Judicial Colloquium in Bangalore
24-26 February 1988

Developing Human Rights Jurisprudence

The Domestic Application of International Human Rights Norms

Commonwealth Secretariat

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Mr Neroni Slade, Dr Stephen Marks, Mr Jeremy Pope

Second row:
Mr R Sudarshan, Mr Anthony Lester, QC., Judge C Urs, Chief Justice M Haleem, Justice Sir M Kapi, Justice E Dumbutshena, Justice P N Bhagwati, Judge R Bader-Ginsburg, Justice R Lallah, Tun Mohamed Salleh Bin Abas, Justice M D Kirby, CMG., Justice P Ramanathan

Bottom row:
Ms Lathika Nath, Dr Rose D'Sa, Dr Amrit Sarup

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PREFACE

It is a well-established practice for senior Commonwealth judges to gather in small numbers from time to time for informal and private exchanges on matters of special interest.

A high level judicial colloquium of this kind was held in Bangalore, India from 24-26 February 1988, to discuss "The Domestic Application of International Human Rights Norms". It was convened by the Hon Justice P N Bhagwati (former Chief Justice of India) with the support of the government of India and with assistance from the government of the State of Karnataka. The generosity of the Ford Foundation, New York, was fundamental to the success of the project. The colloquium was administered by the Human Rights Unit and the Legal Division of the Commonwealth Secretariat.

Discussion focussed on recent developments in the common law whereby judges and lawyers generally are beginning to draw on international human rights jurisprudence in order to augment the domestic law of their jurisdictions both within and beyond the Commonwealth.

There was a comprehensive exchange of views which, in accordance with the "Chatham House rules" which prevail in these types of meetings, were off-the-record and non-attributable, but the participants agreed that in view of its importance the Chairman of the Meeting should sum up the proceedings in a public statement which has already become known as "The Bangalore Principles". Expert papers for discussion at the meeting were prepared by Justice P N Bhagwati, Justice M D Kirby, CMG, Justice Rajsoomer Lallah and Mr Anthony Lester, QC. Chief Justice Muhammad Haleem submitted a further paper for consideration by the meeting.

Our grateful and sincere thanks are due to the Chief Justice of the High Court of Karnataka, Justice P C Jain, the Hon Justice Rama Jois and to the Judges of the High Court for their inestimable contributions to the colloquium. Our special thanks are due, too, to the Chief Minister of Karnataka and to the government and public officials of the State of Karnataka and to the people of Karnataka for the warmth and the generosity of their hospitality, which contributed so tangibly to its undoubted success.

Commonwealth Secretariat
September 1988

INTRODUCTION BY THE COMMONWEALTH SECRETARY-GENERAL

The quest world-wide for the effective realisation of fundamental human rights in all their manifestations - economic, social, political, cultural - is one which has come to characterise much of the twentieth century. This was a process which could only begin once the universality of the human condition and of the rights and needs fundamental to it, were clearly and unambiguously recognised. It needed, first, a renunciation of human bondage in all its forms, like slavery and indenture, and of course commitment to the decolonisation process. This process of change is by no means ended, as the persisting stain of apartheid in South Africa bears sordid witness. But the quest for respect for the wider rights of humanity is well underway.

Within both Commonwealth and non-Commonwealth countries, there is a constant process of defining and applying human rights norms under national rules and procedures. Coinciding with this development of national formulations of human rights, is the international process of developing and refining international human rights norms. These global norms are not the invention of international civil servants but the evolution, after considerable debate and deliberation of common standards for all nations based on generally accepted principles of law. They reflect concepts of basic human rights which have been long recognised in domestic law and frequently spelt out in the Constitutions of countries.

Some of these internationally recognised principles are comparatively well-known: expressed, for example, in the Universal Declaration itself and the two International Covenants of 1966. Others are of general application but concerned with specific areas; others still are regional, with varying degrees of acceptance in their particular regions: such as the European Convention on Human Rights, the Inter-American Convention on Human Rights and the African Charter on Human and Peoples' Rights. Others are less well-known and not yet accorded general acceptance in the community of nations. Thus the international process continues.

Until quite recently, the legal training of most lawyers has neglected specific instruction in international human rights norms. This reflects, and in turn induces, many inadequacies: a lack of awareness by educators of the legal profession, the unavailability of relevant materials to the legal profession - even to judges themselves, the absence of resource institutions to advise lawyers and judges about international human rights norms and jurisprudence. There are exceptions; but, together, all this has led to a general lack of awareness of the relevance and utility of developing and applying international human rights norms within domestic jurisdictions. Recently, however, a new process has begun. Judges in jurisdictions as diverse as Britain, Zimbabwe and Australia, have begun to have recourse to, and to interpret fundamental rights and obligations against the background of, international human rights norms. This process will be stimulated and be better informed if legal practitioners are encouraged to highlight relevant international human rights jurisprudence in domestic courts.

The time has come for the legal profession to look afresh at the flowering of the international jurisprudence of human rights, and for judges and lawyers everywhere to consider the relevance of such norms and their possible application in the resolution of practical questions determined in their courts according to law on a daily basis. This need is reinforced by the fact that so many states are now parties to the relevant international instruments and therefore have a common need to translate the fine words and sentiments of these instruments into practical application and reality. There is, therefore, a mutuality of interest - both of individuals and of governments - in the process of universalising human rights norms in the application of domestic law.

The legal profession, with its special role in the administration of justice, has much to contribute in its daily work to the advancement of the human rights of all. The initiative taken by Justice P N Bhagwati in bringing together an international gathering of judges in Bangalore, India, to discuss the domestic application of international human rights norms deserves our collective gratitude. The thoughtful and constructive statement made at the conclusion of the deliberations, charts the way forward to judges throughout the Commonwealth, and points them in the direction of a creative, yet consistent, development of human rights jurisprudence.

It is a particular pleasure that the Secretariat could play its part in the organisation of this Meeting, since the values and principles which lie at the core of the Commonwealth association, and which were expressed in such simple but eloquent terms by Commonwealth Heads of Government in Singapore in 1961, embody the Commonwealth message of concern for fundamental rights in all their manifestations. This concern, based on the principles adopted by successive Heads of Government Meetings, pervades the work of the Secretariat at many levels - whether through economic development, law, health, women and development issues, education or public administration. In recent years, Heads of Government Law Ministers and Senior Officials have given particular attention to ways of actively promoting human rights within the Commonwealth. The Report of the Commonwealth Working Group on Human Rights which was set up in 1979 to advise on the possibility of a human rights role for the Commonwealth, resulted in the establishment, in January 1985, of a special Unit within the Commonwealth Secretariat for the promotion of human rights and the provision of appropriate assistance to governments in the development of domestic measures to promote human rights and sustain and nourish human dignity.

There is a great opportunity ahead for new initiatives in the domestic application of international human rights norms. At Bangalore, a pebble was cast into the waters of the common law. I share the hope that the ripples it created will reach into the farthest corners of the Commonwealth.

Shridath S Ramphal
Commonwealth Secretary-General
Marlborough House, London

"BANGALORE PRINCIPLES"

CHAIRMAN'S CONCLUDING STATEMENT

Between 24 and 26 February 1988 there was convened in Bangalore, India, a high level judicial colloquium on the Domestic Application of International Human Rights Norms. The Colloquium was administered by the Commonwealth Secretariat on behalf of the Convenor, the Hon Justice P N Bhagwati (former Chief Justice of India), with the approval of the Government of India, and with assistance from the Government of the State of Karnataka, India.

The participants were:

Justice P N Bhagwati (India) (Convenor)
Chief Justice E Dumbutshena (Zimbabwe)
Judge Ruth Bader Ginsburg (USA)
Chief Justice Muhammad Haleem (Pakistan)
Deputy Chief Justice Sir Mari Kapi (Papua New Guinea)
Justice Michael D Kirby, CMG (Australia)
Justice Rajsoomer Lallah (Mauritius)
Mr Anthony Lester, QC (Britain)
Justice P Ramanathan (Sri Lanka)
Tun Mohamed Salleh Bin Abas (Malaysia)
Justice M P Chandrakantaraj Urs (India)

There was a comprehensive exchange of views and full discussion of expert papers. The Convenor summarised the discussions in the following paragraphs:

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.

2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.

3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.

4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete.

5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.

6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.

7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

8. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.

10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

Bangalore
Karnataka State
India

26 February 1988

LIST OF PARTICIPANTS

Convenor

Justice P N Bhagwati	India

Delegates

Chief Justice E Dumbutshena	Zimbabwe
Judge Ruth Bader Ginsburg	U S A
Chief Justice Muhammad Haleem	Pakistan
Deputy Chief Justice Sir Mari Kapi	Papua New Guinea
Justice Michael D Kirby, CMG	Australia
Justice Rajsoomer Lallah	Mauritius
Mr Anthony Lester, QC	Britain
Justice P Ramanathan	Sri Lanka
Tun Mohamed Salleh Bin Abas	Malaysia
Justice M P Chandrakantaraj Urs	India

Observers

Dr Stephen Marks, Program Officer, Human Rights and Social Justice	Ford Foundation, New York
Ms Lathika Nath, Lecturer in Law	University of Bangalore

Commonwealth Secretariat

Mr J D Pope, Director	Legal Division
Mr N Slade, Assistant Director	Legal Division
Dr A Sarup, Chief Legal Officer	Legal Division
Dr Rose D'Sa, Research Officer	Human Rights Unit, International Affairs Division, (Conference Co-ordinator)

The Ford Foundation

Mr R Sudarshan, Assistant Representative	Ford Foundation, New Delhi
Mr S Chellani, Secretary	Ford Foundation, New Delhi

AGENDA

Tuesday, 23 February

p.m.

Public Inauguration of the Colloquium

Opening Ceremony presided over by the Hon Justice M Rama Jois, Acting Chief Justice of the State of Karnataka

Inaugural Address by the Hon Justice P N Bhagwati

Vote of Thanks by Mr Jeremy Pope, Legal Director, Commonwealth Secretariat

Wednesday, 24 February

a.m.

Opening Session:

1. Presentation by the Hon Justice Lallah on "International Human Rights Norms"

2. Discussion of the sources of International Human Rights Norms including:

(i) International Treaties relating to Human Rights

(ii) Customary international law with particular reference to:

- The UN Charter
- The Universal Declaration of Human Rights
- Declarations, Resolutions of the General Assembly, Declarations by Commonwealth Heads of Government, etc.

(iii) The jurisprudence of the various international mechanisms:

- The UN mechanisms
- The European system
- The Inter-American system
- The African system (preliminary assessment)

Thursday, 25 February

Third Session:

a.m. The relationship between International Human Rights Norms and Domestic Law

Presentation by the Hon Justice P N Bhagwati on "Fundamental Rights in their Economic, Social and Cultural Context"

Discussion on:

3. The incorporation of International Human Rights Norms in relevant national constitutions

4. To what extent are international human rights standards given domestic constitutional or legislative protection in the areas of:

(i) Civil and Political Rights

(ii) Economic, Social and Cultural Rights

5. Locating the lacunae. If there are gaps, how can these be filled by:

(i) The development of the common law by judicial techniques with reference to international human rights norms, or

(ii) The direct application of international customary law by domestic courts

p.m. Fourth Session:

Presentation by Mr Anthony Lester, QC on "Freedom of Expression"

Friday, 26 February

a.m. Fifth Session:

Presentation by the Hon Justice Kirby on "The Role of the Judge in Advancing Human Rights"

Discussion on:

6. Judicial techniques and strategies to translate human rights and fundamental freedoms into practical reality through the interpretation of legislation and the common law including rules of procedure, evidence, amicus curiae briefs, locus standi, etc.

7. The question of funding of public interest litigation and legal aid, the role of human rights commissions, etc.

p.m. Sixth Session:

8. Close of conference and discussion on follow-up.

OPENING CEREMONY ADDRESS

by

The Hon Justice M Rama Jois

In his highly enlightening inaugural speech Hon Justice Bhagwati has stressed the great importance of basic human rights and the duties of judges in enforcing them. He said that concept and purpose of all human rights are to be found in the words 'right to happiness' and 'right to enjoyment of resources' of all individuals.

These concepts have been part of our fundamental philosophy from times past which is evidenced by the declaration made in the Vedas. The relevant declarations are:

Rigveda - Mandala-5, Sukta-60, Mantra-5:

Ajyestaso akanishtasa ete
sam bhrataro va vridhuhu sowbhagaya.
No one is superior (ajyestasaha) or inferior (akanishtasaha). All the brothers (ete bhrataraha). All should strive for the interest of all and should progress collectively (sowbhagaya sam va vridhulu).

Atharvaveda - Samjnana Sukta:

Samani prapa saha vaha annabhagaha
Samane yoktre saha vaha yunajmi
Araha nabhimiva abhitaha.

All have equal rights in articles of food and water. The yoke of the chariot of life is placed equally on the shoulders of all. All should live together with harmony supporting one another like the spokes of a wheel of the chariot connecting its rim and the hub.

These Vedic provisions forcefully declare equality among human beings. The last of them impresses that just as no spoke of a wheel is superior to the other, no individual can claim to be, or regarded as, superior to others. Equality of all human beings and the duty of each individual to strive for the happiness of every other individual as also the equal right over food, water and other natural resources, are found incorporated in those declarations. Finally it is declared that just as no spoke of a wheel is superior to the other, no individual can claim to be superior to or having more rights than others. It is true that in spite of such a basic philosophy enshrined in the Vedic texts, in actual practice our society has denied basic human rights to certain sections of society. That was a breach of human rights, so emphatically declared in the Vedas. However, those rights have been resurrected and are found incorporated in Articles 14, 17, 19 and 21 of the Constitution of India.

One of the basic duties of the King, as incorporated in Rajadharma (Constitutional Law) of ancient India was to protect every individual in every respect and ensure his happiness. Kautilya in the Artha Sastra laid down thus:

> In the happiness of his subjects lies the happiness of the Ruler; in their welfare, his welfare; whatever pleases him the Ruler shall not consider as good but whatever pleases his subjects, the Ruler shall consider as good.

Manu IX-311 laid down thus:

> Yatha sarvani bhutani dhara dharayate Samam
> Tatha sarvani bhutani bibrataha parthivam vratam
>
> The King should support all his subjects without any discrimination in the same manner as the earth supports all human beings.

Kamandaka (V 82-83) declared that the King should protect individuals against arbitrary action of his officers.

There is a glowing instance quoted in Rajatarangini as to how a King of Kashmir Chandrapida (680 to 688 AD) protected the right of residence of a poor individual against the action of his own high officers. The officers of the King had planned to construct a temple on a site. On a part of the site there was a hut belonging to a Cobbler. The officers ordered the Cobbler to remove the hut. He refused stating that it was his residence and he had no other shelter. When the matter was reported to the King, he ordered suo moto thus:

> Rajatarangini IV-59
>
> Nityamyatam Vinirmanam Yadvanyatra Vidheeyatam
> Parabhumyapaharena sukrutam kah kalankayet
>
> Stop the construction of the temple or build it somewhere else. Don't tarnish the pious act of construction of a temple by depriving the poor man of his dwelling.

Such was the respect shown for the basic need and right to shelter and happiness of an individual by a King who constituted the highest judiciary under the ancient Indian Constitutional Law (Rajadharma).

Under the Constitution, the duty to safeguard and protect the basic human rights of the individual incorporated in the Constitution and the Laws, is vested in the Supreme Court and the High Courts. On this aspect, in The State of Madras v V G Row (AIR 1952 SC 196 at 199) Patanjali Sastri, Chief Justice of India, said thus:

> "If, then, the Courts in this country face up to such important and none too easy tasks, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights", as to which this Court has been assigned the role of a sentinel on the 'qui vive'."

The role assigned to the Judges of the Supreme Court and the High Courts Under Articles 32 and 226 respectively, is that of a sentinel for protecting the sacred and basic human rights, which are incorporated in the form of fundamental rights in Part III of the Constitution.

There are innumerable cases in which the Supreme Court of India and the High Courts have protected and enforced basic human rights. I am quoting a few of them:

I Sunil Batra v Delhi Administration - AIR 1980 SC 1579

(V R Krishna Iyer, R S Pathak and O Chinnappa Reddy, JJ)
(Judgment delivered by Krishna Iyer, J)

This was a case in which the Supreme Court held that keeping of under-trial prisoners with the convicts was a violation of human rights. The relevant portion of the judgment reads:

> "The essence of the matter is that in our era of human rights consciousness the habeas writ has functional plurality and the constitutional regard for human decency and dignity is tested by its capability.
>
> Prisons are built with stones of law and so it behoves the court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant 'guardians' of the prison system where they go berserk and defile the dignity of the human inmate. Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials 'dressed in a little, brief authority,' when Part III is invoked by a convict. For when a prisoner is traumatized, the Constitution suffers a shock. And when the Court takes cognizance of such violence and violation, it does, like the hound of Heaven, 'But with unhurrying chase. And unperturbed pace, deliberate speed and Majestic instancy' follow the official offender and frown down the outlaw adventure.
>
> To aggravate the malady, we have the fact that a substantial number of the prisoners are under-trial who have to face their cases in court and are presumably innocent until convicted. By being sent to Tihar Jail they are, by contamination, made criminals - a custodial perversity which violates the test of fairness in Article 21. How cruel would it be if one went to a hospital for a check-up and by being kept along with contagious cases came home with a new disease. We sound the tocsin that prison reform is now a constitutional compulsion and its neglect may lead to drastic court action."

II Hussainara khatoon v State of Bihar - AIR 1979 SC 1369

(P N Bhagwati and D A Desai, JJ)
(Judgment delivered by Bhagwati, J)

In this case, the Supreme Court held that where under-trial prisoners have been in jail for periods longer than the maximum term for which they would have been sentenced, if convicted, their detention in jail is totally unjustified and in violation of the fundamental right to

personal liberty under Article 21 of the Constitution and that their detention in jail being illegal they should be released forthwith.

III Sant Bir v State of Bihar - AIR 1982 SC 1470

(P N Bhagwati and A N Sen, JJ)
(Judgment delivered by Bhagwati, J)

This was a case in which a person was kept in jail as a criminal lunatic, for sixteen years even after a medical report that he was fit for discharge. The relevant portion of the judgment reads:

> "The petitioner, in the instant case, was sentenced to life imprisonment on 28 February 1949. Since the mental condition of the petitioner was not stable, on 20 November 1951 the petitioner was transferred to another jail for confinement as a criminal lunatic. The medical history sheet and the medical report showed that the petitioner was fully recovered and was free from any symptoms since 23 December 1966 and was fit for discharge. This medical report was sent by the Jail Superintendent to the State Government and it was stated that the petitioner was fit for discharge "in the care of his guardian or surety" and the necessary orders should be passed in that behalf. The State Government instead of directing release of the petitioner directed the Jail Superintendent to keep the petitioner in safe custody as a criminal lunatic for three years.
>
> The story narrated by us above makes very sad and distressing reading. Have we lost all respect for the dignity of the individual and the worth of the human person so nobly enshrined in our Constitution that we are prepared to forget a person once he is sent to jail and we do not care to enquire whether he is continued to be detained in the jail according to law or not. It should be a matter of shame for the society as well as the administration to detain a person in jail for over 16 years without authority of law. We would therefore direct that the petitioner should be released from jail and set at liberty forthwith. The State Government will provide to the petitioner at the time of release necessary funds for the purpose of meeting the expenses of his journey to his native place, also maintenance for a period of one week."

In a recent case, the Karnataka High Court (Mr Justice M P Chandrakantaraj Urs) directed the Government to pay compensation of Rs.5000.00 to each of the large number of families who had lost their child/children on account of an epidemic disease which gripped the village concerned, on account of the failure of duty on the part of the Government in taking steps to prevent the spread of the disease.

I should also mention frequent instances of violations of human rights as incorporated in law, by the Police who are entrusted with the duty to enforce the Law. Inspite of a specific provision in the Constitution requiring the production of a person arrested by the Police before the jurisdictional Magistrate within 24 hours, which requirement is also incorporated in the Code of Criminal Procedure, there are several instances which show that it is only obeyed in its breach. It is only after a complaint is made through a habeas corpus petition about unlawful

detention for several days, the person concerned would be produced before the court recording that he was arrested only the previous day. This is a matter worthy to be considered in the judicial colloquium.

To put it in a nutshell, it is true that the Constitution of India confers rights on individuals, but they would be mere paper rights unless the Government departments discharge their duties and secure those rights for individuals. When that duty is not discharged by the Government departments or the rights are encroached upon or deprived by them, it becomes the duty of the Judges to enforce them without fear or favour. "Sukraniti" of ancient India declared that Judges must exercise their power impartially and fearlessly. Of course, the Judges should act within the framework of the Constitution and the Laws and within the jurisdiction conferred on them.

With these words, I conclude my address.

Thank you all.

INAUGURAL ADDRESS

by

The Hon Justice P N Bhagwati, Convenor

The basic theme in the discourse on human rights to which we must address ourselves is how we can convert the rhetoric of human rights into reality. The rhetoric of human rights draws on the moral resources of our belief in the significance of a common humanity and points in the direction of a type of society which ensures that the basic human needs and reasonable aspirations of all its members are effectively realised in, and protected by, law. The language of human rights carries great rhetorical force of uncertain practical significance. At the level of rhetoric, human rights have an image which is both morally compelling and attractively uncompromising. But what is necessary is that the highly general statements of human rights, which ideally use the language of universality, inalienability and indefeasibility should be transformed into more particular formulations, if the rhetoric of human rights is to have major impact on the resolution of social and economic problems in a country.

It is obvious that a certain degree of positivization or particularisation is required, if specific human rights are going to have practical force, because it is only when they are positivized or particularised that they can become a basis for challenge to legislative or executive action which is violative of them as also for compulsive generation of effective executive action. There are certain human rights which operate as a restraint on the power of the State and such restraint is necessary because of the possibility of abuse or misuse of power or excess of power on the part of the State which is inherent in the legitimate possession of monopoly of force within a society and equally there are certain other human rights which require affirmative action to be taken by the State in order for their realisation. The State is thus the necessary friend as well as the recurrent enemy of human rights.

But the process of translating broad idealized objectives or statements of human rights into specific rules requires clarity in formulation untypical of ideological discourse. This can best be done through the mechanism of a strong and independent judiciary which is in tune with the ideologue of human rights. The Bill of Rights can at best only enumerate broad and general statements of human rights but to positivize them, to spell out their contours and parameters, to narrow down their limitations and exceptions and to expand their reach and significance by evolving component rights out of them while deciding particular cases, is a task which the judicial mechanism is best suited to perform, provided of course the judges are fiercely independent and have the right attitudinal approaches.

The judges have to be careful while positivizing human rights and giving them meaning and content, to ensure that they do not in the process, out of ambition or weakness or excessive zeal for protecting the State interest dilute human rights but enlarge their scope and ambit and advance the purposes for which they are enacted as part of the fundamental law of

the country. It would be no exaggeration to state that human rights would remain safe in a society governed by a written Constitution so long as its judges are strong and independent, do not cave in to pressures, influences or centres of power and are committed to the cause of human rights. The threats of human rights, it may be noted, arise not only from State lawlessness - where the State and its agencies are guilty of abuse or misuse or excess of power or act outside the law, but also from violation by other centres of power, social and economic and it is these latter violations which are not so easily perceptive and hence not attracting sufficient attention of human rights activists and the community.

The judiciary has to be ever alert to repel all attacks, gross or subtle against human rights and they have to guard against the danger of allowing themselves to be persuaded to attenuate or construct human rights out of misconceived concern for State interest or concealed political preference or sometimes ambition or weakness or blandishments or fear of executive reaction. Judicial somnambulance, indifference or timidity can be the source of greater threat to human rights enforcement than the aggression of the violators, for the greatest bulwark against State authoritarianism or arbitrainess would then be gone.

We, in Asian countries, live in a troubled world with many threats to the security and well-being of our society - threats external as well as internal. Smaller nations are being used as ploys or playthings by super powers in the name of security, and conflict between different ideologies within a country is seeking to tear apart the political fabric of the country and there are also sometimes destabilizing forces working within a country. In such an atmosphere, there is often a tendency to advocate draconian measures to protect the society against real and imagined ills. The necessity for such measures can frequently appear plausible even to well-intentioned citizens and be activated by high negative emotions, uncertainty, fear and anger. They may be tempted to advocate the principle that "the end justifies the means". It is sufficient to point out that history is replete with the disastrous consequences of the smothering and suppression of human rights by the dictates of expediency.

We must therefore take care to ensure that in no situation, however grave it may appear, shall we allow basic human rights to be derogated from, because once there is a derogation for an apparently justifiable cause there is always a tendency in the wielders of power, in order to perpetuate their power, to continue derogation of human rights in the name of security of the State. Effective respect for human rights must place two kinds of restrictions on the forces of derogation. It must limit the circumstances and specify the procedures under which derogation may be legitimately invoked and it must also identify and reserve certain core human rights such as the right to life or the right to personal liberty or freedom from ex post facto criminal laws which are the most vital from a political science perspective, as absolutely non-derogable.

It then becomes the foremost duty of the judiciary to see that the executive, in order to perpetuate its power, does not violate or cross those limits and declare a state of exception just to cover its misdeeds or to perpetuate the regime of a particular political group. Sometimes pressure - not overt but covert, not direct but indirect, not obvious but suggestively - may be brought on the judiciary to secure its acquiescence in such a conspiracy, but the judges must, in such a situation, not wilt

under pressure or blandishments but exhibit courage of conviction and commitment to constitutionalism and prevent the executive from abusing or misusing the power of derogation and protect the non-derogable human rights, if necessary, by expanding their reach and content and thus build up the strong edifice of human rights jurisprudence. The executive must also accept interpretation by the courts gracefully as part of mature constitutionalism.

I might also say a word about the different categories of human rights which need promotion and enforcement. The first categcry consists of civil and political rights. The Universal Declaration of Human Rights laid greater emphasis on civil and political rights than on other categories of human rights because the world was still haunted by the nightmarish experiences of the horrible Nazi and Fascist regimes, and the Western countries which had a hand in framing the Universal Declaration - the majority of developing countries being then still under foreign domination - had attained a fairly high stage of development in material and economic resources and the social and economic rights did not therefore find much preoccupation in their minds. But it soon came to be realised that civil and political rights are priceless and invaluable, because without them freedom and democracy cannot survive, they do not exist for the large masses of people in the developing countries who are suffering from poverty, want and destitution. They want food and shelter and clothing. There is a revolution of rising expectations amongst them and today they are demanding freedom not only freedom to vote but also freedom from hunger and starvation.

It is only if social and economic rights are ensured to these large masses of people that they will be able to enjoy civil and political rights and become equal participants in the democratic process. With this realisation, we reached the second stage in the evolution of human rights. Social and economic rights which constitute the second stage are as much part of human rights as civil and political rights. Both categories of human rights are equally important. There is a close inter-linkage between the two categories of human rights because all human rights and fundamental freedoms are indivisible and inter-dependent and each category of human rights is indispensable for the enjoyment of the other. Hence, it is axiomatic that the promotion of respect for and enjoyment of one category of human rights cannot justify the denial of the other category of human rights.

We have now reached the third stage in the evolution of human rights and that is the recognition of the right to development. It constitutes the culminating point in the evolution of the concept of human rights. This "super right" transcending the differentiation of civil and political rights and social and economic rights into the future dimension, has been called a third generation right. It has received recognition both as an individual and a collective right and the General Assembly has also adopted the Declaration on the Right to Development in its 41st Session. All these three categories of rights I would subsume under the label "rights to happiness". That is the most comprehensive human right.

These three categories of human rights depend fundamentally on the right to life and personal liberty which is a core human right. The right to life is now confined merely to physical existence but it includes also the right to live with basic human dignity - with the basic necessities of

life such as food, health, education, shelter etc. The right to food and the right to shelter have received considerable recognition in recent times and sometime back Professor Ian Brownlie, QC prepared a study for the Commonwealth Secretariat, working out the parameters of the international legal regime on food. Last year was also declared by the United Nations as the International Year of the Homeless. These human rights fall within the category of social and economic rights and they can be realised only by affirmative action on the part of the State and if the State fails to carry out its constitutional or legal obligations in enforcement of these human rights, it may have to be compelled to do so by an activist judiciary. We in India have done so, by compelling affirmative State action in cases where the State was under a constitutional or legal obligation to do so. See Agra Protective Home's case, Sanjit Raj's case, Nakra's case and Wiraja Chaudray's case.

It is also necessary to bear in mind that sometimes there are apparently conflicting human rights which need to be balanced in order to achieve a just and humane social order. I will give only two examples. For instance, the right not to be deprived of property arbitrarily is a human right embodied in Article 17 of the Covenant on Civil and Political Rights but this right may conflict with the right of everyone to an adequate standard of living including adequate food, clothing and housing and to the continuous improvement of living conditions enshrined in Article 11 of the Covenant on Economic, Social and Cultural Rights. Similarly the right to privacy is a right which may conflict with the right to information or the right of free speech and expression as embodied in the freedom of the press. These are rights which have to be harmonized and a fair and just balance has to be struck, keeping in view societal interest. This delicate balancing function is entrusted to the judiciary and has to be performed by the judiciary with wisdom and sagacity: it needs a high degree of judicial statesmanship and an insightful vision.

Since this is a Judicial Colloquium, I have referred to the role of the legal system in domestic jurisdiction in the implementation of international human rights norms. But it should never be forgotten that the legal system alone cannot ensure formation or implementation of these norms. Human rights are for the people. We lawyers and judges are only technicians and we are therefore obsessed with the idea of their legal enforcement, though even in regard to our role in the implementation of human rights - particularly social and economic rights - there is considerable scepticism in the minds of the people. Steven Lawenstein, an American lawyer who was executive secretary to the Chile Law Programme from 1967 to 1969 said:

> "Lawyers, when they come into contact with development programmes, are nearly always, in a posture of opposition, of citing positive law that prevents what is sought from being done: seldom have lawyers had the perspective or resourcefulness to think originally, contributing fresh ideas and impetus to the effective solution of problems".

These are harsh words but we must pay heed to them. We must forge new methods, fashion new tools and innovative new strategies for securing promotion and enforcement of human rights norms and ensuring their application in our domestic jurisdictions. How we can best do so is a matter which will have to be discussed by us in this Judicial Colloquium.

It is necessary to have more judicial colloquiums of this kind in different regions of the globe, because international human rights norms will remain sterile unless we lawyers and judges can pour life into them and infuse them with vigour and strength so that they become vibrant and meaningful for the entire humanity and their universality becomes a living reality. But it must be recognised that the enforcement of human rights cannot just be the pressure of lawyers, judges and courts nor is adjudication by the courts the only method by which human rights can be enforced. A wide range of alternatives has to be explored in order to secure promotion and implementation of human rights. It is necessary to change some old ways of thinking on this subject and of rooting out deep-seated prejudices in regard to race, colour, sex, caste, religion etc. To this end it is essential to embark upon a complementary programme of education designed to produce new thinking on the part of the people in regard to human rights. We must accelerate social movements to protect human rights, for it is only through social movements using a multiple range of techniques that human rights can be realised. We lawyers and judges have to play a vital role in the promotion and enforcement of human rights through wide-ranging strategies and de-symbolize the constitutional and legal perceptions in regard to human rights by an activist goal-oriented approach.

RESOURCE PAPERS

"INTERNATIONAL HUMAN RIGHTS NORMS"

Paper prepared by
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INTERNATIONAL HUMAN RIGHTS NORMS

1. General Background of Human Rights Norms.
2. Sources of International Law on Human Rights.
3. Content of Human Rights Norms.
4. International and Regional Mechanisms.
5. Emerging Jurisprudence on International Norms.
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ANNEXES

I Universal Declaration of Human Rights, 1948.

II International Covenant on Economic, Social and Cultural Rights, 1966.

III International Covenant on Civil and Political Rights, 1966 and its Optional Protocol.

IV European Convention on Human Rights, 1950.

V European Social Charter, 1961.

VI American Convention on Human Rights, 1969.

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INTERNATIONAL HUMAN RIGHTS NORMS

1. General Background

This colloquy being a meeting of highly experienced persons in the daily application of laws in the field of human rights, it might be more fruitful to concentrate on norms that are by now generally accepted and only refer, necessarily briefly, to matters of purely historical or academic interest for the purpose of reviewing the development of those norms from what, it is hoped, is the right perspective in a field of international law which, in the last 40 years or so, has known a most remarkable and vigorous growth.

Historically, concern for the protection of human rights found expression almost exclusively at the national or domestic level in accordance with the varying notions of changing times. Even in the national sphere prevailing power structures in many countries resisted acceptance, beyond the purely metaphysical or philosophical, of the very notion of human rights, the dignity of the human person and the humanity of man. Violations occurred and were wide-ranging. In the result great popular upheavals took place and gave birth to charters in some states e.g. Magna Carta, the French Declaration of the Rights of Man and of the Citizen of 1789, followed two years later by the American Bill of Rights. These instruments were by modern standards, undeniably limited in content and focus and were not perceived as being of universal application though they undoubtedly inspired and influenced reform in many countries in the field of human rights.

At the international level before the turn of this century, notions of human rights were no more than selective extensions of certain rights which powerful nations wanted their own co-religionists or nationals to enjoy elsewhere and hence their justification for certain religious wars or, upon the expansion of international commerce, the inclusion in bilateral treaties of provisions for the protection of their nationals. Again, humanitarian laws regulating the conduct of war depended on mutual agreement between states. It could not be said, therefore, that the norms of human rights on which states acted had any claim to universality or were other than those which some states bilaterally accepted or else found it convenient to impose, not from any ethical considerations but rather from the practical need to safeguard their own national interests.

After the First World War, however, the beginnings of universality, though still restricted in content and scope, began to emerge. This was, in great measure, due to the founding of the League of Nations and the imposition of certain safeguards in peace treaties in the treatment of minorities. But it was not until the aftermath of the Second World War that the international community became dramatically convinced of the real and pressing need to protect and promote human rights. The promotion and protection of human rights were seen as an integral and essential element for the preservation of world peace and co-operation, not only within the confines of particular states but universally. To achieve this end, the need was also felt to create the necessary mechanisms to deal with the highly complex questions that would inevitably arise in the systematic

quest for generally acceptable norms and their implementation within all national jurisdictions. There were two catalytic factors and, at the risk of repeating the obvious, these may perhaps be recalled.

First, unlike in the past when there was no permanent institutional machinery for the regular discussion of matters of common concern and when international meetings only took place at ad hoc diplomatic conferences with well defined and limited mandates (e.g. the Vienna Congress (1815), the Berlin Conference (1855), the Hague Conferences (1899 and 1907)), the creation of the United Nations system after the Second World War provided a permanent structure for systematic work in the fulfilment of its mandate.

Secondly, following the horrors of the Second World War which humanity had inflicted upon itself and possibly, as well, the need felt to extend to everyone the benefits of the protection given to minorities in those provisions of peace treaties which had been imposed on certain states in the inter-war period, the promotion and the protection of human rights were seen as an inseparable part of the principal objectives which states set for themselves (Articles 1(3) and (4) and 55 of the UN Charter). To achieve this end, they pledged themselves "to take joint and separate action in co-operation with the Organisation" for the achievement of that objective (Article 56 of the Charter). Further, within the system, functional machinery was specifically assigned particular tasks (ECOSOC and its subordinate bodies, specially the Commission on Human Rights and its expert Sub-Commission) to assist the General Assembly in its quasi-legislative functions in the human rights field (adoption of conventions, some eventually with independent treaty supervisory bodies like the Human Rights Committee, adoption of resolutions or declarations of general application). In addition, there was the general mandate of the General Assembly to ensure that the Article 56 pledges were fulfilled by states in which the situation of human rights became a matter of concern to the international community (e.g. in the case of Chile in these past years).

To conclude this general background, mention should be made of the enormously useful parallel work accomplished in the field of human rights by the UN specialised agencies within their field of competence (ILO and UNESCO in particular, the former even before the General Assembly came into being) and by regional organisations like the Council of Europe, the Organisation of American States and the Organisation of African Unity.

2. Sources and Content of Human Rights Norms

Enough has been said so far to suggest that, in relation to human rights norms, customary international law in the orthodox or traditional sense of unwritten non-treaty law based on state practice has largely, if not completely, been overtaken or else subsumed in an ever growing corpus of norms fixed in the form of instruments like resolutions, declarations or else conventions, all adopted by the great majority of states through the international machinery they have created, whether at the regional or global level.

This is not to say that, at any rate with regard to declarations or resolutions which by their very nature do not have the binding character of a multilateral treaty provision, doubt may not be cast on a particular norm. The result may still depend on certain factors e.g. whether the resolution or declaration was adopted by consensus or a substantial majority, with only unimportant abstentions in terms of numbers or whether, on the other hand, it was adopted against strong opposition. In the latter case, state practice would still be relevant. With regard to declarations and resolutions, although great efforts are deployed in the preparatory work with a view to obtaining consensus or universality even at the cost of compromises and minimalist achievements, their value as legal norms always remains uncertain when compared with provisions of widely accepted treaties. This is why, as later indicated, treaties are subsequently worked out to incorporate norms which first achieve some degree of recognition by way of a declaration or a resolution.

Some idea of the quasi-legislative activity of the UN and the specialised agencies may be gathered from both the number of instruments adopted in the last 40 years or so as well as the variety of particular aspects of human rights that they deal with. These instruments are listed in Annex 8 to this paper and the list does not purport to be complete. As may be seen from a quick reading of the list, the Universal Declaration (1948) and its two implementing International Covenants of 1966 on Civil and Political Rights and on Economic Social and Cultural Rights (hereinafter referred to as the ICCPR and ICESCR respectively) cover what, at the time of their adoption, was considered to be the whole range of basic or fundamental rights which states agreed the individual should have. These three instruments together have come to be known as the International Bill of Human Rights and, in view of their global importance, they are reproduced in Annexes 1 to 3 and will be discussed below.

It is interesting to note that, although a particular right is covered in an instrument of general application, it can nevertheless also be the subject matter of another instrument on its own, in a more complete form and having enforcement or monitoring machinery of its own. This is also the case with regard to instruments governing matters which also fall within the competence of specialised agencies (e.g. the 1957 ILO Convention No. 105 on the Abolition of Forced Labour c.f. Article 8(3) of the ICCPR). This is also the case with regard to some UN instruments (e.g. Article 7 of the ICCPR on the prohibition of torture or of cruel, inhuman or degrading treatment or punishment c.f. the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

It is worth noting that, in very much the same way as was the case with the Universal Declaration and its two Covenants (the ICCPR and the ICESCR), some rights achieve recognition by way of a general Declaration first and are subsequently made the subject matter of a specialised Convention. Such has been the case with the 1963 Declaration and the 1965 Convention on the Elimination of All Forms of Racial Discrimination, including the subsequent (1973) Convention on the Suppression and Punishment of the Crime of Apartheid, the 1967 Declaration on the Elimination of Discrimination against Women and its 1979 Convention and, lastly, the 1975 Declaration and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Work is in progress on draft Conventions to give effect to the 1959 Declaration on the Rights of the Child and the 1967 Declaration on Territorial Asylum.

Before I conclude on the aspect of sources of international law with regard to human rights and go on to review the content of generally accepted norms, it would not be out of place to refer, if only in brief terms, to significant regional international concerns relating to the evolution of the norms of human rights and the Conventions that have been born out of those concerns. These concerns have exercised all continents.

Because Europe was the main theatre of the horrors of the Second World War, following an era spanning centuries of internecine conflict often extending beyond its borders, the need for greater political, economic and social unity was most felt there. It was also deeply felt, as is clear from the preamble to the Convention that it adopted, that a meaningful common human rights policy in addition to arrangements covering other fields, would be one of the means of achieving that unity. It was understandable, therefore, that the first regional instrument (1950) concerning a broad spectrum of fundamental rights came into being there shortly after the adoption of the Universal Declaration by the General Assembly. As is evident from the express terms of the preamble to the European Convention and the contents of the Convention itself, the latter was greatly inspired and influenced by the Universal Declaration. Although Europe chose to adopt at the time only the civil and political rights proclaimed in the world instrument, it did a decade later (1961) adopt the European Social Charter which is the equivalent of the ICESCR. The European Convention and the European Social Charter are reproduced as Annexes IV and V. What has so far been said should not give the impression that the world had thrust upon Europe its global philosophy and concepts of human rights. Although the Universal Declaration had provided the inspiration, and the first draft of the implementing Covenants (the ICCPR and the ICESCR) had already been produced, it remains true that Europe or the West exercised a dominating influence in those early years of the UN.

