

instrument where the experience of other systems may well be of great value.

I would suggest the experience gained under the European Convention is of particular interest because in the early years of the Convention the Commission adopted a somewhat narrow view of the rights protected, often embarked on a "balancing" exercise on looking at the right itself, and did not find it necessary to look at the limitation clauses, or, if it did so, followed a line of reasoning that was often narrow and confined to the proposition that the state had reasonable justification for considering that the interference in question was justified. This led to a restrictive approach to the contents of the rights guaranteed, and, as well, of course, to a somewhat cursory examination of the justifications invoked by the state. In recent years, the Commission and Court have become far more demanding. They have taken a broad view of the rights and adopted a quite rigorous scrutiny of the justifications advanced.

Some earlier speakers in this Conference have suggested section 1 of the *Charter* should not be given a great deal of weight and that the 'balancing exercise' should take place in the analysis of the rights themselves. That may well be appropriate under the U.S. Bill of Rights, where the absence of a limitations clause compels the courts to engage in elaborate balancing exercises and to build up quite novel doctrines. But does that need arise where the limitations are spelt out? May there not be a risk that if the courts follow that course, the content of the rights will be limited and the courts may be encouraged to be less than rigorous in scrutinizing the justifications of interference? The other approach — what one might call the 'Strasbourg approach' — may have the advantage that it leads to a broad view of the rights guaranteed (which is an appropriate approach to adopt to a human rights instrument); it gives the court far more guidance on how the balancing exercise is to be done; it helps to focus and clarify the issues on which the case is to be argued; and it is likely to lead to a more systematic and consistent approach, of the type that I think has emerged from Strasbourg.

Dr. Christian Tomuschat:

Experience under the West German Constitution

It is difficult to give an overall picture of German experience under the Fundamental Law of 1949. The basic law, as it is called, put into force in 1949, contains a catalogue of human rights on Articles 1 to 19. We call them all 'fundamental' or 'basic' rights; we do not apply the terminology of the Canadian *Charter*, which refers to rights and freedoms.

One of the most interesting issues is that of limitation clauses. Almost no right is absolute; in almost all instances, some balancing must take

place. Here, the drafters of the German law thought it advisable not to confine themselves to just one limitation clause. (That had been done in the United Nations Universal Declaration of Human Rights, Article 29). It was thought better to adapt the limitation clauses to the specific substance of the right concerned. Some limitation clauses are quite unimaginative, the basic law just specifying that a right can be limited by law; but a general safeguard (which is a little bit enigmatic, I must admit) can be found in a clause to the effect that a right may never be affected in its essence. But what is the "essence" of a right? The doctrinal debate on this issue has not yet come to a clear result.

We have three types of right, according to their limitations clauses. The first type of right has no limitation clause at all. These are paramount rights. Among them you find freedom of art, the right of Germans not to be extradited to a foreign country, the right of asylum, and, from among the rights the Canadian *Charter* calls fundamental, freedom of conscience. Freedom of conscience is, according to the terms of the constitution, an absolute right which may not be restricted.

In the second group you have the rights that are subject only to the general limitation clause, which just says that this right may be limited by law. From among the rights the Canadian *Charter* calls fundamental, there are freedom of assembly and freedom of association.

Finally, there are the rights which have been provided with a specific limitation clause, among them you find freedom of expression.

It has turned out in the experience of our constitutional court, set up shortly after the basic law came into force, that this rigid classification could not be preserved as it had been conceived. It had to be acknowledged that even rights that the constitution grants unconditionally may eventually be subject to some limitations. Consider, for example, the claim of a person to political asylum. Is that an unlimited right or can a person who has become a dangerous criminal be expelled (certainly not to the country which is persecuting him, but to a third country)? Article 16 seems to offer an absolute guarantee of continuing asylum but the court held that in such specific circumstances it was permissible to expel a person who had been given asylum.

With respect to freedom of conscience we, like other countries in cases mentioned by earlier speakers, have had to consider the issue of Jehovah's Witnesses denying certain medical treatment to children. It was held that whenever freedom of conscience entails acts that might put in jeopardy the rights of third persons, the State may limit such action, even though the freedom of conscience provision in the actual text of the constitution is not qualified by a limitation clause. Thus, the original system, while it has kept its general structure, has become somewhat flexible now after thirty years of the practice of the constitutional court.

Freedom of expression is a type of right subject to a specific limitation clause. Following up on points made by earlier speakers, I would note that the constitutional court has always held that freedom of expression is extremely broad in scope and that certain categories of speech should not be excluded from that scope; rather, such instances should be handled within the framework of the limitation clause. The limitation clause refers to two content-related possibilities of limitation. It talks specifically of provisions of law for the protection of youth; it also mentions explicitly in the text the inviolability of personal honour. Then it goes on to say that freedom of expression is also subject to general laws. These general laws are not simply laws of general application but rather laws which protect an interest higher than the interest of freedom of speech. This is tested by the constitutional court at two levels. The court does not confine itself to asking whether in general the interest purported to be protected by the legislation has a higher rank, but goes on to test the interest at stake at the level of the particular case. It never merely says that the legislation that is the legal basis for the act complained of is valid; it looks then into the concrete case and tries to satisfy itself that the real outcome of the case before the court has been decided in accordance with the value given to freedom of expression. Indeed, this is one of the core rights in the constitution and the court has emphasized many times that freedom of speech is one of the cornerstones of a democratic society. Although the text does not speak of limitations that are justified in a free and democratic society, this is an element that has been stressed once and again in the jurisprudence of the court.

