

THE RIGHT OF PEACEFUL PROTEST
IN INTERNATIONAL LAW

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"There was a unanimous resolution passed that we refuse to pay the tax, fill out any log-book form Or be involved in any activity that is an infringement of what we regard as our basic rights". President of the Australian National Farmers Federation, 1986 annual conference. Financial Review 15 May 1986.

"Only a government which consistently fails to relieve valid grievances need fear the outbreak of violent opposition". T I Emerson Toward a General Theory of the First Amendment. 72 Yale Law Journal (1913).

INTRODUCTION

Over past months the rural community in Australia has expressed its dissatisfaction with its economic condition and with government policies or lack thereof in this regard. The decision in May 1986 to refuse to submit to the federal fringe benefits tax represents a form of peaceful protest which goes beyond the techniques of demonstration, speeches and advertisement previously employed by farmers.. The National Farmers Federation and its members appear to have embarked on a campaign of the type which is often referred to as civil disobedience. The use of this technique is not new to Australia being used most memorably during the Vietnam war. The decision serves, however, to highlight the need for this session to address the legality and content of such a 'right' at international law as well as to explore some of the more widely accepted fundamental rights 7 those of conscience, speech, peaceful assembly and association.

The use of civil disobedience as a protest tactic has developed dramatically since the famous Indian non-violence protests.

During the Vietnam War to give an equally famous illustration, anti-Vietnam War demonstrations took place in Europe and in the common law jurisdictions of United States, Canada, Australia as well as many other parts of the world. Since that time anti-nuclear protests regularly occur. New Zealand, a tiny country, has citizens who employ the tactic as a matter of course to claim maori special rights and to prevent football tours of South Africa as well as in the anti-nuclear context. This usage creates confusion for any lawyer trying to identify what constitutes civil disobedience. The Vietnam protest often took the form of breaches of the law by individuals evading military service, by groups burning draft cards and so on. Land rights or environmental claims may take the form of peaceful demonstrations and/or involve trespass.

Confusion is compounded by media usage. Media use the terms of 'peaceful protest', 'civil disobedience', 'protest' in an indiscriminatory way. Participants at this seminar will be familiar with the way in which such tags are attached to the wide range of Australian 'episodes' during the past eighteen months.

The primary focus Of this paper is on the right of peaceful protest at international law. Accordingly, while accepting the difficulty of identifying the ingredients of civil disobedience either from -a domestic Or international perspective, the attempt is made to assess the existence of an international norm of civil disobedience as well as related rights.

For those who are not lawyers it may be helpful to explain that the traditional evidence employed in such an endeavour is to point to international treaties, state practice which demonstrates acceptance of the principle and 'ad desperandum', the writing of jurists or other eminent scholars.

Accordingly, this paper will first examine the notion of peaceful protest in its widest dimension - civil disobedience. Second it will examine rights which are more commonly the focus of legal analysis in both domestic and international law - the so called 'fundamental rights' of conscience, expression, assembly and association. As many participants will be aware these

fundamental rights often 'travel together'. so that their enjoyment usually engages or affects several rights at the same time. For the purposes of this paper the primary focus in looking at fundamental rights is on identifying the international status and content of a right to peaceful assembly and the -limits on its exercise.

An underlying third theme of the paper addresses the issue of enforcement. There appears to be a multitude of ways in which. these fundamental freedoms may be restricted by domestic law and administrative practice. It is a truism to observe that the creation of rights is not enough - "It is a vain thing to imagine a right without a remedy". (Hoff J. in Asby v White 17.()3 2 Ld Ray 938 at 953). What mechanisms are available for the enforcement of such rights at domestic and international law? Further, is there any obligation on the state to provide some measure of protection of such rights as opposed to restricting them?

CIVIL DISOBEDIENCE

It seems to be widely accepted in disciplines other than the law that there are circumstances in which a person is justified, morally, in refusing to obey the law. But from a narrow legalistic viewpoint there can be no legal justification for breaking the law whether such a breach is based on deep moral conviction or insouciance.(1) On this approach it must be concluded that however morally justified the protest be, the civil righter must submit to legal penalties for any breach of the law which is committed in the course of his act of civil disobedience. On this basis it is irrelevant whether a trespass is committed because of some moral conviction of the demonstrator. The tort carries a sanction for breach if the ingredients are proved.