The second regional instrument, in point of time, that requires to be mentioned is the American Convention on Human Rights, 1969. That Convention is reproduced as Annex VI. It was inspired by the global instruments of the UN and of the European Convention.

The most recent regional instrument to have come into force is the African Charter on Human and Peoples' Rights is reproduced as Annex VII. It did so only in 1987 although it had been approved in 1981 by the Heads of State and Government, in Nairobi. The determining reason would appear to have been that the minimum ratifications required to trigger its coming into force was a majority (26) of member states of the OAU membership, whereas the level generally required for such treaties is a quarter or at most a third. This leaves only Asia to have a regional charter of its own.

Insofar as the Commonwealth is concerned, the Singapore Declaration of 1971 incorporates the resolute commitment by the Commonwealth to the effective enjoyment and protection of human rights. At the Lusaka Meeting of 1979, Commonwealth Heads of Government appointed a Working Party to examine and make recommendations on a memorandum by The Gambia for the establishment of a Commonwealth Commission for Human Rights. Commonwealth Heads of Government considered the Report of the Working Party at the Melbourne HGM in 1981 and, after further consideration by Commonwealth Law Ministers in 1983, it was decided to establish a Human Rights Unit within the Commonwealth Secretariat to undertake such activities as might assist member states in the promotion of human rights, leaving for further study

and deliberation the question of appropriate machinery for the protection of human rights.

3. Content of Human Rights Norms

As is apparent from the above discussion of the sources of human rights norms, there is a whole host of instruments and quite a number of rights. This paper will restrict itself to civil and political rights as these are rights which most states are bound to implement within their legal system. Economic, social and cultural rights will be dealt with only to a limited extent. It may be said that international law regards these as matters for progressive achievement and protection. In effect, therefore, this part of the paper will deal with the Universal Declaration (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the European Convention (EHR), the American Convention (AMR) and the African Charter (AFR).

Though the Universal Declaration is of prime importance, it is not a treaty and therefore technically it is weak as an instrument of protection. But its moral force and persuasive character have never been in doubt and it is universally regarded as expounding generally accepted norms. It is a charter for objectives and policy and was drafted in broad and general terms. That was the reason which made it necessary to implement those objectives by more precise and detailed formulation in the form of conventions which would be binding on states parties and hence the adoption of the two International Covenants (ICCPR and ICESCR) which, in the original draft, were one. It will be recalled that the sister Covenants were split into two since the ICCPR created civil and political rights which would be immediately enforceable whereas the ICESCR imposed obligations "to take steps..... to the maximum available resources, with a view to achieving progressively the full realisation of the rights" (Article 2(1) of ICESCR). The ICCPR gives treaty effect to the substance of Articles 1 to 21 of the UDHR whereas the ICESCR, broadly speaking, gives effect to Articles 22 to 28 of the UDHR.

The following is a comparative list of rights recognised in the several instruments to which this part of the paper relates, with indications in abbreviated form of the relevant instrument and the relevant article of the instrument:

Right of peoples to self-determination	ICCPR 1(1), ICESCR 1(1), AFR 20.
Right of peoples to dispose of its natural wealth and resources	ICCPR 1(2), ICESCR 1(2), AFR 21.
Right to equality and non-discrimination	UDHR 1,2,& 7, ICCPR 2(1), 3 & 26, EHR 14, AMR 1(1) & 24, AFR 2 & 3.
Right to effective judicial remedies	UDHR 8, ICCPR 2(3), EHR 6 & 13, AMR 25, AFR 7(1)(a) & 26.
Right to life	UDHR 3, ICCPR 6, EHR 2, AMR 4, AFR 4.

Protection from torture or cruel, inhuman or degrading treatment or punishment	UDHR 5, ICCPR 7 & 10, EHR 3, AMR 5(2) to (6), AFR 5.
Protection from servitude and forced labour	UDHR 4, ICCPR 8, EHR 4, AMR 6, AFR 5.
Right to liberty and security of the person	UDHR 3 & 9, ICCPR 9, EHR 5, AMR 7, AFR 6.
Protection from imprisonment for inability to fulfil a contractual obligation	ICCPR 11, EHR Protocol 4 Art. 1, AMR 7(7).
Freedom to movement	UDHR 13, ICCPR 12, EHR Protocol 4, Art. 2, AMR 22(1) to (5), AFR 12(1) to (3).
Protection of alien from arbitrary expulsion	ICCPR 13, EHR Protocol 4, Art. 4 (restricted to collective expulsions), AMR 22(6) to (8), AFR 12(4) & (5).
Fair and public hearing, presumption of innocence, procedural guarantees, protection from double jeopardy	UDHR 10 & 11(1), ICCPR 14, EHR 5 & 6, AMR 8, AFR 7(1).
Non-retroactivity of offences and punishments	UDHR 11(2), ICCPR 15, EHR 7, AMR 9, AFR 7(2).
Recognition as a person before the law	UDHR 6, ICCPR 16, AMR 3, AFR 5.
Protection of right to property	UDHR 17, EHR First Protocol Art. 1, AMR 21, AFR 14.
Protection of privacy, family, home, correspondence, honour and reputation	UDHR 12, ICCPR 17 & 19(3)(a), EHR 8 & 10(2), AMR 10 & 14, AFR 18 & 27.
Freedom of thought, conscience and religion	UDHR 18, ICCPR 18, EHR 9, AMR 12, AFR 8.
Freedom of opinion and expression and of seeking, receiving and imparting information	UDHR 19, ICCPR 19, EHR 10, AMR 13, AFR 9.
Freedom of Assembly	UDHR 20, ICCPR 21, EHR 11, AMR 15.

Freedom of association and to form and join trade unions	UDHR 20, ICCPR 22, EHR 11, AMR 16, AFR 10.
Right to marry, equality of rights of spouses and protection of the family	UDHR 16, ICCPR 3 & 23, EHR 12, AMR 17, AFR 18.
Rights of the child	ICCPR 24, AMR 17(4) & (5), 18, 19 & 20, AFR 18(3).
Political rights and access to public office	UDHR 21, ICCPR 25, EHR First Protocol Art. 3, AMR 23, AFR 13.
Right of ethnic, religious or linguistic minorities with regard to culture, religion or language	ICCPR 27.
Prohibition of war propaganda and protection from advocacy of racial or religious hatred.	ICCPR 20.
Limitations on derogation in emergencies	ICCPR 4, EHR 15, AMR 27.

It will have been apparent that, although these instruments generally have much in common, there are some differences which might perhaps be highlighted. First, as between the UDHR and the ICCPR, the former instrument does not whereas the latter does cover the right to self-determination, the right for a people to dispose of its natural wealth and resources, protection from imprisonment for a civil debt, the protection of the alien from arbitrary expulsion, the rights of the child, certain rights of minorities and the outlawing of war propaganda and racial or religious hatred. These matters, with the exception of imprisonment for civil debts, are also excluded from the EHR. These were developed in the aftermath of the adoption of the UDHR. Secondly, the ICCPR contains the notable omission of protection of property rights, which initially was also absent from the EHR but was later included in the EHR's First Protocol with certain limitations. Thirdly, both the rights and the permissible limitations are formulated in greater detail in the ICCPR than in the UDHR and become susceptible of better implementation in national legal systems.

As between the ICCPR and the EHR, the AFR and, to a lesser extent, the AMR (which appears much closer to the ICCPR), the ICCPR appears to give wider protection with regard to the treatment of detainees (Article 10), recourse to the death penalty, access to public office, as well as the right of free consent as a pre-condition to marriage and the equality of spouses as to their rights in marriage.

It remains to be seen whether certain new concepts of a collective character such as the right to development and the rights of peoples as set out in Articles 20 to 26 of the AFR would be so interpreted as to narrow rather than strengthen the scope of the rights and freedoms of the individual. These concepts are not, from the strictly juridical point of view, entirely new. There are certain rights already recognised which could be exercised by the individual in community with others, for example

self-determination (ICCPR 1), freedom of association (ICCPR 22) or minority rights (ICCPR). What is worth noting also is the concept of duties formulated in express terms in the African Charter, whereas these remain implied in similar instruments. The extent to which this notion of duties will or will not have an adverse impact on the content of individual rights remains to be seen.

Although there are differences in content and scope as between the various regional instruments and as between these instruments and the ICCPR, it nevertheless remains a fact that a great many states from all regions (88 as at March 1988) are already parties to the ICCPR. Of these, 17 are from Western Europe, 10 from Eastern Europe, 19 from Africa, 21 from the Americas (USA signed in 1977 but has not so far ratified), 10 from Asia and 11 from the Middle East. There are some 19 states parties to the Inter-American Convention, 21 to the European Convention and about 27 to the African Convention.

Insofar as the Optional Protocol to the ICCPR is concerned, whereby states parties have accepted the competence of the Human Rights Committee to receive individual petitions against them, there are 40 states parties of which 11 are from Africa, 17 from the Americas and 12 from Western Europe.

4. Regional and International Mechanisms

The European Convention has established three organs "to ensure the observance of the engagements undertaken" by states parties. These organs are the Commission, the Committee of Ministers, and the Court. The Commission may receive applications either from a state party against another (Article 24), or from an individual, group or organisation (Article 25) concerning a violation. The jurisdiction of the Commission is integral or automatic under Article 24 but depends on whether or not the state concerned has accepted its jurisdiction under Article 25. The difference between an inter-state application and an individual one is that the complaining state need not show that it is in any way a victim whereas an individual must do so in order to have *locus standi*. The other difference also is that an inter-state application may be in respect of alleged incompatibility between the laws and practices of the respondent state and the Convention whereas the individual must establish that those laws or practices, in their application to him, have been violated. There are a number of provisions relating to the admissibility of an application before it is considered on the merits. Briefly, it may be rejected because:

(a) it is incompatible with the provisions of the Convention, for example, the complaint relates to a right not provided for by the Convention,

(b) domestic remedies have not been exhausted,

(c) the application has not been lodged within six months of the exhaustion of domestic remedies, or

(d) because it is manifestly ill-founded (no *prima facie* case disclosed in the application),

(e) the application is anonymous.

The Commission has developed a rich jurisprudence on the rules governing admissibility. Once the Commission has declared an application admissible, it ascertains the facts and proceeds to examine the matter on the merits. It then offers an opportunity to the parties to settle the matter. If a friendly settlement is not achieved, the Commission refers a detailed but confidential report to the parties and the Committee of Ministers, together with its opinion on whether there has been a breach of the Convention. Within three months, the Commission or the state party whose national is alleged to be a victim or either party in an inter-state dispute (but not private parties) may refer the matter to the Court, provided that the state or states concerned have accepted its jurisdiction.

Where the matter is not referred to the Court, the Committee of Ministers, here acting in a quasi-judicial capacity, decides by a two-thirds majority whether there has been a violation of the Convention. Occasionally the Committee of Ministers overturns the finding of a violation. It does not, however, find a violation where the Commission has found none. Its decision is binding and, where it does find a violation, it is empowered to prescribe a time period within which the offending state must take remedial measures. If these are not compiled with in time, the Committee decides upon further measures and usually publishes the report of the Commission. However, the Commission may do nothing as a result of the Commission's findings and is sometimes seen as a weak link.

When a matter is referred to the Court, the Commission assists the Court in very much the same way as an advocate-general and not in the spirit of an advocate for the individual applicant. All decisions of the Court are binding and the Committee of Ministers supervises the execution of the Court's judgment.

The Inter-American machinery under the American Convention on Human Rights is somewhat similar to that of the European Convention, but does not have a Committee of Ministers. Its two organs are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The American Convention reverses the traditional pattern utilised by the European Convention in that the right of individual petition to the Commission is the norm (Article 44 of the Convention) whereas an inter-state petition is only admissible by special acceptance (Article 45 of the Convention). It should be noted that the Commission is empowered to undertake promotional activities for the better observance of human rights and to make on-site visits. It is unfortunate, as regards the competence of the Court, that there have so far been only a few acceptances of its contentious jurisdiction. The Court has, in addition to its contentious jurisdiction, broad advisory jurisdiction at the request of any OAS member state (and not just states parties to the American Convention), as well as all organs of the Organisation of American States.

The African Charter came into force very recently (1986) and it is too early to speculate on its implementation in practice. All that can be said at the moment is that the Charter provides, like the ICCPR which will be next examined, for a single organ - the African Commission, which has functions relating to the promotion (by research and studies on which states may base their legislation, co-operation with kindred institutions, dissemination of information etc.) and protection of human rights. In this

latter regard, there is a procedure for inter-state and individual petitions with reports on the result to the Assembly of Heads of State and Government. The Commission is charged, inter alia, with responsibility to report to the Assembly of Heads of State and Government any special cases revealing the existence of serious and massive violations of human rights which the Commission encounters in the consideration of petitions.

The machinery established by the Covenant on Civil and Political Rights is a single organ called the Human Rights Committee consisting of 18 members periodically elected or re-elected by the states parties. As in the case of the regional mechanisms, members of the Committee serve in their personal capacity. The functions of the Committee are three-fold:

(a) It examines the periodic reports of states parties regarding implementation of the Covenant and adopts general comments in the light of experience gathered in the course of the examination of States Reports.

(b) It considers communications from individuals complaining of a breach of the Covenant by a state party which has acceded to the Optional Protocol to the Covenant.

(c) It considers communications lodged by one state party against another but only in the case of states which have accepted this kind of jurisdiction under Article 41 of the Covenant.

Regarding its functions under (a) above, it must be noted that the reports are required to be extremely detailed covering the particular laws, regulations and administrative practices adopted by the state to give effect to each and every right recognised in the Covenant and any limitations to which the various rights may be subject. The Committee has issued guidelines to ensure that the reports are comprehensive. The examination of a report of a state party takes place in public in the presence of its representatives who are questioned over a number of meetings. As is apparent from the terms of Articles 2 and 40 of the Covenant, the report deals not only with legal but also other measures designed to give effect to the Covenant and, in particular, deals with any factors or difficulties encountered in the implementation of the Covenant within the internal system of the state.

Since the reports are from states which cover all continents and thus a much wider spectrum of political ideologies, of economic, social and cultural situations and of constitutional and legal systems than would have been possible under regional instruments, the general comments adopted by the Human Rights Committee from this enormously varied and rich source of experience has been the result of extremely patient and extensive deliberations from the 18 experts who come from a wide variety of systems and countries. For this reason, these general comments are, from an unpretentious start, gradually being regarded as representing the best attainable standards of universality in the evolution of human rights norms.

The inter-state communications procedure at (c) above has not so far been engaged in the absence of any communication, but communications under the Optional Protocol have been quite substantial and the jurisprudence evolved by the Committee is growing in importance, both at

the international level and the domestic level, in the case of states which are parties to the Optional Protocol. Over the last ten years, communications have been received from some 23 out of the 38 states that are parties to the Optional Protocol. It may very well be that individuals or even the legal profession in the remaining states are not aware of the Optional Protocol or of the fact that their countries are parties to it.

5. Emerging Jurisprudence on International Norms

As already noted in the part of this paper dealing with the content and sources of human rights norms, although the various regional instruments are all inspired from the Universal Declaration, they differ somewhat in substance, formulation and detail not only as between themselves but also as between themselves and the International Covenant on Civil and Political Rights. This part of the paper will deal only with the jurisprudence and standards evolved by the Human Rights Committee in the performance of its functions under the Covenant. Even then only some idea of its jurisprudence could be given in a paper of this kind, since the period covered is one of some 11 years and the number of cases placed before the Committee is 236 of which some 190 have been completed. Suffice it to indicate that the work of the Committee is recorded in the following among other documents:

(a) Official Records of the UN bearing General Assembly Supplement No. 40 for the years 1978 to 1987.

(b) Human Rights Committee Selected Decisions under the Optional Protocol No. CCPR/C/OP/1 obtainable from the Centre for Human Rights, UN, Geneva.

(c) "Application of the International Covenant on Civil and Political Rights" by A de Zayas, J Moller and T Opsahl published in the Canadian Human Rights Yearbook (1986). The first two authors are part of the Secretariat serving the Committee and Mr Ophsal was a member of the Committee for ten years and also a member of the European Commission.

(d) Periodic surveys in the Human Rights Law Journal (HRLJ) published by N P Engel in Strasbourg (France) and in Arlington (USA).

(e) Interights Bulletin published by INTERIGHTS of Kingsway Chambers, 46 Kingsway, London WC2B 6EN.

With regard to the question whether a communication is admissible or not, more or less the same rules apply to the ICCPR as to individual communications under the EHR. Briefly the rules regarding admissibility relate to:

(a) The standing of the author (Articles 1 and 2 of the Optional Protocol), i.e., the communication must emanate from the victim himself or, if he is unable to present the communication himself (if he e.g. is held incommunicado or has "disappeared") from a relative or next friend or else a legal representative. On the other hand, "busy-bodies" cannot submit communications on behalf of others. Any third party submitting a communication would have to justify his

personal authority: J T v/s Canada (104/81), C and Ors v/s Italy (163/84);

(b) the violation complained of affects the victim and is not a complaint about law or practices in general which are alleged to violate human rights recognised under the Covenant. In other words, the Covenant does not recognise an actio popularis: Aumeeruddy-Cziffra and Ors v/s Mauritius (35/78); further the violation complained of must be supported by sufficiently precise factual averments: J H v/s Canada (187/85);

(c) The violation complained of was committed after the entry into force of the Covenant and the Optional Protocol with regard to the State Party concerned or else a previous violation continues to have effect after the date of entry into force, i.e., the ratione temporis rule: J Manera v/s Uruguay (123/82). There is not, as in Article 26 of the EHR, a limit of six months from the exhaustion of domestic remedies;

(d) The victim was at the time of the violation subject to the jurisdiction of the State Party against which the complaint is made. Territoriality or residence is not always a deciding factor as rights recognised under the Covenant may be violated even when the victim is outside the territory of the respondent State. This is the case where the right which is claimed to have been violated is regulated by the law of the state concerned e.g. the refusal by a state to renew the passport of a national who is abroad and who finds his freedom of movement thereby affected: Martins v Uruguay (57/79).

(e) The complaint is not already under investigation under another procedure of international investigation or settlement (e.g. the regional mechanisms): A Estrella v/s Uruguay (74/79), except where the complaint under the other procedure was by an unrelated third party without the authority of the alleged victim;

(f) The victim has exhausted all domestic remedies except when these remedies are ineffective or would require unreasonable delay. An extraordinary remedy of seeking the annulment of a decision of the Ministry of Justice would not qualify as an effective remedy within the meaning of Article 5(2)(b): Mulhonen v/s Finland (89/81);

(g) The subject matter of the complaint is not incompatible with the rights recognised under the Covenant, the ratione materiae rule : I M v/s Norway (129/82);

(h) The alleged violations are sufficiently supported by at least prima facie allegations, more or less the equivalent of the "manifestly ill founded" rule applicable under the European Convention.

Jurisprudence and standards on some of the substantive issues considered under the Covenant which may be mentioned relate to the rights referred to below.

Right to Life (Article 6). The general comments made by the Human Rights Committee reject a narrow interpretation of the right to life as not being restricted simply to the abolition of capital punishment. The Committee has interpreted the commitment undertaken by states under this Article to include, for example, a duty to take steps to reduce infant mortality, to eliminate malnutrition, to prevent epidemics and to banish weapons of destruction. These issues however, are not easily justiciable. With regard to the death penalty as a form of punishment, there is a resolution of the General Assembly (32/61) proclaiming that the objective is that of "progressively restricting the number of offences for which the death penalty may be imposed" until its eventual abolition. The Committee has observed that, while Article 6(2) and (6) does not require states to abolish capital punishment totally, they are obliged to limit its use and, in particular, to abolish it for other than the most serious crimes. Article 7 which is designed to prevent cruel and inhuman treatment would obviously also have an impact on the kind of offences for which the death penalty may be imposed. The Committee has further observed that the right to life cannot, under Article 4, be derogated from even during an emergency.

The cases that have come before the Committee have generally been violations of the right to life by law enforcement officials: (P Camargo v/s Columbia (45/79) or else by the phenomenon of "disappearances": Eduardo Bleier v/s Uruguay (30/78). In such cases, the Committee has held that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities since the state has a duty to protect life and that, where violations occur, there is a duty to establish what has happened and to bring the culprits to justice and to pay compensation.

Torture or Other Prohibited Treatment (Article 7). The numerous cases that have come before the Committee mostly concerned Uruguay, under its previous repressive regime, where victims were held incommunicado and were subjected to treatment outlawed under this Article and from which no derogations can be made even in times of emergency. It has sometimes been difficult to characterise particular treatment as amounting to torture or some other form of treatment and the Committee has on a few occasions applied this Article together with Article 10(1) which imposes an obligation to treat detainees with humanity and respect the inherent dignity of the human person: D Marais v/s Madagascar (49/79).

The Committee has issued a general comment about the obligations imposed upon states parties in addition to the enactment of legal provisions. Since violations occur in spite of legal provisions, the Committee has held that states must ensure effective protection through effective administrative machinery for control and special measures of investigation when complaints are made. Among other safeguards which may make controls effective are provisions against incommunicado detention, the allowing of visits to detainees by doctors, lawyers and relatives, the requirement that detainees should be held in places that are publicly recognised, measures requiring the names of the detainees and the places of their detention to be entered in a special register available to relatives

and officials alike, provisions in the law or judicial practice making confessions or other evidence obtained as a result of violations of this Article inadmissible as evidence and, lastly, the effective training and instruction of law enforcement officials so as to ensure that they do not resort to this kind of treatment.

Right to Liberty and Security of Individuals (Article 9). The Committee has adopted a general comment on this Article indicating that paragraph one of the Article applies to all deprivations of liberty, whether in criminal or other cases such as mental illness, vagrancy, drug addiction, educational purposes, and immigration control, among others. The Committee has indicated that the individual must have a right in these cases to have the reasons for his or her detention investigated by a court and to be given compensation or other effective remedy in cases of a violation (Articles 2(3) and 9(5)).

Complaints have so far touched on three main aspects of the Article. Firstly, many communications have been made under Article 9(1) complaining of arbitrary arrest and detention, for example, without a warrant, release not having been effected promptly after an order to that effect: Soriano de Bouton v/s Uruguay (37/79), abduction in another country and bringing the victim over, the combined effect amounting to arbitrary arrest and detention: Lilian Celiberty v/s Uruguay (56/79) or detention for months without charge: Mbenge v/s Zaire (16/77). Secondly, some complaints have related to a failure to bring the victim to a judicial authority within a reasonable time either for the purposes of a trial or of a remand in custody, in breach of Article 9(3): Barbato v/s Uruguay (84/81) and Lueye v/s Zaire (90/81). Thirdly, some complaints have related to the unavailability of the remedy of habeas corpus or amparo to challenge the lawfulness of detentions (Article 9(4)): Fals Borda and Ors v/s Columbia (46/79).

Human treatment during detention, imprisonment (Article 10). In its general comment, the Committee has indicated that this Article requires positive action by the state to ensure humane treatment and is thus a supplement to Article 7 which prohibits torture and other like treatment. The Standard Minimum Rules for the Treatment of Prisoners adopted under the aegis of the UN is also relevant, but the scope of the Article is broad enough to ensure humane treatment.

Cases before the Committee have involved solitary confinement in small cells for prolonged periods: Marais v/s Madagascar (49/79) or else incommunicado detention over a prolonged period at an unknown place of detention: Romero v/s Uruguay (85/81).

The Right of an Alien not to be expelled arbitrarily from his Country of Residence (Article 13). In its general comment on this Article, the Committee has noted that it is applicable to all procedures leading to the obligatory departure of an alien, whether this departure is described in the national law of a state as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (Articles 9 and 10) may also be applicable. If the arrest is for the particular purpose of extradition, other provisions of national and international law would also apply. The Committee has also indicated that the Article applies only to aliens who are lawfully in states, but not illegal entrants or aliens who have overstayed their

permits. However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his deportation ought to be taken in accordance with Article 13. Although the Article directly regulates only the procedure and not the substantive grounds for expulsion, nevertheless by recognising only those decisions carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions. The Committee has also understood from the nature of Article 13 that its provisions would not be satisfied by laws or decisions providing for mass or collective expulsions and that the procedures for appeal or review against expulsions may only be departed from when "compelling reasons of national security" so require.

Very few cases have been brought before the Committee concerning this Article. In one case, the Committee has held that, in order to determine whether an expulsion was effected in accordance with law, the Committee could not substitute itself for the national courts in the interpretation of national laws, unless there are indications that those laws were not applied in good faith or else that there has been an abuse of power: Anna Marafidou v/s Sweden (58/79).

The Right to a Fair Hearing (Article 14). This right constitutes the basic guarantee made available to the individual who, more often than not, is in an unequal situation vis-a-vis the state. It is not surprising that the Committee has made a general comment compromising about 20 paragraphs, which would be too long to reproduce. A few points may, however, be highlighted in conjunction with communications which have been considered. First, in view of the different words used for the term "suit at law" in the various language texts of the Covenant, the Committee has been faced with the difficulty of deciding to what extent this Article applies to proceedings of an administrative nature but which nevertheless involves a civil right, particularly, in common law systems where there is no strict division between administrative and civil jurisdiction. The Committee decided to give a broad meaning to the term, in order to ensure to the individual a fair hearing where primary jurisdiction regarding the right that is in dispute has been conferred by statute to a tribunal other than a court of law where the right concerned is essentially a civil one: Y L v/s Canada (112/81). The Committee has further indicated that all the guarantees would apply not only where normal courts exercise jurisdiction but also where special courts, like military courts or tribunals, have jurisdiction.

Secondly, most of the cases in which the first paragraph has been invoked have in the past come from repressive regimes. Thus the Committee has found violations of Article 14(1), where the trial took place in camera or in the absence of the accused, or else where the judgment was not made public: Altesor v/s Uruguay (10/77), Cubas v/s Uruguay (70/80).

Thirdly, the Committee has found violations where, because of the conditions of his detention, an accused party could not have access to legal assistance or did not have adequate time and facilities to prepare his defence (Article 14(3)(b): Wight v/s Madagascar (115/82).

Fourthly, the Committee has held that the right to a review of a conviction or sentence as provided in Article 14(5) does not leave the existence of the right to review to be regulated by domestic law, but rather the modalities of the review: Salgar de Montego v/s Colombia

(64/79). The Committee has further held that "the right under Article 14(3)(c) to be tried without undue delay should be applied in conjunction with the right under Article 14(5) to review by a higher tribunal and that, consequently, there was in this case a violation of these provisions taken together. The case in question, Pinkney v/s Canada (27/78), concerned a complaint that the exercise of an appellant's right of appeal had been prejudiced because the transcripts of the lower court's proceedings had taken two-and-a-half years to be produced.

The Right to Freedom from Interference with Privacy, Family, Home or Correspondence (Article 17). In one case where immigration laws provided less generous treatment to foreign husbands than to foreign wives, the Committee held that, since the common residence of husband and wife is normal, the exclusion of one of the spouses from a country where close members of the family normally live can amount to an interference within the meaning of Article 17(1), even though the spouse is an alien : Aumeeruddy Cziffra v/s Mauritius (35/78). In that case, the Committee considered that the precarious residence of a foreign husband amounted to an interference with the family life of his wife and, although this interference could not be described as "unlawful or necessarily arbitrary", nevertheless the position resulted from an adverse distinction based on sex, in violation of Articles 2(1) and 3 taken in conjunction with Article 17(1). In another case, Estrella v/s Uruguay (74/90), the Committee had occasion to hold that, although the authorities were entitled to exercise control over the correspondence of prisoners, that control had to be subject to legal safeguards against arbitrary application and that the degree of restriction exercised had to be consistent with the standard of humane treatment of detained persons as prescribed under Article 10(1).

The Right to hold Opinions and to Freedom of Expression (Article 19). Few cases have come before the Committee concerning this right. Violations of Article 19(2) have been found in a case where a person was detained for having disseminated information relating to trade union activities: Weiz v/s Uruguay (28/78) and in another case where a person had been arrested on a charge of subversive association and conspiracy, when in fact he had only been engaged in the conduct of political and trade union activities: Pietroroia v/s Uruguay (44/79).

In a general comment concerning this Article, the Committee has stressed that, under Article 19(3), the exercise of the right carries with it special duties and responsibilities and may be subject to restrictions which relate either to the interest of others or those of the community, but that, where restrictions are imposed, they may not put in jeopardy the existence of the right itself. Paragraph (3) lays down conditions and restrictions may only be imposed subject to those conditions. In any case, those conditions must be "provided by law" and must be justified as being necessary for one of the purposes described in Article 19(3) sub-paragraphs (a) or (b).

Freedom of Association (Article 22). The freedom of association of the individual under this Article includes in express terms "the right to form and join trade unions for the protection of his interests". In J B and Ors v/s Canada (118/82), members of The Alberta Union of Provincial Employees complained that a law depriving them of their right to strike constituted a breach by Canada of this Article. The Committee, by a majority, declared the communication inadmissible ratione materiae on the

ground that the right to strike was not protected by the Covenant on Civil and Political Rights but by the Covenant on Economic, Social and Cultural Rights. The minority was of the opinion that, inter alia, in covering the "right to form and join trade unions", Article 22 expressly envisaged the purpose for which this right was to be exercised by the individual, i.e., "for protection of his interests" and that this necessarily included the means by which that protection could be achieved. Article 22 also expressly made provisions for the permissible limitations on the exercise of the right, but that was a question relating to the merits of the communication and not to its admissibility.

The Right of the Family to Protection (Article 23). In the case already referred to under Article 17 (Aumeeruddy Cziffra v/s Mauritius (35/78)), the Committee also considered the matter in the perspective of Article 23. The Committee held that a couple, the more so where there are children, constitutes a "family" and as such is "entitled to protection by society and the State". Although the content of that protection may vary from country to country depending on different social, economic and other conditions, the principle of equal treatment of the sexes applies by virtue of Articles 2(1), 3 and 26, the last of which is also relevant because it guarantees the "equal protection of the law". Where the Covenant requires a substantial protection of the kind referred to in Article 23, it follows that the protection must be equal and not discriminatory since the protection of the family cannot vary with the sex of the one or the other spouse. The Committee therefore found a violation of Articles 2(1), 3, and 26 of the Covenant in conjunction with Article 23(1).

Equality before the Law and Equal Protection of the Law (Article 26). The Committee had long been in doubt as to whether this Article guarantees merely formal equality before the law rather than substantive equality protected by the law. In a case Zwaan de Vriez v/s The Netherlands (182/84), where the law granting social security rights treated men and women differently, the Committee came to the conclusion that the question at issue was not whether the Covenant on Civil and Political Rights imposed an obligation on states to provide social security but whether, where a state decided to institute a system of social security, it could do so in breach of Articles 2(1), 3 and 26 read together. In effect, the Committee considered that Article 26 imposed a code of behaviour on the state, whether in the exercise of its legislative, administrative or judicial activity.

6. Incorporation of International Norms into National Legal Systems

6.1 International law leaves it to states to adopt such legislative and other measures, consistent with their own constitutional processes, to give effect to the obligations which they undertake to implement and, more importantly, to ensure that any person whose rights or freedoms are violated have an effective remedy justiciable before independent and impartial tribunals. This is reflected in Article 2(2) of the Covenant on Civil and Political Rights.

Three main methods have generally been discussed for the implementation of the Covenant in domestic law:

(a) Direct incorporation of the rights recognised in the Covenant into what may be called a "bill of rights" in the national legal order.

(b) Enactment of different legislative measures in the civil, criminal and administrative laws to give effect to the different rights recognised in the Covenant.

(c) Self-executing operation of the Covenant in the national legal order.

Two sets of problems have bedevilled the question of implementation. The first of these arises from the fact that law-making powers are vested in Parliament and not the Executive, except to the extent that the latter has delegated powers. These powers may not, however, be exercised contrary to the Constitution and existing law. Furthermore, it is the Executive which enters into treaties. Such treaties therefore can only have legal effect to the extent that they have been implemented in one way or another in domestic law, since the Courts will only apply the law. Even in systems where the Constitution itself provides that a treaty which has been entered into in accordance with the constitutional processes will be binding internally, the problem still arises where there is an inconsistency between the Constitution and the treaty.

There is, in this regard, a difference in perspective between a domestic court and, for example, the Human Rights Committee established under the Covenant. Whereas the domestic court will pronounce on the constitutionality of legislative or other measures, the Committee has jurisdiction to pronounce on their (if I may coin a word) "covenantability" or their consistency with the Covenant. In other words the Committee has jurisdiction to pronounce on the consistency of the national constitution itself with the Covenant. In practice, there need be no conflict between the two jurisdictions if the technique of interpretation is resorted to by the domestic jurisdiction so as to avoid any inconsistency with the treaty provisions. But this may not always be possible.

The second set of problems arises from the fact that treaty provisions are often general in character and need to be implemented by specific detailed provisions in the internal law. For example, the right to life, liberty and security of the person requires to be implemented not simply by a legal provision proclaiming the right but also by detailed provisions in the criminal, civil and administrative laws to provide appropriate remedies, sanctions and other measures designed to guarantee this right. In the same way, family, social, economic and other rights require a whole corpus of family codes, including welfare and industrial codes to ensure implementation which will, in turn, depend on the particular circumstances and traditions of each country.

6.6 For those states which are parties to, for example, the Optional Protocol, it is essential that the rights recognised in the Covenant should be given effect to in the legal system for two reasons. First, because of the rule relating to the exhaustion of domestic remedies, states thereby ensure that alleged violations are investigated in the first place, within their own internal system, and if need be, remedied. Secondly, the international control mechanism will have had the benefit of the thinking of the highest courts in the country against which violations are alleged.

In the case of those countries which are not parties to the Covenant, it is still relevant for the courts to ensure that generally accepted standards of human rights prevail since, by virtue of the obligations which states have undertaken under the UN Charter, they might still, in certain circumstances, be answerable to the various procedures established within the United Nations system in the perspective of the mandate of the General Assembly under sections 55 and 56 of the UN Charter.

One last thought needs perhaps to be expressed. Far too often in the past, the question of human rights at the international level has tended to be dealt with solely by foreign ministries, admittedly with the assistance of Home Office legal advisers. It is to be wondered whether that is enough. It is the courts which normally deal with the implementation of human rights or their violations at grassroots level. The time has perhaps come to ensure that the thinking of the judiciary should be tapped in a systematic way, and that it should be involved at the international level.

"FREEDOM OF EXPRESSION: RELEVANT INTERNATIONAL PRINCIPLES"

by

Anthony Lester, QC*

GENERAL APPROACH TO INTERPRETATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

The difficult task of interpreting constitutional guarantees of fundamental rights and freedoms, of giving life to them and of determining whether a statute or other state action breaches those rights, is entrusted in most democratic countries (in the Commonwealth and elsewhere) to an independent judiciary.

In approaching this task, the Privy Council and other Commonwealth Courts have often applied the generous approach to constitutional interpretation articulated by Lord Wilberforce in Minister of Home Affairs v Fisher [1980] A C 319, 329 (PC). In that case, Lord Wilberforce, for the Judicial Committee, stated that the way to construe a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but:

> "as sui generis, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law".

Construing the fundamental rights and freedoms guaranteed by the Bermuda Constitution, Lord Wilberforce observed that -

> "This constitutional instrument has certain special characteristics. (1) It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality. (2) Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this Chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Fundamental Rights and Freedoms. That convention was ... in turn influenced by the Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called the 'austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

This statement was repeated and approved by the Privy Council, in Ong Ah Chuan v Public Prosecutor [1981] A C 648, as the relevant principle of construction of the fundamental rights provisions in the Constitution of the Republic of Singapore.

Most recently, this principle was again reaffirmed by the Privy Council in construing the Constitutions of The Gambia, and of Mauritius. In Attorney-General of The Gambia v Momodou Jobe [1984] A C 689, 700, Lord Diplock said:

"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."

In Société United Docks and Others v Government of Mauritius [1985] A C 585, 605, Lord Templeman, delivering the judgment of the Privy Council, said that the same broad interpretation should be given to the Constitution of Mauritius.

This approach to the interpretation of constitutional guarantees of fundamental rights and freedoms has also been adopted elsewhere in the Commonwealth. For example, in Dato Menterii Othman bin Baginda v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, at page 32B, Raja Azlan Shah Ag LP of the Federal Court of Malaysia, cited Lord Wilberforce's statement with approval as the correct approach in construing the Malaysian Constitution. He also observed (at page 32B) that:

"a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way."

It is also widely recognised that the judgments of constitutional courts in common law jurisdictions, such as the United States Supreme Court, the Indian Supreme Court, the Privy Council, and other constitutional courts are of strong persuasive authority in cases involving the interpretation of constitutional guarantees of fundamental rights. The Supreme Court of India, in particular, has drawn freely on the rulings of the British Courts, and on those of the United States and Canada as precedents of high persuasive authority in such cases. In Ong Ah Chuan's case, the Privy Council indicated that it was not appropriate to have regard to U.S. decisions to construe fundamental rights in Constitutions on the Westminster model. However, the Privy Council has not subsequently followed that restrictive approach; nor is it a correct approach in view of the universality of the underlying concepts and values.

The legal principles developed by the United States Supreme Court have been of particular influence as regards free speech. (See, for example, Indian Express Newspapers (Bombay) v Union of India [1985] 1 S C R 287 at p.324F-G; Attorney-General of Antigua v Antigua Times [1976] A C 16 (PC); Olivier v Buttigieg [1967] A C 115 at pp.134 and 136 (PC); Maulvi Farid Ahmad v Government of West Pakistan P L D 1965 (W P) Lahore 135). This is so even though the constitutional free speech guarantees under consideration in those cases were not drafted in the absolute language of the First Amendment to the U.S. Constitution.

THE RELEVANCE OF INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS LAW

There has been one notable omission in the source material treated as persuasive by Commonwealth judges in construing constitutional guarantees of free speech: international human rights law. (There have been exceptions: e.g. in Minister of Home Affairs v Fisher, the Privy Council referred to the European Convention on Human Rights as well as to the International Covenant, when construing the Constitution of Bermuda. Although the Indian Supreme Court has cited international material in constitutional cases, there does not seem to be any case in which that material has had the same persuasive force and effect as the Privy Council

approach in Minister of Home Affairs v Fisher). In particular, the European Court of Human Rights and the European Commission of Human Rights, at Strasbourg, have over the years built an important body of case law concerning (inter-alia) the meaning and effect of the right to freedom of expression guaranteed in Article 10 of the European Convention on Human Rights.

As Annexes 1 and 2 to this paper make clear, not only is the definition of freedom of expression in Article 10 strikingly similar to that embodied in Commonwealth and other Constitutions, but the conditions on which this right can legitimately be restricted because of other competing public interests, are also remarkably alike.

Article 10 of the European Convention on Human Rights guarantees the right to freedom of expression in the following terms:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 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 analogous provisions under the International Covenant on Civil and Political Rights (Article 19) and the American Convention on Human Rights (Article 13), are set out in Annex 1 to this paper. The relevant constitutional provisions are contained in Annex 2.

Although the United Kingdom has neither a written constitution nor legislation incorporating the European Convention on Human Rights into domestic law, the Convention has been treated as relevant for the purpose of resolving uncertainties in statute law: see e.g., Waddington v Miah [1974] 1 WLR 683 (HL) at pp.693H-94E. The Convention has also been referred to as a source of public policy for declaring the common law where fundamental human rights and freedoms are at stake. The most notable example[1] of this is in the litigation surrounding the recent publication in the United States of 'Spycatcher', the memoirs of Mr Peter Wright, a former member of the British Security Services, and the U.K. Government's attempts to prevent further publication in the U.K., Australia, New Zealand, and Hong Kong, because he owes a lifelong duty of confidence and public disclosure would harm national security.

The central issue in the pending English proceedings is whether British newspapers should be prevented by injunction from publishing information contained in 'Spycatcher' even though the book is a bestseller

in North America and can be freely brought into the United Kingdom. Lord Templeman, with whom Lord Ackner agreed, accepted (in the interlocutory proceedings) that the House of Lords should have regard to the standards contained in Article 10 for the purpose of determining whether to continue the interlocutory injunctions against publication (Attorney-General v Guardian, Observer and Times Newspapers, [1987] 1 WLR 1248, at pp.1296E-97E and 1307E). (Whether the majority of the Law Lords did in fact comply with Article 10 in ordering interlocutory injunctions may eventually be decided by the European Court of Human Rights). The significance of Article 10 in these proceedings lies in its impact on the burden and standard of proof, and the characterisation of the interests to be balanced.

