"Judicial Colloquium on Human Rights Law in Bloemfontein, South Africa"

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Since 1988, a series of international judicial colloquia have been organised to explore the interrelationship of the developing jurisprudence of international human rights law, and the municipal law applied in domestic courts by judges in common law countries.

The colloquia have been organised by the Legal and Constitutional Affairs Division of the Commonwealth Secretariat, and by interights (The International Centre for the Legal Protection of Human Rights) based in London.

The first colloquium in the series was held at Bangalore, India, in February 1988. The concluding statement of the chairman of that meeting (Justice P N Bhagwati, the former Chief Justice of India) contained what have become known as the Bangalore Principles. Those principles have been given widespread publicity throughout the Commonwealth of Nations, and beyond. They may be found in (1988) 62 ALJ 531f. See also (1988) 14 *Cth Law Bulletin* 1196. Their basic thesis has been increasingly accepted by courts of high authority in many Commonwealth countries, including in the High Court of Australia (see *Mabo v Queensland* (1992) 175 CLR 1, 42) and the Court of Appeal of England (see *Derbyshire County Council v Times Newspapers Ltd & Ors* [1992] 1 QB 770 (CA), 812, 829).

One of the participants in the Bangalore meeting was a non-Commonwealth judge, Judge Ruth Bader Ginsburg, then of the Federal Court of Appeals for the Districts of Colombia in the United States. The participants in Bloemfontein noted with pleasure her elevation to the Supreme Court of the United States in June 1993.

Following the Bangalore meeting, the principles adopted there have been confirmed at judicial colloquia held successively at Harare, Zimbabwe (1989), Banjul, The Gambia (1990), Abuja, Nigeria (1991), and at Balliol College, Oxford, England (1992). A note on the Balliol meeting is found in (1993) 67 ALJ 63. To that note is appended the Balliol Statement of 1992. The Commonwealth Secretariat and interights have now produced, in a handy publication, the statements and re-affirmations of the Bangalore principles. See *Developing Human Rights Jurisprudence*, 1992. In Abuja, it was decided to establish the Commonwealth Judicial Human Rights Association. To initiate operations of that body, the Commonwealth Secretariat in London has now established a data base. This will incorporate cases in which judges around the Commonwealth have made reference to international human rights law in the development of their own common law, or in the resolution of ambiguities in statutes under consideration by them.

The colloquium in Bloemfontein was unusual in several respects. It was the first time that one of the colloquia had taken place in a country outside the Commonwealth of Nations. For many of the participants, it was their first visit to South Africa - following the long years of isolation of that country during apartheid. For many of the judges of South Africa, it was their first meeting with judicial colleagues from other countries of the common law in Africa. The meeting took place after the announcement by the State President of South Africa (Mr F W de Klerk) that the first multi racial elections in the Republic of South Africa would take place in April 1994. This announcement was the culmination of the course of action set in train after the State President's speech

at the opening of the South African Parliament on 2 February 1990. It followed the release from prison of a large number of prisoners, sentenced or detained for their resistance to apartheid, and removal of most of the power structures which enacted and upheld apartheid in South Africa.

Bloemfontein is a major city of the old Orange Free State. Following the Anglo-Boer War, and the establishment of the Union of South Africa in 1910, Bloemfontein became the judicial capital of the country. It has remained such until this day. In the centre of the city is the courthouse of the Appellate Division of the Supreme Court of South Africa, the highest court in the country.

At one point in the judicial colloquium, at the invitation of the Chief Justice of South Africa, the Chief Justice M N Corbett, the participants in the judicial colloquium adjourned to the Appellate Division courthouse. They there had the opportunity of watching two cases being argued. One case concerned the alleged breach of the obligations of confidentiality resting upon a doctor in respect of one of his patients who tested positive for HIV. The other concerned the recovery of a prize for a "hole in one" golf competition. Most of the arguments, and the procedures, appeared familiar to the participants, save for the occasional reference to Roman-Dutch texts, and the bi-lingual argument which switched to Afrikaans from time to time. Even the robes of the judges and counsel are the same as in Australia; although wigs were abolished for advocates in South Africa decades ago.

