COMMENTARY

NON-CANADIAN CONSTITUTIONAL EXPERIENCE RELEVANT TO THE FUNDAMENTAL FREEDOMS PROVISIONS OF THE CHARTER

The following are notes made from the commentaries that followed the presentation of the papers by Professor Beckton and Professor Cotler.

The moderator was l'Hon. M. le juge Marc Beauregard, Cour d'appel du Québec.

F.G. Jacobs:

The European Convention on Human Rights

The European Convention on Human Rights (from this point on referred to as "the Convention") has been accepted by 21 European states — virtually all European states except those in the Eastern bloc — and all but four have accepted the right of individuals to take cases to the European Commission of Human Rights if they consider their rights to have been infringed. The four exceptions are Cyprus, Greece, Malta and Turkey.

There is only limited access to the Court of Human Rights. The individual does not have the right to take a case to the Court. This explains the limited amount of case law in the Court to date.

Apart from its enforcement machinery, the Commission is of interest for a number of reasons that I shall indicate later on. Of particular interest is the fact that it is common to countries of different legal traditions. The United Kingdom does not have its own Bill of Rights, or any other means of controlling Acts of Parliament. However the Convention provides the aggrieved individual with the ability to challenge such an Act before the Commission.

An illustration of a challenge to United Kingdom legislation concerned an Act establishing or authorizing 'closed shops.' This was challenged before the Commission, and subsequently before the Court. The question raised was whether the freedom of association guaranteed under Article 11 also includes a freedom *not* to associate, not to belong to a particular trade union. The Court did not go so far as to hold there is a freedom *not* to associate, but it held on the particular facts of this case that the employer, British Rail, could not dismiss employees for refusing to join a particular union. Substantial damages were awarded to the three men who had been dismissed.

The rights in section 2 of the *Charter* correspond very closely to the rights set out in Articles 9-11 of the European Convention; in particular, freedom of expression in section 2 corresponds to the provisions of Article 10.

I wish to raise two questions: (1) What is covered by freedom of expression in the European Convention? (2) In what circumstances is it permissible to interfere with that freedom?

For reasons that form part of what I might call the 'philosophy' of the European Commission and the Court of Human Rights in their approach to the Convention, these two bodies have, at least in recent years, taken a broad view of the content of freedom of expression. It covers the communication of information and ideas in all its forms, regardless of subject matter, extending to publications that may be alleged to be obscene or blasphemous or seditious. In the seminar we held earlier this week, Professor Tomuschat pointed out that it is still an open issue whether what the Americans call "commercial speech" is protected; he also mentioned that "commercial speech" is expressly excluded under the new Netherlands constitution. I think that if that issue were to arise under the Convention, a preliminary question would be whether a corporation has the right to freedom of expression under Article 10. The question of the rights of a corporation under the Convention admits to different answers in different contexts; for example, a corporation does not have a right to education, but according to a Commission decision, it certainly has a right to a fair trial. It is expressly given a right to property under the additional Protocol and there are a number of substantial claims under the property provisions pending before the Commission at the moment. On the other hand of course, some rights have never been invoked by corporations, such as the right under Article 12 to marry and found a family.

If corporations do have the freedom of expression, then it would be my view that Article 10 would extend to 'commercial speech'. That seems to me in accordance with the philosophy of the Court, which is to give provisions guaranteeing particular rights their maximum scope, to accept that there is a right, and then to look to see whether the interference is justified under the relevant limitation clause in the Convention.

To oversimplify, one may say there are two kinds of Bills of Rights. There are those that have no express limitation clauses, and the limitations have to be read in by the courts; and those that do have express limitation clauses, such as, for example, the Canadian *Charter*, the Convention, and the United Nations Covenant.

The Convention contains a limitation clause on freedom of speech in Article 10, paragraph 2, which sets out in considerable detail the restrictions which are permissible. The significance of that is that when there is an allegation of interference with freedom of speech, the balancing test takes place under paragraph 2, the limitation clause, not under paragraph 1.

The detailed provisions of Article 10, paragraph 1, provide more grounds for interference with freedom of speech than any other article in the Convention:

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of...

and there then follows a long catalogue:

> ... national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

However, although the grounds on which an interference may be justified are more numerous than in some other Charters or bills of rights, this does not indicate that freedom of expression enjoys a less preferred status under the European Convention. It is simply an attempt to spell out in detail all the circumstances in which restrictions may be justified.

There is in addition a restriction in Article 6 of the Convention, which provides the right to a fair trial. That provision makes an express exception to the right to a public hearing; the press and public may be excluded, among other circumstances, in the interests of juveniles.

It is my contention that although the limitation clause in Article 10 of the Convention is very different on first sight from section 1 of the Canadian *Charter,* that does not mean that the principles developed under the Convention cannot be transposed to the *Charter.* On the contrary, the somewhat economical provisions of the *Charter* can usefully be unpacked in the light of the limitation clauses in the Convention as a whole and given, by that means, a very specific content. It should be noted that the relevance of the Convention for this purpose is not limited to freedom of expression; other articles contain other limitation clauses where similar principles can be applied.

Broadly speaking, before an interference can be permissible under such a limitation clause, three conditions have to be satisfied. They are very similar to the conditions in section 1 of the *Charter.* The restriction must be prescribed by law. It must have a legitimate purpose (but in the Convention the legitimate purposes are spelt out in the limitation clause itself). The interference must be necessary in a democratic society for achieving that particular purpose.