The Hong Kong Court of Appeal, in its decision of 8th September 1987, in Attorney-General v South China Morning Post Limited, granting an interlocutory injunction, also accepted that the equivalent provision (Article 19) of the International Covenant on Civil and Political Rights governed the proper approach for determining whether to restrain the newspaper's freedom of expression. This followed from the fact that the United Kingdom has adhered to the International Covenant on behalf of Hong Kong.

In the trial of the English action, the trial judge, Mr Justice Scott, accepted that Article 10 as interpreted by the English Court provided the relevant legal test. He held that no injunction should be granted on the basis of that test (Attorney-General v The Observer Ltd. and Others. The Times, December 22, 1987). The Court of Appeal confirmed this decision in its judgment of 10th February 1988 (The Times, February 11, 1988). All three members of the Court of Appeal regarded the free speech guarantee, contained in Article 10 of the European Convention, as relevant for the purpose of interpreting the common law on confidential information, balancing the competing public interests in free speech and in official secrecy. An appeal to the House of Lords against this decision is pending at the date of completing this paper (April 30, 1988).

The judgments of the European Court of Human Rights interpreting Article 10 are also relevant in domestic cases involving the interpretation of enforceable constitutional guarantees of free speech. This is so particularly in the many Commonwealth countries - such as Mauritius and Zimbabwe - whose codes of fundamental rights are modelled on the international norms reflected in the European Convention on Human Rights. Judges in those countries review the constitutionality of legislation and administrative action against standards derived from the European Convention. It is therefore at least as appropriate in such countries to treat the European Court's case law as of highly persuasive value in construing similar language in written constitutions, as it is for international human rights obligations to be taken into account in interpreting ambiguous ordinary legislation or developing the common law.

In other countries such as India, Malaysia, and Singapore, the European Court's judgments are also of great potential relevance. Their constitutions are of an earlier vintage but the underlying values and concepts are similar. Both the right to freedom of expression and the grounds on which restrictions may be imposed are set out in similar terms. The primary difference lies in the formulation of the permissible extent of restrictions. Whereas Article 19 of the Indian Constitution, for example, permits the state to impose only "reasonable restrictions" on the citizen's

freedom of speech, the European Convention prescribes the more specific test that any restriction must be "necessary in a democratic society". However, the difference in the extent of permissible restrictions under the international and constitutional norms, is more apparent than real. At a very early stage in its history, the Supreme Court of India made it clear that the "reasonableness" test imports the concept of proportionality which the European Court of Human Rights has since held lies at the heart of the notion of "necessity". In State of Madras v V G Row [1952] SCR 597, 607, Patanjali Sastri C J stated (in the context of the fundamental right to form associations or trade unions guaranteed by Article 19(1)(c) of the Indian Constitution) that:

> "The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the rights alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict".

The European Court's interpretation of the test of necessity is potentially relevant in judging the reasonableness of a restriction on the right to freedom of expression under the Indian Constitution.

The Inter-American Court of Human Rights has looked to the European case law as providing the clearest source of guidance in this area, despite the fact that the analogous provision of the American Convention on Human Rights is not in identical language. Article 13 of the American Convention does not refer to the need for any restriction to be necessary "in a democratic society"; it stipulates only that a restriction must be "necessary" for one of the stated purposes. Nevertheless, in a powerful Advisory Opinion on the legality of the compulsory licensing of journalists, the Inter-American Court has held that for a restriction on free speech to be "necessary" under Article 13(2), the government must satisfy the test articulated by the European Court of Human Rights; it must show that the restriction is required by a compelling social need, and that it is so framed as not to limit freedom of expression more than is necessary or proportionate to achieve a legitimate objective (Compulsory Membership of Journalists' Association, Advisory Opinion OC-5/85 of 13th November 1985; 8 EHRR 165 at paragraph 46). One may expect the U.N. Human Rights Committee to take a similar approach to the interpretation of Article 19 of the International Covenant in an appropriate case.

Strasbourg too has been broadminded about comparative sources of interpretation, evidencing a willingness to look at relevant principles developed in national jurisdictions. In construing Article 10 of the Convention, the European Court and Commission pay considerable regard to the case law of the U.S. Supreme Court interpreting the First Amendment to the U.S. Constitution. Thus, for example, the Commission has referred to the settled case law of the U.S. Supreme Court on the "chilling effect" of State practices on the practical enjoyment of the right to freedom of expression (Glasenapp v Federal Republic of Germany, Commission decision on admissibility, decision of 16 December 1982, 5 EHRR 471 at 474). And, as will be seen below, the European Court has ruled, in terms similar to those employed by the U.S. Supreme Court in Procunier v Martinez 416 U.S. 396

(1974), that an interference with expression will only be upheld if there is a "pressing social need" for it in the particular circumstances.

THE SCOPE OF FREEDOM OF EXPRESSION

(a) Right to impart information

The right to freedom of expression guaranteed by Article 10 extends to all types of expression which impart or convey opinions, ideas, or information, irrespective of content or mode of communication. The breadth and importance of this right were recognised by the European Court in the Handyside Case. There, the Court observed that:

> "Freedom of expression constitutes one of the essential foundations of ... a [democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (judgment of 7th December 1976, Series A No 24; 1 EHRR 737, at paragraph 49; see also the Sunday Times Case, judgment of 26th April 1979, Series A No 30; 2 EHRR 245, at paragraph 65; and the Lingens Case, judgment of 8 July 1986, Series A No 103; 8 EHRR 407, at paragraph 41).

The Handyside Case concerned a successful prosecution under the English Obscene Publications Act against the publishers of The Little Red Schoolbook, a book which urged the young people at which it was aimed to take a liberal attitude to sexual matters. The book was published elsewhere in Europe and in some parts of the United Kingdom without prosecution. Although the challenge under Article 10 of the Convention to this interference with free speech failed (upon the basis that Contracting States have a wide margin of appreciation in deciding whether a given interference with free speech is necessary in a democratic society for the protection of morals), the case is important for the general statement of principle.

The importance of freedom of artistic expression has recently been stressed by the Commission. In Müller v Switzerland (report of the Commission adopted on 8 October 1986), it observed that:

> "... freedom of artistic expression is of fundamental importance in [a] democratic society. Typically it is in undemocratic societies that artistic freedom and the freedom to circulate works of art are severely restricted. Through his creative work the artist expresses not only a personal vision of the world but also his view of the society in which he lives. To that extent art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day" (paragraph 70).

Article 10 may not be relied upon, however, to secure protection of racist speech. In Glimmerveen and Hagenbeek v The Netherlands [1982] 4 EHRR 260, the Commission held inadmissible a complaint by extremist right-wing Dutch politicians that their conviction for distributing leaflets advocating racial discrimination and the repatriation of non-whites from the Netherlands violated Article 10. It did so invoking Article 17 which precludes anyone from relying on the Convention for a right to engage in activities that are "aimed at the destruction of any of the rights or freedoms set forth in the Convention." The Commission found that the expression of these ideas clearly constituted an activity within the meaning of Article 17 in that they would encourage racial discrimination which is prohibited under the Convention and other international instruments.

In other cases, the Commission has upheld race relations and defamation laws imposing civil or criminal sanctions for racist statements as being justified interferences with expression under Article 10(2), on the ground that they are necessary for the "prevention of disorder or crime", or for the "protection of the reputation or rights of others" (see e.g. X v Federal Republic of Germany 29 Decisions and Reports 194 (1982)). (The International Covenant on Civil and Political Rights and the American Convention on Human Rights go further in this regard; Article 20 and Article 13(5), respectively, prescribe that advocacy of racial or religious hatred that constitutes incitement to discrimination or violence shall be prohibited by law.)

This is an area in which U.S. First Amendment doctrine has not been followed by the European Court. In 1979, a planned march by a group of neo-Nazis through the streets of Skokie, Illinois,

> "raised in a most painful form the question of whether the First Amendment's protection is truly universal." (Lawrence H Tribe, Constitutional Choices (1985) p.219).

The town passed various ordinances designed to bar the proposed march with its display of swastikas and military uniforms. In its view, the march would have inflicted direct psychic trauma on those residents who were survivors of the Holocaust. The U.S. Court of Appeals for the Seventh Circuit rejected Skokie's justification for the ordinances, holding that speech which inflicts such "psychic trauma" is indistinguishable in principle from speech that invites dispute, or induces a condition of unrest, or even stirs people to anger (National Socialist Party v Skokie 578 F.2d 1197 (7th Cir.) cert. denied, 439 US 916 (1978)).

On the important question of access to radio and television, the European Commission has held that the freedom to impart information and ideas does not include a general right of access to broadcasting time to put them forward. However, it has acknowledged the possibility that denial of access to political parties at election time could raise issues under the Convention. In X and the Association of Z v United Kingdom ((1971) 38 Collected Decisions 86), the applicants sought to challenge the BBC's policy of limiting access to broadcasting time to political parties with representation in Parliament or with parliamentary candidates. The Association wanted to broadcast its own political programmes on television, although it had never fought an election and did not intend to do so. The BBC refused to permit such broadcasts. The Commission held the complaint alleging breach of Article 10 to be inadmissible, stating:

"It is evident that the freedom to 'impart information and ideas' included in the right to freedom of expression under Article 10 of the Convention, cannot be taken to include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio and television in order to forward its opinion. On the other hand, the Commission considers that the denial of broadcasting time to one or more specific groups or persons may, in particular circumstances, raise an issue under Article 10 alone or in conjunction with Article 14 of the Convention [prohibition of discrimination]. Such an issue would, in principle, arise, for instance, if one political party was excluded from broadcasting facilities at election time while other parties were given broadcasting time" (at p.89).

The issue of political broadcasting came before the High Court of Trinidad and Tobago in Rambachan v Trinidad and Tobago Television Company Limited and Attorney-General of Trinidad and Tobago (decision of 17 July 1985, unreported). In the constitutional motion alleging breach of his right to freedom of expression, Mr Rambachan, an Opposition MP, complained about the state-owned Trinidad and Tobago Television's (TTT) refusal to transmit his political broadcast on the basis of opinions expressed in it, and the constraints imposed by TTT on the Opposition's access to the State's lone television station. Mr Justice Deyalsingh upheld both complaints, citing Indian and U.S. authorities in support of his conclusion that the fundamental right of free speech demanded opening up the television media to political broadcasts subject only to reasonable limitations. On the importance of access to television in present-day society, Mr Justice Deyalsingh had this to say:

"... Government is duty bound to uphold the fundamental rights and with television being the most powerful medium of communication in the modern world, it is in my view idle to postulate that freedom to express political views means what the constitution intends it to mean without the correlative adjunct to express such views on television. The days of soap-box oratory are over, so are the days of political pamphleteering ...".

Although both the Trinidad and Tobago Television Company and the Attorney-General appealed against the decision, the appeal was settled in October 1987 on the basis of a consent order declaring that:

"the first named Appellant (TTT) in the operation of its policy dated the 10th February, 1982 infringed the fundamental rights of the Respondent (Mr Rambachan) to express his political views and his right of freedom of expression by refusing to broadcast the Respondent's pre-recorded script on the 21st February, 1982".

The same issue, of whether the right to broadcast on television forms part of the right to freedom of expression, was considered virtually contemporaneously by the courts in Belize in Courtenay and Hoare v Belize Broadcasting Authority. The applicants in this constitutional motion - a Senator and member of the Opposition Party, and the managing director and operator of a television station in the City of Belize - had sought and been refused permission to broadcast a television programme intended to provide the Belize public with the view of the Opposition Party on matters of public interest and public policy. The Belize Broadcasting Authority

refused to allow the airing of this half hour programme on the ground that it was a party political broadcast. The Chief Justice of Belize, Mr Justice Moe, held that:

> "Today television is the most powerful medium for communications, ideas and disseminating information. The enjoyment of freedom of expression therefore includes freedom to use such a medium" (judgment of 30th July 1985, Supreme Court of Belize).

The Chief Justice found the refusal to broadcast to be arbitrary and discriminatory and therefore violative of the applicants' constitutional rights both to freedom of expression and to protection from non-discrimination. He also found that the Broadcasting Regulation requiring prior consent to broadcast was ultra vires the Constitution; it constituted, in his view, an unjustified interference with the right to freedom of expression since it gave the Broadcasting Authority an unfettered discretion to allow or refuse permission to broadcast.

On appeal, the Belize Court of Appeal (judgment of 20th June 1986) upheld the first two conclusions, expressly endorsing Mr Justice Moe's finding that to broadcast on television is today an integral part of the freedom of expression. However, it held that the Regulation itself was not unconstitutional since there were "guidelines" elsewhere in the regulations indicating how the power or discretion of the Authority was to be exercised.

"Political speech", including information and opinions about the workings of government, is especially important and is strongly protected under Article 10. However, it is not only political speech that is protected. Article 10 also protects commercial speech (i.e. advertising or other means of communicating information to consumers). The Commission expressly recognised this in its admissibility decision in X and Church of Scientology v Sweden (16 Decisions and Reports 68 at 73 (1979)) where it stated that it was "not of the opinion that commercial 'speech' as such is outside the protection conferred by Article 10(1)...".

Neither the Commission nor the Court has yet taken this further and addressed the important issue of principle in this area: namely, the extent to which it is permissible under Article 10 to place restrictions on the content of advertising. In Barthold v Federal Republic of Germany (judgment of 25th March 1985, Series A No 90; (1985) 7 EHRR 383), both the Commission and the Court held that an interview given by a veterinary surgeon to a Hamburg newspaper, in which he called for a more comprehensive veterinary night service, was a type of expression fully protected under Article 10, since it communicated information on a matter of general interest. Restrictions imposed on the applicant by his Professional Rules, which prohibited him from repeating his remarks in the press, were thus held to violate his right of free speech. Although the interview had an advertisement-like effect, the Commission and Court both took the view that the case was not concerned with commercial advertising. They did not consider it necessary, therefore, to consider the scope of protection afforded to such speech.

The important underlying issues of principle were emphasised by Judge Pettiti in his Concurring Opinion in the Barthold Case:

"Freedom of expression in its true dimension is the right to receive and to impart information and ideas. Commercial speech is directly connected with that freedom.

The great issues of freedom of information, of a free market in broadcasting, of the use of communication satellites cannot be resolved without taking account of the phenomenon of advertising; for a total prohibition of advertising would amount to a prohibition of private broadcasting, by depriving the latter of its financial backing. Regulation in this sphere is of course legitimate - an uncontrolled broadcasting system is inconceivable - but in order to maintain the free flow of information any restriction imposed should answer a 'pressing social need' and not mere expediency."

The Constitutional Court of Austria, on the other hand, has considered the extent of the protection to be afforded to commercial advertising under Article 10 of the European Convention (whose provisions are incorporated into Austrian law). In its judgment of 27 June 1986 in B 658/85 ([1987] HRLJ 361), the Constitutional Court held that commercial advertising is protected by Article 10 of the European Convention although the protection afforded to such speech may be more restricted than that extended to the expression of political ideas. The Court further held that the Austrian Broadcasting Corporation (the 'ORF') had violated this guarantee in rejecting, without giving reasons, an application by an Austrian weekly to broadcast radio commercials. The Broadcasting Corporation had interpreted a permissive provision in the Broadcasting Act allowing it to carry commercial advertising on its radio and television programmes, as giving it an unfettered discretion to accept or reject commercials. Rejecting this interpretation, the Court stated:

"... It is clear that the allocation of commercial advertising according to [the] Broadcasting Act should primarily follow commercial objectives. This cannot be objectionable under the Constitution because a right to free broadcasting cannot be seriously deduced from Article 10 of the Convention. The Act is comparatively unspecific in this respect. However, it must not be understood that the ORF is free to give available time to the applicants arbitrarily, partially, with preference for certain views or with exclusion of particular entrepreneurs .... On the contrary, in the light of Article 10 of the Convention and the Broadcasting Act, the ORF is required to be available to everybody for lawful commercial advertising under equal, unbiased and neutral conditions that consider the diversity of interests of the applicants and of the public. A preference for and a discrimination between certain enterprises must be avoided ...".

A related issue which has not yet been judicially decided by the European Commission or Court is the meaning of the third sentence of Article 10(1) which permits State licensing of broadcasting, television and cinema enterprises. It is clear that licensing as such is not a breach of Article 10. It is also clear that such licensing must not violate the prohibition on discrimination in Article 14. It is strongly arguable that the power of "licensing" does not entail the power to regulate the content of the material which is broadcast by those persons to whom licences are granted. The third sentence enables public authorities to obtain a licence

but not to regulate the use of such a licence in a manner which would otherwise infringe Article 10(2). These issues are important at a time when new technology has created the possibility of free markets in broadcasting and telecommunications, irrespective of frontiers. Article 10 has the potentiality to eliminate unnecessary national restrictions upon the use of this new technology which hamper broadcasting and telecommunications.

(b) Right to receive information

The right to receive information and ideas is also protected under Article 10 - not simply as the converse of the right to impart information, but in its own right. The European Court has emphasised that the broad public interest in receiving information and in the quality of political and social debate lies at the heart of freedom of expression.

Apart from the express qualifications in Article 10(2), however, there is another important qualification on the right to receive information. This right is dependent upon there being a willing speaker. The Court made this clear in its recent judgment in Leander v Sweden (26 March 1987, Series A No 116; 9 EHRR 433). The applicant in that case had sought and been refused access to information held on a police register, on the basis of which he had been denied security clearance for employment. The Court held, unanimously, that there was no violation of Article 10 in the circumstances, stating that:

> "... the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him .... Article 10 does not .... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" (paragraph 74, emphasis added).

In other words, Article 10 does not confer a right to receive official information from a government department or agency.

In a case decided contemporaneously by the Constitutional Court of Austria (judgment of 16 March 1987 - B154/85 [1987] HRLJ 365), the latter attributed the same meaning to Article 10, stating that it does not oblige the state to guarantee access to information or to provide information. However, the Constitutional Court emphasised that the situation is entirely different where government officials hinder the procurement or the investigation of information accessible to the public. Such an interference is only permissible, the Court stated, if it satisfies the requirements of Article 10(2) of the Convention. The Constitutional Court held that these requirements were not met in the case before it where police seized and destroyed film taken by a journalist at a demonstration. Accordingly, the action was held to constitute a violation of the journalist's rights under Article 10.

Freedom of the press

Article 10 of the European Convention does not expressly mention freedom of the press. However, in several landmark judgments, the European Court of Human Rights has held that the principles of freedom of expression are of particular importance as far as the press and other media are concerned. The Court has stressed the importance of freedom of the press in a democratic society to ensure proper discussion of matters of public interest.

The Court first affirmed the importance of freedom of the press in the Sunday Times Case, which concerned the wish of the Sunday Times to publish an article about the drug, thalidomide. The newspaper was restrained, by an injunction ordered by the House of Lords, from publishing on the ground that publication would interfere with the administration of justice in pending proceedings concerning alleged negligence in the manufacture and distribution of the drug. For the European Court, the injunction violated Article 10 because it was not "necessary" in that it did not satisfy a "pressing social need". The Court emphasised that it was incumbent on the mass media to keep the public informed on judicial proceedings just as on other matters of public interest, and that it was the public's right to receive such information (paragraph 65).

In the Barthold Case, the Court characterised the role of the press as "purveyor of information and public watchdog". It held that the press was hampered in the performance of this task where the applicant was prevented by his professional association from repeating in the press statements which the Court construed as contributing to public debate on a topic affecting the life of the community.

Most recently, in Lingens v Austria, a political defamation case, the Court emphasised the vital role of the press in fostering political debate:

> "Whilst the press must not overstep the bounds set, inter alia, for the 'protection of the reputation of others', it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has the right to receive them.
>
> Freedom of the press furthermore 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" (judgment of 8 July 1986, Series A No 103; 8 EHRR 407, paragraphs 41 and 42).

The Lingens Case concerned a successful criminal prosecution brought against a journalist for articles he wrote impugning the political morality and integrity of an Austrian politician. In its judgment holding Austrian criminal libel law to be in violation of Article 10, the European Court stressed the chilling effect of the fine imposed on Mr Lingens. Although the disputed articles had already been widely circulated so the penalty did not, strictly speaking, prevent him from expressing himself, it would be likely to discourage him from making criticisms of that kind in

the future. Moreover, it would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community.

This conclusion is similar to that reached by the Privy Council in Olivier v Buttigieg [1967] A C 115, which concerned compliance with the free speech guarantee of the Constitution of Malta of a government circular prohibiting government employees from taking the "Voice of Malta", a weekly newspaper published by the Malta Labour Party, into government hospitals. The Privy Council held this prohibition to be an unconstitutional hindrance of the newspaper editor's enjoyment of his freedom to impart ideas and information without interference, even though the editor was not debarred by the prohibition from expressing and circulating his views to the general public. In so holding, the Privy Council rejected the Government's argument that any hindrance was slight and could be ignored as being de minimis; there was always, Lord Morris of Borth-Y-Guest observed, the likelihood of the violation being vastly widened and extended with impunity. The Privy Council cited with approval the view expressed by the Indian Supreme Court in Romesh Thappar v The State of Madras [1950] SCR 594, 597:

> "There can be no doubt that freedom of speech and expression includes freedom of propagation of ideas and that freedom is secured by freedom of circulation. 'Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed without circulation the publication would be of little value.'"

Special taxes and licence fees imposed on newspaper publishers may require special scrutiny. Thus in Indian Express Newspapers v Union of India [1985] 2 SCR 287, the Indian Supreme Court directed the Indian Government to reconsider the imposition of an import duty of 15% on newsprint imported from abroad by newspapers with a circulation of over 50,000. The Court held that while tax may be levied on the newspaper industry, such a tax becomes unconstitutional if it is unduly burdensome:

> "In view of the intimate connection of newsprint with the freedom of the press, the tests for determining the vires of a statute taxing newsprint have, therefore, to be different from the tests usually adopted for testing the vires of other taxing statutes. In the case of ordinary taxing statutes, the laws may be questioned only if they are either openly confiscatory or a colourable device to confiscate. On the other hand, in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness, clearly and directly attributable to the tax" (at pp. 342G-343A).

In the Indian Express case, the Supreme Court found that the Government had not made any assessment of the impact of the levy on the newspaper industry. Nor did the Supreme Court have before it sufficient evidence upon which to make a determination as to whether the impact was so burdensome as to affect the freedom of the press. "On such a vital issue," concluded the Court:

> "we cannot merely say that the petitioners have not placed sufficient material to establish the drop in circulation is directly linked to increase of the levy when, on the side of the

Government the entire exercise is thought to be irrelevant. Hence there appears to be good ground to direct the Central Government to reconsider the matter afresh ..." (at p.367C-D).

(The Supreme Court of India was much more tentative in its treatment of this issue than either the European Court of Human Rights in the Lingens Case, or the U.S. Supreme Court in Grosjean v American Press Company 297 U.S. 233 (1936) where it struck down, as violative of the First Amendment, a Louisiana statute which levied a licence tax on the advertising receipts of newspapers enjoying a large circulation; the measure was clearly designed, in the Court's view, to restrict press freedom rather than to raise revenue).

The Supreme Court of India took a stronger stance in two earlier cases. In Sakal Papers Ltd v Union of India A I R 1962 SC 305, the Supreme Court struck down as contrary to freedom of expression various restraints fixing the maximum number of pages that might be published by a newspaper according to the price charged, and prescribing the number of supplements that could be issued. The Court held that the freedom of a newspaper to publish any number of pages and to circulate it to any number of persons was an integral part of the freedom of speech and expression.

In Bennett Coleman and Co. Ltd. v Union of India A I R 1973 SC 107, the Supreme Court held that the Newsprint Policy for 1972-73 violated Article 19(1)(a) of the Indian Constitution since it contained restrictions which singled out the press and imposed prohibitive burdens on it that would restrict circulation, penalise freedom of choice as to personnel, prevent newspapers from being started, and compel the press to have recourse to Government aid. The Court was of the opinion that in fixing the page limit of newspapers, the Newsprint Policy not only deprived the petitioners of their economic vitality but also affected their capacity to disseminate news. If, as a result of the reduction of pages the newspapers were compelled to depend on advertising as a main source of income, their capacity to disseminate news would be affected. If, on the other hand, they were compelled to reduce their space for advertising to devote more space to news, their financial strength would crumble. Either way, concluded the Court, the Policy was unconstitutional in several respects. The Court further held that the impugned Newsprint Policy was in effect a "newspaper control policy" in the guise of framing an Import Control Policy for newsprint, and as such ultra vires.

In marked contrast, the Privy Council took a less critical approach to Antiguan legislation requiring, as a condition of the freedom to publish, a deposit of $10,000 to satisfy possible libel judgments (Attorney-General for Antigua v Antigua Times [1976] A C 16). This was regarded as "reasonably required for the purpose of the protection of the rights and freedoms of others" in the language of the free speech guarantee modelled on the European Convention. It is to be hoped that the Antigua Times case would not be followed today.

RESTRICTIONS ON FREEDOM OF EXPRESSION

Obviously, freedom of speech is not absolute. But a State may only validly interfere with freedom of expression if the conditions stated in Article 10(2) are satisfied. To justify an interference with freedom of expression, a State must show - and the burden is on it to do so - that the

interference is "prescribed by law", that it is in pursuance of one of the stated purposes, and that it is "necessary in a democratic society" to achieve that purpose (Sunday Times Case, paragraph 45). Each interference with freedom of expression has to be justified by the State under these criteria.

The Supreme Court of India, too, has imposed on the State the burden of proving the constitutionality of legislation which, prima facie, interferes with fundamental rights. In Saghir Ahmad v The State of U P [1955] SCR 707, Mukherjea, J stated on behalf of the Court (at page 726) that:

> "There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the Article".

The European Court has made it clear that, in applying Article 10, it is faced not with a choice between conflicting principles (one of which is freedom of expression), but with "a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted" (Sunday Times Case, paragraph 65). Here, too, there is a notable confluence in the approach taken by the international and national courts. In Romesh Thappar v The State of Madras [1950] SCR 594, a decision of the Supreme Court of India, Patanjali Sastri, J stated (at page 602) that:

> "... very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible".

(a) "Prescribed by law" and Legal Certainty

To be "prescribed by law", an interference with freedom of expression must be authorised by domestic law - whether by statute, common law, or delegated legislation. However, this in itself is not enough. The law must also satisfy the requirements of legal certainty. Those requirements were explained by the European Court in the Sunday Times Case as follows:

> "First, the law must be adequately accessible; the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (paragraph 49).

In the Silver Case, a speech case about restrictions upon prisoners' correspondence, the European Court held that the requirements of legal certainty were not met where prisoners' mail was interfered with by the prison authorities on the basis of unpublished orders and instructions (judgment of 25 March 1983, Series A No 61, 5 EHRR 347). Although the case was argued and decided under Article 8 of the European Convention (right to respect for correspondence), which requires that interferences be "in accordance with the law", it was also argued under Article 10, and the decision applies equally to free speech as to correspondence.

The phrase "prescribed by law" also implies compatibility with the rule of law. This requirement entails that there must be adequate safeguards and effective control in domestic law against arbitrary interferences by public authorities with the rights safeguarded. As the Court observed in the Silver Case,

> "One of the principles underlying the Convention is the rule of law, which implies that an interference by the authorities with an individual's rights should be subject to effective control. This is especially so where, as in the present case, the law bestows on the executive wide discretionary powers, the application whereof is a matter of practice which is susceptible to modification but not to any Parliamentary scrutiny" (paragraph 90).

The European Court found this requirement too to have been violated in the Silver Case in that the authorities' powers to control prisoners' correspondence were not subject to adequate safeguards against abuse. The Court held that the safeguards need not be contained in the very text which authorises the imposition of restrictions. However, it stressed that there must be an effective remedy to challenge and secure redress of an alleged violation of one's rights under the Convention. This requirement was not met where, as in that case, the jurisdiction of the English Courts was limited to examining whether the measures in question were taken arbitrarily, in bad faith, for improper motives or were ultra vires. (See also the Malone Case, judgment of 2nd August 1984, Series A No 82, paragraph 67, inadequate legal controls on telephone tapping in the U K held violative of the right to respect for private life under Article 8).

The Indian Supreme Court has imported the concept of procedural due process into similar language in the Indian Constitution (Maneka Gandhi v Union of India A I R 1978 S C 597 at paragraph 54). So has the Privy Council, in construing similar language in the Constitution of Singapore (Ong Ah Chuan v Public Prosecutor [1981] A C 648 (PC) at pp.669D-71B). The U N Human Rights Committee has yet to give a normative meaning to the various references to "law" contained in the International Covenant on Civil and Political Rights. However, it may well be influenced by this body of international and comparative human rights law. (The Human Rights Committee's General Comment on Article 17 of the Covenant, (adopted on 23rd March 1988 (CCPR/C/21/Add.6), 31 March 1988) states, somewhat delphically, that the term "unlawful" (in Article 17) "means that no interference can take place except in cases envisaged by law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant").

(b) Legitimate aim

The State also has to establish that the interference is in pursuance of one of the legitimate purposes listed in Article 10(2). In practice, this does not cause much difficulty. Normally, the only real issue here is whether the interference complained of is genuinely aimed at one of these purposes (the Sunday Times Case, paragraph 57).

(c) Test of necessity

The most difficult condition for the State to satisfy, and the one on which most of the cases under Article 10 turn, is that the restriction is "necessary in a democratic society" for the legitimate purpose sought to be achieved. The mere fact that the State acts in good faith, or has had the restriction complained of for a long time, does not make the interference valid under Article 10.

The initial responsibility for securing the rights and freedoms enshrined in Article 10 (as in other provisions of the Convention) lies with the Contracting States. Accordingly, the Court has recognised that States enjoy a "margin of appreciation" in conforming their law and practice with the Convention. But States do not enjoy an unlimited margin of appreciation. Ultimately, it is for the European Commission and Court to assess whether the reasons given to justify an interference with freedom of expression are relevant and sufficient. Hence, "the domestic margin of appreciation ... goes hand in hand with a European supervision" (Handyside Case, paragraph 48; The Sunday Times Case, paragraph 59).

The European Court has enunciated a number of important principles relevant to interpreting the test of necessity. It has concluded that the adjective "necessary" is synonymous neither with "indispensable" nor with the looser test of "reasonable" or "desirable". What the test of necessity connotes is a requirement that the State establish a "pressing social need" for the restraint (The Sunday Times Case, paragraph 59).

Implicit in this standard is the notion that the restriction, even if justified to achieve one of the stated purposes, must be framed so as not to limit the right protected by Article 10 more than is necessary. That is, the restriction must be proportionate and closely tailored to the aim sought to be achieved. It was this requirement that the Court held had not been satisfied in the Sunday Times case, since the injunction restraining publication was overbroad in its scope. (Cf., State of Madras v V G Row [1952] SCR 597 at p.607.)

Nor was the test of necessity satisfied in the Silver Case where overbroad controls were imposed on the content of prisoners' correspondence with the outside world. The Court recognised that some measure of control over prisoners' correspondence was called for and was not in itself incompatible with the European Convention. However, it held that regulations which, inter alia, permitted the stopping of letters that contained "complaints calculated to hold the authorities up to contempt", "complaints about prison treatment", "allegations against prison officers", and "grossly improper language", did not correspond to a pressing social need, and were not proportionate to the aim sought to be achieved. In so holding, the European Court applied a very similar test and reached the same conclusions as had the U.S. Supreme Court in Procunier v Martinez [1974] 416 U.S. 396 at 413, a case relied upon by the applicants.

Finally, the interference or restriction must be necessary "in a democratic society". The Court has identified "pluralism, tolerance and broadmindedness" as the hallmarks of a democratic society (Handyside Case). It elaborated on this in Young, James and Webster v the United Kingdom, a case concerning the conformity of a "closed shop" agreement with the freedom of association guarantee in Article 11 of the Convention:

> "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position" (judgment of 26 June 1981 at paragraph 63).

In the context of freedom of expression, the Court has made it clear that the proper functioning of democracy requires freedom not merely for restrained criticism but also for that which may "offend, shock or disturb" (Handyside Case, The Sunday Times Case, and Lingens Case).

The manner in which the European Court has applied the test of necessity in practice may be illustrated by examples from two areas of fundamental importance and considerable topicality: first, where free speech comes into conflict with the right to a fair trial; and secondly, where free speech comes into conflict with the right of public figures to protection of their reputation.

FREEDOM OF EXPRESSION AND THE RIGHT TO A FAIR TRIAL

It is well-recognised in the common law tradition that justice is not a "cloistered virtue" (Ambard v Attorney-General for Trinidad and Tobago [1936] A C 322, 335 (PC)) and that the workings of the legal process should normally be open to public scrutiny. This is an area, however, where restrictions imposed by English law have contrasted sharply with the approach required under the European Convention - particularly as regards the scope of the English doctrine of contempt of court.

In The Sunday Times case, the House of Lords unanimously held that it was a contempt of court for the newspaper to publish any material which prejudged the issue in pending (though dormant) negligence proceedings against the distributors of the Thalidomide drug for the deformities caused to the children of women who had taken the drug during pregnancy, or was likely to cause prejudgment of that issue. The Sunday Times complained that the decision of the House of Lords unjustifiably interfered with the right to free expression guaranteed by Article 10 of the Convention. The case came before the full European Court, which decided (by 11 votes to 9) that the Law Lords had indeed breached the applicants' rights under Article 10. As a result, the Government was obliged to introduce legislation (The Contempt of Court Act 1981) in effect over-ruling the Lords' decision.

The European Court's judgment is a strong and courageous affirmation of the importance of free speech and freedom of the press even where the right to a fair trial is held by a national supreme court to be threatened by public information and discussion. The Court held that the common law of England was sufficiently well established to satisfy the first condition in Article 10 of being "prescribed by law ". Further, it concluded that the ruling had the legitimate aim of maintaining judicial

authority for the reasons given by the Lords. However, the majority went on to hold that the injunction restraining publication of the article was not necessary to preserve the authority of the judges. In view of the legitimate public interest in the thalidomide compensation controversy and the public debate it had occasioned, the injunction which restrained in broad terms any public prejudgment of the legal issues was disproportionate to the aim. It did not satisfy a "pressing social need".

The Court emphasised both the media's responsibility to keep the public informed on judicial proceedings, and the public's right to receive information. On the media's role, it observed:

> "These principles [of freedom of expression] are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is a general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them" (paragraph 65).

As regards the right of the public to be properly informed, the Court said this:

> "In the present case, the families of numerous victims of the tragedy ... had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the 'authority of the judiciary'" (paragraph 66).

In Harman v Home Office [1983] A C 280, the House of Lords decided, by three votes to two, that a solicitor had been guilty of a contempt of court in passing documents to a journalist which had been obtained from her client's adversary in the course of discovery procedures, even though the documents had been read out in open court at the hearing of the action. Lord Diplock, who was in the majority, stated that the case was:

> "not about freedom of speech, freedom of the press, openness of justice or documents coming into 'the public domain'".

A vigorous dissenting judgment by Lord Scarman and Lord Simon of Glaisdale relied upon U.S. First Amendment as well as European Convention doctrine. A subsequent complaint by Ms Harman to the European Commission of Human Rights was held admissible and settled upon the basis that the Government would pay the applicant's legal costs and make necessary amendments to English law.[2]

At issue in two cases currently pending before the European Commission is whether the inability of the media to challenge court orders forbidding publication of the name of a witness in a criminal trial, or banning television reporting of court proceedings until after the jury has given its verdict, is compatible with the European Convention.

The first case, Crook v the United Kingdom, was brought by a journalist over an order made by a trial judge forbidding the press from publishing the name of a chief prosecution witness because it would cause distress both to her and to her family. Her name was nonetheless mentioned in open court. Mr Crook tried to challenge the ban in the High Court but was unsuccessful. The Court held that they had no jurisdiction to review the decision.

The Crook case has been adjourned by the European Commission pending the outcome of Hodgson, D Woolf Production Ltd and the NUJ v the United Kingdom, which concerns the attempt by Channel 4 television to broadcast, nightly, studio readings from a transcript of the proceedings in the trial of Mr Clive Ponting, the civil servant eventually acquitted of violating Section 2 of the Official Secrets Act. The trial judge made an order banning the Channel 4 telecasts until after the jury's verdict in the Ponting case. The order was not opposed by counsel for the prosecution or for the defence, and the judge refused to hear counsel on behalf of the television station and producer on the ground that they had no standing. A complaint by the producer and editor of the programme to the European Commission has been held admissible under Article 13, which guarantees the right to an effective remedy in respect of alleged violations of the Convention (admissibility decision of March 1987, as yet unreported).

In the wake of this decision, the U.K. Government has tabled a new clause to the Criminal Justice Bill which would enable the press and other interested parties to obtain judicial review of banning orders made by Crown Court judges under the Contempt of Court Act.

FREEDOM OF EXPRESSION AND PUBLIC OFFICERS

The Sunday Times Case was decided by a narrow margin of eleven votes to nine. However, in the recent Lingens Case, the European Court unanimously affirmed the principles enunciated in the Sunday Times Case, and unanimously held that the Austrian courts had violated Mr Lingens' right to free expression guaranteed by Article 10.

Mr Lingens, a journalist, had published two articles in the Austrian newsmagazine "Profil" which were strongly critical of Mr Bruno Kreisky, the retiring Chancellor of Austria, for protecting former members of the S.S. for political reasons, and for his accommodating attitude towards former Nazis who had recently taken part in Austrian politics. Mr Lingens described Mr Kreisky's conduct as 'immoral', 'undignified', and amounting to 'the basest opportunism'. Mr Kreisky brought a private prosecution against him for criminal libel. Mr Lingens was found guilty and fined. The Vienna Court of Appeal reduced the fine but confirmed the lower court's judgment in all other respects.

When the case came before the European Court of Human Rights, the International Press Institute obtained leave, through Interights, to submit written comments - similar to an amicus curiae brief - summarising the law

and practice in ten other member States of the Council of Europe and in the United States on how far it is necessary in a democratic society to restrict the expression of opinion in the press in order to protect the reputation of the individual concerned, where the individual is a politician or holds public office. Its conclusion was that in all these countries Mr Lingens would either not have been prosecuted or would almost certainly have been acquitted.

The European Court did not go so far as the U.S. Supreme Court in New York Times v Sullivan and hold that a public official or figure must establish that the allegation was false and that the publisher knew it was. However, the Court's judgment was sympathetic to the principles which explain Sullivan. It stated that:

> "Freedom of the press ... affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.
>
> The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance" (paragraph 42).

In its judgment, the Court also made the important point that a careful distinction must be made between statements of fact and expressions of opinion. The first are susceptible of proof, the second are not. In this case, the applicant had been convicted and punished for expressing his own value judgments on a matter of political controversy. The requirement of Austrian law that he prove the truth of these in order to escape conviction was, the Court held, impossible of fulfilment. It infringed freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention.

Two much earlier, strongly worded judgments of the High Courts of Peshawar and Lahore in Pakistan, are to like effect. In Hussain Bakhsh Kasuar v The State P L D 1958 (W P) Peshawar 15 Mahannad Shafi, J struck down the conviction of the accused for incitement to disaffection on the ground that his criticism of the Government in a speech as being a Government of thieves whose Ministers were men of straw, did not fall within the mischief of the section; it fell short of encouraging the use of force or violence required by the offence. The Judge held that the criminal offence of incitement to disaffection had to be read in the light of the free speech guarantee in Article 8 of the Constitution of Pakistan. It followed, in his view, that:

> "... it is permissible for a citizen to hold up the men who are charged or have been charged with the executive Government of our country and the care of her destinies to ridicule and contempt if they are guilty of mal-administration .... It is not the criticism of the Government, in whatever venomous and enraging words it is cloaked which constitutes an offence under section 124-A of the Pakistan Penal Code [incitement to disaffection], but

the adoption of the methods for the attainment of a certain purpose and that too only when they encourage force and violence which may lead to conflict with the authorities with the certainty that there will be grievous loss of life. Short of that, every criticism of the Government is permissible ..." (p.19).

On the importance in a democracy of being able to criticise government ministers, the Judge stated:

> "To criticise a Minister is no offence. If the Ministers are held above criticism then it would amount to this that if a person by fair or foul means attains to that height then the people cannot make any effort to remove him nor can his own errors even if he repeats them twenty times or his corruption, undemocratic action or mal-administration dislodge him from that position. Public platform is the only place from where the misdeeds of those who hold the reins of the Government can be exposed. If that is shut out, the democracy will see its end in no time" (ibid.).