The opening session of the Bloemfontein colloquium comprised an address by Professor Hugh Corder from the University of Cape Town, concerning the moves towards the new South African Constitution. Professor Corder is involved in the working groups established by the multiparty Congress for a Democratic South Africa (CODSA). He described the suggestions for the establishment of a new South African Constitutional Court, which would have the responsibility of deciding cases under the proposed constitutional charter of basic rights and freedoms. For the overseas

participants, Professor Corder described the political developments in South Africa, the extent of communal violence, and the need for effective legislation to redress unlawful discrimination, and to uphold basic freedoms, including freedom of expression.

These were the two themes of the Bloemfontein meeting: discrimination and equal opportunity, and freedom of expression. The opening paper on race and sex discrimination in England was delivered by Lord Browne-Wilkinson (House of Lords). This was followed by a description of provisions of international human rights law which prohibit discrimination and uphold rights to equal opportunity. This description was given by Lord Lester of Herne Hill QC, (as Anthony Lester, QC, of the English Bar had lately been elevated to become).

Justice Phillip Nnaemeka-Agu, formerly a judge of the Supreme Court of Nigeria, presented a paper on discrimination, and the *African Charter of Human and Peoples' Rights*. Interest in that *Charter* in South Africa has quickened, as the country approaches its new polity. It seems likely that, after its elections, South Africa will be more closely integrated into the developments on the African continent, including by participation in the African *Charter*.

Judge Nathaniel R Jones, of the United States Court of Appeals for the Sixth Circuit, presented a paper on laws about racial discrimination and freedom of expression in the United States. He pointed out that de-segregation in the United States was a complex and continuing process. It had not been achieved by the speeches of Martin Luther King Jnr, so much as by the activities of lawyers and judges in the Southern States of the United States, upholding the Constitution of the United States, in a series of decisions, unpopular with many members of the public, which the federal government enforced.

Sir Robin Cooke, President of the New Zealand Court of Appeal, described the developments in New Zealand after the adoption of the non-constitutional Bill of Rights. He also referred to the special constitutional status of the Treaty of Waitangi, protecting the rights of the Maori people. He described a number of New Zealand court decisions which have upheld those rights, in matters concerned with Maori culture, language, and economic interests.

In the session on discrimination, a paper was presented by Justice Walter Tarnopolsky of the Ontario Court of Appeal in Canada. This concerned discrimination, and equality of rights in Canada. It described the impact of the early discrimination legislation, common law decisions, and the *Charter*, which now enjoys constitutional status in Canada.

Finally, the writer presented a description of Australian developments aimed at removing discrimination against particular individuals and groups within Australian society. The new force given to s 117 of the Australian Constitution by the decision of the High Court in *Street v Queensland Bar Association* (1989) 168 CLR 461 was described, as was the decision of the High Court in *Mabo*, terminating the discriminatory doctrine of rights to land which had disadvantaged Aboriginals and Torres Strait Islanders in respect of their rights to land. The panoply of Federal and State anti-discrimination and affirmative action laws was outlined. So was a sampling of the leading court decisions and a description of the new moves, by anti vilification legislation, to reinforce changing social attitudes to minority groups. The cautiously optimistic opinion about the effectiveness of these laws expressed by Professor Margaret Thwotton, in her book *The Liberal Promise : Anti-Discrimination Legislation in Australia* (OUP 1990, 261) was endorsed.

Throughout the sessions on anti discrimination laws in other Commonwealth countries, and in the United States, judges and lawyers from South Africa taxed the speakers with questions concerned with the operation of

the law, and the resolution of competing human rights - such as the right to free expression, which must sometimes be limited by laws forbidding vilification of people on the grounds of race, gender, sex orientation etc.

The South African participants who led the ensuing debate included some who had been in the forefront of defending basic rights before the courts of South Africa during the apartheid years. The included Mr Arthur Chaskalson. Still others had been on the receiving end of the detention laws, most notably Professor Albie Sachs, who is a leading and insightful proponent of human rights. His *Jail Diary* and his book *Advancing Human Rights in South Africa* are at once a reminder of what went wrong, and a description of the way ahead. Supporting the South African academics was professor Jeffrey Jowell QC of University College, London. South African-born, he is one of many ex patriates who are now contributing to the changes in the country of their birth. Amongst the leading South African judges who took part was Justice Richard Goldstone of the Appellate Division. In addition to his judicial duties, he is also Chairman of the South African Commission of Inquiry into the Prevention of Public Violence and Intimidation.