The first condition, then, is that the limitation must be prescribed by law. On this the European Court of Human Rights has established a number of interesting principles. The leading case is the *Sunday Times* case. It concerned the English law of contempt of court, and whether the *Sunday Times* could be prohibited from publishing an article on a civil action that was pending before the English courts; this case is discussed quite fully by Professor Clare Beckton in her essay, Chapter 5 of the Tarnopolsky and Beaudoin (eds.), *Canadian Charter of Rights and Freedoms* (Carswell, 1982). In the *Sunday Times,* the European Court had to review a decision of the House of Lords upholding the injunction and, in the end,

the Court took the view that the House of Lords was wrong — the first time the House of Lords had been "reversed" by the Court of Human Rights.

Some interesting principles were elaborated. *First,* the interference must have some basis in domestic law, the national law of the state concerned. The Court recognizes this may include, not just an Act of Parliament, but delegated legislation and, in some circumstances and subject to certain qualifications, even the common law. *Second,* the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rule applicable to a given case. For example, in the *Silver* case, concerning restrictions on prisoners' correspondence, there was doubt whether the restrictions were prescribed by law, as they were contained partly in an Act of Parliament, partly in prison rules, partly in subordinate legislation (standing orders) and also partly in instructions to prison governors that were not published documents. *Third,* a norm cannot be regarded as law unless it is formulated with sufficient provision to enable a person to regulate his conduct by reference to it. He must be able — if need be, with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action on his part may entail. So there we have an "overbreadth" doctrine applied by the Court of Human Rights. It also arose recently before the Commission in the *Gay News* case, which involved a prosecution for publishing in England a blasphemous libel — a poem about homosexual acts committed on the body of Christ after the Crucifixion. There was a legal dispute as to whether the crime of blasphemous libel, which had been thought by many to be defunct in England but had been revived by a citizen in a private prosecution, required an intent to blaspheme or only an intent to publish. The House of Lords, in a 3 to 2 decision, upheld the conviction on the basis of intent to publish alone, although even two Law Lords, in the majority, recognized that the law was doubtful. That, incidentally, revived an issue, not only under Article 10 but also under Article 7, which provides no one is to be convicted of a criminal offence for an act or omission that did not constitute a criminal offence under national or international law at the time it was committed. In the end, the Commission rejected the case on the basis that a majority of the English judges had adopted the view that finally prevailed in the House of Lords and that therefore there was not that degree of uncertainty that would attract an 'overbreadth' doctrine. It has been asked whether the Commission may have been affected by what, on this side of the Atlantic, are commonly called "content" limitations.

Although the law must be reasonably certain, obviously an element of discretion must be recognized. This was particularly important in the prisoners' correspondence case, where the Court appreciated that it was not possible to specify in advance in the legislation all the circumstances where the prisoners' correspondence might be interfered with. Since the

prison authorities were dealing with over 10 million items of correspondence a year, a considerable amount of discretion had to be left to them.

The restriction must also be legitimate, in the sense of serving one of the purposes set out in paragraph 2 of Article 10. There is no exact counterpart in the Canadian *Charter,* but it is not difficult to see that similar questions will arise. Since under the *Charter,* limitations have to be demonstrably justified, it is predictable they will have to be considered in light of their particular purposes. Although the *Charter* does not set out the permitted purposes exhaustively, the provisions of the Convention may be useful in showing what the legitimate purposes might well be.

The third condition is whether the restrictions are necessary in a democratic society. Again, here is an obvious analogy with section 1 of the *Charter*. It would seem to me that it would be relevant, in applying such a provision as this, to look at other systems in addition to the one immediately under review. If a particular restriction could not be found in other systems, that might indicate it was not necessary in a democratic society. I was interested to see that in a recent case concerning treatment of persons under remand, Mr. Justice D.C. McDonald of Alberta expressed the view that if the government wished to uphold current practices in terms of what is justifiable in a free and democratic society, that might well require evidence to be produced of what is done in other Canadian jurisdictions or in other free and democratic societies. In the *Sunday Times* case the Court did not appear to share our view, but it may well be that that view is not particularly appropriate to a case involving freedom of expression. Here the Court has recognized that different countries may have different standards. This may well be inevitable in an international body dealing with such a wide variety of countries as are parties to the European Convention. In fact in an obscenity case concerning a publication called "The Little Red School Book", which was an introduction for school children giving unorthodox views on sex, drugs, and politics, where the distributor was complaining of his conviction, the Court expressly recognized that standards may vary from one country to another and that it was not for an international court to impose on the contracting parties its own views of permissible limits in the field of public morals.

What then is the justification for inviting Canadian courts to look to the experience of other countries? Perhaps I only want to justify my own presence here! But I would suggest the purpose and value of the exercise is not to enable the courts to adopt the same standards and tests as have evolved elsewhere; for example, in the law of contempt, to be as strict as the English or as lax as the Americans with respect to pre-trial publicity. In the law of obscenity, there may have to be even greater scope for recognition of particular value choices of particular societies. However, it does seem to me that there are questions of overall technique and what I have loosely called the 'philosophy' of the approach to a human rights

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