any further business of any description or kind" in Alabama and from attempting to qualify to do business there.

Among the acts charged against the association that were causing "irreparable" injury to the property and civil rights of citizens of Alabama were the following:

1 that it had [paid three black women] to encourage them to enroll as students in the University of Alabama in order to test the legality of its policy against admitting Negroes;

2 that it had furnished legal counsel to represent [one of the three women] in proceedings to obtain admission to the University;

3 that it had "engaged in organizing, supporting and financing an illegal boycott" to compel a bus line in Montgomery, Alabama not to segregate passengers by race;

4 that it had "falsely charged" officials of the State and University of Alabama with acts in violation of state and federal law;

5 that it had "falsely charged" the Attorney General of Alabama and the Alabama courts with "arbitrary, vindictive, and collusive" acts intended to prevent it from contesting its ouster from the State "before an impartial judical forum," and had "falsely charged" the Circuit Court and Supreme Court of the State with deliberately denying it a hearing on the merits of its ouster;

6 that it had "falsely charged" the State and its Attorney-General with filing false contempt proceedings against it, knowing the charges to be false;

7 that it had "willfully violated" the order restraining it from carrying on activities in the state;

8 that it attempted to "pressure" the Mayor of Philadelphia, the Governor of Pennsylvania, and the Penn State football team into "A boycott of the Alabama football team" when the two teams were to play each other in the Liberty Bowl;

9 that it had "encouraged, aided, and abetted the unlawful breach of the peace in many cities in Alabama for the purpose of gaining national notoriety and attention to enable it to raise funds under a false claim that it is for the protection of alleged constitutional rights;"

10 that it had "encouraged, aided, and abetted a course of conduct within the state of Alabama, seeking to deny to the citizens of Alabama the constitutional right to voluntarily segregate;" and

11 that it had carried on its activities in Alabama without complying with state laws requiring foreign corporations to register and perform other acts in order to do business within the State.[23]

The Supreme Court unanimously rejected Alabama's effort to stop the NAACP from operating within the state. As noted above, Alabama had claimed, in part, that the NAACP was engaged in organizing, supporting, and financing an illegal boycott of Montgomery's bus system. Justice John Marshall Harlan, who authored the Court's opinion, described as "doubtful" the "assumption that an organized refusal to ride on Montgomery's buses in protest against a

policy of racial segregation, without more, in some circumstances violates a valid state law."24 The veneer that Alabama had applied to the case was stripped away by Justice Harlan in the following language: "This case, in truth, involves not the privilege of a corporation to do business in a State, but rather the freedom of individuals to associate for the collective advocacy of ideas. Freedoms such as [this] are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference."[25]

Justice Harlan had earlier outlined his view on the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues. In *NAACP v Alabama ex rel Patterson,* he wrote: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as the court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[26]

The intersection of basic civil rights and the methods of protest was depicted in another major case. In 1966, black citizens residing in and near Port Gibson, Mississippi, presented white officials with a list of nineteen specific demands. They included a call for the desegregation of all public schools and facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers. Also included were demands that Negroes be addressed with the courtesy titles of Mr, Miss, or Mrs, rather than by terms such as "boy", "girl", "shine", or other discourteous and demeaning names. The petitioners stated that they hoped to solve the problems in the community "by mutual co-operation and efforts at tolerant understanding," rather than by resort to peaceful demonstrations and boycotts. However, they added that picketing and demonstrations would be inevitable "unless there can be real progress towards giving all citizens their equal rights."

A boycott of white merchants ensued when a satisfactory response was not forthcoming. Its acknowledged purpose was to secure compliance by civic and business leaders with the list of demands for equality and racial justice. It was supported by speeches and non-violent picketing. Participants repeatedly encouraged others to join in the cause.

A number of public officials to whom the petition was presented also owned the businesses that were the objects of the boycott. These merchants sued the NAACP and 146 black citizens alleged to have become culpable by virtue of attending meetings of the NAACP at a local church. The action was filed in a state court, and plaintiffs sought to recover losses caused by the boycott and to enjoin future boycotts. The state court rendered a judgment against the NAACP and the individuals for all business losses that were sustained over a seven-year period. The court further enjoined the NAACP and others from engaging in future boycott activity.

The case ultimately reached the United States Supreme Court,[27] on petition by the NAACP and others - thus confronting the Court with the question of whether the non-violent elements of the boycott were protected by the First Amendment. The Supreme Court made the following points in its opinion reversing the lower court's judgment:

> [T]he non-violent elements of petitioners' activities are entitled to the protection of the First Amendment. [Through exercise of their First Amendment right of speech, assembly, association, and petition, rather than through riot or revolution, petitioners sought to bring about political, social and economic change.]

> While States have broad power to regulate economic activities, there is no comparable right to prohibit peaceful political activity such as that found in the boycott in this case.
>
> [Petitioners are not liable in damages for the consequences of their non-violent protected activity.] While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of non-violent, protected activity; only those losses proximately caused by the unlawful conduct may be recovered.
>
> [Similarly, the First Amendment restricts the ability of the State to impose liability on an individual solely because of his associations with another.] Civil liability may not be imposed merely because an individual belongs to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.[28]

These cases demonstrate the importance of a vigorous protection of the freedom of expression, including the rights to speak, assemble, associate, and petition the government freely, in the struggle for civil rights in America. It is true, without a doubt, that blacks and other minorities, have been beneficiaries of the guarantees of the First Amendment, and that much of the progress in the struggle for civil rights would have been impaired absent the guarantees of the First Amendment.

Speech and Expressive Conduct that Promotes Racism: The Tension Between First Amendment Jurisprudence and the Pursuit of Equality

America has no doubt witnessed great progress in its efforts to attain the constitutional guarantees of equality under the law. Yet to this day, racial discrimination still limits the opportunities and hopes of many black Americans. Many neighbourhoods remain racially divided, though not by any law. Unemployment rates remain disproportionately higher for blacks, and the delivery of medical care is so racially stratified that, in 1991, it was called a racist system by the Journal of the American Medical Association. Moreover, in the last few years, incidents of racism have been increasing. Implicated also in this phase of America's bout with racial discrimination are the values ensconced in the Bill of Rights. Other nations with diverse racial, religious and ethnic elements will also have to come to terms with the tensions resulting from clashes between competing guarantees and human rights values.

The United States Congress has reflected its concern about racist crimes by enacting a Hate Crimes Statistics Act.[29] It has not, however, enacted any laws generally addressing hate speech or crime.[30] To stem the increasing tide of incidents of racially-motivated harassment and violence, local and state legislatures, as well as policy-makers of universities and other public institutions, have turned to regulation. The majority of states in the United States have enacted a variety of anti-hate, anti-discrimination regulations referred to as "hate speech" or "hate cries" acts. These regulations generally fall into several categories: 1) bans on speech or expression with a racist content, 2) penalty enhancements for crimes motivated by bigotry or prejudice, or 3) prohibitions of certain forms of harassment, such as rules against cross-burning or against wearing masks.[31] These regulations are aimed at protecting the right of black Americans to be free from discrimination.

The wisdom as well as the legality of these regulations has been the subject of intense debate.[32] Many of these anti-hate, anti-harassment regulations have been challenged as violating the First Amendment's protection of the freedom to advocate ideas, no matter how offensive. The right to freedom of expression is considered a preeminent right in America. Yet, although the right to free speech is a "preferred right," it has never been an absolute right. Some forms of speech,[33] including defamation, obscenity, "fighting words" (words which by their very utterance incite an immediate breach of the peace), and the advocacy of imminent lawless action fall completely outside the protection of the First Amendment.[34] Even protected speech can be restricted by content-neutral regulations that are narrowly tailored to serve a compelling governmental interest. Perhaps the major premise behind the First Amendment is the concept that the government may not proscribe speech or expressive conduct because of disapproval of the ideas expressed. Designed to guarantee that public debate is uninhibited and open, the First Amendment protects speech we hate as much as speech which we hold dear. Thus, despite the fact that racist expression may cause anger, hurt feelings, or resentment, it is generally protected under the First Amendment unless it falls within the category of fighting words or advocates *imminent* lawless action.

Equality and the right to be free from discrimination are also highly valued principles in American jurisprudence. Constitutional provisions, as well as numerous federal, state, and local statutes, are designed to protect the rights of racial and other minorities to be free from discrimination in education, housing, employment, and many other areas. Racist incidents and other forms of bigotry implicate and may jeopardize the right to equality.[35] Thus, the tension between liberty and equality seems unavoidable in the context of speech or expressive conduct that promotes racism. The dilemma has led some to question whether the constitutional guarantee of freedom of expression found in the First Amendment and the constitutional guarantee of equality found in the Fourteenth (and Thirteenth) Amendment are allies or antagonists.[36] Yet, where racial, ethnic, and religious diversity exists, mechanisms for reconciling the intersection of various interests must be found and protected.[37]

The clash between the First Amendment and anti-discrimination regulations has surfaced in a number of cases. A recent example is the anti-harassment statute enacted by the city of St. Paul in the state of Minnesota. The ordinance made it a misdemeanor to place on private property a burning cross or other symbol which one knows or has reason to know "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." In 1991, a seventeen year old white youth burned a cross in a black family's yard, and was charged with violating the ordinance.

The state Supreme Court upheld the misdemeanor charges against the white youth, rejecting his claims that the ordinance violated the First Amendment. It concluded that the ordinance was narrowly tailored to fulfil a compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.[38] The United States Supreme Court reversed the state court, holding that the hate crimes ordinance violated the First Amendment.[39]

According to Justice Scalia, who authored the majority opinion, the ordinance fell afoul of the First Amendment as overbroad and as an impermissible content-based regulation. Although recognizing the ability to proscribe "fighting words," the majority objected to the ordinance as selectively picking and choosing among the type of fighting words that were to be proscribed. Specifically, the ordinance proscribed only fighting words containing messages of bias based on race, color, creed, religion, or gender, but did not cover other types of

fighting words, such as those directed against people on the basis of political affiliation or homosexuality. In other words, according to the majority, it selectively silenced only certain types of fighting words, and was therefore impermissibly content-based.[40] Although it agreed the community must confront notions of racial supremacy, the majority concluded that the "manner of confrontation cannot consist of selective limitations upon speech." The majority added that "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[41]

The four concurring Supreme Court justices agreed that the ordinance was unconstitutionally overbroad in that its proscriptions reached beyond fighting words.[42] The ordinance allowed prosecution for expressive activity which merely inspired anger, resentment, or hurt feelings, rather than being limited to fighting words that were likely to incite an immediate breach of the peace. These justices reiterated that such acts, under prior Supreme Court precedent, fell clearly within the protection of the First Amendment.

Despite their concurrence in striking down the ordinance, the four concurring justices bluntly criticized the majority's rationale. Justice Blackmun labeled the majority's rationale as "folly."[43] In the words of Justic Blackmun:

> I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of St. Paul from specifically punishing the race based fighting words that so prejudice their community.[44]

Thus, if the ordinance were not overbroad, these four justices would have upheld the St. Paul ordinance. In their view, it regulated expressive conduct that is wholly proscribable (fighting words), not on the basis of viewpoint or content, but in recognition of definite harms caused by such activity.[45]

The *RAV* ruling may cause serious confusion about First Amendment jurisprudence and may impair the ability of states and localities to combat racist activity. The rationale of the majority suggests that states and cities could punish racially hateful acts only if every other type of hate-inspired expression or conduct was likewise punished.[46]

At the least, this decision is likely to lead to confusion. In fact, one day after the RAV decision, the highest court in Wisconsin struck down the state's hate crime law that enhanced the penalty against defendants who intentionally selected their victim on the grounds of race.[47] This case arose when a black teenager, Todd Mitchell, after watching the popular and racially charged movie "Mississippi Burning," said to a group of other young black men: "There goes a white boy, go get him." The group beat the white boy, fourteen years old Gregory Riddick, knocking him unconscious and leaving him in a coma for four days. The jury convicted Mitchell of aggravated battery and separately found that he had intentionally selected his victim because of the boy's race. Based on the state statute which created an enhanced penalty for a crime whenever the defendant selected his victim on account or race, the defendant's sentence was increased from two years of imprisonment to four.

The state Supreme Court held that the statute violated the First Amendment directly by punishing what the legislature has deemed to be offensive thought. The court found the law unconstitutional as a restriction on freedom of thought (which is protected as much as speech itself).[48] Additionally, the statute was struck as unconstitutionally overbroad. Based on the

fear that words spoken before or during a crime could result in an enhanced penalty, the statute might have a chilling effect upon every kind of speech.[49]

The Supreme Court, in June of this year, unanimously rejected the decision of the Wisconsin High Court, holding that Mitchell's First Amendment rights were not violated by the application of the penalty enhancing statute in his sentencing.[50] Chief Justic Rehnquist, who authored the decision, noted that judges have always used a wide variety of factors in sentencing, including the defendant's motive. Although motive may be considered, a defendant's abstract beliefs, no matter how offensive, may never be taken into consideration in sentencing.

Litigation has also risen out of racist incidents on university campuses. At the University of Michigan, for example, a group of black women using a campus lounge came across a stack of handbills declaring "open hunting season" on blacks. This and other racially motivated incidents prompted the university to enact a speech code that banned behavior that stigmatizes or victimizes a person based on race or which "creates an intimidating, hostile or demeaning environment." Many leading universities have enacted various forms of regulations against racially motivated speech or harassment. The University of Wisconsin prohibited students from directing racist remarks to particular individuals with the intent to demean them and create a hostile environment. Proponents of these regulations argue that a university has an obligation to ensure that no one will be deprived of the right to equal educational opportunity and to eradicate prejudice and discrimination. Opponents fear that stifling expressions of racial animus would not counter, and could even aggravate, the underlying problem of racism.[51]

Both of the anti-hate speech codes mentioned, from the University of Michigan and from the University of Wisconsin, were invalidated as overbroad and thus in violation of the First Amendment.[52] All remaining reported decisions involving hate speech on campuses have likewise struck down limitations on expression.[53]

As these cases demonstrate, the United States has favored freedom of expression over censorship or restrictions on expression in the interests of racial equality and the elimination of discrimination. This conclusion is all the more apparent in comparison with other nations and with international law. The International Covenant on Civil and Political Rights, which the United States has recently ratified, obligates states parties to enact legislation which prohibits "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[54] Legislation prohibiting expressions of hatred that "constitute incitement to discrimination, hostility, or violence" pursuant to the Civil and Political Covenant would be invalidated under current Supreme Court jurisprudence.[55]

Conclusion

The campaign for equality in America has changed over the history of the nation. In the words of two scholars:

> The struggle for equality of opportunity has shifted from the effort to win the legal rights of citizenship to the effort to gain fair access to society's resources, particularly to jobs, housing, and education; from the fight against crude and savage forms of racial discrimination to the fight against more subtle forms of racial subordination; from claims based solely on race to claims based on an amalgam of race and poverty,

from the goal of statistical desegregation to the more elusive goal of true cultural and socioeconomic integration.[56]

The struggle for civil rights was aided greatly by vigorous protection of the First Amendment right to free expression, including the rights to free speech, assembly, association, and petition. In the latter phase of the efforts to achieve true social and economic integration and equality, local regulations designed to counter racist incidents and ideology have come under attack as violations of the First Amendment. The nation now faces the challenge of reconciling the Bill of Rights' guarantee of freedom of expression with the interests of equality and the eradication of racial discrimination to which the Constitution commits all citizens.

Endnotes

1. The words "race" or "slavery" do not appear in the original Constitution or the Bill of Rights.

2. The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceable assembly, and to petition the Government for a redress of grievances."

3. Dred Scott v Sanford 60 US (19 How) 393, 15 LEd 691 (1857).

4. The Fourteenth Amendment provides in relevant part: "[No State shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. It was not until 1969 that all of the guarantees of the Bill of Rights were held applicable to the states. Respect by the states for the Sixth Amendment guarantees of a fair, speedy, and public trial was also essential in the struggle for civil rights.

6. For an excellent written and photographic account of the history of the struggle for civil rights, see Ira Blasser and Bob Adelman, Visions of Liberty: The Bill of Rights for All Americans (New York: Arcade Publishing, 1991), 190-226.

7. Justice Thurgood Marshall, "Reflections of the Bicentennial of the United States Constitution," Address Before the Annual Seminal of the San Francisco Patent and Trademark Law Association, in Maui, Hawaii (6 May 1987), in 101 Harv L Rev 1, 2 (1987).

8. For example, in 1957, the Governor of Arkansas called out the National Guard to prevent black teens from entering a high school in Little Rock.

9. National Advisory Commission on Civil Disorder (Kerner Report), 1968.

10. This civil rights law outlawed racial discrimination in public accommodations such as restaurants and hotels, forbade discrimination in any federally funded program and

authorized the Attorney-General to sue segregated public facilities. In its very important Title VII, it prohibited discrimination in employment by most private employers. 42 USC s. 2000e-2(a)(a).

11. The Voting Rights Act, and its subsequent amendments, outlawed discriminatory voting tests. Also, to offset the ability of Southern officials to create methods of circumventing civil rights laws, the Act required "preclearance" - the requirement that any local change in voting procedures or election laws had to be approved first by the federal government.

12. The Act outlawed racial discrimination in the sale, purchase, rental, or financing of housing.

13. See Kerner Report, supra n 9.

14. Jones, "The Desegregation of Urban Schools Thirty Years After Brown," 55 U Colo L Rev 515 (1984).

15. In these cases, for example, the Supreme Court 1) ruled that a Reconstruction era civil rights statute, now codified as 42 USCA Section 1981, could not be construed as affording a cause of action for discrimination in public employment contracts beyond the initial hiring stage, Patterson v McClean Credit Union 110 S Ct 2363 (1989); 2) held that white employees may challenge a consent decree in a Title VII case on the grounds of "reverse discrimination," Martin v Wilks 109 S Ct 2180 (1989); 3) shifted the burden of production of evidence to the plaintiff in a disparate impact case (which requires proving that an otherwise neutral policy has a discriminatory effect on a minority while it benefits others) and undercut the use of statistical disparities in proving a disparate impact, Wards Cove Packing v Antonio 109 S Ct 2115 (1989).

16. The Civil Rights Act of 1991 allows a person who brings an intentional discrimination claim against an employer under Title VII to request a jury trial and to be awarded compensatory and punitive damages to supplement traditional back-pay remedies.

The Act also negates the effect of the Supreme Court decision in Wards Cove, supra n 15, regarding the burden of proof in disparate impact discrimination cases. The 1991 Act reduces the burden of proof on the plaintiff and imposes a more stringent burden on an employer to justify a challenged practice.

The Act also amends s. 1981 so that it affords a cause of action for discrimination in all stages of employment, including terminations. It thereby negates the Supreme Court's restrictive interpretation of the Act in Patterson, supra n 15.

17. Among the guarantees was freedom of the press. The black press co-founded by John Russworm and Samuel Cornish in 1827 with the publication of Freedom's Journal, triggered a greater use of the written word by blacks to protest slavery. Historians and scholars credit William Monroe Trotter with playing an important role in "re-establishing" the black press as a dominant force in the black protest movement after a period of remission.

18. Section 5 of the Fourteenth Amendment gives Congress the power to "enforce by all appropriate legislation the provisions of the Article."

19. 371 US 415 (1963).

20. 357 US 449 (1958).

21. Id at 466. The right of association, which is not mentioned in the First Amendment, was implied from the rights to free speech and assembly.

22. NAACP v Alabama ex rel Flowers, 377 US 288 (1964).

23. Id at 302-03.

24. Id at 307.

25. Id at 309-10.

26. 357 US 449 at 460.

27. NAACP et al v Clairborne Hardware Co et al, 458 US 886, 889-90 n 26 (1982).

28. Id at 1911-12, 913, 918, 920.

29. Hate Crimes Statistics Acts, Pub L 101-275, 104 Stat 140, 23 April 1990.

30. Although Congress hasn't issued any laws generally addressing hate speech or crime, federal civil rights laws, such as s. 1985, the Religious Vandalism Act, and the Fair Housing Act have been used to prosecute hate crimes. See infra n 46 for one example.

31. The case of Hernandez v Virginia 406 SE 2d 398 (Va 1991), serves as an interesting example of this type of regulation. In Hernandez, a state appellate court held that the wearing of a mask by a member of the Ku Klux Klan was not expression protected by the First Amendment. The court reasoned that the wearing of the mask itself, unlike the wearing of the white robe and hood, did not convey a particular message. "The mask adds nothing, save fear and intimidation, to the symbolic message expressed by the wearing of the robe and hood." Thus, although the right of a Ku Klux Klan member to wear a white robe and hood is protected as expressive conduct, the wearing of a mask is not.

32. Although much has been written on these controversial topics, one outstanding resource is Sandra Coliver ed, Striking a Balance: Hate, Freedom of Expression and Non-discrimination (University of Essex: Article 19, 1992).

33. The term "speech" includes expressive conduct. US v O'Brien 391 US 3667 (1968); US v Eichmann 496 US 313 (1990) (holding that flag burning is expressive conduct and therefore protected under the First Amendment).

34. The fighting words doctrine was articulated in Chaplinsky v New Hampshire in 1942. Fighting words were defined as words which by their very utterance inflict injury or

incite an immediate breach of the peace. The Supreme Court, in subsequent decisions, has carefully scrutinized any decisions under Chaplinsky and appears to only recognize the second prong of the doctrine. See Ronna Greff Schneider, "Hate Speech in the United States: Recent Legal Developments," in Striking a Balance, supra n 32 at 272.

The case of Brandenburg v Ohio 395 US 444 (1969), which governs the restriction upon the advocacy of violence or other illegal conduct, is somewhat parallel to the fighting words doctrine. According to the Brandenburg Court, only speech which is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action" can be restricted. The mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment.

35. See also Richard Delgado, "Campus Antiracism Rules: Constitutional Narratives in Collison," 85 Northwestern Univ L Rev 343 (1991) (reprinted in Striking a Balance, supra, n 32 at 288).

36. See eg Ronna Greff Schneider, "Hate Speech in the United States," supra, n 34 at 269.

37. Commentators have proposed a variety of approaches for reconciling the conflict between freedom of expression and equality. See eg Burt Neuborne, "Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech," 27 Harv Civil Rights-Civil Liberties Law Rev 371 (1992). Neuborne proposes to reconcile the tension by prohibiting limitations upon expression that causes "bruised emotions, rage and anguish" but allowing limitations on expression that results in a "loss of the ability to derive tangible benefits from a common enterprise." Id at 397.

38. RAV v City of St Paul, Minnesota, 464 NW 2d 507 (Minn 1991).

39. RAV v City of St Paul, 112 SCt 2538 (22 June 1992). Chief Justice Scalia writing the opinion for the majority, was joined by Kennedy, Rehnquist, Souter, and Thomas, JJ.

40. The majority emphasized that the government may not regulate speech based on "hostility - or favoritism - towards the underlying message expressed." Id at 2545.

41. Id at 2548. The majority concluded: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." Id at 2550.

42. Id at 2559 (Justice White was joined in his concurring opinion by Blackmun, O'Connor, and Stevens, JJ.

43. Id at 2561.

44. Id at 2561.

45. Id at 2571.

46. States could use alternative approaches to prosecuting perpetrators of racial harassment. For example, a defendant may be convicted under a federal statute, 18

USC s. 241, which makes it a crime to conspire to injure or intimidate any citizen in the free exercise of federally protected rights. See eg, US v McDermott 822 FSupp 582 (ND Iowa, 1993) (holding that even though cross-burning is a form of expression, an indictment against defendants under this statute for burning a cross in order to threaten and prevent African-Americans from using a park did not violate the First Amendment.)

The tort of intentional infliction of emotional distress may provide another mechanism for responding to hate speech.

47. Wisconsin v Todd Mitchell 169 Wis 2d 153, 163, 485 NW 2d 807, 811 (1992).

48. Id at 815.

49. Id at 815. One of the two dissenting judges described the hate crimes law as "a law against discrimination." In his view, the statute did not target the expression of bigotry, but rather the "act of discriminatory selection plus criminal conduct." Bablitch J, dissenting, at 819.

50. Wisconsin v Todd Mitchell 113 S Ct 2194 (11 June 1993), reported in 61 USLW 4575.

51. See Nadine Strossen, "Balancing the Rights To Freedom of Expression and Equality: A Civil Liberties Approach to Hate Speech on Campus," in Striking a Balance, supra, n 32).

52. Doe v University of Michigan 721 F Supp 852 (E D Mich 1989); UMW Post, Inc v Board of Regents of University of Wisconsin, 774 F Supp 1162 (ED Wis 1991).

53. See Ronna Greff Schneider, supra n 34 at 275. Despite this, universities could employ the rationale of Mitchell to arrest racially motivated incidents through the use of enhanced penalities under campus penal codes for bias motivated incidents.

54. Art 20(2).

55. Such legislation would be invalidated as a violation of the First Amendment for two reasons. First, the expression of offensive ideas (such as advocacy of discrimination and hatred) is protected by the First Amendment unless the expression falls into the categories of fighting words (words that are likely to lead to an immediate breach of the peace) or expression which advocates imminent illegal action. See supra, n 34. Moreover, legislation which punishes only certain types of offensive speech, such as that advocating national, racial or religious hatred, would run afoul of the Supreme Court's most recent decision in the case of RAV v St Paul, supra, p 18-19.

56. Visions of Liberty, supra, n 6 at 226.

Discrimination - The Australian Response

By The Hon Mr Justice Michael Kirby AC CMG, President of the New South Wales Court of Appeal, Australia, and Chairman, Executive Committee, International Commission of Jurists

Not such a "Fair Go Society"

Most Australians believe that they live in an egalitarian society. Perhaps their conception is best captured by what we Australians laconically and frequently call the right to a "fair go".

History, however, casts a somewhat different light on Australia's attitude to basic human rights. The settlement of Australia from 1788 onwards by successive waves of immigrants led to the expropriation of the traditional lands of the indigenous population by the British colonists and other arrivals. By early in the nineteenth century the entire Australian continent had been claimed in the name of the British Crown. Only recently, since the decision of the High Court of Australia in *Mabo v The State of Queensland*[1] in 1992, has native title been recognised, and even then, it has been limited to special classes. The degradation of the Aboriginal people of Australia extended to the subversion of their culture through a programme of forced assimilation into white society, including usually forced conversion to Christianity by outback missions, and often the removal of their children by the state, such children to be raised by white families. Aborigines were not entitled to vote in government elections, or eligible to be counted in a census, until the 1960s[2].

Australia's poor record of racial discrimination extended well beyond its own indigenous people, including the Torres Strait Islanders. For much of the twentieth century Australia maintained an official discriminatory immigration practice called the "White Australia Policy", which evinced a formal preference for British and European migrants. It was upheld by law. Until the 1960s this policy had the support of virtually all Australian leaders, political parties, the churches and the trade union movement.

Until the concept of multiculturalism emerged in Australia in the 1970s, a negative attitude was officially displayed towards those who did not adopt the culture and language of the dominant white population. In this respect, Australian values were not so very different from those of the white settlers in South Africa. All that was different was the ratio between the white settlers and the indigenous people.

Constitutional Protections

There is no general prohibition of discrimination in Australian law akin to that which exists, for example, in the equal protection clause of the American Constitution. However, on its face, the Australian Constitution contains various provisions which guarantee certain basic human rights. Placitum 51(xxxi) of the Constitution provides that the acquisition of the

property of any State or person under Federal law shall be on just terms. Section 80 affords a trial by jury for offences against Federal laws. Section 92 protects freedom of movement among the States[3].

Section 116 prohibits the Federal legislature from discriminating on religious grounds. Section 117 protects an interstate resident, who is an Australian citizen, from the operation of a law, wherever the effect of a law is to subject an interstate resident to a disability or discrimination to which that person would not be subject as an interstate resident[4].

The leading judgment in the *Mabo* decision mentioned above, included the suggestion that the Australian common law will itself have to adapt to international human rights standards[5]. Perhaps, in this way, Australia will secure the protection of basic rights supplementing the common law[6].

The Federal legislature has powers under the Australian Constitution which are capable of being used for the protection of human rights. These powers, contained in s. 51, enable the Federal legislature to make relevant laws, *inter alia*, with respect to naturalisation and aliens, marriage, people of any race, immigration and emigration, the influx of criminals and external affairs. All of these heads of federal power provide ripe subject areas for discrimination and thus for federal laws prohibiting and redressing it.

Despite the plethora of constitutional powers which could support Federal anti-discrimination legislation, the most widely used power remains Placitum 51(xxix), the foreign affairs power. This power has been held to entitle the Federal Parliament to enact domestic legislation based on international treaties to which Australia is a signatory and also to enact laws upon matters of international concern, external to Australia[7].

Federal Anti-Discrimination Legislation

The proliferation of Federal and State anti-discrimination statutes since the mid 1970s signifies recognition and concern at every level of government that discrimination has been, and continues to be, a serious problem facing Australian society. In the 1990s, classes within Australian society, such as women, Aborigines, migrants, homosexuals and the physically and intellectually impaired, continue to be the victims of discriminatory treatment by virtue of their special attributes.

There are four major Federal anti-discrimination statutes. The Racial Discrimination Act 1975 (Cth) (RDA) is based on the International Convention on the Elimination of All Forms of Racial Discrimination. The RDA covers both the Federal and State governments and their instrumentalities. Under the RDA it is unlawful to discriminate on the ground of race of a person or of a relative or associate of that person. Trade unions can lodge complaints on behalf of members under the RDA.

The Sex Discrimination Act 1984 (Cth) (SDA) is based on the International Convention on the Elimination of All Forms of Discrimination Against Women. The SDA also covers Federal government and instrumentalities. Under the SDA it is unlawful to discriminate on the ground of a person's sex, marital status or pregnancy.

The SDA expressly applies to the Crown in the right of the States, generally to State government departments, in education, accommodation, land, administration of Federal laws and programmes and application forms, etcetera. The Disability Discrimination Act 1992 (Cth) (DDA) purports to cover the whole of Australia including the crown in the right of the States, state government and instrumentalities. The term "disability" is broadly defined in the DDA. It includes physical, sensory, intellectual and psychiatric impairment, mental illness and the presence in the body of organisms causing disease. The last part of the definition is intended to cover people who are HIV positive or who have AIDS.

The definition also includes a disability which presently exists, which existed in the past and one which may exist in the future, as well as a disability which is imputed to a person. An employer has a defence to an allegation of discrimination on the ground of disability if the person is unable to carry out the inherent requirements of the job or would, in order to carry out those requirements, require services or facilities which it would impose unjustifiable hardship on the employer to provide.

The Human Rights and Equal Opportunity Commission Act 1986 (Cth) (HREOCA) is enacted in pursuance of Australia's obligations under the Discrimination (Employment and Occupation) Convention 1958 (ILO 111), the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.

The HREOCA establishes the Human Rights and Equal Opportunity Commission. The Commission administers the HREOC Act, the RDA, the SDA and the DDA. The functions of the Commission, performed on its behalf by the Commissioners and the staff of the Commission, include inquiry into whether enactments, acts or practices are consistent with human rights. It also provides conciliation, advice to government, education in relation to human rights and promotion of human rights and of equality in employment.

The Commission has the primary function of inquiring into alleged infringements of the SDA, RDA and DDA, which respectively prohibit discrimination on the grounds of sex or race in employment, education, accommodation, disability and other areas.

In order to eliminate duplication of Federal and State services, under co-operative arrangements with New South Wales, Victoria, Western Australia and South Australia, State anti-discrimination bodies can, with some exceptions, receive and investigate complaints arising under relevant Federal legislation on behalf of the Federal Commissions.

The Commission's decisions may have an impact upon the administrative decision makers in several respects. First, policy formation leading to the drafting of new legislation is likely to be affected by the Commissioner's powers to make inquiry as to whether an enactment, or proposed enactment, would be inconsistent with a human right. If it is, or may be, that right may become the subject of an inquiry, conciliation and a determination. This may lead to a review of government policy. That happened, for example, when the criteria applied by the Federal Department of Education for the grant of benefits under the Tertiary Education Allowance Scheme were found to discriminate against students who could not complete the normal workload expected of other students.

State Anti-Discrimination Legislation

Every state in Australia, except Tasmania, has its own anti-discrimination legislation. The Northern Territory was the last to enact such legislation in 1992. Discrimination is one of the relatively few areas of law in Australia where the applicable legislation at both federal and state levels are almost identical. The federal laws have a "savings clause" so that State laws will not be invalid as long as they can operate concurrently with federal laws. This provision is, of course, subject to the Constitutional provision on inconsistency (s. 109). Some State legislation also covers the additional grounds of discrimination on the grounds of political or other belief or activity.

The New South Wales Anti Discrimination Act 1977 (NSW) (ADA) makes it unlawful to discriminate on the grounds of sex, including sexual harrassment and pregnancy, race, including colour, nationality or ethic origin, marital status, physical impairment and homosexuality in certain area of public life including employment, the provision of goods and services, accommodation, public education and registered clubs. The unlawful reason for discrimination need not be a "dominate" reason. It is sufficient that it be a significant reason to fall within the prohibition mandated by the Act.

In summary, the common grounds specified in the various Federal and State anti-discrimination laws are as follows:

Race and related grounds

Race is covered by all laws. Related grounds of colour, and national or ethnic origin are covered by the Federal, New South Wales and Victorian legislation. Federal law includes prohibition on discrimination in immigration. It extends to discrimination based on the race of an associate or relative, as a prohibited ground. New South Wales and Victoria specify nationality as a ground.

Sex and related grounds

Sex and marital status are prohibited grounds in all existing legislation. Sexual harassment has been held to be discrimination on the ground of sex. It is also separately identified as an unlawful act in the statutes of Victoria, South Australia and the Commonwealth. Pregnancy is a prohibited ground in the Federal legislation and in the South Australian and Western Australian legislation. It is an aspect of sex discrimination in New South Wales. In Victoria pregnancy, which is a characteristic of the female sex, would fall within sex discrimination on that ground. Homosexuality and sexuality are prohibited grounds in New South Wales, South Australia and Queensland respectively. Attempts to introduce a sexuality ground into the Victorian legislation were defeated in Parliament, but the fact of being a parent, childless or of being a *de facto* spouse is a prohibited ground in Victoria.

Disability or impairment

Physical disability or impairment is a prohibited ground in New South Wales, Victoria, South Australia and Western Australia. Intellectual disability or impairment is a prohibited ground only in New South Wales, Western Australia and Victoria. The statutes contain complex

definitions of what amounts to a physical or intellectual impairment. Statutory exemptions limit the field of impairment discrimination more than other grounds of discrimination.

Lawful religious or political belief or activity

A lawful religious or political belief or activity is a prohibited ground of discrimination in Victoria. Western Australia prohibits discrimination on the basis of a religious or political conviction. The Commonwealth and the other States do not deal with this ground at all. In the Federal sphere, s. 116 of the Australian Constitution provides certain prohibitions on religious discrimination.

Victimisation

In each State, any action taken against a person who has lodged a complaint of discrimination because they have lodged a complaint (known as victimisation) is unlawful. This is so even if the original complaint is unsuccessful.

Discrimination in employment on other grounds

Discrimination in employment on grounds not covered by Federal or State legislation (such as age, medical record or political belief) may be dealt with by the Human Rights and Equal Opportunity Commission. The Commission will attempt to conciliate between the employee and employer, but, in the absence of any legal prohibition, if conciliation fails, no other legal action can presently be taken.

Each Act includes specific exemptions for certain activities which would otherwise be prohibited discrimination. These include bona fide occupational qualifications, life insurance and superannuation, most sporting activities, single sex and religious or educational institutions and charities. In addition, there is provision for individual temporary exemptions to be given. The width of the statutory exemptions has been criticised on the grounds that they sometimes remove the incentive for an organisation to create non-discriminatory methods of conducting its activities.

Affirmative Action Laws

There is also an exemption in all of the Australian legislation for special measures designed to remedy the effects of past discrimination on disadvantaged groups. This leaves the way open for affirmative action programmes to be implemented.

Affirmative action programmes cover a wide range of activities. However, basically they refer to actions taken to reduce the disadvantages faced by members of groups which have suffered discrimination in the past, such as Aborigines, women, and people with disabilities. They range from providing English classes for migrants to ensuring that job selection and promotion committees contain adequate numbers of women.

The implementation of affirmative action schemes is an acknowledgement that statutes which prohibit discrimination cannot eliminate structural discrimination in the workforce, however helpful they might be in individual cases. The Affirmative Action (Equal Opportunities for

Women) Act 1986 (Cth), requires most public and private sector employers to phase in affirmative action schemes in relation to recruitment and promotions over a three year period.

The Act does not require the filling of mandatory quotas of female employees. It requires employers to set up and apply an "affirmative action programme" which is designed to review and monitor their employment practices to eliminate discrimination against women, and to ensure that they take steps to promote equal employment opportunity for women. The Federal legislation follows similar schemes operated by the Commonwealth and a number of State governments within their public services for many years.

Some Leading Cases - The Response of Courts and Tribunals

Under the provisions of the ADA both direct and indirect discrimination are unlawful. Direct discrimination is treating someone unfairly or unequally simply because they belong to a group or category of people. Some recent Australian decisions illustrate examples of direct discrimination.

In *Metwally v University of Wollongong*[8], the Equal Opportunity Tribunal held that the university, through its employees, had unlawfully discriminated against an Egyptian PhD student on the ground of his race. The student's supervisors and other staff had allegedly adopted an antagonistic attitude to him which resulted in his work suffering. This attitude manifested itself in the form of racist remarks and slurs, including an affront to the student's Islamic beliefs. The case became embroiled in the courts in a constitutional argument concerning the validity of the provisions of the State Act (under which Mr Metwally had lodged his complaint) after the Federal Act on racial discrimination (RDA) was enacted. The High Court held that the State Act was overridden by the Federal statute. In this way Mr Metwally lost his complaint under State Law[9].

In *Leves v Haines & Ors*[10], the Equal Opportunity Tribunal held that direct discrimination on the ground of sex had occurred, where the choice of elective subjects offered by a Girls' High School was based on the general imputation of "domestic" characteristics of females, leading to the failure to introduce industrial arts subjects to the Girls' High School. Less favourable treatment occurred as the complainant had diminished access to the benefits of provision of scholastic and vocationally relevant schools. The finding was upheld in the courts[11].

In *Waterhouse v Bell*, the complainant was refused registration as a racehorse trainer by the Australian Jockey Club (AJC) because she was married to a person who had been "warned off' all racecourses as a result of his involvement in a horse substitution scandal. The New South Wales Court of Appeal found that the refusal by the AJC to grant a licence to the complainant was based on a characteristic imputed to married women, namely, that all wives are liable to be corrupted or influenced to do wrong by their husbands. On that basis, the Court held that the refusal constituted discrimination against the complainant on the ground of marital status[12].

In *Anstee v Allders International Pty Ltd* the complainant alleged she had been discriminated against on the ground of her sex in her employment by Allders International. The complainant was given notice by Allders, in accordance with company policy, her employment would be

terminated on her sixtieth birthday. The Equal Opportunity Tribunal held that Allders had afforded the complainant conditions of employment which were less favourable than those afforded to a man[13]. She had been dismissed, whereas a man would not have been dismissed. The decision was effectively upheld in a challenge brought to the State Supreme Court[14].

In *Squires v Qantas Airways Limited,* the complainant alleged that Qantas had discriminated against women in the recruitment, promotion and placement of cabin crews. Qantas conceded that up to June 1983, females were not afforded the same promotional opportunities as male flight attendants. However, Qantas argued that the complainant had not been discriminated against on the ground of her sex because Qantas was complying with two industrial awards negotiated in 1974 covering Airline Hostesses (F) and Flight Stewards (M) respectively. The Tribunal, however, was unable to find anything in either award which would provide Qantas with a defence under the Act, or which could support an argument that Qantas did not discriminate on the ground of sex because it had relied on one of the relevant industrial awards[15].

In *Bugden v State Rail Authority,* the complainant alleged that he had been discriminated against on the ground of physical impairment due to his colour blindness. The State Rail Authority (SRA) relied on an exception in the ADA which states that discrimination on the grounds of physical impairment will not be unlawful where it is reasonable having regard to any limitations on the capacity of the physically impaired person to carry out the work required to be performed in the relevant job or requires special facilities or services which would be needed by the person.[16]

The Equal Opportunity Tribunal found that the SRA had acted under a general policy of not employing colour blind people in the relevant depots, and that this was not reasonable in the circumstances because the complainant could have performed his particular work duties without special facilities[17]. It is now very clear from this case that an employer must consider the specific attributes of a job applicant and the specific requirements of the job very carefully before refusing the application on the basis of a perceived impairment of the applicant.

In *Hill v Water Resources Commission* the complainant alleged to the Equal Opportunity Tribunal that she had been the victim of sexual harassment at the hands of co-workers in the Water Resources Commission, that the Commission had discriminated against her on the grounds of her sex and that the Commission, as the responsible employer, was found liable.

The Tribunal found that the Water Resources Commission, as the employer, had taken little or no effective action to stop the behaviour of its male employees, despite frequent complaints by Ms Hill and another employee[18]. This case confirms that employers can be liable under the ADA for the acts or omissions of their employees. The case also confirms that sexual harassment is unlawful under the ADA, even though it is not expressly referred to in the Act.

Cases of Indirect Discrimination

Indirect discrimination occurs where there is a requirement, for example, a rule, policy, practice or procedure, that is the same for everyone, but which has an unequal or disproportionate effect on a particular group. Unless the requirement is "reasonable in all the

circumstances" it will be indirectly discriminatory.

For indirect discrimination to be established it must be shown that -

(i) the discriminator required the complainant to comply with a requirement or condition,

(ii) a substantially higher proportion of persons of a different status than the complainant are able to comply with the requirement or condition than persons of the same status as the complainant,

(iii) the complainant must not be able to comply with the requirement or condition, and

(iv) the requirement or condition is unreasonable in the circumstances.

The leading case on indirect discrimination in Australia is *Australian Iron and Steel v Banovic*[19]. In that case, thirty four female ironworkers employed, or formerly employed, by Australian Iron and Steel Ltd (AIS) at its Port Kembla steelworks complained to the Equal Opportunity Tribunal on the basis that AIS had discriminated against them in the following three ways -

1. AIS had earlier denied women employment opportunities as ironworkers, because they were women, but at the same time had offered men similar employment;

2. AIS policy to retrench ironworkers based on the length of service discriminated against women on the grounds of their sex because AIS had only recently changed its policy and commenced to employ women; and

3. AIS had discriminated on the basis of sex by actually dismissing some of the women on the basis of its "last on, first off" policy.

The issue of indirect discrimination arose, although the "last on, first off" policy appeared neutral as between people of different sexes, because of the effect of the past discriminatory hiring practices, whereby the employment of women was delayed in preference to the employment of men. This meant that a higher proportion of the female members of the workforce, as compared to the male members, were retrenched.

The majority of the High Court of Australia held in this case that the system of reverse gate seniority could not be regarded as reasonable even though its result was that men and women were retrenched in the AIS workforce in proportion to their respective numbers. This could only be done and be reasonable if those numbers were not themselves the result of prior discrimination. See *Australian Iron and Steel Pty Ltd v Banovic*[20].

The ADA also provides that public acts of racial vilification are against the law in certain circumstances. To amount to racial vilification, there must be a public act which incites hatred towards, serious contempt for or severe ridicule of, a person or group of persons on the ground of their race. However, unlike the Victorian and Western Australian anti-discrimination legislation, religious discrimination is not a ground for complaint under the NSW ADA.

It was recently proposed that the ADA should be amended, in line with the findings of the NSW Anti-Discrimination Board's Inquiry into HIV and AIDS Related Discrimination, to make it unlawful to vilify persons, or groups of persons, on the ground of homosexuality or HIV infection, whether real or assumed. A Bill for that purpose has been introduced into the New South Wales Parliament. It has been strongly criticized in the media upon grounds of derogation from rights to freedom of expression.

The Machinery to Combat Discrimination

In each State there is an agency established to receive and investigate complaints of discrimination and to attempt to conciliate between the parties concerned. Anyone who believes that they have been a victim of discrimination can contact this agency in person, or by telephone or letter to discuss their concerns. If the agency is to take any further action, such as conciliation, a formal complaint must be lodged with it within a specified time limit, usually of one year from the act of discrimination alleged.

In New South Wales this agency is the Anti-Discrimination Board. In Victoria, South Australia and Western Australia, it is the Commissioner for Equal Opportunity. All these agencies can deal with complaints under State or Federal legislation. In Queensland, Tasmania and the Northern Territory, complaints under Federal laws can be made to offices of Human Rights and Equal Opportunity Commission.

