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FREEDOM OF EXPRESSION AND THE ROLE OF A SUPREME COURT - SOME ISSUES FROM ACROSS THE WORLD

LEGAL BOUNDARIES, COMMON PROBLEMS AND THE ROLE OF THE SUPREME COURT

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The purpose of this short address is to make some remarks about the subject that our distinguished panel will discuss, that is, freedom of expression with particular reference to the role of Supreme Courts. I will, therefore, look at the subject of freedom of expression refracted through the lens of the role of a Supreme Court. This is a chance to do a little thinking out of the box. The case law, as I see it, shows that in this field Supreme Courts have exercised a leadership role. This is a function that, so far as I am aware, has not previously been publicly debated, at least in this jurisdiction.

Before we consider freedom of expression, it is worth spending a moment reflecting upon what makes a court a Supreme Court. Most importantly, it will be a final court of appeal in some area of law or other, though not necessarily in all areas of law with which it deals. Generally a Supreme Court has power to interpret a written constitution. (The United Kingdom does not of course have a single statute setting out its constitution). Often a Supreme Court also has power to determine federal questions. The new United Kingdom Supreme Court will have power to

determine devolution questions, and there are some parallels between devolution questions and federal questions.[1] If, as I suggest, a Supreme Court also has a leadership role in setting out how the law should develop, it also has a responsibility to select those cases that will enable it to set the law in a new direction.

Justice Sandra Day O'Connor of the United States Supreme Court in her autobiography writes:

> When Congress... lights a fire by passing significant new legislation or taking bold new action, we are inevitably summoned to attend to the blaze.[2]

But she also concedes that the US Supreme Court occasionally starts a fire of its own.

In putting out the fire, or perhaps dampening it down or sending it in a new direction, a Supreme Court is also responsible for more mundane matters such as giving clear guidance and laying down the law in a way that avoids unnecessary litigation.

The virtues of free speech and expression are well known. Freedom of speech is said to involve two basic principles: first, that there should be a marketplace in ideas with a view to public discussion winnowing out the truth, especially in political affairs; and second, that people should be able to express themselves as part of their right to self-realisation. That right is part of the right to private life conferred by Article 8 of the European Convention on Human Rights.[3]

But while freedom of speech is an important card in the pack, as we shall see it is not always the ace of trumps. Some cases, with the obvious example of defamation, are all about limiting freedom of expression.

Let us look at some examples of how some Supreme Courts across the world have shown leadership when dealing with issues of freedom of expression. Freedom of expression is a vast subject, and these cases are only the tip of an iceberg.

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[1] On this point see the decisions of the Court of Appeal and the European Court of Justice in *R (on the application of Horvath) v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWCA Civ 620 and C-428/07 (ECJ decision of 16 July 2009).

[2] Sandra Day O'Connor, *The Majesty of the Law*, Random House (2004), pages 14 to 15.

[3] Arden, *On Liberty and the European Convention on Human Rights*, contribution to *Tom Bingham and the Transformation of the Law*, edited by Andenas and Fairgrieve, Oxford, 2009, page 3.

Expression is usually by words but may be by conduct. The decision of the Supreme Court of the United States in *Texas v Johnson*[4] concerns expressive conduct, namely flag burning. *T*he US Supreme Court, by a majority of 5 to 4, declared unconstitutional a state law that criminalised the burning of the American flag. Johnson had burnt the flag in an act of protest at the Republican National Convention. The First Amendment to the US Constitution enshrines the right to freedom of expression. The State argued that the flag should be preserved as a symbol of nationhood and national unity. The majority held that the First Amendment established a "bedrock principle": namely that the government could not prohibit the expression of an idea simply because society found the idea offensive or disagreeable. No official could force citizens to confess by word or action their faith in a particular belief. Prohibiting flag burning would "dilute the freedom that this cherished emblem represents". The court held:

> It is the nation's resilience, not its rigidity, that Texas sees reflected in the flag -- and it is that resilience which we reassert today.

That decision has proved very controversial. Congress tried to reverse it but its attempt to do so was also declared unconstitutional. Possibly as a result of both decisions of the Supreme Court, the pressure for legislation criminalising flag burning then went away.