It is interesting to note that the main impact of freedom of expression has not been to protect individuals against State interference, but to protect freedom of speech from interference by other private individuals. The court has never bluntly applied Article 5, concerning freedom of expression, to relationships between private citizens. It does not recognize a general 'third party effect' of freedom of expression or the other guarantees under the constitution. It holds that mainly and primarily the basic rights under the Basic Law are a protection of the individual against State interference but it has shaped a doctrine according to which, since the fundamental rights embody values generally recognized in a free and democratic society, attention has to be given to the fundamental rights in the field of private law.

The leading case, decided in the early Fifties, concerned a film producer who under the Third Reich had produced many films, among them one about a famous Jewish banker of the Eighteenth Century that was made with the aim of initiating racial hatred against the Jews. When the producer came back after the War and made new films, a prominent politician called for a boycott of those films, saying that a man who had supported the Third Reich in such an active and demagogic position, should not be a leading figure of the new German film industry and people should

not go to see his films. The producer brought an action against the politician. The ordinary courts gave him the remedies he sought: the producer was awarded damages and the politician was enjoined to withdraw his utterances. The constitutional court set aside these decisions, saying that freedom of speech was of such paramount importance in a free and democratic society that it could even justify a call for a boycott in the given circumstances.

This line of reasoning has been maintained in the cases that have followed this first leading case. Thus the basic proposition has evolved, that there should be free speech on matters of public interest. Whenever speech turns to private matters, then the constitutional court is much more restrictive.

The Court has also developed a second doctrine that says, putting it simply, that when a person has been hit hard by the newspapers he may hit back with the same strength. The newspaper may not complain of the response.

Another main point in connection with freedom of speech that has been much discussed in recent years is whether advocacy of violence should be an offence under criminal statutes. A provision in the Penal Code did make advocacy of violence generally a penal offence. This was attacked. It was argued that advocacy of violence could not be defined and determined, and because such a provision was necessarily too broad and indefinite it should be repealed. This was done. These criticisms may not be persuasive, but the advocates of repeal could point to some cases in which the statute had been applied in a somewhat arbitrary manner.

Mention has been made of the question whether only natural persons may be the holders of fundamental rights. The Basic Law contains a specific provision on the issue. Article 19, paragraph 3, says that the basic rights shall apply also to domestic juristic persons to the extent the nature of the right permits.

The Basic Law has established a comprehensive system for the review of State action. This applies to executive action as well as to legislative enactments, which can be challenged on the ground of alleged unconstitutionality. However, the Basic Law is rather cautious in granting standing. The provision that a person may bring an action when his rights have been violated is to be found, not only in the Constitution, but also in ordinary Acts. But it has not been enlarged, and the general line of our authorities is that a person can bring an action only when his or her rights have been infringed. Accordingly, it may well be that a challenge to the cruise missile tests of the type now in the Canadian courts, if brought in Germany, would be dismissed by the courts on the issue of standing, because the plaintiffs would not be able to show how they were affected in their specific, concretized, personal rights.

In the German system, which recognizes the right of affected citizens to challenge or bring under review every type of state activity, the judges of course bear a very heavy responsibility. I daresay they have been able to live with this responsibility. No unsound results have been reached on the whole. In particular, the Constitutional Court has rarely found itself in open conflict with Parliament. A few laws intended to carry out major new reform policies have been struck down. One may mention an abortion law, which gave the woman the right to interrupt the pregnancy during the first ninety days; the Court thought this contravened the guarantee of the right to life contained in Article 2, that some specific justification for abortions was necessary, and that an absolute right of the mother to decide the fate of the foetus could not be reconciled with the constitution. A new law enlarging or liberalizing recognition of conscientious objection to military service, by allowing young men simply to state that they refused service on grounds of conscience without having to prove the grounds of objection further, was held irreconcilable with the constitution because it entailed inevitably a discriminatory application between those who were honest and those who were dishonest in their declarations, and so violated the principle of equality.

In instances where such major statutes were struck down by the Constitutional Court there was some talk about a need to reform the Court or complaints that it exceeded its proper function by making political choices rather than applying legal standards. However, after a while, those criticisms faded away and I think that today there is broad general trust in the Court and no real suggestion for doing away with the Court or limiting its powers. It has stood the test of time.

Professor C. Edwin Baker

Some United States Experience and Points of View

I am in substantial agreement with the spirit, and with most of the conclusions, of Professor Beckton's references to American law. However I would like to discuss one troubling area where American law has not resolved an important debate, and on which, despite some earlier contrary comments by others, I would suggest the United States experience will be relevant to Canada.

Professor Beckton suggested that in the United States it is not controversial that freedom of expression is protected and that it is only the degree of protection that is subject to debate.

That may be going too fast.

In fact, I think, there are three questions under debate, not just the one, as to the extent of the protection. There is, apparently, an issue in the