If a complaint cannot be settled by conciliation, it can go to a formal hearing in the Federal Human Rights and Equal Opportunity Commission, or in the Equal Opportunity Tribunal (New South Wales, South Australia and Western Australia) or in the Equal Opportunity Board (Victoria).

While laws prohibiting discrimination have helped to reduce some of the more blatant and objectionable forms of discrimination, the experience in Australia over a decade of the operation of these laws demonstrates that they have not by any means provided a complete solution to problems faced by disadvantaged groups. Strong and enforceable laws against discrimination are very important for the self respect and defence of groups such as Aborigines, women, migrants, gays and people with disabilities. They should not, however, be seen as self implemented still less as a panacea for social inequality.

One of the more sanguine observers on the operation of anti discrimination legislation in Australia, Professor Margaret Thornton of La Trobe University, has offered this evaluation on the effect of the legislation and case law so far[21]:

> . . . Anti-discrimination legislation does represent a halting step towards formal recognition of the fact that white, Anglo-Celtic, heterosexual, able-bodied men have power in our society and that they will inevitably exercise it in their own interest. Heretofore, the universality of liberal legalism has sought to deny this truth. It may be that legislation can practically deal with only the more excessive manifestations of social power exercised over subordinates. In spite of its inability to fulfil the unrealistic expectations that it transforms our society so that the scales of justice are not perpetually tipped in favour of the powerful, anti-discrimination legislation does

serve an important symbolic and educative function. First, the deontological dimension underscores the right of individual women and minority group members to be treated fairly. Secondly, the collective dimension asserts the dignity and worth of women and minorities, and rejects entrenched classwide stereotyping. Thirdly, the public interest dimension, embodied in the legislative texts, confirms the fact that equal treatment is a matter of societal concern; it is not just the private concern of those who are deleteriously affected. These three strands are collectively empowering women and minority group members . . .

Beyond Legislation - Changing Attitudes

Anti-discrimination laws can help rectify some wrongs. They can also assist in setting standards of acceptable and unacceptable social conduct. In many countries, including Australia, such laws have begun with useful work on racial and religious prejudice. They have then moved into prejudice on the ground of gender. Now they are tackling other causes of prejudice: such as age, handicap, disability and sexual orientation or HIV status. There is a common enemy here. It is stereotyping. In the context of HIV/AIDS that enemy impedes the spread of educational messages and the self esteem of those who must receive them. However, to be truly successful in combating discrimination and sustaining the effort, we must begin at the source of the problem: in the minds of those whose behaviour we must hope to modify - for their own protection, for the protection of others and for the protection of society.

This is why human rights education is now assuming such an important role in Australian strategies to control unfair discrimination. The province of law is limited. But it is still real. And it may help to build a society in which protecting the fair go is translated from a national mythology into day to day experience for all Australians.

Endnotes

1. (1992) 175 CLR 1.

2. See Constitution Alteration (Aboriginals) 1967 (No. 55 of 1967).

3. See Cole v Whitfield (1988) 165 CLR 360.

4. See Street v Queensland Bar Association (1989) 168 CLR 461.

5. See ibid n 1 above, p 34 (Brennan J).

6. See M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 Uni NSWLJ 1.

7. See The Commonwealth v Tasmania (Tasmanian Dams Case) (1983) 158 CLR 1.

8. (1984) EOC 92-030.

9. See The University of Wollongong v Metwally (1984) 158 CLR 447. See also Viskauskas v Niland (1983) 153 CLR 280.

10. (1986) EOC 92-167.

11. See Haines v Leves (1987) 8 NSWLR 442 (CA).

12. See Waterhouse v Bell (1991) 25 NSWLR 99 (CA).

13. (1985) EOC 92-132.

14. See Allders International Pty Ltd v Anstee & Ors (1986) 5 NSWLR 47 (SC).

15. (1985) EOC 92-102; (1985) EOC 92-135; 12 IR 21; 12 IR 30 (EOT)

16. See Qantas Airways Ltd v Gubbins (1992) 28 NSWLR 26 (CA).

17. (1992) EOC 92-434.

18. (1985) EOC 92-127.

19. (1989) EOC 92-271 (EOT).

20. (1989) 68 CLR 165,

21. Thornton, M (1990) The Liberal Promise; Anti-Discrimination Legislation in Australia. Oxford University Press, p 261.

Discrimination and Equality Rights in Canada

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Discrimination and the Law Before the Enactment of Anti-Discrimination (Human Rights) Laws

(a) The Constitutional Position

Canada's basic constitutional document - the British North America Act of 1867 (now called the Constitutional Act 1867) - makes no reference to the equality rights of individuals.[1] In addition, the premable to that document declares that the new federal union would have "a constitution similar in principle of that of the United Kingdom", which incorporates the doctrine of Parliamentary sovereignty. Until recently, the most influential assertion of this doctrine was that of A V Dicey:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.[2]

Although some aspects of the details of this definition have been criticized in the United Kingdom[3] and in the Commonwealth,[4] the essential result was that courts would not question laws enacted by Parliament on the grounds that they were unwise or discriminatory. The best illustration of this is provided in two decisions of the Judicial Committee of the Privy Council[5] (JCPC) concerning Canada.

In 1899 the JCPC was concerned with a challenge[6] to legislation enacted by the Legislature of British Columbia, which forbade "Chinamen" from working underground in mines. The JCPC held that "courts of law have no right whatever to inquire whether [the] jurisdiction has been exercised wisely or not". Similarly, some four years later,[7] the Committee was faced with a provision in the British Columbia Elections Act denying the franchise to "Chinamen, Japanese and Indians". They declared that "the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic upon which their Lordships are entitled to consider". It is not surprising therefore, that in 1914[8], the Supreme Court of Canada upheld the validity of an Act of Saskatchewan which prohibited white women from residing or working in "any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman". Although in the *Bryden case* the legislation was held invalid on the ground that it infringed federal jurisdiction over "naturalization and aliens", it is quite clear from all three cases that, as long as Parliament and the provincial legislatures did not exceed their legislative jurisdiction as set out in the British North America Act, discriminatory legislation could not be challenged on the ground that it was unconstitutional. In Canada this constitutional position was not changed until the coming

into force of s. 15, the equality rights provision of the Constitution Act 1982, on 17 April 1985.[9]

(b) Racial Discrimination and the Civil (Common) Law

As early as the seventeeth century, English courts applied a duty upon innkeepers and common carriers to provide service to all members of the public without discrimination, unless there was some reasonable or lawful excuse for the refusal. However, this duty was narrowly construed. It was not extended to lodging or boarding houses'[10], nor to public taverns'[11], nor to places of entertainment[12], nor to restaurants.[13]

In addition, even though the common law did recognize a cause of action for discriminatory denial of access to inns, the compensation ordered was so inadequate that pursuit of the remedy was not encouraged. The leading case is *Constantine v Imperial Hotels Ltd.*[14] Constantine was a West Indian cricketer who booked a reservation at the hotel for himself and his family. Upon arrival, however, they were denied access in a contemptuous and insulting manner. Allegedly, the management told the plaintiff that "they would not have niggers in the hotel because of the Americans staying here". Although the trial judge held that the plaintiff had suffered "much unjustifiable humiliation and distress", he felt bound by previous decisions and awarded damages of £5.

The limitation of the common law protection against discrimination in Canada can be illustrated by the decision of the Supreme Court of Canada, in 1939, in the case of *Christie v York Corporation.*[15] Christie was a black man who was denied service in a beer tavern on the ground that the waiter had been instructed "not to serve coloured people". The appellant sued for damages. Four of the five judges of the Supreme Court held that the respondent could refuse service on the ground that "the general principle of the law of Quebec was that of complete freedom of commerce", and that it could not be argued "that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order".[16]

Another area of activity with respect to which Canadian courts might have held that discrimination was contrary to public policy, but did not, was real property transactions.[17]

In these circumstances,[18] then, it is no wonder that legislatures, with no aid from the judiciary, had to start to enact anti-discrimination legislation, the administration and application of which have largely been taken out of the courts and given to statutory human rights commissions.

The Rise and Spread of Human Rights Legislation

In Canada the first half century after Confederation witnessed an increase in the number of statutes which discriminated against certain people.[19] Most of these were still with us until World War II. It is only since that time that all these laws have been repealed, probably partly as a reaction to the horrors of racism exhibited just before and during World War II, partly because of the coming to independence of tens of African and Asian former colonies, and

partly because of the lead of the United Nations, both to bring about de-colonization and to draft new standards condemning racial discrimination.

(a) The History

The first anti-discrimination legislation started to be enacted during the 1930s[20] but it was not until near the end of World War II that modern human rights legislation started to spread. In 1944 the Province of Ontario enacted the Racial Discrimination Act[21] which prohibited the publication or displaying of signs, symbols, or other representations expressing racial or religious discrimination. The Act was brief, and limited to one specific purpose, and it was not until 1947 that the first detailed and comprehensive statute was enacted: The Saskatchewan Bill of Rights Act.[22]

The Saskatchewan Act did not deal only with anti-discrimination legislation, but with the fundamental freedoms as well. Moreover, it purported to bind the Crown and every servant and agent of the Crown. Enforcement of this legislation was through penal sanctions: the imposition of fines, perhaps injunctive proceedings, and imprisonment. There was no supervision for any special agency charged with administration and enforcement of the Act that was left to the regular enforcement of police and courts as would apply with respect to any other provincial statute that includes prohibitory provisions, such as the liquor or vehicles Acts.

Experience soon showed, as it had in the United States, that this form of protection - although better than none, and having a certain usefulness by way of indicating a government's declaration of public policy - was subject to a number of weaknesses. First, there was a reluctance on the part of the victim of discrimination to initiate the criminal action if complaint to the police had failed to result in a prosecution and it always appeared that the police did not act. Second, there were all the difficulties of proving the offence to the criminal standard of proof, ie beyond a reasonable doubt (and it is extremely difficult to prove that a person has not been denied access for some reason other than a discriminatory one). Third, there was reluctance on the part of the judiciary to convict - a reluctance probably based upon a feeling that some of the prohibitions impinged upon the traditional freedom of contract and the right to dispose of one's property as one chose. Fourth, without extensive publicity and education, most people were unaware that such legislation existed for their protection. Members of minority groups, who were the frequent victims of discrimination, tended to be somewhat sceptical as to whether the legislation was anything more than a sop to the conscience of the majority. Fifth, and this was as important a factor as any, the sanction (in the form of a fine or even if it were imprisonment) did not help the person discriminated against in obtaining a job, a home, or service in a restaurant, hotel, or barbershop.

To overcome the weaknesses of quasi-criminal legislation, Fair Accommodation and Fair Employment Practices Acts were enacted. These new types of human rights provisions were copied from the legislative scheme first introduced on this continent in 1945 in the State of New York.[23] The New York legislation was an adaptation of the methods and procedures that had proved effective in labour relations. These Acts provided for assessments of complaints, for investigation and conciliation, for the setting up of commissions or boards of inquiry where conciliation proved unsuccessful and - but only as a last resort - prosecution and the application of sanctions. The first of this new legislation, the Fair Employment Practices Act,

was passed in Ontario in 1951[24] and within the next decade and a half most of the provinces enacted similar statutes. The first Fair Accommodation Practices Act was enacted by the Province of Ontario in 1954[25] and again most of the other provinces followed within the decade.[26]

The Fair Employment and Accommodation Practices Acts were an improvement over the quasi-criminal approach, but they still continued to place the whole emphasis in promoting antidiscrimination legislation on the victims, who were obviously in the least advantageous position to help themselves, as if discrimination were solely their problem and responsibility. The result was that very few complaints were made and very little enforcement was achieved.

The next major step was taken by Ontario in 1962 with the consolidation of all human rights legislation into the Ontario Human Rights Code[27] to be administered by the Ontario Human Rights Commission, which had been established a year earlier. By 1975, every province in Canada had established a Human Rights Commission to administer antidiscrimination legislation and, in 1977, the Canadian Human Rights Act established a federal commission.[28] With minor variations, all the legislation is similar except that Saskatchewan and Quebec have additional protections.[29]

(b) The Scope

All of the human rights acts in Canada prohibit discrimination on racial grounds, in the wide sense of "racial" defined in the United Nations Convention on Elimination of all Forms of Racial Discrimination. Thus, both "race" and "colour" are referred to in all the Acts. Other terms, relating to one's ancestry or racial origin, include: "national extraction", "national origin", "place of birth", "place of origin", "ancestry", "ethnic origin", and "nationality", with the last term used in Manitoba, Ontario and Saskatchewan. All prohibit discrimination on grounds of "religion" or "creed" or both.

In addition to the racial grounds, all jurisdictions have legislation prohibiting discrimination on grounds of "sex" and, all but Alberta and Nova Scotia, on grounds of "marital status" or "family status"; all but British Columbia, Alberta, Nova Scotia and Newfoundland, prohibit discrimination on the ground of "age", and five - Manitoba, Newfoundland, Prince Edward Island, Quebec and Yukon - prohibit discrimination on the basis of "political opinion", "belief" or "convictions". Four jurisdictions - Manitoba, Ontario, Quebec and Yukon - prohibit discrimination based on "sexual orientation". In addition, the Quebec Act adds "language" and "social condition" as prohibited grounds of discrimination, while four - Manitoba, Ontario, Prince Edward Island and Nova Scotia - add "source of income". The federal and Northwest Territories Acts include, as prohibited grounds of discrimination, "a conviction for which a pardon has been granted". Discrimination on the grounds of physical or mental handicap or disability is now prohibited in all jurisdictions and, in addition, the federal and Prince Edward Island Acts include "dependence on alcohol or a drug."

The Acts address themselves to equality of access to places, activities, and opportunities. All Acts prohibit discrimination in employment; in the rental of dwelling and commercial accommodation; in accommodations, services, and facilities customarily available to the public; and in the publishing and/or displaying or discriminatory notices, signs, symbols, emblems or other representations. In addition, New Brunswick, Nova Scotia, British

Columbia, Manitoba, and Saskatchewan prohibit discrimination in the selling of real property. The Quebec Act appears to be the most comprehensive:

> s. 12. No one may, through discrimination, refuse to make a juridical act concerning goods or services ordinarily offered to the public.
>
> s. 13. No one may in a juridical act stipulate a clause involving discrimination.

Equality Rights in the Constitution Act of 1982

(a) The Main Provision

There are four rights in the main equality rights provision:

> *Equality Rights*
>
> s. 15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In the elaboration of these equality rights in the Charter, one of the first questions that could be raised is whether the four clauses in s. 15(1) will be given a wider application than that given to such foreign provisions as the American Equal Protection Clause. It is too soon to tell, except that thus far the courts have not gone into any detailed discussion as to any possible differences between the four clauses. Unquestionably, "equality under the law" and the right to "equal benefit of the law" were added to the "equality before the law" clause of s. 1(b) of the Canadian Bill of Rights, and the "equal protection" clause from the American XIVth Amendment, because of women's reactions to the limited interpretations given by the Supreme Court of Canada (SCC) to the "equality before the law" clause in s. 1(b) of the Canadian Bill of Rights.[30]

(b) Additional Equality Rights Provisions

(i) *Affirmative Action*

In Canada s. 15(2) of the Charter provides, explicitly, that affirmative action is not a violation of s. 15(1):

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Thus, it should not be necessary in Canada to go through the evolution that occurred in the United States from the *Bakke case*[31] which held that racial quotas in medical schools' admissions criteria were invalid, through the *Weber case*[32] upholding

affirmative action under a collective agreement, to *Johnson*[33] which upheld a voluntarily-adopted affirmative action program giving preference to hiring and promoting women.

Although there are few cases on point so far, it would seem that the onus is on the party seeking to invoke s. 15(2) to prove that it applies.[34]

(ii) *Equal Rights of Women and Men*

As mentioned earlier[35] women's lobbying groups had a great influence on the drafting of s. 15 of the Charter. Even after having achieved the inclusion of the "equality under the law" and "equal benefit" clauses in s. 15, they sought to prevent any possibility of the judiciary giving gender discrimination a lesser scrutiny than any other prohibited ground by insisting on an overriding clause proclaiming equality between women and men. Thus, in Charter s. 28 they obtained what women's lobbying groups in the United States did not, ie, an "Equal Rights Amendment":

> s. 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

(iii) *Multicultural Rights*

Section 27 of the Charter provides:

> s. 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Although s. 27 can be taken to be a reflection of Art 27 of the ICCPR, it is clearly within Canada's history of group rights protection and codifies the official policy of multiculturalism proclaimed by the federal government in 1971.[36] Although it is drafted as an interpretation provision, this does not detract from its importance.[37] In fact, the SCC has already given it an important role in buttressing conclusions that the Charter envisages a pluralistic society, which tolerates a wide divergence of religious practices[38] but which also justifies such restrictions on freedom of expression as those which prohibit "hate literature".[39]

(iv) *Group Rights*

From the beginning in 1867, Canada's Constitution has included protection for group rights, rather than individual human rights. Thus, s. 133 of the Constitution Act 1867, provided protections for the English and French languages in legislatures and courts, while s. 93 provides protection for separate denominational schools. However, neither protection applied equally to all jurisdictions.[40] The Charter protects and expands these group rights.[41]

Before leaving this topic it should be pointed out[42] that although group rights have been discussed here as part of equality rights, they are *not* of the same essence as individual human rights of equality. A group right, such as language, is granted to

individuals *as* members of a specially protected group. A person asserts an individual's right to equality, on the other hand, *despite* being a member of a definable group. This is not to imply that either right is more important, but merely to point out that they are essentially different.

(c) Who is Bound? State Action or Private Action?

In the Canadian Charter there is a specific provision dealing with this issue, s. 32(1):

> s. 32(1). This Charter applies -
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislation and government of each province in respect of all matters within the authority of the legislature of each province.

In 1986, in the *Dolphin Delivery case*[43] the SCC held that the Charter applied to "governmental action" and did not apply to private litigation. For the court McIntyre J held that the Charter applies to the legislative, executive[44] and administrative branches of government, to both legislation and the common law, but "only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom".[45] It is interesting that, unlike the USSC decision in *Shelley v Kramer*[46] the SCC held that the Charter did not apply to court orders. They were not, McIntyre J asserted[47] elements of governmental action even though, obviously, they were bound by the Charter, as by all law.

The most important discussion of this distinction and of the distinction between those institutions that can be brought within the test of "governmental action", and those which cannot, is to be found in four decisions of the SCC concerning mandatory retirement, all rendered on 6 December 1990. One was an appeal from Ontario, concerning universities,[48] while three were from British Columbia, concerning a university,[49] a hospital[50] and a community college.[51] Although the SCC unanimously agreed that mandatory retirement was contrary to s. 15(1), there was division both as to whether the institutions, all of whom received the bulk of their funds from government, came within s. 32(1) of the Charter and as to whether, even if there was a contravention of the age discrimination provision of Charter s. 15(1), it was a reasonably justifiable limit under s. 1. A majority held that only the community college could be considered as constituting a government entity and a slightly different majority held that the retirement policies were protected by Charter s. 1.

If 540 type-script pages can be summarized in one brief paragraph, I would say that La Forest J, for the majority, made a distinction between the community college and the other three institutions, not only because it was government-funded and created by statute, but also because its governing board was less independent of government than those of the other three institutions. The last-mentioned characteristic, ie autonomy, as well as the need not to apply the Charter to all activities in the country, seemed to be the most important factor to the majority in finding that universities and the hospital board were not part of government.

(d) Who is Protected?

(i) **Canada**

A. *"Individuals"*

Although the SCC has not yet had an opportunity to pronounce upon this issue, the jurisprudence in the courts below has been fairly consistent that s. 15 does *not* apply to corporations.[52] The SCC has held[53] that one does not compare an individual with the Crown to determine equality issues.

B. *Enumerated and Non-Enumerated Grounds*

From the beginning, lower courts did not restrict the protected groups to those enumerated in s. 15(1).[54] However, in 1989 in *Andrews v Law Society of British Columbia,*[55] and more particularly in *Re Workers' Compensation Act, 1983 (Nfld)*[56] the SCC held that s. 15 applied only to "enumerated and analogous" grounds.

(e) Must Intent Be Proved?

(i) **Canada**

In Canada, the Supreme Court, in *R v Big M Drug Mart Ltd,*[57] came down early and explicitly in favour of looking at both the intent or purpose of the law as well as, if necessary, its effects. This approach has been re-emphasized and applied subsequently.[58]

(f) What is the Onus?

Although there was some academic suggestion early on[59] that the American 3-level scrutiny might be considered, even if adapted, in Canada, there was also argument that it was inappropriate.[60] In any case, the courts below the SCC were not concerned so much with levels of scrutiny or with validity of legislative intent as with an assessment through a three-step process by which the party alleging a s. 15 infringement must:[61]

(1) identify the class allegedly suffering denial of an equality right as well as the class to which it should be compared;

(2) demonstrate that the two classes are similarly situated in relation to the purposes of the law; and

(3) show that the difference in treatment is discriminatory in the sense of a disadvantageous or invidious purpose or effect of the impugned law or action.

However, the SCC rejected the "similarly situated" test in the *Andrews case*[62] as being inappropriate because it would permit such unsupportable distinctions as those arising from Nazi laws against Jews or Canadian laws forbidding alcohol consumption by aboriginal people.[63] The rejection of the similarly situated test has recently been re-affirmed.[64]

Nonetheless, the third-step of the "similarly situated" test has been retained by the SCC, although never acknowledged as being part of it. In other words, both *Andrews*65 and the *Newfoundland Workers' Compensation Act case*[66] have emphasized that a distinction is not enough - there must also be "discrimination". However, unequal treatment arising solely from different provisions in federal legislation for residents in different provinces[67] or merely from the exercise of provincial powers by different provinces,[68] does not constitute "discrimination" for purposes of s. 15.

In the earlier reference to the *McKinney case*[69] it was pointed out that any limitations on equality rights in Canada are dealt with under s. 1 of the Charter. The result will probably be that, unlike the rather rigid 3-level scrutiny in the United States, in Canada there will be more of a continuum, which will be determined on a case-by-case basis.

The Aboriginal Peoples

In Canada, Indians have a special status under federal jurisdiction. Section 91(24) of the Constitution Act 1867 gives the federal Parliament exclusive jurisdiction with respect to "Indians, and Land reserved for the Indians."

The Indian Act[70] is mostly inapplicable to Indians who leave the reserves and, until recently, to Indian women who married non-Indians and to their issue. They were excluded from the Act's coverage upon such marriage. This distinction from Indian men who intermarried (and did not lose their status), was held not to constitute an infringement of the "equality before the law" clause in s. 1(b) of the Canadian Bill of Rights.[71] When the Human Rights Committee under the ICCPR found this to be a contravention of Art 27 of the Covenant,[72] the Canadian Parliament moved to repeal the discriminatory clause, and s. 35 of the Constitution Act, 1982, was amended to extend aboriginal and treaty rights "equally to male and female persons". Also s. 35 of the Constitution Act, 1982, extends constitutional protection to all "aboriginal peoples" by defining such peoples to include "the Indian, Inuit and Metis [being of mixed Indian and non-Indian descent] peoples of Canada".

The new constitutional protections are very limited and undetermined. Thus, although s. 25 merely assures, as is explained in the marginal note thereto, that "aboriginal rights and freedoms [are] not affected by the Charter", these rights and freedoms are not specified, beyond declaring that they include (1) any recognized by the Royal Proclamation of 1763 (Canada's first Imperial Constitution); and (2) any that may now exist or may be acquired by way of land claims agreements.

The symbolic significance of the Royal Proclamation was described in *Calder v A-G for BC*[73] as follows:

> Its force as a statute is analogous to the status of Magna Carta which has always been considered to be the law throughout the Empire.

The actual requirements of the Royal Proclamation have been summarized as follows:

> The Proclamation reserved certain lands to the Indians and provided that Indian lands could not be purchased or otherwise alienated except by way of surrender to the Crown, and then only according to procedures prescribed in the Proclamation for obtaining agreement of the Indians.[74]

However, its significance to the Indian people is much greater:

> It has been suggested that in addition the Proclamation extends, by implication if not expressly, to a considerably broader range of rights . . . such . . . as the recognition of aboriginal peoples as nations, the implied necessity of mutual consent to alteration of their relationship with the Crown, the protection of aboriginal rights, and an implied right to self government in areas not ceded to the Crown.[75]

Whatever be the extent of these rights, they are supplemented with a provision outside the Charter, s. 35, which by itself constitutes Part II of the Constitution Act of 1982. Besides defining "The aboriginal peoples of Canada", this provision recognizes and affirms "the existing aboriginal and treaty rights" of these peoples (sub s. (1)). It would be beyond the scope of this review to try to outline what these aboriginal rights[76] or treaty rights[77] are, except to note that they now have constitutional status and therefore should override any inconsistent federal or provincial laws.

Section 37 of the Constitution Act of 1982 required the holding of a constitutional conference within one year after the coming into force of the Act, which conference was to include in its agenda matters affecting aboriginal peoples and required the Prime Minister to invite representatives of those people to participate. The first such conference was held in Ottawa on 15 and 16 March, 1983. Predictably, it did not complete the task of refining the definition of these rights, although certain technical amendments to the aboriginal rights provisions were agreed upon. Section 25 was amended to substitute a new para [b] to make clear that what is protected are "any rights or freedoms that now exist by way of land claims agreements or may be so acquired", while s. 35 had a similar clarification to provide that "treaty rights" include "rights that now exist by way of land claims agreements or may be so acquired" and that the rights "are guaranteed equally to male and female persons". In addition, ss. 35.1 and 37.1 were added. Section 35.1 commits the Government of Canada to the "principle" that a conference of first ministers and representatives of the aboriginal peoples of Canada will be convened "before" any amendments are made to s. 91(24) of the Constitution Act 1867, or to ss. 25 and 35 of the Constitution Act 1982. Finally, s. 37.1 required two further constitutional conferences concerning "constitutional matters that directly affect the aboriginal peoples of Canada" by April 1985 and April 1990. However, no further conferences have been held since 1985, that one having ended in utter failure, and s. 37.1 was repealed.

Endnotes

1. Nevertheless, some guarantees of equal rights for the main minority groups were provided for by s. 93 of the British North America Act (BNA Act) of 1867 in providing for separate schools for Catholic minorities in Ontario and Protestant minorities in Quebec, and by s. 133, which protected the use of the English and French languages in the federal Parliament and courts and the courts and Legislature of the Province of Quebec. For leading text on Canada's Constitution see P W Hogg, Constitutional Law of Canada, 2 vols 3rd ed, Scarborough: Carswell, 1992.

2. A V Dicey, Introduction to the Law of the Constitution, 10th ed by E C S Wade, London: McMillan. 1961, 39-40.

3. Sir Ivor Jennings, The Law and the Constitution, 5th ed, University of London Press, 1960, Chapter IV; R F V Heuston, Essays in Constitutional Law, 2nd ed, London: Stevens, 1964, Chapter I; G Marshall, Parliamentary Sovereignty and the Commonwealth, Oxford: Clarendon, 1957, Part III and Appendices I-III; T B Smith, Studies Critical and Comparative, Edinburgh; Green, 1962, Chapter IV; J D B Mitchell, Constitutional Law, 2nd ed, Edinburgh: W Green & Son, 1964, Chapter IV.

4. O Dixon, "The Law and the Constitution" (1935), 51 Law Q Rev 590; D V Cowen, "Legislature and Judiciary, I" (1952) 15 Modern L Rev 282; (1953) 16 MLR 273; H R Gray, "The Sovereignty of Parliament Today" (1953), 10 U of Tor LJ, 54; E McWhinney, "The Union Parliament, the Supreme Court, and the 'Entrenched Clauses' of the South Africa Act" (1952) 30 Can Bar Rev 692; W S Tarnopolsky, The Canadian Bill of Rights, Toronto: Carleton Library Series, 1975, Chapter III.

5. The Judicial Committee of the Privy Council was the ultimate court of appeal for the British Empire and continued as such for Canada until abolition of such appeals in 1949.

6. Union Colliery of British Columbia v Bryden [1899] AC 580.

7. Cunningham v Tomey Homma [1903] AC 151.

8. Quong-Wing v The King (1914) 49 SCR 440.

9. Section 32(2) of the Constitution Act provided for a three year delay for the coming into force of s. 15, the main equality rights provision. The reason for this delay was to give the various legislatures three years to try to bring their laws into accordance with the requirements of s. 15.

10. Thompson v Lacy [1820] 3 B&Ald 283; Dansey v Richardson (1854) 3 E&B 144. For a discussion of the situation at common law see A Lester and G Bindman, Race and Law in Great Britain, Harvard University Press, 1972, c 1.

11. Sealey v Tandy [1902] 1 KB 296.

12. Webb v Fagotti Bros (1898) 70 LT 683.

13. Ultzen v Nicols, [1894] 1 QB 92; Orchard v Bush & Co [1898] 2 QB 284.

14. [1944] 1 KB 693.

15. [1940] SCR 139.

16. A year later the British Columbia Court of Appeal held that the principles established by the SCC in the Christie case were applicable in the common-law provinces as well - Rogers v Clarence Hotel [1940] 3 DLR 538. Similarly, in 1961 the Alberta Court of Appeal, without written reasons, upheld a lower court decision that the plaintiff was not a "traveller" and the motel, which did not serve food, was not an "inn" and so was not bound by the English common law applicable to inns - King v Barclay and Barclay's Motel (1961) 35 WWR (NS).

17. A restrictive covenant prohibiting the sale of land to any person of a "Jewish, Hebrew, Semitic, Negro, or coloured race or blood", was upheld by courts in Ontario. Before the case reached the Supreme Court of Canada, the legislatures of Ontario and Manitoba passed amendments to their property legislation providing that such covenants are invalid. Despite this evidence of the view of legislatures about public policy, the Supreme Court did not choose the egalitarian route, but rather held the covenant invalid because it did not relate to the use of land and was also void for uncertainty - Noble and Wolf v Alley [1951] SCR 64.

18. The following summation from Lester and Bindman pp. 70-71, supra, 10, illustrates the limitations of the common law:

> The victim of racial discrimination would . . . would have no redress if he were denied most types of employment, or were refused work at the level for which he was qualified, or were paid at sub-standard wages, or were given inferior working conditions, or were denied training or promotion earned by length of service and on merit, or were made redundant, solely because of his race or colour. He could obtain no assistance from the courts if he were refused a house or flat which was available and which he could afford, or if he were denied the services of an estate agent; and he could not prevent the publication or public display of blatantly discriminatory advertisements . . . As for commercial services and facilities, he could claim damages if arbitrarily denied accommodation in a hotel, or transport by a common carrier, but would have no remedy if excluded from other public places . . . or facilities . . or if he were offered these services and facilities only upon discriminatory terms.

19. For details of these see W S Tarnopolsky and W F Pentney, Discrimination and the Law, revised ed, Toronto: De Boo, 1985, Chapter 2.

20. For example, the Ontario Insurance Act was amended to forbid discrimination in assessing risks (SO 1932, c 24); the Manitoba Libel Act was amended to prohibit group libel (SM 1934, c 23).

21. SO 1944, C 51.

22. SS 1947, c 35.

23. NY Public Laws of 1945, c 118, added to Art 12 of Executive Law 1909; now see Art 15 of Executive Law of 1951.

24. SO 1951, c 24.

25. SO 1954, c 28.

26. For more details see Discrimination and the Law, supra n 19.

27. SO 1960-61, c 92.

28. SC 1976-77, c 33.

29. Saskatchewan has continued the protection for fundamental freedoms introduced in its 1947 Bill of Rights, RSS 1978, c S-21.1. Quebec, in its Charter of Human Rights and Freedoms, has enacted a comprehensive Bill of Rights which proclaims fundamental freedoms, legal civil liberties, egalitarian rights, and even economic and social rights, SQ 1975, c 6.

30. W S Tarnopolsky, "The Equality Rights" in Tarnopolsky and Beaudoin, eds, The Canadian Charter of Rights and Freedoms: Commentary, Toronto: Carswell, 1982, chapter 13 at 407 to 423 and now absorbed in W S Tarnopolsky and W F Pentney, Discrimination and the Law in Canada, 2nd ed, Toronto: De Boo, 1985, chapter XVI, 16-8 to 16-11. For greater detail see K H Fogarty, Equality Rights and Their Limitations in the Charter, Toronto: Carswell, 1987, chapter 3, esp 89-134 and A F Bayefsky and M Eberts, eds, Equality Rights and the Canadian Charter of Rights and Freedoms, Toronto: Carswell, 1985, esp chapter 1 by A F Bayefsky and chapter 4 by M Eberts.

31. Regents of the University of California (Davis) v Bakke 438 US 265 (1978).

32. United Steelworkers of America v Weber 99 S Ct 2721 (1979).

33. Johnson v Transportation Agency, Santa Clara County California 107 S Ct 1442 (1987).

34. See, eg, Re Apsit et al and the Manitoba Human Rights Commission (1985) 23 DLR (4th) 277 (Man QB).

35. See the authorities listed in n 30, supra, the texts of Bayefsky, Eberts and Fogarty.

36. See Tarnopolsky and Pentney, supra, n 19 at 16-26 to 16-30.

37. Ibid, 16-30 to 16-33.

38. R v Big M Drug Mart Ltd [1985] 1 SCR 295 at 337-8; R v Videoflicks Ltd et al (1984) 14 DLR (4th) 10 at 41-3 (Ont CA), affd except as to remedy, as sub nom Edwards Books and Art Ltd et al v The Queen [1986] 2 SCR 713.

39. R v Keegstra [1990] SCR 697; R v Andrews [1990] 3 SCR 870; and Canadian Human Rights Commission v Taylor, [1990] 3 SCR 892.

40. The language protection only extended to the Parliament and courts of Canada, and the legislature and courts of Quebec. Subsequently, The Manitoba Act, 1870, 31-32 Vict c 3 (Canada), extended these guarantees to that province, but they were removed in the 1890's and not re-instated until the 1980's. For a recent description of this history see P W Hogg, Constitutional Law of Canada, 2nd ed, Toronto: Carswell, 1985, chapter 36. As far as denominational schools are concerned, the main protection was for whatever was the state of protection at the time that the province concerned entered the federation, and thus the protections varied considerably. In addition it was a protection for Roman Catholics and Protestants only and for no other religious groups - see the majority opinion of the Ontario Court of Appeal in Ref re an Act to Amend the Education Act (1986) 25 DLR (4th) 1.

41. For an assessment of the Charter's language rights provisions see J Woehrling, "Minority Cultural and Linguistic Rights and Equality in the Canadian Charter of Rights and Freedoms" (1986) 31 McGill LJ 50. Sections 16 to 20 expand the s. 133 rights of the English and French languages to "all institutions of the Parliament and government of Canada", and to communications with them, and extends these expanded rights to the province of New Brunswick. Section 21 preserves the s. 133 level of language protection in the provinces of Quebec and Manitoba, while s. 22 protects any other language right or privilege that might be "acquired or enjoyed either before or after the coming into force of this Charter". At this time one cannot even speculate whether there will ever be such a language right. Section 23 provides for minority language education rights for English and French linguistic minorities. In A-G Quebec v Quebec Association of Protestant School Boards et al [1984] 2 SCR 66, the SCC held that Quebec's Charter of the French Language, RSQ 1977, c 11, was invalid to the extent that it was inconsistent with s. 23 of the Canadian Charter in denying the minority language rights to people who had come into Quebec from another province. In the same vein, in Ref re Education Act of Ontario and Minority Language Education Rights, (1984) 10 DLR (4th) 491 the Ontario Court of Appeal unanimously held that s. 23 deserves a liberal interpretation and in effect creates a code for minority language education rights for Canada.

42. See the majority decision in Ref Re an Act to Amend the Education Act, supra, n 97 at 54-5, and Tarnopolsky and Pentney, supra, n 85 at 16-26 to 28.

43. Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd [1986] 2 SCR 573.

44. Earlier in Operation Dismantle Inc et al v The Queen et al [1985] SCR 441, the SCC had held that the Charter applies to decisions of Cabinet.

45. Dolphin Delivery, supra, n 43 at 599.

46. 334 US 1 (1948).

47. Supra, n 43 at 600-601:

> . . . I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes the making of the order, where a Charter right would be infringed, it would seem that all private litigation would be subject to the Charter.

48. McKinney v University of Guelph [1990] 3 SCR 229.

49. Harrison v University of British Columbia [1990] 3 SCR 451.

50. Stoffman v Vancouver General Hospital [1990] 3 SCR 483.

51. Douglas/Kwantlen Faculty Ass'n. v Douglas College [1990] 3 SCR 570.

52. See eg, Mund v Medicine Hat (1985) 67 AR 11 (Alta QB); Smith, Kline v French Laboratories Ltd v A-G Canada (1985) 24 DLR (4th) 321 at 365 (FCTD); Re Aluminium Co of Canada Ltd and The Queen in right of Ontario (1986) 55 QR (2d) 522 (Ont Div Ct), but see E Gertner, "Are Corporations Entitled to Equality?: Some Preliminary Thoughts" (1986) 19 CRR 288.

53. Rudolph Wolff & Co v Canada [1990] 1 SCR 695 at 700-702.

54. A database count up to 17 August 1987, (see Appendix A to the brief submitted by LEAF in the SCC hearing of the appeal from the BCCA in Andrews, infra (n 145) showed that of all the s. 15 cases up to the level of courts of appeal, 123 were based on enumerated grounds, 40 concerned both enumerated and non-enumerated grounds, while 346 were based on grounds not enumerated in s. 15(1).

55. [1989] 1 SCR 143.

56. [1989] 1 SCR 922.

57. [1985] 1 SCR 295 at 334, per Dickson J:

> . . . [T]he legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no

need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity.

58. See, eg, R v Edwards Books and Art Ltd et al [1986] 2 SCR 713 at 752, concerning the impact on freedom of religion of provincial Sunday closing laws and R v Smith [1987] 1 SCR 1045 at 1060, which held invalid the minimum requirement of 7 years imprisonment for importation of narcotic drugs.

59. See, eg, Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can Bar Rev 242 at 255.

60. See, eg, Fogarty, supra, n 30 at 296 to 308.

61. These three steps are most clearly set out in three Ontario Court of Appeal decisions: R v Ertel (1987) 35 CCC (3d) 398; R v Ramos Realty Inc (1987) OR (2d) 737; R v Turpin, Siddiqui and Clauzel (1987) 36 CCC (3d) 289.

62. Supra, n 55.

63. I have indicated my skepticism as to that argument - Catholic Children's Aid Society of Toronto v Tammy S (1989) 60 DLR (4th) 397, in the fn at 413.

64. McKinney, supra, n 48.

65. Supra, n 55.

66. Supra, n 56.

67. R v Turpin [1989] 1 SCR 1296 held that Criminal Code provision for a 6-person jury in Alberta (for historical reasons) did not result in discrimination in the province of Ontario, where a 12-person jury was required.

68. R v Sheldon S [1990] 2 SCR 254 at 286-92.

69. Supra, n 48.

70. RSC 1970, c I-6.

71. A-G Canada v Lavell [1974] SCR 1349.

72. Lovelace v Canada No. 24/1977, The Human Rights Committee, Selected Decisions under the Optional Protocol, 2nd to 16th Sessions, NY: UN, 1985, 83.

73. [1973] SCR 313, 394-5.

74. K M Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in Tarnopolsky and Beaudoin, eds., Canadian Charter of Rights and Freedoms: Commentary, Toronto: Carswell, 1982, ch 15, 473.

75. Ibid, 475.

76. Ibid, 476-84. D E Sanders, "Aboriginal Peoples and the Constitution" (1981), 19 Alberta L Rev 410.

77. Ibid, 484-7.

Freedom of Expression

By Mr Soli K Sorabjee, SA, Former Attorney-General of India

At the outset some fashionable fallacies need to be dispelled. Freedom of expression is not an exclusive western value nor is it a luxury of the affluent. Thanks to the constitutional guarantee of freedom of expression and the freedom of the press in India, numerous under-trial prisoners languishing for years in jails, several inmates of asylums and care homes, labourers working under horribly unhygienic conditions in stone quarries and brick kilns and countless children forced into hazardous employments, have obtained some ameliorative relief and were not consigned to the oblivion.

Freedom of expression is necessary for the attainment of truth, for individual fulfilment, for maintaining the balance between stability and change in society and for successful functioning of democracy. Indeed it is one of the most cherished values of a free democratic society whose basic postulate is that government shall be based on the consent of the governed. Consent should not only be free but should also be well informed by debate and discussion. Hence the necessity for adequate information and discussion, aided by the widest possible dissemination and reception of information and opinions from diverse and antagonistic sources.[1] Right conclusions are more likely to emerge from a multitude of voices than through one voice authoritatively preaching the official gospel.

Courts have recognised the vital importance of freedom of expression for the effective functioning of democratic parliamentary institutions. The Supreme Court of Canada in 1938, when there was no Charter of Rights in Canada, deduced freedom of discussion from the preamble of the British North America Act which stated that the Canadian Constitution was "similar in principle to that of the United Kingdom". The Court reasoned that since the United Kingdom is a parliamentary democracy the right of free discussion of public affairs which is "the breath of life for parliamentary institutions" was available to Canadian citizens as it was to the citizens of the United Kingdom".[2]

A similar judicial exercise has been done recently in 1992 by the High Court of Australia. There is no judicially enforceable Bill of Rights in Australia and freedom of expression is not a constitutionally guaranteed freedom. None-the-less the High Court spelt out freedom of expression as a constitutional right by implication from the provision in the Australian Constitution which provides for a system of responsible and representative government. Chief Justice Mason, speaking for the majority, held that in the absence of freedom of expression and communication representative government would fail to achieve its purpose, namely, "government of the people through their elected representatives", because government would cease to be responsive to the needs and wishes of the people.[3]

The Supreme Court of India in striking down the restrictions placed on the press by the mechanism of levy of steep import duty on newsprint observed in the celebrated case of *Bennett Coleman:*[4] "Freedom of the Press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions. Never has criticism been more necessary than today when the weapons of propaganda are so strong and so subtle".[5]

Freedom of expression if it is to be meaningful must have a capacious content. It cannot be limited to ideas and doctrines which are accepted and acceptable but must extend to those that "offend, shock or disturb the State or any sector of the population".[6] It must accord to the thought we hate an accomodation as hospitable as that it assures to the orthodoxies of the day. This precept is easy to preach but one of the most difficult to practice.

Freedom of expression undoubtedly is one of the most basic human rights and is essential for safeguarding and promoting other human rights. But, if I may venture to add, it is not an end in itself, it is the means to attainment of a society in which law and order prevails and where other human rights and human dignity are respected. Whilst we must vigorously defend this precious freedom against onslaughts from fanatics we should not be fanatical about it. We must recognise that freedom of expression cannot be absolute and unlimited. There are situations which may warrant withholding of news and information for a temporary duration. For example: movements of military forces during a war;[7] or details of a rescue operation to free hostages held captive by terrorists; or reports of communal or racial carnage whose publication at a particular point of time is certain to aggravate tension between the concerned races or communities and result in violent conflict.

Regional and international human rights instruments recognise the need for curtailment of freedom of speech and expression in certain cases. Article 10 of the European Convention on Human Rights 1950 (ECHR) which protects the right to freedom of expression permits restrictions as are prescribed by law and are necessary in a democratic society. The heads of restrictions are: interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Quite a long list of restrictions!

Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR) also recognises that freedom of expression may be subject to certain restrictions such as are provided by law and are necessary for respect of the rights or reputations of others and for the protection of national security or of public order (ordre public), or of public health or morals.

The American Convention on Human Rights 1969 (ACHR) which guarantees freedom of expression by Art 13 also provides for restrictions on the exercise of free speech in order 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.

Article 9 of the African Charter on Human and Peoples' Rights, (Nairobi, 1981) guarantees to every individual the right to receive information as also the right to express and disseminate opinion within the law. This freedom along with others "shall be exercised with due regard to the rights of others, collective security, morality and common interest". (Art 27(2)).

The ICCPR (Art 20) and the American Convention (Art 13(5)) expressly prohibit any propaganda for and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Freedom of speech and expression is guaranteed as a fundamental right by Art 19(1)(a) of the Constitution of India (see Appendix A). In a series of decisions, the Supreme Court of India has ruled that Freedom of the Press is implicit in the guarantee of freedom of speech and expression, which like other fundamental rights guaranteed by the Indian Constitution, is not absolute. It can be restricted provided the restriction has the authority of law to support it, falls within one or more heads specified in Art 19(2) and is not unreasonable. In other words, the restriction must not be excessive or disproportionate. The procedure and the manner of imposition of the restriction also must be just, fair and reasonable.[8] Validity of the restriction imposed by a law is justiciable. Courts in India exercising the power of judicial review can and have invalidated laws and measures which do not satisfy the above requirements.[9]

Once it is accepted that speech can in some cases be restricted some form of censorship is inevitable. The real problem is about the permissible limits of restriction on freedom of expression, in striking the right balance between preservation of free speech and the legitimate interests of society. The difficulty is not in formulating this proposition conceptually, but in translating it into practice because there are varying perceptions about the function of free speech and there is no uniformity about the societal values and community interests which need to be protected from the "onslaught" of free speech.