Sometimes the courts have had to balance the right of free expression with a constitutional right to protection of reputation. For example, in 1958 in *Luth*[5], the German Federal Constitutional Court had to determine the constitutionality of an order restraining the defendant from making repeated public calls for the public to boycott a film that had been produced by the film director Veit Harlan. According to the defendant, Harlan had been "Nazi film director number one" during Hitler's Reich. He had produced an infamous anti-Semitic film and had only avoided a criminal conviction for his activities on technical grounds. In the defendant's view he was therefore an unworthy representative of the German film industry, and his return to public life in Germany would reopen recent wounds. There were public disturbances. Harlan successfully obtained an order from the Regional Court restraining the defendant from calling for a boycott. The defendant argued that the injunction infringed his fundamental right to free expression under Article 5 of the Basic Law.

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[4] (02-102) 539 U.S. 558 (2003) 41 S. W. 3d 349.
[5] BVerfGE 7, 198.

The Constitutional Court noted that fundamental rights are primarily intended to guarantee the individual's sphere of freedom against the state. However, fundamental rights also had to be taken into account in disputes between individuals. The Court gave particular weight to the fact that the defendant was using his right to free expression to contribute to the formation of public opinion. In the circumstances, the right to free expression meant that the defendant should not have been restrained from publicly urging a boycott of Harlan's films. Anyone who felt injured by a public statement of another could similarly reply in public.

Articles 8 and 10 of the European Convention on Human Rights guarantee the right to respect for private life and the right to freedom of expression respectively. These are qualified rights, and so may be subjected to restrictions that are prescribed by law, proportionate and necessary in a democratic society. The United Kingdom does not have its own Bill of Rights, but we shall see from the later case of *Campbell v MGN*[6] that the House of Lords has used Articles 8 and 10 to produce a similar result to that in *Luth* by applying those Articles in a private dispute.

The authoritative court on the European Convention is the European Court of Human Rights in Strasbourg. The extent to which Strasbourg court has been prepared to permit contracting states to restrict freedom of speech has depended on the context. In the case of political speech, few restrictions are permitted. This is illustrated by a series of recent cases concerning disputes between the Moldovan Government and "Flux", a national newspaper. In one case the newspaper had published an article which asked whether there was a connection between changes to tax laws and a party given by a businessman for some members of Parliament at a luxury hotel. One of the politicians involved successfully sued the newspaper for libel in the Moldovan courts and obtained the maximum award of damages. The Strasbourg court held that the decision of the national court violated Article 10.[7] The article contained both statements of fact and value judgments. A requirement to prove the truth of a value judgment infringed freedom of opinion. The truth of a value judgment was not susceptible of proof. Even though the defendant had been unable to establish the truth of some of the facts, the Strasbourg court held that in all the circumstances there had been a violation of Article 10. The Strasbourg Court reiterated that journalists play a pre-eminent role in a democratic society and that contracting states have only a narrow margin of appreciation in freedom of expression cases concerning politicians. In these circumstances there was an unjustified infringement of the newspaper's

[6] [2004] 2 AC 457.
[7] *Flux v Moldova* (Application no. 28702/03).

right to free expression. By contrast, in relation to limitations on free speech for matters such as the protection of national security, the Strasbourg court allows a wide margin of appreciation and leaves it to the national institutions to determine what restrictions are appropriate.

In *NM & Others v Smith,*[8] the Constitutional Court of South Africa was required to strike a balance between the right to freedom of expression and the protection of individuals' privacy interests. The applicants were three HIV positive individuals who had participated in clinical research concerning possible HIV treatments. The respondents published a book which discussed those clinical trials. A passage in the book referred to the applicants by their real names and disclosed their HIV status. The applicants argued that the disclosure of this information without their consent had violated their fundamental rights to privacy, dignity and psychological integrity. The Constitutional Court held that there had been a violation of their fundamental rights. The right to free expression had to give way to the fundamental right of human dignity. Madala J noted:

> The disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure.

O'Regan J, a member of our panel, considered freedom of expression to be an "indispensable element" of a democratic society. It enables individuals to form and share opinions and thus enhances human dignity and autonomy.[9] There are therefore "close links" between freedom of expression and other constitutional rights such as human dignity, privacy and freedom. The disclosure of a person's HIV status without their consent was an affront to human dignity that was not justified by reference to the right of free expression.

In recent months, the media in the United Kingdom have been responsible for bringing shocking details of expense claims by members of Parliament into the limelight. In addition, a blogger, operating under the extraordinary name of *Guido Fawkes*, is said to have uncovered a sleazy plan on the part of prime ministerial aides to tar opposition politicians with scandals.

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[8] *NM, SM & LH v Charlene Smith, Patricia De Lille & New Africa Books (PTY) Ltd, Freedom of Expression Institute (Amicus Curiae)* Case CCT 69/05, [2007] ZACC 6.

