Judicial Colloquium in Georgetown, Guyana
3-5 September 1996

Developing Human Rights Jurisprudence, Volume 7

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

Commonwealth Secretariat

INTERIGHTS

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Legal and Constitutional Affairs Division
Commonwealth Secretariat

INTERIGHTS
International Centre for the Legal Protection of Human Rights

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Contents

III. Freedom of Expression

IV. The Right to a Fair Trial

ANNEXES

Preface

This volume contains the papers delivered at the seventh in a series of judicial colloquia on the domestic application of international human rights norms. The meeting was held in Georgetown, Guyana from 3 to 5 September 1996. The first such meeting was held in Bangalore, India in 1988 and was followed by gatherings in Harare, Zimbabwe in 1989; Banjul, The Gambia in 1990; Abuja, Nigeria in 1991; Oxford, England in 1992; and Bloemfontein, South Africa in 1993.

As with the previous colloquia, the participants at this meeting were primarily judges from Commonwealth countries and from international and regional human rights tribunals. In all, there were 30 participants in the Guyana Colloquium, 20 of whom were from the Commonwealth Caribbean. Others were from Africa, Asia/Pacific, Europe and North America.

Like its predecessors, the Georgetown meeting focused on the domestic application of international human rights norms. The papers in the opening session discussed the ways in which domestic courts have given effect (or have failed to give effect) to the norms established under international human rights treaties. In the second part, two papers look at the particular problem of compliance with international human rights standards and the death penalty in the Commonwealth Caribbean. The following sessions dealt with two substantive topics, the right to freedom of expression and the right to a fair trial. The overall theme of these sessions was the relationship between national and international standards in the protection of specific fundamental rights.

At the end of the meeting, the Georgetown Conclusions on the effective protection of human rights through law were unanimously adopted by the participants. The Georgetown Conclusions are included in the beginning pages of this volume while the closing statements from the previous colloquia are appended as an annex.

The papers in this volume are current as of the date of their writing, though in a few exceptional instances the editors have updated information in the form of a footnote. This volume was edited by Maggie Maloney for INTERIGHTS, who gratefully acknowledge her assistance.

The Georgetown Colloquium, as with the previous meetings in the series, was organized jointly by INTERIGHTS (the International Centre for the Legal Protection of Human Rights) and the Legal and Constitutional Affairs Division of the Commonwealth Secretariat. It was funded by the Commonwealth Secretariat, the UK Overseas Development Agency, Cable and Wireless and the World Council of Churches, whose generosity is gratefully acknowledged.

Natalia Schiffrin, Senior Legal Officer
INTERIGHTS
London
August 1998

Participants

Antigua and Barbuda	Hon Mr Justice Albert Redhead, Justice of the High Court
Barbados	Rt Hon Mr Justice Telford Georges, PC, Member, Judicial Committee of the Privy Council; former Chief Justice of The Bahamas, Tanzania and Zimbabwe
	Ms Sandra Mason, Chief Magistrate; Member of the UN Committee on the Rights of the Child
Belize	Hon Madame Justice Cynthia Pitts, Judge, Family Court
British Virgin Islands	Hon Mr Justice Ephraim Georges, Resident Judge
Dominica	Hon Mr Justice Odel Adams, Puisne Judge
Grenada	Hon Mr Justice Brian Alleyne, High Court Judge, Supreme Court of the Eastern Caribbean
	Hon Mr Justice Stanley Moore, High Court Judge, Supreme Court of the Eastern Caribbean
Guyana	Hon Mr Justice Aubrey Bishop, Chancellor and Head of Judiciary; former Chief Justice
	Hon Madame Justice Desirée Bernard, Justice of Appeal
India	Hon Mr Justice P.N. Bhagwati, former Chief Justice of India; Vice-Chairman of the United Nations Human Rights Committee
	Mr Soli J. Sorabjee, SC, Senior Advocate, Supreme Court; former Attorney-General (1989-90)

Jamaica	Dr Lloyd G. Barnett, Attorney-at-Law; Chairman, General Legal Council, Jamaica
	Hon Madame Justice Hazel Harris, Supreme Court
	Hon Mr Justice Carl Rattray, OJ, QC, President, Jamaica Court of Appeal; former Minister of Justice and Attorney-General
	Hon Mr Justice Edward Zacca, former Chief Justice
New Zealand	Hon Justice Sir Kenneth Keith, KBE, Court of Appeal
St Lucia	Hon Mr Justice Dennis Byron, Chief Justice (acting), Supreme Court of the Eastern Caribbean
	Hon Madame Justice Suzie D'Auvergne, High Court Judge, Supreme Court of the Eastern Caribbean
Trinidad and Tobago	Hon Mr Justice Anthony Lucky, Supreme Court
	Hon Madame Justice Jean Permanand, Court of Appeal
United Kingdom	Hon Sir John Laws, Justice of the High Court, Queen's Bench Division; sometime First Junior Counsel to the Treasury, Common Law
	The Lord Lester of Herne Hill, QC, practising member of the English Bar of Blackstone Chambers; Liberal Democrat peer; President of INTERIGHTS
United States of America	Hon Judge Betty Fletcher, Circuit Judge, United States Court of Appeals (Ninth Circuit)
Zimbabwe	Hon Mr Justice Anthony Gubbay, Chief Justice

Inter-American Commission on Human Rights/Organization of American States
Ms Elizabeth Abi-Mershed, Staff Attorney

United Nations Mr Laurel Francis, Member of the Human Rights Committee

Mr Andreas Mavrommatis, Member of the Human Rights Committee and of the Committee against Torture

Dr Bertrand Ramcharan, Director in the Department of Political Affairs, UN Secretariat, New York

Observing Judiciary from Guyana Hon Mr Justice Deonaraine Bicsessar, Puisne Judge

Hon Mr Justice M.A. Churaman, Justice of Appeal

Hon Mr Justice Rudolph H. Harper, Retired Chief Justice

Hon Mr Justice Prem Persaud, Justice of Appeal

Hon Mr Justice Carl Singh, Puisne Judge

Hon Mr Justice Oslen Small, Puisne Judge

Commonwealth Secretariat Representative

Professor Reginald Austin, Director of Legal and Constitutional Affairs Division

INTERIGHTS Representatives Ms Emma Playfair, Executive Director

Ms Natalia Schiffrin, Legal Officer

Ms Helen Cooper, Barrister

Caribbean Community (CARICOM) Secretariat

Mr Duke Pollard, Legal Consultant

Ms Thelma Rodney-Edwards, Assistant General Counsel

Dr Gloria Richards-Johnson, Assistant General Counsel

Non-participant Mr Francis Jacobs, Advocate General of the Court of Justice of the European Communities, was unable to attend the colloquium in person; his paper, included in this volume, was presented in his absence.

Judicial Colloquium on the Domestic Application of International Human Rights Norms

Georgetown, Guyana
3-5 September 1996

The Georgetown Conclusions

1. The participants reaffirmed the general principles stated at the conclusion of the Commonwealth Judicial Colloquium in Bangalore, India, in 1988, and developed by subsequent colloquia in Harare, Zimbabwe, in 1989; in Banjul, The Gambia, in 1990; in Abuja, Nigeria, in 1991; in Balliol College, Oxford, in 1992; and in Bloemfontein, South Africa, in 1993.

2. Fundamental human rights and freedoms are universal and are inherent in all human kind. They find expression in constitutions and legal systems throughout the world; they are anchored in the international human rights instruments by which all genuinely democratic states are bound; their meaning is illuminated by a rich body of case law of international and national courts.

3. The universality of human rights and freedoms derives from the moral principle of each individual's personal and equal autonomy and human dignity. That principle transcends national political systems and is in the keeping of the independent judiciary.

4. The international human rights instruments and their developing jurisprudence enshrine values and principles of equality, freedom, rationality and fairness, now recognized by the common law. They should be seen as complementary to domestic law in national courts. These instruments have inspired many of the constitutional guarantees of fundamental human rights and freedoms within and beyond the Commonwealth; they should be given constitutional status in all dependent territories.

5. Commonwealth Caribbean judges in the discharge of their functions should give increasing effect to relevant international human rights norms (including those of the Inter-American international human rights instruments) when interpreting and applying their national constitutions and laws. The constitutional guarantees should be interpreted with the generosity appropriate to charters of freedom, avoiding the austerity of tabulated legalism.

6. It is the vital duty of an independent, impartial, well-qualified judiciary, assisted by an independent well-trained legal profession, to interpret and apply national constitutions and ordinary legislation, and to develop the common law in the light of these values and principles. As Commonwealth Law Ministers recognized, at their meeting in Kuala Lumpur, Malaysia in April 1996, the independent and impartial judiciary plays a crucial role in a healthy democracy. "The protections enjoyed by judges, including financial independence and security of tenure, are an important defence against improper interference and free the judiciary to discharge the particular responsibilities given to it within national constitutional frameworks."

7. Both civil and political rights and economic, social and cultural rights are integral, indivisible and complementary parts of one coherent system of global human rights. The implementation of economic, social and cultural rights is a primary duty for the legislative and executive branches of government. However, even those economic, social and cultural rights which are not justiciable can serve as vital points of reference for judges as they interpret their constitutions and develop the common law, making choices which it is their responsibility to make in a free, equal and democratic society. Respect for human rights under the rule of law provides the best environment for the economic, social and cultural development of everyone in all parts of the world.

8. Fundamental human rights and freedoms are more than mere pious aspirations. They form part of the public law of every nation, protecting individuals and minorities against the misuse of power by public authorities of all kinds. It is the special province of judges to see to it that the law's undertakings are realized in the daily life of the people. In a society ruled by law, all public institutions and authorities - legislative, executive and judicial - must act in accordance with the constitution and the law.

9. The legislative and executive branches of government have a duty to provide the necessary means to secure the equal protection of the law, speedy and effective access to justice, and effective legal remedies. To achieve this, there is a need for adequate funds for the proper functioning of the courts, and adequate legal aid, advice and assistance for people who cannot otherwise obtain legal services. It is also essential for each branch of government to introduce and maintain appropriate rules and procedures to promote compliance, in discharging their functions, with the international human rights instruments by which they are bound.

10. The provision of equal justice requires a competent and independent judiciary and legal profession trained in the discipline of the law and sensitive to the needs and aspirations of all the people. It is fundamental for a country's judiciary and legal profession to enjoy the broad confidence of the people they serve.

11. Judicial review and effective access to the courts are indispensable, not only in normal times, but also during periods of public emergency. It is at such times that basic human rights are most at risk and when courts must be especially vigilant in their protection.

12. Freedom of expression must be jealously protected as essential to the safeguarding of democracy and human rights. The courts must be zealous to protect free speech and expression in their widest sense and at all times.

13. In relation to the death penalty, the participants recommended:

    (i) that it should not be extended to any new offences to which it is not now applied in the particular state;

    (ii) that states whose Independence constitutions preclude the determination by the courts as to whether the sentence is inhuman and degrading, if the punishment was lawful prior to the achievement of national status, should amend their constitutions to remove this fetter on judicial determination;

    (iii) that the death penalty should not be carried out until the exhaustion of all domestic and international legal remedies available to the applicant.

14. There is a 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. The urgent necessity remains to bring the principles of human rights into the daily activities of

government and public officials alike and of ordinary men and women. In this way a global culture of respect for human rights can be fostered.

15. The participants recognized 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 cases. The courts should allow themselves to be assisted by well focused *amicus curiae* submissions from independent non-governmental organizations (NGOs), such as Interights, in novel and important cases where international and comparative law and practice may be relevant. National laws should enable NGOs and expert advocates (whether local or otherwise) to provide specialist legal advice, assistance and representation in important cases of public interest. Bar Associations and Law Societies should ensure that public interest cases are able to be effectively presented *pro bono publico.*

16. The participants expressed concern that the legislatures of some countries pass amendments to their constitutions or laws designed to erode or diminish fundamental rights and freedoms as interpreted and applied by national courts and by international human rights fora. They recommended that this practice of diluting the internationally and nationally guaranteed human rights of the individual should not be resorted to, and that no amendment should be made which would destroy or impair the essential features of democratic societies governed by the rule of law.

17. The participants urged closer links and co-operation across national frontiers by the judiciary of the Commonwealth Caribbean and beyond on the interpretation and application of human rights law. They attached the highest importance to disseminating to the judiciary and other lawyers 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. They greatly welcomed the publication by Interights of the Commonwealth Human Rights Law Digest as an important means of improving access by judges, lawyers, non-governmental organizations, and the public. They 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 previous colloquia.

18. In these ways a global culture of knowledge and respect for human rights can be fostered, and the noble words of international human rights instruments will be translated into practical reality for the benefit of the people we serve, but also ultimately for the benefit of people in every land, with the Commonwealth properly at the forefront, as befits its high ideals.

Table of Cases

Table of Cases

NATIONAL COURTS

CARIBBEAN

Antigua

Bahamas

Barbados

Bermuda

Grenada

Guyana

Jamaica

St Vincent and the Grenadines

Trinidad and Tobago

AFRICA

Botswana

Mauritius

Namibia

South Africa

Tanzania

Zambia

Zimbabwe

AMERICAS (excluding Caribbean)*

Canada

Costa Rica

United States

* For Caribbean, see p xvii.

ASIA AND THE PACIFIC

Australia

Hong Kong

India

New Zealand

Pakistan

Singapore

EUROPE

Cyprus

United Kingdom

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

INTERNATIONAL AND REGIONAL TRIBUNALS

UN Human Rights Committee

International Court of Justice

Inter-American Commission and Court of Human Rights

European Commission and Court of Human Rights

European Court of Justice

Papers

1

Human Rights and an Emerging World Order

Opening Address by Hon Mr Justice Aubrey Bishop

> "The year 2000 is operating like a powerful magnet on humanity, already reaching down into the 1990s and intensifying the decade. It is amplifying emotions, accelerating change and heightening awareness, compelling us to re-examine ourselves, our values, and our institutions ... The year 2000 is not just a new century..."

That is an excerpt from the best-seller *Megatrends 2000,* by John Naisbitt and Patricia Aburdane, published in 1988. The authors are theologians who, though they contemplated a world-wide readership at the time of their authorship, might not specifically have had in their focus the six judicial colloquia on "Developing Human Rights Jurisprudence" and the seventh here in Guyana. Nonetheless these judicial conferences can be seen as appropriate examples that justify their thesis. They are of the same genre. It is therefore within that context that this presentation is made.

A review of the events of the present century will reveal that concern for the development of the international protection of human rights is a relatively recent trend. Only states and international governmental organizations are possessed of international legal personality - states to a greater degree than international governmental organizations.

In consequence, individual human beings have never been able as of right to enjoy rights under international law, although their position with respect to duties under international law is somewhat different. This is shown by the War Crimes Tribunals which were established after the Second World War and, more recently, the tribunal established following the war in former Yugoslavia.

The rule as regards rights of individual human beings, or perhaps more properly the absence of them in the contemporary epoch, appears to be in retreat, most notably in the case of the countries bound by the European Convention on Human Rights, where, for very special reasons, the citizen is, in certain circumstances, able to press his legal rights against his own government and get satisfaction at the end of a not over-long process. But the countries bound by the European Convention have a certain commonality with respect to those aspects of their national traditions that are of the greatest criticality to the success

of such a process: they have comparable standards of living and a shared devotion to democratic tenets. In these countries, good human rights protection becomes good politics, since by reason of their governments being held strictly accountable to their constituents, their performance in this regard must either accord with certain standards or, in the alternative, result in their ouster from political office.

And this very process is aided by the transparency of political action in these countries. Inevitably, such transparency will be at its maximum only in the long term but, relative to the rest of the world, it is more than sufficient in the short term to assure censure for those political operatives whose behaviour falls below the societal consensus regarding the limits of acceptable behaviour. It is by adherence to this societal consensus that these governments derive their legitimacy, and so preserve the stability and continuity of the major social institutions of their respective countries.

Clearly, that this should be the case does not derive from any special endowment of the populations involved. Rather, a concatenation of events over the years has given rise to a number of what may be termed "supra-national institutions" that bind the countries of Western Europe in the pursuit of common goals desired by their several populations. There is no fear in the maintenance of open national borders *inter se* since, in purely economic terms, there is little likelihood that migration of the indigenes of one country to another would have the effect of severely injuring the economy of that other. That is so because, by and large, there is a rough comparability of all the economies and, therefore, the several countries benefit from the opening of their borders.

The relative openness of the societies, an openness which emerged over time and which is probably a survival imperative of the system at present, assures a continuing scrutiny of governmental acts and at least some effort on the part of political decision-makers to respond to the demands of their constituents, or to those whom they deem appurtenant to their constituency of accountability: that part of the populace considered by political decision-makers to be capable of influencing their tenure of office and to whom, therefore, they consider themselves to be accountable.

The European Convention on Human Rights was signed in 1950 under the auspices of the Council of Europe - a body consisting of a number of the democratic states of Western Europe. The successes of the Commission and of the Court created by that Convention are well known. There is significantly a substantial overlap in the membership of the Council of Europe and the European Union, and it may be that the effectiveness of the former, in the human rights arena, has been undergirded by the co-operation in other areas by at least that part of the membership that is common to both organizations.

It would seem that the process of real European unification began with the creation of the European Coal and Steel Community in 1951, the idea having been nurtured by Jean Monnet and Robert Schuman who were of the view that the merger of the coal and steel industries of France and Germany would lead to such a convergence of political interests

between the two countries as to eliminate, for all time, the possibility of war between them. The Treaty of the Coal and Steel Community, which entered into force in 1953, included, in addition to France and Germany, Italy, Belgium, the Netherlands and Luxembourg. Over time, this nucleus has grown into the European Union, which encompasses a considerably expanded membership as well as competencies, to the point where there is now a shared responsibility in areas of the greatest economic and political significance: areas which had previously been the exclusive province of each nation state, whether acting individually or in unison. The 1992 Maastricht Treaty is perhaps the latest movement in this direction, and a common European currency is planned, though receptivity to this idea among the Member States continues to vary so widely that the introduction of a single currency will most likely have to be postponed for at least a few years, if not longer. The controversies that attend this issue have been heated, especially in the United Kingdom where that country's decision with regard to its acceptance of the new currency will probably hinge on the results of the next (1997) general election, the introduction of the new currency being widely perceived, and perhaps not unreasonably so, as a substantial diminution of sovereignty. Here, a vital question must be whether the change seems likely to generate greater offsetting benefits.[1]

It might not, therefore, be unreasonable to propose that the commonalities of the Western European states have been generative of massive co-operation between them; these very commonalities have led to a situation where the protection of human rights that transcends national boundaries is perceived by them as being conducive to the greater good and to the strengthening of the social fabric of all the Western European states. Similarities of aspirations and constructive organization present them already as a resolute cohesive group.

The protection of human rights in Western Europe seems to derive primarily from the European Convention on Human Rights, and not from the system created under United Nations sponsorship which took shape in 1966 in the form of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The European Convention, it would appear, was tantamount to what may be termed a declaratory codification of a way of doing things. This declaratory codification has emerged from the particular circumstances by which these countries are encompassed: circumstances that tie economic co-operation to an enhanced quality of life for all.[2] These particular circumstances emphasize the sound protection of the rights of the citizenry, even against the possible excesses in which nominally democratic polities have been known to indulge. They are seen as a way of guaranteeing that enhanced quality of life by obviating the economic and other social dysfunctionalities that are the inevitable consequences of absolutism and arbitrariness.

It is precisely in this sort of milieu that we are likely to find the best national and transnational protection of the rights of the citizens. It cannot therefore be emphasized too strongly that the European Convention on Human Rights, as it evolved, far from creating a new dispensation, was no more than a reflection of a pre-existing state of affairs - a state of affairs that was new only in that it was a natural outgrowth of intensified co-operation that

1 *See* Report on Britain and sentiments attributed to Lord Mackay, Lord Chancellor, *The Economist*, 10-16 August 1996, p 41.

2 *See* Charter of the United Nations, Chapter IX: International Economic and Social Co-operation, Article 55, where, at (a), the resolve is to promote higher standards of living, full employment, and conditions of economic and social progress and development.

had been politically mandated by a number of like-minded states in areas which offered the greatest advantages for the people, and extended well beyond the initial collaborative effort in the unification of their coal and steel industries.

Briefly then, the fact that human rights prescriptions now operative within the states comprised in the Council of Europe may, in their substantive content, coincide with the prescriptions comprised in certain international conventions on human rights, most notably the 1966 International Covenant on Civil and Political Rights, entered into under United Nations auspices, is a coincidence, in that it may, with propriety and accuracy, be claimed that the European Convention on Human Rights is rather more firmly anchored in a pre-existing consensus that derived from a particular matrix: the events and commonalities of societal circumstances to which reference has earlier been made. The pre-existing consensus was evidence of the socio-political conditions necessary for the forward thrust of human rights and administration of its evolving principles in courts of law, wherever appropriate.

But there should be caution against using the experience of Western Europe in the area of human rights as a basis for extrapolating protection models for the rest of the world, where circumstances are not at present conducive to such implantation. This is not to say they are without human rights solutions, but that infinite cultural, ethnic and political perspectives render the European model difficult for immediate adaptation as a universal.

The treatment of the individual in international law, as earlier pointed out, has been that of an "object", that is, an entity to whom things can be done, but who has no right to assert rights under the international legal order. It is still, to a great extent, true that, for most governments the world over, the treatment by a state of its own nationals is a matter pertaining to their domestic jurisdictions and should be of little concern to the international community at large.

At one point in time even a mild enquiry in this area could be interpreted as constituting an unwarranted and unlawful interference in the domestic affairs of a sovereign state and deemed wholly unacceptable. Individuals did figure in international law to a very limited extent if they were foreigners in a particular state, and had entered the jurisdiction of that state lawfully. An injury to an individual in such circumstances was deemed to be an injury to the state of that individual's nationality and that state was endowed with the capacity, in its own unfettered discretion since it was not acting as an agent for the injured individual, to espouse the cause of its national with respect to the conduct of the other state. Such espousal is of course seen by the state as being an assertion by it of its rights in redressing an injury to itself.

The concept of protection for foreigners lawfully within the jurisdiction of a state was articulated many years ago by Elihu Root, a former United States Secretary of State, in a speech to the Annual Meeting of the American Society of International Law in 1910, a speech in which he asserted the existence of a certain standard of treatment prescribed by

international law for foreigners lawfully within the jurisdiction:[3]

> "Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.
>
> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own existence is that its system of law and administration shall conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens."

Over time, the vague standard espoused by Elihu Root in 1910 came to be generally accepted in Latin America and the Caribbean - the standard, that is, purged of the excesses to which it was subject in the years following Root's address and earlier and, most scandalously, when in 1902 warships of Britain, Germany and Italy had assembled in battle formation over the coast of Venezuela by way of coercing the government to pay debts that were alleged to have been incurred on behalf of the state. And the casual invocation of nationality as a basis for asserting, by a state, its power of diplomatic protection on behalf of a national *vis-à-vis* a foreign state was forever proscribed by the International Court of Justice in the *Nottebohm* case between Liechtenstein and Guatemala.[4] The Court explicitly stated that it was not passing comment on the validity of the nationality conferred upon Nottebohm by Liechtenstein, but merely that, in the absence of a substantial social "link" between Nottebohm and the Principality, it could not constitute a basis upon which Liechtenstein could assert its power of protection on behalf of its newly acquired national.

It should be fair to say that almost until the present and, with the exception of the states bound by the European Convention on Human Rights, only foreigners who were lawfully within the jurisdiction of a state enjoyed the protection of international law in circumstances where treatment by that state fell below a certain standard, and the rights of such foreigners were to be asserted by the states of their respective nationalities in circumstances where such nationalities represented a substantial social link between them

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3 Elihu Root, "The Basis of Protection to Citizens Residing Abroad", opening address by the president of the American Society of International Law at the fourth annual meeting of the Society in Washington, 28 April 1910, Proceedings of the American Society of International Law, AJIL Vol 4 (1910), pp 517-28.

4 "[The] facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization [as a national of Liechtenstein] in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein, but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations - other than fiscal obligations - and exercising the rights pertaining to the status thus acquired.

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible." *Nottebohm case, Liechtenstein v Guatemala*, ICJ Reports 1955, p 4ff.

and the states concerned. The rights of citizens continued, by and large, to be without international protection, with the exception of certain states of Western Europe, notwithstanding the existence of a multitude of international conventions on human rights that remained, to all appearances, largely moribund and unenforceable.

In recent years, researchers and students of international law have witnessed significant and sometimes fundamental transformations in the international community and in the conduct of relations between sovereign states. There was first the process of decolonization that was, for the greater part of its history, accompanied by a bipolarization of the world into Eastern and Western Bloc powers. A decolonization, of sorts, has also proceeded amongst the Eastern Bloc states, the Soviet Union and Soviet hegemony having collapsed as a result. There is, in consequence, no longer a bipolar but a multipolar distribution of power in the international community. Efforts to prevent the re-emergence of dictatorship in the East seem, for the time being, to monopolize the attention of the industrialized financial donor countries of the West, while Third World countries, which at present constitute the bulk of independent and sovereign states, seem not eminently relevant to the foreign policy concerns of these states. Third World countries no longer have two superpowers to court their favour, one of these having disintegrated into component units, a process that reflected a new distribution of political power that followed the demise of the Soviet elite. That process is not unlike decolonization in that the units appear, in retrospect, to have been held together within an empire, with the issues of national self-determination only now re-emerging, and the new political dispensation not yet settled into new and stable patterns.

Third World countries have emerged from the collapse of a number of colonial empires. These countries are often racked by violence and chronic political instability. A number of them, most notably Liberia, Somalia, Sierra Leone and Algeria, amongst others that might be named, are now referred to as "failed states", and it has even been suggested by a number of latter-day imperialists that the time for recolonization is at hand - recolonization being perceived as a device for "saving" them.

Yet the instability that is evident in most of these countries is but a natural consequence of colonial rule which, throughout history, has always been primarily concerned with the preservation and furtherance of the interests of the colonial power as contradistinguished from the interests of the colonized: the indigenous populations of varying ethnic and social composition often being mutually antagonistic, a circumstance that often derived from the arbitrariness with which the boundaries of colonies were determined and which had the ancillary benefit for the colonizer of postponing to the indefinite future any challenges to its political paramountcy. Such challenges did emerge in our own time largely as a result of the Second World War, when the political expectations of the colonized world appear to have been elevated everywhere. They were met with dramatically varying degrees of alacrity, but decolonization was to occur on a world-wide scale, with the emergence, at a rate unprecedented in history, of a plethora of newly independent states.

These newly independent states were able to carry over into their new status very little of value from the colonial period. The British said that they were bent on "leading the natives step-by-step" to self-government and independence. The French were proclaiming their "*mission civilisatrice*", and both the French and the Belgians had even invented an *evolue* status for those amongst the "natives" who were thought to have acquired the attributes of Europeans, although the numbers admitted to this exalted status were so calibrated as to obviate any diminution of European dominance in their respective territories, that calibration being carried through with such parsimony that it came to be seen by some as reflecting an absence of good faith. The result was that the process, contrary to the intent of its progenitors, came itself to constitute a force for decolonization, a force that convinced the alleged beneficiaries of the arrangement that the only way for them to obtain justice in their own lands was to effectuate the ouster of their colonial rulers.

At independence, there was a change in the identity of those who controlled the political centres of the former colonies, those who wielded the preponderance of political power therein and very little else. The task of nation-building was especially formidable, in that it became necessary to weld into a single nation or state diverse population elements that had been mutually antagonistic for generations. With the withdrawal of the colonial ruler, each group now sought to further its own interests at the expense of the others. Material resources being in short supply almost everywhere, governments performed a delicate balancing act in seeking to hold on to power by the distribution to their supporters of what material benefits were within their gift; and since the benefits were inevitably inadequate to the demands, kaleidoscopic change and its concomitant instability became the order of the day in many countries.

Constitutions were often no more than decorative instruments ineffective for ordering the political life of particular countries. That ordering was determined by less formal and shifting coalitions driven by opportunism. In such circumstances, some will argue, governments lack legitimacy and, as a consequence, major political institutions of society will take a veritable eternity to become institutionalized, if a crucible for human rights observance is to be laid. Trust, for the time being, ends at the boundaries of an ethnic or linguistic group, since all these discrete elements seem mutually antagonistic and unconcerned with the destiny of the nation or state, an entity that is perceived by them only hazily and, moreover, as one with limited political relevance. The explanation is that the political loyalties of such people are narrowly constricted in the sense of being parochial or provincial.

A generation of trust that transcends ethnic and linguistic group boundaries is what is needed for the construction of the state where major institutions are to be taken seriously by the populace as instruments for advancing the beneficial causes of the human race and the systems that enable the effective pursuit of related objectives. Human rights law is administered in courts or tribunals of law; but law is not the only institution that serves or could serve human rights or the development of a new world order.

A trend in this direction has begun. There is increasing globalization of economic activity,

and state boundaries are acquiring a steadily diminished significance as a consequence, and even the role of the state itself appears to be in decline.[5] Furthermore, many governments world-wide now operate in a milieu of transparency that is probably unprecedented. And this circumstance, facilitated by the phenomenal rapidity of contemporary communications. renders them more accountable than ever to those whom they govern. Populations, desperate to improve their material lot, in the circumstances of political transparency are more than hitherto aware of what is actually happening - more aware of what is actually being done or omitted by their governments.

The point being advanced here is that international relations, in systemic perspective, are undergoing a period of purposive, beneficial transition. It will be a process not noted for its alacrity, but one that is continuing nonetheless. And if there is respect for the axiom that a system comprises a set of interrelated parts, such that an alteration in the value of any one part results in an alteration in the value of all other parts, and if heed is given to the view that an open system, such as the system of international relations, is one that is capable of having exchanges within its environment, it would appear that the survival imperatives of the new system will, of necessity, differ from the survival imperatives of the system it is replacing. The world has witnessed the collapse of the known colonial empires as well as the decolonization of the states of the former Soviet Union and the former Soviet satellites in Eastern Europe. The bipolarization of the world dominated by two superpowers has now been transformed into a multipolar universe with a wide dispersal of power and influence throughout the system. Regrettably, however, the former colonies that were part of the vast colonial empires are not yet apparently vitally prominent in the foreign policy patterns of the rich industrialized countries.

The globalization of economic activity proceeds apace and inexorably. It is suggested that the globalization of concern for the protection of human rights is also proceeding apace, and as a logical concomitant. With the institutionalization of the societal consequences of these processes, an international law of human dignity will be accorded its true place, having been urged for decades by the distinguished international lawyer Professor Myres McDougal[6] - an advocacy decried, initially, as an exercise in metaphysics, but which has recently registered itself possibly as the wave of the future. And it should not be forgotten that the late Sir Hersch Lauterpacht, who was Whewell Professor of International Law at Cambridge University, before becoming a judge of the International Court of Justice, witnessed how his pioneering work on the protection of human rights by international law[7] was also discounted as an empirically ungrounded illusion. But within the past fifty years or so, his views have gained the approbation of a substantial body of international scholars and jurists.

And with the treatment by a state of its own nationals, together with the other nationals within its territorial confines, becoming a proper focus of international law, the now largely and apparently moribund international human rights conventions might at last be imbued with real life, not because they have suddenly been perceived to be of value, but rather

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5 *See* Joseph Camilleri, Anthony P. Jarvis and Alberto J. Paotini (eds), *The State in Transition: Reimaging Political Space* (Boulder: Lynne Rienner, 1955); Jean-Marie Guehenno, *The End of the Nation State* (Minneapolis: University of Minnesota Press, 1995); and Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economics* (New York: The Free Press, 1995).

6 *See* Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven: Yale University Press, 1980).

7 *See* Sir Hersch Lauterpacht, *International Law and Human Rights* (New York: F.A. Praeger, 1950).

because they will have become reflective of processes internal to the world's states, processes that are concerned with the protection of human rights. Within the Caribbean area of endeavour we have made a start in this direction. It may be recalled that in October 1992, the heads of government of the Caribbean Community (CARICOM), at their special meeting in Port of Spain, Trinidad and Tobago, adopted the recommendation of the West Indian Commission that a Charter of Civil Society for the Caribbean Community be subscribed to by members of the Community for the purpose of establishing the guiding principles of the Community.[8]

To further the human rights process, Guyana is doing its part. Between 1994 and 1996 Guyana sent four contingents of its troops to Haiti under the aegis of the United Nations, where they formed part of an international force seeking to enhance the process of the return of democratic government in that troubled country. And, only a few weeks ago, in August 1996, there was an international conference, summoned here in Guyana by Dr Cheddi Jagan, the President. Its sole concern was the establishment and advancement of a New Global Human Order. Perhaps this particular initiative will proceed at the outset on the basis of a regional collaborative effort, extending ultimately to the entire world and making that world a more humane place.

In this context, the Seventh Judicial Colloquium, convened in Georgetown, Guyana, to consider the domestic application of international human rights law, would have underscored the well-founded view that:

> "In democratic societies fundamental human rights and freedoms are more than paper aspirations.... And it is the special province of judges to ensure that the law's undertakings are realized in the daily life of 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."[9]

Seven judicial colloquia within a span of eight years, in the closing years of the present century, exemplify the magnetic pull of the 21st century of which Naisbitt and Aburdane speak. The time seems propitious enough to anticipate the success of this Seventh Colloquium, having regard to the additional fact that seven is a perfect number and holy.

Imbued with the high expectation and exhilaration that this Seventh Colloquium has inspired in all Guyanese, I am sure I speak for them when I simply say: "Welcome to our dear land of Guyana. May the deliberations be profitable".

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8 A draft document entitled "Charter of Civil Society for CARICOM" has been prepared but has not yet been adopted by Caribbean governments.

9 "The Bloemfontein Statement", Sixth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bloemfontein, South Africa, 3-5 September 1993, *Developing Human Rights Jurisprudence, Vol 6: Sixth Judicial Colloquium on The Domestic Application of International Human Rights Norms*, (1995), p vii-viii.

2

Changing Commonwealth Caribbean Constitutions to Conform with Human Rights Norms

Lloyd G. Barnett

The background

In the face of widespread economic deprivation, social inequalities and political marginalization, the peoples of the Commonwealth Caribbean experienced during the 1930s a ferment of egalitarian philosophies, libertarian ideas and nationalistic aspirations. Subsequently, post-war revulsion against racism, imperialism and inhumanity inspired an international and unprecedented commitment to the principles of self-determination and human rights. In the Caribbean the immediate demand was for the democratization of the franchise and increased popular participation in the processes of government, since these were seen as indispensable to the paramount need for far-reaching social reconstruction.[1]

Constitutional reform concentrated on the introduction of universal adult suffrage and the transfer of executive power from the colonial administration to local political representatives. In the final analysis, protection against any possible local abuse of governmental power was seen to be secured by gubernatorial legislative veto and residual imperial legislative and prerogative powers.[2]

It was not until independence became imminent that a demand developed for the incorporation of human rights guarantees in Caribbean constitutional instruments. By then the Universal Declaration of Human Rights had acquired international prestige. The United Kingdom had herself adopted the European Convention on Human Rights. The Indian Constitution had included extensive human rights provisions and, most significantly, the Nigerian Constitution incorporated a Bill of Rights which was patterned on the European Convention on Human Rights.[3]

Apart from Trinidad and Tobago, which utilized the more generic expression of human rights to be found in the Constitution of the United States of America, the Commonwealth Caribbean constitutions have followed the Nigerian example and adopted the detailed statement of fundamental rights and freedoms of the European Convention with its express

1 *Report of the West India Royal Commission*, Cmd 6607 (1945), pp 57-8.

2 Lloyd G. Barnett, *The Constitutional Law of Jamaica* (Oxford: Oxford University Press, 1977), pp 376-7.

3 S.A. de Smith, *The New Commonwealth and its Constitutions* (London: Stevens, 1964), pp 162-83; A. Gledhill, "Fundamental Rights" in J.N.D. Anderson (ed), *Changing Law in Developing Countries* (London: Allen & Unwin, 1963), p 81.

prescription of qualifications.

The Balliol Statement of 1992 which emanated from the fifth Judicial Colloquium declared that:

> "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.
>
> The international human rights instruments and their developing jurisprudence enshrine values and principles long recognized 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."[4]

The present position

Despite the historic and idealistic antecedents of these constitutional human rights provisions, there are at least four main sources of potential conflict between their application and the norms established by international conventions. These are as follows:

- traditionalism in the approach to judicial interpretation of constitutional provisions;
- the presence of savings clauses in the bills of rights which preserve pre-independence laws;
- the existence of variation between the constitutional and conventional expressions of human rights standards; and
- the continuing development of conventional human rights norms.

Judicial interpretation

The application of a traditional judicial approach to statutory interpretation in the construction of the constitutional instruments was encouraged by the fact that invariably the constitutional Preamble to the Bill of Rights commenced with the following words:[5]

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4 *The Balliol Statement of 1992*, paras 4-5.

5 For example, Jamaica, Section 13; Bahamas, Article 15; Guyana, Article 40.

> "Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest ..."

This ambiguous expression, which failed to acknowledge expressly that international human rights principles provided a primary source of the constitutional provisions, contributed to an initial view that the Bill of Rights conferred no new rights.

In the *Nasralla*[6] case, which gave Caribbean judges one of the earliest opportunities to construe one of these constitutional instruments, both the Supreme Court and Court of Appeal of Jamaica treated the fundamental rights provisions in question as merely declaratory of the common law. In the Court of Appeal, Mr Justice Lewis stated that the Bill of Rights chapter of the Jamaican Constitution "seeks in some measure to codify those 'golden' principles of freedom, generally referred to as the rule of law, which form part of the great heritage of Jamaica and are to be found both in statutes and in great judgments delivered over the centuries".[7] In the same case, Lord Devlin on the appeal to the Privy Council in giving the opinion of the Board referred to the Preamble as demonstrating that this chapter of the Constitution proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. His Lordship stated:

> "This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions."[8]

In Trinidad and Tobago where the "due process clause" predominated and gave scope for less traditionalist sentiments, a similar approach was demonstrated. This was evident even in such a case as *Trinidad Island-Wide Cane Farmers' Association Inc and Attorney-General v Prakash Seereeram* (1975),[9] where the Court of Appeal of Trinidad and Tobago took a liberal approach in holding that a statute imposing compulsory deduction of cess (a levy) on canes supplied by cane farmers to sugar manufacturers for eventual payment to an association was unconstitutional, as infringing the constitutional right to property and freedom of association. Although reference was made to the Universal Declaration of Human Rights and relevant International Labour Organization (ILO) conventions, Phillips JA nevertheless stated:

> "The right of freedom of association, which is recognized by the Constitution as existing before its commencement, has its roots in the common law of England which is deemed to have been in force in Trinidad as from 1st March 1848. (See Section 12 of the Supreme Court of Judicature Act 1962.) In my judgment, counsel's submission that a restricted

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6 *Nasralla v Director of Public Prosecutions*, (1965) 9 WIR 15.

7 Ibid, at 27.

8 *Director of Public Prosecutions v Nasralla*, [1967] 2 AC 238, at 247-8.

9 (1975) 27 WIR 329.

> interpretation must be put upon the expression 'freedom of association and assembly' is untenable."[10,11]

However, in *Maharaj v Attorney-General (No 2)*,[12] Lord Diplock, in delivering the majority opinion in the Privy Council, expressly recognized that prior to the Bill of Rights some of the fundamental rights and freedoms only existed *de facto*, and the common law rules could be in conflict with the constitutional guarantees, as evidenced by the insertion of a savings clause in respect of pre-independence laws both written and unwritten. Lord Diplock stated:

> "In view of the breadth of language used in Section 1 to describe the fundamental rights and freedoms, detailed examination of all the laws in force in Trinidad and Tobago at the time the Constitution came into effect (including the common law so far as it had not been superseded by written law) might have revealed provisions which it could plausibly be argued contravened one or other of the rights or freedoms recognized and declared by Section 1."[13]

In more recent years British consciousness of the importance of international human rights norms has been aroused by the application of the European Human Rights Convention and the work of the European Commission and Court. The literal approach to constitutional interpretation which the common law tradition prescribed is now being challenged by the more purposive approach which the international human rights norms suggest. In *Minister of Home Affairs v Fisher* (1979),[14] Lord Wilberforce in a Bermudian appeal gave the historical and philosophical justification for the liberal approach. His Lordship stated:

> "It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms .... That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[15]

The divergent attitudes of the liberal and traditionalist schools have a profound bearing on the significance and efficacy of the constitutional guarantees. Results of actual cases vary

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10 Ibid, at 355.

11 *See also Collymore and Abraham v Attorney-General*, (1967) 12 WIR 5; *Lassalle v Attorney-General*, (1971) 18 WIR 379, at 395.

12 *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)*, [1979] AC 385.

13 Ibid, at 395-6.

14 *Minister of Home Affairs v Collins Macdonald Fisher*, [1980] AC 319.

15 Ibid, at 328.

with the approach judges take in reasoning their judicial decisions both at the national and international levels. In the *Sunday Times*[16] case, the highest court in the United Kingdom reversed the decision of a liberally constituted Court of Appeal which had discharged an injunction restraining as in contempt of court the publication of certain articles dealing with the subject matter of pending court proceedings. The House of Lords held that the proposed publication was objectionable as it would prejudge the issue of negligence, lead to disrespect of the processes of law and expose the defendants to public and prejudicial discussion of the merits of the case. The European Commission on Human Rights referred the *Sunday Times* application to the European Court of Human Rights,[17] which held that freedom of expression constitutes one of the essential foundations of a democratic society, and in weighing the interests of the parties, took into account that the families of numerous victims who were unaware of the legal difficulties had a vital interest in knowing all the underlying facts and the various possible solutions. The European Court held that the interference on which the House of Lords relied did not constitute a social need sufficiently pressing within the meaning of the European Convention and was unnecessary for the preservation of the authority of the judiciary. The Court thus held that the decision of the House of Lords conflicted with the Convention.

Similar divergence in judicial attitude at the municipal and international level can be seen in the *Antigua Times*[18] case, where the Privy Council reversed the decision of the Eastern Caribbean Court of Appeal which had held that a statute requiring a deposit of a substantial sum of money as a pre-condition for operating a newspaper was invalid as it was not reasonably required for the protection of the reputation of others. In the *New Guyana Co*[19] case, the Court of Appeal of Guyana held that an import licence and/or payment of a fee as a condition precedent to obtaining the newsprint or printing equipment needed to produce a newspaper did not hinder the fundamental right to freedom of expression. The basis of the decision was that the impugned orders in their true nature and character were intended to regulate trade and commerce and not the freedom of expression.

By contrast, the advisory opinion of the Inter-American Court,[20] which had been requested by the Costa Rican Government following the *Stephen Schmidt*[21] case, took the more liberal approach. The question was whether compulsory membership in an association prescribed by law for the practice of journalism offended Articles 13 and 29 of the American Convention. The Court held that the desire to regulate professional standards and ethics would not justify the restriction, and that the Costa Rican provisions conflicted with the Convention. The Inter-American Court stated:

> "The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions....

16 *Attorney-General v Times Newspapers Ltd*, [1974] AC 273.

17 *Sunday Times v UK*, Judgment of 26 April 1979, Series A No 30; (1979-80) 2 EHRR 245.

18 *Attorney-General of Antigua and Minister of Home Affairs v Antigua Times Ltd*, (1973) 20 WIR 573 (CAWIAS); [1976] AC 16 (PC).

19 *Hope and Attorney-General v New Guyana Co Ltd and Vincent Teekah*, (1979) 26 WIR 233.

20 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights) Advisory Opinion, OC-5/85 (13 November 1985), Series A No 5; 7 HRLJ 74 (1986).

21 Resolution 17/84, Case 9178 (OEA/Ser L/V/II 63 doc 15), 2 October 1984.

> In fact it is possible, within the framework of the Convention, to understand the meaning of public order as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles."[22]

It is noteworthy that in a subsequent case, the Costa Rican Constitutional Court held the impugned legislation to be unconstitutional as offending the implied incorporation in the Costa Rica Constitution of the international human rights standards.[23]

Capital punishment cases have provided the most dramatic demonstration of the divergence in judicial attitudes. Because the constitutional and conventional instruments permit the retention of the death penalty where it hitherto existed, the real issue with which the Caribbean courts have had to grapple is the delayed execution of such sentences. The *Pratt and Morgan*[24] case provides the high-water mark in this development. The Privy Council, in reversing its own decision in the *Riley*[25] case, placed considerable reliance on the conclusions which had been reached by the Inter-American Commission on Human Rights and the UN Human Rights Committee to the effect that the American Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR) and its first Optional Protocol placed on State Parties an imperative duty in capital cases to observe vigorously all guarantees for a fair trial set out in the international instruments, and that the punishment should not be inflicted if the State Party had violated those guarantees. The Privy Council expressed the view that it was proper for the state authorities to afford weight and respect to the views of the international bodies although they were not legally binding. The Privy Council also relied on the judgment of the European Court of Human Rights in the case of *Soering v United Kingdom*[26] which had held that extradition to the United States of a German national would violate the guarantee of the European Convention against "inhuman or degrading treatment or punishment", in that in the State of Virginia, where the applicant would be extradited to, he would be subject to the "death row phenomenon".

The Privy Council expressed itself as preferring the interpretation of the Constitution of Jamaica that "accepts civilized standards of behaviour which will outlaw acts of inhumanity, albeit they fall short of the barbarity of genocide".[27] This approach to the construction of Caribbean constitutions with respect to the carrying out of death sentences has been applied by the Privy Council also to the Bahamas,[28] although, unlike Jamaica, that country had not ratified the International Covenant and its Optional Protocol and the American Convention.[29] The *Pratt and Morgan* case therefore demonstrates that the constitutional guarantees may and should be interpreted so as to conform with international human rights norms irrespective of the absence of conventional legal obligations.

The traditionalist approach has not died easily, however.

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22 *Supra*, n 20, paras 44 and 64.

23 Accion de Incost No 421-S-90, *Roger Ajun Blanco*, Art 22, Ley Orig de Periodistas (12 May 1995).

24 *Earl Pratt and Another v Attorney-General for Jamaica*, [1994] 2 AC 1.

25 *Noel Riley v Attorney-General of Jamaica*, [1983] 1 AC 719.

26 Judgment of 7 July 1989, Series A No 161; (1989) 11 EHRR 439.

27 *Supra*, n 24, at 33G.

28 *Reckley v Minister of Public Safety and Immigration*, (1995) 46 WIR 27; [1995] 3 WLR 390.

29 [***EDITOR'S NOTE:*** *After this paper was written, in October 1997 Jamaica notified the UN of its withdrawal from the Optional Protocol to the ICCPR; in May 1988 Trinidad announced its withdrawal from the Optional Protocol and from the American Convention.*]

Subsequent to the landmark decision in *Pratt and Morgan*, Bingham J in the Supreme Court of Jamaica in the case of *Albert Huntley v The Attorney-General and Director of Public Prosecutions*[30] stated:

> "It has long been judicially recognized that the fundamental rights and freedoms ... are and have always been available to the individual prior to the coming into operation of the Constitution."[31]

Savings clauses

Jamaica was the first of the Commonwealth Caribbean countries to attain independence. The uncertainties of the future and the fear that an unpredictable amount of existing legal rules would fall foul of the new Bill of Rights led to the introduction of a savings clause in the following terms:

> "Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."[32]

This example was followed by Barbados, Trinidad and Tobago, Guyana, and Belize. In the case of Guyana the savings provision is expressly confined to "written law", and in the case of Belize to a limited period. In the case of Antigua and Barbuda, St Christopher and Nevis, and Grenada the savings provision is limited to "disciplinary law", namely the law regulating discipline in the armed forces, police and prison services.

It is remarkable that even after a revision of the constitutions in Guyana and in Trinidad and Tobago such savings clauses have been retained. It seems illogical to have a bill of rights solemnly declaring rights and freedoms as fundamental, and nevertheless to preserve indefinitely ordinary legislation or principles of law which were made or developed in a colonial era and which conflict with the bill of rights. Still less is it justifiable to preserve against constitutional challenge the exercise of wide discretionary powers conferred on the executive by such pre-existing laws. In any case, the apprehensions of the constitution-makers do not appear to be justified, as in the many countries which have not resorted to such savings clauses no exceptional difficulties have been experienced.

Variations in formulation

There are areas in which international human rights conventions afford greater protection or include rights which are not provided for in the constitutions. A few examples will suffice: the right to a fair trial under the American Convention on Human Rights posits the

30 Misc Suit No SC M 1/93 (23 April 1993).

31 Ibid, at 4, 5.

32 Constitution of Jamaica, Section 26(8).

"inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel".[33] In the domestic systems while the accused cannot be prevented from engaging counsel of his choice, if one is available, the state has no obligation to provide him with such representation. In many of these jurisdictions very limited legal aid is provided by the state, and persons may be tried on very grave criminal charges without the protection of legal representation. Indeed, persons on the capital charge of murder have been tried and held to be validly convicted although they did not have the assistance of counsel in the conduct of their defence, even where this resulted from the improper withdrawal of counsel from the trial at the last moment.[34]

Under the American Convention a person tried on a criminal charge must have, at the minimum, a right of appeal to a higher court.[35] Although this is the usual position in the administration of criminal justice in the English-speaking Caribbean, the legislature may deny this right, at least where no constitutional question arises. The right to compensation, where a person had been sentenced by a final judgment through a miscarriage of justice, is provided for under the Convention[36] but not in the domestic system. However, if it involves a direct infringement of a fundamental right, this relief may be obtained.[37]

The right to privacy under the Convention also has more positive and fuller expression than in the domestic constitutions. The former proclaims that "Everyone has the right to have his honor respected and his dignity recognized",[38] whereas the latter merely prohibits illegal search and entry on private premises.[39]

Although both the Convention and the constitutions express the protection of freedom of thought and expression in similar language, the Convention goes further and significantly prohibits prior censorship and the indirect restriction of the freedom by means such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information.[40]

Development of international human rights norms

Since the pattern of the Caribbean constitutional instruments was established in the early 1960s there have been considerable developments in international human rights law. International conventions have come into being affecting a wide variety of subjects. There have been conventional provisions relating to, *inter alia*:

- discrimination in education;
- statelessness;
- minimum age for marriage and registration of marriages;

33 American Convention on Human Rights, Article 8(2)(e).

34 *R v Pusey*, (1970) 12 JLR 243; *Frank Robinson v The Queen*, [1985] 3 WLR 84.

35 American Convention, Article 8(2)(h).

36 Ibid, Article 10.

37 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*, *supra*, n 12.

38 American Convention, Article 11(1).

39 The exclusionary rule is not applied where evidence is obtained in breach of these rights. *Herman King v The Queen*, [1969] 1 AC 304; *R v Howard*, (1970) 16 WIR 67.

40 American Convention, Article 13.

- elimination of racial discrimination;
- economic, social and cultural rights;
- civil and political rights;
- elimination of discrimination against women;
- apartheid in sports;
- rights of the child;
- the environment; and
- protection of intellectual property.

Some Commonwealth Caribbean states have acceded to various of these international treaties. Many of them widen the scope of existing rights and impose higher duties on states. If conflicts between constitutional provisions and international obligations are to be avoided, it is submitted that not only is a liberal interpretation of the constitutions and the removal of restrictive savings clauses essential, but a new and more flexible formulation of the constitutional guarantees is demanded.

A scheme of amendment

So far Caribbean leaders have shown a reluctance to make any significant changes to the bills of rights. We have commented on the incorporation of savings clauses in these bills of rights. The Report of the Constitution Commission of Trinidad and Tobago stated:[41]

> "We have not included in the draft any clause preserving existing legislation. Where an existing law abridges or infringes a fundamental right, its validity will depend on its falling within one or other of the permitted exceptions and also on its satisfying the test of what is reasonably justif. .ble in a society with a proper respect for the rights and freedoms of the individual. It will not, if enacted before Independence, have had to be passed by a three-fifth majority; that requirement will only apply thereafter.
>
> We are satisfied that the specific categories set out will accommodate all areas of existing desirable legislation. The broad exception of public interest leaves room for dealing with any unusual situation which may develop. We are confident that the capacity of any government to act has not been unduly circumscribed.
>
> Further, because the formulation we have used has been so widely adopted, there will be a growing body of decided cases on its interpretation in various parts of the world which should be of help to our courts when dealing with their own problems. Cases dealing with the European Convention on Human Rights will also be useful since there are many points of similarity between the Convention and the proposed Declaration of Rights - the name we have suggested for the new chapter in our draft.

41 Report of the Constitution Commission of Trinidad and Tobago (22 January 1974).

> It will also be possible to challenge existing laws which may be thought to abridge or infringe the fundamental rights and freedoms as they have now been defined since there has been no wholesale adoption of the pre-Independence body of law. It seems only proper that citizens should be able to test such laws against the standards which the society has elected to adopt."

A momentous effort is being made in Jamaica to reform the constitutional guarantees so as to bring them in closer harmony with international human rights norms. In its first report,[42] the Constitutional Commission of Jamaica stated that it was agreed that "the declaratory provisions of the Fundamental Rights and Freedoms should be expressed in positive terms...". In that regard, the Commission noted the communication through the Ministry of Foreign Affairs and Foreign Trade from the Organization of American States (OAS) requesting that Jamaica "bring [its] fundamental rights and freedoms in line with that of the United Nations".[43] The final report[44] of the Constitutional Commission recommended considerable changes to the formulation of the Bill of Rights and prepared a draft which has been accepted by Parliament for implementation.

Some important features of the draft may now be mentioned. First, it seeks to make clear that the genesis of fundamental rights and freedoms is not confined to English common law but encompasses universally accepted human rights norms. Reminiscent of the Universal Declaration of Human Rights it states in the following words that the rights and freedoms are the entitlement of the people by virtue of their inherent dignity as individuals:

> "We resolve as a people to preserve for ourselves and future generations the fundamental rights and freedoms to which we are entitled by virtue of our inherent dignity as individuals and as citizens of a free and democratic society."

Second, to ensure that the constitutional provisions synchronize with Jamaica's undertakings under international conventions, it is provided that "in determining the meaning and effect of the provisions of the Bill of Rights" judicial notice should be taken of the international instruments to which Jamaica is a party.

Third, the presumption of constitutionality which favoured legislative and executive encroachment of fundamental rights is reversed, and the onus placed on the state or other responsible party to justify any legislative or executive act which has a direct impact on the rights.

Fourth, the standard of proof required of the person or official who trespasses on the fundamental rights and freedoms is heightened as the encroachment will be unconstitutional unless it is "demonstrably justified in a free and democratic society".

Fifth, the draft contains a declaration of several rights not previously specified in the existing instruments, such as "equality before the law", "respect for private and family life and privacy of communication", "the right of every child to such measures of protection as

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42 Report of the Constitutional Commission - Jamaica (August 1993).

43 Ibid, para 12(1).

44 Final Report of the Constitutional Commission - Jamaica (February 1994), Appendix A.

are required by the status of a minor or as part of the family, society and the state", and "the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage".

Until the Caribbean bills of rights are modernized to such a significant extent as the Jamaican draft envisages, the primary onus will fall on the judiciary to secure harmony between our constitutional guarantees and international human rights norms.