In Maulvi Farid Ahmad v Government of West Pakistan, P L D 1965 (W P) Lahore 135, the High Court granted the accused's petition for habeas corpus on the ground that his preventive detention for delivering speeches during an election campaign in which he criticised the police force, the powers of the President and nepotism in administration - was not justified for the purpose of maintaining public order. The Court expressly adopted the clear and present danger test articulated by the U.S. Supreme Court. Holding that this test had not been met, the Court stated:

> "He [the accused] has indeed criticised the Government and its policies, but the criticism of the administration cannot always be interpreted to mean that it was intended to undermine respect from the Government with a view to bringing about disorder" (p.144).

FREEDOM OF EXPRESSION AND INVASION OF PRIVACY

In Winer v the United Kingdom (Application No.10871/84, admissibility decision of 10 July 1986), the applicant contended that there is a considerable difference between speech which is "in the public interest" and that which is merely of public interest. Expression which falls into the former category should, and does - on the principles which have been articulated by the European Court and Commission - receive strong protection under Article 10. By contrast, newspaper articles or books which purport to describe the private lives of ordinary individuals, particularly those which constitute gross intrusions into an individual's private life and family life, ought not to receive such protection because they do not contribute to the formation of public opinion. At the very least, the fact that the right to respect for one's private and family life is expressly guaranteed in Article 8 of the European Convention requires that a careful balance be struck between the interests of expression and an individual's privacy rights where such speech is at issue.

This is not, however, the approach which the Commission has taken. The Winer case concerned a complaint that English law did not provide an adequate remedy, including a right of reply, for gross invasions of the applicant's privacy arising from statements published in a book which were not alleged to be either defamatory or untrue. The Commission held the

complaint to be inadmissible. There was no reasoned consideration of the interaction between Articles 10 and 8 in such a case. On the contrary, the Commission observed simply that "... it is true that this state of the law gives greater protection to other individuals' freedom of expression, [but] the applicant's right to privacy was not wholly unprotected, as shown by his defamation action and settlement, and his own liberty to publish". The Winer case suggests that the Commission does not wish personal privacy to be respected at the expense of free speech except in gross instances of unwarranted invasions of one's private life.

FREEDOM OF EXPRESSION AND PUBLIC MORALS

Where an interference with freedom of expression is aimed at protecting morals (a goal which is shifting and subjective), the European Commission and Court have held that State authorities have a wide margin of appreciation in determining whether the interference is necessary. This follows, in their view, from the fact that:

> "... it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject" (Handyside Case, paragraph 48).

Even here, however, European supervision is effective to ensure that the measures taken are no more restrictive than necessary. This is well exemplified by the Commission's analysis in Müller v Switzerland (report of the Commission adopted on 8 October 1986), which raised the issue of the balance to be drawn between freedom of artistic expression and the protection of public morals.

The Müller case arose from the conviction of the applicants - an artist and the organisers of an art exhibition - for showing, in an exhibition open to the general public, paintings which the Swiss courts held to be obscene. The applicants were fined, and the offending paintings were confiscated for an indefinite period. In considering whether these measures were in conformity with Article 10, the Commission emphasised that freedom of artistic expression consists not only in freedom to create works of art but also in freedom to disseminate them, particularly through exhibitions. Both the fines and the confiscation amounted to clear interferences with this freedom. The confiscation was a particularly serious interference with Mr Müller's freedom of expression in that it precluded him from exhibiting his work either abroad or in Switzerland in the future. The fines were upheld under Article 10(2) as being necessary "for the protection of morals". However, the indefinite confiscation of the paintings was held not to be necessary. The Commission stated that in a case such as this, where the items judged obscene were unique works of artistic value, Article 10 required a weighing of the opposing interests, namely the moral interest and the cultural interest. This had not been done. Since other measures less restrictive of Mr Müller's freedom of expression could have achieved the desired goal of preventing public exhibition of items which the authorities considered morally harmful, the interference was held to be unnecessary in a democratic society.

By contrast, the UN Human Rights Committee has not so far exercised particularly effective supervision where a State has invoked the protection of public morals to justify restrictions on speech. In Hertzberg and others v Finland ((Communication No 61/1979), adoption of views 2 April 1982; Selected Decisions under the Optional Protocol, volume 1 p.124), the applicants complained that the State-controlled Finnish Broadcasting Company (FBC) had unjustifiably interfered with their right to freedom of expression, contrary to Article 19 of the International Covenant, by censoring radio and television programmes which they had produced dealing with homosexuality. The censorship was carried out by the responsible programme directors who indicated that transmission of the programmes in full would entail legal action against the FBC under the Finnish Penal Code (which makes it a criminal offence to encourage homosexuality). The State justified the measures under Article 19(3) of the Covenant as being necessary for the protection of public morals.

Like the Strasbourg organs, the Human Rights Committee expressed the opinion that where public morals are concerned, States must be accorded a certain margin of discretion since there is no universally accepted common standard. However, the Committee went further than this. It held that it could not question the decision made by the Broadcasting Company, and does not appear to have applied the test of necessity. Accordingly, it found that there had been no violation of the applicants' rights. In failing to carry out any examination of whether the restrictions were in fact necessary, the Committee in effect gave the State not merely a margin of discretion but an unlimited discretion.

In an Individual Opinion (concurred in by Mr Rajsoomer Lallah, and Mr Walter Tarnopolsky), Mr Torkel Opsahl emphasised the particular importance of the test of "necessity" in this context:

> "... in my view the conception and contents of "public morals" referred to in article 19(3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority. Therefore, even if such laws as paragraph 9(2) of chapter 20 of the Finnish Penal Code may reflect prevailing moral conceptions, this is in itself not sufficient to justify it under article 19(3). It must also be shown that the application of the restriction is "necessary"."

However, the minority too found no violation of the Covenant in the circumstances. What was at issue, in their view, was not official censorship but self-imposed restrictions to which the criteria of Article 19(3) of the Covenant did not apply.

FREEDOM OF EXPRESSION OF CIVIL SERVANTS

The European Court has thus far failed to address the important and difficult issue of the scope of freedom of expression within the Civil Service. This issue was raised, but not dealt with by the court, in the two recent cases of Glasenapp and Kosiek v the Federal Republic of Germany (judgments of 28 August 1986, 9 EHRR 25 and 328). These cases concerned the dismissal of a teacher and a university lecturer - both civil servants

on probation - for alleged violation of their oath of allegiance to the German Constitution.

Mrs Glasenapp was dismissed from her job as a school teacher for refusing to dissociate herself completely from the German Communist Party (of which she was not a member). She had written a letter to a Communist newspaper supporting an "international people's kindergarten", a policy also supported by the Communist Party. Mr Kosiek, a physics lecturer, was not only a member of the National Democratic Party of Germany, an extreme right-wing party, but had represented that Party in the Land parliament for four years and had stood for election to the federal parliament. He had written two books expressing his political views. His appointment was terminated (after eight years) on the ground that his activities and opinions evidenced a lack of allegiance to the Constitution.

The Commission held, by a majority of nine to eight, that there had been a violation of Article 10 in Mrs Glasenapp's case. The requirement to take the loyalty oath was a disproportionate means of pursuing the legitimate aim of safeguarding the democratic order, since there was no evidence to suggest that the applicant's political views interfered with the discharge of her work. On the other hand, the Commission found, by ten votes to seven, that there had been no violation of Mr Kosiek's rights under Article 10. In the light of his extreme opinions, which showed little sympathy for the principles of pluralism and basic equality contained in the Convention, his dismissal was held to be justified under Article 10(2), for the protection of the rights of others or in the interest of national security.

By contrast with the Commission, the Court summarily dismissed both applications as not raising any issue under Article 10. What was being claimed, in the Court's view, was a right of access to the Civil Service, a right that was not protected by the Convention. In a puzzling non sequitur, the majority of the Court held that the authorities had taken account of the applicants' opinions and activities only in order to determine whether they were qualified for the post in question and that, accordingly, there had been no interference with their freedom of expression. A minority of six judges, however, expressed some reservation about the potentially broad implications of such a holding. In a Joint Concurring Opinion, they stated that the non-applicability of Article 10 in these cases "does not preclude the possibility that Article 10 might apply even to the Civil Service where all freedom of expression was de jure or de facto non-existent under domestic law".

Only Judge Spielmann grappled with the difficult question of how to reconcile the State's interest in securing the loyalty of its civil servants with the applicants' right to freedom of expression. In a Dissenting Opinion in each case, he applied the Court's consistent jurisprudence on Article 10; there had been a prima facie interference with the applicants' freedom of expression, the pressing social need for which had to be demonstrated by the State under Article 10(2). In his view, this exacting test had not been met in the circumstances since the measures taken were disproportionate to the aim pursued.

It is submitted that Judge Spielmann's analysis is correct. If civil servants are to enjoy an effective protection of their rights under the Convention, it is essential that a government be required to

demonstrate the necessity for any restriction of those rights. It is vitally important - particularly in the light of the large number of persons employed in the Civil Service, their public functions, and the public interest in being informed about the workings of government - that the Court clarify this issue at the earliest opportunity.

The question as to the circumstances in which the public interest in protecting official secrets is outweighed by the public interest in free speech is, of course, a central issue in the pending litigation in Australia, New Zealand, Hong Kong, and the United Kingdom concerning 'Spycatcher'.

CONCLUSION

The European Court and Commission of Human Rights have articulated important principles protecting free speech against unjustifiable interference by public authorities, often redressing the balance so as to give greater importance to free speech than has been given by some national courts (including English courts). The Strasbourg case law is of strong persuasive value in interpreting and applying constitutional guarantees of free expression, in the context of restrictions imposed by statute law, common law, or administrative action.

30th April 1988

ANNEX 1

INTERNATIONAL GUARANTEES OF FREE EXPRESSION

International Covenant on Civil and Political Rights

"Article 19

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."

European Convention on Human Rights

"Article 10

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 and 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."

American Convention on Human Rights

"Article 13

1. Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary in order to ensure:

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

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

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law."

ANNEX 2

RELEVANT CONSTITUTIONAL FREE SPEECH GUARANTEES

India

Article 19 of the Constitution of India 1950 provides in relevant part:

"19.(1) All citizens shall have the right -

(a) to freedom of speech and expression;

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the

interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

Malaysia

Article 10 of the Federal Constitution of Malaysia (as amended to 15th May 1981) provides in relevant part:

"10.(1) Subject to Clauses (2) (3) and (4) -

(a) every citizen has the right to freedom of speech and expression;

(2) Parliament may by law impose -

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law."

Mauritius

Article 12 of the Constitution of Mauritius provides:

"12. Protection of freedom of expression.

(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) 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 technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainments; or

(c) for the imposition of restrictions upon public officers,

except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society."

Islamic Republic of Pakistan

Article 19 of the Constitution of the Islamic Republic of Pakistan (adopted in April 1973) provides:

"19. Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence."

Independent State of Papua New Guinea

Section 46 of the Constitution of the Independent State of Papua New Guinea (1982) provides:

"46. - Freedom of expression.

(1) Every person has the right to freedom of expression and publication, except to the extent that the exercise of that right is regulated or restricted by a law -

(a) that imposes reasonable restrictions on public office-holders; or

(b) that imposes restrictions on non-citizens; or

(c) that complies with Section 38 (general qualifications on qualified rights).

(2) In Subsection (1), "freedom of expression and publication" includes -

(a) freedom to hold opinions, to receive ideas and information and to communicate ideas and information, whether to the public generally or to a person or class of persons; and

(b) freedom of the press and other mass communications media.

(3) Notwithstanding anything in this section, an Act of the Parliament may make reasonable provision for securing reasonable access to mass communications media for interested persons and associations -

(a) for the communication of ideas and information; and

(b) to allow rebuttal of false or misleading statements concerning their acts, ideas or beliefs,

and generally for enabling and encouraging freedom of expression."

Section 38 provides:

"38. - General Qualifications on Qualified Rights.

(1) For the purposes of this Subdivision, a law that complies with the requirements of this section is a law that is made and certified in accordance with Subsection (2), and that -

(a) regulates or restricts the exercise of a right or freedom referred to in this Subdivision to the extent that the regulation or restriction is necessary -

(i) taking account of the National Goals and Directive Principles and the Basic Social Obligations, for the purpose of giving effect to the public interest in -

(A) defence; or

(B) public safety; or

(C) public order; or

(D) public welfare; or

(E) public health (including animal and plant health); or

(F) the protection of children and persons under disability (whether legal or practical); or

(G) the development of underprivileged or less advanced groups or areas; or

(ii) in order to protect the exercise of the rights and freedoms of others; or

(b) makes reasonable provision for cases where the exercise of one such right may conflict with the exercise of another,

to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

(2) For the purposes Subsection (1), a law must -

(a) be expressed to be a law that is made for that purpose; and

(b) specify the right or freedom that it regulates or restricts; and

(c) be made, and certified by the Speaker in his certificate under Section 110 (certification as to making of laws) to have been made, by an absolute majority.

(3) The burden of showing that a law is a law that complies with the requirements of Subsection (1) is on the party relying on its validity."

Democratic Socialist Republic of Sri Lanka

Articles 14 and 15 of the Constitution of the Democratic Socialist Republic of Sri Lanka provide in relevant part:

"14.(1) Every citizen is entitled to -

(a) the freedom of speech and expression including publication;"

"15.(2) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence."

"15.(7) The exercise and operation of all the fundamental rights declared and recognised by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security."

"15.(8) The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them."

United States of America

The First Amendment to the U.S. Constitution provides in relevant part:

"Congress shall make no law ... abridging the freedom of speech, or of the press."

Zimbabwe

Article 20 of the Constitution of Zimbabwe (1980) provides in relevant part:

"20.(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held in contravention of subsection (1) to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of -

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts or tribunals of the Senate or the House of Assembly;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

(v) in the case of correspondence, preventing the unlawful dispatch therewith of other matters; or

(c) that imposes restrictions upon public officers,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(6) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles."

REFERENCES

[1] Barrister and Bencher of Lincoln's Inn, Honorary Professor of Public Law at University College London, and Chairman of INTERIGHTS (the International Centre for the Legal Protection of Human Rights). The author wishes to acknowledge the important contribution made by Susan Hulton, LL.M., Legal Director of INTERIGHTS, in the preparation of this paper.

[2] See also Re K D [1988] 1 All ER 577 at 587-591 (HL) where Lord Oliver, giving the speech for the House, analyses at length whether English law governing parental access to a child in care is in conformity with Article 8 of the European Convention on Human Rights (which guarantees the right to family life); and Hone v Maze Prison Board of Visitors [1988] 1 All ER 321 at 327-29 (HL) where Lord Goff, with whom Lords Mackay, Bridge, Ackner and Oliver agree, considers that the European Convention is relevant to determining whether a prisoner is entitled to legal representation in disciplinary proceedings, and concludes that English law is in conformity with Article 6 of the Convention.

[3] The Rules of the Supreme Court (Amendment) 1987, published on 19 August as SI 87/1423 (L8) give effect to this settlement. A new rule provides that once a case is read or referred to in open court, the undertaking that the parties and their lawyers will not use it for purposes other than those of that case will come to an end. As envisaged by the settlement, it will be open to a party or the owner of the document to apply to the court for an order that the undertaking should continue, but such an order is only to be granted if there are special reasons.

"FUNDAMENTAL RIGHTS IN THEIR ECONOMIC, SOCIAL AND CULTURAL CONTEXT"

A paper prepared by
Justice P N Bhagwati
(former Chief Justice of India)

I must thank the Commonwealth Secretariat and the Ford Foundation for giving me an opportunity to convene and organise this Judicial Colloquium where high judicial personages from different parts of South Asia and South East Asia as well as Africa, Australia, Europe and the USA are participating in the discussion of a subject of vital interest to the well-being of all humanity. We have gathered together here to discuss the subject of "The Domestic Application of International Human Rights Norms". It is a vast and special subject and it is not possible to deal with all its manifold aspects within the limited space of a paper or even within the limited time available to a workshop. One can only focus on a few of its important aspects, though even what is important amongst its various aspects may itself be a matter of some controversy.

The basic theme in the discourse on human rights to which we must address ourselves is how we can convert the rhetoric of human rights into reality. The rhetoric of human rights draws on the moral resources of our belief in the significance of an underlying common humanity and points in the direction of a type of society which ensures that the basic human needs and reasonable aspirations of all its members are effectively realised in, and protected by law. Human rights discourse can therefore serve both as a potent source for radical critiques of actual social arrangements and also as a powerful basis for working out and presenting alternative institutional practices.

The language of human rights carries great rhetorical force of uncertain practical significance. At the level of rhetoric human rights have an image which is both morally compelling and attractively uncompromising. But what is necessary is that the highly general statements of human rights which ideally use the language of universality inalienability and indefeasibility should be transformed into more particular formulations, if the rhetoric of human rights is to have major impact on the resolution of social and economic problems. The meaning and scope of each right has to be clarified, the content and location of any co-relative duties must be spelt out and the permissible range of exceptions and limitations specified.

Whether this work is done by the framers of the constitution, the ordinary law making procedures or the activities of the courts themselves, it may be regarded as realisation or positivization of human rights through law. The most obvious form in which this is done is through specific constitutional provisions which incorporate a statement, or Bill of Rights, which are given the status of fundamental law. These rights are then regarded as superior to ordinary legislation, and are used to render invalid any legislative action or administrative or other governmental decisions which are held to run counter to the enumerated rights. Institutionally this invalidation is normally achieved through the medium of courts, whose task it is to rule on the constitutionality of ordinary legislation as also executive action and to determine whether the fundamental rights of the citizen have been infringed in particular cases.

This model, which had its origin in the United States, has been adopted with variations in most of the countries which attained independence after the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10th December 1948 and recently it has been incorporated also as part of the Canadian Constitution. This mechanism gives major power in positivizing human

rights to courts, since the type of decision to be made in applying highly general statements of rights to specific circumstances results, in effect and substance, in creating detailed formulations which are applicable in the particular circumstances of each case. This mechanism has the advantage that there is an institutional avenue for challenging violations of human rights by governments, though it is open to the charge that it is undemocratic. It is perhaps for reasons of democracy and accountability, that the protection of human rights is left to elected legislative bodies, like Parliament in the United Kingdom, while courts are in effect limited to the determination of whether the executive organs of government have acted within the law.

However, this apparently more democratic process leaves human rights vulnerable to the decisions of bodies which have much more on their collective minds than the protection of human rights and are subject to majoritarian populist pressures and reasons of state which so often lead to human rights violations. It is therefore believed in many jurisdictions such as the United States, Canada and most of the countries whose justices are participating in this Judicial Colloquium, that the special function of human rights in placing limits on state action cannot be left safely in the hands of the legislature or the ordinary processes of law. It is the firm conviction of the people of these countries that the best mechanism for positivizing human rights and realising human rights through law is through the enactment of basic or fundamental rights in the constitution and entrusting constitutional courts with the power and duty to interpret and enforce these human rights.

It is necessary to point out that a certain degree of positivization or particularisation is required if specific human rights are going to have practical force, because it is only when they are positivized and particularised that they can become a basis for challenge to legislative or executive action which is violative of them as also for compulsorily generating effective executive action. There are certain human rights which operate as a restraint on the power of the state and such restraint is necessary because of the possibility of abuse and misuse of power by the state which is inherent in the legitimate possession of the monopoly of force within a society and equally there are certain other human rights which require affirmative action to be taken by the state, particularly in cases where the realisation of a given human right requires to be facilitated by state action. It would not therefore be incorrect to observe that the state is the necessary friend as well as the recurrent enemy of human rights.

The process of realising human rights involves translating idealised objectives into specific rules which require clarity in formulation untypical of ideological discourse. And this can best be done through the mechanism of a strong and independent judiciary which is in tune with the ideologue of human rights. The Bill of Rights can at best only enunciate broad and general statements of human rights but to positivize them, to spell out their contours and parameters, to narrow down their limitations and exceptions and to expand their reach and significance by evolving component rights out of them while deciding particular cases, is a task which the judicial mechanism is best suited to perform provided of course the judges have the right attitudinal approaches. The judges have to be careful while positivizing human rights and giving them meaning and content to ensure that they do not in the process dilute human rights but enlarge their scope and ambit and advance the purposes for which they are enacted as part of the fundamental law.

Interpreting the Constitution

Since the judiciary has to perform an important role in the interpretation and enforcement of human rights inscribed in the fundamental law of a country, it is necessary to consider what should be the approach of the judiciary in the matter of constitutional interpretation. Mr Anthony Lester, QC has in his paper referred to what he has called a generous and purposive approach to constitutional interpretation as observed in several decisions of the Judicial Committee of the Privy Council. I would like to repeat what I said in the course of the speech delivered by me at the Commonwealth Law Conference in Jamaica in regard to judicial interpretation in constitutional law: -

> "It must be remembered that a constitution is a totally different kind of enactment than an ordinary statute. It is an organic instrument defining and regulating the power structure and power relationship: it embodies the hopes and aspirations of the people; it projects certain basic values and it sets out certain objectives and goals. It cannot therefore be interpreted like any ordinary statute. It must be interpreted creatively and imaginatively with a view to advancing the constitutional values and spelling out and strengthening the basic human rights of the large masses of people in the country, keeping in mind all the time that it is the constitution, the basic law of the land, that we are expounding and that ultimately, as one great American judge felicitously said, 'the Constitution is what we say it is.'"

The judiciary must therefore adopt a creative and purposive approach in the interpretation of fundamental rights embodied in the constitution with a view to advancing human rights jurisprudence.

There is a serious controversy in the United States between the originalist interpretation of the constitution and the creative and purposive interpretation. Speaking for myself, I am not in favour of the originalist interpretation of the constitution. The court in interpreting the constitution is not bound to accept the meaning which the constitutional provisions had in the "original understanding" of the framers, drafters and adopters of the constitution. If that were so, many of the progressive interpretations of the provisions in the Bill of Rights in the United States would not have been possible and so also in Canada and India. The constitution is a living document and the interpretation which must be given by the court is that which advances the constitutional values and enhances the protection of the people by limiting and structuring the executive and legislative power and ensuring realisation by the people of the human rights guaranteed to them under the constitution. The constitutional history of many countries which have a Bill of Rights in their constitution shows how a creative and imaginative interpretation of constitutional law can advance the cause of human rights and social justice.

There are three traditions in the interpretation of the fundamental rights guaranteed in a constitution. The first tradition is what I call the bureaucratic tradition where the constitutional text is treated like any other statutory enactment. Judges display a high level of fidelity to the written text which is treated as ex cathedra and they claim that they do not allow their judicial function to be confused by social, political

and economic considerations. This view, I am afraid, cannot sit easily in the apparatus of decision making of a modern judge in this over simplified form. Judges cannot just interpret the constitutional guarantees in a mechanical fashion unconcerned with the consequences of their decision or to use the words of Holmes, J. with the potential radiation of the decision they are making.

The second tradition of judicial interpretation has its origin in liberal Whigism. The constitution confers power on various organs of the state and also lays down the limits within which such power can be exercised. It is necessary to ensure that these limitations are observed and there is no abuse or misuse of power. Where there is abuse or misuse or excess of power by the state or its officers and the rule of law is violated or in other words where the state acts outside the constitution and the law, it is guilty of what I call state lawlessness which has to be controlled by the judiciary. This is what I call the abuse of power approach. But obviously judicial concern must extend beyond merely containing state lawlessness, to the most substantive features which constitutionalism requires judges to promote and structure.

Social Justice

That takes me to the third approach to constitutional interpretation, namely, the approach of social justice. It is an approach which the Supreme Court in India has adopted in the last decade. The judges in India have asked themselves the question: Can judges really escape addressing themselves to substantial questions of social justice? Can they simply turn round to litigants who come to them for justice and the general public that accords them power, status and respect and tell them that they simply follow the legal text, when they are aware that their actions will perpetuate inequity and injustice? Can they restrict their inquiry into law and life within the narrow confines of a narrowly defined rule of law? Does the requirement of constitutionalism not make greater demands on the judicial function?

It is a truism as pointed out by a great American judge that the constitution is what judges make it and judges cannot therefore remain oblivious to social needs and requirements while interpreting the constitution. There are normative expectations from judges and these normative expectations arise from the revolution of rising expectations which characterises modern society in most parts of the Third World. The world is at present on the threshold of a new era of freedom and progress because with a passion unequalled in the past century, the peoples of the developing countries are today demanding freedom; not only freedom from arbitrary restraint of authority but also freedom from want, independence from poverty and destitution and from ignorance and illiteracy. It is this freedom which is now demanded by millions of people all over the world and the judges in interpreting the fundamental rights enshrined in the constitution cannot remain aloof and alienated from this demand of the people for social and economic freedom which I subsume under the label 'social justice'.

I stress this aspect because I believe that most of the jurisdictions in the Third World countries have made a determined attempt to shift the focus of constitutional interpretation away from the bureaucratic and abuse of power modes of discourse and taken to the social

justice approach. The result is that there is now greater emphasis in developing countries on social and economic rights than on civil and political rights. There is unfortunately, today, a misguided controversy in regard to the question of choice between civil and political rights on the one hand and social and economic rights on the other. I am of the view that the problem of choice is actually more apparent than real because in fact two sets of human rights are so inter-related as to form one single pattern of human rights. The relationship between these categories of rights is so obvious that the International Human Rights Conference in Tehran declared in its final proclamation that:

> "Since human rights and fundamental freedoms are indivisible the full realisation of civil and political rights without the enjoyment of economic social and cultural rights is impossible."

It is indeed questionable how human freedom and dignity can be promoted and protected at all without realisation of both categories of human rights. Whether there is conflict or antithesis between these two categories of human rights has been and still remains a matter of international debate but there is no logical reason to perceive this debate as indicating any incompatibility between these two sets of rights. The apparent difference stems from two different ideologies, one being the ideology of the Western liberal tradition and the other being the communist ideology. It is not necessary to enter into any discussion in regard to this controversy because it has now been recognised in the International Covenants that both categories of human rights are extremely important and valuable.

The Western liberal tradition of course emphasises the individual rights which are largely civil and political rights but the validity and practicability of the Western conception of human rights has been doubted in its application to the developing countries. Fouad Ajami of Princeton University has questioned the completeness of the liberal concept of human rights, its vulnerability to charges of particularism and self righteousness, and its incapacities. There are far too many forms of deprivations of human rights which are embedded in the contemporary global context.

It is natural that in view of the chronic and widespread poverty and disparities in the Third World, social and economic rights should be thought of as being of priority. By contrast, civil and political rights often seem a luxury and an irrelevance in the face of stark inequality and starvation. Nonetheless the harsh reality of the poverty in the Third World and the consequent disillusionment with Western liberalism ought not to blind us in a moral trap. It is imperative to view human nature and the problem of structuring power in a proper perspective in order that we should not fall into extreme laissez faire or totalitarianism. For both, in the last analysis, add to our repression of human freedom and dignity.

I may reiterate that since some time past, the focus of human rights in developing countries has shifted from civil and political rights to social and economic rights. This has been assisted by two developments in human rights jurisprudence which are extremely important. One is the decision of the Human Rights Committee that it will also examine violations of economic, social and cultural rights and the other is the increasing recognition which has now been given to the right to development as a human

right. It is now realised that the right to development is a basic human right without the realisation of which it is not possible to enjoy any other human right. The right to development has received recognition both as an individual and as a collective right and in fact the United Nations has adopted a Declaration on the Right to Development. I will therefore concern myself in this paper with the domestic application of social and economic rights.

Judicial activism : the Indian experience

Before I come to the international human rights norms set out in the International Covenants on economic, social and cultural rights I may once again point out that the interpretive approach of the judiciary in India, as in Canada, has been creative and purposive. The Indian judiciary has adopted an activist goal-oriented approach in the matter of interpretation of fundamental rights. The judiciary has expanded the frontiers of fundamental rights and in the process rewritten some parts of the constitution through a variety of techniques of judicial activism. The Supreme Court judiciary in India has undergone a radical change in the last few years and it is now increasingly being identified by justices as well as by people as "the last resort for the purpose of the bewildered". The transition from traditional captive agency with a low social visibility into a liberated agency with high socio-political feasibility is an interesting development in the career of the Indian appellate judiciary. The Supreme Court of India has, through judicial activism, found a new historical basis for the legitimation of judicial power and acquired a new credibility with the people. This development has been the result of intense social activism on the part of some of the justices of the Supreme Court of India.

I propose to give a few examples of the manner in which the judiciary in India has tried to give effect to the human rights norms embodied in the two International Covenants. Article 9(3) of the International Covenant on Civil and Political Rights provides that persons awaiting trial should be released, subject to guarantees to appear for trial, and Article 28 of the Principles on Equality of the Administration of Justice of the Indian Constitution lays down that:

> "national laws concerning provisional release, custody pending or during trial shall be so framed as to eliminate any requirement of pecuniary guarantees."

Article 16(2) of the Principles of Freedom from Arbitrary Arrest and Detention also provides that:

> "to ensure that no person shall be denied the possibility of obtaining provisional release on account of lack of means, other forms of provisional release than financial security shall be provided".

These human rights norms have been incorporated into the domestic law by a process of judicial interpretation. Article 21 of the Indian Constitution says that:

> "No person shall be deprived of his life or personal liberty except by procedure established by law".

The view was held by the Supreme Court of India for a long time that this Article merely embodied the Diceyian concept of the rule of law, namely, that no one can be deprived of his life or personal liberty by the executive without the authority of law. It was enough so long as there was some law authorising such deprivation, and it did not matter what was the nature or character of that law. The decision in Maneka Gandhi's case marks a watershed in the history of constitutional law in India, for the Supreme Court of India held that it is not sufficient merely to have a law in order to authorise constitutional deprivation of life and personal liberty, but that such law must be prescribed by procedure and such procedure must be reasonable, fair and just. The Supreme Court of India by a process of judicial interpretation, brought in the procedural due process concept of the American Constitution, though the original intent of the framers of the Constitution was to exclude a due process clause. The Supreme Court of India proceeded to hold that insistence on monetary bail in a case of a poor accused would be inconsistent with reasonable, fair and just procedure so far as the poor accused is concerned, and therefore violative of the constitutional guarantee under Article 21. It was held for the first time that more liberal norms consistent with human rights should be adopted on which accused persons may be allowed to remain at liberty pending trial. It was observed by the Supreme Court that the risk of monetary loss is not the only deterrent against fleeing from justice, but there are others which act as equal deterrents against fleeing.

Thus, the entire law of bail was "humanised" by a judicial interpretation of Article 21 and the Supreme Court of India held that a new insight should inform the judicial approach in the matter of pre-trial release. If the court is satisfied after taking into account the information placed before it, that the accused has roots in the community and is not likely to abscond, it need not insist on a monetary bond and may safely release the accused on a personal bond. The human rights norm set out in the international instruments was thus translated into national practice.

The Supreme Court of India also in the same case adopted an activist approach and took positive steps in the direction of implementing Article 14(3)of the International Covenant on Civil and Political Rights which lays down that everyone shall be entitled in the determination of any criminal charge against him "to be tried without undue delay". Article 16 of the Principles on Equality in the Administration of Justice reiterates that everyone shall be guaranteed, in the determination of any criminal charge against him, the right to a prompt and speedy hearing. The Supreme Court of India held that the right to a reasonably expeditious trial is an integral and essential part of reasonable, fair and just procedure in case of an accused who is in jeopardy of his life or personal liberty. It is therefore implicit in the fundamental right to life and personal liberty enshrined in Article 21. The state accordingly has a constitutional mandate to do whatever is necessary to ensure an expeditious investigation and a speedy trial. The Supreme Court of India for the first time read the fundamental rights as imposing an affirmative obligation on the state instead of merely reading them as negative restraints on the power of the state. The Supreme Court of India in another case, following upon this view, held that so far as juveniles are concerned the criminal trial against them must be completed within a period of two years at the outside and if it is not so completed, the criminal prosecution would be liable to be quashed. The Supreme Court of India thus not only gave effect to the right to speedy trial enshrined in the international instruments but also

gave effect to the right of a child to expeditious disposal of any criminal proceedings against him.

Access to Justice

Nationally and internationally, access to justice has now been recognised as one of the most important basic human rights without which it is not possible to realise many of the human rights whether they be civil and political or social and economic. There is in fact considerable literature on access to justice as a human right. The Constitution of India included by an amendment made in 1976, Article 39A in the Directive Principles of State Policy, with a view to ensuring equal access to justice to the people irrespective of their caste, creed or resources, but this Directive Principle was not being implemented. The Supreme Court of India found that the state was dragging its feet in providing access to justice. Large masses of people in the country were leading a life of want and destitution and on account of lack of awareness, assertiveness and availability of machinery, were priced out of the legal system and were denied access to justice. The Supreme Court in a leading case, therefore took the view that in a criminal case which imperils the life or personal liberty of an accused, if the accused is on account of his poverty or ignorance or socially or economically disadvantaged position unable to afford legal representation, it would be violative of Article 21 of the Constitution to proceed to try him without giving him proper and adequate legal representation. The Supreme Court took the view that providing proper and legal representation to a poor accused in a criminal trial is part of reasonable, fair and just procedure and is therefore implicit as a fundamental right in Article 21 of the Constitution. The Court in keeping with its newly found role of protector and promoter of human rights, directed the state to provide free legal assistance to a poor accused in a criminal trial through creative judicial interpretation of Article 21. It held that the right to free legal assistance is an essential element of any reasonable, fair and just procedure for a person accused of an offence and it must therefore be held implicit in the constitutional guarantee of Article 21. The Supreme Court of India thus spelt out the right to legal aid in a criminal proceeding from the language of Article 21 and evolved the affirmative obligation on the state to provide legal assistance. The Court also held in a subsequent case that if the magistrate does not inform the accused that he is entitled to free legal assistance, or if the accused is not provided with such free legal assistance in a criminal trial, the conviction would be liable to be set aside.

The judiciary in India also had occasion to interpret the expression "the right to life". In a seminal decision, the Supreme Court held that life does not mean merely physical existence, but it also includes the use of every limb or faculty through which life is enjoyed and also implicit in it is the right to live with basic human dignity, because without basic human dignity life would not be worth living. The state cannot deprive a person of his right to life with basic human dignity which would include the basic necessities of life. On the words of Article 21 the state can effect such deprivation by reasonable, fair and just procedure prescribed by law. However, the judiciary held that no procedure which deprives a person of the right to live with basic human dignity can possibly be reasonable, fair and just. The right to live with basic human dignity was thus elevated to the status of a fundamental right which could not be abridged, defeated or taken away by the state and this was achieved through a process of judicial interpretation.

"THE ROLE OF THE JUDGE IN ADVANCING HUMAN RIGHTS by Reference to Human Rights Norms"

A paper prepared by
The Hon Justice Michael Kirby CMG
Australia

"THE ROLE OF THE JUDGE IN ADVANCING HUMAN RIGHTS BY REFERENCE TO INTERNATIONAL HUMAN RIGHTS NORMS"

The Hon Justice Michael Kirby CMG*
Australia

Abstract

In this paper, the author deals with the "role" of judges in "advancing" human rights. He cautions that the needs of different countries will vary. He starts with a reference to the recent failure of Judge Robert Bork to secure confirmation to the Supreme Court of the United States. Bork had been a long time proponent of judicial restraint in the interpretation of the Bill of Rights, urging that protection of human rights should normally be left to the democratically accountable branches of government - the executive and the legislature. After reviewing the theoretical and practical arguments for and against judicial restraint, the author states his own conclusions. These are that, especially where there is a constitutional charter of rights and particularly in common law countries, judges have an inescapable function in developing the law. Their decisions necessarily advance their view of human rights. In human rights cases, they may nowadays receive assistance from international statements of human rights and the jurisprudence developing around such statements. The author appeals for an international approach but acknowledges that this will be difficult for lawyers who are traditionally jurisdiction bound. But he warns that there are limits to the "activism" of the judiciary in controversial human rights cases. Judges themselves do well to recognise these limits both for their legitimacy and their effectiveness. An important modern challenge to the judiciary is that of resolving this dilemma between the pressures for restraint and the urgency of action.

> "Modern Anglo-American constitutional theory is preoccupied with one central problem. The problem consists in devising means for the protection and enhancement of individual human rights in a manner consistent with the democratic basis of our institutions" T R S Allen, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 444 CLJ 111.

A VIVID INTRODUCTION TO THE LIMITS OF JUDICIAL POWER

I recently received a vivid demonstration of the limits upon the powers of the judiciary. It happened in, of all countries, the United States of America. I was on my way to a conference, this time in Calgary, Canada. I had a close plane connection at Los Angeles International Airport. The immigration queues were long. I would surely miss my plane,

if I waited my turn. I therefore approached an officer with my official passport and asked whether I could secure priority. Eventually I was taken to the head of the queue. But the officer at the barrier was unimpressed. "This is not a diplomatic passport", he intoned. Meekly I pleaded, with an advocate's irrelevant flourish,: "In my country, judges are generally regarded as quite as important as diplomats". This official in the administration of the United States then made a telling comment: "Well Robert Bork thought he was important. But we showed him a thing or two". Just the same, he let me through the barrier. I caught my plane.

As I winged towards Calgary, I reflected on this comment about Judge Bork's unsuccessful bid to receive Congressional consent to his nomination to the Supreme Court of the United States.

The court to which he had been proposed has been described as the "world's first human rights tribunal".[1] The judge who had so angered the majority of the Senate (and his fellow citizen at LAX) did so ostensibly in the name of a theory of judicial restraint and in defence of the sovereign will of the people, expressed through the elected arms of government both n the executive and legislature.[2] Bork's views were generally propounded not in popular magazines such as one sees at airports but in heavy books, obscure law reviews and more lately, court judgments. Nor was Bork a lone maverick with eccentric opinions. Amongst the supporters of his general approach might be listed none other than the present Chief Justice of the United States (Rehnquist CJ). In the end, Bork's rejection by Congress appears to have arisen in part from perceived defects of his personal style and presentation; in part, from a politicisation of issues inevitable as a Presidential campaign approached in the United States; and in part, from the fear of the liberals and so-called "Middle America", that Bork's views, on what may broadly be called human rights issues were unacceptably different from the mainstream.

Because of the crucial role repeatedly asserted by the Supreme Court of the United States in determining the agenda of human rights in that country, the Supreme Court and its composition, are now legitimately the focus of a great deal of political attention. Impeachment apart, the confirmation process is the one chance which the democratic legislature has to influence the composition of the court, with such important functions in striking the human rights "balance" of the United States. Once through the barrier, the judge may have 20, 30 or more years in which to stamp upon 200 million people his or her viewpoint about the meaning of the Constitution, the limits of government power and the content of the human rights of people in the United States.

It is because that court has such an important function in giving content to the human rights guarantee contained in the United States constitution, that a great deal of attention is paid (more so of late) to the judicial confirmation process. In most of the countries of the Commonwealth, there is no such opportunity for prior democratic attention. Judicial appointments are typically the province of the Executive Government. Judicial independence is usually guaranteed by law and by tradition. Unfortunately, such guarantees are not always respected as a number of reports of judicial removals demonstrate.[3]

To write of the "role" of the judge in "advancing" human rights, presupposes that a judge has such a role. It suggests that it is a role in which he or she should be active and vigorous. It may be that one should conclude that such is the case. Certainly, it has been so asserted in numerous recent considerations of the topic particularly in developing countries, of the common law. Thus in a workshop on the theme "The Role of the Judiciary in Plural Societies" held in Kenya and organised by the International Centre for Ethnic Studies of Sri Lanka and the Public Law Institute of Kenya, the following conclusion was reported:[4]

> "An innovative approach to legal training is required to effectively evolve devices of judicial activism which are relevant in African and Asian societies. Legal training in most of our societies is generally based on the study of statutes, precedents, and legal concepts which are often not relevant to our social context. Traditional legal training makes lawyers and judges extremely uncomfortable with doctrines and concepts which are "non-legal" in origin. However, other disciplines especially the social sciences, may provide the judiciary with data and concepts which are relevant to the actual social reality. Concepts such as "pluralism" attempt to provide the judiciary with legal-political tools for the sensitive implementation of existing law and for the creative development of new and more relevant judicial doctrine."

The report concluded:

> "Judicial activism, far from being a threat to national security or the development of a nation-state, is imperative for the attainment of such objectives. A principal constraint to the principle of judicial activism is the lack of co-ordination in the responsibilities of the judiciary in aiding the attainment of the goals of national security and societal development".

