HUMAN RIGHTS AND WHAT IS REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY

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The new Papua New Guinea Constitution will contain all the eleven rights and freedoms presently provided for in the *Human Rights Act* 1971--the right to life; the right to personal liberty; freedom from slavery and forced labour; freedom from inhuman treatment; protection of property; protection from arbitrary search and entry on premises; protection of the law to ensure no imprisonment except on a proper charge and after a fair trial; freedom of thought, conscience and religion; freedom of speech the right to publish; freedom of peaceful assembly and association; and freedom of employment.[1] In addition, four new rights and freedoms will be provided--freedom of movement; the right to privacy; the right to stand for public office and to vote; and freedom of information.[2] Any laws, whether already in force or passed after the Constitution is enacted, which are in any way inconsistent with these new provisions will be avoid to the extent of the inconsistency. All the new rights and freedoms are essentially declaratory of previous indefinite common law rights.

These fundmental rights and freedoms will not be absolute or unlimited. With the exception of protection from inhuman treatment, all the rights and freedoms will be subject to some qualification. For example, the protection of personal liberty will be subject to prescribed procedures on arrest; the provision on the protection of law will be subject to a list of occasions when "due process" of law will operate; and the rights to stand for public office and to vote will apply only to persons obtaining citizenship. Moreover certain citizens will be excluded from voting or holding public office. Finally, the exercise of any right or freedom will be limited by the requirement that it be compatible with the exercise by

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1 Secs. 10-20.

2 Constitutional Planning Committee, *Final Report*, (tabled before the House of Assembly, September 1974) Ch. 5 para. 26, referred to hereafter as *Final Report*.

someone else of any other right or freedom.

The Constitutional Planning Committee has recommended the inclusion in the Constitution of one general qualification which was formerly in the *Human Rights Act*.[3] This will allow the government to place such restrictions on individual rights and freedoms as are "reasonably justifiable in a democratic society," mainly in the interests of defence, public safety, public order, public health, public welfare or protection of the rights of other individuals. The aim of this article is to investigate the scope and meaning of the phrase "reasonably justifiable in a democratic society." Underlying this investigation is the question whether judges in Papua New Guinea will interpret the phrase to allow the majority party at any time to escape the obvious shackles of the human rights provisions. The phrase represents the permissable extent to which wider social interests may restrict the seemingly absolute individual interest, but its meaning is ambiguous, and attempts to apply it will raise many problems.[4]

I. THE NIGERIAN VIEW

Some help on the meaning of this pharase has came from the courts of Nigeria.[5] The Nigerian constitutional rights land freedoms are contained in sections 17 to 32 of the Nigerian Constitution. Certain of the rights--namely, those concerning deprivation of life (section 17); the right to private and family life (section 22); freedom of conscience (section 23); freedom of expression (section 24); the right to peaceful assembly and association (section 25); and freedom of movement (section 26)--are made subject to the express restriction that nothing in these sections shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order,

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3 *Final Report*, Ch. 5 paras. 26 - 30.

4 But see *Final Report*, Ch. 5 para. 27, where the C.P.C. suggest that judges should find application of the phrase less difficult than this article would suggest.

5 See generally Holland, "Human Rights In Nigeria," (1962) *Current Legal Problems* 145; Nwabueze, *Constitutional Law of Nigeria* (1964).

public morality or public health. Very soon after the passage of the Constitution, consideration was given to the precise scope and meaning of the phrase in *Dahiru Cheranci v. Alkali Cheranci*.[6] The case arose out of the prosecution of Dahiru Cheranci for inciting a young boy to participate in politics contrary to section 35 of the *Children and Young Persons Law* 1958 of the Northern Region of Nigeria. Sections 33 to 35 prohibited minors from participating in any form of political activity. Dahiru Cheranci then applied to the High Court of the Northern Region, by way of motion, to have the provisions of the 1958 law declared void as, he contended, they derogated from the freedoms of expression, peaceful assembly and association and conscience guaranteed by the Constitution. Bate J. held that the provisions did conflict with the freedoms of expression and peaceful assembly, but not with freedom of conscience.[7] The issue, he found, was whether the derogation was reasonably justifiable in the interests of public order and morality. Bate J. adopted the Indian approach to the interpretation of human rights provisions, which rules that statutes are presumed to be constitutional and to have been passed in the reasonably justifiable interests of society. The burden is, therefore, on the plaintiff to prove that the statute is not reasonably justifiable in a democratic society. To carry the burden, the plaintiff must show that the restriction upon a human right was not necessary in the interest of public order and morality or was out of proportion to the object it sought to achieve. On this reasoning, Bate J. decided that the 1958 law was reasonably justifiable in the interests of public morality as juveniles tend to be highly receptive to ideologies which they do not fully comprehend through lack of education and standards of comparison. He further held the law justifiable in the interests of public order as juveniles are more likely than adults to lose control through natural high spirits and enthusiasm during

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6 (1960) N.R.N.L.R. 24.