3

The Relevance of International Human Rights Norms

Lord Lester of Herne Hill, QC

The Bangalore Principles

Eight years ago, in Bangalore, India, the first in a series of high-level colloquia on the domestic application of international human rights norms, organized by the Commonwealth Secretariat and Interights, was held. Its convenor was the former Chief Justice of India, Justice P.N. Bhagwati, now a member of the UN Human Rights Committee. The other judges taking part were Justice Michael Kirby, now a member of the High Court of Australia; Justice M.P. Chandrakantaraj Urs, a member of the High Court of Karnataka; Tun Mohamed Salleh Bin Abas, the Lord President of Malaysia, soon to be removed from office for incurring his government's displeasure; Justice Rajsoomer Lallah, later to become Chief Justice of Mauritius; Muhammad Haleem, the Chief Justice of Pakistan; Mari Kapi, the Deputy Chief Justice of Papua New Guinea; Justice P. Ramanathan of the Supreme Court of Sri Lanka; Judge Ruth Bader Ginsburg, now a member of the Supreme Court of the United States; Enoch Dumbutshena, the Chief Justice of Zimbabwe; and the Chief Justice and members of the High Court of Karnataka.

This group of eminent jurists reached a consensus on a series of propositions which have become known in many parts of the Commonwealth as "the Bangalore Principles".

The Bangalore Principles began by noting that 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. These international instruments provide important guidance in human rights cases. They observed that there is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights. This jurisprudence is of practical relevance and value to judges and lawyers generally. They recognized that in most countries whose systems are based upon the common law, international human rights conventions are not directly enforceable unless their provisions have been incorporated by legislation into domestic law. However, they perceived 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. This tendency they welcomed 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. They expressed the wish that the norms contained in the international human rights codes should be still more widely recognized and applied by national courts, taking into account local laws, traditions, circumstances and needs. It is, they agreed, 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. On the other hand, 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, they suggested, the court should draw the 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.

The Bangalore colloquium regarded it as 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. They called (amongst other things) for better dissemination of information to judges, lawyers and law enforcement officials.

What was begun in Bangalore was developed in five further Commonwealth judicial colloquia. In 1989, the Bangalore Principles were discussed at a gathering of mainly Commonwealth African judges, convened by Chief Justice Dumbutshena, and held in Harare, Zimbabwe. The Harare Declaration of Human Rights warmly endorsed the Bangalore Principles, emphasizing that fine statements in domestic laws or international human rights instruments are not enough, and calling for the better dissemination of information about the human rights case law of international and national courts.

In 1990, another colloquium, of mainly Commonwealth African judges, meeting in Banjul, The Gambia, was convened by Chief Justice E.O. Ayoola. It endorsed the Bangalore Principles and the Harare Declaration in the Banjul Affirmation, and examined human rights protection in the context of the African Charter.

A year later, an equally distinguished colloquium of a large number of senior judges, mainly from Nigeria, convened by Chief Justice Mohammed Bello, met in Abuja. Their discussions led to the Abuja Confirmation of the domestic application of international human rights norms. One of their many practical recommendations was to provide judges and lawyers with up-to-date information about human rights jurisprudence. They set up as an informal body a Commonwealth Judicial Human Rights Association whose members send to Interights published judgments in which they or their colleagues have applied or made use

of international and comparative human rights norms. And they requested Interights, in co-operation with the Commonwealth Secretariat, to obtain the necessary resources to act as a clearing house of information and to publish practical digests of human rights decisions.

In 1992, judges from 16 Commonwealth countries, as well as from the United States, Ireland, and Hungary, together with the President of the European Court of Human Rights, Judge Rolv Ryssdal, met at Balliol College, Oxford. The Lord Chancellor, Lord Mackay of Clashfern, convened the colloquium, which was attended by several senior British judges. The Balliol Statement reaffirmed the principles accepted in the earlier judicial colloquia. The judges asserted that the international human rights instruments and their developing jurisprudence enshrine values and principles long recognized by the common law, and that they are vital points of reference for judges, whose special province it is to see to it that the law's undertakings are realized in the daily life of the people. They urged the Commonwealth Secretariat to provide the necessary resources to service the Commonwealth Judicial Human Rights Association, and considered the dissemination of knowledge to be an urgent necessity.

The sixth judicial colloquium was held in Bloemfontein, South Africa, in 1993, hosted by Mr Justice M.M. Corbett, Chief Justice of South Africa, and attended by senior judges from 16 Commonwealth countries. In the Bloemfontein Statement, the participants affirmed the now well-established principles and the importance of international and comparative national human rights case law as essential points of reference for the interpretation of national constitutions and legislation and the development of the common law.

During the past eight years, there has been a sea change in many leading Commonwealth courts, willing, as never before, to look beyond their national jurisdictions for guidance in making difficult choices among competing public interests in constitutional and human rights cases, each jurisdiction drawing on the experience of others. The Bangalore Principles have become conventional judicial wisdom in England, Australia, India, South Africa, New Zealand, Namibia, Zimbabwe, and other common law jurisdictions. Judges who have participated in the Interights colloquia have been especially influential in developing the use of international and comparative constitutional law as sources of interpretation of national laws: Chief Justice Brennan and Justice Michael Kirby in Australia; Sir Robin Cooke (now Lord Cooke of Thorndon), as President of the Court of Appeal of New Zealand; Enoch Dumbutshena and Tony Gubbay, the former and present Chief Justices of Zimbabwe; Justice Bhagwati, as a very active former Chief Justice of India (now Vice-Chairman of the UN Human Rights Committee); Lord Browne-Wilkinson and Lord Woolf of Barnes (now Master of the Rolls), in the House of Lords and in the Privy Council; Ismail Mahomed, Chief Justice of Namibia, and many others. South Africa's Constitution requires its Constitutional Court to have regard to this rich source of law, and, under the leadership of President Arthur Chaskalson, it has done so with great learning and insight.

Examples of this change can be seen, for instance, by looking at how concepts of human dignity, developed by the European Court of Human Rights, have influenced

Commonwealth African courts to decide that judicial corporal punishment is degrading and unconstitutional, and at how European human rights law and American constitutional law have influenced English, Australian and English courts in restricting public authorities and politicians from using libel law to chill public criticism of their official activities.

English judicial use of international human rights law

English courts have increasingly been willing to have regard to international human rights law, and especially to the European Convention on Human Rights, even though it has not been enacted by Parliament to make it part of English law.

The United Kingdom is party to the European Convention on Human Rights (and to the International Covenant on Civil and Political Rights and other international human rights codes). The rights and freedoms which they contain are guaranteed, as a matter of international law, against the misuse of legislative, executive, or judicial powers within the United Kingdom. Their primary purpose is to protect the individual against the misuse of public powers by public authorities, but they may also influence public policy in private law areas, and therefore have an indirect horizontal as well as vertical effect. Both the Convention and the Covenant oblige the United Kingdom (in international law) to secure their rights and freedoms in domestic law, and to provide effective remedies before national authorities for breaches of their provisions. The Convention empowers the European Court of Human Rights to award compensation for breaches of the Convention by public authorities for whom the United Kingdom is responsible.

Successive United Kingdom governments refused to introduce legislation to incorporate Convention (or Covenant) rights and freedoms directly into domestic law.[1] They argued that, in the absence of incorporation or a constitutional Bill of Rights, domestic law matched the Convention (or Covenant), or could readily be amended where it failed to do so, without the need for direct incorporation.[2]

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1 [***EDITOR'S NOTE:*** *After this paper was written, the new Labour government elected in May 1997 introduced a Human Rights Bill to make the rights guaranteed by the European Convention enforceable in UK domestic law. The Human Rights Act 1998 will come into force in 1999.*]

2 The UN Human Rights Committee noted that the legal system of the United Kingdom "does not ensure fully that an effective remedy is provided for all victims of violations of the rights contained in the Covenant". It "is concerned by the extent to which implementation of the Covenant is impeded by the combined effects of the non-incorporation of the Covenant into domestic law, the failure to accede to the first Optional Protocol and the absence of a constitutional Bill of Rights." (Concluding Observations of the Human Rights Committee: United Kingdom, UN Doc CCPR/C/79/Add 55, 27 July 1995). The Committee recommended that the United Kingdom "take urgent steps to ensure that its legal machinery allows for the full implementation of the Covenant" by examining the need to incorporate the Covenant into domestic law or by introducing a Bill of Rights; that it review the reservations which it has made to the Covenant; that it review the Criminal Justice and Public Order Act and the equivalent legislation in Northern Ireland to ensure that the provisions which allow inferences to be drawn from the silence of accused persons do not compromise the implementation of Article 14 of the Covenant; that it take further action to tackle remaining problems of racial and ethnic discrimination and of social exclusion; that it give wide publicity to the Covenant, to the report of the Committee, and to the reporting procedure, and that the Comments of the Committee should be distributed to interested non-governmental groups and the public at large. The Committee's recommendations were rejected by the Conservative government (Hansard (HL), 30 October 1995, cols WA 140-142). *See also* the 1996 Sieghart Lecture given by Judge Rosalyn Higgins DBE QC on 22 May 1996, "Ten Years on the UN Human Rights Committee: Some Thoughts upon Parting" ([1996] 6 EHRLR 570-82).

In a 1996 House of Lords debate on the Constitution, the Lord Chancellor, Lord Mackay of Clashfern, explained why he opposed incorporation of the European Convention. He stated "The question of whether the European Convention is incorporated or not is, in my view, of little relevance to the real standard of legal protection afforded by the state to individuals in this country .... Legal traditions, legislative and judicial approaches lead in practice to the same or a higher level of protection of human rights provided in a number of other ways. Unwritten principles, for example, of rationality and legality can be greatly superior to the list of rights set out in the Convention.... Enacting a Bill of Rights in terms similar to the Convention, or incorporating the Convention itself would give courts wide discretion over matters which in my view are properly the preserve of Parliament. It is for Parliament to legislate so that our legal arrangements comply with Convention principles, taking account, for example, of the margin of appreciation allowed to Member States under Strasbourg law .... Moreover, the scope for judicial interpretation would inevitably draw judges into making decisions which are essentially political rather than legal in nature ... Against such a background a strong demand would emerge for judges to be chosen for their social or political views rather than their legal qualities or impartiality." (Hansard (HL), 3 July 1996, cols 1451-2)

The European Court of Human Rights has made it clear[3] that, although Contracting States are not obliged to incorporate the Convention into their domestic laws, the intention of the Convention's drafters was that the rights and freedoms should be directly secured to anyone within the jurisdiction of the Contracting States; and that intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law. The Convention obliges the higher authorities to respect for their own part the rights and freedoms it embodies, and also requires those authorities to prevent or remedy any breach of the Convention at subordinate levels. The Court has consistently held[4] that the responsibility of a state is engaged if a violation of one of the Convention rights and freedoms is the result of the state's breach of its obligation to secure those rights and freedoms to everyone within its jurisdiction.

However, the European Court has not interpreted Article 6[5] or Article 13[6] of the Convention so as to give a powerful incentive to the United Kingdom Government or Parliament to provide more effective domestic remedies. In an early landmark case,[7] the Court held that Article 6(1) guarantees a right of effective access to the civil courts, as well as to a fair hearing by those courts within a reasonable time. It has also emphasized[8] that the Convention is intended to guarantee "not rights that are theoretical or illusory but rights that are practical and effective". At one time it seemed that the Court would therefore give a strong interpretation to Article 6(1) so as to increase national judicial protection. For example, it held[9] that the "right to a court", and the right to a judicial determination of the dispute, guaranteed by Article 6(1), covers questions of fact just as much as questions of law. This led the Court, in the context of a local authority's decision about parental access to a child in public care, to decide[10] that, since on an application for judicial review English courts will not review the merits of the decision, but confine themselves to ensuring that the administrative authority will not act illegally, unreasonably or unfairly, the scope of judicial review is not sufficient to satisfy the requirements of Article 6(1). More recently, the Court has treated the narrow limits of English judicial review as compatible with the requirements of Article 6(1), even though English courts still do not apply the principle of proportionality, nor require public authorities to comply with the Convention when exercising broadly delegated public powers.[11]

The Court has also given a narrowly restrictive meaning to the practical content of the right to an effective national remedy guaranteed by Article 13 of the Convention. It has held[12]

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3 *Ireland v United Kingdom*, Judgment of 18 January 1978, Series A No 25; (1979-80) 2 EHRR 25, para 239.

4 *See*, for example, *Costello-Roberts v United Kingdom*, Judgment of 25 March 1993, Series A No 247-C; (1995) 19 EHRR 112, para 26.

5 Article 6(1) provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

6 Article 13 provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

7 *Golder v United Kingdom*, Judgment of 21 February 1975, Series A No 18; (1979-80) 1 EHRR 524, paras 35-6.

8 *Airey v Ireland*, Judgment of 9 October 1979, Series A No 32; (1979-80) 2 EHRR 305, para 24.

9 *Albert and Le Compte v Belgium*, Judgment of 10 February 1983, Series A No 58; (1983) 5 EHRR 533, para 29; *see also Le Compte, Van Leuven and De Meyere v Belgium*, Judgment of 23 June 1981, Series A No 43; (1982) 4 EHRR 1, para 51.

10 *See*, for example, *W v United Kingdom*, Judgment of 8 July 1987, Series A No 121; (1988) 10 EHRR 29, para 82.

11 *See*, for example, *Fayed v United Kingdom*, Judgment of 21 September 1994, Series A No 294-B; (1994) 18 EHRR 393; *Air Canada v United Kingdom*, Judgment of 5 May 1995, Series A No 316-A; (1995) 20 EHRR 150. There was a greater justification for this approach in the earlier UK case of *Soering v United Kingdom*, Judgment of 7 July 1989, Series A No 161; (1989) 11 EHRR 439, because English judicial review adopts a stricter scrutiny of administrative decisions where the right to life is at stake.

12 *Boyle and Rice v United Kingdom*, Judgment of 27 April 1988, Series A No 131; (1988) 10 EHRR 425.

that Article 13 guarantees the availability of a remedy at national level to enforce - and hence to allege non-compliance with - the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order, provided that the grievance is an arguable one in terms of the Convention. However, in practice, even where the Commission has found a complaint to be admissible and one in respect of which no effective remedy existed, the Court has rejected a claim of breach of Article 13.[13] Article 13 is almost dead as a means of securing effective national remedies. For example, in *Vilvarajah*[14] the Court, by a majority, went so far as to overrule the Commission's near-unanimous finding of breach of Article 13 in that the applicants did not have effective domestic remedies available in respect of their Article 3 claims. The majority glossed over the limited nature of English judicial review in not yet recognizing the principle of proportionality as a distinct ground of review, or permitting a review of the merits, and in not treating the exercise of administrative discretion as including an obligation to have regard to the Convention.

Use of the Convention by English courts

Because these international codes have not been incorporated by statute, they are not part of domestic law.[15] However, English courts have regard to their provisions, as sources of principles or standards of public policy. They do so where a statute is ambiguous: *R v Miah*;[16] *Garland v British Rail*;[17] or where the common law is developing or uncertain:

13 *See*, for example, ibid, paras 71-6, and paras 79-83.

14 *Vilvarajah and Others v United Kingdom*, Judgment of 30 October 1991, Series A No 215; (1992) 14 EHRR 248.

15 In *J.H. Rayner v Dept of Trade*, [1990] 2 AC 418 (HL), Lord Oliver of Aylmerton summarized the position as follows (at 499F-501A): "It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law.... On the domestic plane, the power of the Crown to conclude treaties is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law....

[A]s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

These propositions do not, however, involve as a corollary that the court must never look at or construe a treaty. Where, for instance, a treaty is directly incorporated into English law by Act of the legislature, its terms become subject to the interpretative jurisdiction of the court in the same way as any other Act of the legislature.... Again, it is well established that where a statute is enacted in order to give effect to the United Kingdom's obligations under a treaty, the terms of the treaty may have to be considered and, if necessary, construed in order to resolve any ambiguity or obscurity as to the meaning or scope of the statute....

Further cases in which the court may not only be empowered but required to adjudicate upon the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation ....

It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular issue arises, may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one.... The legal results which flow from [a treaty] in international law, whether between parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts."

Unlike conventional international law, customary international law is automatically part of the common law: *see Trendtex Trading Corporation v Central Bank of Nigeria*, [1977] QB 529, at 553-4. Denning MR stated, in support of the doctrine of incorporation, that "Otherwise I do not see that our courts could ever recognize a change in the rules of international law.... Seeing that the rules of international law have changed - and do change - and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law."(at 554D and G). However, little of the law guaranteeing fundamental rights and freedoms has attained the status of customary international law. By comparison with the wide range of rights and freedoms guaranteed by the International Covenant and the European Convention, only gross violations of individual rights, such as genocide, slavery, torture, arbitrary detention, and racial discrimination are protected by customary international law at its present stage of development.

16 [1974] 1 WLR 683 (HL).

17 [1983] 2 AC 751 (HL).

Attorney-General v Guardian Newspapers (No 2);[18] *Derbyshire County Council v Times Newspapers;*[19] affirmed on other grounds: *Derbyshire County Council v Times Newspapers;*[20] or where the common law is certain but incomplete: *Derbyshire County Council v Times Newspapers;*[21] *R v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury.*[22] The Convention and the Covenant are also relevant as sources of public policy: *Blathwayt v Cawley;*[23] or when determining the manner in which judicial powers[24] are to be exercised: *Rantzen v Mirror Group Newspapers;*[25] *John v MGN Ltd.*[26] In *R v Khan*[27] the House of Lords decided that Article 8 of the Convention (guaranteeing the right to respect for personal privacy) was potentially relevant when a judge had to decide whether to exclude evidence from a criminal trial.[28]

Common law rights, reflected in the Convention, have been recognized by our courts not only in relation to the right to freedom of expression (notably in *Derbyshire County Council v Times Newspapers*, above), but also in relation to the right of access to courts and to solicitors, derived from Article 6: *see R v Secretary of State for the Home Department, Ex parte Anderson;*[29] *R v Secretary for the Home Department, Ex parte Leech.*[30] It is possible that a right to personal privacy, derived from Article 8, will also be developed.[31] In *R v Khan*[32] three Law Lords[33] indicated that Article 8 was indeed potentially relevant in this context.

The rights and freedoms guaranteed by the Convention and by the Covenant cannot be directly invoked in English courts to determine whether administrative discretion, exercised under broad statutory powers, has unnecessarily interfered with those rights or freedoms, or has been disproportionate to the decision-maker's aims. This is because a statute conferring broad discretionary powers is regarded as unambiguous, and the international principles and standards are irrelevant in construing the purpose of the legislation: *R v Secretary of State for the Home Department, Ex parte Brind;*[34] see also *R v Secretary of State for the Environment, Ex parte National and Local Government Officers Association.*[35] Furthermore, the principle of proportionality (requiring that the decision-maker should use not use a lawfully exercised power excessively or unnecessarily), anchored in the Convention, is not

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18 [1990] 1 AC 109 (HL); *see also Lord Advocate v Scotsman Publications Ltd*, [1990] 1 AC 812 (HL).

19 [1992] 1 QB 770 (CA), at 812, per Balcombe LJ; at 830, per Butler-Sloss LJ; *see also Attorney-General v Blake*, [1997] Ch 84 at 93H-94A, per Sir Richard Scott V-C.

20 [1993] AC 534 (HL).

21 *Supra*, n 19, at 812, per Balcombe LJ; at 830, per Butler-Sloss LJ.

22 [1991] 1 QB 429 (DC), at 449, per Watkins LJ.

23 [1976] AC 397 (HL), at 425, per Lord Wilberforce.

24 Under Section 8 of the Courts and Legal Services Act 1990 to set aside excessive awards of damages by juries in defamation cases.

25 [1994] QB 670 (CA).

26 [1997] QB 586 (CA).

27 [1997] AC 558 (HL).

28 In exercising the power conferred by Section 78 of the Police and Criminal Evidence Act 1984.

29 [1984] QB 778 (DC).

30 [1994] QB 198 (CA).

31 *See* generally, Lester, "English Judges as Lawmakers", [1993] PL 269, at 284-6.

32 *Supra*, n 27.

33 Lord Browne-Wilkinson, Lord Nolan and Lord Slynn.

34 [1991] 1 AC 696 (HL). *Brind* was cited with approval by the Constitutional Court of South Africa in *The Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*, 1996 (4) SA 671, at 688.

35 (1993) 5 Admin LR 785 (CA).

recognized as an independent ground of judicial review.[36]

In *R v Secretary of State for the Home Department, Ex parte Norney*,[37] Dyson J distinguished *Brind* because it was clear that the provision in the Criminal Justice Act 1991 which created the Home Secretary's discretion to refer cases of discretionary life prisoners to the Parole Board had been passed to bring domestic law into line with the Convention. Dyson J stated that it would be perverse to hold that, when considering the lawfulness of the exercise of the discretion, the court must ignore the relevant provisions of the Convention.

Where fundamental human rights or freedoms are at stake, English courts will require a stricter objective justification of the exercise of public powers than would satisfy the loose *Wednesbury* test,[38] which requires nothing less than an outrageous defiance of logic or accepted moral standards: *Council of Civil Service Unions v Minister for Civil Service*;[39] *R v Secretary of State for the Home Department, Ex parte Bugdaycay*.[40]

It is unclear how far our courts will extend the scope of review beyond "*Wednesbury* unreasonableness" yet short of proportionality. In *R v Ministry of Defence, Ex parte Smith*,[41] the Court of Appeal (per Sir Thomas Bingham MR) accepted, as an accurate distillation of the principles laid down by the House of Lords in *Ex parte Bugdaycay* and *Ex parte Brind*, David Pannick QC's submission that

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."[42]

It has been recognized that the status of the principle of proportionality is unclear: *R v Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd.*[43] The current view is that (*pace Brind*) the Convention feeds irrationality, its contents being mirrored in the common law: *R v Secretary of State for the Home Department, Ex parte McQuillan*;[44] *R v Mid-Glamorgan Family Health Services Authority, Ex parte Martin*.[45] In *R v Manchester Metropolitan University, Ex parte Nolan*,[46] the Divisional Court (Mann LJ and Sedley J) assumed that the principle of proportionality was potentially available as a discrete head of challenge in appropriate cases (in that case, a penalty imposed by the Board of Examiners). In *R v*

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36 Ibid.

37 Times Law Reports, 6 October 1995.

38 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] 1 KB 223 (CA).

39 [1985] 1 AC 374 (HL).

40 [1987] AC 514 (HL).

41 [1996] QB 517 (CA).

42 Ibid, at 554E-F.

43 [1993] 2 PLR 75.

44 [1995] 4 All ER 400, per Sedley J.

45 [1995] 1 WLR 110, per Laws J.

46 *The Independent*, 15 July 1993, CO/2856/92.

Secretary of State for the Home Department, Ex parte Leech,[47] the Court of Appeal (Neill, Steyn and Rose LJJ) adopted a proportionality test, in construing a statutory power to censor prisoners' correspondence.[48]

Some aspects of the expansion of English judicial review were criticized by Lord Irvine of Lairg QC, in his 1995 lecture to the Administrative Law Bar Association.[49] Lord Irvine criticized the concept of a lower threshold for review in fundamental rights cases, and regards as "highly disputable" the proposition stated in *R v Panel on Take-overs and Mergers, Ex parte Guinness*[50] that where natural justice applies, what it requires in context is a matter of law for the court, which is the "author and sole judge" of procedural standards. Lord Irvine argued that "the court should only intervene if the procedures applied by the decision-maker are so unfair that they could not reasonably have been adopted". He also considered that there is a "fundamental objection" to the use of the proportionality principle, namely, that it

> "invites review of the merits of public decisions on the basis of a standard which is considerably lower than that of *Wednesbury* reasonableness and would involve the court in a process of policy evaluation which goes far beyond its allotted constitutional role. Proportionality requires the court to address questions involving compromises between competing interests which in a democratic society must be resolved by the legislature. In the administrative context, they are plainly questions whose decision is entrusted by Parliament to the decision-maker."[51]

This approach is much narrower than the scope of judicial review undertaken by courts elsewhere in Europe, and by the two European courts (the European Court of Human Rights and the European Court of Justice), as well as by supreme courts elsewhere in the Commonwealth in interpreting their written constitutions.

The continuing gap

The continuing gap in the scope of English judicial review between the high threshold of *Wednesbury* unreasonableness and review of the merits (notably according to the principle of proportionality) may, in appropriate cases, involve breaches of the United Kingdom's obligations under Article 6(1) of the European Convention (*see*, for example, *W v United Kingdom*;[52] *Le Compte, Van Leuven and De Meyere v Belgium*).[53] In that event, recourse may be had to the European Court of Human Rights (after exhausting any effective and sufficient domestic remedies).

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47 *Supra*, n 30.

48 In *R v Secretary of State for Social Security, Ex parte Joint Council for the Welfare of Immigrants (JCWI)*, *The Times*, 27 June 1996, Lord Justice Neill, dissenting, indicated that a proportionality test would be appropriate in deciding whether regulations were made within the scope of the powers conferred by primary legislation.

49 "Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review", [1996] Pub L 59. (However, as Lord Chancellor, Lord Irvine of Lairg has been a strong advocate of the Human Rights Bill and the requirement that UK courts and tribunals should where possible construe statutes to accord with European Convention rights. This will involve use of the proportionality principle.)

50 [1990] 1 QB 146, per Lloyd LJ, at 183.

51 *Supra*, n 49, p 74.

52 *Supra*, n 10.

53 *Supra*, n 9.

The "right to a court" under Article 6(1) covers questions of fact just as much as questions of law. The Convention requires either that the jurisdictional organs themselves comply with Article 6(1), or that they do not comply, but are subject to subsequent control by a judicial body that has "full jurisdiction" and does provide the guarantees of Article 6(1): *Albert and Le Compte v Belgium*;[54] see also *Le Compte, Van Leuven and De Meyere v Belgium*, above (the right to a judicial determination of the dispute covers questions of fact as much as questions of law).

In *Fayed v United Kingdom*,[55] the European Court held that Article 6(1) had not been breached because of the restricted nature of English judicial review of the report by the inspectors appointed by the Department of Trade and Industry. This was because judicial review would be effective as regards unfairness or cases where the findings or conclusions were unreliable, and because there were "not inconsiderable [administrative] safeguards intended to ensure a fair procedure and the reliability of findings of fact".[56] In *Air Canada v United Kingdom*,[57] the Court held by a majority of five votes to four that Article 6(1) of the Convention, and Article 1 of the First Protocol to the Convention, had not been breached, in relation to the seizure of Air Canada's aircraft by the Commissioners for Customs and Excise, and the delivery back of the aircraft on payment of a penalty. This was in part because it would have been open to Air Canada to have instituted judicial review proceedings to challenge the failure of the Commissioners to provide reasons for the seizure of the aircraft; and because it was open to the English courts to hold that the exercise of the Commissioners' discretion was tainted with illegality, irrationality or procedural propriety; and because Air Canada could have sought to contest the factual grounds on which the exercise of the Commissioners' discretion was based.[58] *See also Soering v United Kingdom*[59] and *Vilvarajah and Others v United Kingdom*,[60] where the Court was persuaded that English judicial review complied with the Convention's requirements in the particular circumstances of those cases. In *Bryan v United Kingdom*[61] the Court was persuaded that, in the specialized area of planning legislation, where the facts had been found by a quasi-judicial procedure governed by many of the safeguards required by Article 6(1), the limits of English judicial review did not breach Article 6(1).

It would seem that the decisions of the European Court of Human Rights in these cases would have been adverse to the United Kingdom if the courts had been effectively disabled from reviewing whether the impugned decision was irrational and perverse so as to amount to an abuse of power.

In *R v Ministry of Defence, Ex parte Smith*[62] Sir Thomas Bingham MR stated that it is important to note that, in considering whether English law satisfies the requirement in Article 13 of the Convention that there should be a national remedy to enforce the substance of the Convention rights and freedoms, the European Court of Human Rights

54 *Supra*, n 9.

55 *Supra*, n 11.

56 Ibid, para 78.

57 *Supra*, n 11.

58 Ibid, paras 46-60.

59 *Supra*, n 11.

60 *Supra*, n 14.

61 Judgment of 22 November 1995, Series A No 335-A; (1996) 21 EHRR 342.

62 *Supra*, n 41, at 555H.

has held, in *Vilvarajah*,[63] that it does satisfy Article 13, attaching very considerable weight to the power of the English courts to review administrative decisions by way of judicial review. In *R v Khan*,[64] several Law Lords also referred to Article 13 as a significant provision.

Potential future use of Convention law

In the absence of statutory incorporation of the Convention, the House of Lords might well limit or overrule *Brind* in an appropriate case where a Minister flouted the Convention. Indeed, there are hints of this in the reasoning in *R v Khan*, above.[65] In *Tavita v Minister of Immigration*,[66] the Court of Appeal of New Zealand declined to follow *Brind* and left open the question whether the Minister should have taken into account the International Covenant on Civil and Political Rights or the UN Convention on the Rights of the Child in considering an application for a residence permit by a father, in the light of the rights of a child (a New Zealand citizen). The Court observed that the Minister's argument that he was entitled to ignore the international instruments was "deeply unattractive" as it implied that New Zealand's adherence to various international instruments had been at least partly window-dressing.[67] In *Minister for Immigration and Ethnic Affairs v Teoh*[68] the High Court of Australia went further, holding that ratification by Australia of the Convention on the Rights of the Child created a legitimate expectation, in the absence of statutory or executive indications to the contrary,[69] that administrative decision-makers would act in accordance with the Convention. These Commonwealth cases are of strong persuasive authority.[70]

Article 6 of the Convention may have implications[71] for widening the circumstances in which discovery should be ordered in judicial review cases (in the light of the narrow line of cases on "fishing expeditions" and "Micawber applications", emanating from *R v Secretary of State for the Home Department, Ex parte Harrison*),[72] and for the scope of the evolving duty to give reasons: *R v City of London Corporation, Ex parte Matson*.[73]

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63 *Supra*, n 14.

64 *Supra*, n 27.

65 In *R v Secretary of State for the Home Department, Ex parte McQuillan*, [1995] 4 All ER 400, at 422H-J, Sedley J observed that "Once it is accepted that the standards articulated in the [European] Convention are standards which both march with those of the common law and inform the jurisprudence of the European Union, it becomes unreal and potentially unjust to continue to develop English public law without reference to them." (This point will be of only academic interest when the Human Rights Act 1998 comes into force.)

66 [1994] 1 LRC 421.

67 In *Yin v Director of Immigration*, [1995] 2 LRC 1, after referring to *Tavita*, the Hong Kong Court of Appeal observed that it is "at least potentially arguable ... that where Hong Kong has a treaty obligation not to expel stateless persons except on grounds of national security or public order, then, even though that obligation has not been incorporated into our domestic law, it is, nevertheless, a factor which our immigration authorities ought to take into account when exercising a discretion ...".

68 (1995) 128 ALR 353.

69 The Government has responded by introducing the Administrative Decisions (Effect of International Instruments) Bill stating that there is no such expectation.

70 *See also* Ryszard Piotrowicz, "Unincorporated Treaties in Australian law", [1996] Pub L 190; Lester, "Government compliance with international human rights law: A new year's legitimate expectation", ibid, p 187.

71 In *R v Khan, supra*, n 27, Lord Nicholls observed that "when considering the common law and statutory discretionary powers under English law the jurisprudence on Article 6 can have a valuable role to play".

72 10 December 1987, CA (unreported).

73 [1997] 1 WLR 765 (CA).

European Community law and human rights

Within its sphere, European Community law is paramount law in the United Kingdom. Independently of national legislation, Community law imposes obligations on individuals and confers rights upon them which become part of their legal heritage.[74] Appropriately worded provisions of Treaty provisions, regulations, and directives are capable of giving rise to rights in individuals which national courts are bound to safeguard without the need for national implementing legislation (the principle of "direct effect"). This includes provisions of directives which are absolute, unconditional and precise.[75]

Community law takes precedence over inconsistent national legislation, and Member States must not maintain in force measures which are liable to impair the useful effects of the EEC Treaty.

> "[E]very national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."[76]

Community law applies immediately, without the need to await the outcome of domestic proceedings, even on constitutional issues.[77] An individual relying on Community law must have an effective judicial remedy.

The European Court of Justice (ECJ) has also held that national courts must have the power to ensure the necessary interim protection for rights which an individual derives from Community law, even if those courts do not have that power under their domestic law.[78]

Community law precludes the competent authorities of a Member State from relying, in proceedings brought in its national courts against those authorities by an individual relying on a directive which the Member State in question has not yet properly transposed in its domestic legal system, on national procedural rules laying down time-limits for the bringing of actions.[79] The extent to which *Emmott* is of general application is, however, uncertain.

Even where Community rules lack direct effect (for example, because they are contained in a directive which binds only public authorities, and the case involves only private parties), they may influence the interpretation of national implementing rules. In *Von Colson and Kamann v Land Nordrhein-Westfalen*,[80] a case involving a directive which had no direct effect on the parties to the case, the ECJ stated that, in dealing with national legislation designed to give effect to a directive,

> "[i]t is for the national court to interpret and apply the legislation adopted for

74 *Van Gend en Loos*, Case 26/62 [1963] ECR 1.

75 *Van Duyn v Home Office*, Case 41/74 [1974] ECR 1337.

76 *Italian Minister of Finance v Simmenthal*, Case 106/77 [1978] ECR 629, at 644.

77 Ibid; *Mecanarte*, Case C-348/89 [1991] ECR I-3277.

78 *Ex parte Factortame*, Case C-213/89 [1990] ECR I-2433.

79 *Emmott v Minister for Social Welfare and the Attorney-General of Ireland*, Case C-208/90 [1991] ECR I-4269.

80 Case 14/83 [1984] ECR 1891, at 1910-11.

> the implementation of the Directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law."

In the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designated to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter.[81]

The ECJ has increasingly insisted on the need for more effective access to justice and effective national remedies. It has held that an order made by the Secretary of State, acting under wide discretionary powers, to exclude a right of access to industrial tribunals on grounds of national security must not breach Community standards for the effective protection of the rule of law: *Johnston v Royal Ulster Constabulary*.[82] It has required that, where financial compensation is the measure adopted in a Member State to achieve sex equality, it must be adequate reparation: *Marshall (No 2)*.[83]

Member States are obliged to make good the damage caused to individuals by a breach of Community law for which they are responsible, such as a failure to implement a Community directive: *Francovich*.[84] In *Brasserie du Pêcheur*,[85] the ECJ held that where a breach of Community law is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where (a) the rule of Community law is intended to confer rights upon them; (b) the breach is sufficiently serious; and (c) there is a direct causal link between the breach and the damage sustained by the individuals. The conditions laid down by national law must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation. The condition imposed by English law on state liability, requiring proof of misfeasance in public office, was held to contravene this principle (the ECJ quaintly observing that such an abuse of power was "inconceivable in the case of the legislature").

These principles will be very important in the development in English public law of a right to compensation against the state for damage suffered by reason of an unjustifiable failure to implement a directive correctly in domestic law, and, by analogy, for "public law torts", for example, if and when the European Convention is incorporated into UK domestic law. *X (Minors) v Bedfordshire County Council*[86] is unlikely to remain the last word on this difficult subject.

Although the ECJ has no power to examine the compatibility with the European Human

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81 *Comet BV v Produktschap voor Siergewassen*, Case 45/76 [1976] ECR 2043, at 2053.

82 Case 222/84 [1986] ECR 1651.

83 Case C-271/91 [1993] ECR I-4400.

84 *Francovich v Italian Republic*, Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357. This principle was reiterated in *Ex parte British Telecommunications plc*, Case C-392/93 [1996] ECR I-1654, Judgment of 26 March 1996. The Court noted, however, that in assessing the seriousness of a breach of Community law, it was entitled to take into consideration the clarity and precision of the rule breached. In this case the wording of a directive which had been incorrectly transposed into national law was held to be imprecise, and capable of bearing the meaning attributed to it by the British Government, releasing them from liability.

85 Joined Cases *Brasserie du Pêcheur v Federal Republic of Germany*, C-46/93 and *Ex parte Factortame*, C-48/93, [1996] ECR I-1131, Judgment of 5 March 1996.

86 [1995] 2 AC 633 (HL) (a number of joined cases dealing with the deficient provision of education and social services by local authorities). (The public interest immunity declared by the House of Lords in these cases is currently being challenged before the European Commission of Human Rights.)

Rights Convention of national rules which do not fall within the scope of Community law, where such rules do fall within Community law, and a national court refers to the ECJ for a preliminary ruling, the ECJ must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with those fundamental human rights which the ECJ ensures, and which derive in particular from the Convention.[87] By this route Convention rights and freedoms will increasingly become part of English public law as an element in the interpretation of Community measures. For example, in *Elliniki Radiophonia Tileorassi*, it was for the Greek court to interpret a national rule creating a radio monopoly in the light of the EC Treaty read with the free expression guarantee in Article 10 of the Convention.

This process would be accelerated if the EC Commission's proposal (made in 1979, and revived in 1990) were adopted at the 1997 Inter-Governmental Conference on the Treaty of European Union, namely, that the Community as a whole should accede to the Convention.

One important juridical consequence of belonging to the Community legal order is that United Kingdom courts are more purposive and less textual and literal than was the case before accession to the European Community.[88]

Community law has been successfully invoked to challenge the discriminatory provisions of United Kingdom statutes against the yardstick of proportionality.[89] By using Community law in this way, English courts may give redress without waiting for the EC Commission to bring infringement proceedings before the ECJ under Article 169 of the EC Treaty.

The use of Community law to challenge a statutory provision or an administrative decision on the basis of a lack of proportionality requires a new approach to evidence. General "legislative facts" are relevant as to the history, aims, impact, appropriateness and necessity of the impugned measure or decision, including comparative material about the laws and practices of the other Member States of the European Community.[90]

English courts will have to fashion new public law remedies to give effect to Community law, such as regards declaratory relief before Parliament has enacted implementing legislation and compensatory relief for public law wrongdoing.

International human rights law in other Commonwealth countries

In recent years the highest Commonwealth courts have been increasingly willing to look beyond their national jurisdictions to international and comparative human rights principles, drawing upon the experience of other jurisdictions, and the legacy of the European Convention system, even though their states are not party to the Convention. These principles have been of particular influence in three areas: first, in relation to freedom of speech; second, in relation to the prohibition of cruel and degrading treatment; and third, in relation to the death penalty.

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87 *Elliniki Radiophonia Tileorassi*, Case C-260/89 [1991] ECR-I 2925, para 62.

88 *See*, for example, *Pepper v Hart*, [1993] AC 593 (HL), and *O'Brien v Sim-Chem Ltd*, [1980] 1 WLR 1011 (HL).

89 *R v Secretary of State for Employment, Ex parte Equal Opportunities Commission*, [1995] 1 AC 1 (HL).

90 *See*, for example, ibid.

Freedom of speech

The free speech story begins with the landmark decision of the United States Supreme Court in *New York Times v Sullivan.*[91] The plaintiff was an elected Commissioner of Police in Montgomery, Alabama. The *New York Times* published an advertisement containing several factual allegations about the activities of the Montgomery police, without identifying Sullivan. In an incandescent judgment, Justice Brennan recognized that Alabama's rule of libel law, which compelled the critic of official conduct to guarantee the truth of all his factual assertions, led, in effect, to self-censorship. Under such a rule, would-be critics of official conduct might be deterred from voicing their criticism, even though it was believed to be true and even though it was in fact true, because of doubt whether it could be proved in court, or fear of the expense of having to do so.

These criticisms of the Alabama strict liability rule (based on the English common law rule) and the public interest considerations underlying the First Amendment led the United States Supreme Court to decide that a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with knowledge that it was false, or with reckless disregard of whether it was false or not.

Sullivan has travelled across the world. In 1986, in *Lingens,*[92] the European Court of Human Rights found that the Austrian courts had violated the free speech guarantee in Article 10 of the European Convention when they awarded Bruno Kreisky, the Austrian Chancellor, damages against a journalist, Peter Lingens, who had charged Kreisky with the "basest opportunism". The Court held that the limits of acceptable criticism are wider as regards a politician than as regards a private individual. A politician "knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large".[93]

In 1993, in *Derbyshire Country Council v Times Newspapers,*[94] the House of Lords ruled that Derbyshire County Council could not use the common law of libel to vindicate their "governing reputation" because to do so would be an unnecessary interference with free speech in a democratic society. Lord Keith of Kinkel referred[95] to *New York Times v Sullivan* and other American case law[96] and observed, echoing Justice Brennan, that:

> "[w]hile 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."[97]

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91 376 US 254 (1964).

92 *Lingens v Austria*, Judgment of 8 July 1986, Series A No 103; (1986) EHRR 407.

93 Ibid, para 42.

94 *Supra*, n 20.

95 Ibid, at 547G-48D.

96 *See*, for example, *City of Chicago v Tribune Co*, 139 NE 86 (1923) (Supreme Court of Illinois).

97 *Supra*, n 20, at 548D-E.

In May 1994, in *Ballina Shire Council v Ringland*,[98] the Court of Appeal of New South Wales considered the *Derbyshire* issue. A local council was attempting to bring an action in defamation against an organization which had published a press release criticizing the practices of the council in relation to sewage disposal. The Court looked at *Derbyshire*, *Sullivan*, South African jurisprudence, and the European Convention and the International Covenant, and it held, by a majority, that governmental institutions did not have a "governing reputation", which could be vindicated in a libel action. The Chief Justice made it clear that:

> "[t]he idea of a democracy is that people are encouraged to express their criticisms, even their wrong-headed criticisms, of elected governmental institutions, in the expectation that this process will improve the quality of the government .... [T]o maintain that an elected governmental institution has a right to a reputation as a governing body is to contend for the existence of something that is incompatible with the very process to which the body owes its existence."[99]

The issues raised by *Sullivan* have been determined in other Commonwealth jurisdictions, usually in the light of their constitutional guarantees of free expression, but sometimes by extending the common law of qualified privilege.

Article 19 of the Indian Constitution expressly guarantees freedom of speech, subject to "reasonable" restrictions.[100] In October 1994, in *Rajagopal v State of Tamil Nadu*,[101] the Supreme Court of India referred to *Derbyshire* and to *Sullivan*, and held,[102] adopting *Sullivan*, that public officials cannot obtain an injunction to restrain publication of a libel; nor can they recover damages for libel in respect of the way they discharge their official duties unless they can prove that the publication was made by the defendant with reckless disregard for the truth. In such a case it is enough for the defendant to prove that he acted after a reasonable verification of the facts. It is not necessary for the defendant to prove that what he has published is true.

A few days after the *Rajagopal* decision, in *Theophanous v The Herald and Weekly Times Ltd*,[103] and in *Stephens v West Australian Newspapers Ltd*,[104] a majority of the High Court of Australia applied the recently implied constitutional right to freedom of communication, and a modified version of the *Sullivan* principle, to traditional English libel law. They decided that there is a freedom to publish material concerning members of the federal and state legislatures and relating to their suitability for office as members of Parliament. A false and defamatory statement will not be actionable if the newspaper establishes that it was unaware of the falsity of the material published, and that the publication was reasonable in the circumstances.

In November 1994, the same issue arose in three different Divisions of the Supreme Court of South Africa. In *De Klerk v Du Plessis*[105] the Supreme Court Transvaal Provincial Division

98 (1994) 33 NSWLR 680.

99 Ibid, at 691A and C.

100 A less stringent test, as a matter of literal interpretation, than is required by Article 19 of the International Covenant on Civil and Political Rights, or by Article 10 of the European Convention on Human Rights.

101 1994 (6) SCC 632.

102 Ibid, at 650.

103 [1994] 3 LRC 369.

104 [1994] 3 LRC 446.

105 1994 (6) BCLR 124 (T).

rejected a plea that Section 15 of the new Constitution protected the publication of impugned material discussing matters of public interest, published in good faith and without the intention of defaming the plaintiffs. However, qualified privilege had not been pleaded, and the Court expressly left open the possibility that the defendants might be able to rely upon *Sullivan* in a re-pleaded case.[106]

In *Gardener v Whitaker*[107] the Supreme Court Eastern Cape Division held, in the light of the constitutional guarantee of free speech, and of Sullivan and its progeny, that the common law of defamation requires that where a public employee is allegedly defamed by a publicly elected official during the course of a meeting where public issues are discussed, the plaintiff must prove not only that the statement referred to him and was defamatory, but also that the statement was "not worthy of protection as an expression of free speech".[108]

In *Jurgens v Editor, The Sunday Times Newspaper*[109] the Attorney-General of the Republic of Ciskei sued the defendant newspaper for defamation in respect of the reporting of statements made by the head of the State of Ciskei. The Supreme Court, Witwatersrand Local Division, held that the defendants were free to raise a defence based upon the constitutional guarantee of free expression in Section 15, although they disallowed an unpleaded case relying upon *Sullivan.*

In February 1995, in *Sata v Post Newspapers Ltd (No 2),*[110] the High Court of Zambia considered an argument that the common law principles of defamation, as applied to plaintiffs who were public officials, should be modified in relation to the burden and standard of proof, in the light of the guarantee of free expression in Article 20 of the Constitution of Zambia, *Sullivan, Derbyshire,* and *Theophanous.* Ngulube CJ stated that, if the Zambian Constitution had permitted him to do so, he would have adopted the approach of the High Court of Australia, rather than that of the Supreme Court of the United States.

In the context of the Zambian Constitution, which attaches equal weight to freedom of the press and the right to reputation, the Chief Justice concluded that:

> "in order to counter the inhibiting or chilling effect of [libel] litigation, I am prepared to draw a firm distinction between an attack on the official conduct of a public official and imputations that go beyond this and attack the private character of such official which attack would be universally unsanctioned."[111]

He also stated that he was prepared,

> "when considering the defence of fair comment on a matter of public interest arising from the conduct of a public official, to be more generous and expansive in its application."[112]

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106 Ibid, at 134.

107 [1994] 3 LRC 483.

108 Ibid, at 502F.

109 1995 (1) BCLR 97 (W).

110 [1995] 2 LRC 61.

111 Ibid, at 75E.

112 Ibid, at 75F.

In July 1995, in *Manning and Church of Scientology of Toronto v Hill*,[113] the Supreme Court of Canada considered the issues in *Sullivan*. The case concerned libel proceedings brought by the respondent, Crown counsel, over allegations of serious professional misconduct made by the Church of Scientology. The Supreme Court held that the common law of defamation must be interpreted consistently with the principles of the Canadian Charter of Rights and Freedoms, as a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social values and conditions.[114] After reviewing criticisms of the *Sullivan* principle, the Supreme Court decided that there was no reason to adopt *Sullivan* in Canada in an action between private litigants. However, the Supreme Court also emphasized that:

> "[n]one of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar ... this appeal does not involve the media or political commentary about government policies. Thus the issues raised by the High Court of Australia in *Theophanous* are ... not raised ... and need not be considered."[115]

In February 1996 in South Africa, the Witwatersrand Local Division Court heard the case of *Holomisa v Argus Newspapers*.[116] The case concerned the circumstances in which, under the new Constitution, public officials were entitled to claim damages for untrue defamatory statements made about them in the performance of their public duties.

Cameron J referred to *Derbyshire* and *Sullivan*, and contrasted the approach of the Australian courts in *Theophanous* with the Canadian approach in *Manning v Hill*. He felt that "Given ... the urgent need in South Africa for the 'fundamental values' which underlie [the] legal system to accommodate to constitutional norms and principles" it would be more appropriate for him to follow the "more encompassing and receptive approach" of the High Court of Australia.[117] He concluded that defamatory statements relating to "free and fair political activity" are constitutionally protected, even if false, unless the plaintiff shows that, in all the circumstances of their publication, they were unreasonably made.

In Pakistan, a few days later, in *Rashid v Nizami*[118] the Lahore High Court considered the issue. It adopted *Sullivan*, preventing a politician from recovering damages from a newspaper which had published defamatory statements made by a third party because he could not prove that the editors had acted maliciously.

Cruel and degrading treatment

The prohibition of torture and inhuman or degrading treatment or punishment is contained in Article 3 of the European Convention. In *Tyrer v United Kingdom*[119] the European Court of Human Rights held that a sentence of birching passed on a 15-year-old, following his

113 (1995) 126 DLR (4th) 129 (SCC); [1996] 4 LRC 17.

114 Ibid, para 91.

115 Ibid, para 139.

116 [1996] 1 All SA 478 (W).

117 Ibid, at 492G.

118 Judgment of 19 February 1996.

119 Judgment of 25 April 1978, Series A No 26; (1979-80) 2 EHRR 1.

conviction for assault, constituted inhuman and degrading treatment contrary to Article 3.

In June 1982, in *Riley v Attorney-General of Jamaica,*[120] the Privy Council considered whether prolonged delay in the execution of a death sentence was contrary to the prohibition of inhuman or degrading punishment in Section 17(2) of the Jamaican Constitution. Lord Scarman and Lord Brightman dissented from the majority, adopting "a generous interpretation" of the Constitution as "a constitutional instrument declaring and protecting fundamental human rights". They referred to *Tyrer,* holding that the appellants had suffered a "cruel and dehumanizing experience" by virtue of the "inordinate" delay, and that such delay was therefore unconstitutional.

In December 1983, in *The State v Petrus and Another,*[121] the Botswana Court of Appeal considered the constitutionality of statutory provisions which provided for the passing of a sentence of "imprisonment ... with corporal punishment". The punishment was to be carried out in instalments in the first and last years of the sentence. The Court referred to *Tyrer* and to the minority of opinion in *Riley,* unanimously concluding that the legislation was *ultra vires,* null and void.

In December 1987, in *Ncube and Others v The State,*[122] the Supreme Court of Zimbabwe considered the constitutionality of a sentence of whipping imposed upon three adults. The Court noted that the South African judiciary had been outspoken in their condemnation of whipping as a brutal and degrading form of punishment. It followed *Tyrer* and *Petrus,* unanimously holding that such punishments were inhuman and degrading, contrary to Section 15(1) of the Declaration of Rights in the Constitution of Zimbabwe.

In June 1989 in *A Juvenile v The State,*[123] the same court again considered the issue of corporal punishment. It arose on this occasion from a sentence of caning passed on an juvenile following his conviction for assault. The Court was unanimous in holding that the punishment was unconstitutional. Three judges (Dumbutshena CJ, Gubbay JA, Korsah JA) applied *Ncube,* holding that the same reasons that had led the Court in that case to find that the whipping of adults was unconstitutional applied equally to judicial corporal punishment inflicted on juveniles. McNally and Manyarara JJA felt that whether or not such a punishment was unconstitutional depended on the particular circumstances of the case.

The Chief Justice considered that it was an "added advantage" that the courts of Zimbabwe were "free to import into the interpretation of [the Constitution] interpretations of similar provisions in international and regional human rights instruments ...". He stated that "[i]n the end international human rights norms will become part of our domestic human rights law. In this way our domestic human rights jurisdiction is enriched".[124]

In April 1991, the Supreme Court of Namibia had an opportunity to consider the issue in *Ex parte Attorney-General of Namibia, In re Corporal Punishment by Organs of State.*[125] The Court was requested by the Attorney-General to determine whether the infliction of corporal

120 [1983] 1 AC 719 (PC).

121 [1985] LRC (Const) 699.

122 [1988] LRC (Const) 442.

123 [1989] LRC (Const) 774.

124 Ibid, at 782G-H.

125 [1992] LRC (Const) 515.

punishment by or on the authority of organs of state in respect of certain categories of person or certain crimes or offences was contrary to Article 8 of the Constitution of Namibia, which guarantees respect for human dignity and protection from inhuman or degrading treatment or punishment.

The Court considered a wide variety of comparative case law, including *Tyrer, Petrus, Ncube* and the juvenile whipping case, and concluded that any sentence of corporal punishment imposed by a judicial or quasi-judicial authority, and corporal punishment in government schools, was in conflict with the Constitution and was consequently unlawful. Mahomed AJA stated that the interpretation of the concept of "inhuman or degrading treatment" involved the making of a value-judgment which

> "requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilized international community."[126]

In June 1995, in *State v Williams and Others*,[127] the Constitutional Court of South Africa addressed the issue of corporal punishment, measuring it against Sections 10 and 11(2) of the new Constitution of the Republic of South Africa. The Court noted that the wording of Section 11(2) conformed to a large extent with most international human rights instruments, including Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, and Article 3 of the European Convention. It repeated the observations of Mohamed AJA in *Ex parte Attorney-General of Namibia* about the interpretation of the concept of "inhuman" and "degrading" treatment. It went on to survey the Commonwealth jurisprudence in the area, referring to *Tyrer, Ex parte Attorney-General of Namibia, Ncube*, the juvenile whipping case, and *Petrus* among others, following them and concluding finally that juvenile whipping was unconstitutional and unlawful.

The death penalty

In *Vatheeswaran v State of Tamil Nadu*[128] the Supreme Court of India held that the execution of the appellants, sentenced to death and subsequently detained for eight years in illegal solitary confinement, would constitute a gross violation of their right not to be subject to torture or cruel, inhuman or degrading punishment or treatment, implied into Article 21 of the Indian Constitution.

In *Soering v United Kingdom*[129] the European Court of Human Rights considered whether the extradition of a German national to Virginia, USA, where he was wanted for murder, would amount to a violation of Article 3 of the European Convention. The Court unanimously found that there was a real risk that a Virginia court would sentence Soering to death. If this proved to be the case, the conditions for prisoners on death row in Virginia would be

126 Ibid, at 527I.

127 [1995] 2 LRC 103.

128 AIR 1983 SC 361.

129 *Supra*, n 11.

sufficient to violate Article 3 of the Convention. The average period that a prisoner could expect to spend on death row before being executed was between six and eight years. Although the Court noted that this delay was largely caused by the prisoner himself, as a result of attempts to stay the proceedings, it further noted that it is "part of human nature that the person will cling to life by exploiting those safeguards to the full".

In September 1991, in the case of *Kindler v Canada (Minister of Justice)*,[130] the Supreme Court of Canada referred to *Soering*, but held by a majority of four to three that there was no violation of the Canadian Charter of Rights and Freedoms in the surrender of a convicted offender to face capital punishment in the United States. La Forest J for the majority took the view that "[i]t would be ironic if delay caused by the appellant's taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice".[131]

In *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others*,[132] the Supreme Court of Zimbabwe considered the cases of four men who had spent between four and six years on death row following sentence. It was suggested that these delays were such as to amount to inhuman and degrading treatment contrary to Section 15(1) of the Constitution of Zimbabwe. The Chief Justice engaged in an exhaustive study of the relevant law and practice in India, the United States, the West Indies and Canada. He referred to the decisions of the UN Human Rights Committee and noted that in construing Section 15(1) of the Constitution account must be taken of

> "... the emerging consensus of values in the civilized international community ... as evidenced in the decisions of other courts and the writings of leading academics ...".[133]

He followed *Ncube*, applied the opinion of the minority in *Riley*, referred to *Vatheeswaran*, *Soering* and the juvenile whipping case and disapplied *Kindler*, holding that the delays were sufficient to amount to inhuman and degrading treatment, and substituting the death sentences with sentences of life imprisonment.

In November 1993, in *Pratt and Morgan*,[134] the Privy Council considered the cases of two men who had been on death row in Jamaica for 14 years. It referred to the *Catholic Commission* case and to *Soering* and *Kindler*, holding that this delay constituted inhuman and degrading treatment contrary to Section 17(1) of the Jamaican Constitution. *Pratt and Morgan* was applied by the Privy Council in *Bradshaw v Attorney-General* and *Roberts v Attorney-General*.[135]

In June 1994, in *Republic v Mbushuu and Another*,[136] the High Court of Tanzania considered whether the imposition of the death penalty was itself contrary to Articles 14 (which guarantees the right to life) and 13(6)(e) (which guarantees protection against cruel, inhuman or degrading punishment) of the Tanzanian Constitution. Mwalusanya J stated

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130 [1993] 4 LRC 85.

131 Ibid, at 121D.

132 [1993] 2 LRC 279.

133 Ibid, at 289H.

134 *Pratt and Another v Attorney-General for Jamaica*, [1993] 2 LRC 349; [1994] 2 AC 1 (PC).