Besides, what impels censorship is a complicated network of causes, one of which is psychological viz., the compulsive need to prevent unpalatable utterances and images. Another is political or religious vested interest in preserving the status quo. There is also the social and moral factor motivated by a fervent desire for the preservation of a "clean" society. Last but not the least of the grounds for censorship is the phantom of national security.

Under the shield of laws ostensibly designed to protect the security of the State countless sins of repression have been committed. The axe has fallen on several innocent publications whose only crime was to strongly dissent from government's policy and criticise the current rulers for their lapses.

The offence of sedition exists in several countries and its abuse is rampant and persistent. In the hey day of British colonialism sedition was construed by the Privy Council in the case of *Tilak*[10], *Wallace-Johnston*[11] and *Sadashiv Bhalerao*[12] to include any statement that caused "disaffection" namely, exciting in others certain bad feelings towards the government even though there was no element of incitement to violence or rebellion. The Supreme Court of India in the case of *Kedar Nath*[13] dissented from the Privy Council decisions. It held that the gist of the offence of sedition under s. 124A of the Indian Penal Code is incitement to violence or the tendency to create public disorder by words spoken or written and does not cover mere criticism of government however strong or vigorous. Otherwise the section would be violative of the fundamental right of freedom of expression guaranteed by the Constitution.

The same liberal trend is reflected in some judgments of courts in Africa. The Court of Appeal (Enugu Division) in Nigeria invalidated the relevant sections of the Criminal Code dealing with seditious publications because they did not provide for a defence of truth and could lead to a conviction even in the absence of any evidence that the publication was likely to lead to a break-down in public order. In the memorable words of Olatawura JCA: "We are no longer the illiterates or the mob society our colonial masters had in mind when the law was promulgated. . . . To retain s. 51 of the Criminal Code, in its present form, will be a

deadly weapon to be used at will by a corrupt government or a tyrant . . . Let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose".[14]

In Uganda, the editor and the writer of an article which alleged that the failure to appoint indigenous African Ugandans to the High Court bench was essentially based on tribal prejudice were charged with sedition and detained under emergency regulations. The Chief Magistrate, Mohammed Saied, held that the law of sedition does not "encourage the creation of a servile press, but a press which possesses perfect freedom of speech so long as it does not deliberately deteriorate into a malignant abuse . . .".[15] He pointed out that all of the judges, other than the Chief Judge, were non-African drawn from different parts of the Commonwealth, and since the policy of Africanisation was a matter of public concern the delay in its implementation gave rise to a reasonable grievance. He ruled that although the language used may be objected to if redress is sought *bona fide* that would not be seditious and courageously acquitted the accused.

The High Court of Peshawar in 1958[16] struck down the conviction of the accused for inciting disaffection by calling the government a "government of thieves" because such criticism could not be construed as encouraging the use of force or violence. The Court emphasised the importance of public discussion of the misdeeds of government officials in a democratic society.

The Privy Council, in a recent decision from the Caribbean,[17] displayed a robust approach in allowing the appeal of the editor of a local newspaper in Antigua who was convicted because his article was said to have the effect of undermining public confidence in the conduct of public affairs. Under the Constitution of Antigua freedom of expression could be restricted, *inter alia*, under the head of public order. In the opinion of the Privy Council, a statutory provision which criminalised statements likely to undermine public confidence in the conduct of public affairs, as distinct from undermining public order, was to be viewed "with utmost suspicion" because any attempt to stifle or fetter criticism of those who hold office in government and are responsible for public administration "amounts to political censorship of the most insidious and objectionable kind".

Unfortunately the talismanic invocation of the mantra of "national security" by the executive not infrequently generates timorousness in our judicial sentinels leading to an attitude of undue deference to governmental claims. Fortunately, judges who are more sensitive to the value and function of free speech in a democratic society, adopt a different approach. They believe with the great Sir Maurice Gwyer that "hard words break no bones"[18] and make due allowance for the emotive invectives which are the stock in trade of the demagogue or the passionate preacher provided there is no tendency to disrupt public order.

It is not suggested that courts should lightly dismiss considerations of national security. The point is that judges should not regard the executive's ipse dixit and the oft-repeated bald assertions of danger to national security as papal dogmas of infallibility but should view them with searching scepticism because history and experience have shown that these concerns tend to be highly exaggerated and are non-existent in some cases. Take the case of the wholesale evacuation and relocation of American citizens of Japanese descent on the West Coast in the USA during World War II.

Fred Korematsu, a native born American citizen of Japanese ancestry was convicted for being in a place from which all persons of Japanese ancestry were excluded pursuant to an Exclusion Order issued by Commanding General J L DeWitt. The constitutionality of the action was upheld by the United States Supreme Court and Korematsu's conviction was affirmed.[19] Korematsu petitioned United States District Court, ND California in 1984 for a writ of *coram nobis* to vacate his 1942 conviction on the grounds of governmental misconduct. During the hearing of the case some horrific facts were brought out.

The Commission of Wartime Relocation and Internment of Civilians established in 1980 by an act of Congress unanimously found that military necessity did not warrant the exclusion and detention of ethnic Japanese and there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt. The Commission, which was composed of former members of Congress, the Supreme Court and the Cabinet as well as distinguished private citizens, concluded that "broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership". As a result, "a grave injustice was done to American citizens and resident aliens of Japanese ancestry". In the course of the hearing it was established that several Department of Justice officials had pointed out to their superiors and others the "wilful historical inaccuracies and intentional falsehoods" contained in the DeWitt Report. Worst of all, government "knowingly withheld information from the courts when they were considering the critical question of military necessity" and provided misleading information in papers before the court. Significantly the government acknowledged its concurrence with the Commission's observation that "today the decision in Korematsu lies overruled in the court of history".

Judge Patel memorably concludes: "Korematsu remains on the pages of our legal and political history. . . . As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect citizens from the petty fears and prejudices that are so easily aroused".[20]

This caution should always be uppermost in judicial minds when the court is confronted with formidable and imperious claims of national security.

It also must not be forgotten that at times security of the State is equated with the security of the ruler or the leader. It happened in India in June 1975 when a fraudulent emergency was declared by Mrs Indira Gandhi. Under the Indian Constitution one of the grounds for declaration of emergency is threat to the security of India. Somehow those at the helm of affairs read or construed security of India as "security of Indira". The consequence was temporary demise of democracy in India till emergency was revoked in March 1977 by the succeeding Morarji Desai government.

Danger to national security should not be in the realm of hypothetical possibilities. To justify suppression of freedom of expression and other associated freedoms what is required is a real likelihood of danger, a strong probability.

This is not a quixotic prescription. For example, the Israeli judiciary has not permitted freedom of expression to be held hostage to claims of national security despite the fact that Israel faces a real and continued threat to its security. In the landmark case of Schnitzer decided in 1988 the Court nullified the chief military censor's order prohibiting the publication of an article which criticised the Director of the Israeli Intelligence Service, Mossad. The Court ruled: "In publishing criticism of the functioning of the Director no proximate certainty had been created of a serious threat to state security; it might have been a remote possibility, but this is not the standard to be considered in our legal system. . . . A free society cannot exist without a free press. Thus, the press must be allowed to fulfil its role; publication of newspaper articles should be prohibited only where there is proximate certainty that state security is under serious threat".[21]

Another vexed question is whether hate speech can be suppressed and criminalised. The answer to this question would depend upon our understanding of what hate speech means. Broadly speaking hate speech is any expression that stigmatises a person as lacking in integrity or ability, unworthy of respect and dignity and unfit for a place in society because of the person's race, religion, creed or colour. There can be no denying that words can hurt badly, the injury caused by them can be very severe and painful. The European Commission of Human Rights in *Gay News v United Kingdom*[22] recognised the need to protect the right of citizens not to be offended in their religious feelings by publications.

Should this protection take the form of proscription of expression and its criminalisation? I think not. Hurt or injury to feelings is a highly subjective matter. Whose feelings are to be taken into consideration? No doubt, judicial decisions have emphasised that in judging the effects of a speech or a writing the standards to be employed must be of reasonable human beings of ordinary common sense and sensibilities and not of those who scent hurt, humiliation and hostility in every adverse and critical point of view. But in practice how is one to distinguish a fanatic from the ardent believer and the devout? Indeed the more one is convinced of the everlasting truth of his or her beliefs, the greater is the hurt that will be felt.

A Christian is sure to be offended if he is told that Jesus was not divine or that the Revelation did not end with him but there is a later messenger of God, "Mahomet". A Muslim is bound to be outraged by the doctrine that Mahomet was only one in the line of the prophets and has been succeeded by another prophet viz Bahaulla who is a later manifestation of God and the founder of the Bahai religion. Likewise a Bahai would be most hurt if in the course of a religious debate Bahaulla who claims to symbolise the second return of Christ is described as a deluded person. The feelings of Catholics will be certainly injured if the doctrine of papal infallibility and their belief in the Immaculate Conception was portrayed as fairy tales. And Protestants would be no less hurt if Henry VIII is described as an over-sexed monarch rather than the Defender of the Faith. And what about atheists and agnostics? Are their feelings not injured if they are described as wicked persons for whom a special place has been reserved in Dante's eternal inferno?

Furthermore, in any movement for religious or social reform, feelings of the persons who are keen to maintain the existing order and orthodoxies are bound to be hurt. Many practices supposed to be sanctioned by religion such as untouchability, sati (burning of widows in the funeral pyre after their husband's death), stoning to death as a punishment for adultery, would be rightly condemned by reformers. It must be remembered that to bring about reforms and

changes, especially where deep-rooted practices and prejudices are prevalent, it may be necessary to administer a shock by having recourse to expression which is not only trenchant but may be insulting. That would certainly be injurious to the feelings of those who adhere to these practices but certainly would not be a legitimate ground to proscribe such expression because otherwise it would be impossible to effect any reforms.

Laws designed to prevent expression which is hurtful would suffer from vagueness and the tests for their application would usually be lacking in precision. Freedom of expression cannot be made dependent upon such subjective elements which would play a dominant role in the law's enforcement. There would be serious difficulties in enforcing such laws. The ineffective implementation of the Prevention of Incitement to Racial Hatred Northern Ireland Act of 1970 is an instance in point.

Moreover, criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression.[23] Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other's religion, tenets or practices. That is what is increasingly happening today in India. We need not more repressive laws but more free speech to combat bigotry and to promote tolerance.

Besides, there is a grave danger of minority regimes misusing hate speech laws against the majority. This has happened in India during the British colonial rule and also in South Africa where these laws were invoked by the minority white regime to suppress the protests and dissent of the majority population.

On balance, advocacy of objectionable doctrines however strong and vigorous but which lacks the ingredient of incitement to violence cannot legitimately be prohibited and criminalised. If a person wants to propagate the scientifically false and discredited theory of superiority based on race and colour the response should be one of ridicule contempt and effective response. To overract and prohibit such racist nonsense is to do too great an honour to the expression in question and may confer upon the speaker or the writer the halo of a martyr. If we are true to the ideals of democracy and genuinely cherish freedom of expression we must grant a fair field and an honest race to all the infinite variety of cranks and fanatics and the self-appointed saviours of humanity provided their voice is not one of incitement to violence. If ideas and doctrines are false they should be countered with true and sound ideas. To be afraid of ideas is to be unfit for democracy.

This aspect was emphasised in a judgment of the Gujarat High Court which struck down the ban on a book which expounded and extolled Mao-Tse-Tung's works and philosophy. In the words of Chief Justice Bhagwati (as he then was): "If the people want to adopt the philosophy of Communism as expounded by Mao-Tse-Tung, confiscation of a book like this is not going to stop them from doing so. The reasons for their choice would be much deeper and if the Government wants to repel the onslaught of Communist ideology, it is to an elimination of these reasons that the Government may well address itself rather than proscribe a book like this which propagates the principles and practice of Communism as expounded by one of its chief exponents, with a view to their academic study by the people".[24]

It is essential to bear in mind the vital distinction between mere dissemination and advocacy of obnoxious ideas and doctrines which cause injury to feelings without more, and speech which incites persons to violence. For example, it is one thing to say that migrant workers belonging to certain communities are lazy, dirty and dishonest and should be deported. It is quite another to portray them as a grave threat to the community and advocate their liquidation. Hate speech may be proscribed in the category of cases where expression from its very nature or manner of expression and time and place considerations would in all reasonable likelihood lead to imminent commission of an offence or result in unlawful action because preservation of public peace and order is a matter in which all citizens have a vital stake no less than in the preservation of freedom of expression.

There is another class of cases which may warrant proscription of hate speech, namely, systematic vilification of individuals or groups by reason of their colour, race, religion or beliefs and which is likely to evoke extreme feelings of opprobrium and subject the targeted class to discrimination and social and economic disabilities, especially in matters of housing and employment. Persistent propagation of hate propaganda can undermine the dignity and self-worth of target group members, lead to erosion of tolerance and mutual respect that must flourish in a multi-cultural society and result in tensions which can erupt into violent conflicts between different groups in the community. Besides the victims of virulent hate propaganda generally are vulnerable groups who do not possess the resources to defend themselves and their protection can be the legitimate concern of any democratic society committed to the ideal of equality.

In such cases hate speech may be regulated or restricted provided the statutory provisions are drawn narrowly and with precision and the restrictions imposed are not arbitrary or disproportionate.

Besides it must be ensured that expression is not restricted on the basis of vague apprehensions and far-fetched concerns of mischief. There should be a real, rational and proximate nexus between the expression and its potential for imminent violence and unlawful action.

However it cannot be overemphasised that expression which does not constitute incitement to imminent violence cannot be suppressed on account of threats of violence by persons who find the expression deeply offensive. Freedom of expression cannot be held to ransom by fanatics and bigots who are so utterly convinced of the infallibility of their beliefs that they resent any unfavourable comments on their Faith. The duty of a government in such cases would plainly be to put down violence, punish the law breakers, rather than penalise the writer or the speaker and suppress expression. A pluralistic society can hardly survive if a religious or an ethnic group demands not merely equality and the vote, but a violent veto on policies or doctrines which do not accept its tenets and moral judgments. Tranquility ought not to be maintained in all cases by sacrifice of liberty. In order to prevent threat to disorder, the State should not suppress rights, and particularly freedom of expression, which it is the duty of a democratic state to uphold.

This approach was adopted by the Supreme Court of India in a recent judgment[25] in which the court rejected the Tamil Nadu government's plea that it was necessary to stop the exhibition of a movie because there were threats from certain sections that the cinema threatre

which would exhibit the film would be burnt down. The court declared "If the film is unobjectionable and cannot constitutionally be restricted under Art 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would be tantamount to negation of the rule of law and surrender to blackmail and intimidation. Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people".[26] This judgment has far-reaching implications. Its wholesome effect and timeliness cannot be over-emphasised in view of the rising tide of intolerance of late witnessed in India.

Defamation is one of the heads of restriction permitted by ECHR, ICCPR, ACHR, and several national Constitutions including the Constitution of India. Libel laws can have a chilling effect on freedom of expression. This is especially so in countries whose legal systems or jurisprudence do not permit sufficient latitude to criticism of government and the conduct of public functionaries. Every inaccurate statement should not be actionable unless it is made with malice, ie with actual knowledge of the falsity of the statement or with reckless and utter disregard of the true state of affairs. This is because erroneous statements are unavoidable in free debate in a democracy and must be tolerated if freedom of expression is to have "the breathing space it needs to survive". These principles were enunciated by the United States Supreme Court in its landmark decision in *New York Times v Sullivan.*[27] It is heartening to note that the House of Lords has taken a significant step forward for the protection of free speech in its recent judgment in the *Derbyshire County Council case*. The House of Lords held that the Council, being a local authority, could not sue for libel because it is a governmental body and it is of the highest public importance that any governmental body should be open to uninhibited public criticism. Furthermore, the Lords recognised that threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech and enunciated a very important, and to my mind a salutary principle, namely, that "it would be contrary to public interest to permit institutions of government to sue for libel because that would place an undesirable fetter on freedom of speech".[28]

One of the heads on which freedom of expression is restricted is public health or morals, more specifically, "decency" or "obscenity". Restrictions on these grounds have created a host of problems which at the end of the day seem insoluble. The reason is that sin, as Pascal reminds us, is geographical. "Obscenity", "indecency", "immorality" are equivocal and relative concepts. Standards of morality and decency vary from time to time in the same society and from person to person and there is no uniform test of community standards of tolerance. Opinions honestly held by reasonable people, including judges, will vary widely depending upon their background and standards of decency.

It is interesting to note that the sixth international Congress for suppression of traffic in women and children which took place in the summer of 1924 at Gratz, Austria, unanimously resolved, agreeing with the view of the official Congress on obscene publication, that "it is undesirable to define the word obscene".

The Federal Court of Appeal in Canada held that the words "immoral" and "indecent" are highly subjective and emotive in their content. The court ruled that uncertainty and vagueness are inherent in the very concept of immortality and indecency and therefore are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. Consequently prohibition of importation of matters of "immoral or indecent character" was

held to be not a reasonable limitation upon the freedoms guaranteed by s. 2(b) of the Charter.[29] The House of Lords has not helped matters by ruling in 1973 that indecency is not confined to sexual indecency but includes anything that an ordinary man or woman finds to be shocking, disgusting and revolting.[30]

It is obvious that subjectivity plays a crucial role in any decision about banning expression on these grounds. The history of the books which have been banned at different times - some of which are now regarded as classics - demonstrates the utter unfeasibility of censorship under these heads especially when the power is entrusted to officials who lack the requisite qualifications and outlook. D H Lawrence's, *Lady Chatterley's Lover*, fell foul of the Indian Supreme Court justices in *Ranjit Udeshi's case*.[31] Indian Customs authorities held up the importation of Nabakov's *Lolita* which was permitted after the intervention of Prime Minister Nehru who found nothing objectionable in it. The same book was branded indecent in 1961 by a New Zealand Court in a majority decision.[32]

The oft-repeated judicial admonition not to dwell upon a stray passage or a few words here and there torn out of the context without regard to the general nature and tendency of the publication is often ignored. The Censor is like the lady who complained to Dr Johnson about the presence of objectionable words in a book and was roundly reprimanded: "Madam, you must have been searching for them."

Judges, despite valiant efforts, have failed to evolve a satisfactory definition of obscenity. The judicial impotence has been vividly summed up in the lament of Justice Stewart of the United States Supreme Court who confessed that he could not define obscenity but recognised it when he saw it.[33]

The least unsatisfactory workable test would be to confine obscenity or indecency laws only to publications which are patently offensive and whose expressive content is worthless and of *de menis* value to society in terms of art, literature or any other discipline. This might reduce the role of subjectivity but cannot altogether eliminate it.

Tension between freedom of expression and censorship from the very nature of things is inevitable because freedom of expression and censorship have conflicting purposes and pull in different directions. Real protection to freedom of expression would like not so much in enacting laws as in creating a temperament of tolerance, fostering mutual respect and understanding of the beliefs and practices of others. This requires a sustained effort to change the attitudes of persons and to sensitise them to the value of free speech and the importance of dissent. There must be realisation that no group has the monopoly of truth and morality about which there may be genuinely different perceptions.

In situations where some form of limitation on expression is unavoidable the perennial problem is of performing the delicate balancing act. This involves weighing all relevant factors for determining whether expression of a particular kind should or should not be permitted at a particular time and in a particular place. No doubt freedom of expression is a universal value. However its protection and promotion cannot be strait jacketed by any universal prototype. Different countries have their distinctive cultures and values, different ethical perceptions, different problems and reactions. Publications which pass muster in America may be quite unacceptable in India or in South Africa.

There can be no hard and fast rule, except one. When in doubt, resolve it in favour of expression rather than its suppression. And always remember the memorable words of that indomitable fighter for free speech, Charles Bradlaugh: "Better a thousand fold abuse of free speech than denial of free speech. The abuse dies in a day, but the denial slays the life of the people and entombs the hopes of the race."[34]

Appendix A

Article 19 - Protection of certain rights regarding freedom of speech, etc

(1) All citizens shall have the right -

(a) to freedom of speech and expression . . .

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

Endnotes

1. Terminiello v City of Chicago, 93 L ed 1131 at 1134; Himat Lal v Police Commissioner, Ahmedabad, AIR (1973) SC 87

2. In Re Alberta Legislation, (1938) 2 SCR 100, 132-133; 145-146

3. Nationwide News Pty Ltd v Wills (1992) 66 AJLR 658; Australian Capital Television Pty v Commonwealth of Australia, (1992) 66 AJLR 695

4. AIR (1973) SC 106

5. Ibid, 150

6. Handyside v United Kingdom (1976) 1 EHRR 737

7. Near v Minnesota 283 US 697 (1931)

8. Chinataman Rao v State of MP AIR 1951 SC 118 at 119; State of Madras v V G Rao AIR 1952 SC 196 at 199, 200; Tikaramji v State of UP AIR 1967 SC 676 at 711; Express Newspapers, AIR 1958 SSC 578 a 621; State of Bihar v R N Mishra AIR 1971 SC 1667

9. Sakal Papers, supra n 6; Bennett Coleman & Co v Union of India AIR 1973 SC 106

10. ILR 22 Bom 112

11. 1940 AC 231

12. AIR 9147 PC 82

13. AIR 1962 SC 955

14. Chief Arthur Nwanko v the State FCA/E/111/83 (Fed CA: Enugu), (1985) 6 NCLR 228

15. Uganda v Rajat Neogy & Abu Mayanja (The Transition Case), 1 Feb 1968, reported in Transition, No. 38 (1972) 47, 48

16. Hussain Bakhsh Kasuar v The State, PLD 1958 (WP) Peshawar 15

17. Hector v Attorney General of Antigua and Barbuda (1990) 2 AC 312, 315 (PC)

18. Niharendu Dutt Majumdar v Emperor AIR (1942) FC 22

19. Korematsu v United States 323 US 214 (1944)

20. Korematsu v United States 584 F Sup 1406 (1984)

21. Meir Schnitzer and Ors v Chief Military Censor, HC 42 (4) PD 611 (1988); 24 Israeli L Rev 304

22. 5 EHRR 123 (1983)

23. R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury (1991) 1 QB 429

24. Manubhai v State of Gujarat 12 Guj L R 968, 979

25. Rangarajan v Jagjivan (1989) 2 SCR 204

26. Ibid, 230

27. 376 US 290 (1961)

28. Derbyshire County Council v Times Newspapers Ltd & Ors, (1993) AC 534

29. Re Luscher and Deputy Minister, Revenue, Canada, 17 DLR (4th) 503

30. Reg v Knuller (Publishing, etc) Ltd (HL (E)), 1973 AC 435 at 458

31. AIR (1965) SC 881

32. In Re Lolita, (1961) NZLR 542

33. Jacobellis v Ohio 12 L ed 2d 793, 804 (per Justice Stewart)

34. Soli J Sorabjee, "The Law of Press Censorship in India" p 6

Freedom of Expression: An English Perspective

By The Rt Hon Lord Woolf of Barnes, Lord of Appeal in Ordinary, United Kingdom

Like most of my generation in Britain, I was brought up to believe that it was one of the privileges of being "an Englishman", that yours was a country in which freedom of speech flourished. I remember well on my first visit to London in my early teens being taken to Hyde Park Corner on a Sunday morning to listen to free speech at work and being deeply impressed by the repartee between the soapbox orators and the hecklers in the audience. It therefore came as a great shock to me when, early in my legal career, I discovered that many commentators were far from convinced that freedom of expression was anything like as well protected as it should be in the United Kingdom.

The explanation for this was, at least in part, twofold. First of all there has been a tendency to take freedom of expression for granted. As is the position in common law countries, under English law freedom expression is not based on any express right, but arises from the principle that you are entitled to do or say what you wish as long as you do not contravene any legal restriction which has been placed upon your activities. However, both by statute and by decisions of the court, too many restrictions have been allowed to accumulate which either directly or indirectly inhibit freedom of expression.

The restrictions exist in many areas of the law. Some of the restrictions are entirely acceptable, for example in the case of copyright law. The desirability for there to be freedom of expression can not be allowed to unfairly prejudice the legitimate personal rights to which the individual is entitled as a result of his creative endeavours.

Again the protection which is provided by statute against racially or sexually discriminatory conduct is an acceptable qualification on freedom of expression. In the case of obscene conduct or defamatory remarks there has to be protection provided by the law although that protection will inevitably impinge on freedom of expression. The same is true of matters of national security. There have to be some secrets which the State must be able to ask the courts to preserve.

In such cases the justification for the restriction is that greater harm would be done to society if the restriction did not exist than is caused by its presence. The need for the restriction has to be weighed against the harm which it will cause to freedom of expression.

In the past this balancing act has not always been carried out when it should be by the courts when deciding how the law should develop and when it has been carried out the courts on occasions have not given sufficient weight to the importance of freedom of expression.

The same can be said of Parliament in relation to legislation. The fact that a well protected ability to communicate by all possible means is essential to the proper working of our

constitution, as is the case in any democracy, has not always been given sufficient prominence in reaching decisions which have had a significant effect on the development of our law.

The second factor is the absence in English Law of any legislation relating to freedom of information. The inability to obtain relevant information can and does dampen the ability to communicate. While the British civil service is deservedly very much admired for its professionalism and lack of corruptibility, openness is not always one of its virtues.

In litigation the ability to obtain discovery can mitigate the problem, but the courts have never been favourably disposed to the litigants engaging in fishing exercises on discovery and without necessary information a party may not be in position to embark on litigation. In addition in the absence of any express statutory obligation the Courts have not in the past been willing to imply any general obligation to give reasons for administrative decisions.[1]

The question of whether the United Kingdom should now have an entrenched Bill of Rights as part of our domestic law has once more become very much a live issue.[2] If we had had such an Instrument as part of our domestic law then it is probable that some of the concerns which now arise as to the state of our law as to freedom of expression would not exist.

The Instrument would almost inevitably include a right to freedom of expression and a provision as to freedom of information. The rights could be the subject of express limitations contained in the Instrument or those limitations could be left to be inferred. The rights could or may not override express legislation to the contrary.[3] However, whatever form the Instrument took it would help to bring home to the legislature and the courts the importance of preserving freedom of expression and the need before interfering with that freedom to balance the public interests at stake.

An area where our law could well have developed differently, if an entrenched Bill of Rights had existed, is confidentiality. There is no real difficulty in justifying a reasonably robust approach by the courts to the attempt to disclose information of a confidential nature which is personal, such as communications between husband and wife,[4] but different considerations arise where the claim to confidentiality is being made on behalf of a public body and the information is of a class which it can be forcefully contended the public has an interest in receiving. In the Crossman Diaries case the principle of confidentiality was extended to discussions in Cabinet[5] and it was in the centre of the argument in the protracted *Spycatcher* litigation.

The difference which can result from the existence of a Bill of Rights is illustrated by the difference in the approach in the House of Lords and the majority of the European Court in the contempt proceedings which followed upon the campaign waged by the *Sunday Times* in connection with the thalidomide litigation. The House of Lords regarded the protection of the defendant Distillers Company in the litigation as out weighing the interests of freedom of communication. The European Court, although it allows each member state an area of appreciation, came to a different conclusion because of the greater importance it attached to preserving free speech.

If the House of Lords had been required to give effect to the European Convention, I am by no means certain the decision would have been the same. With out the express requirement

to take into account the *right* to freedom of expression it is understandable that the judiciary should attach primary importance to preserving freedom of access to the courts.

The difference in approach which results from the United Kingdom not having an entrenched Bill is vividly illustrated by the decision of the House of Lords in *Brind v Secretary of State for Home Affairs* [1991] AC 696. In that case a gallant attempt was made to establish that a direction given by the Home Secretary to the BBC and IBA under a statutory power was unlawful. Although the statutory power was not ambiguous (if it had been this would have justified reference to the ECHR) reliance was sought to be placed on the Convention to suggest that direction was unlawful as being a disproportionate response to the adverse consequences of permitting interviews with terrorist organisations to be broadcast.

The directive only had a limited direct effect on freedom of speech since it only prevented the words used being spoken by the representative of the organisation and not their words being dubbed by an actor. On the other hand the nature of the restriction was such that the consequences were rather comic so it could be fairly contended that the directive hardly achieved its purpose.

The directive was however supported by a resolution which had been passed by the House of Commons by a large majority and the attempt to have the directive set aside failed. Lord Ackner, who gave the main speech, stated that to allow recourse to the ECHR in these circumstances was not permitted, to do so would be to give direct effect to the ECHR "by the back door" when Parliament had not done so by the front door.

Why the case is such a good illustration of the state of English law is that in deciding whether direction was lawful the House of Lords in each speech made it clear it was not for the Law Lords to decide the merits of the direction, that was a matter for the Secretary of State: the court could only intervene if he had gone outside his powers or otherwise acted unlawfully. If ECHR had been part of the domestic law the role of the court would have been different. The court would have had to decide for itself whether the infringement involved fell within the words of limitation contained in Art 10.

It should not however be thought that the decision in Brind amounted to a holding that English law did not recognise the importance of freedom of speech. On the contrary, Lord Bridge said:

> . . . we are . . . entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it.

and Lord Templeman commenced his speech with these words:

> . . . freedom of expression is a principle of every written and unwritten democratic constitution.

These statements are very much in accord with the growing influence on our law of the ECHR which has been perceptively traced extra judicially by Lord Browne-Wilkinson in his article "The infiltration of a Bill of Rights".[6]

He said:

> It is now inconceivable that any court in this country would hold that, apart from statutory provisions, the individual freedoms of a private person are less extensive than the basic human rights provided by the ECHR. Whenever the provisions of the ECHR have been raised before the court, the judges have asserted that the Convention confers no greater rights than those protected by the common law.

Where there is no existing statute involved and the courts are not confined to performing their limited role on an application for judicial review, greater effect can be given to fundamental principles and the courts are doing this with ever increasing enthusiasm.

One area of restriction to which I have already referred is due to the law of defamation. The protection which individuals receive from our law of defamation is greater than that provided in some other jurisdictions, particularly the United States, where I must confess under the First Amendment, the limitations on that protection are greater than I would regard as appropriate in a United Kingdom context. Criticisms are made of the restrictions of our defence of fair comment and the scale on which juries are in the habit of awarding damages, sometimes to plaintiffs of dubious merit. There can therefore be little doubt that the laws of defamation have a dampening effect on free speech, an effect that some unscrupulous personalities of great wealth have been able to exploit.

In this situation media interests were concerned as to what would be the outcome when a local authority brought an action for libel in *Derbyshire v Times Newspapers* [1993] AC 534.[7] There was one English authority suggesting that such an action could be brought. However both in the Court of Appeal and the House of Lords it was decided that local government, like central government, should not be entitled to a remedy in damages for defamation, the appropriate forum in which they should defend their reputation was the political one.

In giving the reasons of the House of Lords for the decision, Lord Keith stressed that "it is of the highest public importance that a democratically elected government body or indeed any government body, should be open to uninhibited public criticism." Lord Keith in his speech applied the decision of the Supreme Court of South Africa in *Die Spoorbond v South African Railways* [1946] AD 999 and cited copiously from the impressive judgement of Shreiner JA in that case. In reaching their conclusion the Court of Appeal relied heavily on the provisions of ECHR because the law was unclear on the subject. However the House of Lords considered that English Law is such that the result was clear without the need for resort to the ECHR.

An other recent case which again illustrates the importance now being attached to freedom of expression is the decision of the Court of Appeal in the *Esther Rantzen case* (April 1993). Normally an appellate court is reluctant to interfere with a jury's award of damages. However reflecting what was regarded as being a change of atmosphere resulting in greater importance being attached to the fundamental right, the Court of Appeal considered it was proper to interfere with an extravagant award of damages which could have a chilling effect on freedom of speech.

The future of free expression in the United Kingdom is therefore not entirely without its brighter side. There is a new awareness of its importance and the fact that it can be eroded by default.

This is not confined to the courts. When a consultation paper was issued recently by the Lord Chancellor with a view to legislation its impact on the ECHR was one of the issues considered. However, as Helsinki Watch made clear in their recent publication, "Freedom of Expression in the United Kingdom", there is still room for improvement and while I would not endorse all their recommendations, I would certainly agree that our law of blasphemy should be repealed.

Endnotes

1. On applications for judicial review, it has been the commendable practice of respondent governmental bodies to disclose their cards - good, bad or indifferent - in their affidavits.

2. Both the new Lord Chief Justice and the Master of the Rolls have publicly gone on record as being in favour of some form of Bill of Rights, as has the Leader of the Opposition.

3. Article 10 of the European Convention and 19 of the International Covenant both contain express limitations.

   Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states:

   (1) Everyone has the right to freedom of expression. This right should include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

   (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

   Article 19 provides:

   (1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Section 14 of the New Zealand Bill of Rights contains no express limitation, it simply states that: "Everyone has the right to freedom of expression including the freedom to seek, receive, and impart information and opinions of any kind in any form."

Section 4 also provides that its rights and freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However its provisions do not override other legislation (section 4).

4. Duchess of Argyle v Duke of Argyle [1967] Ch 302

5. Attorney-General v Jonathan Cape [1976] QB 613

6. Public Law 1992 p 367; quotation at p 405.

7. The text of the report is annexed as Appendix 1.

Appendix 1

[House of Lords]

DERBYSHIRE COUNTY COUNCIL ..... **Appellant**

and

TIMES NEWSPAPERS LTD and Others ..... **Respondents**

1992 Dec 7, 8, 9, 10;
1993 Feb 18

Lord Keith of Kinkel, Lord Griffiths,
Lord Goff of Chieveley,
Lord Browne-Wilkinson and Lord Woolf

Defamation - parties - corporation - publication relating to administration of local authority's superannuation fund - publication insinuating maladministration of pension funds - balance between public interest in freedom of speech and protection of authority's reputation - whether local authority entitled to maintain action in defamation

The plaintiff, a local authority, brought an action for damages for libel against the defendants in respect of two newspaper articles which had questioned the propriety of investments made for its superannuation fund. On a preliminary issue as to whether the plaintiff had a cause of action against the defendants, the judge held that a local authority could sue for libel in respect of its governmental and administrative functions, and dismissed the defendants' application to strike out the statement of claim. On appeal by the defendants, the Court of Appeal held that the plaintiff could not bring the action for libel.

On appeal by the plaintiff: -

Held, dismissing the appeal, that since it was of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism, and since the threat of civil actions for defamation would place an undesirable fetter on the freedom to express such criticism, it would be contrary to the public interest for institutions of central or local government to have any right at common law to maintain an action for damages for defamation, and that, accordingly, the plaintiff was not entitled to bring an action for libel against the defendants, and its statement of claim would be struck out.

Manchester Corporation v Williams [1891] 1 QB 94, DC considered.

Bognor Regis Urban District Council v Campion [1972] 2 QB 169 overruled.

Decision of the Court of Appeal [1992] QB 770; [1992] 3 WLR 28; [1992] 3 All ER 65 affirmed on different grounds.

The following cases are referred to in the opinion of Lord Keith of Kinkel:

Attorney-General v Guardian Newspapers Ltd [1987] 1 WLR 1248; [1987] 3 All ER 316, HL (E)
Attorney-General v Guardian Newspapers Ltd (No. 2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL (E)

Barthold v Germany (1985) 7 EHRR 383

Bognor Regis Urban District Council v Campion [1972] 2 QB 169; [1972] 2 WLR 983; [1972] 2 All ER 61

Chicago (City of) v Tribune Co (1923) 139 NE 86

Die Spoorbond v South African Railways, 1946 AD 999

Hector v Attorney-General for Antigua and Barbuda [1990] 2 AC 312; [1990] 2 WLR 606; [1990] 2 All ER 103, PC

Lingens v Austria (1986) 8 EHRR 407

Manchester Corporation v Williams [1891] 1 QB 94; 63 LT 805, DC

Metropolitan Saloon Omnibus Co Ltd v Hawkins (1859) 4 H & N 87

National Union of General and Municipal Workers v Gillian [1946] KB 81; [1945] 2 All ER 593, CA

New York Times Co v Sullivan (1964) 376 US 254

Reg v Secretary of State for the Home Department, Ex parte Brind [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL (E)

South Hetton Coal Co Ltd v North-Eastern News Association Ltd [1894] 1 QB 133, CA

Sunday Times v United Kingdom (1979) 2 EHRR 245

W (A Minor)(Wardship: Restrictions on Publication), In re [1992] 1 WLR 100; [1992] 1 All ER 794, CA

The following additional cases were cited in arguments:

Alberta Legislation, In re [1938] 2 DLR 81

Argus Printing and Publishing Co Ltd v Inkatha Freedom Party, 1992 (3) SA 579

Attorney-General v Antigua Times Ltd [1976] AC 16; [1975] 3 WLR 232; [1975] 3 All ER 81, PC

Australia Capital Television Pty Ltd v Commonwealth of Australia (No 2) (1992) 108 ALR 577

Austrian Communes, Sixteen v Austria (1974) 46 Eur Comm HR Dec 118

Blackshaw v Lord [1984] QB 1; [1983] 3 WLR 283; [1983] 2 All ER 311, CA

Castells v Spain (1992) 14 EHRR 445

Church of Scientology Inc v Anderson [1980] WAR 71

Cox v Feeny (1863) 4 F & F 13

Dennis v United States of America (1951) 341 US 494

Dudgeon v United Kingdom (1981) 4 EHRR 149

Edmonton Journal v Attorney-General for Alberta (1989) 64 DLR (4th) 577

Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd [1980] 3 WLR 98; [1980] 1 All ER 1097

Fielding v Variety Incorporated [1967] 2 QB 841; [1967] 3 WLR 415; [1967] 2 All ER 497, CA

Foster v British Gas Plc [1991] 2 AC 306; [1991] 2 WLR 1075; [1991] 2 All ER 705, HL (E)

Hoechst A-G v Commission of the European Communities (Case 46/87R) [1987] ECR 1549, ECJ

Le Fanu v Malcomson (1848) 1 HL Cas 637, HL (E)

London Association for Protection of Trade v Greenlands Ltd [1916] 2 AC 15, HL (E)

Nationwide News Pty Ltd v Wills (1992) 108 ALR 681

Oberschlick v Austria, 23 May 1991, Publications of the European Court of Human Rights, Series A No. 204

Prince George (City of) v British Columbia Television System Ltd. (1978) 85 DLR (3d) 755; (1979) 95 DLR (3d) 577

Reg v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury [1991] 1 QB 429; [1990] 3 WLR 986; [1991] 1 All ER 306, DC

Reg v Independent Television Commission, Ex parte TSW (Broadcasting) Ltd, The Times, 30 March 1992, HE (E)

Reg v Wells Street Stipendiary Magistrate, Ex parte Deakin [1980] AC 477; [1979] 2 WLR 665; [1979] 2 All ER 497, HL (E)

Retail, Wholesale & Department Store Union, Local 850 v Dolphin Delivery Ltd. (1986) 33 DLR (4th) 174

Silkin v Beaverbrook Newspapers Ltd [1958] 1 WLR 743; [1958] 2 All ER 516

Sunday Times v United Kingdom (No. 2) (1991) 14 EHRR 229

Te Runanga O Wharekauri Rekohu Inc v Attorney-General (unreported), 3 November 1992, New Zealand

Telnikoff v Matusevitch [1992] 2 AC 343; [1991] 3 WLR 952; [1991] 4 All ER 817, HL (E)

Times Newspapers Ltd v United Kingdom (Application No. 14631/89) (unreported), 5 March 1990, ECHR

Webb v Times Publishing Co Ltd [1960] 2 QB 535; [1960] 3 WLR 352; [1960] 2 All ER 789

Appeal from the Court of Appeal.

This was an appeal, by leave of the Court of Appeal, by the plaintiff, Derbyshire County Council, from the decision of the Court of Appeal (Balcombe, Ralph Gibson and Butler-Sloss LJJ) [1992] QB 770 allowing an appeal by the defendants, Times Newspapers Ltd., Andrew Neil, the editor of "The Sunday Times," and Rosemary Collins and Peter Hounam, two of the newspaper's journalists, from the order of Morland J [1992] QB 770 holding, on a preliminary issue, that the plaintiff could maintain a cause of action in libel against the defendants in respect of articles in issues of "The Sunday Times" dated 17 and 24 September 1989.

The facts are stated in the opinion of Lord Keith of Kinkel.

Charles Gray QC and Heather Rogers for the plaintiff. In exercising its powers and carrying out its functions as a county council, the plaintiff has a reputation that is distinct from that of its individual members or officers. At common law trading corporations can sue for libel: Metropolitan Saloon Omnibus Co Ltd v Hawkins (1859) 4 H & N 87. It is not necessary for the corporation to prove actual damage: South Hetton Coal Co Ltd v North-Eastern News Association Ltd. [1894] 1 QB 133. Non-trading corporations can also sue: National Union of General and Municipal Workers v Gillian [1946] KB 81. So, too, can trade unions: Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd. [1980] QB

585. Each of these bodies, although having only legal personality, has a legitimate entitlement to protect its reputation from defamatory attacks. Further, a partnership (which does not have a separate legal personality) is entitled to sue in its own name for damage done to its reputation: Le Fanu v Malcolmson (1848) 1 HL Cas 637. There is no reason in logic or principle to distinguish the plaintiff from these bodies.

Bognor Regis Urban District Council v Campion [1972] 2 QB 169 remains good authority for the proposition that a local authority has a "governing" reputation, which it can protect by an action for libel. [Reference was also made to City of Prince George v British Columbia Television System Ltd (1978) 85 DLR (3d) 755; (1979) 95 DLR (3d) 577; Church of Scientology Inc v Anderson [1980] WAR 71; Die Spoorbond v South African Railways, 1946 AD 999 and Argus Printing and Publishing Co Ltd v Inkatha Freedom Party, 1992 (3) SA 579.] The Court of Appeal erred in holding that Manchester Corporation v Williams [1891] 1 QB 94; 63 LT 805 conflicts with the Bognor decision and casts doubt on the general principles that a local authority is entitled to sue for libel. That case only decided that a local authority could not sue for libel in respect of an imputation of bribery and corruption. The basis of the decision was the wrong conclusion that a local authority cannot commit those offences. The common law is thus clear and certain.

There is no statutory restriction preventing the plaintiff from taking action for libel. On the contrary, s 222 of the Local Government Act 1972 confers a wide power on local authorities to institute civil proceedings of all types. The need for a local authority to be able to sue for libel to protect its reputation is a real and pressing one. Damage to its reputation may make it more difficult for the authority to borrow money or tender for contracts, and may disaffect its staff or deter participation in its pension scheme. The rationale for permitting persons other than individuals to sue for libel thus applies with equal force to local authorities.

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) should not be used to determine what the common law is, or to resolve any uncertainty in the common law; in fact, however, English domestic law is consistent with article 10. It is accepted that the precepts underlying the Convention may be looked at to decide whether the public interest in freedom of information should prevail over the right to protect one's reputation. [Reference was made to Reg v Secretary of State for the Home Department, Ex parte Brind [1991] 1 AC 696, 760.] But regard should be had to the fact that the right to freedom of expression under the Convention is not unlimited. It is subject to restrictions which are prescribed by law, or necessary in a democratic society, or necessary for the protection of the reputation or rights of others. [Reference was made to Attorney-General v Antigua Times Ltd [1976] AC 16, 25-28.] Any restriction should be proportionate to its aim.

The article should not be applied in the abstract to conclude that a local authority's right to bring a libel action will inevitably and in all circumstances infringe the article. The correct approach should be to consider whether in the context of the particular case, the relevant domestic law is unnecessarily restrictive; see Castells v Spain (1992) 14 EHRR 445; Lingens v Austria (1986) 8 EHRR 407 and Oberschlick v Austria, 23 May 1991, Publications of the European Court of Human Rights, Series A No. 204. Even if the question were to be asked in the abstract, a thorough investigation of the aims and effect of domestic law would show that the English law of defamation strikes a balance between the rights of protection for

reputation and of freedom of expression. Thus, a local authority has to show that a defamatory article in a newspaper refers to it as such, not just to individuals associated with it. The newspaper only has to prove the "sting" of the libel, not every single allegation. The defence of fair comment gives a wide protection to the newspaper. Honest comment (including inferences of fact) cannot be the subject of a successful libel action: Silkin v Beaverbrook Newspapers Ltd [1958] 1 WLR 743 and Telnikoff v Matusevitch [1992] 2 AC 343. Damages awarded to corporate plaintiffs are not large. A local authority has no feelings to be hurt by a libel: see Fielding v Variety Incorporated [1967] 2 QB 841. Thus, the English law of defamation imposes no unnecessary or illegitimate restriction on freedom of expression within Art 10.