There are many points in these citations which would catch the eyes of lawyers and judges in developed (and doubtless some developing) countries. The notion of such an active role on the part of judges, particularly in the field of "national security", would strike such readers as novel, if not shocking. Their concept of the judicial function would be more passive, reactive, restrained and limited.

This response requires it to be said at the outset, that care must be taken in suggesting universal approaches to the discharge of judicial functions, even on human rights questions. By definition, universal human rights are international. They attach to the human person because of that humanness. Lord Scarman recently observed that many of the civil and political rights, at least as stated in recent international instruments, provide no fundamental surprises or shocks for lawyers brought up in the traditions of the common law. Most independence constitutions of the English speaking world (at least) have been profoundly influenced by the Bill of Rights of 1688 and by the human rights guarantees in the amendments to the United States constitution. Lord Scarman, with just the faintest touch of Anglocentrism, reminds us that the draftsmen of the United States Charter:

"...were in fact English lawyers, brought up in the Middle Temple and other Inns, making sure that for the protection of individuals and the States, the individual States, the English Common Law, with the powers of the Monarch removed, should become the charter for basic human rights. Now, the American Bill of Rights is a very Common Law Document. Strangely enough the European Convention of Human Rights, borrows an enormous amount from the American Bill of Rights. Indeed, we know as a matter of history that much of its drafting was done by two very distinguished English lawyers, one of whom was later a Lord Chancellor. Therefore, it really is a chimera to think that the Bill of Rights is something so vague, and so uncertain that it will mystify British judges. It is no more uncertain than the common law, and indeed I would say it is very much more precise....".[5]

Nevertheless, the extract from the Kenya workshop quoted above demonstrates why it may be inappropriate to draw universal conclusions about the "role" of the judiciary in advancing human rights. The conventions and history of the judiciary in different countries will inevitably demonstrate certain differences. The perceived needs for "activism" will also inevitably, vary in different countries. Particularly in countries upon which has been grafted a foreign legal system, expressing ideas of justice in a foreign language and using procedures which are necessarily different from local custom, the need to adapt the law may be more urgent than in countries the societies of which are more similar, and whose language is the same, as that in which the law first developed. Furthermore, in many developing countries the priorities of economic and social reform will usually be desperately urgent. Indeed, it is this consideration which is typically used to justify derogations from universal human rights and from adherence to the rule of law. Judges will frequently be among the very few highly educated citizens available for leadership in developing countries. This consideration may justify imposing upon them different duties than would be acceptable in developed countries. Certainly, they will be subject to different pressures.

The very economic plight of a developing country will tend to pull the sensitive judge in the directions of reform and activism. On the one hand, he or she will see the deprivation of human rights and be appalled by them. On the other hand, the stark reality of the economic costs of providing and enforcing ideal standards of human rights may cause restraint, lest such orders fully implemented, might be beyond the economic power, even of a government obedient to court rulings. There are reflections of these competing pressures in the recent decision of the Supreme Court of India such as Tellis & Ors v Bombay Municipal Corporation & Ors.[6] That was a case where the petitioners were pavement and slum dwellers in Bombay, some of whom were forcibly evicted by the corporation. They claimed (as they had not below) that they had been deprived of their fundamental right to life under Article 21 of the Constitution of India. The Supreme Court held that the right to life conferred by that Article did indeed extend to protect the right to livelihood. Normally, it was held the court would have directed the corporation first to permit the dwellers to show why they should not be removed. However, as they had not put that case in the court below, such relief would not be granted in the Supreme Court. Nevertheless, the direction was made that to minimise hardship, no further evictions should be made until the end of the then current monsoon season.[7] A sensible practical compromise, you might think.

The report from the Kenya conference (above) appears to indicate amongst the unspecified participants, a certain impatience with the caution and restraint of lawyers and judges who too often abstain from active implementation of unspecified goals of national security and social advancement. So much may also be hinted in the notion that judges have a role in advancing human rights. I therefore want to begin by recalling some of the reasons for this irritating habit of judicial restraint. It will be useful to catalogue these explanations in order to judge whether, in current world circumstances, they still apply to the judicial role.

REASONS FOR JUDICIAL RESTRAINT - THE THEORY

In listing the reasons for restraint on the part of judges in the active enforcement of human rights - particularly in the implementation of international norms - I leave aside the municipal constitutional and other laws of our several countries. The use that may properly be made by judges of these norms will necessarily vary from one jurisdiction to another according to the terms of local law. Instead, I wish to concentrate on the reasons that have typically been given for restraint and "non-activism". They are well known. But they have to be considered in any new thrust which calls upon judges to assume a more positive and activist function - whether in the defence of human rights, the advancement of national goals, the protection of national security or otherwise. The arguments are usually advanced both at a theoretical and at a practical level.

The theoretical arguments relate principally to the conception that is held of the judicial function. Naturally, it will vary from one jurisdiction to another in accordance with the history, constitution and societal needs of each place. Most of our countries have inherited the conception of the judge from England. And in that country - more reasons of history than legal theory - that function was a powerful, but a subordinate one:

> "Let judges .... remember, that Solomon's throne was supported by lions on both sides. Let them be lions, but yet lions under the throne: being circumspect they do not check or oppose any points of sovereignty."

This statement of cautionary advice by Francis Bacon was written long ago. It was offered even before the notion of parliamentary sovereignty reached its zenith with the British Empire, in the late 19th century. The doctrine of parliamentary sovereignty is no longer accepted as a universal truth in all countries. Particularly in federations, the basic law is generally provided by the constitution which apportions power. Historically, that constitution may have been derived (as Australia's was) from a former colonial power. It may be derived from a local home-grown constitutional assembly, entirely autochtonous. It may or may not be strictly observed in practice at all times. But whatever the history and formality, the legitimacy of the constitution is normally traced nowadays to the will of the people who live under it.

It is because of deference to the will of the whole people, encapsulated by legal theory in a written constitution, that the judges in most countries will not usually assert that they possess powers which do not derive ultimately, from the "will" which the "people" have expressed. In one sense, this doctrine of derivative judicial powers is inconsistent

with the assertion of judicial review which the United States Supreme Court made so early in its life in Marbury v Madison.[9] That decision has since been followed in most countries with written constitutions. However, judicial review can be justified as a necessary implication derived from the constitution in order to provide a practical means of giving authoritative decisions to resolve conflicts of power between the various arms of government. Less readily justifiable will be assertions of judicial power which were clearly not contemplated in the written constitution and indeed may have been expressly denied when that constitution was first written. It is when judges assert a legal duty to observe human rights which cannot be traced satisfactorily to a constitution or other enacted law, that they invite criticism. In such cases they are open to criticism as "self willed" and "offenders against government under law".[10] They are placing themselves above the law even though, as President Nixon discovered, our theory teaches that no one is in that position, be he "ever so high".[11]

The public's concept of courts is that they are unbiased and neutral, applying not making the law. This is one of the points made by Robert Bork. He was critical of the obfuscation by judges in the United States of the sources of their power. All too often he asserted, the judges dressed their human rights decisions up in the language of the purportedly neutral application of pre-existing law; when what they were in fact doing was candidly making the law - new law:

> "One may doubt that there are 'fundamental presuppositions of our society' that are not already located in the constitution but must be placed there by the Court. The presuppositions are likely, in practice, to turn out to be the highly debatable political positions of the intellectual classes. What kind of 'fundamental presuppositions of our society' is it that cannot command a legislature majority?".[12]

The defenders of judicial restraint, including in the field of human rights, constantly remind any judge who may have forgotten that he or she lacks the legitimacy to deal with the broadest issues of public policy. That function is enjoyed only by the elected branches of government. It is because judges are usually unelected - even in the United States where Federal judges at least, must submit only to a democratic legislature for confirmation - that they are denied the legitimacy of the great sweep of law making. Even in the highest courts (according to the proponents of restraint) they remain lions under the throne[13] according to this view. If judges are to observe their proper and limited constitutional and legal function, whilst at the same time retaining their individual integrity, they must be able to trace each and every development of the law to a democratically sustained source of legitimacy. It may most readily be conferred by the express language of a constitutional bill of rights and by the function of judicial review.[14] But that language and function, in the view of the restrainers, does not authorise judges to indulge their personal whims in political theory, to treat the constitution itself as a scrap of paper and to ignore the decisions of their predecessors.[15] When they do so, they will be criticised as "self appointed scholastic mandarins" laying down the law without any apparent legitimate will of the people to sustain the norms they establish.[16]

Critics of the Warren Court in the United States never ceased to remind the liberal proponents of the decisions of that Court of the words of the great democrat Jefferson:

> "Our peculiar security is the possession of a written Constitution. Let us not make it blank paper by construction."[17]

There were warnings to like affect both before and after Jefferson's. George Washington in his Farewell Address declared:

> "If in the opinion of the People the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the constitution designates. But let there be no change by ursurpation for though this, in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."[18]

As to later warnings, it will suffice to cite Robert H Jackson, of the Supreme Court of the United States:

> "The rule of law is in unsafe hands when courts cease to function as courts and become organs for the control of policy."[19]

There are many other reasons for restraint from activism by judges which are catalogued by the proponents of restraint. They include the fact that judges who are "active" may be "active" in the right direction. But they may equally be "active" in the "wrong direction" - and difficult to remove or correct, precisely because they are judges. Lord McCluskey, in his recent Reith Lectures, reminded his listeners - in an eloquent appeal against a Bill of Rights for the United Kingdom - that the "broad, unqualified statements of rights" in the United States had sometimes resulted in decisions which today, are seen as wrong and even oppressive:

> "[They took] a narrow, legalistic laissez-faire perspective on freedom so as to strike down as unconstitutional legislation designed to stop the exploitation of workers, women, children or immigrants. They legalised slavery and when it was abolished they legalised racial segregation. They repeatedly held that women were not entitled to equality with men. They approved the unconstitutional removal by the Executive of the constitutional rights of Americans of Japanese origin after the bombing of Pearl Harbour."[20]

Depending on the composition of courts and one's own opinion, the judges can go terribly wrong in "advancing" human rights. If the legislature or the Executive Government err, the people, in democracies at least, have the possibility in the long run of removing their oppressors and reinstating their rights. The sense of frustration about the overly activist court, insusceptible to ready change may in the ultimate, cause - and even justify - unrest and the very civic disorder which it has traditionally been a function of the judiciary to avoid and replace.[21]

REASONS FOR RESTRAINT - PRACTICAL

To these reasons for restraint which derive from the traditional function and legitimacy of the judiciary can be added numerous practical arguments advanced against activism on the part of a judge in advancing human rights beyond the strict and clear warrant of an applicable legal text.

Judges tend to come from a group in the community which is unrepresentative - compromising as they still do mainly middle class, middle aged, males.[22] Even if they can find legitimacy for activism in the broad language of a constitutional grant of rights, it must sometimes be doubtful even in the case of the boldest of judges, that he or she can represent, or even conceive, in his or her own person the needs and wishes of a great community whose rights will be affected by a given decision.

Many, if not most, contentious issues about human rights tend to be emotive. Whether they relate to rights to abortion, rights to desegregation of schools, rights to free speech in conflict with protection from race hatred or the rights of pavement dwellers who are in the path of a modernizing freeway - they are the kinds of issues which agitate great emotions. Sometimes those emotions surface in the court itself. They may produce strongly worded dissenting judgments.[23] But whether reflected in the court or not, these cases typically concern issues which already polarise society. In these circumstances it is usual in democracies at least to consult the community in resolving them. Because this is so, some authors who envisage a greater activism by the judges, contend that judges too should endeavour under their modern remit, to consult a wider community.[24] Yet it is the very inability of judges to do this - confined as they typically are by the primary duty to resolve the case before them - that may put a restraint on the boldest decisions of policy. The judge does not know where that bold decision may lead or what its consequences may be.[25] These limitations have lead some of the advocates of restraint, including in the judiciary concerned about injustice, to urge the alternative model of law reform by agencies which can consult the experts and the people and stimulate the democratic law makers into reformatory action.[26]

Linked with this last consideration is what might be called the economics of human rights. It is uncreasingly recognised that many human rights decisions have significant economic consequences. This was called to attention by the Supreme Court of the United States in a decision concerned with the requirements of "due process" under the United States constitution.[27] In Australian courts, specific evidence has been called, e.g. concerning the costs which would be involved in giving prisoners an oral hearing when it was asserted that the requirements of natural justice (in Australia not very different from "due process") required that such an oral hearing be given.[28]

One hurdle which the "activists" have to overcome, in urging the domestic application of international norms, is latent xenophobia, never far from the surface in most countries. For many in the developed world, the United Nations and the other agencies which have chartered many of the international statements of human rights are seen as collections of countries, most of which have autocratic and authoritarian regimes indifferent to human rights, laying down norms which they will not observe

themselves but which they readily impose upon others in vaguely worded instruments.[29] It is instructive, when reviewing the latest publication of the compliance of countries in the Asian and Pacific regions with international human rights instruments, to see that some of those countries with the best record for ratification are not necessarily those which would be described as havens for human rights in an oppressed world. See the Schedule below.[30]

The faults of others is not a reason for ourselves not seeking to do better. But this is a major propaganda obstacle to the domestic implementation of international human rights norms, including by the judiciary. Many lawyers are sceptical about such instruments because of their notions about the hypocrisy and double standards of some of their protagonists.

A further obstacle, which relates to the very controversy of human rights issues, that is where broad decisions of policy are required, vigorous activism may be positively desirable; whereas for the judiciary activism has traditionally been performed by stealth and where acknowledged, recognised with embarrassment or even apology, precisely because of the community perception that judges apply and do not make the law.

Finally, there is the fact that many of the new problems for human rights involve knowledge of matters that may not normally be in the possession of the judges. The major human rights debates of the future will concern the impact of technology upon the lives of people.[31] Because of the economic, social and individual ramifications of human rights decisions on matters such as bioethics, informatics, nuclear fission, AIDS and so on, courts may not necessarily be the best places in which to make wide ranging decisions of lasting significance.[32] There are limits to judicial competence. Saying this involves no disrespect to the judiciary. It simply recognises the obvious fact which derives from the background and experience typically found amongst judges.[33] There are some who would seek to correct gaps in judicial knowledge by training in human rights norms. But every time this idea is suggested, at least in Australia and the United Kingdom, the spectre of executive encroachment upon the intellectual independence of the judiciary is raised.[34]

To sum up, the opponents of judicial "activism" in the field of human rights rest their case in part upon the underpinnings of legitimacy which sustain the rule of law and the respect for judge-made decisions. In part, they rely upon the dangers involved if judges are drawn too obviously into political decisions of broad application.[35] The underpinning of legitimacy may be sufficiently answered, if the people so provide, by the provision of constitutional norms - such as exist in most countries although not so far, (to any significant degree) in the United Kingdom, Australia or New Zealand. But even that underpinning will not remove the concept which the people generally have of judges and the dangers which exist if judges stray too far from that concept.

In the United States, in the context of human rights decisions, the function of the judges in resolving this dilemma was described by Alexander Bickel in terms that:

> "The court should declare as law only such principles as will - in time, but in a rather immediate foreseeable future - gain general assent."[36]

In other words, it is essential that the courts' expositions of human rights entitlements should not at any given time stray too far from what will be accepted in the community. That way danger lies.

In retrospect, it appears that Robert Bork's invocation of what was felt by some to be an extreme of restraint - and the perceived danger of the revival of constitutional battles settled long ago - led to his unacceptability, as much to the Congress as to the American citizen on the street. In other words, judges named as such, trade on the political capital that is built up from respect for the authority of the courts which simply apply the law. That respect depends in part, upon the popular acceptance of a limited function of the judges. It reserves them to a fundamentally passive role. There are practical considerations which reinforce these reasons of principle. In some developing countries, they can on occasion, in times of emergency or military rule, involve the very conception of the self preservation of the judiciary - given the vital function which judges can play, even in an undemocratic regime, in the amelioration of tyranny.[37]

REASON FOR ACTIVISM OR DYNAMISM - THE THEORY

The debate about the function of the judiciary - and whether it should be "passive" or "activist" and not "dynamic" is not, of course, new. I have already cited Bacon. But even in the context of the United States, where it was to present itself in the Supreme Court soon after the Revolution, the debate was reflected in the Federalist Papers. Hamilton, at least, envisaged a role for the courts as "bulwarks of a limited constitution against legislative encroachments."[38] Furthermore, he envisaged that the courts would "construe the laws according to the spirit of the constitution."[39] So the debate is not new. For the proponents of judicial activism, the focus of the debate is not to be upon whether the judges may make laws and decide important issues of policy. Rather it is upon where they should do so, when and how far they should go.

In Commonwealth countries, the citation usually invoked in support of recognising rather belatedly, the creative function of the judiciary is that of Lord Reid. He declared that the notion that a judge's role is simply to declare the law is a "fairy tale" which we did not believe any more.[40] In the United States the same thought was earlier put in strikingly similar terms, by James Kilpatrick:

> "Somewhere in this broad land, perhaps one or two innocents still truly believe in Santa Claus. And somewhere one or two simpletons still cling to the vacuous notion that 'ours is a government of laws, not of men'. But the image of the Supreme Court is a body of nine gods roosting on a marble Olympus, breathing the rarefied air of pure law and pure justice, is an image most Americans abandoned in their cradles."[41]

In countries such as the United States, India and other lands with a written constitution, the democratic legitimacy for judicial decisions of great significance for policy, economics, national security and the like can be attributed, with varying degrees of conviction and persuasiveness, to the authority of the written constitution. In this way, it can generally be traced back to the authority of the people. They either made, or have acquiesced in, that written body of fundamental law. But even in such societies, the Grundnorm of acceptance of the authority of that constitution remains, virtually a common law principle. That is that the constitution will be obeyed and enforced by the courts. It is this fact which has lately led to new assertions of a judicial function, even in countries without a written Bill of Rights, to declare that the common law preserves and respects some rights. There may be no difficulty in so holding where say, a "right" to speedy trial of criminal charges is asserted.[42] More controversial is the suggestion by Sir Robin Cooke of New Zealand that there are some fundamental rights which lie so deep that even the democratic Parliament cannot disturb them for they repose in the people.[43] That suggestion recently enjoyed little success in my own court for the reasons there given.[44] But three members of the Court at least, reserved the broader question of what would happen in a constitutional emergency where only the courts stood between the people and gross oppression by the legislature.

The realists of the "activist" or "dynamic" school, point to the curiously old fashioned ring nowadays of a Privy Council assertion in 1903 that policy is of no concern to the courts.[45] Today, even the most "conservative" judges are rarely so naive. Furthermore, in the function of courts in giving meaning to a written constitution, to legislation on human rights expressed in general terms or even to old precedents inherited from judges of an earlier time, there is often plenty of room for judicial choice. In that opportunity for choice lies the scope for drawing upon each judge's own notions of the contents and requirements of human rights. In doing so, the judge should normally seek to ensure compliance by the court with the international obligations of the jurisdiction in which he or she operates.[46] An increasing number of judges in all countries are therefore looking to international legal developments and drawing upon them in the course of developing the solutions which they offer in the particular cases that come before them. In this way international legal instruments are not coercive of municipal law. Nor are they given local operation where municipal law does not itself justify their direct application. They are simply used as useful background material and as indications of the developments of international customary law with which a municipal judge may properly seek to bring domestic law into harmony.[47] A decision may have greater legitimacy if it accords with international norms that have been accepted by scholars and then by governments of many countries of the world community than if they are simply derived from the experience and predilections of a particular judge.

In the field of human rights protection at least, the point is often made that courts have an important function as a teacher of the community. Their decisions not only resolve the conflicts of the parties before them. They also quite frequently expound principles of general application in circumstances which are analogous to those considered in the instant case. It is in this way that courts - and particularly final courts - in countries where information is freely exchanged, take a part in the continuous process of influencing opinion. Conversely, courts

themselves are inescapably affected by community opinion on issues as that opinion is perceived by the judges. Eugene Rostow wrote in the context of the United States Supreme Court:

> "The process of forming opinion in the United States is a continuous one with many participants - Congress, the President, the press, political parties, scholars, pressure groups and so on. The discussion of problems and the declaration of broad principles by the Court is a vital element in the community experience through which American policy is made. The Supreme Court is, amongst other things, an educational body and the justices are inevitably teachers in a vital national seminar."[48]

To the same effect Bickel once observed:

> "Virtually all important decisions in the Supreme Court are the beginnings of a conversation between the Court and the people and their representatives. They are never, at the start, conversations between equals. The Court has an edge, because it initiates things with some immediate action, even if limited. But conversations they are, and to say that the Supreme Court lays down the law of the land is to state the ultimate result, following upon a complex series of events, in some cases and in others it is a form of speech only. The effectiveness of the judgment universalised depends on consent and administration."[49]

This perception of the function of the courts in human rights questions is one which I find persuasive. It is not to say that courts always give the "right" answers on such questions. It is not even to concede that there are necessarily "right" answers to be given to some questions involving human rights. Nor does the "rightness" of the answer offered by the court necessarily endure for all time. What would have been "right" for limitations on free speech of say, a Nazi supporter in 1946 may not necessarily, be right years later when Nazism may have become largely irrelevant to immediate community concerns. There is no getting away from the fact that, in important decisions on human rights, the courts have frequently cut the Gordian knot where the legislature and the executive have lamentably failed to do so. It is in this sense that, by its dialogue with the people and the other branches of government, the courts become a kind of "political conscience" of the community which they serve.

Many and varied are the solutions which the Supreme Court of the United States has offered on human rights questions.

They include:

- the limits of telephone tapping;[50]
- whether the mentally subnormal could be compulsorily sterilised under State law;[51]
- whether minimum wages laws could be enacted;[52]

- whether capital punishment was permitted by the Constitution;[53]

- whether married couples could lawfully use contraceptive devices;[54]

- whether the President was subject to the criminal law;[55]

- whether the Constitution prohibits laws restricting access to abortion and if not, with what exceptions;[56]
- how electoral boundaries should be drawn;[57]

- whether school children could be required by law to salute the United States flag;[58]

- whether the races could be segregated on trains[59] and in schools;[60]

- whether women could be barred from practising law;[61] and

- the limits to police power in the investigation of crime.[62]

Even Lord McCluskey, who does not much like the notion of a written statement of rights or activist judges to interpret them, concedes:

> "Without doubt the exercise by the Supreme Court [of the United States] of its great imperium, has been, on the whole, a force for good."

His basic misgiving is that those who can be "active" and "inventive" in the assertion of rights can get it wrong, just as readily as they get it "right". Judge Douglas of the Supreme Court of the United States, himself no slouch in the application of the Bill of Rights, captured this idea in Poe v Ullman:[64]

> "For years the Court struck down social legislation when a particular law did not fit the notions of a majority of the Justices as to legislation appropriate for a free enterprise system."

Accordingly, the genius of a legal system which reposes such enormous powers in judges tends only to be acknowledged when, as Bickel put it, the court gets it right. Then at least, the court is playing its part as an element in a complex and interrelated system of governmental institutions with functions to inch society gradually towards conditions which the majority of the people accept as just and desirable.[65]

PRACTICAL REASONS FOR JUDICIAL ACTIVISM

In addition to these reasons, a number of practical arguments have been put forward to justify an "activist" role on the part of the judiciary in the protection of human rights.

The first is the recognition of the universal failure of legislators in democracies to attend to many urgent tasks of law reform, relevant to the protection of individual liberties.[66] In this context, those who call for "strict construction" of laws providing for human rights must often be taken to be actually calling for inattention to rights, despite the fact that those who have studied and thought about them, consider such rights to be in need of urgent practical protection. In Commonwealth countries, including Australia the law reform agency model, advising the legislature, has been only partly successful. This is not so much because of the rejection of law reform reports; but simply because of the legislative and administrative log jam which has prevented the prompt attention to many of them. In such circumstances, judges considering what to do in a particular case before the court, may often have little confidence that restraint on their part will be rewarded with a finely tuned, sensitive and energetic protection of rights by the vigilant executive and legislative branches of government.

This sobering realisation may act as a stimulus to some judicial "activism" - particularly if the injustice caused by judicial restraint is so glaring and obvious that action and innovation are judged to be urgent and likely to accord with the community conscience.[67] This is not the whole justification. Rights matter most when they concern unpopular minorities or "marginal persons",[68] e.g. prisoners, mental patients, drug victims, AIDS patients, criminal suspects etc. In the interrelationship of the arms of government, the democratic institutions may ignore or even penalise, these minorities.[69] The modern liberal democracy tempers the tyranny of transient majorities by protecting the correlatively varying minorities. And the most potent instrument of protection is quite frequently the judiciary.

A further practical reason for a degree of activism is that some things are simply and plainly unacceptable in a civilised and democratic society. This is where international statements of human rights may be specially useful. If the representatives of many lands can agree, in terms that are sufficiently clear and applicable, that this or that conduct is forbidden, their definition of the proscription may encourage the municipal judge to confirm his or her opinion, to the same end.

The harsh implication of a narrow restraint on the part of the judiciary in the definition and enforcement of human rights is a recognition of the fact that great wrongs will otherwise be sanctioned by the law. In the United States, for example, there would probably have been no means of ridding that country of the blight of segregation, save for the courts.[70] The activist judiciary became an essential component in the processes of institutional activity which achieved that unarguably desirable end.

Similarly, Donald Woods, a self exiled South African journalist, has written of apartheid:

> "The obscene laws which constitute apartheid are not crazed edicts issued by dictators, or the whims of a megalomaniac monster, or the one-man decisions of a fanatical idealogue. They are the result of polite caucus discussions by hundreds of delegates in sober suits, after full debate in party congresses. They are passed after three solemn readings in Parliament which opens every day's proceeding

with a prayer to Jesus Christ. There is a special horror in that fact."[71]

This vision of the judicial function, not as a final act of automatons dispensing edicts based upon rules which are clear but as components of interdependent interacting institutions of government may offend the purist, whose eyes are fixed resolutely on the separation of constitutional powers. But almost certainly, it is the way the social scientist would portray the judicial function. It envisages that there will rarely be a final answer to questions of human rights. Discourse in courts will invariably be provisional in character. The lack of electoral accountability and the limitations in the materials and consultations available to the judiciary may be reasons for prudent caution by the judges in some cases. The preservation and if possible, enhancement of judicial authority upon which respect for the order of the judges depends may also be a reason, on occasion, for caution. But wrongs will sometimes be so glaring as to require redress and correction if that be possible. It is then that judges must act to defend human rights. They must be satisfied that they have a basis in law for doing so. Because the law of human rights is often expressed (whether in constitutions, statutes or court decisions) in language of great generality, there will frequently be opportunities for judicial choice. It is then that the judge must decide how far he or she will go.

In striking new ground, it is then a comfort to find authority in the developing international customary law of human rights. But it is a wise caution, in every country, to keep Bickel's warning in mind. The judiciary should not expend in unacceptable, futile or failed endeavours its capital of public and political acceptability. This acceptability depends, in part at least, upon the community's persisting adherence to the automaton image of the judicial role, individual integrity and respect for the rule of law. That image necessarily put a brake on the boldest strokes of judicial activism on human rights.

CONCLUSIONS

The purpose of this paper has been to provide a background to a discussion of the adaptation in the judicial method to the use of the developing norms of international law concerning human rights. In the age of rapid international travel, nuclear fission, satellites and the communication revolution, as well as the biological challenges that confront all mankind, it behoves the judiciary to struggle for release from a too narrow and provincial conception of its role and duties. Cases do present themselves where judges can opt for an internationalist approach to the issues before them. They may for example involve such questions as the respect of the laws of other *fora* and the principles of *forum non conveniens*.[72] Attitudes to such questions may differ.[73] Our duty as lawyers is to make ourselves aware of the gradual evolution of international statements of human rights and the jurisprudence developing around them, even where domestic law does not bind us to apply them. They are becoming part of the law of the world we live in.

Although many members of the general public still cling to the "slot machine" notion of the judicial function, the judges at least, know better. Particularly in common law countries, judges have inescapable opportunities for choice, decision and judgment. Particularly is this so

where necessarily general statements of human rights must be applied. One source of guidance in the performance of the tasks of choice, decision and judgment is that body of law which is being developed by international agencies with authority and expertise in the field of human rights.

The first step on the path to the domestic application of such norms, where that would be appropriate, is knowledge of their existence and content. In Australia, the Human Rights and Equal Opportunity Commission proposes to take an initiative in 1988 to introduce judges and lawyers to the international jurisprudence of human rights obligations. In the burdensome development of domestic law, there will be many who will question the relevance of such additional instruction. But in the world after Hiroshima, all educated people have a responsibility to think and act as citizens of a wider world. There will, no doubt, be resistance from the hide bound provincialists. The law, by its duty to its own jurisdiction, tends to breed many of this conviction. It will take an act of will on the part of a generation of judges gradually to place domestic law into its international setting. But this will happen. It is happening already. Most vigorously, it is happening in those countries which have accepted the direct application to their citizens of international statements of human rights.[74] But even in other countries in our region, which have nothing equivalent to the European Convention on Human Rights, we can sometimes draw upon international human rights statements simply because of the leeways for choice afforded by the domestic law to its judges.[75] There are limits in doing this. It may sometimes be risky if the judge goes too far ahead of an apparent legal warrant. In such a case there may be difficulty in securing the acceptance of the instruction by the society receiving it.

The extent to which it will be appropriate and useful to look to international standards may vary from one country to another. In developing countries, where laws suitable to local circumstances are more urgently needed, there may be a readier inclination to look to such international norms. Sometimes, simply because there are more of them, the developing countries may have influenced the expression of, and priority given to, particular rights of greater relevance to them.

This said, it remains to the end, important for judges drawing on such norms, to remember their limited functions in a democratic society. Even armed with a constitutional statement of rights, an ambiguous statute or a precedent decision expressed in broad terms, the judge remains a "crippled law maker". This is so precisely because of the limitation that arises because of the lack of democratic accountability. In the context of the High Court of Australia, this dilemma was described recently in these terms:

> "The High Court is not an assembly of Wise Persons, free to soar on the wings of policy as it sees fit. Nor is it an assembly of legal automatons, releasing the law on the slot machine theory of jurisprudence. It hovers somewhere between these two extremes endeavouring not to stray so far from the latter that it endangers its legitimacy, nor to come so close to it that it endangers its credibility."[76]

The last words, which contain a cautionary encouragement but also a salutary warning, belong to Judge Learned Hand:

"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, they are false hopes. Liberty lies in the hearts of men and women; when it dies there is no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."[77].

SCHEDULE

Human Rights
International Instruments
Signatures, Ratifications, Accessions, etc.
September, 1985

States	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	States
Afghanistan	x	x		x	x	s	x	x	x	x	x	x								x	x		s	Afghanistan
Australia	x	x		x		x	x		x	x	x	x		x	x	x	x			x			Australia
Bangladesh	x	x		x		x	x																Bangladesh
Bhutan				s		s																	Bhutan
Burma				x		x			s	x	x		s							s			Burma
China				x	x	x	x					x		x	x								China
Democratic Kampuchea	s	s		x	x	s	x																Democratic Kampuchea
Democratic People's Republic of Korea	x	x				x	x																Democratic People's Republic of Korea
Fiji				x		x	x		x	x	x								x	x	x		Fiji
India	x	x		x	x	s	x	x	x	x	x	x	x				x		s	x			India
Indonesia	x	x		x		x	x													x			Indonesia
Iran	x	x		x		s	x		s				s	x	x					x			Iran
Japan	x	x		x		x	x		x	x	x	x	x	x	x		x		x	x			Japan
Kiribati																x	x						Kiribati
Lao People's Democratic Republic																							Lao People's Democratic Republic
Malaysia				x	x	x	x	x				x							x	x			Malaysia
Maldives																							Maldives
Mongolia	x	x		x	x	x	x	x			x	x								x			Mongolia
Nauru																							Nauru
Nepal																							Nepal
New Zealand	x	s		x		x	x	x	x	x	x	x		x	x				s	x	x		New Zealand
Pakistan	x	x		x		x	x		x	x	x	x								x			Pakistan
Papua New Guinea																							Papua New Guinea
Philippines	x	s		x		x	x	x			x	x	x	x	x		s			x	x		Philippines
Republic of Korea																							Republic of Korea
Samoa																							Samoa
Singapore																							Singapore
Solomon Islands																							Solomon Islands
Sri Lanka	x	x		x	x	x	x		x	x	x	x	x	x	x				x	x	s		Sri Lanka
Thailand																							Thailand
Tonga				x			x													x			Tonga
Tuvalu																							Tuvalu
Vanuatu																							Vanuatu
Vietnam	x	x		x	x	x	x	x	x	x	x	x	x	x	x	x	x			x	x		Vietnam

x Ratification, accession, notification of succession, acceptance or definitive signature

s Signature not yet followed by ratification.

a Declaration recognising the competence of the Human Rights Committee under article 41 of the International Covenant on Civil and Political Rights

b Declaration recognising the competence of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination

FOOTNOTES

* President, Court of Appeal, Supreme Court of New South Wales, Australia. Commissioner, International Commission of Jurists. Formerly Judge of the Federal Court of Australia and Chairman of the Law Reform Commission of Australia. The views stated are personal views.

1. P Seighart, "The Lawful Rights of Mankind", 1985, 29.

2. See e.g. R Bork, "The Legacy of Alexander M Bickel" 6 Yale L Rep 9 (1979).

3. See discussion S F Nariman, "The Judiciary Under Martial Law Regimes" (1984) 14 CIJL Bulletin 41. See also (1985) 16 CIJL Bulletin where the position in Bangladesh is discussed.

4. See "The Role of the Judiciary in Plural Societies" (1985) 16 CIJL Bulletin 45, 46.

5. Lord Scarman in discussion in J H McCluskey, "Law, Justice and Democracy", the Reith Lectures 1986, Sweet & Maxwell/BBC Books, 1987, 108 (hereafter "McCluskey").

6. [1987] LRC (Const) 351 (Chandrachud CJ).

7. ibid, 379, 382.

8. Francis Bacon, "Of Judicature" cited in McCluskey, 108.

9. 5 US 39 (1803).

10. Frankfurter J cited R Berger, "Government by Judiciary", Harvard UP, Cambridge, Mass. 1977, 258 (hereafter "Berger").

11. As Lord Denning stated in Gouriet v Union of Post Office Workers & Ors [1977] 1 QB 729, 761-2 "To every subject of this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: 'Be you ever so high, the law is above you'".

12. R Bork, supra n2.

13. A F Bayefsky, "The Judicial Function under the Canadian Charter of Rights and Freedoms" (1987) 32 McGill LJ 791, 826-7 (hereafter "Bayefsky").

14. Bayefsky, 794; Berger, 285.

15. Berger, 286.

16. ibid, 322.

17. T Jefferson, "Writings of Thomas Jefferson" 247 (Ford ed, 1892) cited Berger, 291.

18. G. Washington, Farewell address, cited Berger 299.

19. Jackson J, cited Berger, 298.

20. McCluskey, 50.

21. R Bork, "Neutral Principles and Some First Amendment Problems" 47 Ind LJ1, 1 (1971).

22. Bayefsky, 827.

23. See e.g. the recent dissent of Brennan J in the school magazine censorship case of Hazelwood School District et al v Cathy Kuhlmeier et al decided 13 January 1988 and reported in 98 L Ed 2d 592; 108 S Ct 562; 56 USLW 4079.

24. Bayefsky, 394.

25. Cf Mason J in State Government Insurance Commission v Trigwell (1979) 142 CLR 617, 633 ["....But there are very powerful reasons why the court should be reluctant to engage in such an exercise [of radical change]. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility. They are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor does the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide ranging enquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature"].

26. ibid.

27. Mathews v Eldridge, 424 US 319 (1976). See also J L Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication" 44 Uni Chicago L Rev 28 (1976).

28. Johns v Release on Licence Board & Ors (1987) 9 NSWLR 103.

29. Cf M J Perry, "The Constitution, The Courts and Human Rights - An Enquiry in the Legitimacy of Constitutional Policymaking by the Judiciary" Yale U P New Haven, Conn, 1982, 151, (hereafter "Perry").

30. Lawasia, Human Rights Bulletin, Vol 5 No 2, 1986.

31. M D Kirby, Human Rights - The Challenge of the New Technology (1986) 60 ALJ 170.

32. McCluskey, 38.

33. Perry, 151.

34. P Devlin, The Judge, OUP, 1979, 82. Cf Lord Scarman in McCluskey, 67.

35. Mcluskey, 54.

36. A Bickel, cited Perry, 124. Emphasis added.

37. G J Alexander, "The illusory Protection of Human Rights by National Courts during Periods of Emergency" (1984) 5 HRLJ 1, 49, (hereafter "Alexander"). The author there discusses the position of the emergency in India under Prime Minister Indira Gandhi. He cites with apparent approval U Baxi, The Indian Supreme Court and Politics, 1980 37-41.

38. Federalist Papers, Number 78. See Berger, 293.

39. Federalist Papers, Number 81.

40. Lord Reid, "The Judge as Lawmaker", (1972) 12 Journal of Public Teachers of Law, 22. See discussion M D Kirby, The Judges, Boyer Lectures, 1983, 60 ff.

41. J Kirkpatrick, cited Perry, 141.

42. See e.g. Herron v McGregor & Ors (1985) 6 NSWLR 246 (NSWCA).

43. See Cooke J in L v M [1979] 2 NSWLR 519; Brader v Ministry of Transport [1981] 1 NZLR 73; New Zealand Drivers' Association v New Zealand Road Carriers [1982] 1 NZLR 374, 390 and Fraser v State Services Commission [1984] 1 NZLR 116. See also J J Caldwell, "Judicial Sovereignty - A New View" [1984] NZLJ 357.

44. Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor (1986) 7 NSWLR 372 (NSWCA).

45. Cunningham v Toomey Homa [1903] AC 151, 155 ("The question which their Lordships have to determine is which of these two views is the right one, and, in determining that question, the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider".] See discussion, Bayefsky, 795.

46. See eg R v Secretary of State for the Home Department; ex parte Phansopkar [1987] 1 QB 606, 626 (HL). The reference was to the European Convention on Human Rights. See also R v Secretary of State for the Home Department & Anor; ex parte Bhajan Singh [1976] 1 QB 198.

47. See discussion Australia, Human Rights Commission, Human Rights and the Deportation of Convicted Aliens and Immigrants, AGPS, Canberra, 1983, 23 ff.

48. E. Rostow, "The Democratic Character of Judicial Review", 66 Harvard L Rev 193, 208 (1952).

49. A Bickel, "The Supreme Court and the Idea of Progress", 1970, 177. See also Perry, 113.

50. Katz v United States 398 US 347 (1967). The succeeding cases are catalogued in McCluskey, 35.

51. Buck v Bell, 274 US 200 (1927).

52. West Coast Hotel v Parrish 300 US 379 (1937).

53. Woodson v North Carolina 428 US 280 (1976).

54. Griswold v Connecticut 381 US 479 (1965). See also Eisenstadt v Baird 405 US 438 (1972).

55. United States v Nixon 418 US 683, (1974).

56. Roe v Wayde 410 US 113, (1973).

57. Baker v Carr 399 US 186 (1962). See also Reynolds v Sims 377 US 533 (1964).

58. West Virginia School Education Board v Barnett E 319 US 624 (1943) reversing Minersville School District v Gobitis 310 US 566 (1940). It was held to be in breach of the First Amendment guarantee.

59. Plessy v Ferguson 163 US 537 (1986).

60. Brown v Board of Education (1) 347 US 483 (1954).

61. Bradwell v Illinois 83 US 16 (1873).

62. Miranda v Arizona 384 US 436 (1966); Mapp v Chio 367 US 643 (1961).

63. McCluskey, 60.

64. (dissenting) 367 US 497, 511 (1961).

65. Cf Perry, 113-4.

66. Berger, 287.

67. Alexander, 49.

68. Perry, 149.

69. As for example the treatment of Japanese citizens in the United States and Canada during the Second World War. See e.g. E Rostow, "The Japanese - American Cases - A Disaster" 54 Yale LJ 489 (1945). Cf Berger, 331-2.

70. See Perry, 142.

71. D Woods, "The Indictment", 1978, cited Perry, 142.

72. Oceanic Sunlight Shipping Co Inc v Fay (1987) 8 NSWLR 242 (NSWCA). Cf Spiliada v Maritime Corporation v Cansulex Ltd [1987] AC 460.

73. The High Court of Australia has granted special leave to appeal. The decision is reserved. See comment (1987) 61 ALJ p 437.

