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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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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 -
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> (a) that is reasonably required in the interests of defence, public safety, public order, public morality, or public health; or
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> (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
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> (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.