A local authority should not be deprived of the right to bring an action for libel because of the possibility of its being able to prosecute for criminal libel. This offence is virtually extinct and is anomalous and difficult to reconcile with Art 10: see Reg v Wells Street Stipendiary Magistrate, Ex parte Deakin [1980] AC 477. Nor should the right be denied because of the availability of actions for malicious falsehood. If there is a legitimate need for a local authority to protect its reputation, why should its ability to do so depend on whether, fortuitously, it could prove malice. A non-malicious publication may cause just as much damage as a malicious one.

If a local authority has a right to sue for libel at common law, only Parliament, not the courts, can take away that right: see Dennis v United States of America (1951) 341 US 494.

Anthony Lester QC and Desmond Browne QC for the defendants. The plaintiffs are not a trading corporation or some other private body: they are a governmental body performing public duties and exercising public powers not possessed by individual citizens or private bodies. There is no justification for treating a local authority's governing reputation as analogous to a private company's or trade union's business reputation, and there is no legitimate public interest in restricting or interfering with freedom of speech to protect that governing reputation. For the courts to allow an elected public authority to sue for libel would be to authorise unnecessary interference by the common law with freedom of expression in a democratic society. It is important that there should be as much public information and public criticism about the workings of local government as there is about the workings of central government. If the council were to succeed in this appeal, any governmental body with corporate status could bring libel proceedings against a newspaper or individual citizen alleged to have defamed its governing reputation. Such bodies would be able to wield the very sharp sword of libel proceedings to deter or suppress public criticism and information about what they do as the people's representatives and public servants. They could do so using public funds and knowing that an ordinary individual citizen could not afford access to justice to defend his freedom of political expression against such a claim. This is not a hypothetical matter: the defendant in the Bognor Regis case [1972] 2 QB 169 was completely ruined by the legal costs of defending a libel trial for having handed out a leaflet at a ratepayers' association meeting in a village hall. Freedom of expression is an essential feature of citizenship and of representative democracy. Close scrutiny of possible threats to fundamental freedoms is called for: Reg v Independent Television Commission, Ex parte TSW (Broadcasting) Ltd, The Times, 30 March 1992.

The plaintiffs seek to extend the tort of libel well beyond the ambit of the criminal offence of seditious libel, which is designed to protect the government and the public against scurrilous and extreme attacks upon the Crown or government institutions: see Reg v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury [1991] 1 QB 529. Seditious libel requires proof of a seditious intention, whereas state of mind is immaterial for defamatory libel, since malice is implied from the mere publication of defamatory matter. The development of a tort of government libel, much more draconian than the crime of seditious libel, would have a chilling effect upon the freedom of expression of newspapers as well as of the individual citizen critic of government. The press is not above the law or entitled to some special privilege or immunity not enjoyed by the individual citizen: it has no greater or fewer rights than does the citizen for whom it is the surrogate.

In the Bognor Regis case [1972] 2 QB 169 no attempt was made to weigh the public interest in freedom of expression against the public interest in the protection of reputation. Although followed in City of Prince George v British Columbia Television System Ltd, 85 DLR (3d) 755 it is uncertain whether that case remains good law in Canada in the light of the constitutional guarantee of free speech in the Charter of Rights and Freedoms: see Edmonton Journal v Attorney-General for Alberta (1989) 64 DLR (4th) 577 and Retail, Wholesale & Department Store Union, Local 850 v Dolphin Delivery Ltd (1986) 33 DLR (4th) 174. Where there has been judicial weighing of the competing public interests, it has been held that governmental bodies cannot sue in respect of their governing reputations: City of Chicago v Tribune Co (1923) 139 NE 86; New York Times Co v Sullivan (1964) 376 US 254 and Die Spoorbond v South African Railways, 1946 AD 999.

In the United Kingdom there is no Act of Parliament incorporating the guarantee of free speech contained in Art 10 of the European Convention on Human Rights and Fundamental Freedoms into domestic law. However, the common law is not ethically aimless. Subject to the sovereign power of Parliament to intervene by legislation, the common law matches the protection given to free speech by Art 10. The fundamental human right to free expression is an essential feature of citizenship and of representative democracy. It is a basic principle of the unwritten British Constitution, protected by the common law.

In the absence of legislative intervention by Parliament, it is the constitutional function of the courts, when declaring and applying the common law, to ensure that the law does not unnecessarily interfere with free expression: see In re Alberta Legislation [1938] 2 SLR 81; Australian Capital Television Pty Ltd v Commonwealth of Australia (No. 2) (1992) 108 ALR 577; Nationwide News Pty Ltd v Wills (1992) 108 ALR 681 and Te Runanga O Wharekauri Rekohu Inc v Attorney-General (unreported), 3 November 1992.

Where a statute confers an apparently unfettered power on a minister to restrict free expression, the common law principles of statutory interpretation require the restriction to be closely scrutinised and to be justified as necessary to protect an important competing public interest: see Reg v Secretary of State for the Home Department, Ex parte Brind [1991] 1 AC 696. There is a similar requirement where the restriction upon free expression is imposed by the common law itself: Attorney-General v Guardian Newspapers Ltd [1987] 1 WLR 1248 and Attorney-General v Guardian Newspapers Ltd (No. 2) [1990] 1 AC 109. Furthermore, the courts will, unless constrained by binding authority, declare the common law so as to be in harmony with the right to freedom of expression recognised and guaranteed by Art 10 of

the Convention and with the principle that only necessary interferences with freedom of expression are acceptable. The Convention, though not part of domestic law, enshrines the common law. The mere existence of a legal rule can violate a Convention right or freedom if it has a chilling effect upon the practical enjoyment of that right or freedom: Dudgeon v United Kingdom (1981) 4 EHRR 149 and Times Newspapers Ltd v United Kingdom (Application No. 14631/89) (unreported), 5 March 1990. [Reference was also made to Castells v Spain 14 EHRR 445 and Hector v Attorney-General for Antigua and Barbuda [1990] 2 AC 312.] The application of the Bognor Regis decision undoubtedly interferes with free speech, authorises potential restrictions and penalties and has a serious chilling effect upon freedom of speech generally. A rule enabling a government corporation to sue for libel thus cannot be justified under Art 10(2) in accordance with the principles of objective necessity and proportionality. These principles are of particular importance so far as the press is concerned as public watchdog. The limits of permissible criticism are wider with regard to the government. A critic of government conduct ought not to have to guarantee the truth of all his factual assertions endangering the esteem in which government is held on pain of a successful suit for libel. This would deter newspapers and individual citizens from offending governmental bodies and would lead to self-censoring and public ignorance about the workings of government. Placing the burden of proving justification upon the defendant does not mean that only false allegations would be deterred. In addition, would-be critics of government conduct will be deterred from voicing criticism even though what they published was reasonably believed to be true and was in fact true, because of doubt of whether it could be proved to the satisfaction of a court of law, or because of fear of the expense of having to do so: see City of Chicago v Tribune Co, 139 NE 86, approved in New York Times Co v Sullivan, 376 US 254. [Reference was also made to Hoechst A-G v Commission of the European Communities (Case 46/87R) [1987] ECR 1549; Sixteen Austrian Communes v Austria (1974) 46 Eur Comm HR Dec 118; Sunday Times v United Kingdom (1979) 2 EHRR 245; Sunday Times v United Kingdom (No. 2) (1991) 14 EHRR 229 and Foster v British Gas Plc [1991] 2 AC 306.]

Even if a governmental body is entitled to sue for libel, a constitutional privilege should attach to a publication imputing maladministration to such a body. The categories of publications which enjoy privilege at common law are not closed: London Association for Protection of Trade v Greenlands Ltd [1916] 2 AC 15.

An individual councillor or local government officer can bring proceedings in his own name for an attack upon his personal reputation in relation to his official activities. It is open to question, however, whether qualified privilege attaches to the publication of fair information on a matter of public interest concerning the manner in which a public officer performs public functions: see Webb v Times Publishing Co Ltd [1960] 2 QB 535 and Blackshaw v Lord [1984] QB 1 in which the Court of Appeal took too narrow a view of the scope of privilege in such circumstances.

The plaintiffs cannot rely on s 222(1) of the Local Government Act 1972, since their proceedings are not capable of promoting or protecting the interests of the inhabitants of Derbyshire generally and they constitute an unnecessary interference with free expression.

Browne QC following. The freedom to express criticism of a governmental body can be more easily stifled by a series of civil actions than by criminal prosecutions: City of Chicago v

Tribune Co, 139 NE 86, 90. Unlike a criminal prosecution, in a civil action the plaintiff does not need to show a prima facie case as a precondition to going for trial. The mere issue of a writ tends to have a gagging effect; and once proceedings are set down for trial, they become active so that further publications are caught by the strict liability rule: s. 2(3) of, and Schedule 1 to, the Contempt of Court Act 1981. A civil court can grant prior restraint of publication, and damages are potentially without limit. There is no legal aid and proceedings are notoriously costly. The plaintiff does not have to prove his claim beyond reasonable doubt. [Reference was made to Cox v Feeny (1863) 4 F & F 13.]

Gray QC in reply. If there is a need for greater protection to be given to freedom of expression, the manner of achieving that ought not to be an arbitrary removal from certain plaintiffs of their rights, but should be by extension of existing common law defences. The route to reform should be through the law of privilege.

Their Lordships took time for consideration.

18 February 1993. Lord Keith of Kinkel. My Lords, this appeal raises, as a preliminary issue in an action of damages for libel, the question whether a local authority is entitled to maintain an action in libel for words which reflect on it in its governmental and administrative functions. That is the way the preliminary point of law was expressed in the order of the master, but it has opened out into an investigation of whether a local authority can sue for libel at all.

Balcombe LJ, giving the leading judgment in the Court of Appeal, summarised the facts thus [1992] QB 770, 802:

> The facts in the case are fortunately refreshingly simple. In two issues of "The Sunday Times" newspaper on 17 and 24 September 1989 there appeared articles concerning share deals involving the superannuation fund of the Derbyshire County Council. The articles in the issue of 17 September were headed "Revealed: Socialist tycoon's deals with a Labour chief" and "Bizarre deals of a council leader and the media tycoon:" that in the issue of 24 September was headed "Council share deals under scrutiny." The council leader was Mr. David Melvyn Bookbinder; the "media tycoon" was Mr. Owen Oyston. It is unnecessary for the purposes of this judgment to set out in any detail the contents of these articles: it is sufficient to say that they question the propriety of certain investments made by the council of moneys in its superannuation fund, with Mr. Bookbinder as the prime mover, in three deals with Mr. Oyston or companies controlled by him. Excerpts from the articles giving the flavour of the allegations made will be found in the judgment at first instance . . . to which those interested may refer. The council is the "administering authority" of its superannuation fund under the Superannuation Act 1972 and the Local Government Superannuation Regulations 1986 (S.I. 1986 No. 24) made thereunder.

Following the publication actions of damages for libel were brought against the publishers of "The Sunday Times," its editor and the two journalists who wrote the articles, by Derbyshire County Council, Mr. Bookbinder and Mr. Oyston. Mr. Oyston's action was settled by an apology and payment of damages and costs. The statements of claims in this action by the plaintiff and in that by Mr. Bookbinder are for all practical purposes in identical terms. That

of the plaintiff asserts in paragraph 6 that there were written and published "of and concerning the council and of and concerning the council in the way of its discharge of its responsibility for the investment and control of the superannuation fund" the words contained in the article of 17 September, and paragraph 8 makes a similar assertion in relation to the article of 24 September. Paragraph 9 states:

> By reason of the words published on 17 September 1989 and the words and graph published on 24 September 1989 the plaintiff council has been injured in its credit and reputation and has been brought into public scandal, odium and contempt, and has suffered loss and damage.

No special damage is pleaded. On 31 July 1991 French J refused an application by the plaintiff to amend the statement of claim so as to plead a certain specific item of special damage.

The preliminary point of law was tried at first instance before Morland J [1992] QB 770 who on 15 March 1991 decided it in favour of the plaintiff. However, on appeal by the defendants his judgment was reversed by the Court of Appeal (Balcombe, Ralph Gibson and Butler-Sloss LJJ) [1992] QB 770, on 19 February 1992. The plaintiff now appeals, with leave given in the Court of Appeal, to your Lordships' House.

There are only two reported cases in which an English local authority has sued for libel. The first is Manchester Corporation v Williams [1891] 1 QB 94; 63 LT 805. The defendant had written a letter to a newspaper alleging that "in the case of two, if not three, departments of our Manchester City Council, bribery and corruption have existed, and done their nefarious work." A Divisional Court consisting of Day J and Lawrence J. held that the statement of claim disclosed no cause of action. The judgment of Day J in the Queen's Bench report is in these terms [1891] 1 QB 94, 96:

> This is an action brought by a municipal corporation to recover damages for what is alleged to be a libel on the corporation itself, as distinguished from its individual members or officials. The libel complained of consists of a charge of bribery and corruption. The question is whether such an action will lie. I think it will not. It is altogether unprecedented, and there is no principle on which it could be founded. The limits of a corporation's right of action for libel are those suggested by Pollock CB in the case which has been referred to. A corporation may sue for a libel affecting property, not for one merely affecting personal reputation. The present case falls within the latter class. There must, therefore, be judgment for the defendant.

Lawrence J said that he was of the same opinion.

The Law Times report contains a somewhat longer judgment of Day J in these terms, 63 LT 805, 806-807:

> This action is brought by the mayor, aldermen, and citizens of the city of Manchester to recover damages from the defendant in respect of that which is alleged by them to be a libel on the corporation. The alleged libel is contained in a letter written by the defendant to the editor of the `Manchester Examiner and Times,' which charged, as

> alleged by the statement of claim, that bribery and corruption existed or had existed in three departments of the Manchester City Council, and that the plaintiffs were either parties thereto or culpably ignorant thereof, and that the said bribery and corruption prevailed to such an extent as to render necessary an inquiry by a parliamentary commission. Now it is for us to determine whether a corporation can bring such an action, and I must say that, to my mind, to allow such a thing would be wholly unprecedented and contrary to principle. A corporation may sue for a libel affecting property, not for one merely affecting personal reputation. This does not fall within the class of cases in respect of which a corporation can maintain an action, but does fall within the second class commented on by Pollock CB in his judgment in the case of the Metropolitan Saloon Omnibus Co Ltd v Hawkins, 4 H & N 87, with which I fully agree . . . [a quotation follows] The charge in the present case is one of bribery and corruption, of which a corporation cannot possibly be guilty, and therefore, in my opinion, this action will not lie.

It is likely that the Law Reports version of his judgment was one revised by Day J, in which he omitted the sentence which ends the Law Times report, so that the true and only ratio of the decision is that a corporation may sue for a libel affecting property, but not for one merely affecting personal reputation.

Metropolitan Saloon Omnibus Co Ltd v Hawkins (1859) 4 H & N 87 was an action by a company incorporated under the Joint Stock Companies Act 1856 (19 & 20 Vict c 47) in respect of a libel imputing to it insolvency, mismanagement and dishonest carrying on of its affairs. The Court of the Exchequer held the action to be maintainable. Pollock CB, in the passage referred to by Day J, said, at p 90:

> That a corporation at common law can sue in respect of a libel there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong; and if its property is injured by slander it has no means of redress except by action. Therefore it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured.

In South Hetton Coal Co Ltd v North-Eastern News Association Ltd. [1894] 1 QB 133 a newspaper had published an article alleging that the houses in which the company accommodated its colliers were in a highly insanitary state. The Court of Appeal held that the company was entitled to maintain an action for libel without proof of special damage, in respect that the libel was calculated to injure the company's reputation in the way of its business. Lord Esher MR said, at p 138:

> I have considered the case, and I have come to the conclusion that the law of libel is one and the same as to all plaintiffs; and that, in every action of libel, whether the statement complained of is, or is not a libel depends on the same question - viz., whether the jury are of opinion that what has been published with regard to the

> plaintiff would tend in the minds of people of ordinary sense to bring the plaintiff into contempt, hatred, or ridicule, or to injure his character. The question is really the same by whomsoever the action is brought - whether by a person, a firm, or a company. But though the law is the same, the application of it is, no doubt, different with regard to different kinds of plaintiffs. There are statements which, with regard to some plaintiffs, would undoubtedly constitute a libel, but which, if published of another kind of plaintiffs, would not have the same effect.

He went on to say that certain statements might have the same effect, whether made with regard to a person, or a firm, or a company, for example statements with regard to conduct of a business, and having elaborated on the question whether or not a particular statement might reflect on the manner of conduct of a business, continued, at p 139:

> With regard to a firm or a company, it is impossible to lay down an exhaustive rule as to what would be a libel on them. But the same rule is applicable to a statement made with regard to them. Statements may be made with regard to their mode of carrying on business, such as to lead people of ordinary sense to the opinion that they conduct their business badly and inefficiently. If so, the law will be the same in their case as in that of an individual, and the statement will be libellous. Then, if the case be one of libel - whether on a person, a firm, or a company - the law is that the damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case.

In National Union of General and Municipal Workers v Gillian [1946] KB 81 the Court of Appeal held that a trade union could, in general, maintain an action in tort, and that an action for libel was no exception to that rule. No detailed consideration was given to the nature of the statements in respect of which the action might lie, though Scott LJ, at p 87, referred to the disintegration of a trade union which might result from a libel, and Uthwatt J, at p. 88, said that he saw no reason why a non-trading corporation should not have the same rights as a trading corporation as respects imputations on the conduct by it of its activities.

The second case involving proceedings by a local authority is Bognor Regis Urban District Council v Campion [1972] 2 QB 169, a decision of Browne J. Mr. Campion had distributed at a meeting of a ratepayers' association a leaflet savagely attacking the council, which sued him for libel. At the trial Mr. Campion conducted his own case without the assistance of solicitors or counsel. Browne J found in favour of the council and awarded it damages of £2,000. At p 173, he stated his intention to apply a principle to be found in National Union of General and Municipal Workers v Gillian [1946] KB 81, from which he quoted extensively in the following pages. He continued [1972] 2 QB 169, 175:

> Just as a trading company has a trading reputation which it is entitled to protect by bringing an action for defamation, so in my view the plaintiffs as a local government corporation have a "governing" reputation which they are equally entitled to protect in the same way - of course, bearing in mind the vital distinction between defamation of the corporation as such and defamation of its individual officers or members. I entirely accept the statement made in Gatley on Libel and Slander, 6th ed (1967), p 409, para 890: "A corporation or company cannot maintain an action of libel or

slander for any words which reflect, not upon itself, but solely upon its individual officers or members." Then there is a quotation: "To merely attack or challenge the rectitude of the officers or members of a corporation, and hold them or either of them up to scorn, hatred, contempt, or obloquy for acts done in their official capacity, or which would render them liable to criminal prosecution, does not give the corporation a right of action for libel." I stress the words "solely" and "merely" in those passages. The quotation given in Gatley there is from a United States case, Warner v Ingersoll (1907) 157 Fed R 311.

Browne J then proceeded to consider Manchester Corporation v Williams, and after quoting from the judgment of Day J in the Law Times Report, 63 LT 805, 806-807, said [1972] 2 QB 169, 177:

> Day J seems to put his judgment on two grounds; first, that a corporation may sue for a libel affecting property and not for one merely affecting personal reputation. If this was ever right, it has in my view been overruled by South Hetton Coal Co v North-Eastern News Association Ltd. [1894] 1 QB 133, 134, 135 (where substantially this argument was used by the defendants) and by National Union of General and Municipal Workers v Gillian (where the Manchester Corporation case [1891] 1 QB 94 was cited). The other ground seems to have been that a corporation cannot be guilty of corruption and therefore it cannot be defamatory to say or write that it has been guilty of corruption. This was based on the obiter dictum of Pollock CB in Metropolitan Saloon Omnibus Co v Hawkins (1859) 4 H & N 87 and was repeated later by Lopes LJ in South Hetton Coal Co v North-Eastern News Association Ltd [1894] 1 QB 133, 141. The Manchester Corporation case is severely criticised in Spencer Bower on Actionable Defamation (1908), pp 279 and 280; in Fraser on Libel and Slander, 7th ed (1936), pp 89 and 90; and by Oliver J in Wills v Brooks [1947] 1 All ER 191 where he said, at p 192, that after reading the National Union of General and Municipal Workers case he agreed with the editors of Fraser, who say, at p 90: `It is respectfully submitted that the above statement of the law by Day J . . . is unsound in principle and would not be upheld in the Court of Appeal.' Oliver J in Willis v Brooks [1947] 1 All ER 191, 193 said: `Counsel for the defendants' - who incidentally were Sir Valentine Holmes and Mr Milmo - `did not seriously contend that an action for libel imputing something very like corruption, as in this case, would not lie in any circumstances at the suit of a trade union,' and he awarded the plaintiffs £500 damages. As I have said, the Manchester Corporation case was cited in the National Union of General and Municipal Workers case and the libel in that case seems to have imputed among other things something very like corruption."

Finally, he said, at p 178:

> The actual decision in the Manchester Corporation case can perhaps be supported, as Mr. Waterhouse suggested, on the argument that the libel there was not capable of referring to a corporation consisting (as the plaintiffs did) of the mayor, aldermen and citizens, and not, as here, of the chairman and councillors. I think that that case is distinguishable from this on that ground, and also on the ground that in my view none of the statements in the leaflet in this case actually impute corruption. But I hope that

> the Court of Appeal will soon have occasion to consider the Manchester Corporation case.

It is to be observed that Browne J did not give any consideration to the question whether a local authority, or any other body exercising governmental functions, might not be in a special position as regards the right to take proceedings for defamation. The authorities cited above clearly establish that a trading corporation is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. Examples are those that go to credit such as might deter banks from lending to it, or to the conditions experienced by its employees, which might impede the recruitment of the best qualified workers, or make people reluctant to deal with it. The South Hetton Coal Co case [1894] 1 QB 133 would appear to be an instance of the latter kind, and not, as suggested by Browne J, an authority for the view that a trading corporation can sue for something that does not affect it adversely in the way of its business. The trade union cases are understandable upon the view that defamatory matter may adversely affect the union's attitude towards employers. Likewise in the case of a charitable organisation the effect may be to discourage subscribers or otherwise impair its ability to carry on its charitable objects. Similar considerations can no doubt be advanced in connection with the position of a local authority. Defamatory statements might make it more difficult to borrow or to attract suitable staff and thus affect adversely the efficient carrying out of its functions.

There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech. In City of Chicago v Tribune Co (1923) 139 NE 86 the Supreme Court of Illinois held that the city could not maintain an action of damages for libel. Thompson CJ said, at p 90:

> The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished . . . but all other utterrances or publications against the government must be considered absolutely privileged. While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticise the government is a privilege which, with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions . . .

After giving a number of reasons for this, he said, at p 90:

> It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.

These propositions were endorsed by the Supreme Court of the United States in New York Co v Sullivan (1964) 376 US 254, 277. While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public. In Hector v Attorney-General of Antigua and Barbuda [1990] 2 AC 312 the Judicial Committee of the Privy Council held that a statutory provision which made the printing or distribution of any false statement likely to undermine public confidence in the conduct of public affairs a criminal offence contravened the provisions of the constitution protecting freedom of speech. Lord Bridge of Harwich said, at p 318:

> In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion.

It is of some significance to observe that a number of departments of central government in the United Kingdom are statutorily created corporations, including the Secretaries of State for Defence, Education and Science, Energy, Environment and Social Services. If a local authority can sue for libel there would appear to be no reason in logic for holding that any of these departments (apart from two which are made corporations only for the purpose of holding land) was not also entitled to sue. But as is shown by the decision in Attorney-General v Guardian Newspapers Ltd. (No. 2) [1990] 1 AC 109, a case concerned with confidentiality, there are rights available to private citizens which institutions of central government are not in a position to exercise unless they can show that it is the public interest to do so. The same applies, in my opinion, to local authorities. In both cases I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to

admit such actions would place an undesirable fetter on freedom of speech. In Die Spoorbond v South African Railways, 1946 AD 999 the Supreme Court of South Africa held that the South African Railways and Harbours, a governmental department of the Union of South Africa, was not entitled to maintain an action for defamation in respect of a publication alleged to have injured its reputation as the authority responsible for running the railways. Schreiner JA said, at pp 1012-1013:

> I am prepared to assume, for the purposes of the present argument, that the Crown may, at least in so far as it takes part in trading in competition with its subjects, enjoy a reputation, damage to which could be calculated in money. On that assumption there is certainly force in the contention that it would be unfair to deny to the Crown the weapon, an action for damages for defamation, which is most feared by calumniators. Nevertheless it seems to me that considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect that reputation. The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered. At present certain kinds of criticism of those who manage the state's affairs may lead to criminal prosecutions, while if the criticism consists of defamatory utterances against individual servants of the state actions for defamation will lie at their suit. But subject to the risk of these sanctions and to the possible further risk, to which reference will presently be made, of being sued by the Crown for injurious falsehood, any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the state, derived from the state's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country. Such actions could not, I think, be confined to those brought by the railways administration for criticism of the running of the railways. Quite a number of government departments, as appeared in the course of the argument, indulge in some form of trading on a greater or a lesser scale. Moreover, the government, when it raises loans, is interested in the good or bad reputation that it may enjoy among possible subscribers to such loans. It would be difficult to assign any limits to the Crown's right to sue for defamation once its right in any case were recognised.

These observations may properly be regarded as no less applicable to a local authority than to a department of central government. In the same case Watermeyer CJ, at p 1009, observed that the reputation of the Crown might fairly be regarded as distinct from that of the group of individuals temporarily responsible for the management of the railways on its behalf. In the case of a local authority temporarily under the control of one political party or another it is difficult to say that the local authority as such has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change. A publication attacking the activities of the authority will necessarily be an attack on the body of councillors which represents the controlling party, or on the executives who carry on the day to day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation. Further, it is open

to the controlling body to defend itself by public utterances and in debate in the council chamber.

The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain any action of damages for defamation. That was the conclusion reached by the Court of Appeal, which did so principally by reference to article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), to which the United Kingdom has adhered but which has not been enacted into domestic law. Article 10 is in these terms:

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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

As regards the words "necessary in a democratic society" in connection with the restrictions on the right to freedom of expression which may properly be prescribed by law, the jurisprudence of the European Court of Human Rights has established that "necessary" requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate to the legitimate aim pursued. The domestic courts have "a margin of appreciation" based upon local knowledge of the needs of the society to which they belong: Sunday Times v United Kingdom (1979) 2 EHRR 245; Barthold v Germany (1985) 7 EHRR 383 and Lingens v Austria (1986) 8 EHRR 407, 418. The Court of Appeal approached the matter upon the basis that the law of England was uncertain upon the issue lying at the heart of the case, having regard in particular to the conflicting decisions in Manchester Corporation v Williams [1891] 1 QB 94 and Bognor Regis Urban District Council v Campion [1972] 2 QB 169 and to the absence of any relevant decision in the Court of Appeal or in this House. In that situation it was appropriate to have regard to the Convention. Balcombe LJ referred in this connection to Reg v Secretary of State for the Home Department, Ex parte Brind [1991] 1 AC 696; Attorney-General v Guardian Newspapers Ltd [1987] 1 WLR 1248; In re W (A Minor) (Wardship: Restrictions on Publication) [1992] 1 WLR 100; and Attorney-General v Guardian Newspapers Ltd (No. 2) [1990] 1 AC 109. Having examined other authorities he concluded, having carried out the balancing exercise requisite for purposes of Art 10 of the Convention, that there was no pressing social need that a corporate public authority should have the right to sue in defamation for the protection of its reputation. That must certainly be true considering that in the past hundred years there are only two known instances of a defamation action by a local authority. He considered that the right to sue for malicious falsehood gave such a body all the protection which was necessary. Similar views were expressed by Ralph Gibson and Butler-Sloss LJJ [1992] QB 770, 824, 834, who observed that the law of criminal libel might be available in suitable cases, to afford additional protection. All three Lords Justices also alluded to the consideration that the

publication of defamatory matter concerning a local authority was likely to reflect also on individual councillors or officers, and that the prospect of actions for libel at their instance also afforded some protection to the local authority.

My Lords, I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention. My noble and learned friend, Lord Goff of Chieveley, in Attorney-General v Guardian Newspapers Ltd (No. 2) [1990] 1 AC 109, 283-284, expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and art 10 of the Convention. I agree, and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field.

For these reasons I would dismiss the appeal. It follows that Bognor Regis Urban District Council v Campion [1972] 2 QB 169 was wrongly decided and should be overruled.

Lord Griffiths: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend. Lord Keith of Kinkel, and for the reasons he gives. I, too, would dismiss the appeal.

Lord Goff of Chieveley: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel, and for the reasons he gives, I, too, would dismiss the appeal.

Lord Browne-Wilkinson: My Lords, I, too, would dismiss the appeal for the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel.

Lord Woolf: My Lords, I, too, would dismiss the appeal for the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel.

Appeal dismissed with costs.

Freedom of Expression

By Lord Lester of Herne Hill, QC, United Kingdom

Language and Context

The right to freedom of expression is defined by Art 10 of the European Convention in detailed and specific terms as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The language and structure of Art 10 reflect the different and sometimes competing values of, on the one hand, individual self-expression and the free flow of information, and, on the other hand, other important rights, freedoms, and social needs, and the "duties and responsibilities" of those communicating or receiving information and ideas.

Article 10 has to be read in the light of the Convention as a whole. For example, Art 14 extends the scope of Art 10 by guaranteeing the enjoyment of its rights and freedoms, without discrimination on any ground. The right to respect for correspondence[1] and to respect for personal privacy[2] contained in Art 8, is closely linked to freedom of expression; as is the right to freedom of peaceful assembly and freedom of association, contained in Art 11;[3] and the right to manifest one's religion or belief, contained in Art 9.

Other provisions restrict the scope of Art 10. For example, Art 16 provides that nothing in Art 10 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens. On its face, Art 16 is an entirely unlimited exception. If interpreted loosely, it would enable public authorities arbitrarily and unnecessarily to censor or suppress the expression of political views by aliens. Article 17 provides that nothing in the Convention (that is, including Art 10) may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Convention or at their limitation to a greater degree than is provided for in the Convention. Again, a loose interpretation of Art 17 would destroy the substance of the right to freedom of expression for people with unpopular and extreme political views. Article 15 permits derogations to be made to Art 10 in time of war or other

public emergency threatening the life of the nation. Once more, a loose interpretation could seriously endanger freedom of speech in troubled times.

The rights and freedoms positively guaranteed by other provisions of the Convention, and reflected in Art 10(2) itself, also limit the scope of the right to free expression. For example, the right to a fair judicial hearing, guaranteed by Art 6, justifies some restrictions upon freedom of speech.[4] The right to respect for private life, including personal privacy, guaranteed by Art 8, protects a person's honour and reputation against unnecessary attack.[5]

The right to freedom of expression is expressed in Art 10 in weaker language than in Art 19 of the UN International Covenant on Civil and Political Rights[6] in several respects. In particular, Art 10 does not, in its terms, create an independent right to hold opinions without interference;[7] nor does it expressly refer to the right to seek information;[8] nor does it specifically refer to information and ideas "of all kinds." However, the European Court and Commission generally seek to interpret Art 10 of the Convention in a manner which is consistent with Art 19 of the Covenant.[9]

Article 10 contains more detailed and specific exceptions to the right to free expression than does any other international human rights instrument. By contrast, and unlike, for example, Art 20 of the International Covenant,[10] the Convention does not require war propaganda or incitement to racial or religious hatred or discrimination to be prohibited.

Compared with the well-known constitutional guarantees of free speech in the United States,[11] France[12] and Germany,[13] the right to free expression in Art 10 is more heavily qualified by its exceptions. Unlike Art 13(2) of the Inter-American Convention on Human Rights, there is no statement in Art 10 that the exercise of the right to freedom of expression shall not be subject to prior censorship.[14] Unlike Art 14 of the Inter-American Convention,[15] the European Convention does not expressly guarantee a right of reply for injury resulting from inaccurate or offensive statements or ideas transmitted to the public.

Relevance to Other Legal Systems

The principles stated in Art 10 and its case-law are relevant in interpreting other international human rights treaties[16] and national constitutions[17] and laws, as well as treaties such as the European Convention on Transfrontier Television.[18]

Since all the Member States of the European Community are Contracting Parties to the Convention, the European Court of Justice also derives guidance from the fundamental rights and freedoms stated in the Convention when interpreting and applying Community law[19] or national implementing measures. In its Memorandum on the Accession of the European Communities to the Convention,[20] the EEC Commission recognized that Art 10 has a potential role in connection with EEC competition law and with rules on the free movement of goods.[21]

In addition, in its legislative capacity, the Council of the European Communities has referred to Art 10 of the Convention as a relevant norm for Community legislation. The preamble to the Council Directive on television broadcasting activities[22] describes the Community freedom

to provide television broadcasting services as a "specific manifestation in Community law of a more general principle, namely the freedom of expression as enshrined in Art 10(1) of the Convention." For this reason the Council there recognized that the issuing of directives on the broadcasting and distribution of television programmes must ensure their free movement in the light of Art 10(1) and subject only to the limits set by Art 10(2) of the Convention and by Art 56(1) of the EEC Treaty.[23]

The Right to Impart Information and Ideas

The right of freedom of speech extends to all types of expression which impart or convey opinions, ideas or information, irrespective of content or the mode of communication. Freedom of speech presupposes a willing speaker; but where a speaker exists, the protection afforded is to the communication, to its source and to the recipient.[24] The right to free speech applies to "everyone" whether natural or legal persons (including profit-making corporate bodies).[25]

The breadth and importance of the right to free speech were recognized by the European Court in the *Handyside case*[26] as being inherent in the concept of a democratic and plural society. In a celebrated statement, the Court observed that:

> Freedom of expression constitutes one of the essential foundations of a [democratic society], one of the basic conditions for its progress and for the development of every man. Subject to para 2 of Art 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."

The *Handyside case* concerned a successful prosecution under the English Obscene Publications Act against the publishers of *The Little Red Schoolbook*, a book that urged the young people at which it was aimed to take a liberal attitude to sexual matters. Although the challenge under Art 10 of the Convention to this interference with free speech failed (upon the basis that Contracting States have a wide margin of appreciation in deciding whether a given interference with free speech is necessary in a democratic society for the protection of morals) the decision is important for the general statement of principle, treating free speech as indispensable to a plural and tolerant democratic society. It is also important for the recognition of the "margin of appreciation," an elastic and elusive concept that has often been applied by the Court in a manner which - as will become evident in what follows - seriously dilutes the strong principles of freedom of expression proclaimed by the Court.

The Court gave further emphasis to the high priority to be given to the protection of political expression, and to freedom of the press, in its landmark majority judgment in the first *Sunday Times case*, where it stated[27] that it is incumbent on the mass media "to impart information and ideas concerning matters . . . of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them." The Court also held[28] that its supervision is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith." In addition, it decided[29] that

it "is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions that must be narrowly interpreted."

In its unanimous judgment in the *Lingens case*,[30] the Court stated that it is incumbent on the press "to impart information and ideas on political issues, just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them." Freedom of the press, the Court observed,

> affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.[31]

The importance of freedom of *artistic* expression was emphasized by the European Commission of Human Rights in the *Müller case*.[32] It observed that -

> freedom of artistic expression is of fundamental importance in [a] democratic society. Typically it is in undemocratic societies that artistic freedom and the freedom to circulate works of art are severely restricted. Through his creative work the artist expresses not only a personal vision of the world but also his view of the society in which he lives. To that extent art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day.

Freedom of artistic expression, in the Commission's opinion,[33] consists not only in freedom to create works of art but also in freedom to disseminate them, in particular through exhibitions.

The Commission regarded the confiscation of Mr Müller's paintings because they were judged to be obscene as a particularly serious interference with freedom of expression because of the effect upon his freedom to exhibit the paintings in future. It held that the confiscation was in breach of Art 10.

The Court accepted that freedom of artistic expression is included in Art 10, and that freedom of expression affords the opportunity to take part in the public exchange of "cultural, political and social information and ideas of all kinds."[34] However, the Court was markedly weaker than was the Commission in giving practical content to artistic expression. Instead the Court emphasized the "duties and responsibilities" of artists,[35] and the wide margin of appreciation in relation to the public morals exception. In one of several judgments overruling the Commission's findings of breaches of the right to free expression, the Court decided that the confiscation of the paintings did not infringe Art 10. If an interference as extreme as the confiscation of an artists' works is regarded as within the wide margin of appreciation, it is difficult to imagine a case in which European supervision is likely to be real and effective where a work is regarded by the national authorities as obscene or otherwise injurious to public morals.

In spite of the Court's strong and oft-repeated statement of principle, in the *Handyside case*,[36] that, subject to para 2, Art 10 applies to ideas that "offend, shock, or disturb the State or any sector of the population," politically extreme speech has been treated as falling outside the protection of Art 10. In *Glimmerveen and Hagenbeek v The Netherlands*,[37] the Commission held inadmissible a complaint by extremist right-wing Dutch politicians that their conviction for distributing leaflets advocating racial discrimination and the repatriation of non-whites from The Netherlands violated Art 10. The Commission invoked Art 17, which precludes anyone from relying on the Convention for a right to engage in activities "aimed at the destruction of any of the rights or freedoms set forth in the Convention." The Commission stated that the purpose of Art 17 was "to prevent totalitarian groups from exploiting, in their own interests, the principles enunciated in the Convention." It found that the expression of these ideas constitute an activity within the meaning of Art 17 in that they would encourage racial discrimination, which is prohibited under the Convention and other international instruments. Accordingly, such expression fell outside the scope of Art 10 altogether.

In *Purcell v Ireland*, journalists and producers of Irish radio and television programmes challenged restrictions imposed upon the broadcasting of interviews with spokesmen and members of various proscribed organizations, including the Provisional IRA and Sinn Fein (a registered political party). The restrictions applied irrespective of the contents of the programmes, and covered broadcasts by Sinn Fein speakers during Irish general elections and elections to the European Parliament.

The Commission did not on this occasion regard the complaint as falling outside Art 10, because of Art 17 of the Convention. However, even though the broadcasting ban covered politically innocuous speech, the Commission rejected the application at the admissibility stage,[38] referring to the power and influence of radio and television, the limited possibilities for the broadcaster to correct, qualify, interpret or comment on any broadcast statement, the risk that live statement could involve coded messages, and the "limited scope of the restrictions imposed on the applicants and the overriding interests they were designed to protect." The Commission has thereby seriously weakened European protection of freedom of political speech in exactly the kind of difficult context in which European protection is most needed, so as to enable ideas to be communicated to the public even though they shock, disturb or offend the State or many of its citizens, and even though they are expressed by those who support terrorism. Indeed, on this occasion it was not the content of the ideas, but the nature of the speakers and of the medium of expression which caused the Commission to uphold the compatibility of the broadcasting ban with Art 10.

In other cases, and with more justification, the Commission had upheld race relations and defamation laws imposing civil or criminal sanctions for racist statements as being justified interferences with expression under Art 10(2), on the ground that they are necessary for the "prevention of disorder or crime," or for the "protection of the reputation or rights of others."[39]

This is an area of expression in which United States First Amendment doctrine has not been followed in Europe. In 1979, a planned march by a group of neo-Nazis through the streets of Skokie, Illinois, "raised in a most painful form the question of whether the First Amendment's protection is truly universal."[40] The town passed various ordinances designed to ban the proposed march with its display of swastikas and military uniforms. In its view,

the march would have inflicted direct psychic trauma on those residents who were survivors of the Holocaust. The United States Court of Appeals rejected Skokie's justification for the ordinances, holding that speech which inflicts such "psychic trauma" is indistinguishable in principle from speech that invites dispute, or induces a condition of unrest, or even stirs people to anger.[41]

The European approach - reflected in Convention case law - treats racist expression as akin to using offensive weapons, not deserving of being a protected form of expression. This approach gives much greater importance to "respect for the dignity of the individual and concern for the rights of minorities"[42] than to the commitment in American constitutional doctrine to market place trading freely in competing ideas.[43]

In the light of the tragic European experience of genocide and totalitarianism in this century, it is not surprising that many European jurists adopt a more pessimistic view than American jurists of the ability of democratic societies to resist racist propaganda without the need for censorship or punishment. There is, however, a danger that unnecessary interferences with free speech might be permitted in the name of racial or religious harmony.[44]

Regrettably, the European Court has permitted State interference with the freedom of expression of civil servants, without even requiring proof of a pressing social need for the interference. In *Glasenapp v Germany*,[45] the applicant was dismissed from her job as a school teacher for refusing to dissociate herself from the German Communist Party (of which she was not a member). She had written a letter to a Communist newspaper supporting an "international people's kindergarten," a policy also supported by the Communist Party. As a civil servant, she had undertaken, as required by law, to uphold the free democratic constitutional system within the meaning of the Basic Law.

By a narrow majority, the Commission found a violation of Art 10.[46] The Commission pointed out that Mrs Glasenapp's appointment had been revoked because of specific incidents relating to expression or withholding of her political opinions. The expression of opinion at issue was a letter to the editor of a newspaper after a news conference, following which she declined to clarify her position when this was required of her by the School Board to confirm her loyalty to the Basic Law. The Commission held that the conditions and restrictions which arose from the obligation of loyalty constituted an interference with the right to freedom of expression and opinion. It recalled the vital role played by the protection of freedom of expression in the democratic structure of Member States. It concluded that the requirement that she should dissociate herself completely from a political party with which she had had only a limited connection could not be considered a "necessary" condition and restriction on her freedom of opinion and its expression. The operation of loyalty control in the particular case did not correspond to a "pressing social need" and the response of the control mechanism was a disproportionate means of pursuing the legitimate aim of safeguarding the democratic order, since there was no evidence to suggest that the applicant's political views had interfered with the discharge of her work.

Although the Commission was divided in its opinions as to the merits of the case, all members of the Commission were agreed that there had been an interference with freedom of opinion and expression, which required to be justified under Art 10(2). As a matter of causation, it is difficult to see how they could have reached any other conclusion. But for Mrs

Glasenapp's political opinions and her expression of them at a press conference and in a letter, her appointment would not have been revoked. Like every civil servant, she owed an obligation of loyalty and allegiance to the Basic Law. This obligation was a condition of her appointment and continuing employment in the civil service. As the Commission found,[47]

> It resulted in the introduction for her of a condition on her freedom of opinion and expression, since she could only avoid the consequences of the loyalty appraisal system if she expressed such opinions as were compatible with the obligation of loyalty which she had assumed. Her job as a civil servant was therefore conditional on the opinions she held or expressed.

The Court, however, came to the opposite conclusion (by sixteen votes to one) that there had been no interference with the exercise of the right protected under Art 10(1), and therefore found it unnecessary to consider the complaint under Art 10(2).[48] What was being claimed, in the Court's view, was a right of access to the civil service, a right that was not protected by the Convention. In a puzzling *non sequitur*, the Court held that the authorities had taken account of her opinions and attitude merely in order to satisfy themselves as to whether she possessed one of the necessary personal qualifications for the post in question, and that, accordingly, there had been no interference with her freedom of expression.

A minority of six judges expressed some reservation about the potentially broad implications of such a holding. They stated that the non-applicability of Art 10 in this case did not preclude the possibility that Art 10 might apply "even to the Civil Service where all freedom of expression was *de jure* or *de facto* non-existent under domestic law."[49]

Only Judge Spielman grappled with the difficult question of how to reconcile the State's interest in securing the loyalty of its civil servants with the applicant's right to freedom of expression. In his dissenting opinion, he applied the Court's jurisprudence on Art 10. There had been a *prima facie* interference with the applicant's freedom of expression, the pressing social need for which had to be demonstrated by the State under Art 10(2). In his view, this exacting test had not been met in the circumstances since the measures taken were disproportionate to the aim pursued.

