A COMPARATIVE ANALYSIS

of

THE BOPHUTHATSWANA BILL OF RIGHTS

FROM AN INTERNATIONAL LAW PERSPECTIVE

by

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S T A T E M E N T

"I declare that A COMPARATIVE ANALYSIS OF THE BOPHUTHATSWANA BILL OF RIGHTS FROM AN INTERNATIONAL LAW PERSPECTIVE is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references".

SIGNATURE: .....

A R J U N A N A I D U

DATE: 14 December 1984

S U M M A R Y

It is difficult to define "human rights". Is it a political or a legal concept? Notwithstanding this difficulty which is primarily academic, Bophuthatswana has been able to entrench and enforce a justiciable Bill of Rights which is embodied in its Constitution.

In Part One there is a general discussion on the concept of human rights together with a general overview of the events leading up to the independence of Bophuthatswana. The nature of the Bophuthatswana Constitution is analysed. The provisions of the Bill of Rights are enumerated and there follows a detailed discussion and analysis of all judicial decisions in which the Bill of Rights was in issue.

The general theme of this thesis is to compare the Bophuthatswana Bill of Rights with other instruments, whether national, regional or international. Part Two, therefore looks at the protection of human rights in certain selected countries. These particular countries have been chosen because their Constitutions contain Bills of Rights. Part Two also examines in great detail the judicial protection of the rights guaranteed in each of these countries. For the sake of completeness, Part Two concludes with a resume of the position of human rights in each of the other independent national States (that is, Transkei, Ciskei and Venda).

Part Three considers the role of regional organisations and regional conventions on human rights of which the most effective is the European Convention.

Part Four surveys the international protection of human rights, particularly the United Nations and the many conventions initiated by that body.

Part Five comprehensively considers each human right enumerated in the Bill of Rights in a systematic and comparative manner with similar provisions in other national, regional and international instruments. In order that there might be some conception of the kinds of violations involved, decided cases under the European Convention are exhaustively referred to.

Part Six concludes this thesis with a brief look at some other important rights (in the author's view) that are excluded from the Bill; and also a discussion on the future trends in Bophuthatswana with regard to the promotion and protection of human rights and fundamental freedoms.

P R E F A C E

This thesis is my humble contribution to the exposition of human rights in Bophuthatswana. Although my thesis will lay its footprints in the sands of time in Bophuthatswana, it is hoped that the foundation-stone that I have laid will be built upon by many other students concerned with international law and human rights.

It was almost from the dawn of my understanding of human society that I have been fascinated by the notion of human rights of individuals **vis-a-vis** the State and other individuals. Caught on this wave of enthusiasm, I resolved during the early years of my legal education to concentrate on human rights as my field of specialisation. This thesis, therefore, not only is a culmination of many, many years of accumulated research, but also a fulfilment of my fascination for this area of human endeavour and learning.

I wish to express my gratitude and sincere appreciation for the invaluable assistance, scholarly guidance, patience (and even sympathy when I encountered stumbling-blocks) which I have so generously received from my supervisor Professor Ramanlal Soni. I recall meeting Professor Soni for the first time in 1976 when I participated in his public international law class for my Bachelor of Laws (LLB) degree at the University of Durban-Westville. Over

the years, our association has mellowed into an academic journey into our common field of interest, namely, human rights.

I also wish to express my heartfelt gratitude to Professor Marinus Wiechers of the University of South Africa for his guidance and invaluable assistance over the past three years.

I record my appreciation and thanks to Professor G L Peiris, Dean of the Faculty of Law at the University of Colombo, Sri Lanka, for inviting me to take up a Visiting Associate Professorship at the University of Colombo during 1983. I lectured on international law in general and human rights in particular to students taking the Master of Laws (LLM) programme. During my stay there I was able to undertake valuable research which has been incorporated into this thesis.

Special mention must be made of Mr A R C Perera, Senior State Counsel in Colombo, who painstakingly collected and indexed all the Sri Lankan human rights cases for me. Truly a great friend indeed!

I owe a great intellectual debt to Professor J E S Fawcett of the University of London and formerly President of the European Commission on Human Rights. He was my lecturer on human rights for the Master of Laws (LLM) degree. In fact, his wise suggestions and counsel prompted me to gather research material for this thesis as early as 1977 when the foundation-stone was

laid. He encouraged me to undertake most of my research in London.

No words will ever be able to record or express my sincere appreciation for everything my dear wife, Susan, has, over many long years, done for me. Shortly after we were married, we went off to London where I read for the Master of Laws (LLM) degree at the University of London. For the one and half years that we spent in London, Susan worked at Harrods to provide for our bare necessities (rent, food, my books and even bus fares for me to get to and from Law School each day). Such selfless devotion is evidence of the love and affection that my precious wife has for me. Turning to the present time, I also wish to record my sincere gratitude to my wife for her invaluable assistance in proof-reading the entire manuscript, numbering the pages and helping with the index. She has been and will always be my pillar of strength and the only one I can turn to at all times for comfort, joy and love. I truly thank God for all the blessings that flow from having such a loving wife.

I will not forget the gallant and smiling manner in which Mrs Lynn Grant tackled the mountain of typing. She had to endure constant pressure, many interruptions and even the worst possible example of illegible handwriting. I wish to express my heartfelt gratitude to her. I also wish to record my indebtedness to Mrs Kathy Shardlow for so willingly assisting with the typing even though she is overburdened with work.

One of the factors that motivated me to choose human rights as my field of specialisation is because of a lesson I learned very early in childhood from my parents. My parents, Alagamma and Sadagopa Naidu, both British subjects of Indian ancestry, arrived in Natal - my father as an indentured labourer in 1908-1910 - to set up home. Although they both died during my early boyhood years, they taught me the meaning and value of humility for which I am grateful. This important trait has characterised my life and my relations with others and is an invaluable living legacy from my parents - humble, unsophisticated, illiterate (in the Western sense) folk. I think humility is interwoven with human rights. It is a privilege to have been born of humble parentage. All I have of my parents are treasured, cherished memories.

I would also like to express my sincere appreciation to Keith and Charmaine Small in Mmabatho who have been a tremendous source of support and encouragement at all times.

All responsibility for the present work is mine.

I have learnt in the preparation of this thesis that the realms of legal knowledge in this wide and diversified field of human rights are but a few scattered islands in a boundless and unchartered sea of ignorance.

Finally, I must place everything in its proper perspective. I thank the Lord Jesus Christ for giving me life, for giving me the

grace, knowledge, wisdom, understanding and ability to have progressed this far in my legal education and academic career. TO HIM ALONE GOES ALL GLORY, HONOUR AND PRAISE.

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A R J U N A N A I D U

MMABATHO

December 1984

THIS THESIS IS DEDICATED TO

MY DARLING WIFE, SUSAN

AND

MY PRECIOUS DAUGHTER, CANDICE LESLEY

TABLE OF CONTENTS

TABLE OF CASES

Page

B. REGIONAL

1. AMERICAN CONVENTION

2. EUROPEAN CONVENTION

C. NATIONAL

1. BOPHUTHATSWANA

2. CANADA

Page

3. ENGLAND

4. THE FEDERAL REPUBLIC OF GERMANY

Page

5. GRENADA

6. INDIA

Page

11. UNITED STATES OF AMERICA

SELECTED ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
American Declaration	American Declaration of the Rights and Duties of Man
BVerfGE	*Bundesverfassungsgericht* (Decisions of the West German Constitutional Court)
CD	*Collection of Decisions* (of the European Commission and Court)
CE	Council of Europe
CENTO	Central Treaty Organisation
CILSA	*Comparative and International Law Journal of Southern Africa*
DLR	*Dominion Law Reports*
DR	*Decisions and Reports* (of the European Commission and Court)
ECOSOC	*United Nations Economic and Social Council*
European Commission	European Commission of Human Rights
European Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
European Court	European Court of Human Rights
FAO	Food and Agriculture Organisation
ICLQ	*International and Comparative Law Quarterly*
Inter-American Commission	Inter-American Commission on Human Rights
ILO	International Labour Organisation
NAACP	National Association for the Advancement of Colo(u)red People (US)
NATO	North Atlantic Treaty Organisation

NLR	*New Law Reports*
OAS	Organisation of American States
OAU	Organisation of African Unity
SALJ	*South African Law Journal*
SAYIL	*South African Yearbook of International Law*
SEATO	South East Asia Treaty Organisation
UN	United Nations Organisation
Universal Declaration	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Social and Cultural Organisation
US	United States of America
WHO	World Health Organisation
YB	*Yearbook (of the European Commission and Court)*

Freedom is the birthright of every human being

Preamble - Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery signed at Geneva on 7 September 1956 and adopted by ECOSOC Resolution 608 (XXI) of 30 April 1956. Entered into force on 30 April 1957

PART 1

B O P H U T H A T S W A N A

On 6 December 1977 the sun rose on a newly independent and sovereign State in Africa, the Republic of Bophuthatswana - A Place for All.

CHAPTER 1

INTRODUCTION

1.1. THE CONCEPT OF HUMAN RIGHTS

The notion of "human rights and fundamental freedoms" did not have its origins in international law but in fact developed within the constitutional framework of individual States. The idea that the individual enjoys certain fundamental rights and freedoms *vis-a-vis* the States is derived from the concept of natural rights (or natural justice) prevalent in Europe during the seventeenth century. This doctrine of natural rights was developed further by the political philosophers of the time such as Locke and Rousseau and it formed a part of the Constitutions adopted by individual American States after their secession from England. It was therefore the national constitutions, rather than international instruments which accorded legal recognition to the rights and liberties of the individual. It is submitted that the notion of "human rights" is basically similar to the notions encompassed by expressions such as "civil liberties"; "constitutional rights"; "fundamental rights" and even "rule of law".

According to Donnelly[1] it is a common assumption that a natural rights theory of human rights underlies contemporary human rights doctrines. The term "human rights" is generally taken to mean what Locke and his successors meant by "natural rights", namely rights held simply by virtue of being a human being. Such rights are natural in the sense that their source is human nature. He also suggests that there are differences in emphasis in each of the major formulations. The term "natural rights"

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1 Donnelly J Human Rights as Natural Rights (1982) Vol 4 No 3 *Human Rights Quarterly* 391

indicates an emphasis in human nature. It also refers to a tradition of thought which includes Locke, Paine and Jefferson and postulates a link with the older idea of natural law. But this may be an unnecessary limitation because Locke, for example concentrates mainly on civil and political rights. The term "rights of man" conjures up the idea of man as the source of rights. To the extent that man is viewed as not merely natural, but also rational and moral, this indicates a more illuminating source for these rights. The term "human rights" seems to avoid the disadvantage of the other two terms and seems to be the best possible term to use. Like the term "rights of man" it suggests a subtle and interesting derivation of rights from the complex moral notion of humanity: human nature as the source of the rights. However the term "human rights" may have one misleading connotation, namely, that it might suggest that all the rights held by human beings are human rights Donnelly suggests that human rights are a particular type of rights held by human beings - the rights they hold simply by their nature as human beings. Furthermore the term "human rights" might be wrongly construed to mean that one is being humane, charitable and beneficient in establishing or recognizing such rights, whereas in fact one gives to rightholders that to which they are entitled. It is suggested that of all the terms used "human rights" is probably the best.[2]

Rights must, of necessity, constitute claims. If we are to assert that we have a right, then it is also correct to say that we have a valid (or legal) claim. But there are many qualifications between the claim and its realization which may prevent the enjoyment or the fulfilment of that right

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2 *Ibid*

without extinguishing the right in any way, for example there are many Third World countries in which people are unable to claim, and therefore, realize, their social and economic rights. Most economically deprived countries are incapable of providing rights such as the right to employment and social security for their populace who most certainly do have such rights. Therefore some rights cannot be claimed whenever it suits the individual. Perhaps an example in Southern Africa will suffice. Ciskei has a Declaration of Rights,[3] albeit non-justiciable, incorporated in its Constitution. Article 17 of the Declaration guarantees not only the right to work, to free choice of employment but also the right to protection against unemployment. It is submitted that this idealistic right must and will remain nothing more than a dream which will be difficult if not impossible to come to fruition for the simple reason that Ciskei is a developing country, with very little economic resources and is therefore unable to provide employment opportunities for all its people. It is a simple task to incorporate the idealistic rights rather than practical pragmatic rights in a Declaration. It makes little or no sense and it is worth nothing to have excellent national constitutions embodying all sorts of human rights provisions - civil, political, economic, social, cultural and even ecological - and the noblest and most lofty ideal in human rights treaties if a State in unable, due to various factors, to guarantee the practical implementation of those rights should an individual decide to exercise his rights.

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3 See Part II Chapter 9 *infra* at footnote 175. Article 2 of the German Constitution declares that "(e)veryone shall have the right to the free development of his personality." This would indicate that a person has the right to develop to his full potential within the context of his tradition, culture and the values of his particular society. It is

Over the past few centuries most of the "human rights" have been crystallized into definite categories. So, for example, if someone refers to "civil and political rights" we acknowledge immediately the exact parameters of this category. It includes all the traditional liberties which emerge from the aftermath of the French Revolution and the American Declaration of Independence, namely, the right to equality, the right to life, liberty and security of person, the right to respect for family life, freedom of expression, religion, freedom of assembly and of association, *etc.* The fundamental object of these rights is to protect the freedom of the individual from encroachment by the State. This category forms the nucleus of the constitutionally guaranteed freedoms.

Alongside this category there has now emerged a second group of rights collectively termed "social and cultural rights." These rights emerge as a result of the changed position of the modern individual who seeks independence of the political machinery of the State in certain areas, but other areas remain dependent on State encouragement and initiatives. Alone the individual cannot normally procure employment, educational facilities, favourable working conditions and insurance against sickness (in countries with National Health programmes). These rights can only be ensured and enjoyed through the intervention of State action. The rights that fall within the ambit of this category include the right to work, and to fair wages, the right to an adequate standard of living, medical facilities, education, *etc.* For these rights to be utilized, the State has to take the necessary measures to make them a practical reality. From these categories it is obvious that human rights is not an abstract concept. It has been translated into specific content by the enumeration of the various rights.

Can natural human rights be construed as absolute rights? In municipal law absolute rights are real, personality and industrial property rights. They are called absolute rights because they are enforceable against the whole world. However, no right in municipal law is absolute in the sense that it is unlimited: even ownership, the most extensive of rights is subject to certain limitations, for example municipal regulations compel me to build a certain distance away from the boundary or I may not divert a river flowing through my property so as to deprive my neighbour of water for, perhaps, farming purposes.[4]

In international law certain rights may be termed absolute, for example the right not to be tortured. A convicted prisoner serving a jail term cannot claim the right to liberty during the period of incarceration. Anti-suicide laws, defamation laws, compulsory education, and compulsory vaccination all constitute exceptions to basic human rights which are clearly justified and necessary in our society.

The concept of "human rights" is undoubtedly an integral part of our lifestyle. We live by it daily, and we can lay claim to it at any time. In the past few decades thousands of people have died fighting for their rights and fundamental freedoms. Why? It is possible that, as postulated above, the concept of "human rights" in inherent in our very human nature, our system, and so we merely demand what is natural to us. The very notion of

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4 Hosten *et al* *Introduction to South African Law and Legal Theory* Butterworth, Durban 1983 at 278.

"human rights" suggests that every human being in every society (perhaps even in all stages of development or civilization) is entitled to demand, and therefore expect, respect for his rights and freedoms.

It is an accepted fact that human rights is a universal concept. It is accepted (sometimes grudgingly and with reservations) by all States in the international community. The Universal Declaration of Human Rights (1948) has been accepted by almost all States as a common standard of achievement for all peoples and nations. Today, a number of States are parties to the UN Civil and Political Rights Covenant and the Economic, Social and Cultural Rights Covenant.

The UN Charter ushered in a new international law of human rights. The new law buried the old dogma that the individual is not a subject of international law and that a government's behaviour towards its own nationals is a matter of domestic concern. It penetrated national frontiers and pierced the veil of sovereignty. It removed the exclusive identification of an individual with his government. Human rights differs from other international rules. Generally, international law is made to serve common or reciprocal national interests. The move to a comprehensive human rights law also sought to appeal to national and transnational interests. Human rights, it was argued, are related to international peace, for States that violate human rights at home are not trustworthy in international relations. The international law of human rights parallels and supplements national law, superseding and supplying the deficiencies of national constitutions and laws; but it does not replace, and indeed depends on, national institutions.[5]

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5 Henkin L *The International Bill of Rights: The Covenant on Civil and Political Rights* Colombia University Press, New York (1981) at 6-7

In other respects, too, international law and politics visualize human rights in the context of the international political system. Although human rights are universal, they are the claims of an individual upon his society, and not upon other societies. Although the society in which one lives may be crucial to life and dignity and although a right to change one's society might well be deemed fundamental, the individual does not have an absolute right to join another society and seek his rights there. Those who, for example, are starving at home do not have an internationally recognized human right to be taken in by the more affluent societies or to be fed by them.[6]

Human rights are the equal and inalienable rights which the individual should have in his State. If States fully respected these rights then there would not be the necessity for international or regional instruments on human rights to protect these rights. International human rights law in the form of treaties and conventions are meant to act as a conscience for States to rectify the defects in their municipal laws so that the full protection and promotion of human rights can be ensured. Henkin suggests that "(i)nternational human rights obligations are met when, and only when, national laws and institutions meet the minimum international standards and give effect to the minimum of human rights."[7]

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6 *Ibid*

7 *Ibid* at 14

1.2. BOPHUTHATSWANA: BACKGROUND

Independence for Bophuthatswana is the second major milestone (Transkei being the first) in the implementation of South Africa's policy of multi-national development which envisages full self-determination and sovereignty for the various peoples in South Africa.[8]

By a unique combination of historical, political and geographical factors during the nineteenth century, several autonomous peoples in Southern Africa came under the political sphere of influence of South Africa. A State with a population composed of different peoples and groups is confronted with problems common to all multinational and plural societies. The groups or peoples develop common as well as disparate interests and needs. This is particularly true where each group reveals clear cohesion and consciousness of its own identy as a result of natural group-centric and ethno-national attitudes and where all groups are at the same time differentiated by significant and clearly perceptible socio-cultural characteristics and by their stages of political and economic development.[9]

Over a period of 30 years the policy of multinational deveopment has grown into comprehensive programme for development which takes into account all the practical problems posed by the complex group of relationships involved.

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8 Bophuthatswana Department of Foreign Affairs *The Republic of Bophuthatswana* Chris Van Rensberg Publications (Pty) Ltd Johannesburg (1977) at 191

9 South African Department of Foreign Affairs *South Africa 1980/1*

It envisages the peaceful co-existence of the peoples of South Africa, modelled on the modern pattern of independent national communities. The multinational system of this nature, founded on the basis of separate national states which desire to co-operate in areas of common interest, for example, the rendering of professional advice and economic interdependence will, according to South Africa, create adequate opportunities for consultation and pave the way for combined developmental actions. It will also safeguard the identity of each group, including that of minorities.[10]

In view of the fact that South Africa, more than any other country, is a microcosm of the world's ethnic problems, it is natural that it devotes relatively more attention to the ethnic factor in formulating its socio-political development programmes. South Africa is a community of nations living within a common geopolitical system. The geopolitical and sociological situation which the South African Government faces today is a kaleidoscope of disparate nations with different languages, cultures and aspirations, living within the geographical boundaries of a single State. The main challenge here is to satisfy and reconcile the disparate national and cultural aspirations of these divergent nations and at the same time to protect the identity of the numerically smaller groups. According to the policy of multi-national development, South Africa's objective is self-determination for all its peoples. It is a policy designed to avoid group conflicts and therefore cannot be said to run counter to civilized conceptions of human rights, dignities and freedoms, irrespective of race, colour or creed. The principle of self-determination

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Official Yearbook of the Republic of South Africa Chris van Rensberg Publications (Pty) Ltd Johannesburg (1980) at 175

10 *Ibid*

leaves the way open for each population group ultimately to make its own choice regarding its political future.[11]

The foundation-stone for the political development of Black homelands was laid in 1951 when the South African Parliament promulgated the Bantu Authorities Act. In terms of this Act the recognition and further development of the traditional system of government for the homelands was entrenched. This development gained momentum in 1959 with the passing of the Promotion of Bantu Self-Government Act which provided the constitutional machinery for advancement towards full autonomy and subsequent independence. This Act envisaged a future commonwealth of politically independent and economically interdependent States in Southern Africa. This Act also made provision for the appointment of a South African Commissioner-General in Bophuthatswana to liaise with the Tswana nation. The first Commissioner-General was appointed in 1960 and the Territorial Authority was constituted in 1961. In March 1967 the Territorial Authority decided that the time was ripe to elect a Chairman and a Vice-Chairman who would act as Speaker and Deputy-Speaker respectively; and also a Chief Councillor and five Councillors who would comprise the Executive Council. This came into effect on 9 December 1968 with Chief Mangope as the Chief Councillor.

The provisions of the Homelands Constitution Act (1971) was made applicable to the Tswana homeland. In terms of proclamation R87 of 1971 the

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11 South African Department of Foreign Affairs *supra* at 180-181

Territorial Authority was superseded by the Tswana Legislative Assembly which had legislative authority on matters such as government departments, government service commission *etc.* In 1971 a constitutional committee was appointed by the homeland government to draft a constitution for a future self-governing territory. In terms of Proclamation R130 Bophuthatswana attained self-government on 1 June 1972. Bophuthatswana obtained its own flag and national anthem and in addition the High Court of Bophuthatswana was established. The Executive Council was superseded by a Cabinet comprising a Chief Minister and five other ministers. The Legislative Assembly consisted of 24 elected and 48 nominated members. The three parties that contested the elections were the Bophuthatswana National Party (BNP), the Tswana National Party and the Seoposengwe (Unity) Party (SP). The SP won two seats and the rest were won by BNP candidates or Independents who supported the BNP. Chief Mangope was elected Chief Minister. The new cabinet was sworn in on 1 November 1972. Bophuthatswana had now attained self-governing status.

There was a rift in the BNP and in November 1974 Chief Mangope formed the Bophuthatswana Democratic Party (BDP) with the same fundamental principles as the BNP. The BNP then merged with the SP to form the Bophuthatswana National Seoposengwe Party (BNSP).

On 6 December 1977 Bophuthatswana became an independent, sovereign State with Mmabatho as the capital. Thus the Tswana regained their sovereignty 140 years after the first tribes underwent subjugation in the Transvaal. Of major significance for the future is the fact that while the Tswana lost their independence as tribes they regained it

as a nation, encompassed within a Tswana State.[12]

1.3. THE CONSTITUTION

The Constitution[13] is entirely autochthonous. It was designed exclusively by the Tswana people; neither the South African Government nor any of its agencies had any part in framing it. In fact the Republic of Bophuthatswana Constitution Bill was not tabled in the South African Parliament, but in the Bophuthatswana Legislative Assembly. This procedure is a unique departure from the normal constitutional pattern when dependencies are granted sovereignty by colonial powers[14]

The Constitution is rigid. Article 79 provides:

> Parliament may repeal or amend any provision of the first ten Chapters of this Constitution with a two-thirds majority of its members present in the National Assembly.

Article 7(1) makes it clear that the "Constitution shall be the supreme law of Bophuthatswana." Article 7(1) provides that "(a)ny law passed after th date of the coming into operation of the Constitution which is inconsistent with the provisions thereof, shall, to the extent of such inconsistency, be void." Soon after independence the Bophuthatswana Government appointed

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12 Bophuthatswana Department of Foreign Affairs *op cit* at 205

13 The Bill of Rights will be considered separately in Chapter 3 *infra*

14 Bophuthatswana Department of Foreign Affairs *op cit* at 208

a Law Revision Committee to look at existing legislation and to suggest and undertake law revision. To avoid the consequence of a string of cases, section 7(2) specifically provides that only laws passed *after* the coming into force of the Constitution will be subject to judicial review if they are inconsistent with the Constitution. However, it must be noted that there has been a very recent amendment to Article 7(2) of the Constitution, namely, the words "*before or*" have been inserted. This amended section now reads as follows:

> Any law, passed *before* or *after* the commencement of this Constitution which is inconsistent with the provisions of this Constitution, shall, to the extent in which such inconsistency exists be void.[15]

This therefore clearly indicates that the Bophuthatswana Supreme Court now has the power not only to test post-independence legislation but also pre-independence legislation which was promulgated by South Africa and inherited by Bophuthatswana.

1.3.1. THE PRESIDENCY

The President is the executive head of State and the Commander-in-Chief of the Armed forces. His functions include *inter alia* mobilising and calling out the Defence Force, to confer honours, to receive diplomats, to ratify international conventions to declare war and peace and to declare martial law. He is elected for a five year term of office by an

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15 Emphasis added. This amendment is found in Section 1(2) of the Constitution Amendment Act 16 of 1984 which was assented to on 25 May 1984.

electoral college consisting of members of the National Assembly and under the chairmanship of the Chief Justice or other judge. He must be at least 35 years of age. He must be a member of Parliament. The dignity and reputation of the President is protected by the Constitution. The President may be removed from office by a majority vote of both the elected and nominated members of Parliament on impeachment for treason, bribery or other high crimes.[16]

1.3.2. THE EXECUTIVE

According to Article 31 the executive government is vested in the President who must consult the Ministers in Executive Council.

The Constitution of Bophuthatswana achieves a combination of a Parliamentary democracy and a Presidential regime in a very remarkable way. The President, as a member of the National Assembly and as the leader of the majority party, will certainly take cognisance of the wishes of his caucus in appointing and dismissing his ministers. On the other hand as national leader and chairman of the Parliamentary caucus he can wield considerable personal influence and as long as he is assured of the support of the majority of either the nominated or elected members of Parliament, he can virtually ignore the advice of his ministers and even dismiss them if their resistance proves to be an obstruction.[17]

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16 See further Chapter 3 Articles 19-30 of the Republic of Bophuthatswana Constitution Act of 1977.

17 Wiechers M and Van Wyk DH *The Republic of Bophuthatswana Constitution 1977* SAYIL Vol 3 1977 at 94-95

Chapter 4 of the Constitution does not have any provision for the office of a Prime Minister. This is because the President is the executive Head of State and the leader of the majority party in the National Assembly. However, Article 26 does make provision for the office of an Acting President whenever the Office of President is vacant or when the President is unable to perform his duties because of illness.[18]

1.3.3. THE LEGISLATURE

Article 38 provides that legislative power is vested in Parliament which consists of the President and the National Assembly. Parliament has full power to make laws for the proper government of the State. However no Act of Parliament will be upheld if it contradicts the provisions of the Constitution, especially the Bill of Rights. The National Assembly comprises 48 members designated by regional authorities (that is, nominated members), 48 members elected by popular vote, and 3 members appointed by the President because of their special knowledge qualification or experience. Members must be at least 25 years old and must be registered voters in any electoral division. The Constitution provides that the life of the National Assembly will be five years but the President may dissolve the Assembly before the end of the five year period and announce a general election.[19]

1.3.4. THE JUDICIARY

In terms of Article 59 the Supreme Court of Bophuthatswana shall be vested

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18 See further Chapter 4 of the Constitution (Articles 31 to 36)

19 See further Chapter 5 (Articles 38 to 55)

with the judical power of Bophuthatswana. The Chief Justice and other judges of the Supreme Court are appointed by the President. The Supreme Court has jurisdiction over all persons residing in Bophuthatswana. It not only determines civil and criminal matters, but is also the Court of Appeal for all inferior courts in Bophuthatswana. Judges may be removed from office by the President at the request of the National Assembly, on the grounds of incapacity and misbehaviour. The Appellate Division of the Supreme Court of Bophuthatswana entertains appeals from the Supreme Court. It must be pointed out that during the initial years of independence the Appellate Division of the Supreme Court of South Africa was the highest Court of Appeal for Bophuthatswana. In 1983, however, Bophuthatswana established its own Appellate Division.

In terms of Article 67(1) "(i)n all proceedings involving questions of tribal customs followed by persons in Bophuthatswana it shall be in the discretion of the court to decide such questions in accordance with the tribal law applying to such customs except in so far as the court may find that such law has been repealed or modified or is contrary to public policy or opposed to the principles of natural justice."[20]

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20 See further Chapter 7 (Articles 59 to 67) of the Constitution It is submitted that the court will also have to take cognisance of the Bill of Rights when considering issues of tribal law and custom. Although the traditional law seems to be a privileged law existing side by side with the Roman-Dutch system it is submitted that it will only be upheld if it is not inconsistent with the Bill of Rights.

CHAPTER 2

THE STATUS OF BOPHUTHATSWANA

2.1. THE CONCEPT OF A STATE

The concept of "legal personality" may be defined as the recognition that a legal subject is legally capable of exercising certain rights and undertaking certain duties. In municipal law legal personality is accorded to natural persons (human beings) as well as to juristic persons (for example, an incorporated company). Juristic persons have a legal personality which is distinct from the natural persons who created them and they can sue and be sued in their own name.[21]

In international law the State is the best example of a legal *persona*. Of course, other entities may also be considered as subjects of international law if they enter into legal intercourse. Since 1945 there has been a rapid increase in the number of organisations, both regional and international. International law therefore also acknowledges that international institutions not only have legal personality but are also subjects of international law. Greig D W, however, suggests that because international relations are primarily the concern of States, therefore, any definition of international personality should distinguish the position of States from the position of those whom international law affects only in a subsidiary capacity. His definition of an international person is an entity having the power of independent action on the

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21 See further Boberg PQR *The Law of Persons and the Family* Juta and Co Ltd 1980

Olivier PJJ *The South African Law of Persons and Family Law* Butterworths Durban 1980 Second Edition by Barnard AH and Cronjé DSP

international plane. This definition has the advantage of including not only States but also communities such as "protected States" which lack some attribute of statehood, such as complete independence, but which are regarded as endowed with their own separate identity.[22]

The problem of what constitutes the term "state" has been canvassed by several distinguished writers on international law.[23] However, the common trend has been to define a "state" in absolute, rigid terms and writers have postulated that if an entity fulfils certain enumerated requirements then it qualifies as a State. The rigidity of this trend assumes that the term "state" has a fixed meaning which provides an unambiguous yardstick, free from error which can measure the existence of international personality. In determining whether an entity is a "state" or not, it is important to take into consideration the interests of the community which will be affected by the decision. If the term "state" is to have any useful meaning, then we must be concerned with the interests of mankind in conducting an ordered, regulated and peaceful society, in which individual liberties and human dignity may be promoted.[24]

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22 Greig DW *International Law* 2nd edition Butterworths London 1976 at 92

23 See for example Greig DW *supra*

Akehurst M A *Modern Introduction to International Law*

Lauterpacht H *Oppenheim's International Law*

Brierly J L *The Law of Nations*

See also the *Nottebohm Case* ICJ Reports (1953) 122

24 Higgins R *The Development of International Law through the Political Organs of the United Nations* Oxford University Press London (1963) at 11-12

For an entity to be admitted to the United Nations it must satisfy the traditional criteria for statehood. This means that in terms of UN practice any new factors are not taken into account. Although there has been a proliferation of international organisations since 1945 all of which have the authority to undertake legal intercourse on the international level, the State is still regarded as the best and clear-cut example of an international person. A problem arises in the conception of a "state". It seems that the answer depends, to a certain extent on one's geographical location and political viewpoint. In terms of traditional international law there are four criteria that must be satisfied before an entity can be regarded as a "state". These are embodied in Article 1 of the Convention on the Rights and Duties of States[25] which reads:

> The State as a person of International Law should possess the following qualifications:
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> (a) a permanent population;
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> (b) a defined territory;
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> (c) government;
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> (d) capacity to enter into relations with the other States.

It is not easy to apply these four criteria to practical examples. Can the Ukraine be categorised as a state? Other problems are Rhodesia, Katanga and Biafra. There is no question that Rhodesia, during the period of unilateral declaration of independence fulfilled all of the four traditional criteria, and the government of the day would challenge anyone who argued that Rhodesia was not a State. However, the United Kingdom refused to acknowledge Rhodesia's statehood, that is, it refused to accord *de jure* recognition. In addition, the United Nations would

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25 Signed on 26 December 1933 at Montevideo

never have accepted Ian Smith's Rhodesia as a member of that body. But it cannot be denied that Rhodesia as an entity fulfilled all the requirements to qualify it for statehood. It is submitted that the question whether an entity is a state or not is a question of fact. It is submitted further, that this question must be disentangled from all political considerations that might cloud the factual issues. The question of recognition of an entity as a State is a separate question. Political factors would normally motivate a State in deciding whether or not to grant recognition. The view taken here is that even if due recognition is not accorded to an entity which satisfies all the legal criteria for statehood, nevertheless the factual *status quo* would still remain, that is, that entity will for all *de facto* purposes be a State. If one were to apply the traditional criteria of statehood to entities such as Katanga (1961) and Biafra (1967) then one would have to concede that they can be regarded as States. However, both the United Nations and the international community of States would deny that Katanga and Biafra were states in the *de jure* sense.

It is clear therefore that there is no universally accepted legal definition of a "state" or "statehood". Both the League of Nations Committee of Experts for the Progressive Codification of International Law and the International Law Commission have consistently rejected proposals to codify rules relating to statehood and recognition thereof. This issue has remained on the International Law Commission's work programme since 1949, but there has been little or no interest in pursuing this matter. At the 1973 session, the consensus was that "the question of recognition of States and governments should be set aside for the time being, for although it had

legal consequences, it raised many political problems which did not lend themselves to regulation by law."[26] The lack of a satisfactory definition may well be because the question usually arises only in a few cases, where a new entity has emerged bearing some of the characteristics of States. One is thus faced with the difficulty of characterization. Crawford lists the following characteristics of States:

(a) States can perform acts and *inter alia* ratify treaties in the international sphere;

(b) States have full jurisdiction over their internal affairs and are not subject to the control of other states;

(c) States are not subject to compulsory international processes, jurisdiction or settlement unless they consent.

(d) States are regarded as equal to other States in international law.[27]

2.2. PERMANENT POPULATION

The population comprises an aggregate of individuals of both sexes who live as a community. This does not necessarily mean that they must belong to the same race, creed,colour or ethnic origin. A State therefore is made up of a number of individuals, of perhaps diverse backgrounds, put together. If part of the population of a particular entity has nomadic tendencies (for example the tribes in North Africa) this would not be fatal to the legal existence of a State.

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26 See Crawford J *The Creation of States in International Law* Oxford University Press (1979) footnote 1 at page 31

27 Crawford J *op cit* at 32

2.3. DEFINED TERRITORY

A State is a territorial unit existing on the earth. For an entity to qualify as a State it must possess some territory. However, there seems to be no minimum area for an entity to qualify as a State.[28] Israel was recognised as a State by the majority of the members of the UN in 1949 even though its borders had not been precisely defined at that time.

Philip Jessup of the United States in advocating the admission of Israel to the United Nations *inter alia* made the following submissions:[29]

> Following the proclamation of independence of Israel on 14 May 1948 the United States extended immediate and full recognition to the State of Israel and recognized the Provisional Government of Israel as the *de facto* authority of the new State. The consideration of the application (for membership) requires an examination of ... the question whether Israel is a State duly qualified for membership. Article 4 of the Charter of the United Nations (declares that membership of the UN is open to peace-loving states which accept the obligations contained therein ...) My Government considers that the State of Israel meets these Charter requirements. The first question which may be raised in analysing Article 4 of the Charter ... is the question of whether Israel is a State .... It is common knowledge that, while there are traditional definitions of

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28 For example Monaco is a few square kilometres in area.

29 Quoted in Briggs H W *The Law of Nations, Cases, Documents and Notes* 2nd edition 1952 at 69-71.Philip Jessup presented his submissions to the United Nations Security Council at its meeting on 2 December 1948

a State in international law, the term has been used in many different ways. We are all aware that, under the traditional definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second, there must be a territory; third, there must be a government; and, fourth, there must be capacity to enter into relations with other States in the world.

In so far as the question of capacity to enter into relations with other States of the world is concerned, learned academic arguments can be and have been made to the effect that we already have, among the Members of the United Nations, some political entities which do not possess full sovereign freedom to form their own international policy, which traditionally have been considered characteristic of a State. We know, however, that neither at San Francisco nor subsequently has the United Nations considered that complete freedom to frame and manage one's own foreign policy was an essential requisite of United Nations membership ... On this point, I believe that there would be unanimity that Israel exercises complete independence of judgment and of will in forming and executing its foreign policy.

When we look at the other classic attributes of a State, we find insistence that it must also have a Government. No one doubts that Israel has a Government ... (In addition) nobody questions the fact that the State of Israel has a people ...

> The argument seems chiefly to arise in connection with territory. One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. We all know that, historically, many States have begun their existence with their frontiers unsettled. Let me take as one example my own country, the United States of America. Like the State of Israel in its origin, it had certain territory along the seacoast. It had various indeterminate claims to an extended territory westward. But ... that land had not even been explored, and no one knew just where the American claims ended and where French, British and Spanish claims began ... And yet I maintain that, in the light of history and in the light of practice and acceptance by other States, the existence of the United States of America was not in question before its final boundries were determined ..... (T)he concept of territory does not necessarily include precise delimitation of the boundries of that territority ... Historically, the concept is one of insistence that there must be some portion of the earth's surface which its people inhabit and over which its government exercises authority. No one can deny that the State of Israel responds to this requirement.

The Arab States and the United Kingdom argued that since Israel's borders were unsettled it should not be granted statehood. Other states (eg the US) argued that minor details concerning the delimitation of territory were of no importance. By 1949 all the Security Council members, except Egypt, had already recognized the State of Israel.

When we look at other practical examples on the issue of a defined territory we note that the problem is obscured by peripheral issues such as frontier disputes. For example, Greece's objection to Albania's admission to the United Nations because there was an unsettled claim between them to northern Epirus. Afghanistan objected to Pakistan's admission to the United Nations because it did not recognize the north west frontier as part of Pakistan. On the other hand Congo (now Zaire) was admitted as a member of the UN even though at the time of the admission Tshombe declared that the province of Katanga had seceded and was a separate State.[30]

In some instances the territorial disputes have reached such magnitude that they have cast serious doubts on the separate existence of one of the countries involved. Higgins[31] cites Mauritania as one such example. Mauritania gained its independence from France on 28 November 1960. Morocco claimed in the Security Council that the area known as Shengit had always been a part of Morocco and that its effective and continuous sovereignty had been interrupted by the French military occupation. Morocco submitted that Mauritania could not be categorized as independent. Evidence was offered of Moroccan control of public order and national defence in Mauritania until 1912 and also of the use of Moroccan currency. However, the Security Council recommended Mauritania's admission and this was confirmed by General Assembly Resolution 1631 (XVI).

Another example is Kuwait's application for membership. Iraq argued that

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30 Higgins R *Ibid* at 18

31 *Ibid*

Kuwait had always been considered, legally as well as historically, as an integral part of Iraq. The original application by Kuwait was rejected but following on a change of government in Iraq, Kuwait was admitted to the UN on 14 May 1963.[32]

2.4. GOVERNMENT

For an entity to be regarded as a State it should have an effective government. This criteria still poses problems in the international arena. The US and China have maintained that the South Korean Government is the only lawful government over that part of Korea in which a substantial majority of the people live. On the other hand the USSR disputes this claim. France objected to the application for membership of the so-called Democratic Republic of Vietnam on the grounds that it had none of the attributes which confer international status on a State.[33]

However, recent UN practice has not been consistent with its earlier practice that before a State can be admitted to the UN it must have a stable and effective rule. The case of Congo serves as a good example in this context. After obtaining its independence from Belgium in 1960, the situation in Congo very rapidly deteriorated to the point of chaos and instability in government circles. It was waging a war against Tshombe in Katanga. The new government was hardly able to control even the capital and as a result UN troops had to be stationed

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32 Higgins R *Ibid* at 19

33 Higgins R *Ibid* at 20-21

in Congo. This surely is a clear indication of a government that is neither stable nor effective. Yet despite this situation Congo was widely recognized as a State and it received UN membership.

Another example is Ruanda-Urundi which later attained statehood as Ruanda and Burundi. Ruanda-Urundi became a Belgian colony in 1923, a mandated territory under the League of Nations and thereafter a trust territory under the UN. The UN Commission which was set up to supervise elections in 1961, reported that it was ideal to amalgamate both territories into an independent unitary state. However, neither territory wanted to become consolidated into a single state. The two States became independent on 1 July 1962. It must be pointed out that governmental control was neither stable nor effective and thus both these entities did not have this essential criteria of statehood. This view is borne out by the fact that in terms of the General Assembly Resolution (1746 XVI) Belgium was to remove its forces on 1 August 1962, that is, one month after independence. This indicates that the UN feared that the new governments would not be able to assert their authority.

The absence of governmental authority does not necessarily deprive an *existing* State of its right to be considered as a State. States have overcome periods of civil war and anarchy. No one would argue that the United States was not a State during the period of the American Civil War. However, if an entity which is not already a State, wants to claim the status of a State then its government must not be subject to the control of another State, in other words it must not be a puppet

State. In this regard, Manuchuria serves as a good example.[34]

Greig suggests that this traditional criteria of "government" also poses problems when attempting to determine the status of very small territorial units. Their number has increased in recent times but it is not a novel phenomenon because entities such as Andorra, Liechtenstein, Monaco and San Marino have been in existence since feudal times.[35]

Andorra is subject to the protection of both France and Spain. Greig suggests that it should therefore be classified as a protectorate. Liechtenstein's foreign affairs are conducted by Switzerland and economically speaking it falls within the Swiss confederation. Liechtenstein was refused membership of the League of Nations on the grounds that a part of its sovereignty was transferred to Switzerland. There is no doubt that under international law Liechtenstein is a sovereign independent State, even though because if its size it is unable to handle most of the functions of government by itself. Liechtenstein has however acceded to the Statute of the International Court of Justice in terms of Article 93(2) of the UN Charter.[36]

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34 Manchuria was a province of China and was conquered by Japan in 1931 Japan installed a government in Manchuria and labelled it as the new, independent and sovereign State of Manchukuo. The League of Nations refused to accord it any recognition.

35 *op cit* at 95-97

36 Article 93(2) provides: "A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

Monaco's independence and sovereignty is guaranteed by a treaty signed with France in 1918. However, should the ruler of Monaco not have an heir then, Monaco would come directly under French protection. Monaco is economically dependent on France. San Marino is under the general protection of Italy.

The other difficulty with small States is that they may not be able to carry out their Charter obligations which is a condition for UN membership. Their small size and limited population make it difficult for these "micro-states" to make a monetary contribution to the UN and in addition are unable to conduct normal foreign relations, for example, The Gambia, a West African State, and a member of the UN does not have a permanent mission at the UN; or the group of Maldive Islands, a member of the UN has a population of only about 150 000 people. It is submitted that if such tiny entities can be regarded as "states" and in addition be granted admission to the UN, how much stronger is the case for Bophuthatswana?

2.5. CAPACITY TO ENTER INTO RELATIONS WITH OTHER STATES

According to the traditional criteria for statehood even if an entity

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See the *Nottebohm Case supra* at footnote 23 where the ICJ did not indicate that Liechtenstein is different from any State on the issue of granting its nationality to any particular person.

has a stable and effective government, nevertheless in order for its claim to succeed it must have the capacity to enter into relations with other states in the international community. It is submitted that this is not a valid criterion for the concept of a "state" but rather it is a consequence emanating from statehood. The capacity to enter into relations with other States will depend on the question of recognition by those other States.[37]

2.6. INDEPENDENCE

Independence is the central criterion of statehood. If an entity is not independent of the sphere of influence of other States then it does not satisfy this essential criterion of statehood. The term "sovereignty" is sometimes equated to independence. However, Crawford[38] suggests that "sovereignty" should be seen as a consequence of statehood, namely, the full legal competence that a State normally possesses. In the case of *Customs Union Régime between Germany and Austria*[39] independence was described as

> sovereignty, or external sovereignty, by which is meant that the State has over it no other authority than that of international law.

In the *Lotus Case* the Permanent Court of International Justice decided

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37 See *infra* on Recognition

38 *op cit*

39 PCIJ (1931) Series A/B No 41

40 PCIJ 1927 Series A10

that the principles of international law govern relations between independent States. The aim of international law is to regulate relations between the family of nations which is a collection of sovereign and independent States. Restrictions upon a State, whether arising out of ordinary international law or contract, do not *per se* affect a State's independence, as long as these restrictions do not place the State under the authority of another State. The difference between the alienation of a nation's independence and a restriction which a State may agree to over its sovereign power is clear. This latter is, for instance, the position of the States which become Members of the League of Nations (or for that matter the United Nations). It is certain that membership imposes upon them important restrictions on the exercise of their independence, without its being possible to allege that it entails an alienation of that independence. Practically every treaty entered into between independent States restricts to some extent the exercise of the power incidental to sovereignty. Complete and absolute sovereignty, unrestricted by any obligations imposed by treaties, is impossible and practically unknown. The alienation of the independence of a State implies that the right to exercise these sovereign powers would pass to another State or group of States.[41]

It is obvious that total independence is impossible in modern times. States are interdependent in many spheres and this factor cannot be overlooked - but interdependence does not mean that a State is not independent. United Nations practice has been to recognize actual independence rather than legal independence. However, even the most cursory survey of UN practice reveals that in some instances entities

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41 *Ibid* at 77

were admitted even though their true independence could be brought into issue, for example Mongolia. Mongolia's application for admission to the UN had been before the UN since almost the formation of that body. In 1960 the US and the USSR reached an agreement in terms of which the US approved Mongolia's application while the USSR agreed not to veto Mauritania's application. This was clearly politics at work. The question of the independence of Mongolia was not raised in 1960.

Luxembourg is generally recognized as a sovereign independent State even though it has granted to Belgium the right to conclude commercial treaties on its behalf. Such a delegation of sovereignty in no way indicates that Luxembourg is a dependency of Belgium. In its advisory opinion in the case of *Nationality Decrees in Tunis and Morocco*[42] the Permanent Court of International Justice took the view that no clear answer could be given as to when independence ceases and legal dependency begins.

A survey of the General Assembly and Security Council practice indicates that these two organs regard it as a significant factor if an entity is able to conduct its own foreign affairs, for example. Australia opposed Mongolia's application for admission to the UN on the basis that there wasn't adequate evidence to indicate that Mongolia was in a position to conduct its own foreign affairs.

Higgins suggests[43] that perhaps the only genuinely doubtful case is that

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42 PCIJ 1923 Series B4

43 *op cit* at 37

of Nepal. Indian influence over Nepal's affairs is indeed considerable. The 1950 Treaty of Peace and Friendship makes it obligatory on Nepal to accept Indian assistance in case of aggression. India is well-informed of Nepalese negotiations with other States. However, the formal power to conduct foreign affairs lies solely with Nepal and in practice the Indo-Nepalese arrangements have not seriously affected Nepal's freedom to conduct its own foreign affairs.

Diplomatic relations are not a pre-requisite for proving independence, but it is submitted that a total absence of diplomatic relations with other States may suggest some limitation on the independence of the State concerned. It is submitted that the existence of diplomatic relations is not a criteria for statehood, but rather it is one of the consequences that flow from statehood.

2.7. RECOGNITION

An entity becomes a State when it acquires the criteria of statehood canvassed above. It is suggested that as long as an entity satisfies the requisites of a State, formal recognition is not a necessary condition for that entity to acquire rights and duties.

According to Akehurst[44] recognition is one of the most difficult topics in international law. It is a confusing mixture of politics, international law and municipal law. The legal and political elements cannot be

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44 *A modern Introduction to International Law* Third Edition Fourth Impression 1980 at 60

disentangled; when giving or withholding recognition, states are influenced more by political factors than by legal considerations, but their acts do have legal consequences.[45]

When a new State comes into existence, or when a new government comes into power in an existing State by violent means, other States are confronted with the problem of recognition or non-recognition of that new State or government. Recognition presupposes a desire to interact with the new state as a member of the international community of nations or with the new government as the authority of that State. Non-recognition is sometimes based on the fact that the new government is not in effective control of the entity which it lays claim to. The US in sometimes refusing to recognize foreign governments because it disapproves of them is thereby using recognition as a mark of approval. The UK, on the other hand, usually recognizes all governments which are in actual control of their territory.[46]

According to the constitutive theory on the one hand, an entity is not regarded as a State in international law until it is recognised. Recognition is thus a pre-requisite for the establishment of a State. This theory is totally outmoded. State practice indicates that there

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45 *Ibid* at 60-61

46 *Ibid* at 61

has been recognition of entities by some States and non-recognition by other States, for example, until 1973 most of the Western European States did not recognize East Germany. This non-recognition did not mean that East Germany did not exist. For all practical purposes it had a government and an independent existence. The problem with accepting the constitutive theory is that it does not explain the existence of unrecognized states of which there have been several since 1945.

According to the declaratory theory, on the other hand, recognition (or non-recognition) has no legal effect. The categorization of an entity into a State is purely a question of fact. According to this theory recognition would then merely be an acknowledgement of the factual existence of the State. This would seem to be a better theory, for example, Czechoslovakia was formally recognized in terms of the Treaty of Saint-Germain, which was signed in September 1969 and which came into force in July 1920. But, Czechoslovakia had been in existence since the beginning of 1919 with the approval of the Allied Powers. In a German case,[47] it was held that the appellants had been properly convicted of counterfeiting Czech stamps in May 1919. Their argument that in May 1919 the Czechoslovakian Republic had not been legally constituted was rejected. In the Court's opinion, the Republic had already been established and its government had been in power since January 1919. The Court found that the question of recognition was irrelevant. In the *Tinoco Arbitration Case*[48] it was held that at the

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47 (1919-1922) I AD Case No 24 referred to in Greig *Ibid* at 98

48 UN Reports of International Arbitral Awards 1923 (1) 375

time in question Tinoco's régime was the government of Costa Rica because it had been in effective control of the country, and the fact of non-recognition by several States did not alter the legal position. However, it was also pointed out that the question of recognition or non-recognition would have been raised if Tinoco's control over Costa Rica had been less clear because in such a case recognition by other States has important evidential value in determining the existence of a government. Where the facts are clear, as in this case, recognition or non-recognition is of no consequence because it does not alter the factual situation. Recognition in such instances would be declaratory.

According to the so-called Stimson doctrine,[49] the United States made it clear that it would withhold recognition from any entity which had been created by aggression. The United States took this position as a direct result of the Japanese invasion of Manchuria[50]. Stimson made public the following note[51]:-

> in view of the present situation ... the American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese Republic that it cannot admit the legality of any situation *de facto* nor does it intend to recognise any treaty or agreement entered into between those Governments ... which may impair the treaty rights of the United States ... including those which relate to the sovereignty, the independence, or the

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49 Stimson was the United States Secretary of State at the time of the invasion of Manchuria in 1931

50 See footnote 34 *supra*

51 Greig D W *Ibid* 129

territorial and administrative integrity of the Republic of China ... and that it does not intend to recognise any situation, treaty or agreement which may be brought about by means contrary to the Pact of Paris ...

Article 10 of the Covenant of the League of Nations[52] provides:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League ...

The Paris Pact of 1928 condemns the recourse to war for the solution of international disputes. Greig[53] suggests that a duty to apply the principle of non-recognition was said to stem from both Article 10 of the Covenant of the League of Nations and the Paris Pact.

Akehurst[54] takes the view that the only effect of the Stimson doctrine seems to have been to delay the grant of recognition.

Lauterpacht took the view that states were under a positive duty to grant recognition to all entities which satisfied the factual criteria for statehood. State practice, however, indicates a clear rejection of the Lauterpacht doctrine. Akehurst[55] points out that many states have frequently used recognition as an instrument of national policy, by

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52 Came into force on 10 January 1920

53 *Ibid* 130

54 *Ibid* 64

55 *Ibid* 65

withholding recognition from states or governments which they did not like.