135 (joined cases) [1995] 1 LRC 260.

136 [1994] 2 LRC 335.

that "international human rights instruments and court decisions of other countries provide valuable information and guidance in interpreting the basic human rights in our Constitution".[137] He referred expressly to the Bangalore Principles and to the *Petrus* and *Catholic Commission* cases, concluding that the death penalty was a cruel, inhuman and degrading punishment contrary to the Constitution.

The Court of Appeal partly upheld this decision in January 1995.[138] It followed *Tyrer*, agreeing with the trial judge that the death sentence amounted to cruel and degrading punishment as prohibited by the Constitution. It held, however, that it was not unconstitutional. The Constitution authorized derogations from basic rights for legitimate purposes and such derogations were lawful if, as here, they were not arbitrary and were reasonably necessary for such a purpose. The Court went as far as to commend the trial judge for "his unexcelled industry in his exploration of the human rights literature".[139]

In June 1995, in *State v Makwanyane and Another*,[140] the Constitutional Court of South Africa unanimously held that the imposition of the death penalty was contrary to Chapter 3 of the new Constitution and, in particular, to Section 9, which guarantees the right to life, and Section 11(2) which prohibits cruel, inhuman or degrading treatment or punishment. The Constitution does not expressly define what is meant by "cruel, inhuman or degrading" and so the Court set out to give meaning to these words itself.

The President of the Court referred to international agreements and customary international law as providing, in accordance with the Constitution, a framework within which the relevant provisions of the Constitution could be understood. He also referred to decisions of international tribunals and to comparative "bill of rights" jurisprudence. He considered the case law on capital punishment in the United States and in India, discussed the approach taken by the European Convention and International Covenant, and examined a wide range of comparative jurisprudence which included *Pratt and Morgan*, *Kindler*, *Soering*, *Mbushuu* and the *Catholic Commission* case.

In January 1995, in *State v Ntesang*,[141] the Botswana Court of Appeal considered the constitutionality of the death penalty in Botswana. The Court held, however, that "despite that the death penalty may be considered, as it apparently has been elsewhere, to be torture, inhuman or degrading treatment",[142] the Constitution expressly preserved that form of punishment, and it could not be amended by the courts.

In February 1995, in *Jabar v Public Prosecutor*,[143] the Singapore Court of Appeal referred to *Vatheeswaran* and the other Indian authorities on the death penalty, but considered them irrelevant to the position in Singapore. It looked at *Pratt and Morgan* but chose not to follow it. Adopting similar reasoning to that adopted by the majority in *Kindler* it held that the accumulation of time spent on death row did not constitute an independent infringement of a prisoner's constitutional rights.

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137 Ibid, at 342D.

138 [1995] 1 LRC 216.

139 Ibid, at 232I.

140 [1995] 1 LRC 269.

141 [1995] 2 LRC 338.

142 Ibid, at 348C.

143 [1995] 2 LRC 349.

Conclusion

The principles stated eight years ago by the judicial colloquium in Bangalore have been developed and applied in many Commonwealth jurisdictions as part of a rich body of international and comparative human rights law. Their relevance has been widely accepted by the courts when they interpret their constitutions and declare the common law, making choices which it is their responsibility to make in free, equal and democratic societies. During the years ahead it seems probable that the national implementation of the internationally guaranteed civil and political rights will be done more effectively by national courts, making closer links across national frontiers, with much better access to the relevant jurisprudence.

The legislative and executive branches of government have a vital duty to provide the necessary means to secure the equal protection of the law, and effective access to justice for all. It is also crucially important for each branch of government - legislative and executive as well as judicial - to bring in procedures which promote compliance with the international human rights instruments by which they are bound.

4

Application of International Human Rights Law in New Zealand

*Hon Justice Sir Kenneth Keith, KBE**

New Zealand, along with the other members of the Commonwealth, is bound by a very wide range of international human rights obligations.

This paper considers in turn:

- the subject matter and characteristics of human rights treaties;
- the general constitutional status of treaties in New Zealand law;
- the legislative implementation of human rights treaties; and
- judicial approaches to the interpretation of legislation in the light of human rights instruments.

It concludes by mentioning matters of information and education, and some constitutional questions.

The paper emphasizes that part of international human rights law which is incorporated into binding treaties. It is however important to bear in mind the other sources of international law, especially customary international law. Non-binding or non-treaty instruments may also be significant; for instance, the Privacy Act 1993 is, according to its title, an Act to promote and protect individual privacy in general accordance with the Recommendation of the OECD concerning guidelines governing the protection of privacy and transborder flows of personal data.[1]

Subject matter and characteristics of human rights treaties

Discussions of human rights treaties tend to emphasize developments in the United Nations since it was founded, including its Charter which itself, notably in its Preamble and Articles 1(3), 55 and 56, includes very important guarantees of human rights and fundamental

* I am grateful for comments on a draft of this paper by James Allan, Terence Arnold, Margaret Bedggood, Lord Cooke of Thorndon, Jerome Elkind, Philip Joseph, Sir Geoffrey Palmer, William Sewell, Antony Shaw and Anne Twomey.

1 *See also* the obligation of private prisons to comply with the UN Standard Minimum Rules for the Treatment of Prisoners, Penal Institutions Act 1954 (as amended) Sections 4B and 36H. The UN General Assembly Declaration on Friendly Relations of 1970 and the First Additional Protocol of 1977 to the Geneva Conventions scheduled to the Geneva Conventions Act 1958 (as amended) could operate within the New Zealand legal system in relation to the rights of people captured in armed conflict who claim to be entitled to a fair trial as prisoners of war.

freedoms. Building on those general propositions and the Universal Declaration of Human Rights are the great general treaties, the International Covenant on Civil and Political Rights (ICCPR) (and its first Optional Protocol) and the International Covenant on Economic, Social and Cultural Rights. Next are the United Nations treaties concerned with more particular matters, of discrimination in respect of race and against women (building on the earlier conventions relating to the political rights and nationality of married women, and marriage), the Convention on the Rights of the Child, the Torture Convention, and Conventions concerned with refugees and citizenship. With important exceptions, these conventions affirm rights of the individual against the state.

A wider view is important. Going back in time are a number of significant conventions relating to the criminal liability of individuals. At first they do not appear to fall easily within the present topic since they are concerned with the ***obligations*** of individuals (rather than their rights) owed to the state or even to the world community. But the obligations are of course imposed to protect the human rights of others. Historically we can begin with war crimes and piracy, traditionally governed by customary international law but also the subject of treaty last century and this. Associated with the former body of law is the Genocide Convention, and with the latter recent conventions designed to protect transport by sea and by air. Slavery conventions were first signed in the course of the 19th century and have been updated this century; there are associated International Labour Organization (ILO) conventions relating to forced labour as well as the League of Nations conventions concerned with white slavery. Also in the criminal area are conventions relating to hostages, internationally protected persons, obscene publications and the counterfeiting of currency, the last now complemented by OECD guidelines relating to money laundering.

Some of the obligations in the conventions already mentioned are obligations not of the individual to the state, or the state to the individual, but are essentially obligations owed by one individual to another. The discrimination conventions and the ILO conventions dating back over 70 years provide notable instances. Also among the treaties operating in the private law area between individuals are the conventions of the Hague Conference concerned with the abduction of children and inter-country adoption, and of the United Nations relating to the enforcement of maintenance obligations.

To summarize: first, the subject matter of human rights treaties is enormously various. Secondly, the treaties may affirm or create (1) rights held by the individual against the state, or (2) duties owed by the individual against the state in favour of other individuals, or (3) rights and corresponding duties between individuals. (In all those situations the States Parties to the treaties are of course obliged to ensure that those rights and duties are recognized in national law.) A third variable in the treaties is in the specificity or, to use a term of art, the self-executing character of the obligations.

The significance of the last point can be highlighted by comparing two cases decided in North America soon after the Charter of the United Nations was adopted. They both

concerned challenges based on the human rights provisions of the Charter, *Re Drummond Wren*[2] and *Sei Fujii v State of California.*[3] The question for the courts in Ontario and California was whether racially discriminatory covenants and alien land laws should be struck down because, among other reasons, they were contrary to prohibitions on racial discrimination declared in the Charter of the United Nations. The anticipated result might have been that because of the Charter breach the American court would strike down the discriminatory provisions while the Canadian court would not. After all, under the United States Constitution, a treaty made "under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby",[4] while just a few years earlier, in a Canadian case, the Privy Council had reaffirmed that, if the performance of treaty obligations involved alteration of the existing domestic law, legislative action was required.[5] The outcomes were exactly the reverse of that possible prediction. The Ontario court said that the restrictive covenant was to be struck down as being contrary to public policy as manifested among other things in the Charter provisions about racial discrimination. The Californian court on the other hand drew on long-established American constitutional doctrine to say that those Charter provisions were "non-self-executing". The obligations were directed at the political arms of government, at Congress or the executive. They did not give rise to immediately enforceable rights which could be implemented by the judicial arm. (The law did fall, but for breach of the equality guarantee in the 14th Amendment to the United States Constitution.)

The New Zealand Law Commission in a recent report, *A New Zealand Guide to International Law and Its Sources,*[6] has discussed the distinction between self-executing and non-self-executing treaties in a way that may be helpful. It began by quoting from a judgment of the Supreme Court of Cyprus:

> "'Only such provisions of a Convention are self-executing which may be applied by the organs of the state and which can be enforced by the courts and which create rights for the individuals; they govern or affect directly relations of the internal life between the individual, and the individuals and the state or the public authorities. Provisions which do not create by themselves rights or obligations of persons or interests and which cannot be justiciable or do not refer to acts or omissions of state organs are not self-executing ...' (*Malachtou v Armefti,* (1987) 88 ILR 199, 212-213)."

The Commission commented:

> "If a treaty provision falls within the second, 'non-self-executing' category, extensive national practice emphasizes that further action must be taken by national, and especially legislative, authorities before the treaty provisions can be given effect to by national courts. Characteristics of the treaties indicating the need for that action include the following:
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> • The treaty might ***empower*** the state to take action. Consider for instance

2 [1945] 4 DLR 674.

3 242 P 2d 617 (1952).

4 Constitution of the United States, Article VI(2).

5 *Attorney-General for Canada v Attorney-General for Ontario,* [1937] AC 326, at 347.

6 (1996) NZLC R34, pp 16-17.

those parts of the law of the sea relating to the continental shelf and the exclusive economic zone (and probably the territorial sea as well): international law does not require states to make the claims that they are entitled to make. National action additional to the acceptance of the treaty is called for; in some cases that action will be executive but usually it is legislative. The Tokyo Convention on Crimes on Board Aircraft and the High Seas Intervention Convention similarly authorize national action which in some cases will require a legislative basis.

• The treaty itself might create a ***duty*** to take national legislative action. For instance, article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination requires states parties to declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, and incitement to racial discrimination, 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 their financing.

• The treaty might not only create a duty to take that distinct state legislative action, but it might also give that obligation a ***programmatic character***. For instance, the undertaking of each states party under article 2(1) of the International Covenant on Economic, Social and Cultural Rights is to 'take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

• The wording of the undertaking might be ***so broad as not to provide judicially manageable standards***. Pious declarations are non-self-executing. Some of the condemnatory language in the Racial Discrimination Convention has such a character.

• The obligations may be of a ***procedural*** rather than a substantive character. Many treaties, for instance in the trade and environment areas, require states to notify affected states and consult about certain matters. These provisions operate essentially only between the states parties. Chief Justice Marshall made an important statement in the first major United States decision on this matter:

> '... when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.' (*Foster v Neilson* (1828) 27 US 253, 314; (1830) 8 US 108, 121)"

That discussion by the New Zealand Law Commission occurs in the context of the choice to be made by the legislature of the form of words best designed to incorporate the treaty text. That is to say, in what circumstances is the better course simply to set out the treaty text and provide that it is to "have the force of law"? Or, on the other hand, when is it necessary to weave the obligations into the existing law? The discussion does help as well to point up the difficulty which courts may have when they are faced with arguments based simply on the general language of some international treaty texts. I come back to that matter later in the paper.

The general constitutional status of treaties in New Zealand law

In New Zealand, as in many other parts of the Commonwealth, the traditional British position is adopted: that is, that treaties do not become part of the law of the land in the sense of changing rights and duties under the law simply as a consequence of the executive action of the state becoming party. While the state is bound by virtue of the various executive actions of signature, ratification or other acceptance, if a change in rights and duties under the law is required, then there must be appropriate legislative action.

It by no means follows, however, that courts cannot have regard to treaties which have not been incorporated into the law. The Law Commission report mentioned earlier notes at least five ways in which that might happen:

1. as a foundation of the Constitution;
2. as relevant to the determination of the common law;
3. as a declaratory statement of customary international law which is itself part of the law of the land;
4. as evidence of public policy; and
5. as relevant to the interpretation of a statute.[7,8]

I discuss the last of those in some detail in a later part of the paper. The first is illustrated by cases decided in the 1920s and 1930s in New Zealand, Australia and South Africa about the power of those countries to legislate for mandated territories. Courts sought the source of that power in, among other places, the Treaty of Versailles which established the mandate system and the mandate documents themselves. The issue has not expired with the mandates. Consider the Treaty of Union between England and Scotland[9] or the Treaty of Waitangi in New Zealand.

Of the latter, Lord Cooke noted at the Sixth Judicial Colloquium at Bloemfontein that:

> "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

7 *Supra*, n 6, pp 23-5.

8 So far as I am aware no New Zealand court has yet faced directly the proposition accepted by the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh*, (1995) 128 ALR 353; but see the reference to it in the judgment of Thomas J in *New Zealand Maori Council v Attorney-General*, [1996] 3 NZLR 140, at 186.

9 Cf *Gibson v Lord Advocate*, 1975 SC 136, at 144.

> 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.[10,11]

The second role of treaties is illustrated by the litigation in the United Kingdom, mentioned by Lord Woolf at the same Colloquium,[12] about the right of local government bodies to sue in defamation. The Court of Appeal in particular gave considerable weight in the determination of the common law to the guarantee of freedom of expression in the European Convention on Human Rights.[13]

The third role of treaties was seen in recent litigation in New Zealand in which the Court of Appeal held that the Governor of Pitcairn had immunity from the jurisdiction of the local courts in respect of an employment dispute.[14]

So far as the fourth role is concerned, I have already mentioned the Ontario decision of 1945. A comparable case is the decision of the New Zealand Supreme Court in *Van Gorkom v Attorney-General*,[15] where Cooke J, when invalidating discriminatory conditions laid down by a minister under subordinate legislation, made use of international documents including the Universal Declaration of Human Rights, the Declaration on the Elimination of Discrimination Against Women, and an ILO Convention to which New Zealand was not party. That case might also be seen as one involving the interpretation of the empowering statute by reference to international texts.

The basic proposition remains, however, that treaties in the absence of implementing legislation do not impose duties or confer rights under the law of New Zealand. This paper now accordingly considers in turn legislation designed to give effect in domestic law to human rights provisions and the judicial interpretation of legislation by reference to such provisions.

Legislative implementation of human rights treaties

Following the earlier discussion of the types of obligations stated in the treaties, I begin with some examples from criminal law. In New Zealand since 1893 the criminal law has been statutory. There are no common law crimes. That approach helps give effect to the prohibition on retrospective criminal law, reaffirmed in Article 15 of the International Covenant on Civil and Political Rights.

Some legislation creating the relevant crimes shows its international origins on its face: the statutes relating to aviation crimes, war crimes (the grave breaches under the Geneva

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10 *Developing Human Rights Jurisprudence, Vol 6: Sixth Judicial Colloquium on The Domestic Application of International Human Rights Norms*, (1995), p 192.

11 I do not take up this very important area of human rights law in the present paper. *See*, for example, Lord Cooke in the paper cited in n 10, pp 191-4 and "The Challenge of Treaty of Waitangi Jurisprudence", (1994) 2 Waikato LR 1; S. Elias "The Treaty of Waitangi and Separation of Powers in New Zealand" in B.D. Gray and R.B. McClintock (eds), *Courts and Policy: Checking the Balance - Papers presented at a conference held by the Legal Research Foundation, Auckland, August 1993* (Wellington: Brooker's, 1995), p 206, and the special sesquicentennial 1990 issue of the New Zealand Universities Law Review (Vol 14, No 1).

12 *Supra*, n 10, pp 101, 104-21.

13 *Derbyshire County Council v Times Newspapers Ltd*, [1992] 1 QB 770, [1993] AC 534.

14 *Governor of Pitcairn v Sutton*, [1995] 1 NZLR 426; *see also* its judgments in the wine box cases, *Controller and Auditor-General v Davison*, [1996] 2 NZLR 278, at 306-7.

15 [1977] 1 NZLR 535, at 542-3.

Conventions of 1949 and the 1977 Protocol), torture, internationally protected persons and hostages, for instance. But in other cases that origin may not be so obvious. The Crimes Act 1961, for example, includes provisions about slavery and piracy which do not indicate any treaty origin, although the definition of piracy - somewhat quaintly, given that it was most recently re-enacted in 1961 - does define the crime by reference to "the law of nations". That provision of the Crimes Act also assumes that piracy can be committed in relation to aircraft, although, given the requirements of the definition of piracy as now found in the 1958 and 1982 Conventions on the Law of the Sea, that appears to be highly unlikely in fact. Rather, hijacking is dealt with under the Aviation Crimes Act 1972 which indicates its origins in the air law conventions of the 1960s and the 1970s.

Legislation giving explicit effect to treaty obligations might or might not use its exact terms. The earlier passage from the report of the Law Commission about self-executing and non-self-executing treaties is directed at that choice. Recent New Zealand legislation concerning the Hague Convention on the abduction of children points to the problems that can arise when the legislator decides to depart from the precise terms of the treaty texts. In a case in the Court of Appeal in 1994 where the Court did manage to reconcile the different wording of the implementing statute and of the Hague Convention (in that respect reversing the decisions in the lower courts) one of the judges said, "It is unfortunate that for reasons which are not readily discernible the Act has departed from the wording of the Convention, instead of simply adopting it as has apparently been done in other countries. Some of the differences appear to be significant."[16]

The most notable New Zealand statute implementing a human rights instrument is the New Zealand Bill of Rights Act 1990.[17] Its text is set out at the end of this paper.

According to its title, that Act 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".

As appears clearly from the text of the Bill of Rights, its terms follow closely the content and the wording of provisions of the International Covenant on Civil and Political Rights. There are differences, generally in the direction of following the language of the Canadian Charter of Rights and Freedoms. Even with those differences, the courts from the outset have been assiduous in recognizing the international origins of the Bill of Rights. That plainly conforms with the Government's intent. Its White Paper, *A Bill of Rights for New Zealand* (1985), elaborated the point when setting out the reasons for a Bill of Rights. One of them was:

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16 *Gross v Boda*, [1995] 1 NZLR 569, at 574.

17 Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1980 and the Human Rights Act 1983* (Wellington: Brooker's, 1995) provide a valuable account of the Bill of Rights including its drafting and early operation (Chapter 1 by Rishworth), its international context (Chapter 2 by Hunt and Bedggood), its constitutional significance (Chapter 3 by Rishworth), and freedom of expression (Chapter 5 by Huscroft). They refer to the New Zealand primary sources and to much of the commentary.

"The implementation of New Zealand's international obligations

4.21 New Zealand ratified the International Covenant on Civil and Political Rights in 1978. As the New Zealand Government's report and presentation to the United Nations Human Rights Committee indicates, the Government was of the opinion, with the exceptions marked by the formal reservations attached to the instrument of ratification, that New Zealand law and administrative practice conformed with the Covenants. At the same time that presentation recognized that there can be a legitimate difference of opinion about the adequacy of the protection afforded to the human rights set out in the Covenant in the absence of a basic or supreme law which guarantees those rights. In a formal legal sense there is no guarantee that the relevant law will not be changed and that Parliament will not invade the rights that New Zealand is internationally bound to observe. The representative then went on to refer to the argument mentioned earlier: that there are other informal restraints guaranteeing individual liberty.

4.22 The Bill would provide that greater guarantee of compliance with those important international obligations that comes from the superior status of the Bill. It would as well give a legal significance, a significance, that is, that can be asserted in court proceedings, to the informal restraints on which we place such very large reliance at the moment.

4.23 As will appear from the Commentary on the draft Bill, many of its provisions do in fact relate closely to those of the Covenant. There are some differences. Some provisions of the Covenant do not appear in the draft. The Bill would include rights not included in the Covenant. And the detail of the drafting differs."

The reference in paragraph 4.22 to "the superior status of the Bill" makes it necessary to note a significant difference between the 1985 proposal and the 1990 measure as actually enacted. The original proposal was for an entrenched Bill which could have been amended only following a referendum or by a 75 per cent vote of all the members of the House of Representatives. That status and the consequent judicial powers of the striking down of statutes were strongly opposed and the Bill was enacted as an ordinary statute, subject to repeal or override, impliedly as well as expressly, by other Acts of Parliament (see especially Section 4, which was added in the course of the Bill's passage through Parliament to emphasize the point). The Bill was to have interpretative rather than overriding effect. It is for others to say how significant that change in status has been.

The Human Rights Act 1993 (which replaced the Human Rights Commission Act 1977 and the Race Relations Act of 1971) is also designed, in a more general way than the Bill of Rights Act, to give effect to international human rights instruments. Its title says, among other things, that it is an Act "to provide better protection of human rights in New Zealand

in general accordance with United Nations covenants or conventions on human rights". One of the functions of the Human Rights Commission continued under the Act is to report to the Prime Minister on action needed to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights and on the desirability of New Zealand becoming bound by any such instrument. That Act also gives substantial effect to the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination Against Women. It forbids the various acts of discrimination proscribed by those conventions and sets up mechanisms through the Race Relations Office, the Human Rights Commission and a Tribunal for enforcing the prohibitions.

Many other statutes give effect to human rights obligations. That appears for instance from the list included in the Law Commission report, mentioned earlier, of statutes with possible implications for New Zealand treaty obligations.[18] That list includes about one-third of the public statutes of New Zealand.

It is not enough of course to enact the legislation. It must then be applied and interpreted. In what follows I limit myself to the judicial role.[19]

Judicial approaches to the interpretation of legislation presenting international human rights issues

In practice, three different situations involving interpretation by reference to treaty provisions can be distinguished:

1. the legislation in question aligns exactly or in substance with the relevant treaty provisions;

2. the legislation is intended in a general way to give effect to the treaty, but departs from its wording;

3. the legislation is not concerned in its main provisions and purposes with the treaty (which might indeed have been accepted by the Government after the legislation was enacted) but the treaty is nevertheless claimed to be relevant to its operation.

(A fourth situation is where the legislation contradicts the treaty. In that case, in general, the interpretative techniques are not available.)

The principal human rights cases falling within the first category relate to the application and interpretation of the Bill of Rights. In an early major case, both the present President of the Court of Appeal and his immediate predecessor emphasized the international

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18 *Supra*, n 6, pp 116-19.

19 Steps have been taken to attempt to ensure that treaties are properly taken into account when legislation is prepared. The papers put to Cabinet proposing legislation must certify compliance with relevant international obligations (*Cabinet Office Manual* (1996) 57, 122, 124). That process will sometimes be related to that under Section 7 of the Bill of Rights - the power of the Attorney-General to vet proposed legislation against the Bill (and accordingly the International Covenant on Civil and Political Rights). *See*, for example, the discussion of amendments to the Transport Act 1962, giving additional powers to the police to screen drivers for drink-driving, in light of public safety considerations and the provisions of the Bill of Rights, in Keith, "Road Crashes and the Bill of Rights: A Response", [1994] NZ Recent Law Review 115. Prevention is often better than cure.

context in which the Bill is to be seen.[20] Cooke P quoted the statement "now evidently destined for judicial immortality" made by Lord Wilberforce in *Minister of Home Affairs v Fisher*:[21] the antecedents of the Bermuda Constitution in the European Convention on Human Rights and the Universal Declaration of Human Rights and the form of the Constitution itself "call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to". Cooke P then quoted passages from the Bill of Rights including its title, set out earlier in this paper, and continued:

> "In approaching the Bill of Rights Act it must be of cardinal importance to bear in mind the antecedents. The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them: see *Mabo v Queensland* (1988) 166 CLR 186, 217-218. The right to legal advice on arrest or detention under an enactment may not be quite in that class, but in any event it has become a widely-recognized right (for some references see [1992] 2 NZLR 257 at p. 265) and one of those affirmed in New Zealand. It has great 'strategic' value as a safeguard against violations of undoubtedly fundamental rights such as the right not to be arbitrarily arrested or detained (s 22 of the New Zealand Bill of Rights Act). Subject to contrary requirements in any legislation, the New Zealand Courts must now, in my opinion, give it practical effect irrespective of the state of our law before the Bill of Rights Act."[22]

Richardson J also set out the title to the Act and made three points:

> "First 'affirm', 'protect' and 'promote' are all words expressive of a positive commitment to human rights and fundamental freedoms. It is in that spirit that interpretation questions are to be resolved. Second, the deliberate reference to 'affirm' in the long title and in s 2 which provides 'The rights and freedoms contained in this Bill of Rights are affirmed' makes the very important point that the Act is declaratory of existing rights. It does not create new human rights. As basic human rights, the rights and freedoms referred to do not derive from the 1990 Act. In that respect it parallels the Bill of Rights Act 1689 which was declaratory of 'the true, ancient and indubitable rights and liberties of the people' (s 6). That philosophical underpinning has to be taken into account when construing and applying the Bill of Rights Act provisions. Third, para (b) of the long title affirms New Zealand's commitment to internationally acceptable human rights standards. As recognized in the preamble to the International Covenant on Civil and Political Rights, human rights 'derive from the inherent dignity of the human person' and States party to the Covenant are obliged to 'promote universal respect for, and observance of, human rights and freedoms'.

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20 *Ministry of Transport v Noort*, [1992] 3 NZLR 260.

21 [1980] AC 319, at 328H.

22 *Supra*, n 20, at 270.

> Next, any reading of the 1990 Act brings out its special characteristics. Some have already been noticed. Two more should be mentioned. First the statement in Part II of civil and political rights is in broad and simple language. No doubt that is to emphasize the importance which Parliament attaches to their clear expression. It calls for a generous interpretation suitable to give the individuals full measure of the fundamental rights and freedoms referred to (*Minister of Home Affairs v Fisher*, [1980] AC 319, 328).
>
> The second is the recognition of limitations on the absoluteness and generality of the rights and freedoms affirmed in the Act. This reflects the fundamental consideration that individual freedoms are necessarily limited by membership of society and by duties to other individuals and to the community. That consideration is also reflected in the statement in the preamble to the International Covenant on Civil and Political Rights that an individual has 'duties to other individuals and to the community to which he [or she] belongs'."[23]

As appears from Section 3 of the Bill of Rights, it applies to the judiciary as well as to the other organs of the state. It may accordingly govern the way in which the courts perceive their powers, for instance in respect of the suppression of the publication of evidence. The parallel provisions of the International Covenant on Civil and Political Rights may be also used in that process, as appears from a recent judgment of the Court of Appeal lifting a suppression order on evidence which had not been admitted in a high profile murder case.[24,25] The first sentence of the judgment stated the issue in this way:

> "This application concerns, on the one hand, the principles of public and open justice and freedom of expression and, on the other, the right of privacy and the dignity of victims of offences."

By the time the application was heard the regular course of the criminal justice process was complete. Accordingly there was no real basis for contending that the suppression order was needed to protect the interests of justice in the particular sense of protecting the right of a person charged with the offence to "a fair and public hearing by an independent impartial court", Section 25(a) of the Bill of Rights.

That provision, along with the direction in the Criminal Justice Act 1985, provided the critical reminder that in the absence of compelling reasons to the contrary, criminal justice is to be public justice. That principle, said the Court, must be the starting point. The Court then quoted the parallel provisions of Article 14(1) of the International Covenant which indicates in addition possible compelling reasons, relevant as well to the limiting provision of Section 5 of the Bill of Rights, for making exceptions to the principle of public justice. Among the possible limiting principles is that stated in the Victims of Offences Act 1987: that judges should treat victims (here including the family of those murdered) with courtesy, compassion and respect for their personal dignity and privacy.

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23 Ibid, at 277.

24 *Television New Zealand Ltd v R*, [1996] 3 NZLR 393; [1997] 1 LRC 392.

25 For another recent judgment when the Covenant provisions were directly invoked *see Re J (An Infant): B and B v Director-General of Social Welfare*, [1996] 2 NZLR 134, at 145, affirming [1995] 3 NZLR 73; the court exercised its broad guardianship powers to override the parental refusal to allow a blood transfusion to a child for religious reasons. Lord Cooke also mentioned freedom of expression cases at the Bloemfontein Colloquium (*supra*, n 10, pp 186-9).

The Court next referred to a further principle supporting the lifting of the suppression order:

> "The principle of public or open justice does not stand alone in the present situation. It gains support from the right to freedom of expression, a right in this case of the proposed witness as well as of the applicant. That right is declared in s 14 of the Bill of Rights:
>
> > '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.'
>
> Again, the related covenant provision indicates, conformably with s 5 of the Bill of Rights, that there may be limits on that right. Article 19(3) states that the exercise of that right:
>
> > '... 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.'"

The Court recalled reasons and purposes underlying both the principle of public justice and the supporting right to freedom of expression:

> "In an earlier case in this Court, Woodhouse P put the reasons for public justice persuasively and succinctly:
>
> > 'The Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purposes.' *Broadcasting Corporation of New Zealand v Attorney-General*, [1982] 1 NZLR 120, 122-123; see also Cooke J, 127-128, and Richardson J, 132"

In support of freedom of expression the Court quoted the metaphor of Justice Oliver Wendell Holmes, "the best test of truth is the power of the word to get itself accepted in the competition of the market".[26] It then assessed the facts in the light of the principles and concluded:

> "To summarize, the basic principles of open and public justice, and of freedom of expression, are subject to limits. But there is no right, interest or value, in particular in terms of the dignity or privacy of members of the Bain family, which at this time justifies, in terms of s 5 of the Bill of Rights, the limit on those principles contained in the order made last December."

In this case the provisions of the Bill of Rights, the Covenant and indeed basic common law principles (as seen for instance in *Scott v Scott*)[27] were all aligned. More difficult is the second situation identified above where the fit between the treaty text and statute is not a neat one.

A notable instance is *Baigent's Case*,[28] where the Court of Appeal held that a person whose rights set out in the Bill had been breached had a cause of action in public law, in appropriate cases in monetary compensation, against the Crown.[29] The plaintiffs alleged an unlawful execution of a search warrant by the police and sought damages for trespass and breach of the right stated in Section 21 of the Bill of Rights to be secure against unreasonable search or seizure.

One problem standing in the way of the proceeding was that the Bill of Rights contains no remedy provision. Further, the remedy provision which had been included in the draft Bill of Rights tabled in Parliament in 1985 (on the model of the Canadian Charter) was no longer in the Bill introduced in 1989 when, as well, the status of the proposed measure was reduced from an entrenched Bill to an interpretative one. In both respects the New Zealand Bill differs from the related constitutional documents of Canada and of Trinidad and Tobago, the latter being significant because of the central role in the *Baigent* judgments of the Privy Council decision on the Trinidad measure in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*.[30]

A related problem was presented by immunity provisions apparently protecting the police officers and the Crown, included in the Crown Proceedings Act 1950, the Crimes Act 1961 and the Police Act 1959. Those protections, said the Crown, blocked both the common law trespass actions and any action based on the Bill of Rights. This argument gained additional force from the fact that Parliament had made it clear that the Bill of Rights would not override any legislation including that already on the statute books, Section 4. Parliament did however also provide that if legislation "can" be given a meaning consistent with the Bill of Rights that meaning "shall" be preferred to any other, Section 6. (And that direction led the judge who dissented on the main holding to read the protections narrowly, in favour of the trespass cause of action.)

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26 *Abrams v United States*, 250 US 616 (1919), at 630.

27 [1913] AC 417.

28 *Simpson v Attorney-General*, [1994] 3 NZLR 667; [1994] 3 LRC 202.

29 The decision has led to considerable comment and criticism; *see* especially the criticism by Professor John Smillie, "The Allure of 'Rights Talk': *Baigent's Case* in the Court of Appeal", (1994) 8 Otago LR 188; *see also* a note by the same author, "Fundamental Rights, Parliamentary Supremacy and the New Zealand Court of Appeal", (1995) 111 LQR 209, and the support of Rodney Harrison QC in Huscroft and Rishworth (*supra*, n 17, Chapter 10). The Law Commission is reporting to the Government on possible legislation on the matter; its draft report of 1 April 1996 supported the decision.

30 [1979] AC 385.

Among the reasons leading to the conclusion that a monetary remedy could be available for breach of the Bill were a "rights-centred" approach to the Bill, the principle that where there is a right there is a remedy and, most relevantly for the present paper, the affirmation in the title of the Bill of New Zealand's commitment to the International Covenant on Civil and Political Rights. Particular emphasis was placed on the obligation, stated in Article 2(3)(a) of the Covenant, of States Parties "to ensure that any person whose rights or freedoms as ... recognized [in the Covenant] are violated shall have an effective remedy". Supporting that obligation is the undertaking to ensure that the right to such a remedy be "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy", Article 2(3)(b). Reference was also made to the Human Rights Committee set up under the Covenant to consider, among other things, complaints by individuals of breaches of the Covenant. "The Act reflects Covenant rights, and it would be a strange thing if Parliament, which passed it one year [after New Zealand acceded to the Optional Protocol], must be taken as contemplating that New Zealand citizens could go to the ... Committee ... for appropriate redress, but could not obtain it from our own Courts".[31] Perhaps a lesson was learned from the difficulties which the United Kingdom had had with the European Human Rights Court and Commission.

That last matter is one reason for resisting the argument that the undertakings in Article 2 of the Covenant are directed at the legislative branch rather than the judicial, to return to the earlier discussion of self-executing and non-self-executing treaties. In this context it is interesting to note that, when the Human Rights Committee most recently considered New Zealand's periodic report on implementation of the Covenant, it proposed not only that the *Baigent* remedy should be available (it was informed of the decision), but that that should be made explicit in legislation. The question might be asked whether those who monitor compliance with those international obligations should be concerned about the particular means by which the state complies with its international obligations. Is it not the result which counts?[32]

The third category of case presenting interpretation issues arises where, by contrast to the other two, the legislation may have been enacted without any particular reference to the treaty, or even before the treaty was accepted. The statutory powers are often conferred in broad terms as well. The treaty provisions in issue may also be stated in general terms. In three recent immigration cases in the Court of Appeal all those matters came together: *Tavita v Minister of Immigration*,[33] *Puli'uvea v Removal Review Authority*,[34] and *Rajan v Minister of Immigration*.[35] The treaty provisions, from the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, concern the rights of the family and the child.

The relevant part of the latest of these three judgments has been paraphrased as follows:

> "The Court considered that there were at least four factors which militated in favour of reading the power conferred by s 20 as subject to the international obligations. The first is the presumption of statutory

31 *Supra*, n 28, at 691 (Casey J).

32 *See*, for example, Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 1993) pp 53-4.

33 [1994] 2 NZLR 257; [1994] 1 LRC 421.

34 [1996] 3 NZLR 538.

35 [1996] 3 NZLR 543; [1996] 4 LRC 190.

> interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations. The second is the fact that s 20 confers a discretion. Third is the great importance of the right involved. It would hardly be surprising if humanitarian considerations were mandatorily relevant to the exercise of that power, particularly as time passes and the ties of those affected with New Zealand grow. Fourth, the very existence of an 'appeal' on humanitarian grounds might be seen as implying that the initial decision maker will have regard to them.
>
> On the other hand, there were factors telling against the imposition of the requirement. First, while it is true that the power includes a discretion, it does not follow that that discretion carries with it any mandatory factors. Second, by contrast to the silence of s 20 several other provisions make it explicit that those exercising important powers leading to the removal of persons resident in New Zealand are to have regard to humanitarian considerations. Third, the issues required to be considered by the international texts appear to fall clearly within the explicit duty of an independent tribunal. Under s 22 the Deportation Review Tribunal is to determine whether it would be unjust or unduly harsh for the appellant to lose the right to be in New Zealand indefinitely. In assessing that matter, the Tribunal is to have regard among other things to the interests of the appellant's family. Fourth, while the Minister was obliged by 1977 amendments to the Immigration Act 1964 and carried forward in the 1987 Act expressly to have regard to humanitarian considerations, that is no longer the case. Following the 1991 amendments it is only the independent tribunals which are expressly required to have regard to those matters. Parliament, it might be said, has decided that only the tribunals and not the minister are now to make the humanitarian assessments.
>
> The result is that the issue noted in the *Tavita* and *Puli'uvea* cases - the significance of treaty obligations, including those stated in broad terms, which have not been given direct legislative effect, for the exercise of powers and discretions conferred in general terms - has yet to be decided by a New Zealand court."[36]

To move to broader ground, on the one side is the obligation under international law of New Zealand to comply with the treaties to which it is party; on the other the basic principle of the Constitution that the executive cannot in general alter the law of the land.[37]

Concluding comments

In the first of the three immigration cases just mentioned, Cooke P referred to two decisions of the European Court of Human Rights which "appear distinctly relevant. Neither was cited to us in argument, but that implies no criticism for the case had to be

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36 Newsletter No 2 of the Institute of Public Law, Victoria University of Wellington.

37 For a valuable discussion of the issues, pitting *The Parlement Belge*, (1879) 4 PD 129 (reversed 5 PD 197 but not on the treaty issue) against the *Case of Proclamations*, 12 Co Rep 74, 77 ER 1352, see Elkind and Shaw, "The Municipal Enforcement of the Prohibition Against Racial Discrimination: A Case Study on New Zealand and the 1981 Springbok Tour", (1984) 55 BYIL 189, pp 233-41.

prepared under pressure and such decisions are not always easy to locate". Such comments, and the growing realization of the mounting importance of international law in the national legal system, led the Law Commission to prepare the *Guide* noted earlier.[38] *The Guide* emphasizes that importance, and provides information about major sources of international legal materials. It points to the importance of professional practice and culture.

The implications of globalization for education, not only in the law schools but both before and after that stage, in general education and continuing legal education are also fundamental. As long ago as the 1820s Chancellor Kent began his lectures to the law students at Columbia College with the law of nations. The law of the United States or of New York would not be properly appreciated without that background.[39] There must be a lesson in that for legal education 170 years later.

The growth in the internationalization of law-making also brings with it major constitutional issues. New Zealand's very early ratification, in February 1990, of the Second Optional Protocol to the ICCPR relating to the abolition of the death penalty helps make the point. That was purely an executive action - as it can be in our constitutional system - involving no parliamentary or public opportunity for comment, criticism or opposition. To be fair Parliament had, on 28 November 1989, enacted the Abolition of the Death Penalty Act repealing the remnants of that penalty for treason and treachery in the armed forces. That was however effected by a private members bill which preceded the adoption by the UN General Assembly (on 15 December 1989) of the Second Optional Protocol, and although the drafting of the Protocol was mentioned in the parliamentary debate there was no indication at all that the Government would move to sign and ratify it and to do that so rapidly.

There is a strong argument that there is no right to withdraw from that Protocol. That position under international law is to be contrasted with the domestic constitutional position. At the time it ratified the Protocol the Government had accepted that it could do no better domestically than to have an interpretative Bill of Rights, and yet it was very likely committing New Zealand, without any public process, to an irrevocable bar on capital punishment. (It is not even clear that the proposed entrenched Bill of Rights would have superseded the remaining instances of capital punishment.)[40] It is not surprising that some who have called for the reintroduction of capital punishment in New Zealand have been inclined to question the commitment in the Protocol. There is, however, no question. The commitment exists. But treaty-making processes should be such as to emphasize that commitment. They should be more public, participatory and democratic.

Australia is leading the way with the important Senate Committee report, *Trick or Treaty? Commonwealth Powers to Make and Implement Treaties* (November 1995) and the Government response given in early 1996. The Government will in general table in Parliament all treaties which it proposes to accept at least 15 sitting days before acting; a national interest analysis is also to be tabled. More, timely information is to be made available and the process of consultation is to be enhanced.[41]

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38 *Supra*, n 6.

39 *Commentaries on American Law* (1826), Part I: Of the Law of Nations.

40 *See* paras 10.84 - 10.89 of the White Paper referred to at p 53, *supra*.

41 *See*, for example, the statements made on 2 May 1996 and the opening address of the Attorney-General, Daryl Williams QC, MP, to the Joint Meeting of the Australian and New Zealand Society of International Law and the Australian Branch of the International Law Association, 17 May 1996, and the *First Report* (August 1996) of the Joint Standing Committee on Treaties on the first 25 treaties tabled under the new rules.

It would be wrong for me to leave the impression that the New Zealand authorities are reluctant to make treaty processes more open and to provide greater information. There are some notable instances of consultation, for example, through the long Uruguay Round (although some controversy about that process remains),[42] and the Ministry of Foreign Affairs and Trade and other Ministries publish valuable information, for instance on New Zealand's periodic reporting on human rights treaties. And the Law Commission has prepared a paper as a basis for further discussion of the issues. The lack of appreciation of the growing significance of this international law-making activity is, I suspect, more to be found in the legal profession and the wider public than in the ministries. Meetings such as the present should help remove this ignorance.

42 Nottage, "The GATT Uruguay Round 1984-1994: 10 Years of Consultation and Co-operation", Address to the Senior Executive Service Conference, Wellington, 19 August 1994, *Ministry of Foreign Affairs and Trade Record*, August 1994.

Appendix

NEW ZEALAND BILL OF RIGHTS ACT 1990

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

1. Short title and commencement -

(1) This Act may be cited as the New Zealand Bill of Rights Act 1990.

(2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

PART I

GENERAL PROVISIONS

2. Rights affirmed - The rights and freedoms contained in this Bill of Rights are affirmed.

3. Application - This Bill of Rights applies only to acts done -

(a) By the legislative, executive, or judicial branches of the Government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4. Other enactments not affected - No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), -

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment -

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. Justified limitations - Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred - Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights - Where any Bill is introduced into the House of Representatives, the Attorney-General shall, -

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill, -

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

PART II

CIVIL AND POLITICAL RIGHTS

Life and Security of the Person

8. Right not to be deprived of life - No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9. Right not to be subjected to torture or cruel treatment - Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10. Right not to be subjected to medical or scientific experimentation - Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11. Right to refuse to undergo medical treatment - Everyone has the right to refuse to undergo any medical treatment.

Democratic and Civil Rights

12. Electoral rights - Every New Zealand citizen who is of or over the age of 18 years -

(a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and

(b) Is qualified for membership of the House of Representatives.

13. Freedom of thought, conscience, and religion - Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

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.

15. Manifestation of religion and belief - Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16. Freedom of peaceful assembly - Everyone has the right to freedom of peaceful assembly.

17. Freedom of association - Everyone has the right to freedom of association.

18. Freedom of movement -

(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

Non-Discrimination and Minority Rights

19. Freedom from discrimination -

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the

Human Rights Act 1993.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.

20. Rights of minorities - A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Search, Arrest, and Detention

21. Unreasonable search and seizure - Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22. Liberty of the person - Everyone has the right not to be arbitrarily arrested or detained.

23. Rights of persons arrested or detained -

(1) Everyone who is arrested or who is detained under any enactment -

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have 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.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is -

(a) Arrested; or

(b) Detained under any enactment -

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24. Rights of persons charged - Everyone who is charged with an offence -

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and

(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) Shall have the right to consult and instruct a lawyer; and

(d) Shall have the right to adequate time and facilities to prepare a defence; and

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

(f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25. Minimum standards of criminal procedure - Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court:

(b) The right to be tried without undue delay:

(c) The right to be presumed innocent until proved guilty according to law:

(d) The right not to be compelled to be a witness or to confess guilt:

(e) The right to be present at the trial and to present a defence:

(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

(g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

(h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:

(i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

26. Retroactive penalties and double jeopardy -

(1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27. Right to justice -

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

PART III

MISCELLANEOUS PROVISIONS

28. Other rights and freedoms not affected - An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

29. Application to legal persons - Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

5

Application of International Human Rights Law in Britain

Hon Sir John Laws

In this paper I shall discuss the impact of the European Convention on Human Rights on the law of England. I do so because the European Convention has been far and away the most influential international human rights text in English law, save (in relation to asylum cases) for the 1951 Geneva Convention relating to the Status of Refugees.[1]

Human rights law in England has an odd recent history. It is because of two factors: first, the fact that the European Convention forms no part of our municipal law;[2] secondly, because the English judges nevertheless have paid increasing attention to it. Many voices now call for its incorporation. Lord Lester, the most distinguished human rights lawyer in England, has made it his theme for a good number of years. Senior judges, including the present Lord Chief Justice and his immediate predecessor, have publicly commended its incorporation. The present government has steadfastly opposed any such change. The Labour opposition is on the other hand committed to incorporation. In this paper I do not intend to enter into the debate about incorporation, although for what it is worth I am on record as favouring it. What I am concerned with is what the common law has made of fundamental rights absent incorporation.

Attempts to persuade English judges to apply the Convention were already well known in the 1970s. I will start with *Ex parte Bibi*.[3] That was an immigration case. Louis Blom-Cooper QC sought to persuade the Court of Appeal that immigration officers acting under the Immigration Act 1971 ought to act in conformity with the Convention. Lord Denning MR said:

> "I cannot accept this submission. ... The position ... is that if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it. Furthermore, when Parliament is enacting a statute, or the Secretary of State is framing rules, the courts will assume that they had regard to the provisions of the Convention, and intended to make the enactment accord with the Convention: and will interpret them accordingly. But I would dispute

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1 Unlike the European Convention, the Refugee Convention has (in effect) been incorporated into English law by Section 2 of the Asylum and Immigration Appeals Act 1993. Since therefore it is part of our municipal law, I shall not deal with it in this paper.

2 [***EDITOR'S NOTE:*** *After this paper was written, the Labour government elected in May 1997 introduced a Human Rights Bill which would essentially incorporate the provisions of the European Convention into domestic law.*]

3 *R v Chief Immigration Officer, Heathrow Airport and Another, Ex parte Salamat Bibi*, [1976] 1 WLR 979.

> altogether that the Convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament. I desire, however, to amend one of the statements I made in the *Bhajan Singh* case [1976] QB 198, 207. I said then that the immigration officers ought to bear in mind the principles stated in the Convention. I think that would be asking too much of the immigration officers. They cannot be expected to know or to apply the Convention. They must go simply by the immigration rules laid down by the Secretary of State, and not by the Convention."[4]

Mr Blom-Cooper in fact had distinguished support for the position he took, in the shape of dicta by Scarman LJ in two recent cases. In *Bibi*, Roskill LJ (as he then was) noted:

> "In *Ex parte Phansopkar* [1976] QB 606 and again in *Pan-American World Airways Inc. v Department of Trade* [1976] 1 Ll Rep 257, Scarman LJ ... went ... rather further in this connection than did the other two members of the court. Scarman LJ, after a reference to Magna Carta, said [1976] QB 606, 626:
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> > 'This hallowed principle of our law is now reinforced by the European Convention on Human Rights to which it is now the duty of our public authorities in administering the law, including the Immigration Act 1971, and of our courts in interpreting and applying the law, including the Act, to have regard...'
>
> With respect, that dictum was obiter. I venture to think it was somewhat too wide and may call for reconsideration hereafter. In his judgment ... in the *Pan-Am* case [1976] 1 Ll Rep 257, a few days later, Scarman LJ ... went on to say very much the same thing as he had said in the *Phansopkar* case ... He said at p. 261:
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> > 'Such a Convention' - and there he was referring to the Convention on Human Rights - 'especially a multilateral one, should then be considered by courts even though no statute expressly or impliedly incorporates it into our law.'
>
> There again with great respect I think the matter is somewhat too widely expressed."[5]

Although, as we shall see, the courts have more recently made increasingly uninhibited use of the Convention, the reasoning in *Bibi*'s case has not, so far as I know, itself been questioned. The reason is not I think far to seek. Mr Blom-Cooper's submission was really to the effect that the courts should incorporate the Convention - enforce it directly in municipal litigation. This enterprise was, I think, always doomed to failure on constitutional grounds. The Convention is of course an international treaty; and under our constitutional

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4 Ibid, at 984G-985A.

5 Ibid, at 986B-F.

arrangements treaties are generally entered into by the executive. Since, subject to irrelevant exceptions, the executive is not a source of primary municipal law, it follows that a treaty must lack the force of law unless it is incorporated by Parliament.[6] The judges cannot incorporate it ***as a legal text*** into the law of England, for that would be tantamount to a legislative act: in effect, the enactment of a new statute. The position would be indistinguishable from that which would arise if Parliament passed an Act incorporating the Convention. Whatever claims may be made for judicial creativity in the English courts in recent years, plainly the judges cannot usurp the legislative function by, as it were literally, legislating themselves.

But that of course is not to say that the judges cannot make law; and, of course, nothing is more elementary than that the common law is judge-made. There is a world of difference between the incorporation of a text into law and the development of legal principle aided by a text. The real question concerning the impact of the Convention on English law is what use the judges have made of it in developing the common law. As regards that, *Bibi*, while firmly rejecting any notion of judicial incorporation, opens a door to be found in Lord Denning's dictum which I have already set out: "The position ... is that if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it". Now, the rule that the courts may look to an international treaty as an aid to the construction of a statute is well established and uncontentious.[7] But the notion that the judges may have regard to such a treaty in resolving uncertainties in the common law is rather more subtle, as I shall try to show.

However, in examining what the courts have done with the Convention in developing the common law, it is first necessary to look at more recent authority. We may come forward several years from the *Bibi* case to *Spycatcher*.[8] I will not rehearse the tortuous history of that litigation, in which Lord Lester and I were opponents at various stages in the proceedings in England. He appeared in a whole series of other jurisdictions where the Crown sought to prevent publication of that book. The first appeal to the House of Lords was concerned with whether an interlocutory injunction should be continued to prohibit certain British newspapers from reporting what the author had said, not least in light of the book's publication in the United States and the seepage of copies from there to the UK. In that case Lord Templeman said:

> "My Lords, this appeal involves a conflict between the right of the public to be protected by the Security Service and the right of the public to be supplied with full information by the press. The appeal therefore involves consideration of the Convention..."

He then set out Article 10, which of course provides:

> "(1) Everyone has the right to freedom of expression. This right shall

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6 *See* Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?", [1993] Pub L 59, p 61.

7 See Lord Diplock in *Garland v British Rail*, [1983] 2 AC 751 at 771B:

> "... it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."

8 [1987] 1 WLR 1248.

> 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."[9]

Lord Templeman proceeded to refer to the *Sunday Times*[10] case before the European Court of Human Rights in which the Strasbourg Court, dealing with the question of what kind of circumstances justified reliance on the exceptions under Article 10(2) to the right *prima facie* conferred by Article 10(1), had said:

> "[the Court] 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 which must be narrowly interpreted ... It is not sufficient that the interference involved belongs to that class of exceptions listed in Article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it."[11]

As is well known, the Strasbourg Court in that case articulated the "pressing social need" test. What is of interest for present purposes, however, is what Lord Templeman went on to say:

> "The question is therefore whether the interference with freedom of expression constituted by the Millett injunctions [viz. those which had been granted by Millett J at first instance] was, on 30 July 1987 when they were continued by this House, necessary in a democratic society in the interests of national security, for protecting 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 ..."[12]

Next, see what Lord Bridge had to say in *Brind*.[13] He (with their other Lordships' agreement) had rejected an argument to the effect that the terms of a statutory discretion, arising in that case by way of a power conferred on government to control broadcast material in certain circumstances, ought to be confined by reference to Article 10 of the Convention. He said:

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9 Ibid, at 1296F.

10 Judgment of 26 April 1979, Series A No 30; (1979-80) 2 EHRR 245.

11 Ibid, para 65.

12 *Supra*, n 8, at 1297E

13 *R v Secretary of State for the Home Department, Ex parte Brind and Others*, [1991] 1 AC 696.

> "But I do not accept that this conclusion [viz. that there is no presumption that a statutory discretionary power must be exercised within European Convention limits] means that the courts are powerless to prevent the exercise by the executive of administrative discretions, even when conferred, as in the instant case, in terms which are on their face unlimited, in a way which infringes fundamental human rights. Most of the rights spelled out in terms in the Convention, including the right to freedom of expression, are less than absolute and must in some cases yield to the claims of competing public interests. Thus, Article 10(2) of the Convention spells out and categorizes the competing public interests by reference to which the right to freedom of expression may have to be curtailed. In exercising the power of judicial review we have neither the advantages nor the disadvantages of any comparable code to which we may refer or by which we are bound. But again, this surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organizations, we are not perfectly 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. The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment."[14]

After this came the judgment of Balcombe LJ in *Derbyshire v Times Newspapers,*[15] which collects much of the recent learning on the use of the Convention in the development of English law. The case concerned the question whether a local authority may sustain a cause of action in defamation. Part of the argument involved Article 10 of the Convention. Balcombe LJ said this:

> "Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law: per Lord Ackner in *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696, 761. Thus (1) Article 10 may be used for the purpose of the resolution of an ambiguity in English primary or subordinate legislation. ... (2) Article 10 may be used when considering the principles upon which the court should act in exercising a discretion, e.g. whether or not to grant an interlocutory injunction .... (3) Article 10 may be used when the common law (by which I include the doctrines of equity) is uncertain. In *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 the courts at all levels had regard to the provisions of Article 10 in considering the extent of the duty of confidence.

14 Ibid, at 748F-749B.

15 *Derbyshire County Council v Times Newspapers Ltd and Others,* [1992] 1 QB 770.

> They did not limit the application of Article 10 to the discretion of the court to grant or withhold an injunction to restrain a breach of confidence.
>
> Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of Article 10. Thus in *R v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury* [1991] 1 QB 429, where the issue was whether the common law offence of blasphemy is restricted to Christianity, Watkins LJ, delivering the judgment of a strong Divisional Court said, at p. 449:
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> > '[Counsel] accepted that the obligations imposed on the United Kingdom by the Convention are relevant sources of public policy where the common law is uncertain. But, he maintained, the common law of blasphemy is, without doubt, certain. Accordingly, it is not necessary to pay any regard to the Convention. Nevertheless, he thought it necessary, and we agree, in the context of this case, to attempt to satisfy us that the United Kingdom is not in any event in breach of the Convention'."[16]

The decision was appealed to the House of Lords.[17] Lord Keith (with whom all their other Lordships agreed) said:

> "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."[18]

After referring to authority from the United States, he continued:

> "But as is shown by the decision in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 [the final appeal in the *Spycatcher* case] ... 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 in the public interest to do so. The same applies ... 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."[19]

Towards the end of his speech, he said:

> "The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain an action of damages for defamation. That was the conclusion reached by the Court of

16 Ibid, at 812B-G.

17 [1993] AC 534.

18 Ibid, at 547F.

19 Ibid, at 549B-C.

> Appeal, which did so principally by reference to Article 10 of the European Convention [on Human Rights] ... My Lords, I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention."

And he called to mind Lord Goff's opinion in the final *Spycatcher* appeal "that in the field of freedom of speech there was no difference in principle between English law on the subject and Article 10 of the Convention."[20]

I should also mention here another decision, of the Court of Appeal, in *Middlebrook Mushrooms Ltd v TGWU*.[21] This was an appeal against the grant of an interlocutory injunction in a picketing case. I need say no more about the facts. Neill LJ said, obiter:

> "Though counsel for the appellants did not place any specific reliance on Article 10 of the [European Convention] it is relevant to bear in mind that in all cases which involve a proposed restriction on the right of free speech the court is concerned, when exercising its discretion, to consider whether the suggested restraint is necessary."[22]

It is hardly unreasonable to suppose that the Lord Justice regarded his observation as quite uncontroversial.