It is respectfully submitted that Judge Spielman's analysis was preferable. If civil servants are to enjoy an effective protection of their rights under the Convention, it is essential that the State should be required to demonstrate the necessity for any restrictions on those rights. It is questionable whether the Court's judgment in the *Glasenapp case* interpreted Art 10 so as to make its safeguards "practical and effective" and in accordance with the general spirit of the Convention as "an instrument designed to maintain and promote the ideals and values of a democratic society."[50] Instead of adopting a generous and purposive interpretation, the Court's approach was restrictive and formal. It failed to avoid what has been called[51] "the austerity of tabulated legalism."[52]

The Court's judgment in the first *Sunday Times case*[53] was a landmark judgment. The House of Lords - the supreme judicial authority of the United Kingdom - was there held, by a majority of the Court, to have breached Art 10 by restraining *The Sunday Times* from publishing articles about the history of the testing, manufacture and marketing of the drug "thalidomide," which had caused severe deformities in the children of women who had taken

the drug as a sedative during pregnancy. Civil proceedings were pending against the manufacturers and distributors of the drug. The Court rejected the contention that it was necessary to restrain publication so as to maintain the authority of the judiciary until the proceedings had been determined. It emphasized the fact that the thalidomide disaster was a matter of undisputed public concern. The question of where responsibility lay was a matter of public interest. The facts did not cease to be a matter of public interest, in the view of the majority of the Court, merely because they formed the background to pending litigation.

The Court's majority decision was wafer-thin: eleven votes to nine. Its subsequent restrictive case law on Art 10 may be partly explained by the fact that, as it happened, many more of the dissenting minority were to remain members of the Court after *The Sunday Times case* than were those who formed the majority in that case.

The clear differences between the contrasting views are vividly illustrated by what happened in another and more recent free speech case concerning the authority of the judiciary. In the *Barfod case*,[54] a Danish citizen wrote an article, which was published in a magazine, expressing his opinion that two lay judges were disqualified under the Danish Constitution, and questioning their ability and power to decide impartially in a case brought against their employer.[55] The case in question concerned the legality of a tax imposed by the Greenland Local Government, of which the two lay judges were employees. They had sat in the case, together with a High Court judge, who subsequently required the Greenland Chief of Police to investigate the matter. The applicant was charged and convicted of defamation of character, and was fined 2,000 Danish crowns.

The Commission decided,[56] by fourteen votes to one, that, in matters of public interest involving the functioning of the public administration, including the judiciary, the test of necessity in Art 10(2) must be a particularly strict one:

> It follows that even if the article in question could be interpreted as an attack on the integrity or reputation of the two lay judges, the general interest in allowing a public debate about the functioning of the judiciary weigh more heavily than the interest of the two judges in being protected against criticism of the kind expressed in the applicant's article.

The Commission also observed that "in the eyes of the respondent Government, employees of a party to a dispute ought not to sit as judges on that very dispute. This fundamental element of fair justice is also anchored in Art 6 . . . and it does not lose any of its importance in a system with lay judges." The Commission therefore found, without apparent difficulty, that there had been a breach of Art 10.

However, a Chamber of the Court was as decisive in finding to the contrary (by six votes to one) that there had been no breach of Art 10. The Court held that the impugned statement was "a defamatory accusation against the lay judges personally, which was likely to lower them in public esteem and was put forward without any supporting evidence . . In view of these considerations, the political context in which the tax case was fought cannot be regarded as relevant for the question of proportionality." It is respectfully submitted that the Commission's opinion is greatly to be preferred to the Court's decision in the *Barthold case*, which retreats from the Court' strong judgment of principle in *The Sunday Times case*. It is

to be hoped that, in future cases, the Court will ensure, in practice as well as in theory, that justice is not a "cloistered virtue."[57]

The Court has been reluctant to decide whether and to what extent Art 10 protects "commercial speech"; that is, advertising or other means of communicating commercial information to consumers. In the *Barthold case*,[58] both the Commission and the Court held that an interview given by a veterinary surgeon to a Hamburg newspaper, in which he called for a more comprehensive veterinary night service, was a type of expression fully protected under Art 10, since it communicated information on a matter of general interest. Restrictions imposed upon the applicant by his professional rules, which prohibited him from repeating his remarks in the press, were thus held to violate his right to free speech. Although the interview had an advertisement-like effect, the Commission and the Court took the view that the case was not concerned with commercial advertising. They did not therefore consider it necessary to consider the scope of protection afforded to advertising.

The important underlying issues of principle were described by Judge Pettiti in his concurring opinion in the *Barthold case*:

> Freedom of expression in its true dimension is the right to receive and to impart information and ideas. Commercial speech is directly connected with that freedom.
>
> > The great issues of freedom of information, of a free market in broadcasting, of the use of communication satellites cannot be resolved without taking account of the phenomenon of advertising; for a total prohibition of advertising would amount to a prohibition of broadcasting, by depriving the latter of its financial backing. Regulation in this sphere is of course legitimate - an uncontrolled broadcasting system is inconceivable - but in order to maintain the free flow of information any restriction imposed should answer a "pressing social need" and not mere expediency.

In the *Markt Intern case*,[59] the Court decided that information of a commercial nature cannot be excluded from the scope of Art 10(1), which "does not apply solely to certain types of information or ideas or forms of expression." However, the Commission reaffirmed[60] its previous opinion that the test of necessity can be less strict when applied to commercial advertising, while the thrust of the Court's majority judgment shows an unwillingness to give full Art 10 protection to commercial communications.[61]

Markt Intern publishes weekly news sheets aimed at specialized commercial sectors, such as chemists and beauty product retailers. It published an article describing the experience of a chemist, dissatisfied with an order from a mail-order firm, who sought a refund. The article also reported the firm's reply to *Markt Intern's* own inquiry about the matter. It sought information from trade readers as to whether they had had similar experiences with the firm. The statements in the article were true.

The German courts restrained *Markt Intern* from repeating these statements in the form in which they had been published. They did so on the ground that they had done acts contrary to honest practices in breach of the Unfair Competition Act.

The Commission concluded, by twelve votes to one, that there had been a violation of Art 10. It noted that *Markt Intern* was not in any competitive relationship with the criticized firm, that the statements were factually accurate, and that the German judicial decision was based on reasoning which removed the protection of freedom of expression, irrespective of the particular circumstances of the case, from any publication which the civil courts had found to be acts of competition within the meaning of the Unfair Competition Act.

However, what seemed to the Commission to have been a clear breach of Art 10 caused the Court to be deeply divided. The Court decided, by nine votes to nine, with the casting vote of the President, that there had been no breach. The majority based their decision upon the margin of appreciation, which they described[62] as -

> essential in commercial matters and, in particular in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate.

The majority also stated[63] that "it is primarily for the national courts to decide which statements are permissible and which are not." They concluded[64] that -

> It is obvious that opinions may differ as to whether the Federal Court's reaction was appropriate or whether the statements made in the specific case by *Markt Intern* should be permitted or tolerated. However, the European Court of Human Rights should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered the restrictions to be necessary.

The opinions given by the dissenting half of the Court criticized the decision for failing to follow the Court's established criteria. In their view, it is just as important to guarantee freedom of expression in relation to the practices of a commercial undertaking as in relation to the conduct of a head of government. The fact that a person defends a given interest does not deprive him of the benefit of freedom of expression. In order to ensure the openness of business activities, it must be possible to disseminate freely information and ideas concerning the products and services proposed to consumers. They found the reasoning with regard to the margin of appreciation a cause for serious concern, because it meant that the Court was effectively eschewing European supervision as to the conformity of the contested measures with Art 10.

The divided judicial opinions in the *Markt Intern* case leave uncertainty about the extent to which commercial speech is covered by Art 10. The application of the margin of appreciation to the particular facts raises the question whether those members of the Court who found no violation established really regard commercial speech as effectively protected by Art 10.

The Court's case-law is less well developed in this area than is the case-law of several European national courts.[65] It is respectfully submitted that[66] expression should not lose its Art 10 protection because money is spent to communicate it, or because it is carried in a form that is sold for profit, or because it does no more than propose a commercial transaction, or

because it is critical of a competitor. The fact that the communicator has a purely economic motive cannot disqualify him from protection; the fate of his business may well depend upon his ability adequately to advertise his product. In addition, the consumer's interest in the free flow of commercial information may be at least as keen as his interest in political controversy. Advertising that is honest, truthful and decent is a means of informing consumers, so that they can make choices about goods and services. Society may well have an interest in the free flow of such information since much of it may relate to matters of public interest.

In addition to these factors, the extent to which Art 10 protects commercial speech is of great practical importance to the creation of a common market for broadcasting. Without advertising, broadcasting cannot be developed and expanded.

The Right To Receive Information and Ideas

Art 10(1) guarantees not only the right to impart but also the right to receive information and ideas without interference by public authority. Unlike Art 19(2) of the International Covenant, it does not expressly mention the right to seek information, nor does it expressly impose a duty upon the State to provide information.

The Court has been very cautious in developing its case law on the subject of a right of access to information, preferring to view this as an aspect of the right to respect for private life and personal privacy, under Art 8(1).[67] In *Leander v Sweden*, the Court held[68] that the right to receive information under Art 10 "basically prohibits a Government from restricting a person from receiving information that others may wish or may be willing to impart to him." Accordingly, the applicant had no right of access to a government register containing information on his personal position, nor did Art 10 impose an obligation on the Government to impart such information to him. The Court affirmed this restrictive approach in the *Gaskin case*.[69]

The Court was, however, careful to confine its ruling to the particular circumstances of each case. In both cases, the information sought was personal to the applicant. In the *Gaskin case*, the Court held[70] that Art 8 imposes a positive obligation upon the State to ensure that the interests of an individual seeking access to confidential records relating to his private and family life is secured when a contributor to the records either is not available or improperly refuses consent to access to the records. "Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent." This comes close to deciding that Art 8 confers an enforceable duty upon the State to provide effective access for an individual to personal information which is of vital concern to his private life or family life.

What has still to be clarified is whether Art 10 confers a public right of access to official information about matters of legitimate public interest and concern.[71] It is to be hoped the Court will answer this very important question affirmatively.

The Licensing of Broadcasting

Article 10 applies not only to the content of information but also to the means of transmission or reception, since "any interference with the means necessarily interferes with the right to receive and impart information."[72] The third sentence of Art 10(1) states that Art 10 "shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." This provision empowers the State to regulate the number and type of broadcasting services, and the identity of those who provide such services. In its early case law, the Commission went further and decided[73] that the third sentence of Art 10(1) empowers the State to regulate the *content* of the material broadcast by those persons to whom licences are granted. Such an interpretation would seriously weaken the right to free speech in the context of broadcasting, because it would enable public authorities to censor the public communication of information and ideas without having to demonstrate a pressing social need under Art 10(2).

Any doubt about this important matter was removed by the Court in its judgment in the *Radio Groppera case*,[74] where it stated that the purpose of the third sentence is:

> to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of para 2, for that would lead to a result contrary to the object and purpose of Art 10 taken as a whole.

In *Radio Groppera*, the Court again overruled the Commission's finding of a violation of Art 10. The Swiss Government had prohibited the retransmission by cable of radio signals from an unlicensed station in Italy, consisting mainly of popular music programmes. The Court weighed the requirements of protecting the international communications order and the rights of others against the rights of the applicants, concluding that the national authorities had not overstepped their margin of appreciation. The Court noted that there had been no censorship directed against the content or tendencies of the programmes concerned, but a measure taken against a station which the Swiss authorities could reasonably hold to be in reality a Swiss station operating from the other side of the border in order to circumvent the statutory telecommunications system in force in Switzerland.

In its judgment in the *Autronic AG case*,[75] the Court agreed with the Commission's opinion that there had been a breach of Art 10. The Swiss Government had prohibited the retransmission of television signals from a Soviet satellite. The Swiss Government argued that the Soviet satellite signal was telecommunications rather than broadcasting, and that they were required to prohibit the retransmission of such signals because the Soviet Government's permission had not been obtained. The Court refused to distinguish between signals communicated to the general public in the "footprint" of a direct broadcasting satellite and similar signals transmitted by a telecommunications satellite. The Court referred to its case law on the margin of appreciation, going hand in hand with European supervision "whose extent will vary according to the case." It stated[76] that -

> Where, as in the instant case, there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be

> strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established.

It is not clear from this statement whether the Court was intending to hold that, in view of the importance of the right to free speech, scrutiny of State interference will be more strict than in other cases under the Convention, or whether the Court meant to confine this stricter scrutiny to restrictions upon the licensing of broadcasting.[77]

The Commission has left open[78] the question whether the third sentence of Art 10(1) excludes or permits a public television monopoly. It is submitted that the existence of such a monopoly would be contrary to the object and purpose of Art 10 taken as a whole, as would the imposition of unnecessary restrictions upon transmitting and receiving advertisements across national frontiers.

Exceptions to the Right to Freedom of Expression

Apart from the exceptions in Arts 15, 16 and 17, noted earlier, the only exceptions to the principles stated in Art 10(1) are those listed in Art 10(2). To justify an interference with freedom of expression under Art 10(2), a respondent State has to establish that the interference[79] complained of satisfies the following three tests: (a) it is "prescribed by law"; (b) it is in pursuance of one of the legitimate aims listed in Art 10(2); and (c) it is "necessary in a democratic society," having regard to the "duties and responsibilities."

These criteria are interpreted by the Court in the context of the "duties and responsibilities" which Art 10(2) declares are inherent in the exercise of the right to freedom of expression. The scope of these duties and responsibilities depends upon the context.[80] For example, a senior official in the Ministry of Foreign Affairs cannot complain that there has been a breach of Art 10 when he has been transferred to another department as the result of articles in the press inspired by him concerning the alleged surveillance to which he is subjected by reason of the nature of his job.[81] The duties and responsibilities "incumbent on members of the armed forces" are relevant to an assessment of whether their right to freedom of expression has been infringed.[82]

The Court has stated[83] that, in applying Art 10(2), it is faced not with a choice between conflicting principles, one of which is freedom of expression, but with "a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted."

However, although the principle that exception clauses should be strictly interpreted is a general principle of international human rights law (and of comparative public law), the Court has not consistently adopted this approach in free speech cases. More frequently, it has tended to give the public authorities the benefit of any doubt, balancing free speech against competing rights and freedoms, and interpreting its doctrine of the margin of appreciation loosely.[84] Each of the three tests in Art 10(2) needs separate scrutiny.

A. Prescribed by law

The requirement that an interference be "prescribed by law" is contained in several other provisions of the Convention and its Protocols, sometimes expressed in different language. In *The Sunday Times case*, the Court held[85] that two of the requirements that flow from the expression "prescribed by law" are:

(1) "the law must be adequately accessible; the citizen must be given an indication that is adequate in the circumstances of the legal rules applicable to a given case"; and

(2) the relevant norm must be "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

In practice it is rare for a State's legislative or common law interferences with fundamental rights and freedoms to fail to satisfy these requirements of the principle of legal certainty. However, in the *Open Door Counselling Ltd case*, the Commission held[86] that there had been a breach of Art 10 because the applicants could not reasonably have foreseen that their activities, in providing information to pregnant women in Ireland about abortion clinics in Britain, were unlawful, and that their freedom of expression could lawfully be restricted under domestic law. The Commission observed that a law which restricts freedom of expression "in such a vital area requires particular precision to enable individuals to regulate their conduct accordingly."

B. The purposes for which a restriction may be imposed

If the respondent State establishes that the interference with freedom of expression is "prescribed by law," it then has to establish that the interference is in pursuance of one of the legitimate purposes listed in Art 10(2). The interference must be "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

These phrases must be interpreted within the meaning of the Convention, and not simply as a matter of domestic law.[87] The issue under this test is whether the interference complained of is genuinely aimed at one of the factors listed in Art 10(1). If so, the aim of the interference under Art 10(2) is legitimate.[88]

The phrase "in the interests of national security, territorial integrity or public safety" includes a threat of the desertion of soldiers, even in peacetime, in that it tends to weaken the role of the army as an instrument to protect society from internal or external threats;[89] or the possibility that the public disclosure of confidential information about the security service by its former members might damage its efficacy.[90]

The phrase "the prevention of disorder or crime" covers criminal penalties imposed upon an elected public officer for having published an article imputing responsibility for acts of

violence to the Government;[91] or upon those who advertise or otherwise promoted "pirate" radio stations.[92] "Disorder" is a broad term. It covers not only "public order" but also "the order which must prevail within the confines of a specific social group. This is so, for example, when, as in the case of the armed forces, disorder in that group can have repercussions on order in society as a whole."[93] Similarly, restrictions upon freedom of expression may be imposed to avoid the risk of disturbances to public order after the end of a war.[94] The prevention of disorder also includes protecting the international telecommunications order.[95]

The "protection of health or morals" is a purpose which may be relied upon to impose restrictions upon those who claim that an unlicensed product has pharmaceutical qualities.[96] The word "morals" covers obscene publications.[97] There is a natural link between the protection of morals and the protection of the rights of others.[98]

The "protection of the reputation or rights of others" covers the imposition of civil or criminal sanctions for defamation.[99] The reference to "the rights of others" justifies the concept of the offence of blasphemous libel as laid down in English law.[100] It entitles the State to prohibit the display of pamphlets alleging that it is a "lie" and a "swindle" that millions of Jews were killed by Nazi Germany.[101] It empowers the State to take disciplinary measures against a lawyer who has broken his professional duty not to use aggressive or insulting language.[102] It entitles a school to prohibit a teacher from subjecting pupils to his personal moral or religious views.[103] The protection of "the rights of others" applies to protect consumers.[104] It also applies to promoting pluralism in information by allowing the fair allocation of radio frequencies.[105]

Preventing "the disclosure of information received in confidence" includes forbidding a civil servant to disclose official secrets imparted to him in confidence.[106] It also includes preventing a newspaper from publishing confidential information about the working of the security service.[107]

Maintaining "the authority and impartiality of the judiciary" covers the English common law forbidding contempt of court;[108] and preserving the confidentiality of a judicial investigation.[109]

C. Necessary in a democratic society

The State must establish not only that the interference with freedom of expression was "prescribed by law" for one of the purposes listed in Art 10(2); it must also establish that the interference was "necessary in a democratic society." In applying this test, the Court has developed the following principles, some of which have been noted already:

(1) The adjective "necessary" is synonymous neither with "indispensable" nor with the looser test of "reasonable" or "desirable". What the test of necessity connotes is a requirement that the State establish a "pressing social need" for the interference.[110]

(2) The initial responsibility for securing the rights and freedoms enshrined in Art 10 lies with the Contracting States. Accordingly, Art 10(2) gives those States a "margin of appreciation."[111]

(3) Nevertheless, States do not have an unlimited margin of appreciation. It is for the Commission and the Court to assess whether an interference with freedom of expression exceeds the limit. Hence, the domestic margin of appreciation goes hand in hand with a European supervision.[112]

(4) European supervision is not limited to ascertaining whether the State has exercised its discretion reasonably, carefully and in good faith. Such conduct is not necessarily in compliance with the criteria of Art 10(2).[113] Supervision must be strict, because of the importance of the rights in question; the necessity for restricting them must be "convincingly established."[114]

(5) The test to be satisfied by the respondent State is whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it are relevant and sufficient under Art 10(2).[115] To assess whether the interference was based upon "sufficient" reasons, which rendered it "necessary in a democratic society," account must be taken of any public interest aspect of the case.[116]

(6) The scope of the margin of appreciation is not identical as regards each of the aims listed in Art 10(2). With regard to an interference with free speech aimed at protecting morals (a goal which is subjective and shifting), for example, State authorities are in principle in a better position than the Commission and the Court to assess whether the interference is necessary. With regard to an interference with free speech aimed at a goal which is more objective in nature (such as maintaining the authority of the judiciary) State authorities are not necessarily in a more informed position.[117] Therefore, the test of "necessity" requires consideration of the nature of the aim pursued.

(7) In applying the test of necessity, it is also relevant to conisder (a) the breadth of the restriction - the greater the breadth, the greater the scrutiny called for;[118] (b) the practice of other Contracting States; where the sanctions or preventive measures are of an unusual kind, their justification has to be considered with particular care;[119] (c) the type of media through which the communication is expressed; (d) the type of information, idea or opinion which would be communicated but for the restriction imposed by the State - with political, philosophical or religious information, ideas and opinions receiving the most protection, and with commercial speech receiving less protection; and (e) whether informed opinion in the respondent State has suggested that the impugned interference with free speech could be removed without serious adverse consequences.[120]

It is relatively easy to articulate the relevant legal principles for the interpretation and application of Art 10. It is much harder to apply those principles faithfully and consistently in controversial cases involving tensions between freedom of speech, State power, and pressing social needs.

Despite the promises of the early case-law, the Court and, to a lesser extent, the Commission, have weakened European supervision of interferences by public authorities with the right to free expression. Excessive use of the elusive concept of the "margin of appreciation,"

restrictive interpretations of the scope of Art 10, and expansive interpretations of the phrase "duties and responsibilities," have seriously eroded the protection given to freedom of expression by the Convention.

This is particularly unfortunate because of the special importance of free speech to the effective enjoyment of the other fundamental rights and freedoms guaranteed by the Convention, and because, as the court has recognized,[121] freedom of expression is an essential foundation of a democratic society, a basic condition for its progress and for the development of every human being. It is greatly to be hoped that the European Court and Commission of Human Rights (and, where relevant, the European Court of Justice) will strengthen the practical application of Art 10, and interpret the exceptions and the margin of appreciation with a strong presumption in favour of freedom of speech.[122]

Endnotes

1. See Silver and others judgment of 25 March 1983, Series A no. 61.

2. See, for example, the Commission's admissibility decision of 10 July 1986, in Winer v United Kingdom 48 DR 154.

3. See Ezelin judgment of 26 April 1991, Series A no. 202, paras 35 and 37.

4. See The Sunday Times judgment of 26 April 1979, Series A no. 30, para 55.

5. See Lingens v Austria judgment of 8 July 1986, Series A no. 103, para 38.

6. Article 19 provides as follows:

   (1) Everyone shall have the right to hold opinions without interference.

   (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of his choice.

   (3) The exercise of the rights provided for in para 2 of this Article carries with it special duties and responsibilties. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

      (a) For respect of the rights or reputation of others;

      (b) For the protection of national security or of public order (ordre public), or of public health or morals.

See generally McGoldrick, The Human Rights Committee (Oxford, Clarendon Press 1991), pp 459-79.

7. Unlike Art 19(1) of the Covenant. It is difficult to see why there should ever be a legitimate interference by public authorities with the possession, as distinct from the expression, of opinions.

8. Unlike Art 19(2) of the Covenant. However, it seems likely that Art 10, read with Art 8 of the Convention, will gradually be interpreted as containing a public right and a personal right of access to information in some circumstances.

9. In the Müller v Switzerland judgment of 14 May 1988, Series A no. 133, para 27, the Court referred to Art 19(2) of the Covenant for confirmation that the concept of freedom of expression includes artistic expression. In the Groppera Radio and others judgment of 28 March 1990, Series A no. 173, para 61, the Court referred to the text and history of Art 19 of the Covenant for confirmation that the third sentence of Art 10(1) was included only to make it clear that States are permitted to control by a licensing system the technical aspects of the way in which broadcasting is organized, but that licensing measures are otherwise subject to the requirements of Art 10(2) of the Convention.

10. Article 20 provides as follows:

    (1) Any propaganda for war shall be prohibited by law.

    (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

    See generally McGoldrick, The Human Rights Committee (Oxford, Clarendon Press 1991), pp 480-97. See also Art 13(5) of the Inter-American Convention on Human Rights, and Art 4 of the UN International Covenant on the Elimination of All Forms of Racial Discrimination.

11. First Amendment to the US Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

12. Article 11 of the French Declaration of the Rights of Man and of the Citizen: "The unrestrained communication of thoughts or opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he is responsible for the abuse of this liberty, in the cases determined by law."

13. Article 5 of the Basic Law provides as follows:

    (1) Everyone has the right freely to express and disseminate his opinion orally, in writing, and in pictures, and to inform himself without hindrance from all generally accessible sources. The freedom of the press and the freedom of reporting through radio and film are guaranteed. There is to be no censorship.

(2) These rights find their limits in the rules of the general laws, the statutory provisions for the protection of youth, and in the right to personal honour.

(3) Art and learning, research and teaching are free. The freedom of teaching does not release one from the constitution.

14. Except for the prior censorship of public entertainments for the sole purpose of regulating access to them for the moral protection of childhood and adolescence; ibid, Art 13(4).

15. Article 14 provides that:

(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 make a correction using the same communication 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.

(3) For the effective protection of honour and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible, who is not protected by immunities or special privileges.

16. The Inter-American Court of Human Rights held, in its powerful Advisory Opinion of 13 November 1985 on Compulsory Membership of Journalists' Association, 8 EHRR 165, paragraph 46, that for a restriction on free speech to be "necessary," under Art 13(2) of the Inter-American Convention, it must satisfy the test articulated by the European Court in relation to Art 10(2) of the Convention.

17. For example, in Indian Express Newspapers v Union of India [1985] 2 SCR 287, and in S Rangarajan v P Jagivan Ram (1989) 1 SCJ 128, the Supreme Court of India had regard to Art 10 of the Convention and its case-law for the purpose of construing the Indian constitutional guarantee of freedom of expression.

18. The Preamble to the Television Convention recalls that freedom of expression, as embodied in Art 10 of the European Convention on Human Rights, "constitutes one of the essential principles of a democratic society and one of the basic conditions for its progress and for the development of every human being." It also reaffirms the commitment of the member States of the Council of Europe to "the principles of the free flow of information and ideas and the independence of broadcasters, which constitutes an indispensable basis for broadcasting policy."

19. See, for example, joined cases 60 and 61/84, Cinéthèque v Féd nat des cinémas [1985] ECR 2605, 2607; case 12/88, Demirel v Stadt Schwäb, Gmünd [1987] ECR 3747, 3754; case 260/89, Elliniki Radiophonia Tiléorassi-Antonini Etairia, judgment of 18 June 1991.

20. Adopted on 4 April 1979, Bulletin Supplement 2/79, para 18. See also Art 5 of the European Parliament's Declaration of Fundamental Rights and Freedoms, Official Journal 1989 no. C 120, p 51.

21. The same is true of the Community rules on the provision of services: cf case 352/85, Bond van Adverteerders v Netherlands State [1988] ECR 2085. See generally the opinion of Mr Advocate General Van Gerven of 11 June 1991 in case 159/90, The Society for the Protection of Unborn Children Ireland Ltd v S Grogan and others (not yet reported).

22. Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC).

23. See generally "Television without Frontiers" - Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable (June 1984), pp 37-38, 48-49, 127-36 and 254-57; case 260/89, n 19 above.

24. Virginia State Board of Pharmacy v Virginia Citizens Consumer Council 425 US 748, 756 (1976); The Sunday Times judgment of 26 April 1979, Series A no. 30, paras 65-66. In its opinion in De Geillustreerde Pers NV v The Netherlands, 8 DR 5 (1976), the Commission suggested that the freedom to impart information under Art 10 "is only granted to the person or body who produces, provides or organises it." If the public has other ready means of access to the information, Art 10 does not apply. That case concerned the bar on publication in unauthorized magazines of complete lists of television and radio programme details. The Commission was dealing with information protected by Dutch copyright law, which was already readily available to the public. The Commission's restrictive interpretation of Art 10 has been forcefully criticized by academic writers: see, for example, Roger Pinto, La Liberté d'Information et d'Opinion en Droit International (Paris, Economica Press 1984), pp 216-17. In its admissibility decision of 12 April 1991, P-Institut v Austria, Application no 13470/87, the Commission stated their opinion that the scope of Art 10 is not limited to the expression of one's own views. It protects, for example, the operator of a cinema.

25. Autronic AG judgment of 22 May 1990, Series A no. 178, para 47.

26. Judgment of 7 December 1976, Series A no. 24, para 49. See also The Sunday Times judgment of 26 April 1979, Series A no. 30, para 64.

27. Judgment of 26 April 1979, Series A no. 30, para 65.

28. Ibid, para 59.

29. Ibid, para 65.

30. Lingens v Austria judgment of 8 July 1986, Series A no. 103, paras 41-42.

31. See also Oberschlick v Austria judgment of 23 May 1991, Series A no. 204, paras 57-61; Castells v Spain judgment of 23 April 1992, Series A no. 236, para 42. The approach exemplified in these cases is close to the reasoning in the landmark decision of the US Supreme Court in New York Times v Sullivan 376 US 710 (1964). In Wachtmeester v The Netherlands, Application no. 16617/90, admissibility decision of 12 April 1991, the Commission regarded a conviction for simple insult as justified, given that the behaviour criticized did not concern public or political personalities.

32. Report adopted on 8 October 1986, Series A no. 133, p 37, para 70. The Court's judgments in the pending case of Schwabe v Austria and Thorgeirson v Iceland seem likely to develop this approach further.

33. Ibid, para 95. In P-Institut v Austria, Application no. 13470/87, the Commission declared admissible (on 12 April 1991) a complaint by a cinema operator of the seizure, forfeiture and prohibition of a film for disparaging religious precepts.

34. Judgment of 24 May 1988, Series A no. 133, para 27.

35. The notion that artists owe duties and responsibilities in their capacity as artists seems strange, in the light of the inherently subversive nature of the artistic impulse. It may be, however, that the Court meant to say no more than that artists, like everyone else, have to obey the law.

36. See n 26 above.

37. Report adopted on 11 October 1979, 4 EHRR 260.

38. Admissibility decision of 16 April 1991 (as yet unreported).

39. See, for example, Application no. 9235/81 X v Federal Republic of Germany 29 DR 194 (1982).

40. Lawrence H Tribe, Constitutional Choices (Harvard University Press 1985) p 219.

41. National Socialist Party v Skokie 578 F.2d 1197 (7th Cir) cert denied, 439 US 916 (1978). But see Beauharnais v Illinois 343 US 250 (1952).

42. Roger Errera, "The Freedom of the Press: The United States, France, and Other European Countries," in Louis Henkin and Albert Rosenthal (ed.) Constitutionalism and Rights - The Influence of the United States Constitution Abroad (New York, Columbia Univeristy Press 1990) p 63 at p 85.

43. See, for example, Abrams v United States 250 US 616, at 630 (1919), per Holmes J (dissenting); Whitney v California 274 US 357, at 375-78 (1927, per Brandeis J concurring). For a detailed analysis of the contrast between US and European approaches, see David Kretzmer, "Freedom of Speech and Racism," 8 Cardozo Law Review (1987), p 445. See also the decision of the Supreme Court of Canada, in P v Keegstra 61 CCC (3d) 1, upholding a criminal provision prohibiting wilful promotion

of hatred as being proportionate, in relation to the guarantee of free speech in the Charter of Rights. For a survey of the position in 30 countries see Art 19 in Sandra Coliver (ed), Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination (1992).

44. For example, in Singapore, the Maintenance of Religious Harmony Act 1990 (no. 26 of 1990) confers sweepingly broad Ministerial powers to make restraining orders, free from any judicial review, against officials or members of religious groups or institutions, or any person.

45. Judgment of 28 August 1986, Series A no. 104.

46. Report adopted on 11 May 1984. The Commission's opinion is contained in Series A no. 104, p 38, as an Annex to the Court's judgment.

47. Ibid, p 39, para 69.

48. Ibid, p 27, para 53.

49. In its judgment of 6 June 1991, in Public Service Commission v Millar (as yet unreported), the Supreme Court of Canada was much stronger in its protection of the freedom of expression of civil servants. It held that a statutory prohibition on partisan political expression and activity by public servants, under threat of disciplinary action including dismissal from employment, infringed the right to freedom of expression in s. 2(b) of the Charter of Rights, was over-inclusive and, in many of its applications, went beyond what was necessary to achieve the objective of an impartial and loyal civil service.

50. Soering judgment of 7 July 1989, Series A no. 161, para 87.

51. Minister of Home Affairs v Fisher [1980] AC 319 (PC), at 328, per Lord Wilberforce.

52. In the companion case of Kosiek v Germany, judgment of 28 August 1988, Series A no. 105, both the Commission and the Court rejected the applicant's complaint of a breach of Art 10. The facts of his case were strikingly different from those of Mrs Glasenapp's case. Mr Kosiek, a physics lecturer and civil servant, was not only a member of the National Democratic Party of Germany, an extreme right-wing party, but had represented that party in the Land parliament for four years and had stood for election to the federal parliament. He had written two books expressing his political views. His appointment was terminated after eight years on the ground that his activities and opinions evidenced a lack of allegiance to the Constitution.

53. Judgment of 26 April 1979, Series A no. 30.

54. Judgment of 22 February 1989, Series A no. 149.

55. The article stated: "Most of the Local Government's members could . . afford the time to watch the two Greenland lay judges - who are by the way both employed directly

by the Local Government, as director of a museum and as consultant in urban housing affairs - did their duty, and this they did. The vote was two to one in favour of the Local Government and with such a bench of judges it does not require much imagination to guess who voted how."

56. Report of the Commission of 16 July 1987, para 71.

57. The phrase comes from the decision of the Privy Council in Ambard v Attorney-General for Trinidad and Tobago [1936] AC 322, at 335, and in turn from Milton's Areopagitica (1644) ("I cannot praise a fugitive and cloistered virtue . . .').

58. Barthold v Germany judgment of 25 March 1985, Series A no. 90.

59. Markt Intern Verlag GmbH and Klaus Beermann judgment of 30 March 1989, Series A no. 165, para 26.

60. Report of 18 December 1987, para 231.

61. The Supreme Court of the United States has decided that commercial speech, including advertising, is within First Amendment protection. Even though it gives less protection to such speech than to political speech, the Supreme Court has thus far been much stronger than the European Court of Human Rights in protecting advertising and other forms of commercial communication: see, for example, Virginia State Board of Pharmacy v Virginia Consumer Council 425 US 748 (1976); Bates v Bar of Arizona 433 US 350 (1977); Central Hudson Gas & Electric Corp v Public Service Commission 447 US 557 (1980).

62. Judgment, para 33.

63. Ibid, para 35.

64. Ibid, para 37.

65. See generally Anthony Lester and David Pannick, Advertising and Freedom of Expression in Europe (Paris, International Chamber of Commerce 1984), pp 12-13. See also the important judgment of 27 June 1986 of the Constitutional Court of Austria, in B 658/85 [1987] HRLJ 361, holding that commercial advertising is protected by Art 10 of the Convention, and that the Austrian Broadcasting Corporation (the ORF) had violated Art 10 in rejecting, without giving reasons, an application by an Austrian weekly to broadcast radio commercials. The Court held that, in the light of Art 10, the ORF was required to "be available to everybody for lawful commercial advertising under equal, unbiased and neutral conditions that consider the diversity of interests of the applicants and of the public. A preference for and a discrimination between certain enterprises must be avoided . . ."

66. These principles have been largely culled from the decision of the Supreme Court of the United States in Virginia State Board of Pharmacy v Virginia Citizens Consumer Council 425 US 748 (1976). In Hempfing v Germany, Application no. 14622/89,

admissibility decision of 7 March 1991 (unreported), the Commission rejected the Government's submission that a professional reprimand against a lawyer for advertising fell outside Art 10. The Commission observed that restrictions on the freedom of expression of members of liberal professions should not discourage them from contributing to a public debate on topics affecting the life of the community. It held that, taking into account the applicant's interest in advertising his services and the proper functioning of the legal profession, together with the very light nature of the sanction, the interference was necessary under Art 10(2).

67. However, in its report of 12 October 1983, in Application no. 8231/78, X v United Kingdom, 28 DR 5, the Commission held that the denial of access to writing paper and the restrictions imposed upon access to newspapers and periodicals during the applicant's imprisonment were in breach of Art 10.

68. Judgment of 26 March 1987, Series A no. 116, para 74. In Z v Austria, Application no. 10392/83, 56 DR 13, admissibility decision of 13 April 1988, the Commission held that freedom to receive information, guaranteed by Art 10(1), is "primarily a freedom of access to general sources of information which may not be restricted by positive action of the authorities."

69. Judgment of 7 July 1989, Series A no. 160, para 52.

70. Ibid, para 49.

71. See Recommendation no. R(81)9, on access to information held by public authorities, adopted by the Committee of Ministers of the Council of Europe on 25 November 1981; and the Declaration on the freedom of expression and information, adopted by the Committee of Ministers on 29 April 1982. See also, for example, Stefan Weber, "Environmental Information and the European Convention on Human Rights," 12 HRLJ (1991), pp 177-85.

72. Autronic AG judgment of 22 May 1990, Series A no. 178, para 47.

73. X and the Association of Y v United Kingdom (Application no 4515/70) 14 Yearbook 539 (1971), 38 Coll Dec 86.

74. Judgment of 28 March 1990, Series A no. 173, para 62. Cf National Broadcasting Co Inc v United States 319 US 190 (1943), at 226.

75. Judgment of 22 May 1990, Series A no. 178.

76. Ibid, para 61. This strict approach was not, however, stated in the judgment of virtually the same plenary Court, delivered less than two months earlier in the Radio Groppera case.

77. It would be curious if it were the latter. The US Supreme Court has consistently held that "of all the forms of communication, it is broadcasting that has received the most limited First Amendment protection": FCC v Pacifica Foundation 438 US 726, at

748-50 (1978). So, for example, broadcasters must allow a right of reply to those they have criticized: Red Lion Broadcasting Co v FCC 395 US 367 (1969) (cf Miami Herald Publishing Co v Tornillo 418 US 241 (1974) on the press). Broadcasters are not required to accept editorial advertisements: Columbia Broadcasting System v Democratic National Committee 412 US 94 (1973). The main reasons for this lesser degree of protection for free speech in the broadcasting media have been the scarcity of broadcasting frequencies or channels, and the fact that broadcasting confronts the individual not only in public but also in the privacy of the home. However, it is questionable whether these factors should now distinguish broadcasting from other means of expression. Technological developments in satellite and cable mean that there are no longer such finite resources in broadcasting. People reading newspapers are not warned against, or protected from, unexpected content. Questions of this kind have not yet been fully explored under the Convention. Nor has the Court had to consider questions about the organization of the broadcasting media, including the role of public service broadcasting, the prevention of undue influence by the owners of private oligopolies, the preservation of impartiality, rights of reply, and so on: cf Eric Barendt, "The Influence of the German and Italian Constitutional Courts on their National Broadcasting Systems," Public Law, 1991, pp 93-115. In its narrowly restrictive judgment in case 52/79, Procureur du Roi v Debauve [1980] ECR 833, the European Court of Justice held that a national ban on cable television advertising, applied on grounds of general interest, and without discrimination, was justified, apparently because the ban was intended to ensure the survival of a pluralistic written press. See also case 352/85, Bond van Adverteerders v Netherlands State [1988] ECR 2085; case 260/89, n 19 above. It is difficult to understand why the revenue of newspapers should be favoured in this way in preference to broadcasters.

78. Sacchi v Italy, 5 DR 43, 50 (1976); X Association v Sweden, 28 DR 204, 205 (1982). The pending complaints by Informationsverein Lentia and others v Austria, Applications nos 13914/88, 15041/89, 15717/89, 15779/89, and 17207/90, declared admissible on 15 January 1992, challenge a State monopoly on radio and cable television broadcasting, and seem likely to result in a strengthening of the protection of Art 10 in this very important area.

79. Article 10(2) refers to "formalities, conditions, restrictions or penalties." It is submitted that this phrase should be interpreted broadly to cover any interference by a public authority which hinders, limits or chills freedom of speech, such as an import quota on newsprint: cf Minneapolis Star v Minnesota Commissioner of Revenue 460 US 575 (1983); Indian Express Newspapers (Bombay) Ltd v Union of India (1986) ASC 515. See also Sakal Papers (P) Ltd v Union of India [1962] 3 SCR 842 (law seeking to regulate the prices of newspapers in relation to the numbers of their pages and their size, and to regulate the allocation of advertising space). The Commission has referred to the settled case-law of the US Supreme Court on the "chilling effect" of State practices on the practical enjoyment of the right to freedom of expression: Glasenapp v Federal Republic of Germany, admissibility decision of 16 December 1982, 5 EHRR 471, at 474. An official reprimand by a professional association is an interference: Hempfing v Germany, Application no. 14622/89, admissibility decision of 7 March 1991; a fine is an interference: Sonnemann v Germany, Application no. 16315/90, admissibility decision of 11 July 1991; the limiting of the radio and television

coverage of football matches by the private organizer of the matches is not an interference: Nederlandse Omroepprogramma Stichting v The Netherlands, Application no. 13920/88, admissibility decision of 11 July 1991.

80. Handyside, para 49.

81. X v Norway, 27 DR 228 (1981).

82. Engel v The Netherlands judgment of 8 June 1976, Series A no. 22, para 100.

83. The Sunday Times judgment, para 65.

84. For a recent example, pending before both European Courts, see n 86 below.

85. Ibid, para 49.

86. Open Door Counselling Ltd and Dublin Well Women Centre Ltd, Report of the Commission of 7 March 1991, paras 45-53. The case is pending before the Court. Unfortunately, the Commission did not go on to decide whether, even if the restrictions were prescribed by law, they were necessary in a democratic society. As a result, in the companion proceedings under Community law (Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v S Grogan, there was no Commission decision on the merits to guide the European Court of Justice when construing Community law and Irish law in the light of Art 10 of the Convention. The Opinion of 11 June 1991 of Mr Advocate General Van Gerven [1991] 3 CMLR 84 9 regarded the Irish ban on the provision of information in Ireland to pregnant women about medical abortion services, lawfully available in the United Kingdom, as being "useful and indispensable and not disproportionate to the aim sought." The aim was intended to give effect to a value-judgment, enshrined in the Irish Constitution, attaching high priority to the protection of unborn life. The Advocate General's Opinion described the question as "delicate," because of the "sensitive" nature of the competing rights to freedom of expression and to the protection of unborn life. He dscribed it as a question of "balancing two fundamental rights, on the one hand the right to life as . . . applicable to unborn life . . . and on the other hand the freedom of expression." He relied heavily upon the "fairly considerable margin of appreciation" which must be allowed to individual States. The Court of Justice adopted a similarly restrictive approach in its judgment of 4 October 1991 as regards the relevance of Art 10 of the Convention. However, it is difficult to understand how the principle of proportionality could be regarded as satisfied in the circumstances. As the Court of Human Rights held, in para 65 of its Judgment in The Sunday Times case, the question was not one of balancing two rights, but of a right to freedom of expression, subject to exceptions which must be narrowly interpreted. Pregnant women surely have a right, under Community law and under Art 10 of the Convention, to obtain information about the nature of medical services lawfully provided in another State. Ireland may lawfully forbid abortions, and, in that way, protect the rights of the unborn (subject to Art 8 of the Convention). However, by going further, and forbidding the provision of information about the availability of medical services, lawfully provided in another State, it is respectfully submitted that the national

restriction goes beyond what is necessary to meet the legitimate aims of the State. Furthermore, Art 10 guarantees the right to receive information "regardless of frontiers." Pregnant women in Ireland with the necessary knowledge and means, are able to obtain information from the United Kingdom (by telephone, facsimile transmission, or letter) about the nature and availability of abortion medical services. It is difficult to understand the pressing social need to prevent them from obtaining such information from an advisory service in Ireland itself. See, for example, the Commission's report of 12 July 1990 in the Spycatcher case (Times Newspapers Ltd and Andrew Neil v United Kingdom) where the Commission stated (para 75) that it failed to see a pressing social need to prevent the British public reading about something which the rest of the world was free to read and which concerned a matter of major interest to them. See also the Court's judgment of 26 November 1991, Series A no. 217, para 54. It remains to be seen whether the European Court of Human Rights will give a strong interpretation of free expression in this important case.

87. The Sunday Times judgment, para 55.

88. Ibid, para 57.

89. Arrowsmith v United Kingdom, 19 DR 22 (1978). It was there held that Art 10 was not breached by prosecuting someone under the Incitement to Disaffection Act 1934 for encouraging soldiers to desert the army.

90. The Sunday Times v The United Kingdom (no. 2) judgment of 26 November 1991, Series A no. 217, para 49; The Observer and Guardian v The United Kingdom, judgment of 26 November 1991, Series A no. 216, para 56.

91. Castells v Spain, report of the Commission of 8 January 1991, para 54, now pending before the Court. See also, in the particular context of Art 11, Ezelin judgment of 26 April 1991, Series A no. 202, para 47 (professional advocate's failure to dissociate himself from unruly incidents during a demonstration).

92. X v United Kingdom, 16 DR 190 (1978).

93. Engel v The Netherlands judgment of 8 June 1976, Series A no. 22, para 98.

94. De Becker, report of the Commission of 8 January 1960, para 263.

95. Radio Groppera judgment, para 69.

96. Liljenberg v Sweden, Application no. 9664/82, admissibility decision of 1 March 1983, p 17 (unreported).

97. Handyside judgment, para 46.

98. Muller judgment, para 30.

99. Lingens judgment, para 36.

100. X Ltd and Y v United Kingdom 28 DR 77 (1982).

101. K v Federal Republic of Germany 29 DR 194 (1982).

102. X v Federal Republic of Germany 39 Coll Dec 58 (1971).

103. X v United Kingdom 16 DR 101 (1979).

104. Liljenberg v Sweden, Application no. 9664/82, admissibility decision of 1 March 1983 (unreported); Hempfing v Germany Application no. 14622/89, admissibility decision of March 1991 (unreported).