74. See e.g. X v Sweden 4 EHRR 398, 410 (1981); X v United Kingdom (1981) 4 EHRR 188; East African Asians v United Kingdom (1973) 3 EHRR 76, 91; Her Majesty's Attorney-General v The Observer Ltd & Guardian Newspapers Ltd & Ors C/A (Eng) 10 February 1988; Waddington v Miah [1974] 1 WLR 692, HL; Blathwayt v Baron Cawley [1976] AC 397, HL; R v Lemon [1979] AC 617 HL; Science Research Council v Nasse [1980] AC 1028, HL; Attorney-General v British Broadcasting Corporation [1981] AC 303 HL; United Kingdom Association of Professional Engineers v Advisory, Conciliation and Arbitration Service [1981] AC 424; Gold Star Publications Ltd v DPP [1981] 1 WLR 732; Raymond v Honey [1983] AC 1 HL; Attorney-General v English [1983] AC 116 HL; Home Office v Harman [1983] AC 280, HL; Cheall v APEX [1983] 2 WLR 679 HL; and R v Barnet LBC [1983] 3 WLR 16 HL; R v Secretary of State for the Home Department, ex p Bhajan Singh [1976] QB 198, 207, CA; R v Secretary of State for the Home Department, ex p Phansopkar [1976] QB 606, 626 CA.

75. See the Australian cases cited in the Human Rights Commission Report, op cit n 47, pp 25 ff; Daemar v Industrial Commission of New South Wales & Ors CA 4 March 1988; S & M Motor Repairs Pty Ltd & Ors v Caltex Oil (Aust) Pty Ltd & Anor CA 11 March 1988.

76. M Coper, "Encounters with the Australian Constitution" CCH Aust, Sydney, 1987, 422.

77. Learned Hand J, in "Spirit of Liberty; Papers and Addresses of Learned Hand", 1953, cited McCluskey, 60. Note also Cardozo J's admonition in "The Nature of the Judicial Process" 141 (1921):-
"The judge, even when he is free, is still not wholly free. He is not a knight-errant, roaming at will in pursuant of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to "the primordial necessity of order in the social life". Wide enough, in all conscience, is the field of discretion that remains."

See also M H McHugh, "The Law-making function of the Judicial Process" (1988) 62 ALJ 15.

"THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS"

A paper prepared by
Mr Justice Muhammad Haleem,
Chief Justice of Pakistan

"THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS"

by

Mr Justice Muhammad Haleem,
Chief Justice of Pakistan

SYNOPSIS

The title of the paper on "Domestic Application of International Human Rights Norms" reflects the belief that the world has moved into an era in which greater conscious effort is being launched toward the promotion and protection of human rights on a global scale. This paper is meant to draw the attention of states constituting the comity of nations to undertake steps for effective national, regional and international measures to halt the deprivation of rights. The treatise has projected the role that domestic courts can play in the enforcement of international human rights norms.

The processes referred to above began in earnest with the adoption by the UN General Assembly of the "Universal Declaration of Human Rights", which provided the necessary impetus for the development of a global human rights movement. Since then, activities at the United Nations have included the drafting of a large number of conventions, covenants and treaties on human rights. Although nation-states have not been able to match their impressive record of codification and prescription with equally vigorous attempts at the application and enforcement of human rights norms, recent developments suggest that effective steps are essential in that sphere. The present paper attends to this universally felt need. It points to the new directions that are emerging to design an expanded role for domestic courts. It has been emphasised that domestic courts can play a meaningful role in the transnational development and diffusion of international human rights norms.

An effort has been made in this paper to refine human rights theory and concepts and to verify the various competing and contending human rights perspectives. The paper covers a number of relevant dimensions such as the significance of human rights, equation of human rights and the rule of law, internationalisation of human rights, the role of the UN Charter of Human Rights, the contributions of the UN Commission on Human Rights, the nature and scope of human rights treaties and conventions, a probe into the European, the African and the American systems, a look into the approaches to the implementation of human rights norms, an examination of human rights jus cogens, the relations between international human rights norms and domestic law, the domestic legislative protection of international human rights, the incorporation of international human rights norms in national constitutions, and finally and most importantly the direct application of the international law of human rights by domestic courts.

The thesis inherent in this paper points to three special features of international human rights norms: for instance, there is a recognition that individual citizens are now treated as subjects of international law; that nation-states are the primary guardians of international human rights;

and that the prime need of immediate significance at the international level is that the international community and its member states should concern themselves lawfully with human rights violations and control them by a process of the assimilation of verdicts given by the domestic courts in this field. Thus the paper sets the stage for further work that will aid in the actual protection and enforcement of human rights at the global level.

SIGNIFICANCE OF HUMAN RIGHTS

The quest for human rights and human dignity is a phenomenon of contemporary life of universal dimensions and immense significance. The concept of human rights is a concept of world order. It is a determination for so structuring the world that every individual's human worth is realized, and every individual's human dignity is protected.

Human rights are based on an international consensus. They include the right not to be subjected to torture, to cruel, inhuman or degrading treatment or punishment, or to arbitrary arrest, imprisonment or execution. Human rights also include the right not to have one's home invaded and the right to fair, prompt and public trial.

A state is considered to violate international law if it practices, encourages or condones:

(a) genocide,

(b) slavery or slave trade,

(c) the murder or causing the disappearance of individuals,

(d) torture or other cruel, inhuman or degrading treatment or punishment,

(e) prolonged arbitrary detention,

(f) systematic racial discrimination, or

(g) consistent patterns of gross violations of internationally recognized human rights

Human rights are of broad application. They apply not only to countries that have recognized these rights in their legal institutions, but to virtually all countries.

Human rights are not controversial in the sense that other political and economic issues are. These are recognized in the constitutions of many countries whose political principles are otherwise quite divergent.

Human rights express universal requirements of social justice. The international commitment to implement human rights is a commitment to encourage the development of just institutions in every society. These rights are inalienable in the sense that a person who has them cannot voluntarily and irrevocably divest himself of them by gift, sale or transfer to another person.

The history of mankind can be described as the history of the long struggle to assert and then to protect human rights. The concept has made a remarkably sudden entry into the international vocabulary. It has become a very live issue in the conduct of world affairs, and the world as a whole is now seized with the issue of human rights.

EQUATION OF HUMAN RIGHTS AND THE RULE OF LAW

Human rights can be enforced in settings where the rule of law prevails. The American Conference on "World Peace Through The Rule of Law", held at San Jose, Costa Rica in June 1961 agreed that the effective protection of the fundamental human rights of the individual is the indispensable basis for achievement of a sound legal order based on peace and justice. Similar conferences of continental scope held in Nigeria, India, Thailand, Sri Lanka, Japan, Brazil and Italy yielded identical conclusions and they were given universal expression in the "Declaration of General Principles for a World Rule of Law", adopted at the First World Conference on "World Peace Through The Rule of Law" held in July 1963, at Athens in Greece. A consensus emerged that all states and persons must accept the rule of law in the world community. It was suggested that in international matters, individuals, juridical persons, states and international organisations must all be subject to international law, deriving rights and incurring obligations thereunder. The Conference also concluded that international law and legal institutions must be based on fundamental concepts of fairness, justice and human dignity.

In 1949, the International Law Commission in Article 14 of its "Draft Articles on Rights and Duties of States" formulated the basic principle of the state system as follows:

> "Every state has the duty to conduct its relations with other states in accordance with the principle that the sovereignty of each state is subject to the supremacy of international law."

The important point is that the peoples of the world now have an established institutionalized process through which they can freely and unambiguously express their expectations about policy, authority and control in relation to human rights.

The general principle establishing international accountability and the right to censure is now regarded as a settled law. Any state may pursue international remedies against any other state for a violation of the customary international law of human rights. The International Court of Justice gave currency to this idea in the Barcelona Traction case by suggesting in a dictum that "basic rights of the human person" create obligations erga omnes. Since the Judgment of the PCIJ in the Barcelona Traction case, there has been a growing acceptance in contemporary international law of the principle that all states have a legitimate interest in and the right to protest against human rights violations wherever they may occur, regardless of the nationality of the victims.

The recognition of inalienable human rights and the recognition of the individual as a subject of international law are synonymous. To that extent they both signify the recognition of a higher, fundamental law not only on the part of states but also, through international law, on the part of the organized international community itself. Such fundamental law

constitutes legal order. The recognition and protection of human rights have now assumed the complexion of legal rights of individuals and of legal obligations of states and of the United Nations as a whole. Members of the United Nations are under a legal obligation to act in accordance with these purposes. It is their legal duty to respect and observe fundamental human rights.

INTERNATIONALISATION OF HUMAN RIGHTS

The adoption of the UN Charter ushered in a process leading to the gradual internationalisation of human rights through the rule of law. The UN Declaration clearly envisages the important role that the rule of law plays for the realisation of the goal of respect for universal human rights. The Declaration states:

> "... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

The very objective of the maintenance of international peace and security being directly linked to the assurance of respect for human rights can be attained only through the process of internationalisation. Former Secretary-General of the United Nations, U Thant, in his Human Rights Day Message on December 10, 1965, pointed out that "we need constantly to remind ourselves that the United Nations is firmly committed to the proposition that the eventual objective of all its functions and activities is the well being of individual men and women and also the freedom and opportunity to find their worth as human beings, whatever their race, language, religion or political belief."

The UN Charter introduced a significant change in the pre-existing legal conceptions by requiring the member states to pledge themselves to take joint and separate action in co-operation with the organisation in order to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex. language or religion. These provisions impose legally binding obligations on the member states. To the extent that the Charter creates these obligations no UN member state can claim that human rights as such are a matter within its domestic jurisdiction. The UN law-making practice indicates that the obligation to these rights will be deemed to be violated if a state systematically pursues governmental policies denying the enjoyment of these rights on a large scale, particularly rights that are most basic. This internationalisation of human rights has greatly reduced, if not made practically insignificant, the domestic jurisdiction defence that was available to states under the international law of the pre-World War II era.

THE UN CHARTER

The United Nations Charter, after reaffirming, in the Preamble, faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, pronounces in Article 1(3) that one of its purposes is to promote and encourage respect for human rights and fundamental freedoms for all without distinction on account of sex or other ground. Of particular significance is Article 8 which reads:

"The United Nations shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs".

The founding of the United Nations in 1945 with the signing of the UN Charter marked the first agreement among nations to promote and observe human rights and fundamental freedoms for all. The first definition of what was meant by human rights was not delineated until 1948 in the UN Universal Declaration of Human Rights. Since then the Declaration has come to be regarded as basic international law, augmented later by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In addition, agreements on a regional basis have been established by the Organisation of American States as well as by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The General Assembly, the Economic and Social Council, or any other competent organ of the United Nations, is authorised to discuss a situation arising from any alleged non-observance by a state or a number of states of their obligation to respect human rights and freedoms. The object of such discussion may be the initiation of a study of the problem under the aegis of the United Nations; it may be a recommendation of a general nature addressed to the concerned state and drawing its attention to the propriety of bringing about a situation which is in conformity with the obligations of the Charter. Thus the pressure of world public opinion as expressed through these channels is brought to bear upon the recalcitrant state. A dispute or situation ceases to be essentially within the domestic jurisdiction of a state if its nature or repercussions are such as to constitute a direct or potential threat to international peace and security. The correlation between peace and observance of fundamental human rights is now a generally recognised fact. The United Nations, as the guardian of peace, is qualified to intervene whenever those rights are threatened.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

One of the accomplishments of the United Nations has been to consolidate the principle that human rights are a matter of international concern and that the international community is entitled to discuss and to protect human rights. The UN Declaration of Human Rights was adopted on December 10, 1948. It contains 30 articles, the first 21 are generally identified as civil and political, ranging from prohibition of torture and arbitrary arrest to the freedoms of speech, assembly, religion and emigration and the right to vote by secret ballot. The remaining articles include the so-called economic, social and cultural rights, such as the right to work, education and adequate standard of living, social security, and vacations with pay.

The UN Declaration of Human Rights envisages that all human beings are born free and equal in dignity and rights and that everyone has the right to life, liberty and security. It also declares that no one shall be held in slavery or servitude and no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. It asserts that everyone has the right to recognition as a person before the law and that no one shall be subjected to arbitrary arrest, detention or exile.

When the Universal Declaration was adopted unanimously in December 1948 by the General Assembly, the stated expectation was that it mirrored merely a common standard of achievement, and was devoid of legal authority and enforceability. In the early three decades subsequent to its adoption, however, the Universal Declaration has been affirmed by numerous resolutions of United Nations' entities and related agencies; invoked and reinvoked by a broad range of decision-makers, national and transnational, judicial and others; and incorporated into many international agreements and national constitutions. The result is that the Universal Declaration is now widely acclaimed as a Magna Carta of humankind, to be complied with by all actors in the world arena. What began as mere common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of the UN Charter and as established customary law, having the attributes of jus cogens and constituting the heart of a global bill of rights.

THE UN COMMISSION ON HUMAN RIGHTS

The UN Commission on Human Rights has demonstrated considerable ingenuity in fashioning remedies which combine diplomatic contacts with a government, conciliation, fact-finding, and embarrassment to the state involved in the violation of human rights. The United Nations has begun to experiment with two approaches which require further exploration: aid to the victims and technical assistance to governments.

The Secretary-General, Javier Perez de Cuellar, noted in his address of February 15, 1983 to the UN Commission on Human Rights:

> "It is a source of encouragement that in the human rights programme of the United Nations in recent years, attention has been given not only to dealing with violations, but to providing assistance to governments, at their request, in strengthening their laws and institutions for restoring respect for human rights, as well as providing assistance to victims of violations of human rights".

HUMAN RIGHTS TREATIES AND CONVENTIONS

Respect for human rights is a proper subject for discussion bilaterally and multilaterally for a thorough exchange of views on their implementation. Widely ratified international conventions establishing effective organs of enforcement are the method through which the international community aspires to protect human rights. In the history of international relations this is a very recent goal and the international community has only just begun to implement it.

Like other international law, human rights law is made by bilateral and multilateral treaties and by conventions for the protection of human rights. There is also customary human rights law made by national practice with a developed sense of legal obligation. Treaty law overrides contrary provisions of domestic legislation. A human rights treaty protects all persons within the jurisdiction of the signatory state.

Modern human rights treaties are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states. Their object and purpose is the protection of the basic rights of individual human beings

irrespective of their nationality, both against the state of their nationality and all other contracting states. In concluding these human rights treaties, states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but all individuals within their jurisdiction.

The UN Charter and the two International Covenants are by no means the only multilateral effort at promoting human rights. There are over 20 treaties now and they include, inter alia:

(a) the Convention on the Prevention and Punishment of the Crime of Genocide,

(b) the International Convention on the Elimination of all Forms of Racial Discrimination,

(c) the Convention concerning the Abolition of Forced Labour,

(d) the American Convention on Human Rights,

(e) the Convention Relating to the Status of Refugees,

(f) the Convention on the Reduction of Statelessness,

(g) the Convention on the Political Rights of Women,

(h) the Convention on the Nationality of Married Women, and

(i) the Convention on the Elimination of All Forms of Discrimination Against Women.

These conventions create binding legal obligations on the parties to them.

The adoption by the General Assembly in 1966 of the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, and the Optional Protocol to the Covenant on Civil and Political Rights, marks the beginning of a long process of investiture of a great idea with the substance of power capable of producing effective change in all realms of personal, national and international life. These international treaties are binding commitments by states towards their own citizens, towards one another, and toward the community of nations to ensure, observe and safeguard human rights. By transforming international concern with human rights into legally binding international obligations, the Covenants have laid the groundwork for the erection of international institutions and procedures which are meant to give concrete expression to these obligations.

It is not only on the global level that efforts to promote human rights take place; by and large, some of the most innovative attempts have occurred at regional level. Indeed, it appears that regional arrangements have most rapidly advanced the commitment of nations to human rights.

THE EUROPEAN SYSTEM

A prominent regional achievement is the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Convention established a Commission and a Court for handling both state and individual complaints.

In some instances individuals are able to assert their human rights in courts or other appropriate forums. For example, the European Convention on Human Rights and the Optional Protocol to the Covenant on Civil and Political Rights establish specific procedures for the bringing of complaints by private individuals where the nation concerned has agreed to such a procedure.

In the law of human rights, it has long been apparent that the mere creation of international standards may be meaningless if it is unaccompanied by appropriate institutional enforcement mechanisms at the transnational level. The European Commission and the Court of Human Rights of the Council of Europe, are generally considered to be the most effective existing enforcement institutions, inspite of their limited geographical scope.

The European Convention on Human Rights represents more than a common standard of achievement. It imposes upon the contracting state parties a certain body of legal principles which they are obliged to conform to. In specific cases compliance with this law is ensured by the use of the Convention's enforcement machinery. The Convention forms an integral part of the domestic law of many of the contracting state parties. The Conventions' provisions are deemed to maintain great validity whether or not prior legislation on the subject exists at the domestic level. The basic function of this machinery consists primarily of examining and determining whether domestic law as it stands complies with the provisions of the Convention. Although constructed upon tenets of traditional treaty law, the Convention law transcends the traditional boundaries drawn between international and domestic law.

THE AFRICAN SYSTEM

The international human rights movement reflects, to a large extent, the liberal, individualist tradition of civil and political liberties. There is something very new in the present attempt by the Organisation of African Unity to embody a list of collective or peoples' rights in a human rights convention that provides for the enforcement of those rights. With the drafting in 1981 the African Charter on Human Rights and Peoples' Rights, meaningful steps are being taken in that direction.

THE INTER-AMERICAN SYSTEM

The American Convention on Human Rights entered into force in 1978. The Convention establishes two supervisory organs, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The Court is a judicial institution of the Organisation of American States (OAS) in matters relating to human rights. It has the power to decide disputes relating to the interpretation and application of the Convention to states which have accepted the Court's contentious

jurisdiction. The decisions of the Court in these cases are final and binding for the parties to the dispute. The role of the Court as a judicial institution of the OAS is grounded in its advisory jurisdiction. These opinions are important also for the contributions they make to the development of international human rights law.

IMPLEMENTATION OF HUMAN RIGHTS NORMS

Scholars tend to agree with the proposition that public policy does not allow states to violate severally such norms as they are prohibited form violating jointly with other states. Judge Mosler of the ICJ, who deserves credit for coining the phrase "public order of the international community", characterised such order as consisting of principles and rules the enforcement of which is of such vital importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force. The reason for this follows simply from logic; the law cannot recognise any act either of one member or of several members in concert, as being legally valid if it is directed against the very foundation of law.

There are three main approaches to the international implementation of human rights. The first approach is on the government-to-government level. This may be through bilateral diplomacy or resort by a government to multilateral machinery. The difficulty with this approach is that governments are often reluctant to complicate diplomatic relations by bringing human rights complaints against another government. The second approach is to give individuals direct access to an international commission or tribunal. Such a right is available to an individual (subject to acceptance by the state) to petition the European Commission and the European Court of Human Rights and he can also invoke the right of individual petition under the Optional Protocol to the International Covenant on Civil and Political Rights and under the Convention on Racial Discrimination. This approach is feasible between countries which share a substantial degree of consensus on human rights standards. The third approach is through an international executive who can influence government action through fact-finding, publicity and persuasion.

HUMAN RIGHTS JUS COGENS

The notion of peremptory norms of international law (jus cogens) is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted. The principle of jus cogens restricts the freedom of states to make agreements at variance with these peremptory norms. Its moral and deterrent effect is of particular importance in the present context of internal and international violence. The rules of customary international law that require the states to abstain from the violation of human rights constitute jus cogens and all agreements made in contravention of these rules are considered illegal. Judge Mosler of the ICJ took account of the dignity of the human person and declared that obligations to protect human rights fall in the domain of jus cogens. Third states have the right and duty to question the illegal act, and to refrain from recognising it or giving it legal effect.

Many of the policies about human rights would appear to be so intensely demanded that they are acquiring not merely the status of international concern, but also that of jus cogens and of a global bill of

rights. Nations suggest that the great bulk of contemporary human rights principles are identifiable as jus cogens. This view finds support in the statement of Judge Tanaka of the ICJ that the law concerning the protection of human rights may be considered as belonging to the jus cogens. Thus all rules of general international law created for a humanitarian purpose constitute jus cogens.

THE RELATIONS BETWEEN INTERNATIONAL HUMAN RIGHTS NORMS AND DOMESTIC LAW

The relation between international law and municipal law is a question of determining what are the most appropriate juridical means of achieving, in state legal systems, the aims and intentions lying behind the rules established by international law. The obligations imposed on a state by international law with a view to ensuring the implementation, in municipal law, of the terms of an international treaty to which the said state is a party, are the means of guaranteeing harmony and material agreement between the two legal orders.

A state has an obligation to make its municipal law conform to its undertakings under treaties to which it is a party. With regard to interpretation, however, it is a principle generally recognised in national legal systems that, in the event of doubt, the national rule is to be interpreted in accordance with the state's international obligations.

A matter is essentially within the domestic jurisdiction of the state only if it is not regulated by international law or if it is not capable of regulation by international law. In the modern age of economic and political interdependence, most questions which, on the face of it, appear to be essentially domestic are, in fact, essentially international.

A valid domestic jurisdiction defence can no longer be founded on the proposition that the manner in which a state treats its own nationals is ipso facto a matter within its domestic jurisdiction. A government's human rights policy is no longer prima facie a domestic matter. A state engaging in gross violations of human rights is considered to be violating the United Nations Charter obligations and consequently is not protected by the domestic jurisdictions clause of the Charter. It is, therefore, apparent that under international law the subject of human rights is not deemed to be inherently domestic in nature.

So far, a major deficiency in the development of human rights law is one of enforcement. The implementation of human rights law largely depends on the consent of nations. However, even if that consent is forthcoming, an adverse judgment against a consenting nation may or may not be effectively enforced. Currently, the implementation and enforcement of human rights law are largely dependent on voluntary compliance, moral pressures, and other forms of influence.

The questions arise as to why governments adhere to numerous human rights treaties? Why do they repeatedly vote for formulas that produce resolutions and declarations, and establish bodies designed to promote the implementation of the legal norms proclaimed in these instruments? The answer no doubt is that they find it difficult to vote against what is deemed to be good, what a vast majority of people of the world want, and what consequently makes good political sense for governments to be for, if only to give lip service to. The vast body of international human rights

law as is available today is testimony to the fact that governments know that the appeal, the yearning, and the demand for human rights is universal. It has been brought on by the universality of mankind's suffering and the worldwide awareness produced by the speed with which news travels in the world. Today, unlike in the past, what happens in any part of the world is flashed instantaneously to all parts of the world, provoking sympathy, protests, and empathy. (See the remarks of the Judge of the Inter-American Court of Human Rights, Professor Thomas Buergenthal, in the Proceedings of the 75th Anniversary Convocation of the American Society of International Law, Washington D C April 1981).

The time has come for world citizens to stop thinking of human rights and human needs as internal affairs. Human needs are coming to be regarded as a first charge on the world's resources. And human rights are becoming a first charge on the public conscience of people anywhere. The issue of human rights, in the very recent past, has penetrated the international dialogue. It has become an active ingredient in interstate relations and has burst the sacred bounds of national sovereignty. No nation can any longer claim not to know what human rights are; nor can any nation now assert that the manner in which it treats its own nationals is free from international scrutiny.

In the present context of world society, a recognised principle is that the jurisdiction of a state to entertain claims of human rights is determined by the position that the state has acquired in the comity of nations at a particular time. In its Tunis and Morocco Nationality Decrees Opinion, (Series B No: 4 at p24, 1923) the PCIJ declared that the question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations. The Court's analysis indicates that the phrase "the development of international relations" has reference to the legal obligations assumed by states with regard to a specific subject.

In its Advisory Opinion on Namibia, the ICJ declared the extension and continuation of apartheid in Namibia to be a violation of the purposes and principles of the Charter. In 1967, by an overwhelming vote, the Economic and Social Council (ECOSOC) extended the interpretation of the UN Charter to reach beyond racial discrimination, authorising the Commission on Human Rights to study situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid.

An inspiring recommendation of experts in respect of the protection of human rights is that the various provisions of international agreements can be interpreted by domestic courts. It would be worthwhile for the domestic courts to declare any variance with the peremptory norm of human rights as void and the courts may find it appropriate to terminate any existing agreement which is in conflict with that norm. The opinion merits consideration that General Assembly resolutions in respect of human rights should be given legal effect by domestic courts as indicative of a general consensus of customary international law. Such resolutions can give an important impetus to the emergence of new rules needed for the promotion of human rights.

It is important for the protection of human rights and for the realisation of the rule of law that domestic courts be allowed to review the acts of foreign states when such enquiry is necessary to determine the

nature of human rights violations. This practice does not violate the recognised principles of sovereign immunity. The domestic courts can have an obligation to determine whether foreign acts of states comply with the requirements of international law. Where the foreign act violates a generally accepted principle of international law in the domain of human rights, the domestic courts fulfil their role by refusing to accept the policy of the foreign legal system.

Article 27 of the International Law Commission's "Draft Articles on State Responsibilities" provides that any aid or assistance given by a state to another state for the commission of an internationally wrongful act, wherever such incidents are reported, in itself constitutes an internationally wrongful act. The domestic courts can entertain claims arising out of an alleged violation of human rights and these claims cannot be defeated by the "act of state" defence since the international law of human rights contemplates external scrutiny of such acts. The balancing of the functions of the domestic courts and those of international tribunals requires the domestic courts to entertain the petitions of those whose human rights have been violated.

If international protection of human rights is to respond concretely to the imperatives of the age, it must be institutionalised. And if human rights are to be protected internationally, they must be juridically defined and be made contractually binding. The domestic courts can become the most effective means by which international conventions could be implemented and made effective.

Effective enforcement of remedies requires that they be articulated as effectively as possible, that they support international legal norms. Independent lawyers and judges obviously are the people who can be most effective in this articulation. Private non-governmental organisations, in compiling information on the human rights practices of the various countries, can undertake an examination of the independence of lawyers and judges and of the extent to which judges are subjected to political pressure in various countries.

A task that the domestic courts often face in the area of international human rights norms is that of determining the adequacy of procedural alternatives. Here the doctrine of selective incorporation assumes special significance. Under this doctrine, the specifics of the international human rights norms can be progressively applied to all those states which constitute the comity of nations. The states should be able to afford flexibility in the implementation of domestic constitutional values.

The domestic application of human rights norms is now regarded as a basis for implementing constitutional values beyond the minimum requirements of the constitution. The international human rights norms are in fact part of the constitutional expression of liberties guaranteed at the national level. The domestic courts can assume the task of expanding these liberties. The exercise of judicial power to create an order of liberties on a level higher than the respective constitutions is now considered to be an ingredient of judicial activism. The present thinking at the international level supports an expanded role of domestic courts for the observance of international human rights norms. This reappraisal enables domestic courts to extend to citizens, via state constitutions,

greater protection of internationally recognised human rights. This type of court activism is commanding appreciation all over the world.

A consciousness is now emerging that in the sphere of human rights the citizen of a particular state is no less a citizen of all other states and that each citizen is entitled to due process of law and the equal protection of laws from all state governments. This legal revolution which has brought human rights law to the fore does not inhibit the independent protective force of domestic law, for without it, the full realisation of liberties cannot be guaranteed. The principle stated by Mr Justice Bradley of the United States Supreme Court in 1886 in the case of Boyd versus United States (116 US 616) has started attracting great attention, after the lapse of a hundred years, at the international level. The principle states that:

> "constitutional provisions for the security of person and property should be liberally construed and it is the duty of the (domestic) courts of law to be watchful for the constitutional rights of the citizens".

It is now felt that the protection of international human rights can ensure the maintenance of constitutional structures of governments at the national level. Obviously, the genius of the written constitutions of national states resides not in any static meaning, but in the adaptability of the great principle of the constitution to cope with problems of human rights. The universal approach maintains that every such principle must be of wider application than the circumstances giving rise to it at the domestic level. National constitutions are not short-lived documents designed to meet passing needs. The demands of international peace and security have assumed responsibility for their care, and therefore, in their application, the domestic contemplation is enlarged to incorporate international contemplation. This is surely an important and a highly significant development of constitutional jurisprudence. Adopting the premise that domestic courts can be trusted to safeguard international human rights, it can well be appreciated that domestic courts can provide a double source of protection for the rights of citizens. Thus the domestic courts can thrust themselves into a position of prominence in the struggle to protect the people from arbitrary intrusions of their freedoms.

The attention of nation states to international human rights norms is resulting in the birth of a transnational legal science and of a system whose basic postulates can survive without challenge, in this last phase of the 20th century and the ensuing 21st century. An argument is now being forcefully made that the newly developing formal aspects of international human rights norms, along with their logic, their style of reasoning, their levels of generalisation, and their techniques of inter-relating liberties and universal cases and concepts, are indeed superb. The new legal methodology of human rights points to a recognition of the structural unity of the total human society. The emergence of human rights law is much more than an intellectual achievement and it is much more than a method of reasoning or a method of organising thought. The substantiation of international human rights norms is part of a larger process of attempting to reconcile law and equity, justice and mercy, equity and freedom. It is now being viewed as the equation of Allah Almighty and mankind. It is a new vision of the ultimate destiny of man which the courts of law can upgrade and enhance for the welfare of humanity as a whole.

DOMESTIC LEGISLATIVE PROTECTION OF INTERNATIONAL HUMAN RIGHTS NORMS

It is now considered important for the states concerned to be able to have the first opportunity of providing remedies for the violation of human rights. The provisions of remedies would require specific legislation for domestic incorporation. Some would like to see this idea expressed in more forceful terms to place a legal obligation on states either to incorporate it in treaties or to have essentially identical terms incorporated in written constitutions by appropriate amendments. This suggestion emphasises the need for convincing national governments to incorporate legislation on human rights in such a way that national courts might in fact utilize the international human rights norms. The domestic courts can take cognizance of a human rights violation more easily and in a shorter time than an international court.

It is of cardinal importance to the domestic legislation of human rights that violations by every country be treated with equal attention, with the same due process, and with severity proportional to the offence. States can be persuaded to accept the interpretations of courts of law based on the domestic legislation of other states. The courts of law can also examine, on the petition of affected persons, whether the state concerned has complied with its human rights obligations.

DIRECT APPLICATION OF INTERNATIONAL LAW BY DOMESTIC COURTS

The enforcement machinery that exists domestically to protect human rights should resemble the enforcement machinery that exists internationally. The domestic courts can be successfully enlisted in the process of enforcement. It is the prestige of domestic courts that can persuade the executive and the legislative branches of government to comply with the decisions taken by the international courts in the sphere of human rights.

Domestic courts can, however, look to the respective national constitutions as the best protection of human rights. An illustrious example of this observation is provided by the US Supreme Court in its decision of the case of Brown versus Board of Education (347 US 483--1954). It appears that international norms played a large part in bringing about the Supreme Court's decision in this case. The prestige of the Court itself was enhanced because the decision solved an international problem of human rights pertaining to segregation in schools and in that fashion brought the United States of America into conformity with international law.

The domestic courts can find it useful to consistently interpret and apply the international law of human rights. Since there are few international tribunals and their jurisdiction is very limited, domestic courts can play a major role in the interpretation and development of international law in this sphere. International organisations, in their turn, can accord substantial weight to judgments of domestic courts.

The problem of bringing about actual remedies in domestic jurisdiction is analogous to the problem of bringing about remedies internationally. The domestic courts now face the challenge of how to root their decisions as solidly and as effectively as possible in international human rights legal norms. The greater degree to which international legal

norms become known to domestic courts, the better the chance of justice being dispensed in this field.

It appears that national courts may be used as a fora for enforcement of international human rights. If these courts cannot be harnessed, the prospects of private initiation and effective enforcement of human rights are bleak. Securing a long-term extension of national jurisdiction in matters such as these will require more than simply persuading the judiciary on a case-by-case basis. Terms such as "act of state", "political question", "separation of powers", etc., even though they are still relevant in the domain of international law, have required a different status in the context of human rights. The new perspective enables courts of law to accord greater weight to the concept of human rights whenever it competes with the "act of state" defence. That concern should therefore be addressed systematically by according predominance to the concept of human rights over the "act of state" defence.

Human rights are so important as to deserve a simultaneous attack at the domestic level by legislation, governmental administration and non-governmental functioning.

A UN HUMAN RIGHTS TRIBUNAL

A desirable long-term solution would be to establish, through a special protocol, a UN Human Rights Tribunal which would be empowered to apply not only the International Bill of Human Rights, but the entire corpus juris of international human rights adopted under the aegis of the United Nations. The UN Human Rights Tribunal could be given authority to give advisory opinions, or to decide, on the basis of reciprocity, disputes between states pertaining to the interpretation or application of particular human rights instruments. It can also entertain complaints from individuals, or various groups, or organisations, against the states concerned. The Human Rights Tribunal can maintain effective co-ordination and meaningful equation with domestic courts in the United Nations member countries.

INCORPORATION OF INTERNATIONAL HUMAN RIGHTS NORMS IN NATIONAL CONSTITUTIONS

The Pakistan Constitution has the distinctive privilege of incorporating in its Chapter I, about two-thirds of the 30 fundamental human rights enumerated in the UN Charter of Human Rights. These rights are incorporated in provisions ranging from Article 8 to Article 28. The Constitution declares that:

> "any law, or any usage having the force of law, in so far as it is inconsistent with the rights conferred by that Chapter (of the Constitution), shall to the extent of such inconsistency, be void".

The Pakistan Constitution has accorded recognition to rights pertaining to the security of person, dignity of man, freedom of movement, assembly, association, speech, religion and protection of property. The Constitution provides safeguards against arrest and detention, against discrimination in services and against taxation for the purposes of any particular religion. The Constitution also guarantees equality before the law and equal protection of law.

In addition, the Constitution sets out the principles of policy in Article 31 to 40 and makes each organ and authority of the state responsible to act in accordance with these principles. The principles are concerned with the promotion of local government institutions, participation of women in national life, protection of minorities and families, social justice, economic and social well being of people and the promotion of international peace. These principles are identical in nature and scope to civil and political rights forming part of the International Covenants and Regional Conventions at the international level. Even though the principles of policy are not justiciable, yet the mere fact that the national courts have been called upon, in collaboration with all other organs of state, to promote international peace, good will and friendly relations among all nations, impliedly authorises domestic courts to interpret constitutional provisions in consonance with the spirit of the international law of human rights.

The Supreme Court of the United States of America has often employed human rights precepts as legally relevant standards or juristic aids to incorporate constitutional and statutory norms. This is what judges are most comfortable with, and it is worth pursuing this as a strategy. Indeed, use by the domestic courts can be made with express or implicit expectation that fundamental constitutional rights constitute legal principles. History demonstrates that there is a human rights purpose behind most amendments to the US Constitution. This precept can be emulated in other national settings. Human rights can be incorporated directly by the judiciary as the basis for its decisions. The international law of human rights does recognise the capacity of private plaintiffs to litigate its provisions in domestic courts. National courts can serve as an effective mechanism for the protection and extension of civil liberties and can operate with great force for the co-ordinated international role.

In my view, courts should be viewed not in isolation but as a co-ordinated source of governmental power, as an integral part of the larger political system. In the present context of world society the legitimacy of the domestic courts and the powers judges exercise in human rights litigation are founded on the unique competence of the judiciary to perform a distinctive social function which is to give concrete meaning and application to the public values embodied in any authoritative legal text such as the chapters on fundamental human rights in the national constitutions. The capacity of judges to give meaning to public values inherent in the concept of fundamental human rights turns not on some personal moral expertise, but on the method by which a public morality at the domestic level must be construed. One feature of that process which signifies the role of domestic courts in the implementation of international human rights norms is the dialogue that judges usually conduct. They listen to all grievances, hear a wide range of interests, reply and assume judicial responsibility for what they say. The foremost task of judges of domestic courts which has assumed prominence in the domain of human rights is to weigh their fundamental commitment to individual rights and group rights against the competing sentiments of nationality, the prejudices of race, the interests of ethnic groups, the demands of justice, the cultivation of virtue, the impulse of compassion, the higher callings of truth and salvation, and the allure of prosperity.

CONCLUSION

Even some success in the international human rights field, however small, will make this world a better place to live in. That, after all, is what law is all about.

ANNEXES

THE INTERNATIONAL BILL OF HUMAN RIGHTS

1. Universal Declaration of Human Rights

Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

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

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right to equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

2. International Covenant on Economic, Social and Cultural Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966

ENTRY INTO FORCE: 3 January 1976, in accordance with article 27.

PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(*a*) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(*b*) Safe and healthy working conditions;

(*c*) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(*d*) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(*a*) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(*b*) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(*c*) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(*d*) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.

(*a*) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(*b*) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(*a*) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(*b*) The improvement of all aspects of environmental and industrial hygiene;

(*c*) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(*d*) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(*a*) Primary education shall be compulsory and available free to all;

(*b*) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(*c*) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(*d*) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(*e*) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(*a*) To take part in cultural life;

(*b*) To enjoy the benefits of scientific progress and its applications;

(*c*) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2. (*a*) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(*b*) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(*a*) Signatures, ratifications and accessions under article 26;

(*b*) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

3. International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966

ENTRY INTO FORCE: 23 March 1976, in accordance with article 49.

PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

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

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(*a*) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(*b*) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(*c*) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

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

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same inter-

mediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (*a*) No one shall be required to perform forced or compulsory labour;

(*b*) Paragraph 3 (*a*) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(*c*) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (*b*), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (*a*) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(*b*) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independant and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(*a*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(*b*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(*c*) To be tried without undue delay;

(*d*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(*e*) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(*f*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*g*) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

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

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or corres-

pondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

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.

Article 20

1. Any propaganda for war shall be prohibited by law.

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

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*order public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(*a*) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(*b*) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(*c*) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the

law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:

(*a*) Twelve members shall constitute a quorum;

(*b*) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(*a*) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(*b*) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fill within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(*a*) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.

(*b*) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.

(*c*) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

(*d*) The Committee shall hold closed meetings when examining communications under this article.

(*e*) Subject to the provisions of sub-paragraph (*c*), the Committee shall make available its goods offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant.

(*f*) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (*b*), to supply any relevant information.

(g) The States Parties concerned, referred to in sub-paragraph (*b*), shall have the right to be represented

when the matter is being considered in the Committee and to make submissions orally and/or in writing.

(*h*) The Committee shall, within twelve months after the date of receipt of notice under sub-paragraph (*b*), submit a report:

(i) If a solution within the terms of sub-paragraph (*e*) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of sub-paragraph (*e*) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. (*a*) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(*b*) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(*a*) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(*b*) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(*c*) If a solution within the terms of sub-paragraph (*b*) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(*d*) If the Commission's report is submitted under sub-paragraph (*c*), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowerd to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the *ad hoc* conciliation commissions which may be appointed under article 42, shall be entiled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures

prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(*a*) Signatures, ratifications and accessions under article 48;

(*b*) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

4. Optional Protocol to the International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966

ENTRY INTO FORCE: 23 March 1976, in accordance with article 9.

The States Parties to the present Protocol,

Considering that in order further to achieve the purposes of the Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

Have agreed as follows:

Article 1

A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.

Article 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Article 3

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

Article 4

1. Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.

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

Article 5

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

2. The Committee shall not consider any communication from an individual unless it has ascertained that:

(*a*) The same matter is not being examined under another procedure of international investigation or settlement;

(*b*) The individual has exhausted all available domestic remedies.
This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meetings when examining communications under the present Protocol.

4. The Committee shall forward its views to the State Party concerned and to the individual.

Article 6

The Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the present Protocol.

Article 7

Pending the achievement of the objectives of resolution 1514 (XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

Article 8

1. The present Protocol is open for signature by any State which has signed the Covenant.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Covenant.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 9

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 10

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 11

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

Article 12

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.

Article 13

Irrespective of the notifications made under article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

(*a*) Signatures, ratifications and accessions under article 8;

(*b*) The date of the entry into force of the present Protocol under article 9 and the date of the entry into force of any amendments under article 11;

(*c*) Denunciations under article 12.

Article 14

1. The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

ANNEX IV

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

(with amendments)

ROME 4.XI.1950

Text amended according to the provisions of Protocol No. 3 which entered into force on 21 September 1970, and of Protocol No. 5 which entered into force on 20 December 1971.