[9] This was a dissenting judgment. Contrary to the decision of the majority, O'Regan J considered that it was necessary to show that the respondents had been negligent or intentional in disclosing the names of the appellants without their consent and that on the facts this had not been shown.

There is no doubt about the value in a democracy of a free press. But that does not mean that there cannot be too much freedom or, as I put it earlier, that freedom of expression is always a trump card. Here in the United Kingdom, the House of Lords has in some recent decisions developed the law, on occasion by limiting the right of an individual to sue for defamation and on occasion by placing restrictions on media freedom.

Reynolds v Times Newspapers[10] was a defamation case brought by a former Prime Minister of Ireland (Taoiseach) against *The Times* newspaper. The challenged article concerned a political crisis that had precipitated the collapse of his coalition government. Mr Reynolds claimed that the article was defamatory, as it suggested that he had deliberately misled the Irish Parliament and his Cabinet colleagues. *The Times* argued that the defence of qualified privilege should be developed by the creation of a new head of privilege for political speech, modeled on the decision of the Supreme Court of the United States in *New York Times v Sullivan*.[11] The House of Lords rejected *The Times*' argument but recognised the role of investigative journalism and approved the development of the existing law of qualified privilege so as to protect responsible journalism, even if what was said could not be shown to be true. The consequence of this decision is that, if the conditions necessary for the defence of responsible journalism are fulfilled, the individual about whom the statements were made will have no right to vindicate his reputation or to obtain redress through an award of damages for defamation.

In *Campbell v MGN*[12] the House of Lords developed the law in the other direction so as to protect the rights of the individual at the expense of those of the press. The claimant, Naomi Campbell, the famous fashion model, claimed in public that she did not take drugs. *The Mirror*, a British tabloid newspaper, published a series of articles detailing her treatment for drug addiction, accompanied by photographs showing her in a public place leaving a meeting of a self-help group, Narcotics Anonymous. The claimant sought damages for breach of confidence against the publishers. She complained about the level of detail given about her, and about the photographs. She succeeded in the House of Lords by a majority of 3:2 (Lord Nicholls and Lord Hoffmann dissenting on the facts). No new action for invasion of privacy was created but the House of Lords developed the existing tort of breach of confidence, using the newly-incorporated Articles 8 and 10 of the Convention. The majority considered that there was a legitimate public interest in running a story that demonstrated that the claimant had misled the

[10] [2001] 2 AC 127.
[11] (1964) 376 US 254.
[12] [2004] 2 AC 457.

public over her use of illegal drugs but that the publication of details of her treatment and the photographs was unjustified. There is an analogy here between this case and *NM*. *Campbell* undoubtedly extended the law in a way that resulted in a restriction on the freedom of the press.

The content of the right to freedom of expression can only be understood in the context of specific legal cases. The cases I have outlined show that the content of the right depends upon the context and the environment in which the question arises. In these cases we can see apex courts developing their evaluation of freedom of expression. In particular, we can see the House of Lords moving the law on and moreover doing so in *Campbell* by imposing new restrictions on freedom of speech. This was so even though, to use the words of the Lord Chief Justice, Lord Judge, "free speech is bred in the bone of the common law".[13]

At a general level, our subject for discussion raises the question of the extent to which a Supreme Court should exercise a leadership role, and exactly what such a leadership role involves. Here are some of the questions that our panel might be asked to address: is it a function of Supreme Courts to lead the development or the reordering of the law in response to changing social conditions? Should they do so against the weight of public opinion? Should they look for vehicles in which to modernise the law in areas that appear to them to require it? Do their decisions in turn lead to a change in attitudes and behaviour in society? As regards the United Kingdom, it is often said that the British media have changed their working methods in response to decisions such as *Campbell* and *Reynolds*, and that press reporting is now less invasive of individual privacy than hitherto. A free press is of course vital in a democracy, and British newspapers have some of the widest readership in the world. Even tabloid newspapers help disseminate information and encourage participation in public debate. Should the courts leave matters in this sensitive area to the democratically-elected legislature?

These are only some of the questions on which we can invite the views of our very distinguished panel. We have much to learn from the way Supreme Courts have discharged their role both in other times and other places, mindful, however, that what has served us well in the past may no longer serve us well in the future. We look forward to hearing the views of our distinguished panel on the extent to which they consider that Supreme Courts derive assistance from looking at what other Supreme Courts do. We shall also be interested to hear whether there is a

[13] *R v Criminal Central Court, ex parte Bright* [2001] 1 W.L.R. 662, 679.

common thread between the approaches of the various Supreme Courts of whom our panel has experience.