105. Autronic AG judgment, para 59.

106. X v Federal Republic of Germany, 13 Yearbook 888 (1970).

107. See the Commission's reports of 12 July 1990 in the "Spycatcher" case, now pending before the Court: n 90 above. However, as the Commission there made clear, "the need for a temporary injunction must be established with particular clarity where it is the Governments which rely on a private law concept of a breach of confidence to restrict the dissemination of information which is of considerable interest to the public." Moreover, information which is no longer confidential cannot be prevented from being made public to prevent the disclosure of information received in confidence: Weber judgment of 22 May 1990, Series A no. 177, para 51.

108. The Sunday Times judgment, para 56. See also Barfod judgment of 22 February 1989, para 26; Commission's admissibility decision of 9 March 1987, in G Hodgson and D Woolf Productions v United Kingdom 51 DR 136, at 145-46.

109. Weber judgment of 22 May 1990, Series A no. 177, para 45.

110. Handyside judgment, para 48; The Sunday Times judgment, para 59.

111. Ibid.

112. Handyside judgment, para 49; The Sunday Times judgment, para 59.

113. The Sunday Times judgment, para 59.

114. Autronic AG judgment, para 61.

115. Handyside judgment, paras 48-50; The Sunday Times judgment, para 62.

116. So where the issue upon which freedom of speech is restricted is "a matter of undisputed public concern" upon which people have "a vital interest in knowing" relevant information, then it is permissible to deprive them of that information "only if it appeared absolutely certain that its diffusion would" have the adverse

consequences legitimately feared by the State: The Sunday Times judgment, paras 65-66.

117. Handyside judgment, para 48; The Sunday Times judgment, para 59.

118. The Sunday Times judgment, para 63; Barthold judgment, paras 79-81. The dangers inherent in prior restraints are such that they call for the most careful scrutiny. This is especially so as far as the press is concerned, because of the perishable nature of news: The Observer and Guardian v The United Kingdom judgment, para 60; The Sunday Times v The United Kingdom (no. 2) judgment, para 51.

119. Commission's report of 8 January 1960, para 263.

120. The Sunday Times judgment, para 60.

121. See n 26 above.

122. The Court remains closely divided between those favouring stronger or weaker interpretations of Art 10 and the margin of appreciation. Compare, for example, the majority and dissenting judgments in The Observer and Guardian v The United Kingdom, Series A no. 216.

Freedom of Expression and of the Press and the African Charter

By The Hon Mr Justice P Nnaemeka-Agu, Former Justice of the Supreme Court of Nigeria

Introduction

The African Charter on Human And People Rights, like the Universal Declaration of Human Rights and such Regional Instruments as the European Convention and the Inter-American Convention, made elaborate statements on human rights norms and principles. The African Charter goes beyond the other two Regional Covenants in that it contains corresponding duties of individuals and Member States. But it falls short of them in that it provides, for the enforcement machinery, for only the African Commission on Human Rights and courts in exercise of their domestic jurisdictions. It did not envisage or provide for an African Court of Human Rights. One of these norms provided for is freedom of expression and of the press. It is that norm that I wish to focus upon in this paper.

Freedom of Expression

Even though the words "freedom" and "expression" are words of common usage, I deem it necessary to define or explain their use in this context, albeit briefly. In ordinary parlance, "freedom" means liberty, exemption from control, without restraint, licence. But in our context, it must be noted that not all these shades of meanings are applicable. This is because "freedom" in the sense it is used in relation to freedom of expression is ordered freedom[1] which by itself is antithetic to licence. In general law, it does not confer an absolute and unrestricted right to speak or publish against our government or our neighbour without responsibility whatever one may choose, or an unrestricted licence with immunity for every possible use of language.[2] Rather, freedom of expression connotes that one may say or publish anything with utmost responsibility provided that one does not infringe such laws as those of sedition, official secrets, libel, slander, or injurious falsehood. It does appear though from analogy from the decision of the European Court of Human Rights in *Lingens v Austria* (1986) Series A No. 103; 8 EHRR 407, that a court can overturn a local law on criminal libel if it runs counter to the tenor of Art 10 of the European Convention. Subject to these laws, one may say or publish anything against the government or anybody. "Expression" in the context of freedom of expression includes both speaking orally or writing whether ordinarily or in the print or electronic media. By its very nature, freedom of expression is no doubt, the very foundation of every democratic society. It gives the citizens of the State the freedom and right to discuss issues - and write freely on current and contemporary issues - matters of public interest whether such matters are political, social, educational or even for public enlightenment.

"The press" is a compendious expression which is used to describe the aggregate of publications issuing from print or electronic media. Such publications may include those in

newspapers, radio, television, books, magazines, artistic representations and other publications. The main purpose of the freedom of expression and of the press is to foreclose public authority from assuming a guardianship position of the public mind.[3] Its true essence is free flow of information, news and/or ideas to/from the citizenry, that is freedom of expression subject only to the laws of the particular country relating to libel, slander, official secrets, sedition and injurious falsehood.[4] Press censorship or any act which may give the impression that the State dictates to the individual or the press, print or electronic, what to write or say on an issue is antagonistic to the concept of freedom of expression and of the press in a democratic society.

The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (to be hereinafter referred to simply as the Charter) was adopted by the Organization of African Unity in Nairobi, Kenya, in June 1981. Due, however, to the fact that it required the ratification of a majority of the members (26) before it could come into force, it did not come into force until 1986. Like the UN Covenant on Civil and Political Rights, it has a single organ, to wit: the Commission which came into being in 1987. But, unlike the European Convention, it provided for no court of human rights and doubts have been raised about the efficacy of the Commission. Yet because Member States undertook to implement the Charter and domestic courts of Member States are empowered to enforce the provisions of the Charter in their various decisions on human rights,[5] it would have been useful to consider its far reaching provisions in the area of human rights in some detail. But limitations of time and the particular theme of this paper will not permit any detailed treatment.

It is enough to say that such rights as equality before the law, human dignity and inviolability, prohibition of slavery, torture, and degrading treatment are guaranteed without qualification: whereas some rights including the freedom of expression are qualified.[6]

I shall advert to a part of the preamble to the Charter which states and re-affirms its underlying spirit. It states:

> Recognising on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand that the reality and protection of peoples' rights should necessarily guarantee human rights.

In short, the Charter accepts, like the Universal Declaration of 1948, the inherent dignity of man and the equal and inalienable rights of all members of the human family, the universality of fundamental human rights and the justification for their international protection and enforcement.

Freedom of Expression

On freedom of expression, the Charter provides in Art 9 thus -

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinion.

It is noteworthy also that the Charter after a statement of the various rights in Chapter I - quite unlike other international and regional instruments - proceeded to prescribe corresponding duties in Chapter II. Relevantly, it states in Art 27, sub-para 2 and Art 28 as follows:

> *Article 27*
>
> 1. . . .
>
> 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, moral and common interest.
>
> *Article 28*
>
> Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."

Then after dealing with measures of safeguard, the mandate and procedure of the Commission etc, it dealt with applicable principles. Expressly, it enjoined the Commission to draw inspiration from international law on human and peoples' rights and international instruments, including the Universal Declaration, relating thereto.[7]

Scope of Freedom of Expression Under the Charter

It can be seen from the above provisions of the Charter that freedom of expression is intended to embrace so much. It extends to all types of expressions, oral, written, artistic expression, or broadcasting, which conveys information, opinions or ideas. It includes:

(i) The right to receive information, and

(ii) The right to express and disseminate opinion.

These are expressly conferred by Art 9.

(i) <u>The right to receive information</u>

Under Art 9, government, no matter how benevolent, is not intended to constitute itself the guardian of whatsoever information, opinion or idea a citizen may impart or receive. The right to receive information impliedly prohibits a government from restricting or preventing a person from receiving information which another person is willing to impart to him. It probably does not create an obligation on the part of the government to impart such an information to the individual. Such was the decision on a similar provision in the European

Convention in the case of *Leander v Sweden.*[8] As was stated in the Nigerian case of *Archbishop Olubunmi Okojie v Attorney-General of Lagos State* (1981) NCLR 218, such a fundamental right entrenched and guaranteed by a constitution is not liable to be abridged or abrogated by executive acts. Rather, it is intended to limit the powers of the Executive in such matters. But equally, it is not intended to impose any burden on the Executive which the norm itself does not expressly or by natural implication convey.

(ii) The right to express and disseminate opinion and information

This right is again guaranteed by Art 9 of the Charter. It is a very wide right and includes a broad range of information conveyed in different ways by way of opinions, ideas, information. It may be conveyed by oral speech, writing of different types including books, journals, newspapers or artistic expression. Its breadth, meaning and implication were recently adumbrated by the European Court of Human Rights in the case of *Handyside* where it stated.

> Freedom of expression constitutes one of the essential foundations of a (democratic society), one of the basic conditions for its progress and for the development of every man . . . it is applicable not only to "information" or "ideas" that are favourably conceived or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance, and broad-mindedness without which there is no democratic society.[9]

Although the provision in Art 9 of the African Charter deals with only the right to express and disseminate opinion and does not contain the word "information", I do not think that any difference in principle was intended. Rather, I believe that the same principle and concepts are implied. This is borne out by reading the Charter as a whole.

It will be observed, too, that Art 9 of the African Charter does not expressly mention freedom of the press. This is exactly similar to the case with Article 10 of the European Convention. Yet in many important decisions, the European Court of Human Rights has held that the principles of freedom of expression apply with equal force to freedom of the press, both print and electronic media. It has been held, and common sense confirms this, that for freedom of expression to have the desired impact, it must, and does, include freedom of the press. One may wonder how a good deal of the necessary communication to and from the members of the public which the freedom entails could have been effectuated without the involvement of the mass media.

An interesting twist in the European situation which does not apply to the African situation simply because there is no supranational court of human rights in the African Region, a need for which I have emphasized elsewhere[10] - is shown by the English case of *Sunday Times.* The paper was restrained by an order of injunction issued from the House of Lords from publishing an article on the drug thalidomide. The ground for the restraint was that the publication would interfere with the administration of justice in pending proceedings on a claim for negligence in the manufacture and distribution of the drug. The European Court held that the injunction was unnecessary because no "pressing social need' was proved. So it held that the injunction was in violation of Art 10 of the European Convention. What is, perhaps, more relevant to our circumstances is the opinion of the European Court that it was

incumbent on the mass media to keep the public properly informed on judicial proceedings just as in other matters of public interest. After all, the media was a "purveyor of information and public watchdog", the Court held in the *Barthold case*. Cases decided by the American Court of Human Rights show a similar trend of the free press being regarded as "the cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion" . . . and . . . "a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies . . .".[11] Such communication media must also be open to all without discrimination.[12]

In my view, these decisions are proper beacon lights and guides to courts in the African Region which may be faced with identical problems in the area of freedom of expression. Therein lies one aspect of the international character of human rights norms.

Thus it can be seen not only that the Charter has expressly provided for the right to freedom to receive information and to express and disseminate opinion that is, in ordinary language freedom of speech or of expression and the press, but also that it has adopted the principles of international law and instruments relating thereto. These are of great importance to all the courts in the African Region in exercise of their interpretative jurisdictions over matters of human and peoples' rights. Decisions of European and American courts of human rights are of strong persuasive authority in such cases. This is because while interpreting any particular provision relating to freedom of expression or of the press in their domestic jurisdiction, they can with perfect propriety have due regard to decisions of the courts in other jurisdictions in similar circumstances. In this respect, Art 27, read with Art 28, is important in that:

(i) It emphasizes the need in exercise of these rights and freedoms to have due regard to the rights of others. In other words exercise of such a right or freedom of expression does not entitle the person exercising it to libel or slander others or to commit the tort of injurious falsehood against them.

(ii) It emphasizes the need to exercise the right in such a way as not to imperil the collective security of the state. This is usually provided for by such laws as those of sedition and official secrets.

(iii) It is limited also by considerations of the moral and general interests of the State. It appears to me that the purport of this provision is to exclude the publication of purely scandalous matters and matter of pure seditious sensationalism from protection under the Charter.

Whose Responsibility?

After five successful colloquia on international human rights norms and measures for protection and advancement of human rights, it has become obvious that fine and even grandiose statements of principles in national constitutions and international instruments are not enough. In the final analysis it is only the existence of an independent and effective judiciary that can make them work. This is because "judges have a key role to play in the renewal in countries in all parts of the world of principles of democracy, human rights and the rule of law - to do justice to everyone within their jurisdiction by due process of law . .

.".[13] It is therefore apposite to ask whether the fine statements of principles in the African Charter, particularly in Arts 9 and 27(2) set out above, placed any duty on the shoulders of the judiciary. In other words, whose duty is it to decide on the above limitations? It is pretty settled that when in any state a question arises as to interpretation of a law or a legal instrument it is the undisputed responsibility of the various judiciaries in the African Region to interpret the various provisions of the Charter. Having adverted to the above limitations, I must emphasize the fact that the function of the judge is always to balance any or all of these limitations with his bounden duty of protecting and enforcing human rights. It is worthy of note in this respect to observe that, unlike the European Convention[14] and the American Convention[15], which specify that certain rights may be derogated from in times of war or public emergency that threatens the life of the nation, there is no express derogation clause in the African Charter.

In my opinion, the wording of Arts 9, 27 and 28 read together fall short of such an express power of derogation in the other two Conventions. It appears that, as presently worded, rather than giving express authority to any other arm of government to derogate from the right, they rather leave it to the judge to apply his interpretative skill to the circumstances of any particular case and decide whether or not any act called in question is, by the manner of exercise of it, in breach of other peoples' rights or in jeopardy of the collective security of the state or the common and moral interest of all. It is all a matter of difference between leaving the issue at the power of the politician with his characteristic kaleidoscopic criteria for what is right and rather leaving it to the judge who will decide according to known principles, guided by precedent. As Hon Justice Kirby rightly observed:

> Judges of the common law have choices. Their task is by no means mechanical. To exercise their choices they must have points of reference. Choices must not be made upon the idiosyncratic whim of a particular judge. They must be made by reference, among other things, to the fundamental principles of international human rights norms.[16]

A number of other differences flow from this significant difference as to the situs of the competence to decide on human rights issues. The politician, be he the executive or the legislator, has usually only his political interests to serve and take into account. The judge is a professional whose primary function is to do justice and who is himself all through on trial at the forum of public opinion, the dictates of precedent and rules of practice and procedure and the whip of his conscience. He cannot do violence to the proven facts of the case. He cannot deviate from the established rules of interpretation or ignore the authority of similar cases decided in similar circumstances. Above all, if what he has before him is a case of interpretation and application of constitutional guarantees of human rights and freedoms, he has always to remember the fact that he has to bear a number of principles in mind. He has to interpret and apply purposefully, that is in such a manner as to achieve the desired objective. He has to take into account the nature and scope of the constitutional provision. The Privy Council underscored this point in the case of *Attorney-General of The Gambia v Momodu Jobe* (1984) AC 689, at p 700, per Lord Diplock, where he said:

> A Constitution, and in particular that part of it which protects and entrenches human rights and freedoms to which all persons in the state are to be entitled is to be given a generous and purposeful construction.

The Supreme Court of Nigeria said much the same thing in the case of *Nafui Rabui v Kano State* (1980) 8-11 SC 130, where Udoma JSC, stated at p 149:

> My Lords, it is my view that the approach of this court to the construction of the Constitution should be and so it has been, one of liberalism, probably a variation of the theme of the general maxim *ut res magis valeat quam pereat.* I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.

Several other decisions of the Supreme Court of Nigeria have followed the trend of thought in Rabui case.[17] In a beautiful and well-researched paper on *Freedom of Expression: Relevant International Principles* by Hon Recorder Anthony Lester QC, one of the best known experts on human rights, which was read at the maiden session of these colloquia held in Bangalore, India, in 1988, and published in *Developing Human Rights Jurisprudence*[18] he cited decisions of the highest courts of several countries of the world, the Commonwealth in particular, to show that a similar approach to cases on human rights is the vogue world-wide. Quite apart from the accepted fact that beautiful or grandiose statements on human rights in international instruments or national constitutions may come to nought unless the judiciary of the particular country breathes life and meaning and purpose into them, the challenge facing the judiciaries of Africa in this respect, particularly at this period of its history, is pretty obvious.

It is equally refreshing to note that in the area of freedom of expression as an aspect of human rights there are abundant source materials in other international and national provisions. Among them are Art 19 of the International Covenant on Civil and Political Rights, Art 10 of the European Convention of Human Rights, s. 19 of the Constitution of India (1950), Art 10 of the Federal Constitution of Malaysia (as amended up to 1981), Art 12 of the Constitution of Mauritius, Art 19 of the Constitution of the Islamic Republic of Pakistan (1973), s. 46 of the Constitution of Papua New Guinea (1982 as qualified by s. 38), Arts 14 and 15 of the Constitution of the Democratic Socialist Republic of Sri Lanka, the First Amendment to the United States Constitution and Art 20 of the Constitution of Zimbabwe (1980). Further reference may be made to most post-British colonial countries, now in the Commonwealth, including those of Nigeria, Ghana and most Caribbean countries. Outside the Commonwealth, reference may be made to Art 5 (IX) of the Constitution of the Federal Republic of Brazil, 1988.

Most of these are similarly worded and carry the same implications. Decisions on many of those similarly worded provisions will have persuasive effect on any court in Africa faced with the problem of interpretation and application of Art 9 of the African Charter of Human and Peoples' Rights.

What Alternative?

Have the judiciaries in the African Region any alternative than to apply their skills and good judgements in exercise of their interpretative powers purposefully in advancing freedom of

expression and other human rights in the Region? The Charter itself leaves them no alternative. For, as I have pointed out, though not creating a supranational court of human rights, it provides in Art 7 thus:

Article 7

1. Every individual shall have his cause heard. This comprises:

   (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;

   (b) The right to be presumed innocent until proved guilty by a competent court or tribunal;

   (c) The right to defence, including the right to be defended by counsel of his choice;

   (d) The right to be tried within a reasonable time by impartial court or tribunal;

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be inflicted only on the offender.

So it is the intendment of the Charter itself that cases on human rights, which have been amply spelt out not only in the Charter but also in the written constitutions of the different countries in Anglo-phone Africa, shall be adjudicated upon by the respective judiciaries and in accordance with well known principles.

Good News and Bad News

In the area of human rights in the African Region there have been what I may call good news as well as bad news. In many countries in the African Region, apart from those under military regimes, in the statements of human rights and other provisions in the Charter as well as in many domestic provisions in their respective constitutions, they are as good as those of other Regions. This is good news. Makers of their organic and other laws must be congratulated on this. But in the execution and application of these norms, there have been rampant complaints about assaults on human rights, some of them serious, and some others have made deliberate attempts at their abridgement. These features are probably worse in countries that have come under military regimes, many of which have either suspended or abridged human rights by Decrees.[19]

More disturbing is the fact that some courts in their approach to cases arising therefrom do not always show sufficient courage or circumspection, although this has not always been the case. In the case of *Governor of Lagos State v Ojukwu* (1986) 3 NWLR 621, the Supreme Court of Nigeria had courage to condemn a State Governor for "executive lawlessness" for

a serious infringement of human rights. But, for a court to hold that a union of journalists as a class does not have the *locus standi* to challenge a law which takes away their freedom of expression is bad news. In the *Nigerian Union of Journalists v Attorney-General of Nigeria* (1986) LRC 1, the Court of Appeal held that Nigeria Union of Journalists had no *locus standi* to sue to challenge the right of freedom of expression taken away by Decree No. 4 of 1984, and which runs counter to the freedom of expression guaranteed by s. 36 of the Constitution of 1979. A similar trend is manifested by the decision of a High Court of Anambra State in the *State v Nwankwo* (1986) 6 NCLR 645, at p 662 in which it was held that even an unrestricted use of language could deprive a journalist of the protection under the right to freedom of expression. Fortunately in *Nwankwo v The State*, the Court of Appeal corrected the error of the High Court. On the part of the Executive it is disturbing to observe that some Chief Executives of governments consider their positions as being tantamount to immunity from criticisms: the law of sedition is in places being stretched to a breaking point.[20] These are aspects of the bad news - from both the executive and the judicial arms of government.

It appears pertinent, though, that I must underscore a caveat. The right to freedom of expression conferred by Art 9 of the African Charter, and indeed all other similar provisions in the domestic constitutions of many African countries, must be read and construed subject to its being exercised in pursuit of the truth and in the pursuit of Arts 27 and 28 of the Charter, that is in accordance with the truth and the publisher's duties towards his family, society, state and the international community and with due regard to the rights of others. As was pointed out in a case on the First Amendment to the United States Constitution in *Kline v Robert M Mcbridge Co* 170 Misc 974, 11 NYS 2s 674 at p 679. Liberty of the press connotes "the right to print and publish the truth, from good motives and for justifiable ends." This is a good pointer to a very useful guide to the courts in the African Region on their interpretation and application of the norm of freedom of expression.

Finally, I wish to end this paper by adopting the opinion of Justice Murphy in the US case of *Thornhill v Alabama* (1940) 310 US 88 where he said:

> Abridgement of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to public exercise of the power of correcting error through the process of popular government . . . Mere legislative preference for one rather than another means for combating substantive evil, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that when the effective exercise of these rights is claimed to be abridged, the courts should "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations.

I am of the clear view that with the present state of the Charter and our organic laws and the powers usually given to judges in the African Region, in appropriate metaphor, the ball is squarely in the judges' courts. They should prove themselves equal to the challenge.

Challenges For Nations

I would like to end this paper on Freedom of Expression, and my earlier paper on Discrimination[21], and the African Charter by making one final point. It has been stated by high authority with respect to the relationship, from the English point of view, between International and Regional Laws on the one hand and Domestic Law on the other thus:

> "As regards the United Kingdom all rules of customary international law are either University recognized or have at any rate received the assent of this country as *per se* the law of the land. To that extent there is still valid in England the common law doctrine, to which Blackstone gave expression in a striking passage, that the law of nations is part of the law of the land. It has been repeatedly acted upon by the courts and can be regarded as an established rule of English law."[22]

This principle is fully adopted by English Judges, as can be illustrated by many cases. See, for an example, *Trendtex Trading Corporation v Central Bank of Nigeria* (1977), All E.R. 881. This principle is now almost generally true of most Commonwealth countries in which the English tradition has been received and has taken firm roots.

But it would be a drastic over-simplification to assume that because the African Charter is an international instrument designed for countries in the African Region it would be automatically binding on all Member States in the Region and be enforceable by individuals in such States. For, the question of bindingness of such an instrument is always determined by considerations as to what extent treaty obligations are part of the domestic law of the particular state. This raises the often recondite issue of incorporation. It may also be necessary to determine how far rights of individuals can be said to have been safeguarded and guaranteed by the particular treaty. An important fact is that the Charter, like most treaties, even if subscribed to by the State, is still the handiwork of the Executive. But, with the exception of military regimes in which executive and legislative functions are usually collected in one body or even an individual, the Executive does not make laws. It therefore stands to reason that after the Executive has assented to a treaty such as the Charter, it still has got to go through a process usually, in written constitutions, prescribed by the organic law of the particular State whereby the treaty gets incorporated as a part of the law of the particular country. In the United Kingdom, the nature of the problem is illustrated by those connected with the European Convention On Human Rights. Based on the theories that, because the Executive is not a source of law - only the Legislature and the Judiciary are - it cannot impose such a treaty as though it were a law on the people by merely assenting to it as an international agreement; so it is only if Parliament passes a law incorporating such as a part of the law of the land that it becomes a part of such law. Views have been strongly expressed by British Judges that inspite of the country subscribing to the Optional Protocol, the Convention is not a part of the domestic law of the United Kingdom. Cases such as *Malone v Commissioner of Police* (1979) 2 All E.R. 620 and *Rex v Secretary of State For the Home Department, Ex parte Brind* (1991) 1A.C. 696 clearly illustrate the difference, in England, between the country being a party to such an international treaty and its taking the further step to incorporate it as a part of its domestic law.

Why, it may be asked, will the judiciary in Britain, as another source of law, not incorporate such treaties? The answer is simple. The Judicature as the guardian of the Constitution will

not trespass into the preserves of the other arms of government or distort or ignore the organic structure of the Constitution. So, much as it is true that in many areas, such as in the law of negligence, judges have reflected evolutionary trends in the moral and social aspects of society, judges have usually proceeded rather gradually and cautiously from existing principles. In doing so, they do not import treaties or treaty obligations and enforce them as binding obligations. But when there is an international legal norm, they can apply them for their persuasive effect, just as they can refer to academic text books or relevant judgments of courts in, say, the Commonwealth or other foreign countries on an issue before the court and allow themselves to be persuaded by them. But I must emphasize that aspects of these problems are peculiar to Great Britain because of the unwritten nature of its Constitution.

For historical reasons, countries in Commonwealth Africa are in more favourable positions. For, all of them, while getting independence from their colonial masters, did so on clearly drafted and duly promulgated written constitutions. Most of those constitutions clearly provide for how binding treaties should be made by the particular country. I take the case of Nigeria, as an example. Section 17 of the Constitution of Nigeria, 1979, which is now the same with section 13 of the Constitution of Nigeria, 1989, provides as follows:

"13 (1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

(3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted, unless it is ratified by a majority of all the Houses of Assembly in the Federation."

Pursuant to this provision, the National Assembly in 1983 passed "The African Charter of Human and peoples' Rights (Ratification and Enforcement Act) 1993 Cap. 10 in Vol.1 Laws of Nigeria, 1990 which made the Charter operative in the Federation. Similar provisions as section 12 of the Nigerian Constitution, 1979, are contained in the constitutions of several countries of Commonwealth Africa.

I am convinced that any country in the African Region which goes as far as Nigeria has gone in its constitutional or other organic law legislation needs to have no problem with the incorporation of the provisions of the African Charter into its domestic law.

Endnotes

1. See Williams v Majekodunmi (No. 3) (1962) 1 All NLR 413.

2. See The State v Nwankwo (1985) 6 NCL 645, p 662.

3. See Thomas v Collins, 89 L ed 430.

4. See Tony Momoh v Senate of the National Assembly (1981) 1 NCLR 102.

5. See Art 7(1)(a) of the Charter.

6. See Umozuruike, Developing Human Right Jurisprudence, Volume 3 pp 40-41.

7. See Art 60 of the African Charter.

8. Series No. 116, 9 ECHR 433 of 26 March 1987.

9. See Judgment in series A No. 24.1 EHRR 737 of December, 7, 19.

10. See my paper on The Domestic Application of International Human Rights Norms: The Nigeria Experience published at pp 38 in Developing Human Rights Jurisprudence, Volume 3, at p 36. See also Resolution 18(j) of the Abuja Colloquium.

11. See its Advisory Opinion in the case of Compulsory Membership of Journalists Association: OC 5185.

12. Ibid.

13. See "Abuja Confirmation", para 13.

14. See Art 15.

15. See Art 27.

16. Hon Justice Kirby, Developing Human Rights Jurisprudence: Volume 3, at p 56.

17. See among others, A-G Kaduna State v Hassan (1985) 1 NWL 483; Adigun v A-G Oyo State (No. 2) (1987) 2 NWLR 197, FCSC v Laoye (1989) 2 NWLR 652; Military Gov of Ondo State v Adewunmi (1988) 3 NWLR 288. Several scores of cases followed suit.

18. See Developing Human Rights Jurisprudence: Volume 1 (1988) at pp 23 to 56.

19. See section 35 of the Constitution of the Federal Republic of Nigeria 1979, now s. 38 of that of 1989.

20. In Nigeria this has been done by, among others, Decrees Nos. 1 of 1984, 2 of 1984, 4 of 1984 and 13 of 1984.

21. Supra, p.31

22. Oppenheim: International Law (1992) at pp. 56-57

Freedom of Expression in Canada

**By The Hon Mr Justice W S Tarnopolsky,
Court of Appeal for Ontario, Canada**

The Constitutional Situation Before the Charter

Any discussion of this topic should start with our basic constitutional document - the British North America Act of 1867,[1] now entitled the Constitution Act 1867. As mentioned in my accompanying paper on Equality Rights, the Constitution Act 1867 did not include a Bill of Rights with provisions for individual human rights protection, but rather such group rights as those of language, s. 133, and of separate (originally confessional) schools, s. 93.

Apart from these group rights provisions, our human rights and fundamental freedoms were determined essentially by the Preamble to the Constitution Act 1867, and especially a statement therein which declared that the original colonies were to be "federally united with a Constitution similar in Principle to that of the United Kingdom." Until 1982 and the adoption of the Canadian Charter of Rights and Freedoms, that is what really determined the strengths and weaknesses of protections of human rights and fundamental freedoms, ie, federalism and the principles of the United Kingdom Constitution.

Federalism in itself is a protection for civil liberties. The only truly functioning federal systems in the world - there are some that are not truly federal in operation - provide basic protections for human rights and fundamental freedoms, even in the absence of a Bill of Rights. Let me mention just three reasons for this - two political and one judicial. The first is that when you have, as in our case, eleven different governments, protection of civil liberties can be more effective, because one is able to compare one government with another and apply political pressure on the government that might be overriding or infringing these liberties. A second is that no one government can totally determine all rights and obligations. These are divided between the two levels.

Third, if one has a court which is activist in terms of promoting or protecting human rights and fundamental freedoms, federalism can provide somewhat of a protection through what may be called the power allocation technique of judicial review. If the deprivations of a particular right or freedom are those of one level of government, then the Supreme Court may find that the subject matter is within the jurisdiction of the other level. In our particular case, not invariably but frequently, many of the deprivations resulted from provinicial action. One example, right at the turn of the century, is the case known as *Union Colliery v Bryden*.[2] An amendment to the Mines Act of our western-most province, British Columbia, which excluded Chinese people from working underground in coal mines, was held to be invalid, not because the enactment was discriminatory, but because it was beyond the jurisdiction of the provincial Legislature in that it constituted naturalisation and aliens legislation, which was within federal jurisdiction.

More recently and more particularly with respect to freedom of expression, we have two further examples. One case arose in the western province of Alberta,[3] in which three of the six judges of the Supreme Court held that a legislative attempt to interfere with press freedom, in terms of requiring newspapers to print government refutations of articles critical of the government, was beyond the jurisdiction of the province because such regulation was part of the criminal law power, a matter within federal jurisdiction. Similarly, in 1937, the Legislature of the province of Quebec, our French-speaking province, enacted a law which prohibited the propagation of "Bolshevik" or Communist "propaganda". Again, when the Supreme Court came to deal with this law, it did not do so from the point of view of a civil liberty which had to be protected, but rather on the basis that such a statute was part of the criminal law.[4] In both cases references were also made to the facts that the Parliamentary system was one of the features of the United Kingdom Constitution that Canada had inherited and that although such a system is based upon the supremacy of Parliament, it also requires "free public opinion and free discussion throughout the nation of all matters affecting the state."[5] The rights of free opinion, public debate and discussion are necessary to parliaments and governments.[6]

Another aspect of civil liberties protection that was evolved out of the Preamble is based upon that basic principle of the United Kingdom Constitution known as the "Rule of Law". One of the leading decisions in the Supreme Court of Canada with respect to the "Rule of Law"[7] implemented the proposition that, unless a government agent can find the source of his power specifically in a law, that power does not exist. In that we have the contrast, also under the principle of the rule of law, with the position of a citizen, who is free to do whatever he or she wishes, *unless* it is prohibited by law. The person involved was one Maurice Duplessis, who was not only Premier of the Province of Quebec, but also its Attorney-General and, by statute, legal adviser to the Liquor Commission of Quebec. The Liquor Commission, on his orders, revoked the licence of one Roncarelli, who had been bail bondsman for Jehovah's Witnesses on numerous occasions. Although the case took about sixteen years to get to the Supreme Court of Canada (which illustrates one of the difficulties with judicial protection of human rights), nevertheless, when it did get there, the Court held that, despite Duplessis' many positions, there was nothing in the Liquor Licencing Act which gave him the authority to order the revocation of the licence and therefore the revocation was invalid.

One of the techniques available to the Court, which is associated with the application of the "Rule of Law," is what may be referred to as the "restrictive interpretation technique." Its best illustration is in a case known as *Boucher v The King*,[8] wherein the Supreme Court narrowly interpreted the crime of "sedition" in the Criminal Code to hold, in effect, that very strong criticism of governments and of courts, and the creation of disaffection amongst citizens, were not enough to meet the definition of sedition, and so Boucher was acquitted.

All of these judicial protections are possible when one refers to "a Constitution similar in principle to that of the United Kingdom," except that one must keep in mind that that Constitution also includes the doctrine of Parliamentary Supremacy. The result is that whatever the courts, through the Rule of Law, may protect, Parliament, through Parliamentary Supremacy, may take away.

We have then a series of cases, one of which was *Cunningham v Tomey Homma*,[9] which concerned the British Columbia Franchise Act, which denied the franchise to people of

Chinese, Japanese and Indian (both native Indian and Indians from the Asian sub-continent) origin. Tomey Homma was a Japanese-Canadian citizen who challenged the exclusion. The very same Judicial Committee of the Privy Council which had decided the earlier *Bryden case*, mentioned earlier, held in this case that courts were not concerned with the wisdom of legislation and, since it was clearly within the jurisdiction of the province to determine what the franchise should be, that was the end of the matter. Obviously, the decision is not that surprising if you consider that the franchise in Canada was withheld from people of Asiatic origin until after World War II, and that women did not have the vote in Canada until after World War I and, within the Province of Quebec, not until during World War II.[10] So one can see why the Court could easily determine that the franchise was a privilege rather than a right. But clearly, once one had determined that a law was within the jurisdiction of the legislature enacting the law, then, because of Parliamentary Sovereignty or Supremacy, there could be no challenge.

Before leaving this sub-topic, one has to make reference to the Canadian Bill of Rights of 1960.[11] Section 1 thereof "recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex . . . (d) freedom of speech . . and (f) freedom of the press." However, the Bill of Rights (1) applied only to the federal level; and (2) was not entrenched as part of the Constitution Act 1867. More importantly, it was never recognized by the Supreme Court of Canada as being a constitutional and overriding document.[12] Moreover, the words "have existed and shall continue to exist" were so applied by a majority of the Supreme Court as to result in a "frozen concepts" interpretation, which limited the extent of civil liberties protections to that in 1960, when the Bill of Rights was enacted.[13]

The result was that s.-s. 1(d) and (f) were never applied by the Supreme Court so as to protect freedom of expression. No case involving those subsections reached the Supreme Court. The major Supreme Court decision dealing with freedom of expression - A-G *Canada and Dupond v Montreal*[14] - concerned provincial legislation, which was not subject to the Bill of Rights. At issue in this case was the validity of a City of Montreal by-law which gave the Executive Committee of the city the power to prohibit all assemblies, parades or gatherings for a period of thirty days. The basic division on the Supreme Court between the majority of six and the minority of three was whether the by-law related to a matter of a "merely local and private nature" (s. 92(16) of the Constitution Act 1867) and thus within provincial jurisdiction, or a matter of the criminal law, within federal jurisdiction. However, Beetz J, on behalf of the majority, also went on to assert a number of very revealing "propositions" in response to a contention that the by-law was -

> . . . in relation to and in conflict with the fundamental freedoms of speech, of assembly and association, of the press and of religion which were inherited from the United Kingdom and made part of the Constitution by the preamble of the British North America Act 1867, or which come under federal jurisdiction and are protected by the Canadian Bill of Rights. The *Reference re Alberta Statutes* was relied upon.[15]

His response, which illustrates the predominant views of the majority of the Supreme Court of Canada during the period of 1960 to 1982, when the Canadian Bill of Rights was in full effect, included the following:

1. None of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation.

2. . . .

3. Freedoms of speech, of assembly and association, of the press and of religion are distinct and independent of the faculty of holding assemblies, parades, gatherings, demonstrations or processions on the public domain of a city. This is particularly so with respect to freedom of speech and freedom of the press as considered in the *Reference re Alberta Statutes (supra). Demonstrations are not a form of speech but of collective action. They are of the nature of a display of force rather than of that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse.*[16] [emphasis added]

Freedom of Expression and the Charter

(a) The Pertinent Provisions

The drafters of the Charter were very conscious of the main defects of the Bill of Rights referred to above and drafted proposals to remedy them.[17] The most important change was that the new Charter is Part I of the Constitution Act 1982, by s.-s. 52(1) of which it is proclaimed that:

> s. 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

By s.-s. 52(3) it is provided that:

> (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

The amendment provision pertinent to the Charter is s.-s.. 38(1), which requires -

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty *per cent* of the population of all the provinces.

Thus, the Charter is constitutionally entrenched.

The result of constitutional entrenchment was that the Supreme Court held, right from the very first decision concerning the Charter - *Law Society of Upper Canada v Skapinker*[18] - that the Charter should not receive the restrictive interpretation given to the Bill of Rights. The "frozen concepts" interpretation was specifically rejected,[19] and the paramountcy of the Charter applied. The result was that in a whole number of cases, decisions under the Bill of

Rights were overridden in favour of similarly worded civil libertarian and human rights values in the Charter.[20]

Furthermore, s.-s. 32(1) applies the Charter not just to the federal sphere, but also -

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Thus both the federal and provincial spheres are subject to the Charter.

At the same time, s. -s. 32(1) has been interpreted (in *Retail, Wholesale and Department Store Workers v Dolphin Delivery*)[21] as having a limiting effect in that it is restricted to "government action" and does not apply to such private activities as secondary picketing of a private enterprise.

Before dealing more specifically with freedom of expression, it is important to note two provisions, one providing for a judicially-imposed limitation on the rights and freedoms set out in the Charter (s. 1) and one providing for a legislative override (s. 33):

> Guarantee of Rights and Freedoms
>
> s. 1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> . . .
>
> s. 33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Section 2 of the Charter proclaims the fundamental freedoms, including the freedom of expression. These are clearly inspired by, although less detailed than the comparable provisions in Arts 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights. Thus, whereas s. -s. 2(b) of the Charter refers to "freedom of thought, belief, opinion

and expression, including freedom of the press and other media of communication" (a freedom which is more detailed than the others set out in s. 2, eg, freedom of association), Art 19 of the Covenant is more exigent and still more detailed. Thus, para 2 provides:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

And, further, the right in para 1 "to hold opinions without interference" is explicitly excluded from the limitations clause set out in para 3 thereof.

(b) The Two-Step Analysis under section 2(b)

The fundamental approach to determining if there has been an infringement of s. -s. 2(b) of the Charter was set out in *Irwin Toy Ltd v Quebec* (A-G),[22] which concerned Quebec legislation prohibiting commercial advertising directed at children under thirteen years of age. In the result, all members of the court held that the legislation contravened s.-s. 2(b) of the Charter, although three of the five members of the panel also held that it constituted a reasonable limit under s. 1.

In coming to the conclusion that the legislation violated s.-s. 2(b), the three members of the majority asserted that there were two "steps" to be taken or questions to ask:

> The First Step: Was the Plaintiff's Activity Within the Sphere of Conduct Protected by Freedom of Expression?
>
> The Second Step: Was the Purpose or Effect of the Government Action to Restrict Freedom of Expression?[23]

In the course of answering these two questions, the majority set out a number of observations and criteria that have been applied since[24] and so it is useful to set them out at least as they were summarized:[25]

> When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no *content* of expression or (2) which conveys a meaning but through a violent *form* of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief

> consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

In the instant case, the court held that "the plaintiff's activity is not excluded from the sphere of conduct, protected by freedom of expression."

In *Irwin Toy* the majority asserted that activity is expression if it attempts to convey meaning. Activity cannot be excluded from the scope of the guarantee of free expression on the basis of the content or meaning being conveyed. While all *content* of expression is protected, some *forms* of expression, such as violence, are *not* protected. However, if meaning is sought to be expressed, it need not be "redeeming" in the eyes of the court to merit the protection of s.-s. 2(b), whose purpose is to ensure that thoughts and feelings may be conveyed freely in non-violent ways without fear of censure. Even physical activity, such as sexual activity, can be expression.[26] Thus, even obscenity may come under s.-s. 2(b), although prohibition of exhibition and sale may be saved under s. 1.

Before leaving this topic it should be mentioned that the approach taken to freedom of expression seemed to be that only expression communicated directly through physical harm is excluded from s.-s. 2(b) as being violent.27 Once it was determined that a particular activity was expression, it was covered by s.-s. 2(b). Any limitation or exclusion would have to be justified under s. 1. However, in *Committe for the Commonwealth of Canada v Canada*,[28] which was concerned with the validity of an administrative banning of the handing out of leaflets in an airport terminal, the overwhelming majority (in five separate judgments) held that an individual's freedom to express himself or herself on government-owned property is protected under s.-s. 2(b) if the form of expression is compatible with the principal function or intended purpose of the place. Only one judge dealt with that limitation under s. 1.[29] Subsequent decisions[30] would seem to have re-emphasized the *Irwin Toy and Keegstra* approach.

A case similar to *Committee for the Commonwealth*, which concerns prohibition of television coverage of ingress to and egress from a courtroom, is now before the Supreme Court of Canada on appeal from a deeply divided Ontario Court of Appeal decision in *R v Squires*.[31] Perhaps the Supreme Court decision will clarify the seeming anomaly of *Committee for the Commonwealth.*

(c) Section 1 Limitations

If an activity is found to be an expression protected by s.-s. 2(b), the next step is to determine whether a limitation of it is reasonable. At a very early stage in Supreme Court Charter jurisprudence, in 1984, in the case of *Hunter v Southam*,[32] it was held that the onus of proving the applicability of s. 1 was on the one who raised it. In 1986, in *R v Oakes*,[33] the details of the tests in s. 1 were elaborated by Dickson CJC and, since they are essentially applied to this date, the summation of them in a subsequent case[34] is authoritative:

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

   (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;

   (b) impair the right or freedom in question as "little as possible"; and

   (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

A full discussion of s. 1 is beyond the scope of this paper and the comments on it are so numerous[35] that I do not wish to add to them. I hope next to illustrate its application by brief references to some kinds of limitations that have been upheld. One general comment applicable specifically to s. 1 limits on expression that could be referred to here is that, in determining whether government controls of expression are reasonable limits within s. 1 of the Charter, the courts must examine the extent to which the expression at stake in a particular case promotes freedom of expression principles, namely: the search for the truth; the gaining of self-fulfillment by articulating thoughts and ideas as one sees fit; the requirement of freedom of expression as a basis of representative democracy.[36]

Let me just add briefly that the contrast in the results in *Zundel and Keegstra* gives some indication of the application of s. 1. In *Keegstra*, the legislation at issue was the Criminal Code prohibition of hate literature. In *Zundel*, it was the old "false news" prohibition in that Code. *Keegstra* involved anti-Semitic propaganda generally, while *Zundel* dealt more specifically with Holocaust denial. The hate literature provision was upheld as a reasonable limit, while the "false news" provision was not. The difference appears to be that the "false news" provision had an ancient origin no longer appropriate, it was too broadly drafted and vague, and the "hate literature" provision was considered more suitable for the purpose. The "hate literature" provision also reflected the non-discrimination values of s. 15 of the Charter and the multicultural values of s. [27].

(d) Some Examples of Activities Involving Expression and the Reasonability of Limits Thereto

In a case which involved secondary picketing of a private employer, although the Supreme Court held that the Charter did not apply to private action, it held that picketing was included in freedom of expression.[37] However, in another case it was held that s.-s. 2(b) does not protect mandatory payment of union dues.[38]

In two very important Quebec cases[39] involving restrictions on the public use of languages other than French, the Supreme Court held that one's choice of language was protected by s.-

s. 2(b) and the limitation in the Charter of the French Language was *not* a reasonable limit as being overbroad.

Several cases have held that "commercial" speech is protected by s.-s. 2(b) and includes advertising, but restrictions may be more easily justified under s. 1.[40]

A scheme for reimbursement of election expenses under the Manitoba Elections Finances Act was held[41] not to violate s.-s. 2(b), because it did not prohibit taxpayers from expressing their beliefs. However, prohibition of partisan political expression and activity by federal public servants was held[42] to violate s.-s. 2(b) and to not be a reasonable limit, because the restriction was overbroad in not making distinction between the ranks of the public service.