7 Sec. 23(1) provides that every person shall be entitled to freedom of thought, conscience and religion, but sec. 23(4) provides that nothing in the section shall invalidate any law that is reasonably justifiably in a democratic society in the interests of defence, public safety, order, morality or health or to protect the rights of others.

speeches and meetings.[8]

The phrase was considered again in *Chike Obi v. Director of Public Prosecutions*.[9] Dr. Chike Obi was leader of the Dynamic Party and was charged with sedition under section 50 (1)(c) of the Nigerian Criminal Code. He had allegedly distributed pamphlet entitled "The People: the Facts You Must Know," in which he claimed that the government were the "enemies of the People, oppressors of the poor" and that the people ought to bring down the government of the day whose salaries were inflated and interests misplaced. Dr. Obi's defence contended that sections 50 and 51 of the Nigerian Criminal Code violated the freedom of expression guaranteed by section 24 of the Constitution.[10] The Supreme Court took the view that Dr. Obi's words ridiculed the government and it was impossible to say that the words would not provoke disorder. Dr. Obi was found guilty by the Chief Justice of sedition, who held that in a democratic society it is reasonable to check trends that could lead to disorder. The court argued that this decision would not unduly limit free expression. Whereas publication of seditious material with the intention of bringing the government or Constitution of Nigeria into hatred or contempt or exciting disaffection would not be permissible, criticism of the government was still possible to the extent of showing that the government was mistaken in some measure it had taken, pointing out errors in the Consti-

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8 A subsequent attempt by the plaintiff to nullify the law failed as he was held to have insufficient interest in the subject matter of the claim. *Olawoyin v. Attorney General* (1962) N.R.N.L.R. 29. See also 4 *J. of African Law* (1961) 117-123.) A court can make declarations that statutes are invalid only when the person challenging the constitutionality of the statute is in danger of sustaining some direct injury as a result of the enforcement of the statute. This jurisdictional requirement would appear to apply to cases involving the proposed Papua New Guinea Constitution also see *Final Report* Ch. 5 recommendation 17, Ch. 8 recommendation 81.

9 (1961) 1 ALL N.L.R. 186.

10 Section 24(1) provides that every person shall be entitled to freedom of expression but sub-section (2) holds that nothing in the section shall invalidate any law that is reasonably justifiable in a democratic society in the interests of defence, public safety, order, morality or health or protecting the rights of others.

tution, persuading people to alter the Constitution or pointing to matters which produced ill feeling in the country. The sedition laws were therefore reasonably justifiable in the interests of public order.

From these cases it would appear that in Nigeria the phrase "reasonably justifiable in a democratic society" has not placed much of a limitation on legislative attempts to encroach on the rights of individuals. The interests of the state have prevailed.[11]

II. THE INDIAN VIEW

In the Indian Constitution, Article 19(1) grants to all citizens the rights to freedom of expression, peaceful assembly and association, movement in India, residence anywhere in India, acquisition and disposition of property and practice of any profession.[12] Article 19(2) provides that "nothing . . . shall prevent the State from making any law in so far as such law imposes reasonable restrictions on the exercise of the right . . . in the interests of security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."[13] Article 19 clauses (3)-(6) contain substantially the same wording as Article 19(2). The content of these individual rights has not posed the court much difficulty, but not so the limitations provided by Article 19(2)-(6).

The case law on the scope of the phrase "reasonable restriction" has been considerable and varied. In the leading case, Patanjali Sastri C.J. laid down the rule that the test of reasonableness is not fixed or abstract but the result of

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11 However, these cases were decided soon after the Constitution was enacted, at a time when the country was undergoing unsettling political changes. At such a time, the individual interest would be more likely to be subordinated to the state's interest in establishing a stable political unit.

12 See Appendix 1 to H. Seervai, *Constitutional Law of India* (1967) for a text of the Constitution.

13 This clause was substituted by Sec. 3(1), *(1st Amendment) Act* 1951.

weighing the nature of the right infringed, the purpose of restriction, the extent of the evil to be remedied and the prevailing political conditions at the time of the judgement.[14] Judges, he went on, should try to avoid personal social philosophies and look to the Constitution as a document representing the interests of all. So, in *Chintaman Rao v. State of M.P.*, Mahajan J. talking about freedom to practise a trade said that a reasonable restriction implies striking" a proper balance between the freedom granted in Article 19(1) and the social control permitted by clause (6) of Article 19."[15] The test, therefore, is what the ubiquitous reasonable man of the common law considers reasonable.