What have the judges actually been doing in these decisions? They have not sought to ***incorporate*** the Convention. More important, their reasoning is not, surely, about resolving an uncertainty in the common law; it is about developing it. The truth, however, is that this is a distinction without a difference. To see that this is so, we must look at another distinction: that between statutory ambiguity and common law uncertainty. In *Bibi* Lord Denning referred to these two concepts in terms suggesting that there was no logical or legal difference between them. With deference to him, that is not right. A statute may be ambiguous because and only because its words make it so. Ambiguity, where it arises, is a property of a particular form of words and of nothing else. A common law rule cannot be ambiguous, because although (of course) it is articulated in language its sense is not dependent on any particular form of words. It follows that the concept of uncertainty in the common law points to a different idea. What can it be? There is only one candidate. It is a defining feature of the common law that it develops case by case, moulding and adapting old principle to accommodate new facts, if necessary in the light of changing social conditions. The law of negligence and that of judicial review provide prime examples. Thus the proposition that in any given circumstance the common law is uncertain denotes only this: that on the concrete facts of an instant case, there is a question which way the law ought to go. It may arise because the case is not concluded on existing authority or because the House of Lords considers that it might be right to depart from a previous decision of its own under the 1966 Practice Direction. It means that common law "uncertainty", where the Convention may be brought into play, engages issues about the law's substantive content and not about the meaning of words: two very different things.

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20 Ibid, at 550E and 551F-G.

21 *Middlebrook Mushrooms Ltd v Transport and General Workers Union and Others*, [1993] ICR 612.

22 Ibid, at 620C.

What the judges have done, case by case, is to move towards the articulation of legal principles which recognize and give effect to fundamental rights as a matter of the common law's substance. They have not always deployed the Convention in doing this: see the last citation which I have set out from Lord Keith's speech in *Derbyshire.*[23] But often they have. Sometimes they have taken it as an axiom, not requiring separate demonstration, that the common law marches with the Convention. They have even appeared to indicate that the Convention jurisprudence should be directly considered: see the citations from Lord Templeman in *Spycatcher,*[24] from Watkins LJ in *Ex parte Choudhury* set out by Balcombe LJ,[25] and from Neill LJ in *Middlebrook Mushrooms.*[26] As a matter of strict logic it is difficult to escape the view that the unspoken premise of this latter exercise is the proposition that (in the field in question) breach of the Convention amounts to a breach of English law; but that would in substance amount to *pro tanto* incorporation, and no judge would accept that that was what he was doing. I think many judges might say that the Convention expresses internationally accepted standards of personal liberty and state justice such that it would be surprising if the common law adopted a lesser standard. Thus, subject to the rules of *stare decisis* (short of the House of Lords) and to the dictates of any particular statute, the way is open to the courts to assume that the standards are the same. And as regards statutes, there is the uncontentious rule that an ambiguity will be resolved in favour of a construction which conforms to the United Kingdom's international obligations under the Convention in relation to the subject-matter in question. On this footing, it might appear that the judges are able without committing any constitutional solecism to give effect to Convention standards across the board save only where a statute unambiguously applies a lower standard.

But there remain important difficulties, and what I have so far said perhaps demonstrates that the use which the courts allow themselves to make of the Convention in developing the common law has not been precisely articulated. One difficulty relates to the very concept of statutory ambiguity. I do not know of a case where it has been held that a statutory provision in an area addressed by the Convention is indeed ambiguous, and so falls to be construed conformably with the Convention. Yet it is well known that the UK is a frequent respondent in Strasbourg, and in many of the cases that go there, I think the issue has been the use of statutory power by the UK authorities. Why then has the rule - on its face uncontentious, as I have said - that ambiguous Acts are to be construed consistently with the UK's international obligations not been more effective? I think the reason is that a case of true ambiguity, in a statute dealing with any part of the subject-matter of the Convention, is hard to find. Since in large measure the Convention is concerned with the rights of individuals *vis-à-vis* the state, Acts of Parliament bearing on such rights are apt to involve the conferment of discretionary power, and therefore use such expressions as "The Secretary of State may, if he thinks fit, ...". The term "may", and no doubt similar expressions deployed by the draftsman to confer discretion, is not ambiguous as for instance the word "cleave" is ambiguous (I use this example because "cleave" is the only word I know of in the English language which bears two diametrically opposite meanings - split asunder, and stick fast). "May" simply confers the power to do what is envisaged. The question of what limits the court should impose on that power is not a function of the

23 *Supra*, n 20.

24 *Supra*, n 9-11.

25 *Supra*, n 16.

26 *Supra*, n 21-2.

meaning of the word, which it would be if it were a question about ambiguity. Rather it concerns what standards, procedural and substantive, the court should impose on the decision-maker, what are the legitimate purposes for which the discretion may be exercised, and so forth: in English law terms, application of the *Wednesbury* and *Padfield* principles, and of appropriate requirements of fairness. While any of these judge-made criteria may involve scrutiny of the statutory context in which the discretionary power is granted (and *Padfield* will always do so), that is not because the words conferring the power are ambiguous, but because the power's setting in the Act is highly material to the court's decision as to what is the nature and extent of any public law constraints which ought to be applied to its exercise.

Accordingly the judicial task of ascertaining the limits of a statutory discretion does not consist in the resolution of an ambiguity; rather it involves the elaboration and application of substantive legal principles. It follows that the principle that the Convention may be appealed to in order to resolve an ambiguity has no application, and indeed that any attempt to apply it would be tantamount to judicial incorporation of the Convention into domestic law. This result is plainly reflected in Lord Bridge's reasoning in *Brind*:

> "... it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. Hence, it is submitted, when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes any basic human right protected by the Convention, it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations which the Convention imposes. I confess that I found considerable persuasive force in this submission. But in the end I have been convinced that the logic of it is flawed. When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it."[27]

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27 *Supra*, n 13, at 747H-748D.

Thus the rule that ambiguous provisions in Acts of Parliament are to be construed conformably with the Convention has in practice much less impact than might at first appear; indeed I have discerned no impact so far.

So there is one difficulty. Indeed, I am not sure that the word "difficulty" is right, since, for reasons I have given, I accept entirely that the judges would have no business seeking to incorporate the Convention. But it is a feature to be noticed in any discussion of the extent to which the courts may make use of the Convention, absent incorporation by Parliament.

Let me turn to another problem. Many lawyers working in the fields of administrative law and human rights would I think say that the "pressing social need" test (which by the Strasbourg jurisprudence must be met before exceptions to Convention rights such as are contained in Article 10(2) - compare Articles 8(2), 9(2), and 11(2) - will be applied) may require a state to go further in justifying the merits of its decision to curtail a Convention right than does the traditional *Wednesbury* test in English public law, albeit that the Human Rights Court has recognized that the state enjoys what it calls a "margin of appreciation". Thus "pressing social need" imports a more intrusive form of judicial control of state action than is implied by traditional English doctrines. If that is right, it uncovers what might be described as a constitutional obstacle in the way of adopting, by decisions in the common law courts, an approach to fundamental rights issues which marches in line with Strasbourg. The difficulty is as follows. The very reason why the *Wednesbury* doctrine is as confined as it is arises because the courts recognize that to substitute their own view on the merits of a decision for the view taken by the statutory decision-maker, who is Parliament's delegate, would usurp the democratically elected arm of government. Hence the traditional formulation of the *Wednesbury* rule in terms of an insistence that the decision-maker must act rationally and have regard only to legally relevant considerations; Parliament is assumed to have conferred the power in question on terms that its delegate keep within such bounds, and so for the courts to require him to do so cannot amount to any usurpation of the legislative function. *Wednesbury* may thus be seen as an aspect of the *ultra vires* principle, which as it happens I have attacked elsewhere,[28] but that is a debate beyond the scope of this paper.

The question that does arise, however, is this. How great an inhibition upon the development of a common law of fundamental rights is presented by the apparent mismatch between domestic *Wednesbury* and Strasbourg "pressing social need"? It might be thought that the dicta I have cited from Lord Templeman, Balcombe LJ, and Neill LJ - and Lord Goff's observation in the final *Spycatcher* appeal quoted by Lord Keith - suggest that the mismatch is indeed more apparent than real. But the restrictive nature of the *Wednesbury* rule is a matter of principle, whether or not on a proper analysis it is based on *ultra vires*, and our jurisprudence has to accommodate it.

The answer, I think, is to be found in a recognition that *Wednesbury* does not set a unitary, as it were monolithic, standard. In *Ex parte Smith*[29] (a case about the rules prohibiting homosexuals from serving in the armed forces) the Court of Appeal accepted the approach

28 Michael Supperstone and James Goudie, *Judicial Review* (London: Butterworths 1992), Chapter 4.

29 *R v Ministry of Defence, Ex parte Smith, and other appeals*, [1996] 1 All ER 257.

to the *Wednesbury* test put forward by counsel for the appellants as follows:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."[30]

The Court of Appeal expressly took the view that this formulation was in accordance with *Brind*, and also with the reasoning of the House of Lords in the immigration case of *Bugdaycay*,[31] to which I have not referred.

The appellants' case was rejected in *Ex parte Smith*. But given all the learning I have cited, including the approach taken in that case, I would venture these conclusions as regards the state of the law relating to fundamental rights in England:

1. Not much is to be gained from the rule that ambiguous statutes are to be construed conformably with international obligations.

2. There is no question of the judges incorporating the European Convention (or any other international text) as such into the common law.

3. The use made, and to be made, by the common law of the European Convention is growing, but is a case-by-case exercise. Within that exercise tensions between traditional public law tests of executive action and the more vigorous Strasbourg approach may lessen as the common law courts identify more concretely specific areas in which fundamental rights are in play, and as the concept of fundamental rights is increasingly recognized as belonging to the corpus of the common law.

30 Ibid, at 263C-D.

31 *Budgaycay v Secretary of State for the Home Department*, [1987] 1 All ER 940.

6

The Death Penalty: Remedying the Problems of Compliance with International Standards in the Commonwealth Caribbean

Hon Mr Justice R. Carl Rattray, OJ, QC

It is recognized and accepted by the various governments of the countries of the Commonwealth Caribbean that the international human rights instruments formulated by the United Nations represent universally accepted core values and are a benchmark of the civilization of states.

The International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol have been ratified or acceded to by a number of the independent Commonwealth Caribbean states.[1]

It is important for us to remind ourselves that for more than 25 years after it came into being the Universal Declaration of Human Rights provided the international "standard of achievement for all peoples and all nations". What the coming into being of the Covenants provided was the acceptance by States Parties of a legal obligation, which hitherto had been moral, to promote and protect human rights and fundamental freedoms.

It is in relation to the death penalty that problems have arisen in the Commonwealth Caribbean states in terms of compliance, and I will seek in this paper to identify such problems as have emerged and such progress as has been made in the efforts to remedy these problems.

It is to be noted that in Article 6(2) of the Covenant recognition is given to the fact that there are countries which have not abolished the death penalty and are therefore empowered to impose it as a sentence of the court. The provision reads as follows:

> "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the

1 At the time of writing, Barbados, Guyana, Jamaica, St Vincent and the Grenadines and Trinidad and Tobago had ratified the ICCPR and the Optional Protocol; Dominica and Grenada had ratified the ICCPR (but not the Optional Protocol); Antigua and Barbuda, Bahamas, St Kitts and Nevis, and St Lucia were party to neither of these treaties. [***EDITOR'S NOTE:*** *Subsequently, in October 1997, Jamaica notified the UN that it was withdrawing its ratification of the Optional Protocol. In May 1998, Trinidad and Tobago also announced its withdrawal from the Optional Protocol, purporting to re-accede to that instrument with a sweeping reservation precluding the Human Rights Committee from hearing any cases relating to the death penalty.*]

> provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."

The Westminster model constitutions of all the Commonwealth Caribbean states protect and preserve the fundamental rights and freedoms of the individual in terms similar to those enumerated in the Covenant on Civil and Political Rights.

The death penalty has not been abolished in any of the Commonwealth Caribbean states, as it has been retained for the criminal offence of murder.

In so far, therefore, as there is a complaint that these fundamental rights and freedoms of the citizen have been violated by the state, the citizen would have had recourse to the domestic courts under the Constitution and the domestic laws of the state, and thereafter to the international agencies after the domestic remedies have been exhausted.

The Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted and proclaimed by the General Assembly of the United Nations in December 1989, is directed to the abolition of the death penalty. This Second Optional Protocol has not been ratified by the Commonwealth Caribbean nations, which still by their constitutions and domestic laws retain the death penalty.

Article 28 and Part 4 of the International Covenant on Civil and Political Rights establishes a Human Rights Committee, and by virtue of the provisions of Article 1 of the first Optional Protocol, Commonwealth Caribbean States Parties to the Protocol have recognized:

> "the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant."

However, persons who make such a claim must have, as a pre-condition, first exhausted all domestic remedies (Article 2).

Since the creation of the Organization of American States (OAS) for the protection of human rights among member states of the Organization, the Inter-American human rights system has evolved with the essential features, *inter alia,* of a Charter, the American Convention on Human Rights, the Declaration on the Rights and Duties of Man, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

Under Article 44 of the Convention individuals or non-governmental agencies may lodge petitions alleging violation of the Convention by states who are parties to the Convention. The rights protected by the Convention are basically the same as those set forth in the typical Westminster model constitutions of the independent Commonwealth Caribbean territories and in the UN International Covenant on Civil and Political Rights.

With respect to its jurisdiction, only States Parties to the Convention and the Commission have a right to submit a case to the Inter-American Court of Human Rights.

Patrick Robinson, Jamaica's Deputy Solicitor-General and a member and one-time Chairman of the Commission has noted that:

> "Not many petitions have been lodged against Caribbean English-speaking States, perhaps because the level of human rights abuses is not very high in these countries and perhaps because the Commission is in contradistinction to the situation in the Latin American civil law countries not well known in those countries."[2]

The consideration therefore in respect of problems of compliance with international human rights standards as they relate to the Commonwealth Caribbean must recognize that for some states there are two existing regimes: the regime established under the UN Covenant; and the regime established under the OAS human rights Convention.[3]

It is in respect of the death penalty that both the UN Human Rights Committee and the Inter-American Commission on Human Rights have received communications from individuals in the Commonwealth Caribbean territories on whom sentence of death has been pronounced by the court in the domestic jurisdiction.

With regard to Jamaica, my research discloses that up to the beginning of 1995 there were 41 communications which have come before the UN Human Rights Committee from persons under sentence of death for murder and awaiting either the final determination of their cases in the domestic court system or their execution as ordered by the sentence of the court. Of these 41 cases, the Committee had in respect of 21 cases found a violation entailing the author's release or commutation of the sentence of death to one of imprisonment for life. The allegations in the different communications range over a very wide area and are directed to establishing that the author of the communication did not receive a fair trial. In some cases they have related to whether the author was promptly informed of the charges against him or was brought expeditiously before a judge or other officer authorized by law to exercise judicial discretion. In some cases the question has to do with whether the accused person had adequate time and facilities for the preparation of his defence, and sometimes even the adequacy of the legal representation has been relied upon to form the basis of a complaint.

The Westminster model constitutions of the Commonwealth Caribbean states

The fundamental rights and freedoms clauses to be found in all the constitutions of the Commonwealth Caribbean states include provisions entitling every person to the right to life, liberty and the security of the person, protection from arbitrary arrest and detention,

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2 West Indian Law Journal, Vol 17, May 1992, p 16.

3 [***EDITOR'S NOTE:*** *After this paper was written, in May 1998, Trinidad and Tobago became the first state ever to withdraw as a party to the American Convention on Human Rights. Its withdrawal will come into effect after one year, in May 1999.*]

protection from inhuman treatment, and provisions to secure the protection of the law, which include the right to be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. These rights are entrenched, as is also the right of any person alleging a breach of these provisions to seek redress by constitutional motion to the Supreme Court without prejudice to any other action with respect to the same matter which is lawfully available.

The communications to the UN Human Rights Committee and the Inter-American Commission all come from persons who have been tried in the domestic courts, convicted of murder and sentenced to suffer death in the manner provided by law.

The exhaustion of domestic remedies and the question of admissibility

In all the cases which I examined, the state took the position that the matter had been brought to the UN Human Rights Committee before the applicant had exhausted all available domestic remedies and therefore the communication was not admissible before the Committee. The domestic criminal jurisdiction in the Commonwealth Caribbean generally includes a final appeal from the local court of appeal to the Judicial Committee of the Privy Council in the United Kingdom. This is provided for under the various constitutions. There is, however, also provision in our constitutions giving a right to an aggrieved person who claims his constitutional rights to have been breached to apply to the Supreme Court by way of a constitutional motion for redress. In respect of the Jamaican cases the state maintained that the remedy of a constitutional motion was available even after the final appeal to the Judicial Committee of the Privy Council had been dismissed, since what is complained about in all the cases is in relation to breaches of constitutional rights guaranteed under the fundamental rights and freedoms clauses of the Constitution.

The UN Human Rights Committee consistently ruled the communications admissible and gave the following reasons:

> (a) The domestic remedies within the meaning of the Optional Protocol must be both available and effective.[4]
>
> (b) In Jamaica legal aid is not provided in respect of constitutional remedies. As was said by the Committee in the case of *Glenford Campbell*,[5] since no lawyer in Jamaica was prepared to represent the author of the communication on a *pro bono* basis, "it is not the author's indigence that absolves him from pursuing constitutional remedies, but the State party's inability or unwillingness to provide legal aid for that purpose".[6]
>
> (c) Although Article 5(2) of the Optional Protocol states:
>
> "(2) The Committee shall not consider any communication from an

4 *George Winston Reid v Jamaica*, 355/1989, Annual Report of the Human Rights Committee 1994, GAOR 49th session, Supplement No 40 (A/49/40), pp 59-64, para 10.

5 *Glenford Campbell v Jamaica*, 248/1987, Annual Report of the Human Rights Committee 1992, GAOR 47th session, Supplement No 40 (A/47/40), pp 232-41.

6 Ibid, para 5.4.

> individual unless it has ascertained that ... (b) the individual has exhausted all available domestic remedies",

it further provides that

> "This shall not be the rule where the application of the remedies is unreasonably prolonged".

Within the meaning of these provisions the Committee has maintained that a constitutional motion does not constitute a remedy that is both available and effective.

Article 4(2) of the Optional Protocol requires that:

> "Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter, and the remedy, if any, that may have been taken by that State."

As a consequence of Jamaica's position with respect to admissibility on the ground that all domestic remedies have not been exhausted, as well as its frequent observation that, in many cases, the communication merely raises issues of fact and evidence which the Committee does not have the competence to evaluate, the clarifications have not been forthcoming.

The failure of Jamaica to give the clarifications required by the Committee has led the Committee in *Glenford Campbell*[7] to state:

> "The Committee cannot but interpret this as the State party's refusal to co-operate under Article 4 paragraph 2 of the Optional Protocol. ... The summary dismissal of the author's allegations ... does not fulfil the requirements of Article 4 paragraph 2. In the circumstances, due weight must be given to the author's allegations to the extent that they have been credibly substantiated."[8]

The consequence of this is that in most of these cases the Committee has arrived at a conclusion on the acceptance of the facts stated by the author in the communication, since the State Party has not contested the facts for the reasons already mentioned. The unsatisfactory consequence of the state's failure to answer factual allegations may be extracted from a part of the Committee's decision in *Glenford Campbell* which reads:

> "Concerning the adequacy of the author's legal representation, both on trial and on appeal, the Committee recalls that it is axiomatic that legal assistance be made available to individuals facing a capital sentence. In the present case, it is uncontested that the author instructed his lawyer to raise objections to the confessional evidence, as he claimed this was obtained through maltreatment; this was not done. This failure had a clear incidence on the conduct of the appeal; the written judgment of the Court of Appeal

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7 *Supra*, n 5.

8 Ibid, para 6.1.

> of 19 June 1987 emphasizes that no objections were raised by the defence in respect of the confessional evidence. Furthermore, although the author had specifically indicated that he wished to be present during the hearing of the appeal, he was not only absent when the appeal was heard but, moreover, could not instruct his representative for the appeal, despite his wish to do so. Taking into account the combined effect of the above-mentioned circumstances, and bearing in mind that this is a case involving the death penalty, the Committee considers that the State party should have allowed the author to instruct his lawyer for the appeal, or to represent himself at the appeal proceedings. To the extent that the author was denied effective representation in the judicial proceedings and in particular as far as his appeal is concerned, the requirements of Article 14 paragraph 3(d) have not been met."[9,10]

The Committee, of course, arrived at its conclusion on the facts relying solely on the author's allegations and the acceptance of them as true. The unsatisfactory effect has been that in these cases, and indeed they are the great majority, the decision of the Committee has been taken in the face of an objection to the admissibility of the complaint, and without the benefit of a satisfactory hearing in order to determine the facts. This situation is one which should always be avoided as being totally unsatisfactory.

The Judicial Committee of the Privy Council in *Pratt and Another v Attorney-General for Jamaica* (hereinafter referred to as *Pratt and Morgan*)[11] noted that

> "Jamaica being a signatory to the International Covenant on Civil and Political Rights and to the Optional Protocol the views of the UN [Human Rights Committee] should be afforded weight and respect but were not of legally binding effect; and that the like considerations applied to the [Inter-American Commission on Human Rights]."[12]

In *Pratt and Morgan* also, their Lordships of the Privy Council, without expressly stating so, seem to have given some endorsement to the UN Human Rights Committee's position in relation to the effect of the applicant not embarking upon a constitutional motion before making an application to the Committee. Their Lordships stated,

> "The UN [Human Rights Committee] does not accept the complaint unless the author 'has exhausted all available domestic remedies'. The UN [Human Rights Committee] has decided in this case and in *Carlton-Reid v Jamaica* (250/1987, Annual Report of the Human Rights Committee 1990, Vol II, GAOR, 45th session, Supplement No 40, p. 85), that a constitutional motion to the Supreme Court of Jamaica is not a remedy to which the complainant need resort before making an application to the Committee under the Optional Protocol. A complainant will therefore be able to lodge a

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9 Ibid, para 6.6.

10 Article 14(3)(d) of the Covenant guarantees the right of a person charged with a criminal offence "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

11 [1994] 2 AC 1.

12 Ibid, at 27C.

> complaint immediately after his case has been disposed of by the Judicial Committee of the Privy Council."[13]

It appears therefore that the objection to the admissibility of the complaint, on the ground that domestic remedies have not been exhausted because there still existed a right to bring a constitutional motion, is no longer available to the state, as a result of the dictum of the Judicial Committee of the Privy Council, the final court of appeal in our jurisdictions, and that these complaints to the UN Human Rights Committee can now be addressed without objection by the state on this ground.

The adequacy of legal representation and the provision of legal aid

In our jurisdictions legal aid is provided for all persons charged with a capital offence if that person cannot afford to pay for legal representation. This representation is by qualified lawyers whose competence must be presumed. Concerning the adequacy of legal representation referred to by the UN Human Rights Committee in *Glenford Campbell*,[14] it is relevant to point out that, although the trial judge has a duty to ensure fairness in the conduct of the trial, a trial judge cannot instruct counsel how to conduct the defence. If an appellant is represented by counsel in an appeal as distinct from a trial, the determination of whether the appellant is present at the hearing of the appeal is one for defence counsel acting on the instructions of his client who is in custody at the time of the hearing. Some persons may wish to come before the appeal court when the appeal is being heard notwithstanding the presence of the lawyer, some may not. The court is not made aware of the arrangements between counsel and client in this regard. The blame therefore laid on the State Party by the Committee in *Glenford Campbell* with respect to the author's legal representation seems in my view to have been misplaced, and results from a misunderstanding of what takes place in the appellate process.

Article 14 paragraph 5 of the Covenant provides:

> "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

The Committee has found a violation of this article in cases where the Court of Appeal did not give a written judgment, and the decision of the Court of Appeal was appealed to the Judicial Committee of the Privy Council which dismissed the appeal. It is very rare in Jamaica that the Court of Appeal does not give a written judgment when an appeal is dismissed. The Committee has stated that

> "... if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them. Moreover, in order to enjoy the effective use of this right, the convicted person is entitled to have, within a reasonable time, access to written judgments, duly reasoned, for all instances of appeal."[15]

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13 Ibid, at 35C.

14 *Supra*, n 5.

15 *Raphael Henry v Jamaica*, 230/1987, Annual Report of the Human Rights Committee 1992, GAOR 47th session, Supplement No 40 (A/47/40), pp 210-18, para 8.4.

Our jurisprudence has never mandated, however desirable, a compulsory written judgment by our Court of Appeal, although the seriousness of the offence and the penalty in an appeal which is being dismissed would make one most desirable. Since then, however, it has been directed that in all appeals determined by the Court of Appeal in capital cases a written judgment must be given. To this extent there is now compliance with the views of the Committee.

Inhuman or degrading treatment or punishment

Article 7 of the Covenant prohibits anyone being subjected to inhuman or degrading treatment or punishment. This is a provision which finds itself in the constitutions of all the territories of the Commonwealth Caribbean. There is, however, a proviso which is common to all these constitutions, though perhaps expressed in different words, but which in the case of the Jamaican Constitution Section 17(2) reads as follows:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

The appointed day is the day the territory receives its independence. The effect of this proviso has been to keep in place as constitutional descriptions of punishment which on examination may be found to be inhuman and degrading but which were types of punishment in force in our territories immediately before our independence. The proviso prevents the categorization of these as "inhuman and degrading treatment or punishment".

Punishments such as the death penalty and flogging and whipping may well be categorized as such by some jurists. I admit to this view. Public opinion in the Caribbean, however, is strongly in favour of the retention and imposition of these forms of punishment on the basis that in an environment of escalating violent crime they have a deterrent effect which is necessary at this period of our history. It is this very environment that militates against the calm and sober discussion of these issues and, in particular, of whether the use of legislated violence by the state achieves anything other than adding another element of violence to the already violent environment which is being sought to be remedied.

Pratt and Morgan - the question of delay

The Privy Council case of Earl Pratt and Ivan Morgan in Jamaica, which has been followed in judgments of the Judicial Committee of the Privy Council in other Caribbean jurisdictions (see *Guerra v Baptiste*[16] in Trinidad and Tobago and *Peter Bradshaw and Denzil Orlando Roberts v Attorney General*[17] in Barbados) raised two issues: the question of cruel and inhuman treatment; and the question of undue delay.

16 [1995] 4 All ER 583.

17 [1995] 1 WLR 936.

It is the requirement in our constitutions that a person charged with a criminal offence should be afforded a fair hearing within a reasonable time. Both issues coalesced in *Pratt and Morgan* since it was submitted that the delay amounted to cruel and inhuman treatment. The Judicial Committee of the Privy Council had originally dismissed the appeals of Messrs Pratt and Morgan, but the matter returned to that body by way of a constitutional motion brought by Pratt and Morgan in the Supreme Court and which eventually went on appeal to the Judicial Committee of the Privy Council. The Judicial Committee had in *Riley v Attorney-General*[18] decided on a three-to-two majority that whatever the length of delay or the reasons therefor in executing a sentence of death lawfully imposed, that delay afforded no ground upon which an application by means of constitutional motion could be successfully brought as being in contravention of Section 17 of the Constitution of Jamaica which prohibits inhuman or degrading punishment or other treatment. The Jamaican courts are of course, bound by the decisions of their final Court of Appeal which is the Judicial Committee of the Privy Council.

On 2 November 1993, in a landmark decision in the case of *Pratt and Morgan*,[19] the Judicial Committee of the Privy Council sitting in a panel of seven Law Lords, rather than a panel of five which had sat in *Riley*, reversed its own decision in *Riley*. Its conclusions are so central to our consideration that I cite the final paragraphs of the judgment delivered by Lord Griffiths:

> "Their Lordships are very conscious that the Jamaican Government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated to an appellant at an early stage. The aim should be to hear a capital appeal within 12 months of conviction. The procedure contained in the Governor-General's Instructions should be reinstated so that the Jamaican Privy Council consider the case shortly after the Court of Appeal hearing and if an execution date is set and there is to be an application to the Judicial Committee of the Privy Council it must be made as soon as possible, as both the rules of the Judicial Committee of the Privy Council and the Governor-General's Instructions require, in which case it should be possible to dispose of it within six months of the Court of Appeal hearing or within a further six months if there is to be a full hearing of the appeal. In this way it should be possible to complete the entire domestic appeal process within approximately two years. Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets which, if achieved, would entail very much shorter delay than has occurred in recent cases and could not be considered to involve inhuman or degrading punishment or other treatment.

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18 *Noel Riley v Attorney-General of Jamaica*, [1983] 1 AC 719.

19 *Supra*, n 11.

> The final question concerns applications by prisoners to the [Inter-American Commission on Human Rights] and UN [Human Rights Committee]. Their Lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefiting from the wisdom of their deliberations. It is reasonable to allow some period of delay for the decisions of these bodies in individual cases but it should not be very prolonged. ... If, however, Jamaica is able to revise its domestic procedures so that they are carried out with reasonable expedition no grounds will exist to make a complaint based upon delay. And it is to be remembered that the UN [Human Rights Committee] does not consider its role to be that of a further appellate court:
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> > 'The Committee observes that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts and to review the interpretation of domestic law by national courts. Similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality.'[20]
>
> It therefore appears to their Lordships that provided there is in future no unacceptable delay in the domestic proceedings complaints to the UN [Human Rights Committee] from Jamaica should be infrequent and when they do occur it should be possible for the Committee to dispose of them with reasonable dispatch and at most within 18 months.
>
> These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'. If, therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to Section 25 of the Constitution, the Governor-General now refers all such cases to the Jamaican Privy Council who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to Section 17(1)."[21]

In the circumstances their Lordships advised Her Majesty that the appeal ought to be allowed, and the sentences of the appellants commuted to life imprisonment.

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20 *D.S. v Jamaica*, 304/1988, Annual Report of the Human Rights Committee 1991, GAOR 46th session, Supplement No 40 (A/46/40), pp 281, 282.

21 *Supra*, n 11, at 34F-36A.

There has been much discussion in Caribbean jurisprudential circles concerning *Pratt and Morgan* which I will not deal with in this paper. Suffice it to say the combination of *Pratt and Morgan* and an amendment to the Offences Against the Person Act, which I will deal with later, which categorizes murder in Jamaica into capital and non-capital, have led to a mass commutation of sentences of persons who were on death row.

The Jamaican Privy Council

The commutation of a sentence of the court or the release of a convicted person which is an exercise of the prerogative of mercy can only be effected in Jamaica by the Governor-General acting on the advice of the Jamaican Privy Council. The Governor-General is the representative in Jamaica of Her Majesty the Queen, who is the Queen of Jamaica and is the head of state of the nation,[22] which is an independent nation within the Commonwealth. The Governor-General appoints the Jamaican Privy Council and must act on its advice with respect to the exercise of the prerogative of mercy. The political government in Jamaica has no input into this determination, nor indeed in the process of the appointment of the Privy Councillors.

The recommendations of the UN Human Rights Committee are sent by the Committee to the relevant government ministry, the Ministry of Foreign Affairs, which transmits them to the Governor-General for consideration by the Privy Council for its advice, since it is only the Jamaican Privy Council that can under our Constitution commute the sentence of a court.

Of the 21 cases from Jamaica in which the UN Human Rights Committee has found a violation entailing the author's release or commutation of sentence, my enquiries reveal that 10 have been considered by the Jamaican Privy Council. In nine of those cases the advice to the Governor-General has been against release or commutation. In one case - Frank Robinson[23] - the sentence of death has been commuted to life imprisonment. The Committee had found that the violation entailed his release. It appears to me that the Jamaican Privy Council would have had before it in those cases the facts which the State Party had not supplied to the Committee, and which left the Committee to accept as factual the unrebutted allegations of the author of the communication. The Jamaican Privy Council therefore exercised its discretion on a fuller knowledge of the facts than was available to the Human Rights Committee.

Arising from this review it appears to me there needs to be some clarification between the State Party and the UN Human Rights Committee as to the role of the Committee as distinct from the role of the appellate courts in Jamaica. The lines of demarcation have to be clearly designated since a State Party is more likely to wish to follow the conclusions of the Committee if satisfied that the matters which have influenced the Committee to make its recommendations are not matters which fall within the exclusive function of the appellate courts to determine.

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22 There are states in the Commonwealth Caribbean - Trinidad and Tobago and Guyana - which are republics with a president as their head of state. Trinidad and Tobago has retained the Judicial Committee of the Privy Council as its final court of appeal.

23 *Frank Robinson v Jamaica*, 223/1987, Annual Report of the Human Rights Committee 1989, GAOR 44th session, Supplement No 40 (A/44/40), pp 241-5.

The State Party has a treaty obligation to effect the decisions of the relevant Committees established under the Covenants ratified by the state. This review raises the question as to whether a situation may not arise where in some respects the constitutional structures of the state fall short of empowering the state to carry out certain treaty obligations. If, as in the case of Jamaica, constitutionally the political government does not, in view of the constitutional role of the Jamaican Privy Council, have the final word in determining the question of commutation or release, how in this respect can it be ensured that the treaty obligation be met? There seems to me to be a need for a mechanism for dialogue on these issues and perhaps constitutional restructuring.

On an overall assessment the Commonwealth Caribbean nations' compliance with the Covenant has been substantial. The constitutions of our nations, our system of law including the common law statutes and proceedings, and our judicial structures provide an adequate framework within which the mandates of the Covenant can be, and are, substantially observed. In so far as I have highlighted the weaknesses for the purpose of this paper it is not to deny the satisfactory compliance in the areas not addressed. The existence of a vibrant, vocal and unfettered public opinion brings promptly to attention such infringements as may take place from time to time. The existence of machinery for redress is a restraining factor against excesses, even though admittedly an easy availability may not be so apparent. The pressure of escalating crime does severely test the integrity of our police forces, themselves endangered by violent crime. Efforts are continually made to clean up the police forces and institute professionalism.

If a judgment is to be given it must be against the background of these factors, including the fragile economic condition of small developing Caribbean states, which militates against large expenditures in areas like legal aid which a modern justice system demands. Perhaps the most effective monitor of the state and the most telling instrument of compliance in our democratic society would be the acceptance by the people themselves that the mandate of the Covenants is in their best interest, and that none of the provisions, including those against inhuman and degrading punishment and treatment, can be compromised because of the pressures, be they financial, or the escalating crime rates, or other, of a particular period in our history as a nation and as a people.

The way forward

I have so far sought to identify the areas of historical conflict or misunderstanding between the states of the Commonwealth Caribbean and the international human rights organizations in their treaty relationships and under the respective Covenants and specifically in relation to the death penalty.

Decisions of our final court of appeal, the Judicial Committee of the Privy Council, have sought to bring some certainty to the status of the relationship that Jamaica and other Commonwealth Caribbean jurisdictions, as signatories to the International Covenant on

Civil and Political Rights and the Optional Protocol, have to the views of the UN Human Rights Committee - namely, that they should be afforded weight and respect but are not of legally binding effect. The like considerations apply to the Inter-American Commission on Human Rights.

In so far as the interventions of the international human rights agencies and the exercise of their jurisdiction can add to delay, which takes on significant proportions in view of *Pratt and Morgan* and cases following, the question of procedures designed to minimize delay has to be addressed.

As I have noted, it now appears to be settled that a communication will be properly admissible when received by the international bodies, although a constitutional motion has not been pursued by the author. However, if states provide legal aid for such constitutional issues, the human rights image would be greatly enhanced. A new Legal Aid Bill in draft in Jamaica directed towards overhauling the legal aid system makes such a proposal.[24] Consultations between Jamaica's Solicitor-General and the Human Rights Committee in March 1994 sought to arrive at a consensus on the way forward. It was observed that

1. Greater attention should be given in the future to addressing matters of substance rather than being bogged down in preliminary issues of admissibility.

2. An "accelerated procedure" could be devised by the Committee which would expedite the process and was particularly necessary in view of the judicial decisions with respect to delays.

3. Applicants should file their substantive claims as soon as possible providing the fullest details available.

4. The Committee should not mechanically apply the five-year prescription in *Pratt and Morgan* but should assess each communication on a case-by-case basis.

5. Jurisdiction and merit issues should be dealt with at the same time, and communications speeded up by being faxed directly to the appropriate office dealing with the matter and responses sent directly to the Human Rights Committee.[25]

It does appear that if the Commonwealth Caribbean states could meet jointly with the international human rights organizations a consensus could be achieved on these issues and such other matters as would be relevant to ensuring that the states' treaty obligations are seen as mechanisms to achieve the enhancement of justice without the appearance of being a hindrance.

In Jamaica amending legislation enacted in 1992 to the Offences Against the Person Act,

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24 [***EDITOR'S NOTE:*** *This was passed into law in December 1997.*]

25 Oral communication to the author.

which created categories of murder (capital and non-capital), and a classification process in respect of prisoners on death row according to these new categories, has significantly reduced the numbers on death row. The new categorization has also resulted in fewer persons convicted of murder being sentenced to death. It is expected that there will be many fewer matters being the subject of complaints from aggrieved persons to the international human rights bodies and thus fewer communications from these bodies to the state.

In Jamaica too the combination of the effect of the Offences Against the Person (Amendment) Aet 1992 and the decision in *Pratt and Morgan* has so far resulted in the sentences of 220 persons convicted of murders and sentenced to death being commuted.

It appears to me too that some agreement could be arrived at which allowed either the UN Human Rights Committee or the Inter-American Commission on Human Rights to deal with a communication since they are in fact engaged in the same exercise and for the same purpose and neither constitute an appeal procedure from the other. Article 5(2) of the Optional Protocol to the UN Covenant does provide that

> "The Committee shall not consider any communication from an individual unless it is ascertained that ... the same matter is not being examined under another procedure of international investigation or settlement."

The question that needs to be clarified is whether the Committee should treat a case as admissible after another international investigation has been concluded, resulting in a decision.

In the final analysis, the acceptance of human rights mandates by the people, as distinct from the state, is the strongest guarantee of the survival of the human rights culture in our societies, which accept and welcome the scrutiny and recommendations of the specialist international agencies exercising their watchdog functions. This certainly requires an effective public education component, as being essential in terms of the public acceptance of the virtue of compliance with international standards in the Commonwealth Caribbean.

7

The Commonwealth Caribbean and the International Covenant on Civil and Political Rights*

Andreas Mavrommatis

On 8 November 1996 the Human Rights Committee will end its 58th session. That date will mark the completion of two decades of work by this important treaty-based organ.

This fact alone might be deemed to be sufficient to justify certain, albeit personal, observations with a fair degree of certainty, a certainty that stems from in-depth study, comparison and observation of the progress and developments in the field of human rights which has been achieved at a constantly increasing pace since the collapse of Soviet communism and its Eastern Bloc.

These observations will be mainly confined to the Caribbean region, although most of them are equally applicable to most regions.

The Human Rights Committee has to date examined the reports of nearly all of the 134 States Parties to the International Covenant on Civil and Political Rights (ICCPR). As some of them have entered the fourth cycle of their reporting obligations, the Committee has in fact examined over 300 initial, periodic and special reports.

The aforesaid reports include a rather small number of reports from Commonwealth Caribbean states. This is due to both the limited number of Caribbean states which are parties to the ICCPR, and to neglect of their reporting obligations.

As well as these reports, the Committee has to date dealt with over 710 communications, many with more than one alleged victim, and has completed consideration of all but 150 of them. Of this total, nearly 200 emanated from four Caribbean countries. About 68 of these are still pending. The proportionately high percentage of communications originating from Caribbean states can only be partly explained by the fact that in their vast majority the communications from these states involve the imposition of the death penalty.

The Human Rights Committee consists of 18 members who are independent experts, and it could be said that it has been blessed by a membership whose calibre is higher than average

* [***EDITOR'S NOTE:*** *After this paper was written, in October 1997 Jamaica notified the UN of its withdrawal from the Optional Protocol to the ICCPR. In May 1998, Trinidad and Tobago also announced its withdrawal from the Optional Protocol, purporting to re-accede to that instrument with a sweeping reservation precluding the Human Rights Committee from hearing any cases relating to the death penalty. (At the same time, Trinidad and Tobago also withdrew as a party to the American Convention on Human Rights.)*]

for such committees. Its tasks are threefold:

> (a) It considers the reports of States Parties on measures taken to give effect to the rights recognized by the Covenant. The initial report has to be submitted within one year of the entry into force of the Covenant for that State Party. The periodicity of subsequent reports is five years. The committee may also ask for special reports whenever the human rights situation in a state makes it desirable to do so. It has done this in respect of several countries including those of the former Yugoslav Federation.
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> (b) The second task is consideration of communications (or individual petitions) from complainants against States Parties to the Covenant which are also parties to the Optional Protocol. By now there exists a very important body of jurisprudence of interest to governments, judiciaries, and others.
>
> By 3 July 1996, 708 communications had been filed, of which 153 are still pending, including 108 still at the pre-admissibility stage. While 220 were declared inadmissible and 112 were discontinued, after a full consideration of the merits of 223 cases, violations were found in respect of 165 of them.
>
> (c) The Committee may also receive and consider a communication by a State Party to the Covenant, that has accepted Article 41 thereof, against another State Party that has also made a similar declaration of acceptance, alleging that the latter is not giving effect to the provisions of the Covenant and thus is not fulfilling its obligations thereunder.
>
> No such communications have, as yet, been received and it is my feeling that none is to be expected in the near future, as this type of procedure has in practice proved to be more appropriate for action under regional arrangements between like-minded states, than for action under global mechanisms.

The first two decades of the life of the Human Rights Committee have witnessed, despite understandable complaints by NGOs, considerable progress in the enjoyment of human rights, especially in so far as it concerns Third World and former Eastern Bloc countries. The new Commonwealth countries and particularly Caribbean ones, viewed as a region, have fared quite well. The fact that my theme obliges me to concentrate on certain problems of compliance with international standards in no way detracts from this assessment.

Human rights and the common law

Commonwealth countries, in so far as the application of international human rights standards is concerned, start from a distinct advantage in that most of these standards were first developed in the fertile field of common law. For example, common law countries

were amongst the first to ensure, by means of appropriate mechanisms, the independence of the judiciary.

However, sometimes this advantage is turned into an obstacle by a reluctance to accept either new related concepts or even further development and broadening of the same principles when they do not have a purely common law pedigree. There is a danger of forgetting that in our contemporary world one cannot nourish efforts for the protection and promotion of human rights solely on a diet of common law precedent.

Often the work and the jurisprudence of international human rights mechanisms, or even bills of rights contained in duly ratified international or regional treaties which under the constitutions of some countries are accorded a superior status to that of municipal law, were deemed to be a form of outside interference, and means were devised to exclude, ignore or doubt their usefulness and validity. In short, there sometimes exists considerable reluctance to accept anything that occurs outside the territorial limits and is intended to amend or improve something that obtains municipally.

Another factor is that the general socio-economic conditions in most of the former colonies did not permit them to bring their legislation up to date, and in some instances some aspects of it remain almost archaic.

International treaties

The 1970s and 1980s were the era of human rights, and many considered that a country would have no claim to respectability unless it acceded to or ratified all available human rights treaties. Thus a number of countries proceeded with ratification or accession without even a rudimentary study of their legislation and the Covenant in order either to enter a reservation, if appropriate, or to ensure substantial compliance with the Covenant's provisions. There were also even a few countries that accepted the Optional Protocol and that was the last time the Committee has heard from them despite a number of communications.

Human rights treaties are not mere exchanges of obligations between states, but are there for the benefit and protection of persons within their jurisdiction. They provide for mechanisms to monitor and ensure compliance and to receive individual petitions (providing, when appropriate, a remedy). Moreover, the Covenant contains no denunciation clauses. These characteristics make it a *sine qua non* for States Parties to have in place, prior to ratification, all that is essential in order to be able to comply with the legally binding obligations that treaties such as the Covenant impose on them.

Failure to give effect to this is one of the reasons why certain countries do not benefit to the maximum extent possible from human rights instruments.

Particular difficulties with compliance

I shall now deal with certain problems, not unique to the Caribbean, that affect compliance with international standards. I shall concentrate mainly on the death penalty and fair trial.

I have already referred to antiquated legislation, and wish to add that this covers not only procedural issues but also such other important matters as intention, malice aforethought, premeditation, provocation, insanity, degrees of murder, diminished responsibility manslaughter, failure to define torture (as distinct from other forms of assault) as a specific criminal offence, problems of identification of culprits, and the voluntary or non-voluntary nature of confessions.

There are inordinate delays in respect of trials and appeals, mostly due to lack of resources, which often turn the question of the availability of the trial record into a modern odyssey. Such delays,together with the absence of an effective scheme of legal aid, funded by the state and assisted when necessary by local bar associations, that would ensure adequate legal representation from arrest all the way to the Privy Council (when applicable) and including constitutional recourses which relate to the conduct of trials, hinder the provision of fair trial.

Today there are a number of procedures whereby such constitutional recourses are dealt with effectively and expeditiously so that delays and duplication are avoided.

Death penalty

In so far as the imposition of the death penalty is concerned, the situation in the Caribbean is in substantial compliance with the letter and spirit of the Covenant in that the death penalty is imposed only for the most heinous crimes, and the mandatory sentence of death is now confined to first degree or capital murder, thereby correcting anomalies due to the old concept of malice aforethought. However, I would like to stress that whilst the Covenant does not prohibit, but only limits, the imposition of the death penalty, it clearly envisages the progressive abolition thereof. Thus the increase in the number of crimes carrying the death penalty, or its reimposition after its abolition, is in all probability contrary to the Covenant.

According to the jurisprudence of the Human Rights Committee, the method of execution is important, as it could violate the provision of Article 7 that deals with cruel punishment. Death by hanging is of doubtful consonance with international standards, and death by gas asphyxiation definitely, according to the Human Rights Committee, violates Articles 7 and 10 of the Covenant.

The mandatory imposition of a death sentence would be contrary to Article 14(5) of the Covenant which provides for review (appeal) of both conviction and sentence by a higher tribunal.

I should also say a few words about what has become known as the "death row

phenomenon", first propounded by the European Court of Human Rights and then taken up by the Judicial Committee of the Privy Council in a case from Jamaica.

The position of the Committee which is held by a fast eroding and thin majority is, in a nutshell, as follows:[1]

> "... While a period of detention on death row of well over 11 years is certainly a matter of serious concern, it remains the jurisprudence of this Committee that detention for a specific period of time does not amount to a violation of Articles 7 and 10(1) of the Covenant in the absence of some further compelling circumstances. The Committee is aware that its jurisprudence has given rise to controversy and wishes to set out its position in detail.
>
> The question that must be addressed is whether the mere length of the period a condemned person spends confined to death row may constitute a violation by a State party of its obligations under Articles 7 and 10 not to subject persons to cruel, inhuman and degrading treatment or punishment and to treat them with humanity. In addressing this question, the following factors must be considered:
>
> (a) The Covenant does not prohibit the death penalty, though it subjects its use to severe restrictions. As detention on death row is a necessary consequence of imposing the death penalty, no matter how cruel, degrading and inhuman it may appear to be, it cannot, ***of itself***, be regarded as a violation of Articles 7 and 10 of the Covenant.
>
> (b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that Article 6 'refers generally to abolition in terms which strongly suggest that abolition is desirable'....
>
> (c) The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (Article 31 of the Vienna Convention on the Law of Treaties). As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.
>
> In light of these factors, we must examine the implications of holding the length of detention on death row, *per se*, to be in violation of Articles 7 and 10. The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's

1 *Errol Johnson v Jamaica*, 588/1994, views adopted by the Committee 22 March 1996, UN Doc CCPR/C/56/D/588/1994 (5 August 1996).

> object and purpose. The above implication cannot be avoided by refraining from determining a definite period of detention on death row, after which there will be a presumption that detention on death row constitutes cruel and inhuman punishment. Setting a cut-off date certainly exacerbates the problem and gives the State party a clear deadline for executing a person if it is to avoid violating its obligations under the Covenant. However, this implication is not a function of fixing the maximum permissible period of detention on death row, but of making the time factor, *per se*, the determining one. If the maximum acceptable period is left open, States parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.
>
> The second implication of making the time factor *per se* the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed. This is not a message the Committee would wish to convey to States parties. Life on death row, harsh as it may be, is preferable to death. ...
>
> In the present case, neither the author nor his counsel have pointed to any compelling circumstances, over and above the length of the detention on death row, that would turn Mr Johnson's detention into a violation of Articles 7 and 10...."[2]

The views of the members of the Committee who have dissented are quite significant and it is pertinent to include excerpts from the individual opinion of one of them:

> "However, the Committee, conscious of the risks of maximalist application of such a view by States, recognizes that keeping a person under death sentence on death row for a number of years is not a good way of treating him.
>
> This position is very debatable for the following reasons:
>
> It is true that the Covenant does not prohibit the death penalty;
>
> It logically follows from this that execution of the penalty is also not forbidden and that the existence of a death row, i.e. a certain period of time prior to execution, is in this sense inevitable;
>
> On the other hand, one cannot rule out the conclusion that no time-lag can constitute cruel, inhuman or degrading treatment by postulating that awaiting death is preferable to death itself and that any sign to the contrary

2 Ibid, para 8.

emanating from the Committee would encourage the State to proceed with a hasty execution.

This reasoning may be considered excessively subjective on two counts. In an analysis of human behaviour, it is not exceptional to find that a person suffering from an incurable illness, for example, prefers to take his own life rather than await the inevitably fatal outcome, thereby opting for immediate death rather than the psychological torture of a death foretold.

As to the 'message' which the Committee refuses to send to States lest the setting of a time-limit provoke hasty execution, this again is a subjective analysis in that the Committee is anticipating a supposed reaction by the State. ...

I therefore believe that being on death row cannot in itself be considered as cruel, inhuman or degrading treatment. However, it must be assumed that the psychological torture inherent in this type of waiting must, if it is not to constitute a violation of Article 7 of the Covenant, be reduced by the State to the minimum length of time necessary for the exercise of remedies.

Consequently, the State must:

- Institute remedies;

- Prescribe reasonable time-limits for exercising and examining them. ...

However, since the Covenant does not prohibit capital punishment, its imposition cannot be prohibited, but it is incumbent on the Human Rights Committee to ensure that the provisions of the Covenant as a whole are not violated on the occasion of the execution of the sentence.

Inevitably, each case must be judged on its merits: the physical and psychological treatment of the prisoner, his age and his health must be taken into consideration in order to evaluate the state's behaviour in respect of Articles 7 and 10 of the Covenant. Similarly, the judicial procedure and the remedies available must meet the requirements of Article 14 of the Covenant...."[3]

Although subscribing to the logic of the majority view, I do believe that there might come the time when prolonged incarceration on death row may itself amount to "compelling circumstances". The solution does not lie in a fixed cut-off date but should depend on individual circumstances.

My last point on the question of the death penalty is simply a plea to States Parties to respect what we call "Rule 86 decisions"[4] by the Committee requesting the State Party not to execute the sentence until the Committee completes consideration of the case. To do

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3 Ibid, p 11.

4 Rule 86 of the Committee's Provisional Rules of Procedure.

otherwise is not just a violation of an obligation under international law but also a complete disregard of what is perhaps the most valuable gift to mankind, the right to life.

There have been dozens of instances of compliance with Rule 86 decisions and two regrettable instances[5] of non-compliance. These two cases highlight the problems which have arisen from fixing a maximum specific time limit on death row which does not in practice allow sufficient time for the exhaustion of all possible appeals.

Fair trial

In the field of human rights the quintessence of protection is to be found in the courts of law, and its embodiment is the fair trial. It should be realized that constitutions, even those that have included verbatim the texts of international instruments, contain only minimum standards, which at the international level are frequently supplemented by subsequent instruments and the practice and jurisprudence of human rights organs.

There are a lot more difficulties in respect of fair trial, most of which are systemic in the sense that protection emanates from the Constitution, municipal laws and existing common law principles and that international obligations seem to be immaterial if they cannot be found in any of the above. The most recent example was the Privy Council's June 1996 decision in *Director of Public Prosecutions v Tokai*,[6] a Trinidad and Tobago case that involved an unacceptably long delay in bringing the accused to trial.

The above, coupled with the almost universal lack of enabling laws or mechanisms that permit the implementation of views or decisions of international treaty bodies, makes ineffective the protection that states have voluntarily covenanted to ensure to both citizens and aliens within their jurisdiction.

Trial without undue delay is one of the most frequent grounds for complaints and covers not only preliminary enquiries and first instance trials but also appeals. A lot more importance is attached to the former, as trials involve witnesses and their power of recollection.

A lot of what has already been said in respect of the death row phenomenon is relevant to this, and delays in preparing the record of trials or appeals or providing written reasoned judgments have also often accounted for inordinate delays, although in this regard matters have recently improved greatly in the region.

Legal aid is another one of the problems faced in respect of fair trial. Legal assistance should be assigned to an accused person, without payment if he does not have sufficient means to pay for it, throughout the criminal process. Preferably it should start upon arrest and continue to the very end of the appeal process including such constitutional or other recourses as would adjudicate on the fairness of the trial.

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5 *Glen Ashby v Trinidad and Tobago*, 580/94; *Rockliffe Ross v Guyana*, 702/96.

6 [1996] 3 WLR 149.

There should be in place a system of legal aid that ensures not only availability but also adequacy of legal representation. Time and again, in going through the records of trials and appeals, the Human Rights Committee has been struck by the apparent inadequacy of representation, often due to lack of interest because of ridiculously low fees. The question of adequacy could also be raised in respect of privately engaged counsel and this is an issue where the bench can also play an important role.

There also exist difficulties connected with inadequate time for preparation of a defence, lack of efforts to trace witnesses, stereotype defences, such as is sometimes the case with alibi, with the accused making unsworn statements from the dock, and delay at police stations, either in informing a suspect of the reasons for his arrest and detention, or in bringing him before a magistrate for a remand order. The question of the admissibility of confessions also frequently raises problems, particularly as such confessions are often the only evidence in an otherwise weak prosecution case.

Conclusion

Human rights are the birthright of every woman and man on the planet. They are too precious to depend for their implementation on the largesse of governments or the "length of the Chancellor's foot". They are too vital to be employed by the great powers as a tool to combat totalitarianism or authoritarianism and even then only when economics and geostrategics permit it. And they are too urgent, after years of neglect, to be dehumanized by being given low priority in state planning and projections. It is the duty of all of us to promote their application before it is denied to us.

Although it is true that developing countries face more problems in applying social and economic rights with indirect effects on civil and political rights, there is no human rights paradise and even wealthy developed countries, especially when facing problems connected with internal security, insurrection, crime, immigration or other social problems resort to action that gives the basic principles of human rights a very wide berth.

My long association with the Caribbean and with human rights permit me a number of suggestions.

Firstly that, as is the case almost everywhere, steps are urgently needed to improve awareness, not only because awareness is the necessary prerequisite to claiming one's rights, but also because it will remedy the anomaly of a region with the Caribbean's sophistication, humane approach to problems, and dedication to democracy having a rather poor record of acceptance of basic international human rights conventions such as the two Covenants.

The local bar and other lawyers' associations have a particular responsibility to improve their knowledge of international human rights law and act as the catalyst that would ensure its eventual entrenchment in systems that have closed their shells to it.