An important aspect of recognition is the issue of *de jure* and *de facto* recognition. The terms *de jure* and *de facto* recognition are commonly used to indicate recognition of a *de jure* government and recognition of a *de facto* government respectively. In this regard the traditional view of recognition is that before recognition can be granted there should be the exercise of effective control over a given area. Greig[56] points out that in deciding between *de jure* and *de facto* recognition, a state might feel that while circumstances require that recognition be granted, its disapproval of the new régime can be signified by the use of *de facto* rather than *de jure* recognition. If one takes international law as the sole criterion of legality then it is clear that one cannot regard *de jure* governments as being more lawful than *de facto* governments. There is no rule of international law that requires states to adopt any particular form of government - it is sufficient if a government is in effective control of a country, however revolutionary or undemocratic it may be.[57]

Recognition of an entity can be either express or implied. An example of implied recognition would be the establishing of diplomatic relations or the signing of bilateral treaties. Akenhurst[58] is of the opinion that the exchange of trade missions, the presentation of an international claim, payment of compensation or even membership of international

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56 *Ibid* 127

57 For "Withdrawal of recognition and conditional recognition" see Greig *Ibid* 131-133

58 *Ibid* 67

organisations do not constitute implied recognition.[59]

2.8. RECOGNITION OF BOPHUTHATSWANA

At the outset it must be emphatically stated that Bophuthatswana satisfies all the traditional criteria for statehood. It has a population; a territory; a government and independence.

As regards territory there is no international rule that lays down that the territory must be one geographic unit, for example, Alaska and Hawaii form part of the USA; at one time Pakistan was made up of East and West Pakistan; Seychelles is constituted of a string of islands, *etc*. There is therefore no justification in the argument that Bophuthatswana is not a State because it is not a geographic unit.

As regards the criteria of population it must be pointed out that there is no rule of international law which provides that all the citizens of a country must live within its geographical boundaries. Both Lesotho and Mocambique serve as examples in this regard. A substantial majority of the people of these two States are employed in the Republic of South Africa. This factor in no way diminishes the legal existence of either of these two States. The fact that a substantial part of Bophuthatswana's population live and work in the Republic of South Africa does not affect Bophuthatswana's claim to legal statehood.

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59 See Greig *Ibid* 133-137 on "Recognition and the United Nations" and 137-142 on "The effects of recognition in international law"

As regards the criteria of government it is clear from earlier discussion in this regard that international law requires a stable and effective government, that is, a government that is in effective control of the territory and population. This could be a *de jure* government or a *de facto* government. Where an entity and its new government have come into existence as a result of the exercise of self-determination then that is an additional factor to be taken into consideration in its favour when declaring it a State. As Brownlie[60] puts it: "The principle of self-determination will today be set against the concept of effective government, more particularly when the latter is used in arguments for continuation of colonial rule." It is submitted that the peoples of Bophuthatswana have exercised their right of self-determination by opting for independence from South Africa. Every nation not only has the right to aspire towards self-determination but also has the right not be be overwhelmed by any other nation in its quest for self-determination.

As regards the criteria of independence it has been canvassed earlier that "independence" means the absence of control or manipulation in the legal affairs of a State (particularly foreign relations) by another State. There is ample evidence to indicate that Bophuthatswana is politically totally independent from the Republic of South Africa. Bophuthatswana has its own legislative, executive and judicial organs and these organs are not dependent on South Africa.

Barrie[61] points out that to accept the idea that recognition is one

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60 *Principles of Public International Law* 1966 at 67

61 Barrie G N *Topical International Law* at 60

of the criteria for a new State to become a legal person in international law would oblige one to say that an unrecognized State has neither rights nor duties in international law and some of the consequences of accepting that conclusion would be startling. For example, we would have to say that an intervention, otherwise illegal, would not be illegal in Transkei (or Bophuthatswana); or if Transkei (or Bophuthatswana) were to be involved in a war it would be under no legal obligation to respect the rights of neutrals. It is unnecessary to discuss the absurdity of subjecting the legality of a State's existence to the subjective and opportunistic political motives of recognition, which could result in a legal curiosity when the status of a State recognized by State A but not by State B would be both an international person and a non-international person at the same time. The persistent refusal of the Arab States to recognize the State of Israel does not destroy the legality of that State but must be regarded as a mere refusal to accept realities.[62] Similarly the non-recognition of Bophuthatswana will never destroy its legality.

The arguments of both the UN and the OAU against the independence of Bophuthatswana do not in any way undo the realities of the situation, namely the fact that the State of Bophuthatswana is in existence as a factual independent entity. Bophuthatswana may in a very small proportion be economically dependent on South Africa, but then there are many other States (who are UN members) who are economically dependent on South Africa. Brownlie puts it more strongly:

"Certainly, if an entity has its own executive and other organs,

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62 *Ibid*

> conducts its foreign relations through its own organs, has its own system of courts and legal system ... then there is a *prima facie* evidence of statehood."[63]

On 7 September 1982 Bophuthatswana House in London was officially opened by President Mangope. That date will probably be remembered as a significant landmark in Bophuthatswana's ongoing quest for international recognition. Bophuthatswana House is owned by the Bophuthatswana National Commercial Corporation Limited (BNCC) The BNCC is a British Company and a majority of shares is held in trust for the Bophuthatswana Government by private citizens of Bophuthatswana.

The Public Affairs Consultant[64] for the BNCC said:

> For some time it had become evident that an agency and an information source for the Bophuthatswana Government in Britain would be of considerable help in furthering the acceptance of Bophuthatswana world-wide ... It is not an Embassy nor even a Consular Office."[65]

In June 1984 President Mangope officially opened the Mmabatho International Airport. In his opening address he said that Bophuthatswana valued life too much to resort to gaining independence through bloodshed and to win international recognition as a result thereof. Although Bophuthatswana had come into existence with the old-fashioned stigma attached to an

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63 *Ibid* at 76

64 that is, Ruth Rees

65 *Ikonomi* Vol1 No 5 December 1982 at page 1; Department of Economic Affairs, Bophuthatswana

illegitimate child it is new a full-fledged adult and the international community of states should give it due recognition.[66] The President went on to say:

> We pray that it [the new airport] will help to bring people to our part of the world who will not only listen to us but who will also hear what we have to say, and that they will understand that people in South Africa can live in racial harmony.[67]

President Mangope took the view that the new airport *would help the country to join the international community as an adult member.*[68]

On 21 September 1984 the Bophuthatswana Minister of Manpower and Co-ordination[69] announced that Bophuthatswana had acquired landing rights on the North-Western African island of Maderia.[70] The Minister stated, *inter alia*, that

> (t)he people of Maderia are interested in trade with Bophuthatswana. They want us to export beef and maize to them. They want to export wine, wicker work and embroidery articles to us.[71]

It is submitted that the opening of Bophuthatswana House in London, the acquisition of landing rights and trade links with Maderia are positive steps in the direction towards international recognition of Bophuthatswana.

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66 *The Mail* Bophuthatswana's National Newspaper 15 June 1984 at page 2

67 *The Mail, op cit* at page 1

68 *The Mail, op cit* Emphasis added

69 that is, The Honourable Mr. Rowan Cronjé

70 This was reported in *The Mail* 21 September 1984 at page 1

71 *op cit*

The United Nations has made it clear[72] that any division of the territorial integrity of a State is contrary to the purposes and principles of its Charter. It is submitted that this in fact was an attempt at safeguarding the colonial borders of independent States. These borders sometimes cut right through the middle of a tribe or a community, for example the people living in the extreme north-west of Ghana are essentially of the same tribe as those living across the frontier in Upper Volta. It is submitted that this principle of indivisibility of a State must always be understook in conjunction with the principle of self-determination.[73] If a particular group of people in a State desire self-determination and the government of that State has no objection, then there is no reason why the UN should uphold the notion of indivisibility of a State as if it is a sacrosanct principle. Bophuthatswana is for all practical purposes a State with a *de facto* government. It is submitted that non-recognition would perhaps constitute a denial of the right of self-determination. Bophuthatswana as an entity was not created out of nothing. It satisfies all the criteria for statehood and should therefore be accorded recognition by other States in the international community.

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72 See for example: Declaration on the Granting of Independence to Colonial Powers and Peoples (adopted by General Assembly Resolution 1514 (XV) of 14 December 1960).

73 See further Booysen H *The South African Homelands and their Capacity to conclude Treaties* SAYIL (Vol 8) 1982 at 58

One contentious issue which affects the recognition of Bophuthatswana is the question of citizenship. Three South African statutes regulated the position before independence. These are the South African Citizenship Act (44 of 1949), the Bantu Homelands Citizenship Act (26 of 1970)[73(a)] and the Status of Bophuthatswana Act (89 of 1977). The Bantu Homelands Citizenship Act provides (in Section 2(1) and 2(2)) that every black person is a citizen of one or other homeland provided he is not a prohibited immigrant in the Republic of South Africa. Section 2(3) provides that every person who is a citizen of a homeland shall exercise his franchise rights in that area and enjoy all other rights, privileges and benefits and shall be subject to all the duties, obligations and responsibilities of citizenship of that homeland as are accorded to him or imposed upon him in terms of any law.

This would suggest that every citizen of the pre-independent homeland was supposed to exercise his political rights through the Bophuthatswana government only. Olivier takes the view that the intention was to create a new and stronger tie with the homeland.[73(b)]

Section 2(4) of Act 26 of 1970 makes it clear that a citizen of a homeland shall not be regarded as an alien in South Africa and shall, by virtue of his citizenship of a territory forming part of the Republic of South Africa, remain for all purposes a citizen of the Republic and shall be accorded full protection according to international law by the Republic of South Africa.

73(a) This Act has been amended by Act 21 of 1971 and Act 70 of 1974.

73(b) Olivier W H *Bophuthatswana Nationality* 1977(3) SAYIL at 112-113 In terms of this Act the right to vote, the right to be elected, the jurisdiction of the Bophuthatswana courts, the duty to contribute to the Bophuthatswana revenue fund were reserved for Bophuthatswana

. .

Olivier suggests that this Section 2(4) implies that a Bophuthatswana citizen should be regarded as a person with South African nationality. He takes the view that this Act differentiates between citizenship and nationality.[73(c)]

Section 80 of the Republic of Bophuthatswana Act (1977) provides:

> 80(1) Citizens of Bophuthatswana shall be -
>
> (a) all Batswana as defined by an Act of Parliament;
>
> (b) any other person legally domiciled in Bophuthatswana at independence for a period of five years or more; and
>
> (c) any other people who apply and are accepted as citizens
>
> 80(2) Any Bophuthatswana citizen shall have the right to renounce his citizenship of Bophuthatswana.

In interpreting this section one has to bear in mind the three South African Acts mentioned earlier in order to ascertain to what extent it repeals or amends them.

Wiechers and Van Wyk draw attention to the fact that an unusual feature of this citizenship clause in the Constitution is the introduction of an ethnic element into the law of citizenship of Bophuthatswana and thereby deviating from the *ius soli* and the *ius sanguinis* principle. Another feature is the omission of a detailed description concerning the

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73(c) *supra* at 113

acquisition or loss of citizenship. This approach could be ascribed to various factors, for example, the Bophuthatswana Assembly could have been influenced by the rigid approach of the South African government towards the issue of homeland citizenship resulting in a contentious situation during the independence negotiations, and a decision to leave the issue of citizenship as wide open as possible until the matter has been resolved between the two governments. Support for this inference is to be found in the fact that section 80 does not form part of the entrenched chapters of the Constitution and could therefore be amended by ordinary majority.[73(d)]

Section 2(4) of Act 26 of 1970 must be contrasted with section 6(1) of the Status of Bophuthatswana Act (89 of 1977) Section 6(1) provides:

> Every person falling in any of the categories of persons defined in Schedule B shall be a citizen of Bophuthatswana and shall cease to be a South African citizen[73(e)]

73(d) Wiechers M and Van Wyk DH *The Republic of Bophuthatswana Constitution* 1977 (3) SAYIL at 99-100

73(e) Schedule B reads as follows

Categories of persons who in terms of section 6 are citizens of Bophuthatswana and cease to be South African citizens:

(a) Every person who was a citizen of Bophuthatswana in terms of any law at the commencement of this Act;

(b) every person born in or outside Bophuthatswana, either before or after the commencement of this Act, of parents one or both of whom were citizens of Bophuthatswana at the time of his birth who is not a citizen of a territory within the Republic of South Africa or a territory that previously formed part of the Republic of South Africa and is not a citizen of Bophuthatswana in terms of paragraph (a);

In terms of section 80(2) a Bophuthatswana citizen shall have the right to renounce his citizenship. Section 6(3) of the Status of Bophuthatswana Act provides that a Bophuthatswana citizen may renounce his citizenship after independence on conditions agreed upon between the Governments of Bophuthatswana and South Africa and in a manner prescribed by the Government of Bophuthatswana. Although Bophuthatswana would not seem to be bound by section 6(3), the very idea of statelessness for one of its citizens would make Bophuthatswana hesitant to accept any renunciation.[73(f)]

(c) every person who has been lawfully domiciled in Bophuthatswana for a period of at least five years, irrespective of whether or not such period includes any period prior to the commencement of this Act, and, on application in the prescribed manner, has been granted citizenship of Bophuthatswana by the competent authority in Bophuthatswana;

(d) every South African citizen who is not a citizen of a territory within the Republic of South Africa, is not a citizen of Bophuthatswana in terms of paragraph (a), (b) or (c) and speaks a language used by members of any tribe which forms part of the population of Bophuthatswana, including any dialect of any such language;

(e) every South African citizen who is not a citizen of a territory within the Republic of South Africa and is not a citizen of Bophuthatswana in terms of paragraph (a), (b), (c) or (d) and who is related to any member of the population contemplated in paragraph (d) or has identified himself with any part of such population or is culturally or otherwise associated with any member or part of such population.

73(f) Wiechers M and Van Wyk D H *supra* 105-106

Section 6(4) of the Status of Bophuthatswana Act provides that "(n)o citizen of Bophuthatswana resident in the Republic at the commencement of the Act shall, except as regards citizenship, forfeit any existing rights, privileges or benefits by reason only of the provisions of this Act". At first glance this section would seem to have a tempering effect on the position of citizens of Bophuthatswana who have lost their South African citizenship, eg they would retain their right to permanent residence, labour permits and even to a certain extent the freedom of movement. However, despite this tempering effect, it must be pointed out that the loss of citizenship has dire consequences - as an alien, the citizen of Bophuthatswana is subject to all other laws applicable to aliens - the worst of which is that he becomes subject to deportation in given circumstances. This result would not have been so grave, had it not been for the fact that the vast majority of the persons affected by section 6(4) were once South African citizens by birth. The conclusion is inevitable that despite the benevolent wording of section 6(4), and despite the limited meaning of South African citizenship for blacks, the position of a citizen of Bophuthatswana resident in South Africa at the commencement of the Status of Bophuthatswana Act underwent a subtle but fundamental change.[73(g)]

It is interesting to note that the Bophuthatswana Citizenship Act,[73(h)] provides for citizenship by birth, registration, descent and naturalisation. In terms of Schedule 2 of this Act the following are some of the South African statutes that are repealed.

(a) South African Citizenship Act (44/1949)

(b) South African Citizenship Amendment Act (64/1961)

(c) Bantu Homelands Citizenship Act (26/1970)

(d) South African Citizenship Amendment Act (41/1973)

(e) Section 6 and Schedule B of the Status of Bophuthatswana Act (89/1977)

73(g) Wiechers and Van Wyk *supra* See further pages 106-107 where the

How can one reconcile the issue of citizenship with the question of recognition. It can be argued that recognition has been withheld because more than half of Bophuthatswana's citizens have had their South African citizenship nullified by legislation. It might be argued that recognition might be more easily granted if the South African Government had not deprived the Tswanas living in the RSA of their South African citizenship. Nevertheless, the writer takes the view that recognition should be declaratory. Bophuthatswana exists as an entity and this should be recognised as a fact.[73(i)]

Designated Neighbouring Countries Act (41 of 1978 and the Bantu Homelands Citizenship Amendment Act (13 of 1978) are also considered.

73(h) Act 19 of 1978. The President assented to this Act on 23 June 1978.

73(i) On 6 December 1984 President Mangope began his second term of office as Executive Head of State. It is interesting to note that both Israel and the Federal Republic of Germany sent diplomatic representative to the inauguration ceremony.

CHAPTER 3

THE PROTECTION OF HUMAN RIGHTS IN BOPHUTHATSWANA

3.1. THE DECLARATION OF FUNDAMENTAL RIGHTS

The Bophuthatswana Bill of Rights[74] is a unique innovation in the constitutional protection of human rights in Southern Africa. For the first time a Southern African State has elevated the promotion and protection of human rights to its proper place, that is,in the Constitution. By doing so, Bophuthatswana assures to all its peoples the right to access to the Supreme Court or even to the Bophuthatswana Appellate Division if their rights and freedoms are violated.

It must be pointed out at the outset that the Bophuthatswana Bill of Rights differs markedly from other national bills of rights in one very important respect, namely, the former makes no distinction between citizens and non-citizens. All peoples within the territory of Bophuthatswana are assured of the protection of their rights as enumerated in the Bill of Rights. Other national constitutions, for example the Indian Constitution (Article 19),[75] the Sri Lankan Constitution (Article 14), the Egyptian Constitution (Article 24),[76] *etc*, make a distinction between citizens and non-citizens and guarantee certain rights to citizens only. In terms of the Bophuthatswana Bill of Rights citizenship is not a pre-requisite for the protection of one's rights.

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74 See the whole of Part V *infra* for a detailed critical comparative analysis of each right enumerated in the Bophuthatswana Bill of Rights

75 See Part II, Chapter 5

76 See Part II, Chapter 8

See further Brownlie I *Basic Documents on Human Rights* Oxford (1971) page 50 ff

In terms of Article 8 any person may apply to the Supreme Court of Bophuthatswana to enforce his rights. This therefore makes the Bill of Rights justiciable. It is unlike the Ciskei Declaration of Rights which is unenforceable in law. The Sri Lankan Constitution also has a specific provision (Article 126)[77] which confers on the Supreme Court the right to protect an individual's rights. It is submitted that the act of conferring on the Bophuthatswana Supreme Court the right to pronounce on any infringements of the Bill of Rights is a move in the proper direction. If more States followed this pattern, then the global protection of human rights would not be a distant, unattainable goal but certainly a practical reality near at hand.

The doctrine of *stare decisis* of South African cases is applicable in Bophuthatswana but only in so far as these judicial precedents are not in conflict with the Bophuthatswana Constitution. For example a South African AD decision confirming the conviction of a person in a lower court for contravening the relevant provisions of the Immorality Act or the Mixed Marriages Act would not be upheld as judicial precedents in Bophuthatswana because it would run contrary to the Constitution. It also logically follows that South African cases such as *Minister of Posts v Rasool*[78] and *R v Abdurahman*[79] which upheld the "separate but equal" notion as being legal will not be regarded as judicial

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77 *Ibid*

78 1934 AD 167

79 1950(3) SA 136A

precedents in the Appellate Division of Bophuthatswana because they would conflict with Article 9 of the Constitution which lays down that everyone is equal before the law and that there shall be no discrimination on the grounds of sex, descent, race, language, origin, or religious belief.

Article 10 provides that everyone's right to life is protected. The exception here is the execution of a sentence of a court of law following on a conviction of a crime for which the penalty is provided by law. The essence of this Article is that capital punishment is entrenched in the Constitution. If a person is killed as a result of the

(a) defence of any person from unlawful violence, or

(b) in the course of lawful arrest or in the prevention of escape from lawful detention, or

(c) in the quelling of a riot or insurrection, then such killing shall not be regarded as the intentional deprivation of one's life.

Article 12, in keeping with the liberty of a person, outlaws the practise of slavery. Forced or compulsory labour is also prohibited, but work done in detention or in an emergency or calamity does not constitute forced labour. Article 12(3) is concerned with the right to liberty and personal security.

Wiechers and Van Wyk[80] state in relation to Article 12 as follows:

> Owing to the overriding authority of the Bophuthatswana Constitution,a provision such as section 12 has the effect that the continued application in Bophuthatswana of various South African enactments not repealed in Schedule 7 of the Constitution, become dubious on account of their incompatibility with the Declaration of Fundamental Rights. This applies in particular to South African legislation dealing with detention without trial, exclusion from pre-trial legal representation, and the system known as banning.[81]

Article 13(1) stipulates that everyone has the right to respect for his private and family life, his home and his correspondence. This right will only be limited in the interests of national security, public safety, and prevention of disorder and crime, the protection of health and morals andthe protection of the rights and freedoms of others. Article 13(3) refers to the system of education. Unlike the First Protocol to the European Convention, the African Charter and the American Declaration, Article 13(3) does not guarantee a *right* to education. It merely provides that the "system of education shall be controlled by the State" and that private educational institutions are permitted to function.

Article 14 guarantees to everyone the right to freedom of thought,

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80 Wiechers M and Van Wyk DH *The Republic of Bophuthatswana Constitution* SAYIL (Vol 3) 1977 85

81 *Ibid* at 91-92

conscience and religion. The limitations imposed here are similar to those imposed on the right to private and family life. Article 15 guarantees the right to freedom of expression. Article 16 guarantees the right to freedom of assembly. Article 16 falls short of the equivalent Article in the European Convention, Civil Rights Covenant and the African Charter in that Article 16 does not expressly provide for the right to form and join trade unions.

Article 17 guarantees the right of private and communal ownership. This Article reconciles the traditional aspects of acquisition of property with the western conceptions of private ownership.

Article 18(1) provides: "The rights and freedoms ... may be restricted only by a law of Parliament and such a law shall have a general application" and

Article 18(2) provides: "Except for the circumstances provided for in this Declaration, a fundamental right and freedom shall not be totally abolished or in its essence be encroached upon."

No particular procedure is laid down for Parliament to restrict a fundamental right. Wiechers and Van Wyk[82] point out that in view of the "Supreme Court's testing power this would not be a drawback. The Supreme Court is endowed, in terms of Article 8 of the Constitution, with a fairly wide discretion to look into the constitutionality

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82 *Ibid* at 93

of parliamentary and other legislation, and a special procedural requirement for the parliamentary limitation of fundamental rights would not only prove rather cumbersome, but impractical as well. The responsibility of the Supreme Court as guardian of the Constitution and the fundamental rights would ..... be a challenging one - expecially in the light of the traditional reservations of the South African legal and political system about the formal constitutional protection of fundamental human rights ..." [83]

Anyone familiar with the European Convention would immediately recognise most of the provisions found in the Bophuthatswana Bill of Rights as being similar and in some instances identical. The draftsmen of the Bophuthatswana Bill of Rights, by modelling it on the European Convention follow a tradition richly steeped in the protection of human rights and fundamental freedoms. [84]

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83 *Ibid*

84 The European Convention has amassed around it a rich jurisprudence of case law and learned treatises. This means that one can look to these sources for a proper understanding of the various rights. See footnote 74 *supra*.

3.2. THE MALULEKE CASE

In *Maluleke v Minister of Internal Affairs*[85] an agreement concluded between the Governments of Bophuthatswana and South Africa was challenged in the Bophuthatswana Supreme Court. The agreement (SA Government Gazette 5823 of 6 December 1977) provides in section 1 that the movement to and from and the stay in either State of citizens of the other State "... shall subject to the provisions of this agreement, be governed by the laws and regulations regulating the admission of residents in and departure from the country in question." The Minister of Internal Affairs of Bophuthatswana had revoked Maluleke's permission to enter the country because the latter had insulted the personal dignity and injured the reputation and office of the President in contravention of Article 28 of the Constitution

The applicant submitted that in terms of section 4 of the agreement if a person wished to remain in either State for a period not exceeding 14 days then it was not necessary to obtain permission from the government of that State. The applicant also argued that permission could be withdrawn by the government concerned only in the public or national interest; and further that the applicant had the right to be heard by the government concerned before any decision is taken.

The Supreme Court however held that the agreement in question was concluded between governments and that therefore the citizens of either

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85 1981(1) SA 707 (Bophuthatswana Supreme Court)

State were not parties to it and could not derive any benefits from it in consequence thereof. The Court held further that the question of the admission of an alien into a State remains the sole right of the sovereign State and that the courts have no jurisdiction to overrule any such administrative action. The Bophuthatswana Aliens and Travellers Control Act 22 of 1979 provides for the restriction, regulation and control of entry into, departure from, and travel through Bophuthatswana. It also contains provisions regulating residence and visits of a short duration by aliens. In terms of this Act the Minister of Internal Affairs has authority to revoke any permission (to enter and reside) that has already been granted.

3.3. THE *MARWANE* CASE (NO 1)

In *S v Marwane*[86] an application was made for leave to appeal on the merits of the applicant's conviction on 28 November 1978 of contravening section 2(1)(c) of the South African Terrorism Act 83 of 1967.. After conviction there was an application for leave to appeal against the sentence of 15 years imprisonment. On 21 March 1979 leave to appeal against the sentence was refused but special leave was applied for in terms of section 316(6) of the Criminal Procedure Act, by petition to the Chief Justice of the Appellate Division of South Africa. Special leave to appeal against both conviction and sentence was granted.

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86 1981(3) SA 588 (Bophuthatswana Supreme Court)

The counsel for the applicant contended "that the South African Terrorism Act had no application in Bophuthatswana at the time of the trial. This argument was based on section 7(1) of the Constitution Act 18 of 1977." [87] Section 7(1) declares:

> This Constitution shall be the supreme law of Bophuthatswana.

It was argued [88] that the Terrorism Act conflicts with the words and spirit of the Bill of Rights in that it -

(a) defines contraventions in terms so wide as to render definition meaningless and leaves an accused unaware of the precise allegations against him;

(b) permits indefinite detention of persons without any prospect of a trial within a reasonable time or at all;

(c) sanctions indefinite detention of a detainee without access to friends, relatives or legal advisers;

(d) rules out any recourse to court of law by a detainee;

(e) dispenses with the principle of *autrefois acquit*.

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87 *Ibid* at 589

88 *Ibid*

In view of the above it was submitted that the Terrorism Act is irreconcilable with the terms of the Constitution and is in fact so radically opposed to it that it can only continue to operate in Bophuthatswana in terms of a specific provision to that effect[89] It was further contended that the Terrorism Act was totally incompatible with the tenets of democratic government and with Western conceptions of human rights.[90]

However Hiemstra CJ preferred to give the Constitution a narrow interpretation.[91] The learned Judge felt bound by Article 7(2) of the Constitution which provides:

> Any law passed after the date of coming into operation of the Constitution which is inconsistent with the provisions thereof, shall to the extent of such inconsistency, be void.

It is submitted that the Court should have viewed the Constitution in its entirety. Any law that conflicts with the Bill of Rights should be summarily struck down. However, Article 7(2) has now been amended to include all laws passed before 6 December 1977 in addition to laws passed after that date. The amended section 7(2) now reads:

> Any law, passed *before* or *after* the commencement of this Constitution, which is inconsistent with the provisions of

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89 *Ibid*

90 *Ibid* at 589-590

91 This is similar to what the Supreme Court has done in Sri Lanka

this Constitution, shall, to the extent in which such an inconsistency exists, be void.[92]

Hiemstra CJ felt bound to refuse the application for leave to appeal on the merits of the case.

3.4. THE *MARWANE* CASE (NO.2)

The case of *S v Marwane*[93] is an appeal to the South African Appellate Division against a conviction[94] in the Supreme Court of Bophuthatswana. At the time of the hearing of this appeal the Appellate Division of South Africa was still the highest Appeal Court for the Republic of Bophuthatswana. However, shortly thereafter Bophuthatswana constituted its own AD and since then there has been no recourse to the South African AD.

The Counsel for the appellant contended that the Terrorism Act could no longer be in force in Bophuthatswana because it was impliedly repealed by the Constitution.[95] In terms of Article 93, the laws enumerated in Schedule 6 to the Constitution are expressly declared as continuing in force, and Article 98 provides that the laws mentioned in

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in interpreting its authority in relation to the Bill of Rights in terms of Article 126 of the Sri Lankan Constitution. The Sri Lanka Supreme Court has given a narrow restrictive interpretation. See further Part II Chapter 8 at paragraph 8.4.

92 Emphasis added. See further Part 1 Ch 1 Para 1.3. and footnote 15 *supra*

93 1982 (3) SA 717 AD

94 See footnote 86 *supra*

Schedule 7 are repealed. The Terrorism Act is not mentioned in either of these Schedules. Article 7 provides that the Constitution is the supreme law of Bophuthatswana and that any law passed after its enactment which is inconsistent with it is void to the extent of the inconsistency.Counsel submitted that the Judge erred in his approach.[96] Article 7(2) has a rationale of its own, namely to oust the ordinary rule that later legislation prevails over former legislation; in this case, the Constitution, being supreme, is to prevail over later legislation which is inconsistent with it. There is no reason in logic or in policy why the constitutional protection should apply only in respect of future legislation.[97]

The preamble declares that the purpose of the Constitution *inter alia* is to secure "to all the people their fundamental rights" and Article 1 declares that Bophuthatswana "accepts the principles of democracy". Article 7 gives the Constitution supremacy. Article 8 declares that the fundamental rights are justiciable. Article 79 entrenches the first ten Chapters of the Constitution. Mahomed S C, counsel for the appellant, argued that in view of the above, "Parliament is no longer supreme and the validity of its legislation can properly be tested against the constraints of the Constitution. If a statute conflicts with an entrenched Constitution, the Court has jurisdiction to strike it down".[98] In support of this proposition he referred to *Harris and Another v The Minister of Interior*[99] and *Minister of Interior v Harris*[100]

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95 *Ibid* at 720

96 *Ibid* at 721

97 *Ibid*

He further argued as follows: "In the context of Bophuthatswana, it is not necessary to have recourse to any speculation as to what the Legislature intended. The crisp issue is whether the Terrorism Act is consistent with the Constitution. If it is not, it cannot survive. When an Act is so broad that its effect is potentially to criminalise virtually everyone in the State, subjecting them to the most drastic penalties, it can no longer be said that everyone has the right to liberty and security of person. Such a right has been undermined ... by such an enactment ..." [101]

One other important submission that Mahomed SC made was that the fact that the Terrorism Act is not included in the lists of Acts repealed in terms of Schedule 7 is not decisive because Schedule 7 was never intended to be a codification of all repealed laws. Thus, for example Schedule 7 repeals the Group Areas Act 36 of 1966 and the amendments to that Act in 1969, 1972 and 1974, but not the amendment introduced by Act 22 of 1975. Act 57 of 1952 which makes it compulsory for certain sections of the population to carry reference books is not mentioned in Schedule 7. Accordingly, the Legislature in enacting the Constitution had contemplated that certain enactments would be impliedly repealed.[102]

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98 *Ibid*

99 1952(2) SA at 468-469

100 1952(4) SA 769

101 *op cit* at 722

102 *op cit* at 732

Miller J A in the course of delivering the majority judgment referred to *Minister of Home Affairs v Collins MacDonald Fisher and Another*[103] where Lord Wilberforce considered an argument that provisions in the Act subsequent to the declaration of fundamental rights should be construed as would any other Act of Parliament. He stated that it would be proper to treat a constitutional instrument as *sui generis* which calls for principles of interpretation of its own.[104]

The learned Judge of Appeal concluded that he was in all the circumstances unable to construe the words "subject to the provision of this Constitution" in the context of Article 93(1) in any way other than that laws in conflict with the Constitution are to be excluded from the laws which in terms of that section are to continue in operation. Any other conclusion would constitute an unjustifiable departure from their natural, ordinary meaning in the context of Article 93(1) and in the context of the Constitution as a whole.[105]

The minority judgment, however, was that the phrase "subject to the provisions of this Constitution" should be restrictively construed and that therefore the appeal should not have been allowed.

It was held

(a) that the phrase "subject to the provisions of this Constitution"

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103 1980 AC 319 (PC)

104 *op cit* at 748-749 of the Judgment

105 *op cit* at 754

clearly governed the provisions that laws in operation immediately prior to the commencement of the Constitution were to continue in operation;

(b) that Constitution Acts should, like other Acts be given the ordinary accepted meaning and effect of the words used unless to do so would result in glaring absurdity;

(c) that the laws specified in Schedule 7 were expressly repealed not with the intention that that was to be the final and exclusive list of laws which would no longer continue to operate in Bophuthatswana, but because such legislation, by reason of its nature, immediately came to mind as being inappropriate or unsuitable in the new State;

(d) that Section 93(1) was the mechanism by which other Acts, not expressly mentioned in Schedule 7, which were in conflict with the Constitution, were repealed to the extent of such conflict by being rendered inapplicable in Bophuthatswana;

(e) that Article 7(1) of the Constitution states clearly that the "Constitution shall be the supreme law of Bophuthatswana." From the moment of its coming into operation, the rules of law laid down by the Constitution were therefore to take precedence over other laws which might be in conflict with them;

(f) that the phrase "subject to the provisions of this Constitution" means that laws in conflict with the Constitution must be excluded from the laws which in terms of Article 93(1) are to continue in operation;

(g) that the Terrorism Act is not applicable in Bophuthatswana - it was repealed by the Constitution to the extent of the conflict;

(h) that the conviction on the main charge was set aside;

and (i) that on the second alternative charge the sentence be reduced to three and a half years imprisonment.

Professor Wiechers with reference to the judgment said:

> "The implication of the Appeal Court judgment is that South Africa's Terrorism Act cannot stand the test of measurement against the European Convention on Human Rights. In as much as the Terrorism Act continues to exist in the [South African] Internal Security [Act], the Appeal Court judgment applies equally to it in a moral, though not legally enforceable sense."[106]

Bophuthatswana has, since this decision, repealed the Terrorism Act. Its

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106 *The Star* newspaper 20 May 1982

security legislation is contained in the Bophuthatswana Internal Security Act of 1979 which, according to Professor Wiechers ,was drawn up with the conscious objective of reconciling it with the Bill of Rights.[107]

Professor Dugard said that the historic judgment meant that the main provisions of the Internal Security Act which is based on the Terrorism Act "has now been condemned as contrary to civilised legal standards by the Appellate Division, the Law Society of South Africa and the General Bar Council. In other words, every branch of the South African legal profession has expressed its opposition to the measure."[108] Mr Kentridge SC said that this decision showed the importance of having a constitution with a Bill of Rights.[109]

The decision highlights the important fact that the Bophuthatswana Bill of Rights is not mere paper law. It is living law and is proof that the individuals rights are well protected in Bophuthatswana. The Bill of Rights sets an excellent precedent for other South African States and it is hopeful that this Bill of Rights will serve as the foundation-stone for a Southern African Convention on Human Rights and Fundamental Freedoms.

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107 *Ibid*. See further Part V, Chapter 23.11 at pages 309ff

108 *Rand Daily Mail* 20 May 1982

109 *Ibid*

It is of interest to note that S v *Marwane* is only the third occasion in the history of the Appeal Court that a full bench of eleven judges sat. It is necessary for eleven judges to sit only when an Act of Parliament is in issue. The first occasion was in October 1956 when the Court had to decide on the validity of the

3.5. THE *SMITH* CASE

The case of *Smith v Attorney-General, Bophuthatswana*[110] concerned an appeal against a refusal of bail in the Magistrate's Court. The appellant was in custody from 18 August on charges of fraud. When he applied for bail the Attorney-General personally opposed the application and invoked Section 61A of the Criminal Procedure Act 51/1977(RSA) as inserted in that Act by the Bophuthatswana Act 33 of 1980.[111]

The counsel for the appellant argued that Section 61A was inconsistent with Article 12(3) of the Bill of Rights.

Hiemstra CJ in the course of his judgment said:

> The question opens issues of great constitutional importance to Bophuthatswana, namely, the impact of the Bill of Rights on the powers of a sovereign Legislature. The Bophuthatswana Parliament operates under self-imposed restraints which are foreign to the Westminster system of a supreme parliament clothed with unfettered legislative powers.

Senate Act of 1955 and the South African Act Amendment Act of 1956. The second occasion was in September 1968 when the applicability of the Terrorism Act and Article 5 of the General Laws Amendment Act to South West Africa was in issue.

110 1984 (1) SA 196 (Bophuthatswana Supreme Court).

111 Section 61A reads as follows:

The Court helps to shape the Declaration of Human Rights with great deference to the Legislature. A Court which is over-active in striking down legislation can destroy the exalted instrument it is trying to bring to life; it can incur the resentment of the Legislature and cause the Declaration, which was meant to be a charter of freedom, to become a clog upon the wheels of government. That must be avoided for the sake of the Constitution itself and for the sake of the stature of Parliament

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Attorney-General may prevent granting of bail to accused permanently or ordinarily resident outside jurisdiction of Supreme Court

(1) If an accused who is in custody in respect of any offence applies under S 60 to be released on bail in respect of such offence, and the Attorney-General, whether by way of a certificate submitted to court or in person, informs the court before which the accused applies for bail -

(a) that the accused, according to information at the disposal of the Attorney-General, is permanently or ordinarily resident at a place or in an area in respect of which the Supreme Court of Bophuthatswana does not have jurisdiction; and

(b) that it is likely, in the opinion of the Attorney-General according to information at the disposal of the Attorney-General or by reason of the circumstances of the particular case, that if the accused be released on bail he -

(i) will not appear at the place and on the date and at the time appointed for his trial or to which the

as the highest law-making forum of the nation. In the course of reasoning along these lines the Court will for instance not create an embarrassing *lacuna* within the legislative structure if it is at all possible to avoid such a result. On the other hand, the Court dare not abdicate its function as upholder of the long-term aims and ideals of the Constitution.[112]

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proceedings relating to the offence in respect of which he is so released on bail are adjourned; and

(ii) on such date and at such time, will be beyond the area in respect of which the Supreme Court of Bophuthatswana has jurisdiction.

and by so doing render impossible his trial or the further hearing of his case.

and that the Attorney-General on the grounds of the likelihood referred to in para (b) (i) and (ii), objects to the granting of bail to the accused, the court shall, subject to the provisions of ss (2), refuse the application for bail.

(2) Any notification by the Attorney-General in relation to -

(a) the circumstances contemplated in ss (1) (a), shall be conclusive proof of the existence of such circumstances, unless and until the contrary be proved in a competent court;

(b) the matters referred to in ss (1) (b) (i), shall be conclusive and final proof of such matters

(3) In applying this section the provisions of ss(2),(3),(4) and (5) of s 61 shall *mutatis mutandis* apply.

112 *op cit* at 199

The *Smith case*[113] was the first case before the Supreme Court of Bophuthatswana on the infringement of a right contained therein (that is, Article 12(3)). The right of individual freedom is an important right. The Bill of Rights is a statement of the ideal society.

The learned Judge went on to say[114]:

> Those societies where a declaration of fundamental rights has become a living force shaping the people's way of life and disciplining the leaders to observe democratic practices, are served by wide-awake and independent information media. This country, though guaranteeing freedom of thought and conscience, does not yet have well developed information channels or a sophisticated press. In addition, the government has no opposition in Parliament. That is so because democratic political processes are in their infancy, and not because of any constitutional barriers to opposition. In such a situation the Court has a particular duty as guardian of liberty, but it has to exercise its powers of controlling legislation with a scalpel and not with a sledge-hammer.

In stating that section 61A is unconstitutional the learned Judge declared[115]

> The universal method of safeguarding individual liberty is to

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113 *Ibid*

114 *Ibid* at 200

115 *Ibid*

> entrust it to an independent judiciary operating in public and compelled to give reasons. Every man is entitled to "due process of law". This principle is so ancient that it can be traced back to the *Magna Carta* (1225). In section 61 A the judicial process is eliminated. The order refusing bail to a suspect is still made in open court by a judicial officer, but it is a pantomime of a court. The magistrate is not only compelled to accept the Attorney-General's *ex parte* statements of fact, not supported by any evidence, but the statute also tells him what order to give, namely a refusal of bail. A statute which eliminates the judicial process in matters of person liberty is plainly unconstitutional. I do not now refer to the internal security laws. Other considerations apply there, brought about by section 12(3) (f) of the Declaration of Fundamental Rights.

The Court discussed the AD case of *S v Marwane*[116] but felt unable to accept it. Hiemstra CJ stated that the Constitution makes it clear that a distinction is drawn between inherited legislation and subsequent legislation and that only legislation passed after the coming into force of the Constitution will be subject to the Bill of Rights.[117]

The Court allowed the appeal and declared that Act 33 of 1980 is unconstitutional and therefore null and void.

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116 *Ibid* footnote 93

This is a significant judgment because the right to liberty and security of person is an important right and should not be arbitrarily taken away from a person. Once again, this decision proves beyond any doubt that the Bophuthatswana Bill of Rights is a living document entrenching the rights and freedoms of all people in Bophuthatswana.

3.6. THE OMBUDSMAN

Throughout the world there has been a marked increase in the number of civil servants. In fact in a large proportion of countries the State is the chief employer. This expansive growth in the administrative hierarchy might become impersonal and unaware of the individuals problems - hence the need for an Ombudsman.

An Ombudsman is a Parliamentary Commissioner appointed by Parliament to investigate complaints against government officials and agencies.

An Ombudsman may be appointed for a State, a region, a city or for a special purpose only. The origin of this system of the protection of human rights can be traced to Sweden. The Ombudsman system cover not only general civil administration but also the armed forces and the department of prisons. New Zealand has had an Ombudsman since 1974. France set up a Parliamentary

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117 See footnote 92 *supra* which refers to the amendment to Article 7(2) of the Constitution in terms of which all legislation (pre and post independence) is made subject to the Constitution.

Commission in 1973. Both Nigeria and Tanzania have Ombudsmen. Regional ombudsmen are found in each of the states of Australia and the provinces of Canada. An example of an ombudsman for a city only is the one that has jurisdiction over Jerusalem. Ombudsmen are also appointed for specific aspects of administration, for example both West Germany and Austria have an ombudsman for the armed forces. Canada has a linguistic ombudsman (to supervise the implementation of the Official Languages Act) and a prison ombudsman (to investigate complaints from prisoners).[118] The Ombudsman system has a beneficial effect on any government administration because civil servants become acutely aware of the fact that their actions are subject to investigation.

An Ombudsman, in most countries,has no power to alter decisions. He may only make recommendations. He acts as a listening ear for people's problems and grievances. He may investigate the allegations that are made to him and he may decide whether or not they are justified. To enable him to do this he is empowered in relation to any investigation to see all relevant documents, to call witnesses, to demand the reasons for any decisions, to enter official premises, to question any person and to require explanations for any actions taken. When he reaches a conclusion (decision) he makes such recommendations as may be necessary -

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118 See Part II Chapter 4, paragraph 4.6 on the Canadian Ombudsman
See further: MacDonald R St J and Humphrey JP *The Practice of Freedom* (1979) at 377.

and he may make them at the highest echelons of government. He also has to report to Parliament. It is a rare official or department which would relish the publicity of a report to Parliament by the Ombudsman upon that official's or department's refusal to properly consider and, where necessary, make changes as a result of recommendations following an Ombudsman's investigation. [119]

Just as the Supreme Court of Bophuthatswana ensures the protection of human rights and fundamental freedoms as enshrined in the Constitution, so too, does the Bophuthatswana Ombudsman perform the role of mediator between erring administrative departments of the government and the general public.

In Bophuthatswana the office of Ombusdman was made possible by the Control Commissioner (Ombudsman) Act 39 of 1980. This enactment did not, however, embrace the full concept of "Ombudsman". This has been rectified by subsequent amendments, manely Act 7 of 1981 and Act 40 of 1982. In accordance with Act 39 of 1980 the first Ombudsman was appointed on 1 July 1981. [120]

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119 Bophuthatswana Ombudsman *First Annual Report* 1982 at 5

120 For a cross-section of cases handled in 1982 see Bophuthatswana Ombudsman *op cit* at 40-77

PART II

NATIONAL PROTECTION OF HUMAN RIGHTS - A SURVEY OF SELECTED COUNTRIES

We know that ultimately, whatever rules and words you may put into a Constitution, the working of it lies with the men and women who work it. You may have all the precautions to make the Judiciary independent, but unless the men who man the Judiciary are men of courage, men of wisdom, the Judiciary will never be independent. We have had such men in the past. We have such men in the present. Now the object of all of us is to see that in the future too, in the written Constitution, we create the conditions for such men to live, thrive and prosper. If they feel that they will be subject to pressures from governmental forces or from those elected to Parliament, they will not be able to perform their duty.

per Cooray, JAL *Constitutional and Administrative Law of Sri Lanka* at 479

CHAPTER 4

CANADA

4.1. INTRODUCTION

Just as in most countries in the world, the development of the promotion and protection of human rights and fundamental freedoms in Canada is mainly something that has started and accelerated after World War II. Another reason for the low priority given to human rights in Canada until relatively recently, is because of the role of the courts. Canadian courts do not play as important a role as protectors of human rights as do the United States courts.[1]

There is a Bill of Rights at the Federal level. However, this is not entrenched in the Constitution. There is also a Federal Human Rights Commission. There are also human rights acts and commissions in the provinces.

John Wilson in his article *The Canadian Political Cultures: Towards a Redefinition of the Canadian Political System*[2] prefers to segment Canada into ten (10) provincial political systems, in other words, ten societies. However, an earlier study, the *Preliminary Report of the Royal Commission on Bilingualism and Biculturalism*[3] preferred to divide Canada into two (2) societies on the basis of culture and language.

To belong to any society is to accept the fact that one has to share and

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1 MacDonald, R.St.J and Humphrey J.P. *The Practice of Freedom* (1979)

2 In *Canadian Journal of Economics and Political Science*, VII September, 1974 438

3 Report of 1965 (Ottawa Queen's Printer)

clearly the most important kind of sharing and participation must surely be in a code of human rights and a system of political institutions for defining and giving effect to those rights.

Professor R. ST.J. MacDonald holds the view that it is better that a Bill of Rights is not entrenched in the Canadian Constitution. He argues that it is not proper to impose present day formulations of human rights on future generations and that if the constitutional provisions defining such rights is very explicit, then there is less scope for subsequent adjustment to changing circumstances through evolving custom or judicial review. He suggests that no legislature can bind its successors.[4]

4.2. THE DEVELOPMENT OF HUMAN RIGHTS THROUGH STATUTES AND JUDICIAL DECISIONS

In the British North America Act (1867) one finds that human rights is not mentioned. However, the Preamble does mention that Canada's Constitution is

"similar in principle to that of the United Kingdom".

This was helpful because since the common law was an integral part of the British Constitution, this indicated even if there was no statute a person whose human rights had been violated could look to the common law for recourse.[5]

In *Sparrow v Johnson* (1899)[6] a black couple were barred from taking their seats for a concert at the Montreal Academy of Music. The couple sued

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4 "The Case against the Canadian Charter of Human Rights" in *Canadian Journal of Economics and Political Science* 11 (September 1969) 277

5 Hunter I.A.: "The Origin, Development and Interpretation of Human Rights Legislation in *The Practice of Freedom supra* at 77.

6 1899 (15) Quebec C.S. 104 discussed in *The Practice of Freedom supra* at 78

the management for breach of contract. It was held that when entertainment is publicly advertised and tickets are publicly sold, the management forfeits the right of a private club to exclude anyone it chooses from the premises.[7]

In *Lowe's Montreal Theatres Ltd. v Reynolds*[8] a 1919 decision, a black man was refused a seat at Lowe's Theatre but was given a balcony seat because the manager had a rule that non-whites should sit in the balcony. The Trial Court had awarded the Plaintiff ten (10) dollars damage. However, the King's Bench Court reversed this decision on the basis that the manager's rule did not offend anyone in regard to morality.

In *Franklin v Evans*[9] a decision of 1924, an Ontario Court held that a restaurant proprietor who refused to serve customers because of their colour or ethnic origin was notcontravening any human rights provisions.

In 1940 Judge O'Halloran in a dissenting minority judgment emphatically laid down that discrimination is incompatible with even the most basic

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7 Archibald J. held, albeit *obiter* at 107 : "Our constitution is and always has been essentially democratic, and it does not admit of distinctions of races or classes. All men are equal before the law and each has equal rights as a member of the community." The Judge awarded the Plaintiffs fifty (50) dollars damage for breach of contract.

8 1919 (30) Quebec CBR 459.

9 1924 (55) OLR 349

notions of human rights.[10]

The first racial discrimination case to be heard in the Supreme Court of Canada was *Christie v York Corporation* (1940)[11] This was a disappointing judgment[12] because it re-iterated and entrenched the *status quo*[13].

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10 *Rogers v Clarence Hotel* 1940(2) W.W.R. 545 (British Columbia). At page 550 the learned Judge held: "The respondent is a British subject. All British subjects have the same rights and privileges under the common law - it makes no difference whether white or coloured; or of what class, race or religion. This elementary principle of the common law seems to have been overlooked entirely ..." (from *The Practice of Freedom, supra* at 78).

11 1940 S.C. Reports 135.

12 Christie, a black man, was refused service in an inn in Montreal. He claimed two hundred dollars in delict. The Trial Court awarded twentyfive dollars as damages. However, the Court of the King's Bench reversed and dismissed the matter. The Supreme Court upheld this decision. Judge Rinfret pointed out that "... the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public" (from *The Practice of Freedom, supra* at 79).

13 See further Tarnopolsky, W.S.: *The Control of Racial Discrimination* in *The Practice of Freedom supra* at 294.

The Supreme Court of Canada missed a golden opportunity in 1940 of placing the promotion and protection of human rights in its proper perspective. It had preferred to further the cause of commerce. Both the common law and the judiciary were thus found to be inadequate in the protection of human rights.

The next stage in the development of human rights was the progressive introduction of legislation to fill the many *lacunae* in the field of the protection of human rights.

Ontario took the lead in enacting the *Ontario Racial Discrimination Act* (1944) which declared as illegal the publication, display, or broadcast of anything which gives an intention of discriminating on the basis of race or creed.

Hunter [14] points out rather bluntly that:

> The Act was designed to combat the once prevalent and prominently displayed 'Whites only' signs, which besmirched many shop windows, amusement arcades, beaches and other places of public resort. Although such signs have largely disappeared, the legislative proscription remains. A section based on the 1944 Act is found in most provincial human rights legislation.

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[14] *Supra* at 80. See further Betcherman L.R. : *The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties*, where he writes that "(m)otorists driving into Toronto were greeted by a large 'Gentiles only' sign on a private beach just outside the city limits. Summer resorts displayed signs stating 'No Jews or Dogs Allowed' and their owners distributed brochures assuring prospective clients that their clientele was restricted". (Quoted in *The Practice of Freedom* at 99).

Saskatchewan promulgated the first *Bill of Rights* in 1947. It ordained freedom of religion, speech, press and of association; and the right to vote. It also outlawed discrimination on grounds of race, creed, religion, colour or ethnic origin.

Since then there have been a number of enactments promoting and protecting various human rights and fundamental freedoms in all the provinces.[15]

In one interesting decision[16] an Ontario truck rental enterprise refused

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15 For example, in 1951 Ontario passed the first *Fair Employment Practices Act*, and in 1954 passed the *Fair Accommodation Practices Act*. All other provinces followed suit. But the problem here, as Tarnopolsky W.S. argues in *The Canadian Bill of Rights* at 69, was that "very few complaints were made and little enforcement was achieved " because of the shortage of staff to administer and enforce these Acts.

In 1962 Ontario enacted the *Ontario Human Rights Code* which had a full-time director to administer it. This Code outlawed discrimination on grounds of race, colour, nationality or place or origin.

In *Lopetrone v Juan de Fuca Hospital Society* 31 March, 1976 (Report of a Board of Inquiry under the British Columbia Human Rights Code) the Board found no discrimination on grounds of race or place or origin; but nevertheless the Board decided that L was refused employment with a justifiable reason.

16 *Shack v London Drive-Ur-Self* Report of a Board of Inquiry in terms of the Ontario Human Rights Code (7 June 1974).

to hire a female rental clerk because it was felt that on some occasions she would be alone at night. It was held that this was a good example of discrimination on the basis of sex.[17]

To employ only female restaurant workers would constitute discrimination on the grounds of sex.[18]

4.3. THE CANADIAN BILL OF RIGHTS (FEDERAL)

In Canada many of the rights and fundamental freedoms are found mainly in the form of ordinary statutes of the Canadian Parliament or of the provincial legislatures. The best example is the Canadian Bill of Rights passed as an ordinary enactment of the Canadian Parliament in 1960 and which operates only on the Federal level.

Section 1 provides:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely:
>
> (a) the right of the individual to life, liberty, security of person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> (b) the right of individuals to equality before the law and the protection of the law;

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17 See also *Phillips v Martin Marietta Corporation* 1970 (400) US 542.

18 *Kesterton v Spinning Wheel Restaurant* Report of a Board of Enquiry under the British Columbia Human Rights Code (22 October, 1975)

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.[19]

Section 2 provides:

> Everylaw of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgment or infringement of any of the rights or freedoms herein recognised and declared.