A Criminal Code provision for mandatory banning of any publication identifying the victim of sexual assault upon such victim's application, was held to contravene freedom of the press, but was held to be a reasonable limit within s. 1.[43] On the other hand, a provision of the Alberta Judicature Act, which prohibits the publication of any detail relating to matrimonial proceedings other than the names, addresses and occupations of the parties and witnesses, was held[44] to violate s.-s. 2(b) and was found not justifiable under s. 1.

In an interesting case, an adjudicator's order that an employer answer any reference inquiry respecting a former employee exclusively by sending a specified letter, was held to have infringed s.-s. 2(b), but was saved by s. 1 as being reasonable.[45]

I have mentioned earlier that the Criminal Code provision which prohibits the wilful promotion of hatred against an identifiable group, infringes s.-s. 2(b) of the Charter, but is saved by s. 1.[46] Similarly, s. 13(1) of the Canadian Human Rights Act, which makes it a discriminatory practice to communicate by telephone any message likely to expose persons to hatred or contempt on the basis of race or religion, infringes s.-s. 2(b) of the Charter, but is saved by s. 1.[47] However, the provision in the Code which prohibits a person from wilfully publishing a statement that he knows is false and causes or is likely to cause injury or mischief to a public interest, infringes s.-s. 2(b) and cannot be saved by s. 1.[48]

Finally, s. 163(8) of the Criminal Code, which provides an exhaustive test of obscenity, infringes s.-s. 2(b), but is saved by s. 1 in its aim to prevent harm to society.[49]

Endnotes

1. 30 & 31 Vict, c 3 (UK).

2. [1899] AC 580.

3. Re Alberta Statutes (Alberta Press Bill case) [1938] SCR 100.

4. Switzman v Elbling (the Padlock case) [1957] SCR 285.

5. Supra, n 3, 146, per Cannon J.

6. Supra, n 4, 306, per Rand J.

7. Roncarelli v Duplessis [1959] SCR 121.

8. [1951] SCR 265.

9. [1903] AC 151.

10. For references to some of these denials and their terminations see chapter I of W S Tarnopolsky, Discrimination and the Law in Canada, Toronto: De Boo, 1982, now in a revised edition by W F Pentney, 1985.

11. SC 1960, c 44, now RSC 1985, App III. For a detailed discussion of the Bill, its history and the relevant jurisprudence, see W S Tarnopolsky, the Canadian Bill of Rights, Toronto: Carswell, 1966, 2nd rev ed, Carleton Library Series, 1975 and W S Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms" (1981) 44 Law and Contemporary Problems 169, 182-6.

12. See my futile and totally overlooked arguments to the contrary in my book on the Canadian Bill of Rights, ibid, chapters III and IV.

13. Supra, n 9, chapter IV.

14. [1978] 2 SCR 770.

15. Ibid, 796.

16. Ibid, 796-97.

17. I can attest to this as one of the federal drafters of the Charter and one of the most consistent critics of the interpretation of the Bill of Rights by the Supreme Court of Canada.

18. [1984] 1 SCR 357 at 366.

19. Hunter v Southam [1984] 2 SCR 145 at 155; R v Big M Drug Mart Ltd [1985] 1 SCR 295 at 343-44.

20. For example:

    Cf: R v Big M Drug Mart Ltd [1985] 1 ACR 295 at 333, 343-44, 18 DLR (4th) 321 13 CRR 64 with Robertson and Rosetanni v The Queen [1963] SCR 651;

    Cf: R v Therens [1985] 1 SCR 613 at 638-39 and 640, 18 DLR (4th) 655, 13 CRR 193 with Chromiak v The Queen [1980] 1 SCR 471;

Cf: R v Oakes [1986] 1 SCR 103 at 124-25, 26 DLR (4th) 200, 19 CRR 308 with R v Appleby [1972] SCR 303;

Cf: Reference re Section 94(2) of the Motor Vehicle Act RSBC 1979, [1985] 2 SCR 486 at 509-511, 24 DLR (4th) 536, 18 CRR 30 with Duke v The Queen, [1972] SCR 917;

Cf: R v Smith [1987] 1 SCR 1065 at 1066-70 with Miller and Cockriell v The Queen [1977] 2 SCR 680;

Cf: Brooks v Canada Safeway Ltd [1989] 1 SCR 1219 at 1221 with Bliss v A-G of Canada [1979] 1 SCR 183.

21. [1986] 2 SCR 573.

22. [1989[1 SCR 927. See the comments of Dale Gibson, "Constitutional Law - Freedom of Commercial Expression under the Charter - Legislative Jurisdiction over Advertising - A Representative Ruling: A-G Oue v Irwin Toy Ltd" (1990) 69 Can Bar Rev 339, and David Lepofsky "The Supreme Court's Approach to Freedom of Expression - Irwin Toy v Quebec (A-G) - and the Illusion of Section 2(b) Liberalism" (1993) 3 Natl Jo of Constitutional Law 37.

23. Ibid, 967 and 971.

24. See, eg, Royal College of Dental Surgeons v Rocket [1990] 2 SCR 232 at 244-45 and R v Keegstra, [1990] 3 SCR 697 at 728-30.

25. Supra, n 22 at 978-79. For the full discussion see pp 967-78. There are a large number of publications concerning freedom of expression in Canada. Amongst the many, see a book of essays - David Schneiderman, ed, Freedom of Expression and the Charter, Toronto Thomson Publishing, 1991; P W Hogg, Constitutional Law of Canada 3d ed, Scarborough: Carswell, 1993, Part III, chapter; Clare Beckton, "Freedom of Expression" in E Ratushny and G Beaudoin, eds Canadian Charter of Rights and Freedoms 2d ed, Scarborough; Carswell, 1992, chapter 5; Nicole Duplé, "Les limites intranséques et les limitations étatiques de la liberté d'expression: l'interprétation télélogique et contextualisée" in The Charter: Ten Years Later, Cowansville: Les éditions Yvon Blais Inc, 1992 39; A W MacKay, "Freedom of Expression: Is It All Just Talk?" (1989) 68 Can Bar Rev 713; S L Martin, "Canadian Perspectives on Freedom of Expression" (1991) Contemporary Law 517.

26. R v Butler [1992] 1 SCR 452.

27. See Irwin Toy, supra, and Keegstra, supra, n 24.

28. [1991] 1 SCR 139. See, eg, at 156-58, per Lamer CJC and at 226-27, per Cory J.

29. The lone dissenter was L'Heureux-Dubé J. For trenchant criticism of the approach of the majority see Jamie Cameron, "A Bumpy Landing; The Supreme Court of Canada

and Access to Public Airports under s. 2(b) of the Charter" (1992) 2 Media and Comm L Rev 91.

30. See, eg, R v Zundel [1992] 2 SCR 731 and R v Butler [1992] 1 SCR 452.

31. (1992) 11 OR (3d) 385.

32. [1984] 2 SCR 145 at 169.

33. [1986] 1 SCR 103.

34. R v Chaulk [1990] 3 SCR 1303 at 1335-36.

35. See, eg, Jamie Cameron, "The Original Conception of Section 1 and its Demise: A comment on Irwin Toy Ltd v Attorney-General of Quebec" (1989) 35 McGill LJ 253; Dale Gibson, "Reasonable Limits under the Canadian Charter of Rights and Freedoms" (1985) 15 Man LJ 27; P W Hogg, "Section 1 Revisited" (1991) 1 NJCL 1; André Morel, "La clause limitative de l'article 1 de la Charte canadienne des droits et libertés: une assurance contre le gouvernement des juges" (1983) 61 Can Bar Rev 81.

36. R v Keegstra, supra, n 24, 759-67, per Dickson CJC.

37. RWDSU v Dolphin Delivery [1986] 2 SCR 573 at 586-88. Also see BCGEU v BC (A-G) [1988] 2 SCR 214 at 244-45.

38. Lavigne v OPSEU [1991] 2 SCR 211 at 258-63.

39. Ford v Quebec (A-G) [1988] 2 SCR 712 and Devine v Quebec (A-G) [1988] 2 SCR 790.

40. Irwin Toy, supra, n 22; Ford v Quebec (A-G), ibid; and Royal College of Dental Surgeons v Rocket, n 24.

41. Mackay v Manitoba [1989] 2 SCR 357 at 366-67 per Cory J.

42. Osborne v Canada (Treasury Board) [1991] 2 SCR 69 at 88-90 per Sopinka J.

43. Canadian Newspapers Company Ltd v Canada (A-G) [1988] 2 SCR 122 at 129.

44. Edmonton Journal v Alberta (A-G) [1990] 2 SCR 1326 at 1341-42 and 1350-51 per Cory J.

45. Slaight Communications Inc v Davidson [1989] 1 SCR 1038 at 1050 and 1057, per Lamer J.

46. R v Keegstra, supra, per Dickson CJC and R v Andrews, [1990] 3 SCR 870, per Dickson CJC.

47. Canada (Human Rights Commission) v Taylor [1990] 3 SCR 870, per Dickson CJC.

48. Zundel, supra, n 30.

49. Butler, supra, n 30, at pp 509-10, per Sopinka J for the court.

Freedom of Expression - Some Recent Australia Developments

By The Hon Mr Justice Michael Kirby, AC CMG, President of the New South Wales Court of Appeal, Australia, and Chairman, Executive Committee, International Commission of Jurists

A Vital Attribute of Freedom

The value of freedom of expression rests primarily on the ability of every individual to express his or her beliefs. A free society seeks to support individual self expression as a vital attribute of freedom not far less important than the protection of life itself. Life without freedom to express ideas and beliefs is less than human. Freedom of speech provides the ideological underpinning of individualism. It is a vital protection against tyranny. In a free society, citizens and others are able to criticise the government, to protest peacefully against its policies and practices, and to lobby for a change of public opinion as a means of securing political, social, economic, legal and administrative changes.

Constitutional Protections - A New Development

Despite its importance, freedom of speech is offered limited express protection by Australian law. There is no legal guarantee of free speech as such in any jurisdiction. The laws dealing with speech are more concerned with its control than its facilitation and protection.

The Australian Constitution does not contain a Bill of Rights. An attempt in 1988 to introduce some fundamental rights was overwhelmingly defeated at referendum. The regulation of expression is substantially left to State legislation and common law. Some Federal laws govern the electronic media. In Australia freedom of expression is what is left when the various Federal, State and local legislation and the common law dealing with expression has been applied and exhausted. Such laws deal such matters as defamation, obscenity, sedition, offensive language, intellectual property and so on.

Nonetheless, courts in Australia have lately discovered that there are implied rights and freedoms in the Constitution of Australia relevant to freedom of expression. These rights are those which are consistent with the democratic principles which underlie the Australian Constitution as a whole. In this respect, two recent decisions of the High Court deserve special mention.

The first is *Australian Capital Television Pty Ltd v The Commonwealth [No. 2]* (1992) 66 ALJR 695; 108 ALR 577, or the *Freedom of Political Expression case*, as it has come to be known. That case concerned a challenge by a commercial television broadcaster to the constitutional validity of amendments made by the Federal Parliament to broadcasting legislation. The amendments imposed a general prohibition on the transmission of paid

political broadcasts and advertisements during an election period. The prohibition was modelled upon legislation enacted in several European democracies. It was negotiated in a hotly contested public debate in the Australian Parliament. Its given object was to prevent the trivialisation of political debate by slogans and jingles, typical of superficial political advertising. It was said to be a measure designed to prevent wealthy interests manipulating the media presentation of issues in the pre-electoral period and to enhance serious and factual discussion of political issues. The legislation breached no express prohibition of the Australian Constitution. However, it was struck down by the High Court of Australia as unconstitutional on the basis of implied guarantees of free expression said to be derived from the very nature of the Australian Federal polity.

The second decision, in *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658, 108 ALR 681 also known as the *Industrial Relations Commission case*, concerned provisions in the Federal Industrial Relations Act which prohibited public criticism of the Commonwealth Industrial Relations Commission (IRC). This prohibition was effected by provisions creating an offence, in the nature of contempt, akin to scandalising a court. In each of the above cases, it was claimed that these provisions were unconstitutional. In each case this argument succeeded.

In both cases, the majority of the High Court of Australia began with the proposition that the Australian Constitution makes it clear that the Commonwealth is to be a representative democracy. The Court held, in both cases, that there was an implied right to enjoy and participate in freedom of communication about governmental and political affairs in a representative democracy. Without such free discussion, one of the implied features, fundamental to the system of government envisaged by the Constitution, would be frustrated or prevented. Such free expression was therefore integral to, and necessary for, the very operation of the Constitution.

In the *Freedom of Political Expression case*, the High Court held that a right to be governed democratically was meaningless unless there was a freedom to communicate about matters relevant to the performance and election of governments, so that the people could exercise an informed choice. In a representative democracy, the Government should be under constant scrutiny from public debate of those issues. The Federal Parliament's powers to legislate was therefore subject to this implied right. Only in that way could legislative powers be exercised in accordance with the assumptions of the Constitution.

In the *Industrial Relations Commission case*, the majority concluded that the statutory provisions prohibiting, in effect, all criticisms of the IRC went further than was necessary to protect the integrity of that body. The restrictions on free expression were not a justified derogation from the freedom to communicate. They were declared unconstitutional.

The Legal Inhibitions Upon Free Expression

The right of the individual to freedom of expression in Australia is constrained by much legislation and common law. Freedom of expression sometimes affects the interests of state security, public order, public morality, and the protection of privacy. Laws relevant to these interests necessarily impinge upon, and to that effect diminish, the individual's right to free

expression. In Australia there is no First Amendment to protect such freedom from legislative diminution.

A free society may punish advocacy of its own destruction. However, experience suggests that it is dangerous to allow the law to interfere with speech which does not incite actual violence or overthrowal of society. Yet in all Australian jurisdictions it is an offence to write, print or utter seditious words. Seditious words are those which bring the sovereign into hatred or contempt or which undermine loyalty. The emptiness of these provisions has been brought into sharp relief in the current debate in Australia on republicanism. The prosecution of the Prime Minister and others of the kind for sedition, because of their expressed republican views, is of course unthinkable. In earlier times it was not so.

It can be dangerous for individuals to express their opinions about the workings of Parliament, the courts, or even of the police drug squad. The offence of scandalising the courts has been the occasion of arbitrary use. Lately, however, there have been few prosecutions in Australia for such conduct. Judges, and politicians seem content to endure a high level of calumny as an attribute of freedom and a feature of holding office in a democratic society at the end of the twentieth century.

In the past in Australia it has frequently been the militant trade unionists whose opinions about the courts resulted in punishment for contempt. Academics, journalists and those who publicise views espoused by others critical of courts or of Parliament, were rarely charged with contempt. The expression of opinions detracting from the respect of Parliament can lead to imprisonment without court trial, as a journalist and publisher discovered in Australia in 1954.

Like the offence of sedition, these laws are unconcerned with the actual effect of the speech in undermining confidence in the institutions of the State. They are simply aimed at prohibiting the expression of the opinion in the first place. While it is true that laws of sedition and contempt are now used relatively infrequently to diminish the right of free expression in Australia, they still pose a limitation upon free expression. They are frequently the subject of demands for repeal or reform.

One of the greatest threats to an individual's freedom of expression in Australia derives from rules requiring conformity to standards of public morality. "Unacceptable" material is censored. "Unusual" behaviour evinces intolerance. The imposition of rules requiring conformity to standards of public morality necessarily diminishes the individual's right to freedom of expression. Further, the law in one State of Australia (Tasmania) still makes it an offence to engage in homosexual acts, thus limiting a vital aspect of human expression which, at least between adults who consent, should plainly be free.

In Australia, censors of various kinds, acting under legislation, enforce public morality as conceived by them. A great deal of material never reaches individuals in Australia. Public officials have the power, by statute, to forbid the importation, sale, distribution or exhibition of publications which they consider unsuitable for general availability. The Commonwealth (Federal) Censor has power to prevent the importation of any film or video, as well as printed material considered to be blasphemous, indecent, unduly emphasising sex, horror or violence,

or likely to encourage depravity. This power is now used sparingly. But it was not always so. Within the last 20 years prosecutions for possessing or importing pornography were common.

State laws also ban or limit the availability of material which is not approved. In Queensland, the Objectionable Literature Board of Review frequently bans books. In Tasmania, restricted publications cannot be sold to people below a specified age. In Western Australia and New South Wales classified publications cannot be published, or the person responsible is liable to prosecution.

Censorship of this kind has a clear impact on free speech in Australia. Not only is the audience affected by limited access to images and ideas. Artists themselves are limited in the expression of their ideas. They are constrained by uncertainty as to their legal rights and the possibility that something they produce may be deemed to be indecent, obscene, blasphemous or otherwise unlawful. It should be said that in most States in Australia prosecution upon such grounds has greatly diminished in the past decade. Often this fall in prosecutions has occurred in response to more liberal public opinion and sensible prosecuting decisions rather than as a result of change in the substantive law. That law generally remains the same.

The right of an individual to free expression sometimes collides with a right of another individual, such as the right to a fair trial and to reputation. The protection of free speech will not extend to the expression of views or to the disclosure of information which may prejudice the interests of an accused person who is charged and who is awaiting trial. Laws prohibiting *sub judice* publications, far from diminishing basic civil rights actually protect them, although at a cost of some limitation on complete freedom of expression.

The law of defamation in Australia protects a person's reputation. If a statement or publication adversely affects reputation, an individual may claim financial compensation for the damage done. Initially, the concern of the law of defamation (slander and libel) was the preservation of a person's esteem amongst his or her peers. Today, the people who typically make use of the law of defamation tend to be public figures whose career depends on public reputation, and whose claim of hurt concerns a media publication. The law of defamation acts as an important brake on completely free speech. The amounts awarded as damages for defamation by courts often bear little apparent relationship to the impact the statement has had on the life of the defamed person. This is so although in many parts of Australia, exemplary or punitive damages have been abolished by law. To some extent, the large verdicts seem to reflect the Australian community's low opinion of the media - an opinion not always entirely unmerited.

The Australian Law Reform Commission in 1978 proposed reforms of Australia's defamation laws to provide new means of redress by way of rights of court ordered correction and of reply. However, these have not been enacted - largely because of resistance by powerful media interests.

A High Level of Freedom

Despite the foregoing catalogue of restrictions in the law upon freedom of expression in Australia, that freedom is highly prized. It is also widely practised. Some of the legal restraints (eg, blasphemy, sedition, indecency) seem now to be of diminished significance and

exercise little real restraint. Other interests (eg privacy) enjoy inadequate protection from the law. Still other interests (eg against pre trial publicity and protection of true reputation) have a legitimate demand for protection. One person's right to free expression does not extend to unreasonable assaults upon the privacy, fair trial rights and reputational integrity of another person.

By and large it is convention, tradition and community expectations (as well as the great power of the media) which defend freedom of expression in Australia. The law provides little express protection. Only lately have implied constitutional protections been discovered by the High Court of Australia. The *Australian Capital Television* decision of the High Court of Australia may carry portents of things to come in Australia in the larger protection by the law of rights of free expression.

Further Reading

Barendt, E "Election Broadcasts in Australia". The Law Quarterly Review Vol 109 April 1993, pp 168-171.

Campbell, E and Whitmore, H (1967) Freedom in Australia. Sydney University Press.

Dalton, L "Freedom of political expression: A watershed in Australian constitutional history". The Law Institute Journal. Vol 67, Nos 1 & 2, (1993) p 67.

Gronow, M "Freedom of political expression cases reviewed". The Law Institute Journal. Vol 67, Nos 1 & 2, (1993) p 68.

Pagone, A and Wallace, J (1990) Rights and Freedoms in Australia. The Federation Press.

Pullan, R Guilty Secrets; Free Speech in Australia (1984) Methuen Australia.

Research & Information Centre on Censorship Freedom of Information and Expression in Australia; A commentary by Article 19 on the report submitted to the United Nations Human Rights Committee by the Government of Australia (1988).

The Media Law Association of Australasia Freedom of Expression Seminar August 11 1984.

A Sketch from the Blue Train - Non-Discrimination and Freedom of Expression: The New Zealand Contribution

By The Rt Hon Sir Robin Cooke KBE, President of the Court of Appeal of New Zealand

The human rights scene in New Zealand seethes with activity. International instruments, including but not confined to those which the state has ratified, influence the interpretation and development of the domestic law. International jurisprudence from a wide range of countries is consulted and borrowed from by the Courts, as is appropriate in a small country willing to learn from precedents established in larger jurisdictions. As well there have been distinctive legislative and judicial developments, perhaps most particularly in the field of race relations. Having been asked by the Colloquium organisers to commit my offerings to paper, I will attempt a sketch of some salient features of the scene. The caveat must be entered that the current President of a Court which is decidedly *in medias res* ("part of the action" for those who prefer a contemporary phrase) must be circumspect in writing about controversial matters and unsettled questions. The title reflects the fact that most of what follows was written without recourse to a library on an agreeable train journey from Johannesburg to Cape Town. Accuracy in detail is therefore not warranted.

Freedom of Expression and A Bill of Rights

For more than forty years, since the abolition by unchallenged statute of the Upper House (the Legislative Council), New Zealand has had a unicameral legislature. Parliament consists of the Queen and the House of Representatives. The royal functions have been delegated to a Governor-General appointed on the advice of the Government of the day. In practice the Government has been the successful party in the most recent triennial general election and a two-party contest has been the pattern. There is full adult suffrage, women having been accorded the vote as long ago as 1893: centennial celebrations are underway. A referendum is about to be held on whether proportional representation should be introduced, in order better to provide for minority group representation.[1] The only specific minority representation at present is provided by four Maori seats, for which persons may register as electors. Maori can and do, however, vote and stand for election in other seats, and some have succeeded. The Speaker of the House is the first Maori to have held that office. Black Rod is also a Maori.

In 1990 Parliament enacted by ordinary statute a Bill of Rights. The New Zealand Bill of Rights Act 1990 is not entrenched nor declared to be supreme law. Soundings of public opinion had been thought to show that the community was not ready for those more thoroughgoing changes. The effect of s. 4 of the 1990 Act is that ordinary enactments may override the rights and freedoms affirmed in the Bill of Rights, but the effect of s. 6 is that this will only occur if the legislation is sufficiently explicit:

> s. 6. *Interpretation consistent with Bill of Rights to be preferred* - Wherever an enactment can be given a meaning that is consistent with this Bill of Rights, that meaning shall be preferred to any other meaning.

Note the words "can" and "shall" which make s. 6 a key and strong section. "Can" has been held not to cover strained interpretations: the possibility must be reasonably open. Still, the section places in the hands of the Courts a weapon of justice of an effective nature and reach. At the same time, by laying down a rule of interpretation it satisfies the dogma of the sovereignty of Parliament, so dear to Diceyans. The latter may be a dying breed, but that is another story.

The practical operation of s. 6 may be illustrated by contrasting decisions concerning the breath and blood-alcohol testing of motorists. The provisions of the Transport Act authorising these procedures contain no reference to the Bill of Rights. By s.23(1)(b) of the Bill of Rights, everyone who is arrested or who is detained under any enactment shall have the right to consult and instruct a lawyer without delay and to be informed of that right. The Transport Act provides for a roadside breath screening test; if it is positive, the driver is required to undergo at a police station an evidential breath test or a blood test, which may form the basis of a prosecution. It has been held that the operating requirements of this legislative scheme are inconsistent with, and therefore exclude, s. 23(1)(b) of the preliminary roadside stage. But the decision has been otherwise at the police station stage. Before any evidential test is administered the driver must be told of his or her right to legal advice and must be given a reasonable opportunity (telephone consultation is usually enough) of exercising that right. Despite initial misgivings on the part of the prosecuting authorities, the Courts have been told that this law is now working well: often legal advice reassures the driver and leads to co-operation, yet it is also, of course, a safeguard against abuse of police powers.

By s. 3, the New Zealand Bill of Rights Act applies to those who perform public functions, including naturally the judicial branch of the government of New Zealand (as the Courts are described in the section), so the Act necessarily applies in the evolution of the common law. It may require occasional modification of hitherto established common law rules; for, although the Bill of Rights can be overridden by a sufficiently explicit statute, it cannot be overridden by the common law. More importantly, the Bill of Rights may be of prime influence in the shaping of the common law in areas hitherto grey or unexplored. Where any of the rights and freedoms affirmed in Part II and referred to in s. 2 are relevant, the developing common law must be moulded so as to give effect to them. The rights and freedoms are generally declared in terms familiar in international instruments, as is to be expected from the long title of the Act. It is an Act:

> (a) to affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
>
> (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

It would be out of place to detail the rights and freedoms here. Suffice it to mention some of particular significance. Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment; and the right not to be

subjected to medical or scientific experimentation without consent. As to the subjects of this Colloquium the directly relevant provisions are in ss. 14 and 19:

> s. 14. *Freedom of expression* - Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
>
> 19. *Freedom from discrimination* -
>
> (1) Everyone has the right to freedom from discrimination on the grounds of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.
>
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination.

Before returning to those provisions I will continue to note briefly some of the other rights and freedoms.

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise; and the right not to be arbitrarily arrested or detained. The expressions "unreasonable" and "arbitrarily" have been the subject of debate in the Courts. Can a search - for example, a search of a motor car resulting in the discovery of illicit drugs - be reasonable if it is not lawful? Canadian Supreme Court decisions seem to indicate the answer No. We have learnt much from Canada, whose Charter is indeed the document that had the greatest direct influence on the wording of our Bill of Rights. But so far a majority of the New Zealand Court of Appeal have not been prepared to accept the Canadian answer to this question.

So far, the New Zealand cases point to a rather less categorical answer. There may be special circumstances wherein an unlawful search is nevertheless reasonable, as when a police officer catches a glimpse of a partly concealed corpse in a vehicle which he may have no apparent power to search. But at best such cases must surely be rare. To say that the police may reasonably act unlawfully is to set foot on a slippery slope. An alternative solution is to accept that a search is in breach of s. 23(1)(b) of the Bill of Rights yet to allow the results to be admitted in evidence. The New Zealand Courts, not having to wrestle with the Canadian Charter test relating to the bringing of justice into disrepute, have evolved a straightforward rule. *Prima facie*, evidence obtained as the result of a breach of the Bill of Rights should be excluded. Again, only in special circumstances would its admission be fair and right.

The rights of persons arrested or detained under any enactment have already been touched on. The reference "under any enactment" was inserted in the Act to emphasise that in New Zealand there are no common law powers of official detention. The affirmed rights include the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful. Rather curiously, this combination of provisions has caused or permitted some judges to suggest that some kinds

of unlawful public detention, such as detention of a mere suspect for interrogation, are outside the scope of s. 23(1)(b) of the Bill of Rights. The suggestion is that this is not covered because it is neither a formal arrest nor a formal detention under an enactment. If one believes that unlawful detention by the police, purportedly acting in accordance with their powers, is the very kind of thing which a Bill of Rights is intended to guard against, one cannot be attracted to that reasoning. But at least, s. 22, affirming the right not to be arbitrarily arrested or detained, has not been subjected to any restrictive interpretation.

The rights of persons charged with offences are set out at some length. In the main they are on obvious lines. It may be of some interest in South Africa to note that the New Zealand provisions include the right, except in military law offences, to the benefit of a trial by jury when the penalty is imprisonment for more than three months. In any event there is a right to a fair and public hearing before an independent and impartial court; a right not to be compelled to be a witness or to confess guilt; and a right of appeal against conviction and sentence. Natural justice must be accorded by any tribunal or other public authority having the power to make determinations in respect of rights, obligations, or interests protected or recognised by law. The corollary is also affirmed, a right to apply in accordance with law for judicial review of the determination. Finally it may be noted that, with some exceptions, the Bill of Rights applies so far as is practicable for the benefit of all legal persons, as well as for the benefit of all natural persons.

Through the rule of interpretation enshrined in s. 6 quoted above, the Bill of Rights may be said to permeate statute law. Through its paramountcy over other law, as explained above, it may be said to permeate the common law. It cannot rightly be seen as some special and somewhat arcane or foreign phenomenon standing apart from the day-to-day practice and administration of the law. We are slowly but surely learning this approach in New Zealand. It should be, and no doubt is, taught at the most elementary levels in the law schools. In the language being adopted in the Bloemfontein Statement, "In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law". And, in blending them into the corpus of the law, judges have to learn to rise above any black-letter technique, avoiding what Lord Wilberforce has famously labelled "the austerity of tabulated legalism". In Privy Council judgments often cited, the great British Judges Wilberforce and Diplock have recommended a generous approach to the interpretation or application of broad-textured human rights declarations. It is the generality and character of the declarations that make this approach apt. Whether or not a given declaration is also entrenched in supreme law is beside the point.

Most of the Bill of Rights cases that have come before the New Zealand Courts so far have arisen in criminal proceedings. Hence the unpopularity of the Bill of Rights with some to whom "law and order" policies have a ready appeal. Indeed, after an initial period when many people, including many lawyers, tended to think of the Act as a token and toothless thing, there ensued something of a flood of Bill of Rights points, as criminal advocates came to realise that the Courts were not merely paying lip service to this historic development. It has become necessary to quell this tendency by emphasising that points must be clearly taken at the trial and based on a sufficient evidential foundation, although if such a foundation is established (at a voir dire or deposition hearing, for instance) the onus has been held to fall on the prosecution to negative a material breach on the balance of probabilities. A highly

desirable factor now beginning to reduce the incidence of criminal Bill of Rights cases is a better appreciation by the police and other public authorities of the need for compliance.

But the potential of the Bill is by no means confined to the criminal law, as may be illustrated by two 1993 cases, both still unreported,[2] encouraging freedom of expression. Both show how the Bill may be used in situations where the law is not clear. In speaking of them it is necessary to be careful, as both came to the Court of Appeal at the interlocutory stage and further proceedings are pending.

In one, an "investigative" television documentary is complained of by manufacturers and distributors of a certain brand of ionisation smoke detectors. They claim, as plaintiffs, that the programme meant that the products contained radio-active material rendering them a major health hazard. The programme included contributions by scientists supporting a conservation cause who appeared to lend some support to the suggestion. It also featured the reactions of members of the public whose concern had been aroused - such as a housewife and mother who said that she had consigned the device to an outside garage or shed: "I would not let my kids near it". The plaintiffs plead two causes of action, malicious falsehood and defamation. In addition to damages for injury to their business and reputation, they seek an order directing the television company to publish a corrective statement.

The defendants moved to strike out the latter prayer on the ground that it is a form of relief not available in the Courts. Certainly it is not alluded to in such standard works as *Gatley on Libel and Slander and Salmond on Torts.*

But there is strangely little direct judicial authority on the question in the Commonwealth, and apparently no case containing an examination of it in depth. Various scholars, such as Professor Fleming, favour the introduction of such a remedy. That there seems to be no compelling reason of public policy against it is suggested by the enactment in New Zealand of jurisdiction to order the publishing of corrections in the specific fields of broadcasting (but the complaints of the plaintiffs to the Broadcasting Standards Authority has been stymied by the retort of the defendants that the matter is *sub judice* and that a possible jury trial should not be prejudiced) and misleading trade descriptions (the Commerce Commission may apply to the High Court for an order). On the other hand the press is of course insistent that editorial freedom is sacred. Media attitudes have not changed since in Anthony Trollope's Phineas Finn and Palliser novels, Mr Quintus Slide edited *The People's Banner.*[3]

The Court of Appeal unanimously took the view that in principle the jurisdiction to grant mandatory injunctions should not be fettered and is wide enough to cover this type of case. One member of the Court of three, however, considered that in this particular case the likelihood of any order being obtained is so slight that the prayer should be struck out. The decision of principle remains; and, while it can be reached without the aid of the Bill of Rights, s. 14 has been invoked in support. As has been seen, the section extends to the right to impart information. Especially if, for example, a programme is shown to be seriously damaging, false and malicious, the section is capable of providing the victim with effective redress in kind. Let it be added that the defences pleaded include the claim that the programme was true, so I am expressing no view about the final outcome.

The other case, *Prebble v Television New Zealand Limited*, goes the other way, showing how the section can be used in aid of the defence. The plaintiff, a former Cabinet Minister, is suing on another 'investigative' television programme. Its theme is alleged to have been that the former Labour Government, moving from its traditional position to a sudden conversion to the prevailing market philosophy, had decided to sell off public assets without a mandate from the electorate; and that the plaintiff in particular had come to support this policy, contrary to his true convictions, in return for donations from business leaders to his party's funds. The defendant is pleading justification, qualified privilege and fair comment. Some one hundred pages of particulars include a number of references to speeches made by the plaintiff in the House of Representatives and other statements which may come under the heading of proceedings in Parliament. On an application to strike out particulars of his claim, the Attorney-General, with the authority of the Privileges Committee of the House, has maintained that to allow them to be investigated in court would be to transgress parliamentary privilege.

As we have been reminded by *Pepper v Hart* in the House of Lords, s. 9 of the Bill of Rights 1689 provides "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". For some time the New Zealand courts have acted on the view now endorsed by the House of Lords that this ancient provision does not prevent a Court from obtaining aid from *Hansard* in appropriate cases in interpreting ambiguous legislation. In the *Prebble case*, however, the Court of Appeal has held that s. 9 does in fact apply. The former Minister's motives for his speeches are being called in question by the defence. The Minister's right to the vital freedom of parliamentary expression is not to be permitted to be cut down by having his motives questioned by such means.

The more difficult point is the consequence for the future of the action. It cannot safely be assumed at this stage that the references to parliamentary debates are not of sufficient moment to the defendant's case to be dismissed as insubstantial or immaterial. Or at least such is the view of the majority of the court. If a defendant is to have one hand tied behind his back in defending his or her comments on statements made within the shelter of parliamentary privilege, the result will be a gross restriction of freedom of speech in a democracy. A solution to the dilemma can be reached without resort to the Bill of Rights, but again s. 14 seems of help. It can be seen as just as important as the long-standing s. 9. The New Zealand Bill of Rights 1990 emphasises everyone's right to freedom of speech; the United Kingdom Bill of Rights 1689, also part of New Zealand law, emphasises the parliamentarian's right to freedom of speech in his own domain. Neither enactment need be seen as totally eclipsing the other.

The solution adopted by the Court of Appeal has been to order that the action be stayed unless and until parliamentary privilege is waived, both by the House as a whole and the plaintiff. This appears to be in accord with such comparatively few precedents as there are in Commonwealth jurisdictions, yet the Privileges Committee has now resolved that it has no power to waive privilege, even (it seems) on a petition for that purpose. Prominent among the reasons given is the need to protect witnesses before parliamentary committees, although it must be observed that neither in argument nor in judgment was there any suggestion in the case that the privilege of a witness could be waived without his or her joining in the waiver. Whether the Committee is right, and whether its view could bind subsequent Houses, does

not matter for present purposes. The present point is simply that the 1990 Bill of Rights and its declarations of principle can be seen, in an area where the law has been uncertain, as of equal influence in working out a solution.

Another caveat remains to be added. Both the recent cases used here as illustrations of the permeating theme are, or may be, under appeal to the Privy Council. In evolving New Zealand law, the New Zealand Courts are still subject to the jurisdiction of their Lordships. The last word on evolution in these two instances could therefore rest with two other participants in the Colloquium.

At any international gathering of laywers having freedom of speech among the items on the agenda, the *Spycatcher* litigation with its territorial versions is a natural focus of attention. I must therefore not fail to lay claim to the status of a *Spycatcher* old boy, and even to ask whether any other Judge had to write as many as three judgments on the subject?[4] The stages of the New Zealand litigation, initiated by Her Majesty's Attorney-General, are reported consecutively in [1988] 1 NZLR from page 129 to page 183. At the last stage we declined discretionary leave to appeal to the Privy Council, partly on the ground that the case required the Court to balance the claimed interests of the British Government against the claimed interests of the New Zealand press and public. The approach of a New Zealand Court might be different from (not surely "to" as the headnote says) that of a British Court, and it would have placed the Privy Council in an invidious position if required to determine for New Zealand a clash of interests of that kind.

What we did with the litigation in New Zealand was to recognise that Wright, and others in any national security service, must owe a lifelong duty of confidence to the government of their country. It did not seem to us to matter whether the duty stemmed from statute, equity, the royal prerogative or any other conceivable source. The duty may stem from more than one source, but surely it exists. Nor did it seem to the Court of Appeal, contrary to the opinion of the then Chief Justice at first instance, that in one aspect the case might be characterised as an attempt to enforce in the jurisdiction the penal law of another jurisdiction. The fact that the New Zealand Government had been persuaded to lend support to the action brought by the Government of a country in a sense our progenitor and now our ally was enough to overcome that obstacle; here we differed from the result reached later (not earlier, *pace* Lord Griffiths in [1988] 3 All ER at 655) by the High Court of Australia, who disposed of the case by determining that it was non-justiciable in Australia.

We were not willing nevertheless to rubber-stamp the New Zealand Government's approbation of the British action. The late deeply-respected jurist Dr F A Mann subsequently told me that he thought we had not given enough weight to the wishes and assessments of the two Governments. He is as likely to be right as anyone. The factors turning the scales for us, in refusing first an interim injunction and secondly any permanent relief by way of injunction, account of profits, exemplary damages or otherwise, against the local newspaper which had reproduced extracts from the book published in the London Sunday Times, were twofold. It verged on the absurd to restrain a New Zealand newspaper from reproducing information or alleged information that was already in the international public domain. Moreover, for the purpose of the proceedings in New Zealand (and likewise those in Australia) the British Government formally accepted that the injurious stories in Wright's book were true. I remember the marked impact on our Court when it became clear that so much was conceded.

Breach of confidence by a public servant is a serious and commonly reprehensible step, as all human rights instruments recognise expressly or by implication. Occasionally though - and it may be only very occasionally - the time comes for what Lord Denning called "whistle blowing". Concerned as we were with the New Zealand public interest, not automatically to be identified with the United Kingdom public interest, we had little doubt that the defence that publication was in the public interest had to prevail in the light of the factual concession. Sometimes it is called the iniquity defence, too narrow a description. The circumstances in which the judiciary can properly hold that a Bill of Rights freedom of expression prevails over a Bill of Rights or international instrument recognition of confidentiality as a protected value cannot be encapsulated in a phrase. Like so much else in the law, everything depends on facts and circumstances. The true motives of the media in an exposé or an ostensible one may have to be weighed in deciding the question.

Lord Lester of Herne Hill, and this is the first and possibly a technically proleptic opportunity of having the pleasure of writing that designation, has pointed out that in the *Spycatcher* litigation the New Zealand Court of Appeal did not cite international instruments. That is true. In mitigation one can only say that neither side asked us to, and it was before the era of the New Zealand Bill of Rights. If our judgments needed further support, as Francis Mann thought, we could have found it in that quarter. The point to stress is the one so well made by numbers at the Colloquium. Any restriction of freedom of speech is to be regarded in a democracy with deep suspicion, to be subjected to the closest scrutiny. It is a freedom always entitled to the benefit of the doubt.

All democratic nations contribute to the universal law, slowly but inevitably evolving, as to freedom of speech and other basic human rights. Partly it is that consideration which leads to the doubts already hinted at regarding the retention of a New Zealand appeal to the Privy Council in England, composed essentially as it is of English and Scottish Judges. How can they honestly speak for New Zealand in contributing to an international process? It is asking too much of them, schooled as they are in the belief instinctively that English or Scottish law knows no fellow, to see issues from a South Pacific perspective.[5] It is asking too much of New Zealand Judges to expect them to fill a role different from that of their British, Canadian and Australian counterparts and contemporaries, to accept a British legal intellectual yoke - much though the leaders of British human rights thought are admired. Legislators and the general public do not understand these truths and are seldom encouraged to understand them by the media. That is but one respect in which faith in the freedom of speech enjoyed and at times exploited by the media is the ultimate fallback position.

Anti-Discrimination Legislation

Long before the 1990 Bill of Rights with its generally-expressed right to freedom from discrimination, New Zealand had specific legislation against discrimination. In recent weeks there has been enacted the Human Rights Act 1993 -

> An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection for human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights.

An elaborate piece of legislation of 153 sections plus Schedules, the Act enlarges upon the preceding statute law, an account of which and the leading cases thereunder will be found in *Constitutional and Administrative Law in New Zealand* by Philip Joseph (Law Book Company, Sydney, 1993) 130 et seq. The Act constitutes a Human Rights Commission chaired by a Chief Commissioner (currently an academic lawyer, Margaret Mulgan). Its members include the Race Relations Conciliator and the Privacy Commissioner: the office of the latter, created by the Privacy Act 1993, adds another player to the rather crowded human rights stage in New Zealand. It is largely a response to the power of the computer; the first holder of the office is Bruce Slane, a former President of the New Zealand Law Society and well-known internationally.

The role of the Human Rights Commission is educational in the formation of public and political understanding of human rights issues. There are wide powers of investigation and report. The Act lists prohibited grounds of discrimination and, with sundry exceptions and qualifications, outlaws action based on such grounds in various fields of activity - employment, vocational control, partnership, education, disposal of land and accommodation, access to public facilities, and so forth. Complaints of breaches may be made to the Commission, and those found to have substance are usually settled by the Commission's mediation. Failing settlement, the Commission may bring proceedings before a body of a judicial character, the Complaints Review Tribunal. The Tribunal has extensive powers to grant relief by way of mandatory remedial orders, monetary compensation for loss or humiliation and distress, etc. From its decisions there are full rights of appeal on both fact and law to the High Court, where the proceedings are to be reheard before a Judge sitting with additional members. Finally there is a right of appeal by leave to the Court of Appeal on questions of law. Thus the human rights administrative and adjudicatory machinery is linked to, and in the judical aspect integrated with, the basic Court structure of the state, a pattern to be found also in other fields in New Zealand.

No doubt the categories of discrimination are never closed, but the draftsman of the 1993 Act (I decline to say "draftsperson") appears to have made something not far from a bid in that direction. Anyone in search of a catalogue might care to consult s.21. Taking into account the numerous specific sub-classifications in a section notable for dotting i's and crossing t's, there seem to be more than fifty prohibited grounds of discrimination. Some of the phraseology is unexpected, and some of the substance striking:

> "Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions"
>
> "Political opinion, which includes the lack of a particular political opinion or any political opinion"
>
> "The presence in the body of organisms capable of causing illness".

Thus s.21 might be called in some respects, and without depreciating its laudable and necessary purpose, discrimination for the connoisseur. But so far the bulk of complaints apparently relate to more familiar discriminatory practices, such as sexual harassment in the workplace or racial intolerance. For the most part the Tribunal has been able to keep its feet on the ground. For instance "robust banter" was found to be not truly insulting to Australians.

Perhaps on the other side of the line was the Tribunal's finding of breaches of the Act by newspapers carrying an advertisement offering a position as a service station attendant, required to pour petrol, to a "keen Christian person". Although the Prime Minister of the day did not fail to take the opportunity of pronouncing the law to be an ass, he did so without expressly drawing to the attention of the people that in this instance what was involved was law enacted by Parliament.

The Waitangi Cases

The present visit to South Africa has underlined that the New Zealand experience in recent years in dealing with the justiciable claims of an indigenous people may not be without some relevance to the problems awaiting a reconstructed Republic. In the newspaper *Business Day*, 7 September 1993, an article from Simon Barber in Washington conveys the views of consultants and officers of the World Bank there; while markets and property rights should be fortified, the *status quo* is economically irrational. Instead of wide-scale, capital-intensive white commercial farms, there should be, according to the argument, a shift towards small-scale farming with black smallholders: farm sizes not exceeding "what one family with a tractor would comfortably manage". It is said that no one aside from the PAC is suggesting expropriation but that, once the ANC is in power, the urban trade unions and the needs of unemployed urban youth should not be allowed to monopolise attention. A rural restructuring will be required. Claims to land both general and specific will have to be adjusted. All this for economically rational rather than racially-based reasons. In any event, Mr Nelson Mandela is reported as having promised that privately-owned land and property would not be seized by an ANC government.[6]

The New Zealand analogy cannot be pressed too closely. The overwhelming predominance of black numbers in South Africa contrasts with a New Zealand situation in which less than 15 *per cent* of the population are Maori, although their growth rate is faster. It is in ideas capable of modification or development, rather than imitation, that the New Zealand developments may possibly be helpful.

The judiciary has a part to play in the just evolution of a diverse yet integrated and functional society. The following account reflects largely the lessons of sitting in a series of cases in the New Zealand Court of Appeal in which the Court was faced, probably as never before, with the need to adjudicate for a society now multicultural - there are many from other South Pacific Islands or of Indian or Chinese extraction - and formed fundamentally by the union of two races, the predominantly British European and the Polynesian Maori. When we had to confront this task virtually afresh and realistically, it was a far cry from the nineteenth century colonial days when Judges could speak of the founding Treaty of Waitangi 1840 as "a praiseworthy device to pacify savages" or "a simply nullity".