Given the very nature of human rights, with the Universal Declaration being considered part of customary international law, the fact that acceptance of its tenets has now become an important factor in international relations and almost a precondition to the granting of economic aid, and the acceptance by all that efforts to improve states' compliance with human rights norms is not considered to be interference in their internal affairs, governments in the region should urgently consider, *inter alia*, the following:

(a) entrenchment of international human rights instruments in their legislation and/or establishing a bill of rights with a ranking higher than ordinary municipal legislation;

(b) the initiation or completion of a thorough study of their laws, regulations and jurisprudence so as to ensure consonance with the provisions of international instruments applicable to them;

(c) given that constitutional provisions in respect of human rights are rather limited, and may in many cases permit infringements which are prohibited by international instruments, governments should also take all measures necessary to ensure that views, recommendations and decisions of international organs or mechanisms supervising the implementation of human rights treaties and/or dealing with individual petitions or communications are implemented, by means of enabling legislation or some other process, as soon as possible;

(d) governments should also improve, as necessary, human rights provision in their constitutions or basic laws, and provide additional protection by introducing new institutions such as independent national human rights commissions, ombudsmen, and, when applicable, by accepting provisions in international conventions such as the (first) Optional Protocol to the Covenant on Civil and Political Rights;

(e) improve generally, in the case of the Covenant, co-operation with the Human Rights Committee and in particular give full and not incomplete or stereotype replies to allegations in communications under its Optional Protocol and also accelerate the rate of compliance with the views of the Committee; and

(f) include the subject of human rights in the curricula of schools, universities, police and military academies, and in bar examinations.

The above will help to maximize the benefit from international human rights treaties. However, as we all realize, it sometimes happens that a country does not have the economic or human resources to do what is necessary in the field of rights and freedoms. Such a lack of resources can lead, among other things, to delays in producing periodic reports to the Committee by most, if not all, countries of the region. In that case they should turn to

regional or UN advisory services that are there to help. The Human Rights Committee and its individual members, at least in so far as the Covenant on Civil and Political Rights is concerned, are quite willing to lend a helping hand on this.

8

Freedom of Expression in the Caribbean

*Hon Madame Justice Jean Permanand**

The Shorter Oxford Dictionary defines "freedom", *inter alia*, as follows:

> "1. Exemption or release from slavery or imprisonment; personal liberty; 2. Exemption from arbitrary control; independence; civil liberty; 3. The quality of being free from the control of fate or necessity; the power of self determination."

The freedoms which we today take for granted were hard fought for by our ancestors. As a consequence, the several rights which are enshrined in the written constitutions of nearly all or most democratic countries must be carefully preserved and jealously guarded.

No country which professes to have a democratic form of government should allow the executive government to abridge the fundamental freedoms and rights enshrined in its Constitution or Bill of Rights. It must be pointed out that in some jurisdictions there seems to be a disturbing tendency for some chief executive officers or ministers of government to portray themselves as being infallible and to consider their positions as being tantamount to immunity from criticism.

The following quotation is conveniently quoted:

> "It is freedom of expression that guarantees the rights of individuals, minorities, the collective and the community. Any suggestion that freedom of expression is a luxury of the West insults the historic struggles of individuals and communities all over the world for the dignity and well-being of their kind, for social fulfilment, equality of opportunity, equitable sharing of resources, access to shelter, nourishment and health. Such claims are an attempt to diminish our humanity, to reduce us to marginal existence even within our own societies. It is a clear vote for the party of Power against the communality of Freedom."[1]

The bills of rights in modern Commonwealth constitutions, notably in the Commonwealth Caribbean countries, include qualified guarantees of freedom of conscience and religion,

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* Deepest gratitude is conveyed to Errol Mathew Esq, Senior Tutor, and Mrs R. Johncilla, successful final year student (July 1996), both of the Hugh Wooding Law School, for their research and assistance.

1 Wole Soyinka, Nigerian writer and Nobel Laureate, quoted in *Human Rights Education Newsletter* (York, UK: Centre for Global Education, University College of Ripon and York St John) No 13, Spring 1996.

freedom of speech and expression, and freedom of peaceable assembly and association.[2] The qualifications are manifested in various statutory and judicial restraints. In Britain these rights, though not formally guaranteed, enjoy protection in practice. In 1979 Lord Denning MR, in delivering the judgment in a matter where a political party brought an action against a borough council,[3] expressed his opinion on the importance of freedom of speech and freedom of assembly:

> "Freedom of speech means freedom not only for the views of which you approve, but also freedom for the views [of which] you most heartily disapprove.... But, mark you, freedom of speech can be abused. It can be used so as to promote violence; to propagate racial hatred and class warfare; and to undermine the structure of society itself....
>
> Freedom of assembly is another of our precious freedoms. Everyone is entitled to meet and assemble with his fellows to discuss their affairs and to promote their views: so long as it is not done to propagate violence or do anything unlawful."[4]

In practice the freedoms are intimately related and if serious encroachments are made on any one of them some or all will be diminished.

In this paper I propose to consider the several constitutions of the Commonwealth Caribbean and their provisions touching and concerning freedom of expression. These provisions are juxtaposed with provisions guaranteeing a similar right in various treaties to which some of the Caribbean states are signatories. The implications of these treaties in the context of municipal law provisions are explored. Judicial determinations by national, regional and international courts are incorporated to illustrate the operation of the various restraints. The related issue of freedom of speech as an aspect of parliamentary privilege is also examined.

The significant issue of the right of an individual to a fair trial with the correlative issue of freedom of the press (which is guaranteed under the Constitution of Trinidad and Tobago) is given particular attention, having regard to the current contentious nature of these issues in the Caribbean, and in particular in Trinidad and Tobago. The Judicial Committee of the Privy Council affirmed on 19 February 1996 the decision of the Court of Appeal of Trinidad and Tobago, comprising JJA Sharma, Gopeesingh and Permanand, in *Boodram v Attorney-General of Trinidad and Tobago*[5] where the appellant had contended that adverse publicity would prejudice his right to a fair trial. Lord Mustill, who expressed the opinion of the Board, held that no constitutional question is invoked, but stated,

> "In expressing this conclusion their Lordships do not altogether foreclose the possibility of an application to the High Court for relief under the Constitution in a case of trial by media where the chance of a fair trial is obviously and totally destroyed, for there is no due process of law available in such a case to put the matter right."[6]

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2 S.A. de Smith and R. Brazier, *Constitutional and Administrative Law*, (6th ed, Penguin 1989), p 482.

3 *Verrall v Great Yarmouth Borough Council*, [1981] QB 202.

4 Ibid, at 217.

5 [1996] 2 LRC 196; (1996) 47 WIR 485 (see also *infra*, n 68 and accompanying text).

6 Ibid, at 206.

The paper then discusses other aspects of freedom of the press, access to information and, finally, the implications of the Internet on fundamental rights and freedoms in the context of the need to protect them against abuse.

Relevant constitutional provisions of the Caribbean

The Constitutions of the States of Anguilla, Antigua and Barbuda, the Bahamas, Barbados, Bermuda, Dominica, Grenada, Guyana, Jamaica, Montserrat, St Lucia, St Kitts and Nevis, St Vincent,[7] and Trinidad and Tobago[8] declare that persons in the respective states enjoy freedom of expression protected by the provision of an enforcement procedure against the state or organ of the state. The protection is given in public law. As between private citizens other legal restraints and appropriate redress exist.

In the Constitution of the Republic of Trinidad and Tobago[9] Section 4 provides as follows:

> "It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:- ...
>
> (i) freedom of thought and expression;
>
> (j) freedom of association and assembly; and
>
> (k) freedom of the press."

Its predecessor, the 1962 Constitution,[10] is one of a family of constitutions similar, but not now identical, in form, enacted for former colonial dependencies of the Crown on their attaining independence.

The relevant provisions of the constitutions of the other aforementioned Caribbean states differ from the provisions of the Trinidad and Tobago Constitution, as in the latter there is no express provision for restraints on these freedoms. This, however, is not to say that the qualification does not apply. Section 4 of the Constitution declares that the rights and freedoms therein enumerated had existed even before the coming into being of the Constitution itself. This principle has been given judicial force by the Privy Council[11] where it was stated that at least in Trinidad and Tobago the fundamental rights and freedoms enshrined in the Constitution are rights which

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7 Schedule to the Anguilla Constitution Order 1982, Sections 1, 11 and 16; First Schedule to the Antigua and Barbuda Constitution Order 1981, Chapter 23 (1992 Revised Laws of Antigua and Barbuda), Sections 3(b), 12 and 18; Schedule to the Bahamas Independence Order 1973, Sections 15, 23 and 28; Schedule to the Barbados Independence Order 1966, Sections 11, 20 and 24; Second Schedule to The Bermuda Constitution Order 1968, Sections 1, 9 and 15; First Schedule to the Commonwealth of Dominica Constitution Order 1978, Sections 1, 10 and 16; First Schedule to The Grenada Constitution Order 1973, Sections 1, 9 and 16; Schedule to the Constitution of the Co-operative Republic of Guyana 1980, Sections 40, 146 and 153; Second Schedule to the Jamaica Independence Act 1962, Sections 13, 22 and 25; Second Schedule to the Montserrat Constitution Order 1989, Sections 52, 60 and 66; First Schedule to the St Lucia Constitution Order 1978, Sections 1, 10 and 16; First Schedule to the St Christopher and Nevis Constitution Order 1983, Sections 3, 12 and 18; Schedule to the St Vincent Constitution Order 1979, Sections 1, 10 and 16.

8 Schedule to the Constitution of the Republic of Trinidad and Tobago Act 1976.

9 Ibid, Section 4.

10 Trinidad and Tobago (Constitution) Order in Council (1962) SI 1962 No 1875, 2nd Schedule.

11 *Thornhill v Attorney-General of Trinidad and Tobago*, [1981] AC 61.

> "have in fact been enjoyed by the individual citizen, whether their enjoyment by him has been *de jure* as a legal right *de facto* as the result of a settled executive policy of abstention from inference or a settled practice as to the way in which an administrative or judicial discretion has been exercised."[12]

The relevant provisions of the Constitution of Barbados,[13] which may be considered to be the prototype of the other Caribbean constitutions, are:

> "11. Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely - ...
>
> (d) freedom of conscience, of expression and of assembly and association,
>
> the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest....
>
> 20(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence or other means of communication.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -
>
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality, or public health; or
>
> (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the administration or

12 Ibid, at 71C, per Lord Diplock.

13 *Supra*, n 7.

technical operation of telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or

(c) that imposes restrictions upon public officers or members of a disciplined force."

In these constitutions the enforcement provisions give an aggrieved party the right to make an application to the High Court on an allegation that any of the applicant's rights has been, is being, or is likely to be infringed, and the High Court has original jurisdiction to hear such applications and make such orders for the purpose of "enforcing or securing the enforcement of any of the provisions ... to the protection of which the person is entitled."[14] In all of the states the applicant has a right of appeal to the Court of Appeal, and in some to the Privy Council, with a stay of execution of the order as may have been granted by the lower court, and there is also provision, at the discretion of the court, to grant bail.[15]

The international law dimension

While the right to freedom of expression is enshrined in several treaties to which many of the Caribbean states are signatories, it is to be noted that national constitutions and municipal laws may prevail, as, for example, the Constitution of the Republic of Trinidad and Tobago provides in Section 2: "This Constitution is the supreme law of Trinidad and Tobago". The treaties, however, recognize the need for curtailment of freedom of speech and expression in certain cases.

Article 19 of the of the ***International Covenant on Civil and Political Rights*** (1966) 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."

14 Constitution of the Republic of Trinidad and Tobago, Section 14(2).

15 Constitution of the Republic of Trinidad and Tobago, Section 14(5).

The first Optional Protocol to the International Covenant makes provision for individuals claiming to be victims of violations of the rights under the Covenant to send communications to the Human Rights Committee set up under the Covenant, for it to "receive and consider".

The ***American Convention on Human Rights*** (1969) also provides for the protection in the signatory states of the right to freedom of expression. Article 13 contains basically the same provisions as Article 19 of the International Covenant, but with the following elaborations:

> "(3) The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
>
> (4) ... public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
>
> (5) Any propaganda for war and advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."[16]

Although the above is a comprehensive statement of the right to freedom of expression, the reservation expressed by Trinidad and Tobago to Article 62 of the American Convention seems to point to an affirmation of the provisions of the Constitution of the Republic of Trinidad and Tobago in the face of the limited recognition given to the jurisdiction of the Inter-American Court. Perhaps this is in keeping with the principle of international law which deems municipal laws as prevailing in the event of contradiction with the provisions of international law instruments.

The following international human rights instruments which guarantee the right of freedom of expression and recognize the need for curtailment are also noted:

The ***African Charter on Human and Peoples' Rights*** was adopted by the Organization of African Unity in Kenya in 1981, and came into force in 1986. In 1987 a Commission was appointed, and by Article 60 it is enjoined to draw inspiration from international law on human and peoples' rights and other international instruments including the Universal Declaration of 1948. On freedom of expression, the Charter provides in Article 9:

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16 Barbados, Dominica, Grenada, Jamaica, and Trinidad and Tobago have ratified this Treaty. Note, however, the reservations made by Trinidad and Tobago in respect of Article 62 which provides the option to all states ratifying the instrument to recognize the jurisdiction of the Inter-American Court of Human Rights (IACtHR) which Court has jurisdiction to rule on all matters relating to the interpretation of the American Convention brought before it for its adjudication. The Inter-American Court has declaratory powers as well as the power to award compensation to injured parties. Trinidad and Tobago, in its reservation with respect to Article 62 dealing with the jurisdiction of the Inter-American Court, declared that it would recognize this court "only to the extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago and provided that any judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizens". (Similarly, it should be noted here that Section 13(1) of the Constitution of Nigeria 1989 provides: "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 of the National Assembly".) [***EDITOR'S NOTE:*** *On 26 May 1998, however, subsequent to the completion of this paper, Trinidad and Tobago notified the Organization of American States that it was withdrawing its ratification of the American Convention.*]

"(1) Every individual shall have the right to receive information.

(2) Every individual shall have the right to express and disseminate his opinions within the law";

and in Article 27(2):

"The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest";

and Article 28 states:

"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".

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

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 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 majority judgment in the *Sunday Times*[17] case given by the European Court of Human Rights interpreted the aforementioned Article 10 and stated that it was 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".[18] Earlier, when this case had come before the House of Lords, Lord Reid had stated, "Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice".[19] Thereafter followed the unanimous judgment in *Lingens v Austria*[20] when the European 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.

17 Judgment of 26 April 1979, Series A No 30; (1979-80) 2 EHRR 245.

18 Ibid, para 65.

19 *Attorney-General v Times Newspapers Ltd*, [1974] AC 273, at 294E.

20 Judgment of 8 July 1986, Series A No 103; (1986) 8 EHRR 407.

Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them."[21] 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."[22]

The reluctance of the House of Lords in the aforementioned *Times Newspapers*[23] case appears to have been settled in *Derbyshire County Council v Times Newspapers Ltd*[24] where Lord Keith agreed with Lord Goff's statement in *Attorney-General v Guardian Newspapers Ltd (No 2)*,[25] that "in the field of freedom of speech there was no difference in principle between English law on the subject and Article 10 of the Convention", and added, "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".[26]

Restraints on the right to freedom of expression

At common law freedom of expression consists of the right to speak or write as one wishes provided that in doing so no legal rules are infringed. This is well described in an excellent treatise on the law of libel as follows:

> "Our present law permits anyone to say, write and publish what he pleases; but if he make a bad use of this liberty he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment."[27]

In modern times the restrictions, though not oppressive, can be described as multifarious. These include prohibitions relating to the publication of defamatory, treasonable, seditious, obscene, and blasphemous matter, or matters which are calculated to provoke a breach of the peace. There are also those special limitations which forbid the inciting of mutiny or disaffection, contempt of court, and the unauthorized publication of parliamentary proceedings.[28]

Having regard to the above, the list which follows is not exhaustive, but the intention is to give a broad picture of the scope of an individual's right to freedom of expression.

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21 Ibid, para 41.

22 Ibid, para 42.

23 *Supra*, n 19.

24 [1993] AC 534.

25 [1990] 1 AC 109, at 283-4.

26 *Supra*, n 24, at 551G.

27 Odgers, *Libel and Slander, Introduction* (3rd ed, 1896) p 12, cited in A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, London: Macmillan, 1959), p 240.

28 Lloyd G. Barnett, *The Constitutional Law of Jamaica* (Oxford: Oxford University Press, 1977), p 408.

Defamation

This is one of the most important limitations on the freedom of expression. In a well known dictum, Cave J stated:

> "the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit."[29]

The filing of lawsuits ("gagging writs", as they are termed) against newspapers and journalists is not unknown in the Caribbean. In Guyana several such lawsuits were filed by the former President against the *Catholic Standard* and its editor.[30] This paper was for several years the only non-political medium of communication in Guyana. A recent case in Trinidad and Tobago was brought by a former Attorney-General against a newspaper for libel, but the matter did not reach finality; the former Attorney-General is now deceased and the action did not survive after his death.[31]

In June 1996 the Barbados House of Assembly passed an amendment to the ninety-year-old Defamation Act which removed the distinction between libel and slander. With the abolition of the distinction, a statement will be simply defamatory. One of the important factors of the Act is the "defence of triviality" - that is, that the circumstances of the publication of the matter complained of were such that the person defamed was not likely to suffer harm to his reputation.

In both civil and criminal cases there are a number of occasions on which publication is absolutely privileged. The classic example of such absolute privilege is the freedom of expression given to members of parliament in respect of matters stated or published on proceedings held in that chamber. This privilege extends to official reports of the proceedings in parliament.

Censorship

Censorship in the broad context of the right to freedom of expression relates to official power given under various statutes whereby the exercise of freedom of speech is restrained. Thus, for example, under the Cinematograph Act[32] of Trinidad and Tobago a Board of Film Censors is established which has the power to review all films before they are aired for public viewing.

It is an offence under this Act to present by means of cinematograph or other optical apparatus any exhibition of pictures or other optical effects without the permission of the Board which is appointed by the Minister. The Chairman of the Board of Censors complained in 1992 that there is no jurisdiction with regard to videos. While censorship in this regard could lead to the issue of a denial of the right of the individual to respect for his private life, in a recent case brought by the state against the curator of the zoo, convictions were recorded for possession of pornographic videos. A conviction was subsequently

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29 *Scott v Sampson*, [1882] 8 QBD 491, at 503.

30 Ainsley Sahai, *A Comparative Study of the Media Laws in the Caricom Countries: A study for UNESCO* (Kingston, Jamaica: UNESCO, January 1996), p 15.

31 *Richardson v Trinidad and Tobago Newspaper Group Ltd*, HCA 5267/89.

32 Cinematograph and Video Entertainment Act, Chapter 20:10 of the Laws of Trinidad and Tobago, Sections 11-12.

recorded against him in the United States for a similar offence on a plea of guilty.

In terms of theatres and plays it is noteworthy that public morals and obscenity play an important role in the adjudication of offences which are deemed to arise in this context. The use of certain language is still deemed to be contrary to the laws against obscenity. In 1991, in the course of a performance at Port of Spain, two actors were arrested on stage and charged with offences contrary to the Theatres and Dance Halls Act.[33] This is an Act which has been in existence since 1934.

A fundamental provision exists in most of the Commonwealth Caribbean constitutions giving the head of state (be it the President or Governor-General) the power to make certain regulations in times of emergencies. The provisions are usually very widely worded, for example:

> "(1) Without prejudice to the power of Parliament to make provision in the premise, but subject to this section, where any period of public emergency exists, the President may, due regard being had to the circumstances of any situation likely to arise or exist during such period make regulations for the purpose of dealing with that situation and issue orders and instructions for the purpose of the exercise of any powers conferred on him or any other person by any Act referred to in subsection
>
> (3) or instrument made under this section or any such Act....
>
> (3) An Act that is passed during a period of public emergency and is expressly declared to have effect only during that period or any regulations made under subsection (1) shall have effect even though inconsistent with Sections 4 and 5 except in so far as its provisions may be shown not to be reasonably justifiable for the purpose of dealing with the situation that exists during that period."[34]

It was indeed under these provisions that a gag was placed on the press in 1970 during the Black Power revolution in Trinidad and Tobago, when a state of emergency was declared,[35] likewise the declaration of a curfew in July 1990 when the state of Trinidad and Tobago was the target of an attempted coup.[36] Other instances in the Commonwealth Caribbean when declarations of states of emergency have affected the media have been in Jamaica in 1967; Antigua and Barbuda in 1968; Montserrat in 1969; and Anguilla in 1969.[37]

In accordance with the Trinidad and Tobago Post Office Act[38] the Postmaster-General is authorized to withdraw from transmission through the post any postal article of a seditious character or containing any words or marks of a scurrilous, threatening, indecent, obscene or grossly offensive character.[39]

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33 Chapter 21:03 of the Laws of Trinidad and Tobago.

34 Constitution of the Republic of Trinidad and Tobago, Section 7(1) and (3).

35 Emergency Powers Act 1970.

36 Emergency Powers Regulations 1990.

37 *Supra*, n 30, p 12.

38 Post Office Act, Chapter 47:01 of the Laws of Trinidad and Tobago, Sections 23 and 58, and Regulation 66.

39 Sedition Act, Chapter 11:04 of the Laws of Trinidad and Tobago, Section 5(5).

Public order

Closely associated with the question of freedom of expression embracing the freedom of the press is the matter of public order. Every Caribbean country has legislation protecting public order. These provisions usually prohibit unauthorized public marches and public meetings, attempts to influence public opinion prejudicially to public order, the possession of documents whose dissemination is likely to cause public disaffection, and the unauthorized possession or use of firearms and explosives.

In *Richards and Walker-James v Attorney-General*,[40] the plaintiff filed an originating motion seeking declarations *inter alia* that Section 64 of the Criminal Code 1988 was in contravention of Section 10 of the Constitution of St Vincent and the Grenadines which protected freedom of expression. Section 64(1) of the Criminal Code reads as follows:

> "Any person who publishes any false statement, rumour or report which is likely to cause fear or alarm or to disturb the public peace, is guilty of an offence and liable to imprisonment for one year."

The High Court, in dismissing the motion, held that Section 64 of the Criminal Code was reasonably required in a democratic society and was not a hindrance to a citizen's freedom of expression but assisted in protecting the security of the person (also guaranteed by the Constitution). This is achieved by keeping citizens from being made to suffer fear or alarm or have the public peace disrupted by the publication of false statements, rumours or reports.

Restraints on press freedom

The Constitution of the Republic of Trinidad and Tobago is the sole constitution in the Commonwealth Caribbean which makes express provision for guaranteeing the right of freedom of the press. Section 12 of the Constitution of Antigua,[41] which provides for the right of freedom of expression, includes a marginal note to the effect that freedom of expression is one "including freedom of the press". So stated it can be said that the establishing and running of a press is one of the ways of enjoying a certain facet of the constitutionally guaranteed freedom of expression. This facet ensures the "freedom" to communicate ideas and information without interference.

The question of whether the requirement of the payment of a libel deposit amounts to an infringement of the right to freedom of the press arose for judicial determination in the context of the Constitution of Antigua, where in the case of *Attorney-General v Antigua Times Ltd*[42] before the Privy Council, it was held that such a requirement fell within the exceptions given in most of the constitutions to the effect that nothing contained in or done under a law shall be held to contravene freedom of expression to the extent that the law in question makes provision "that is reasonably required ... for the purpose of protecting the reputations, rights and freedoms of others". The Privy Council ruled that the libel deposit requirement clearly had

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40 Commonwealth Law Bulletin, Vol 16 (1990) 755.

41 First Schedule, Antigua and Barbuda Constitution Order 1981.

42 [1976] AC 16.

as its purpose the protection of the reputations and rights of others. Thus, although the requirement of the deposit may have the effect of hindering freedom of expression by reducing the resources of the paper, it could not be treated as being unconstitutional. There being no evidence that the "tax" was not reasonably required, the libel deposit was held to be constitutional. The actual effect on the exercise of the right to freedom of the press was ignored.

The licensing requirements which can be said to be standard throughout the Caribbean have nonetheless given rise to the issue as to whether the exercise by Parliament of its legislative powers can amount to an abuse of power by government. In *Hope and Attorney-General of Guyana v New Guyana Co Ltd and Vincent Teekah*[43] two trade orders which had been passed by the Guyanese legislature prohibited the importation of newsprint and printing equipment except by licence issued by a competent authority. The then opposition leader challenged the constitutionality of these orders. The Court of Appeal held that, although the orders had the effect of hindering the newspaper in the enjoyment of its right to freedom of expression guaranteed by Article 12 of the then prevailing 1966 Constitution, the importation of newsprint and printing equipment nonetheless could not be considered to be an integral part of the guaranteed freedom of expression. In order for legislation to interfere with the guaranteed right to freedom of expression, such legislation must interfere directly with the right, and not merely indirectly or consequentially. This test, referred in constitutional law theory as the "direct impact" test, has been criticized on the basis that unless it is applied in favour of the individual and against the state, it can undermine the fibre of a bill of rights entrenched into a constitution and protected by judicial review.[44]

However in *Trinidad and Tobago Newspaper Publishing Group Ltd v Central Bank of Trinidad and Tobago and Attorney-General*[45] Lucky J stated,

> "In this country where the literacy rate is one of the highest in the Third World countries, viz 98.7%, and where individuals rely upon newspapers for information which affects their daily lives; where the majority depend upon them to inform and educate on national and international affairs; where an avenue exists to express one's views on political and non-political issues; and where the press can agitate and militate for the common good; in the national interest, freedom of the press must be jealously guarded by the courts."[46]

The decision in *Hope v New Guyana Co Ltd*[47] and several Indian authorities[48] were considered and the judge found that the right to newsprint is an integral part of freedom of the press - an enshrined right in the Constitution - and accordingly held that the applicant was entitled to seek redress under the Constitution notwithstanding that there were other remedies available, and granted the following declarations:

> "(c) A declaration that the action of the Central Bank of Trinidad and Tobago in not allocating sufficient foreign exchange approval to the

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43 (1979) 26 WIR 233.

44 Francis Alexis, *Changing Caribbean Constitutions* (Bridgetown, Barbados: Antilles Publications, 1983), p 194.

45 [1990] LRC (Const) 391.

46 Ibid, at 410B.

47 *Supra*, n 43.

48 *Romesh Thappar v State of Madras*, [1950] SCR 594; *Bennett Coleman and Co Ltd v Union of India*, AIR 1973 SC 106; *Express Newspapers Ltd v Union of India*, [1959] SCR 12.

applicant company to purchase newsprint, graphic arts and accessories for use in the publication of its newspapers is unconstitutional and illegal.

(d) A declaration that the action of the Central Bank of Trinidad and Tobago in not giving the applicant foreign exchange approval to the extent of at least 75% of the amount it utilized in 1987 to purchase newsprint, graphic arts and accessories for use in the publication of newspapers is unconstitutional and illegal.

(e) A declaration that the applicant company is entitled to receive an allocation of foreign exchange approval of at least 75% of the amount of foreign exchange purchased in 1987 to purchase newsprint, graphic arts and accessories for use by it in the publication of its newspapers."[49]

In *Hector v Attorney-General of Antigua and Barbuda*, a case involving criticism of the authorities, the editor of a newspaper was charged with printing in it a false statement which was likely to undermine public confidence in the conduct of public affairs contrary to Section 33B of the Public Order Act of 1972. The proceedings were stayed pending determination of his application to the High Court for redress under Section 18(1) of the Constitution. The judge declared that the applicant's constitutional rights had been contravened by the institution of the proceedings under Section 33B which was unconstitutional to the extent of the words "or to undermine public confidence in the conduct of public affairs", and the criminal proceedings against him were quashed. The Court of Appeal reversed that decision.

On the applicant's appeal to the Judicial Committee of the Privy Council[50] it was held, allowing the appeal, that the words in question in Section 33B of the Act were not reasonably required in the interests of public order within Section 12(4)(a)(i) of the Constitution, and that they were of no effect, and that, therefore, the criminal proceedings against the applicant would be quashed. It is to be noted the condemnatory tone of the Board when Lord Bridge of Harwich stated:

> "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

49 *Supra*, n 45, at 411E-G. [***EDITOR'S NOTE**: However, on 15 June 1998, subsequent to the completion of this paper, this order was reversed by the Trinidad and Tobago Court of Appeal.*]

50 [1990] 2 AC 312.

> which criminalizes statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."[51]

From the above it can be seen that censorship is always a lurking concern for the media. The media is considered as one of the strongest guarantees of freedom which exists in a democracy. It ensures that political figures do not overstep the limits of their powers. In 1989 the Media Association of Trinidad and Tobago (MATT) was severely critical of the government's Draft Medium Term Economic Planning Framework on Communication and Information. MATT considered the draft as an attempt to override the freedom of the press and restrict the flow of ideas that contribute towards a democratic society.

The right of the individual to a fair and public hearing creates both statutory and judicial restraints on freedom of the press. On the one hand there are express provisions[52] which prevent the publication of the names of both the accused and the complainant in respect of sexual offences unless either the accused or the complainant makes an application to the court to remove the restriction on the ground that it is substantial and unreasonable and that it is in the public interest to remove same. Similar restrictions are laid out under the Trinidad and Tobago Indictable Offences (Preliminary Enquiry) Act, whereby restrictions are placed on the media in terms of what information can be published.[53]

A problem of great constitutional importance which consistently faces the court is the right of an individual to a fair hearing having to be balanced with the right of freedom of the press. Indeed, the Constitution ensures to an accused person the right to be presumed innocent until proved guilty according to law. The problem arises where a court must ensure that the guilt or innocence of each accused person is determined only on the weight of evidence adduced in court. The court, as the guardian of the Constitution, has the responsibility of ensuring that all persons whose rights are affected are protected against infringements.

The direct issue of the effect of prejudicial pre-trial publicity, and the prevention of "trial by the press", has been recently adjudicated by the Privy Council in *Boodram v Attorney-General of Trinidad and Tobago*.[54] The first occasion on which the House of Lords had to consider the problem of prejudicial pre-trial publicity, and the responsibility of the publication media for it, was in *Attorney-General v Times Newspapers Ltd.*[55] Lord Diplock in his speech formulated the basis of the law of contempt and made an analysis of its concepts, and stated *inter alia*,

> " ... 'trial by newspaper', i.e. public discussion or comment on the merits of a dispute which has been submitted to a court of law or on the alleged facts of the dispute before they have been found by the court on the evidence adduced before it, is calculated to prejudice the ... requirement that parties to litigation should be able to rely on there being no usurpation by any other person of the function of that court to decide their dispute according to law."[56]

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51 Ibid, at 318B-C.

52 Sexual Offences Act 1986 (27 of 1986), Laws of Trinidad and Tobago, Section 32.

53 Indictable Offences (Preliminary Enquiry) Act, Chapter 12:01 of the Laws of Trinidad and Tobago, Section 42. Only names and addresses of the accused, the witnesses, a concise statement of the charge and the defence in support of which evidence has been given and submissions on any point of law arising in the course of the enquiry, as well as the decision of the Magistrate, can be published.

54 *Supra*, n 5.

55 *Supra*, n 19.

56 Ibid, at 310B.

In a more recent case of *Grant and Others v Director of Public Prosecutions*,[57] before and after the preferment of indictment on charges of conspiracy to murder and of murder against the appellants, there was massive press publicity in Jamaica. The Judicial Committee of the Privy Council, in dismissing their appeals, held that the failure of the appellants to establish that prejudice was so widespread and so indelibly impressed on the minds of potential jurors that it was unlikely that a jury unaffected by it could be empanelled, coupled with the concession made by their counsel at the hearing before the Judicial Committee, vitiated the argument that their right to a fair trial under Section 20(1) of the Constitution had been, was being or was likely to be violated.

In *Boodram's*[58] case the appellant, relying on the enforcement provision of the Constitution, argued that comments in the media and/or the failure of the Director of Public Prosecutions (DPP) to take steps were in themselves an infringement of his rights under the Constitution. Further, he argued that comment by the media prejudiced his constitutional right to a fair trial. The gist of his argument was based on the allegation that adverse publicity (a matter which the Privy Council refused to assess on the ground that it would be within the purview of the High Court to do so when the trial had begun) had arisen in respect of the charges he faced, and would prejudice, not the existence of the right to a fair trial, but rather the exercise of it (that is, in the context of whether the jurors eventually selected would already have been exposed to a blitz of negative publicity in the media in respect of the said charges).

The Privy Council accepted the submissions of the appellant that the DPP was under a duty to issue the necessary cautions to the media (the appellant had argued that the inaction on the part of the DPP in warning the media amounted to a breach of his constitutional rights to a fair trial). It went even further to state that it was "surprising" that in view of the publicity given to the upcoming trial of the appellant the DPP seemed "to have done nothing at all". However, any "antecedent" action on the part of the DPP could not interfere with the integrity of the criminal court process, nor with the function of the trial judge to make decisions on issues of law. Whereas the Board was cognizant of the apparently dual role of the DPP in the context (as the person who initiates and pursues the prosecution, and also the person who can take measures to forestall and punish misconduct by the media), it held that that issue was of no practical significance to the matter before it. The power of the DPP to bring to court any publisher of restricted information is exercisable under the rubric of contempt of court. To exercise this discretionary power before a trial would necessarily undermine the discretion of the DPP and at the same time leave the door open for possible further abuses by the media. The attitude of the courts and of the Privy Council can be said to have been stated in the dictum, quoted from the Court of Appeal judgment:

> " ... in deciding whether he should bring proceedings the Director of Public Prosecutions has to consider all the circumstances. He may choose to bring it before the trial is actually heard, or even after, if he considers for instance that if it were brought before the trial, publicity attendant upon such

57 (1980) 30 WIR 246.

58 *Supra*, n 5.

> proceedings may actually exacerbate the prejudice. If [counsel for the appellant] is correct, it would clearly mean that all proceedings for contempt must precede the trial, thereby creating an inflexible and rigid rule, and thus depriving the Director of Public Prosecutions of an important discretion. This I cannot accept.... Since the contempt invariably arises after the articles have been published, then it would logically mean that the mischief of bias has already seeped into the minds of potential jurors; ... I am of the opinion that the 'protection of the law' that the appellant is entitled to receive in these circumstances is his access to the Constitutional Court and the criminal courts where the judge will apply all the necessary procedural steps and substantive law to ensure a fair trial ...."[59]

The Privy Council concluded by stating that the question of prejudice to the accused could only be determined as a matter of fact, that is, the relevant publications either will or will not prove to have been so harmful that when the time for the trial arrives the techniques available to the trial for neutralizing them will be insufficient to prevent injustice. The pertinent measures available to the court were summed up by Lord Mustill:

> "The proper forum for a complaint about publicity is the trial court, where the judge can assess the circumstances which exist when the defendant is about to be given in charge of the jury, and decide whether measures such as warnings and directions to the jury, peremptory challenge and challenge for cause will enable the jury to reach its verdict with an unclouded mind, or whether exceptionally a temporary or even permanent stay of the prosecution is the only solution."[60]

With regard to matters on appeal, Lord Parker CJ gave a warning in 1960 that "newspapers publish ... articles at their peril in regard to proceedings for contempt of court or libel".[61] However on the question of whether any particular article would interfere with the course of justice the learned judge stated,

> "Even if a judge who eventually sat on the appeal had seen the article in question and had remembered its contents, it is inconceivable that he would be influenced consciously or unconsciously by it. A judge is in a very different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case. This, indeed, happens daily to judges on assize. This is all the more so in the case of a member of the Court of Criminal Appeal, who, in regard to an appeal against conviction is dealing almost entirely with points of law, and who, in the case of an appeal against sentence, is considering whether or not the sentence is correct in principle."[62]

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59 Ibid, at 203.

60 Ibid, at 206.

61 *R v Duffy and Others, Ex parte Nash*, [1960] 2 QB 188, at 200.

62 Ibid, at 198.

Contempt of court

This includes contempt arising from words written or spoken, scandalizing the court,[63] or statements to the effect that an accused will not get a fair trial. Words written or spoken calculated to interfere with the course of justice relate directly to the issues raised and discussed in the *Boodram* case mentioned above. Judgments given by the Privy Council in earlier Caribbean cases confirmed the law that no wrong is committed by any member of the public who exercises freely the ordinary right of criticizing temperately and fairly, in good faith, in private or in public, any episode in the administration of justice. Provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice, or attempting to impair the administration of justice, they are immune from proceedings for contempt of court.[64]

In *Chokolingo v Attorney-General*[65] it was stated that "'scandalizing the court' is a convenient way of describing a publication which, although it does not relate to any specific case either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice".[66] Chokolingo was found guilty of contempt. He was the editor of a newspaper in which there was a short story entitled "The Judge's Wife" in which it gave an account of the household and suggested that fellow judges conducted themselves similarly. The editor subsequently sought (unsuccessfully) a declaration that his committal was unconstitutional and that his imprisonment was in breach of the human rights and fundamental freedoms guaranteed to him by Section 1(a), (i) and (k) of the 1962 Constitution of Trinidad and Tobago, namely:

> "(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; ...
>
> (i) freedom of thought and expression; ...
>
> (k) freedom of the press."[67]

A press complaints authority

In Trinidad and Tobago a self-regulating body has recently been set up by three privately owned publishers in the face of growing concerns expressed by certain members of the incumbent government. A retired judge is the chairman, and the body has been endorsed (at least in principle) by the Media Association of Trinidad and Tobago. (A Caribbean Press Council existed previously.) The underlying rationale behind the body is that there ought to be some recourse available to members of the public whereby grievances relating to the press (and the related issue of freedom of the press) can be aired and, if possible, resolved.

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63 *R v Gray*, [1900] 2 QB 36.

64 *In the matter of a Special Reference from the Bahama Islands*, [1893] AC 138.

65 (1980) 32 WIR 354.

66 Ibid, at 358.

67 Constitution of Trinidad and Tobago 1962, *supra*, n 10 (cited in *supra*, n 65, at 355-6).

Or, possibly, Sharma JA was the precursor when he stated in *Boodram's*[68] case:

> "Take for example the freedom of the press. Here in Trinidad and Tobago, there are no written or oral codes of ethics by which journalists are guided. There is no press council to impose any sanctions. There are no statements of principles by which newspapers regard themselves as mutually bound. On the contrary, since independence the newspapers have flourished; each establishing its own ethical or moral standing. In an area where there is such keen competition to establish broad circulation within a limited market, those which have survived (many have folded up) have persistently pandered to sensationalism, to ensure that their circulations swell.
>
> It is amazing that with such awesome power given to the press, it has not even recognized the need to ensure that some form of proper and stringent self-regulation be put in place, if only to ensure that standards do not further fall and the credibility and integrity it so sanctimoniously demands of others does not continue to be a one-sided affair.
>
> Indeed, in this country the press is sometimes seen as creating its own parallel charter to our Constitution, accountable to no one with no sanction (except perhaps the sporadic libel action), which is reluctantly initiated in the first place for fear that it might encourage further character assassination.
>
> Here in Trinidad and Tobago freedom is now synonymous with licence. What seems to have entrenched this perception is the fact that the law of contempt at least in respect of pending trials seem to have fallen into a state of quiescence ...."[69]

The learned judge referred to what Rinfret CJ (Canada), himself citing a judgment in an earlier case, stated:

> "there must be a point where restriction on individual freedom of expression is justified and required on the grounds of reason, or on the ground of the democratic process and the necessities of the present situation."[70]

Freedom of the press and access to information

This issue as to public access to information is another perennial issue. Access to such is essential to any vibrant democracy. As one writer has stated:

> "Only a well-informed public can sensibly carry out its obligation to shape policy and political institutions. When a government operates in secret, these goals are undermined."[71]

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68 *Boodram v Attorney-General and Another* (Trinidad and Tobago Court of Appeal), (1994) 47 WIR 459.

69 Ibid, at 470-471.

70 *Boucher v R*, [1951] 2 DLR 369, at 378, cited in *supra*, n 68, at 471.

71 Steven Goldberg, *Public Access to Government Information* (Freedom Papers Vol 6) (Washington, DC: US Information Agency, 1994).

This issue is related to the corollary one of the ability of the state to rely on public policy and national security considerations so as to avoid the exposure of what the state may refer to as "sensitive" documentation. There will always be problems in separating legitimate from illegitimate claims by the government that secrecy is necessary. The focus in such cases is usually the desire to retain at least in the public eye the integrity of public officials, and more specifically to prevent corruption. Any provision created by the legislature which has the effect of seeking to protect such officials from exposure can be seen as a direct threat to the guaranteed right given to the individual of freedom of expression and, at least in Trinidad and Tobago, the right of freedom of the press.

Sir William Blackstone in his *Commentaries* in 1765 stated:

> "Liberty of the press consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but, if he publishes what is improper, mischievous, and illegal, he must take the consequences of his own temerity .... To punish any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty."

In the United States the public's desire to obtain honest information about its government was a central motivation behind the First Amendment to the Constitution - "Congress shall make no law ... abridging the freedom of speech, or the press". During the colonial period in American history there was what was termed "prior restraint" in that authors had to obtain licences from the Crown prior to publication. Today there exists the Freedom of Information Act 1966, which makes provision for gaining access to government information and those instances when it can be withheld because it "would constitute a clearly unwarranted invasion of personal privacy". As a consequence the Federal Privacy Act 1974 was passed, which requires that government records about individuals should be accurate, and that dissemination of such information is limited to legally authorized channels. In the quest for information to be made public, trials in the United States of America have been put on television. The courts' early scepticism has given way to acceptance.[72] Today 47 states permit television coverage.

Perhaps it should be noted here that in Sweden in 1766 there was enacted the Freedom of Press Act which provided for access to documentary material in government files. Legislation on freedom of the press remained a central part of Swedish law and has become enshrined in its Constitution.

The Canadian Access to Information Act 1983 is established on similar lines to the

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72 *Estes v State of Texas*, 381 US 532 (1965); *Chandler v Florida*, 449 US 560 (1981).

American Freedom of Information Act, and makes provision for an Information Commissioner to deal with complaints. In Australia the Freedom of Information Act was enacted in 1982. There are also statutes in New Zealand and several European countries. In the United Kingdom there is a series of statutes that grant public access to government records in specific areas, for example, the Data Protection Act 1984 allows one to see computerized records concerning oneself.

However at common law there is no duty on the part of the government or a minister to disclose official information. Non-disclosure on grounds of public interest immunity where it applies cannot be waived,[73] and the minister's objection to disclosure should normally be accepted by the Court. The reasons for public interest immunity were stated by Lord Scarman in the *Burmah Oil*[74] case. But in the *Derbyshire County Council* case it was stated: "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".[75]

In the context of the above one can note in passing the grumblings heard from the media in Trinidad and Tobago in respect of "gags" placed upon them relating to one trial presently under way. Of more direct relevance is a bill which has been offered to the public for comment, such bill purporting to "establish a general right of access to official records for members of the public and for connected purposes".[76]

The question which arises in the context of this Trinidad and Tobago bill is whether the codifying of what has existed mainly at common law is simply an affirmation of a common law code to protect official secrets. Under the Civil Service Act holders of office specified in the Second Schedule take and subscribe to the oath or affirmation of office and of secrecy set out in the Third Schedule.[77]

Freedom of expression and the Internet

Since the availability of the Internet depends upon the availability of at least a computer with a modem and a telephone line, the question of its implications in Trinidad and Tobago may initially be limited in terms of numbers, and the full impact may not be felt for some time. The fact that access to the "Net" involves something akin to a telephone call causes its scope to be limited to the issue of an individual's right to privacy. However, the fact that as yet uncensored information and material flowing freely onto a screen which minors and infants have easy access to is enough to raise some concern for all involved. These concerns aside, the extension of humanity's ability to communicate since the invention of printing now allows for communication across national borders without interference. The "Net" itself has certain built-in guarantees of free expression. It was designed without any central control so that it could survive a nuclear war. This basic architecture makes it difficult to censor traffic on the "Net". The "Net" protocols cannot tell whether a site is blocked because of an enemy attack or a code order. In either case they find another route for data.

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73 *Duncan v Cammel Laird and Co Ltd*, [1942] AC 624.

74 *Burmah Oil Co Ltd v Governor and Company of the Bank of England*, [1980] AC 1090 (HL).

75 *Supra*, n 24, at 547F.

76 Freedom of Information Bill, 1996.

77 Civil Service Act, Chapter 23:01 of the Laws of Trinidad and Tobago, Section 11.

The use of the Internet appears to be not without problems, giving great cause for concern particularly with regard to its control. According to a recent article in the press, Indonesia complained of a cyberspace attack on its authoritarian rule when a group of computer hackers penetrated its military computer network. Prior to this the Chinese authorities ordered all Internet users to report to the police. In Zambia, in February 1996, the authorities declared an issue of the Lusaka-based independent newspaper, *The Post*, including its electronic Internet edition, to be a prohibited publication; the issue in question had contained an article which included information from leaked government documents.[78]

What seems to be clear regarding this phenomenon is that the various legislatures may now have to redefine (in common with each other, and in keeping with international protocols) the meaning of certain fundamental rights and duties as guaranteed in our constitutions so as to avoid the "Net" being used as an escape route to protect persons who would otherwise be prosecuted for breaches of restraints placed on the rights of freedom of expression and freedom of the press.

Conclusion

The time has come when freedom of expression, which is a universal value, should be a universal right. Its protection and promotion cannot be stereotyped simply because different countries have their distinctive cultures, ethnicity, and, ethical perceptions.

The enacting of legislation enshrining the various freedoms in constitutional and international instruments would be meaningless unless the responsibility of safeguarding these freedoms is vested in a body. The only body which now seems able to give some meaning and offer some form of protection for ensuring these freedoms internationally is the existence of an independent and effective judiciary.

The authors Tarnopolsky and Beaudoin[79] have expressed their opinion that judges in deliberating on political issues are understandably reluctant to impose their political judgment on the elected arm of government, since the supremacy of elected representatives is an important principle of parliamentary democracy, but that the supremacy of the Constitution is an even more fundamental principle and judges at times have to overrule legislators. The authors in describing this judicial approach called it "judicial statesmanship" and stated:

> "By 'statesmanship' is meant an appreciation by the court of the effect each of its constitutional interpretations will have on the way life is lived in Canada and a conscious attempt to favour those interpretations that seem likely to have the most beneficial impact on the lives of Canadians. An understanding of the priorities Canadians have historically assigned to various social, political and economic values is imperative, but so is a willingness to abandon traditional solutions which have ceased to serve the

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78 *Globe & Mail* (Canada), 29 June 1996. [***EDITOR'S NOTE**: For an account of this incident, see also "Media Law and Practice in Southern Africa, No 7: Zambia" (London: ARTICLE 19, 1998), p 15.*]

79 Walter Tarnopolsky and Gérald A. Beaudoin (eds), *Canadian Charter of Rights and Freedoms: Commentary* (Toronto, Canada: Carswell, 1982).

> nation's long-term needs. The task is political, in the best sense, but not partisan; each judge should properly take account of the fundamental values upon which the political philosophy he or she favours is founded, but not of short-range advantages for political parties. That differences between the philosophical orientations of some judges will lead them to different constitutional conclusions is not to be deplored; so long as the judiciary as a whole effectively represents all major points of view, a balanced consensus can be expected to emerge."[80]

It is expedient to note that in Trinidad and Tobago judges take and subscribe to the oath of allegiance and the oath for the due execution of office as follows:

> "that I will bear true faith and allegiance to Trinidad and Tobago and will uphold the Constitution and the law, that I will conscientiously, impartially and to the best of my knowledge, judgment and ability discharge the functions of my office and do right to all manner of people after the laws and usages of Trinidad and Tobago without fear or favour, affection or ill-will."[81]

80 Ibid, pp 27-8.

81 Section 107 of the Constitution of the Republic of Trinidad and Tobago and First Schedule thereto.

9

Freedom of Expression in India

Soli J. Sorabjee, SC

Throughout India's freedom struggle there was a persistent demand for a written Bill of Rights for the people of India which included the guarantee of free speech. Understandably, the Founding Fathers of the Indian Constitution attached great importance to freedom of speech and expression and the freedom of the press. Their experience of waves of repressive measures during British rule convinced them of the immense value of this right in the sovereign democratic republic which India was to be under its Constitution. They believed that freedom of expression and the freedom of the press are indispensable to the operation of a democratic system. They knew that when avenues of expression are closed, government by consent of the governed will soon be foreclosed. In their hearts and minds was imprinted the message of the Father of the Nation, Mahatma Gandhi, that evolution of democracy is not possible if one is not prepared to hear the other side. They endorsed the thinking of Jawaharlal Nehru who said, "I would rather have a completely free press with all the dangers involved in the wrong use of that freedom than a suppressed or regulated press".[1] No wonder that members of the Constituent Assembly hailed the guarantee of free speech as the "most important", "the charter of liberties", "the crux of fundamental rights", and in similar eulogistic terms.[2]

Part III of the Indian Constitution guarantees a wide spectrum of judicially enforceable fundamental rights which broadly corresponds to the civil and political rights guaranteed by the International Covenant on Civil and Political Rights 1966 (ICCPR). Freedom of speech and expression is guaranteed as a fundamental right by Article 19(1)(a) of the Constitution.[3]

Freedom of expression, like other fundamental rights guaranteed by the Indian Constitution, is not absolute. It can be restricted provided three distinct and independent prerequisites are satisfied.

> (1) The restriction imposed must have the authority of law to support it. Freedom of expression cannot be curtailed by executive orders or administrative instructions which lack the sanction of law.

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1 Nehru's speech on 20 June 1916 in protest against the Press Act 1910.

2 B. Shiva Rao (ed), *The Framing of India's Constitution: A Study* (New Delhi: Institute of Public Administration, 1968) p 222.

3 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.

(2) The law must fall squarely within one or more heads of restrictions specified in Article 19(2), namely, (a) security of the state, (b) sovereignty and integrity of India, (c) friendly relations with foreign states, (d) public order, (e) decency or morality, (f) contempt of court, (g) defamation, or (h) incitement to an offence. Restriction on freedom of expression cannot be imposed on such omnibus grounds as "in the interest of the general public"[4] which is permissible in the case of fundamental rights like freedom of trade and business.

(3) The restriction must be reasonable. In other words, it must not be excessive or disproportionate. The procedure and the manner of imposition of the restriction also must be just, fair and reasonable.[5] The validity of the restriction is justiciable. Courts in India exercising the power of judicial review have invalidated laws and measures which did not satisfy the above requirements.[6]

One of the curiosities of the Indian Constitution is that freedom of the press has not been specifically guaranteed as a fundamental right. During the framing of the Constitution questions were raised about this omission and there were demands for incorporating freedom of the press as a distinct fundamental right. According to the constitutional adviser, Dr B.N. Rau, it was hardly necessary to provide for it specifically, because freedom of expression would include freedom of the press.[7] In a series of decisions, the Supreme Court of India has affirmed this view and ruled that freedom of the press is implicit in the guarantee of freedom of speech and expression. Consequently freedom of the press by judicial interpretation is one of the fundamental rights guaranteed by the Constitution of India.[8]

Freedom of the press does not occupy a preferred position in the Indian Constitution which does not recognize a hierarchy of rights. Nonetheless freedom of the press has received generous support from the judiciary and a categorical assurance that as long as "this Court sits", newspapermen need not have the fear of their freedom being curtailed by unconstitutional means.[9] There are dicta of the Supreme Court describing this freedom as "the Ark of the Covenant of Democracy",[10] "the most precious of all the freedoms guaranteed by our Constitution".[11]

The Supreme Court has ruled that newspapers have to be left free to determine their pages, their circulation and the new editions which they can bring out within the quota of newsprint allotted to them. A restraint on the number of pages, a restraint on circulation and a restraint on advertisements would adversely affect press freedom and any provision or measure which requires newspapers to reduce their size would be compelling them to

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4 *Sakal Papers (P) Ltd v Union of India*, AIR 1962 SC 305.

5 *Chintaman Rao v State of Madhya Pradesh*, AIR 1951 SC 118 at 119; *State of Madras v V.G. Rao*, AIR 1952 SC 196 at 199, 200; *Tikaramji v State of Uttar Pradesh*, AIR 1956 SC 676 at 711; *Express Newspapers v Union of India*, AIR 1958 SC 578 at 621; *State of Bihar v R.N. Mishra*, AIR 1971 SC 1667.

6 Sakal Papers, *supra*, n 4; *Bennett Coleman and Co v Union of India*, AIR 1973 SC 106.

7 *Supra*, n 2, pp 219-20.

8 *Brij Bhushan v State of Delhi*, AIR 1950 SC 129; *Express Newspapers Ltd v Union of India*, AIR 1958 SC 578; *Sakal Papers Ltd v Union of India*, *supra*, n 4; *Bennett Coleman and Co. v Union of India*, *supra*, n 6.

9 *Express Newspapers Ltd v Union of India*, AIR 1986 SC 515 at 538.

10 Bennett Coleman, *supra*, n 6, at 129.

11 *Supra*, n 4, at 315.

restrict their dissemination of news and views and thus directly affect freedom of the press and it is unconstitutional.[12]

An interesting case arose in the State of Andhra Pradesh. The proprietor of a Telugu daily, *Eenadu*, complained that the government had withdrawn advertisements from its paper on account of extraneous reasons, and this had adversely affected the revenue and circulation of the paper. This action of the government was challenged as unconstitutional. The High Court did not accept the contention that a newspaper has a constitutional right to obtain advertisements from the government. It however ruled that the government cannot exercise this power or privilege "to favour one set of newspapers or to show its displeasure against another section of the press. It should not use the power over such large funds in its hands to muzzle the press, or as a weapon to punish newspapers which criticize its policies and actions. It has to use the funds in a reasonable manner consistently with the object of the advertisement, viz., to educate and inform the public about the activities of the government."[13]

In a case in which a steep levy of customs duty on newsprint was challenged, the Court observed that whilst newspapers did not enjoy any immunity from payment of taxes and other fiscal burdens, the imposition of a tax such as customs duty on newsprint is an imposition on knowledge. The Court accepted the plea that a fiscal levy on newsprint would be subject to judicial review because in the case of ordinary taxing statutes, the laws may be questioned only if they are openly confiscatory or a colourable device to confiscate. "But in the cases before us the Court is called upon to reconcile the social interest involved in the freedom of speech and expression with the public interest involved in the fiscal levies imposed by the Government specially because newsprint constitutes the body, if expression happens to be the soul. Therefore, in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness clearly and directly attributable to the tax."[14] The Court did not strike down the levy because all the relevant materials were not placed before it. The government was directed to reconsider the matter afresh and fix the import duty on newsprint in the light of the principles enunciated in the judgment.

There is no provision in the Indian Constitution proscribing censorship, unlike, for instance, the Japanese Constitution (Article 21) and the German Constitution (Article 5) whereunder pre-censorship is prohibited. Similarly, the American Convention on Human Rights (San José) 1969 expressly states in Article 13(2) that freedom of expression "shall not be subject to prior censorship".

Barely four months after India became an independent republic, the Supreme Court of India in May 1950 had to resolve the tension between freedom of expression and censorship in *Brij Bhushan v The State of Delhi.*[15] Section 7(1)(c) of the East Punjab Safety Act 1949 provided for submission of material for scrutiny if the government was satisfied that such action was necessary for the purpose of preventing or combating any activity prejudicial to public safety or the maintenance of public order. The Court declared the statutory provision in question unconstitutional on the ground that the restrictions imposed were outside the purview of Article 19(2) as it then stood, which did not include

12 *Supra*, n 4.

13 *Ushodaya Publications (P) Ltd v Govt of Andhra Pradesh*, AIR 1981 AP 109.

14 *Supra*, n 9 at 540.