Section 1(a) of the Canadian Bill of Rights refers to the right to "due process" before a person is deprived of the "enjoyment of property". Other rights are also protected procedurally, for example, right to life, liberty and security of person.

Section 2(e) indicates that Canadian laws must be interpreted and applied in such a way that they do not "deprive a person of the right to a fair hearing ... for the determination of his rights and obligations".

However Tarnopolsky,[20] W S points out that Sections 1(a) and 2(e) have

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[19] See further Van der Vyver J D *Seven Lectures on Human Rights* at 86 The full title of the Act is *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*

[20] *supra* *The Canadian Bill of Rights* at 222.

been very narrowly interpreted by the courts.

However,it is clear that where one is deprived of the enjoyment of property and/or where the determination of rights and obligations is concerned then it is obligatory to exercise the "due process" of the law.

Canadian experience with the interpretation and application of the principles of equality before the law and non-discrimination which are entrenched in the Bill of Rights illustrates the great difficulties almost inevitably attending first efforts to strive at manageable standards for the delimitation of the content of such guarantees.[21]

The question arises whether section 2 makes it obligatory on the courts to declare as inoperative or null and void those enactments which are in conflict with the rights and fundamental freedoms set out in the Bill of Rights. The effect of the Bill of Rights on the federal enactments was discussed as early as 1962 in *R v Gonzales*.[22]

This issue, that is, whether the Bill of Rights has supremacy when federal legislation conflicts with its provisions was finally decided

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21 Polyviou, P G *The Equal Protection of the Laws* at 134ff Duckworth and Co. Ltd (London) 1980

22 1962(32) DLR 290.
See Polyviou *supra* at 135 for a discussion of this case.

in *R v Drybones*.[23] The Supreme Court held that discriminatory legislation cannot be consistent with the provisions of the Bill of Rights and that the Bill of Rights is characterized by supremacy.[24]

In *Attorney-General of Canada v Lavell*[25] it was stated that "the effect of section 1 of theBill of Rights is to guarantee to all Canadians the rights specified in paragraphs (a) to (f) of that section, irrespective of race, national origin, colour or sex."

Polyviou points out[26] that Canadian courts have attributed great significance to the state of Canadian law as it existed at the time when the Bill of Rights was enacted. The Bill itself begins with a Declaration by Parliament that in Canada the enumerated rights and freedoms "have existed and shall continue to exist". In *Robertson and*

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23 1970 S C Reports 282

The facts (from Polyviou at 136) were Section 94 of the *Indian Act* (1952) made it an offence for a Canadian Indian to be intoxicated off a reserve. *The Liquor Ordinance* (1956) provided that no-one shall be intoxicated in a public place. Thus an Indian might be guilty of an offence where no other citizen would be. The penalty was greater under the former Act.

24 See further Tarnopolsky: *The Canadian Bill of Rights from Diefenbaker to Drybones* in 17 *McGill Law Journal* 1971 at 437

Leigh: *The Indian Act, the Supremacy of Parliament and the Equal Protection of the Laws* in 16 *McGill Law Journal* 1970 at 389

25 1973(38) D R L 481 at 492 as quoted in Polyviou *supra* at 139

26 *supra* at 144

another v R[27] it was noted that the Bill is concerned with human rights and fundamental freedoms as they existed in Canada immediately prior to the Bill being enacted. The six defined human rights in the Bill had existed earlier and were protected under the common law and the Bill did not purport to define new rights and freedoms.

What is the criterion to be used to determine allegations of inequality and discrimination? In R v *Gonzales*[28] it was emphasized that the right of equality cannot mean that laws must become of universal application and extend similar burdens and benefits to all people. This theme has featured prominently in many other Canadian cases. A typical statement is that"(i)t is of the essence of sound legislation that law be so tailored as to be applicable to such classes of persons and in such circumstances as are best calculated to achieve the social, economic or other national objectives that have been adopted by Parliament" (*Prata v Minister of Manpower and Immigration* 1972 F C 1405)

There are many other judicial decisions on the interpretation of the right of an individual to equality before the law as expressed in

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27 1963 S C Reports 651

28 1962(32) DLR 282 at 290 (Quoted in Polyviou at 148).

section 1(b) of the Bill of Rights[29].

4.4. THE CANADIAN HUMAN RIGHTS COMMISSION

The Universal Declaration was ratified by Canada in 1976. This Declaration was the catalyst for the formation of the Canadian Human Rights Commission.

According to Fairweather, R G L in *The Canadian Human Rights Commission*[30] the "Commission was intended to serve both as the principal agency within the federal jurisdiction for the creation of a favourable climate for equality of opportunity, and as a means of ending a wide variety of discriminatory practices"[31].

The Bill received Royal Assent on 14 July 1977. The Bill is now the Canadian Human Rights Act.

Clause 2 states:

> The purpose of this Act is to extend the present laws in Canada to

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29 See Polyviou *supra* 168-173 wherein he lists and discusses these cases: *Regina v Smythe* 19 DLR 480, *Regina v Burnshine* 1974 (4) WWR 49 *In Re Prata and Minister of Manpower and Immigration* 1973(31) DLR 465, *Regina v Natrall* 1973(32) DLR 241, *R v Viens* 1970(10) CRNS 363 *R v Lavoie* 1971(16) DLR 647

30 In *The Practice of Freedom*, *supra* at 309ff

31 *supra* at 310

give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(a) Every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory practices based on physical handicap; and

(b) the privacy of individuals and their right of access to records containing personal information concerning them for any purpose including the purpose of ensuring accuracy and completeness should be protected to the greatest extent consistent with the public interest[32].

The Federal Canadian Human Rights Commission maintains a close working relationship with each of the provincial Human Rights Commissions.

Anyone who believes that he has been discriminated against can file a complaint with the Commission in person, or by letter or by telephone. Further, any person or group of persons who has good reason to believe that an individual is involved in a discriminatory practice may inform the Commission of it. Further, the Commission itself may process a

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32 *Clause 2* taken from *The Practice of Freedom, supra* at 311.

complaint if it has reasonable grounds to believe that someone is involved in a discriminatory practice.

The Commission would then appoint a Human Rights Tribunal to investigate the matter. If it is found that there has been discriminatory practice then the Commission may order that the respondent desist from such practice and/or compensate the victim.

The Commission has the authority *inter alia* to consider recommendations and suggestions on human rights and fundamental freedoms from any source (Section 22(1) (e)). It also has the responsibility to undertake studies on human rights. In terms of section 22(1) (g) it shall also undertake, by persuasion, publicity or other means, to discourage and reduce discriminatory practices.

As Fairweather[33] comments:

> Parliament has thus entrusted the Commission with a double mission: the restoration of rights to those who have been deprived of them by discrimination; and the improvement of social systems and public attitudes so as to reduce, and eventually eliminate the incidence of discrimination. These two purposes can be distilled into a statement of the ultimate objectives of the Commission: social justice and social change.

4.5. THE LAW REFORM COMMISSION

The Law Reform Commissions of most of the provinces together with the

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33 *supra at 316*

Federal Law Reform Commission of Canada have played a major part in the improvement of the protection of human rights in Canada.

The Law Reform Commission of Ontario (in 1968) compiled a report on the protection of privacy. In 1971 the promulgation of the Age of Majority and Accountability Act was a direct result of a study initiated (in 1969) by the Ontario Law Reform Commission. In 1970 this same Commission did a study on Sunday observance legislation[34]. This resulted in the enactment of the *Retail Business Holidays Act* (1975).

The Manitoba Law Reform Commission did a study in 1974 on the merits of a bill of rights for the province and came to the conclusion that such legislation was necessary.

The Federal Law Reform Commission of Canada is particularly concerned with civil liberties[35]. The freedom of the individual from arbitrary state action is discussed in many reports including an investigation of the powers of the police; freedom of expression, the rights of indigenous peoples, etc. Recommendations of law reform commissions in the field of human rights; according to Barnes[36], seem to lack the public impact achieved by other agencies of law reform. He suggests that human rights commissions, ombudsmen and private organisations have done much to generate public awareness in this field. He

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34 See further Barnes J: *The Law Reform Commission* in *The Practice of Freedom*, *supra* at 328

35 *supra* at 330

36 *supra* at 331

indicates that judicial decisions dramatically illustrating the legally disadvantaged position of particular individuals would be a stronger catalyst for human rights reform than a detailed report from a Law Reform Commission.

4.6. THE OMBUDSMAN

Between 1967 and 1979 all the Canadian provinces[37] appointed Ombudsmen[38].

In addition the Federal Government also appointed two Ombudsmen for specialized areas namely a linguistic Ombudsman (who supervises the implementation of the Official Languages Act), and a prison Ombudsman (to investigate complaints from prisoners).

Further discussion on specific human rights and fundamental freedoms in Canada will be found in Part VI of the present work.

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37 See further: Friedmann K A *The Ombudsman* in *The Practice of Freedom* (*supra*) at 377ff

38 See further: Part 1 (3.6) on the Bophuthatswana Ombudsman.

CHAPTER 5

INDIA

5.1. INTRODUCTION

The Indian Constitution (1949) is based upon experience in other federal systems modified to suit the requirements of Indian political conditions[39].

Part III[40] of the Indian Constitution contains the section on "Fundamental Rights." The Preamble declares that one of the purposes of the State is to secure to all its citizens "(e)quality of status and opportunity."

An important point to note at this juncture is that Part III (Fundamental Rights) of the Indian Constitution, just like the Bophuthatswana Bill of Rights and the Sri Lanka Bill of Rights, is justiciable i.e. they are law and are protected by the courts.

Article 14 contains the fundamental rights of equality before the law and the equal protection of the laws. The phrase "any person" indicates that these rights are available both to citizens and non-citizens.

Article 15 forbids discrimination on the basis of religion, race, caste, sex or place of birth.

Article 16 offers equality of opportunity in the sphere of employment or appointment to any office under the State. In terms of Article 17 the concept of "untouchability" is abolished and its practice is forbidden. Articles 19 to 31 protect various other rights.

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39 Brownlie *Basic Documents on Human Rights* at 29.

40 Full text in Brownlie *supra* at 29.

5.2. THE RIGHT TO EQUALITY (ARTICLE 14)

Article 14 provides:

> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

This Article is directed to the State[41]. According to Article 12 the term 'State' "includes the Government of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India"[42] Article 14 therefore applies even to subordinate authorities in India. In the *Rajasthan Electricity Board Case*[43] the Supreme Court decided that

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41 *Bashesher Nath v I T Commissioner* AIR 1959 SC 157 Most of the cases referred to in this Chapter are found in Polyviou *The Equal Protection of the Laws* 85ff Other cases are found in Basu *Cases on the Constitution of India*

42 Mathew J pointed out in *Sukhdev Singh v Bhagatram* AIR 1975 SC 1331 at 1349 that Article 12 does not define the word "State" - it only provides that "State" includes the authorities specified therein.
See further: Seevai H M *Constitutional Law of India: A Critical Commentary* 1975 (2nd edition)
Tripathi, P K *Some Insights into Fundamental Rights* 1972

43 AIR 1967 SC 1857 There are many cases which deal with Article 14 some of which are:
Dhirendra v Legal Remembrancer 1955(1) SCR 224, *Charanjit lal v Union of India* 1950 SCR 869. *State of Gujarat v Shri Ambica Mills* AIR 1974 SC 1300 M S *Ali v Union of India* AIR 1974 SC 1631

Article 14 even included any authority created by a statue and functioning within the territory of India.

Article 13 provides that all laws in force immediately prior to the commencement of the Constitution are void if they are inconsistent with the provisions of Part III of the Constitution. According to Article 13(2) the State cannot make any law which abridges or abolishes the rights contained in Part III. Thus Article 13 ensures that the right to equality cannot be tampered with by the legislature.

The phrase "equality before the law" is a negative concept whereas "equal protection of the laws" is a positive concept. The former declares that everyone is equal before the law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter indicates an equal protection alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed[44].

5.3. NON-DISCRIMINATION (ARTICLE 15)

Article 15 does not allow discrimination on the grounds of religion, race, caste, sex or place of birth. If a statue discriminates on any of the above grounds then that statute immediately becomes unconstitutional.[45]

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[44] *State of U P v Deoman Upadhyaya* AIR 1960 SC 1125 at 1134 (Polyviou at 91)

[45] *The Kathi Raning Case* 1952 SCR 435

Article 15 does not prevent legislative differentiation or discrimination on the basis of some ground other than those listed in Article 15.

In short, discrimination really amounts to inequality of treatment or differential treatment which is not justifiable by objective and reasonable criteria. It is worth noting in this context that in the *Belgian Linguistics Case*[46] the European Court of Human Rights pointed out that to justify differential treatment and to prevent it being discriminatory, the existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, having regard to general principles which normally prevail in a democratic society. In other words, the European Court was saying here that differential treatment must have a legitimate aim - not necessarily a legal aim but a permissible aim. One of the peculiarities of this concept of differential treatment is the recognition of the acceptance of differential treatment towards aliens. There is no obligation on States, in terms of international instruments, to grant full national status to aliens.

Article 15(3) indicates that the State reserves to itself the right to "discriminate" in favour of women and children. There have been several cases on Article 15(4) which have all considered the Scheduled Castes and Scheduled Tribes.[47]

5.4. EQUALITY OF OPPORTUNITY (ARTICLE 16)

Article 16 guarantees to all citizens the equality of opportunity "in

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46 II YB 832 European Court of Human Rights, Series A Nos. 5 and 6.

47 See Polyviou 124-129 and the cases listed therein.

matters relating to employment or appointment to any office under the State".

Equal opportunity in this context, according to Polyview[48], undoubtedly permeates the whole spectrum of an individual's employment from appointment through promotion and termination, to the payment of gratuities and pensions. But here, the concept of equality has inherent limitations arising from the very nature of the constitutional guarantee and the need to operate it in contemporary society. Equality is for equals. Only those who are similarly circumstanced are entitled to equal treatment. The guarantee of equality is not applicable as between members of distinct and different classes of the public service. The Government should in general be free to pick from among the most qualified applicants ...

5.5. CIVIL AND POLITICAL RIGHTS (ARTICLES 19-31)

Articles 19 to 31 contain a comprehensive list of civil and political rights.

According to Article 19 all citizens have the right to freedom of speech and expression, to peaceful assembly, to form trade unions, free movement, to acquire property, and to practise any profession or occupation or trade.

Article 20 makes it clear that crimes shall not have retroactive effect and further (Article 21) that a person's right to life and liberty may not be infringed except according to the procedure established by law. However,

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48 *supra* at 129-130

as Van der Vyver[49] points out, most of these rules are subject to exceptions. The period of preventive detention can be extended from three months to a period determined by Parliament (Article 22(3) - 22(7).

Article 24 provides that no one below 14 years of age shall be employed to work in any factory or mine or engage in any other hazardous employment. This Article would have had greater impact if the right of children to education had been included in Articles 29 or 30. Unfortunately, India being very densely populated and overcrowded and with millions trying to eke out an existence it would be very difficult, if not almost impossible, to implement Article 24.

In *Ahmedabad St Xavier's College Society v State of Gujarat*[49(bis)] Mathew J disagreed with the argument that minority institutions (as provided for in Article 30) had no fundamental right to obtain recognition or affiliation unless they submit to regulations which apply to all educational institutions, regardless of whether they were maintained by majority or minority communities .

India, being a multi-religious country, it is only natural that the Bill of Rights should ensure not only freedom to profess, practise and propagate religion, but also that the religions *per se* are protected (Articles 25 - 28)

On the whole, having made a general survey of the Indian judicial decisions pertaining to human rights and fundamental freedoms, it is proper to conclude that the executive, legislative and judicial organs of India do indeed encourage the promotion and protection of human rights and fundamental freedoms.

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49 *Seven Lectures on Human Rights* at 88.

See also: *Fagu Shaw v State of West Bengal* 1974(4) SC REPORTS 152
Baxi, U(editor) *K K Mathew on Democracy, Equality and Freedom.*

49(bis) 1974(1) SC 717. (Quoted in Baxi *supra* at LVIII)

CHAPTER 6

FEDERAL REPUBLIC OF GERMANY

6.1. INTRODUCTION

An example of a relatively recent constitutional enactment for the promotion and protection of human rights and fundamental freedoms is the West German Constitution (1949)[50]

Chapter 1 of the Constitution[51] enumerate a catalogue of fundamental human rights which are in many respects similar to the Bophuthatswana Bill of Rights and the various regional and international instruments.

A fundamental characteristic here is the notion in Article 1(1) which declares that "the dignity of man is inviolable (*unverletzlich*). Article 1(2) indicates that the inviolable (*unveräusserlich*) rights form the basis of every community, of peace and of justice in the world.

Articles 2 to 19 contain a list of human rights provisions some of which are

the right to life;
equality before the law;
freedom of religion;
conscientious objection to military service (this right is rarely found in national Bills of Rights); freedom of expression, and peaceful assembly;
the right of asylum (this right is also not common in national constitutions.

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50 Van der Vyver *supra* at 62.

51 Brownlie *supra* for full text of Chapter 1 at 18 ff.

6.2. THE RIGHT TO EQUALITY (ARTICLES 3 AND 6(5))

Article 3 provides that "all persons shall be equal before the law"; "men and women shall have equal rights"; and "no one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith or his religious or political opinion".

The Federal Constitutional Court is the guardian of the human rights and fundamental freedoms as enunciated in the Constitution. The acts of the executive, legislative, and judicial organs of the State are subject to the authority of the Constitutional Court to determine whether such acts conform to the criteria laid down in the Basic Law (Constitution).

The Federal Constitutional Court had to determine the meaning and content of the principle of equality as found in Article 3.

In one of its early decisions[52] the Constitutional Court undertook the task of defining the principle of equality. The state of Baden, through its government, alleged inequal treatment in relation to other states in the Federal Republic. The Court held that the equality clause does not require all to be treated equally. It merely forbids that persons or facts which are substantially equal are treated differently, but not that persons or facts which are substantially unequal should be treated differently in relation to the existing

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52 *B Verf GE 1,14* (See Koopmans, T *Constitutional Protection of Equality* footnotes 22 and 24 at 111)

inequality. The equality clause is violated when no reasonable ground can be found for legislative differentiation or non-differentiation arising from the nature of the object or from otherwise objective circumstances. On the particular facts, the Court held that for Baden there was a difference of objective circumstances in comparison with the rest of the Federal Republic which justified unequal treatment[53].

On a decision[54] of 22 March 1971 the Court[55] found that where an enactment allowed compensation (for preventive detention of innocents) to aliens only on the basis of reciprocity, it did not infringe Article (3). The differentiation corresponds to the legitimate concern of a State to exercise strong pressure in this way on other States in order to promote legal protection for its citizens outside its boundries. The Court's view is that legislation contrary to the Basic Law is an infringement of the principle of equality. But this infringement is reduced if, for sufficient reasons the violation can be legalised.

Klein[56] also considers the question whether the prohibition from treating equal things unequally correspond to a prohibition from treating unequal things equally, that is whether there can be a lack of differentiation contrary to equality. The Court has answered this question in the affirmative on several occasions. It is not necessary that different

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53 Klein, E *Federal Republic of Germany* in Koopmans, T *supra* at 75

54 *B Verf GE 30, 409* (see Koopmans, T *supra* at footnote 34)

55 Koopmans, T *supra* at 77

56 Koopmans, T *supra at 80*

things be treated differently in all circumstances; an obligation always to take account of all dissimilar factual circumstances would have the odd result of hindering unification of law in many fields. Differentiation is however a constitutional obligation when factual differences are so important that there are no objective grounds for their being treated the same in law; in that case lack of differentiation would be arbitrary. Thus the prohibition of unequal treatment in Article 3(1) is subject to the same conditions as the prohibition against equal treatment arising from that rule[57].

The Courts in West Germany are also bound by Article 3. It is therefore possible that in some cases judicial acts can violate Article 3. Article 3 is not violated if the Court proceedings are fraught with errors. Also Article 3 is not violated if different courts have varying punishment practices (or if they depart from earlier decisions). Article 3 will be breached if the same court applies, for example, criminal law differently to different people.

Article 3(2) provides that men and women shall have equal rights. This is a constitutional right enforceable in law. This provision must certainly affect every facet of the law. Article 3(2) makes it clear that sexual differences can never constitute the basis for legal differentiation. Article 1 pronounces that the dignity of man (used in its widest context) is inviolable. From this principle it therefore must logically follow that men and women should have equal rights. In one decision it was

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57 See Koopmans, T *supra* his footnotes 69 to 74 at 113 and especially the following decisions: *B Verf GE 23, 288 B Verf GE 2, 118 and B Verf GE 1, 264*

pointed out that the different treatment of men and women in law is only allowed when the physiological distinctions of sex become of paramount importance[58]. The traditional views about the role and functions of the different sexes cannot constitute a valid ground for justification. In fact, especially in the context of marriage and family relations the State extends protection in terms of Article 6. In one case[59] it was decided that work hour schedules which are different for men and women do not contravene Article 3 (2) because the physiological differences in women must be protected. Other decisions indicate that the principle of equality is also intended to prevent differentiation which work to the detriment of men, for example a widower cannot be placed in a worse position regarding maintenance, *etc*, than a widow[60].

Article 3 (3) forbids discrimination on certain specified grounds including, *inter alia*, ancestry race and religion. Obviously the draftsmen of the Constitution must have borne in mind Hitler's dictatorship and his racial and religious policies.

The word "ancestry" refers to the biological relationship of a person with his ancestors; "homeland" means the geographical area; and "origin" means his social and class background[61].

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58 *B Verf GE 3,225* (footnote 132 in Koopmans *supra* at 115)

59 *B Verf GE 5,9* (footnote 136 in Koopmans *supra* at 115)

60 *B Verf GE 21, 329* (footnote 139 in Koopmans *supra* at 116)

61 *B Verf GE 5,17* (footnote 148 Koopmans *supra* at 116)

Article 3(3) will be breached if differential treatment results from one of the grounds named in it. As Klein[62] points out, there must be a causal *nexus* between the existence of one of the features listed in Article 3(3) and the differential treatment.

Foreign nationality may possibly be one of the reasons for differentiation because Article 3 (3) does not include nationality as one of the grounds. However it must be noted that should there be differentiation against a foreigner because of nationality then such person can show discrimination on the grounds of homeland and origin, language or race.

Article 6 (5) guarantees the principle of equality to illegitimate children and puts them on an equal footing with legitimate children. In August 1969 Parliament enacted a statute on the legal position of illegitimate children. This meant that discriminating legislation, such as the one which stated that a father had no family relation with his illegitimate child,was rendered ineffective.

Klein considers various other aspects of the constitutional rights and more especially the relationship of the nation of equality to the various branches of the law.[63]

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62 *supra* at 87

63 *supra* at 92-110

Professor Peter Häberle points out[64] that fundamental rights are the core of a democratic constitution but they are only part of the constitution, not the whole constitution - they must be interwoven with other themes, principles and values in the constitution. He suggests that the development of human rights and fundamental freedoms is a sign of the ultimate attainment of mankind for the good of everyone. It is the mark of a civilized order among the nations of the world.

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64 Häberle, P (Professor) Universität Bayreuth, Federal Republic of Germany delivered a paper entitled *Fundamental Rights as an object of democratic Constitutional Theory* at the University of Bophuthatswana in 1982

CHAPTER 7

THE UNITED STATES OF AMERICA

7.1. THE ORIGIN AND DEVELOPMENT OF HUMAN RIGHTS

American constitutional protection of human rights can be traced beyond the U.S. Constitution (1789) to the earlier State Constitutions, for example, as early as 1641 the Colony of Masachusetts adopted a *Body of Liberties*. However, the most well-known of these early pronouncements on human rights was the *Virginia Bill of Rights* adopted on 12 June, 1776. This document was widely used as a model, not only in America, but also abroad, for example, it was well received in France and to some extent it contributed to the French Declaration of the Rights of Man.

The Virginia Bill of Rights provides *inter alia*, that all men "are equally free and independent and have certain inherent rights, of which when they enter into a state of society, they cannot .... divest their posterity, namely the enjoyment of life and liberty." (Article 1). Article 2 indicates that all power derives from the people and is vested in the people. Article 12 entrenches the freedom of the press.[65]

The Church of England was the established church in the American Colonies at the time of the American Revolution. One of the results of the Revolution was the separation of Church and State. Although the Virginia Bill of Rights did have the principle of religious liberty, there was much opposition to separation. It was only on 16 January, 1786 that Madison and Jefferson were successful in enacting the *Virginia Statute of Religious Liberty*. Jefferson, who all his life exalted intellectual freedom, regarded this statute as one of his most notable contributions to American thinking on fundamental

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65 For the full text of this and all other American human rights documents refer to Commanger, H.S. *Living Documents of American History* by courtesy of U.S. Information Service.

freedoms[66]. Paragraph 11 provides that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief ; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities."

Expansionism and general movements westward caused complications. New laws had to be devised for these areas. On 13 July, 1787 the *Northwest Ordinance* was promulgated. This applied to the government of the territory settled northwest of the Ohio River. This ordinance contained several human rights provisions. Article 1 provides for freedom of worship. Article 2 entrenches the right to a writ of *habeas corpus* and the right to property. Article 3 protects the rights of American Indians. Article 6 provides for liberty of person by outlawing slavery.

The U.S. Constitution became the fundamental law of the land on 4 March, 1789. Historically, the Constitution emerged from the Articles of Confederation which merely established a League of States and which dealt only with union. This league of states was converted by the draftsmen of the U.S. Constitution into a federal government. There is a limited philosophy of rights in the Constitution but, of course, this was later greatly amplified in the Bill of Rights (1791) and later amendments.

The United States may not necessarily be the principal democracy, but it has well developed human rights doctrines and institutions for protecting them. The U.S. built on eighteenth century fundamentals - popular

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[66]Commanger *supra* at 11.

sovereignty, limited government, and retained individual rights - it has offered several elements to contemporary human rights ideology:

> a written constitution, difficult to abrogate, replace, suspend or change;
> the Constitution as the source of governmental authority and the condition of its legitimacy;
> safeguards against too strong government by separation of powers, checks and balances and federalism;
> representative government as a basic right;
> a bill of political civil rights;
> both the constitutional blueprint of government and the bill of rights authoritatively interpreted and maintained by an independent judiciary whose mandate is conclusive.[67]

The draftsmen of the Constitution did not include a bill of rights in it not because they were indifferent to human rights and fundamental freedoms but because it was felt that since the Constitution did not specifically grant authority over such matters as freedom of the press or assembly, there was no need to indicate that this authority did not exist. This position was sound logically but not psychologically. Americans wanted their rights specially set forth in the Constitution. Shortly after the first Congress met, Madison introduced a lengthy Bill of Rights as amendments to the Constitution. Twelve of these were passed by Congress but only ten were ratified by the States and became part of the Constitution on 15 December, 1791. This document is known as the Bill of Rights. Most of the amendments are stated as limitations on the Federal Government. Eventually they came

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67 Henkin, L. *The Rights of Man Today* at 36-37 (Stevens and Sons, London 1979)

to be interpreted to apply, in a general manner, to State governments as well. As almost every State has a bill of rights, either as part of the State Constitution or as amendments, it is proper to indicate that all Americans enjoy the protection of their human rights and fundamental freedoms against all levels of government - local, state and federal.[68]

The First Amendment guarantees freedom of speech and of press, freedom of religion and the right to peaceful assembly. In 1803 Chief Justice Marshall[69] claimed for the Supreme Court the power of judicial review of Acts of Congress. Since 1803 the Court has had authority to declare as unconstitutional and therefore, null and void both State and Federal laws which it considers repugnant to the Constitution. Various other amendments were promulgated in later years, notably the Fourteenth Amendment in 1805.

7.2. THE BILL OF RIGHTS: THE CONCEPT OF EQUALITY AND ITS INTERPRETATION BY THE SUPREME COURT.

The legal position of equality in the U.S. can best be surveyed by reviewing the decisions of the Supreme Court. Since World War II the Court has become the leading exponent of equality ideal. Its constitutional decisions reflect the extent of movement towards the elimination of inequality. The Fourteenth Amendment has proved to be the main constitutional basis for the principle of equality.[70]

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68 Commanger, *supra* at 22.

69 *Marbury v Madison* 1803(3) US 137.

70 Lusky, L and Botein, M. *The Law of Equality in the United States* in Koopmans, T *Constitutional Protection of Equality.* at 13ff

Section 1 of this Amendment provides *inter alia*,

> No State shall ... deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifteenth Amendment adopted in 1870 was intended primarily towards protecting Black voting rights. It declares that:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude.

For many years the Supreme Court interpreted the Civil War Amendments on a narrow basis, for example in 1873[71] the Court held that federal citizenship is constituted by a narrow base of unimportant privileges and immunities that cannot be enlarged by statute.

In 1883, the Court[72] invalidated a Federal statute prohibiting discrimination against Blacks by inns and places of public entertainment.

In the interpretation of the Fourteenth Amendment, the Court in *Plessy v Ferguson* (1896)[73] found that there was nothing inherently wrong with racial segregation laws, if equal but separate facilities were provided for Blacks and Whites. However, Judge Harlan in his dissenting judgment indicated that racial segregation laws were intended to perpetuate a system reminiscent of the slavery era. Perhaps one can suggest that Harlan's

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71 *Slaughter House Cases* 16(1873) 36 (at 15 of Koopmans *supra*)

72 *Civil Rights Cases* 109(1883) US 3.

73 163 (1896) US 537.

views were too revolutionary for his time because it was only in 1954 that the Court declared that racial segregation was unconstitutional.[74]

A new era began with the onset of World War II. The Supreme Courts standpoint on human rights issues became more realistic and equal for all people.

After Japan had launched an attack on Pearl Harbour, the American military authorities were concerned about the loyalty and patriotism of Americans of Japanese descent. The military hierachy then ruled that an entire community of these people would be excluded from certain areas in California. However, in 1944 in *Korematsu v US*[75] the Supreme Court held that this military order did not violate the Constitution. Nevertheless, the Court did express grave concern that there should he such discrimination against a minority group at a time when the US was participating in a war in the name of justice and liberty and equality. There was thus a greater awareness by the Court of the social realities in enforcing the notion of constitutional equality.[76]

In the same year in *Smith v Allwright*[77] a Black person was successful in an action for damages for exclusion from the Democratic Party primary in Texas.

The cause for equality took a dramatic turn for the better in *Shelley v Kraemer* (1948)[78] where it was held that an agreement among certain white property owners that their land would not be occupied by non-whites for a fifty year period, was unconstitutional.

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74 See *infra* footnote 79 *Brown v Board of Education* 347 (1954) US 483.

75 323 (1944) US 214

76 Lusky, L and Botein, M *supra* at 19

77 321 (1944) US 649

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It was only in 1954 that the Court really came to grips with the question of whether racial segregation was constitutional or not. This was in the famous *Brown v Board of Education* case[79]. This case had such widespread ramifications for the equal protection of human rights that what was originally the issue of racial segregation in schools was eclipsed by the application of the *ratio decidendi* here in various other situations. In addition this case overturned the "separate but equal" ruling in *Plessy v Ferguson (supra)*.[80]

In *Brown's case* it was held decisively that racial segregation in public schools infringed the equal protection clause. Earlier decisions up to 1950 had indicated that the Court did not regard equal segregation as a form of discrimination.[81]

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79 See footnote 74 *supra*.

80 See footnote 73 *supra*.

81 For example *Sweatt v Painter* 339 (1950) US 629 or
McLaurin v Oklahoma State Regents 339 (1950)US 637

Sweatt's case concerned a Texas statute establishing a separate law school for Blacks. The Court found that the separate law school was not equal to that of the University of Texas. In *McLaurin's case* a Black graduate at the University of Oklahoma complained that he was forced to sit in special segregated seats in the lecture room, dining room and library. The Court held that segregation deprived him of free association with fellow students. However, the Court did not go as far as holding that segregation is unconstitutional.

In *Brown's case* the Court found that separate education of Black children would instil in them feelings of inferiority as regards their esteem in society. In coming to its decision the Court did not turn back the clock to 1868 (the date of the Fourteenth Amendment) but decided that public education should be "considered in the light of its full development and its present place in American life throughout the Nation." The Court then concluded that"(s)eparate educational facilities are inherently unequal."

The second case of *Brown v Board of Education*[82] was decided in 1955. Here the Court indicated that local school boards should begin the process of ending discrimination in public education.

Other constitutional rights, such as freedom of expression, have been extended to include cases emanating from racial discrimination issues, for example in a 1963 decision it was held that a Virginia Statute designed to curb NAACP was invalid.[83] NAACP is concerned with the encouragement of desegregation litigation by prejudiced persons, and the payment of costs in such suits.

The Court has invoked the equal protection concept in various other fields for example legal disabilities resulting from illegitimacy were held to be unconstitutional.[84]

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82 349 (1955) U.S. 294.

83 *NAACP v Button 371 (1963) US 415*

84 See Koopmans, T *supra* at 37 and the various cases cited therein notably:
Levy v Louisiana 391 (1968) US 68
Glonar v American Guardian and Liability Insurance Co. 391(1968)US 73
Weber v Aetna Surety Co. 406 (1972) US 164
Gomez v Perez 409 (1973) US 535
Labine v Vincent 401 (1971) US 532.

Further the Court found that a state statute forbidding the distribution of contraceptives to unmarried persons for the prevention of pregnancy was unconstitutional on the basis that it discriminated against such unmarried persons.[85]

The various forms of discrimination on the grounds of sex have largely been abolished but cultural bias still exists. The *Civil Rights Act* (1964) discouraged the idea that women should be discriminated against on the ground of gender. The Court,making full use of the Civil Rights Act, held (in 1971) that an employer who hired fathers and not mothers of pre-school going children was discriminating on the ground of sex.[86] Also in 1971 it was held that a statute that conferred a preferential right upon a father (as against the mother) to administer his deceased child's estate was unconstitutional.[87] In 1973 it was decided that it is unconstitutionalthat only male members of the army received a housing allowance and medical benefits for their spouses.[88]

The doctrine of equality has perhaps reached the zenith of its development in the 1964 Civil Rights Act. It has created the right of equal access to privately owned places of public accommodation and to private employment. The term "public accommodation" is given a wide meaning and embraces hotels, *etc.* which have more than five rooms to let, restaurants, petrol stations, theatres and any sports complex. It outlaws discrimination or segregation on grounds of race, colour, religion or national origin. This Act also stipulates that there shall be no discrimination in the field of employment.

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85 Koopmans T *supra* at 37 and see further *Eisenstadt v Baird* 405(1972)US 438

86 *Phillips v Martin Marietta Corporation* 400(1971) US 542

87 *Reed v Reed* 404(1971) US 71.

88 *Frontiero v Richardson* 411(1973) US 677. See Van der Vyver *supra*, generally on the applicability of the equality principle to women at 21ff.

The *Civil Rights Act* (1968) extended the federal enactment against discrimination in the sale or rental of accommodation.

There is no doubt that the US Supreme Court has played an invaluable and incalculable role in the promotion, protection and interpretation of human rights and fundamental freedoms.[89]

Franklin D Roosevelt in his *Four Freedoms Speech* to Congress on 6 January, 1941 said:

> In the future days which we seek to make secure we look forward to a world founded upon four essential human freedoms.
>
> The first is freedom of speech and expression - everywhere in the world.
>
> The second is freedom of every person to worship God in his own way - everywhere in the world.
>
> The third is freedom from want - which, translated into world terms, means economic understanding which will secure to every nation a healthy peace time life for its inhabitants - everywhere in the world.
>
> The fourth is freedom from fear - which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbo(u)r - anywhere in the world.[90]

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89 Further discussion on specific human rights and fundamental freedoms in the United States will be found in Part V *Infra*.

90 Commager, H.S. *Living Documents of American History*, *supra* at 65.

CHAPTER 8

SRI LANKA

8.1. THE ORIGIN AND DEVELOPMENT OF HUMAN RIGHTS UNTIL 1972

The origin of human rights in Sri Lanka can be traced back to a thousand years B.C. During that time Sri Lanka was administered by kings who more often than not had some judicial machinery.[91]

The Portugese,[92] the Dutch[93] and finally the British[94] ruled Sri Lanka at some time or the other during its history and they all left behind a rich legacy *inter alia* of legal traditions and values and respect for basic human rights.[95]

The Courts Ordinance[96] of 1889 established the Supreme Court, and Magistrate's

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91 See further Thambiah HW *Principles of Ceylon Law* Cave and Co Colombo, Sri Lanka

92 1505 to 1658

93 1658-1796

94 1796-1948. In 1948 Sri Lanka (formerly Ceylon) gained its independence

95 See, for example, Peiris P.E. (Sir) *Ceylon: The Portugese Era* Vol II
Ribeiro, J. *The Historic Tragedy of the Island of Ceylon* translation by Peiris P E 3rd edition (1925)
Mendis C.C. *The Colebrooke - Cameron Papers - Documents on British Colonial Policy in Ceylon* 1796-1833

96 Chapter VI, Legislative Enactments (1956) as amended by 1 of 1962; 3 of 1964 and 5 of 1965
See further: Courts (Amendment) Ordinance 1966 supplementary legislation Vol 1 at page 1.

Courts. Everyone was equal before the law. The writ of *habeas corpus* was made available from the time of the establishment of the Supreme Court. As early as 1864[97] it was stated by the Supreme Court that the right to issue a writ of *habeas corpus* was one of the most sacred functions entrusted to a judge and unless sufficient cause was shown for a person's detention, he was entitled to his liberty. The *Bracegirelle case*[98] stands out as a pre-independence case where the Supreme Court intervened to protect the right of a person to his liberty. The Supreme Court held that the power of the Governor to issue an order of arrest, detention and deportation was not absolute and could only be executed in a state of emergency and further that the deprivation of one's liberty could be legally undertaken by judicial process only.

During this period various laws were passed and these enactments protected certain rights and freedoms, for example the Evidence Ordinance (1865) and the Criminal Procedure Code (1898) provided for fair trial.

Sri Lanka became independent on 4 February 1948. This was in terms of

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97 Perera ARC *The Judicial Protection of Human Rights in Sri Lanka* at 28 (LL.M. dissertation - unpublished).

98 *In re Mark Antony Lyster Bracegirelle* 1937 (39) NLR 193
See also *Dias v The Attorney-General* 1918 (20) NLR 193
and *The Attorney-General v De Keyser's Royal Hotel* 1920 (22) NLR 161

they Ceylon Independence Act (1947) and theCeylon Order in Council (1947). At the time of independence Sri Lanka did not have a Bill of Rights in its Constitution (1946).[99] This Constitution was in force until 1972 when the first Republican Constitution was adopted. Although this Constitution did not embody a Bill of Rights it did protect certain rights, such as the right of minorities and the freedom to worship according to one's religious beliefs (Article 29).[100] Sir

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[99] This is the 1946 Constitution which came into force after independence

[100] Article 29 provides as follows:

29(1) Subject to the provisions of this order, Parliament shall have power to make laws

29(2) No such law shall:

(a) prohibit or restrict the free exercise of any religion; or

(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are made liable; or

(c) confer on persons of any other community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or

(d) alter the constitution of any religious body except with the consent of the governing authority of that body.

Perhaps we may regard section 29 as an embryonic prototype of the 1972 and 1978 Bill of Rights. It must be noted, however, that Article 29 purported to limit only legislative encroachment and not executive or judicial action. The 1946 Constitution placed restrictions on legislative power whereas in terms of the 1978 Constitution the fundamental rights incorporated

Ivor Jennings, the constitutional affairs adviser at that time,felt that there was no need to incorporate a Bill of Rights at that time. However, about 15 years later (in 1961) he recanted and said that the formal inclusion of a Bill of Rights in Sri Lanka was very necessary having regard to the fact that Sri Lankan society was multi-cultured and multi-lingual.[101]

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therein are not justiciable against legislative action but only against administrative and executive action. In addition,the 1946 Constitution guaranteed constitutional protection to all people in Sri Lanka. No distinction was made between "citizen" and "non-citizen." This distinction is evident both in the 1972 and the 1978 Constitution. See further on Article 29: Amerasinghe CF *The Doctrine of Sovereignty and Separation of Powers in the Law of Ceylon* (Colombo 1970)

Jennings, I (Sir) *The Constitution of Ceylon*

Marshall G. *Parliamentary Sovereignty in the Commonwealth* (1957)

Cooray MJA *The Judicial Role under the Constitution of Ceylon/Sri Lanka* and

Marasinghe M C *Ceylon - a conflict of Constitutions* 1971 ICLQ (20) 645

101 This admission was made in a BBC Overseas Service discussion and is referred to in Cooray JAL *Constitutional and Administrative Law of Sri Lanka.*

8.2. THE 1972 CONSTITUTION

The Constitution of 1972 embodied in Chapter VI certain fundamental rights and freedoms.[102] This Constitution came into existence at a time when there was a marked global increase in awareness of the need to protect human rights and fundamental freedoms, for example, both the UN Covenants had been adopted in 1966 and in addition there was also the Proclamation of Teheran (1968).[103]

Article 18 clearly does not constitute a comprehensive statement of human rights. Only citizens were entitled to the protection of all (except two) of these rights. It is submitted that the very notion of human rights exists solely in relation to individuals (whether citizens or non-citizens) and that therefore there should be no discriminatory measures whatever between these two classes of persons.

Many fundamental freedoms which are found in international or regional instruments, such as the Universal Declaration, the two UN Covenants, the European Convention, *etc*, are not included in Article 18 of the 1972 Constitution, for example freedom from torture or inhuman or degrading treatment, the right to a fair trial, property rights, family rights *etc* Article 18(3) provides

> All existing law shall operate notwithstanding any

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[102] The whole of Chapter VI covers just one Article, namely Article 18

[103] For the text see United Nations: *A Compilation of International Instruments*.

> inconsistency with the provisions of subsection (1) of this section.

This is an unfortunate limitation on the scope of the fundamental freedoms. This is in stark contrast to Article 13 of the Indian Constitution and Section 2 of the Canadian Bill of Rights both of which render as null and void any existing law which conflicts with the Bill of Rights.

The rights and freedoms enumerated in Article 18 were not enforceable. It is submitted that a right that is unenforceable in a duly constituted court of law, is not a right at all because the individual cannot rely on any machinery for any redress should his rights be violated. It is submitted that such a Bill of Rights (as in the 1972 Constitution) is merely paper law. In 1971 the then incumbent Minister of Constitutional Affairs[104] explained why he was not in favour of a justiciable bill of rights. He said

> If we must have justiciable rights and freedoms and if we must at the same time, move, without hinderance, towards the establishment of socialism, we have no option but to adopt a procedure ensuring that the implementation of laws passed by the (National) Assembly is not held up by court action relating to the validity of laws ... (a) new constitution (containing) a statement of justiciable rights and freedoms (will make) the position immeasurably worse. Reactionaries of every kind will exploit it to the

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104 Dr Colvin R de Silva

> limit of normal judicial processes to oppose and delay social progress if no adequate constitutional safeguard is provided.[105]

The Minister in support of the above then referred to three matters where the law had not been settled for some length of time.[106]

8.3. THE 1978 CONSTITUTION

On 31 August 1978 a new Constitution came into force and accordingly established the second Republic of Sri Lanka and for the first time an Executive President became Head of State. The Preamble accepts the "immutable republican principles of representative democracy" and at the same time "(assures) to all people freedom, equality, justice, fundamental human rights and the independence of the judiciary as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of Sri Lanka and of all the people of the World ..." The Preamble also indicates that this Constitution is "the supreme law" of Sri Lanka.

Chapter III[107] of this present Constitution is concerned with fundamental rights. This is certainly a much more comprehensive Bill of Rights than that found in the 1972 Constitution.

The rights enumerated in Chapter III may be broadly categorised as those

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105 Comments on Basic Resolution 22, National Assembly 4 July 1971
Acknowledgment to Perera ARC *supra*

106 *Kodeswaran v Attorney General* 1979 (72) NLR 337
Walker & Sons v Fry 1965 (68) NLR 73

applicable to"persons" and those applicable to "citizens". Personal freedoms and other related rights are made claimable by all "persons", whereas the rights catalogued in Article 14 can be claimed and enforced by "citizens" only. Article 14 includes *inter alia* the freedom of speech, peaceful assembly, association, religion and free movement. It is submitted that it serves no purpose to distinguish between "persons" and "citizens". Sri Lanka has an Indian population which constitutes a sizeable minority. These Indians are employed mainly in the numerous Sri Lankan tea estates and also in private residences as domestic servants. To deny to such a sizeable minority the basic rights enumerated under Article 14 is a gross infringement of their fundamental human freedoms. To distinguish between "persons" and "citizens" and to accord to the latter class a more comprehensive catalogue of rights than to the former class constitutes, it is submitted, discrimination. Article 12(2) provides that:

> No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.

It seems that the draftsmen envisaged here that only citizens have the right not to be discriminated, and that non-citizens (of whom as already mentioned there is a sizeable minority) may be discriminated against on any one or more grounds. It is submitted that this is a major defect in the Sri Lankan Bill of Rights. In this regard the Bophuthatswana Bill of Rights is an excellent piece of draftmanship because there is no distinction made between "citizens" and "other persons".[108] The West

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107 *Perera v Peiris* 1969 (70) NLR 217
Articles 10 to 17

108 Article 9 of the Bophuthatswana Bill of Rights provides that:

German Basic Law (Article 3) and the Indian Constitution (Article 14) both provide that no one shall be discriminated against.[109]

Article 16(1) declares that " all written law and unwritten law shall be valid and operate notwithstanding any inconsistency with the preceding

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> All people shall be equal before the law, and no one may because of his sex, his descent, his race, his language, his origin or his religious beliefs be favoured or prejudiced.

The rights are not restricted to any particular group of persons. It is submitted that the Bophuthatswana Bill of Rights can be invoked even by people who are merely passing through Bophuthatswana. It is indeed commendable that it is so wide in its application. The Sri Lankan Constitution (Article 12(2)) is not the sole national constitution that provides that *only citizens* shall not be discriminated against, for example Article 24 of the Egyptian Constitution (1948) provides that:

> Egyptians are equal before the law. They have equal public rights and duties without discrimination between them due to race, origin, language, religion or creed.

[109] See Part V, Chapter 33 entitled *Non-Discrimination* for a detailed discussion.
See also Part II Chapter 5 entitled *India*

provisions of this Chapter." As mentioned earlier this provision was also embodied in the 1972 Constitution and the same criticism applies here. Further, it must be noted that this provision runs directly contrary to the Preamble wherein it is laid down that the Constitution is the "Supreme Law" of Sri Lanka. It is submitted that in view of this provision the Bill of Rights is not supreme law in Sri Lanka because if any existing law is in conflict with a fundamental right as set out in Chapter III, then according to Article 16(1) the existing law must take precedence and would therefore prevail over the fundamental right.

Chapter IV of the Constitution covers the language issue. In terms of Article 18 Sinhala is the official language. According to Article 19 Tamil and Sinhala are the national languages. According to Article 21 a person shall be entitled to be educated through the medium of either Tamil or Sinhala. However, Article 22(5) makes an important distinction[110] between Tamil-speaking people and Sinhala-speaking people in that a Tamil-speaking person may be required to have a sufficient knowledge of Sinhala as a condition for admission into the Public Service; whereas Sinhalese people are not required to have a knowledge of Tamil for entry into the Public Service.

Article 17 provides that:

> Every person shall be entitled to apply to the Supreme

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110 The author submits that Article 22(5) constitutes a discrimination which cannot be justified under Article 12(2).

> Court, as provided for in Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter.

Article 17thus makes the Bill of Rights justiciable. Article 126 gives to the Supreme Court the exclusive jurisdiction and authority to hear and pronounce on any infringement. The application must be brought by the victim within one month of the alleged violation complained of. The Supreme Court (according to Article 126(5)) "shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference."[111]

The effective enforcement of fundamental rights presupposes the existence of an impartial and an independent tribunal. The Constitution provides for the independence of the judiciary in the usual manner by providing for security of tenure of office, salaries, *etc.* The Judicial Service Commission which was founded under the 1946 Constitution (and) abolished under the 1972 Constitution has been brought back to secure the independence of the judiciary. For the first time the jurisdiction of the Supreme Court is set out in the Constitution, leaving no room for the erosion of powers of the Supreme Court through ordinary legislation.[112]

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[111] The practical effect here is that up to the end of 1983 87 applications were filed in the Supreme Court by persons alleging a violation of their fundamental rights. See footnotes 126 and 170 *infra*.

[112] Perera ARC (footnote 97) at 49.

The 1978 Constitution also provides for the establishment of the office of an Ombusdman. Article 156 provides that:

> (1) Parliament shall by law provide for the establishment of the office of the Parliamentary Commissioner for Administration (Ombudsman) charged with the duty of investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other injustices by public officers and officers of public corporations, local authorities and other like institutions ...

In terms of the Sri Lanka Parliamentary Commissioner for Administration Act[113] the Ombudsman has to submit an annual report to Parliament. The report must include a resumé of the cases handled each year.

8.4. THE ROLE OF THE SUPREME COURT IN THE PROTECTION OF HUMAN RIGHTS

Article 17 of the Constitution makes provision for a special remedy for the protection of human rights set out in Chapter III of the Constitution. This remedy is by way of petition to the Supreme Court (Article 126). It is submitted that the traditional remedies (such as writ of *habeas corpus*, interdict *etc*) are still available to anyone whose rights have been infringed and that the Article 17 remedy is in addition to the traditional remedies that existed prior to 1978.

Articles 17 and 126 indicate that the remedies lie only in respect of executive and administrative action. Article 126 provides that the aggrieved person or his attorney must lodge an application within one month of the alleged violation. It is submitted that this time period is

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113 Act No 17/1981

inadequate and does, in certain cases, actually render ineffective the constitutional protection of human rights. For example in *Ranatunga v Jayawardena*[114] Chief Justice Samarakoon (with Ismail J and Wijesundra J concurring) held:

> Though the allegation made by the petitioner cannot be said to be unjustified yet since the alleged wrongful

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[114] Supreme Court Application no. 27 of 1979
See also (a) *Jayawardena v Attorney General and Two Others* S.C. Application Number 4 of 1981 - Here the learned Judge Weerraratne said:

> The question that arises for determination by us is whether there was an infringement or imminent infringement of a fundamental right by executive or administrative action as alleged by the petitioner. We are satisfied that the application is out of time, and hence we refuse it since our jurisdiction cannot be exercised after the period of one month from the date of the executive or administrative act complained of.

(b) In *Gunawardena and Three Others v E.L. Senanayake and Two Others* SC Application Number 12 of 1981 Ismail J held:

> We are of the view that the petitioners have not come within the stipulated period of one month from the date of the alleged violation of the fundamental right claimed by them. The objection taken, therefore, succeeds and the application stands dismissed

and (c) *Mahenthiran v The Attorney General and Three Others*, Supreme Court Application Number 68/1980. Here Thamotheram J (with Ismail J and Wanasundera J concurring) held

> Article 126 requires that the application to the Supreme Court must be made within one month of the date of the alleged

> action was prior to 7 September 1979 it was not justifiable. However, assuming it was a threatening infringement and it continued until 7 September 1979, the petitioner had to make the application within one month of that date. The words "within one month thereof" refer to both infringement and threatening infringement."

If Article 126 confers on the Supreme Court the "sole and exclusive jurisdiction to hear and determine any question relating to an infringement by executive or administrative action of any fundamental right, then surely the whole purpose is defeated by allowing a mere one month period for the petitioner to make his application? It is submitted that a longer time period is absolutely essential. This would ensure that every aggrieved party would have sufficient time to approach the Supreme Court for redress. Furthermore the Supreme Court should have interpreted the one month time limit stipulated in Article 126 as being directory and not mandatory. In fact Counsel for the Petitioner in *Mahenthiran's case*[115] argued that the time limit in Article 126 is not mandatory but only directory and that the court has a discretion, in a fit case, to entertain an application outside the time limit. However, this contention was rejected by the Court.[116]

> infringement of the fundamental right. This petition is clearly out of time. We would accordingly reject application number 68/80

[115] See footnote 114 *supra*

[116] At page 6 of the judgment

Note: Since 1980 none of the human rights cases are formally reported

In *Dayananda v Weerasinghe and Two Others*[117] it was decided that the Supreme Court has no jurisdiction in terms of Article 126 to pronounce on the order made by a magistrate in the exercise of his judicial discretion. In *Ranasinghe v Ceylon Plywood Corporation*[118] the Supreme Court held that Article 126 does not give the Court power to enquire into grievances which no longer existed. However, it is respectfully submitted that this is not a sound judgment because no cognizance was taken of sub-section 4 of Article 126 which provides:-

> The Supreme Court shall have the power to grant such relief or make such directions as it may deem *just and equitable in the circumstances* in respect of any petition ...[119]

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or printed in law reports as such. During the latter part of 1983 when the author was a Visiting Associate Professor at the University of Colombo, Sri Lanka, he was able to acquire a personal copy of every case involving Chapter III of the Constitution (Fundamental Rights) which came before the Supreme Court in terms of Articles 17 and 126 for the period 1979 to 1983. This compilation of cases is a photocopy of the original judgments. Page references are therefore references to pages in the original judgment and not to references in any later reported version.