The Governments signatory hereto, being Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948 ;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the rights therein declared :

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms ;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend ;

Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration ;

Have agreed as follows :

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary :

a. in defence of any person from unlawful violence ;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained ;

c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this article the term "forced or compulsory labour" shall not include :

a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention ;

b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service ;

c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community ;

d. any work or service which forms part of normal civic obligations.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law :

a. the lawful detention of a person after conviction by a competent court ;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfiment of any obligation prescribed by law ;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so ;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority ;

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants ;

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1. *c*. of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6

1. 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights :

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him ;

b. to have adequate time and facilities for the preparation of his defence ;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time

when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

1. Everyone has the right to freedom of thought, conscience and religion ; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

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.

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

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.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15

1. In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II

Article 19

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up :

a. A European Commission of Human Rights, hereinafter referred to as "the Commission" ;

b. A European Court of Human Rights, hereinafter referred to as "the Court".

SECTION III

Article 20

The Commission shall consist of a number of members equal to that of the High Contracting Parties. No two members of the Commission may be nationals of the same State.

Article 21

1. The members of the Commission shall be elected by the Committee of Ministers by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly ; each group of the Representatives of the High Contracting Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.

2. As far as applicable, the same procedure shall be followed to complete the Commission in the event of other States subsequently becoming Parties to this Convention, and in filling casual vacancies.

Article 22 *

1. The members of the Commission shall be elected for a period of six years. They may be re-elected. However, of the members elected at the first election, the terms of seven members shall expire at the end of three years.

2. The members whose terms are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after the first election has been completed.

3. In order to ensure that, as far as possible, one half of the membership of the Commission shall be renewed every three years, the Committee of Ministers may decide, before proceeding to any subsequent election, that the term or terms of office of one or more members to be elected shall be for a period other than six years but not more than nine and not less than three years.

4. In cases where more than one term of office is involved and the Committee of Ministers applies the preceding paragraph, the allocation of the terms of office shall be effected by the drawing of lots by the Secretary General, immediately after the election.

5. A member of the Commission elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

6. The members of the Commission shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

Article 23

The members of the Commission shall sit on the Commission in their individual capacity.

Article 24

Any High Contracting Party may refer to the Commission, through the Secretary General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.

Article 25

1. The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

* Text amended according to the provisions of Protocol No. 5 which entered into force on 20 December 1971

2. Such declarations may be made for a specific period.

3. The declarations shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

4. The Commission shall only exercise the powers provided for in this article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

Article 26

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

Article 27

1. The Commission shall not deal with any petition submitted under Article 25 which :

a. is anonymous, or

b. is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

2. The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition.

3. The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.

Article 28

In the event of the Commission accepting a petition referred to it :

a. it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission ;

b. it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in this Convention.

Article 29 *

After it has accepted a petition submitted under Article 25, the Commission may

* Text amended according to the provisions of Protocol No. 3 which entered into force on 21 September 1970.

nevertheless decide unanimously to reject the petition if, in the course of its examination, it finds that the existence of one of the grounds for non-acceptance provided for in Article 27 has been established.

In such a case, the decision shall be communicated to the parties.

Article 30 *

If the Commission succeeds in effecting a friendly settlement in accordance with Article 28, it shall draw up a report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary General of the Council of Europe for publication. This report shall be confined to a brief statement of the facts and of the solution reached.

Article 31

1. If a solution is not reached, the Commission shall draw up a report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the report.

2. The report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the States concerned, who shall not be at liberty to publish it.

3. In transmitting the report to the Committee of Ministers the Commission may make such proposals as it thinks fit.

Article 32

1. If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.

2. In the affirmative case the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.

3. If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph 1 above what effect shall be given to its original decision and shall publish the report.

4. The High Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.

* Text amended according to the provisions of Protocol No. 3 which entered into force on 21 September 1970.

Article 33

The Commission shall meet *in camera.*

Article 34 *

Subject to the provisions of Article 29, the Commission shall take its decisions by a majority of the members present and voting.

Article 35

The Commission shall meet as the circumstances require. The meetings shall be convened by the Secretary General of the Council of Europe.

Article 36

The Commission shall draw up its own rules of procedure.

Article 37

The secretariat of the Commission shall be provided by the Secretary General of the Council of Europe.

SECTION IV

Article 38

The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State.

Article 39

1. The members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe ; each Member shall nominate three candidates, of whom two at least shall be its nationals.

2. As far as applicable, the same procedure shall be followed to complete the Court in the event of the admission of new Members of the Council of Europe, and in filling casual vacancies.

3. The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

* Text amended according to the provisions of Protocol No. 3 which entered into force on 21 September 1970.

Article 40 *

1. The members of the Court shall be elected for a period of nine years. They may be re-elected. However, of the members elected at the first election the terms of four members shall expire at the end of three years, and the terms of four more members shall expire at the end of six years.

2. The members whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary General immediately after the first election has been completed.

3. In order to ensure that, as far as possible, one third of the membership of the Court shall be renewed every three years, the Consultative Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more members to be elected shall be for a period other than nine years but not more than twelve and not less than six years.

4. In cases where more than one term of office is involved and the Consultative Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by the drawing of lots by the Secretary General immediately after the election.

5. A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

6. The members of the Court shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

Article 41

The Court shall elect its President and Vice-President for a period of three years. They may be re-elected.

Article 42

The members of the Court shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

Article 43

For the consideration of each case brought before it the Court shall consist of a Chamber composed of seven judges. There shall sit as an *ex officio* member of the Chamber the judge who is a national of any State Party concerned, or, if there is none, a person of its choice who shall sit in the capacity of judge ; the names of the other judges shall be chosen by lot by the President before the opening of the case.

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* Text amended according to the provisions of Protocol No. 5 which entered into force on 20 December 1971.

Article 44

Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.

Article 45

The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48.

Article 46

1. Any of the High Contracting Parties may at any time declare that it recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

2. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

3. These declarations shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.

Article 47

The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32.

Article 48

The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Parties concerned if there is more than one :

a. the Commission ;

b. a High Contracting Party whose national is alleged to be a victim ;

c. a High Contracting Party which referred the case to the Commission ;

d. a High Contracting Party against which the complaint has been lodged.

Article 49

In the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

Article 51

1. Reasons shall be given for the judgment of the Court.

2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 52

The judgment of the Court shall be final.

Article 53

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

Article 54

The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

Article 55

The Court shall draw up its own rules and shall determine its own procedure.

Article 56

1. The first election of the members of the Court shall take place after the declarations by the High Contracting Parties mentioned in Article 46 have reached a total of eight.

2. No case can be brought before the Court before this election.

SECTION V

Article 57

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.

Article 58

The expenses of the Commission and the Court shall be borne by the Council of Europe.

Article 59

The members of the Commission and of the Court shall be entitled, during the discharge of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Article 60

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 61

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 62

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 63

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.

2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Commission to receive petitions from individuals, non-governmental organisations or groups of individuals in accordance with Article 25 of the present Convention.

Article 64

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2. Any reservation made under this article shall contain a brief statement of the law concerned.

Article 65

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a Party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 63.

Article 66

1. This Convention shall be open to the signature of the Members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2. The present Convention shall come into force after the deposit of ten instruments of ratification.

3. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

4. The Secretary General of the Council of Europe shall notify all the Members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950 in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

ANNEX V

EUROPEAN SOCIAL CHARTER, 1961

TURIN, 18.X.1961

The Governments signatory hereto, being Members of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity between t Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their e onomic and social progress, in part' ular by the maintenance and further realisation of human rights and fundamental freedoms,

Considering that in the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950, and the Protocol thereto signed at Paris on 20th March 1952, the member States of the Council of Europe agreed to secure to their populations the civil and poli ic l rights and freedoms therein specified;

Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour sex, religion, political opinion national extraction or social origin,

Being resolved to make every effort in common to improve the standard of living and to promote the social well-being of both their urban and rural populations by means of appropriate institutions and action,

Have agreed as follows:

PART I

The Contracting Parties accept as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised:

1. E eryone shall have the opportunity to earn his living in an occupation freely entered upon.

2. All workers have the right to just conditions of work.

3. All workers have the right to safe and h al hy working conditions.

4. All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families.

5. All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.

6. All workers and employers have the right to bargain collectively.

ARTICLE 1

THE RIGHT TO WORK

With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake :

1. to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment,

2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;

3. to establish or maintain free employment services for all workers;

4. to provide or promote appropriate vocational guidance, training and rehabilitation.

ARTICLE 2

THE RIGHT TO JUST CONDITIONS OF WORK

With a view to ensuring the effective exercise of the right to just conditions of work, the Contracting Parties undertake .

1. to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit;

2. to provide for public holidays with pay;

3. to provide for a minimum of two weeks annual holiday with pay;

4. to provide for additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations as prescribed;

5. to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest.

ARTICLE 3

THE RIGHT TO SAFE AND HEALTHY WORKING CONDITIONS

With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Contracting Parties undertake :

1. to issue safety and health regulations;

7. Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed.

8. Employed women, in case of maternity, and other employed women as appropriate, have the right to a special protection in their work.

9. Everyone has the right to appropriate facilities for vocational guidance with a view to helping him choose an occupation suited to his personal aptitude and interests.

10. Everyone has the right to appropriate facilities for vocational training.

11. Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.

12. All workers and their dependents have the right to social security.

13. Anyone without adequate resources has the right to social and medical assistance.

14. Everyone has the right to benefit from social welfare services.

15. Disabled persons have the right to vocational training, rehabilitation and resettlement, whatever the origin and nature of their disability

16. The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.

17. Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection.

18. The nationals of any one of the Contracting Parties have the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons.

19. Migrant workers who are nationals of a Contracting Party and their families have the right to protection and assistance in the territory of any other Contracting Party.

PART II

The Contracting Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following Articles and paragraphs.

2. to provide for the enforcement of such regulations by measures of supervision;

3. to consult, as appropriate, employers' and workers' organisations on measures intended to improve industrial safety and health.

ARTICLE 4

THE RIGHT TO A FAIR REMUNERATION

With a view to ensuring the effective exercise of the right to a fair remuneration, the Contracting Parties undertake :

1. to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living;

2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;

3. to recognise the right of men and women workers to equal pay for work of equal value;

4. to recognise the right of all workers to a reasonable period of notice for termination of employment;

5. to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards.

The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage-fixing machinery, or by other means appropriate to national conditions.

ARTICLE 5

THE RIGHT TO ORGANISE

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

ARTICLE 6

THE RIGHT TO BARGAIN COLLECTIVELY

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake :

1. to promote joint consultation between workers and employers;

2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;

3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;

and recognise :

4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

ARTICLE 7

THE RIGHT OF CHILDREN AND YOUNG PERSONS TO PROTECTION

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake :

1. to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education;

2. to provide that a higher minimum age of admission to employment shall be fixed with respect to prescribed occupations regarded as dangerous or unhealthy;

3. to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;

4. to provide that the working hours of persons under 16 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training;

5. to recognise the right of young workers and apprentices to a fair wage or other appropriate allowances;

6. to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day·

7. to provide that employed persons of under 18 years of age shall be entitled to not less than three weeks' annual holiday with pay;

8. to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations;

9. to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control;

10. to ensure special protection against physical and r oral dangers to which children and young persons are exposed and particularly against those resulting directly or indirectly from their work.

ARTICLE 8

THE RIGHT OF EMPLOYED WOMEN TO PROTECTION

With a view to ensuring the effective exercise of the right of employed women to protection, the Contracting Parties undertake ·

1. to provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after childbirth up to a total of at least 12 weeks;

2. to consider it as unlawful for an employer to give a woman notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence;

3. to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose,

4. (*a*) to regulate the employment of women workers on night work in industrial employment;

(*b*) to prohibit the employment of women workers in underground mining, and, as appropriate, on all other work which is unsuitable for them by reason of its dangerous, unhealthy, or arduous nature.

ARTICLE 9

THE RIGHT TO VOCATIONAL GUIDANCE

With a view to ensuring the effective exercise of the right to vocational guidance, the Contracting Parties undertake to provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity : this assistance should be available free of charge, both to young persons, including school children, and to adults.

ARTICLE 10

THE RIGHT TO VOCATIONAL TRAINING

With a view to ensuring the effective exercise of the right to vocational training, the Contracting Parties undertake :

1 to provide or promote, as necessary, the technical and vocational training of all persons including the handicapped, in consultation with employers' and workers organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude;

2. to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments,

3. to provide or promote, as necessary :

   (*a*) adequate and readily available training facilities for adult workers;

   (*b*) special facilities for the re-training of adult workers needed as a result of technological development or new trends in employment;

4. to encourage the full utilisation of the facilities provided by appropriate measures such as :

   (*a*) reducing or abolishing any fees or charges;

   (*b*) granting financial assistance in appropriate cases;

   (*c*) including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment;

(*d*) ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally.

ARTICLE 11

THE RIGHT TO PROTECTION OF HEALTH

With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

1. to remove as far as possible the causes of ill-health;

2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;

3. to prevent as far as possible epidemic, endemic and other diseases.

ARTICLE 12

THE RIGHT TO SOCIAL SECURITY

With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake:

1. to establish or maintain a system of social security;

2. to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention (No. 102) Concerning Minimum Standards of Social Security;

3. to endeavour to raise progressively the system of social security to a higher level;

4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure:

(*a*) equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties;

(*b*) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.

ARTICLE 13

THE RIGHT TO SOCIAL AND MEDICAL ASSISTANCE

With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake :

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;

2. to ensure that persons receiving such assistance shall not for that reason, suffer from a diminution of their political or social rights;

3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;

4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this Article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.

ARTICLE 14

THE RIGHT TO BENEFIT FROM SOCIAL WELFARE SERVICES

With a view to ensuring the effective exercise of the right to benefit from social welfare services, the Contracting Parties undertake :

1. to promote or provide services which, by using methods of social work, would contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment;

2. to encourage the participation of individuals and voluntary or other organisations in the establishment and maintenance of such services.

ARTICLE 15

THE RIGHT OF PHYSICALLY OR MENTALLY DISABLED PERSONS TO VOCATIONAL TRAINING, REHABILITATION AND SOCIAL RESETTLEMENT

With a view to ensuring the effective exercise of the right of the physically or mentally disabled to vocational training, rehabilitation and resettlement, the Contracting Parties undertake :

1. to take adequate measures for the provision of training facilities, including, where necessary, specialised institutions, public or private,

2. to take adequate measures for the placing of disabled persons in employment, such as specialised placing services, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment.

ARTICLE 16

THE RIGHT OF THE FAMILY TO SOCIAL, LEGAL AND ECONOMIC PROTECTION

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.

ARTICLE 17

THE RIGHT OF MOTHERS AND CHILDREN TO SOCIAL AND ECONOMIC PROTECTION

With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services.

ARTICLE 18

THE RIGHT TO ENGAGE IN A GAINFUL OCCUPATION IN THE TERRITORY OF OTHER CONTRACTING PARTIES

With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Contracting Party, the Contracting Parties undertake :

1. to apply existing regulations in a spirit of liberality;

2. to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;

3. to liberalise, individually or collectively, regulations governing the employment of foreign workers;

and recognise :

4. the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Contracting Parties.

ARTICLE 19

THE RIGHT OF MIGRANT WORKERS AND THEIR FAMILIES TO PROTECTION AND ASSISTANCE

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake :

1. to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;

2. to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;

3. to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries;

4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

(*a*) remuneration and other employment and working conditions;

(*b*) membership of trade unions and enjoyment of the benefits of collective bargaining;

(*c*) accommodation;

5. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;

6 to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;

7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this Article;

8. to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;

9. to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire;

10. to extend the protection and assistance provided for in this Article to self-employed migrants insofar as such measures apply.

PART III

ARTICLE 20

UNDERTAKINGS

1. Each of the Contracting Parties undertakes:

(*a*) to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that Part;

(*b*) to consider itself bound by at least five of the following Articles of Part II of this Charter: Articles 1, 5, 6, 12, 13, 16 and 19;

(*c*) in addition to the Articles selected by it in accordance with the preceding sub-paragraph, to consider itself bound by such a number of Articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of Articles or numbered paragraphs by which it is bound is not less than 10 Articles or 45 numbered paragraphs.

2. The Articles or paragraphs selected in accordance with sub-paragraphs (*b*) and (*c*) of paragraph 1 of this Article shall be notified to the Secretary-General of the Council of Europe at the time when the instrument of ratification or approval of the Contracting Party concerned is deposited.

3. Any Contracting Party may, at a later date, declare by notification to the Secretary-General that it considers itself bound by any Articles or any numbered paragraphs of Part II of the Charter which it has not already accepted under the terms of paragraph 1 of this Article. Such undertakings subsequently given shall be deemed to be an integral part of the ratification or approval, and shall have the same effect as from the thirtieth day after the date of the notification.

4. The Secretary-General shall communicate to all the signatory Governments and to the Director-General of the International Labour Office any notification which he shall have received pursuant to this Part of the Charter.

5. Each Contracting Party shall maintain a system of labour inspection appropriate to national conditions.

PART IV

ARTICLE 21

REPORTS CONCERNING ACCEPTED PROVISIONS

The Contracting Parties shall send to the Secretary-General of the Council of Europe a report at two-yearly intervals, in a form to be determined by the Committee of Ministers, concerning the application of such provisions of Part II of the Charter as they have accepted.

ARTICLE 22

REPORTS CONCERNING PROVISIONS WHICH ARE NOT ACCEPTED

The Contracting Parties shall send to the Secretary-General, at appropriate intervals as requested by the Committee of Ministers, reports relating to the provisions of Part II of the Charter which they did not accept at the time of their ratification or approval or in a subsequent notification. The Committee of Ministers shall determine from time to time in respect of which provisions such reports shall be requested and the form of the reports to be provided.

ARTICLE 23

COMMUNICATION OF COPIES

1. Each Contracting Party shall communicate copies of its reports referred to in Articles 21 and 22 to such of its national organisations as are members of the international organisations of employers and trade unions to be invited under Article 27, paragraph 2, to be represented at meetings of the Sub-committee of the Governmental Social Committee.

2. The Contracting Parties shall forward to the Secretary-General any comments on the said reports received from these national organisations, if so requested by them.

ARTICLE 24

EXAMINATION OF THE REPORTS

The reports sent to the Secretary-General in accordance with Articles 21 and 22 shall be examined by a Committee of Experts, who shall have also before them any comments forwarded to the Secretary-General in accordance with paragraph 2 of Article 23.

ARTICLE 25

COMMITTEE OF EXPERTS

1. The Committee of Experts shall consist of not more than seven members appointed by the Committee of Ministers from a list of independent experts of the highest integrity and of recognised competence in international social questions, nominated by the Contracting Parties.

2. The members of the Committee shall be appointed for a period of six years. They may be reappointed. However, of the members first appointed, the terms of office of two members shall expire at the end of four years.

3. The members whose terms of office are to expire at the end of the initial period of four years shall be chosen by lot by the Committee of Ministers immediately after the first appointment has been made.

4. A member of the Committee of Experts appointed to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

ARTICLE 26

PARTICIPATION OF THE INTERNATIONAL LABOUR ORGANISATION

The International Labour Organisation shall be invited to nominate a representative to participate in a consultative capacity in the deliberations of the Committee of Experts.

ARTICLE 27

SUB-COMMITTEE OF THE GOVERNMENTAL SOCIAL COMMITTEE

1. The reports of the Contracting Parties and the conclusions of the Committee of Experts shall be submitted for examination to a Sub-committee of the Governmental Social Committee of the Council of Europe.

2. The Sub-committee shall be composed of one representative of each of the Contracting Parties. It shall invite no more than two international organisations of employers and no more than two international trade union organisations as it may designate to be represented as observers in a consultative capacity at its meetings. Moreover, it may consult no more than two representatives of international non-governmental organisations having consultative status with the Council of Europe, in respect of questions with which the organisations are particularly qualified to deal, such as social welfare, and the economic and social protection of the family.

3. The Sub-committee shall present to the Committee of Ministers a report containing its conclusions and append the report of the Committee of Experts.

ARTICLE 28

CONSULTATIVE ASSEMBLY

The Secretary-General of the Council of Europe shall transmit to the Consultative Assembly the conclusions of the Committee of Experts. The Consultative Assembly shall communicate its views on these Conclusions to the Committee of Ministers.

ARTICLE 29

COMMITTEE OF MINISTERS

By a majority of two-thirds of the members entitled to sit on the Committee, the Committee of Ministers may, on the basis of the report of the Sub-committee, and after consultation with the Consultative Assembly, make to each Contracting Party any necessary recommendations.

PART V

ARTICLE 30

DEROGATIONS IN TIME OF WAR OR PUBLIC EMERGENCY

1. In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. Any Contracting Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary-General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary-General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

3. The Secretary-General shall in turn inform other Contracting Parties and the Director-General of the International Labour Office of all communications received in accordance with paragraph 2 of this Article.

Article 31

RESTRICTIONS

1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those Parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

Article 32

RELATIONS BETWEEN THE CHARTER AND DOMESTIC LAW OR INTERNATIONAL AGREEMENTS

The provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected.

Article 33

IMPLEMENTATION BY COLLECTIVE AGREEMENTS

1. In member States where the provisions of paragraphs 1, 2, 3, 4 and 5 of Article 2, paragraphs 4, 6 and 7 of Article 7 and paragraphs 1, 2, 3 and 4 of Article 10 of Part II of this Charter are matters normally left to agreements between employers or employers' organisations and workers' organisations, or are normally carried out otherwise than by law, the undertakings of those paragraphs may be given and compliance with them shall be treated as effective if their provisions are applied through such agreements or other means to the great majority of the workers concerned.

2. In member States where these provisions are normally the subject of legislation, the undertakings concerned may likewise be given, and compliance with them shall be regarded as effective if the provisions are applied by law to the great majority of the workers concerned.

ARTICLE 34

TERRITORIAL APPLICATION

1. This Charter shall apply to the metropolitan territory of each Contracting Party. Each signatory Government may, at the time of signature or of the deposit of its instrument of ratification or approval, specify, by declaration addressed to the Secretary-General of the Council of Europe, the territory which shall be considered to be its metropolitan territory for this purpose.

2. Any Contracting Party may, at the time of ratification or approval of this Charter or at any time thereafter, declare by notification addressed to the Secretary-General of the Council of Europe that the Charter shall extend in whole or in part to a non-metropolitan territory or territories specified in the said declaration for whose international relations it is responsible or for which it assumes international responsibility. It shall specify in the declaration the Articles or paragraphs of Part II of the Charter which it accepts as binding in respect of the territories named in the declaration.

3. The Charter shall extend to the territory or territories named in the aforesaid declaration as from the thirtieth day after the date on which the Secretary-General shall have received notification of such declaration.

4. Any Contracting Party may declare at a later date by notification addressed to the Secretary-General of the Council of Europe, that, in respect of one or more of the territories to which the Charter has been extended in accordance with paragraph 2 of this Article, it accepts as binding any Articles or any numbered paragraphs which it has not already accepted in respect of that territory or territories. Such undertakings subsequently given shall be deemed to be an integral part of the original declaration in respect of the territory concerned, and shall have the same effect as from the thirtieth day after the date of the notification.

5. The Secretary-General shall communicate to the other signatory Governments and to the Director-General of the International Labour Office any notification transmitted to him in accordance with this Article.

ARTICLE 35

SIGNATURE, RATIFICATION AND ENTRY INTO FORCE

1. This Charter shall be open for signature by the Members of the Council of Europe. It shall be ratified or approved. Instruments of ratification or approval shall be deposited with the Secretary-General of the Council of Europe.

2. This Charter shall come into force as from the thirtieth day after the date of deposit of the fifth instrument of ratification or approval.

3. In respect of any signatory Government ratifying subsequently, the Charter shall come into force as from the thirtieth day after the date of deposit of its instrument of ratification or approval.

4. The Secretary-General shall notify all the Members of the Council of Europe and the Director-General of the International Labour Office, of the entry into force of the Charter, the names of the Contracting Parties which have ratified or approved it and the subsequent deposit of any instruments of ratification or approval.

ARTICLE 36

AMENDMENTS

Any Member of the Council of Europe may propose amendments to this Charter in a communication addressed to the Secretary-General of the Council of Europe. The Secretary-General shall transmit to the other Members of the Council of Europe any amendments so proposed, which shall then be considered by the Committee of Ministers and submitted to the Consultative Assembly for opinion. Any amendments approved by the Committee of Ministers shall enter into force as from the thirtieth day after all the Contracting Parties have informed the Secretary-General of their acceptance. The Secretary-General shall notify all the Members of the Council of Europe and the Director-General of the International Labour Office of the entry into force of such amendments.

ARTICLE 37

DENUNCIATION

1. Any Contracting Party may denounce this Charter only at the end of a period of five years from the date on which the Charter entered into force for it, or at the end of any successive period of two years, and, in each case, after giving six months notice to the Secretary-General of the Council of Europe, who shall inform the other Parties and the Director-General of the International Labour Office accordingly. Such denunciation shall not affect the validity of the Charter in respect of the other Contracting Parties provided that at all times there are not than five such Contracting Parties.

2. Any Contracting Party may, in accordance with the provisions set out in the preceding paragraph, denounce any Article or paragraph of Part II of the Charter accepted by it provided that the number of Articles or paragraphs by which this Contracting Party is bound shall never be less than 10 in the former case and 45 in the latter and that this number of Articles or paragraphs shall continue to include the Articles selected by the Contracting Party among those to which special reference is made in Article 20, paragraph 1, sub-paragraph (*b*).

3. Any Contracting Party may denounce the present Charter or any of the Articles or paragraphs of Part II of the Charter, under the conditions specified in paragraph 1 of this Article in respect of any territory to which the said Charter is applicable by virtue of a declaration made in accordance with paragraph 2 of Article 34.

ARTICLE 38

APPENDIX

The Appendix to this Charter shall form an integral part of it.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Charter.

Done at Turin,

this 18th day of October 1961, in English and French, both texts being equally authoritative, in a single copy which shall be deposited within the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the Signatories.

APPENDIX TO THE SOCIAL CHARTER

Scope of the Social Charter in terms of persons protected :

1. Without prejudice to Article 12, paragraph 4 and Article 13, paragraph 4, the persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned, subject to the understanding that these Articles are to be interpreted in the light of the provisions of Articles 18 and 19.

This interpretation would not prejudice the extension of similar facilities to other persons by any of the Contracting Parties.

2. Each Contracting Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed at Geneva on 28th July 1951, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Contracting Party under the said Convention and under any other existing international instruments applicable to those refugees.

PART I — *Paragraph 18* and *PART II* — *Article 18, paragraph 1*

It is understood that these provisions are not concerned with the question of entry into the territories of the Contracting Parties and do not prejudice the provisions of the European Convention on Establishment, signed at Paris on 13th December 1955.

PART II

Article 1, paragraph 2

This provision shall not be interpreted as prohibiting or authorising any union security clause or practice.

Article 4, paragraph 4

This provision shall be so understood as not to prohibit immediate dismissal for any serious offence.

Article 4, paragraph 5

It is understood that a Contracting Party may give the undertaking required in this paragraph if the great majority of workers are not permitted to suffer deductions from wages either by law or through collective agreements or arbitration awards, the exceptions being those persons not so covered.

Article 6, paragraph 4

It is understood that each Contracting Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31.

Article 7, paragraph 8

It is understood that a Contracting Party may give the undertaking required in this paragraph if it fulfils the spirit of the undertaking by providing by law that the great majority of persons under 18 years of age shall not be employed in night work.

Article 12, paragraph 4

The words "and subject to the conditions laid down in such agreements" in the introduction to this paragraph are taken to imply *inter alia* that with regard to benefits which are available independently of any insurance contribution a Contracting Party may require the completion of a prescribed period of residence before granting such benefits to nationals of other Contracting Parties.

Article 13, paragraph 4

Governments not Parties to the European Convention on Social and Medical Assistance may ratify the Social Charter in respect of this paragraph provided that they grant to nationals of other Contracting Parties a treatment which is in conformity with the provisions of the said Convention.

Article 19, paragraph 6

For the purpose of this provision, the term "family of a foreign worker" is understood to mean at least his wife and dependent children under the age of 21 years.

PART III

It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof.

Article 20, paragraph 1

It is understood that the "numbered paragraphs" may include Articles consisting of only one paragraph.

PART V

Article 30

The term "in time of war or other public emergency" shall be so understood as to cover also the *threat* of war.

ANNEX VI

TEXT PREPARED

WITHIN THE

ORGANISATION OF AMERICAN STATES

THE INTER-AMERICAN CONVENTION ON HUMAN RIGHTS

SAN JOSE (Costa Rica), 22.XI.1969

AMERICAN CONVENTION ON HUMAN RIGHTS

PREAMBLE

The American States signatory to the present Convention,

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognising that the essential rights of man are not derived from one's being a national of a certain State but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a Convention reinforcing or complementing the protection provided by the domestic law of the American States;

Considering that these principles have been set forth in the Charter of the Organisation of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organisation itself of broader standards with respect to economic, social and educational rights and resolved that an inter-American Convention on human rights should determine the structure, competence and procedure of the organs responsible for these matters,

Have agreed upon the following:

AMERICAN CONVENTION ON HUMAN RIGHTS

PART I - STATE OBLIGATIONS AND RIGHTS PROTECTED

CHAPTER I - GENERAL OBLIGATIONS

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

CHAPTER II - CIVIL AND POLITICAL RIGHTS

Article 3. Right to Juridical Personality

Every person has the right to recognition as a person before the law.

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, this may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. Its application shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be re-established in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offences or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending a decision by the competent authority.

Article 5. Freedom from Torture

1. Every person has the right to have his physical, mental and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.

5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialised tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.

6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 6. Freedom from Slavery

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.

2. No one shall be required to perform forced or compulsory labour. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labour, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

3. For the purposes of this article the following do not constitute forced or compulsory labour:

a. any work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;

b. any military service and, in countries in which conscientious objectors are recognised, any national service that the law may provide for in lieu of that service;

c. any service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or

d. any work or service that forms part of normal civic obligations.

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for non-fulfilment of duties of support.

Article 8. Right to a Fair Trial

1. Every person shall have the right to a hearing with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights or obligations of a civil, labour, fiscal or any other nature.

2. Every person accused of a serious crime has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

b. prior notification in detail to the accused of the charges against him;

c. adequate time and means for the preparation of his defence;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

f. the right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g. the right not to be compelled to be a witness against himself or to plead guilty; and

h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person, acquitted by a non-appealable judgment, shall not be subjected to a new trial for the same cause.

5. Criminal procedure shall be public, except in so far as may be necessary to protect the interests of justice.

Article 9. Freedom from Ex Post Facto Laws

No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequently to the commission of the offence the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Article 10. Right to Compensation

Every person shall have the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

Article 11. Right to Privacy

1. Everyone has the right to have his honour respected and his dignity recognised.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation.

3. Everyone has a right to the protection of the law against such interference or attacks.

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for religious and moral education of their children, or wards, that is in accord with their own convictions.

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly estalished by law and be necessary in order to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

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 implements or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship, for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law.

Article 14. Right of Reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honour and reputation, every publication and every newspaper, motion picture, radio and television company shall have a person responsible, who is not protected by immunities or special privileges.

Article 15. Right of Assembly

The right of peaceful assembly, without arms, is recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interests of national security or public safety or public order, or to protect public health or morals or the rights or freedoms of others.

Article 16. Freedom of Association

1. Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports or other purposes.

2. Exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interests of national security, public safety, or public order, or to protect public health or morals or the rights and freedoms of others.

3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

Article 17. Rights of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. The right of men and women of marriageable age to marry and to raise a family shall be recognised, if they meet the conditions required by domestic laws, in so far as such conditions do not affect the principle of non-discrimination established in this Convention.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

5. The law shall recognise equal rights for children born out of wedlock and those born in wedlock.

Article 18. Right to a Name

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

Article 19. Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor, on the part of his family, society and the State.

Article 20. Right to Nationality

1. Every person has the right to a nationality.

2. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.

3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 22. Freedom of Movement and Residence

1. Every person lawfully in the territory of a State Party shall have the right to move about in it and to reside in it subject to the provisions of the law.

2. Every person has the right to leave the country freely, including his own.

3. The exercise of the foregoing rights may be restricted only pursuant to a law, to the extent indispensable in a democratic society in order to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

4. The exercise of the rights recognised in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.

5. No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it.

6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.

7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the State and international Conventions, in the event he is being pursued for political or related common crimes.

8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

9. The collective expulsion of aliens is prohibited.

Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:

   a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

   b. to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

   c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph, exclusively on the basis of age, nationality, residence, language, education, civil and mental capacity and conviction by a competent judge in criminal proceedings.

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court of tribunal for protection against acts that violate his fundamental rights recognised by the Constitution or laws of a State or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his right thereto determined by the competent authority provided for by the legal system of the State;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted.

CHAPTER III - ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Article 26. Progressive Development

The States Parties undertake to adopt measures, both internally and through international co-operation, especially those of an economic and technical nature, , with a view to achieving progressively by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires.

CHAPTER IV - SUSPENSION OF GUARANTEES, INTERPRETATION AND APPLICATION

Article 27. Suspension of Guarantees

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion or social origin.

2. The foregoing provision does not authorise any suspension of the following articles: Article 3 (Right to Juridical Personality); Article 4 (Right to Life); Article 5 (Right to Humane Treatment); Article 6 (Freedom from Slavery); Article 9 (Freedom from Ex Post Facto Laws); Article 12 (Freedom of Conscience and Religion); Article 17 (Rights of the Family); Article 18 (Right to a Name); Article 19 (Rights of the Child); Article 20 (Right to Nationality); and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organisation of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension and the date set for the determination of such suspension.

Article 28. Federal Clause

Where a State Party is constituted as a federal State, the national government of such State party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

With respect to the provisions over whose subject matter the constituent units of the federal State have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfilment of this Convention

Whenever two or more States Parties agree to form a federation or other type of association they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new State that is organised.

Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group or person to suppress the enjoyment or exercise of the rights and freedoms recognised in this Convention or to restrict them to a greater extent than is provided for herein;

b. restricting the enjoyment or exercise of any right or freedom recognised by virtue of the laws of any State Party or by virtue of another Convention to which one of the said States is a party;

c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Article 30. Scope of Restrictions

The restrictions that, pursuant to this Convention may be placed on the enjoyment or exercise of the rights or freedoms recognised herein may not be applied except in accordance with laws enacted for reasons of general interest and for the purpose of which the restrictions have been established.

Article 31. Recognition of Other Rights

Other rights and freedoms recognised by virtue of the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.

CHAPTER V - PERSONAL RESPONSIBILITIES

Article 32. Relations between Duties and Rights

1. Every person has responsibilities to his family, his community, and mankind.

2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

PART II - MEANS OF PROTECTION

CHAPTER VI - COMPETENT ORGANS

Article 33

The following organs shall be competent to hear matters relating to the fulfilment of the commitments made by the States Parties to this Convention.

a. the Inter-American Commission on Human Rights, referred to as the "The Commission"; and

b. the Inter-American Court of Human Rights, referred to as "The Court".

CHAPTER VII - INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Section I. Organisation

Article 34

The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognised competence in the field of human rights.

Article 35

The Commission shall represent all the member countries of the Organisation of American States.

Article 36

1. The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organisation from a list of candidates proposed by the governments of the member States.

2. Each of those governments may propose up to three candidates, who may be nationals of the States proposing them or of any other member States of the Organisation of American States. When a State of three is proposed, at least one of the candidates shall be a national of a State other than the one proposing the slate.

Article 37

1. The members of the Commission shall be elected for a term of four years and may be re-elected only once, but the terms of three of the members chosen in the first election shall expire at the end of two years. Immediately following that election the General Assembly shall determine the names of those three members by lot.

2. No two nationals of the same State may be members of the Commission.

Article 38

Vacancies that may occur on the Commission for reasons other than the normal expiration of a term shall be filled by the Permanent Council of the Organisation in accordance with the provisions of the Statute of the Commission.

Article 39

The Commission shall prepare its Statute, which shall be submitted to the General Assembly for approval, and it shall also establish its own Regulations.

Article 40

Secretariat services for the Commission shall be furnished by the appropriate specialised unit of the General Secretariat of the Organisation. This unit shall be provided with the resources required to accomplish the tasks assigned to it by the Commission.

Section II. Functions

Article 41

The main functions of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

a. to develop an awareness of human rights among the peoples of America;

b. to make recommendations to the governments of the member States, when it considers such action advisable, for the adoption of progressive measures in favour of human rights within the framework of their domestic law and constitution precepts as well as appropriate measures to further the observance of those rights;

c. to prepare such studies or reports as it considers advisable in the performance of its duties;

d. to request the governments of the member States to supply it with information on the measures adopted by them in matters of human rights;

e. to respond, through the General Secretariat of the Organisation of American States, to inquiries made by the member States on matters related to human rights and, within the limits of its possibilities, to provide those States with the advisory services they request;

f. to take action on petitions and other communications pursuant to its authority, in accordance with the provisions of Article 44 through 51 of this Convention and

g. to submit an annual report to the General Assembly of the Organisation of American States.

Article 42

The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields, so that the Commission may watch over the promotion of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires.

Article 43

The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention.

Section III. Competence

Article 44

Any person or group of persons, or any non-governmental entity legally recognised in one or more member States of the Organistion, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

Article 45

1. Any State Party may, when it deposits its instrument of ratification or of adherence to this Convention, or at any later time, declare that it recognises the competence of the Commission to receive, and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognising the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period or for a specific case.

4. The declarations shall be deposited in the General Secretariat of the Organisation of American States, which shall transmit copies thereof to member States of that Organisation.

Article 46

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 and 45 shall be subject to the following requirements:

a. that the remedies of domestic law have been pursued and exhausted, in accordance with generally recognised principles of international law;

b. that the petition is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final decision;

c. that the subject of the petition or communication is not pending before another international procedure for settlement; and

d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile and signature of the person or persons or of the legal representative of the entity lodging the petition.

2. The provisions of paragraphs 1 (a) and 1 (b) of this article shall not be applicable when:

a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;

b. the party alleging violation of his right has been denied access to the remedies of domestic jurisdiction or has been prevented from exhausting them; or

c. there has been unwarranted delay in rendering a final judgment under the afore-mentioned remedies.

Article 47

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

a. any of the requirements indicated in Article 46 has not been met;

b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;

c. the statements of the petitioner or the State indicate that the petition or communication is manifestly groundless or obviously out of order; or

d. the petition or communication is substantially the same as one previously studied by the Commission or another international Organisation.

Section IV. Procedure

Article 48

1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:

a. If it considers the petition or communication admissible, it shall request information from the government of the State which has been indicated as being the authority responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.

b. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.

c. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.

d. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the fact. If necessary and advisable, the Commission shall conduct an investigation, for the effective conduct of which it shall request and the interested States shall furnish to it, all necessary facilities.

e. The Commission may request the State concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.

f. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognised in this Convention.

2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the State in whose territory a violation has allegedly been committed.

Article 49

If a friendly settlement has been reached in accordance with paragraph 1.f of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention and then communicated to the Secretary General of the Organisation of American States for publication. This report shall contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it.

Article 50

1. If a settlement is not reached, the Commission shall, within the the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.

2. The report shall be transmitted to the States concerned, which shall not be at liberty to publish it.

3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

Article 51

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the States concerned, the matter has not either been settled or submitted by the Commission or by the State concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the State is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the State has taken adequate measures and whether to publish its report.

CHAPTER VIII - INTER-AMERICAN COURT OF HUMAN RIGHTS

Section I. Organisation

Article 52

1. The Court shall consist of seven judges, nationals of the member States of the Organisation, elected in an individual capacity from among jurists of the highest moral authority and of recognised competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the State of which they are nationals or of the State that proposes them as candidates.

2. No two judges may be nationals of the same State.

Article 53

1. The judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention in General Assembly of the Organisation, from a panel of candidates proposed by those States.

2. Each of the States Parties may propose up to three candidates, nationals of the State that proposes them or of any other member State of the Organisation of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a State other than the one proposing the slate.

Article 54

1. The judges of the Court shall be elected for a term of six years and may be re-elected only once. The term of three of the judges chosen in the first election shall expire at the end of three years. Immediately after the election, the names of the three judges shall be determined by lot in the General Assembly.

2. A judge elected to replace a judge whose term has not expired shall complete the term of the latter.

3. The judges shall continue in office until the expiration of their term. However, they shall continue to serve with regard to cases that they have begun to hear and that are still pending, for which purposes they shall not be replaced by the newly-elected judges.

Article 55

1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.

2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an *ad hoc* judge.