15 AIR 1950 SC 129.

public order as a permissible head of restriction. The Court did not rule that prior censorship is *per se* unconstitutional. Indeed, in 1957 the Court upheld censorship imposed for a temporary period under the Punjab Special Powers (Press) Act 1956, which provided for a right of representation to the government.[16] Judges are human, and contemporary events cast their shadow on judicial thinking. The Court in the Punjab case was much influenced by the tension that had arisen between the Hindus and the Akalis, a Sikh group, over the question of the partition of the State of Punjab which they feared "might flare up into communal frenzy and faction fight disturbing the public order of the State which is on the border of a foreign State".[17] It is noteworthy, however, that another statutory provision imposing censorship without any time limit and without providing any right of representation was struck down by the Court in a judgment delivered on the same day.[18]

India's worst brush with censorship occurred during the state of emergency declared by the government of Prime Minister Indira Gandhi on 25 June 1975. Censorship of the press was imposed for the first time in independent India by the promulgation of a Central Censorship Order, dated 26 June 1975. No censorship was imposed during two previous declarations of emergency, in 1962 and 1971, when the nation was fighting a war. Under the Indian Constitution during an emergency, fundamental rights, including freedom of speech and expression and the freedom of the press, stand suspended. Censorship, which in normal times would be struck down, becomes immune from constitutional challenge. Taking advantage of the emergency, numerous repressive measures were adopted in the form of executive non-statutory guidelines, and instructions were issued by the censor to the press. One of the instructions of the censor was the following: "Nothing is to be published that is likely to convey the impression of a protest or disapproval of a government measure".[19]

Consequently anything that smacked of criticism of governmental measures or action was almost invariably banned, even if the criticism was sober and moderate. The censor's scissors were applied arbitrarily and in a few cases his decisions bordered on the farcical. Quotations from Mahatma Gandhi, Tagore and Nehru were banned. A statement by the Chairman of the Monopolies and Restrictive Trade Practices Commission criticizing the working of public sector undertakings was blacked out. Other ludicrous instances were the bans imposed on news about a member of a former royal family, Begum Vilayat Mahal, squatting at New Delhi railway station; a report about junior lawyers marching to the Delhi High Court; a London report of the arrest of a famous Indian actress for shoplifting; and the news about a meeting of the Wild Life Board, which considered the grant of a hunting licence to a certain maharajah's brother.[20] These bans had nothing to do with the security of the state or preservation of public peace and order but reflected the capricious working of the censoring authorities.

Some of the censor's directives were sinister, like the ones prohibiting any reference to the transfer of state high court judges; banning publication of judgments of high courts which ruled against the censor; "killing" news of the opposition of certain state governments to

16 *Virendra Kumar v State of Punjab*, AIR 1957 SC 896.

17 Ibid, at 900.

18 Ibid, at 903 (petition of K. Narendra, heard together with this case).

19 Sorabjee, *The Emergency, Censorship and the Press in India 1975-77* (London: Writers and Scholars Educational Trust, 1977), p 13.

20 Ibid, pp 31, 27, 29.

proposed constitutional amendments; banning reports of alleged payoffs made during the purchase of Boeing aircraft; and suppressing criticism of family planning programmes.[21] The object was not merely withholding of information but manipulation of news and views to legitimize the emergency and make it acceptable. One tragic consequence was that inhuman practices like forcible sterilization of young men and other excesses of over-enthusiastic family planning officials came to light much later after the events, by which time family planning had become an anathema to the rural masses. An urgent and important programme suffered a serious setback thanks to suppression of freedom of expression by the censor.

The Indian judiciary, especially the state high courts, displayed commendable courage in striking down the censor's orders and upheld the right of dissent even during the emergency. The High Court of Bombay in the landmark judgment of *Binod Rao v Masani*[22] delivered on 10 February 1976 declared:

> "It is not the function of the Censor acting under the Censorship Order to make all newspapers and periodicals trim their sails to one wind or to tow along in a single file or to speak in chorus with one voice. It is not for him to exercise his statutory powers to force public opinion into a single mould or to turn the Press into an instrument for brainwashing the public. Under the Censorship Order the Censor is appointed the nurse-maid of democracy and not its grave-digger. ... Merely because dissent, disapproval or criticism is expressed in strong language is no ground for banning its publication."[23]

The Court, however, cautioned that the voice of dissent cannot take the form of incitement of revolutionary or subversive activities, for then instead of serving democracy it would subvert it.[24]

The State High Court of Gujarat in its judgment in *C. Vaidya v D'Penha* castigated the censorship directives for imposing upon the people "a mask of suffocation and strangulation". In construing the expression "prejudicial report", the Court observed:

> "To peacefully protest against any governmental action with the immediate object of educating public opinion and the ultimate object of getting the ruling party voted out of power at the next general elections is not a prejudicial report at all. Such a public education is the primary need of every democracy."[25]

During the 1975-77 state of emergency the Police Commissioner refused permission to hold a public meeting to be addressed amongst others by retired judges of the High Court and the Supreme Court at which there was likely to be criticism of the emergency as well as the measures taken under it. The High Court of Bombay courageously stuck down the order. Justice Tulzapurkar in his concurring judgment held:

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21 Ibid, pp 32, 36-8.

22 (1976) 78 Bom LR 125.

23 Ibid, at 169.

24 Ibid, at 169.

25 *C. Vaidya v H. D'Penha* in Sp CA 141/1976, 22 March 1976 (unreported).

> "Even during the emergencies that are currently in operation it is legitimate for any citizen to say that the proclamations of emergency, which are legislative acts on the part of the President, are unjustified or unwarranted; it is legitimate for any citizen to say that these emergencies are being kept alive for suppressing democratic dissent and criticism and that these should be ended."[26]

These judgments were delivered at a time when "inconvenient" judges were transferred from one state to another in India. Notwithstanding this, the high courts rose to the occasion. Indeed it was their finest hour.

A potent source of restriction on freedom of expression in India is its criminal law, which deals with offences against religion and punishes certain kinds of expression which may be loosely called "hate speech". Speech or writings which promote enmity, hatred, ill-will or disharmony between different religious, racial or linguistic groups or castes or communities are prohibited by Section 153A of the Indian Penal Code (IPC). A related provision, Section 153B, proscribes the making or publishing of imputations or assertions which imply that

> "any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India".

Speech which intentionally and deliberately wounds the religious feelings of any person is punished by Section 298. Speech and writings which "with deliberate and malicious intention" insult the religion or the religious beliefs of any class of citizens are prohibited and punished by Section 295A.[27] Writings covered by the above categories can by a notification be declared to be forfeited to government and thereupon every copy of such book or writing can be seized. The aggrieved party can apply to the High Court to set aside the declaration of forfeiture.[28]

These sections, which were enacted by the British during colonial rule, were not inspired by any antipathy to free speech as such. The rationale underlying the provisions is the maintenance of public peace and tranquillity in a country like India where religious passions can be easily aroused and inflamed. The British did not want a religious riot on their hands and were not really concerned about the religious tenets of those who professed them. Therefore, any speech or writing, whether true or false, which deliberately and intentionally insulted a religion or outraged the religious feelings of a class or community was prohibited. At the same time it was realized that there cannot be a total ban on religious discourse or debate. Christianity and Islam are proselytizing religions; conversion was legal, provided it was not brought about by force or fraud. Indeed, there were strong objections by Christian missionaries when those provisions were in the draft stage that, unless the requirement of deliberate intent was incorporated, it would be very difficult to preach the gospel and spread the light amongst the "natives" of India.

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26 *N.P. Nathwani v Commissioner of Police*, (1976) 78 Bom LR 1 at 72.

27 "295A. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

28 Section 94, Criminal Procedure Code 1973.

The background and history of Section 295A which punishes insult to religion are interesting. It was enacted in 1927 after the judgment of the Lahore High Court in what is popularly known as the *Rangila Rasool* case.[29] A tract, *Rangila Rasool*, was published in which there were offensive references to the Prophet Mohammed's personal life. The High Court took the view that the prosecution which was launched under Section 153A was not legally sustainable because the writing could not cause enmity or hatred between different religious communities though it was certainly offensive to the Muslim community. There was an outcry from the Muslims. Apart from the unreasonable demand about sacking Justice Dalip Singh who had delivered the judgment (incidentally, he was a Christian) there was a plea for a change in the law.

The report of the Select Committee in connection with the enactment of Section 295A in the IPC is significant. The Select Committee emphasized that the essence of the offence is "that the insult to religion or the outrage to religious feelings must be the sole, or primary, or at least the deliberate and conscious intention".[30] The Committee

> "were impressed by an argument to the effect that an insult to a religion or to the religious beliefs of the followers of a religion might be inflicted in good faith by a writer with the object of facilitating some measure of social reform by administering such a shock to the followers of the religion as would ensure notice being taken of any criticism so made. We have therefore amplified the words 'with deliberate intention' by inserting reference to malice, and we think that the section which we have now evolved will be both comprehensive and at the same time of not too wide an application."[31]

Thus Section 295A was enacted to punish "insults to religion or religious beliefs of any class", if done with deliberate and malicious intention.

The constitutionality of Section 295A was questioned before the Supreme Court in the case of *Ramji Lal Mody*.[32] The Supreme Court upheld its validity on the ground that the restriction imposed on freedom of expression by the section was reasonable and was covered under the head of "public order". The reasoning of the Court was that the section did not penalize any and every act of insult to religion or the religious beliefs of a class of citizens, but was directed to acts perpetrated with the deliberate and malicious intention of outraging the religious feelings of a class of citizens. In the words of the Supreme Court: "The calculated tendency of this aggravated form of insult is clearly to disrupt the public order".[33]

In India religious feelings are easily ruffled by attacks on religious beliefs or practices. There have been instances where the publication of a book condemnatory or severely critical of a particular religion or its founder has led to riots and widespread disturbances. The man who wrote *Rangila Rasool*, which portrayed the Prophet as an immoral person, was murdered in court. Writings in India have to be judged in the context of the conditions existing in the country, the light in which they will be viewed by the people who read them, and their reactions, depending upon the intensity of the beliefs and sentiments of the

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29 *Raj Paul v Emperor*, AIR 1927 Lahore 590.

30 Select Committee Report, Gazette of India, Part V, 251 (17 September 1927).

31 Ibid, at 251-2.

32 AIR 1957 SC 620.

33 Ibid, at 623.

people whose religious tenets and practices are criticized. There is an English saying that hard words break no bones, but in certain situations in India hard words will break mosques and temples. At the same time it must not be forgotten that India is a secular democratic state which guarantees not merely the freedom to preach, practise and propagate religion but also freedom of conscience. The religious person and the atheist both have been guaranteed fundamental rights under the Indian Constitution. Religion may be extolled by the devout. Equally it may be condemned by the atheist or scorned by the Marxist as the opium of the people.

Courts in India have tried to balance the values underlying freedom of expression with the maintenance of peace and order. The trend of the decisions is that criticism of a religion and religious beliefs is permissible provided it does not descent to vile or vituperative abuse of any religion or its founder. One may legitimately criticize the tenets of a particular religion and characterize them as illogical or irrational or historically inaccurate. But it is not permissible to condemn the founder of a religion or the prophets it venerates as immoral persons or frauds and charlatans. Courts would in such cases probably infer a "deliberate and malicious intention" to insult the religion, particularly if the language is abusive or vituperative.[34] Ultimately it depends upon the approach of the judges. Do they attach more weight to freedom of expression or are they more concerned with preservation of peace and order?

There are other statutory provisions in India which also prohibit or restrict freedom of expression in certain circumstances. For example, the Indian Telegraph Act 1885 and the Post Office Act 1898 prohibit certain categories of writings, namely obscene or subversive ones. The Cinematography Act 1952 empowers the Government to ban films which could harm public peace or morals. The Drugs and Magic Remedies (Objectionable Advertisements) Act 1954 prohibits, in the interest of public health, advertisements relating to magical cures, self-medication, etc. Under Section 11 of the Customs Act 1962, by the issue of a notification the importation of books can be prohibited *inter alia* on the ground of maintenance of public order or of standards of decency or morality or because they contain matter which is likely to prejudicially affect friendly relations with any foreign state or is derogatory to national prestige. Various state public security Acts also authorize the imposition of restrictions on the ground of public order or public security.

The main difficulty with these laws is in their enforcement. Most statutory provisions confer wide powers on the executive. In practice the enforcement authorities have proved to be insensitive to constitutional values. At present they have become almost paranoid in their over-anxiety to prevent riots and disturbances and the axe has fallen on many writings which are critical of some religion or its founder and prophets but which would not be covered at all by the governing statutory provisions. The authorities deem it prudent to play it over-safe. The tendency is to ban a book or a play if there is the slightest possibility of demonstrations and disturbances, to forfeit it and drive the aggrieved person to court to obtain a judicial verdict. If there is any breach of the peace on account of the judgment striking down the ban, the executive can then safely disclaim responsibility and put the ball

34 *Shiv Ram v Punjab State*, AIR 1955 (Pun) 28; *State of Mysore v Henry Rodrigues*, (1962) 2 Cr LJ 564; *T. Parameswaran v Dist Collector, Ernakulam*, AIR 1988 Ker 175.

in the court of the judiciary.

What is worse is that some of these provisions have been selectively enforced at the behest of different religious groups on different occasions and their implementation in some cases has been on account of political manipulation. The ban on Salman Rushdie's book, *The Satanic Verses,* is a classic instance. There are cases where books which are critical of some Hindu religious figure or leader have been banned, again on account of sectarian pressure, irrespective of the nature and content of the book. A recent instance is the unofficial ban on Rushdie's novel, *The Moor's Last Sigh,* which was perceived by some Hindu fanatics belonging to a political party, the Shiv Sena, to be a caricature of its autocratic leader, Bal Thackeray. Such action on the part of the authorities is perceived by Muslims and others as an instance of the government yielding to Hindu pressure.

This was precisely the objection to the enactment of Section 295A expressed by five dissenting members of the Select Committee. They had perceptively observed:

> "It's a regrettable concession to fanaticism, it will on the contrary, make the situation worse; each side will accuse the other of publishing writings which are against their religion, and government will again be seen siding with one party or the other."[35]

It is remarkable that one member of the Select Committee, P. Ananda Charlu, had in 1886 described the enactment of Section 153A

> "as a dangerous piece of legislation and has been impolitic (among other reasons) by necessitating government to side with or to appear to side with one party as against another. In my humble judgment it will only accentuate the evil which it is meant to remove. Far from healing the differences which still linger, or which now and then come to the surface, it would widen the gap by encouraging insidious men to do mischief in stealth."[36]

His objection was not only perceptive but prophetic.

Experience shows that criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression.[37] 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.

Laws designed ostensibly to protect the security of the state and public order are another source of suppression of expression. Under this pretext, the axe has fallen on several innocent publications whose only crime was to strongly dissent from government policy and criticize the current rulers for their lapses. The offence of sedition exists in several countries and its abuse is rampant and persistent. In the heyday of British colonialism

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35 *Supra,* n 30, at 253.

36 Select Committee Report, Gazette of India, Part V, 15 (5 February 1898).

37 *R v Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury,* [1991] 1 QB 429.

sedition was construed by the Privy Council in the case of *Tilak*,[38] *Wallace-Johnson*[39] and *Sadashiv Narayan*[40] 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*[41] dissented from the Privy Council decisions. It held that the gist of the offence of sedition under Section 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.

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, those judges who are more sensitive to the value and function of free speech in a democratic society, adopt a different approach 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 in some cases are non-existent.

Exhibition of movies has often been banned or restricted by the authorities under the Cinematograph Act 1952 on the ground of obscenity or indecency or vulgarity. Prior restraint has been upheld by the Supreme Court with regard to the exhibition of motion pictures in *K.A. Abbas v Union of India.*[42] According to the Court,

> "... it has been almost universally recognized that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture."[43]

The Court, however, emphasized the necessity for a corrective machinery in the shape of an independent tribunal and also a reasonable time-limit for the decision of the censoring authorities. In laying down certain guidelines for the censor, the Court was at pains to point out that the

> "standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for ourselves must make a substantial allowance in favour of freedom".[44]

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38 25 Indian Appeals 1.

39 [1940] AC 231.

40 AIR 1947 PC 82; 74 Indian Appeals 89.

41 AIR 1962 SC 955.

42 AIR 1971 SC 481.

43 Ibid, at 492.

44 Ibid, at 498.

In subsequent cases the Supreme Court has emphasized that standards must be of "reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view".[45] In *S. Rangarajan v P. Jagjivan Ram*,[46] the Court approved the observations of the European Court of Human Rights that freedom of expression protects not merely ideas that are accepted but also

> "those that offend, shock or disturb the State or any sector of the population. Such are the demands of the pluralism, tolerance and broadmindedness without which there is no 'democratic society'".[47]

The Court laid down an extremely important principle:

> "If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threats of demonstrations 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."[48]

This judgment has far-reaching implications. Its wholesome effect and timeliness cannot be over-emphasized in view of the rising intolerance witnessed of late in India. Tranquillity ought not to be maintained in all cases by sacrifice of liberty. In order to prevent a threat to order, the state should not suppress fundamental rights, and particularly freedom of expression, which it is the duty of every democratic state to uphold.

In its recent judgment concerning the movie *The Bandit Queen*,[49] the Court ruled that neither nudity nor vulgarity can necessarily be equated with obscenity. It endorsed the observations in its previous decision in *Samaresh Bose and Another v Amal Mitra and Another*[50] in the context of a novel, that "if a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and will have to read books which are purely religious". With reference to the objected brief scene of frontal nudity of Phoolan Devi, the Bandit, the Court observed:

> "Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film 'Schindler's List' was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive".[51]

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45 *Ramesh v Union of India*, 1988 (1) SCC 668, at 676.

46 *S. Rangarajan v P. Jagjivan Ram*, 1989 (2) SCC 574, at 598.

47 *Handyside v United Kingdom*, (1979-80) 1 EHRR 737, para 49.

48 *Supra*, n 46, at 598.

49 *Bobby Art International v Shri Om Pal Singh Hoon*, JT (1996) 4 Supreme Court 533.

50 1985 (4) SCC 289.

51 *Supra*, n 49.

Defamation is one of the heads of restriction permitted by the Constitution of India. Libel laws can have a chilling effect on freedom of expression. Every inaccurate statement about government officials or public figures should not be actionable unless it is made with malice, that is, 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*[52] and have been endorsed by the House of Lords in the *Derbyshire County Council* case. The Lords recognized that threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech and enunciated a very 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".[53]

The Supreme Court of India in its path-breaking judgment in *R. Rajagopal v State of Tamil Nadu and Others*,[54] approved of *Sullivan* and *Derbyshire County Council* and *inter alia* laid down that the remedy of action for damages is not available to public officials with respect to their acts and conduct relevant to their official duties,

> "... even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages".[55]

The Court has applied the same principles in the case of public figures because "public figures like public officials often play an influential role in ordering society ... [they] have access to mass media communication both to influence the policy and to counter criticism of their views and activities".[56] The Court further held that neither the government, nor the officials who apprehend that they may be defamed, had the right to impose a prior restraint upon the publication of the autobiography of Auto Shankar, a convict serving sentence of death in jail and whose publication by his wife was likely to reveal a nexus between criminals and high ups in the police. "The remedy of public officials/public figures, if any, will arise only after the publication".[57]

An important question regarding use and control of electronic media and airwaves and frequencies was decided by the Supreme Court in *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*.[58] The Court ruled that "the right to communicate

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52 376 US 254 (1964).

53 *Derbyshire County Council v Times Newspapers Ltd and Others*, [1993] AC 534.

54 1994 (6) SCC 632.

55 Ibid, at 646.

56 Ibid, at 646.

57 Ibid, at 649.

58 1995 (2) SCC 161.

includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. ... This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach".[59] At the same time the Court recognized that "since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies".[60] It directed that "the central government shall take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves".[61]

Guarantee of freedom of speech also guarantees the right not to speak. That is the effect of the landmark decision of the Supreme Court of India[62] which upheld the claim made by three students of the Jehovah's Witnesses faith that they were forbidden by their religious beliefs to sing the national anthem of any country. The students were expelled by the educational authorities because of their refusal to sing the Indian national anthem, even though they respectfully stood up in silence when the anthem was sung. The Court held that expulsion was violative of their fundamental right of freedom of expression. The Court concluded with a ringing note: "Our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practises tolerance; let us not dilute it".[63]

The Supreme Court of India recently had to deal with a case which concerned the issue of the right of reply. Professor Manubhai Shah published a study paper which was strongly critical of the working of the Life Insurance Corporation (LIC). A reply to Professor Shah's article was published in *Yogakshema*, a magazine of the LIC. Shah's request that his article should also be published in the same magazine was refused. The Supreme Court applied the fairness doctrine and held that LIC's refusal was "unfair because fairness demanded that both viewpoints were placed before the readers".[64] The attention of the Supreme Court was not drawn to the advisory opinion of the Inter-American Court of Human Rights delivered on 29 August 1986, and consequently the Supreme Court had no occasion to consider the social dimension of the right to reply based on the important premise that "the formation of public opinion based on true information is indispensable to the existence of a vital democratic society".[65]

The Supreme Court has held that commercial speech is within the guarantee of Article 19(1)(a) and commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen.[66]

One of the heads on which freedom of speech and expression can be restricted under the

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59 Ibid, at 213.

60 Ibid, at 226.

61 Ibid, at 252.

62 *Bijoe Emmanuel v State of Kerala*, AIR 1987 SC 748.

63 Ibid, at 758, per Chinnappa Reddy J.

64 *Manubhai Shah v Life Insurance Corporation of India*, 1992 (3) SCC 637.

65 *Enforceability of the Right of Reply or Correction*, Advisory Opinion OC-7/86 of 29 August 1986, 7 HRLJ 238 (1986).

66 *Tata Press Ltd v Mahanagar Telephone Nigam Ltd*, 1995 (5) SCC 139 at 154; *Supra*, n 9 at 548, 549.

Indian Constitution is "decency or morality". D.H. Lawrence's book, *Lady Chatterley's Lover,* fell foul of the Indian Supreme Court justices in the case of *Ranjit Udeshi,* decided on 19 August 1964.[67] The Supreme Court adopted the nineteenth-century *Hicklin* test laid down by courts in England and came to the surprising conclusion that the book was obscene judged "from our community standards and there is no social gain to us which can be said to preponderate".[68] This judgment may well be regarded as an aberration. The average English-speaking Indian has free and easy access to books in libraries and bookshops in whose company *Lady Chatterley's Lover* would blush like a tomato. Two decades later, in 1985, the Supreme Court adopted a less illiberal approach in *Samaresh v Amal Mitra*[69] and held that the Bengali novel, *Prajapati,* was not obscene. Unfortunately, the Court did not discard the outdated *Hicklin* test but emphasized that vulgarity was not synonymous with obscenity. The Court concluded that the novel was not obscene "merely because slang and unconventional words have been used in the book in which there has been emphasis on sex and description of female bodies".[70]

Onslaughts on freedom of expression can emanate also from groups or individuals who demand the banning of a book or a movie which appears offensive or hurtful to them. In the recent past, freedom of expression was severely threatened by militant groups in the northern Indian states of Punjab and Jammu and Kashmir which dictated to the press and to All India Radio, run by the government, what should or should not be printed or broadcast. Non-compliance with these directives entailed bodily harm, and even death, to the disobedient. The government's failure to take stern action against militants led to severe self-censorship imposed by media persons in Punjab and other parts of India.

Freedom of expression has on the whole received solicitous protection from the Indian judiciary. The Supreme Court has endorsed the approach and thinking of Madison in regard to the freedom of the press that "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits".[71]

The real protection to freedom of expression would lie in creating a temperament of tolerance, mutual understanding and respect for the beliefs and points of view of others. This requires a sustained effort to change the attitudes of persons and to sensitize them to the value of free speech and the importance of dissent, and to impress upon them that no group has the monopoly of truth and wisdom, about which there may be genuinely different perceptions.

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67 *Ranjit D. Udeshi v State of Maharashtra,* AIR 1965 SC 881.

68 Ibid, at 891.

69 *Supra,* n 50.

70 *Supra,* n 50.

71 *Romesh Thappar v State of Madras,* AIR 1950 SC 124 at 129.

10

Freedom of Expression under the European Convention on Human Rights

Lord Lester of Herne Hill, QC and Natalia Schiffrin

The relevance of Strasbourg case law

The right to freedom of expression is defined by Article 10 of the European Convention 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 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 Article 10 reflect the different and competing values of, on the one hand, the basic right to 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.

The case law under the European Convention, in this and other areas, is relevant beyond Europe for a number of reasons. Judgments of the European Court can be used as a helpful aid to the interpretation of domestic law provisions in countries with constitutional guarantees similar to the guarantees of the European Convention,[1] - including the Commonwealth Caribbean. Reference to the decisions of the European Court may also be persuasive before other international and regional human rights tribunals. This may be of particular relevance to litigants in the Caribbean who have recourse to bodies such as the

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1 For cases referring to Article 10 *see*, for instance, *Director of Public Prosecutions v Mootoocarpen and Others*, [1989] LRC (Const) 768, at 773 (a Mauritian case addressing whether publication of an article critical of the judiciary constituted contempt of court, containing extensive discussion of the *Sunday Times* case, *infra*, n 13, and, in *obiter dicta*, concluding that Mauritian law should be interpreted consistently with Article 10 of the European Convention). *See also* the Indian case, *Rangarajan v Jagjivan Ram and Others*, [1990] LRC (Const) 412.

UN Human Rights Committee and the Inter-American Commission on Human Rights and the Inter-American Court.[2] Reference to the case law under Article 10 may be of particular value because it is far more developed than the case law established under the parallel guarantees of other international and regional human rights treaties.

The right to free expression is technically drafted in Article 10 in weaker language than in Article 19 of the UN International Covenant on Civil and Political Rights[3] in several respects. In particular, Article 10 does not in terms create an independent right to hold opinions without interference;[4] nor does it expressly refer to the right to seek information;[5] nor does it specifically refer to information and ideas "of all kinds". However, the European Court and Commission generally seek to interpret Article 10 of the Convention in a manner which is consistent with Article 19 of the Covenant.[6]

Article 10 also contains more detailed and specific exceptions to the right of free expression than does any other international human rights instrument influenced by British legislative drafting style. On the other hand, unlike Article 20 of the International Covenant,[7] the European Convention does not require the prohibition of war propaganda, or of incitement to racial or religious hatred or discrimination.

Compared with the well-known constitutional guarantees of free speech in the United States,[8] France[9] and Germany,[10] the right to free expression in Article 10 is heavily qualified

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2 Also referring to Article 10, *see*, for instance, the decision of the Inter-American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A No 5; 7 HRLJ 74 (1986).

3 Article 19 of the Covenant 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 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."
See generally, McGoldrick, *The Human Rights Committee* (Oxford: Clarendon Press, 1991), pp 459-79.

4 Unlike Article 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.

5 Unlike Article 19(2) of the Covenant. However, it seems likely that Article 10, read with Article 8 of the Convention, will gradually be interpreted as containing a public right and a personal right of access to information in some circumstances. *See* section of this paper on "The right to receive information and ideas", p 155 *infra*.

6 In *Müller v Switzerland*, Judgment of 24 May 1988, Series A No 133, para 27, the Court referred to Article 19(2) of the Covenant for confirmation that the concept of freedom of expression includes artistic expression. In the case of *Groppera Radio AG and Others v Switzerland*, Judgment of 28 March 1990, Series A No 173, para 61, the Court referred to the text and history of Article 19 of the Covenant for confirmation that the third sentence of Article 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 Article 10(2) of the Convention.

7 Article 20 of the Covenant 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, *supra*, n 3, pp 480-97. See also Article 13(5) of the American Convention on Human Rights, and Article 4 of the UN International Covenant on the Elimination of All Forms of Racial Discrimination.

8 First Amendment to the US Constitution: "Congress shall make no law ... abridging the freedom of speech, or of the press".

9 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."

10 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."

by its detailed exceptions. Unlike Article 13(2) of the American Convention on Human Rights,[11] there is no statement in Article 10 that the exercise of the right to freedom of expression shall not be subject to prior censorship. Similarly, unlike Article 14 of the American Convention,[12] 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.

The scope of freedom of expression

Basic principles: freedom of political speech and freedom of the press

However, Article 10 confers wide-ranging and important protections. It has been interpreted to extend 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.[13] The right to free speech applies to "everyone", whether natural or legal persons (including profit-making corporate bodies).[14]

The breadth and importance of the right to free speech were recognized by the European Court in the *Handyside*[15] case as being inherent in the concept of a democratic and plural society. In a celebrated statement, the Court observed that

> "[f]reedom 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 paragraph 2 of Article 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'."[16]

The *Handyside* case concerned a successful prosecution under the English Obscene

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11 Article 13(2) of the American Convention states: "The exercise of the right [to freedom of expression] shall not be subject to prior censorship, but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary 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 13(4), however, does permit prior censorship of public entertainments for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

12 Article 14 of the American Convention 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 communications outlet, under such conditions as the law may establish.
(2) The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
(3) For the effective protection of honor 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."

13 *Sunday Times v UK*, Judgment of 26 April 1979, Series A, No 30, paras 65-6. In its opinion in *De Geillustreerde Pers NV v the Netherlands* (Application No 5178/71), Report of 6 July 1976, (1977) 8 DR 5, the Commission suggested that the freedom to impart information under Article 10 "is only granted to the person or body who produces, provides or organizes it". If the public has other ready means of access to the information, Article 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 Article 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.

14 *Autronic AG v Switzerland*, Judgment of 22 May 1990, Series A No 178, para 47.

15 *Handyside v UK*, Judgment of 7 December 1976, Series A No 24. *See also Sunday Times v UK, supra*, n 13.

16 *Handyside v UK, supra*, n 15, para 49. *See also* the *Sunday Times Case, supra*, n 13, para 65.

Publications Act against the publishers of "The Little Red Schoolbook", a book which urged the young people at which it was aimed to take a liberal attitude to sexual matters. Although the challenge under Article 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 which has often been applied by the Court in a manner which seriously dilutes the strong principles of freedom of expression proclaimed by the Court.

The European 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*[17] case, where it stated that it is incumbent on the mass media

> "to impart information and idea 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."[18]

The Court also held that its supervision is not limited

> "to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith."[19]

In addition, it decided 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."[20]

In its unanimous judgment in the *Lingens*[21] case, the Court observed that freedom of the press

> "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."[22,23]

Defamation

One of the most important exceptions to the right to free political speech is where it is necessary to protect personal reputation. Because the relevant cases concern crucial issues relating to criticism of government and politicians as well as the right to debate matters of

17 *Sunday Times v UK, supra*, n 13.

18 Ibid, para 65.

19 Ibid, para 59.

20 Ibid, para 65.

21 *Lingens v Austria*, Judgment of 8 July 1986, Series A No 103.

22 Ibid, para 42.

23 Recognition of the *importance* of freedom of the press was most recently expressed in *Goodwin v UK*, Application 17488/90, Judgment of 27 March 1996, Reports of Judgments and Decisions 1996-II, where the Court held that Article 10 protected a journalist from being obliged to reveal his sources.

public concern, the balance between the conflicting public interests has given rise to some of the European Convention's key human rights decisions.[24]

The *Lingens*[25] case, for example, concerned a journalist in Austria who had been criminally convicted for publishing two articles strongly critical of then Chancellor Kreisky's support for a politician who had been an SS officer. Though Mr Lingens was not alleged to have made any false statements, the Austrian courts found that he had not proved that his opinions were "true", as required under Austrian law. It was this requirement that the Court did not allow. The Court held that

> "[a] careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof.... As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself."[26]

In striking down the conviction of Mr Lingens, the Court also held that "the limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual".[27]

In *Castells v Spain*,[28] an opposition member of parliament challenged before the European Court his conviction for criticizing the Spanish Government in accusing it of inactivity in investigating certain murders in the Basque country. In *Castells*, the *Lingens* decision was extended in two ways, first, by holding that elected representatives enjoy greater protection in their speech than do ordinary people, and second, in providing even greater protections for those alleged to have "defamed" a government rather than an individual politician in his or her private life.

In *Thorgeirson v Iceland*,[29] these principles were further extended, this time to afford protection to those addressing not only political matters but matters of other public interest. In that case, a writer had been found to have criminally defamed members of the police force in an article in which he made allegations of police brutality. In striking down the conviction, the Court held,

> "there is no warrant in [the] case-law for distinguishing ... between political discussion and discussion of other matters of public concern."[30]

In *Tolstoy v UK*,[31] the Court struck down as excessive a jury award of libel damages. The Court held that

> "under the Convention, an award of damages for defamation must bear a

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24 *See also Schwabe v Austria*, Judgment of 28 August 1992, Series A No 242-B (conviction for defamation of a politician violates Article 10 where facts were reasonably accurate and told in good faith, and value-judgment not intended to imply a falsehood). *See also Oberschlick v Austria*, Judgment of 23 May 1991, Series A No 204.

25 *Lingens v Austria*, *supra*, n 21.

26 Ibid, para 46.

27 Ibid, para 42.

28 Judgment of 23 April 1992, Series A No 236.

29 Judgment of 25 June 1992, Series A No 239.

30 Ibid, para 64.

31 *Tolstoy Miloslavsky v UK*, Judgment of 13 July 1995, Series A No 316-B.

> reasonable relationship of proportionality to the injury to reputation suffered."[32]

The applicant challenged a libel damages award against him of £1.5 million, the highest ever awarded in English history. The Court held that the lack of judicial control over damages awards did not provide adequate safeguards to satisfy the requirements of Article 10. Unfortunately, in *Tolstoy* the Court failed to articulate principles or guidelines for future cases concerning damages awards for defamation. Nonetheless, the Court's recognition of the potential "chilling effect" of large damages awards is important.

Authority of the judiciary

In these defamation cases the Court has established important protection for the principle of free and robust debate on matters of political and public interest. An exception to this liberal trend concerns criticism of the judiciary. In two cases in this area, the Court has upheld convictions of individuals charged with defaming judges, placing great emphasis upon the protection of the reputation of the judiciary.

In *Barfod v Denmark*,[33] a journalist was convicted of criminal libel for criticizing a court judgment and suggesting improper motives on the part of some of the judges. The European Commission decided, 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 Article 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 weighs more heavily than the interest of the two judges in being protected against criticism of the kind expressed in the applicant's article."[34]

However, in refusing Mr Barfod's claim, the European Court rejected the view that the defamation was part of "political debate" and held that the 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 ...."[35]

Similarly, by a narrow vote of five to four, the Court found no violation of Article 10 in *Prager and Oberschlick v Austria*,[36] also a case concerning defamation of the judiciary. While noting that the press is one of the means for allowing public scrutiny of the judiciary, the Court said that

> "[r]egard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed

32 Ibid, para 49.

33 Judgment of 22 February 1989, Series A No 149.

34 Report of the Commission, 16 July 1987, appended to the Court's judgment of 22 February 1989, *supra*, n 33, para 71.

35 *Supra*, n 33, para 35.

36 Judgment of 26 April 1995, Series A No 313.

> State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticized are subject to a duty of discretion that precludes them from replying."[37]

The Court's judgment in the earlier *Sunday Times*[38] case also concerned the judiciary. However, on that occasion, a closely divided Court had decided that the House of Lords in the UK had breached Article 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, and the English courts accepted the Attorney-General's contention that it was necessary to restrain publication so as to maintain the authority of the judiciary until the proceedings had finally been determined.

In rejecting this claim, the Court emphasized 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 merely because they formed the background to pending litigation.[39] The Court held by a vote of eleven to nine that there had been a breach of Article 10. The Court stated that

> "[t]here is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialized journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest."[40]

Freedom of expression of civil servants

In comparison with its views in political speech cases, the Court has been more reluctant to afford protection under Article 10 to civil servants, even in cases that concern mere membership in political organizations. However, recent cases indicate recognition that civil servants are entitled to freedom of expression.

In *Vogt v Germany*,[41] the Court ruled in favour of a civil servant, a school teacher, dismissed because of her political activities on behalf of the German Communist Party. It was alleged that she had violated the duty of "political loyalty" which she owed as a civil servant. The Court noted that the "duties and responsibilities" referred to in Article 10(2) "assume a

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37 Ibid, para 34.

38 *Supra*, n 13.

39 *See* also *Weber v Switzerland*, Judgment of 22 May 1990, Series A No 177, where the Court struck down a conviction under a Swiss law making it an offence to make public "any documents or information about a judicial investigation" until it had been fully completed.

40 *Sunday Times, supra*, n 13, para 65.

41 Judgment of 26 September 1995, Series A No 323.

special significance" when relating to the freedom of expression of civil servants, and considering Germany's particular history. It said,

> "The Court proceeds on the basis that a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded. In this connection it takes into account Germany's experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949 ...."[42]

Nonetheless, in considering that Mrs Vogt's position did not involve any security risks and that she had had only wholly satisfactory reports on her professional conduct and abilities, there was no evidence she had actually made anti-constitutional statements, and her activities were entirely lawful, the Court held, by ten votes to nine, that even allowing for the margin of appreciation, the dismissal was disproportionate.[43]

Though the ultimate decision was a narrow one, the Court in *Vogt* had agreed by seventeen to two that Article 10 was applicable, a finding it had declined to make in an earlier similar case, *Glasenapp v Germany*.[44] In *Glasenapp*, the applicant's appointment as a school teacher was annulled because of her refusal 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. By sixteen votes to one, the Court came to the conclusion here that there had been no interference with the exercise of a right protected under Article 10(1), and therefore found it unnecessary to consider the complaint under Article 10(2). 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.

Artistic expression

The protection attached to political speech is by far the strongest under the Convention. However, freedom of artistic expression also comes within the ambit of Article 10. The major cases in this area balance freedom of artistic expression against issues of morality such as the use of criminal law to punish obscenity and blasphemy, areas in which the Court has not been minded to give strong free expression rights.

In *Müller and Others v Switzerland*,[45] the Commission emphasized the importance of artistic expression, observing that it is

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42 Ibid, para 59.

43 For the same reasons, the Court held that there was also a violation of the Article 11 guarantee of freedom of assembly and association.

44 Judgment of 28 August 1986, Series A No 104. 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 Article 10. The facts of Mr Kosiek's 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.

45 Report of the Commission, 8 October 1986, appended to the Court's judgment of 24 May 1988, *infra*, n 47, para 70.

> "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,[46] consists not only in freedom to create works of art but also in freedom to disseminate them, in particular through exhibitions. In *Müller*, an artist had been convicted on an obscenity charge because of sexually explicit paintings on public exhibition (which were confiscated).

While the Court accepted 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" it was markedly weaker than was the Commission in giving practical content to artistic expression. In one of several judgments overruling the Commission's findings of breaches of the right to free expression, the Court emphasized the "duties and responsibilities" of artists,[47] and the margin of appreciation in relation to the public morals exception, and decided that the confiscation of the paintings did not infringe Article 10.[48]

If an interference as extreme as the confiscation of an artist's 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. Indeed, in *Otto-Preminger-Institut v Austria*,[49] the Court (again overruling the Commission) found that there had been no violation of Article 10 where an allegedly blasphemous film that was to be shown in an art cinema was seized and permanently forfeited. Here the Court had to balance the right to freedom of artistic expression against the protection of respect for religious feelings. The Court said that

> "in seizing the film, the Austrian authorities acted to ensure religious peace in [the] region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner."[50]

A similar case is now pending before the Court, also concerning an allegedly blasphemous video, this one containing sexual imagery. *Wingrove v UK*[51] arose out of the refusal of the British film classification board to classify a short film for video distribution. Here again, the Commission held in a near-unanimous decision that there had been a violation of the Convention, this time emphasizing that the video was unlikely to be on public display.

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46 Ibid, para 95.

47 *Müller and Others v Switzerland*, Judgment of 24 May 1988, Series A No 133, para 34. The notion that artists owe duties and responsibilities in their capacity as artists seems strange, in light of the inherently subversive nature of the artistic impulse. However, it may be that the Court meant to say no more than that artists, like everyone else, have to obey the law.

48 Ibid, para 43.

49 Judgment of 20 September 1994, Series A No 295-A.

50 Ibid, para 56.

51 Case No 19/1995/525/611. Report of the Commission, 10 January 1995, appended to the Court's judgment of 25 November 1996, Reports of Judgments and Decisions 1996-V.

Significantly, the Commission held that "particularly compelling reasons" are required to justify prior censorship.[52]

It is hoped that the Court will take this opportunity to draw the line at *Wingrove*, and extend protection under Article 10 to this short video film. Offensive though the video may be to some, the censorious and meddling prohibition of this short, unimportant and, as the director himself concedes, not very good, film is surely not necessary to protect public morals.

Commercial speech

Another area where the Court has been reluctant to extend strong protection concerns "commercial speech". The Court has been hesitant in deciding whether and to what extent Article 10 protects advertising or other means of communicating commercial information to consumers.

In *Barthold*,[53] 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 Article 10, since it communicated information on a matter of general interest. Restrictions imposed upon the applicant by the rules of his profession, 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 private 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."[54]

In the *markt intern*[55] case, the Court decided that information of a commercial nature

52 Ibid, para 65.

53 *Barthold v Germany*, Judgment of 25 March 1985, Series A No 90.

54 Ibid.

55 *Markt intern Verlag GmbH and Klaus Beermann v Germany*, Judgment of 20 November 1989, Series A No 165.

cannot be excluded from the scope of Article 10(1), which "does not apply solely to certain types of information or ideas or forms of expression".[56] In that case the Commission nevertheless reaffirmed 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 Article 10 protection to commercial communications.[57]

Markt intern published 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 performed acts contrary to honest practices in breach of the Unfair Competition Act.

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 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."[58]

The majority also stated that

> "it is primarily for the national courts to decide which statements are permissible and which are not."[59]

They concluded that

> "[i]t 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."[60]

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56 Ibid, para 26.

57 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 Citizens 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).

58 *Supra*, n 55, para 33.

59 Ibid.

60 Ibid, para 37.

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 commercial 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 freely disseminate information and ideas about the products and services proposed to consumers. They found the reasoning based upon the margin of appreciation a cause for serious concern, because it meant that the Court was effectively abdicating European supervision as to the conformity of the contested measures with Article 10.

In *Casado Coca v Spain*[61] the Court again deferred to the state's margin of appreciation and upheld curbs on professional advertising, by a vote of seven to two. In that case the applicant, Mr Casado Coca, challenged the penalty imposed upon him by the Barcelona Bar Council, and upheld by the Spanish courts, for advertising his services as a lawyer. The advertisements supplied Mr Casado Coca's name, his legal title, his office address, and his office phone number.

In its decision, the Court stated that, although advertising is for citizens "a means of discovering the characteristics of goods and services"[62] offered, it may be restricted to prevent unfair competition, and untruthful and misleading advertising. The Court further said that

> "[i]n some contexts, the publication of even objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions."[63]

Such restrictions, however, must be "closely scrutinized" by the Court.

In holding the restrictions to be reasonable and proportionate, the Court noted that the ban was not absolute, but did allow information such as notices announcing a change of address. The Court concluded that the legal profession could not be compared to commercial ventures, such as insurance companies that are not subject to restriction on advertising their own legal services, because the Bar's special status gives it a "... central position in the administration of justice as intermediaries between the public and the courts".[64] The Court stated that the wide range of regulations and the different rates of change throughout the Council of Europe indicates the complexity of the issue and underscores that the national authorities are in the best position to determine how the balance should be struck between the various interests involved.[65] Considering that only accurate and useful information was sought to be advertised in *Casado Coca*, the case makes

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61 Judgment of 24 February 1994, Series A No 285.

62 Ibid, para 51.

63 Ibid.

64 Ibid, para 54.

65 *See* also *Colman v UK*, Report of the Commission, 19 October 1992, where the Commission found no breach of Article 10 in a case concerning a challenge of the applicant, a doctor, to the General Medical Council's policy against paid advertising of medical services in the press. In finding no violation, the Commission noted that there was not a blanket restriction on doctors' advertising at the material time, and that the applicant was only affected by the prohibition on newspaper advertising. The Commission also was satisfied that the measures complained of were not disproportionate to the legitimate aim of protecting patients' health, as well as the rights of others, namely other doctors.

it clear that the Court continues to offer only scant supervision of states' practices restricting commercial speech.

It is strongly arguable that[66] expression should not lose its Article 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.

The right to receive information and ideas

Article 10(1) guarantees not only the right to impart but also the right to receive information and ideas without interference by public authority. Unlike Article 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.

In *Open Door and Dublin Well Woman v Ireland*,[67] the Court struck down an injunction preventing family planning counsellors from providing information to women about where to obtain abortions outside Ireland, where the procedure is illegal. In striking down the injunction, the Court concluded that it was excessive and beyond the scope of the state's margin of appreciation, because it "imposed a 'perpetual' restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age, state of health or their reason for seeking counselling on the termination of pregnancy".[68] Since the injunction prohibited the provision of information regarding medical procedures which were lawful in other Council of Europe states, and since travel to other states for the purposes of obtaining an abortion was not illegal under Irish law, Article 10's freedom of information provision would have little content if the Court had ruled otherwise.

In other cases, the Court has been 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 Article 8(1).[69] In *Leander v Sweden*,[70] the Court held that the right to receive information under Article 10

> "basically prohibits a Government from restricting a person from receiving information that others may wish or may be willing to impart to him."[71]

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66 These principles have been largely culled from the decision of the Supreme Court of the United States in *Virginia State Board of Pharmacy, supra*, n 57.

67 Judgment of 29 October 1992, Series A No 246.

68 Ibid, para 73.

69 However, in its Report of 12 October 1983, in Application No 8231/78, *X v United Kingdom*, (1986) 49 DR 1, the Commission held that the denial of access to writing paper, and restrictions imposed upon access to newspapers and periodicals, during the applicant's imprisonment, were in breach of Article 10.

70 Judgment of 26 March 1987, Series A No 116.

71 Ibid, para 74.

Accordingly, the applicant had no right of access to a government register containing information on his personal position, nor did Article 10 impose an obligation on the government to impart such information to him. The Court affirmed this restrictive approach in the *Gaskin*[72] case. However, the Court was 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 that Article 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 are 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."[73]

In *Gaskin*, the Court found a breach of Article 8 because no such authority existed in the UK enabling the applicant to obtain records relating to his childhood in public care. The holding in *Gaskin* thus comes close to deciding that Article 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 Article 10 confers a public right of access to official information about matters of legitimate public interest and concern. It is to be hoped that 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.

The third sentence of Article 10(1) states that Article 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 that the third sentence of Article 10(1) empowers the state to regulate the content of the material broadcast by those persons to whom licences are granted.[74] 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 Article 10(2).

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72 *Gaskin v UK*, Judgment of 7 July 1989, Series A No 160.

73 Ibid, para 49.

74 *X and the Association of Y v UK* (Application No 4515/70), 14 Yb 539 (1971), 38 Coll Dec 86.

Any doubt about this important matter was removed by the Court in its judgment in the *Groppera Radio*[75] case, 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 organized 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 paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole."[76]

In *Groppera Radio*, the Court again overruled the Commission's finding of a violation of Article 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*[77] case, the Court agreed with the Commission's opinion that there had been a breach of Article 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". However, it stated that

> "[w]here, 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."[78]

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

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75 *Supra*, n 6. *See also National Broadcasting Co Inc v United States*, 319 US 190, at 226 (1943).

76 Ibid, para 61.

77 *Supra*, n 14.

78 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 *Groppera* case, *supra*, n 6.

stricter scrutiny to restrictions upon the licensing of broadcasting.[79]

In *Informationsverein Lentia and Others v Austria*,[80] the Court unanimously ruled that Austria's public broadcasting monopoly was incompatible with Article 10. The question here was whether the public monopoly was necessary in order for the appropriate authorities to ensure compliance with its aim of maintaining plurality of opinion on the airwaves. The applicants suggested that the government was in reality seeking to retain political control, and that true diversity would only be achieved by allowing a variety of stations and programmes.

In reaching its decision, the Court emphasized the importance, particularly in the audio-visual media, of the principle of pluralism, of which, the Court said, the state is the "ultimate guarantor". It said,

> "[t]he Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. ... Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely."[81]

The Court noted that of all the means of ensuring pluralism, a public monopoly is

> "the one which imposes the greatest restrictions on freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station."[82]

The Court also said that as a result of technical progress made over the last few decades, the limited restrictions were no longer justified by the number of frequencies available. Above all, the Court said,

> "... it cannot be argued that there are no equivalent less restrictive solutions;

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79 It would be curious if it were the latter. The US Supreme Court has consistently held that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection": *FCC v Pacifica Foundation*, 438 US 726 (1978), at 748-50. 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). (*See also*, on the press, *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974).) 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: *see* Eric Barendt, "The Influence of the German and Italian Constitutional Courts on their National Broadcasting Systems", [1991] PL 93. 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 the Netherlands State* [1988] ECR 2085. It is difficult to understand why the revenue of newspapers should be favoured in this way in preference to broadcasters.

80 Judgment of 24 November 1993, Series A No 276.

81 Ibid, para 38 (citations omitted).

82 Ibid, para 39.

it is sufficient by way of example to cite the practice of certain countries which either issue licences subject to specified conditions of variable content or make provision for forms of private participation in the activities of the national corporation."[83]

Race hate speech

In spite of the Court's strong and oft-repeated statement of principle, in the *Handyside*[84] case, that, subject to paragraph 2, Article 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 Article 10. In *Glimmerveen and Hagenbeek v the Netherlands*,[85] 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 Article 10. The Commission invoked Article 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 Article 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 constituted an activity within the meaning of Article 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 Article 10 altogether.

While the Court and Commission have been consistent in their refusal to extend protection to politically extreme speech, in *Jersild v Denmark*[86] the Court held that a journalist could report such speech where it is clear that the journalist is not personally attempting to propagate those ideas. In *Jersild*, a journalist was found guilty of disseminating racist language on account of a radio interview he had broadcast with several self-avowed racist youths. In striking down the conviction, the Court was satisfied that Mr Jersild had dissociated himself from the offending speech, and emphasized "the journalist's discretion as to the form of expression used". The Court said that

> "[n]ews reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of 'public watchdog'. ... The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."[87]

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83 Ibid.

84 *Supra*, n 15.

85 Applications Nos 8348/78 and 8406/78, Admissibility Decision of 11 October 1979, (1980) 18 DR 187.

86 Judgment of 23 September 1994, Series A No 298.

87 Ibid, para 35 (citation omitted).

National security[88]

In two companion cases concerning the book "Spycatcher", *The Observer and Guardian v UK*[89] and *Sunday Times v UK (No 2)*,[90] the Court considered whether or not various injunctions preventing publication in the press of excerpts of "Spycatcher" were necessary in the interests of "national security". Publication of details of the contents of the book, the memoirs of a former intelligence officer, was enjoined even after the book had been published across the world. Before the European Court, the UK Government argued that the injunctions were necessary for security reasons, to preserve the confidence of other governments in the secrecy of information held by the intelligence services, to enforce the duty of confidentiality owed by crown servants, and to safeguard the rights of the Attorney-General pending final determination of the lawfulness of the injunctions by the House of Lords.

In its decision, the Court ruled that, prior to publication elsewhere, the injunctions fell within the state's margin of appreciation. The Court in particular emphasized the nature and possible contents of the book, and the potential prejudice to the Attorney-General. However, the Court held that, once "Spycatcher" had been published elsewhere, the interest of the press and the public in imparting and receiving the information outweighed the government's interests. The Court stressed in particular that "[a]bove all, the continuation of the restrictions after [the publication of 'Spycatcher' and the continuance of the original interlocutory injunctions] prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern."[91]

In *Purcell v Ireland*,[92] 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.

Even though the broadcasting ban covered politically innocuous speech, the Commission noted that Article 10 allows restrictions based on Article 17[93] and rejected the application at the admissibility stage.[94] The Commission referred 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 statements 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 in this case seriously weakened European protection of freedom of political speech in exactly the kind of difficult context in which European protection is

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88 *See also Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria*, Judgment of 19 December 1994, Series A No 302 (right to distribute journal within a military barracks upheld), and *Vereniging Weekblad 'Bluf!' v the Netherlands*, Judgment of 9 February 1995, Series A No 306-A (disallowing seizure of publication that included "confidential" material obtained from the Dutch Internal Security Service).

89 Judgment of 26 November 1991, Series A No 216.

90 Judgment of 26 November 1991, Series A No 217.

91 *Supra*, n 89, para 69.

92 Application 15404/89, Admissibility Decision of 16 April 1991, 70 DR 262.

93 *See* section of this paper on "Race hate speech", p 159 *supra*.

94 *Supra*, n 92.

most needed, namely in situations where ideas are sought 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 Article 10.[95]

Exceptions to the right of freedom of expression

The primary exceptions to the principles stated in Article 10(1) are those listed in Article 10(2). To justify an interference with freedom of expression under Article 10(2), a respondent state has to establish that the interference[96] complained of satisfies the following three tests:

(a) it is "prescribed by law"; and

(b) it is in pursuance of one of the legitimate aims listed in Article 10(2); and

(c) it is "necessary in a democratic society", having regard to the "duties and responsibilities".

Each of the three tests in Article 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 first *Sunday Times*[97] case, the Court held 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."[98]

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95 *See also Brind and Others v United Kingdom*, Application No 18714/91, Admissibility Decision of 9 May 1994, 77-A DR 42, where the Commission ruled inadmissible a challenge to a similar UK broadcasting ban.

96 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*, AIR 1986 SC 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, (1983) 5 EHRR 471, at p 474.

97 *Supra*, n 13.

98 Ibid, para 49.

In practice it is rare for a state's interferences with fundamental rights and freedoms to fail to satisfy these requirements of the principle of legal certainty.

(b) The purposes for which a restriction may be imposed

If the 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 Article 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 reputation or 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.[99] The issue under this test is whether the interference complained of is genuinely aimed at one of the factors listed in Article 10(2). If so, the aim of the interference under Article 10(2) is legitimate.[100] It is rare for a state to be unable to show that an interference with free speech pursues a legitimate aim.

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;[101] or the possibility that the public disclosure of confidential information about the security service by its former members might damage its efficacy.[102]

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;[103] or upon those who advertise or otherwise promote "pirate" radio stations.[104] "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".[105]

Similarly, restrictions upon freedom of expression may be imposed to avoid the risk of disturbances to public order after the end of a war.[106] The prevention of disorder also

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99 Ibid, para 55.

100 Ibid, para 57.

101 *Arrowsmith v UK*, Report of the Commission of 12 October 1978, 19 DR 5, at 22. It was there held that Article 10 was not breached by prosecuting someone under the Incitement to Disaffection Act 1934 for encouraging soldiers to desert the army.

102 The "Spycatcher" cases: *The Observer and Guardian v UK*, *supra*, n 89, para 56, and, generally, *Sunday Times v UK (No 2)*, *supra*, n 90.

103 *Castells v Spain*, *supra*, n 28, para 39. *See also* in the particular context of Article 11, *Ezelin v France*, Judgment of 26 April 1991, Series A No 202, para 47 (professional advocate's failure to dissociate himself from unruly incidents during a demonstration).

104 *X v UK*, Admissibility Decision of 4 December 1978, 16 DR 190.

105 *Engel v the Netherlands*, Judgment of 8 June 1976, Series A No 22, para 98.