117 Supreme Court Application Number 97 of 1982. Decided on 13 December 1982.

118 Supreme Court Application No 35 of 1979. Decided on 17 September 1979

119 Emphasis added.

An important question that the Supreme Court had to decide in relation to Article 126 was whether the acts of corporate entities constitute executive and/or administrative action. In *Perera and Perera v University Grants Commission and the Attorney-General*[120] it was held that a university is an organ of the State and that, its action in regard to the admission of students has the characteristics of executive or administrative action within the meaning of Article 126 of the Constitution. This decision was confirmed and followed in *Wijetunga v The Insurance Corporation of Sri Lanka and The Attorney-General*[121] where the Supreme Court held that the acts of the Insurance Corporation fell within the purview of "executive or administrative action."

Certain executive acts cannot be challenged in the Supreme Court in terms of Article 126 even if a person's fundamental rights have been violated by such acts. Perera lists the following:[122]

(a) The refusal of the Ombudsman to investigate a complaint made to him[123]

(b) The determination of the Commissioner of Elections as to which of rival factions of a political party is in fact the party.[124]

(c) An order for the detention or restriction of movement made by a Minister.[125]

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120 Supreme Court Application Number 57 of 1980 decided on 4 August 1980

121 Supreme Court Application Number 87 of 1982 decided on 29 November 1982

122 Perera ARC at 66-67 (see footnote 97 *supra*)

123 Section 14 of the Parliamentary Commissioner for Administration Act No 17 of 1981

These three executive actions cannot be challenged in the Supreme Court and they once more lend credence to the view that Chapter III (Fundamental Rights) is not "supreme law" in Sri Lanka despite the fact that the Preamble to the Constitution declares otherwise.

As mentioned earlier there were 87 applications made (in terms of Articles 17 and 126) from the time of the inception of this Constitution until the end of 1983.[126] Sixteen applications were lodged in 1979 butnone were successful. In 1980 seventeen applications were filed and only one case was successful. None of the ten applications lodged in 1981 were successful. Only three out of thirty applications were successful in 1982, and finally in 1983 only one application out of fourteen was successful. This means that only five applications out of a total of eighty seven were thus far successful.

Nirmala Chandrahasan[127] writes as follows on the paucity of success:

> Despite the obvious benefits of domestic enforcement, the national courts often prove unwilling to exercise jurisdiction over cases involving human rights violations. This is particularly true when a national court is faced with a human rights violation attributable to one acting under the colour of State authority. The issue as to what constitutes

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[124] Section 10 of the Presidential Elections Act 15/1981 and Section B of the Parliamentary Elections Act 1/1981

[125] Section 10 of the Prevention of Terrorism Act 48/1979

[126] see footnote 111 *supra* and footnote 170 *infra*

[127] Head of the Department of Law, University of Colombo, Sri Lanka

> state action in this situation provides domestic courts with a delicate dilemma whether to apply international human rights standards against officers of the State, and thereby impute to the government complicity in violations of international law, or to avoid the confrontation by narrowing construing the domestic law.[128]

It is submitted that whether the Supreme Court is "guilty" of"narrowly construing the domestic law" can only be ascertained by an assessment of its judicial decisions in the field of human rights. In one of its early decisions on Chapter III of the Constitution, *De Silva v Attorney-General and Another*[129] Judge Samarawickrema stated that the petitioner "has failed to satisfy us that he has set out any breach of a fundamental right or an imminent breach of such a right which facts alone entitle him to make an application under Section 126 of the Constitution." In *Vitharana v Attorney-General and Two Others*[130] the facts were that the petitioner was an assistant teacher. He was appointed to perform the duties of a circuit education officer. He was then ordered to revert back to his substantive post of assistant teacher. Ismail J held that the order could not be construed as punishment and that there was therefore no violation of any fundamental right.

The case *Jayasena and Two Others v Soysa*[131] was an apt case for the Supreme Court to make a finding of violation of Article 14(1) (c) and (d)

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128 *Human Rights* Quarterly 1983 at 59

129 Application No. 20 of 1980 Decided on 6 May 1980

130 Application No 27 of 1980 Decided on 23 May 1980

131 Application No 53 of 1980 Decided on 15 July 1980

of the Bill of Rights, but instead the Court found that the petitioners were unable to show that the respondent acted *mala fide*. The three petitoners were the Secretary, Treasurer and a member of the Colombo Gas and Water Company Workers' Union. They argued that the termination of their services for no apparent reason was a violation of their fundamental rights guaranteed by Article 14(1) (c) and (d) of the Constitution, (that is - the freedom of association, and the freedom to form and join a trade union). The respondent actively support a rival union which was under the leadership of the ruling United National Party and intimidated all employees who joined or desired to join the petitioners' union. Perhaps this decision is a good example of what Chandrahasan means when she says:

> "... a delicate dilemma is whether to apply international human rights standards against officers of the State (or supporters of the ruling party) and thereby impute to the government complicity in violations ..."[132]

Two very important cases that were decided in 1980 (but in which no relief was granted) are *Thadchanamoorthi v The Attorney-General and Three others*[133] and *Mahenthiran v The Attorney-General and Three Others*.[134] In both cases the applicants petitioned the Supreme Court

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[132] *supra* footnote 128

[133] Application Number 63 of 1980. Decided on 14 August 1980

[134] *supra* footnote 114

under Article 126 and alleged a violation of Article 11, namely, the prohibition against "torture or cruel, inhuman or degrading treatment or punishment."

The facts in *Mahenthiran's case* briefly are that Mahenthiran heard that the police were looking for him in connection with the investigation of an offence. He went in the company of his attorney to the Eravur Police Station. Soon after his attorney departed he was severely assaulted "with batons, fists and shod feet for the purpose of extorting a confession of guilt to murder". The next day, Mahenthiran's wrists were tied behind his back; he was hung up by his wrists and beaten with fists and batons. The Supreme Court dismissed this application because it was not filed within the time limit prescribed in Article 126. It is submitted that this is one instance where the Court should not have construed the law narrowly. In terms of Article 126(4) the Court has a judicial discretion,which, unfortunately, was not exercised in this case.

In the *Thadchanamoorthi case* the petitioner also alleged that Article 11 had been violated (that is torture *etc*). The facts are similar to the *Mahenthiran case*. The petitioner alleged that he was "severely assaulted with hands, shod feet, an axe handle and fence sticks and he was also hung by his wrists and beaten up. The medical report detailing his external injuries corroborated his allegations up to a point. The Court rejected the application on the grounds that the material placed before it "is neither clear nor cogent and falls short of even the minimum proof necessary for that purpose."[135]

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135 At page 9 of the Judgment

The Court then went on to deliberate on a question raised by the respondent's counsel. He argued that an act done by a State functionary would not constitute State action unless it is done within the scope of the powers given to him, which means that if it is an unlawful act or is an act considered *ultra vires* it would not be considered State action, but only as the individual act of the person concerned[136] and the State would not be responsible and it would therefore fall outside the scope of Article 126 The petitioner's counsel submitted that "all acts of a public official, whether acting within the terms of his powers or acting under colour of office would be State action and should be attributable to the State".[137] The Court pointed out that "it seems extremely improbable that a Government would openly authorise acts of torture or such other cruel or degrading treatment or punishment unless in time of war or in an emergency situation. It is more likely that a Government may covertly sanction such illegal acts or connive in the perpetration of such acts, or sanction them or tolerate them to such an extent that they become a virtual administrative practice."[138]

In answering the question whether the acts eomplained of constituted "executive or administrative action" the Court looked to the jurisprudence of the European Court in *Ireland v United Kingdom*[139] The Supreme Court decided that there should be two elements from which an administrative

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136 *Ibid*

137 At page 10 of the Judgment

138 *Ibid*

139 Application No 5310/71; Report 25 January 1976; Judgment 18 June 1978; YB 19, 82

practice can be presumed. The elements are repetition of acts and official tolerance.By repetition is meant a substantial number of acts of torture or ill-treatment which are the expression of a general situation. By official tolerance is meant that, though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of these immediately responsible though aware of such acts, take no action to punish them or prevent their repetition; or that higher authority, in the face of numerous allegations, manifests indifference by refusing any adequate investigation of their veracity or falsity.[140] The Court found that in this case neither element was present and that is therefore suggested the non-existence of an administrative practice of torture or ill-treatment.

It is respectfully submitted that the Court erred in its findings and further that the Court should have taken judicial cognizance of the more liberal approach taken by Judge Sharvananda in the interpretation of "executive and administrative action" in *Perera and Another v University Grants Commission*[141] which had been decided only a week earlier. In this case the Grants Commission argued that its policy did not constitute "executive or administrative action". The Court, however, rejected this argument and held that the State or its agencies exercising governmental functions, such as the Grants Commission fall within the purview of "administrative action."

A year later in *Velumurgu v The Attorney-General and Another*[142] the

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[140] At page 13 of the Judgment

[141] *supra* footnote 120

[142] Supreme Court Application No 74 of 1981. Decided on 9 November 1981

Supreme Court once again had to decide whether the petitioner's allegations of torture, brutality and degrading treatment constituted "administrative practice" within the meaning of Article 126 of the Constitution. Wanasundera J said that "Article 11 which gives protection from Torture and ill-treatment has a number of features which distinguish it from the other fundamental rights. Its singularity lies in the fact that it is the only fundamental right that is entrenched in the Constitution in the sense that an amendment of this clause would need not only a two-thirds majority but also a referendum. It is the only right in the catalogue of rights set out in Chapter III that is of equal application to everybody and which in no way can be restricted or limited."[143]

Wanansundera J then quoted from the judgment of Brandeis J in *Iowa - Des Moines National Bank v Bennett*[144]: "Acts done by virtue of a public position under a State Government and in the name and for the State ... are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of State law."[145]

However, the judge did not agree with the above American case and stated as follows: "I favour the view that .... a distinction has to be drawn between high State officers and subordinate personnel. ... (T)he State should be held strictly liable for any acts of its high state officials ... (and that the) liability in respect of subordinate officers

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143 At 43-44 of the Judgment

144 1931 (284) US 3239

145 At 44 of the *Velumuruga* Judgment

should apply to all acts done under colour of office, that is, within the scope of their authority, express or implied and should also extend to such other acts that may be *ultra vires* ..."[146]

It is submitted that the learned judge erred in distinguishing between "high state officers" and "subordinate personnel." The learned judge should have addressed himself to the question whether the violation *per se* constitutes "administrative practice". If the State official, irrespective of his particular rank or position, has exercised the State authority then the answer must obviously be that the State is liable.

The *minority* judgment of Sharvananda J (with Ratwatte J concurring) found that the petitioner's allegations of torture and assault were reasonably probable and awarded him 10 000 rupees as compensation. The learned judge noted that the "State had endowed the officer with coercive power, and his exercise of its power, whether in conformity with or in disregard of fundamental rights, constitutes executive action. The official's act is ascribed to the State for the purpose of determining responsibility, otherwise the constitutional provision would have no meaning .... This sweep of State action, however, will not cover acts of officers in the ambit of their personal pursuits, such as rape by a police officer of a woman in his custody; such an act has no relation to the exercise of the State power vested in him. ... His conduct is totally unconnected with any manner of performance of his official functions."[147]

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146 At 45

147 at 66

In the course of his minority judgment the learned judge referred to *Ex parte Commonwealth of Virginia*[148] where Judge Strong, referring to the prohibitions in the Fourteenth Amendment, said that:

> Whoever by virtue of public position under a State Government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the Constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the Constitutional prohibition has no meaning, when the State has clothed one of its agents with the power to annul or evade it.[149]

In his concluding remarks Sharvananda J said:

> "The case discloses a shocking and revolting episode in law enforcement. If fundamental rights assured by our Constitution are to be meaningful, trampling underfoot the fundamental freedoms of subjects by law enforcement officers should not be tolerated."[150]

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148 100 US 339

149 At 346 Quoted at 68-69 of the *Velumuruga* Judgment

See also: *Virginia v Rives* 100 US 313

Neal v Delaware 1880 (103) US 370.

Holme Telephone and Telegraph Co v Los Angeles 227 US 278

Raymond v Chicago Union Traction Co 1907 (207) US 20

Shamdasani v Central Bank of India 1952 AIR (SC) 59

Sunday Lake Iron Co v Wakefield 1918 (247) US 350

In *Raj v Attorney-General and Another*[151] the principle of State liability in terms of Article 126 was elucidated by Sharvananda J and he followed the same interpretation that he laid down in *Velumurgu's case*.[152]

The most recent case on the violation of Article 11 (that is torture, cruel treatment and degrading punishment) and Article 13(1) (unlawful arrest) is *Gunawardena v Attorney-General*.[153] In this case the Court rejected Judge Wanasundera's distinction in the *Velumurgu case* between "high State officers" and "subordinate personnel".[154] Of the fourteen human rights cases filed in 1983 only *Gunawardena's case* was successful.

The *Saturday Review Case*[155] is the most recent case on the issue of freedom of publication (Article 14(1)(a)). The publishers of the "Saturday Review" challenged the closure of their press on the grounds that it was a violation of the fundamental rights of freedom of speech and expression

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150 At 91 of the Judgment.

151 Supreme Court Application No 130 of 1982
Decided on 14 February 1983

152 See footnotes 142 and 147 *supra*

153 Supreme Court Application No. 20 of 1983

154 See footnote 146 *supra*

155 *Visuvalingam and Six Others v Liyanage and Two Others* also known as *The Saturday Review Case* Supreme Court Application Numbers 47 of 1983, 53 of 1983 and 61 of 1983 Decided on 18 November 1983
The First to the Sixth Petitioners in Application Nos 47/1983

including publication. They also alleged violation of the right to engage by themselves or in association with others in any lawful occipation, profession,trade or business enterprise as set out in Article 14 (1) (g) of the Constitution.

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and 53/1983 were the sole shareholders of the Seventh Petitioner company which published the English language newspaper called the *Saturday Review*. The First Repondent who is the Competent Authority appointed under the Emergency Regulations acting under the powers vested in him by Regulation 14(3) of the Emergency (Miscellaneous Provisions and Powers) Regulation of 18 June 1983 made an order that:

(a) No person shall print, publish or distribute or in any way be concerned in the printing, publication or distribution of the *Saturday Review* for a period of one month from the date of the order, and

(b) That the printing press in which the said newspaper was printed shall for a period of one month from the date of the order not be used for any purpose whatsoever.

Consequent to this order, the Second Respondent (the Inspector-General of Police) sealed the offices of the *Saturday Review*.

It was held that the Competent Authority was neither unreasonable nor wrong in deciding to act in terms of the Emergency Regulations, and that any rights of the Company that may be affected are not fundamental rights recognized and enforceable under the Constitution Judge Soza noted that "In a case involving fundamental rights, the Court, no doubt will be liberal in its interpretation, but this does not mean that it should abandon the legal approach in

The Counsel for the Petitioner stated at the outset,[156] that from 1956 the Tamils have had no security from the police and armed forces. The freedom of speech and expression is an essential pre-requisite for the purpose of working democratic institutions successfully. If democracy refers to a form of Government which is to be conducted by means of organized public opinion, any clog or fetter, that may be imposed on the citizens' right to express themselves freely on public questions, virtually would amount to preventing effectively the formation of that very opinion which is the admitted basis for the working of a democratic government.[157]

Care has to be taken to see that this freedom is not abused. In this modern age where the means available for the dissemination of information and opinion are so widespread and effective, the need does arise of safeguarding not only the interests of other citizens in so far as their right to reputation is concerned but also of ensuring that freedom of speech shall not be used for the purpose of subverting the organized civil government of the day by resorting to violence or other unlawful acts.[158]

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favour of a factual approach. Such a course can be fraught with danger It could result in uncertainty and even confusion."

156 Details of the arguments and submissions by Counsel are taken from a Sri Lankan newspaper *The Island* 10 November 1983 at pages 1-3

157 At p 1 of *The Island*

158 *Ibid*

The case of *American Communication Association v Dodds*[159] was referred to (by the learned Cousnel in support of his submissions) wherein it was stated *inter alia*:

> Freedom of speech, press and assembly are dependent upon the power for constitutional Government to survive. If it is to survive it must have power to protect itself against unlawful conduct and under certain circumstances against incitements to commit unlawful acts. Freedom of speech does not comprehend the right to speak on any subject at any time.

The Press plays a very important role in a Parliamentary democracy. It is the chief means of giving the people some idea of what is going on in the country and outside.A free and responsible Press puts forth facts as well as standards of right and wrong in the field of politics and in many other fields of human endeavour. It is the standard vehicle for the dissemination of public opinion. It is often the Press that gives information to Parliament on how the executive arm of the State and its officers act in the performance of their functions so that the legislature may supervise the State officers more effectively.[160]

Often it has been the Press in most democratic countries that has brought to light grave misdemeanours on the part of a public figure as a result of which they have had to resign and in some cases have even been convicted. In this context one is reminded of the Watergate scandal (the painstaking

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159 1950 (339) US 382 94 Law Ed 825 at 927

160 At p 2 of *The Island*

work of reporters attached to the *Washinton Post*) as a result of which President Nixon was compelled to resign in order to avoid impeachment. Similarly quite recently the world press highlighted the conviction (for bribery) of Tanaka, the former Prime Minister of Japan. He was sentenced to a term of four years imprisonment. Tanaka's exposure was the direct result of a team of journalists working for *Bungai Shungu* magazine. This is what a responsible free Press can do and is expected to do in a democracy.[161]

Despite such persuasive argument the Supreme Court decided that the closure of the press belonging to the publishers of the *Saturday Review* did not constitute a violation of the right to free and unhindered publication and that therefore Article 14(1)(a) of the Constitution had not been infringed at all.

It is quite clear from the above cases and many others[162] over the past five years that, even where it is obvious from the facts that there has been a violation of one or other fundamental right, the Supreme Court has been

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161 At p2-3

162 The author has made a survey of only those important decisions in which fundamental principles have been expounded and interpreted by the judges. As mentioned above there were 87 human rights cases from the period 1979 to 1983 (see footnotes 111 and 126 *supra*) and it is impossible to analyse each one of them in this thesis. However, it must be pointed out that in the vast majority of cases that were dismissed there was no elucidation of any of the human rights provisions that are in the Constitution.

reluctant (and perhaps cautious to the extreme) in exercising to the fullest its powers under Article 126. The Supreme Court, it is respectfully submitted, has failed dismally in the protection of human rights. The fact that there were only five successful applications out of eighty-seven (up to the end of 1983) indicates that the Court should move away from its restrictive,[163] rigid and technical interpretation of Article 126. There is no doubt that some or other fundamental right was infringed in most of these eighty-seven cases but the Supreme Court felt unable to move away from the technicalities of Article 126. It is submitted that because human rights and fundamental freedoms are a part of international law (Universal Declaration, Civil and Political Rights Covenant, Economic, Social and Cultural Rights Covenant) the Supreme Court should with all boldness and tenacity move forward in the direction of the liberal interpretation of both the fundamental rights and the violations thereof.

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163 For example in *Vasapala v Wickremasinghe and Three Others* (Application Number 103 of 1980 Decided on 8 December 1980) it was decided that the right to form and join a trade union did not include the right to strike. This is a typical restrictive interpretation.

In *Adiapathan v The Attorney-General* (Application Number 17 of 1979) it was decided that a cheque is not a communication.

CHAPTER 9

SOUTHERN AFRICAN INDEPENDENT NATIONAL STATES

9.1. TRANSKEI, VENDA AND CISKEI

These three independent national States will be considered here briefly because just like Bophuthatswana they were formerly an integral part of the Republic of South Africa, but are now sovereign independent States with their own executive, legislative, judicial and other administrative organs.[164] However, from the point of view of the protection of human rights these States have nothing in common with Bophuthatswana. Both Transkei and Venda do not have a Bill of Rights and therefore an aggrieved individual must have recourse to the common law (for example writ of *habeas corpus*, interdict, compensation *etc*) if any of his fundamental rights are infringed. Ciskei however does have an unenforceable Declaration of Rights. This means that the Ciskean courts do not have the power to test legislation that conflicts with the Declaration. It is submitted that the Declaration is only morally binding on the Government of Ciskei.

Transkei became independent in 1976 in terms of the Status of Transkei Act (1976)[165] Venda became independent in 1979 in terms of the Status of Venda Act 107 of 1979. The Venda Constitution is remarkably similar to that of Bophuthatswana. There is a unicameral Parliament, composed of both elected members and chiefs and the Head of State is an executive President. The Constitution is flexible whereas Bophuthatswana's

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164 For the question of what constitutes a "State" in international law and the corollary question of "recognition" see Part 1 Chapter 2 on the Status of Bophuthatswana.

See further: O'Connell D P *International Law* Vol 1 2nd edition 1970

Brownlie I *Principles of Public International Law*

Constitution is rigid [166].

Ciskei became independent in 1981 [167] Section 3(1) of this Act provides that public international law is an integral part of the Ciskeian law. The Declaration of Rights is contained in the Chapter III of the Constitution and it embodies the following rights: the right of human dignity and equality before the law; non discrimination; right to life, liberty and security of person; right to privacy and reputation; right to family life; freedom of movement; right to nationality; freedom of thought, conscience and religion, freedom of association, right to education, and employment and finally the right to protection of property.

This Declaration has a saving clause which is similar to those found in other national and international instruments. Article 19 declares that the catalogue of rights and freedoms may be restricted by any law of the National Assembly which is "necessary in a free and 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 maintaining the authority and impartiality of the judiciary and for the social, moral and economic

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2nd edition 1973.

165 For a study of the Transkei Constitution see Booysen H *et al* *Comments on the Independence and Constitution of Transkei* 1976(2) *SAYIL* at 1

166 See Carpenter G *The Independence of Venda* 1979(5) *SAYIL* at 40

167 See Carpenter G *Variation on a Theme - The Independence of Ciskei*

well-being of all the inhabitants of the State.

Article 19(3) declares that no law of the National Assembly shall be declared invalid by a court of law merely because it contravenes the provisions of Chapter III. This is similar to Article 16(1) of the Sri Lankan Constitution. For Ciskei, the newest independent national State, it would appear that legislative supremacy is essential for the development of the country. Experience in Africa[168] has shown that emergent States do not wish to be hindered by lofty judicial pronouncements. The legislature would desire a free hand to enact laws.

In conclusion, it must be noted that although the Ciskeian Declaration of Rights is entrenched in the sense that a two-thirds majority is required in order for it to be repealed or even amended, nevertheless it is not justiciable (similar to the Sri Lankan Constitution of 1972) because there is no provision in the Constitution for enforcing the rights contained in the Declaration.[169]

1981(7) *SAYIL* at 83

168 See *Introduction* to Part III *supra*.

169 The author has not considered the detailed provisions of the Constitutions of any of these three independent national States because they are not relevant to the issue, namely, the national protection of human rights.

The author's starting point has been to compare the Bophuthatswana Bill of Rights with other equivalent and noteworthy instruments,

In a thought-proving article Professor Barend van Niekerk writing[170] at a time when none of the homelands had opted for independence suggests several methods of ensuring the protection of human rights and fundamental freedoms in these homelands.

Firstly he suggests that should a homeland decide to opt for independence "the obvious way would be for (it) to petition the South African Government to secure the enactment of a Bill of Rights and a mode of entrenchment before (it) gains independence. To avoid the suggestion that this *Grundnorm* flows from an imposed foreign source, it would be highly desirable to summon a national convention of representatives of the peoples of the (homeland) to which due reference must be made in the Bill of Rights and which will - formally at least - decide on the exact scope of the rights to be entrenched, the exceptions to and limitations of these rights, and other related matters".[171]

He suggests that should the South African Government be reluctant to permit this ordinary method of entrenchment then the homeland itself immediately upon attaining independence can enact an entrenched Bill of Rights.[172]

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both national and international. The question of the promotion and protection of human rights in the Republic of South Africa has been excluded from this thesis because South Africa does not have a Bill of Rights enshrined in its Constitution. Hence, any comparisons between Bophuthatswana's Bill of Rights and South Africa would be extremely difficult. See Dugard J *Human Rights and the Legal Order* Princeton University Press (New Jersey) 1978

Secondly he suggests that should a homeland refuse to opt for independence but prefers to continue with its self-governing status then delegates from that homeland could determine the scope and content of a Bill of Rights and through its legislative organ request the South African Government to promulgate the necessary legislation. Such a Bill of Rights would then constitute a binding norm against all legislation of the self-governing homeland.[173]

Thirdly, he suggests that a homeland could simply enunciate (without any authority) an informal set of principles.

In this context it seems appropriate to conclude by quoting from a speech given by Chief Buthelezi and which is referred to by Professor Van Niekerk.[174]

> I do not think it is premature for the Government of the Republic (of South Africa) to help us to embody this idea in our Constitutions for the protection and edification of basic human rights. In that spirit I propose that we should have human rights constitutionally safeguarded and placed beyond the reach of fleeting majorities, passing

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170 1973(90) SALJ 403

171 *op cit* at 405

172 *Ibid*

173 at 406

174 at 403 of 1973 (90) SALJ 403

contingencies and everchanging idiosyncrasies. I realize there is a long and arduous task ahead of preparing myself and my people for all this. Exercise of power needs to take place under the law, and under the law ... which enhances freedom and does not attempt to restrict or abolish it. There should be a régime of law which will attempt to embody the best that the world has to offer in the field of basic human and civil rights. This we hope will be régime of law which will not seek to imitate the worst examples of authoritarian and repressive rule ... It is so simple to opt for the easy way out of problems by suppressing liberties. We need to unlearn the bad examples which we set right before our eyes. We should aspire to eschew repressive measures, all-embracing security legislation ... (*etc*) ... The example of the guarantee of human rights enforced in Western Europe in international law under the Council of Europe is a more recent and shining example for us to emulate. We would like to be sure that we can depend on the loyalty of our people when the chips are down, when their fundamental rights are protected ... This ... is our dream of liberty as we see it looming on the horizon. No one can oversimplify the issue, because it involves long preparation to entrench once and for all these constitutional safeguards. If South Africa ... would assist us in doing this ... (t)he rights of citizens can in this way be enhanced and entrenched for all time. If the homelands ended up in a federation we would welcome the establishment by all States of a common constitutional court to interpret, enforce and expand these civil rights.[175]

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175 *Ibid*

PART III

THE REGIONAL PROTECTION

OF

HUMAN RIGHTS

One phenomenon of the period since 1945 is the rapid growth in the number of intergovernmental regional organizations. In fact, regional organizations founded since 1945 outnumber those of a universal nature by approximately a two-to-one ratio. Obviously, not all regional agencies perform highly significant functions, but some have assumed important roles in world affairs.

As the term is used (in this Part) a "regional organization" is a segment of the world bound together by a common set of objectives based on geographical, social, cultural, economic or political ties and possessing a formal structure provided for in formal intergovernmental agreements.

In the twentieth century a cleavage has developed between certain advocates of universalism and some advocates of regionalism. Both sets of antagonists agree that the international system must eventually be modified from the primacy of the nation-state in the direction of a partial surrender of state sovereignity to larger political units. Extreme universalists and regionalists each see their own approach to order and stability as the *only* feasible alternative to the deficiencies of the present system. Thus a dichotomy is set up in which the choice is presented as either universalism or regionalism.

LeRoy Bennet, A *International Organizations*
Prentice Hall Inc (US) 1980 at 366-367

CHAPTER 10

INTRODUCTION

10.1. INTRODUCTION

The system propounded in Chapter VIII (Articles 52-54) of the United Nations Charter makes clear provision for the formation and functioning of regional arrangements[1].

There can be little or no hope of achieving effective protection of human rights and fundamental freedoms on a world wide scale in the near future. This is the grand ideal but this universal ideal can never be translated into practical reality on a global scale as long as so many diverse political philosophies are practised in different parts of the world. In some systems the ideal of human rights is a relative and a secondary concept. In most Black African countries and Latin American countries where there is an attempt to rule on the basis of a democratic constitution one finds that after a short while the initial democratic constitution is swept aside on the basis of the theory that in order to make possible rapid development (industrialization, technical programmes, social programmes etc) one has to equip the government for a certain period with such wide powers that no opposition would be able to hinder it in its purposes.

Thus one finds that in a large proportion of countries (Latin America, Black

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[1] See Chapter VIII Articles 52-54 of the United Nations Charter. Regional arrangements or agencies are allowed for the maintenance of international peace and security and the Security Council must at all times be kept fully informed of all actions undertaken in terms of regional agencies. See further generally on Regional Organisations: Kelsen - Law of the United Nations 1951; American Journal of International Law 49 (1955) pp 166ff.

Africa, parts of the Middle East, all of the communist countries) in which the powers of the state authority (however the regime is motivated in terms of political ideology) are extremely wide and the human rights of individuals are extremely narrow.

At the other end of the spectrum one finds that in the democratic states (Western Europe; North America) the rights of individuals are very wide and there is a narrowing down of the scope of governmental authority.

In those countries where human rights are restricted or non-existent, the emphasis is to broaden the State authority even further and therefore to narrow still further the very narrow scope of human rights; whereas in these countries where human rights are given maximum protection and governmental powers are controlled far more effectively than anywhere else, the emphasis is on a broadening of human rights still further and narrowing the scope of governmental authority still further.

This would indicate a paradox: surely in countries where there is little or no human rights there should be a restriction on governmental authority? Perhaps the answer lies in the suggestion that in certain countries the ideal of human rights is secondary to economic development and progress? Perhaps it would be a tongue-in-cheek attitude to suggest that peoples in developing countries would be primarily concerned with seeing to it that their bellies are adequately full? Can one then theorize that societies in different standards of development (both economic and political) should not be asked to conform to the same standard of human rights! Should one try to help a society that is near perfection in terms of human rights to come still nearer perfection and leave the other societies in their very imperfect state or should one rather concentrate on raising the standards

of those that are least developed? This is a difficult question and that is why it is postulated that the ideal of human rights on a global level can not be regarded as a short term goal. In the hierarchy of multiple problems to be solved, the protection of human rights by no means appears to present the same degree of urgency everywhere. Individual rights presuppose a minimum standard of existence, for example, the freedom of the press and of expression have only a limited importance in a country whose population is illiterate.

The Universal Declaration of Human Rights[2] was a reaction against the horrors of war[3]. Without compulsory machinery the Declaration despite its noble and lofty terms, and whatever its juridicial scope, could not achieve its objectives.

The idea of regionalism already embodied in the United Nations Charter[4] gained tremendous impetus with the signing of the European Convention for the Protection of Human Rights and Fundamental Freedoms[5].

Simultaneously with the rapid increase in the membership of the United Nations there has been a proliferation of regional organisations. Both the Organisation of American States and the Arab League were already in existence

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2 On 10 December 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (U.N. Document A/811). Forty-eight states voted for and none against. Eight states abstained. The Declaration is not a legally binding instrument per se.

3 That is, mainly World War II (1939-1945)

4 See footnote 1 *supra*

5 Signed in Rome on 4 November 1950. Entered into force on 3 September 1953
See further: Robertson: Human Rights in Europe 1963

British Yearbook of International Law (1950) pp145ff

in 1945. Since then many other regional organizations have been founded such as the Council of Europe (CE), North Atlantic Treaty Organisation (NATO), the Central Treaty Organisation (CENTO); the South East Asia Treaty Organisation (SEATO) now defunct; Organization of Central American States (OCAS) and the Organization of African Unity (OAU). All these regional organizations have created a climate conducive to the initiation and advancement of joint ventures in the area of human rights.

Regional conventions on human rights are greatly facilitated by the social factor of the closer solidarity found among nations, as among individuals, belonging to the same geographic region[6]. A state, unlike natural persons, cannot select its neighbour. Therefore a regional convention allows a state to have a good working relationship with its neighbour, because being limited to a defined geographical area it permits full effect to be given to the feelings of solidarity and to its common juridico-political concepts.

It is therefore postulated that the quickest manner for the effective protection of human rights and fundamental freedoms on a global basis is via the detour of regional conventions and institutions. No doubt one can hope to achieve universal institutions such as a World Court of Human Rights in the distant future, but such a noble project would at present be premature, while the establishment of a network of regional bodies - courts, commissions of enquiry etc.- would have an indisputable interest and value.[7]

At the level of principles, universality is less difficult. This is in

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6 Fawcett, J E S (Prof) - seminar delivered at University of London October 1979

7 As per 6

large measure the achievement of the Universal Declaration. There does not then yet exist, on the world level, independent and effective machinery assuring the realization and protection of human rights, and it is in this field that the idea of regional institutions seems to be particularly fruitful. This has been demonstrated in Europe by the machinery of the European Convention[8].

It would also be necessary to achieve the institution of an international centre for human rights which would act as a clearing house and information centre for permitting the encouragement of regional efforts without having recourse to over ambitious methods[9].

It therefore postulated that regionalism is the answer to the problem of effective protection of human rights on a global level. The European Convention stands as a workable model for the other regions of the world.

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8 As per 6

9 As per 6

CHAPTER 11

AFRICA

11.1. THE ORGANIZATION OF AFRICAN UNITY (OAU)

In Africa with its multi-ethnicity, military regimes, one party states, dictatorships and commonplace coups de etat it is indeed remarkable that the notion of an organisation of African states was even mooted in the first place. The formation of the Organization of African Unity (OAU) is a brave attempt (that is functioning) at having a regional body as a unifying force in Africa.

The Charter of the OAU was adopted by a Conference of Heads of States and Governments is Addis Ababa, Ethopia on 25 May 1963[10].

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[10] See Brownlie, Basic Documents in International Law 1978 page 68 wherein the learned author points out that: thirty-two States signed the Charter; this total includes all African States with the exception of (a) States not then independent (Gambia, Malawi, Zambia); (b) the Republic of South Africa; and (c) Spain and Portugal represented on the Continent by possessions categorized as non-self governing by resolutions of the United Nations General Assembly on the basis of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV) of 14 December 1960.

On 21 July 1964 thirty-two member states signed the Protocol of the Commission of Mediation, Conciliation and Arbitration established by Article 19 of the Charter of the OAU.

The Preamble reads as follows[11].

> We, the Heads of African and Malagasy States and Governments assembled in the City of Addis Ababa, Ethopia;
> Convinced that it is the inalienable right of all people to control their own destiny; conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples; Conscious of our responsibility to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour;
>
> Inspired by a common determination to promote understanding among our peoples and co-operation among our States in response to the aspirations of our peoples for brotherhood and solidarity, in a larger unity transcending ethnic and national differences;
>
> Convinced that, in order to translate this determination into a dynamic force in the cause of human progress, conditions for peace and security must be established and maintained;
>
> Determined to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our States and to resist neo-colonialism in all its forms;

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[11] Brownlie I *Basic Documents in International Law*. Text is in p 68 -76

> Dedicated to the general progress of Africa. Persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the Principles of which we re-affirm our adherence, provide a solid foundation for peaceful and positive co-operation among states;
>
> Desirous that all African States should henceforth unite so that the welfare and well-being of their peoples can be assured;
>
> Resolved to reinforce the links between our States by establishing and strengthening common institutions;
>
> Have agreed to the present Charter

Article 2[12] lays down the purposes of the OAU which inter alia are:

> To co-ordinate and intensify their collaboration and efforts to achieve a better life for the peoples of Africa
>
> To defend their sovereignty, their territorial integrity and independence
>
> To eradicate all forms of colonialism from the continent of Africa

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12 Brownlie I *Ibid* at 69-70

> To promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

The OAU envisages the fulfilment of these purposes through Member-States co-ordinating and harmonizing their general policies in various fields, inter alia[13]

> political and diplomatic co-operation;
> educational and cultural co-operation;
> health, sanitation and nutritional co-operation;
> scientific and technical co-operation, etc.

Article 3 lays down a set of principles which the Member-States solemnly affirm and to which they declare their adherence. These are inter alia[14]

> The sovereign equality of all Member-States
> Non-interference in the internal affairs of States
> Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence. Absolute dedication to the total emancipation of the African territories which are still dependent; etc.

The Preamble, Article 2 and Article 3 are the only sections of the OAU Charter which make references to human rights. The Member States of the OAU realized that something more tangible was needed for the implementation and protection of human rights. It is with this in mind that the African

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13 Article 2(2) of the OAU Charter page 70 of Brownlie supra.

14 Brownlie *Ibid* page 70

Charter on Human and People's Rights was drawn up.

11.2. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS[15]

The African Charter is the newest of the conventions (albeit regional) on human rights[16].

The writer has been unable to ascertain whether the African Charter has entered into force. Enquiries have been made but the writer has drawn a blank. It is nevertheless included in this thesis because it is a document that has far reaching consequences for the furtherance of human rights in Africa.

The African Charter follows tradition[17] in the sense that it first enumerates the civil and political rights. It then enumerates the economic, social and cultural rights. Articles 19-24 are concerned with rights that are not vested in individuals but in collective groups of individuals called peoples. The African Charter follows the Universal Declaration and the American Declaration of the Rights and Duties of Man in drawing no distinction between the different categories of rights and duties which

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15 See Appendix II for the full text

16 The Heads of State of the OAU at their meeting in Nairobi in July 1981 approved the Charter unanimously. The text referred to and used by the writer here is that which was approved at the OAU Ministerial Conference in Banjul, The Gambia, in January 1981 and is believed to be the correct text of the Charter as approved at Nairobi.

17 The African Charter resembles the European Convention and the Civil and Political Rights Covenant in its format

it enumerates. However, it breaks new ground in a treaty by imposing (in Article 1) the identical State obligation, absolute and immediate in form, for all of them[18].

Just as in the case of the other regional instruments[19] the African Charter makes provision for an independent body, the African Commission on Human and Peoples' Rights to promote human and peoples' rights and ensure their protection in Africa[20].

However one of the major differences between the African Charter and other regional instruments is that the African Commission is the only organ provided for in the African Charter. There is no provision for an African Court on Human and Peoples' Rights![21]

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18 SIEGHART P *The International Law of Human Rights* 1983 Oxford p 29

19 See the European Convention and American Convention on Human Rights

20 See Appendix II Part 11 of African Charter. Articles 30 ff

21 Further discussion on the African Charter, namely a comparative analysis of human rights articles will be found in Part V of this thesis.

CHAPTER 12

AMERICA

12.1. INTRODUCTION

Latin America provides a store of contradictions in the field of human rights. Legal and political sophistication belong to some of the American socially élite groups, and the outcome of this sophistication is a desire to adopt legal instruments on human rights. At the same time social conditions in nearly all of Latin America entail inequalities and deprivation on such a scale that recourse to guarantees of the Classical Western political and civil rights is manifestly inadequate. Moreover, in the absence of general social and economic development, the position relating to civil and political rights is itself precarious[22].

The position in Latin America has special features. The whole question of human rights is bound up with the status of aliens and their property; powerful foreign corporations will wish to rely on human rights standards to preserve an economic status quo favourable to their interests. More significant is the relation of human rights to the regional security system represented by the Organisation of American States (OAS). There is abundant evidence that the concept of human rights in Latin America has been employed as a weapon against revolutionary regimes, particularly Cuba,. Regimes which threaten the system of private property and foreign private investment are likely to be denounced by the OAS organs as threats to regional security and as inimical to human rights, whilst military regimes which accept the economic status quo will remain free from condemnation. The paradox is thus the likely use of machinery for

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22 Brownlie I *Basic Documents in Human Rights* Oxford 1971 page 387

the protection of human rights to justify the intervention in the name of the regional organ, the OAS, with the purpose of conserving a system which tolerates appalling social injustice. Even so, formal adherence by governments to agreements containing guarantees of human rights will help politicians striving to improve social conditions, and will improve the possibility of reporting abuses[23].

12.2. AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN[24]

This Declaration[25] enumerates a catologue of human rights and fundamental freedoms (civil, political, social, economic and cultural.) The Declaration was not intended to be binding and it differs only in a few respects from that of the Universal Declaration. Its provisions have been used since 1960 by the Inter-American Commission on Human Rights as the standards to be applied in its work and continue to be so used for those Member-States of the OAS which have not yet become bound to the American Convention[26].

Just as in the case of the Universal Declaration, the American Declaration does not create binding obligations in international law. In 1949 the

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23 Brownlie *Ibid* at 387-8

24 For the text see Brownlie supra 389-395

25 Was adopted in 1948, a few months before the Universal Declaration, at the Ninth International Conference of American States, Bogota, Colombia (1948).

26 Sieghart P *Ibid* at 28

Inter-American Juridical Committee (an official organ of the OAS Council) ruled that the American Declaration does not create binding obligations[27].

But it is clear that later events may have affected the juridical status of the American Declaration.[28] Article 5 (j) of the OAS Charter (1948) stated that:

> The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex.[29]

But the Charter did not declare what the "fundamental rights" were. However the Statute of the Inter-American Commission promulgated in 1960 declares that:

> for the purpose of this Statute, human rights are understood to be those set forth in the American Declaration[30].

Since 1960 the Inter-American Commission has consistently applied the provisions of the American Declaration as its standards in exercising its functions both before and after it became a principal organ of the OAS

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27 Report of the Committee to the Inter-American Council of Jurists 26 September 1949.

28 Sieghart *Ibid* at 55

29 This is now Article 3 (j) of the 1970 OAS Charter

30 Article 2 of the Statute of the Inter-American Commissions

under Article 51 of the revised Charter of 1970[31].

For a detailed comparative analysis of the human rights provisions in this instrument with other instruments see Part V of the present work.

12.3. DECLARATION OF PUNTA DEL ESTE

This Declaration was a reaction against the Castro regime in Cuba. There was a fear that Socialist policies would take root in Latin America and therefore in 1961 there was an attempt to create a regional programme of social and economic development[32].

The text[33] declares inter alia:

> To accelerate economic and social development, thus rapidly bringing about a substantial and steady increase in the average income in order to narrow the gap between the standard of living in Latin American countries and that enjoyed in the industrialized countries ...(T)o provide decent homes for all our people To assure fair wages and satisfactory working conditions to all our workers ... To wipe out illiteracy ... To press forward with programme(s) of health and sanitation ..... etc.

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31 Sieghart *Ibid* at 55

32 Brownlie *Ibid* at 396

33 For full text see Brownlie *Ibid* 396-8

12.4. AMERICAN CONVENTION ON HUMAN RIGHTS

The Bogota Conference (1948) which accepted the American Declaration first mooted the idea of an American Convention on Human Rights. Negotiations and drafting took place from as early as 1959. Drafting was undertaken primarily by the Inter-American Council of Jurists. The Convention was signed in 1969 and it entered into force on 18 July 1978.

The American Convention[34] sets out in great detail all the civil and political rights. The State obligation here is absolute. This is emphasized in Article 1 which declares:

> The State Parties to this Convention undertake to respect the rights and freedoms recognized 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, colo(u)r, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.

Article 26 is important from the point of view of the progressive protection and elevation of human rights. It reads:

> The States Parties undertake to adopt measures, ... with a view to achieving progressively .... the

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[34] For full text see Brownlie *Ibid* at 397-427

> full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the OAS ...

The American Convention[35] is in most parts modelled on the European Convention. It makes provision, just like the European Convention for a Commission and a Court of Human Rights. The Commission has its seat in Washington D.C., while the Court sits in San José, Costa Rica. Just as in the European Convention, the judgments of the Court are final. Unlike the European Convention no declaration is necessary to make the Commission competent to receive petitions against State Parties from individuals or groups, but such a declaration is required for complaints by one State Party against the other[36].

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35 For a full comparative discussion and analysis of the provisions in this Convention see Part V of this thesis.

36 Sieghart P *Ibid* 28-29

CHAPTER 13

EUROPE

13.1. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The European Convention[37] originated in the reactions to totalitarian rule in Europe in the 1930's and the horrific experiences of World War II. About two years after the signing of the Universal Declaration and generally motivated by that instrument the Member States of the Council of Europe drafted the European Convention. This was signed on 4 November 1950 and came into force on 3 September 1953. One of the factors that expedited this instrument was the general belief that Member States of the Council of Europe were politically and socially sufficiently homogenous to create a common Bill of Rights. It was also felt that there should be some effective means of enforcing the Universal Declaration. This then was the background to the European Convention.

There are a number of compromises. Should, for example, the Universal Declaration be repeated *in toto* or should there be some limitation? It was decided that the European Convention should be limited to civil and political rights - and accordingly several articles, from the Universal Declaration were not included, for example, the right to work.. However the Protocols to the European Convention do embrace several other rights, for example, right to education, right to have and participate in elections, etc.

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37 For the full text see Brownlie *Ibid* 339ff

Although in form it is an international agreement between a number of States, essentially it creates obligations not between the contracting States but between the ratifying States and the individuals within those States. Ratification is a unilateral declaration by the ratifying State that it will adhere to the European Convention with regard to its individuals.

In terms of Article 19[38] of the European Convention a permanent European Commission of Human Rights and a permanent European Court of Human Rights has been created (sitting in Strasbourg, France). According to Article 24[39] any High Contracting State may refer to the Commission any alleged breach of the provisions of the Conventions by another High Contracting Party.

Where a State Party declares under Article 25[40] that it recognizes the competence of the Commission, the Commission may then receive petitions from any individual organization or group of individuals claiming to be a victim of a violation by that State Party of the rights embodied in the Convention.

The Commission may then refer the matter to the Court provided that the State Party concerned has recognised the Court's jurisdiction under Article 46[41]. The judgments of the Court are final.

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38 Brownlie *Ibid* 345

39 Brownlie *Ibid* 346

40 Brownlie *Ibid* 346

The task of the Commission and Court is to ensure that the standards of the European Convention and its Protocols are observed by the administration of the States concerned. The Commission and the Court have provided valuable material for the elaboration of the provisions on civil liberties; and anomalies have been exposed in national systems of law, with the result in some cases that the relevant national legislation has been changed for the better[42]. In addition, applications to the Commission have led in many cases to friendly settlements between the victim and the State Party, often again involving changes in the State Party's internal arrangements for the future[43].

13.2. FIRST PROTOCOL TO THE EUROPEAN CONVENTION

This Protocol[44] was added to the European Convention in 1952 and entered into force on 18 May 1954. It, just like the other Protocols, forms an integral part of the European Convention. It deals with property rights and education rights.

13.3. SECOND PROTOCOL TO THE EUROPEAN CONVENTION

This Protocol[45] confers upon the European Court the power to give advisory opinions. It is not an important document from the point of view of

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42 Brownlie *Ibid* 338

43 Sieghart P *Ibid* 27

44 Brownlie 355-7

45 Brownlie 357-9

enunciation of human rights.

13.4. THIRD PROTOCOL TO THE EUROPEAN CONVENTION

This Protocol[46] merely amends certain articles in the European Convention and does not cover any additional human rights.

13.5. FOURTH PROTOCOL TO THE EUROPEAN CONVENTION

This Protocol[47] deals mainly with the question of freedom of movement and the right (or otherwise) to enter and leave a country. This is an important Protocol because this particular human right (or freedom) is not found in the European Convention itself. This Protocol entered into force on 2 May 1968

13.6. FIFTH PROTOCOL TO THE EUROPEAN CONVENTION

This Protocol[48] concerns itself with the terms of office of the members of the European Commission and European Court. It does nto deal with any human rights provisions and therefore is not important for the purposes of this work.

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46 Brownlie 359-60

47 Brownlie 361-3

48 Brownlie 363-5

13.7. SIXTH PROTOCOL TO THE EUROPEAN CONVENTION

This Protocol[49] which was drawn up on January 1983 will make it obligatory for States to abolish the death penalty in peace time and will allow no derogation or reservation therefrom. This Protocol has been opened for signature on 28 April 1983 and it will enter into force after ratification by five Member States of the Council of Europe. This then is a resumé of the European Convention and its six Protocols[50].

13.8. THE EUROPEAN SOCIAL CHARTER

The European Social Charter[51] is intended to complement the European Convention in the sense that it protects social and economic rights whereas the European Convention protects civil and political rights.

In Part 1 of the European Social Charter there is a list of 19 economic and social rights which the Contracting Parties accept as the aim of their policy to be pursued by all appropriate means.

The European Social Charter was signed at Turin on 18 October 1961 and

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49 The writer has been unable to find any textbook which deals with this Sixth Protocol. It is sufficient to note that it does exist. The writer has also been unable to ascertain whether it has acquired the necessary ratifications by five (5) States

50 For a detailed comparative analysis of specific human rights provisions in the European Convention and its Protocols refer to Part V of the present work.

51 For the full text see Brownlie *Ibid* 367-86

entered into force on 26 February 1965 and it was concluded on the basis that the signatory states were

> 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[52]

The Preamble also refers to the aim of the Council of Europe, namely to achieve greater unity between its members for the purpose of safe guarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realization of human rights and fundamental freedoms.

In this context the Preamble also mentions the European Convention. In a sense it is a big footnote to the European Convention. It is an emphatic pronouncement of certain principles governing social policy and labour relations, and at the same time a formulation of certain international obligations concerning specific standards to be applied to labour and social legislation and administration and to judicial practice in these fields[53].

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52 Preamble to the European Social Charter

53 Jacobs F G (Editor) European Law and the Individual
North Holland Publishing Co (1976) 182
article by Kahn-Freund, O - entitled *The European Social Charter* p 182

However Evans M in a paper[54] entitled *The European Social Charter*[55] says that

> notwithstanding the loftiness of its aim and the fact that it represents one of the most significant realisations of the Council of Europe, the Charter has, to a large extent, failed to capture the attention either of the general public or of legal commentators. One has, only to compare the scattered and repetitive literature concerning the Charter with the enormous quantity of books, monographs and articles produced in connection with the European Convention ...

The uniqueness of the European Social Charter lies in the fact that it combines a catalogue of general principles (in Part 1) with the formulation (in Part II) of substantive obligations intended to give effect to the general principles.

The principles are not only general but to a large extent also vague. But as Kahn-Freund points out[56] this is a characteristic which the European Social Charter shares with all instruments embodying fundamental rights and freedoms, both international and national and that the indeterminacy of, for example, the French Declaration of the Rights of Man (1789), of the first Ten Amendments to the United States Constitution, or of the

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54 Bridge J W et al (Editors) - Fundamental Rights Sweet & Maxwell 1973

55 Bridge JW *op cit* Chapter 19 at 278

56 In Jacobs F G at 182-3

Universal Declaration does not prevent any of these texts from being either the source of positive rules of law or of general principles guiding the courts in the interpretation of legislation.

He goes further[57] to say that the American and German experience seems to show that the value of such catalogues as sources of principles and of rights depends on their vagueness:their lack of specificity ensures that they can live up to their function of supplying a blank cheque to be filled by the judge or administrator.

Article 20 (1) (a) of this Charter indicates that acceptance by the Contracting Party of the principles contained therein create a positive legal obligation. The ratification of any part of Part II makes it obligatory on a State to implement the whole of Part 1[58]

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57 *Ibid* at 183

58 See further Robertson A H *Human Rights in Europe* Manchester University Press 1963 Chapter VIII pp 140ff

Harris: The European Social Charter, *ICLA* 13 (1964) 1076

Tennfjord The European Social Charter, an Instrument of Social Collaboration, *European Yearbook* 1961 (IX) at 71.

"The European Social Charter and International Labour Standards" 1961 (XXXIV) *International Labour Review* 354-75

13.9. THE HELSINKI ACCORD

There was an inter-governmental Conference from 1973 to 1975. It met in Helsinki, Finland and in Geneva, Switzerland. The motive of this Conference was to negotiate a declaration to indicate that the nations of Europe were in peaceful relations with each other. All European States, except Albania participated in this Conference.

This Conference resulted in the signing of the Helsinki Final Act on 1 August 1975 in Helsinki. One section of the Accord is concerned with co-operation in humanitarian fields. The Accord creates no binding obligations in international law and is therefore capable of no formal legal effect. However, though it might have no formal legal effect it certainly has had a tremendous and significant influence on governments.

