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The Relevance of International Human Rights Norms

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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.