Given the existence of this narrow doctrinaire approach to the moral claim to a right to disobey the law it may be helpful to attempt some wider definition which would permit this view to be sidestepped or modified. As stated at the outset there is a

great deal of confusion about what is meant by 'civil disobedience'. Certainly the term 'peaceful protest' is used to cover 'civil disobedience' as well as what some see as its ingredients. However, it seems that what is meant by 'civil disobedience' is deliberate non-compliance with the law or violation of the law. The 'ingredients' by contrast cover the newspaper editorial, private or public speech, meeting and march, picketing' and the like which is conducted in conformity with domestic law. The fundamental difference is obvious. Any right to civil disobedience involves a deliberate decision to disobey the law. The focus of the right to peaceful assembly or free speech involves what is permissible within the ambit of valid limits on such a right. Of course lawful assembly can become unlawful if permissible standards are violated but the starting point is that it is a right and not per se unlawful.

One issue which requires clarification at this point is the extent to which, if at all, an exercise in civil disobedience can include the exercise of lawful rights. In other words, is it legitimate in exercising a perceived right to disobey a law to claim the right to freedom of expression. An example is when a person-who-objects to conscription claims to exercise the right to freedom of speech by addressing potential conscriptees with the aim of persuading them to refuse to be conscripted. In the case of the individual it seems clear that he is punishable for any illegal conduct but otherwise retains his legal right to free speech. If the 'content of his speech offends a law, such as one prohibiting inflammatory speeches on the subject of conscription, the issue is whether that law is a proper restriction on his right to freedom of speech. His right to choose to speak is still standing.

Emersen (2) suggests that the same rule should apply to associations and makes the separate point that illegal conduct by some members should not be a ground for restricting expression on the part of other sympathisers or members. It will quickly be seen that this line of reasoning may be used to give more credibility to the existence of a right to civil disobedience.

None of this analysis while useful, assists in getting over the legal hurdle of 'he who breaks the law must accept the penalty', accordingly to which civil disobedience has no relevance as a legal concept - it adds nothing to the legal status of those who invoke the principle.

Looking at this proposition more carefully it may be possible to modify its starkness by reliance on the notion of moral or philosophical justification. Indeed without such an approach the topic obviously has little legal content for the lawyer.

Two key issues which Delbert D Smith identified as relevant to the question of definition are:

- (1) can organised group disobedience have the same ethical justification as the action motivated by the conscientious belief of an individual?
- (2) If so., do such ethical justifications extend to civil disobedience whose primary motivation is political rather than based on some moral'.
ground? (3)

Smith's analysis derives from the perceived difference between a personal decision based on ethical grounds to disobey the law on the one hand, and on the other, group disobedience of the law which is aimed at political change. The point is important given that there has been „a limited degree of recognition by national laws of rights such as those manifested by conscientious objectors. .

An attempt at definition made in 1964 By Frankel (4) suggested that civil disobedience occurred whenever anyone Commits an act of civil disobedience if and only if, he acts illegally, publicly, non-violently and conscientiously with the intent to

frustrate (one of) the laws, policies or decisions of the government. • This definition is most useful in exposing what it doesn't cover. As Smith observes, it is limited to government or quasi-government instrumentalities. It is limited to individuals as actors. It requires illegality as opposed to the threat of illegality. It requires public action without explaining whether by this is meant that the public interest be affected or merely that the act attract publicity. What does the term 'non-violent' mean?' 'Does withdrawal of essential services fall within such a definition?

Another definition by Riehm (5) states that civil disobedience is a course of legally unauthorised conduct engaged in by relatively homogeneous groups for the redress of grievances outside the system provided by organised society.

Riehm's definition has the advantage that it emphasises the principle that the actor should exhaust all reasonably available and effective legal avenues of redress. Here, it must not be forgotten that the technique of challenging the validity of laws has traditionally been available in many jurisdictions by what lawyers call 'collateral' challenge. By this is meant that where, for example, a licence to hold a meeting is withheld on a ground that is not based on a valid statutory authority but on the whim of the decision-maker, then the group may elect to hold the meeting. When prosecuted the group can set up this invalidity as a defence. This is not civil disobedience in terms of refusing to obey a valid law because one disagrees with it.

It is a lawyer's trick which does not attack the merits of the law itself but its operation. It assumes that a prohibition properly issued would be obeyed.