The Preamble recognises the close link between peace and security in Europe and in the world as a whole and indicates that States are conscious of the need to make their contribution to the promotion of fundamental rights.

Principle VII of the Accord provides:

> The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.
>
> They will promote and encourage the effective exercise of

> civil, political, economic, social, cultural and other rights and freedoms, all of which derive from the inherent dignity of the human person and are essential for his free and full development.
>
> Within this framework the participating States will recognise and respect the freedom of the individual to profess and practise, alone or in community with others, religion or belief acting in accordance with his own conscience.
>
> States ... will afford (national minorities) the full opportunity for the actual enjoyment of human rights and fundamental freedoms ...
>
> In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the UN Charter and the Universal Declaration.
>
> They will also fulfil their obligations as set forth in the international declarations and agreements on this field, including *inter alia* the International Covenants on Human Rights, by which they may be bound.

It must be noted that neither of the two UN Covenants were in force at the time of the adoption and signature of the Helsinki Final Accord[59].

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59 See further Buergenthal T (editor) *Human Rights, International Law and Helsinki Accords* (1977)

PART IV

THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS

WE THE PEOPLES OF THE UNITED NATIONS

.... reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and ... to promote social progress and better standards of life in larger freedom,

and for these ends

to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, ... accordingly ... have agreed to the present Charter of the United Nations

Preamble to the United Nations Charter signed on 26 June 1945 in San Francisco as an affirmation of international consensus on peace and freedom.

CHAPTER 14

THE UNITED NATIONS CHARTER

14.1. THE UNITED NATIONS CHARTER

The Charter of the United Nations was established as a result of the UN Conference on International Organization held at San Francisco and entered into force on 24 October 1945[1].

A tremendous breakthrough for the draftsmen of the UN Charter[2] was the emphasis of certain human rights provisions as the foundation for a war-free international community.

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

Among the Purposes of the United Nations as set forth in Article 1 of the UN Charter are:

> 3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, and
>
> 4. To be a centre for harmonizing actions of nations in the attainment of these common ends.

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1 Brownlie *Basic Documents in International Law* p 1

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Article 55 provides

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 provides

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

The UN Charter undoubtedly has the supreme status of a multilateral treaty because it is the founding statute of an intergovernmental organization. There is also no doubt that from an international law point of view it creates binding obligations on the State Parties. Article 56 embodies one of these obligations expressly in the form of a pledge -

> to take joint and separate action for the achievement of the purposes set form in Article 55.

However as Sieghart points out[3] -

> The importance of this State obligation has decreased in the measure in which States have ratified and acceded to the later human rights treaties which impose their own, and more specific and detailed, State obligations But the UN Charter obligation remains important for the diminishing number of States which, while members of the UN have not yet become bound by any of these other treaties: for them, it is still the only treaty obligation relating to human rights.

There is neither a definition nor a list of the human rights and fundamental freedoms in the UN Charter. However, this omission is covered by the Preamble of the Universal Declaration which refers back to the UN Charter obligation as the authentic UN catalogue[4].

In the Advisory Opinion on *The Legal Consequences of the Continued Presence of South Africa in Namibia*[5] the International Court of Justice made it clear that the legal effect of Articles 55 and 56 of the UN Charter is that they "bind Member States to observe and respect human rights".

It is interesting to note that these Articles 55 and 56 have also been

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3 Sieghart P *The International Law of Human Rights* 51

4 Sieghart *op. cit* 52

5 ICJ Reports 1971, 16

enforced in certain national jurisdictions wherein domestic legal systems either incorporate international law or take cognizince of it. For example in *Oyama v California*[6] the United States Supreme Court applied these Articles against attempts to enforce racial discrimination. There was a similar application in *In re Drummond Wren*[7] in Canada.

The ICJ has held also in the *Barcelona Traction Case* (1970)[8] that the UN Charter does create legally enforceable obligations for Member States to uphold the principles of human rights. In this case the ICJ drew a distinction on the one hand between the obligations of a State *vis-a-vis* other States and on the other hand the obligations of a state *vis-a-vis* the community of nations.

Some human rights academics[9] are of the opinion that a great stumbling-block towards the enforcement of human rights provisions in the UN Charter seems to be Article 2 (7) of the Charter which provides

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII

Chapter VII, of course, refers to matters which constitute a threat to the peace, a breach of the peace, or an act of agression (Article 39)

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6 332 US 633

7 4 ONTARIO Reports 778,

8 *Barcelona Traction, Light and Power Case* 1970 ICJ Reports 3

9 Van der Vyver, J D *Seven Lectures on Human Rights* Juta & Co 1976

in which case the Security Council shall make recommendations or decide what measures should be taken (under Articles 41 and 42).

Van der Vyver[10] argues that discriminatory practices ought never to be classified as essentially domestic matters. If in any national system human rights and fundamental freedoms are violated in a discriminatory manner, then in other countries there may be sympathizers with the group discriminated against, and such sympathizers can by their reactions cause the matter to be transformed into an international issue.

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10 *Ibid* at 128

CHAPTER 15

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

15.1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS[11]

The Universal Declaration was adopted by the UN General Assembly on 10 December 1948. The Declaration is not a legally binding instrument *per se*. However some of its provisions constitute general principles of law. The Universal Declaration has invaluable indirect legal effect and it is regarded by the General Assembly and by some international lawyers as an integral part of the body of the UN law[12].

The Universal Declaration is notably the first systematic catalogue of human rights and fundamental freedoms enunciated by the UN. The catalogue is set out in the first 28 Articles. The Universal Declaration created a link[13] between the rule of law and the doctrine of human rights

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11 1948 UN DOCUMENT A/811
For the full text see *Human Rights: A Compilation of International Instruments of the United Nations* (New York 1983) at 1

12 See further: Oppenheim *International Law* 8th Edition at 744ff
Robinson *The Universal Declaration of Human Rights* 195
McDougal & Bebr American Journal of International Law (1964) at 603ff
Lauterpacht H *International Law of Human Rights* 1950 Londo

13 For an excellent discussion on *Human Rights and the Rule of Law* see Van der Vyver supra Chapter 6, page 106ff wherein Professor Van der Vyver canvasses in great detail this link between human rights and the

by asserting

> that human rights should be protected by the rule of law[14].

The Universal Declaration is designed to promote a nucleus of human rights in all countries and to foster a common attitude. At the level of principles, universality is less difficult.

The Universal Declaration has pride of place as a public proclamation of "a common standard of achievement for all peoples and all nations"[15].

The Preamble makes it clear that Member States have, in joining the UN "pledged themselves to achieve in co-operation with the UN, the promotion of universal respect for and observance of human rights and fundamental freedoms. The Declaration, it must be pointed out, differs from the traditional catalogues of human rights which are contained in various constitutions of the 18th, 19th and early 20th centuries, in that it embraces not only civil and political rights but also economic, social and cultural rights.

Through public debate in the UN and publicity throughout the world it has worked as a formation of an international conscience, and it is the source from which the UN Covenants, regional instruments and national constitutions protecting human rights have been and are being drawn up. It was invoked in the UN over apartheid and the treatment of people of Indian descent in South Africa, over Russian labour camps and over the restriction of movement of Russian wives of foreigners, etc. The

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14 Preamble to the Universal Declaration

15

Declaration has established the principle that the denial of human rights is a matter of international concern and has indeed done much to remove Article 2 (7) of the UN Charter as an obstacle to the UN action[16].

It is suggested that surely one of the great political victories of the Declaration has been through the notion of self-determination which was later embodied in the UN Civil and Political Rights Covenant (1966) and in the Economic, Social and Cultural Rights Covenant (1966). Article 1 of these covenants provides:

> 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.

The UNESCO Convention on Discrimination in Education (1960); the UN Declaration on Racial Discrimination (1963) and the General Assembly Declaration on Elimination of all forms of Religious Intolerance (1981) all serve to amplify and elaborate on the Universal Declaration.

The UN Secretary General in his *Survey of International Law* (1972) noted that the Declaration is not in terms a treaty instrument. He pointed out however that during the years since its adoption the Declaration has come to have a marked impact on the pattern and context of international law and has acquired a status extending beyond that originally intended for it.

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16 Fawcett JES (Prof): Seminar Nov 1979 University of London.

There is no question therefore that the Universal Declaration has, since its inception exercised a tremendous influence throughout the world both internationally and nationally.

CHAPTER 16

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

16.1. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS[17]

In 1948 during the time of the acceptance of the Universal Declaration it was assumed that it would not be able to impose any sufficiently binding obligations. The UN Commission on Human Rights undertook the task of drafting Covenants on human rights and fundamental freedoms. The General Assembly adopted the Civil and Political Rights Covenant together with the Economic, Social and Cultural Rights Covenant in 1966. The Civil and Political Rights Covenant came into force on 23 March 1976.

The reason that the catalogue of rights reflected in the Universal Declaration was divided into two was so as to accommodate certain ideological and political differences between the States, for example neither Covenant mentions any right to property.

In this Covenant there are 27 Articles which set out certainly in much greater detail than the Universal Declaration, a catalogue of rights and freedoms. Article 2 makes it obligatory on a State

> to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such

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17 For the full text see *Human Rights: A Compilation of International Instruments of the United Nations* (New York 1983) at 8ff

as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Covenant has established a Human Rights Committee which has authority to

(a) comment on reports to be submitted by the State Parties on the measures they have adopted to comply with their obligations under the Covenant;

(b) to investigate complaints that State Parties are failing to fulfil their obligations; and

(c) under an Optional Protocol to investigate complaints from victims of such failures[18].

In terms of Article 41 of this Covenant the notion of inter-state applications is recognized. Article 41 mentions that an application may be brought by a State which is a Party to the Covenant. Both States (applicant State and respondent State) must first have accepted the inter-state application system. There must be written communications between the state of the allegations. The respondent State then undertakes to give an explanation or to make a reference to domestic remedies which may be provided. It is only after this point that either State may refer the matter to the Human Rights Committee but within a period of

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18 Sieghart *Ibid* at 25

six (6) months. This Committee then has to ascertain whether there has been an exhaustion of domestic remedies, and in doing so it must obtain all relevant evidence. The Committee is obliged to hold its meetings *in camera* when examining all the relevant communications. It shall endeavour to effect a friendly settlement of the matter on the basis of respect for human rights and fundamental freedoms. The Committee shall, within twelve (12) months of receiving the initial communications make a report. If a solution has been reached the report shall consist of a brief statement of the facts and of the final solution. (This particular provision is identical to Article 30 of the European Convention). If no solution has been reached then the report shall contain a brief statement of the facts together with the submissions of both parties.

Article 42 provides that even if no friendly settlement is reached the Committee may appoint an *ad hoc* Conciliation Commission in order to effect an amicable solution.

This Covenant must be regarded as a far-reaching instrument on human rights that unequivocally sets standards for the protection and implementation of human rights and fundamental freedoms[19].

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19 For a comprehensive discussion and analysis of specific human rights provisions in the Covenant on Civil and Political Rights refer to Part V of the present work

16.2. THE OPTIONAL PROTOCOL TO THE CIVIL AND POLITICAL RIGHTS COVENANT[20]

This Optional Protocol was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A(XXI) of 16 December 1966. It entered into force in accordance with Article 9 on 23 March 1976.

This Optional Protocol makes it possible for the Human Rights Committee (set up in Part IV of the Covenant)

> to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant[21].

Article I provides *inter alia* that the Committee is competent to receive and consider petitions from individuals who are subject to the jurisdiction of a State Party to the Covenant.

Article 2 makes it clear that all domestic remedies must be exhausted while Article 3 lays down that all anonymous communications, those that abuse the right of submission and those that are incompatible with the Covenant will be rejected on the grounds of inadmissibility.

Articles 1, 2 and 3 of this Optional Protocol are similar to Articles 25

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20 For the full text see *Human Rights: A Compilation of International Instruments of the United Nations* (New York 1983) at 16ff.

21 Preamble

26 and 27 of the European Convention.

Article 1 contains the phrase "subject to its jurisdiction" indicating that only individuals who are subject to the jurisdiction of a State Party to the Covenant may address communications to the Committee. It is submitted that "subject to its jurisdiction" has a narrower meaning than "within its jurisdiction". The former term could mean nationals only; it is submitted that a better approach would be to say that Article 1 in actual fact implies "within its jurisdiction".

The Optional Protocol does not require that for an enquiry to be made there must be some *prima facie* case. The Optional Protocol does not require a separate enquiry or decision on admissibility.

In terms of Article 4 the Committee must bring the alleged violation to the attention of the State concerned. The State concerned must then, within six (6) months, submit to the Committee, written explanations, or statements clarifying the matter and remedy, if any that may have been taken by that State.

CHAPTER 17

THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

17.1. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS[22]

This Covenant was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. It entered into force on 3 January 1976 in accordance with Article 27.

The Preamble lays down several important considerations *inter alia*

> 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;
>
> 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

The first fifteen (15) Articles set out in a measure of detail a catalogue of rights mainly culled from the Universal Declaration.

This Covenant provides a reporting procedure, through the UN Secretary General, to the UN Economic and Social Council (ECOSOC) which may then transmit the State reports to the UN Commission on Human Rights.

ECOSOC derives its existence from the UN Charter[23]. It is an inter-

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22 For the full text see *Human Rights Ibid* at 3ff

23 Chapter X Articles 61-72

governmental organ of the UN. Its members are elected by the UN General Assembly. Its functions *inter alia* are:

> To make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all[24].

> It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence[25].

> It shall set up commissions in economic and social fields and for the promotion of human rights[26].

The UN Commission on Human Rights is one of the functional commissions set up in 1946 by ECOSOC. The work of the Commission since its inception, has been directed towards submitting proposals, recommendations and reports to ECOSOC regarding

> (a) an international bill of rights;
>
> (b) international conventions on civil liberties, and the status of women

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24 Article 62 (2) of the UN Charter

25 Article 62 (3) of the UN Charter

26 Article 68 of the UN Charter

(c) the protection of minorities;

(d) the prevention of discrimination on the grounds of race, sex, language or religion;

(e) any other matter concerning human rights[27].

The Members of the Commission sit as representatives of their governments. A Sub-Commission on the Prevention of Discrimination and Protection of Minorities has also been established. This Sub-Commission undertakes studies and makes recommendations to the Commission on matters relating to the prevention of discrimination of any kind in the field of human rights and the protection of racial, national, religious and linguistic minorities.

Under Resolution 1235 (XLII) of 6 June 1967 the Commission has power to consider complaints from any source about violations of human rights and to make a study of the situation if that information reveals a consistent pattern of violations of human rights.

Resolution 1503 (XLVIII) was adopted byECOSOC on 27 May 1970. It is of importance because it *inter alia* sets down the standards and criteria of communications:

1(a) The object of the communication must not be inconsistent with the relevant principles of the (UN) Charter, of the

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27 Economic and Social Council Resolutions 6 (1) of 16 February 1946 and 9 (11) of 21 June 1946.

> Universal Declaration of Human Rights and of the applicable instruments in the field of human rights.
>
> (b) Communications shall be admissible only if ... there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation ... in any country[28]

Communications may originate from persons or a group of persons who are victims. Anonymous communications will be inadmissible. The communication must contain a description of the facts and must indicate the rights that have been violated. A communication will be inadmissible if it is not submitted to the UN within a reasonable time after the exhaustion of the domestic remedies.

Article 16 (1) of the Covenant on Economic, Social and Cultural Rights places an obligation on State Parties to submit reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized in the Covenant. Articles 16 to 22 outline the procedure to be followed in the submission of these reports.

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28 Article 1 (a) and 1 (b) Sieghart *Ibid* at 426

CHAPTER 18

UNITED NATIONS ORGANS CONCERNED WITH THE PROTECTION OF HUMAN RIGHTS

UNITED NATIONS ORGANS CONCERNED WITH THE PROTECTION OF HUMAN RIGHTS

18.1. THE UNITED NATIONS SECRETARIAT

The UN Secretariat is an organ of the UN. It is made up of the Secretary-General and his staff. Their responsibilities are of an international nature and they cannot receive instructions from any government or any authority outside the ambit of the UN itself.

The Division of Human Rights is an organ within the UN Secretariat. It sits in Geneva, Switzerland. Its function is to assist in carrying out the UN Charter provisions in the field of human rights. It reports to the Secretary-General. The Division of Human Rights is divided into three departments, namely for:

(a) international conventions;

(b) research and studies; and

(c) advisory services and publications.

The Division of Human Rights has as one of its functions to provide secretariat services to all the UN organs concerned with human rights (for example ECOSOC, UN Human Rights Committee, UN Commission on Human Rights etc).

It carries out substantial research on human rights and collects and disseminates information and publications.

The Division, has no authority to create human rights conventions but there is no doubt that in practice its influence is very great, eg the first drafts of both the UN Covenants were prepared by the Division.

18.2. THE UNITED NATIONS SECURITY COUNCIL[29]

The UN Charter confers on the Security Council primary responsibility for the maintenance of international peace and security and to take appropriate measures for the maintenance of international peace and security. The Security Council has in recent years become extremely concerned with violations or denial of human rights and fundamental freedoms. It is not necessary here to give a list of the numerous resolutions either passed by the Security Council or vetoed by certain of its Permanent Members on violations of human rights in various parts of the world.

18.3. THE TRUSTEESHIP COUNCIL[30]

One of the basic objectives of the Trusteeship Council is to encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion and to encourage the recognition of the inter-dependence of the peoples of the world. The work of this Council thus involves important aspects and issues on human rights.

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29 UN Charter, Chapter V Articles 23-32

30 UN Charter, Chapter XIII Articles 86-91

18.4 THE INTERNATIONAL COURT OF JUSTICE (ICJ)

The ICJ[31] is the judicial organ of the United Nations. Every member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party. If any party to a case fails to perform its obligations in terms of a judgment handed down by the Court, the other party may have recourse to the Security Council which may decide upon measures to be taken to give effect to the judgement.

The General Assembly or the Security Council may request the Court to give an advisory opinion on any legal question. Other organs of the United Nations and specialized agencies, which may at any time be so authorised by the General Assembly, may also request the Court to give advisory opinions on legal questions arising within the scope of their activities.[32]

Fifteen judges, no two of whom may be nationals of the same State, constitute the ICJ. They are elected for a nine-year term of office. The headquarters of the ICJ is at The Hague.

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31 United Nations Charter XIV 92-96
See further *The United Nations and Human Rights*, Office of Public Information, United Nations, New York (1978) at 14.

32 For example in *The Reparations Case* ICJ Reports (1949) 174 one of the issues was whether the United Nations could claim reparation for injury to its agents which had been committed by nationals of a non-Member State. The Court answered this question in the affirmative.

A number of the United Nations human rights conventions (for example, Genocide Convention, Convention on Statelessness, *etc*), contain provisions according to which any dispute between the parties relating to the interpretation, application or fulfilment of such conventions may be submitted to the ICJ at the request of any of the parties to the dispute.

Since its creation in 1946, the Court has dealt with several contentious cases involving such human rights as the right to asylum, the rights of aliens, the rights of the child, and the continued existence of the South African mandate for South West Africa. In addition, it has handed down advisory opinions on such human rights questions as the effect of reservations to the Genocide Convention and the legal consequences for States of the continued presence of South Africa in Namibia.[33]

18.5 OFFICE OF THE UNITED NATIONS HIGH COMMISSION FOR REFUGEES

This Office was established by the General Assembly on 1 January 1951. It is entrusted with the function of providing international protection for refugees by:

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33 *The United Nations and Human Rights Ibid* 14 For example. *Nottebohm Case* ICJ Reports (1953) 122 *South West Africa Cases (Second Phase)* ICJ Reports 1966 *The Legal Consequences of the Continued Presence of South Africa in Namibia* ICJ Reports (1971) 16.

(i) promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application, and proposing amendments thereto;

(ii) promoting, through special agreements with governments, the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;

(iii) assisting governmental or private efforts to promote voluntary repatriation or assimilation within new national communities;

(iv) promoting the admission of refugees to the territories of States;

(v) endeavouring to obtain permission for refugees to transfer their assets;

(vi) obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;

(vii) keeping in close touch with the Governments and inter-governmental organisations concerned;

(viii) establishing contact with private organisations dealing with refugee questions; and

(ix) facilitating the co-ordination of the efforts of private organisations concerned with the welfare of refugees.[34]

The High Commissioner follows policy directives from the General Assembly or the Economic and Social Council. He reports annually to the Assembly through the Council. He is entitled to present his views to the Assembly, the Council and their subsidiary bodies. The Office of the High Commissioner is located in Geneva.[35]

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34 *The United Nations and Human Rights. Ibid* 13-14

35 *The United Nations and Human Rights. Ibid* 14

CHAPTER 19

UNITED NATIONS SPECILIZED AGENCIES CONCERNED WITH HUMAN RIGHTS

19. UNITED NATIONS SPECIALIZED AGENCIES CONCERNED WITH HUMAN RIGHTS

19.1. INTERNATIONAL LABOUR ORGANISATION (ILO)[36]

The main concern of the ILO has been the formulation of international labour standards and efforts to render these standards as fully effective as possible.

The ILO has its office in Geneva, Switzerland. It was founded in 1919 by the Treaty of Versailles. Its main concern is social and employment justice - Most of its organs are composed of members of governments, employers and employees. It has sponsored many international conventions and declarations.

In terms of Article 22 of the ILO Constitution each of its Member States is obliged to report on all the measures it has taken to give effect to the Conventions of which it is a Party.

Under Article 24 if any representation is made to the ILO Office by an association of employers or employees that any of the Members has failed to observe any Convention to which it is a Party, the ILO may invite that government to make a statement on the issue.

According to Article 26 any Member shall have the right to file a complaint with the ILO Office if it feels that another Member is not observing

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36 For the Constitution of the ILO see Brownlie *Basic Documents in International Law* at 45ff

any Convention which both have ratified.

In addition to operating its own procedures in regard to its own Conventions the ILO may also take part in the supervision procedures for both the Covenant on Economic, Social and Cultural Rights (Article 18) and the European Social Charter (Article 26)

19.2. UN EDUCATIONAL,SCIENTIFIC AND CULTURAL ORGANISATION (UNESCO)

The purpose of UNESCO is to contribute to peace and security by promoting collaboration among nations through education, science and culture in order to further universal respect for justice, the rule of law and for human rights and fundamental freedoms[37].

Its main concern in the field of human rights is the right to education and freedom of opinion and expression.

The UNESCO Committee is competent to consider communications from any source and directed against a State. The violation must be of a human right falling within UNESCO's competence in fields of education, science, culture and information.

19.3. WORLD HEALTH ORGANISATION (WHO)

The Preamble to the WHO Constitution declares that the enjoyment of the highest attainable standard of health is one of the fundamental rights

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37 UNESCO Constitution Article 1.

of every human being and that governments have a responsibility for the health of their people which can be fulfilled only by the provision of adequate health and social measures.[38]

WHO serves as the co-ordinating authority on international health work. It maintains certain necessary international health services, promotes and conducts research in the field of health, and works to improve standards of teaching in the health, medical and related professions.[39]

In many countries projects supported by WHO promote the development of health services, the control of infectious diseases, the management of chronic and degenerative diseases and rehabilitation, the promotion of family health and nutrition, and the improvement of envrionmental health. WHO also assists countries in promoting maternal and child health and welfare, and in developing an informed public opinion on matters of health.[40]

19.4 FOOD AND AGRICULTURE ORGANISATION (FAO)

One of the basic purposes of the FAO as set out in the Preamble of its Constitution is to contribute towards an expanding world economy and ensuring humanity's freedom from hunger. FAO is mainly concerned with raising levels of nutrition and standards of living, securing improvements in the efficiency of the production and distribution of

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38 *The United Nations and Human Rights Ibid* 17

39 *op cit*

40 *op cit*

food and agricultural products and thus contributing towards an expanding world economy. Its activities are designed to help solve one of the fundamental problems of mankind, namely, the maintenance of the balance between the world's food supply and its population. Perhaps the right to be free from hunger can be regarded as a vital human right.[41]

19.5 CONCLUSION

There is no doubt that all the United Nations' specialised agencies do play a role in the promotion and/or protection of human rights. Some of these United Nations organs can survive independently of the United Nations itself, and in fact, would continue to function effectively should the political organs of the United Nations themselves collapse or become defunct.

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41 *Ibid*

PART V

SPECIFIC RIGHTS AND FREEDOMS IN THE BOPHUTHATSWANA BILL OF RIGHTS : A COMPARATIVE ANALYSIS FROM AN INTERNATIONAL LAW PERSPECTIVE

CHAPTER 20

THE RIGHT TO LIFE (ARTICLE 10)

The use of abortion to help solve economic and subsistence problems resulting from the population explosion would be a manifest and grave violation of human rights

-Inter-American Commission on Human Rights (AR 1971 33) - referred to in Sieghart, P *The International Law of Human Rights*

20.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 10(1))

Everyone's right of life shall be protected by law ...

FEDERAL REPUBLIC OF GERMANY - BASIC LAW (Article 2(2))

Everyone shall have the right to life and to inviolability of his person ...

INDIA - FUNDAMENTAL RIGHTS (Article 21)

No person shall be deprived of his life or personal liberty, save in execution of the sentence of a court ...

NIGERIA - CONSTITUTION (1963) (Article 18 (11))

No person shall be deprived intentionally of his life

UNIVERSAL DECLARATION (Article 3)

Everyone has the right to life ...

AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN (Article 1)

Every human being has the right to life

CIVIL AND POLITICAL RIGHTS COVENANT (Article 6(1))

Every human being has the inherent right to life ...

EUROPEAN CONVENTION (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 court ...

AMERICAN CONVENTION ON HUMAN RIGHTS (Article 4(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.

AFRICAN CHARTER (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.

20.2. THE FUNDAMENTAL RIGHT TO LIFE

From which point is "life" protected. This important question is not answered in *any* of the texts above except the American Convention. Most of the texts just say "everyone". But we are left with no

assistance on the question raised above. Another unanswered question is to what extent would abortion (termination of life) and sterilisation (preventing conception) be tantamount to interference with life in contravention of the above texts?

It is noteworthy that the American Convention, to a certain extent defines "life" as "from the moment of conception."[1] Since, according to

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1 The right to life is extended to the protection of the *foetus* as well. This Article in the American Convention indicates that from the time of conception the *foetus* has the right to life. It follows therefore that its rights must also be protected during pregnancy. But Cf *Christian League of Southern Africa v Rall* 1981(2) SA 821 (O)

See generally *Ex parte Blomerus* 1936 CPD 368
Ex parte Wessels 1942 CPD 356
Ex parte Lombard 1940 TPD 228
Ex parte Odendaal 1928 OPD 218
Ex parte Sadie 1940 AD 29
Ex parte Simpson 1953 (1) S A 565 (A)
Chisholm v East Rand Proprietary Mines Ltd 1909TH297
Pinchin NO v Santam Insurance Co Ltd 1963(2) SA 254W

See further

Barnard A H and Cronjé DSP - P J J Olivier *The South African Law of Persons and Family Law* 2nd Ed Butterworth (Durban) 1980

the European Convention, only victims may bring an application before the Commission, it would appear that the right to life, at its inception, would be difficult to protect.[2] In *X v Norway (1960)*[3] the applicant requested the European Commission to declare that a Norwegian statute permitting abortion was contrary to the terms and spirit of the European Convention. However, the Commission had to reject the application because the applicant was neither a parent nor a victim in terms of Article 25 of the Convention. In 1961[4] an applicant brought an action

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Boberg P Q R *The Law of Persons and the Family* Juta & Company Ltd 1980

Isaacs I and Horwitz M *The South African Law of Testate Succession* Butterworths (Durban) 1979 at 8-9

Hosten W J *et al: Introduction to South African Law and Legal Theory* Butterworths 1977 Revised Reprint 1983 at 281 ff

Lasok D *The Rights of the Unborn* in Bridge JW *et al: Fundamental Rights* at 18ff Sweet and Maxwell (London) 1973

2 See *Pinchin's case and other cases* cited at footnote 1 *supra*

3 *X v Norway* (1960) 867/60 CD6,34 Yearbook 4 at 270

4 *X v Denmark* (1961) 1287/61 European Commission.
See also *In Re D* 1976(1) ALLER 326 where it was held that a sterilization operation constituted the violation of a basic human right, namely the right of a woman to reproduce.

against Denmark alleging that his wife had been sterilised without his consent. The Commission held that in certain instances sterilisation may constitute a breach of Article 2. In this particular application the Commission found that the sterilisation had been performed for medical reasons only and with the consent of the wife. The Commission decided that the application was manifestly ill-founded.

In the 1975 decision of *Brüggeman and Scheuten v Federal Rep of Germany*[5] the Commission decided that a German statute which prohibited abortion merely because the woman did not want to have a baby was not contrary to the Convention.

In *X v United Kingdom* (1978)[6] the Commission felt that the word "everyone" should not be stretched to apply to the *foetus*. The Commission felt that even if one had to ordain that from the moment of conception a *foetus* had the right to life, this must be subject to the limitation allowing abortion in instances where the mother's life or health was in danger. In this regard the New Zealand Appeal Court held in *R V Woolnough*[7]

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5 (1975) 6959/75 DR10

6 (1978) 8416/78 DR 19,244

7 1977 (2) NZ LR508 referred to in Sieghart *supra* at 132

that an induced miscarriage does not violate the right to life if it is done to preserve the health of the mother.

One other right is not referred to in any of the texts referred to at the beginning of this chapter, namely, the right to terminate one's life by suicide or euthanasia. Whether euthanasia could be regarded as the arbitrary deprivation of life has not yet been decided by the Commission or the Court. A related question is whether consent of a person may be sufficient to authorize what would otherwise be unlawful. Mercy killing, that is, when an incurably ill patient is deprived of his life gives rise to the question whether the turning off of the life support systems would constitute a violation of the "right to life". The celebrated American case of *Karen Quinlan* does afford us some guidelines. In this case Karen's family wanted her life support systems switched off because doctors found that without these machines she was unable to live. This clearly points in the direction that the right to life should be independently exercised by each person in the sense that we should be able to maintain and regulate our body functions on our own.[8]

This basic human right is clearly worded in these instruments. All these instruments indicate that *everyone* has the right to life and we must therefore include in this context those who are terminally ill. It doesn't

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8 See also *S v Hartman* 1975(3) SA(C) 532. Where the accused, a doctor, had killed his terminally ill father. He was sentenced to one year imprisonment, to be detained until the rising of the Court, and the balance of the sentence to be suspended for one year. Also see *S v Bellocq* 1975(3) SA(T) where accused murdered her new born infant because the baby was an idiot.

matter how serious the patient may be - even comatose - the fact is that such person has an "inherent" (Civil and Political Rights Covenant Article 6(1)) right to life.

In certain decisions the European Commission has formulated the extent to which the above Articles (all of which reflect the same notion) could protect the right to life. In a 1973 decision[9] the European Commission came to the conclusion that Article 2 cannot be interpreted as imposing a duty on a State to give protection by providing personal bodyguards, at least not for an indefinite period of time.[10]

The Inter American Commission on Human Rights has stated that where individuals have disappeared by the government concerned refuses to provide any information about them, it is legitimate to presume that the inherent right to life has been violated, and that agents of the government, or individuals protected or tolerated by it have not been involved in the

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9 *X v Ireland* (1973) 6046/73 CD44,121

10 Nedjati, ZM *Human Rights under the European Convention* North Holland Publishing Company (1978) at 62.

See further *X v United Kingdom* (1969) 4 203/69 CD34, 48 and *Association X v United Kingdom* (1975) 7154/75 DR 14,31 where the Commission pointed out that the expression "shall be protected by law" imposes a duty on the State not only to refrain from taking life intentionally but in addition to take appropriate steps to safeguard life (referred to in Sieghart *supra* at 133)

violation.[11]

In conclusion it must be pointed out that the right to life is not an absolute right. Sieghart suggests that:

> (a)s human rights can only attach to living human beings, one might expect the right to life itself to be in some sense primary, since none of the other rights would have any value or utility without it. But the international instruments do not in fact accord it any formal primacy: on the contrary, [the Civil and Political Rights Covenant, European Convention and American Convention] all contain qualifications rendering the right less than absolute, and allowing human life to be deliberately terminated in certain specified cases. [The African Charter] too prohibits only the 'arbitrary' deprivation of the right to respect for life.
>
> The right to life thus stands in marked contrast to some of the other rights protected by the same instruments: for example, the freedom from torture ... and the freedom from slavery and servitude are both absolute, and subject to no exceptions of any kind. It may therefore be said that international human rights law assigns a higher value to the quality of living as a process, than to the existence of life as a state. This reflects a similar apparent anomaly found in many national legal systems, which award higher measures of compensation for the suffering of pain or long term debilitating injuries (eg as the result of some avoidable accident) than for death caused in similar circumstances.[12]

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[11] *Cases 1702, 1748 and 1755 (Guatemala)* AR 1975, 67 referred to in Sieghart *supra* at 133-134

[12] *supra* at 130

CHAPTER 21

THE RIGHT TO HUMANE TREATMENT (ARTICLE 11)

There are certain inherent difficulties in the proof of allegations of torture or ill-treatment.

First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family.

Secondly, acts of torture or ill-treatment ... would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority.

Thirdly, where allegations of torture or ill-treatment are made, the authorities must inevitably feel that they have a collective reputation to defend ... In consequence there may be reluctance of higher authority to admit or allow inquiries to be made into facts which show that the allegations are true.

Lastly, traces of torture or ill-treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torture itself leaves few external marks.

per *Journal of Universal Human Rights*
Vol 1, No 4 1979 at p 42

21.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 11)

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

EUROPEAN CONVENTION (Article 3)

No one shall be subjected to torture or to inhuman or degrading teatment or punishment.

UNIVERSAL DECLARATION (Article 5)

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

AMERICAN DECLARATION (Articles 25-26)

Every individual ... deprived of his liberty has the right ... to humane treatment.

Every person accused of an offence has the right ... not to receive cruel, infamous or unusual punishment.

CIVIL AND POLITICAL RIGHTS 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.

AMERICAN CONVENTION (Article 5(2))

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

AFRICAN CHARTER (Article 5)

All forms of exploitation and degradation of man, particularly torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

SRI LANKA CONSTITUTION (Article 11)

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

NIGERIA CONSTITUTION (Article 19)

No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

21.2. TORTURE, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT

The obligation on the part of the State is absolute, non-derogable and unqualified.[13] If the State fails to comply with its obligation in regard

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13 *Ireland v United Kingdom* 5310/71 Report of 25 January 1976

to this right it cannot refer to any ground of justification as the reason for violating this right.

One might think that *prima facie* it is really obvious what is meant by torture or inhuman treatment. But when one gets down to the level of actually trying to apply these terms to actual situations it becomes more difficult than appears at first sight.

In the European Commission it has been suggested (certainly in its earlier decisions) that the concept of inhuman treatment as set out both in the European Convention and in the Universal Declaration, was a reflection of the experiences in World War II and that it meant treatment which was inhuman in the sense that it was totally abnormal and beyond any ordinary human practice, for example, the executions in the Nazi gas chambers.[14]

Later it was decided that this definition was too restricted and it was extended to cover "deliberate inhuman treatment causing very serious and cruel suffering".[15] To paraphrase - inhuman treatment is any severe pain or suffering, either physical or mental, imposed deliberately or unnecessarily and torture is an aggravated form of inhuman treatment for some specific purpose, most commonly being the extraction of information.

On 9 December 1975 the UN General Assembly[16] adopted the Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[17] The Preamble states *inter*

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14 See, for example *Denmark, Norway, Sweden and the Netherlands v Greece* 1967 3321 - 3/67 and 3344/67

15 See, for example *Ireland v United Kingdom* (1971) 5310/71

alia that in drafting this Declaration the Members of the UN took cognisance of "Article 5 of the Universal Declaration" of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment and, further that this Declaration is a guideline for all States and other entities exercising effective power.

Article 1 provides us with a good working definition of torture

> Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the *Standard Minimum Rules for the Treatment of Prisoners*.

Report of 25 January 1976

16 This *Declaration* was adopted in terms of Resolution 3452 (XXX) on 9 December 1975

17 For the full text see *Human Rights: A Compilation of International Instruments*, United Nations New York 1983 at 82.

Article 1 (2) indicates that

> Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Article 3 indicates that the prohibition against torture is absolute and that States cannot derogate from this provision. Exceptional Circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

The Convention on the Elimination of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[18] defines torture in the following terms:

> Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or

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18 This definition is not from the final form of the Convention itself. It is from a Working Group Report of 6 March 1981 on the Draft of the Convention (referred to in Sieghart *supra* at 162

> suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Both the Declaration and the Convention indicate that one of the motives for torture is the extraction of information. Here it is submitted that a grave problem lies in the enforcement of this kind of prohibition. It is the whole area of ill-treatment of prisoners or detainees for the purpose of obtaining information. The interrogation of persons who are political detainees or criminally charged or convicted or prisoners of war should not result in torture. Ill-treatment resulting from interrogation is certainly widespread.

In *Denmark et al v Greece*[19] it was stated that the following amount to torture: beating the feet thereby causing swelling and pain but leaving no permanent marks; electric shock; pulling out of hair; intense noise to prevent sleep; being hung upside down for lengthy periods; burning with cigarettes, *etc.*

The European Commission in this case went even further and said that acts that intimidate and humiliate with the intention to deprive an individual of his will and conscience constitute torture, for example, solitary confinement; detention without food or water; the use of insulting and rude

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19 *supra*

language; being coerced to attend the torture of others, absence of heating in winter; lack of hot water; restriction and infringement of personal correspondence.

The Inter American Commission has decided that where individuals are in detention and the government concerned denies this fact then this constitutes torture for the victims' family and friends because of the uncertainty they experience about the fact of the victim and also because they are unable to provide legal, moral or other assistance.[20]

A problem arises with regard to security forces who may be operating under circumstances similar to war and they urgently need information. Endeavours to protect detainees in this type of situation would depend a great deal on the problem of proof. Of course, the difficulty here is that by the very nature of the situation, there is an absence or at least an insurmountable difficulty in securing corroborative evidence. These are factors which do not normally arise in the investigation of ordinary crime, and create great obstacles for any international body attempting to investigate allegations of torture or ill-treatment. The problem of proof must be tackled in a way that is both workable and also will stand the test of criticism including that by the government authority concerned. In trying to enforce this prohibition a strict standard of proof must be applied. A watchdog body set up in terms of this prohibition will achieve very little if it can do no better, or if it can maintain no better standards of enquiry, than other people whose means of investigation may be limited in various ways. A journalist may visit

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20 Sieghart *supra* at 165 and Inter American Commission Report AR197726

a country and do his best to check evidence of alleged violations of this prohibition, and indeed he may succeed and his report may be perfectly good, but he may be subject to limitations under which he cannot be expected to maintain the standards of proof required by these instruments. Similarly when Members of Parliament or other government officials visit a country and declare, after talking to a few selected people, that allegations of torture or ill-treatment are entirely unfounded - this is not a proper method of enquiry. Any watchdog body established to oversee this prohibition will only achieve useful and positive results if it applies standards of proof that are beyond reasonable doubt.[21] In *Ireland v United Kingdom*[22] the European Court held that the standard of proof should be beyond reasonable doubt.

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21 Fawcett JES (Prof) seminar delivered at University of London November 1979.

See further *Denmark et al v Greece supra* where the European Commission found that there are inherent difficulties in the proof of allegations of violations of this prohibition.

"First a victim or a witness able to corroborate his story might hesitate ... for fear of reprisals upon himself or his family. Secondly acts of torture by agents of the police ... would be carried out ... without witnesses ...

Lastly physical traces of torture or ill-treatment may ... become unrecognisable ... where the form of torture itself leaves little external marks.

22 *supra*

It is interesting to note that in *Tyrer v United Kingdom*[23] the European Commission came to the conclusion that corporal punishment as imposed by a court is an assault on human dignity and which has no redeeming social value. The European Court confirmed the Commission's report and held that such punishment constituted degrading punishment. It would not be a futile exercise if any person in Bophuthatswana convicted of an offence and sentenced to corporal punishment by a court would challenge the legality of that sentence on the basis that it constitutes torture (Article 11 of the Bill of Rights). This would certainly be a test case and it would be interesting to see if the Bophuthatswana Supreme Court or the Appellate Division would rule that corporal punishment is a violation of Article 11. The Bophuthatswana Bill of Rights is very closely modelled on the European Convention and it is submitted that decisions of the European Commission or Court would have tremendous persuasive authority in Bophuthatswana.

German Federal Courts have held that to deprive a person of his or her civic rights constitutes degrading punishment[24]. This point is mentioned in relation to Sri Lanka which has a prohibition against torture and degrading punishment (Article 11). In 1977 Jayewardene's United National Party (UNP) won the general election in Sri Lanka by a landslide victory.

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23 14 December 1976 European Commission Report

24 Two decisions referred to in Sieghart are *A G Berlin - Tiergaten* (4 October 1967) NJW 1968,61 and *O L G Köln* (10 June 1963) N J W 1963, 1748

Shortly thereafter a government commission was set up to probe irregularities in the previous government of Mrs. Dandaranaike. Mrs. Bandaranaike was found guilty of abusing power during her tenure of government and she was deprived of her seat in Parliament. She was also deprived of her civic rights for six years.

It is not difficult to see the reasons why the German Courts and the Sri Lanka commission came to totally different pronouncements. It is clear that in charging former government officials politics plays a major part. It is submitted that in depriving Mrs. Bandaranaike of her civic rights the incumbent government has in effect removed all opposition to its regime for the period of the deprivation of the civic rights.

A more recent case on degrading treatment or punishment, perhaps because it is so bizarre in its conception, is worthy of note, namely the attempted kidnapping of Dr. Umaru Dikko, a high-ranking Nigerian government minister. The victim was drugged very heavily, put into a specially constructed crate and was in the process of being loaded onto a Nigerian Airways Airline bound for Lagos when British Police, action on suspicions, opened the crate and rescued the victim. The Nigerian Government, as expected, denied any complicity in the matter. Surely this must be the most vile and brutal form of torture or degrading punishment to come to light in recent times?[25]

The UN Human Rights Committee came to the conclusion in *Ambrosini et al*

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25 The mass media carried extensive news coverage of this unfortunate incident. The source used here is the *Sunday Times* 8 July 1984

v Uruguay[26] that detention in conditions which resulted in a prisoner's ill-health is a violation of the UN Covenant prohibition on torture (Article 7) The Human Rights Committee came to the same conclusion in *Carballal v Uruguay*[27] where a prisoner was kept blindfolded for several months.[28]

Ill-treatment in interrogation would seem to be inevitable but certainly not justified. It would be a catastrophe to attempt to formulate any rule in terms of which torture (or its variants) would be condoned. The prohibition against torture is (and must continue to remain) absolute. As soon as we attempt to formulate a permissive rule, we would fall below a certain threshold and practice could get out of control. Rather it is submitted that the prohibition contained in the Bophuthatswana Bill of Rights, the European Convention and the UN Covenant should be strengthened by encouraging States to "keep under systematic review" interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of"torture or other cruel inhuman or degrading treatment or punishment"[29].

Article 7(1) of the Covenant on Civil and Political Rights also indicates that "no one shall be subjected without his free consent to medical or scientific experimentation". This provision is not found in the Bophuthatswana

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26 UN Human Rights Committee (Report 1/5 -34,124)

27 UN Human Rights Committee (Report 8/33 -36,125)

28 Both cases referred to in Sieghart *supra* at 171-172

29 Article 6 of the UN General Assembly Declaration on Torture *supra*

Bill of Rights or in the European Convention.

The question arises whether it is legitimate that people should consent to their own ill-treatment.[30] The issue of *volenti non fit injuria* would arise. In this context we must take note of UN General Assembly Resolution 37/194(18 December 1982) in terms of which an important instrument was adopted, namely *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.*[31]

Principle 1 lays down the basic rule that prisoners and detainees should be given the same standard of medical care as those who are not imprisoned or detained.

Principle 2 states that medical and other health personnel should not engage in or be party to any act which constitutes torture or other cruel, inhuman or degrading treatment or punishment.

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30 Literally "He who is willing cannot be injured"

See generally: McKerron R G *The Law of Delict* (7th Edition) Juta & Co. (1971)

Hosten W J *et al: Introduction to South African Law and Legal Theory* Butterworths 1983

31 For the full text see United Nations: A *Compilation of International instruments supra* at 86ff

The omission of this provision in the Bophuthatswana Bill of Rights does not detract from the supreme efficacy of this instrument. It is submitted that medical violations against prisoners or detainees can be brought within the general ambit of Article 11 of the Bill of Rights, and that it is therefore not necessary to have a separate sub-Article on this aspect of torture.

CHAPTER 22

THE RIGHT TO BE FREE FROM SLAVERY, SERVITUDE AND FORCED LABOUR (ARTICLE 12 (1))

22.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 12(1)-12(2))

12(1): No one shall be held in slavery or servitude.

12(2): No one shall be required to perform forced or compulsory labour provided that this shall not include -

(a) any work required to be done in the ordinary course of detention ..... or during conditional release from such detention,

(b) any service of a military character in terms of a law requiring citizens to undergo military training,

(c) any service exacted in case of an emergency or calamity threatening the existence or well-being of Bophuthatswana,

(d) any work or service which forms part of normal civil obligations.

EUROPEAN CONVENTION (Article 4)

This is identical to the above provision in the Bophuthatswana Bill of Rights except that in addition it also makes provision for conscientious objectors in countries where they are recognized - that some service must be exacted instead of compulsory military service.

COVENANT ON CIVIL AND POLITICAL RIGHTS (Article 8)

This Article is similar to Article 4 of the European Convention.

THE AMERICAN CONVENTION (Article 6)

The prohibition against slavery, servitude and forced labour in this Convention is similar to the provision in both the European Convention and the Civil and Political Rights Covenant but in addition it also prohibits "traffic in women".

THE UNIVERSAL DECLARATION (Article 4)

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

AMERICAN DECLARATION (Article 34)

It is the duty of every able-bodied person to render whatever civil and military service his country may require for its defence and preservation, and, in case of public disaster, to render such services as maybe in his power.

THE AFRICAN CHARTER (Article 5)

All forms of exploitation and degradation of man particularly slavery, slave trade ... shall be prohibited.

UNITED STATES CONSTITUTION (Article 13)

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

NIGERIA CONSTITUTION (1963) (Article 20)

Article 20 is identical to the provision in the European Convention, Civil and Political Rights Covenant and the American Convention.

22.2. SLAVERY, SERVITUDE AND FORCED LABOUR

The prohibition in these instruments is absolute and there is no derogation permitted.

None of the above instruments defines the terms "slavery, servitude and forced labour". The Slavery Convention[32] (1926), however, provides us with a definition. Article 1(1) declares that "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."

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32 Signed in Geneva on 25 September 1926; entered into force on 9 March 1927 in accordance with Article 12. For the full text see United Nations *Human Rights. A Compilation of International Instruments*.

The slave trade is defined as "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery ... and, in general, every act of trade or transport in slaves." Article 5 places a duty on Member States "to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery."

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery[33] makes it obligatory on States Parties to "take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices" which are analogous to slavery:[34]

> (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services ... as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
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> (b) Serfdom, that is to say, the condition or status of a

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33 Adopted by ECOSOC Resolution 608(XXI) of 30 April 1956 and signed in Geneva on 7 September 1956. Entered into force on 30 April 1957 in accordance with Article 13.
For the full text see *Human Rights*, *supra* at 62ff

34 Article 1

tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents ...;

(ii) The husband of a woman, his family or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(iv) Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

A definition of "forced or compulsory labour" is contained in the Forced

Labour Convention (ILO 29)[35]. Article 2(1) provides that the expression "forced or compulsory labour" shall mean "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".

The ILO Abolition of Forced Labour Convention (105)[36] lays down that Member States must undertake "to suppress and not to make use of any form of forced or compulsory labour" for the following purposes[37]:

(a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;

(b) As a method of mobilising and using labour for purposes of economic development;

(c) As a means of labour discipline;

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35 This an ILO convention. It is number 29 in the ILO series. It was adopted on 28 June 1930 at the 14th session of the ILO Conference.
For the full text see *Human Rights, supra* at 65 ff

36 This is number 105 in the ILO series and was adopted by the ILO General Conference at its 40th session on 25 June 1957.

37 Article 1

(d) As a punishment for having participated in strikes;

(e) As a means of racial, social, national or religious discrimination.

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[38] declares that "prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community."[39] Article 1 provides that Member States "agree to punish any person who, to gratify the passions of another:

(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

(2) Exploits the prostitution of another person, even with the consent of that person."

Article 2 provides that Member States "further agree to punish any person who:

(1) Keeps or manages, or knowingly finances or takes part

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38 Approved by UN General Assembly Resolution 317(IV) of 2 December 1949. Entered into force on 25 July 1951 in accordance with Article 24.

39 Preamble.

in the financing of a brothel;

(2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others."

In *W, X, Y & Z v United Kingdom*[40] the applicants, who at the ages of 15 and 16 had joined the military service, stated that they were later refused discharge and alleged that they had been held in servitude. The European Commission decided that "servitude" is different from "forced or compulsory labour." The Commission found that the allegations of "servitude" were manifestly ill-founded because the minors had originally obtained parental consent.

In a subsequent case it was decided by the Commission that to be sentenced to compulsory work following a conviction in a criminal trial does not amount to servitude.[41]

"On the other hand, the High Court of Kenya has held that, where conditions are such that a husband can enforce compliance by his wife with his physical demands without exposing himself to a criminal charge, a court order for restitution of conjugal rights would subject the wife to the effective dominion of the husband to an extent which constitutes servitude within the meaning of the constitution of Kenya".[42]

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40 Application Numbers 3435 to 3438/1967 Yearbook 2 at 562 or CD28,109

41 *Van Droogenbroek v Belgium* 1977(7906). Report of 9 July 1980

42 Sieghart *supra* at 230 and *Republic of Kenya v Khadi, Kisumu, ex parte Nasreen* (1973) EA 153 (referred to in Sieghart at 230).

Professor Fawcett is of the view that the margin between free and compulsory labour is narrow.[43] According to *X v Federal Republic of Germany*[44] the term "forced or compulsory labour" cannot be fully understood merely by giving it a literal meaning. The European Commission decided that one must have regard to two factors: firstly that the work is performed against the complainant's will; and secondly that the work entails unavoidable hardship to the complainant.

The more important cases on the question of"forced or compulsory labour" that have come before the European Commission are *Iversen v Norway*[45] and *X v Federal Republic of Germany*[46] and *Gussenbauer v Austria*.[47]

In *Iversen v Norway*[48] the applicant, a dentist, complained that a law which required him to practise his profession in a remote part

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43 Fawcett JES (Prof) seminar at University of London February 1980

44 Application Number 4653/70 (CD46,22)

45 Application Number 1468/62; Yearbook 2 at 278 or CD12,80

46 *supra*

47 Application Numbers 4897/71 and 5219/71 CD 42 at 41 and 94 respectively.

48 *supra*

(actually *Moskes in Nordland*) of Norway constituted forced labour within the ambit of Article 4(2) of the European Convention. The Commission held that under the provisions of the Norwegian Act of June 1950 this did not constitute forced labour. The Commission pointed out that the job was neither unjust nor oppressive and it did not entail any unavoidable hardship on the applicant. The Commission also noted that a limited amount of intervention by the State in certain professions is legitimate because it is in the interests of the community as a whole.

In *X v Federal Republic of Germany*[49] the European Commission was faced with the complaint of an advocate who had been appointed by a court to represent a defendant in a legal aid divorce suit. The Commission pointed out that the applicant had freely chosen his profession and that under German law advocates have an obligation to represent clients with limited financial resources if so appointed by a court. There was no unavoidable hardship involved because the brief in question (ie divorce) was part of an advocate's professional work and also there was no financial loss. The Commission found that Article 4(2) of the European Convention had not been violated.

In *Gussenbauer v Austria*[50] the applicant in both his applications to the European Convention alleged that the obligation to act as legal aid counsel under the Austrian legal system constituted forced labour and was therefore a violation of Article 4(2) of the European Convention. The applicant had been appointed by the Vienna Regional Court to represent

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49 *supra*

50 *supra*

(on legal aid) a person accused of theft. Under the Austrian legal system no fee was payable for legal aid work and nor was there any reimbursement for any necessary clerical expenses incurred. The European Commission made available its good offices to the parties to try to reach a friendly settlement and in October 1974 the Commission in its Report approved the settlement that had been reached between the parties. The Austria Government agreed to pay Gussenbauer his expenses in the application before the Commission and in addition gave an undertaking that legal aid cases would be equally distributed.