The third session of the colloquium was devoted to freedom of expression itself. This was led off by a paper on freedom of expression by Mr Soli J Sorabjee, the former Attorney General of India. He outlined decisions on the topic from many jurisdictions of the Commonwealth of Nations, but with special reference to the decisions of the courts in India.

Justice Nnaemeka-Agu of Nigeria described the provisions of the African *Charter* concerning freedom of expression. He said that in the field of human rights, Africa presented good news as well as bad news. He described the military regimes in many African countries, including his own, the difficulties which judges had in safeguarding human rights under such regimes, and the suspension or abridgment of basic rights by the decrees of military governors. At the same time, he instanced many examples of courageous

decisions by judges in condemning "executive lawlessness" and serious infringements of basic rights. See e.g. *Governor of Lagos State v Ojukwu* [1986] 3 NWLR 621 (SC). He stated that free expression was the key human right for the correction of official oppression. See *Thornhill v Alabama* 310 US 88 (1940)(USSC). He urged the judges of Africa to "prove themselves equal to the challenge" of upholding human rights throughout the continent. One African judge who has done just that, Justice Enoch Dumbutshena (former Chief Justice of Zimbabwe), described some of the notable decisions of his court defensive of the basic rights guaranteed in the Constitution.

An important paper on "Freedom of Expression: an English Perspective" was then given by Lord Woolf of Barnes (House of Lords). He appended to it the decision of the House of Lords in *Derbyshire County Council v Times Newspapers Limited & Ors* [1993] AC 534 (HL), in which he had participated. That decision upheld the orders of the English Court of Appeal. The decision determined that a local government authority had no right to sue for defamation, because it was of the highest public importance that a democratically-elected governmental body should be open to uninhibited public criticism. The threat of civil actions for defamation would, it was held, place undesirable fetters on freedom of expression and criticism. Lord Woolf pointed to the way in which Lord Keith, who gave the judgment of the Lords, relied heavily on the decision of Justice Schreiner, of the South African Appellate Division, in *Die Spoorbond v South African Railways* (1946) AD 999 (AD) 1012. In the writer's paper on recent developments in Australia, the decision of the High Court of Australia in *Australian Capital Television Pty Ltd v The Commonwealth [No: 2]* [1992] 66 ALJR 695; 108 ALR 577 (HC), and *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658; 108 ALR 681 (HC), were described. In both of these cases, Australian federal legislation was struck down as unconstitutional upon the ground that it unduly limited, or impeded, the constitutional right to freedom of expression, guaranteed by implication in

the Australian Constitution. Needless to say, there was a great deal of interest in the development of such implied constitutional rights in Australia which has hitherto resisted such ideas. Many questions were addressed to the future directions of such implied rights, and to the shift away from literalism, in constitutional interpretation, which these and other decisions of the High Court of Australia evidenced.

After this preparation for the understanding of anti discrimination law and laws protective of freedom of expression was thus laid, the participants turned to discuss a number of hypothetical problems prepared by Lord Lester. These sessions were ably chaired by Lord Lester and Mr Sorabjee. The former Chief Justice Bhagwati of India simulated the discussion in each of them, upon the basis of a number of Indian decisions in which he had participated as Chief Justice of India. In a similar way, Chief Justice Ismael Mahomed (Namibia) - also a judge in South Africa - drew upon a number of the cases which had come before his court. So did Chief Justices and Judges from the many African Commonwealth countries who took part.

The intellectual activities of the colloquium were interspersed with social events. The Chief Justice of South Africa offered the participants a reception at his official residence. The Mayor of Bloemfontein also gave a reception. A visit was arranged to one of the historic homesteads, at which it was possible to see images of the hardy settler culture which was established in the Free State during pre Union times. At the end of the conference the participants adopted, by consensus, the Bloemfontein Statement. This statement is annexed to this report. The importance of an independent judiciary for the future of the rule of law in South Africa was emphasised, as was the need to take affirmative action to diminish, and eliminate, the causes of discrimination in South Africa, which have lasted so long.

Sadly, after the participants had returned to their homes, they learned that one of their number, Justice Walter Tarnopolsky, of Canada, who made

such a notable contribution to the meeting in Bloemfontein, had died in Toronto soon after his return home. His ceaseless work for human rights in Canada, and far beyond, were greatly appreciated by his colleagues in Bloemfontein, where he was much admired.