3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an ad hoc judge.

4. An ad hoc judge shall possess the qualifications indicated in Article 52.

5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

Article 56

Five judges shall constitute a quorum for the transaction of business by the Court.

Article 57

The Commission shall appear at all cases before the Court.

Article 58

1. The Court shall have its seat at the place determined by the States Parties to the Convention in the General Assembly of the Organisation; however, it may convene in the territory of any member State of the Organisation of American States when a majority of the Court considers it desirable, and with the prior consent of the States concerned. The seat of the Court may be changed by the States Parties to the Covention in the General Assembly, by a two-thirds vote.

2. The Court shall appoint its own Secretary.

3. The Secretary shall have his office at the place where the Court has its seat and shall attend the meetings that the Court may hold away from its seat.

Article 59

The Court shall establish its own secretariat, which shall function under the direction of the Secretary of the Court, in accordance with the administrative standards of the General Secretariat of the Organisation in all matters not incompatible with the independence of the Court. The staff of the Court's Secretariat shall be appointed by the Secretary General of the Organisation, in consultation with the Secretary of the Court.

Article 60

The Court shall draw up its statute and it shall submit it to the General Assembly for approval. It shall adopt its own Rules of Procedure.

Section II. Jurisdiction and Functions

Article 61

1. Only the States Parties and the Commission shall have the right to submit a case to the Court.

2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 to 50 shall have been exhausted.

Article 62

1. A State Party may, upon depositing its instrument of ratification or accession to this Convention, or at any subsequent time, declare that it recognises as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

2. Such declaration may be made unconditionally, or on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organisation, who shall transmit copies thereof to the other member States of the Organisation and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognise or have recognised such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

Article 63

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in the matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Article 64

The member States of the Organisation may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American States. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organisation of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

The Court, at the request of a member State of the Organisation, may provide that State with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Article 65

To each regular session of the General Assembly of the Organisation of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a State has not complied with its judgments and make any pertinent recommendations.

Section III. Procedure

Article 66

1. Reasons shall be given for the judgment of the Court.

2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

Article 67

The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

Article 68

1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with the domestic procedure governing the execution of judgments against the State.

Article 69

The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Parties to the Convention.

CHAPTER IX - COMMON PROVISIONS

Article 70

The judges of the Court and the members of the Commission shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law. During the exercise of their official function they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties.

At no time shall the judges of the Court or the members of the Commission be held liable for any decisions or opinions issued in the exercise of their functions.

Article 71

The position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of a judge or member, as determined in the respective statutes.

Article 72

The judges of the Court and the members of the Commission shall receive emoluments and travel allowances in the form and under the conditions set forth in their statutes, with due regard for the importance and independence of their office. Such emoluments and travel allowances shall be determined in the budget of the Organisation of American States, which shall also include the expenses of the Court and its secretariat. To this end, the Court shall draw up its own budget and submit it to the General Assembly through the General Secretariat. The latter may not introduce any changes in it.

Article 73

The General Assembly may, only at the request of the Commission or the Court, as the case may be, determine sanctions to be applied against members of the Commission or judges of the Court when there are justifiable grounds for such action as set forth in the respective statutes. A vote of a two-thirds majority of the member States of the Organisation shall be required for a decision in the case of members of the Commission and, in the case of judges of the Court, a two-thirds majority vote of the States Parties to the Convention shall also be required.

PART III - GENERAL AND TRANSITORY PROVISIONS

CHAPTER X - SIGNATURE, RATIFICATION, RESERVATIONS, AMENDMENTS, PROTOCOLS AND DENUNCIATION

Article 74

1. This Convention shall be open for signature and ratification by or adherence of any member State of the Organisation of American States.

2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organisation of American States. As soon as eleven States have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any State that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.

The Secretary General shall inform all member States of the Organisation of the entry into force of the Convention.

Article 75

This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.

Article 76

1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.

2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendements shall enter into force on the dates on which they deposit their respective instruments of ratification.

Article 77

1. In accordance with Article 31, any State Party and the Commission may submit proposed Protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.

2. Each Protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it.

Article 78

1. The States Parties may denounce this Convention at the expiration of a five-year period starting from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organisation of American States, who shall inform the other States Parties.

2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that State prior to the effective date of denunciation.

CHAPTER XI - TRANSITORY PROVISIONS

Section I. Inter-American Commission on Human Rights

Article 79

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each member State of the Organisation to present, within ninety days, its candidates for membership on the Inter-American Commission on Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented, and transmit it to the member States of the Organisation at least thirty days prior to the next session of the General Assembly.

Article 80

The members of the Commission shall be elected by secret ballot of the General Assembly from the list of candidates referred to in Article 79. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the member States shall be declared elected. Should it become necessary to have several ballots in order to elect all the members of the Commission, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the General Assembly.

Section II. Inter-American Court of Human Rights

Article 81

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each State Party to present, within ninety days, its candidates for membership on the Inter-American Court of Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented and transmit it to the States Parties at least thirty days prior to the next session of the General Assembly.

Article 82

The judges of the Court shall be elected from the list of candidates referred to in Article 81, by secret ballot of the States Parties to the Convention in the General Assembly. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties shall be declared elected. Should it become necessary to have several ballots in order to elect all the judges of the Court the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the States Parties.

STATEMENTS AND RESERVATIONS

STATEMENT OF CHILE

The Delegation of Chile signs this Convention, subject to its subsequent parliamentary approval and ratification, in accordance with the constitutional rules in force.

DECLARATION OF EL SALVADOR

The Delegation of El Salvador has the honour of signing the American Convention on Human Rights without making any reservations at the present time. It wishes to leave on record, however, that it attended this distinguished Conference in the hope that an American Commission and an American Court would arise therefrom which would have sufficient jurisdiction and powers to effectively promote and protect human rights in the hemisphere, and this, we consider, has not been fully attained inasmuch as the compulsory jurisdiction of these organs was not established and, more serious still, this jurisdiction has been left open to acceptance by the States for specific cases.

RESERVATION OF URUGUAY

Article 80.2 of the Uruguay Constitution provides that citizenship is suspended for a person indicted according to law in a criminal prosecution that may result in a sentence of imprisonment. This restriction of the exercise of the rights recognised in Article 23 of the Convention is not envisaged among the circumstances provided for in this respect by paragraph 2 of Article 23, for which reason the Delegation of Uruguay expresses a reservation on this matter.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, whose full powers were found in good and due form, sign this Convention, which shall be called "PACT OF SAN JOSE, COSTA RICA", (in the city of San José, Costa Rica, the twenty-second of November, nineteen hundred and sixty-nine).

ANNEX VII

TEXT PREPARED WITHIN THE ORGANISATION OF AFRICAN UNITY

THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Nairobi, June 1981

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights" ;

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and legitimate aspirations of the African peoples" ;

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples' of Africa and to promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights ;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights ;

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1. Text provided by the Division of Press and Information of the OAU General Secretariat.

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights ;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone ;

Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights ;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neocolonialism apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions ;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations ;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa ;

Have agreed as follows :

PART I — RIGHTS AND DUTIES

Chapter I - Human and Peoples' Rights

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.

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

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

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

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

b. the right to be presumed innocent until proved guilty by a competent court or tribunal ;

c. the right to defence, including the right to be defended by counsel of his choice ;

d. the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

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.

Article 10

1. Every individual shall have the right to free association provided that he abides by the law.

2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

2. Every citizen shall have the right of equal access to the public service of his country.

3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17

1. Every individual shall have the right to education.

2. Every individual may freely, take part in the cultural life of his community.

3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

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

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal ; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.

4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively to ensure the exercise of the right to development.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that :

a. any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter.

b. their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Article 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Chapter II - Duties

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.

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.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty :

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family ; to respect his parents at all times, to maintain them in case of need ;

2. To serve his national community by placing his physical and intellectual abilities at its service ;

3. Not to compromise the security of the State whose national or resident he is ;

4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened ;

5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law ;

6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society ;

7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.

8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

PART II — MEASURES OF SAFEGUARD

Chapter I - Establishment and organisation of the African Commission on Human and Peoples' Rights

Article 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Article 31

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights ; particular consideration being given to persons having legal experience.

2. The members of the Commission shall serve in their personal capactiy.

Article 32

The Commission shall not include more than one national of the same State.

Article 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

Article 34

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States parties to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

Article 35

1. The Secretary General of the Organisation of African Unity shall invite States parties to the present Charter at least four months before the elections to nominate candidates.

2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

Article 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

Article 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

Article 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 39

1. In case of death or resignation of a member of the Commission the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.

3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

Article 40

Every member of the Commission shall be in office until the date his successor assumes office.

Article 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear cost of the staff and services.

Article 42

1. The Commission shall elect its Chairman and Vice-Chairman for a two-year period. They shall be eligible for re-election.

2. The Commission shall lay down its rules of procedure.

3. Seven members shall form the quorum.

4. In case of an equality of votes, the Chairman shall have a casting vote.

5. The Secretary General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

Article 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and immunities of the Organization of African Unity.

Article 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

Chapter II - Mandate of the Commission

Article 45

The functions of the Commission shall be :

1. To promote Human and Peoples' Rights and in particular :

a. to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.

b. to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.

c. co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interprete all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

Chapter III - Procedure of the Commission

Article 46

The Commission may resort to any appropriate method of investigation ; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

Communication from states

Article 47

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

Article 48

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

Article 49

Notwithstanding the provisions of Article 47, if a State party to the present Charter considers that another State Party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

Article 50

The Commission can only deal with a matter submitted to it *after making* sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

Article 51

1. The Commission may ask the States concerned to provide it with all relevant information.

2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

Article 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report to the States concerned and communicated to the Assembly of Heads of State and Government.

Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

Article 54

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities.

Other communications

Article 55

1. Before each Session, the Secretary of the Commission shali make a list of the Communications other than those of States parties to the present Charter and transmit them to the Members of the Commission, who shall indicate which communications should be considered by the commission.

2. A communication shall be considered by the Commission if a simple majority of its members so decide.

Article 56

Communication relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they :

1. indicate their authors even if the latter request anonymity,

2. are compatible with the Charter of the Organization of African Unity or with the present Charter,

3. are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,

4. are not based exclusively on news disseminated through the mass media,

5. are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged,

6. are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter, and

7. do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

Article 58

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.

2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.

3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

Article 59

1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.

2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.

3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Chapter IV - Applicable principles

Article 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Article 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights,

customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.

Article 62

Each State party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

Article 63

1. The present Charter shall be open to signature, ratification or adherence of the Member States of the Organization of African Unity.

2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.

3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the member States of the Organization of African Unity.

PART III — GENERAL PROVISIONS

Article 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.

2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

Article 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of deposit by that State of its instrument of ratification or adherence.

Article 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

Article 67

The Secretary General of the Organization of African Unity shall inform member States of the Organization of the deposit of each instrument of ratification or adherence.

Article 68

The present Charter may be amended if a State Party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

Adopted by the eighteenth Assembly of Heads of State and Government - June 1981 - Nairobi, Kenya

ANNEX VIII

LIST OF INSTRUMENTS IN CHRONOLOGICAL ORDER OF ADOPTION

Date of Adoption	Instrument
1926	
25 September	Slavery Convention
1930	
28 June	Forced Labour Convention
1948	
9 July	Freedom of Association and Protection of the Right to Organise Convention
9 December	Convention on the Prevention and Punishment of the Crime of Genocide
10 December	Universal Declaration of Human Rights
1949	
1 July	Right to Organise and Collective Bargaining Convention
2 December	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
1950	
14 December	Statute of the Office of the United Nations High Commissioner for Refugees
1951	
29 June	Equal Remuneration Convention
28 July	Convention Relating to the Status of Refugees
1952	
16 December	Convention on the International Right of Correction
20 December	Convention on the Political Rights of Women

1953	
23 October	Protocol amending the Slavery Convention signed at Geneva on 25 September 1926
1954	
28 September	Convention relating to the Status of Stateless Persons
1955	
30 August	Standard Minimum Rules for the Treatment of Prisoners
1956	
7 September	Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery
1957	
29 January	Convention on the Nationality of Married Women
25 June	Abolition of Forced Labour Convention
1958	
25 June	Discrimination (Employment and Occupation) Convention
1959	
20 November	Declaration of the Rights of the Child
1960	
14 December	Convention against Discrimination in Education
14 December	Declaration on the Granting of Independence to Colonial Countries and peoples
1961	
30 August	Convention on the Reduction of Statelessness
1962	
7 November	Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
10 December	Protocol Instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of any disputes which may arise between States Parties to the Convention against Discrimination in Education

14 December	General Assembly resolution 1803 (XVII) on "Permanent sovereignty over natural resources"
1963	
20 November	United Nations Declaration on the Elimination of All Forms of Racial Discrimination
1964	
9 July	Employment Policy Convention
1965	
1 November	Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
7 December	Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples
21 December	International Convention on the Elimination of All Forms of Racial Discrimination
1966	
4 November	Declaration of the Principles of International Cultural Co-operation
16 December	International Covenant on Economic, Social and Cultural Rights
16 December	International Covenant on Civil and Political Rights
16 December	Optional Protocol to the International Covenant on Civil and Political Rights
16 December	Protocol relating to the Status of Refugees
1967	
7 November	Declaration on the Elimination of All Forms of Discrimination against Women
14 December	Declaration on Territorial Asylum
1968	
13 May	Proclamation of Teheran
26 November	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

1969	
11 December	Declaration on Social Progress and Development
1971	
23 June	Workers' Representatives Convention
20 December	Declaration on the Rights of Mentally Retarded Persons
1973	
30 November	International Convention on the Suppression and Punishment of the Crime of Apartheid
3 December	Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity
1974	
16 November	Universal Declaration on the Eradication of Hunger and Malnutrition
14 December	Declaration on the Protection of Women and Children in Emergency and Armed Conflict
1975	
10 December	Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind
9 December	Declaration on the Rights of Disabled Persons
9 December	Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
1977	
16 December	Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms
1978	
27 November	Declaration on Race and Racial Prejudice
28 November	Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War

15 December	Declaration on the Preparation of Societies for Life in Peace
1979	
17 December	Code of Conduct for Law Enforcement Officials
18 December	Convention on the Elimination of All Forms of Discrimination against Women
1981	
25 November	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
1982	
3 December	Declaration on the Participation of Women in Promoting International Peace and Co-operation
18 December	Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
1984	
12 November	Declaration on the Right of Peoples to Peace
10 December	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

ANNEX IX

SELECTED CASE-LAW SUMMARIES

The following case-law summaries provide illustrations where superior courts in a number of jurisdictions have invoked international human rights norms in the context of criminal proceedings.

AUSTRALIA

Jago v The Judges of the District Court of New South Wales and Others. Court of Appeal, Supreme Court of New South Wales (Appeal No. 259 of 1987). 10 May 1988

A case concerning a delay of almost ten years in bringing to trial a person accused of serious criminal charges of misappropriation. An application for a permanent stay of criminal proceedings was refused by the District Court.

The Court of Appeal considered at length the right to a speedy trial of criminal charges. Samuels J A and Kirby P reviewed relevant constitutional provisions and case-law in England, the United States, Canada and Australia. Reference was made to Article 14(3) of the International Covenant of Civil and Political Rights (which has been ratified by Australia).

Article 14(3) states:

"In the determination of any criminal charge against him, every one shall be entitled to the following minimum guarantees in full equality:

(a) to be informed promptly ... of the charge against him;

(b) to be tried without undue delay"

Kirby P stated:

"A (more) relevant source of guidance in the statement of the common law of this State may be the modern statements of human rights found in international instruments, prepared by experts, adopted by organs of the United Nations, ratified by Australia and now part of international law ...".

"It is well established in England that courts, in the interpretation of legislation and the declaration of the common law should act, as far as possible, so as not to bring their decisions into conflict with obligations assumed by the ratification of a relevant international treaty".

It was held that the right to a speedy trial was an attribute of the indisputable right to a fair trial, and fairness required consideration of a wide range of factors. Although the delay in prosecuting the accused was extremely long and largely unexplained, there was insufficient prejudice to the accused in this case, and the trial should therefore proceed.

BERMUDA

Minister of Home Affairs v Fisher [1980] A C 319 (PC)

An appeal from a judgment of the Court of Appeal for Bermuda. The case relates to the status in Bermuda of four "illegitimate" children, all aged under 18 years, of a Jamaican woman who had married a Bermudian and came to live in Bermuda in 1972. In 1976 the children were ordered to leave Bermuda.

Section 11(5) of the Bermuda Constitution lists those persons deemed to belong to Bermuda, sub-section (d) including a person under 18 years who is the child, stepchild or child adopted by a person with Bermudian status or his wife. The Court of Appeal had held by a majority that by virtue of s.11(5)(d) of the Constitution, the Fisher children were deemed to belong to Bermuda. The question for the Privy Council to decide was whether the word "child" in section 11(5)(d) of the Constitution of Bermuda, includes an illegitimate child.

Although the above instruments at the date of the Constitution (1968) had no legal force, they could certainly not be disregarded as influences upon legislative policy.

The appeal by the Minister of Home Affairs was dismissed.

BRITAIN

R v Chief Immigration Officer, ex parte Salamat Bibi [1976] 1 WLR 979 [1976] 3 All E R 843, Court of Appeal

Concerning the application by immigration officers of Immigration Rules made under the 1971 Immigration Act. The applicant was a person seeking admission to the United Kingdom as the wife of a resident Commonwealth citizen. It was argued that the Rules should be interpreted and applied by immigration officers in accordance with the right to respect for family life in Article 8 of the European Convention on Human Rights.

Lord Denning, M R said:

> "... the position, as I understand it, is that if there is any ambiguity in our statutes or uncertainty in our law, then the Courts can look at the Convention as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it. Furthermore, when Parliament is enacting a statute, or the Secretary of State is framing rules, the courts will assume that they had regard to the provisions of the Convention, and intend to make the enactment accord with the Convention and will interpret them accordingly".

However, the Convention is not part of English law until it is made so by Parliament and immigration officers cannot be expected to know or apply the Convention. The appeal was dismissed.

Re: K D [1986] 1 All E R 577 (HL)

An appeal by the natural mother of a minor, who had become a ward of court, against an order that the child should remain a ward of court, that access should be terminated and that the local authority should be at liberty to place the child for adoption.

Lord Wilberforce, giving judgment, said that the way to construe a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but:

> "... sui generis, calling for principles of interpretation of its own suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law ..."

Looking at the origin of the Bermuda Constitution, Lord Wilberforce said:

> "It can be said that this instrument has certain special characteristics. (1) It is, particularly in Chapter 1 drafted in a broad and ample style which lays down principles of width and generality. (2) Chapter 1 is headed "Protection of Fundamental Rights and Freedoms of the Individual". It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953). The Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called the "austerity of tabulated legalism", suitable to give individuals the full measure of the fundamental rights and freedoms referred to."

This meant that the question of what is meant by "child" had to be approached with an open mind. Section 11(5)(d) amounted to a clear recognition of the unity of the family as a group which as a whole belongs to Bermuda. This would be fully in line with Article 8 of the European Convention of Human Rights, the UN Declaration on the Rights of the Child 1959, and Article 24 of the International Covenant on Civil and Political Rights.

Lord Oliver analysed whether English law governing parental access to a child in care was in conformity with Article 8 of the European Convention of Human Rights (right to respect for family life). The judgment of the European Court of Human Rights in R v UK (1987) was looked at in some detail and Lord Oliver stated that:

> "... your Lordships attention has been directed to the decision of the European Court of Human Rights in R v UK (1987)

Although this is not binding on your Lordships, the United Kingdom is, of course a party to the Convention ... and it is urged that it is at least desirable that the domestic law of the United Kingdom should accord with the decisions of the Court of Human Rights under the Convention ..."

"... I do not, for my part, discern any conflict between the propositions laid down by your Lordship's House in J v C (1969) (principle that the child's welfare is the paramount consideration) and the pronouncements of the European Court of Human Rights in relation to the natural parent's rights of access to her child ...".

The appeal was dismissed.

INDIA

Hussainara Khartoon v Home Secretary, State of Bihar [1979] A I R 1369 S C

A case concerning the right of the accused to a speedy trial and the powers of the Supreme Court to issue directions to the State for the enforcement of the right.

Article 21 of the Indian Constitution guarantees:

"Protection of life and personal liberty - no person shall be deprived of life and personal liberty except according to procedure established by law".

The Supreme Court held (Bhagwati, J), following the dynamic interpretation placed on Article 21 in the case of Maneka Ghandi v Union of India, that:

"Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is interesting to note that in the United States, speedy trial is one of the constitutionally guaranteed rights ... so also Article 6 of the European Convention on Human Rights provides that:

"everyone arrested or detained - shall be entitled to trial within a reasonable time or to release pending trial ...".

No procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just" and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21".

It is the constitutional obligation of the State to devise a procedure which would ensure a speedy trial for the accused. It is also the obligation of the Supreme Court, as the guardian of the fundamental rights of the people, to enforce the fundamental right of the accused, by issuing the necessary directions to the State - which may include taking positive action.

The powers of the Supreme Court in the protection of the constitutional rights are of the widest amplitude and there is no reason why the Court should not adopt an activist approach.

Indian Express Newspapers (Bombay) Private Ltd v Union of India [1986] A I R 515 S C.

Concerning the imposition of an import duty of 15% on newsprint imported from abroad by newspapers with a circulation over 50,000. The Supreme Court held that while taxes may be levied on the newspaper industry, the Government should exercise caution, and such a tax may become unconstitutional if it is unduly burdensome.

The Court emphasised the value of a free press and held that although the Indian Constitution does not use the expression "freedom of the press" as such in Article 19, it is included in Article 19(1)(a) which guarantees freedom of speech and expression.

It is with a view to checking government malpractices which interfere with the free flow of information that democratic constitutions all over the world have made provisions guaranteeing the freedom of speech and expression and laying down the limits of interference with it. It is, therefore, the primary duty of all national courts to uphold the said freedom and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate.

Olga Tellis v Bombay Municipal Corporation [1986] A I R 180 S C

A case concerning the eviction of slum dwellers, who claimed deprivation of their right to life under Article 21 of the Indian Constitution. Article 21 guarantees:

> "Protection of life and personal liberty - no person shall be deprived of life and personal liberty except according to procedure established by law".

The Supreme Court held that the scope of Article 21 is wide and and far-reaching, and includes, as an equally important facet, the right to livelihood because no person can live without the means of living.

Other provisions of the Constitution, being Directive Principles of State Policy not enforceable in the courts, provide that the State shall direct its policy towards ensuring that citizens have the right to an adequate means of livelihood and employment.

If there is an obligation upon the State to secure to citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compelled to provide adequate means of livelihood or work to citizens. But any person who is deprived of his right to livelihood except according to a just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.

A direction was made by the Supreme Court that, to minimise hardship, no further evictions should be made until the end of the current monsoon season.

MALTA

Olivier v Buttigieg [1967] A C 115 (PC)

An appeal from the Court of Appeal of Malta. The respondent was the editor of the "Voice of Malta" - a weekly newspaper published by the Malta Labour Party. In 1961 the Archbishop of Malta condemned the newspaper, and said that no one, without committing a mortal sin could print, write, sell, buy, distribute or read it. In 1962 the Chief Governmental Medical Officer issued a circular to all the establishments and services in the Medical and Health Department prohibiting employees to take the Voice of Malta into such places.

Lord Morris of Borth-y-Gest, giving judgment for the Privy Council, agreed with the Court of Appeal of Malta and held that the respondent's right to freedom of expression guaranteed under s.14 of the Malta Constitution, had been violated. In particular, Lord Morris looked at the question of whether the respondent was hindered in the enjoyment of his freedom to impart ideas and information without interference and referred to cases from India (Ramesh Thapper v State of Madras 1950) and the United States (Martin v City of Struthers 1943) to support his conclusion that freedom to distribute information is a vital component of freedom of expression:

> "The steps taken by the editor of a newspaper to impart ideas and information include the expression of ideas and information in words followed by the printing of such words in the paper followed by publishing the paper and followed by circulating it".

Lord Morris also rejected a submission that any hindrance was minor both on the facts and on principle and stated that:

> "Their Lordships considered that where "fundamental rights and freedoms of the individual" are being considered a court should be cautious before accepting the view that some particular disregard of them is of minimal account".

Reference was made to the US case of Thomas v Collins (1944) (..."it is from petty tyrannies that large ones take root and grow").

Although the State is entitled under the Constitution to limit the right to freedom of expression on certain grounds, the publication of the Voice of Malta did not contravene any law and it was not shown that the prohibition imposed by the circular was warranted by any law that imposed "restrictions upon public officers".

The newspaper editor, Buttigieg, was granted relief.

PAPUA NEW GUINEA

The State v NTN Pty Ltd and NBN Ltd, Supreme Court of Papua New Guinea, 7 April 1987 (No SC 323)

An application before the Supreme Court of Papua New Guinea for the enforcement of a fundamental right under s.57 of the Constitution - namely the right to freedom of expression under s.46, or more specifically the right to communicate through the medium of television.

The applicants were prohibited by the Television (Prohibition and Control) Act 1986 from broadcasting television until 31 January 1988. Under the Constitution the right to freedom of expression may be "regulated" or "restricted" by law, but that law must comply with s.38 of the Constitution which states that the law can be for one of three different purposes: to give effect to public interest in defence, public safety, public order, etc; to protect the exercise of the rights and freedoms of others; to make reasonable provisions for cases where the exercise of one such right may conflict with the exercise of another. The onus is on the State to prove that the restriction comes within the limits permitted by s.38 and the Act must clearly set out the particular purpose for which the law is made. In addition the Act must be "necessary" and "reasonably justified in a democratic society".

Kapi, D C J said:

> "The word "necessary" implies that fundamental rights should not be regulated or restricted if there is another way of effectively protecting the public interest ..."
>
> "(In addition) A law that is necessary does not necessarily mean that it is also reasonably justifiable in a democratic society ... the test is an objective one and must be considered within the context of the subject matter or circumstances of each case".

These are near-identical tests to those applied by the European Convention organs and the UN Human Rights Committee, as well as by many other national and international bodies.

Giving judgment, Kapi, D C J said that:

> "... the provisions of the Constitution relating to fundamental rights must be interpreted with a liberal approach to ensure protection of fundamental rights. The courts in other jurisdictions have also adopted the same approach". (Cases from The Gambia, Bermuda and Canada were cited).

The Court held that the Television (Prohibition and Control Act) 1986 was not reasonably justifiable in a democratic society and was therefore invalid as being ultra vires the Constitution.

SINGAPORE

Ong Ah Chuan v Public Prosecutor: Koh Chai Cheng v Public Prosecutor [1981] A C 648 (PC)

Two appeals from the Court of Criminal Appeal of Singapore. Both applicants were found guilty of drug trafficking and sentenced to death. Under the Misuse of Drugs Act 1973 (Singapore) the death penalty is mandatory in a drug trafficking offence, where the amount (e.g. of heroin) exceeds 15 grammes. By s.15 of the Act there is a rebuttable presumption that possession of an amount greater than 2 grammes is for the purpose of trafficking.

The appeal to the Privy Council was based on the issue of whether the presumption contained in s.15 conflicted with Articles 9(1) and 12(1) of the Singapore Constitution and whether the mandatory death penalty was unconstitutional.

Article 9(1) states:

"No person shall be deprived of his life or personal liberty save in accordance with law".

Article 12(1) states:

"All persons are equal before the law and entitled to the equal protection of the law".

The defendants argued that the statutory presumption was in conflict with the "presumption of innocence" guaranteed implicitly by Articles 9(1) and 12(1).

Giving judgment, Lord Diplock applied the same criteria for interpreting a constitution on the Westminster model as Lord Wilberforce in Minister of Home Affairs v Fisher - namely that it should be treated as sui generis and not as an Act of Parliament. He said:

".... the requirements of the Constitution are (not) satisfied simply if the deprivation of life or liberty complained of has been carried out in accordance with provisions contained in any Act passed by the Parliament of Singapore, however arbitrary or contrary to the fundamental rules of natural justice the provisions of such Act may be".

The question of what "in accordance with law" and "equality before the law" meant was discussed at length, with cases cited from Malaysia, India, Britain, the United States, Singapore, Canada and the European Court of Human Rights.

"In a Constitution founded on the Westminster model, and particularly in that part of it that purports to assure individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had

formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution ..."

"It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution, would be a system of law that did not flout those fundamental rules".

But in this case, it was held that s.15 of the Misuse of Drugs Act was not unconstitutional. On the question of the mandatory death penalty, the Privy Council refused to consider its efficacy or morality and said Article 21(1):

"does not forbid discrimination in punitive treatment between one class of individual and another in relation to which there is some difference in the circumstances of the offence that has been committed".

ZIMBABWE

Ncube, Tshuma and Ndhlovu v The State Supreme Court of Zimbabwe, Judgment No. SC 156/87

Concerning the issue of whether the imposition of a sentence of whipping upon a male adult offender was inhuman or degrading punishment in contravention of s.15(1) of the Declaration of Rights contained in the Constitution of Zimbabwe.

The three appellants had all been found guilty of rape and were sentenced to between 5 and 7 years imprisonment with labour, plus a whipping of six strokes each. Applications for appeal against the sentence were allowed, but only in respect of that part of their sentences ordering them to be whipped.

S.15(1) of the Declaration of Rights of Zimbabwe states:

"No person shall be subject to torture or to inhuman or degrading punishment or other such treatment".

Gubbay, J A, giving judgment held that:

"Section 15(1) is not confined to punishments which are in their nature inhuman or degrading. It also extends to punishments which are "grossly disproportionate"; those which are inhuman or degrading in their disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty - the punishment being so excessive as to shock or outrage contemporary standards of decency".

In determining whether corporal punishment was per se inhuman or degrading, the position in Zimbabwe, South Africa, the United Kingdom, Canada, Australia and the United States was looked at. Gubbay, J A concluded that:

"Fortunately on the few occasions where the issue of whether whipping is constitutionally defensible has been judicially considered, it appears to have resulted in little difference of opinion, whether imposed upon an adult person or a juvenile offender the punishment in the main has been branded as both cruel and degrading ...".

"... perhaps the most important decision is that of the European Court of Human Rights in Tyrer v United Kingdom delivered on 25 April 1978 for it was concerned directly with Article 3 of the European Convention of Human Rights - a provision worded virtually identically to section 15(1) of the Constitution of Zimbabwe".

This case, in which judicial corporal punishment was held to be "degrading punishment", was quoted from at length.

Giving judgment, Gubbay, J A concluded that:

"the whipping each appellant was ordered to receive breaches section 15(1) of the Constitution of Zimbabwe as constituting a punishment which in its very nature is both inhuman and degrading ..."

Regard was had to international practice and also to the decreasing recourse to whipping in Zimbabwe. More especially, reliance was placed upon the following adverse features which were inherent in the infliction of a whipping:

"(1) The manner in which it is administered ...

(2) By its very nature it treats members of the human race as non-humans ...

(3) ... it is a procedure easily subject to abuse ...

(4) It is degrading to both the punished and the punisher alike".

The challenge to the constitutionality of the sentence of a whipping upon the person of a male adult was therefore upheld. The appeals were accordingly allowed to the extent that the imposition of the strokes were deleted from the sentence.

ANNEX X

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Directorate of Human Rights
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ANNEX XI

THE WORK OF THE COMMONWEALTH SECRETARIAT'S HUMAN RIGHTS UNIT

Introduction

1. Commonwealth Heads of Government have always attached importance to the observance of human rights and have affirmed their commitment in various Commonwealth Declarations notably those of Singapore (1971), Lusaka (1979) and Melbourne (1981). At the Commonwealth Heads of Government Meeting in London in June 1977, The Gambia presented a Memorandum which proposed the establishment of a Commonwealth Human Rights Commission as a feasible and effective step forward in the Commonwealth's efforts to defend human rights. Following consideration of The Gambian proposal at the Lusaka Heads of Government Meeting in August 1979, a Working Party was established to examine The Gambian proposal and make recommendations through the Secretary-General for consideration by Commonwealth governments.

2. Governments were invited to submit written comments to the Working Party. The responses were varied; in particular there was concern that the Commonwealth should not duplicate the functions of existing international or regional machinery, nor depart from the Commonwealth traditions of consultation and consensus.

3. The Report of the Working Party proposed that the Commonwealth Secretariat establish a special Unit for the promotion of human rights and that an Advisory Committee for the protection and maintenance of human rights be set up by the Secretary-General in consultation with Governments. At the Melbourne HGM 1981, Heads of Government considered the Report of the Working Party and reaffirmed the importance which all Commonwealth Governments attach to the observance of human rights. They urged those Governments which had not yet done so to accede to relevant global and regional instruments on human rights and endorsed in principle the establishment of a special Unit in the Secretariat for the promotion of human rights, subject to the provision of funding, an agreed Commonwealth definition of human rights and definition of the Unit's functions.

4. It was not envisaged that co-operation in promoting human rights should involve interference in the internal affairs of Commonwealth countries and it was agreed that the Unit should not have investigative or adjudicative functions. Heads of Government took note of the Working Party's proposals for an Advisory Committee for the protection and maintenance of human rights and asked that this should be further considered by the next meeting of Commonwealth Law Ministers.

5. The proposal to set up a Commonwealth Advisory Committee was carefully considered at the Commonwealth Law Ministers Meeting in Sri Lanka, February 1983. In reaffirming the value of establishing a Human Rights Unit in the Secretariat, Ministers gave guidance to the definition of human rights from a Commonwealth perspective and concluded that although

there was considerable interest in the Advisory Committee proposal being kept on the agenda, it was considered that it was not appropriate for immediate implementation.

6. The Unit was finally set up with the approval of the Finance Committee in January 1985. It has a staff of three persons and is located within the International Affairs Division of the Secretariat. The Division is responsible for monitoring international political developments and assisting consultation between member governments on political issues. It was understood that the work of the Unit should avoid duplication with that of other inter-governmental human rights institutions.

Mandate of the Human Rights Unit

7. The mandate of the Human Rights Unit is:

(a) to promote human rights within the Commonwealth; it is understood that the functions of the Unit will not involve any investigative or enforcement role;

(b) to ensure that in the Secretariat itself due account is taken of human rights considerations in the work of all its Divisions.

The definition of human rights within the Commonwealth

8. The definition of "human rights" from the Commonwealth perspective derives from the various Commonwealth Declarations, the relevant international instruments which Commonwealth countries have accepted, and also includes customary international law. Successive Commonwealth Declarations indicate the collective commitment of Member States to:

(a) the liberty of the individual;

(b) equal rights for all citizens regardless of race, colour, sex, creed or religious belief.

(c) the inalienable right of all individuals to participate by means of free and democratic political processes in the framing of the society in which they live;

(d) the right of all men and women to live in ways which sustain and nourish human dignity.

9. To quote the Singapore Declaration: "We oppose all forms of colonial domination and racial oppression and are committed to the principles of human dignity and equality. We will therefore use all our efforts to foster human equality and dignity everywhere and to further the principles of self-determination and non-racialism".

10. The Lusaka Declaration on racism and racial prejudice recognises that "the peoples of the Commonwealth have the right to live freely in dignity and equality, without any distinction or exclusion based on race, colour, sex, descent, or national or ethnic origin". It further emphasises that "we share an international responsibility to work together for the total eradication of apartheid and racial discrimination".

11. The Melbourne Declaration emphasises the importance of all men and women having "the right to live in ways that sustain and nourish human dignity" and that this right imposes obligations on all States, large and small, to act at national and international levels to reduce the gross inequality of wealth and opportunity currently existing in the world.

12. The concern for human rights, based on the principles adopted by successive Heads of Government meetings, pervades the work of the Secretariat at many levels and has been a clear factor in dealing with important political issues such as the question of Zimbabwe's independence, the situation in South Africa and the special needs of small states.

Activities of the Human Rights Unit

13. The Secretary-General has invited each government to nominate a point of contact to whom requests for information about the domestic procedures for promoting human rights may be sent. The Human Rights Unit is available to advise points of contact on matters relevant to the mandate of the Unit and its work programme, specifically in respect of the following:

(i) Assistance to Commonwealth Governments to Promote Human Rights

14. The Human Rights Unit serves to facilitite practical ways of assisting Commonwealth governments to promote respect for and understanding of fundamental human rights in all their aspects. Member governments are invited to inform the Secretariat as to the particular fields in which they would envisage the Human Rights Unit providing assistance to them.

15. Throughout the Commonwealth, various national institutions and domestic procedures are evolving in recognition of the developmental significance of measures to promote equality and justice. Given the extent of comparable legal and administrative practices, those directly responsible for promoting respect for human rights can derive obvious benefits from regular exchanges of information and experiences at the pan-Commonwealth, regional and national levels. The Human Rights Unit is seeking to ascertain the possibility of advancing this process through Commonwealth mechanisms by, in the first instance, undertaking a survey by questionnaire, on the functions of relevant national institutions and domestic procedures within the Commonwealth.

16. The Unit's research facility is available to assist governments, as appropriate. It commissions studies, reports on issues relating to human rights and facilitates the organisation of seminars and symposia for the promotion of human rights within the Commonwealth, including the teaching of human rights in the Commonwealth.

(ii) Human Rights Clearing House

17. Commonwealth governments have expressed an interest in the Human Rights Unit serving as a "clearing house" for information. Over the years the Commonwealth Law Bulletin has regularly published details of Commonwealth human rights legislation. The Unit has been contributing further items of relevance to human rights issues. It now also publishes its own newsletter - Human Rights Update, which is distributed essentially

as a service to governments. A limited number of copies are also distributed to official national institutions, relevant inter-governmental organisations and selected Commonwealth professional bodies. It includes details of human rights and international humanitarian law courses and conferences, articles on noteworthy developments in respect of Commonwealth measures to promote human rights concerns, and reviews of relevant articles and books.

18. Member Governments may indicate further kinds of information and activities which would be of interest to them and direct specific requests for data to the Unit.

(iii) International Human Rights Instruments

19. The Unit monitors the status of the principal international human rights instruments with regard to Commonwealth governments. Priority is being given to developing appropriate explanatory documentation for Commonwealth jurisdictions on the principal instruments. To this end an "accession kit" was produced on the Convention on the Elimination of All Forms of Discrimination Against Women for the Nairobi World Conference to review and appraise the achievements of the UN Decade for Women.

20. A further project is underway to produce documentation on the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It will examine inter alia the inter-relationship between the two instruments in light of the importance attached by the Commonwealth to the principle of non-discrimination, whether on the basis of race, colour, sex, creed or religious belief.

21. In addition, the Human Rights Unit serves to facilitate exchanges of information on various subjects relevant to the implementation of the principal international instruments on human rights and humanitarian law including measures which States Parties have taken to fulfil their obligations, whether problems have arisen in interpreting specific articles and how States Parties meet their reporting obligations.

22. Member governments have been invited to consider the value and possibilities of technical assistance to them in reviewing legislation and administrative procedures with respect to the practical implementation of international human rights instruments and the role that the Commonwealth might play in the delivery of such assistance.

(iv) Integrating Human Rights considerations into the work of the Commonwealth Secretariat

23. Importance is placed on ensuring that all Commonwealth programmes take into account the human rights dimension. There are in-house consultations on ways of integrating human rights considerations into all aspects of the Secretriat's work. It is already apparent that many of the programmes being implemented serve to promote the realisation of human rights in a general sense.

24. It is important, however, that even if human rights considerations are not made specific, those responsible for the planning and implementation of programmes are aware of the relevance of their work for

the promotion of human rights. The Unit has worked with several Secretariat Divisions, notably the Legal Division, the Food Production and Rural Development Division and the Women and Development Programme, on joint activities.

(v) Liaison with International Organisations

25. The Human Rights Unit monitors trends in the United Nations debates on human rights and liaises with the UN and other relevant inter-governmental organisations. It also maintains contact with international and regional non-governmental organisations. The Unit is exploring ways of liaising fruitfully with international and regional mechanisms concerned with human rights without duplicating the work done by such institutions.

Concluding Comment

26. The programme of work for the Unit is designed to promote greater awareness and understanding of Commonwealth human rights ideals. These are, however, not static abstractions divorced from reality. To promote human rights is to go beyond rhetoric to practical ways by which political and economic processes can promote equality, justice and human dignity. In the long term, the programme of work for the Human Rights Unit may contribute to an exploration of how shared humanitarian concerns can be further integrated into the well-established traditions of consensus and co-operation intrinsic to the Commonwealth consultations and problem solving.

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