There are two notable differences in relation to "forced or compulsory labour between the Civil and Political Rights Covenant on the one hand and the Bophuthatswana Bill of Rights and the European Convention on the other hand. Firstly the UN Covenant states hard labour imposed as a punishment for a crime does not constitute "forced or compulsory labour". Such a provision is not found in the latter two instruments.

Secondly, the term "forced or compulsory labour" does not include the work normally done by persons who are detained or conditionally released from prison. The UN Covenant declares that this would apply to a person who is under detention "in consequence of a lawful order of court" or to a person during conditional release from such detention. However, the European Convention relates it to a person under "detention imposed according to the provisions of Article 5 of the Convention," and the Bophuthatswana Bill of Rights relates it to Article 12(3). Both Article 5 of the European Convention and Article 12(3) of the Bophuthatswana Bill

of Rights permit detention of certain persons *without an order of court*, for example, the detention of minors; detention of persons for the prevention of the spreading of infectious diseases.

The prohibition against "forced or compulsory labour" does not include any service of a military character, or as in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service.

The conscientious objection clause is not found in the Bophuthatswana Bill of Rights. Nevertheless, it is not futile to consider this provision under the European Convention. By including the words "in countries where they are recognised," the State Party to the European Convention has a choice whether or not to recognise conscientious objectors and if so whether or not to prescribe substitute service.

In *Grandrath v Federal Republic of Germany*[51] the Commission and the Court had to decide whether substitute service under the Substitute Civilian Service Act (1960) of the Federal Republic of Germany, instead of military service, constituted forced labour.

The applicant, an adherent of the Jehovah's Witness cult refused to undertake substitute service. The Commission concluded that conscientious objection to military service by a person does not entitle him to claim exemption

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51 1964(2299/64) Report 12 December 1966; Strasbourg 1967, paragraph 40

from substituted civilian service.[52]

Finally it must be noted that two members of the majority of *Iversen v Norway*[53] were of the view that the obligation imposed on the dentist fell within the ambit of Article 4(3) of theConvention (Article 12(2)(c) of the Bophuthatswana Bill of Rights) namely, that the obligation imposed on him was a service reasonably required of him in an emergency or calamity threatening the life or well-being of the community.

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52 See further on this case: Chapter on Freedom of Religion *infra*

53 *supra*

CHAPTER 23

THE RIGHT TO LIBERTY AND SECURITY OF PERSON (ARTICLE 12 (3) AND 12 (4))

The right to liberty is "one of the cherished possessions of our society".

Mpanza v The Minister of Native Affairs 1946 WLD at 229

23.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 12(3)(a)-(f))

Everyone has the right to liberty and security of person and 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 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, provided that such a person shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within reasonable time or to release pending trial, and that release may be conditioned by guarantees to appear for trial;

(c) 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;

(d) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound

mind, alchoholics or drug addicts, or vagrants;

(e) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into Bophuthatswana or of any person against whom action is being taken with a view to deportation or extradition.

EUROPEAN CONVENTION (Articles 5(1) and 5(3))

The provision here is similar to the provision in the Bophuthatswana Bill of Rights.

UNIVERSAL DECLARATION (Article 3)

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

AMERICAN DECLARATION (Article 1)

Every human being has the right to .....liberty and security of person.

AMERICAN CONVENTION (Article 7)

Every person has the right to personal liberty and security.

AFRICAN CHARTER (ARTICLE 6)

Every individual shall have the right to liberty and to security of person ...

EUROPEAN CONVENTION FOURTH PROTOCOL (Article 1)

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

COVENANT ON CIVIL AND POLITICAL RIGHTS (Article 9)

Everyone has the right to liberty and security of person.

SRI LANKA CONSTITUTION (Article 13)

No person shall be accused, arrested or imprisoned, save in the cases determined by law, and according to the forms which it has prescribed.

UNITED STATES BILL OF RIGHTS (Article 4 and Fifth Amendment)

The rights of the people to be secure in their persons ... shall not be violated. No person shall be deprived of ... liberty ... without due process of law.

INDIA CONSTITUTION (Article 21)

No person shall be deprived of his ... personal liberty except according to procedure established by law.

EGYPT CONSTITUTION (1964) (Article 27)

No person may be arrested or detailed except in conformity with the provisions of the law.

NIGERIA CONSTITUTION (1963) (Article 21)

No person shall be deprived of his personal liberty ...

23.2. MEANING OF 'LIBERTY AND SECURITY' (Article 12(3))

The right to liberty and security is recognised as a major right in almost all the instruments listed above. In *Patel and Others v United Kingdom*[54] the question arose whether the term "security of person" should be restricted to the concept of physical security or whether it should be given a wider meaning so as to protect persons from arbitrary action on the part of the authorities that might disturb their daily life. The Commission restricted "security" to "physical security", that is, freedom from arbitrary arrest or detention. The term "security of person" must therefore be understood in its context.

In *X and Y v United Kingdom*[55] the Commission considered the full text of Article 5 and took the view that the expression "liberty and security" must be understood in the context of "liberty". This does not mean that

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54 Application Number 4403/70 C D 36, 29

55 Application Number 5302/71 C D 44, 29

the word "security" is meaningless. The Commission decided that "security" in Article 5 is concerned with arbitrary interference by the State with a person's liberty.

In *X v United Kingdom* [56] the Commission took the view that the term "liberty and security of person" must be read in its entirety and that "security" means only physical security - the freedom from arbitrary arrest and detention. It was decided on the facts that the withholding of the applicant's protographs which were taken by the police against her free will did not infringe on her physical security.

In *Guzzardi v Italy* [57] the European Court decided that the expression "right to liberty" means the physical liberty of the person. In *Arrowsmith v United Kingdom* [58] the European Commission felt that "personal liberty" means mainly freedom from arrest and detention. In *Engel and others v Netherlands* [59] the European Court stated the expression "right to liberty" in Article 5(1) means individual liberty in its classic sense, that is, the physical liberty of a person. The aim here is to ensure that no one is deprived of his liberty arbitrarily.

Kenyan Indians fleeing to Britain *via* India found that they could not

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56 Application Number 5877/72 CD 45,90 (decision of 12 October 1973)

57 Application Number 7367/76 Report 7 December 1978

58 Application Number 7050/75, Report DR 19,5.

59 Application Number 5100/71; Judgment 8 June 1976

get admission into Britain. They alleged before the European Commission that their personal security and liberty had been infringed because of the political uncertainty of their situation[60]. Professor Fawcett takes the firm view that one should not give a purely physical meaning to the notion of "security" when it is set side by side with "liberty". He feels that its real meaning might have to be determined over issues such as passports and citizenship[61] - as in the case of the Kenyan Indians.

Beddard[62] suggests that a person living in a country with a totalitarian regime and who is in perpetual fear of arrest (the knock at the door at three o'clock in the morning) has no security even though he is not actually deprived of his liberty.

The Inter American Commission has consistently regarded torture as a violation of the right to security under Article 1 of the American Declaration. The Inter American Commission has also held that Article 1 is contravened in those instances where a person disappears within a country and the incumbent government provides no information[63].

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60 See *Three East African Asians v United Kingdom* Application Numbers 4715/70; 4783/71; and 4827/71 DR 13 17 and also *Thirty Five East African Asians v United Kingdom* Application Number 4626/70 DR 13,5

61 Fawcett JES (Prof) Seminar at University of London, February 1980

62 In *Human Rights and Europe* at 89.

63 Sieghart *supra* at 142, Case 1702, 1748 and 1755 (Guatemala) AR 1975 67 (referred to in Sieghart)

In terms of Article 21 of the Indian Constitution the notion of "liberty" is very wide[64]. In the notable decision of *Kharak Singh v Uttar Pradesh State*[65]. Judge Subha Rao in a minority judgment noted that personal liberty in the Constitution is the right of an individual to be free from restrictions on his person. In the relatively recent decision of *Maneka Gandhi v Union of India*[66] the same court held that the term "personal liberty" is very wide and that the right to travel abroad also falls within its purview.

In the United States the concept of "liberty" as stated in the Fourth Amendment has also been widely interpreted by the courts. In *Roth's case*[67] the Supreme Court noted that liberty is a very broad term and its meaning must progressively change in a society that is never stagnant.

In *Guzzardi's case*[68] both the European Commission and Court deliberated on whether Guzzardi's compulsory residence on an island constituted a deprivation of liberty in terms of Article 5(1) of the European Convention. The Commission noted the size of the restricted area; regular supervision *etc* and decided that he had suffered a deprivation of liberty. The Court reached the same conclusion as the Commission.

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64 See, for example Baxi, U *K K Mathew on Democracy, Equality and Freedom.*

65 1964 (1) SCR 332 The Supreme Court of India held that police visits at night as a method of surveillance was a violation of the right to liberty

66 1978 SCR 312

67 See, for example *Board of Regents v Roth* 408 US 564 and *Meyer v Nebraska* 262 US 390

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In *X v Austria*[69] it was decided that the compulsory taking of a blood sample is a deprivation of liberty.

23.3. THE LAWFUL DETENTION OF A PERSON AFTER CONVICTION (Articel 12(3)(a))

A conviction will be legally binding only if it has been established in terms of the law. The word "conviction" which normally results in a deprivation of liberty embraces conviction whether termed criminal or disciplinary by the municipal law of each State. The word "court" indicates any body which exhibits not only common fundamental features of which the most important is that it is independent of the executive and of the parties to the case but also the guarantees of judicial process[70]. In order for the judge to effectively exercise his functions as the adjudicator, he should not be made subject to a higher authority.

This particular sub-Article does not require a "lawful conviction"; it merely requires "lawful detention". It follows therefore that a court order setting aside an earlier conviction where a person had already been detained, does not retroactively affect the legality of that detention.

23.4. REASONABLE SUSPICION (Article 12 (3)(b))

Article 12 (3) (b) of the Bophuthatswana Bill of Rights is identical to Articles 5 (1) (c) and 5(3) of the European Convention. In terms of this Article a person who is under a reasonable suspicion of having committed an offence or who might commit an offence or who might flee

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69 Application Number 8278/78 DR 18, 154

70 *De Wilde, Ooms and Versyp* Judgment of the Court on 18 June 1971; Series A 12 47 See footnotes 95 and 115 *infra*

after having done so may be arrested and detained so that he may be brought before a competent legal authority.

In *Lawless v Ireland*[71] the European Commission came to the conclusion that deprivation of liberty is permitted by Article 5(1)(c) only when it is effected so as to bring the person arrested or detained before the competent legal authority.

When a person is arrested or detained in terms of this sub-Article it is not necessary to prove the offences that are alleged because detention is effected so as to expedite the investigation of the offence itself[72]. In the early decision of *Stögmüller v Austria*[73] it was decided that where a person is arrested on the basis of reasonable suspicion that he has committed an offence, then the continued existence of such suspicion is a necessary requisite for the legality of his continued incarceration.

Sieghart[74] refers to *R v MacDonald*[75] where the Supreme Court of Nova Scotia held that a motorist who was stopped by a police officer for a spot check and was required to accompany the latter in order to take a breathalyser test, had been detained within the context of the Canadian Bill of Rights

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71 Application Number 332/57. Report of 19 December 1959.

72 *Bonnechaux v Switzerland* 8224/78.

73 1602/62 see *infra*.

74 *supra* at 147

75 175 (22) N.S.350.

23.5. THE JUDGE OR OTHER OFFICER (Article 12 (3)(b))

This notion is contained in the second part of Article 12(3)(b) of the Bophuthatswana Bill of Rights and is identical to Article 5(3) of the European Convention.

The aim of this provision is to make detention subject to judicial control by laying down that the arrest and detention of a person must have behind it the authority of the judiciary irrespective of whether or not the person has been charged.

This provision mades a reference to a "judge" or "other officer". By specifying these two divisions we can infer that they are not identical; but it is obvious from the text of this Article that they perform similar functions. The European Court has held an "officer" though not identical to a "judge" must have at least some of his attributes, for example, independance and impartiality.[76]

The requirement that a person detained "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power" is in regard to the person's first appearance after arrest or detention and is not concerned with any preliminary or other enquiry. The person's appearance here must also be distinguished from "proceedings by which the lawfulness of his detention shall be decided" (Article 12(4) of theBophuthatswana Bill of Rights and Article 5(4) of the European Convention.

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76 *Schiesser v Switzerland* 7710/76

Sieghart[77] makes a reference to *Motta v Uruguay*[78] where the UN Human Rights Committee was of the view that Article 9(3) of the Civil and Political Rights Covenant (similar to Article 12(3)(b) of the Bophuthatswana Bill of Rights) is violated when a person is brought before a judge only a month after his arrest, during which time he had been held *incommunicado* and had no access to a lawyer.

23.6. TRIAL WITHIN A REASONABLE TIME

Neither the Bophuthatswana Bill of Rights nor the European Convention expressly lay down the maximum period of detention, but both instruments do declare that a person detained in terms of Article 12(3)(b) and Article 5(3) respectively is entitled to be brought to trial within a reasonable time or to be released pending trial.

The time limits fixed for bringing a detained person to trial varies from country to country. In order to understand a little as to how this comes about one has to take cognizance of the differences in the criminal investigation procedures. In Britain and in those countries that follow the common law tradition the procedure is generally *accusatorial* in nature under which if a *prima facie* case has been established then it can be taken directly to a court where the charge may be determined. The periods of detention pending trial in England is limited in terms of the Assizes Act (1889) to an effective six months. In Sweden the average period of detention on remand appears to be under

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77 *supra* at 153

78 R2/11 HRC 35, 132. In *Weinberger v Uruguay* HRC 36 the period was 10 months.

one month. In some European countries such as Austria the procedure is generally *inquisitorial*. This means that a substantial portion of the burden of establishing the evidence supporting a criminal charge is undertaken by an Investigating Judge.

The task of the Investigating Judge is to interrogate the witnesses, including, of course, the suspect himself, examine documentary evidence and in the later stages at which the suspect becomes the accused, the investigation still continues. In those situations where the charge itself is a complex one, as, for example, in a series of financial frauds or evasion of export control, the Investigating Judge may gather a mass of evidence both from his country and abroad. There may also be a legal requirement that every possible charge must be prosecuted. These complex rules of procedure very often prolong the preliminary investigation. The detainee on remand may apply to the Austrian Court once every three months for release pending trial with or without bail. But this is not often granted because of the threat of danger of flight[79] *etc*.

What is in issue here is not just individual instances of the breach of Article 5(3) of the European Convention. It is not a question of just adjusting the claims of the individual applicant or offering him compensation, but rather it is the whole method of administering justice. It may be difficult for a country to change its entire system of criminal procedure. Thus, when the European Convention provides that a person detained on suspicion is to be tried within a reasonable time or released

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79 Fawcett JES seminar University of London February 1980

pending trial, there may be an insurmountable difficulty in deciding (bearing in mind the type of system involved) what is the proper meaning of "reasonable time".

In *Neumeister v Austria*[80] the European Court of Human Rights was called upon to decide whether Neumeister was a victim of the violation of Article 5(3) of the European Convention by the Austrian judicial authorities with regard to the length of his detention pending trial.

The Court took the view that the reasonableness of the time spent by an accused person in detention up to the beginning of the trial must be assessed in relation to the very fact of his detention. Until he is convicted he must be presumed innocent and the purpose of Article 5(3) is to require his provisional release once his continuing detention is no longer reasonable.

The reasons invoked by the authorities to justify their rejection of the applications for release was the danger of Neumeister absconding. The Court decided that the danger of flight cannot, however, be evaluated solely on the basis of considerations such as the gravity of the penalties for the crime. Other factors, especially those relating to the character of the person involved, his morals, his home, occupation, assets, family ties and all kinds of links with the country in which he is being prosecuted may either confirm the existence of a danger of flight or make it appear so small that it cannot justify the detention pending the trial.

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80 1936/63 Report 27 May 1966

It should also be borne in mind that the danger of flight must of necessity decrease as the time spent in detention increases, for there is the probability, however remote, that the length of detention will be deducted from the period of imprisonment to which the accused will be sentenced if convicted. This, in all probability, is likely to reduce his temptation to flee.

Neumeister's argument against the reasons put forward by the Austrian judicial authorities in justification of his detention was that he had a settled position in Vienna - home and family life; occupation, fixed assets *etc* - which was of such a nature as to thwart any temptation to flee. The Investigating Judge himself also conceded that he personally did not believe that Neumiester had any intent to abscond. The Court was of the opinion that in these circumstances the danger that Neumeister would abscond was not so great that he could not be released pending trial.

Neumeister offered bail of a quarter of a million Austrian schillings and later increased it to one million schillings. The Austrian judicial authorities based their calculations mainly on the amount of loss resulting from the offences imputed to Neumeister and which he might be called upon to reimburse. The European Court, however, decided that bail to be assessed solely in relation to the amount of the loss imputed to the detainee is not in conformity with Article 5(3). The guarantee provided by Article 5(3) is designed to ensure not the reparation of the loss but rather the presence of the accused at the trial. The amount must therefore be assessed principally by reference to him, his assets, and his relationship (if any) with the persons who lodge the security.

Neumeister was incarcerated on remand for a period of two years and two months. The European Court concluded that Neumeister's continued provisional detention constituted a violation of Article 5(3) of the European Convention.

In *Wemhoff v Federal Republic of Germany*[81] the European Court pointed out that national courts must be able to determine in the light of the fact of the detention whether the time that has elapsed has exceeded the notion of "reasonableness", that is, whether it has imposed a greater sacrifice than that reasonably expected of a person presumed to be innocent.

The Court felt that two questions must be answered when deciding upon the reasonableness of any period of detention on remand. Firstly, the Commission must ascertain 'whether the reasons given by the authorities to justify continued detention are relevant. Secondly, the Commission must consider the possibility of whether the authorities themselves did not contribute to the prolonged detention on remand by laxity and unnecessary delays in the investigation of the matter.

Wemhoff had been detained on remand for a total period of three years. On 27 June 1968 the European Court in its judgment decided that Article 5(3) had not been violated. Judge Zekia[82] however delivered a

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81 Application Number 2122/64 Judgment 27 June 1968.

82 Judge of theEuropean Court of Human Rights; former Chief Justice of Cyprus.

dissenting minority judgment. He found that Wemhoff had been in detention for an unreasonably long time and that Article 5(3) had therefore been violated. The Judge felt that in deciding whether Article 5(3) has been violated the crucial factor is the notion of reasonableness. He compared the common law system (accusatorial) and the Continental system (inquisitorial) and found that persons are kept in detention for much longer periods on the Continent than in England.

In *Stögmüller v Austria*[83], Stögmüller argued that he had not been brought to trial within a reasonable time or released pending trial.

Article 5(3) clearly implies that the persistence of a suspicion does not suffice to justify, after a certain lapse of time, the prolongation of the detention. Article 5(3) stipulates that the detention must not exceed a reasonable time. It is not feasible to translate this concept into a fixed number of days, weeks, months or years. The Court is led, therefore, in examining the allegation whether Article 5(3) has been breached, to consider and assess the reasonableness of the grounds which persuaded the judicial authorities to decide in this case, on the grave departure from the basic rules of respect for individual liberty. The two reasons advanced by the Austrian authorities in justification of Stögmüller's continued detention, namely, danger of repetition of offences and the danger of absconding were rejected by the Court and it held unanimously that there had been a violation of Article 5(3).

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83 Application Number 1602/62 Judgment of 10 November 1969.

In *Matznetter v Austria*[84], Matznetter had been detained on remand for a total of two years and two months. TheCourt held, on the facts, that Article 5(3) of the Convention had not been infringed.

In *Ringeisen v Austria*[85] the Commission decided that the length of detention (two years and four months) on suspicion of fraud was a violation of Article 5(3) of the Convention.

In *Berberich v The Federal Republic of Germany*[86] Berberich, a member of the Baader-Meinhoff gang, had been in detention awaiting trial for three years and seven months. The Commission took into account all the facts, including the complexity of the matter, and decided that there was no breach of Article 5(3) of theEuropean Convention.

The UN Human Rights Committee has decided in a series of cases that this provision is violated where persons have been held in detention on remand for periods ranging from nine months to twenty-six months and even to three and a half years[87].

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84 Application Number 2178/64; Report 4 April 1967; Judgment 10 November 1969

85 Application Number 2614/65 European Court Series B Vol II; Judgment of 16 July 1971 (on merits) For the facts of this case see footnote 140 *infra* Judgment of 22 June 1972 (for compensation)

86 Application Number 5874/72; CD 46,140

87 Sieghart *supra* at 155 and the following cases referred to therein:
Sequeira v Uruguay (Report 1/6) HRC 35, 127
Burgos v Uruguay (R12/52) HRC 36, 176

Another important question relating to the interpretation of Article 5(3) of the European Covention (and in fact also Article 12(3)(b) of the Bophuthatswana Bill of Rights) is that of the period of detention covered by the concept of "reasonable time". Does appearance in court denote the end of that period or does it continue until the moment when the conviction becomes final? The English version ("entitled to trial within a reasonable time or to release pending trial") would lead to the interpretation that the period referred to ends with the opening of the case before the trial court. However, the French version ("*être jugée dans un délai raisonnable, ou libéré pendant la procédure*") would cover a longer period, ending at the date on which judgment is pronounced. The European Court, while accepting that the Convention allows such interpretations, in the course of its judgment in the *Wemhoff case*[88] stated that the word "trial" refers to the whole of the proceedings before the court, not only the beginning. The Court further stated that the protection against unduly long detention should extend to delivery of judgment[89].

Perdomo and another v *Uruguay* (R2/8) HRC 35, 111
Ambrosini v *Uruguay* (R1/5) HRC 34, 124 and
Weinberger v *Uruguay* (R7/28) HRC 36, 114.

88 *supra*

89 Nedjati *supra* at 96.

As a general rule a detainee on remand cannot be held responsible for any extension of the proceedings while he is in detention, merely because he has exercised rights to which he is entitled[90].

The European Commission has held in several cases[91] that the behaviour of the detained person can be relevant in determining whether the period of time spent in detention was reasonable.

23.7. PERSONS OF UNSOUND MIND AND VAGRANTS (Article 12(3)(d))

Article 12(3)(d) of the Bophuthatswana Bill of Rights is similar to Article 5(1)(e) of the European Convention.

This sub-Article permits "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."

Detention may be ordered by an administrative authority. The detention must be the result of procedure prescribed by law. A person of "unsound mind" within the ambit of this sub-paragraph is not only a certified mental patient but also a person who because of certain personality disorders is prone to commit aggressive offences but cannot be held criminally responsible because of lack of *mens rea*[92]. The European Court has laid down

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90 Nedjati *supra* at 96.

91 For example *Neumiester; Matznetter supra*

92 See Burchell and Hunt *South African Criminal Law and Procedure* Volume I 2nd ed Juta 1983 at 123ff, and *X v Federal Republic of Germany* Application Number 7493/76; DR 6, 182.

minimum criteria to be established before there can be a lawful detention of a person of unsound mind, namely the mental disorder must be determined before a competent authority by hearing objective medical opinion (or opinions); the disorder must be such that medical detention is compulsory; and the legality of the continued detention must depend on the mental disorder still being present[93]. In a judgment handed down on 5 November 1981[94] the court has indicated, however, that in certain instances it might be impossible to obtain the medical opinion before the detention, for example, where a person is an inherent danger both to himself and to others.

As regards the detention of vagrants the notable case here, *De Wilde, Ooms, Versyp (Vagrancy Case) v Belgium*[95] defined the concept "vagrant" in the same terms as the Belgian Criminal Code[96] namely "vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession"[97]. The Court decided that because the applicants had had the character of a vagrant they would, in terms of Article 5(1)(e) of the European Convention be subjected to detention by the competent authorities and subject to the procedure laid down by Belgian law[98].

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93 *Winterwerp v The Netherlands* 6301/73 Judgment: 2 EHRR387 Report 16 July 1980.

94 *X v United Kingdom* 6998/75 Judgment of 5 November 1981.

95 See footnote 70 and *supra* and footnote 115 *infra*

96 Article 347.

97 Quoted from Sieghart *supra*, at 149.

98 Nedjati *supra* at 90-91.

23.8. DEPORTATION AND EXTRADITION (Article 12(3)(f))

Article 12(3)(f) of the Bophuthatswana Bill of Rights is similar to Article 5(1)(f) of the European Convention.

This sub-paragraph permits deprivation of liberty of a person in order to prevent his effecting an unauthorised entry into the country, or of any person against whom deportation or extradition proceedings are to be instituted. The Convention does not guarantee any right of residence in a particular country[99].

The detention of a deportee will be justified in terms of this sub-paragraph only if such detention is directly related to the deportation proceedings. The wording of this sub-paragraph does not indicate that the deportation order must already be in force against the detainee. It is deemed to be sufficient that the wheels of administration are turning with a view to deportation. Only the existence of extradition or deportation proceedings would justify the deprivation of liberty in terms of this sub-Article[100]. It therefore logically follows that if the proceedings are not conducted with the requisite diligence or if the detention results from a misuse or misdirection of authority it is then no longer justifiable under this

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[99] *Patel and Others v United Kingdom* Application Number 4403/70 C.D. 36, 116. Extradition and deportation, *per se*, are not covered by the European Convention. However, it is covered in certain respects by the Fourth Protocol to the European Convention.

[100] Nedjati *supra* at 91

sub-Article[101].

23.9. REASONS FOR ARREST (Article 12(4))

Article 12(4) of the Bophuthatswana Bill of Rights is similar to Article 5(2) of the European Convention.

This sub-Article lays down a basic right to information namely, that "everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charges against him".

It is not necessary that a complete and detailed description of all the charges should be given to the person at the moment of his arrest.[102] The main purpose of this provision is to enable the detainee himself to ascertain the lawfulness or otherwise of the reasons for the arrest and if necessary to take measures to dispute it.

Sri Lanka provides us with a storehouse of cases on various aspects of human rights.[103] In *Regina v Guanaseeha Thero and others*[104] the Supreme

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101 *Lynas v Switzerland* Application Number 7317/75 DR6, 141 See also Bophuthatswana Official Gazette *Agreement between the Government of Bophuthatswana and the Government of the Republic of South Africa relating to Extradition.* Government Gazette Vol 6 (30/12/77) No 46

102 *X v United Kingdom* Application Number 4420/69; DC 37, 51

103 See Part II, Chapter 8, *supra*

104 73 New Law Reports (NLR) 154.

Court of Sri Lanka (at that time Ceylon) indicated that liberty is a sacred right and that persons who are arrested must be informed of their arrest.[105] In *X v United Kingdom*[106] the European Commission noted that if the original grounds for detention change, or if new facts are brought to light, then the detainee has a right to this new information.

In *Delcourt v Belgium*[107] the Commission decided that the rule that the detainee be informed in the language which he understands was adhered to. Here the warrant of arrest was in Flemish, but the detainee had been interrogated in French which he understood.

Sieghart[108] notes that in *de Massera v Uruguay*[109] the UN Human Rights Committee expressed the view that where a person is not charged until nine months after arrest then this is a violation of Article 9(2) of the Civil and Political Rights Covenant (similar to Articles 12(4) and 5(2) of the Bophuthatswana Bill of Rights and the European Convention respectively).

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105 See also in this connection: *Corea v Regina* 55 NLR 457 Cf *Christie v Leachinsky* 1945(2) AllER 395 ---- authority for the English Law rule that an arrest will be unlawful if the arrestee is not told *at the time of his arrest* that he is a suspect in a particular offence.

106 See footnote 94 *supra*

107 2689/65; CD 22,48

108 *supra* at 152

109 (R1/5) HRC 34, 124

23.10. COMPENSATION

Article 5(5) of the European Convention provides that "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."

No similar provision is found anywhere in the Bophuthatswana Bill of Rights. Logically such a provision should be provided in one of the sub-paragraphs of Article 12.

The important case that went before the Commission on this issue of compensation was *Wemhoff*[110] in terms of which before an applicant can succeed under Article 5(5) of the Convention two conditions must be satisfied. Firstly the Commission must have decided that there has been a violation of Article 5(3); and secondly the applicant must have exhausted all domestic remedies available to him.

In the *Ringeisen case*[111] the European Court awarded Ringeisen, for a breach of Article 5(3) of the European Convention, the sum of 20000 Deutche Marks as compensation to be paid by Austria.

As mentioned previously the Bophuthatswana Bill of Rights does not have any provision for the due compensation of a victim who has been in detention on remand for longer than a "reasonable time" in breach of Article 12(3)(b). This does not, however, detract in any way from the quality of the Bill of

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110 *supra*

111 See footnote 85 *supra*.

Rights because the Police Act 7 of 1978[112] is in force in Bophuthatswana and in terms of Article 31 of that Act:

> "any civil action against the Government or any person in respect of anything done in pursuance of this Act shall be commenced within six months after the cause of such action has arisen, and notice in writing of any civil action and of the cause thereof shall be given to the defendant at least one month before the commencement thereof".

23.11 THE INTERNAL SECURITY ACT (BOPHUTHATSWANA)

The Preamble to the Internal Security Act[112(a)] states the purpose of this Act:

> To provide for the safety of the State, the maintenance of public order, the promotion of democracy, the prevention of terrorism, the safeguarding of sound social and economic life, and the regulation of related matters.

Chapter One of the Act deals with internal security. Article 2 provides that if any organisation involves itself in "doctrine hostile to the State"[112(b)] it may be declared an unlawful organisation.

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112 Government Gazette Vol 7, No 41 (Act 7 of 1978)
Other Police Acts are: Bophuthatswana Police Amendment Act 6 of 1979, Police Amendment Act 48 of 1980.

112(a) Act 32 of 1979

112(b) The Act defines "doctrine hostile to the State" as the teachings or plans of any organisation, party or association of persons -

Chapter Two of the Act covers the broad category of terrorism.[112(c)] This Act has repealed the Terrorism Act (of South Africa)[112(d)] Section 22 makes it clear that any person who commits an act with intent to endanger the maintenance of law and order in Bophuthatswana; or who undergoes (or encourages another to undergo) training which could be of use to any person intending to endanger the maintenance of law and order; or who possesses any explosives, or firearm and who fails to prove that he did not intend using such explosive or weapon to commit any act likely to be hostile to the State, shall be guilty of the offence of participating in terrorist activities.

Chapter Three of the Act deals with preventive detention. Article 25(1) gives wide powers to the police[112(e)] to arrest any person without a warrant and detain such person for the purpose of interrogation if the Commissioner of Police has reason to believe that the person in question engages in any activity likely to constitute an offence under this Act or if such person is withholding information relating to any person under this Act.

In order to ensure that a person's rights as laid down in the Bill of Rights are not violated, the Internal Security Act gives a detailed procedure to be followed after a person has been arrested for the purposes of

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(i) which aims at the establishment of a despotic system of government;

(ii) which aims at bringing about political change within the Republic by the promotion of disturbance or disorder; or

(iii) which aims at bringing about political change within the Republic under the guidance of a foreign government.

112(c) See Part 1 Chapter 2 of Act 21 of 1982

preventive detention. Articles 25(2) provides that the Commissioner shall within a period of fourteen days submit to the Attorney-General the reasons for the arrest and detention of the detainee. After consultation with the Minister of Law and Order, the Attorney-General may order either the release of the detainee or his continued detention for a period of not more than ninety days from the date of the arrest of the detainee.

Article 25(3) makes provision for those instances where the Attorney-General is of the opinion that a period of detention exceeding ninety days is necessary for the purpose of State security or the maintenance of public order or in the interests of the administration of justice. In such a case the Attorney-General may at any time before the expiration of the ninety day period, submit to a judge in chambers an application for the further detention of the detainee together with a report setting out the reasons why in his opinion such further detention is deemed necessary. The detainee must be given notice of the Attorney-General's application. The detainee then has a period of seven days to submit a written representation to the judge in chambers setting out the reasons why in his opinion his further detention is unwarranted.

112(d) Act 83 of 1967

112(e) Only policemen of or above the rank of lieutenant-colonel may arrest a person in terms of this Act.

The judge has a wide discretion in this matter. He may call upon either (or both parties) to submit further information or even to orally argue their submissions before him. The judge may even permit the detainee to avail himself of legal representation. The judge then orders either the immediate release of the detainee or his continued detention for a period not exceeding one hundred and eighty days as from the date of such order. Applications for the further detention of the detainee for a period not exceeding one hundred and eighty days may from time to time be submitted to a judge in chambers.

Section 25 also makes provision for a detainee to be visited in private by a magistrate, medical practitioner and a clergyman.

It is submitted that the provisions of the Internal Security Act do not conflict with the Bill of Rights. In fact it was drawn up in such a way as to reconcile and harmonize it with the Bill of Rights.

CHAPTER 24

THE LAWFULNESS OF ARREST OR DETENTION (ARTICLE 12 (5))

24.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 12(5))

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 promptly by a court and his release ordered if the detention is not lawful.

EUROPEAN CONVENTION (Article 5(4))

This Article is similar to Article 12(5) in the Bophuthatswana Bill of Rights.

CIVIL AND POLITICAL RIGHTS COVENANT (Article 9(4))

This provision is similar to Article 12(5) of the Bophuthatswana Bill of Rights.

AMERICAN DECLARATION (Article 25)

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay, or otherwise, to be released.

AMERICAN CONVENTION (Article 7(7))

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.

AFRICAN CHARTER

Unfortunately the African Charter does not have any similar provisions.

24.2. TESTING THE LAWFULNESS OF ARREST OR DETENTION

Article 5(4) of the European Convention entitles the person arrested or detained "to take proceedings by which the lawfulness of his detention shall be decided promptly by a court and his release ordered if the detention is not lawful."

This is a very strict requirement and is intended to protect the liberty of the person arrested and to prevent arbitrary detention. The word "court" is used and this indicates that the body or authority entrusted with deciding the matter must be of a judicial nature, that is, it must be characterized by independence and impartiality. The decision must be given "speedily" ("promptly" in the Bophuthatswana Bill of Rights. In *Christinet v Switzerland*[113] the Commission felt that the word "speedily" cannot be considered in the abstract, but must be determined on the facts of each case. Here it was decided that a delay of ten days did not violate Article 5, whereas in *Engel's case*[114] the Commission felt that a time span of one month was contrary to the concept of time embodied in the word "speedily".

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113 Application Number 7648/76 Report DR 17, 35

114 See footnote 59 *supra*

In *De Wilde, Ooms and Versyp*[115] the legal basis here was detention in an institution by the order of a magistrate. The main complaint of the applicants was that because the magistrate had acted in an administrative capacity, they therefore were unable to obtain a court decision on the lawfulness of their detention in terms of Article 5(4). The European Court had to decide whether in terms of Article 5(4) two authorities are envisaged - one which orders the detention and another, having the attributes of a court, which examines the lawfulness of the order; or alternatively whether it is sufficient that the detention is ordered by an authority which had the elements inherent in the concept of "court" within the meaning of Article 5(4)[116].

The court took the view that "where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that Article 5(4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case, the supervision required by Article 5(4) is incorporated in the decision". The Court concluded that "the intervention of one organ satisfies Article 5(4), but on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question."[117]

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115 See footnotes 70 and 95 *supra*

116 Paragraph 75 of the Judgment

117 Paragraph 76 of the Judgment See also Nedjati *supra* at 97.

24.3. PSYCHIATRIC DETENTION

The detention of a person for purposes of psychiatric treatment because he is mentally unsound may be lawful in terms of Article 12(3)(d) and Article 5(1)(e) of the Bophuthatswana Bill of Rights and the European Convention respectively.

Several applications[118] have been brought before the Commission on this issue of psychiatric detention, notably, from the Netherlands, the United Kingdom and Switzerland, where there is a common problem, - how far can psychiatric detention be left solely to an administrative process bearing in mind that Article 5(4) makes a specific reference to a "court" and Article 5(3) refers to a "judge or other judicial officer".

In the UK the Mental Health Act (1959) provides that a Trial Court may order the detention of a convicted person in a psychiatric hospital, under a Reception and Detention Order, without a time limit. But the Home Secretary may order conditional discharge and in addition he has the exclusive right to order the person back into detention. In essence, therefore, we have here an order of a Trial Court on conviction for a special form of detention. This *prima facie* can be covered by Article 5(9(a) which refers to 'the lawful detention of a person after conviction by a competent court".

Article 5(1)(a) does not specify the type of detention but the usual assumption

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118 See, for example, footnotes 93 and 94 *supra*

is detention in a gaol; but if the Trial Court concludes that a particular case falls within the purview of Article 5(1)(e) (that is, a person of unsound mind) then the order of detention can still be under Article 5(1)(a). It could be argued that Article 5(4) has been fulfilled because it is an order made by a court.

However, difficulties are encountered after the individual is conditionally discharged and then perhaps at the suggestion of his family, or after some incident, the Home Secretary decides to exercise his exclusive power and recalls him into detention once again. Does Article 5(4) operate when he is recalled into detention? In other words is the detainee entitled to have this settled by a court or must the right to recall be left exclusively in the hands of the Home Secretary.

In X v *United Kingdom*,[119] X had been convicted of assault with intent to do grevious bodily harm. A detention was ordered under the Mental Health Act on November 1968. In May 1971 he was discharged on condition that he should live at a specified address under the supervision of a probation officer and that he should regularly attend an out-patient clinic at the psychiatric hospital. In April 1974 he was arrested and detained in the hospital.

He then applied for an order of *habeas corpus*. The Home Office, when requested by the Court to state the reasons for the second detention

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119 See footnote 94 *supra*

merely indicated that the probation officer had informed the psychiatrist at the hospital that the applicant's condition was giving cause for concern.

The applicant produced evidence from his fellow-employees and in addition at least one medical report that his condition was not when the psychiatrist had been led to believe.

The English Court, unfortunately decided that it had to refuse an order of *habeas corpus* on the basis that the lawfulness of the detention could not be challenged because in terms of the Mental Health Act the Home Secretary had exclusive jurisdiction in this matter.

The question now arises whether lawfulness includes the procedure for detention or does it include the grounds of detention only. If the Home Secretary has recalled a person by taking into account factors which a court would not accept then the question arises whether the detention is lawful?

The European Court held in this case[120] that the court of review must consider all the essential conditions for the lawfulness of the detention and especially on the questions whether the person's mental disorder still persisted, and whether the administrative authority was entitled to feel that his continued detention was necessary in the interests of public safety. *Habeas corpus* proceedings will not satisfy the requirements of Article 5(4) if they only test the formal legality of the detention, and

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120 That is X v *United Kingdom* see footnote 94 *supra*

can only investigate whether the detaining authority misused its powers. The *habeas corpus* application will serve its purpose if it can review the merits of the decision itself.

In *Winterwerp v The Netherlands*[121] the European Court decided that Article 5(4) must not be interpreted so as to make the detention of persons of unsound mind immune from subsequent review of its lawfulness merely because the initial detention was ordered by a Court. In such cases judicial review of lawfulness must be available at reasonable intervals.

The UN Human Rights Committee has stated that where a person is detained and an application for *habeas corpus* is not available to him then Article 9(4) of the Civil and Political Rights Coventant is violated. Article 9(4) is similar to Article 12(5) of the Bophuthatswana Bill of Rights[122]. Fawcett suggests that there is a more basic question that might be posed in relation to the application of a provision like Article 5(4), namely, is psychiatric detention a matter for the courts at all? Isn't it much better to leave this encroachment of the right to liberty on those who administer hospitals and those who are experts in the science of human behaviour? All the courts ever do is listen to evidence. A judge may appear to balance the issues. The notion that judges are a universal mind well able to solve all problems provided the evidence is

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121 See footnote 93 *supra* See also *Van Droogenbroek v Belgium* (7906/77) Report 9 July 1980 Cf *Kolugala v Superintendant of Prisons* 66 NLR 412

122 Sieghart *supra* at 158 and the cases referred to therein,

given is merely an illusion when one gets into the complex field of human behaviour and mental deviations.[123]

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especially *Ramirez v Uruguay* (R1/4) HRC 35,121 and *Sequeira v Uruguay* (R1/6) HRC 35, 127

123 Fawcett JES (Prof) Seminar at University of London February 1980.

CHAPTER 25

ACCESS TO JUSTICE (ARTICLE 12 (6))

25.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (ARTICLE 12 (6))

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 interest 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.

EUROPEAN CONVENTION (Article 6(1))

Article 6(1) of the European Convention is similar to Article 12(6) of the Bophuthatswana Bill of Rights.

AMERICAN DECLARATION (Article 26)

Every person accused of an offence has the right to be given an impartial and public hearing, and to be tried by courts previously established ...

UNIVERSAL DECLARATION (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 of any criminal charge against him.

CIVIL AND POLITICAL RIGHTS COVENANT (Article 14(1))

Article 14(1) is similar to Article 12(6) of the Bophuthatswana Bill of Rights.

AMERICAN CONVENTION (Articles 8(1) and 8(5))

Every person has 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 in the determination of his rights and obligations of a civil ... nature.

Criminal proceedings shall be public, except ... to protect the interests of justice.

AFRICAN CHARTER (Article 7(1))

Every individual shall have the right to have his cause heard (and he shall have) the right to be tried within a reasonable time by an impartial court or tribunal.

CANADA BILL OF RIGHTS (Article 2(e))

(Everyone shall have) the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

NIGERIA CONSTITUTION (1963) (Article 22)

This is similar to Article 12(6) of the Bophuthatswana Bill of Rights.

25.2. INTRODUCTION

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

The guarantees provided in this Article relate only to "civil rights or obligations" or "of any criminal charge". Proceedings relating to review of an accused person's detention (as, for example *Neumeister's case*)[124] as well as proceedings relating to initial judicial investigation do not fall within the ambit of Article 6(1) because no questions of determining civil rights and obligations or a criminal charge arise.

The European Commission decided in *X v Austria*[125] that the removal of firearms by a court in terms of a preliminary order was not concerned with the determination of a civil right or of a criminal charge laid against the applicant and that therefore Article 6 did not apply.

In *Russell v United Kingdom*[126] the Commission took the view that the determination of a criminal charge in terms of Article 6(1) includes not

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124 See footnote 80 *supra*

125 Application No 5263/71 CD 42, 97

only the determination of the guilt or innocence of the person concerned but also the determination of his sentence.

The European Commission has taken the view that proceedings in criminal cases relating to applications for re-trial are not covered by Article 6[127].

25.3. ACCESS TO COURT

The European Convention does not expressly guarantee the right of access to the courts. The European Commission has considered whether Article 6 impliedly guarantees this right[128].

The most important case on the question of access to courts in terms of

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126 Application No 4623/70 CD 39,66

127 *X v Denmark* 4311/69 CD 37, 82
The Commission has also decided that a petition for re-hearing a civil matter is not covered by Article 6. (See Nedjati at 101-102) Article 6(1) also does not apply to disciplinary proceedings because such proceedings are not concerned with the determination of civil rights or obligations within the meaning of this Article nor with the determination of any criminal charge. (See *X v Federal Republic of Germany* 5109/71 CD42,82)

128 For example, in *Knechtl v United Kingdom* 4115/69 CD 36, 43 the Commission observed that refusal to allow a prisoner access to a lawyer and thus preventing him from obtaining the determination of a civil right by a court, may possibly give rise to the question whether the applicant's right of access to a court has been violated.

Article 6(1) is *Golder v United Kingdom*[129] Golder was serving a prison term in Parkhurst Prison on the Isle of Wight.A disturbance occurred in the prison in October 1969 and Golder was accused of the assault of a prison officer. Although the charges against him were withdrawn, the accusation remained on his prison record and he felt that this might affect his chances of release on parole. He petitioned the Home Secretary for permission toconsult an attorney in order to initiate defamation action proceedings so that he might clear his record. Golder was refused permission and in bringing an application to the Commission, he alleged a violation of Article 6(1) of the European Convention.

The pertinent question here was whether Article 6(1) was limited to the right to a fair trial in matters which were already *pendente lite* or whether it also guaranteed a right of access to the courts for any person who wanted to institute an action in order to have his civil rights and obligations determined. The UK argued that Article 6 is concerned with procedure only and not with the giving of any right of access to a court.

The European Commission decided that Article 6(1) guarantees a right of access to the courts. In a judgment of 21 February 1975 the European Court held that Article 6(1) had been violated. Article 6(1) guarantees the right to institute proceedings before a court.

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[129] 4451/70 Judgment of 21 February 1975

The European Court held that it would be

> "inconceivable ... that Article 6(1) should describe in detail the procedural guarantees afforded to the parties in a pending lawsuit and should not first protect that which alone makes it possible to benefit from such guarantees, that is, access to courts. Were Article 6(1) to be understood as concerning exclusively the conduct of an action which had been already initiated before a court, a Contracting State, would without acting in breach of the text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government".[130]

As a result of the *Golder case* a modification was made in the UK prison administration system. Where a prisoner wished to consult a lawyer the permission of the Home Secretary was no longer necessary.[131]

In *Airey v Ireland*[132] the European Court went further and decided that the right of access to a court cannot be understood as a general right and it must not be hampered by economic or other limitations. Airey complained that extremely high costs involved to secure legal representation before the High Court of Ireland, in seeking a judicial separation from

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130 Paragraph 35 of the Judgment.

131 December 1971 - White Paper presented to British Parliament on the changing of the prison regulations.

132 6289/73 Report 9 March 1978

her husband was tantamount to a denial of access in terms of Article 6(1). The Commission found that Airey did not have the necessary funds to meet the high cost of litigation. The Court held that she therefore did not enjoy an effective right of access to the High Court, and that there was a violation of Article 6(1). The court noted *inter alia*

> "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to fair trial."

The Court also warned that this decision did not mean that the State must provide free legal aid for every dispute relating to a civil right.[133]

It is submitted that this problem of non-representation due to the financial position of the applicant would not arise under Article 12(6) of the Bophuthatswana Bill of Rights which is similar to Article 6(1) of the European Convention. The reason is that no one in Bophuthatswana is denied access to the courts for the determination of his civil rights and obligations solely because he is in a state of penury. Such a person would qualify for Legal Aid from the Bophuthatswana Legal Aid Board. In fact, the provision for legal aid stands very high on the list of priorities of the Government of Bophuthatswana. In July 1984 the sum of R400 000 was allocated to the Legal Aid Board. Observers might argue that this is an excessively high amount bearing in mind that the population of Bophuthatswana

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133 Sieghart *supra* at 273

is only approximately 1,3 million. But it is submitted that Bophuthatswana lives up to Article 12(6)of its Bill of Rights by not denying to anyone the right of access to the courts.[134]

Sieghart[135] mentions a case in Grenada[136] where it was held that a law which retrospectively deems a person's detention during a state of emergency to have been legal and constitutional, and prohibits him from bringing any action before any court to determine its legality, attempts to take away the fundamental right of access to the court.

25.4. CIVIL RIGHTS AND OBLIGATIONS

In *Isop v Austria*[137] the European Commission decided that the question whether a right or obligation is of a civil nature does not depend upon the particular procedure prescribed by domestic law for its determination but only on the nature of the claim itself.

The notion of "civil rights and obligations" is an autonomous concept which must be interpreted independently of the rights existing in municipal

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134 *The Mail* Bophuthatswana's National Newspaper, 13 July 1984

135 *supra* at 273

136 *Attorney-General v Reynolds* 1977 (24) West Indies Reports 552 (Court of Appeal of Grenada and West Indian Associated States)

137 808/60 CD8,80, YB5, 108

law; but cognizance must be taken of the general principles of municipal law in the interpretation of this concept.

The European Commission has decided[138] that where proceedings are related to the rights of an individual *vis-a-vis* the State and which is part of public law, then such proceedings cannot be regarded as being concerned with the determinations of civil rights and obligations and therefore fall outside the ambit of Article 6(1) of the Convention.

The Commission has also decided that proceedings before constitutional courts are not civil rights because they relate to the determination of constitutional rights.[139]

It is therefore clear from the Commission's decisions that the term

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138 For example, *X v. Austria* 3959/69 CD 35,109 and *X v Sweden* 6776/74 DR2, 123

In *X v The Federal Republic of Germany* 4618/70 CD40/11 the Commission decided that legal proceedings to consider the validity of a claim for compensation under a certain Act in terms of which the Federal Republic guaranteed compensation to victims of Nazi persecution for injuries *etc* was part of public law and that such proceedings therefore had nothing to do with the determination of civil rights and obligations.

139 *16 Austrian Communes and some of their Councillors v Austria* 5767/72; 5922/72; 5929/72; 5953-57/72; 5984-88/73; 6011/73; 5849/72 CD 46, 118; YB17,338

Decision of 31 May 1974

"civil rights and obligations" relate to rights and obligations in private law only and it is only for such rights and obligations that Article 6(1) applies.

In the area of public law it would appear that Article 6 cannot be upheld. Therefore, if a person's rights are affected by a purely administrative decision Article 6(1) does not require that the person should be granted a "fair and public hearing". However, there is authority to support the opposite view that Article 6(1) also applies to proceedings before administrative tribunals. This latter view finds support in the *Ringeisen case*[140]. Ringeisen was detained on remand on suspicion of fraudulent property transactions. He argued that he wanted to buy and re-sell certain properties but he could not transfer the titles to the purchasers because the authorities had refused to approve the contracts of sale in terms of which he had acquired the properties in the first place. He argued that his application for the necessary approval was a civil right and because it was not determined by an independent and impartial tribunal, this was a violation of Article 6(1) of the Convention. The Court declared that it is not necessary that both parties to the proceedings should be private persons and that Article 6(1) covers all proceedings the result of which is decisive for private rights and obligations[141]. The Court found that the legal relationship between Ringeisen and the prospective purchasers and the State's interference in the matter by refusing to approve the contract was crucial to the determination of civil rights and obligations.

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140 See footnote 85 *supra*

141 Paragraph 98 of the Judgment

In essence therefore having looked at the decisions of the Commission and the Court in this regard it can be said that the determination of "civil rights and obligations" is concerned broadly with private law. The Commission has indicated that public law covers matters such as taxation, social security, legal aid, payment of prisoners for work done, pensions, *etc*. However in one notable case[142] the European Court decided that the withdrawal of the authority to practise medicine, though an administrative matter and therefore a part of public law, nevertheless did involve the determination of a"civil right" within the meaning of Article 6(1) of the European Convention.

An important question that now arises is the extent to which there can be judicial control of administrative proceedings and administrative action[143]. In France and West Germany the administrative courts are well structured and have been established for some considerable period of time and perhaps we may be able to glean something from them.

The main concepts that are used in the judicial control of the administrative process in France and West Germany are:

(a) The concept of lack of competence ie acting *ultra vires*. Where a department or authority is established, its powers

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142 *König v Federal Republic of Germany* 6232/73 28 June 1978 Series A, 27

143 Prof J E S Fawcett discussed this question at a seminar at the University of London, March 1980

that is, its competence) are defined in the statute that has set it up. The question may arise that it has gone beyond the power accorded to it in the legislature enactment;

(b) The notion of a procedural irregularity;

(c) The administrative authority has violated the law;

(d) That the authority has used the statutory power for a purpose other than that which the statute has set out.

Every decision or act done by a governmental body or authority is an exercise of discretion. The French practice is to distinguish between

(a) the power which is wholly discretionary, that is, there are no guidelines in the statute which sets up the authority;

and

(b) a discretion which must be exercised in terms of certain requirements, for example, the appointment or dismissal of a member of the staff of the authority.

Apart from the question whether the administrative discretion has been exercised for the right purpose there is also the question of the violation of the law. Can we say that the concept "violation of the law" is to be limited to errors of fact or should it also include procedural irregularity? Professor Fawcett suggests that we should deem that the act of an administrative body is unacceptable not because it is using its power for a wrong purpose but because it is interpreting that purpose incorrectly. He points out that it becomes very difficult to draw a distinction between the use of administrative power for a defined purpose and its use for a purpose which

may fall within the scope of the statute, but which may still be socially unacceptable.[144]

In *T A Miller v Minister of Housing and Local Government*[145] the Appeal Court made it clear that tribunals have a duty to apply the principle of *audi alteram partem*[146]. The US Supreme Court put it in much stronger language in *Greene's case*[147]. This case concerned the dismissal of an employee from a private firm which was operating under a contract from the US Department of Defence. The dismissal was made on a federal security clearance programme. The Supreme Court decided that the Federal Agency cannot propose or recommend such dismissal without permitting cross-examination and confrontation of hostile witnesses (by the dismissed employee).