106 *De Becker v Belgium*, Report of the Commission January 1960, Series B No 2, para 263.

includes protecting the international telecommunications order.[107]

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.[108] The word "morals" covers obscene publications.[109] There is a natural link between the protection of morals and the protection of the rights of others.[110]

The "protection of the reputation or rights of others" includes the imposition of civil or criminal sanctions for defamation.[111] The reference to "the rights of others" includes the concept of the offence of blasphemous libel as laid down in English law.[112] Subject to the test of necessity it entitles the state to prohibit the display of pamphlets alleging that it is a "lie" and a "swindle" to state that millions of Jews were killed by Nazi Germany.[113] It empowers the state to take disciplinary measures against a lawyer who has broken his professional duty not to use aggressive or insulting language.[114] It also empowers a school to prohibit a teacher from subjecting pupils to his personal moral or religious views.[115] The protection of "the rights of others" applies to protect consumers.[116] It also applies to promoting pluralism in information by allowing the fair allocation of radio frequencies.[117]

Preventing "the disclosure of information received in confidence" includes forbidding a civil servant to disclose official secrets imparted to him in confidence.[118] It also includes in some circumstances preventing a newspaper from publishing confidential information about the security service.[119]

Maintaining "the authority and impartiality of the judiciary" covers the English common law forbidding contempt of court;[120] and preserving the confidentiality of a judicial investigation.[121]

(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 Article 10(2); it must also establish that

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107 *Groppera Radio*, *supra*, n 6, at para 70.

108 *Liljenberg v Sweden*, Application No 9664/82, Admissibility Decision of 1 March 1983 (unreported).

109 *Handyside* case, *supra*, n 15, para 46.

110 *Müller* case, *supra*, n 47, para 36. *See also Otto-Preminger-Institut v Austria*, *supra*, n 49, para 50.

111 *Lingens* case, *supra*, n 21, para 36.

112 *X Ltd and Y v UK*, Admissibility Decision of 8 May 1982, 28 DR 77.

113 *K v Federal Republic of Germany*, Admissibility Decision of 16 July 1982, 29 DR 194.

114 *X v Federal Republic of Germany*, 39 Coll Dec 58 (1971).

115 *X v UK*, Admissibility Decision of 1 March 1979, 16 DR 101.

116 *Liljenberg v Sweden*, *supra*, n 108.

117 *Autronic AG v Switzerland*, *supra*, n 14, para 59. It is perhaps questionable how far this will remain a legitimate aim, given the absence of spectrum scarcity with digital broadcasting.

118 *X v Federal Republic of Germany*, 13 Yb 888 (1970).

119 See the Court's judgment in the "Spycatcher" case, *The Observer and Guardian v UK*, *supra*, n 89, para 69. Moreover, information which is no longer confidential cannot be prevented from being made public to prevent the disclosure of information received in confidence: *Weber* case, *supra*, n 39, para 51.

120 *Sunday Times v UK*, *supra*, n 13, para 56. *See also Barfod* case, *supra*, n 33, para 26; *G. Hodgson and D. Woolf Productions v UK*, Commission's Admissibility Decision of 9 March 1987, 51 DR 136, at 145-6.

121 *Weber* case, *supra*, n 39, para 45.

the interference was "necessary in a democratic society". In applying this key test, the Court has developed the following principles, some of which have been noted already:

(1) The adjective "necessary" implies the existence of a "pressing social need".[122] It is synonymous neither with "indispensable" nor with the looser test of "reasonable" or "desirable".[123]

(2) The initial responsibility for securing the rights and freedoms enshrined in Article 10 lies with the Contracting States. The Contracting States have a certain "margin of appreciation" in assessing whether a need exists, but it goes hand in hand with a European supervision.[124] It is for the Commission and the Court to assess whether an interference with freedom of expression exceeds the limit. The Court is empowered to give a final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.[125]

(3) 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 Article 10(2).[126] Supervision must be strict, because of the importance of the rights in question; the necessity for restricting them must be "convincingly established".[127]

(4) The test to be satisfied by the respondent state is whether the interference complained of corresponded to a pressing social need, whether, in light of the case as a whole, 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 Article 10(2).[128] 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.[129]

(5) The scope of the margin of appreciation is not identical as regards each of the aims listed in Article 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

122 *Sunday Times v UK (No 2), supra*, n 90, para 50.

123 *Handyside* case, *supra*, n 15, para 48; *The Observer and Guardian v UK, supra*, n 89, para 59.

124 *Handyside* case, *supra*, n 15, para 49; *The Observer and Guardian v UK, supra*, n 89, para 59.

125 *Sunday Times v UK (No 2), supra*, n 90, para 50.

126 *Sunday Times v UK, supra*, n 13, para 59.

127 *Autronic AG v Switzerland, supra*, n 14, para 61.

128 *Handyside* case, *supra*, n 15, paras 48-50; *Sunday Times v UK, supra*, n 13, para 62; *Sunday Times v UK (No 2), supra*, n 90, para 50.

129 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: *Sunday Times v UK, supra*, n 13, paras 65-6.

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.[130] Therefore, the test of "necessity" requires consideration of the nature of the aim pursued.

(6) In applying the test of necessity, it is also relevant to consider (a) the breadth of the restriction - the greater the breadth, the greater the scrutiny called for;[131] (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;[132] (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.[133]

Conclusion

It is relatively easy to articulate the relevant legal principles for the interpretation and application of Article 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 Article 10, and expansive interpretations of the phrase "duties and responsibilities", have 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,[134] 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 Article 10, and interpret the exceptions and the margin of appreciation with a strong presumption in favour of freedom of speech. However, the Convention remains a potent source of jurisprudence especially where governments seek to censor or punish political speech.

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130 *Handyside* case, *supra*, n 15, para 48; *Sunday Times v UK*, *supra*, n 13, para 59.

131 *Sunday Times v UK*, *supra*, n 13, para 63; *Barthold*, *supra*, n 53, paras 79-81.

132 *De Becker v Belgium*, *supra*, n 106, para 263.

133 *Sunday Times v UK*, *supra*, n 13, para 60.

134 *See* n 16, *supra*.

11

US Constitutional First Amendment Jurisprudence: A Historical Perspective

Hon Judge Betty B. Fletcher

The focus of any discussion concerning free expression in a convocation like this one, devoted as it is to human rights, should be upon the development of doctrines that promote tolerance of all viewpoints and of speech that advances self governance. I hope that in the ensuing discussion we can explore these themes.

I am a generalist. My jurisdiction is at the appellate level and spans civil, criminal and administrative law. I face cases involving labour law, discrimination, water rights, Native American land claims, prisoners' rights, anti-trust law, and *habeas corpus* in death penalty cases, just to mention a few of the areas of my jurisdiction. First Amendment and libel law are small morsels on my plate. So I approach the topic not with the expertise of a specialist but rather as an observer of general trends and as only an occasional contributor to the decisional process in the area of freedom of expression.

With that disclaimer, let me speak first about the chequered history of the United States in this area. To do so may help us to work through and to understand the inevitable tensions that today cloud the ideal of free speech in an open society.

The First Amendment to the Constitution of the United States[1] did not have an immaculate conception. It had antecedents and an unusual conception and birth. The document produced at the Constitutional Convention held in Philadelphia in 1787 included no guarantees of freedom of speech or religion, let alone any protection for other human rights. The omission of these matters, however, was not because the framers had no concept of their importance. After all, at the core of many of the early settlements were refugees from religious persecution. (Little matter that many came to impose their own brand of intolerance on others.)

But as early as 1641 the Massachusetts General Court in a formal way proclaimed a broad statement of American liberties, which included a right to petition and a due process

1 The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

clause. In 1663 Rhode Island granted religious freedom. In 1776 Virginia's House of Burgesses passed the Virginia Declaration of Rights - the first bill of rights to be included in a state constitution in America. And, of course, the Declaration of Independence was proclaimed on 4 July 1776.

Why, then, no Bill of Rights in our original Constitution? Most of the framers of the Constitution clearly believed in some such rights, but the range of powers, hard bargained for, vested in the new federal government was so very limited - only specifically granted enumerated powers - that it seemed to pose no threat to individual liberty. The perceived threats to liberty were from state laws and state government. Nonetheless, paranoia among those who saw a danger in a central government exacted a promise: if the states ratified the Constitution as drafted, the first Congress would be asked to adopt amendments constituting a bill of rights. The amendments proposed by James Madison, adopted by Congress and ratified by the requisite three-quarters of the states in 1791, were simply "belts and suspenders" limitations on the already limited powers of the federal government. A footnote to this history: it was not until 1941 that Connecticut, Georgia and Massachusetts finally ratified the Bill of Rights.

Since the restrictions were only upon the federal government, not upon the separate states, it was easy to paper over the differences as the states variously enforced their own perceptions of individual rights. Massachusetts, for example, could jail Baptists for protesting publicly and refusing to pay taxes to support the Congregational Church; South Carolina could persist in a state-established Protestant religion. A prohibition against a federal establishment of religion thus posed no threat to the individual states. At the same time, the views of the likes of Thomas Jefferson and other rationalists, who sought to avoid the prospect of a national religion, were thus accommodated.

The backdrop for freedom of speech and the press included an important assumption of the day: the common law protection of speech and press was only as against prior restraint upon publication; it spoke not to punishment after publication. Thus the law of libel and slander was thought to be a matter for the states - not at all involved in the protection of speech and press.

Did the newly adopted First Amendment override this assumption? The opportunity for an answer to this question arose almost immediately, when in 1798 the Federalist Congress passed the Sedition Act. This law criminalized the uttering of false, scandalous, or malicious writing against the government with intent to bring the government into contempt or disrepute or to stir up sedition.

But no Supreme Court test of this law ever came to pass. The Supreme Court in those days heard only about a dozen cases a year, for it was inadequately funded and much of the time of the individual justices was occupied in literally riding circuit about the country, hearing cases at the trial level. And the Act expired by its own terms in 1801.

It was fortunate, perhaps, that no test case reached the Court, for the Court might well have sustained the legislation.

During the statute's short life there were, however, more than two dozen arrests, a dozen prosecutions, and ten convictions for criticizing the government's conduct during the anti-French hysteria. When Jefferson took office in 1801 he pardoned the seditionists. Thus the potential first great challenge to the clause "Congress shall make no law ..." never was. And the Supreme Court remained quiescent on speech and press issues for a remarkably long time thereafter.

The Fourteenth Amendment, passed by the Congress in the aftermath of the Civil War and ratified in 1868, imposed for the first time broad, sweeping limitations upon the states. It provided, *inter alia*, "... nor shall any State deprive any person of life, liberty, or property, without due process of law".

Essentially, no court-made development of First Amendment law had occurred prior to the Civil War and it was a long while after the war before the implications of the Fourteenth Amendment's effect on First Amendment jurisprudence emerged. The only contemporaneous use was President Lincoln's reliance during the war, I believe, on the First Amendment in ordering two Illinois newspapers reopened after both had been shut down by Union General Ambrose Burnside for publishing "disloyal and incendiary sentiments".

It is important to note, too, that John Stuart Mill's general essay "On Liberty of Thought and Discussion", published in 1859, in which he advanced his notion of the "market place of ideas", ultimately had a profound effect on American First Amendment jurisprudence, becoming the philosophical underpinning of Oliver Wendell Holmes's later classic dissents urging the importance of freedom of speech. But these dissents did not come until the early twentieth century. The Supreme Court was not even a "player in the field" until well into that century.

The United States has a short history compared with many countries of the world, but its citizens have even shorter memories. Today we tend to think of freedom of expression and the First Amendment as inseparable and always so, but in fact we did not move beyond common law ideas of freedom of the press until well into the twentieth century. Although one was free to publish, punishment could follow. Alexander Hamilton described freedom of the press as consisting of the right to publish, with impunity, the truth so long as it was for good motives and for justifiable ends, though it may reflect on government, magistrate or individual. Few in government, of course, would think criticism of national policy could ever be well motivated or for justifiable ends.

Our modern law defining freedom of expression is a post-World War I phenomenon. The persistent myths that colonial America was a society that cherished freedom of expression, and that colonists sought religious and political freedom for all, have been debunked by reliable historians. Americans did not think in terms of freedom of thought and expression

for the other fellow who expressed hated ideas or ideas that were strangers to his own. Tolerance was not an American virtue.

In the early 1900s, when immigration was high, new ideas - socialism, syndicalism, and other "foreign notions" - were emerging. To compound the unease, war clouds were gathering and popular fervour for laws to silence radicals and pacifists reached high pitch. Congress saw no First Amendment impediment to its passage of the 1917 Espionage Act, later strengthened to make it a crime "to use language intended to bring the form of government of the United States into contempt, scorn, contumely and disrepute" or to talk about the government in terms "disloyal, scurrilous and abusive". The *New York Times* would have raised the stakes even higher than criminal sanction - it editorialized that agitators should also lose their civil rights. Hundreds of newspapers came under investigation for suspected seditious writing. Editors were arrested. Foreign-language newspapers were required to print translations. Later, during World War II the Smith Act, another anti-sedition act, was passed by the Congress.

It is against this backdrop that our Supreme Court cases should be reviewed.

I begin with the opinion in *Schenck v United States*,[2] written by Justice Holmes - famous because of the first articulation of the "clear and present danger" test but, in First Amendment jurisprudence, infamous for upholding the espionage and sedition laws. Dr Elizabeth Baer, Charles Schenck, and members of the Socialist Party were accused of conspiring to disrupt the American war effort, in particular to obstruct the draft. Schenck was Secretary of the Socialist Party and Baer acted as recording secretary for a meeting at which it was agreed to distribute 15,000 leaflets (yet to be written and printed) to men who had passed the exemption boards. Circulars were later printed and stacked in the Party's office for distribution. There is no record of who received them, how many were distributed, or what if any reaction they produced. Briefly, the circulars bore the title "Long Live the Constitution of the United States, Wake Up, America, Your Liberties are in Danger". The text argued vigorously against the draft and urged the reader to join the Socialist Party and sign a petition urging Congress to repeal the draft laws. Holmes's bias towards defending the legitimacy of any legislative action - seen by him as the will of the people no matter how ill-advised - led him without a blink to accept Congress's view that in wartime the dissemination of views opposing war and, potentially, possibly disruption of the war effort posed a clear and present danger. Holmes followed *Schenck* close on with two other opinions, *Frohwerk v United States*[3] and *Debs v United States*,[4] decided the same day in 1919. In both, Holmes found clear and present danger during wartime in socialism and pacifist efforts.

Ironically, within eight months Holmes joined Brandeis in dissent in another trilogy of sedition cases. Holmes wrote his famous dissent in *Abrams v United States*,[5] a piece that has led many to see Holmes as a great champion of free speech. For the first time, it seems, in marked contrast to his majority opinion in *Schenck*,[6] he saw the prosecution for the expression of opinion in constitutional terms. I quote from his dissent:

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2 249 US 47 (1919).

3 249 US 204 (1919).

4 249 US 211 (1919).

5 250 US 616 (1919).

6 *Supra*, n 2.

> "... when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.... we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force.... Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law ... abridging the freedom of speech'."

There we have it. At last, expressly, Holmes advances the proposition that the First Amendment is a nearly absolute prohibition against government interference with speech, far more restrictive upon government than the Blackstonian concepts expounded in an earlier day by Alexander Hamilton (that speech is protected as long as it is truthful, spoken with good motives and for justifiable ends). The majority of the Court, however, consistent with this Hamiltonian view, remained content with the formulation in *Schenck* and read the notion of immediate evils as the mere "tendency" of speech to cause or incite illegal actions.

At this juncture let us pause a moment. These words of Holmes - stirring, provocative, wise as they are - were in dissent. Only in time would they be put into practice. At the time they were written we as a nation had not - neither in our highest court, in our legislatures, nor in our hearts - yet become true believers in the efficacy of free expression.

But the dialogue had begun. By 1937 Chief Justice Charles Evans Hughes, in *De Jonge v Oregon*,[7] wrote:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion .... Therein lies the security of the Republic, the very foundation of constitutional government."

Yes. The dialogue had begun, and it will have no finish. Between 1917 and 1976 the Congress of the United States passed 46 laws relating to espionage and sabotage. The Smith Act, an anti-sedition act, still remains on the books.

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7 299 US 353 (1937).

In our public acts we continue to exhibit fear of exposure to "harmful" ideas - that is, ideas with which we disagree. For example, we allow the Immigration Service to deny entry to the United States, even temporarily, to people with leftist leanings. But, all in all, our jurisprudence has gradually developed favourably in support of a free speech and press.

Through the 1920s a majority of the justices continued to reject the views expressed by Holmes and Brandeis. They refused to consider the kind or degree of the threatened evil if the speech was in a class found by the legislature to be dangerous. At the same time, the same court was having no difficulty second-guessing legislatures in the field of economics, business and labour, by invalidating minimum wage laws and other laws seen as infringing on the freedom to contract. Civil libertarians, opposing judicial activism in these areas, more or less wanted more activism in striking down laws that limited freedom of speech. Justice Stone, in a famous footnote in *Carolene Products*,[8] suggested a way out: legislation restricting the dissemination of information or interfering with political activity should be subjected to more exacting judicial scrutiny than most other types of legislation. History supported this view. During the congressional debate on the Bill of Rights, Madison observed that if the amendments were to be incorporated into the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive".

The Court had much changed its composition by the late 1930s, when it finally adopted the strict Holmes-Brandeis "clear and present danger" test.

Though much later, the *Pentagon Papers*[9] case is a good illustration of the changed attitude. These papers consisted of certain government documents pertaining to the conduct of the Vietnam War. Despite strong forebodings from the government that death of soldiers, destruction of alliances, and other serious consequences would result from the publication of the papers, the Court refused to enjoin publication. Of course, one must not lose sight of the fact that this was a prior restraint case. Nonetheless, the point can validly be made that a massive attitudinal change had taken place.

Let me circle back. I have quoted from Chief Justice Hughes's words from *De Jonge v Oregon*.[10] In that 1937 case the Court overturned the conviction of a Communist Party organizer for leading a longshoremen's strike, holding that peaceable assembly for lawful discussion cannot be made criminal. In 1940 in *Cantwell v Connecticut*,[11] the Court held that Jehovah's Witnesses could not be banned from haranguing against the Catholic Church on street corners. The Court was explicit for the first time that the due process clause of the Fourteenth Amendment bound the states to honour the religious freedom provisions of the First Amendment.

The 1950s and 1960s brought ambiguities. The "clear and present danger" test in the Communist Party membership cases gave way to a looser balancing test. At the height of Cold War hysteria and McCarthy witch-hunting the "balance" was lost to hysteria in *Dennis v*

8 *United States v Carolene Products Co*, 304 US 144 (1938).

9 *New York Times Co v United States*, 403 US 713 (1971).

10 *Supra*, n 7.

11 310 US 296 (1940).

United States.[12] The Court there upheld the constitutionality of the Smith Act, to convict Dennis and others for membership in an organization, the Communist Party, that advocated the violent overthrow of the government. It also upheld the conviction of Barenblatt, a college professor who refused to answer questions before the House UnAmerican Activities Committee.

In *O'Brien*[13] the Court upheld the conviction of an anti-war protester for burning draft cards. Here the Court held that the effect on free speech was minimal - the harm was the destruction of government records.

But two years later, in 1969, in *Tinker*,[14] the Court held that students must be allowed to wear black armbands to school to protest the Vietnam War. And that same year in *Brandenburg*[15] the Court overturned the conviction of a local Ku Klux Klan leader for violation of a state syndicalism law. The Court in expansive language stated that advocacy of law violation is punishable only if the advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

In the *Skokie*[16] case (Skokie is a small town in Illinois), the Seventh Circuit upheld the right of Nazi Party members to parade through the streets of a predominantly Jewish community (the Supreme Court denied *certiorari*), and in *Texas v Johnson*[17] Justice Brennan, writing for the Court, ruled that burning the American flag in protest is a protected form of speech. My former colleague, now Justice Kennedy, joined in concurrence.

In this flying trip through First Amendment law I have concentrated on cases for the most part posing some sort of threat to or criticism of government. But while to my mind these concerns are of paramount importance and particularly germane to the concerns of this conference, I want to talk briefly about the many other types of cases and the ways in which free expression comes into conflict with other values.

Our Supreme Court has neatly read obscenity out of First Amendment protection. It is not entitled to First Amendment protection at all. Of course, the rub is in defining obscenity beyond the simplistic "I know it when I see it".

Child pornography has been a special focus of law enforcement against both its makers and consumers, and has engaged the Court's attention as well. Bookstores are under a particular chill because of laws that purportedly would allow confiscation of their whole stock if any "unlawful" materials are found for sale on the premises.

Television, cable, radio, and now Internet websites are subject to child-protection laws and regulations that currently are under challenge. In 1996, in a very convoluted set of opinions, the Supreme Court sustained in part and invalidated in part requirements that cable operators in essence segregate "patently offensive programmes" and make them available only on request. Some justices found "proper balancing", others (Justices Kennedy

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12 341 US 494 (1951).

13 *United States v O'Brien*, 391 US 367 (1968).

14 *Tinker v Des Moines Indep Community School Dist*, 393 US 503 (1969).

15 *Brandenburg v Ohio*, 395 US 444 (1969).

16 *Collin v Smith*, 578 F 2d 1197 (7th Cir), cert denied 439 US 916 (1978).

17 491 US 397 (1984).

and Ginsburg) would strike down the law in its entirety, noting that "affording protection to speech unpopular or distasteful is the central achievement of our First Amendment jurisprudence".[18]

Defamation law throughout its evolution in our jurisprudence has tended to cast the balance in favour of the First Amendment. *New York Times v Sullivan*[19] is, of course, the seminal case. Despite the wrenching harm that can come to a defamed individual, our courts give no protection to a public figure no matter how libellous - untrue and scurrilous - the material, unless he or she can prove it was published with actual malice (that the statement was made with the knowledge that it was false, or with reckless disregard as to whether it was false or not).

Rights of privacy, too, are in tension with First Amendment values. Statements about an individual may be true but involve matters so intimate that the world at large should not be privy to the information. Our courts have tended to consider a variety of factors - the newsworthiness, the "shock-the-conscience" test, the status of the plaintiff. The tendency, however, seems to be to give the edge to free expression at the expense of suffering to the individual.

Commercial speech, once thought worthy of little protection, has achieve an almost exalted status. In 1996, Justice Stevens for a majority of the Court stated that "blanket bans" on truthful, non-misleading commercial speech that are "unrelated to the preservation of a fair bargaining process" are reviewed with "special care". He noted such bans are "particularly dangerous" because they foreclose dissemination of important information. The Court confessed error and admitted having wrongly decided *Posadas de Puerto Rico*,[20] which had upheld a Puerto Rican ban on casino advertising. The Court emphasized that, to withstand scrutiny, any regulation must advance the asserted government interest to a "material degree".[21]

The Supreme Court has looked at the free speech rights of secondary school students in public schools - those are students in our state educational system under the age of 18. A panel of judges in the Ninth Circuit had upheld the right of student speakers to express themselves, albeit somewhat vulgarly, in arguing for their social views in a school sponsored assembly. The Supreme Court reversed, holding that the First Amendment must give way to the school principal's sense of decorum and to the need to maintain school discipline. Suspension from school did not violate the students' First Amendment rights.

The right to engage in hate speech or to use degrading race or sex epithets has arisen particularly in the context of speech codes on university campuses. I am not aware of any cases yet headed towards the Supreme Court.

The Court recently granted *certiorari* in a case from the Ninth Circuit in which the court had held unconstitutional under the federal Constitution a provision in the Constitution of the State of Arizona that pronounced English the official language of the State of Arizona

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18 *Denver Area Educational Telecommunications Consortium Inc v FCC*, 116 S Ct 2374 (1996).

19 376 US 254 (1964).

20 *Posadas de Puerto Rico Assoc v Tourism Co of Puerto Rico*, 478 US 328 (1986).

21 *44 Liquormart Inc v Rhode Island*, 116 S Ct 1495 (1996).

and required that all business conducted by its employees be conducted in English. In essence, the court had found an intolerable burden on speech a measure that foreclosed communication by and with Arizona's Spanish-speaking population - a substantial segment in Arizona.

I have not touched on our many freedom of religion cases. Let me say only that the trend seems to be, under one rationale or another, to relax the once-rigid interpretations of the Establishment Clause's separation of church and state, in order to allow financial and other support to parochial schools and to allow use by religious groups of public facilities for meetings and the like, on an equal footing with secular groups. On the other hand, the Supreme Court, in interpreting the Free Exercise of Religion Clause, has adhered strictly to the prohibition against prayer in schools. The Court has been very protective of the individual's right to practise his or her religion.

The Court has not embraced the notion that the right to hear is a right independent of the right to speak. However, legislatively the concept is embodied in the federal Freedom of Information Act, which grants the public access, without proof of need or reason, to all government documents except those protected by privacy or security concerns. At the state and local level there exist many open-meetings laws which require all deliberation and decision-making to take place in regularly scheduled meetings to which the public has access.

Let me close as I opened - with one simple, basic truth: free expression is essential to a free people in an open, tolerant and democratic society.

12

The Right to a Fair Trial and Access to Justice in the Commonwealth Caribbean

Hon Mr Justice Stanley Moore

Fair trial guarantee

The right to a fair trial features prominently among the human rights and fundamental freedoms guaranteed to persons in the Commonwealth Caribbean by the constitutions, in provisions endearingly termed the bill of rights. The provisions protecting this fundamental human right are presented by the constitutions as aimed at securing the protection of the law. These provisions stipulate that "if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".[1]

Those provisions also require that "any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial", and that in proceedings for such a determination, "the case shall be given a fair hearing within a reasonable time".[2] The fair trial provisions entitle a person being tried to information of the nature of the offence charged, adequate time for the preparation of his defence, the right to legal representation, the right to call witnesses and to cross-examine witnesses called against him, and, *inter alia*, the right to be presumed to be innocent until he is proved or has pleaded guilty.[3]

Such facilities are easily identifiable as the standards traditionally entitling an individual at common law to be afforded a fair hearing of a criminal charge or civil matter, as required by that canon of natural justice captured in the maxim *audi alteram partem*, meaning "hear the other side".[4] But fundamental rights entrenched into a constitution, perhaps more than rights existing at common law, are characterized by evolution and development. So the rights to a fair trial protected under Caribbean constitutions might well be outstripping common law notions of a fair hearing as an entitlement to justice.

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1 Barbados Section 18(1); Grenada Section 8(1); Guyana Article 144(1); Jamaica Section 20(1). *See also* Trinidad and Tobago Section 5(2)(f)(ii).

2 Barbados Section 18(8); Grenada Section 8(8); Guyana Article 144(8); Jamaica Section 20(2). *See also* Trinidad and Tobago Section 5(2)(e).

3 Jamaica Section 20(6).

4 The other broad canon of natural justice at common law is the rule against bias, expressed in the maxim *nemo judex in causa sua*, meaning "no one shall be judge in his own cause".

Access to justice

Caribbean constitutions do not simply entitle the individual to such fundamental human rights as the right to a fair trial in the enjoyment of justice. They go further and ensure an individual's access to such justice, in a section designed for the enforcement of the protective provisions of the constitutions, the provisions stipulating fundamental human rights.

This section of the constitutions says that if any person alleges that any of the fundamental human rights provisions has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person "may apply to the High Court for redress".[5]

This justice access section adds that the High Court shall have original jurisdiction to hear and determine such application, and may make such declarations or orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental human rights provisions.[6]

This section authorizes the High Court to decline to exercise this jurisdiction in deference to adequate means of redress under any other law. It requires bodies subordinate to the High Court to refer questions of constitutional rights to the High Court. It enables Parliament to augment this jurisdiction. It empowers a rule-making authority to regulate the practice and procedure of the High Court regarding this jurisdiction. These are seen below.[7]

In seeking to access justice under this section to obtain redress for contravention of the constitutionally protected right to a fair hearing, an applicant might face certain issues. One is procedure. Another is the doctrine of alternative adequate means of redress. A third is the ouster clause found in some Caribbean constitutions. The fourth is the question of what remedy is available under the section.

Originating process

The access to justice section of Caribbean bills of rights, except in Trinidad and Tobago, does not stipulate what originating process should be invoked by a person seeking constitutional redress. It simply says that a person "may apply to the High Court for redress".[8]

The section does add that a stipulated rule-making authority, usually either Parliament or the Chief Justice, "may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section".[9]

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5 Barbados Section 24(1); Grenada Section 16(1); Guyana Article 153(1) [formerly Guyana 1966 Constitution Article 19(1)]; Trinidad and Tobago Section 14(1) [formerly Trinidad and Tobago 1962 Constitution Section 6(1)]. Jamaica Section 25(1) provides that a person may apply to the Supreme Court for redress; Section 25(3) provides that a person aggrieved by any determination of the Supreme Court under this section may appeal from there to the Court of Appeal.

6 Barbados Section 24(2); Grenada Section 16(2); Guyana Article 153(2) (formerly Guyana 1966 Constitution Article 19(2)]; Jamaica Section 25(2); Trinidad and Tobago Section 14(2) [formerly Trinidad and Tobago 1962 Constitution Section 6(2)].

7 *See* nn 18, 10 and 9 and accompanying text. On constitutional references *see*, for example, Grenada Section 16(3) and 16(4).

8 *See* n 5, *supra*. Trinidad and Tobago Section 14(1) specifies originating motion, unlike its 1962 predecessor.

9 Barbados Section 24(6) (Parliament); Grenada Section 16(6) (Chief Justice); Guyana Article 153(6) (Parliament) [formerly Guyana 1966 Constitution Article 19(6) (Parliament)]; Jamaica Section 25(4) (Parliament). Trinidad and Tobago never had this clause.

One would have thought that unless and until such facilitating capability was utilized,[10] a person could access justice under the section by invoking any procedure known to the law, indeed even by speedy contemporary technological facilities such as facsimile or fax, computers and e-mail.

Yet, while such rule-making capability remained unutilized in Guyana, Olive Jaundoo used the originating motion procedure to protect property rights, only to be faulted by the courts in Guyana for doing so.[11] Ms Jaundoo appealed to the Privy Council. Four years before Ms Jaundoo invoked the originating motion, a Trinidadian had used an originating summons to access justice under the Bill of Rights. The courts in Trinidad and Tobago told him he could not do that.[12]

So access to constitutional justice was being denied the speed both of originating summons and originating motion, and rather was being confined to the slow process of writ of summons. Fortunately, when Ms Jaundoo reached the Privy Council, their Lordships said that in the absence of procedural prescriptions made by the rule-making authority, an applicant could access the courts by any judicially recognized means of originating proceedings in the High Court.[13]

Since then, rule-making authorities have made rules. Parliament in Guyana and the Chief Justice in the Eastern Caribbean have stipulated that an applicant may access constitutional justice by originating motion or by writ of summons.[14] These provisions are so plain that questions ought not now to arise regarding what procedure should be used to gain such access.

Indeed, the courts now hold that it is unconstitutional to require compliance with stipulations additional to those set out in these rules. This arose when the Guyana Teaching Service Commission dismissed a secondary school principal without giving him any trial. In accessing constitutional justice, he did not comply with justices protection legislation[15] requiring that written notice of the intended legal action be given to the public authority concerned and that the action be commenced within a certain time. The Court of Appeal ruled that, among other things,[16] procedural requirements set out in the justices protection legislation could not be used as a condition precedent to the accessing of justice to protect the right to a fair trial.[17]

It would therefore seem that the Caribbean has turned the corner, leaving behind the days when applicants accessing constitutional justice could be readily trapped in run-arounds among the different methods of originating proceedings in the High Court.

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10 This section also enables Parliament to confer upon the High Court powers additional to those granted by the section as appear necessary or desirable for the more effective exercise of the jurisdiction granted by the section, for example Guyana Article 153(5) [formerly Guyana 1966 Constitution Article 19(5)].

11 *Jaundoo v Attorney-General*, (1968) 12 WIR 221 (CA-Guy).

12 *Pierre v Mbanefo*, (1964) 7 WIR 433 (CA-T&T). The report does not specify which rights he sought to protect. *See* now n 14, *infra*.

13 *Jaundoo v Attorney-General*, (1971) 16 WIR 141 (PC-Guy).

14 The Fundamental Rights (Practice and Procedure) Act 1988 of Guyana; The Supreme Court (Constitutional Redress - Grenada) Rules 1968, SRO No 41 of 1968. The Trinidad and Tobago 1976 Constitution Section 14(1) specifies originating motion, unlike its 1962 predecessor.

15 Justices Protection Ordinance of Guyana, Section 8.

16 The Court also said that the facilitating capability mentioned in n 10, *supra* is for facilitating rather than hindering the effective vindication of breaches of fundamental rights: *Mohamed Ali v Teaching Service Commission*, n 17, *infra*, at 176D-E.

17 *Mohamed Ali v Teaching Service Commission*, (1991) 46 WIR 171 (CA-Guy).

Alternative adequate redress

While vesting the High Court with powers to grant redress by declarations, orders, writs and directions for remedying contraventions of fundamental rights, the access to justice section of Caribbean bills of rights says that "Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".[18]

This alternative adequate redress proviso could easily denude the bills of rights of meaning and substance if the High Court forgets that the Bill of Rights should be construed generously and amply in favour of the individual, for whose protection, generally, the rights have been entrenched and are buttressed by the access to justice section.[19]

A contravention of a constitutionally guaranteed human right is usually also a violation of some ancient common law facility. In fact, the courts had initially been maintaining that the rights protected under the Constitution were nothing more than what had traditionally been available at common law.[20] Even the redress afforded under the access to justice section was confined to redress historically known to the common law, so that coercive remedies were no more available against the Crown under the Constitution than at common law.[21]

There has recently been considerable judicial activism regarding constitutional protection against inhuman or degrading punishment or other treatment, sometimes referred to as cruel and unusual punishment or other treatment. This guarantee has been held by the Privy Council to preclude executing a person on a sentence of capital punishment after an unreasonably prolonged delay. This delay might generally be five years following conviction and sentence,[22] but might at times be shorter.[23] But the Privy Council has grounded this ruling in common law origins, in formal terms anyhow.

The full implications of this ruling might not yet be known. A condemned person who takes out a constitutional motion challenging his scheduled execution, which he may do in a proper case,[24] is entitled to a stay prohibiting his execution pending the determination of his motion, so long as the motion raises a real issue and is not merely hopelessly vexatious.[25] How far these notions might be allowed to drift from their common law moorings is not clear.

As matters stand currently, a clearly spectacular exception to this identifying of the bills of rights with the common law is the Privy Council ruling that the state may be sued under the

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18 Proviso to subsection in n 6, *supra*, but never in Trinidad and Tobago.

19 *Minister of Home Affairs v Fisher*, (1979) 44 WIR 107, at 112 (PC-Ber); *Huntley v Attorney-General*, (1994) 46 WIR 218, at 227 (PC-J).

20 *Director of Public Prosecutions v Nasralla*, (1967) 10 WIR 299 (PC-J).

21 *Supra*, n 13.

22 *Pratt and Another v Attorney-General*, (1993) 43 WIR 340 (PC-J).

23 On the principle that execution should follow sentence as swiftly as practicable, allowing a reasonable time for appeal and consideration of reprieve, a delay of four years and ten months following sentence debarred execution in *Guerra v Baptiste*, [1995] 4 All ER 583 (PC-T&T).

24 Contrary to the intimation that the proper challenge is by criminal appeal against the conviction: *Clarke v Attorney-General*, (1992) 45 WIR 1 (SC-Bah).

25 *Guerra and Wallen v The State (No 2)*, (1994) 45 WIR 400 (PC-T&T), *see* text between n 45 and n 50, *infra*. *See also Reckley v Minister of Public Safety and Immigration*, (1995) 46 WIR 27 (PC-Bah).

access to justice section of the bills of rights for at least certain jurisdictional errors of a high court judge. This happens where the judge secures the arrest and imprisoning of someone for criminal contempt of court without observing the constitutional rights of that person to be afforded a fair trial on the contempt charge.

That is what happened when Lawrence Ramesh Maharaj, a Trinidadian lawyer, was charged, convicted and sentenced to imprisonment for contempt of court by Maharaj J, without being allowed to enjoy the constitutionally protected right to a fair trial. The judge thus committed jurisdictional error, for which the state paid dearly in public law, in *Maharaj v Attorney-General (No 2)*.[26] The Privy Council spelt out that this liability of the state for the judicial error of the judge is one in public law, newly created by the Constitution. Their Lordships explained that this liability of the state would arise only in the most unusual cases, and virtually only in instances of jurisdictional errors by judges involving contraventions of the constitutional right to natural justice.

Another historic case in the matter of access to justice to protect the right to a fair trial under the Constitution, whatever the position at common law, arose in Trinidad and Tobago when Terrence Thornhill was arrested after a shoot-out with the police and charged with shooting with intent to murder.

While he was in police custody from 14 to 20 October 1973, the police denied him a chance to consult his lawyer on some five occasions. He asked the Supreme Court to declare that the police had contravened the guarantee at that time set out in Section 2(c)(ii) of the 1962 Constitution, now set out in Section 5(2)(c)(ii) of the 1976 Constitution, that no person who has been arrested or detained shall be deprived of "the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him".

No case could be found to ground in the common law a right to counsel immediately after arrest or detention. It was only after the promulgation of the 1962 Trinidadian independence Constitution that the United States Supreme Court held that the right to counsel attached during police custody.[27] Nevertheless, in a memorable judgment,[28] Georges J held that an individual has a right to counsel immediately after arrest because the Constitution says so, regardless of whether such a right exists at common law.

Georges J linked this right to the right to be promptly informed of the reasons for one's arrest and the right to be taken before a court. In other words, the right to counsel applies to a prosecution and is part of the right to a fair trial. He granted the declaration sought. The Court of Appeal reversed Georges J and held that no right to counsel immediately after arrest could be enjoyed under the Constitution because no such right existed at common law.

Happily, the Privy Council[29] reversed the Court of Appeal and restored Georges J. In doing so, the Privy Council paid respectful tribute to the lucidity and cogency of the judgment of Georges J.

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26 (1978) 30 WIR 310 (PC-T&T).

27 *Escobedo v Illinois*, 378 US 478 (1964).

28 *Thornhill v Attorney-General*, (1974) 27 WIR 281.

29 (1979) 31 WIR 498 (PC-T&T).

In the rare situations presented by *Maharaj* and by *Thornhill*, the alternative adequate redress proviso poses no danger, since there is no redress apart from that afforded by the Bill of Rights. But outside those unique circumstances, the tendency of the courts is generally to ground the rights and remedies of the bills of rights in the laws as they existed at the commencement of the constitutions.

This means that an over-zealous readiness by the courts to present an applicant with the alternative adequate redress proviso might constrain an individual almost always to seek access to justice for violations of his or her rights, not under the remedies provisions of the bills of rights, but common law. This will be a sad disservice to those provisions.

This would be all the more unfortunate in light of the possibly expanding role of the right to a fair trial. This right might soon apply to a body reviewing sentences after a trial and advising on prerogative-type powers of pardon or mercy, a development occurring even at common law today.[30] Because of this right, even in the absence of an irregularity in a trial, a conviction may exceptionally be quashed if, due to the conduct of counsel, a defendant's case is not fairly put before the jury; or if counsel fails to advise separate representation because of a risk of conflict of interest where he represents more than one accused in a criminal trial.[31]

Not that it is being suggested that access to constitutional justice should be allowed to become the only or even the normal process of protecting rights and freedoms. Courts at common law stay criminal prosecutions for constituting an abuse of the process of the court where the accused is unlawfully apprehended out of the jurisdiction, illegally brought into the jurisdiction, or prosecuted on the basis of confessions coerced out of him. Such abuse of the process of the court is an affront to justice and a violation of the right to a fair trial. Constitutional access need not be sought. A submission to the trial judge to stay the prosecution suffices for the House of Lords.[32]

Where such an effective adequate alternative means of redress exists, it may at times be proper to require a person to utilize it and not invoke the access to justice section of the Bill of Rights. Take the case where the Trinidadian teacher was transferred by the Teaching Service Commission from one school to another in the absence of circumstances suggesting disciplinary punishment. Regulations entitled him to make representations to the Commission for a review of the order of transfer. He never made representations.

Rather, he sought to access redress under the Constitution. He suggested that he had property in the position from which he was being transferred, which property was protected by the Constitution, but which was contravened by the transfer. He also indicated that the transfer contravened the constitutionally guaranteed protection of the law.

The Privy Council dismissed these submissions as frivolous. In that setting, in *Harrikissoon v Attorney-General*,[33] the Privy Council protested that the value of the remedies section would

30 *Reckley v Minister of Public Safety, supra*, n 25, at 32; *Guerra v Baptiste, supra*, n 23, at 588. *See also Huntley v Attorney-General, supra*, n 19 (judge classifying previous murder convictions into capital and non-capital). But *see Reckley v Minister of Public Safety and Immigration (No 2)*, [1996] 1 All ER 562 (PC-Bah); *Wallen v Baptiste (No 2)*, (1994) 45 WIR 405 (CA-T&T). *See also* now *Doddy v Secretary of State for the Home Department*, [1993] 3 All ER 92 (HL).

31 *Crosdale v R*, (1995) 46 WIR 278 (PC-J); *Sankar v The State*, (1994) 46 WIR 452 (PC-T&T); *Mills v R*, (1995) 46 WIR 240 (PC-J).

32 *R v Horseferry Road Magistrates Court, Ex parte Bennett*, (1994) 98 Cr App R 114.

33 (1979) 31 WIR 348 (PC-T&T).

be diminished if it is allowed to be misused as a general substitute for invoking judicial control of administrative action.

Clearly, the *Harrikissoon* principle must be kept in its proper context, namely, where an alternative adequate remedy exists but is not pursued, and where the allegation of the human rights violation is frivolous, and where there is the brooding shadow of an ouster clause intent on precluding judicial review.[34] That is, instances where if there is unlawful administrative action it involves no real contravention of any guaranteed human right.

Happily, the courts have been confining *Harrikissoon* to its proper setting and thereby not allowing the alternative adequate redress proviso to cancel the promise of the Bill of Rights. Accordingly, when asked to discreetly decline constitutional jurisdiction under this proviso, the courts lean against submissions to do so *in limine* and insist that this discretion can only be properly exercised after a hearing on the merits.[35]

Ouster clauses

Some Caribbean constitutions contain ouster clauses which provide that the question whether certain public functionaries, like the services commissions, have properly exercised powers vested in them by the Constitution "shall not be enquired into in any court".[36]

Constitutions in the OECS countries[37] do not have these ouster clauses. They do provide that in the exercise of functions under the Constitution by certain functionaries, these functionaries, like the service commissions, "shall not be subject to the direction or control of any other person or authority".[38] But they explicitly add that no such provision shall be construed as precluding a court from exercising jurisdiction regarding any question of whether that functionary has exercised those functions in accordance with the Constitution or any other law.[39] So there is no question of an ouster clause hindering access to justice in the OECS countries.

But even where the ouster clause appears, the courts do not readily allow that clause to preclude access to them to determine applications for redress for contraventions of fundamental rights. The courts kept open access to them despite the ouster clause when a Guyanese deck-hand was dismissed by the Public Service Commission without being afforded the constitutional right to be heard in the determination of his civil rights and obligations. The dismissal order was quashed.[40] This approach has been followed consistently under the constitutions,[41] reflecting settled common law principles made

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34 *See* text between n 35 and n 41, *infra.*

35 *Mitchell v Attorney-General* (No 10), (1986) 3 OECS LR 246 (CA-Gda); *Kent Garment Factory Ltd v Attorney-General*, (1991) 46 WIR 177 (CA-Guy).

36 Guyana Article 226(6) [formerly Guyana 1966 Constitution Article 119(6)]; Trinidad and Tobago Section 129(2) [formerly Trinidad and Tobago 1962 Constitution Section 102(4)].

37 Organization of Eastern Caribbean States. In addition to Grenada, this comprises Antigua and Barbuda, Dominica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, and Montserrat.

38 Grenada Section 83(12). These countries do however have the ouster clause regarding the question whether the Head of State has received or acted in accordance with appropriate advice: Grenada Section 108.

39 Grenada Section 111 (11).

40 *Evelyn v Chichester*, (1970) 15 WIR 410 (CA-Guy).

41 *Re Sarran*, (1969) 14 WIR 361 (CA-Guy); *Re Langhorne*, (1969) 14 WIR 353 (CA-Guy). An anomaly was *Re Fisher*, (1966) 9 WIR 465 (SC-J).

famous by the House of Lords in the celebrated *Anisminic* case.[42]

When an ouster clause bars access to the courts successfully, it is generally because the court has held that the allegation of the human rights contravention is frivolous and vexatious, or the functionary acted within jurisdiction, or the alleged wrong could properly have been remedied by recourse to administrative relief.[43]

Nature of the remedy

An applicant having successfully established a contravention of his right to a fair hearing, the question arises of what justice he is able to access, meaning what redress or remedy he can obtain under the access machinery of the Constitution.

The courts have been applying to the Constitution the traditional common law restraint against issuing coercive remedies against the Crown.[44] Even at common law, though, coercive remedies have long been issued against ministers when not acting for the Crown under law powers as such, but rather when acting as *persona designata* exercising statutory powers.[45] Indeed, in 1993 the House of Lords expressed itself as disposed to applying its contempt of court powers to ministers.[46] These considerations might well have meaning for the redress available under Caribbean constitutions.

One here recalls the order of the Privy Council that Trinidad and Tobago pay compensation to an individual whom a high court judge committed to prison for contempt of court without observing his right to a fair trial.[47] That was a landmark decision, creating a new remedy.

A rather interesting development is the use of the conservatory order in constitutional motions. Its application is particularly striking when used to stay the carrying out of the death sentence after prolonged delay following the imposition of the sentence.

Take that colourful case where the death warrant had already been read to two Trinidadians, one of whom was Lincoln Guerra. Constitutional motions were filed on their behalf asking the High Court to rule that the delay of four years and ten months following their conviction and sentencing for murder was so prolonged and unreasonable that the constitutional protection from cruel and unusual punishment or treatment debarred the state from proceeding with their execution.

The constitutional motions were dismissed by the High Court and appeals were on the way to the Court of Appeal. The appellants could not be sure that, if the Court of Appeal dismissed the motions, that Court would order a stay of execution pending appeals on the motions to the Privy Council. Before the Court of Appeal could decide either the appeals

42 *Anisminic v Foreign Compensation Commission*, [1969] 2 AC 147 (HL).

43 *Harrikissoon v Attorney-General*, n 33, *supra*.

44 *Jaundoo v Attorney-General*, n 13, *supra*.

45 *Padfield v Minister of Agriculture, Fisheries and Food*, [1968] AC 997 (HL).

46 *M v Home Office*, [1993] 3 All ER 537 (HL).

47 *Maharaj v Attorney-General (No 2)*, n 26, *supra*.

on the motion or the application for a stay of execution pending final determination of the motion by the Privy Council, the petitioners asked the Privy Council for a conservatory order to prevent their execution until final adjudication on the motions by the Privy Council.

It should be explained that shortly before this, another condemned Trinidadian, Glen Ashby, was executed while his appeal on his constitutional motion was on the way to the Privy Council, the Court of Appeal not having granted a stay of execution.

In the *Guerra* case, their Lordships confessed to having great anxiety that making the conservatory order prayed for, before the Court of Appeal decided the constitutional motion or the application for a stay, would not encroach upon the jurisdiction of the Court of Appeal. But they also wanted to protect their jurisdiction and have it available for petitioners, which cannot be done if petitioners are executed before their appeals to the Privy Council are decided, as happened with Glen Ashby.

Caught thus between a rock and a hard place, the Privy Council granted the conservatory order as prayed. This directed that if the Court of Appeal dismissed the constitutional motions and refused a stay, and if the petitioners appealed to the Privy Council within the time limits set out in the relevant rules, the death sentences should not be carried out until after determination of the appeals by the Privy Council.[48]

What prevailed was the commitment to ensuring that the right to a fair trial of one's constitutional motion is preserved and that there is access to justice. The Privy Council said that the executing of petitioners before they had an opportunity to exercise their rights of appeal to the Privy Council "would plainly constitute the gravest breach of the petitioners' constitutional rights".[49]

The day after the Privy Council made the conservatory order, the Court of Appeal dismissed the constitutional motions. The Court granted leave to appeal to the Privy Council but deemed it futile to consider making a conservatory order when the Privy Council had already made a contingent conservatory order. The Court was peeved that the order had been made. To the Court, the pre-empting of the Court by counsel going to the Privy Council before the Court decided the conservatory application was "improper conduct" and "a determined effort to undermine and erode public confidence" in the Court.[50]

Nor did the Court of Appeal spare the Privy Council. The Court considered that the effect of the Privy Council's contingent order was to compel the court to exercise its discretion in a particular manner, which the court branded as "incomprehensible". The Court said it was "indeed unfortunate that their Lordships did not appear to consider the full implications of their order before embarking on this course of action". The Privy Council, the Court added, gave the impression that the Court was not capable of ensuring or could not be trusted to ensure that the right of appeal to the Privy Council is respected, making it, the Court lamented, "certainly a sad day for the administration of justice in this country".[51]

If there has to be such an exchange between a Caribbean Court of Appeal and the Privy

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48 *Guerra and Wallen v The State (No 2)*, *supra*, n 25.

49 Ibid, at 403C.

50 *Wallen v Baptiste (No 2)*, (1994) 45 WIR 405, at 445J (CA-T&T).

51 Ibid, at 446B.

Council, let it be concerned with ensuring access to justice to protect the right to a fair trial of one's constitutional motion for trying of a contention that prolonged delay protects one from being executed. Nor was this a mere pyrrhic victory for this noble virtue. The four years and ten months' delay that had elapsed since Guerra had been sentenced for murder was so prolonged and unreasonable that the constitutional protection to freedom from cruel and unusual punishment prevented the state from executing him.[52]

Conclusion

During the first fifteen years or so of the promulgation of the independence Caribbean constitutions, the courts tended to be rather restrained or conservative in affording constitutional applicants sufficient access to justice.

Since 1978, though, with the leading case of *Maharaj v Attorney-General (No 2)*, the courts, especially the Privy Council, have been more venturesome. They are now better implementing the principle that in order to ensure individuals the full measure of the guaranteed human rights, the Bill of Rights should be given a generous interpretation.[53] This entails protecting the access to justice enshrined in the remedies section of the Bill of Rights, a commitment which motivated the Privy Council into taking that rather assertive step to prevent execution first and trial afterwards.[54]

A good measure of the maintenance of the rule of law will be the extent to which the courts safeguard this access to justice as we head inexorably towards the 21st century.

52 *Guerra v Baptiste*, n 23, *supra*.

53 *See* n 19, *supra*.

54 *See* text after n 45, *supra*.

13

The Right of Access to Court in European Law, with Special Reference to Article 6(1) of the European Convention on Human Rights and to European Community Law*

Francis G. Jacobs

The right of access to a court can usefully be studied both under the European Convention on Human Rights and under European Community law. Each of these two systems of law can be regarded as providing, within its field of operation, certain "supra-national" guarantees of that right. The Convention, drawn up within the Council of Europe, guarantees fundamental rights which the Member States (now numbering 40) are required to observe; that observance is supervised by the European Commission and Court of Human Rights, established by the Convention and having their seat in Strasbourg.

While the Council of Europe was established to achieve closer relations between the countries of Europe, the European Communities go further in the direction of European integration. The Treaties establishing the European Communities (now supplemented by the Maastricht Treaty on European Union) provided for a common market, for the free movement of persons and for common action, often by way of Community legislation, in many fields. The Court of Justice of the European Communities is responsible for interpreting Community law, which constitutes an independent legal system having the force of law in all 15 Member States. Within the field of Community law the European Court of Justice has also to ensure the observance of human rights. There is, however, little overlap in practice between the Strasbourg Court and the European Court of Justice in Luxembourg.

This paper will consider in turn:

- Under the European Convention on Human Rights, the right of access to a court in civil proceedings;
- Under the Convention, the right of access to a court for judicial review of administrative decisions;

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- Access to judicial remedies in European Community law; and
- The developing emphasis within Europe on judicial review of constitutionality of legislation.

Access to a court in civil proceedings

The preamble to the European Convention on Human Rights states that the European countries "have a common heritage of political traditions, freedom and the rule of law". Throughout the Convention runs an emphasis on the ability of the individual to challenge arbitrary action by government. Convention rights are framed in the context of law and legal protection, the assumption throughout being that national courts must be able to make decisions on these matters in the event of a dispute between the individual and the state.

It may be that in exceptional circumstances other kinds of redress might be acceptable - such as recourse through a committee of the legislature or with the assistance of an ombudsman. Article 13 of the Convention, which guarantees the right to "an effective remedy before a national authority", has been held not to require a judicial remedy.[1] But in general, the Convention's emphasis is on the role of courts and tribunals.

This was reflected in the judgment in *Golder v United Kingdom*,[2] which was the first decision made by the Strasbourg Court in a case against the United Kingdom. The Court held that Article 6(1) of the Convention, which guarantees the individual's right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, did not merely apply to an individual who was in fact involved in a case before the courts. It included the right of access to the courts. Interference with this right of a prisoner occurred when he was refused permission to consult a solicitor to find out whether he had a right of action in defamation against a prison officer.

In interpreting Article 6(1) as guaranteeing the right to take legal proceedings, the Court had regard to the principle of the rule of law contained in the Statute of the Council of Europe and in the Preamble to the Convention.

The Court considered that the rule of law is scarcely conceivable without the possibility of access to the courts. If the application of Article 6(1) to civil litigation arose only when someone was actually engaged in a dispute over which the courts had jurisdiction, governments could be tempted to remove from that jurisdiction any disputes which it would suit them to have decided in a non-judicial forum.

Access to a court for judicial review of administrative decisions

Article 6(1) applies to the determination of civil rights and obligations. But what are civil rights and obligations? It is evident that "determination of civil rights and obligations"

1 But *see* recent cases such as the judgment of the European Court of Human Rights in *Chahal v United Kingdom*, Judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V; (1997) 23 EHRR 413. Article 13 is not examined further in this paper.

2 (1979-80) 1 EHRR 524.

covers ordinary civil litigation between private individuals. The basic problem in defining this phrase is to know whether it is intended to cover also certain rights which, under some systems of law, fall under administrative law rather than under private law. If, for example, a public authority expropriates my land, do I have the right to a court hearing? Does the term cover only private rights to the exclusion of public law matters?[3]

From the earliest applications, the Commission has consistently stated that the question cannot be answered by reference to the categories of domestic law; it is immaterial whether the claim in issue is characterized by that law as falling under civil law or not. Thus, it has frequently said that the term "civil rights and obligations" employed in Article 6(1) cannot be construed as a mere reference to law, although the general principles of the domestic law of the Contracting Parties must necessarily be taken into consideration in any such interpretation.[4]

The Court considered the interpretation of the term in the *Ringeisen* case.[5] The case concerned the fairness of both criminal proceedings and civil proceedings. The Commission and the Court had to consider whether "civil rights" were involved in an application by Ringeisen for approval of the transfer to him, from a private person, of certain plots of land in Austria. He alleged that the Regional Real Property Transactions Commission, which had heard his appeal against the decision of the District Commission, was biased, and consequently that it was not an impartial tribunal as required by Article 6(1).

The majority of the Commission concluded that the provision should be construed restrictively as including only those proceedings which are typical of relations between private individuals and as excluding those proceedings in which the citizen is confronted by those who exercise public authority. The majority considered that Article 6 did not apply to the proceedings in question. A minority of the Commission did not wish to restrict the term to private law transactions and believed it should apply to interferences by public authorities with the rights and obligations flowing from domestic law.

Both the majority and the minority view were further developed in the hearings before the Court, which examined in detail the English and French texts of the Article.[6] The Court held that Article 6(1) was applicable, although it had not been violated in the present case because, in so far as Ringeisen had alleged bias, that charge had not been made out. As to the interpretation of Article 6(1) it held as follows:[7]

> "For Article 6, paragraph (1), to be applicable to a case ('contestation') it is not necessary that both parties to the proceedings should be private persons, which is the view of the majority of the Commission and of the Government. The wording of Article 6, paragraph (1), is far wider; the French expression 'contestations sur (des) droits et obligations de caractère civil' covers all

3 This section is based on Francis G. Jacobs and Robin C.A. White, *The European Convention on Human Rights* (Oxford: Clarendon Press, 2nd ed, 1996); *see also* A.W. Bradley, "Administrative Justice: a developing human right?", *European Public Law* 1995, p 347.