For the writer, the most telling moment in the Bloemfontein encounter took place in the library of the Appellate Division of the Supreme Court of South Africa. At one end of the library were the judges of the Appellate Division of South Africa, still dressed in their black robes and lace jabots, which they had been wearing in court before the adjournment. At the other end of the room were the judges of the world community of the common law - including large numbers from Africa. Slowly, and a little cautiously, the two groups came together. It was a symbolic meeting - for most, a meeting for the first time. For a moment there was a pause, as each group appreciated the significance of the encounter. But within a short time, the judges were in eager discussion about issues of common concern.

It may be hoped that in the new South Africa, built upon foundations of judicial independence and respect for human rights, the legal links which have been severed for 30 years will be re-established. The Bloemfontein Colloquium was a first step upon this path.

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THE BLOEMFONTEIN STATEMENT

1. Between 3-5 September 1993, a significant event took place in Bloemfontein, South Africa, when for the first time senior judicial figures from around the Commonwealth and the United States of America joined with South African judges and jurists in a judicial colloquium on the domestic application of international human rights norms.

2. The colloquium, the sixth in a series, was held in South Africa in response to the wishes of a broad section of South Africans, who wished to use the opportunity it presented to assist the transition process by furthering informed discussion on the interpretation and implementation of human rights provisions.

3. The colloquium was administered by INTERIGHTS (The International Centre for the Legal Protection of Human Rights) with assistance from the Commonwealth Secretariat and with financial support from the British Overseas Development Administration, the Commission of the European Communities, the Kagiso Trust, the Canadian Embassy Dialogue Fund and the British Council.

4. The participants reaffirmed the general principles stated at the conclusion of the Commonwealth judicial colloquium in Bangalore, India, in 1988, as developed by subsequent colloquia in Harare, Zimbabwe, in 1989, in Banjul, The Gambia, in 1990, in Abuja, Nigeria, in 1991 and in Balliol College, Oxford, Great Britain, in 1992.

5. The participants welcome the movement towards a non-racial democracy in South Africa devoid of apartheid and discrimination, with a constitution which guarantees the protection of fundamental human rights.

6. Participants were keenly aware that their own meeting, attended as it was by a large preponderance of males, itself reflected a legacy of discrimination against women over many generations and in many societies and which needs urgent remedial action.

7. The participants believe that the provision of equal justice requires a competent and independent judiciary trained in the discipline of the law and sensitive to the needs and aspirations of all the people. They stressed their conviction that it is fundamental for a country's judiciary to enjoy the broad confidence of the people it serves; to the extent possible, a judiciary should be broadbased and therefore not appear (rightly or wrongly) beholden to the interest of any particular section of society. They saw this as being of special relevance in cases involving complaints of discrimination in all their countries and

so of being of the highest importance in the context of the judiciary which will interpret and enforce a new South African constitution with a justiciable Bill of Rights.

8. The colloquium affirmed the importance both of international human rights instruments and international and comparative case law as essential points of reference for the interpretation of national constitutions and legislation and the development of the common law.

9. The specific subject matter of the Bloemfontein Colloquium was the effective protection through law of the fundamental rights to equal treatment without any discrimination and to freedom of expression.

10. There was substantial consensus that the principle of equality requires public authorities to take affirmative action to diminish and eliminate conditions which cause or perpetuate discrimination and to ensure equal access to and enjoyment of basic human rights and freedoms. Such affirmative action must be appropriate and necessary to achieve equality. Discrimination takes many forms in all societies. It may be indirect and unconscious as well as direct and deliberate. The principle of equal treatment forbids not only intentional discrimination. It also forbids practices and procedures which have a disparate adverse impact upon particular groups and which have no objective justification. It is essential to secure the elimination of indirect discrimination of this kind.

11. In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law. And it is the special province of judges to ensure that the law's undertakings are realised in the daily life of the people. In a society ruled by law, all public institutions and officials must act in accordance with the law. The judges bear particular responsibility for ensuring that all branches of government - the legislature and the executive, as well as the judiciary itself - conform to the legal principles of a free society. Judicial review and effective access to courts are indispensable, not only in normal times, but also during periods of public emergency threatening the life of the nation. It is at such times that fundamental human rights are most at risk and when courts must be especially vigilant in their protection.

12. Where derogations from fundamental human rights and freedoms are permissible they must be strictly construed so as to avoid weakening the substance of the rights and freedoms themselves and only to the extent demonstrably necessary in an open and democratic society.