25.5. FAIR HEARING

Article 6(1) requires that the hearing should be fair. The notion of fair hearing must be considered in the light of the special circumstances of each case. This means that the court must be able to assess impartially the matters of both fact and law relating to the particular

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144 *Ibid*

145 1968 (2) AllER. 633.

146 See further on this rule: Rose-Innes, L.A. *Judicial Review of Administrative Tribunals in South Africa* (Juta 1963)

147 *Greene v MacTilroy* 1959 (360) US 474

case. It was decided in the *Nielsen case*[148] that the question whether a trial conforms to the standard laid down in Article 6(1) must be decided by taking the trial as a whole into consideration. When the trial in its entirety has been evaluated, only then can one say whether it has been a "fair hearing within the meaning of Article 6(1) of the European Convention.

In *Pataki and Dunshirn v Austria*[149] the European Commission decided that the proceedings violated the notion of "fair hearing" when it was found that the applicants had no right of legal representation in certain proceedings whereas the prosecutor was present. The principle that one can extract from this case is that anyone who is a party to a judicial proceeding should have the right to present his case to the court.

The right to a fair hearing would imply the right to be physically present at the hearing. The right to a fair hearing may be prejudiced by newspaper articles that may possibly tend to impair the impartial administration of justice. Publicity in a criminal case may infringe the right to a fair hearing. In countries that have the jury system, if the jury is composed of laymen, then there is a possibility, however remote, that their impartiality may be called to question.

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148 *Nielsen v Denmark* 343/57 YB2, 412

149 596 59; 789 60 Report of 28 March 1963, YB 4, 714

CHAPTER 26

THE PRESUMPTION OF INNOCENCE (ARTICLE 7)

26.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 7)

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

EUROPEAN CONVENTION (Article 6(2))

This is similar to Article 7 of the Bophuthatswana Bill of Rights.

CIVIL RIGHTS COVENANT (Article 14(2))

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

AMERICAN DECLARATION (Article 26)

Every accused person is presumed to be innocent until proved guilty.

AMERICAN CONVENTION (Article 8(2))

Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law.

UNIVERSAL DECLARATION (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.

AFRICAN CHARTER (Article 7(1)(b))

Every individual shall have the right to have his cause heard. This comprises (b) the right to be presumed innocent until guilty by a

competent court or tribunal.

FRANCE - DECLARATION OF THE RIGHTS OF MAN (1989)(Article 9)

Every man ..... (is) innocent until he has been convicted.

CANADA BILL OF RIGHTS (Article 2(f))

(N)o law of Canada shall be construed or applied so as to (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law ...

NIGERIA CONSTITUTION (1963) (Article 22(4))

Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.

26.2. THE PRESUMPTION OF INNOCENCE

The presumption of innocence in Article 7 of the Bophuthatswana Bill of Rights indicates that the prosecution has to prove the case against the accused beyond reasonable doubt. This presumption applies to persons who are "charged with a criminal offence." It does not, therefore, apply to preliminary police investigations before the suspect is charged with a criminal offence.

According to the European Commission in *Austria v Italy*[150] the European Convention presumption of innocence in Article 6(2) means that judges (or magistrates) must never start with the presumption that the accused

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150 788/60, YB6, 782

committed the offence but rather that any doubt must be for the benefit of the accused. The accused must be allowed to produce (or personally give) evidence in rebuttal of the allegations. The court should always keep an objective mind until the very end of the trial. Only at the end of the trial must the court decide on the guilt or otherwise of the accused having first weighed all the evidence that was placed before it.

The European Commission looked at the practice of a number of Member States where it is part of the procedure for information about the accused's previous convictions to be given *before* the court has come to a decision on his guilt or otherwise. The Commission took the view that such practice does not violate Article 6(2) of the Convention. Such a procedure is not followed in Bophuthatswana, South Africa and in many other countries. The accused's previous convictions are only brought to light after the court has pronounced judgment but before it has passed sentence. In such a case the existence or otherwise of the previous conviction gives the court an indication whether or not he should be treated leniently or severely. This, of course, runs contrary to retribution as a theory of punishment. According to this theory, the accused, having "suffered harm proportionate to that which he has inflicted, his debt to society is paid."

If there has been a squaring of accounts with society and if the slate is wiped clean then the accused's previous convictions should not be taken into account.[151]

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[151] See further Burchell and Hunt *supra* at 70ff.

CHAPTER 27

THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE (ARTICLE 13)

27.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 13)

(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 such a right except in so far as it 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 Bophuthatswana, 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.

EUROPEAN CONVENTION (Article 8)

This is similar to Article 13 of the Bophuthatswana Bill of Rights.

UNIVERSAL DECLARATION (Article 12)

No one shall be subjected to arbitrary interference with his privacy, 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.

AMERICAN DECLARATION (Articles 5, 9 and 10)

Every person has the right to the protection of the law against abusive attacks upon his honour, his reputation, and his private and family life.
Every person has the right to the inviolability of his home.
Every person has the right to the inviolability and transmission of his correspondence.

AMERICAN CONVENTION (Articles 11(2) and 11(3))

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 and reputation. Everyone has the right to the protection of the law against such interference or attacks.

CIVIL AND POLITICAL RIGHTS COVENANT (Article 17)

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

AFRICAN CHARTER

No similar provision is provided in the African Charter.

UNITED STATES BILL OF RIGHTS (Article 4)

The rights of people to be secure in their persons, houses, papers and effects,

against unreasonable searches and seizures, shall not be violated.

FEDERAL REPUBLIC OF GERMANY BASIC LAW (Articles 6(1);10;13)

The family enjoy the special protection of the State. Secrecy of the mail and secrecy of posts and telecommunications shall be inviolable.
The home shall be inviolable.

CHINA (PEOPLE'S REPUBLIC) CONSTITUTION (1954) (Article 90)

The homes of citizens ... are inviolable and privacy of correspondence is protected by law.

EGYPT-CONSTITUTION (Article 33)

Homes have their sancity and they may not be entered, except in the cases, and in the manner, prescribed by law.

NIGERIA CONSTITUTION (Article 23)

Every person shall be entitled to respect for his private and family life, his home and his correspondence.

27.2. PRIVATE LIFE

Article 8 of the European Convention protects private and family life, home and correspondence. It is difficult to define privacy because any definition must incorporate the standards and customs of the society to which we belong.

Nedjati[152] refers to Presser's classification of privacy which is as follows:

(a) intrusion into a person's seclusion or solitude or into his private affairs;

(b) public disclosure of embarrasing private facts;

(c) publicity which puts a person in a false light in the public eye;

(d) use of a person's name or likeness.

It would seem that the right to respect for "private life" is the right to privacy, that is, the right to be protected from publicity[153]. However, the European Commission took the view that the right to respect for private life also includes the right to establish and develop relationships with other human beings. The Commission decided that although a person's sex life is an important facet of his private life Article 8 must not be interpreted to support the view that pregnancy and its termination are solely the concern of the private life of the pregnant woman because the private life of a pregnant woman must, of necessity be connected with the

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152 *supra* at p 153

153 For the violation of privacy as a delict see McQuoid-Mason *The Law of Privacy in South Africa*

developing foetus. The Commission decided that a West German law which forbidding abortion merely because the pregnancy was unwanted did not violate the right of respect for private life.[154]

It was decided in *X v Ireland*[155] that Article 8 does not extend to relationships with non-humans, for example, it cannot be argued that according to Article 8 everyone has the right to keep a dog.

The term "private life" should not be confined merely to a person's home or family life. It could extend to acts done by him in public. Those who of their own volition attract the public, for example, demonstrators and strikers may be perhaps be said to have waived some aspects of the right to privacy. In *X v United Kingdom*[156] the applicant had been photographed whilst taking part in a demonstration. She alleged a violation of Article 8 because the police either refused to destroy them or return them to her. The Commission decided that the applicant's privacy had not been violated because the police had not entered her house and that the photographs were related to a public incident. The Commission concluded that the taking of the photographs and retention thereof did not constitute an interference with her private life in the terms of Article 8.

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154 See, for example, *Bruggeman and Scheuten v The Federal Republic of Germany* DR 5,103.

155 6845/74 DR 5,86

156 5877/72 CD 45, 90 see footnote 56 *supra*

In *Van Oosterwijck v Belgium*[157] the European Court found that failure of Belgium to take cognizance of the change in the applicant's gender (she was born a female, had been a transsexual, and was now a male) constituted a violation of the right to respect the applicants private life. In *Dudgeon v United Kingdom*[158] the European Court considered an English law which made homesexual relations a punishable offence. It even included such relations in private between consenting individuals who are over 21 years. The Court decided that this law constituted a violation of the right to respect of the private lives (which term includes one's sex life) of homosexuals and that such a far-reaching law is not necessary in a democratic society either for the protection of morals, or for the protection of the rights and freedoms of others.

Prisoners cannot complain that there has been a restriction or violation of their private life. The interference with the exercise of the right to respect for the private lives of prisoners (for example, denying married prisoners their marital state *etc*) is justified in a democratic society in the interests of public safety, for the prevention of disorder or crime and for the protection of the rights and freedoms of others.[159]

In *Association X v United Kingdom*[160] it was decided that a voluntary

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157 7654/76 Report 1 March 1979

158 7525/76 Judgment 22 October 1981

159 In other words, it is justified in terms of Article 13(2) of the Bophuthatswana Bill of Rights

160 7154/75 DR 14, 31

innoculation scheme intended to protect one's health does not interfere with the right to respect for private life.

In *X v Austria*[161] it was noted that the compulsory taking of blood samples for a paternity suit is an interference with the right of respect for private life. But because it causes no side-effects and it aids the court in coming to a finding in a paternity issue, the interference is proportionate to the purpose and it may be justified as being necessary in a democratic society for the protection of the rights of others.

The tapping of telephones and use of listening devices are modern examples of the violation of one's privacy. Interference with one's correspondence also constitutes an invasion of one's privacy.

27.3. FAMILY LIFE

The word "family" can conjure up different meanings in one's mind depending on the cultural and indigenous background that one identifies oneself with. In some cultures the extended family (grandparents, parents *etc*) is very much a part of the notion of "family".

To determine whether there is "family life" in a particular case one has to ascertain whether in addition to the legal ties (for example relationship by blood or marriage) there are any factual links (for example the parties may be living together). Article 8 is concerned with *de facto* family life

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161 8278/78 DR18, 154

and not *de jure* family life. The notion of "family life" means that both legitimate and illegitimate children should have the same capacity to inherit on intestacy. The "family" of a person who has been married twice would include the children of both marriages.

Divorce does not terminate the family life of parents with children. The award of custody to one parent interferes with the family life between the child and the other parent.[162] In *X v Netherlands*[163] the Commission decided that the enforcement of the obligation to support one's children cannot be regarded as an interference with the right to private and family life within the meaning of Article 8 of the European Convention.

No right to enter and to reside in a particular country is guaranteed as such by the European Convention. But Article 8 (family life) does apply in the case of the right of one spouse to enter the country where the other spouse is living, and of the right of the family not to be divided by the expulsion of one of the spouses. The Commission has decided that the expulsion of a person from a country where his family members are living may constitute a violation of the right to respect for family life. In *X v Federal Republic of Germany*[164] the applicant, the wife of an Austrian citizen, alleged a violation of Article 8 in regard to her husband's deportation from West Germany. The Commission found that there was nothing

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162 *X v Sweden* 172/56 YB 1, 211

163 6061/73 CD45,120

164 2535/65 CD17,28

preventing the applicant from following her husband to Austria and that therefore there was no violation of Article 8 in regard to "family life".

In *X v Federal Republic of Germany*[165] the Commission noted that the applicant had lived in West Germany for a period of ten years, was married to a German and had two children. The applicant's extradition to Syria would constitute a violation of the right of respect for "family life".

In *Marckx v Belgium*[166] the issue here was the notion of a "one-parent family". The applicants were an unmarried mother and her daughter. The legal issue was the question of the status of the child under Belgian Law and whether this was consistent with the provisions of the European Convention.

One has to first look at the provisions in the Belgian Civil Code. There was a distinction drawn between filiation and legitimation. A child could not be filiated (that is the link with its mother or father cannot be recognized) unless the parent makes a formal act of recognition. Therefore the fact of birth does not by itself create a link. The mother has to make a formal act of recognition. If the mother registers the child, saying - "this is my baby" - that would constitute a formal act

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165 6357/73 DR 1,77

166 6833/74 Report 10 December 1977

of recognition.

The question then arises about the legal status of the child. The child has been filiated, but that in Belgian law does not mean that it is legitimated. This was the crucial point. The natural child, when filiated, cannot claim (or be given) the rights of a legitimate child.

If the father (or mother) has left legitimate descendants, then the natural child may not be given more than one third of the property; half of the estate would be given if the father or mother do not leave any legitimate descendants and three quarters will be given if the parents leave no descendants or ascendants. Natural children cannot obtain a donation *inter vivos* or by will more than what they would get in terms of the above rules. Thus there is a clear differntiation and discrimination between natural children and legitimate children. The legitimation of a child can take place by subsequent marriage of the mother or by adoption by a married couple living together.

Belgium argued that the notion of "family life" in Article 8(1) of the Convention indicates family life based on a legal valid marriage and that Article 8 (1) does not apply in the situation where there is a one-parent family.

The European Commission and Court rejected this argument by Belgium. Article 8 guarantees respect for family life. This is an autonomous concept which must be interpreted independently of the internal law of the Member States. The fact of birth, that is, the existence of a biological link between the

mother and her child creates "family life" within the context of Article 8 (1) of the Convention. Therefore the immediate conversion of the physiological bond into a bond of legal relationship is mandatory for the recognition of the existence of family life. The registration of the child's birth must, without any further formalities, have the effect of the recognition of a legal relationship between the mother and the child. The right to respect for family life is not restricted to legitimate children only. Relations between an illegitimate child and his or her natural parents also fall within the ambit of family life.

There was the further question of discrimination (in combination with Articles 8 and 14). The Commission took the view that differentiation (or discrimination) between people must be objective and reasonable. Here the Commission felt that there was a fundamental difference between the natural child and the legitimate child and that this differentiated not only against the child but also against the parent and that this differentiation lacked any objective or reasonable justification. It could be argued, of course, that this was done for the protection of morals. The Commission pointed out that in most of the Member States the distinction between legitimate and illegitimate children is being gradually eliminated. Therefore, the protection of morals was not sufficient justification in this instance.

27.4. CORRESPONDENCE

The notion of "correspondence" is narrower than the notion of "communication". Indeed, "correspondence" is a form of "communication". The State has an

obligation to refrain from any interference with the correspondence of all persons.

A letter is also the means by which thoughts and opinions are carried and received. Any interference with this right may violate not only the right to privacy but also the right to freedom of thought and expression. The opening and perusal or even delaying or halting of a person's correspondence constitutes an interference of a person's right to respect for his correspondence within the meaning of Article 8(1). The right of a prisoner to communicate with a lawyer also raises the issue of the right to respect for correspondence.[167]

In *Golder v United Kingdom*[168] the Commission decided that Article 8(1) is also violated if the prison authorities destroy letters without reading them. In this case the applicant requested permission to write to an attorney. When permission was refused he was in exactly the same position in which he would have been had he written a letter which was stopped. The Commission decided that this amounted to an interference with his right to respect for his correspondence.

The most recent case on the issue of the censorship of prisoners correspondence is *Reuben Silver et al v United Kingdom*[169]. The Commission made a

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167 *Knechtl v The United Kingdom* 4115/69

168 4451/70 Report 1 June 1973

169 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75. Report of the European Commission: 11 October 1980; Judgment of the European Court: 25 March 1983. A summary of the judgment

Report on 11 October 1980. If was referred to the European Court and the Court gave judgment on 25 March 1983.

The European Court held unanimously that censorship of prisoners' mail by prison authorities is the case of nearly 60 letters constituted a violation of human rights. The seven-judge Court upheld complaints by six prisoners and one prison correspondent in the case of fifty-seven out of sixty-four letters sent between 1972 and 1976.

The Court held

(a) There had been a violation of the prisoners' rights under Article 8 which provides *inter alia* for the right to respect for correspondence and that there shall be no interference by a public authority with that right except in accordance with the law, and where necessary for such purposes as national security or crime prevention: the stopping, delaying and censorship of the fifty-seven letters indisputedly constituted "interference by a public authority" with the applicants' rights which was not in accordance with the law and which was not "necessary in a democratic society; and

(b) In all these instances there had been a violation of Article 13 of the Convention which provides for the right to an effective remedy before a national authority. The channels provided by the British Government did not fulfil

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of the Court is found in the 1983 *Commonwealth Yearbook*.

> that right. Prisoners' complaints went first to the prison Board of Visitors and thereafter to the ombudsman, but neither could make binding decisions and therefore did not amount to an "effective remedy." Prisoners could then petition the Home Secretary and institute proceedings in the English courts. The European Court decided that if a complaint was made to the Home Secretary over the validity of the rules, his standpoint could not be regarded as sufficiently independent to provide an effective recourse. "He would in reality be judge in his own cause" and could deal only with whether the rules had been misapplied. Although the English Courts had jurisdiction over the exercise of powers conferred on the Home Secretary and prison authorities, that jurisdiction was limited to whether they had been exercised arbitrarily, in bad faith, for an improper motive or in an *ultra vires* manner.

In anticipation of the Court's Judgment (and after a unanimous Report by the Commission in October 1980 against the United Kingdom) the Home Office has made substantial reforms to the rules relating to prisoners' correspondence, which affect over 10 million letters per year sent or received by prisoners in England and Wales. The European Court stated that it would not make a ruling on whether the new regulations, in force since December 1981, now comply with the European Convention. This question may have to be determined by one of the forty complaints from prisoners over correspondence which have been pending before the Commission since this historic judgment. A few of those complaints relate to the new rules.

The European Court did not go as far as to say that prison rules and safeguards governing them should be made statutory. However, as a whole the judgment has greatly enhanced prisoners' opportunities to communicate with the outside world.[170]

27.5. SURVEILLANCE AND THE EUROPEAN CONVENTION

Computers, data banks and sophisticated eavesdropping techniques all constitute a threat to one's privacy. Computer operators should not abuse their possession of knowledge of others. A code of ethics, similar to that of the medical or legal profession, may in future be necessary so that computers do not violate our right to privacy.

There are several aspects of surveillance:

(a) There is the whole question of the methods used, the way in which there is intervention of some form and how the information is collected;

(b) There is the question of the accumulation and storage of that information in data banks;

(c) There is the further question of the structure of the data banks;

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170 Of the six prisoners who complained only one was still in custody at the time of the Judgment. This case started with a complaint by Reuben Silver who unfortunately died in 1979 even before the Commission could make a finding.

(d) There is the vital question of what access the individual has to the information, and

(e) To whom is the information communicated and made available.

For any computer-operated data bank to operate so that the right of privacy is not violated, there must be some guarantees that at least the above criteria are adhered to.

The question in relation to the European Convention is concerned with the extent to which people can be regarded as victims of the data bank system?

In the Federal Republic of Germany there had been, since the early 70's statutory authority to intercept and record over a period not exceeding three months any private communication of individuals or of other persons known to be in any way connected with the individual, for the purpose of obtaining information for the preservation of national security. The statute provided that the person concerned might be informed after interception had been discontinued. It was also provided that the Ministers of Defence and Interior were required to submit a report once every six months to a Parliamentary Committee in regard to the number and purpose of the information obtained. They were also required to submit monthly reports to a three member Commission established by Parliament. The Commission, whose chairman was a judge had authority to order discontinuance in any particular case. This was the background to the important case of *Klass v Federal Republic of Germany*[171].

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171 5029/71 DR1,20

Both the Commission and the Court expressed the view that although telephone conversations are not expressly mentioned in Article 8(1), such conversations are covered by the notion of private life. None of the five applicants were able to say that they had been under surveillance. One of them had been sounsel to a member of the Baader Meinhoff group but that was the only visible link. The West German Government argued that the applicants were not victims. The Commission rejected this argument on the ground that a secret system of surveillance makes a potential victim of anyone who is engaged in activities that may affect national security. If there is a secret system of surveillance then everybody is a potential victim. The Court noted that in the mere existence of legislation providing for secret surveillance there is involved for all those to whom the legislation could be applied, a threat of surveillance. This threat violates the freedom of communication between users of the telecommunications services and thereby constitutes a violation of the right to respect for private life and correspondence.

The European Court observed that one must take cognizance of two factors - firstly, the technical advances made in the methods of espionage and surveillance; and secondly the increase in terrorism in Europe in recent times. Democratic societies are threatened by very sophisticated methods of espionage and terrorism with the result that each State, in order to neutralize such threats, must be able to undertake surveillance of subversive elements within its borders. The Court accepted that the existence of some legislation enabling secret surveillance is necessary in a democratic society in the interests of national security. But this gives no right of unlimited surveillance to a State. Whenever a system of secret surveillance is

adopted by a State proper guarantees against abuse must be entrenched into the system.

27.6. SURVEILLANCE IN SWEDEN

Sweden enacted the Data Act in 1974 which provides that personal data registers of any kind are not limited but that data registers of any kind can only be operated by the authority and by means of a licence through a Data Inspection Board. This Board comprises a Director-General and four Members of Parliament, one trade unionist, one representative from the federation of industries; one specialist in public administration and one specialist in computers. The Board has the power to inspect any data system and it has authority to investigate complaints from individuals about the data system or its use.

27.7. SURVEILLANCE IN THE UNITED STATES

The problem of access by interested persons to information in data banks is an important issue. The US Freedom of Information Act (as amended in 1974) considers this problem and provides that an individual has the right of access to the information concerning him so that he may correct it if necessary. However, the Act excludes the individual from having a right of access to matters that are specifically authorised under criteria established by the Federal Government to be kept as a secret in the interests of national security or foreign policy. The District Court has the jurisdiction to examine the contents of such records *in camera* to determine whether such record or any part thereof should be withheld from the individual concerned.

In *Olmstead v United States*[172] the US Supreme Court held that the federal government does not violate the Fourth Amendment by tapping a person's telephone and then using any evidence obtained in such a manner to convict that person of a crime. However, the US Congress has after this decision, enacted the Federal Communications Act which prohibits telephone tapping. The Supreme Court has interpreted this statute to mean that evidence obtained by such a method cannot be used in a federal court but could be used in a state court if allowed according to the state law.[173]

27.8. PRIVACY AND SURVEILLANCE IN CANADA

Some of the Canadian provinces have statutes protecting privacy. However, it is only the Quebec Civil Code that seems to provide a remedy for all forms of violation of privacy, for example a 1957 case[174] illustrates this point. A Montreal doctor criticized (by letter) a television programme. The announcer gave the doctor's name and address and suggested that viewers should better inform the doctor. The doctor received abusive letters and telephone calls. He changed his telephone number and as a result suffered a considerable financial loss in his medical practice. An action against the CBC was successful on the basis that the language of the Civil Code is wide enough to allow liability in such a case.

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172 1928 (277) US 438

173 See for example *Benati v United States* 1957(355) US 96
Schwartz v Texas 1952 (344) US 199

174 *Robbins v CBC* 1957(12) DLR 35 Quebec Supreme Court

The actions of peeping toms, disturbing messages, and indecent telephone calls are all prohibited in Canada.[175] Many types of surveillance are also prohibited by statute. The Post Office Act (1970) indicates that it is illegal to tamper with other people's correspondence. The Protection of Privacy Act[176] prohibits the wilful and unauthorized interception of correspondence and other private communications by electromagnetic, mechanical or any other means. Exceptions here are surveillance by consent and surveillance authorized by a court of law.

In Canada generally most of the provinces have passed legislation to control the use of data banks. These Acts provide that:

(a) no investigation may take place without the written approval of the person concerned;

(b) certain information may not be recorded, for example, references to race and religion, and any detrimental information more than seven years old;

(c) access to personal reports is limited;

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175 In terms of the relevant sections of the Canadian Criminal Code (1970).

176 This is actually Part 4 of the Canadian Criminal Code.

(d) any person may enquire from any data bank agency whether that agency has a file on him and all information contained in any such file must be disclosed to him;

(e) any aggreived person may challenge any information in his file and request that it be corrected;

(f) penalties are imposed on both the user and the agency for failing to comply with the statutory provisions.[177]

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177 See further generally on privacy and surveillance McQuoid-Mason; see footnote 153 *supra*

CHAPTER 28

THE RIGHT TO EDUCATION (ARTICLE 13(3))

28.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 13(3))

The system of education shall be controlled by the State, but private educational institutions may, on application, in the discretion of the Government and subject to such conditions as the Government may deem fit, be allowed wheresuch institutions in their educational aims and standards are not inferior to state institutions.

EUROPEAN CONVENTION FIRST PROTOCOL (Article 2)

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

EUROPEAN SOCIAL CHARTER (Part I, Article 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.

AFRICAN CHARTER (Article 17)

Every individual shall have the right to education.

UNIVERSAL DECLARATION (Article 26)

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.

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.

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

AMERICAN DECLARATION (Article 12)

Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.

Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state

or community is in a position to provide.

Every person has the right to reveive, free, at least a primary education.

AMERICAN CONVENTION (Article 12)

Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own conviction.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS COVENANT (Article 13)

The States Parties to the present Covenant recognize the right of everyone to education. (This Article then lays down in some detail a kind of programme of education - primary, secondary, higher, etc)

CIVIL AND POLITICAL RIGHTS COVENANT (Article 18)

The State 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.

WEST GERMANY: BASIC LAW (Article 7)

The entire educational system shall be under the supervision of the State.

The persons entitled to bring up a child shall have the right to decide

whether it shall receive religious education. Religious instruction shall form part of the ordinary curriculum in state and municipal schools, except secular schools.

EGYPT CONSTITUTION (1964) (Article 38)

All Egyptians are entitled to education which is guaranteed by the State through the establishment of various kinds of schools, universities, educational and cultural institutions and the expansion thereof. The State gives special care to the physical, mental and moral growth of youth.

NIGERIA CONSTITUTION (Article 24)

No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observances if such instruction, ceremony or observances relate to a religion other than their own.

No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

INDIA CONSTITUTION (Articles 29 and 30)

No citizen shall be denied admission to any educational institution maintained by the State ... on grounds only of religion, race, caste,

language or any of them. All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

28.2. THE RIGHT TO EDUCATION

The Bophuthatswana Bill of Rights in Article 13(3) does not grant a right to education. The right to education in the First Protocol to the European Convention is expressly couched in negative terms. ("No person shall be denied the right to education"). At the time of the drafting and signing of this Protocol,[178] this negative formulation was agreed upon by the Member States because they could not assume and take on the burden of an unlimited guarantee to provide education. If the right to education was couched in positive phraseology, it might be interpreted as being obligatory on the governments concerned to take adequate measures to ensure that every individual was able to receive the education that he desired. In addition, a positive construction might be interpreted to mean also that the State is under an obligation to provide all types and levels of education.

In the *Belgian Linguistics Case*[179] the European Court decided that the scope of the "right to education" means that persons within the jurisdiction of Member States can make use of the means of instruction (that is, the educational system existing at that time).

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178 Signed on 20 March 1952 in Paris

179 *Six Groups of Belgian Citizens v Belgium (Belgian Linguistic Case)* 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 YB6.332; YB7. 140 Report 24 June 1965: Judgment 23 July 1968

Six groups of French-speaking applicants, resident in Brussels and in the Flemish part of greater Belgium alleged that the linguistic system of education in Belgium violated the European Convention and its First Protocol. The issue in these cases was Belgium's refusal to establish, subsidise or maintain primary schools in the Dutch speaking regions where French was the medium of instruction. The Belgian Government argued that the "right to education" did not indicate any positive obligation on the part of the State.

The majority of the Commission agreed that the "right to education"placed no positive obligation on the State and did not bind the State either to provide education itself or to subsidise private education. The Commission was of the view that Article 2, notwithstanding its negative formulation, gave the right of education to everyone. It is a right whose scope is not defined in Article 2; and the substance of this right varies from place to place according to the needs of the community. The Commission decided that Belgium being a modern highly industrialized State, the right of education must include nursery, primary, secondary and higher education.

The European Court noted that the right to education would have no meaning whatever if there wasn't an assumption of the right to be educated in the official language or in one of the official languages. The right to education obviously indicated some form of regulation and uniformity by the State. This may vary in time and place according to the particular needs of the community.

The European Court decided that Belgium's refusal to establish, subsidise or maintain primary school education in the Dutch speaking region, was not a violation of Article 2 of the First Protocol.

The UNESCO Convention against Discrimination in Education (1960) lays down that discrimination exists if any person or group of persons

(a) is deprived of access to education;

(b) is given education of an inferior standard; or

(c) is forced to attend separate educational institutions

28.3. PARENTS' RELIGIOUS, MORAL AND PHILOSOPHICAL OPINIONS

In terms of the second sentence of Article 2 of this Protocol the "religious and philosophical convictions" of the parents in relation to the education of their children are assured of protection. In the *Belgian Linguistics Case*[180] the European Court indicated that Article 2 does not mean that in the area of education States must respect the linguistic preferences of the parents, but only their religious and moral values.

The right of parents to their children's education raises issues under both Article 8 (private and family life) of the Convention and Article 2 of the Protocol. The Court took the view that the Convention must be read in its entirety and that a right covered by one article might also be regulated by provisions in other articles. The Court, therefore, looked at the case by taking into account Article 8 of the Convention and Article 2 of the First Protocol.

The Commission decided in X v *United Kingdom* that the right to determine constituent ingredients of a child's education is an essential element of

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180 *Ibid*

181 5608/ 72 CD 44, 66

the right of custody. In cases where a parent no longer has custody then that parent no longer has any right to determine the course of the child's education.

In *X v Netherlands*[182] the applicant complained that against his wishes his children had been placed by the authorities in the care of child welfare organisation with Roman Catholic persuasion. The application was rejected as manifestly ill-founded.

An important case on this issue of "religious and philosophical convictions" is *Kjeldsen and others v Denmark*[183]. The case highlights the difficult problem of balancing the right of the children to receive information and the right of parents to control the information so received. The Danish Parliament had enacted a law in 1970 which was the result of a fairly elaborate enquiry and report and which was implemented in August 1971. This statute made sex education compulsory in all State schools; but it was to be distributed over different subjects and adapted to the age of the pupil. Previously there had been sex education in the schools, but this was in an optional class from which the parents could remove their children if they so desired.

The applicants complained that by making sex education compulsory in all State schools the Danish Government had failed to respect the applicants' right to ensure that the education of their children confirmed with their religious and philosophical convictions. The Government argued that parents could send their children to private schools if they wanted to.

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182 2648/65 CD26,26

183 5095/71; 5920/72; 5926/72 CD43,44 YB 15, 482 21 March 1975

The Commission rejected this argument.

The question in issue here was whether this system failed to respect or ensure the right of the parents to have their children educated according to their religious and moral convictions. Obviously if parents hold or postulate eccentric views one can most certainly use the argument that the rights of the children prevail. Should the information to be given to the children be limited or restricted by the views of a small minority? The system on the whole was a reasonably good one. Control could be exercised by the School Boards in which a representation of parents is required by law. The majority took the view that where the rights of the children are being met in a positive way, then the rights of the parents must not be given pre-eminence. The Commissions vote was seven to seven with the President's (Professor Fawcett) casting vote in favour of the system.

The European Court took the same view as the Commission and stated that the system did not violate the European Convention or the First Protocol. The Court noted that Article 2 requires the State to respect the rights of parents while at the same time exercising its functions in education. The State's functions include the planning of school curricula. Article 2 implies that the State in fulfilling its functions must ensure that the information is disseminated in an objective manner. The State should not indoctrinate where it is contrary to the "religious and philisophical convictions" of the parents. The Court held (by six to one) that the integrated and compulsory sex education in schools did not offend the applicants' religious or philosophical convictions and that Article 2 of the First Protocol had

therefore not been breached.

The Court also noted that Denmark, through its sex education programme was educating children early enough in matters which it viewed as seriously threatening the social norms of the country, for example, illegitimacy, abortions, sexually transmitted diseases, *etc*. The Court found that there was no attempt at indoctrination.

It is not clear why the draftsmen of the Bophuthatswana Bill of Rights did not specifically entrench a right to education in the Bill of Rights. Bophuthatswana, being a new country, it is submitted that one of the quickest methods of expediting the removal of remnants of the armour and even more so of erasing the memory of Bantu education altogether from Bophuthatswana would be to have a specific Article in the Bill of Rights guaranteeing the right of education to citizens and residents alike.

CHAPTER 29

THE RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION (ARTICLE 14)

29.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 14)

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.

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 the public safety, fot the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

EUROPEAN CONVENTION (Article 9)

This provision is identical to Article 14 of the Bophuthatswana Bill of Rights.

UNIVERSAL DECLARATION (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 public or private to manifest his religion or belief in teaching, practice, worship and observance.

CIVIL AND POLITICAL RIGHTS COVENANT (Article 18)

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. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 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.

AMERICAN DECLARATION (Article 3)

Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.

AMERICAN CONVENTION (Article 12)

Everyone has the right to freedom of conscience and of religion. This 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. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religious beliefs. 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.

AFRICAN CHARTER (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.

FRANCE DECLARATION OF THE RIGHTS OF MAN (1789) (Article 10)

No man is interfered with because of his opinions, not even because of his religious beliefs, provided his avowal of them does not disturb public order as established by law.

CANADA BILL OF RIGHTS (1960) (Article 1)

It is hereby recognized and declared that in Canada there (has) existed and shall continue to exist without discrimination ... freedom of religion.

WEST GERMANY: BASIC LAW (Article 4)

Freedom of faith and of conscience, and freedom of creed, religious or ideological, shall be inviolable. The undisturbed practice of religion is guaranteed. No one may be compelled against his conscience to render war service involving the use of arms.

INDIA CONSTITUTION (1949) (Article 25)

Subject to public order, morality and health ... all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

EGYPT CONSTITUTION (1964) (Article 34)

Freedom of belief is absolute. The State protects the freedom of the practice of religion and creeds in accordance with customs, provided this does not infringe upon public order or conflict with morality.

NIGERIA CONSTITUTION (Article 24)

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

SRI LANKA CONSTITUTION (1977) (Articles 10 and 14(1)(e))

Every person is entitled to freedom of thought conscience and religion, including the freedom to have or to adopt a religion or belief of his choice. Every citizen is entitled to the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

29.2. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

The right embraced by Article 14 of the Bophuthatswana Bill of Rights and Article 9 of the European Convention is not limited to moral and religious convictions but it would also include philosophical and political views as well. It is also suggested that freedom of religion must imply also the right not to believe in any religion. It is also clear from this provision that States have a duty to tolerate and respect all religious beliefs and cults within their jurisdiction.

The European Commission decided in *X v Austria*[184] that a law requiring voters to comply with electoral procedures was not contrary to Article 9. The applicant failed in his argument that these electoral procedures constituted an infringement of his freedom of conscience.

In *X v Austria*[185] the Commission concluded that Article 9 places no obligation on a State to distribute books to prisoners which they considered essential for their religious and philosophical beliefs. In *X v United Kingdom*[186] the Commission decided that the refusal by the prison authorities to hand over to a prisoner a book which although basically with a religious theme, but which also discussed the martial arts, was a violation of the prisoner's right to freedom, but was necessary for the protection of the rights and freedoms of others.

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184 1718/62 CD16,30 YB 8, 168

185 1753/63 CD16,20 YB 8, 174

186 6886/75 DR5, 100

The case *Grandrath v Federal Republic of Germany*[187] is concerned with the whole question of freedom of conscience and religion. Grandrath was a member of the Jehovah's Witness cult in West Germany. He was summoned for compulsory military service. He refused on the grounds of conscience, having regard to Article 4(3)(b) of the Convention which provides for civilian service for those who are conscientious objectors to military service. Grandrath refused to perform civilian service as well, on the grounds that it interfered with his religious practice as a minister. He was asked to be an aide in a hospital - obviously he could not argue that this type of civilian service was contrary to his conscience. The Commission examined this case in the light of Article 4(2) and 4(3) and held that because it is expressly recognized that civilian service may be imposed on conscientious objectors as a substitute for military service, therfore, one could not claim exemption from such substitute civilian service.

The question arose whether the substitute civilian service constituted an interference with his right to the manifestation of his religious beliefs in terms of Article 9. Grandrath pointed out that under German Law full-time ministers of religion were exempt from service. He argued that this was discriminatory against him.

The Commission took into consideration that in the Jehovah's Witness cult there are in fact no ministers and that everyone is a minister. This was the critical point. One has to consider a religious practice wherein ministers have a certain role and duties to perform and one could say if

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187 2299/64; Report 12 December 1966; YB8,324

they are not released from military service and civilian service then that would constitute an infringement of their practice as ministers within the community. The numbers involved would be small. The Commission reasoned that inevitable problems would arise if Grandrath's alleged ministry was acknowledged, for example; supposing a group of about 5000 people establish a religious practice and indicate that all of them are ministers. All would wish to be released from military and civilian service. This would create a dangerous precedent. This is where Article 9(2) could be invoked, namely freedom to manifest one's belief is subject to limitations in the interests of public safety and for the protection of public order. The Commission decided that substituted civilian service was not a violation of Grandrath's freedom to manifest his religious belief.

The church is a systematically organized religious society based on similar views. In terms of Article 9, the church itself, as a congregate body, has the right to manifest its beliefs, and to carry out worship and teaching. Article 9 is not violated, according to *Ahmad v United Kingdom*[188], if a Muslim teacher has to transfer to a part-time contract so that he may worship at a mosque during normal school hours every Friday.

An interesting case that came before the Commission was *X v United Kingdom*[189] which concerned a United Kingdom law which made it compulsory for motor-cyclists to use a helmet. The applicant, a Sikh, argued that the act of removing his turban in order to use the helmet was a violation of his right to religious freedom. The Commission agreed with this argument but added that it was

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188 8160/78 Decision of 12 March 1981

189 7992/77; DR 14, 234

necessary and justified for the protection and safety of the public.

The refusal to take out compulsory motor vehicle insurance may be justified on the grounds of conscience, but it is necessary for the protection of the rights and freedoms of others.[190]

In *Gandhi v Bombay*[191] the Indian Supreme Court pointed out that religious practices or religious rites and ceremonies are as much an integral part of religion as belief in a statement of doctrines.

29.3. FREEDOM OF RELIGION IN CANADA

Neither the European Convention nor the Bophuthatswana Bill of Rights mentions or defines the term "creed". One generally tends to adopt the limited meaning of " professed system of religious beliefs" in preference to the more expansive secondary meaning of "a set of opinions on any subject"[192] A problem area here is where the creed of certain employees conflicts with their working conditions, for example, the conflict of religious holidays and work programmes.

The problem with work programmes usually arises with communities such as Orthodox Jews, the Worldwide Church of God, Seven Day Adventists, *etc*; all of who observe Sabbath from sunset on Friday to sunset on Saturday. If an employer permits Christians to observe their "Sabbath" (that is Sunday as

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190 *X v Netherlands* 2988/66 CD23, 137

191 *Ratilal Panchand Gandhi V Bombay* 1954 AIR (SC) 388

192 See the *Oxford English Dictionary*

the Lord's Day) but does not permit members of other religions or religious sects to do so, then the question arises whether this is a violation of the right to manifest one's religious beliefs. Furthermore, if an employer, as a matter of routine, grants so-called Christian holidays (Christmas and Easter) must he similarly accommodate non-Christian religious festival days? Employers who dismiss their staff would argue that it was not because of creed but because of the refusal to work prescribed hours. But, of course, a valid counter-argument can be advanced. One could argue that the wider meaning of the term "creed" should be adopted.

An excellent judgment in this regard is the Canadian case of *R v Ontario Labour Relations Board*[193] where it was stated that

> In dealing with the question as to whether an organisation discriminates on account of creed, the Labour Relations Board is concerned not only with the functional operation of the organisation itself. In other words the Board is interested in deeds as well as words.[194]

This means that a human rights body should question the "functional operation" of a company that routinely grants religious holidays to employees of one religion (or sect or cult) but denies this right to employees of another religion.

In the United States the Equal Employment Opportunity Commission has

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193 *R v Ontario Labour Relations Board, ex parte Trenton Construction Workers Association* 1963(39) DLR (Ontario High Court) 593

194 At page 602-603 of the Law Report

restricted these discriminatory employment practices by a regulation[195] that requires employers to make at least a reasonable allowance for the

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195 Regulation 1605 of 10 July 1967 - *Guidelines on Discrimination because of Religion*

Section 1 of this regulation which is quoted in McDonald *supra* at 103 considers the observation of the Sabbath and other religious holidays.

1(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday or some other day of the week as the Sabbath or who observe certain special religious holidays during the year and, as a consequence do not work on such days.

1(b) The Commission believes that the duty not to discriminate on religious grounds ... includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of the employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

1(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his

religious needs of their employees unless they (the employers) can show that to do so would result in business hardship.

Another issue that can be raised in regard to the right of freedom of conscience and religion applies in those countries that have either legalized abortion or liberalised abortion laws, particularly Western European countries, the United States and Canada. The problem here is that an individual's religious belief or creed or even general moral values might forbid him to be a participant in an abortion procedure This particularly applies to hospital staff.

In a letter dated 14 February 1975 the Director of the Ontario Hospital Association advised the hospitals that

" ... they assume responsibility for informing employees

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religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable

1(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the various religious practices of the American people.

> at the time of hiring about their possible involvement in certain surgical procedures .... to have an opportunity whether they wish to start or to continue employment ..."[196]

This, in effect, means that a certain proportion of nurses and other hospital staff will be denied employment. This would be discrimination because it can be effectively argued that other hospital staff are not obliged to bypass their religious beliefs.

Case law in support of the proposition that no one should be denied employment merely because of his religious beliefs is *In Re Fardella v R* where it was stated that

> ... if an employer's order to an employee does abrogate, abridge or infringe upon the religious freedom of the employee or of another within the meaning of 'freedom of religion' in the Canadian Bill of Rights - the order would be unlawful and the employee could, with impunity, refuse to obey it. Such a refusal would not be a valid ground for discharging the employee from his employment.[197]

29.4. THE QUESTION OF MORALS

In Article 14(2) of the Bophuthatswana Bill of Rights and Article 9(2)

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196 Letter of 14 February 1975 (Referred to in McDonald *The Practice of Freedom*, *supra* at 86)

197 1974 (47) DLR 689 at 707. (Referred to in McDonald *supra* at 86)

of the European Convention reference is made to the fact that freedom to manifest one's religious convictions will be subject to limitations for the protection of public order, health or morals. If it can be argued that the word "public" also qualifies "morals" then it is clear that public morals cannot extend into the sphere of private lives or private activity. The issue of morals is usually invoked for the protection of the rights and freedoms of individuals. The European Convention and the Bill of Rights are not attempting in any way to establish moral standards for individuals, but if there is interference with public morals then restrictions are imposed on the individuals rights and freedoms, for example pornography and prostitution are issues that concern public morals even though an individual might argue that it constitutes a violation of his private life. The concept of public morality varies from country to country. The European Convention lays down a minimum standard only. Whether an act is contrary to public morals would depend on the social values and *mores* of a particular community.

In *R v Stainforth and Jordan*[198] the Court pointed out that the opinion of experts can guide the courts as to the literary, artistic, scientific or other merits of a publication but that that evidence would be inadmissible if it goes beyond an opinion and in fact attempts to redeem the possible obscenity of a publication.

29.5. FREEDOM OF RELIGION IN THE UNITED STATES

Freedom of religion is enshrined in the First Amendment to the US Constitution.

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198 1976(2)AllER 714

In addition Article VI of the Constitution lays down that "no religious test shall ever be required as a qualification to any office or public trust under the United States".[199]

In *Cantwell v Connecticut*[200] the Court upheld religious liberty even in the case of a (then) small cult, the Jehovah's Witnesses. The Supreme Court reversed the decision of the Connecticut Court by declaring that a member of this cult who had been trying to convert the general public in the streets had not caused a civil disorder.

In *Everson v Board of Education*[201] the Court declared that the Church and State are separate entities. The issue of religion in relation to education has resulted in considerable litigation. Education is concerned with the transmission of all facets of knowledge and religion just *one* of these facets. In *Pierce v Society of Sisters*[202] it was pointed out that a State has no authority to compel attendance at State schools. This would constitute a deprivation of the right of the parents to decide on the proper education for their children which would include religious education. It was decided that parents are constitutionally free to choose religious-based schools for their children.

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199 See Commager HS *Living Documents of American History* at 21 by courtesy of the US Information Service

200 1940 (310) US 296

201 1947 (330) US 1

202 1925 (268) US 510

Religious activities in State schools have also occasioned considerable litigation. In some States there was the requirement that passages from *The Bible* had to be read daily by all the classes. In *Engel v Vitale*[203] these practices were declared unconstitutional. In *West Virginia Board of Education v Barnette*[204] it was held that a school should not require a student to make or utter a belief contrary to his religious views. The judgment forbids the coercion on anyone to salute the US flag, if it is contrary to his religious beliefs(as is the case with the Jehovah's Witnesses who regard the saluting of a flag as an idolatrous act).

29.6. CONCLUSION

Any conduct, be it religious or otherwise, must always remain subject to the limitations and restrictions that 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.*[205] Although in a modern community it would be entirely impossible to accommodate all notions that individuals claim to be religious practices or beliefs, tolerance and every possible attempt at accommodation with these diverse notions are the strategems of the exercise of the right to freedom of thought, conscience and religion.

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203 1962 (370) US 421 also known as *The Regents Prayer Case*

204 1943 (319) US 624

205 Article 14(2) of the Bophuthatswana Bill of Rights.
Emphasis added.

CHAPTER 30

FREEDOM OF EXPRESSION, OPINION AND INFORMATION (ARTICLE 15)

30.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 15)

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 authorities and regardless of frontier but this provision shall be subject to the requirements for the licensing of broadcasting, television or cinema enterprises.

The exercise of the right of expression, 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.

EUROPEAN CONVENTION (Article 10)

Article 10 is similar - in fact almost identical - to Article 15 of the Bophuthatswana Bill of Rights.

CIVIL AND POLITICAL RIGHTS COVENANT (Article 19)

Everyone shall have the right to hold opinions without interference.

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, or in writing or in print, in the form of art, or through any other media of his choice.

The exercise of these rights ... shall be subject to ... respect of the rights or reputation of others and for the protection of national security or of public order, or of public health or morals.

UNIVERSAL DECLARATION (Article 19)

Everyone has the right to freedom of opinion and expression; and 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.

AMERICAN DECLARATION (Article V)

Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

AMERICAN CONVENTION (Article 13)

Article 13 is similar to Article 19 of the Civil and Political Rights Covenant.

AFRICAN CHARTER (Article 9)

Every individual shall have the right to receive information.

Every individual shall have the right to express and disseminate his opinions within the law.

FRANCE: DECLARATION OF THE RIGHTS OF MAN (Article 11)

... Every citizen may speak, write and publish freely.

CANADA BILL OF RIGHTS (1960) (Article 1)

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination ... freedom of speech ... (and) freedom of the press.

INDIA CONSTITUTION (Article 19)

All citizens shall have the right to freedom of speech and expression.

WEST GERMANY: BASIC LAW (Article 5)

Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by radio and motion pictures are guaranteed. There shall be no censorship.

EGYPT CONSTITUTION (1964) (Article 36)

Freedom of the press, printing and publication is guaranteed within the

limits of the law.

NIGERIA CONSTITUTION (1963) (Article 25)

Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

SRI LANKA CONSTITUTION (1977) (Article 14(1)(a))

Every citizen is entitled to the freedom of speech and expression including publication.

30.2. FREEDOM OF EXPRESSION, OPINION AND INFORMATION

Freedom of expression is an essential foundation upon which a democratic society can be built to perfection of the respect for human rights and fundamental freedoms. In the *Handyside Case*[206] it was noted by the European Court that "freedom of expression" in Article 10(1) is applicable not only to information that is favourably received but also to information that is offensive, shocking or disturbing to anyone. Freedom of expression constitutes the implementation of the individual freedom of thought. Therefore, the freedom of expression is mainly a collective or congregate freedom which in modern times has become accentuated by and closely connected with the mass media.

The "freedom of expression" would imply that there should exist within the

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206 *Handyside v United Kingdom* 5493/72 Report of 30 September 1975; Judgment 7 December 1976

State, a free and independent press and not subject to censorship. Freedom of expression also implies the right to set up a newspaper. In *De Becker v Belgium*[207] the Commission decided that to forbid a convicted person from editing, printing or distributing a newspaper is contrary to the notion of "freedom of expression" laid down in Article 10(1) of the European Convention.

Article 10(1) indicates that the "right to freedom of expression" also includes the "freedom to hold opinions and to receive and impart information." An opinion may be in the form of a report, a viewpoint or even a value judgment or constructive criticism. Opinions may be given or held in any subject, for example philosophy, art, politics *etc*. The word "freedom" indicates that any person may express his opinions freely (subject, of course, to Article 10(2)) "Freedom of information" entails not only the right to access to information but also the right to dissemination of information.

The right to impart information "without interference by public authorities and regardless of frontier" indicates that the State should not hinder the distribution of that information. The right of a newspaper publisher to refuse to disclose the names of the writers of articles in his newspaper must be upheld. The press should be allowed to receive information in confidence without the fear of jeopardising it sources. Nevertheless, it must be pointed out that the news correspondent or journalist will be guilty of comtempt of court, if he refuses to reveal his source of

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207 214/56 YB 2, 214

information when ordered to do so by a court of law.

It is suggested that the right to freedom of criticism is inherent within the concept of "freedom of expression". Criticism, however, should be based on facts and must be constructive and productive.

In deciding whether the State has interfered with the freedom of expression, the Commission is competent to consider whether such interference is in accordance with the provisions of Article 10(2). In *X v Austria*[208] the Commission pointed out that a State is allowed a certain margin of appreciation in determining the limits that may be placed on the freedom of expression.

There is a responsibility on the press not to publish and disseminate incorrect information which may possibly defame individuals[209]. In many countries journalists abide by a code of ethics. Freedom of the press is greatly enhanced by the press itself upholding high standards of professionalism. It is conceded that some restrictions on the freedom of the press "in the interests of national security" is necessary. It is submitted that there may be occasions when a State would curb the freedom of the press for political reasons whilst actually suggesting security reasons.

In *X v United Kingdom*[210] the application alleged that the prison rules

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208 753/60 CD4; YB 3, 310

209 Cf *SAUK v O'MALLEY* 1977(3) SA 394 AD

210 5442/72 DR1, 41

infringed on his right to freedom of expression. He was not able to enclose anything with his letters for the purposes of publication. The Commission, took into consideration the tremendous burden of checking all correspondence sent out by prisoners for publication, and concluded that the prison rules were necessary in a democratic society for the prevention of disorder or crime within the context of Article 10(2) of the European Convention.

Obsence publications and publications which may corrupt peoples morals may all be restricted in terms of Article 10(2). There is no doubt that the criteria for determining what would fall under the category of "obscene" must depend on the standards of morality prevailing in any society at a given time.

30.3. INTERDICTS AGAINST THE PRESS

An inderdict against the press would *prima facie* constitute an intervention of the right to freedom of expression. When a newspaper (or even an individual) is interdicted from publishing an article the issue can crystalize to whether it is justified in terms of Article 10(2). There is also the related issue of the protection of the reputation and of maintaining the authority and impartiality of the judiciary. The right of the judiciary not to be put in a position where it is influenced by the publication is an important right. The notion of influence could be put in two ways: One can say either that in giving judgment the court was intent on defeating the publication, or that it was influenced by the press because it gave judgment in support of the publication.

In *Woodward and Others v Hutchins*[211] it was noted that the right to freedom of expression and information which is exercised in a newspaper article should not be infringed by interdicts where a civil action for damages is available. A relevant question that may be posed at this juncture is whether the civil action for damages is not closing the door after the damage is done - in the sense that if the article is injurious to one's reputation why does one have to wait until it has been published and then institute a claim?

It would be absurd to suggest that the higher courts in any country are likely to be influenced by the press. It is submitted that the term "judiciary" in Article 10(2) really means the entire court system. It would be too restrictive to suggest that "judiciary" means only titular judges. It is submitted that even tribunals come within the scope of the term "judiciary". The essence of the notion of "judiciary" is that it is a body which must hear both sides of the matter before it. It has to make an objective enquiry and it gives a decision. The decision may not be final because there may be an appeal, but nontheless, it is a decision which is part of a process leading up to the final decision.