A good illustration of the manner in which the Indian judiciary have approached the problem of balancing social and individual interests arose in *Virendra v. State of Punjab*.[16] The Supreme Court had to consider the validity of sections 2-3 of the Punjabi *Special Powers (Press) Act* 1956 which permitted restrictions on the freedom of the press on the issue of prescribed orders. A "Save Hindi Agitation" group was formed which organised demonstrations, shouted slogans and culminated with volunteers of the group forcibly entering the secretariat of the Punjab government at Chandigarb. An order pursuant to section 2(1)(a) of the Act was issued against the petitioner to prevent him from publishing anything about the "Save Hindi" group for two months. Another order under section 3 prevented him from bringing any papers from Dehli. Das C.J. approved the test of reasonableness in *Madras v. Row*.[17] He went on to say that the powerful influence a paper exerts on its readers, the size of its circulation and its easy facilities for circulation should all enter into the verdict on whether any restriction placed on the freedom of a newspaper is reasonable. Maintenance of public order might very well require a reasonable restriction on the freedom of the press. The reports in the newspapers could have led to further violence in the activities of the agitation group disturb-

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14 *State of Madras v. Row* (1952) S.C.R. 597.

15 (1950) S.C.R. 759.

16 (1958) S.C.R. 308. See generally Seevai *op. cit.* Ch. 11 for many other illustrations of the tendency of Indian judges to uphold the claims of society over the rights of the individual.

17 See footnote 14 *supra*.

ing public order or relations with the neighbouring state. The order under section 2(1)(a) was upheld as it was of limited duration and could be appealed against. However, the order under section 3 was not reasonable as it extended over an indefinite period with no appeal. Thus papers could be limited for a period but not totally.

As well as the phrase "reasonable.restriction" the Indian courts have considered the extent of the words "in the interest of." In *Ramji Lal Modi v. State of U.P.*, it was held that making insults about the religious beliefs of a particular group could not be a valid exercise of Article 19(1)(a) which guarantees freedom of speech.[18] It was said that "if certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing a reasonable restriction in the interests of public order although in some cases those cases *may not actually lead to* a breach of public order."[19] Thus the American test, which allows free speech to be limited only if there is a "clear and present danger" of disorder has been held to have no application to the words" in the interests of."[20] Therefore, in India, when a statutory provision is challenged as being in violation of a right or freedom in Article 19(1), the wide interpretation given to the words "in the interests of" tends to militate against the claim of the individual being upheld.

In many other cases, top individuals contesting the constitutionality of restrictions have failed. Thus the *Representation of the People Act* 1951 was held not to interfere with the fundamental liberty of a citizen to freedom of speech for it merely laid down conditions which had to be complied with before entering Parliament.[21] The right to stand for an election was held to be a statutory right which could be exercised only in accordance with conditions prescribed in the

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18 (1957) S.C.R. 80.

19 My emphasis.

20 *Shenck v. U.S.* (1918) 249 U.S. 47. Rejected in *Babulal Parate v. State of Maharashtra* (1961) 3 S.C.R. 423.

21 *Jumuna Prasad v. Lachi Ram* S.C.R. 608.

Act.[22] Similarly, an advertisement designed to promote sales of a medicine was held not to be covered by the freedom of speech provision. Considering the purpose of the *Drug and Magic Remedies Act* 1954, the remedies provived and the mischief intended to be prevented, the court held that an order under the Act was merely a restriction on a trade and had no connection with a foundamental right.[23]

The courts in India, therefore, in deciding was is a "reasonable restriction" on individual rights, have been in line with subsequent Nigerian decisions. The individual's claim is usually second best to society's. Individual interests are being made more and more subordinate to state wishes. However, although condified human rights provisions never prevent a total breakdown in a constitutional order, they can avoid the worst esesses of an administration.

III. *A VIEW FOR PAPUA NEW GUINEA.*

In the Papua New Guinea Constitution one set of human rights provisions will be qualified by the phrase contained in the Nigerian Constitution, "reasonably justifiable in a democratic society."[24] Looking to the Nigerian and Indian cases there is little room for optimism that the judges will uphold individual rights, but the Papua New Guinea Constitution will contain provisions that offer some hope.[25] Moreover, the approach of Sastri C.J. is helpful in assessing the question of reasonableness in that it is not a fixed but a variable standard, dependent on many outside factors including political stability. Sastri. C.J. could well have approved of the dicta of Lord Summer that "the words, as well as the acts which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact."[26]

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22 Although the Papua New Guinea Constitution will contain the right to stand for public office and to vote, conditions will be laid down, which though not stringent will, I suggest, produce the same result as in this case.

23 *Hamdarad Dwakhana (Wakf) Lal v. Union of India* (1960) 2 S.C.R. 671.

24 *Final Report* Chap. 5.

25 However, *Final Report* Chap. 5 para 27 would suggest an opposite view.

26 *Bowman v. Seculak Society Ltd.* [1917] A.C. 406.