As any adjudication in the sphere of race relations is almost sure to be, the answers rendered by the Court of Appeal have been followed by controversy and misrepresentation. The misrepresentation has not been confined to the uninformed; some who have aspired to, and probably deserve, the accolade of statesmanship have been driven to descend. In writing a judgment in this field one is acutely conscious of the risk of misconstruction. One's words have to be chosen carefully. Still, it is hard for anyone writing about a race relations case to

be completely objective. With academic lawyers, for instance, ingrained approaches or pet theories tend to creep in. So it is that, while recognising that there has been much admirable academic and even scholarly writing on the subject, I should prefer those seriously interested in it to read the Court of Appeal judgments themselves before commentaries thereon. To date the main reported judgments are *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (the *lands case*); *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (the *forests case*); *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (the *coal case*); *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (the *fisheries case*); *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 376 (the *broadcasting case*); and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (the *sealord case*).

The Treaty of Waitangi 1840 was made between Queen Victoria (by her representative, Captain William Hobson) and numerous Maori chiefs (there were more than 500 signatories eventually). It is a deceptively simple document of only three articles, with introductory recitals and a conclusion. There are English and Maori versions, which do not completely tally. The key features are that the Queen acquires governance or sovereignty and the Maoris become British subjects, but they are guaranteed the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties so long as it is their wish and desire to retain the same in their possession. If they are disposed to alienate, the Crown has an exclusive right of pre-emption. The Maori text uses "taonga" (treasures) for the other properties, a term which has been held to embrace the Maori language, now under threat of extinction: see the *broadcasting case*.

Regrettably, over the years the pressures of colonial expansion brought with them many breaches of the Treaty, such as acquisition of lands at undervalue or from Maori having no authority from the tribe to sell, the compulsory taking of land or its seizure for alleged rebellion, failure to set aside promised reserves, use of trust land for other purposes, and so forth. The Treaty has always appealed to by Maori complainants as their intended safeguard. At times a more cynical attitude to it prevailed on the European side. For long the ascendant public policy was integration: through intermarriage and assimilation Maori distinctiveness was seen as ultimately disappearing. But in much more recent times the emphasis has shifted to the importance of preserving a flourishing Maori identity and culture, and to raising their socio-economic status.

For long, too, the orthodox view was ascendant that the Treaty was of no legal force or value, unenforceable in the Courts except insofar as it might be incorporated in the law by statute. A Privy Council decision in 1941 was the highwater mark of that approach: *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308. But that was half a century ago. The years since the second world war have seen a vast general change in international attitudes to the rights of colonised indigenous peoples. New Zealand law, like Canadian and Australian law, has naturally begun to be evolved against a changed background of values and circumstances, and with a changed spirit. There are those who contend that the Treaty must be seen as the foundation document of New Zealand, not only in fact as it undoubtedly was, but in law also: a kind of grundnorm, a political compact as fundamental for our South Pacific country as was Magna Carta for England. The Courts have not yet had to face squarely the profound jurisprudential questions raised by such contentions; and long may that remain the position.

In any event there have now been some very significant recognitions of the Treaty by statute. Especially notable is the Treaty of Waitangi Act 1975 and the amending legislation extending its scope. The Act establishes the Waitangi Tribunal, with a majority of Maori members, whose function is to inquire into and make recommendation to the Crown upon claims submitted by Maori. Policies, acts or omissions of the Crown, and even parliamentary legislation as far back as 1840 may be the subject of claims that Maoris have been prejudicially affected inconsistently with the principles of the Treaty of Waitangi. For the most part the Tribunal's conclusions are recommendatory only, although in strictly limited spheres it may make binding orders. In practice, however, its recommendations have a moral force which cannot be and is not ignored by the Government of the day. The recommendations are not necessarily implemented *in toto* or in the precise manner contemplated by the Tribunal, but they lead to negotiations and sometimes settlements on a major scale. The present government has embarked on a policy of endeavouring to settle all outstanding claims by the end of the century. Possibly this is optimistic, but real progress is being made, real goodwill displayed to practical effect.

In the changes the Courts have had a formative role stemming in part from other legislation recognising the Treaty. The prime example is the State-Owned Enterprises Act 1986, a measure prompted by the prevailing market philosophy and having the immediate object of ensuring the conduct of certain state activities on a commercial basis, with the prospect of ultimate privatisation. The risk that land and other assets held by the Government might pass out of public hands and so become unavailable for satisfying Maori claims led to the insertion of a provision of what was to provide profound effect. It it s. 9.

> s. 9. Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

What the legislators meant by the "principles of the Treaty" was not defined; it is doubtful whether there was any clear concept in their minds. Necessarily it fell to the Courts to interpret the phrase. The line of cases already cited have turned chiefly on its interpretation and application. In the leading case, the lands case, the analogy of partnership was selected by the Court of Appeal as a sort of shorthand. The Crown and the Maori are seen as partners owing mutual duties of good faith and reasonableness in their dealings. The duties of the Crown extend to providing proper safeguards for Maori claims and remedies for part breaches of the Treaty. The duties of the Maori include reasonable co-operation and loyalty to the Queen and the state.

These may seem generalities, and so they are, but they have had solid and demonstrable practical effect. Perhaps the best illustration concerns sea fisheries. The overfishing by non-Maori interests of traditional Maori fishing grounds, on which they had depended for subsistence, created a situation unforeseen at the time of the Treaty. Accepted as a living instrument, the Treaty had to be applied in a way taking into account the realities of life in present-day New Zealand. In effect the Waitangi Tribunal (which is not strictly a Court) and the Courts produced by their decisions a situation in which it became obligatory on the Government to provide for Maori some reasonable share of national fishing resources. In effect, in the Sealord case, the Court of Appeal approved a pact or deed of settlement between the Government and leading Maori negotiators whereby, by purchase of shares in the leading fishing company and otherwise, the Government provided more than 23 *per cent* of the

fishing quotas for Maori, with a 20 *per cent* share of any new quota issued in future. This is quite a spectacular, yet a just, result; for, although they had legitimate grievances as to past virtual appropriation of their fisheries, the Maori people compose less than 15 *per cent* of the total population.

Let it be repeated that the foregoing pages about the Treaty of Waitangi, like the rest of this paper, are no more than a sketch. The next steps for those wishing to explore the subject further would be to read the decisions to which references have been given and the reports issued by the Waitangi Tribunal recording the results of its extensive and continuing investigations. The whole subject may be in a sense linked with the New Zealand Bill of Rights Act 1990. In providing redress for past injustices the Waitangi decisions may be classified as a form of positive discrimination within the concept of s. 19(2) of that Act.

My colleagues and I have spent much time on Bill of Rights and Treaty of Waitangi cases. It is stretching and anxious work, calling I think for efforts to follow an approach different from that required in, or sufficient for, cases in traditional fields of private law. The reward to be found in these labours is a sense of the worthwhile and probably indispensable contribution that the judiciary and the legal profession can make towards the evolution of more just national and international societies.

Endnotes

1. In November 1993 the referendum resulted in a clear majority for proportional representation, a form of which ("MMP") will now be introduced.

2. See now TV3 Network Ltd v Eveready New Zealand Ltd [1993] 3 NZLR 435, and Television New Zealand Ltd v Prebble [1993] 3 NZLR 513.

3. Trollope drew a rather odious character, quite without the charm of some editors of the present day, who was nonetheless sincere in his belief that his scandalous "revelations" were in the public interest. One difficulty was that he had ceased to be able to distinguish truth from falsehood.

4. Other old boys at the Colloquim are Lord Browne-Wilkinson, who, when Vice-Chancellor, delivered an early Spycatcher judgment in England; President Michael Kirby, who wrote the first majority judgment in the New South Wales Court of Appeal; and Anthony Lester, beside whose record of arguing the case sixteen times my own judicial figure pales into insignificance.

5. The recent judgment of their Lordships in Attorney-General for Hong Kong v Reid contains some significant concessions on this point. These are valuable, but they cannot remove the basic problem.

6. Mr Mandela said that the SADF controlled about 40% of the country's land which the ANC would "certainly" use to compensate those who had lost land under apartheid. The prevalence of initials in South African political discourse - other examples are NP, CP, IFP, DP, CP, AZAPO, SACP, TVBC, COSATU, CDOESA, TEC is supposed to have led an irreverent commentator to suggest that the Republic be renamed South Acronym.

ANNEXES

Concluding statement of the Judicial Colloquium held in Bangalore, India, from 24-26 February 1988

BANGALORE PRINCIPLES

Chairman's Concluding Statement

Between 24 and 26 February 1988 there was convened in Bangalore, India, a high level judicial colloquium on the domestic application of international human rights norms. The colloquium was administered by the Commonwealth Secretariat on behalf of the Convenor, the Hon Justice P N Bhagwati (former Chief Justice of India), with the approval of the Government of India, and with assistance from the Government of the State of Karnataka, India.

The participants were:

Australia	Justice Michael D Kirby, AC, CMG
India	Justice P N Bhagwati - Convenor
	Justice M P Chandrakantaraj Urs
Malaysia	Tun Mohamed Salleh Bin Abas
Mauritius	Justice Rajsoomer Lallah
Pakistan	Chief Justice Muhammad Haleem
Papua New Guinea	Deputy Chief Justice Mari Kapi
Sri Lanka	Justice P Ramanathan
United Kingdom	Recorder Anthony Lester, QC
United States of America	Judge Ruth Bader Ginsburg
Zimbabwe	Chief Justice E Dumbutshena

There was a comprehensive exchange of views and full discussion of expert papers. The Convenor summarised the discussions in the following paragraphs:

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.

2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.

3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.

4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete.

5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.

6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.

7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

8. However, where national law is clear and inconsistent with the international obligations of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.

10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in administration of justice in fostering universal respect for fundamental human rights and freedoms.

Concluding statement of the Judicial Colloquium held in Harare, Zimbabwe, from 19-22 April 1989

HARARE DECLARATION OF HUMAN RIGHTS

1 Between 19 and 22 April 1989 there was convened in Harare, Zimbabwe, a high level judicial colloquium on the domestic application of international human rights norms. The colloquium followed an earlier meeting held in Bangalore, India in February 1988 at which the Bangalore Principles were formulated. The operative parts of the Principles are an annexture to this Statement.

2 As with the Bangalore colloquium, the meeting in Harare was administered by the Commonwealth Secretariat on behalf of the Convenor, the Hon Chief Justice E Dumbutshena (Chief Justice of Zimbabwe) with the approval of the Government of Zimbabwe and with assistance from The Ford Foundation and Interights (the International Centre for the Legal Protection of Human Rights).

3 The colloquium was honoured by the attendance at the first session of His Excellency the Hon R G Mugabe, President of Zimbabwe, who opened the colloquium with a speech in which he reaffirmed the commitment of his Government to respect for human rights, the independence of the judiciary, the rule of law and a bill of rights which is justiciable in the courts.

4 The participants were:

Australia	Justice M D Kirby, AC, CMG
Botswana	Chief Justice E Livesey Luke
The Gambia	Chief Justice E O Ayoola
Ghana	Justice J N K Taylor
India	Justice P N Bhagwati
Kenya	Chief Justice Cecil H E Miller
Lesotho	Chief Justice B P Cullinan
Malawi	Chief Justice F L Makuta
	Justice L E Unyolo
Mauritius	Justice Rajsoomer Lallah
Nigeria	Justice A Ademola
Seychelles	Chief Justice E A Seaton
Tanzania	Chief Justice F L Nyalali
United Kingdom	Recorder Anthony Lester, QC
Zambia	Chief Justice A M Silungwe
Zimbabwe	Chief Justice Enoch Dumbutshena - Convenor
	Justice A R Gubbay
	Justice E W Sansole

5 The participants examined a number of papers which were presented for their consideration. These included papers which reviewed the development of international human rights norms particularly in the years since 1945; a paper which examined the domestic application of the African Charter on Human and Peoples' Rights; a paper on personal liberty and reasons of state; and a paper on ways in which judges, in domestic jurisdiction, may properly take into account in their daily work the norms of human rights contained in international instruments whether universal or regional.

6 The participants paid especially close attention to the provision of the African Charter on Human and Peoples' Rights. That Charter was adopted as a regional treaty by the Organisation of African Unity in 1981 and entered into force on 21 October 1986. At the time of the Harare meeting, 35 African countries had ratified or acceded to the Charter.

7 Various opinions were expressed by the participants concerning ways of strengthening the implementation of the Charter including:

- the interpretation of the provisions in the light of the jurisprudence which has developed on similar provisions in other international and regional statements of human rights;
- the clarification and strict interpretation of some of the provisions which are derogating from important human rights;
- enlargement, at an appropriate time, of the machinery provided by the Charter for the consideration of complaints and the provision of effective remedies in cases of violation.

8 In particular the participants noted that:

- the opening recital of the Charter of the United Nations contains a ringing re-affirmation of 'faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women';
- the Charter of the Organisation of African Unity includes reference to 'freedom, equality, justice and legitimate aspirations of the African peoples';
- the Preamble to the African Charter on Human and Peoples' Rights proclaims that fundamental human rights stem from the attributes of human beings and that this justifies their international protection;
- the freedom movement in Africa has had as a central tenet the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence which dignity and independence can only be realised fully if the internationally recognised human rights norms are observed and fully protected;
- there is a close inter-linkage between civil and political rights and economic and social rights; neither category of human rights can be fully realised without the enjoyment of the other. Indeed, as President Mugabe said at the opening of the colloquium: "The denial of human rights and fundamental freedoms is not only an individual tragedy, but also creates conditions of social and political unrest, sowing seeds of violence and conflict within and between societies and nations."

9 The participants were encouraged in their work by the declaration of President Mugabe that the nations of Africa, having freed themselves of colonial rule and the derogations from respect for human rights involved in such rule, have a particular duty to observe and respect the fundamental human rights for which they have sacrificed so much to win, including the struggle against racial discrimination in all aspects. The ultimate achievement of the freedom struggle in Africa will not be complete until the attainment throughout the continent of proper respect for the human rights of everyone - as an example and inspiration to humankind everywhere. In the words of Nelson Mandela, to which President Mugabe drew attention, "Your freedom and mine cannot be separated."

10 The participants agreed as follows:

(a) Fundamental human rights and freedoms are inherent in humankind. In some cases, they are expressed in the constitutions, legislation and principles of common law and customary law of each country. They are also expressed in customary international law, international instruments on human rights and in the developing international jurisprudence on human rights.

(b) The coming into force of the African Charter on Human and Peoples' Rights is a step in the ever widening effort of humanity to promote and protect fundamental human rights declared both in universal and regional instruments. The gross violations of human rights and fundamental freedoms which have occurred around the world in living memory (and which still occur) provide the impetus in a world of diminishing distances and growing interdependence, for such effort to provide effectively for their promotion and protection.

(c) But fine statements in domestic laws or international and regional instruments are not enough. Rather it is essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect. They must not be seen as alien to domestic law in national courts. It is in this context that the Principles on the domestic application of international human rights norms stated in Bangalore in February 1988 are warmly endorsed by the participants. In particular, they reaffirmed that, subject always to any clearly applicable domestic law to the contrary, it is within the proper nature of the judicial process for national courts to have regard to international human rights norms - whether or not incorporated into domestic law and whether or not a country is party to a particular convention where it is declaratory of customary international law - for the purpose of resolving ambiguity or uncertainty in national constitutions and legislation or filling gaps in the common law. The participants noted many recent examples in countries of the Commonwealth where this had been done by courts of the highest authority - including in Australia, India, Mauritius, the United Kingdom and Zimbabwe.

(d) There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms - stated in international instruments and otherwise. In this respect the participants endorsed the spirit of Article 25 of the African Charter. Under that Article, states parties to the Charter have the duty to promote and ensure through teaching, education and publication, respect for the rights and freedoms (and corresponding duties) expressed in the Charter. The participants looked forward to the Commission established by the African Charter developing its work of promoting an awareness of human rights. The work being done in this regard by the publication of the *Commonwealth Law Bulletin*, the *Law Reports of the Commonwealth* and the *Interights Bulletin* was especially welcomed. But to facilitate the domestic application of international human rights norms more needed to be done. So much was recognised in the Principles stated after the Bangalore colloquium which called for new initiatives in legal education, provision of material to libraries and better dissemination of information about developments in this field to judges, lawyers and law enforcement officers in particular. There is also a role for non-government organisations in these as in other regards, including the development of public interest litigation.

(e) As a practical measure to carrying forward the objectives of the Principles stated at Bangalore, the participants requested that the Legal Division of the Commonwealth Secretariat arrange for a handbook for judges and lawyers in all parts of the Commonwealth to be produced, containing at least the following:

- the basic texts of the most relevant international and regional human rights instruments;
- a table for ease of reference to a comparison of applicable provisions in each instrument; and
- up to date references to the jurisprudence of international and national courts relevant to the meaning of the provisions in such instruments.

(f) If the judges and lawyers in Africa - and indeed of the Commonwealth and of the wider world - have ready access to reference material of this kind, opportunities will be enhanced for the principles of international human rights norms to be utilised in proper ways by judges and lawyers performing their daily work. In this way, the long journey to universal respect of basic human rights will be advanced. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights. So far as they may lawfully do so, they have a duty to reflect the basic norms of human rights in the performance of their duties.

In this way the noble words of international instruments will be translated into legal reality for the benefit of the people we serve but also ultimately for that of people in every land.

Harare

Zimbabwe, 22 April 1989

Concluding statement of the Judicial Colloquium held in Banjul, The Gambia, from 7-9 November 1990

THE BANJUL AFFIRMATION

1 A high level judicial colloquium on the domestic application of international human rights norms was held in Banjul, The Gambia, from 7 - 9 November 1990. It was the third in a series of judicial colloquia begun in Bangalore, India in February 1988, followed in Harare, Zimbabwe in April 1989. The Bangalore Principles formulated at the first colloquium, and the Harare Declaration of Human Rights produced at the second are annexed to this Statement.

2 The Banjul colloquium was administered jointly by the Commonwealth Secretariat and Interights (the International Centre for the Legal Protection of Human Rights) on behalf of the Convenor, the Hon E O Ayoola, Chief Justice of The Gambia, with the approval of the Government of The Gambia and with assistance from the Ford Foundation, the Danish International Development Agency and the British Overseas Development Agency.

3 Following an opening address by Chief Justice Ayoola the colloquium was formally opened on behalf of His Excellency Alhaji Sir Dawda Kairaba Jawara, President of The Gambia, by the Hon Hassan B Jallow, Attorney-General and Minister of Justice.

4 The participants were:

Australia	Justice Michael D Kirby, AC, CMG
The Gambia	Chief Justice E O Ayoola - Convenor
	Justice P D Anin
	Justice M E Agidee
Ghana	Acting Chief Justice N Y B Adade
	Justice G L Lamptey
	Justice M Abakah
India	Justice Y V Chandrachud
Nigeria	Justice Kayode Eso, CON
	Justice P Nnaemeka-Agu
	Justice A B Wali, OFR
	Justice S U Onu
	Justice A O Ejiwunmi
	Professor U O Umozurike
United Kingdom	Recorder Anthony Lester, QC
Zimbabwe	Justice Enoch Dumbutshena

Representatives of the African Commission on Human and Peoples' Rights, the Commonwealth Secretariat, the Ford Foundation, Interights and the International Commission of Jurists were also present.

5 There was a searching exchange of views on the wide range of subjects covered by the various papers. There were papers on the development of international human rights norms, including a survey of the practice and jurisprudence of international and regional supervisory organs; the domestic application of international human rights norms in Nigeria; and the African Charter on Human and Peoples' Rights and the work of the African Commission. In addition there was an account from the International Commission of Jurists on international developments on human rights, as well as papers on the role of the judge in advancing human rights presenting the viewpoints and experience of several Commonwealth jurisdictions. Interights presented a study on personal liberty and reasons of state which examined the relationship between international human rights norms and domestic law; and there was an essay which considered fundamental rights in their economic, social and cultural context in India.

6 The participants welcomed the opportunity to address the issues in a practical way and to carry forward the Bangalore Principles and the Harare Declaration . Both documents stood at the core of the important judicial endeavour inaugurated in Bangalore and were kept clearly in mind throughout the discussions.

7 The Banjul colloquium was seen as having the particular objective of affording Commonwealth judges in the West Africa region the opportunity to study the domestic application of international human rights norms to constitutional and administrative law. It was important to do this on the basis of a comparative study and a free exchange of views in seeking practical ways to realise the ideals of the international human rights standards. The participants were concerned to develop for Commonwealth Africa a system of justice having common application in every country based on their common heritage of democracy and the rule of law. The participants were also concerned to include non-Commonwealth countries in Africa in the process. They recognised the pressing need to include human rights in legal education, in formal professional teaching and other training activities and to have wide and popular dissemination of information about basic human rights and freedoms.

8 Accepting in their entirety the Bangalore Principles and the Harare Declaration , the participants acknowledged that fundamental human rights and freedoms are inherent in humankind. They were convinced that any truly enlightened social order must be based firmly on respect for individual human rights and freedoms, peoples' rights and economic and social equity. They pledged their commitment and dedication to these goals and principles and decided to issue this Statement of Affirmation of the Bangalore Principles and the Harare Declaration on Human Rights .

9 They called attention to the need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international instruments and national constitutions and laws. For the purposes of Articles 25 and 26 of the African Charter on Human and Peoples' Rights the participants suggested that the African Commission on Human Rights should consider establishing local associations in each member state to facilitate the process of education and training and dissemination of human rights information.

10 The importance of complete judicial independence was underlined, as well as the complete independence of the legal profession. The colloquium also emphasised that it is essential for there to be real and effective access to the ordinary courts for the determination of criminal charges and civil rights and obligations by due process of law. These safeguards are necessary if the rule of the law is to be meaningful, and if the law is to be of practical value to ordinary men and women.

11 The participants urged closer links and cooperation across national frontiers by the judiciary of Commonwealth Africa on the interpretation and application of human rights law. In particular they called for effective arrangements for the publication and exchange of judgments, articles and other information and where appropriate the use of special expertise. They believed also that these links and cooperation should include non-Commonwealth African jurisdictions, many of which are also concerned with upholding and promoting human rights and with attaining the objectives of the African Charter.

12 Adequate resources of way of library stocks and other material should urgently be made available for all judges for their information and assistance and by way of dissemination and teaching of international human rights law. They noted in this respect and fully endorsed the proposals made in the Harare Declaration for the preparation and dissemination of human rights material.

13 The participants recognised the need to adopt a generous approach to the matter of legal standing in public law cases, while ensuring that the courts are not overwhelmed with frivolous or hopeless cases. They also considered that the courts would be assisted by well focussed *amicus curiae* submissions from independent non-governmental organisations, such as Interights, in novel and important cases where international comparative law and practice might be relevant.

14 National laws should enable non-governmental organisations and expert advocates (whether local or otherwise) to provide specialist legal advice, assistance and representation in important cases of public interest.

15 It was agreed that it is essential for the exceptions and derogations contained in the African Charter to be strictly construed, including an interpretation of "law" which rejects arbitrary or unreasonable "laws" in Chapter 1 of the Charter. Otherwise these exceptions and derogations would destroy the very principles guaranteeing fundamental human rights and freedoms.

16 They expressed their belief that the time may have come for an independent African Court on Human Rights, whose decisions would be binding.

Banjul

The Gambia

9 November 1990

ABUJA CONFIRMATION

of the Domestic Application of Human Rights Norms

1 Between 9 and 12 December 1991 there was convened in Abuja, Nigeria, a high level judicial colloquium on the domestic application of international human rights norms. The colloquium followed earlier meetings held in Bangalore, India in February 1988, Harare, Zimbabwe in April 1989 and Banjul, The Gambia in November 1990. The operative parts of the principles accepted in Bangalore (the Bangalore Principles), affirmed and reaffirmed in Harare and Banjul are annexed to this Statement. Once again, they were confirmed by all the participants in Abuja.

2 The Abuja colloquium was, alike with the Bangalore, Harare and Banjul meetings, administered jointly by the Commonwealth Secretariat and Interights (the International Centre for the Legal Protection of Human Rights) on behalf of the Convenor, the Hon Justice Mohammed Bello, CON, Chief Justice of Nigeria, with the approval of the Government of Nigeria and with assistance from the Ford Foundation.

3 Following opening addresses by Chief Justice Bello and on behalf of Prince the Hon Bola Ajibola, SAN, KBE, and an address of welcome by the Hon the Minister of the Federal Capital Territory, Abuja, Major-General Muhammadu Gardo Nasko, FSS, PSC, MNI, the colloquium was opened in the name of the Vice President of the Federal Republic of Nigeria, His Excellency Admiral Augustus Akhomu (rtd), PSC, FSS, MNI. A message of greeting and encouragement was read from the Commonwealth Secretary-General, Chief Emeka Anyaoku, CON.

4 The participants in the Abuja colloquium were:

Australia	Justice Michael D Kirby, AC, CMG
Brazil	Justice Celio Borja
European Court of Human Rights	
	President Rolv Ryssdal
The Gambia	Chief Justice E O Ayoola
Ghana	Chief Justice P E Archer
India	Justice P N Bhagwati
Nigeria	Chief Justice Mohammed Bello, CON - Convenor
	Justice A G Karibi-Whyte, Justice of the Supreme Court
	Justice P Nnaemeka-Agu, Justice of the Supreme Court
	Justice Aloma Mukhtar, Justice of the Court of Appeal
	Justice Niki Tobi, Justice of the Court of Appeal
	Chief Judge M B Belgore, Federal High Court
	Acting Chief Judge E A Ojuolape, Ondo State
	Chief Judge M U Usoro, Akwa-Ibom State
	Chief Judge L A Ayorinde, Lagos State
	Chief Judge T A Oyeyipo, Kwara State
	Chief Judge K M Kolo, Borno State
	Chief Judge G I Uloko, Plateau State
	Chief Judge I B Delano, Ogun State
	Chief Judge S U Minjibir, Kano State

Chief Judge S E J Ecoma, Cross-River State

Judge R H Cudjoe, High Court of Justice, Kaduna State

Chief Judge A Idoko, Benue State

Acting Chief Judge T A A Ayorinde, Oyo State

Judge A N Maidoh, Delta State

Chief Judge F I E Ukattah, Abia State

Judge M O Nweje, Anambra State

Chief Judge S S Darazo, Bauchi State

Judge A C Orah, High Court of Justice, Enugu State

Chief Judge A O Apara, Osun State

Acting Chief Judge Tijjani Abubakar, Jigawa State

Acting Chief Judge Mahmud Mohammed, Taraba State

Chief Judge Ibrahim Umar, Kebbi State

Chief Judge M D Saleh, Federal Capital Territory

Abdulkadir Orire, Grand Kadi of Kwara State

President Y Yakubu, Customary Court of Appeal, Plateau State

Judge R N Ukeje, Federal High Court, Jos

Judge A O Ige, High Court of Justice, Oyo

Judge E E Arikpo, High Court of Justice, Cross-River State

Justice Kayode Eso, CON, Supreme Court (rtd)

Professor U O Umozurike, Member, African Commission on Human and Peoples' Rights

Sierra Leone Chief Justice S M F Kutubu

United Kingdom Recorder Anthony Lester, QC

United States of America

Judge Nathaniel R Jones

Zimbabwe Justice Enoch Dumbutshena

5 The participants had before them a number of papers which were presented for their study and critical attention. These papers examined the developing body of international human rights jurisprudence, with particular emphasis on the application of the International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights, the European Convention on Human Rights, and the African Charter on Human and Peoples' Rights. They noted that the principles contained in these instruments enshrine general principles of customary international law of universal application.

6 The participants also heard oral presentations on the operation of the African Charter on Human and Peoples' Rights and the European Convention on Human Rights. The review of the operation of the Charter was led by Professor U O Umozurike (Nigeria), immediate past Chairman of the African Commission on Human and Peoples' Rights. The review of the jurisprudence which has been developed by and under the European Court of Human Rights was led by the Court's President, the Hon Justice Rolv Ryssdal. This was the first occasion in the series of judicial colloquia that the participants have had the benefit of the participation of a member of the European Court of Human Rights, the jurisprudential influence of which now extends far beyond Europe. Also participating for the first time in the Abuja colloquium was a Judge from the civil law tradition, The Hon Justice Celio Borja (Brazil).

7 The remaining sessions were spent discussing papers presented as well as contributions made by judges from Australia, The Gambia, India, Nigeria, Sierra Leone, the United Kingdom, the United States of America and Zimbabwe.

The international and national contexts

8 The participants were keenly aware of the remarkable international and national contexts in which their deliberations were taking place, affecting the international community, the Commonwealth of Nations, Africa and specifically the host country, Nigeria.

9 In the world community the processes of globalisation, stimulated by technology, continues apace. But it is now taking place in a rapidly changing international political context, reflected most visibly in the end of the Cold War, the rapid political and legal changes in Central and Eastern Europe, and the Soviet Union, accompanied by the decline of totalitarianism, and moves to strengthen the United Nations Organisation and its commitment to the furtherance of human rights protection.

10 In the Commonwealth of Nations, the gradual dismantling of the apartheid regime in South Africa and the inevitable moves towards freedom and democracy in that country, and popular pressures across Africa, have stimulated renewed attention by Commonwealth Heads of Government to the issues of human rights in the Commonwealth more generally. This was reflected in the closing statement of the Commonwealth Heads of Government Meeting in Harare in October 1991, with its particular emphasis on democracy, human rights, accountable government, independence of the judiciary and the rule of law.

11 In Africa, recent political and legal changes provided an encouraging context for the Abuja colloquium. The peaceful change of government in Zambia, the abandonment of the single party state announced in Kenya, and the changes in South Africa creating the prospect of majority rule, all reflect the movement in Africa today towards democracy and respect for human rights and the primacy of the rule of law.

12 In Nigeria, the participants carefully noted the steps being taken towards the restoration of civilian democratic government by the end of 1992.

13 Judges have a key role to play in the renewal in countries in all parts of the world of principles of democracy, human rights and the rule of law - to do justice to everyone within their jurisdiction by due process of law. It was with this consciousness of the importance of the role of the independent judiciary, especially at this point of time in history, that the participants in this colloquium approached the subject matter of their work.

The legitimacy of judicial interpretation

14 The participants reaffirmed the principles stated in Bangalore, amplified in Harare, and affirmed in Banjul. These principles reflect the universality of human rights - inherent in humankind - and the vital duties of the independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. This process involves the application of well-established principles of judicial interpretation. Where the common law is developing, or where a constitutional or statutory provision leaves scope for judicial interpretation, the courts traditionally have had regard to international human rights norms, as aids to interpretation and widely accepted sources of moral standards. This process is all the more necessary where a national Bill of Rights is inspired by international human rights instruments (as in the case in many Commonwealth African countries, including Nigeria). Obviously the judiciary cannot make an illegitimate intrusion into purely legislative or executive functions; but the use of international human rights norms as an aid to construction and a source of accepted moral standards involves no such intrusion.

15 The participants recognised that, as befits a community of individuals answering only to the law and their conscience, different judges may perceive in different ways the choice available to them in particular cases - whether in interpreting constitutional or legislative provisions, or in developing the common law. What to one judge may seem clear and unambiguous may to another seem unclear or ambiguous and such as to require a choice between competing interpretations. It is in such a situation that the international human rights norms provide useful guidance in making the choice. The Bangalore Principles do no more than call to the judge's notice the need to make relevant choices in a principled way.

Personal liberty, access to justice, and the rule of law

16 During the course of discussion, the participants called particular attention to the paramount importance of preserving *habeas corpus*, and effective access to counsel and to bail; of ensuring fair and public trials within a reasonable time by independent and impartial courts and tribunals established by law; of respecting the presumption of innocence; of prohibiting arbitrary detention or imprisonment without trial, and all forms of torture and inhuman or degrading treatment or punishment; and of implementing the humane treatment of prisoners in accordance with United Nations minimum standards.

Confirmation of Bangalore Principles

17 Having regard to the central place and importance of the Bangalore Principles, the Harare Declaration and the Banjul Affirmation, the participants in the Abuja colloquium issued this Statement in confirmation of the Bangalore Principles, as developed in the Harare Declaration and the Banjul Affirmation, and noted as follows:

(i) in the legal systems of the Commonwealth, international human rights norms appearing in international treaties are not, as such, part of the domestic law, unless and until they are specifically incorporated by national legislation; for example, the African Charter of Human and Peoples' Rights is not yet part of the national laws of Nigeria because the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 has not been brought into force;

(ii) the general principles of international human rights instruments are relevant to the interpretation of national Bills of Rights and laws, where choices have to be made between competing interests in the discharge of the judicial function;

(iii) there is an impressive body of case law which affords useful guidance to the national courts - notably , the judgments and decisions of the European Court and Commission of Human Rights, the judgments and advisory opinions of the Inter-American Court of Human Rights, and decisions and general comments of the United Nations Human Rights Committee. There is also an important body of comparative constitutional law, for example, from the Supreme Courts of Commonwealth jurisdictions. This is also an area in which resort can be had to the writings of eminent scholars and jurists.

Practical measures of implementation

18 The participants, as in earlier colloquia, acknowledged practical needs for the effective implementation of the Bangalore Principles in the day to day discharge of their judicial function, which include the following:

(a) the need to protect and strengthen the independence, impartiality and authority of the judiciary, both collectively and individually; noting with satisfaction the establishment by the International Commission of Jurists in Geneva of the Centre for the Independence of Judges and Lawyers (CIJL), and the establishment by the General Assembly of the United Nations of the Basic Principles on the Independence of the Judiciary 1985;

(b) the need to protect and strengthen the independence of the legal profession, and the highest standards of integrity and professionalism in the practice of law;

(c) the need to avoid any undue delay in the adjudication of human rights cases;

(d) the need to provide judges and lawyers with the basic texts of the main international and regional human rights instruments;

(e) the need to provide judges and lawyers with up-to-date information about the jurisprudence of the major international, regional and national courts, tribunals and decision-making and standard-setting authorities;

(f) the need for programmes of continuing judicial studies and professional legal training in international and comparative human rights jurisprudence;

(g) the need for courses in law schools and other institutions of learning to educate the next generation of judges, legislators, administrators and lawyers in human rights jurisprudence;

(h) the need to ensure effective access to justice by providing adequate funds for the proper functioning of the courts, and adequate legal aid, advice and assistance for people who cannot otherwise obtain legal services;

(i) the need to enable independent non-governmental organisations to provide *amicus curiae* briefs, and other specialist legal advice, assistance and representation in important cases involving human rights issues;

(j) the need to establish an independent African Court of Human Rights with jurisdiction over inter-state and individual cases, and with the power to give binding judgments; and

(k) the need for further Commonwealth initiatives and support for the effective implementation of the Bangalore Principles in each of these respects.

Commonwealth Judicial Human Rights Association

19 The participants resolved to establish, as a further practical step in communicating information about international and comparative human rights law to judges and lawyers and non-governmental organisations, an informal body - to be known as the Commonwealth Judicial Human Rights Association (CJHRA). The Association will include, if they so wish, all judges who have participated in the series of colloquia in Bangalore, Harare, Banjul and Abuja (including judges from outside the Commonwealth). It will be open to other judges to join the Association.

20 Members will send to Interights in London published judgments in which they or their colleagues have applied or otherwise made use of international and comparative human rights norms. The participants request Interights, in co-operation with the Commonwealth Secretariat, to obtain the necessary resources to act as a clearing-house of information on these subjects for the Association, and to publish practical digests of human rights decisions for use by judges, lawyers, public authorities and non-governmental organisations.

BALLIOL STATEMENT OF 1992

1 During the past five years an important series of judicial colloquia have taken place concerned with the application within national legal systems of international human rights norms. The meetings have been held under the auspices of the Commonwealth Secretariat and Interights (the International Centre for the Legal Protection of Human Rights). The participants have included judges from various countries of the Commonwealth, together with participants from common law countries outside the Commonwealth, from countries of the civil law tradition, and from international courts and other fora concerned with the legal protection of human rights.

2 The fifth meeting in the series took place at Balliol College, Oxford University, between 21 and 23 September 1992. It was convened by the Lord Chancellor (the Rt. Hon. the Lord Mackay of Clashfern). The Lord Chancellor and Lord Browne-Wilkinson chaired the proceedings. As in earlier colloquia, the Commonwealth Secretariat and Interights organised the gathering with the generous assistance of the Ford Foundation. The participants expressed their appreciation for the efficient preparation and administration of the conference. The participants were:

Australia	Hon Justice Michael Kirby, AC, CMG, President, Court of Appeal of New South Wales
Bangladesh	Hon Justice M H Rahman, Justice of the Supreme Court
European Court of Human Rights	Hon Rolv Ryssdal, President**
Hong Kong	Hon Justice Patrick Chan, Justice of the Supreme Court
Republic of Hungary	Hon Justice Dr Laszlo Solyom, President, Constitutional Court
Republic of Ireland	Hon Justice Niall McCarthy, Justice of the Supreme Court
Jamaica	Hon Justice Edward Zacca, OJ, Chief Justice
Mauritius	Hon Justice Rajsoomer Lallah, Senior Puisne Judge of the Supreme Court and Member of the United Nations Human Rights Committee
New Zealand	The Rt Hon Sir Robin Cooke, KBE, President, Court of Appeal
Nigeria	Hon Justice Mohammed Bello, CON, Chief Justice of Nigeria
	Hon Justice P Nnaemeka-Agu, Justice of the Supreme Court
Pakistan	Hon Justice Muhammad Afzal Zullah, Chief Justice
Papua New Guinea	Hon Justice Kubulan Los, Justice of the Supreme Court
South Africa	Hon Justice Ismail Mahomed, Justice of the Supreme Court of South Africa and of Namibia, President of the Court of Appeal of Lesotho
Sri Lanka	Hon Justice Mark Fernando, Justice of the Supreme Court
Tanzania	Hon Justice Augustino S L Ramadhani, Justice of Appeal

United Kingdom	The Rt Hon The Lord Mackay of Clashfern, The Lord Chancellor**
	The Rt Hon The Lord Templeman, Lord of Appeal in Ordinary**
	The Rt Hon The Lord Browne-Wilkinson, Lord of Appeal in Ordinary
	The Rt Hon Lord Justice Balcombe, Lord Justice of Appeal
	The Hon Lord MacLean, Judge of the High Court of Scotland
	The Hon Mr Justice Campbell, Judge of the High Court of Justice, Northern Ireland
	The Hon Mr Justice Otton, Judge of the High Court of Justice
United States of America	Hon Judge Louis H Pollak, Judge of the United States District Court (3rd circuit)
Zambia	Hon Justice A R Lawrence, Justice of the Supreme Court
Zimbabwe	Hon Justice A Gubbay, Chief Justice
Others	Hon Justice P N Bhagwati, Former Chief Justice of India
	Hon Justice Enoch Dumbutshena, Former Chief Justice of Zimbabwe and Justice of Appeal for Namibia
	The Rt Hon Justice Telford Georges, PC, Member, Judicial Committee of the Privy Council and former Chief Justice of The Bahamas, Tanzania and Zimbabwe
	Mr Recorder Anthony Lester, QC
	Professor Rosalyn Higgins, QC, Member of the United Nations Human Rights Committee

3 The participants reaffirmed the general principles stated at the conclusion of the Commonwealth judicial colloquim in Bangalore, India, in 1988, as developed by subsequent colloquia in Harare, Zimbabwe, in 1989, in Banjul, The Gambia, in 1990, and in Abuja, Nigeria, in 1991.

4 The general principles enunciated in the colloquia reflect the universality of human rights - inherent in humankind - and the vital duty of an independent and impartial judiciary in interpreting and applying national constitutions, ordinary legislation, and the common law in the light of those principles. These general principles are applicable in all countries but the means by which they become applicable may differ.

5 The international human rights instruments and their developing jurisprudence enshrine values and principles long recognised by the common law. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. They should be interpreted with the generosity appropriate to charters of freedom. They reflect international law and principle and are of particular importance as aids to interpretation and in helping courts to make choices between competing interests. Whilst not all rights are justiciable in themselves, both civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights. They serve as vital points of reference for judges as they develop the common law and make the choices which it is their responsibility to make in a free and democratic society.

6 In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law. And it is the special province of judges to see to it that the law's undertakings are realised in the daily life of the people. In a society ruled by law, all public institutions and officials must act in accordance with the law. The judges bear particular responsibility for ensuring that all branches of government - the legislature and the executive, as well as the judiciary itself - conform to the legal principles of a free society. Judicial review and effective access to courts are indispensable, not only in normal times, but also during periods of public emergency threatening the life of the nation. It is at such times that fundamental human rights are most at risk and when courts must be especially vigilant in their protection. It is vital that the courts should ensure that emergency powers be exercised, if at all, only to the extent, and for the limited time, demonstrated to be necessary.

7 The Balliol conference was the first of these colloquia in which judges from the Republic of Ireland and from Northern Ireland participated. It is hoped that the commitments to human rights embodied in the domestic laws and international instruments binding upon the United Kingdom and the Republic of Ireland, which rights are protected by the courts of both countries, may contribute to promoting a swift and enduring resolution of current problems.

8 The Chief Justice of Pakistan drew attention to the statement made in the Bangalore Principles that it is necessary to take fully into account local laws, traditions, circumstances and needs. He emphasised that international human rights norms could not, in his view, override national constitutional standards.

9 The participants expressed the hope that the Commonwealth Secretariat will provide within its human rights programmes the resources necessary to service the Commonwealth Judicial Human Rights Association, in collaboration with Interights, as recommended by the colloquium held in Abuja, Nigeria. The participants attach the highest importance to disseminating to the judiciary and other lawyers, both within the Commonwealth and beyond, knowledge about the human rights norms of international law, the jurisprudence of international and regional human rights bodies, and the decisions of courts throughout the Commonwealth. The urgent necessity remains today, as it was expressed to be at Bangalore and at the colloquia held since, to bring the fine principles of fundamental human rights expressed in the foregoing sources into the daily consciousness and activity of courts and public officials alike. In this way a global culture of respect for human rights can be fostered, with the Commonwealth properly at the forefront, as befits its high ideals.

Balliol College
Oxford
23 September 1992

** The Lord Chancellor and The Lord Templeman were present only on 21 September 1992; President Ryssdal only on 21 and 22 September 1992.

In Memory of Justice Walter Tarnopolsky

by Michael Kirby

For the second time the participants in a judicial colloquium in the Bangalore Series had no sooner returned home but they learned of the death of one of their number.

Justice Walter Tarnopolsky was a leading participant in the Bloemfontein meeting. He died on 15 September 1993, just ten days after the Bloemfontein Statement was adopted.

Justice Tarnopolsky had been a member of the Ontario Court of Appeal since 1983. He was a leading jurist of his own country, Canada. His proud association with his ethnic origins in The Ukraine had recently been called upon as, unexpectedly, that country gained independence from the Soviet Union, and moved to establish a constitutional and rule of law society for itself.

Walter Tarnopolsky was born of Ukrainian immigrant parents, in a small farming community in Saskatchewan. He grew up on a wheat farm. His father spoke little English. However, he was ambitious for the education of his son, who earned his primary degrees at the University of Saskatchewan, with post-graduate degrees from Columbia University, New York and the London School of Economics.

Justice Tarnopolsky was a leader of the Canadian development of human rights law. After gaining his qualifications he went on to teach law at the University of Saskatchewan, the famous Osgoode Hall Law School in Toronto, and the University of Windsor. In 1980 he was appointed Director of the Human Rights Centre of the University of Ottawa. He held that post until his judicial appointment. In that post, he wrote commentaries on the new, and developing, Canadian law of human rights. These interests took him to the United Nations Human Rights Committee, between 1977 and 1983.

He had many other appointments and distinctions. But these are the externalities. I had known him for seven years. We met at conferences, in human rights circles, and in activities of the International Commission of Jurists, which we both supported. I was looking forward to his visit to Australia, where he was to come at the invitation of the Ukrainian-Australian Lawyers' Association. He was an intense man, deeply committed to the cause of equal opportunity. For him, this was no laughing matter.

The participants at Bloemfontein felt the deep wells of conviction, and the years of dedication, behind his intervention in their session. He was able to draw upon decades of reflection, and he gave a lot of his experience, generously and willingly, to his new South African friends. When I left him to return home he was looking forward to seeing briefly the beauties of nature in South Africa. I sat with him often during the lunches and dinners of the Colloquium for we were kindred spirits.

Walter Tarnopolsky was a dedicated champion of human rights. I can still see him, serious and intelligent, studying his papers, and listening attentively to his colleagues for some new insight. We will miss him. But his work and example live on.

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