4 *X* v *Austria* (Application No 1931/63), 2 October 1964, (1964) 7 Yb 212, at 222.

5 *Ringeisen v Austria*, Judgment of 16 July 1971, Series A No 13; (1979-80) 1 EHRR 455.

6 For a detailed consideration of the legislative history of the provision, see Van Dijk, "The interpretation of 'civil rights and obligations' by the European Court of Human Rights - One more Step to Take", in F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension: Studies in Honour of Gérard J. Wiarda* (Köln: Carl Heymanns Verlag, 1990), pp 131-43.

7 *Ringeisen v Austria, supra*, n 5, para 94.

> proceedings the result of which is decisive for private rights and obligations. The English text, 'determination of ... civil rights and obligations', confirms this interpretation.
>
> The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc) are therefore of little consequence.
>
> In the present case, when Ringeisen purchased property from the Roth couple, he had a right to have the contract for sale which they had made with him approved if he fulfilled, as he claimed to do, the conditions laid down in the Act. Although it was applying rules of administrative law, the Regional Commission's decision was to be decisive for the relations in civil law ('de caractère civil') between Ringeisen and the Roth couple. This is enough to make it necessary for the Court to decide whether or not the proceedings in the case complied with the requirements of Article 6, paragraph (1), of the Convention."

It does not, of course, follow from the Court's decision, however, that all decisions of public authorities which affect a person's legal situation are subject to the guarantees of Article 6(1) and require the availability of judicial review. Such an interpretation would be far too sweeping and totally out of line with the administrative law of many Convention states. It was a special feature of the *Ringeisen* Case that there was a pre-existing relationship under civil law between private individuals, which was directly "determined" by the acts of the public authorities. Seen in this light, the Court's judgment does not have the dire consequences for public administration which have sometimes been attributed to it.

Since its decision in the *Ringeisen* case, the Court has continued to adopt a liberal interpretation of the concept of civil rights and obligations, and many of the earlier Commission decisions concluding that certain types of proceedings are outside the scope of Article 6 probably do not represent good current law.

The key distinction is perhaps that where a decision of an essentially administrative character affects a legal relationship between private individuals, civil rights and obligations are at issue and Article 6(1) will apply, but where it does not, the matter will fall outside the scope of Article 6(1).

This proposition is supported by the decision of the Court, in the *König* case,[8] that proceedings which involved the withdrawal of an authority to run a medical clinic and an authorization to practise medicine were within the scope of Article 6(1). This was so, even though the objective of the bodies which had taken the decisions was to act in the interests of public health and to exercise responsibilities borne by the medical profession towards society at large. Notwithstanding this conclusion, the Court expressly stated that it was not necessary in the case to determine whether the term "civil rights and obligations" went

8 *König v Germany*, Judgment of 28 June 1978, Series A No 27; (1979-80) 2 EHRR 170. *See also Kraska v Switzerland*, Judgment of 19 April 1993, Series A No 254-B; (1994) 18 EHRR 188.

beyond rights of a private nature.

The *Benthem* case[9] concerned the refusal of the Dutch municipal authorities to grant the applicant a licence to operate an installation for delivering liquid petroleum gas. The Court stressed that the crucial factor in determining whether the dispute concerned civil rights and obligations was the character of the right at issue. The necessity for the licence was closely associated with the right to use possessions in accordance with the law and had a proprietary character. In this case, the particular circumstances meant that civil rights and obligations were in issue. The Court again expressly stated that it was not necessary to provide any abstract definition of the concept.

The implications of this approach are well illustrated in the *Pudas* case.[10] Pudas held a licence to operate a taxi on specified routes. As part of a programme of rationalization which would have involved the replacement of one of the applicant's taxi routes by a bus service, his licence was revoked. Various administrative appeals against the revocation of the licence failed, and Pudas applied to the Commission alleging a violation of Article 6(1).

The Swedish Government argued that the matter did not involve the determination of civil rights and obligations, since the revocation of the licence depended essentially on an assessment of policy issues not capable of, or suited to, judicial control. Furthermore, the whole question of the issue and revocation of licences carried the "predominant stamp of public law activity". The Court disagreed. The public law features of the case did not alone exclude the matter from the scope of Article 6(1). The revocation of the licence affected the applicant's business activities. The Court was unanimous in holding that Article 6(1) applied. The case also makes clear that Article 6(1) is not concerned only with what goes on in a court or tribunal, but is concerned with any decision-making process determining an individual's civil rights and obligations.

The following have been held to come within the scope of the term "civil rights and obligations": disputes concerning the grant of expropriation permits;[11] the withdrawal of a licence to serve alcoholic beverages;[12] renewals of building prohibitions;[13] refusal of a permit to retain an agricultural estate bought at a compulsory auction;[14] objection to amendments to the building plan for an area;[15] challenge to the grant of a refuse-dumping permit;[16] withdrawal of a permit to work a gravel pit;[17] disciplinary proceedings resulting in suspension from medical practice,[18] and proceedings by which an *avocat* was struck off the roll.[19] However, proceedings relating to a request for a permanent discharge by a person

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9 *Benthem v the Netherlands*, Judgment of 23 October 1985, Series A No 97; (1986) 8 EHRR 1.

10 *Pudas v Sweden*, Judgment of 27 October 1987, Series A No 125; (1988) 10 EHRR 380.

11 *Sporrong and Lönnroth v Sweden*, Judgment of 23 September 1982, Series A No 52; (1983) 5 EHRR 35; and *Bodén v Sweden*, Judgment of 27 October 1987, Series A No 125; (1988) 10 EHRR 367.

12 *Tre Traktörer AB v Sweden*, Judgment of 7 July 1989, Series A No 159; (1991) 13 EHRR 309.

13 *Allan Jacobsson v Sweden*, Judgment of 25 October 1989, Series A No 163; (1990) 12 EHRR 56.

14 *Håkansson and Sturesson v Sweden*, Judgment of 21 February 1990, Series A No 171; (1991) 13 EHRR 1.

15 *Mats Jacobsson v Sweden*, Judgment of 28 June 1990, Series A No 180-A; (1991) 13 EHRR 79.

16 *Zander v Sweden*, Judgment of 25 November 1993, Series A No 279-B; (1994) 18 EHRR 175.

17 *Fredin v Sweden*, Judgment of 18 February 1991, Series A No 192; (1991) 13 EHRR 784.

18 *Le Compte, Van Leuven and De Meyere v Belgium*, Judgment of 23 June 1981, Series A No 43; (1982) 4 EHRR 1.

19 *H v Belgium*, Judgment of 30 November 1987, Series A No 127; (1988) 10 EHRR 339. *See also De Moor v Germany*, Judgment of 23 June 1994, Series A No 292-A; (1994) 18 EHRR 372, on decisions on admission to the profession.

already provisionally discharged from a psychiatric hospital have been held by the Commission not to concern a determination of civil rights and obligations.[20] Nor do investigations into a company's affairs under a regulatory system.[21]

It might be thought that social security is *par excellence* an example of a matter governed by public law. Two cases have considered whether social security proceedings are capable of falling within the ambit of civil rights and obligations. In the *Feldbrugge* case,[22] Mrs Feldbrugge had been receiving sickness benefits but was found to be fit to resume work and so the benefits had ceased. Rights to benefits were considered to be public law rights in the Netherlands. Mrs Feldbrugge appealed the withdrawal of the benefits through the relevant appeals procedures in the Netherlands, but was unsuccessful. She then complained to the Commission alleging a breach of Article 6. The Court again declined to give an abstract definition of the concept of "civil rights and obligations", and noted that the Dutch system displayed features of both public law and private law. The character of the legislation, the compulsory nature of insurance against certain risks, and the assumption by public bodies of responsibility for ensuring social protection were public law characteristics. On the other hand, the personal and economic nature of the right asserted by Mrs Feldbrugge, the connection with a contract of employment, and the similarities with insurance under ordinary law were of a private character. The Court concluded by a majority of ten to seven that the features of private law predominated over those of public law. While none alone was sufficient to be determinative of the question, when taken together and cumulatively, they produced a civil right for the purposes of Article 6(1).

The *Deumeland* case[23] concerned the grant of a widow's supplementary pension following the death of her husband allegedly as a consequence of an industrial accident. The Court by nine votes to eight followed its decision in *Feldbrugge*, which was given on the same day, and concluded that the private law features predominated over the public law features of the claim.[24]

The balancing of private and public law features in such cases is not easy. Though it has not been argued before the Court, it may be that the European Community distinction between social assistance (which is frequently exempt from the social policy rules of the Community) and benefits in respect of identifiable risks of a working life will assist. This analysis could be used to explain why sickness benefits and industrial injury and death benefits are considered to have features in which private law features predominate, while income support, as a form of social assistance, might not. It is certainly difficult in the case of this safety net benefit to see the necessary links with private law. The result is, however, unsatisfactory, since in Great Britain, appeals concerning both types of benefit are heard by social security appeal tribunals. It seems invidious to allow the protection of Article 6 to apply when such tribunals are considering certain benefits, but to deny them when considering others.[25]

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20 *L v Sweden* (Application No 10801/84), Report of the Commission, 3 October 1988, (1989) 61 DR 62.

21 *Fayed v United Kingdom*, Judgment of 21 September 1994, Series A No 294-B; (1994) 18 EHRR 393.

22 *Feldbrugge v the Netherlands*, Judgment of 29 May 1986, Series A No 99; (1986) 8 EHRR 425.

23 *Deumeland v Germany*, Judgment of 29 May 1986, Series A No 100; (1986) 8 EHRR 448. *See also Schouten and Meldrum v the Netherlands*, Judgment of 9 December 1994, Series A No 304; (1995) 19 EHRR 432.

24 *See also*, similarly, *Schuler-Zgraggen v Switzerland*, Judgment of 24 June 1993 Series A No 263; (1993) 16 EHRR 405, relating to invalidity pension.

25 This lack of certainty is one of the reasons Van Dijk argues for the Court to lift its restriction in interpreting the term "civil rights and obligations" to cases involving the private rights and obligations of citizens. *See* Van Dijk, *supra*, n 6.

In the *Rasmussen* case,[26] the Court was called on to consider whether the purpose of a paternity suit was the determination of civil rights and obligations. Such actions concerned a matter of family law and clearly concerned the applicant's private life which was protected by Article 8. Hence Article 6(1) applied. Decisions concerning placement of children for adoption also concern civil rights and obligations.[27]

The Court has held that the outcome of proceedings brought in the ordinary courts to have an arbitration award set aside is decisive for civil rights and so within the scope of Article 6(1).[28]

In summary, the current position adopted by the Court appears to be that the term "civil rights and obligations" is to be viewed widely. No abstract definition of the concept has been offered, but the concept is to be determined under the Convention and not according to the national classification of matters. Public law matters are not excluded where they are directly decisive for the exercise of private law rights. This would seem to exclude only questions arising in connection with entitlement to social assistance, fiscal decisions,[29] and immigration decisions,[30] though in all these cases, it is certainly possible to construct hypothetical situations in which the public law matter can be decisive for the exercise of private rights. The question is only how strong or close the causation has to be.

The need for a dispute

Article 6(1) requires not only that the matter concern civil rights or obligations, but that there be a dispute (*contestation*) concerning the particular rights or obligations. Whether there is a dispute will be determined by the Convention organs. The Court reviewed the case law on this requirement in the *Benthem* case[31] and summarized its content. The notion of a dispute should be given a substantive rather than a formal content. The dispute might relate not only to the existence of the right pursued, but also to its scope or the manner of its exercise, and might involve both questions of fact and law. The dispute must, however, be genuine and of a serious nature. Finally, there must be a direct link between the dispute and the right in question.

The issue in the *Van Marle* case[32] was whether there was a dispute. Germen van Marle and his fellow applicants had sought to be registered as certified accountants, but the Board of Admission had refused their applications on grounds of lack of competence. Their appeals to the Board of Appeal were dismissed. This body's task was to review decisions of the Board of Admission to determine that they had acted within their competence and to reconsider whether the applicants met the legal requirements for registration. No matters falling within the grounds of appeal were alleged by the applicants, who merely questioned the assessment of their competence by the Board of Admission. In such circumstances, the Court concluded that there was no dispute within the meaning of Article 6.

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26 *Rasmussen v Denmark*, Judgment of 28 November 1984, Series A No 87; (1985) 7 EHRR 371.

27 *Keegan v Ireland*, Judgment of 26 May 1994, Series A No 290; (1994) 18 EHRR 342.

28 *Stran Greek Refineries and Stratis Andreadis v Greece*, Judgment of 9 December 1994, Series A No 301-B; (1995) 19 EHRR 293.

29 *See X v France* (Application No 9908/82), 4 May 1983, (1983) 32 DR 266, at 272.

30 At least where no question of respect for family life under Article 8 arises. See, for example, *X, Y and Z v United Kingdom* (Application No 9285/81), 6 July 1982, (1982) 29 DR 205, at 212.

31 *Benthem v the Netherlands*, *supra*, n 9, para 32.

32 *Van Marle v the Netherlands*, Judgment of 26 June 1986, Series A No 101; (1986) 8 EHRR 483.

Access to judicial remedies in European Community law

Under the Community Treaties, and in particular under Article 173 of the EC Treaty, the European Court of Justice has jurisdiction to review all Community measures - whether general normative measures or individual decisions. Thus the Court's jurisdiction embraces the review of Community legislation.

Under Article 177 of the EC Treaty the Court may rule, in a reference from a national court, on the validity of any Community act. In addition, a reference on the interpretation of the Treaty - or of Community legislation - may put in issue the legality of national measures, whether legislation or decisions. Under Article 177 the Court cannot rule directly on the legality of national measures - that jurisdiction exists only under Articles 169 and 170, in a direct action brought before the Court by the Commission or by another Member State. In practice, however, challenges to national measures in the national courts, as being contrary to Community law, often have to be resolved by the European Court of Justice in references under Article 177.

Access to the European Court of Justice

The European Court of Justice has been ready to fill gaps in the system of judicial remedies established by the Treaties in order to fulfil its task of ensuring that "the law is observed".[33] In *Les Verts v European Parliament*[34] the Court emphasized that the Community "is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty". The Court argued that the EEC (now the EC) Treaty established "a complete system of legal remedies and procedures designed to permit the Court ... to review the legality of measures adopted by the institutions".[35] Faced, in an action brought against the European Parliament, with the fact that the Treaty did not at that time provide for such an action (Article 173 then being limited to review of the legality of acts of the Council and the Commission) the Court held nonetheless that an action for annulment did lie against measures adopted by the European Parliament intended to have effect *vis-à-vis* third parties.[36]

Similarly, the Court accepted that proceedings for judicial review could be brought by the European Parliament, notwithstanding the contrary indication in the text, but only for the purpose of protecting the Parliament's prerogatives.[37] Although, on both points, the solutions adopted by the Court were subsequently incorporated into the EC Treaty by the Treaty on European Union, it is arguable that the Court's concern to ensure effective judicial review has led it to exercise a form of inherent jurisdiction.[38] However, the somewhat strict requirements of standing for individuals to bring a direct action before the Court under Article 173 of the EC Treaty are not affected by these developments: they have

33 Article 164 of the EC Treaty.

34 Case 294/83, [1986] ECR 1339, para 23.

35 Ibid.

36 Ibid, paras 24-5.

37 Case 70/88, *European Parliament v Council* ("*Chernobyl*") [1990] ECR I-2041.

38 *See* Arnull, "Does the European Court of Justice have inherent jurisdiction?" (1990) CMLRev 683.

the possibility of action before the national courts which may seek a preliminary ruling from the European Court on the validity of the measure.[39]

Implications for national law

(i) All measures (including Acts of Parliament) must be subject to review

In the domain of Community law it is a fundamental requirement of the rule of law, according to the case law of the European Court of Justice, that all measures whether Community or national having legal effect are subject to judicial review,[40] to ensure their conformity with Community law.

The Court has made it clear that the principle of effective judicial protection may require national courts to review all legislative measures and to grant interim relief, even where they would be unable to do so under national law. The point was decided in *R v Secretary of State for Transport, Ex parte Factortame and Others.*[41] The statutory system governing the registration of British fishing vessels had been radically altered by Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988. The purpose was to stop the practice known as "quota hopping" whereby, according to the United Kingdom, its fishing quotas were "plundered" by vessels flying the British flag but lacking any genuine link with the United Kingdom. Factortame and other companies owned or operated 95 fishing vessels which failed to satisfy the conditions for registration under Section 14(1) of the 1988 Act. Since those vessels were to be deprived of the right to engage in fishing as from 1 April 1989, the companies in question, by means of an application for judicial review, challenged the compatibility of the relevant provisions of the 1988 Act with Community law. They also applied for the grant of interim relief pending final judgment.

The High Court decided to request a preliminary ruling on the issues of Community law raised in the proceedings and ordered that, by way of interim relief, the application of the legislation should be suspended as regards the applicants. On the Secretary of State's appeal against the order granting interim relief, the Court of Appeal held that under national law the court had no power to suspend, by way of interim relief, the application of Acts of Parliament. On further appeal, the House of Lords held that under national law the court had no power to grant interim relief in a case such as the one before it. More specifically, it held that the grant of such relief was precluded by the common law rule that an injunction, and hence an interim injunction, could not be granted against the Crown, and also by the presumption that an Act of Parliament was in conformity with Community law until such time as a decision on its compatibility with that law had been given. The House of Lords sought a preliminary ruling on, *inter alia*, whether Community law obliged or empowered the national court to grant interim protection in circumstances where a request for a preliminary ruling on a point of Community law had been made.

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39 *Les Verts, supra*, n 34, para 23 (at end).

40 Case 22/70, *Commission v Council [ERTA]*, [1971] ECR 263.

41 Case C-213/89, [1990] ECR I-2433.

Replying in the affirmative, the Court stated:

> "... it is for national courts, in application of the principle of co-operation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law .... [A]ny provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law .... [T]he full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule. That interpretation is reinforced by the system established by Article 177 of the EC Treaty whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice."[42]

(ii) The requirements of effective judicial review before the national courts

The European Court of Justice has laid down certain requirements concerning the scope of judicial review for the protection of Community rights in national courts. Following its ruling in *Les Verts* that Member States cannot avoid review of the question whether national measures are in conformity with the Treaty, the Court went on, in *Johnston v Royal Ulster Constabulary*,[43] to spell out the requirements of effective judicial review under Community law.

In *Johnston*, the reference to the Court raised the question whether, in the field of national security, the issue of a certificate by the executive purporting to be definitive and so to exclude the jurisdiction of the courts could preclude reliance on directly effective rights under Community law. Because a number of police officers had been assassinated, the Chief Constable decided that, while male members of the Royal Ulster Constabulary (RUC) would carry firearms, female members of the RUC Reserve would not be issued with firearms or receive firearms training. On this basis he refused to renew the contracts of female members of the RUC full-time Reserve, except when the duties could only be undertaken by a woman. Alleging unlawful sex discrimination, Mrs Johnston challenged the refusal to renew her full-time contract and her exclusion from firearms training. The Sex

42 Ibid, paras 19-22.

43 Case 222/84, [1986] ECR 1651.

Discrimination (Northern Ireland) Order 1976 made it unlawful for an employer to discriminate against a woman by refusing either to offer her employment or in any way to afford her access to opportunities for training, except where being a man was a genuine occupational qualification for the job. However, Article 53(1) of the Order provided that none of its provisions rendered unlawful an act done for the purpose of safeguarding national security or protecting public safety or public order. Article 53(1) stated that a certificate signed by the Secretary of State, certifying that an act was done for these purposes, was conclusive evidence that those conditions were fulfilled. Before the hearing of the case, the Secretary of State issued a certificate, as provided for, stating that the refusal to offer full-time employment to Mrs Johnston in the RUC Reserve was for the purpose of safeguarding national security and protecting public safety and public order. Mrs Johnston conceded that the issue of the certificate deprived her of a remedy under that Order. Instead she relied on the equal treatment directive,[44] Article 6 of which provides:

> "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."

On a reference from the Industrial Tribunal, the Court ruled that the principle of effective judicial review laid down in Article 6 of the directive reflected a general principle of law which underlay the constitutional traditions common to the Member States and was also laid down in Articles 6 and 13 of the European Convention on Human Rights. The European Court of Justice thus held that the statutory rule could not be upheld so as to exclude judicial review of the matter, since this would be to deprive the national court of effective judicial control of the decision to issue the certificate. Notwithstanding the certificate, the national court must examine whether the rule had been made for the purpose of safeguarding national security and protecting public safety. As mentioned, the requirements of judicial control reflected a general principle of law which underlay the constitutional traditions common to the Member States.

To similar effect, there is the European Court's decision in *UNECTEF v Heylens*[45] holding that the French Minister for Sport must give the reasons for refusing to register in France a coach qualified under Belgian law to be a football trainer. Freedom of movement and free access to employment are guaranteed by the Treaty of Rome to nationals of Member States. The existence of a judicial remedy against the decision of a national authority refusing the benefit of those Community rights was essential. Effective judicial review, which must extend to the legality of reasons for a contested decision, presupposes that the individual may require the competent authority to notify the reasons for refusing him the benefit of his Community rights. There was therefore a duty on the French minister to tell Heylens why he had been refused permission to work in France.

In relation to the entry and expulsion of nationals of Member States, Articles 8 and 9 of

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44 Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39, at 40.

45 Case 222/86, [1987] ECR 4097.

Directive 64/221 lay down the requirements for remedies before national authorities and national courts. As interpreted by the Court, this means that Member States must ensure that Community nationals can challenge administrative decisions before a judicial authority by means of an effective remedy which enables the entire decision, including its substantive grounds, to be subjected to judicial scrutiny.[46]

The Court has adopted a similar position in relation to the free movement of goods. Where for example a public telecommunications undertaking has the power to grant type-approval to telephone equipment before it can be connected to the public telecommunications network, traders must be able to challenge before the courts decisions refusing to grant type-approval.[47]

Review related to the application of international human rights norms

For the present study, which is concerned with the domestic application of international human rights norms, it is of particular interest to note that the European Court of Justice exercises its powers of review by taking account where appropriate of international human rights norms, even though those norms do not formally bind the Community or formally form part of Community law. That is so whether the measure reviewed is a Community measure or a measure adopted by a Member State which comes within the Court's jurisdiction.

Thus in a relatively early case, *Nold*, where the applicant invoked certain fundamental rights before the Court, the Court stated:

> "fundamental rights form an integral part of the general principles of law, the observance of which it ensures.
>
> In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.
>
> Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."[48]

In a 1996 case, *Bosphorus*,[49] the Turkish air charter company Bosphorus Airways challenged in the Irish courts a decision of the Irish authorities to impound at Dublin Airport an aircraft owned by Yugoslav Airlines but leased for a four-year period by Bosphorus. The decision in issue was taken under United Nations Security Council Resolutions providing for sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro), which were given effect within the European Union by a regulation of the Council of the

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46 *See*, for example, the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-65/95 and C-111/95, *Shingara and Radiom* [1997] ECR I-3343, at 3345.

47 Case C-18/88, *GB-Inno-BM* [1991] ECR I-5941; *see also* Joined Cases C-46/90 and C-93/91, *Lagauche* [1993] ECR I-5267.

48 Case 4/73, *Nold v Commission* [1974] ECR 491, para 13.

49 Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications, Ireland and Attorney General* [1996] ECR I-3953.

European Union. On a reference from the Irish Supreme Court to the European Court of Justice, Bosphorus relied *inter alia* on a right to the peaceful enjoyment of possessions guaranteed by Article 1 of the First Protocol to the European Convention on Human Rights.

According to the Opinion of the Advocate General:

> "It is well established that respect for fundamental rights forms part of the general principles of Community law, and that in ensuring respect for such rights the Court takes account of the constitutional traditions of the Member States and of international agreements, notably the Convention for the Protection of Human Rights and Fundamental Freedoms, generally known as the European Convention on Human Rights, which has special significance in that respect.
>
> Article F(2) of the Treaty on European Union, which provides that the Union shall respect fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, as general principles of Community law, gives Treaty expression to the Court's case law. Article F(2) appears in Title I of the Treaty, and therefore does not fall within the jurisdiction of the Court in so far as it extends to the Union Treaty as a whole. In relation to the EC Treaty, it confirms and consolidates the Court's case law, underlining the paramount importance of respect for fundamental rights.
>
> Respect for fundamental rights is thus a condition of the lawfulness of Community acts - in this case, the Regulation. Fundamental rights must also, of course, be respected by Member States when they implement Community measures. All Member States are in any event parties to the European Convention on Human Rights, even though it does not have the status of domestic law in all of them. Although the Community itself is not a party to the Convention, and cannot become a party without amendment both of the Convention and of the Treaty, and although the Convention may not be formally binding upon the Community, nevertheless for practical purposes the Convention can be regarded as part of Community law and can be invoked as such both in this Court and in national courts where Community law is in issue. That is so particularly where, as in this case, it is the implementation of Community law by Member States which is in issue. Community law cannot release Member States from their obligations under the Convention."[50]

On the substance, however, the claim by Bosphorus failed. The case nevertheless illustrates how, via Community law, international human rights norms may receive domestic application in the courts of the Member States - and could do so even if the norms themselves had not been directly incorporated into domestic law.

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50 Ibid, Opinion of the Advocate General, paras 51-3 (citations omitted).

Developing emphasis within Europe on judicial review of constitutionality of legislation

Various factors in European legal systems have contributed to a new trend: the principle of access to judicial remedies even where that requires judicial review of primary legislation.[51]

Within the European Community, since it is based on a division of powers between the Community and its Member States, a measure of judicial review of legislation is as necessary as it would be in a federal system to resolve conflicts between Community law and Member State legislation. Thus the European Court of Justice has jurisdiction to review both Community and Member State legislation, as already discussed, within the field of Community law; and national courts may be required not to apply national legislation which conflicts with Community law.

Within the Council of Europe, a similar result may arise, although only on the international plane, where an indirect consequence of a ruling of the European Court of Human Rights is to put in issue the compatibility with the Convention of national legislation. The state concerned may then have an obligation to repeal or amend the offending legislation.

Within the national legal systems of European countries, the judicial review of constitutionality has developed in recent years, with such judicial review entrusted either to the ordinary courts or the Supreme Court or, increasingly, to a specialized Constitutional Court - the last solution being preferred notably in the new constitutions of the Central and Eastern European countries emerging from Communist rule.

In the United Kingdom, with its tradition of Parliamentary sovereignty, the acceptance of the European Convention and of Community law represent departures from constitutional orthodoxy, and it is conceivable that further inroads may follow from proposals to recognize, for example, a degree of autonomy for Scotland, which might require new forms of constitutional adjudication.

One of the live issues today is the extent to which courts - both in judging the exercise of administrative power and the substance of primary legislation - are required to acquiesce in the view that the rule of law must fail in that competition and give way to parliamentary supremacy. The apparent inconsistency between the rule of law and parliamentary supremacy may be resolved by the courts making the presumption that Parliament intended its legislation to conform to the rule of law as a constitutional principle. This presumption is powerful and is not easily rebutted; only express words or possibly necessary implication will suffice. If it is alleged that the courts' jurisdiction is entirely excluded, even this may not suffice. If officials refuse an individual reasonable access to the courts, or discriminate against a class of individuals, the courts will usually intervene to correct such breaches of the rule of law unless the language of the statute clearly and unambiguously prohibits this.[52] In conclusion, it should however always be borne in mind that though courts, in challenging by way of judicial review the constitutionality of legislation, are

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51 Terminologically, "judicial review" has been traditionally used, especially in the US, to refer to review of legislation; its current use in England for "judicial review of administrative action" probably owes much to de Smith's pioneering book under that title (first published in 1959) (*infra*, n 53).

52 *See*, for example, *R v Secretary of State for the Home Department, Ex parte Leech (No 2)*, [1994] QB 198, where regulations prohibiting a prisoner's unimpeded access to a solicitor were held unlawful. Steyn LJ referred to the right of access to a solicitor as being part of the right of access to the courts themselves. This he called a "constitutional right" which could not be taken away except by express words or necessary implication.

increasingly able, and indeed obliged, to require the observance of those principles that govern lawful public decision-making, nevertheless "in so doing they seek to reinforce representative government, not to oppose it - and to promote, not to undermine, the inherent features of a democracy."[53]

53 De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (London: Sweet and Maxwell, 5th ed, 1995), p 18.

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Liberty and Security of the Person in India, with Particular Emphasis on Access to Courts

Hon Mr Justice P.N. Bhagwati

I am deeply grateful to Interights for inviting me to this Judicial Colloquium on the Domestic Application of International Human Rights Norms. This Judicial Colloquium is one in a series which have been held from time to time in different parts of the Commonwealth under the co-sponsorship of Commonwealth Secretariat and Interights. The first was convened by me in 1988 in Bangalore (India) where predominantly South Asian and South East Asian judges of superior courts met in order to discuss the topic of how international human rights norms can be incorporated in domestic jurisprudence. The Bangalore Colloquium adopted a number of principles concerning the role of the judiciary in advancing human rights by reference to international human rights norms. These principles have come to be known as the Bangalore Principles, and they have inspired a good number of judges in the Commonwealth to develop their national human rights jurisprudence in conformity with international human rights norms.

When the Bangalore Principles were formulated, it was found that many of the judges in the Commonwealth countries following the common law system were not familiar with the human rights norms enunciated in the international human rights instruments, and it was therefore felt that similar judicial colloquia should be held also in other parts of the Commonwealth. Consequently the Bangalore Judicial Colloquium was followed by judicial colloquia in Harare, Banjul, Abuja, Oxford and, lastly, Bloemfontein in South Africa, where the Bangalore Principles were affirmed, reaffirmed, explained and elaborated. The Caribbean region was left out and I am, therefore, very glad that this Judicial Colloquium is being held on the initiative of Commonwealth Secretariat and Interights for the judges of the Caribbean region.

The topic which has been assigned to me is "liberty and security of the person in India, with particular emphasis on access to courts". I am going to speak on this subject, with particular reference to the human rights standards or norms embodied in the International Covenant on Civil and Political Rights (ICCPR). But before I deal with the specifics of the topic, let me make a few observations in regard to the role that the judiciary in India has played in expanding and protecting liberty and security of the person, and then describe

how, through innovative strategies, the judiciary has opened the doors of the courts to poor and disadvantaged groups of persons who have been denied liberty and security by the state and its agencies.

The judiciary has to administer justice according to law. But the law must be one which commands legitimacy with the people, and legitimacy of the law would depend upon whether it accords justice. The concept of justice has no universally accepted definition. It has meant different things to different people, in different societies, at different times. It is, therefore, necessary to have a standard of values, especially of justice, against which a law can be measured. Such a standard must necessarily be superior to the law itself and would, therefore, constitute the highest rank in the legal hierarchy.

There was a time when the standard of divine law as revealed by God to men in some holy scriptures was widely applied and served to confer legitimacy upon laws enacted by rulers. But over the years, religion as a standard of values began to lose its vitality and significance. Morality, though undoubtedly important and certainly complementary, was also found unable to solve the complicated problems of modern society and to provide a standard of reference by which to judge the laws enacted by rulers. Some other ground had to be found to support a standard against which to judge the ruler's laws.

This ground was provided by the concept of human rights, which for the first time found its formulation conceptually in the Declaration of Independence and the Bill of Rights in America, and the *Déclaration des droits de l'homme et du citoyen* in France. The principles set out in these two great documents may be summarized as follows:

1. The principle of universal inherence: every human being has certain rights, capable of being enumerated and defined, which are not conferred on him by any ruler, nor earned or acquired by purchase, but which inhere in him by virtue of his humanity alone.

2. The principle of inalienability: no human being can be deprived of any of those rights, by the act of any ruler or even by his own act.

3. The rule of law: where rights conflict with each other, the conflicts must be resolved by the consistent, independent and impartial application of just laws in accordance with just procedures.

The catalogue of rights listed in these two documents all took the form of freedoms, and in order to put them into effect, the United States and the new French Republic used the method of a written constitution. This method has been followed by most of the countries of the Commonwealth which have entrenched basic human rights in their constitutions.

The question remains, however, as to what are the human rights which need to be entrenched and which should govern the actions of the executive and the legislature or, in other words, what are the normative standards or values by reference to which the actions

of the executive and the legislature must be judged. These normative standards or values are to be found in the international human rights instruments which represent the basic values of justice according to the perception of the world community, and it is therefore essential that the standards or norms set out in the international human rights instruments should be taken into account by the judges while developing the common law or interpreting the constitution or statutory law.

It should be possible for the judges to do so, because there is sufficient scope for creativity on the part of a judge even when he is interpreting the constitution or a statute. It is no doubt true that judges have to interpret the constitution and the law according to the words in which the constitution or the law is couched, but as pointed out by Justice Holmes: "A word is not a crystal, transparent and unchanged, it is the skein of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used". It is for the judge to give meaning to what the legislature has said, and it is this process of interpretation which constitutes the most creative and thrilling function of the judge.

Plato posed the problem two thousand years ago: is it more advantageous to be subject to the best men or the best laws? He answered it by saying that laws are by definition general rules, and generality falters before the complexities of life. Laws' generality and rigidity are at best a makeshift far inferior to the discretion of the philosopher king whose pure wisdom would render real justice, by giving each man his due. Aristotle, however, was in favour of the rule of law. He said: "He who bids the law rule bids God and reason rule; but he who bids man rule adds an element of the beast, for desire is a wild beast and passion perverts the minds of rulers even though they be the best of men." The law is "reason unaffected by desire". It is "intelligence without passion" - the accumulated wisdom of the ages.

Yet Aristotle knew with Plato that law cannot anticipate the endless combinations and permutations of circumstance and situation. There is bound to be a gap between the generality of law and the specifics of life. This gap in our system of administration of justice is filled by the judge, and in entrusting this task to the judge, we have synthesized the wisdom of Plato and the wisdom of Aristotle. It is here that the judge takes part in the process of law-making - what Justice Holmes called "interstitial legislation". Law-making is an inherent and inevitable part of the judicial process. Even where a judge is concerned with interpretation of a statute, there is ample scope for him to develop and mould the law. A judge is not a mimic. Greatness on the bench lies in creativity. Judging is a phase of a never-ending movement and something more is expected of a judge than imitative reproduction, the lifeless repetition of a mechanical routine.

Where the language of the law is clear, then, of course, the judge must give effect to it, but there are many cases where it is possible to decide either way, and it is here that the choice of values has to be made by the judge. Where the law and its application are alike plain, or where the rule of law is certain and the application alone is doubtful, there will be no difficulty for the judge. But there are cases where a decision one way or other will count for

the future, will advance or retard, sometimes much, sometimes little, the development of the law in the proper direction, and it is in these types of cases where the judge has to leap in the heart of legal darkness, where the lamps of precedent and common law principles flicker and fade, that the judge gets an opportunity to mould the law and to give it a shape and direction. It is for this reason that, when a law comes before a judge, he has to invest it with meaning and content, and in this process of interpretation the judge must remember that he has to do justice according to the international human rights standards or norms to the extent he can, without doing violence to the language of the law including the constitution.

The judges have a creative function, and a heavy responsibility rests upon them so far as concerns the discharge of the judicial function. They cannot afford to just mechanically follow the rules laid down by the legislature; they must so interpret as to reconcile the rules to the wider objectives of justice which are encapsulated in the international human rights instruments. It is axiomatic that, although different countries in the Commonwealth may have different political structures and different expectations of the people, there must always be a common denominator which must inspire the judicial tradition to correlate constitutional and legal interpretation to basic human rights, in order to ensure basic human dignity and fundamental human freedoms which find their place in the international human rights instruments. This has been done in ample measure by the judiciary in India in developing human rights jurisprudence with regard to the liberty and security of the person with particular emphasis on access to courts.

I may in this connection refer to what has been said in luminous words by the Supreme Court of the United States in *Weems v US*:[1]

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it'. The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction."

1 54 L Ed 801 (1909); 217 US 349 (1910).

It is this principle of interpretation which has been applied by the Supreme Court of India in leading cases relating to liberty and security of the person under the Constitution of India.

Interpreting the Constitution in light of international human rights norms

One of the most remarkable examples illustrating how the reach and ambit of the fundamental rights guaranteeing liberty and security of the person enumerated in the Constitution have been expanded by the judiciary so as to accord with international human rights norms is furnished by the interpretation placed on Article 21 of the Indian Constitution by the Supreme Court of India in the light of the human rights norms embodied in the International Covenant on Civil and Political Rights.

Article 21 is in the following terms:

> "No one shall be deprived of his life or personal liberty except by procedure established by law."

When this article was being debated in the Constituent Assembly, the original draft provided that no one shall be deprived of his life or personal liberty except by ***due process of law***. When our constitutional adviser went to the United States to consult with the American jurists, he was advised by Mr Justice Frankfurter not to introduce the due process clause in the Indian Constitution, because that might give a very large power to the judiciary to interfere with the decisions of the executive and the legislature. Therefore, when we in India came to enact our Constitution, we changed the phraseology of Article 21, and in its revised version as finally enacted, it ran in the form which I have given above.

For a long time, the Supreme Court of India had interpreted Article 21 in a narrow and doctrinaire manner, as providing that no one can be deprived of his life or personal liberty except when such action is backed by the authority of law, whatever be the character of the law. But then the Supreme Court of India held in the *Maneka Gandhi*[2] case that it is not enough that there is law, but the law must provide a fair, reasonable and just procedure before a person can be deprived of life or personal liberty. This was the starting point of human rights jurisprudence in India.

The Constitution of India did not contain any provision for legal aid to a poor and indigent accused, although it is an essential requirement of fair trial as envisaged under Article 14 of the ICCPR. This deficiency had to be made good by the judiciary if the international human rights norm set out in Article 14 was to become part of domestic jurisprudence. The Supreme Court adopted a highly goal-oriented approach and, by a process of creative interpretation, held in two leading decisions, one in *Hoscot's*[3] case and the other in *Hussainara Khatoon's*[4] case, that a procedure prescribed by law for depriving a person of his life or liberty cannot be regarded as reasonable, fair and just if it does not provide for grant

2 *Maneka Gandhi v Union of India*, [1978] 2 SCR 621.

3 *Hoscot v State of Maharashtra*, [1979] 1 SCR 192.

4 *Hussainara Khatoon v State of Bihar*, [1979] 3 SCR 532.

of legal aid to a poor accused when his life or liberty is in jeopardy.

Thus legal aid to a poor accused in a criminal case was evolved by an activist judiciary as a basic fundamental right in keeping with Article 14 of the ICCPR, although the Indian Constitution did not include legal aid as a fundamental right. This was the first time that a positive obligation was read into the negative language of Article 21, and Article 21 was construed as imposing a positive obligation on the state to provide legal aid, which was also in consonance with Article 2 of the ICCPR.

The Supreme Court also held in *Khatri's* case (commonly known as the Bhagalpur blinding case),[5] and several other cases, that legal aid must be made available to an accused from the stage of first production before the magistrate and not only when the trial commences, because "jeopardy to [the accused's] personal liberty arises as soon as a person is arrested and produced before a magistrate". It was pointed out by the Supreme Court that it is at the stage of first production that an accused needs competent legal advice, and no procedure would be reasonable, fair and just which denies legal advice and representation to him at that stage.[6] The Supreme Court in that case rejected the plea of financial constraint on the part of the state, saying that the state cannot deprive its citizens of a constitutional right on a plea of poverty. The Supreme Court also held in the same case that there must be an obligation on the magistrate before whom an accused is produced to inform him of his right to free legal aid. It would be a mockery of legal aid if it were left to a poor, ignorant and illiterate accused to ask for free legal services (*vide Suk Das's*[7] case). This was regarded as an essential requirement of fair trial embodied in Article 14(1) of the ICCPR.

Then again, there is no provision in the Indian Constitution prohibiting arrest and detention of a judgment debtor for payment of the judgment debt. In fact Section 51 of the Code of Civil Procedure read with Order 21 Rule 27 permits arrest and detention of a judgment debtor in a civil prison, which would be contrary to the international human rights norm embodied in Article 11 of the ICCPR. How to give effect to this norm in domestic jurisprudence was the question. Again, Article 21 came to the help of the judiciary. The Supreme Court held in *Jolly George's*[8] case that the aforesaid provision in the domestic law was violative of Article 21, since the curtailment of liberty effected by that provision was unreasonable, unfair and unjust, unless the failure to make payment of the judgment debt was despite possession of sufficient means and there was absence of more pressing claims. The Supreme Court thus brought the domestic law in line with Article 11 of the ICCPR by a process of judicial interpretation. The principle of substantive non-arbitrariness was pressed into service.

The Supreme Court was also anxious to protect and safeguard the liberty of the individual in another area, and this was the area of bail. The courts in India were at one time very chary of granting bail and whenever they granted bail, they imposed monetary conditions on the accused, and in addition insisted that the accused must provide sureties who are solvent for the amount of the bail. The result was that many poor persons could not provide monetary bail with sureties and they had to languish in jail for years before the

5 *Khatri and Others v State of Bihar and Others*, [1981] 2 SCR 408.

6 Ibid, at 413B-C.

7 *Suk Das and Another v Union Territory of Arunachal Pradesh*, [1986] 1 SCR 590.

8 *Jolly George Verghese and Another v The Bank of Cochin*, [1980] 2 SCR 913.

commencement of their trial. The Supreme Court therefore held in *Babu Singh's*[9] case and *Hussainara Khatoon's*[10] case that "personal liberty, of which an accused is deprived when bail is refused, is too precious a value of our constitutional system recognized under Article 21", and bail must therefore be the rule and not the exception. This view taken by the Supreme Court was in conformity with Article 14 of the ICCPR.

Also in conformity with international human rights norms, the Supreme Court gave a broad interpretation to the equality clause of the Constitution enacted in Article 14, with a view to enhancing the protection of the liberty and security of the person in *Maneka Gandhi's* case.[11] Until this decision was given, the equality clause contained in Article 14 of the Indian Constitution had been subjected to a narrow, pedantic and lexicographic interpretation under which that Article was equated with the principle that a classification of persons and things would be discriminatory if it is not based on intelligible differentia having rational relation or nexus with the object of the legislation. But the Supreme Court in *Maneka Gandhi's* case freed Article 14 from the imprisonment of this straitjacket formula and pointed out:

> "We must reiterate here what was pointed out by the majority in *E.P. Royappa v State of Tamil Nadu* ([1974] 2 SCR 348; AIR 1974 SC 555) namely, that 'from positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14'. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."[12]

Thus, by reference to the equality clause, the meaning and content of Article 21 which guarantees the right to life and liberty was expanded in conformity with the ICCPR.

The right to speedy trial was recognized and enforced in *Kadra Pehadiya's*[13] case where, dealing with the case of four young boys who were detained in jail for a period of three years before trial could commence following committal to the court of sessions, I observed, speaking on behalf of the Supreme Court:

> "Three more years have passed, but they are still rotting in jail, not knowing what is happening in their case. They are perhaps reconciled to their fate living in a small world of their own cribbed, cabined and confined within the

9 *Babu Singh and Others v State of Uttar Pradesh*, [1978] 2 SCR 777; (1978) 1 SCC 579.

10 *Supra*, n 4.

11 *Supra*, n 2.

12 Ibid, at 674B-D.

13 *Kadra Pehadiya and Others v State of Bihar*, [1981] 11 SCJ 302.

> four walls of the prison. The outside world just does not exist for them. The Constitution has no meaning and significance and human rights no relevance for them. It is a crying shame upon our adjudicatory system which keeps men in jail for years on end without trial."[14]

If speedy trial is not available, it affects the liberty of the individual, and hence it was recognized as a fundamental right implicit in Article 21. The human rights norm embodied in Article 14 of the ICCPR was given effect in domestic jurisprudence by a process of judicial interpretation regarding speedy trial as a requirement of a reasonable, fair and just procedure.

The words "personal liberty" in Article 21 also came up for interpretation in several cases in India. What is the exact meaning and significance of personal liberty? The Supreme Court again adopted a broad and liberal approach with a view to expanding the reach and content of the right to personal liberty. It held in *Maneka Gandhi's*[15] case, which marked a watershed in the history of human rights jurisprudence in India, that the expression "personal liberty" is of the widest amplitude and covers a variety of rights which go to constitute the personal liberty of man. Consequently, the right of personal liberty includes the right to travel abroad, and impounding the passport of a person without just cause and without observing the principles of natural justice would constitute a violation of Article 21.

The right of liberty is also protected by several other provisions of the Indian Constitution apart from Article 21. Article 20, in keeping with Article 9(3) of the ICCPR, provides that a person who is arrested must be produced before a judicial officer within 24 hours of the arrest and, as provided in Article 9(2) of the ICCPR, he must be informed of the grounds of arrest at the time of his arrest. The arrest cannot be made except under the authority of and in accordance with the law (*vide* Article 9(1) of the ICCPR). If a person is unlawfully arrested or detained, what is his remedy? Of course, he is entitled to a writ of *habeas corpus.* But can he get compensation? There is no provision in the Indian Constitution giving right of compensation to a victim of unlawful arrest or detention. But Article 12(4) of the ICCPR provides for it. The Supreme Court of India filled this gap. In *Rudul Shah's*[16] case, where the petitioner was released 14 years after he was acquitted, the Supreme Court directed payment of compensation by the state, saying that payment of compensation was the only way in which the violation of Article 21 could be redressed. Similarly the Supreme Court awarded compensation for unlawful detention in *Bhim Singh's*[17] case, and for death on account of police firing in the *PUDR*[18] case. Wrongful handcuffing was the reason for compensation in *Ravikant's*[19] case, and in *Wilavati Behera's*[20] case compensation was awarded to a mother whose child died in police custody. The plea of sovereign immunity by way of defence against the claim for compensation was rejected. Thus, by a process of judicial law-making, Article 12(4) of the ICCPR was incorporated in domestic jurisprudence.

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14 Ibid, at 303.

15 *Supra*, n 2.

16 *Rudul Shah v State of Bihar*, [1983] 3 SCR 508.

17 (1985) 4 SCC 677, at 686.

18 *People's Union for Democratic Rights v State of Bihar and Others*, [1987] 1 SCR 631.

19 (1992) 2 SCC 373.

20 (1993) 2 SCC 746.

The right to life embodied in Article 21 has also been expanded in India so as to comport with Article 6 of the ICCPR as explained by the Human Rights Committee in its General Comment[21] on that article. In *Frances Coralie Mullen's*[22] case, the Supreme Court of India held that the right to life does not mean merely the right to physical or animal existence; it also includes the right to live with basic human dignity which lies at the basis of all human rights, as does also the right to basic necessities of life.

The Supreme Court relied upon what Shakespeare says in *The Merchant of Venice*: "You take my life when you take the means whereby I live". The Supreme Court also took the view that Article 21 does not embody merely a negative obligation against the state, but it also covers positive obligations on the state to protect the right to life. The state cannot, by its inaction, jeopardize the right to life. Article 21 has both its negative and positive aspects, just as does Article 6 of the ICCPR, as was observed by the Human Rights Committee in its General Comment on that provision.[23] That is how the Supreme Court laid down a positive obligation on the state to provide legal aid, speedy trial and bail.

It has also been held in India that the right to life includes the right to a clean and healthy environment, which is one of the rights recognized in Article 12 of the International Covenant on Economic, Social and Cultural Rights. The courts can therefore enforce the right to a clean and healthy environment by virtue of Article 21, even though there may be no specific law made by the state for protection against environmental pollution and ecological degradation. Recently, the right to life has also been interpreted to include the right to health and primary education, which are also rights contained in the International Covenant on Economic, Social and Cultural Rights.

Thus by adopting an activist, creative and goal-oriented approach, the Supreme Court has injected international human rights norms into the provisions of domestic law relating to liberty and security of the person.

Access to justice

Let me now turn to consider how the Supreme Court of India has thrown open the doors of the courts and provided access to justice to large multitudes of people hitherto deprived of it. The Indian experience is, I dare say, of great relevance to the Caribbean countries where the socio-economic conditions of the people are no different.

The judges of the Supreme Court of India found that the main problem which deprived the poor and the disadvantaged of effective access to justice was the traditional rule of standing, which insists that only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal rights or legally protected interests can bring an action for judicial redress. It is only the holder of the right who can sue for actual or threatened violation of the right, and no other person can file an action to vindicate such a right. This rule of standing was obviously evolved to deal with a right-duty pattern which is

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21 General Comment 6(16) (Article 6), Annual Report of the Human Rights Committee 1982, GAOR 37th session, Supplement No 40 (A/37/40), pp 93-4.

22 *Frances Coralie Mullen v The Administrator, Union Territory of Delhi and Others*, [1981] 2 SCR 516.

23 *Supra*, n 21.

only to be found in private law litigation. It effectively barred the doors of the court, however, to large masses of people who, on account of poverty and ignorance, could not utilize the judicial process. It was felt that even if legal aid offices were established for them, it would be impossible for them to take advantage of the legal aid programme because most of them lack awareness of their constitutional and legal rights, and, even if they were made aware of their rights, many of them would lack the capacity to assert them.

The Supreme Court of India, therefore, decided to depart from the traditional rule of standing and so to broaden access to justice. Where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of their constitutional or legal rights, and such person or determinate class of persons is, by reason of poverty, disability, or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public or social action group acting *bona fide* can maintain an application in a high court or the Supreme Court seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. This is no more than a radical generalization or extension of the technique followed in most countries in *habeas corpus* cases where the court usually acts on letters written by or on behalf of a person who is in illegal custody and is, by reason of incarceration, unable to approach the court for relief.

The Supreme Court of India also felt that when any member of the public or social organization espouses the cause of the poor, he should be able to move the court by just writing a letter, because it would be quite harsh to expect a person acting *pro bono publico* to incur expenses from his own pocket in order to go to a lawyer and prepare a regular petition to be filed in court for enforcement of the fundamental rights of the poor. In such a case, a letter addressed by him to the court can legitimately be regarded as an appropriate proceeding within the meaning of Article 32 of the Constitution. The Supreme Court thus evolved what has come to be known as "epistolary jurisdiction", where the court can be moved by just addressing a letter on behalf of the vulnerable class of persons.

Epistolary jurisdiction was a major breakthrough achieved by the Supreme Court in bringing justice closer to the large masses of people. The court for a long time had remained the preserve of the rich and the well-to-do, and had been used only for the purpose of protecting the rights of the privileged classes. As a result of this innovative use of judicial power, however, the portals of the court were thrown open to the poor, the ignorant and the illiterate, and their cases started coming before the court through public interest litigation.[24] The people became aware that the court has the constitutional power of intervention which can be invoked to combat repression and exploitation and ensure realization of constitutional and legal rights for persons under trial, convicted prisoners, women in protective custody, children in jail, bonded and migrant labourers, unorganized workers, scheduled castes and tribes, landless agricultural farmers who fall prey to faulty mechanization, women who are victims of flesh trade or dowry, slum and pavement dwellers, and the kin of victims of extrajudicial execution. These and many other disadvantaged groups could, by reason of this innovative strategy, have their problems brought before the court through public interest litigation. These were unusual problems

24 Here, "court" refers generally to the Supreme Court of India and the high courts of the different states in India which enjoy jurisdiction to issue high prerogative writs under Article 32 and Article 226 respectively of the Constitution of India.

which called for extraordinary remedies, and they needed a new kind of lawyering skill and a novel kind of judging.

Right from the commencement of public interest litigation, one difficulty became manifest: the total unsuitability of the adversarial procedure to this kind of litigation. The adversarial procedure can operate fairly and produce just results only if the two contesting parties are evenly matched in strength and resources. Quite often, however, that is not the case. Where one of the parties to a litigation is weak and helpless and does not possess adequate social and material resources, he is bound to be at a disadvantage under the adversarial system, not only because of the difficulty in getting competent legal representation, but more than anything else because of the inability to produce relevant evidence before the court. The problem of proof thus presented obvious difficulties in public interest litigation brought to vindicate the rights of the poor.

The Supreme Court, therefore, innovated the strategy of appointing socio-legal commissions of inquiry for the purpose of gathering relevant material bearing on the public interest litigation before the court. The Supreme Court took the view that under the Constitution the Supreme Court not only had the power but also it was under an obligation to enforce fundamental rights enshrined in the Constitution. For the purpose of enabling it to discharge its constitutional obligations, the Supreme Court took the view that it was entitled to pass any ancillary and incidental orders, and accordingly it started appointing socio-legal commissions of inquiry in aid of discharging its constitutional obligation. The report of the socio-legal commission of inquiry would be regarded as *prima facie* evidence by the Court, and copies of it would be supplied to the parties so that either party could dispute the facts or data stated in the report by filing an affidavit. The Court would then consider the report of the commission of inquiry and the affidavits which may be filed, and proceed to adjudicate the issues arising in the writ petition. This practice marked a radical departure from the adversarial system of justice which formed the basis of the common law system.

But even after all these innovations made by the Supreme Court, the question remained as to what relief the court could give to the disadvantaged and vulnerable groups of people whose problems were brought before the court through public interest litigation. The Court had to evolve new remedies for giving relief. The Supreme Court, therefore, explored new remedies which would make basic human rights meaningful for the large masses of people. These remedies were unorthodox and unconventional and were intended to initiate positive action on the part of the state and its authority. The Supreme Court also on various occasions directed the state to pay compensation to those whose rights of liberty and security of the person were violated.

The Supreme Court thus broadened access to justice and brought it within the easy reach of large numbers of people who had for long remained outside the reach of justice. As one eminent jurist observed, the Supreme Court of India became for the first time, the Supreme Court for Indians.

Annexes

BANGALORE PRINCIPLES

Concluding statement of the Judicial Colloquium held in Bangalore, India, from 24-26 February 1988

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 summarized 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 recognized 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.

Bangalore
India
26 February 1988

HARARE DECLARATION OF HUMAN RIGHTS

Concluding statement of the Judicial Colloquium held in Harare, Zimbabwe, from 19-22 April 1989

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 Organization 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; and

- 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 Organization 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 realized fully if the internationally recognized 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 realized 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 recognized 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 organizations 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 utilized 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 familiarize 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

THE BANJUL AFFIRMATION

Concluding statement of the Judicial Colloquium held in Banjul, The Gambia, from 7-9 November 1990

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 realize 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 recognized 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 emphasized 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 co-operation 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 co-operation 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 by 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 recognized 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 focused amicus curiae submissions from independent non-governmental organizations, such as Interights, in novel and important cases where international comparative law and practice might be relevant.

14. National laws should enable non-governmental organizations 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 I 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

Concluding statement of the Judicial Colloquium held in Abuja, Nigeria, from 9-12 December 1991

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 globalization, 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 Organization 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 is 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 recognized 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 organizations 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 organizations, 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 organizations.

Abuja
Nigeria
12 December 1991

BALLIOL STATEMENT OF 1992

Concluding statement of the Judicial Colloquium held at Balliol College, Oxford, from 21-23 September 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 organized 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 recognized 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 realized 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 emphasized 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.

THE BLOEMFONTEIN STATEMENT

Concluding statement of the Judicial Colloquium held in Bloemfontein, South Africa, from 3-5 September 1993

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. The participants were:

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, Acting Judge of Appeal Hon Mr Justice J.C. Kriegler, Acting 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 The Lord Lester of Herne Hill, QC Professor Jeffrey L. Jowell, QC
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

Representatives of the Commonwealth Secretariat, Interights, and the South African Secretariat were also present.

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 in Balliol College, Oxford, Great Britain, 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 realized 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

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