In the *Sunday Times v United Kindom case*[212] the applicants alleged that an interdict issued by the English High Court and upheld by the House of Lords, forbidding them from publishing an article in the Sunday

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211 1977(2) All ER 751

212 6538/74 DR2,90

Times about thalidomide children constituted a breach of Article 10 of the Convention. The United Kingdom argued that any interference with the right to freedom of expression in the *sub judice* case was completely justified as having been necessary "for maintaining the authority and impartiality of the judiciary" within the proper context of Article 10(2) of the European Convention. The applicants alleged that the restriction imposed by the interdict on the freedom of expression extended beyond that which was necessary in a democratic society and fell outside the United Kindom's margin of appreciation under Article 10 of the Convention.

The question at issue here was whether the interdicted article was capable of affecting the judgment of the Court in the *sub judice* case. The Sunday Times had sometime earlier published another article on the same subject matter. It had suggested that the distillers had neither done sufficient research on the effects of thalidomide nor had they taken adequate precautions. Out of the nearly 60 actions brought by the parents of these thalidomide children only 5 actions were still pending. All the rest had been settled. It is therefore inconceivable that the English court in this *sub judice* case would have been influenced by the intended publication in the Sunday Times bearing in mind that the 5 actions were pending for more than two years.

The Commission and the Court were of the view that in this particular case the impartiality of the court could not really be brought to question by the character of the newspaper article. The European Court added that national courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior

discussion of disputes elsewhere, be it in specialized journals, in the general press, or amongst the public at large. Indeed while 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 but also the public has a right to receive them.[213]

30.4. MONOPOLY OF THE PRESS

The term "information" includes the expression of facts and of news. Lists that contain television and radio programmes in newspapers constitute "information" and not "opinions" within the meaning and context of Article 10 of the European Convention.

In *De Geillustreerde Pers v The Netherlands*[214] the issue of press concentration was raised under Article 10, that is, the extent that press publications could become a monopoly and, perhaps, ultimately also become discriminatory against other press enterprises. The applicant company, The Illustrated Press, published *The Illustrated Magazine* which was a weekly issue covering general subjects. The applicant wanted to include the schedule of broadcasting programmes in this Magazine.

There are eight broadcasting organisations in the Netherlands. All are

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213 Sieghart at 331

214 5178/71 DR 3,5 DR 8,5; YB16, 124 Judgment 10 March 1977

private companies with licences to operate only if they can indicate that they have a combined membership of 100 000 radio and television licence holders. The publication of the full radio and television programmes is limited to magazines published by the eight organisations. In addition a summary of programmes is issued to newspapers appearing at least three times per week.

The applicant company argued that this was a monopoly and that therefore Article 10 had been infringed; and in addition it was discriminatory that some publication of the programmes was allowed to certain newspapers.

The Commission took the view that the freedom to impart information under Article 10 of the kind described is only granted to the person or organisation producing, providing or organising the information; that is, the freedom to impart the information is limited to the author, or otherwise the intellectual owner of the information concerned. Article 10 is not violated where a company is prevented from publishing information not yet in its possession.

On the point whether this information was in any way restricted, in the sense that it was alleged that there was a *quasi* - monopoly, the Commission held that the freedom of the press was not threatened because the public was not deprived of the information. The Commission found that every person in the Netherlands was able to receive information on all forthcoming radio and television programmes through a variety of publications. The Commission took the view that the protection of the commercial interests of particular newspapers or groups of newspapers is not contemplated by the terms of Article 10.

30.5. CONCLUSION

Freedom of speech and expression is not an absolute right. It must always be subject to Article 15(2) of the Bophuthatswana Bill of Rights and similar articles in other instruments. No one should have the absolute right to stand anywhere and say what he wants to without having regard to his neighbours. As Lord Atkin so succinctly summed it up in *Donoghue v Stevenson*[215] that one's neighbour is anyone whom one should have in reasonable contemplation when going about one's business.

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215 1932 AC 562

CHAPTER 31

FREEDOM OF ASSEMBLY AND FREEDOM OF ASSOCIATION (ARTICLE 16)

31.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 16)

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

EUROPEAN CONVENTION (Article 11)

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.

UNIVERSAL DECLARATION (Article 20)

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

No one may be compelled to belong to an association.

AMERICAN DECLARATION (Article 21)

Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.

AMERICAN CONVENTION (Articles 15 and 16)

The right of peaceful assembly, without arms, is recognized.

Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports or other purposes.

AFRICAN CHARTER (Articles 10 and 11)

Every individual shall have the right to free association provided

he abides by the law. Every individual shall have the right to assemble freely with others.

CANADIAN BILL OF RIGHTS (1960) (Article 1)

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion of sex ..... freedom of assembly and association.

WEST GERMANY: BASIC LAW (Articles 8 and 9)

All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.

All Germans shall have the right to form associations and societies.

INDIA: CONSTITUTION (Article 19)

All citizens shall have the right .... to assemble peaceably and without arms (and) to form associations or unions.

NIGERIA CONSTITUTION (1963) (Article 26)

Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to trade unions and other associations for the protection of his interests.

SRI LANKA CONSTITUTION (1977) (Article 14 (1)(b)(c)(d))

Each citizen is entitled to ... the freedom of peaceful assembly; the freedom of association; (and to) the freedom to form and join a trade union.

31.2. FREEDOM OF ASSEMBLY AND ASSOCIATION

The European Commission has made it patently clear that the freedom of peaceful assembly is a fundamental right. The term embraces both private and public meetings.[216] In *Denmark et al v Greece*[217] the background was that during the time of the military regime in Greece political meetings could not be held in public, and could take place in private only with prior police approval. The Commission decided that these restrictions were not consistent with Article 11 of the Convention.

The word "association" indicates a completely voluntary categorization of people for a common purpose. In *Association X v Sweden*[218] it was decided that Article 11 refers to private associations and not public associations. In *Le Compte et al v Belgium*[219] the Commission decided that a medical organisation formed by the State was not an "association" within the meaning of Article 11(1) because it had public functions such as the observance of medical ethics.

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216 *Rassemblement Jurassien and another v Switzerland* 8191/78 DR 17,93

217 *Denmark, Norway, Sweden and Netherlands v Greece* 3321/67; 3322/67; 3323/67; 3344/67 YB11, 690; YB 12 *bis*.

218 6094/73 DR 9,5

219 *Le Compte, Van Leuven and de Meyere v Belgium* 6878/75; 7238/75; Report 14 December 1979; Judgment 23 June 1981

31.3. TRADE UNIONS

Article 11(1) of the European Convention regards trade union freedom as one facet of the right to freedom of association. The two ILO Conventions in this regard are the Freedom of Association and Protection of the Right to Organise Convention (No 87 of 1948) and the Right to Organise and Collective Bargaining Convention (No. 98 of 1949). These instruments deal with labour law standards and they safeguard the right to form and join trade unions, the right of members to freely elect their union representatives and the right of union to organise their administration.[220]

In the *National Union of Belgian Police v Belgium*[221] the European Court decided that Article 11 does not guarantee trade unions a right to be consulted by the State. In the case of *Swedish Engine Drivers' Union v Sweden*[222] the union alleged that the National Bargaining Office refused to enter into a new agreement with it concerning conditions of work and employment. The European Court took the view that members of a trade union have a right, in order to protect their interests, that the trade union should be given a hearing. Article 11(1) left each State a free choice of the methods to be employed in this regard. Article 11 does not lay down any particular criteria for the treatment of trade unions, or their members by the State, such as the right that the State should let any particular union have a preference over others.

In *Schmidt and Dahlström v Sweden*[223] the applicants alleged violation of

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220 *X v Ireland* 4125/69 CD37,42

221 4464/70; Judgment 27 October 1975

222 5614/72; Judgment 6 February 1976

223 5589/72; Judgment 6 February 1976

Article 11 because they were denied the benefit of a retroactive increase in salary. The reason was that their unions had engaged in strikes after a breakdown of negotiations for a new agreement. The Court held that Article 11 does not lay down any particular treatment by the State for members of trade unions, such as the right to retroactivity of benefits, *etc.*

Article 11 refers to trade *unions* (plural). This suggests that a trade union monopoly is excluded. A person must therefore be free to choose which of the existing unions he desires to join; or he may choose to form a new union. The case *James et al v United Kingdom*[224] is interesting because the applicants alleged that they were dismissed because they refused to join specific trade unions. The Commission came to the conclusion that this was an interference of the applicants' right to form or join a trade union of their own choice and in accordance with their personal convictions. The Court came to the same conclusion. The Court stated that dismissal of a person from employment because he refused to join a union runs contrary to the freedom guaranteed in Article 11 of the Convention because Article 11 also protects a person's opinions.

31.4. TRADE UNIONS IN BOPHUTHATSWANA

Article 16 of the Bophuthatswana Bill of Rights merely refers to "peaceful assembly" and "association". It does not refer to "trade unions".

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224 7601/76; 7806/77; Report 14 December 1979

The European Convention (Article 11), on the other hand, makes it explicit that "the right to form and join trade unions" is one aspect of the right to freedom of association. It can therefore be inferred that Article 16 also guarantees the right to form and join trade unions in Bophuthatswana.

Bophuthatswana has the Industrial Conciliation Act[225] which makes provision for the formation and joining of trade unions. The fundamental purpose of this Act, however, is the maintenance of industrial peace. This Act regulates *inter alia*,

> the conditions of employment;
> registration of trade unions;
> registration of employer's organisations;
> the prevention and settlement of disputes between employers and employees;
> and
> the reasonable limitation of strikes and lockouts in the national interest.

Only those trade unions and employer's organisations that have governing bodies in Bophuthatswana are recognized by the Act. The Act specifically lays down that all trade unions are prohibited from affiliating with any political party, organisation or ideology. This prohibition applies to both registered and unregistered trade unions in Bophuthatswana.

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225 Passed by the Bophuthatswana National Assembly, 1984

An unregistered trade union has no protection or power to negotiate agreements that will be recognised in terms of the Act. In addition, an unregistered trade union has no access to an Industrial Council. The registered trade union therefore has open to it all the benefit of collective bargaining.

The Industrial Conciliation Act provides for the establishment of Industrial Councils, and industrial boards to prevent and settle disputes between employers and employees.

Mr. V McCormack, the Industrial Registrar in Bophuthatswana appealed to all the industrialists to make the very best use of the Industrial Conciliation Act, which "provides a sound platform for good orderly relationships between the employed and the employers."[226]

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226 *The Mail* Bophuthatswana's National Newspaper 13 July 1984

CHAPTER 32

THE RIGHT TO PROPERTY (ARTICLE 17)

32.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 17)

The right to own and possess private and communal property is protected. Expropriation shall be authorised only in terms of an Act of Parliament, if it is for the public benefit and if reasonable compensation is paid.

EUROPEAN CONVENTION FIRST PROTOCOL (Article 1)

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

UNIVERSAL DECLARATION (Article 17)

Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

AMERICAN DECLARATION (Article 23)

Every person has a right to own ... private property ...

AMERICAN CONVENTION (Article 21)

Everyone has the right to use and enjoyment of his property.

AFRICAN CHARTER (Article 14)

The right to property shall be guaranteed by law.

CANADA BILL OF RIGHTS (Article 1)

It is hereby recognized and declared that in Canada there have existed and shall continue to exist ... the right of the individual to ... enjoyment of property.

WEST GERMANY BASIC LAW (Article 14)

The rights of ownership are guaranteed.

INDIAN CONSTITUTION (Article 19)

All citizens shall have the right ... to acquire, hold and dispose of property.

32.2. THE RIGHT TO PROPERTY

The Bophuthatswana Bill of Rights and the Universal Declaration both declare a "right to own" property. The European Convention in its First Protocol does not use the term "ownership".

In *Sporrong and Lönnroth v Sweden*[227] it was decided that where a

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227 7151/75; 7152/75 Report 8 October 1980.

local authority has a right to expropriate urban land for development, but does not exercise that right for many years (and during this period the value of the land remains low), then this would constitute an infringement of the right to peaceful enjoyment of the land. Any law which totally forbids or even restricts a mother's right to bequeath her property to her illegitimate children violates Article 1 of the First Protocol to the European Convention.[228]

The right to property is subject to expropriateion "for the public benefit", in other words, to the right of the community at large. The right to expropriate is an inherent facet of the sovereignty of every State. Another method of taking private property is confiscation. It differs from expropriation because no compensation is paid. Confiscation is a form of punishment and is consequent upon conviction for a criminal offence.[229]

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228 *Marckx v Belgium* 6833/74 Report 10 December 1977

229 For the right to private ownership in Ireland see Exshaw EY, *The Right of Private Ownership* in *Fundamental Rights* edited by Bridge JW (*et al*)

For right to property under United States law see Jones WC, The Right to own Property and to Contract in *Constitutional Freedom and the Law* edited by Dorsey GL *et al*

CHAPTER 33

NON-DISCRIMINATION (ARTICLE 9)

33.1. TEXTS

BOPHUTHATSWANA BILL OF RIGHTS (Article 9)

All persons shall be equal before the law, and no one may because of his sex, his descent, his race, his language, his origin or his religious beliefs be favoured or prejudiced.

EUROPEAN CONVENTION (Article 14)

The enjoyment of the rights and freedoms ... 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.

UNIVERSAL DECLARATION (Article 7)

All are equal before the law and are entitled without any discrimination to equal protection of the law.

AMERICAN DECLARATION (Article 2)

All persons are equal before the law ... without distinction as to race, sex, language, creed or any other factor.

AMERICAN CONVENTION (Article 24)

All persons are equal before the law ... (and) are entitled, without discrimination, to equal protection of the law.

AFRICAN CHARTER (Articles 3 and 19)

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

All people shall be equal: they shall enjoy the same respect and shall have the same rights.

CIVIL AND POLITICAL RIGHTS COVENANT (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.

SRI LANKA CONSTITUTION (Article 12)

All persons are equal before the law and are entitled to the equal protection of the law. No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.

WEST GERMANY BASIC LAW (Article 3)

All persons shall be equal before the law. No one may be prejudiced or favoured because of his sex, his parentage, his race, his language,

his homeland and origin, his faith or his religious or political opinions.

INDIA CONSTITUTION (Article 14)

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

33.2. NON-DISCRIMINATION AND EQUALITY BEFORE THE LAW

In the *Belgian Linguistics case*[230] discrimination was considered as inequality of treatment, that is, differential treatment which is not justified by objective and reasonable tests.[231]

Article 14 of the European Convention prohibits discrimination in the enjoyment of the fundamental rights and freedoms set out in the Convention but it does not refer to the right to equality. In the *Grandrath case*[232] the European Commission took the view that the application of Article 14 is not dependant solely upon a finding that another Article of the Convention has been violated. In certain cases Article 14 may be infringed in an area covered by another Article, although there might otherwise be

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230 See footnote 46 in Part II Chapter 5: *India*.
Also see footnote 235 *infra*

231 See further Part II Chapter 5 *India* for a detailed discussion of non-discrimination and equality before the law under the Constitution of India.

232 Application No 2299/64 Report 12 December 1966.

no violation of that Article. In the *Belgian Linguistics Case*[233] the European Court noted that Article 14 has no independent existence because it is related only to "rights and freedoms set forth in the Convention".

In the *Grandrath case*[234] the Commission felt that the idea of discrimination between individuals implied a comparison between different categories of individuals and the treatment that each category receives.

In the *Belgian Linguistics Case*[235] the European Court pointed out that Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms set forth in the Convention. Article 14 does not guarantee complete equality of treatment in every instance. The Court laid down that the principle of equality is not infringed if the differentiation can be justified both on objective and reasonable grounds. The Court also stated that the prohibition against discrimination must indicate an absence of discrimination in fact as well as in law. A law or regulation which is supposed to be for general application, but which is in practice directed against certain people only, would be discriminatory.

Articles 14 and 15 of the Indian Constitution are concerned with non-discrimination and the right to equality.[235] Articles 3 and 6(5) of the West German Basic Law ensure the right to equality in West Germany.[237] The Fourteenth Amendment to the Constitution of the United States is

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233 see footnote 230 *supra*

234 see footnote 232 *supra*

235 see footnote 230 *supra*

236 see footnote 231 *supra*

concerned with the equality principle.[238]

There are many international instruments and General Assembly resolutions which condemn and deal with specific forms and types of discrimination. For example, the International Convention on the Elimination of all Forms of Racial Discrimination[239] defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Other examples are the Discrimination (Employment and Occupation) Convention (1958); Convention against Discrimination in Education (1960); Equal Remuneration Convention (1951); Convention on

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237 See further Part II Chapter 6 for a detailed discussion on the right to equality under West German Law.
For an exposition of this concept under Canadian Law see Part II Chapter 4.

238 See further Part II Chapter 7 for a detailed discussion on the right to equality and the interpretation of the Fourteenth Amendment by the US Supreme Court.

239 Adopted and opened for signature and ratification by General Assembly Resolution 2106A (XX) of 21 December 1965 and entered into force on 4 January 1969 in accordance with Article 19.
For the full text see: United Nations: *A Compilation of International Instruments* at 23 ff.

the Elimination of all Forms of Discrimination against Women (1979) *etc*[240]

In his dissenting opinion Judge Tanaka[241] stated *inter alia*:

(a) The principle of equality before the law requires that what are equal are to be treated equally and what are different are to be treated differently. The question arises: what is equal and what is different.

(b) All human beings, notwithstanding the differences in their appearance and other minor points are equal in their dignity as persons. Accordingly, from the point of view of human rights and fundamental freedoms, they must be treated equally.

(c) The principle of equality does not mean absolute equality but recognises relative equality, namely different treatment proportionate to concrete individual circumstances. Different treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice, as in the treatment of minorities, different treatment of the sexes regarding public conveniences, etc. In these cases the differentiation is aimed at the protection of those

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240 For the full texts of all these and other conventions and declarations prohibiting specific forms of discrimination see: United Nations - *A Compilation of International Instruments*.

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concerned, and it is not detrimental and therefore not against their will.

(d) Discrimination according to the criterion of race, colour, national or tribal origin in establishing the rights and duties of the inhabitants of the territory is not considered reasonable and just. Race, colour, *etc* do not constitute in themselves factors which can influence the rights and duties of the inhabitants as in the case of sex, age, language, religion, *etc*. If differentiation be required, it would be derived from the difference of language, religion, custom, *etc*, not from the racial difference itself.[242]

Equal protection of the laws postulates an equal protection of all alike in the same situation and under like circumstances. There should be no discrimination among equals, either in the privileges conferred or in the liabilities imposed. Article 12 of the Sri Lankan Constitution, for example, does not confer on an individual the right of admission to a university. It only guarantees a right to equality of opportunity for being considered for selection for admission to a university.[243]

The right to equality pervades all spheres of State action, including administrative action of all kinds by all Government bodies. The constitutional provision of equality therefore means that no agency of

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242 at 303 *et seq*

243 *Perera and Another v University Grants Commission* at page 11 of the judgment See footnote 120 in Part II; Chapter 8.

the State or the officers or agents by whom its powers are exerted shall deny to any person the equal protection of the law.[244]

In the United States case of *Neal v Delaware*[245] it was noted that anyone who through his public office in a State government denies the equal protection of the laws violates the Constitution and because he acts in, for and through the State, his act is therefore that of the State.

Equality before the law does not indicate that the same set of laws must apply to all persons in every instance. Differences and disparities must be taken into consideration. The concept of "equality" implies a reasonable classification. In *Devadasan v Union of India*[246] Judge Mudhalkar noted as follows

> What is meant by equality in this Article (Article 14 of the Indian Constitution) is equality among equals. It does not provide that what is aimed at is an absolute equality of treatment to all persons in utter disregard of every conceivable circumstance of differences such as age, sex, education and so on and so forth and as may be found among people in general. Indeed, while the aim of Article 14 is to ensure that invidious distinction or arbitrary discrimination shall not be made by the State between a

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244 *Ibid*

245 1880 (103) US 370

246 1964 AIR SC 179

citizen and a citizen who answer the same description, and the difference which may obtain between them are of no relevance for the purpose of applying a particular law, reasonable classification is permissible - it does not mean more."[247]

For such a reasonable classification to be upheld in a court of law two conditions[248] must be met

(a) The classification must be founded on an intelligible differentiation which distinguishes persons that are grouped together from others left out of the group.

(b) The differentiation in question must have a reasonable *nexus* to the object or result sought.

If the discrimination is not based on any reasonable *nexus* to the object sought to be achieved, then such action will be void because it would violate the notion of equality. As Judge Jackson observed in *Railway Express Agency v New York*[249]: "(t)he equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free.[250]

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247 at 185

248 *supra* footnote 243 at page 14 of the Judgment.

249 1949 (336) US 100

250 at 115

In *Morarjee v Union of India*[251] it was stated that:

> (t)o make out a case of denial of the equal protection, a plea of differential treatment is by itself not sufficient. The petitioner, pleading that Article 14 has been violated, must make out that not only had he been treated differently from others, but that he has been so treated from persons similarly circumstanced without any reasonable basis and such differential is unjustifiable.

In *Perera's case*[252] the Sri Lanka Supreme Court laid down that:

> A person relying on a plea of unlawful discrimination must set out his plea with sufficient particulars showing how, between persons similarly circumstanced, discrimination has been made, which discrimination is founded on no intelligible differential. If the petitioner establishes similarity between persons who are subjected to differential treatement, it is for the State to establish that the differentia is based on a rational object sought to be achieved by it. But where similarity is not shown, the plea as to infringement of Article 12 must fail.[253]

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251 1966 AIR SC 1044

252 *supra* footnote 243

253 At page 15 of the Judgment

In *Singh v Darbhanga Medical College*[254] it was found that in prescribing the necessary qualification for admission to the Medical College, a direction was included in terms of which all candidates with the BSc (Hons) Degree would be admitted immediately. The effect of this was that BSc(Hons) candidates would be preferred to candidates with an ordinary BSc degree. The Court held that such a direction was unreasonable and that it infringed Article 14 of the Indian Constitution.[255]

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254 1969 AIR 11 (Patna)

255 See further Ramcharan BG Equality and Non-Discrimination in *The International Bill of Rights* (ed) Henkin L

PART VI

C O N C L U S I O N

CHAPTER 34

SOME RIGHTS AND FREEDOMS NOT INCLUDED IN THE BOPHUTHATSWANA BILL OF RIGHTS

34.1. FREEDOM OF MOVEMENT AND EXPULSION

The right to free movement in a country and the right of a national not to be expelled from his State are not laid down in the Bophuthatswana Bill of Rights.[1] This is, however, provided for in the Fourth Protocol[2] to the European Convention. Other instruments which incorporate this right are the Universal Declaration (Articles 9 and 13); African Charter (Article 12); Civil and Political Rights Covenant (Article 12) and the American Convention (Article 2

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1 The human race is made up of diverse types of people not only with dissimilar behavioural patterns but also with differing opinions, notions, standards and value judgments. Two people, when confronted with determining what is a human right, might not necessarily both agree that it is fundamental. One individual might rate it extremely low in his schedule of rights which needs to be protected. Another might rate it extremely high. Hence this section is not a criticism of the draftsmen of the Bophuthatswana Bill of Rights. They probably felt that it was not necessary that certain rights should be entrenched. The author, however, takes the view that rights such as: the right of aliens; asylum; freedom of movement and expulsion cannot be ignored. It is submitted that these rights constitute fundamental rights and should be specifically incorporated in any instrument purporting to promote and protect human rights and fundamental freedoms.

2 Articles 2, 3 and 4.

Freedom of movement may be divided into six categories:

(a) freedom to choose a residence within a State;

(b) freedom to move about within a State;

(c) freedom to enter a State;

(d) freedom to leave a State;

(e) freedom from exile;

(f) freedom from expulsion from a State.[3]

In the *Kharak Singh case*[4] it was stated that the notion of freedom of movement means that a person must be able to do whatever he likes, without any fear, but subject to conditions or restrictions prescribed by law. It was found (the minority view) that surveillance infringed the right to freedom of movement, though not physically but in the sense that one's movements were always being monitored.

Article 19 of the European Social Charter makes it an obligation on State Parties to protect migrant workers and their families (who in fact are aliens) and to render them any assistance that may be necessary in

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3 Sieghart P *The International Law of Human Rights* at 179

4 *Kharak Singh v Uttar Pradesh* 1964 (1) SCR 332

the pursuit of their rights and freedoms. Article 19 contains a catalogue of 10 duties imposed on the State in respect of aliens. All these ensure, basically, that the migrant worker or other alien, lawfully in a State, is protected.

34.2. THE RIGHT TO ASYLUM

Neither the Bophuthatswana Bill of Rights nor the European Convention contain any provision for asylum-seekers.

The international community of States has indicated both globally (for example the UN Covenants) and regionally (for example the African Charter) its interest in the promotion and protection of human rights. However, a grave difficulty arises in regard to those persons who are in danger of coming within the protection of no instrument. Persons seeking asylum fall within this category. The need to protect the human rights of such persons should be a priority, but it is a touch of irony that their protection depends entirely on the goodwill of States. From time immemorial people have sought asylum from the violation of their rights and it is submitted that unless and until the protection of human rights is universally assured, people will continue to seek refuge in other countries. There is no doubt that the right to life is a prerequisite for the enjoyment of every other human right and fundamental freedom. It follows, therefore, that the right of asylum is a prerequisite for a refugee for his enjoyment of all other rights.[5]

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5 Acknowledgement to Prof J E S Fawcett, University of London

Traditional doctrine bases the right of asylum on the right of a sovereign State to determine whom it shall admit into its territory. International law prohibits other States from interfering with a State's sovereign jurisdiction. Therefore one State cannot challenge the right of another State to shield within its territory those fleeing from persecution. Article 14 of the Universal Declaration lays down that:

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

The American Convention has a similar provision in Article 22. The right to asylum is also provided for in the African Charter (Article 12). Article 23 of the African Charter has an additional provision relating to asylum. It provides:

> For the purpose of strengthening peace, solidarity and friendly relations States parties to the present Charter shall ensure that 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.

The Convention on the Reduction of Statelessness[6] provides that a person

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6 Adopted on 30 August 1961 in pursuance of General Assembly Resolution 896(IX) of 4 December 1954. This Convention entered into force on 13 December 1975 in accordance with Article 18.

who would otherwise be stateless should be given the nationality of a particular State if one of his parents was a national of that State or if he himself resided in that State for a period of at least three years.[7]

The Convention relating to the Status of Stateless Persons[8] sets out a detailed catalogue of the rights of stateless persons which States Parties should not violate.[9] The Convention relating to the Status of Refugees[10] notes in the Preamble that all States should recognize the social and humanitarian nature of the problem of refugees, and should do everything within their power to prevent this problem from becoming a cause of tension between States. This Convention declares that anyone who has committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime shall not be entitled to refugee status.[11] The Declaration on Territorial Asylum[12] recognizes that the grant of asylum by a State "is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State".[13] Article 1 declares that asylum granted by a State

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7 See further United Nations A *Compilation of International Instruments*

8 Adopted on 28 September 1954 in pursuance of ECOSOC Resolution 526A (XVII) of 26 April 1954

9 For the text see footnote 7 *supra*

10 Adopted 28 July 1951 in terms of General Assembly Resolution 429(V) of 14 December 1950

11 For the text see footnote 7 *supra*

12 Adopted on 14 December 1967 by General Assembly Resolution 2312(XXII)

13 Preamble For the full text see footnote 7 *supra*

in the exercise of its sovereignty shall be respected by all other States. It is the sole right of the State granting the asylum to evaluate the grounds for the grant of asylum. Article 2 provides that should a State be unable to grant asylum other States individually, jointly or through the United Nations should consider granting asylum to the person concerned.

The case of *Amekrane v United Kingdom*[14] came before the European Convention on the issue of asylum. Amekrane a member of the Moroccan Air Force was involved in an attempted *coup de etat* which was aimed at overthrowing the Moroccan Government and deposing the King. Amekrane fled to Gibraltar where he requested the British authorities to grant him political asylum. He was taken into custody and sent back to Morocco shortly thereafter. He was condemned to death by a Moroccan court and was executed by a firing squad. Amekrane's widow argued that by extraditing Amekrane to Morocco in the way it did, the United Kingdom Government deprived him of the right to take proceedings before a court challenging his detention in Gibraltar prior to his extradition (Article 5(4) of the European Convention), and in addition that he was subjected to inhuman treatment (Article 3).

The European Commission was not able to establish the facts because a friendly settlement had been effected. The United Kingdom Government made an *ex gratia* payment of 37 500 pounds sterling.

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14 Application Number 5961/72. Report of 19 July 1974 CD 44,101.

If the objective of States is to ensure the protection of human rights then asylum-seekers will only feel secure in the knowledge that they will always be able to find some State somewhere in which they would be granted asylum. The readiness of individual States to grant asylum will be enhanced by the knowledge that other States will act in the same way. States should therefore introduce the right of asylum into their municipal law. Without individual States and regional organisations taking the necessary initiatives, progress in the protection of asylum-seekers is not likely to be achieved. Every opportunity should therefore be sought to enshrine the right of asylum in municipal law as securely as possible. Whenever States, acting individually or within the framework of regional organizations, create particular legal provisions and instruments for the protection of asylum-seekers, they not only assure those rights within their own territory but, in addition, they also re-affirm their faith in fundamental human rights and in the dignity and worth of the human person as proclaimed in the Preamble to the United Nations Charter.[15]

34.3 THE INHERENT RIGHT TO DIGNITY

The writer takes the view that the right to one's dignity is an inherent fundamental right. It is submitted that the right to one's dignity should be incorporated in any declaration purporting to enumerate a catalogue of rights. Article 1 of the Universal Declaration provides:

> All human beings are born free and equal in dignity and rights.

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15 Fawcett see footnote 5 (*supra*)

The American Convention on Human Rights provides:

> Every person has the right to have his physical, mental and moral integrity respected. (Article 6(1));
>
> Everyone has the right to have his honour respected and his dignity recognised (Article 11(1));

The African Charter provides:

> Every individual shall have the right to the respect of the dignity inherent in a human being (Article 5).

The basic human rights, such as the right to life, liberty, freedom of expression, thought, conscience and religion, *etc*, are, of course, vitally important and, in fact, it is difficult to imagine any bill of rights without such essential rights. However, it is submitted that all these rights will be enhanced if the right to dignity is included. The right to dignity underscores all other rights in the sense that it forms an integral part of all other fundamental rights.[16]

The Declaration on Social Progress and Development[17] declares that:

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16 For a discussion on the right of equality which must, of necessity, stem from the underlying right to one's dignity, see:
Chapter 5 at paragraphs 5.2, 5.3 and 5.4
Chapter 6 at paragraph 6.2
Chapter 7 at paragraph 7.2

17 Proclaimed by the General Assembly of the United Nations on 11 December 1969 (resolution 2542 (XXIV)). For full text see *Human Rights: A Compilation of International Instruments.*

> peoples ... shall have the right to live in dignity and freedom. Social progress and development shall be founded on respect for the dignity and value of the human person ... (Articles 1 and 2).

The right to dignity is not just a right. It is an 'inherent' right. The word 'inherent' seems to indicate that this right cannot be removed or restricted in any way and that it forms the basis for the enjoyment of other rights.

34.4 THE RIGHT TO A HEALTHY ENVIRONMENT

The African Charter is the only instrument (whether national, regional or international) to embody the right to a healthy environment.

Article 24 of the African Charter provides:

> All peoples shall have the right to a general satisfactory environment favourable to their development.

Some of the most basic rights (for example, the right to life, the right to work, the right to marry and found a family, the right to health *etc*) depend on the creation and continued existence of a healthy environment. It must be pointed out that one cannot exercise one's right to life to the maximum if one has to endure for example a polluted atmosphere.

Professor Soni[18] categorizes pollution as follows:

a) air or atmospheric pollution;

b) noise pollution;

c) water pollution;

d) Ionizing radiation; and

e) solid waste.[19]

Air or atmospheric pollution occurs through smoke, fumes, excessive lead content in petrol, the exploding of nuclear weaponry, *etc.*

Noise pollution occurs when one is subjected to sounds which have a high decibel reading, for example, the continual sound of a pneumatic drill. In this regard a person engaged in such work should be supplied with ear-plugs by his employer. If this is not done, then surely his right to life (that is, the right not to be deprived of one's hearing) is partially infringed?

Water pollution occurs when wastes (both human, industrial and oil) are channelled into inland waters and the seas.

Ionizing radiation is also referred to as nuclear pollution. Excessively high levels of radiation emanating from the explosion of nuclear armaments constitute a grave danger to the human race.

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18 Professor Ramanlall Soni is Head of the Department of Public Law at the University of Durban-Westville.

19 Soni R *Control of Marine Pollution in International Law* at 56 (LLD thesis - unpublished).

Solid waste may be defined as all waste matter that has as its source a human activity (for example ind strial waste, kitchen refuse, *etc*).

It is extremely important to have a healthy unpolluted environment in order that all of us can have an equal opportunity to live our lives to the fullest.[20]

Perhaps the most important contemporary statement on the environment is the Stockholm Declaration on the Environment which was adopted by the United Nations Conference on the Human Environment.[21] The objective of the Stockholm Declaration is governmental and international co-operation in protecting the environment which is the common heritage of mankind.[22]

Principle 1 of the Declaration states:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality which permits a life of dignity and well-being and bears a solemn responsibility to protect and improve the environment for present and future generations ...[23]

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20 The popular song *Don't Kill the World*, by Boney M is a desparate cry to mankind not to destroy the world by pollution

21 The Conference took place from 6-16 June 1972 at Stockholm

22 Soni *ibid* at 316

23 Soni *ibid*

Principle 4 declares that man has a special responsibility to safeguard and wisely manage our wild-life heritage which are now in grave peril.

Principle 7 requires that states should take steps to prevent pollution of the seas by substances likely to cause harm to living resources and marine life.

Principle 21 declares that states have a responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states of of areas beyond the limits of national jurisdiction.[24]

Principle 22 lays down that states shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage.

The right to a healthy environment is not included in the Bophuthatswana Bill of Rights. However, in one respect, namely air pollution, the Bophuthatswana Parliament has passed legislation[25] making it a serious

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24 See the *Trail Smelter case* (1941)(United States v Canada) Vol III *United Nations Reports of International Arbitral Awards* 1907 and Soni Ibid at 182 ff for a detailed discussion.

25 Government Notice No 93. This prohibition is made in terms of section 5(1)(a) of the Tobacco Smoking Control Act 1979 (Act 48 of 1979). This prohibition came into force on 1 October 1984.

offence to smoke cigarettes, tobacco and tobacco products in, on or at public places. This would include:

a) buses used for public transport;

b) cinemas;

c) hospitals, clinics and nursing homes;

d) enclosed auditoriums, arenas and stadiums;

e) public halls and public meeting rooms.

Any person who contravenes or fails to comply with the provisions of the Act shall be guilty of an offence and liable on conviction to a fine not exceeding R50,00.[26]

It must be noted that the Act[27] does not purport to control peoples' private lives. It restricts smoking in *public places*. It cannot be argued, therefore, that this Act infringes the right to ones privacy.

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26 *The Mail* 5 October 1984 at page 1 notes:

It is obvious that the provisions of this Act will particularly affect those soccer fans who, during a nail-biting match, tend to want to take a puff or the hospital patient who loves a puff to ease the pain; or the pop fan who becomes delirious with the renderings of his intoxicating super stars.

27 That is, the Tobacco Smoking Control Act *Ibid* In terms of Government Notice No 98 advertisements for cigarettes, tobacco and tobacco products in, on or at public places, are also prohibited. This prohibition also came into force on 1 October 1984.

CHAPTER 35

EVALUATION AND FUTURE TRENDS

35.1. EVALUATION AND FUTURE TRENDS

The human rights which necessitate protection and promotion are the same worldwide - they are not the product of any one legal system. Thus wherever people go the same human rights must be acknowledged and protected. The principle of the protection of human rights is derived from the concept of a man as a person and from his inherent right to dignity. Man's relationship with his own society should not be separated from universal human nature. The existence of human rights does not depend on the will of a State, neither internally on its law, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element. A State is not capable of creating human rights by law or by convention; a State can only confirm their existence and give them protection. The role of the State is no more than declaratory.[28]

There is one major limitation on human rights, namely, although all human rights are supposed to be absolute rights they are of necessity limited. An individual's rights and freedoms are restricted by the equal rights and freedoms of others and by the interests of the State.

The Bill of Rights is a permanent conscience to the State of Bophuthatswana. The Bill constantly reminds the government that the rights and fundamental freedoms it contains are vitally important to the individual.

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28 *South West Africa Cases* (Second Phase) 1966 Brownlie *Basic Documents in Human Rights* at 470-472

It is a major step to incorporate a Bill of Rights in any national constitution, but it is even more important to ensure its proper implementation. Bophuthatswana fulfils this requirement by declaring in Article 8(2) that any person may apply to the Supreme Court to enforce the rights enumerated in the Declaration. The *Marwane case*[29] illustrates the unquestionable importance of incorporating a Bill of Rights in a Constitution. This case also proves that the Bill of Rights is a living document that can be used effectively to protect human rights and fundamental freedom.

The Bill of Rights, being so closely modelled on the European Convention has the tremendous advantage that it can draw sustenance from the rich jurisprudence attaching to the latter. Most of the cases decided by the European Commission and the Court can be used as persuasive authority in Bophuthatswana should similar issues arise here. We live in a constantly changing world and what is a fundamental right in the present time might not necessarily be so in the future. Nevertheless it is laudable that Bophuthatswana has been able to formulate and crystallise certain rights which in the present era are regarded as fundamental for the continued preservation of the dignity of man and of society in general.

What of the future? Can one make a prognosis of the future trend in the protection of human rights in Bophuthatswana?

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29 *op cit* Part 1 Chapter 3 sections 3.3. and 3.4. and footnote 93

Most countries in Africa won their independence as representative democracies, but very few have survived as such. Democracy as visualized at the time of independence from colonial rule has been abandoned as a result of political aspirations and ethnic and cultural diversity of African countries and also of the absence of unifying factors. Competitive party political systems have virtually become non-existent and in most African countries constitutional authority lies with a single political leader, a one party system or a military régime.[30]

It seems safe to say that in the case of Bophuthatswana, the current institutions of government can be no more than a starting point and that in the course of time they will be modified and adapted to new circumstances. However, it is not likely that the change will be radical or revolutionary because there is no significant cultural or ethnic diversity in Bophuthatswana. Instead there is a large measure of national unity which seems to preclude the possibility of one or other ethnic group trying to monopolise the structures of government. The bureaucracy, almost entirely indigenous, has been functioning efficiently for over fifteen years, without any serious inter-tribal rivalry. Finally, Bophuthatswana is continuing its close co-operation in many fields with all its neighbours which naturally guarantees a framework of peace and stability in Southern Africa.[31]

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30 Bophuthatswana Department of Foreign Affairs *Ibid*

31 *Ibid*

In most Third World countries one finds that the democratic constitutions have had a short life-span. The reason seems to be that in order to facilitate economic, social and industrial development one has to allow the government concerned to exercise very wide powers so that it would not be frustrated by any opposition in its aims to proceed with development. This therefore means that the government would not only have to silence all opposition but also it has to take steps which may curtail and even abolish certain rights and freedoms which in other countries might be regarded as fundamental. There is very little criticism of the lack of the guarantee and protection of human rights in such Third World countries. It seems that the international community gives tacit approval to economic advancement at the cost of the sacrifice of human rights. In contrast, it must be noted that in these countries where human rights are given maximum protection the governmental powers in regard to interference with human rights are totally restricted.[31(a)]

Why is this so? Why should certain countries be allowed to trample on an individual's fundamental rights and freedoms and yet other countries are accountable to their inhabitants for any human rights transgressions? It is submitted that the answer seems to lie in the notion of the margin of appreciation of human

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31(a) For a detailed discussion on these issues see the whole of Chapter 10 pp 178 ff *supra*.

rights. Two countries presented with the same human right might not necessarily both regard it as having the same importance. One country might regard it as fundamental, absolute and non-derogatory. The other country might not even consider it to be a right. For example, it is generally agreed that the right to torture is fundamental and absolute. But a Third World government might not necessarily regard it as a right at all if it is, on the one hand, faced with a severe economic crisis and, on the other hand, it is attempting to ward off guerrillas whose objective is to overthrow the incumbent régime. The government in such a case might resort to torture as a matter of course if it captures some of the rebels.

The notion of the margin of appreciation is very important in determining in each context the scope (and to a certain extent the meaning) of the particular right. In Bophuthatswana, Hiemstra CJ in *Smith v Attorney-General*[31(b)] said:

> This country, though guaranteeing freedom of thought and conscience, does not yet have well-developed information channels or a sophisticated press. In addition, the government has no opposition in Parliament. That is so because democratic political

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31(b) 1984(1) SA 196 See Part 1 Chapter 3.5 p 83 ff.

> processes are in their infancy, and not because of any constitutional barriers to opposition. In such a situation the Court has a particular duty as guardian of liberty, but it has to exercise its powers of controlling legislation *with a scapel and not with a sledgehammer*.[31(c)]

This is an important viewpoint. Obviously if one uses the sledgehammer approach in interpreting a fundamental right, particularly if it is contained in a Bill of Rights of a developing country - that would be a catastrophe - the sledgehammer approach would in all probability hinder further development and protection of human rights. However, if we adopt the scalpel approach and thereby weigh up each human right in its proper context (for example, the stage of development of the country, its values and traditions *etc*) then we would thereby ensure that the development of human rights in that country would continue to progress towards the ideal stage. The writer, however, takes the view that if a régime (even if it is part of the Third World) is brave enough to include a Bill of Rights in its legislation then it should stand up to its convictions and not sweep it aside the moment it encounters difficulties. It is also submitted that it makes no sense to have a Bill of Rights and a judiciary to interpret it if the executive refuses or is unable to carry out

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31(c) At page 200. Emphasis added

the final decision of the judiciary. For example, should the Supreme Court find that a person's rights have been violated and that he should be awarded monetary compensation then it is up to the executive arm of the government to implement that decision. If the executive refuses to do so then such a standpoint may be tantamount to the fact that the Bill of Rights would amount to being mere paper law.

In Bophuthatswana it is evident that the Bill of Rights is a living document. The *Marwane case*[31(d)] and the *Smith case*[31(e)] are sufficient proof of this fact. It is submitted that as long as a Bill of Rights remains unchallenged and untested in a court of law its full force cannot be felt; but the moment it is tested in a court of law it acquires a new character - that is it, in a sense, acquires a greater degree of legitimation. Legitimation in the context of human rights simply indicates that a right has been challenged and tested and it has emerged unscathed. Bophuthatswana stands out in Africa and indeed in the world at large, as a fine example of a country with a viable justiciable Bill of Rights. Sceptics and critics of the Bophuthatswana Bill of Rights who have argued that it is only paper law now have to change their viewpoint because the cases referred to above indicate that any person in Bophuthatswana can have recourse to the Supreme Court should he feel that his rights and freedoms have been infringed or violated. It is clear that these human rights decisions indicate that the Bill of Rights is now not only a part of positive law but in addition it is most definitely an integral part of the living law.

31(d) 1982(3) 717AD(B)

31(e) *supra*

The ramifications of the Bophuthatswana Bill of Rights have to be viewed in the context of the whole Southern African region. It will be recalled that the Preamble to Ciskei Constitution Act of 1981 refers to the fact that Ciskei is "deeply conscious of the destiny of our nation in close constitutional, political and economic co-operation with all peace-loving nations in the southern part of Africa ..." It is submitted that this is a reference to a future confederation of Southern African states.

Similarly the President of Bophuthatswana made references to the formation of a federation of States in Southern Africa. At the opening of the 1984 session of Parliament (May 1984) the President re-affirmed his adherence to the deliberations made by homeland leaders in Umtata in 1973 for a federal system of government for Southern Africa. He indicated that the independence of Bophuthatswana was not only the fulfilment of a dream but also the beginning of a new era. He expressed the hope that there should be "the ultimate and happy convergence of various countries, cultures and nations in Southern Africa."[32]

The President went on to say:

> We have committed ourselves to strive for a future whereby all will come together into one integrated, inter-dependent economic block as a prosperous and dynamic Southern African community.
>
> The cultural and socio-political aspirations and integrity of

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32 *The Mail* Bophuthatswana's national newspaper 4 May 1984 at 1

all the member states and nations will, however, have to be protected by far reaching autonomy in these fields.

Peace, harmony and prosperity would have reigned supreme in the region (Southern Africa) if the resources utilised in violence had been utilised to improve the quality of life of the inhabitants of the region. We must all pray for the success of the (Nkomati) Accord and the survival of its spirit in the countries involved.

We must all strive for peace and co-operation and we must pay attention to the problems caused by poor human relations in the Republic of South Africa so that we can work towards the untimate fulfilment of the aspirations of all the people concerned.[33]

The President added that the idea of a federation could only be reached by way of an evolutionary process of development and negotiated settlements.[34]

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33 *Ibid*

34 *Ibid*

See also Wiechers M *The Constitutional Law Implications of the Butheleži Commission Report* XV CILSA 1982 at 257

Boulle L J *The Buthelezi Commission recommendations in the light of current constitutional trends* XV CILSA 1982 at 262

Venter F *The viability of the constitutional proposals of the Buthelezi Commission* XV CILSA 1982 at 286

Ministers representing the Governments of South Africa, Transkei, Bophuthatswana, Venda and Ciskei[35] meet regularly to consider various problems on interstate affairs. The most recent meeting was held in November 1984 in Mmabatho.[36] All the delegates agreed that there were problems concerning petroleum products and electricity in Southern Africa and they emphasized the need for multi-lateral co-operation.[37]

On 7 November 1984 the South African Minister of Constitutional Affairs[38] announced the establishment of an *Inter-Cabinet Committee*.[39]

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35 Popularly known as the SATBVC countries.

36 Reported in *The Mail* 9 November 1984 at 3.

37 *The Mail op cit.*

Some of the problems discussed were:

a) the supply of crude oil;

b) fuel prices;

c) the supply of electricity, *etc*

The Ministers agreed to continue high level consultations on these important issues and to meet again in the second half of 1985.

38 That is, the Honourable Mr Chris Heunis. This announcement was made in the 18h00 news bulletin on SABC Television Channel 1.

39 emphasis added.

The Inter-Cabinet Committee has been entrusted with the task of being a type of liaison body among the SATBVC countries. Obviously, it will have to consider such issues as citizenship, land consolidation, *etc*. It is hoped that the Inter-Cabinet Committee would serve as an ideal forum for bringing the dream of a federation to a practical reality.

It is submitted that one of the positive consequences of a federation of Southern African States would be the initiation of a Southern African Convention on Human Rights and Fundamental Freedoms. This would ensure the protection of human rights of all peoples in this part of Africa. It is, indeed, laudatory that Bophuthatswana has taken the first step in this direction. With regard to the future of both Bophuthatswana and Southern Africa, it is optimistically suggested that this trend towards the total protection of human rights will continue until the peoples of the entire sub-continent are assured of the promotion and protection of their rights and freedoms.

In the light of the aforegoing presentation, it is the writer's considered opinion that Bophuthatswana has not only drawn aside the dark curtains but will also be responsible for the transportation of the torch of human rights throughout the Southern African continent by initiating a Southern African Convention on Human Rights and Fundamental Freedoms.

Page

APPENDIX

APPENDIX 1

REPUBLIC OF BOPHUTHATSWANA CONSTITUTION

CHAPTER 2

DECLARATION OF FUNDAMENTAL RIGHTS

"8.(1) The following fundamental rights are binding on the legislature, the executive and the judiciary, and are directly enforceable by law.

(2) Any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provisions of this Declaration.

(3) The Supreme Court shall have the power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of the rights conferred under the provisions of this Declaration.

9. All people shall be equal before the law, and no one may because of his sex, his descent, his race, his language, his origin or his religious beliefs be favoured or prejudiced.

10.(1) Everyone's right of life shall be protected by law and 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 section 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.

11. No one shall be subject to torture or to inhuman and degrading treatment or punishment

12.(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labour - provided that this shall not include -

(a) any work required to be done in the ordinary course of detention imposed under the provisions of sub-section 3 or during conditional release from such detention;

(b) any service of a military character in terms of a law requiring citizens to undergo military training;

(c) any service exacted in case of an emergency or calamity threatening the existence or well-being of Bophuthatswana;

(d) any work or service which forms part of normal civic obligations imposed by law.

(3) Everyone has the right to liberty and security of person and 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 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, provided that such a person shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within reasonable time or to release pending trial, and that release may be conditioned by guarantees to appear for trial;

(c) 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;

(d) 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;

(e) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in

order to secure the fulfilment of any obligation prescribed by law;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into Bophuthatswana or of any person against whom action is being taken with a view to deportation or extradition

(4) 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.

(5) 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 promptly by a court and his release ordered if the detention is not lawful.

(6) 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 interest 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.

(7) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, and shall have 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, unless a law otherwise provides, through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free of charge when the interests of justice so require.

(8) No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under the law in force at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time the criminal offence was committed.

13.(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 such a right except in so far as it 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 Bophuthatswana, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

(3) The system of education shall be controlled by the State, but private educational institutions may, on application, in the discretion of the Government and subject to such conditions as the Government may deem fit be allowed where such institutions in their educational aims and standards are not inferior to state institutions.

14.(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 freedom of others.

15.(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 authorities and regardless of frontier but this provision shall be subject to the requirements for the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of the right of expression, 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

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.

16.(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others.

(2) No restrictions shall be placed on the exercise of such 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 freedom of others and the provisions of this section 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 Bophuthatswana.

17.(1) The right to own and possess private and communal property is protected.

(2) Expropriation shall be authorised only in terms of an Act of Parliament, if it is for the public benefit and if reasonable compensation is paid.

18.(1) The rights and freedom referred to in sections 9 to 17 may be restricted only by a law of Parliament and such a law shall have a general application.

(2) Except for the circumstances provided for in this Declaration, a fundamental right and freedom shall not be totally abolished or in its essence be encroached upon.

A P P E N D I X II

AFRICAN CHARTER ON HUMAN RIGHTS AND PEOPLES' RIGHTS

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 dignity are essential objectives for the achievement of the legitimate aspiration 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 coordinate and intensify their co-operation and efforts to achieve a better life for the people 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;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and 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 particular attention to the right to development and that civil and politiaal 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 independance, and undertaking to eliminate colonialism, neocolonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all formes of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion;

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 the 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 1 : 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 right, duties and freedom 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 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 comitted. 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 laws

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 explusion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to freely participate 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. State 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.

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 people shall have the 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 theCharter of the United Nations and reaffirm 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.

C H A P T E R II

Duties

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized 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 Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Afticle 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 capacity

Afticle 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 Organization of African Unity shall invite State 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 also provide the staff and services necessary for the effective discharge of the duties of the Commission. The organization of African Unity shall bear the 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 legislati-

(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. Interpret 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 of 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 given 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 State 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 theChairman, to the Secretary General or 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 representations.

Article 52

After having obtained from the States concerned and from other sources

Article 56

Communications 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 of 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

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 stating the facts and its findings. This report shall be sent to the State 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 shall make a list of the communications other than those of State parties to the present Charter and transmit them to the Members of the Commission, who shall indicate which communications should be considered by rhe Commission.

2. A communication shall be considered by the Commission if a simple majority of its members so decide.

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 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 them.

2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these situations 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 Charter 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 subsidary measures to determine the principles of law other general or special international conventions, laying down rules expressly recognised 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 instrument 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 by 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 the 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 or revised 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 constitution procedure three months after the Secretary General has received notice of the acceptance.

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Page

SELECTED INDEX

Blessed are they that mourn; for they shall be comforted.

Blessed are they who do hunger and thirst after righteousness; for they shall be filled.

Blessed are the merciful; for they shall obtain mercy.

Blessed are the peacemakers; for they shall be called the sons of God.

Blessed are they who are persecuted for righteousness' sake; for theirs is the kingdom of heaven.

Blessed are ye when men shall revile you, and persecute you, and shall say all manner of evil against you falsely, for my sake.

Rejoice, and be exceedingly glad for great is your reward in heaven.

MT 5:4, 6,7,9-12 HOLY BIBLE