Chapter two of the *Final Report* of the Constitutional Planning Committee, "National Goals and Directive Principles," could be usefully invoked to assist in reaching such decisions. The object of these recommendations is to provide, according to the Committee, a "philosophy of life" for the people.[27] The Constitution should "incorporate the fundamental national goals towards which the people and their leaders are working."[28] As such the tenor of this chapter could be interpreted as representing national aspirations and to that extent the interests of society for the purpose of deciding the question of what is "reasonably justifiable in a democratic society."

For example, should a case arise where a political pressure group urges people to break the law and the government of the day tries to silence them,[29] the court would be called upon to decide if the government prosecution constituted an unreasonable restriction on freedom of expression not justifiable in a democratic society. The court could, using Sastri C.J.'s reasoning, look to all the surrounding circumstances. Doint so, it might decide that criticism of the law is desirable but that open exhortation to break a valid law has a tendency to disturb the state of tranquillity which is inherent in public order.[30] However, the decision of the court could be reached more easily and confidently with reference to the first of the National Goals on integral Human Development. It could be contended that the society of Papua New Guinea has an interest in integral human development, which requires everyone's participation. The formation and involvement of political pressure groups is conducive to the development of social awareness and education. However, in this case, the group has gone beyond the bounds of mere political participation into law-breaking, which cannot be supported. Therefore, the government's actions are reasonably justifiable in a democratic society as they ensure the social interest of integral human development by maintaining an orderly political

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27 *Final Report* Ch. 2 para. 2.

28 *Ibid.*, para. 6.

29 E.g. by action under the *Public Order Act* 1971.

30 Substantially the decision of *Romesh Thapper v. State of Madras* (1950) S.C.R. 594.

arena.

Again, suppose the government becomes concerned about considerable amount of timber being felled without concert replanting programme. The Minister of Natural Resources is given power under statute to issue permits only in specified areas and to specified quantities per hectare. A permit is refused and a petitioner seeks redress on the ground that his freedom of employment is being violated.[31] A decision assessing what is reasonably justifiable could be reached with reference to the fourth of the National Goals which provides that the natural resources and environment of the country should be conserved for the collective benefit of future generations. Since the interest of society in conserving natural resources over-rides the individual interest in exploiting them because of the existence of a National Goal on the issue, society's claim would prevail. Permits are issued to operate P.M.V. buses in towns.[32] Suppose application for a permit for Port Moresby is refused on the ground that there is an adequate number of buses operating. The plaintiff claims that his right to employment is being violated. Looking to the surrounding circumstances the court would find a virtual monopoly of road transport in one bus company, which would lead the court to consider the underlying philosophy of the second of the National Goals which states that all citizens are to have "an equal opportunity to participate in and benefit from the development of the country."[33] This implies that a proviso for equal distribution of jobs into the guarantee of freedom of employment. That is, society's interest is in sharing benefits, not in bolstering the interests of the single individual or company. As such the refusal could be an infringement of freedom of

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31 Cf. *Narendra Kumar v. Union of India* (1960) 2.S.C.R. 375. These facts would look to a time when timber interests were not vested in Japanese companies as freedom of employment will be restricted to citizens of Papua New Guinea.

32 Permits are usual forms of regualting business but their refusal has caused difficulty in India where the question was posed whether a refusal is a fundamental right being made subject to the exercise of an executive discretion. In *Bidi Suplly Co. v. Union of India* (1956) S.C.R. 267 Bose J. in a dissenting judgement said that "no power resting on executive discretion could be tolerated if the human rights provisions were not to lose their validity" (view also taken by *Mukerjaa J. in Dwarka Prasad Laxmi Narain v. State of U.P.* (1954) S.C.R. 504). There should at least be an appeal from such discretionary refusal.

33 *Final Report* Chap. 2.

employment.

As Munroe said, it is "the right of Government to regulate the conduct of its people in the interests of public safety, health, morals and convenience." This right continually invades the rights of the individual, and a court has to decide when these intrusions step across the imaginary boundary of "reasonably justifiable." Probably, the major area in which the pharase will become important after independence will be in the field of political disent and demonstrations. In these areas, the approach of Sastri C.J. is to be recommended for Papua New Guinea. In deciding what is reasonable, as well as current political trends should contribute to the decision Yet National Goals could afford the judiciary additional assistance when weighing the claim of the individual against that of society. Inevitably these must be fine questions of degree, but they could be simplified by using Chapter Two as an internal aid to construction expressing a phiosophy of national interest endorsed by the people.

Finally, the Constitution of Papua New Guinea will contain a protection of individual rights that was not included in either the Indian or Nigerian constitutions. Subject to the qualification of "reasonably justifiable in a democratic society," any proposed law derogating from individual rights must be passed by three fifths of the members of the national parliament.[34] This may prove to be an important protection against executive abuse of individual rights.

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34 *Final Report*, Chap. 5 para. 28.