Such definitions assume that the person claiming to exercise a right of civil protest is demonstrating against the unfairness of the law. Do these definitions cover persons acting without any interest in the legality of their conduct. I refer here to the civil righter who behaves with insouciance verging on irresponsibility? An analogy would be the lady booked by a traffic officer who says 'Hurry up and book me, I'm late to pick up the kids'.

Allen (6) writing in 1966 suggests that virtually all definitions require that violations of law be motivated by considerations of conscience, by which is meant that at the very least that the actor is seeking objectives larger than his own immediate self interest. He identifies the Satyagrah movement of Mahatma Gandhi as both a striking example of this and as providing a branch of the American protest movement with an intellectual and moral tradition.

Allen also suggests that consistent with the Gandhian tradition, civil disobedience is not only behaviour motivated by conscience, it constitutes an appeal to the conscience of the community. -

None of these definitions deal directly with the argument that civil disobedience of a law involves acceptance of the law's penalties. If this is a necessary part of the baggage of the civil protestor it would seem to result in a very attenuated right. But equally it is a view which is supported by writers and state practice. Drawing on the writings of famous Men one can point to Socrates, to Thoreau, (who saw it as a means of publicising the issue of conscience) to Gandhi and Dr Martin Luther King. From this it can be argued that the 'right' to civil disobedience is at best a claim not to be regarded as a common criminal or revolutionary or traitor. The civil righter argues that he is not denying the fundamental social and constitutional fabric, he is trying to reform as opposed to destroy it. Equally, such a view makes it possible for the state to decide against imposing penalties for breach of the law while reserving the right to do so. This may mean more than might seem at first glance. Acceptance of this special status of the civil righter based on his intentions involves the recognition of the right to engage in this activity subject to lawful penalty.

Most importantly any penalty cannot be deterrent in the sense of discouraging others from exercising this right but must be limited to whatever would normally be the sanction for the breach eg trespass committed by a person without the tag of civil righter, should not attract a separate penalty because of the civil disobedience intention. The importance of this point cannot be over emphasised. As Emerson (7) observed:

"Opposition to the conduct or the potential conduct readily merges into suppression of opinion. The irresistible drive is not only to oppose the action sought by the minority group but to suppress their advocacy of it."

The importance of preserving the right of a vocal minority can be seen as limited to the exercise of a right to free expression. However I would argue it stretches further to embrace the concept of civil disobedience. Once it is accepted that laws are man made then as Thomas Jefferson stated "a strict observance of written, laws is doubtless one of the high duties of a good citizen, but it not the highest".(8) If there is no defence for unjust laws it is -difficult to deny that civil disobedience should not be utilised as a legitimate reform technique.

That being said, those jurisdictions or countries which allow civil 'disobedience would expect that before an individual (or group) claims a 'right' 'to disobey a law he should exhaust other remedies available to correct the alleged wrong. In line with the jurisprudence of international bodies like the European Commission and Court of Human Rights, these channels of redress must offer a reasonable hope of solution. Examples drawn from the United Kingdom - the coal miners strike and the confrontation between News Corporation group and the print workers are dangerous illustrations because of their complexity, but may in part be due to the impotence' of these groups to secure redress for unfair treatment as they perceived it. In situations where the system does not offer a real remedy Whether through judicial or political process it is difficult to deny the moral' and perhaps the legal right to resort to techniques of civil disobedience. Its content in as yet inchoate. For example, does- it incorporate certain types of civil disobedience (secondary or tertiary boycott) which inflict pressure, loss and inconvenience on members of the public who are not responsible . for the wrongs complained of and lack capacity to directly remedy such wrongs?, The right involves a conscious decision to disobey laws which are perceived as unjust, .The right is subject to

lawful penalty for breach of law and may not be resorted to if there is an adequate alternative means of redress. The international evidence of this right is found in writings reaching back to Socrates and reflected by the tolerance of the practice of the right by democratic societies.

Fundamental rights of protest and expression can be viewed as falling within the baggage of the civil disobedience practitioner but as already indicated, while they may be legitimate tools in a civil disobedience exercise, they exist, to the extent that they do exist at all, in their own right. In practice not every exercise of a right to freedom of expression involves an act of civil disobedience.

The importance of making the link at the jurisprudential level is that if, as already suggested, these rights are available to the civil disobedient they may add more legitimacy to the claim that the right of civil disobedience has some legal as well as moral content. (In practical terms the ability to have resort to such rights is of course very relevant indeed.)

Accordingly, given the inchoate nature of any international right to civil disobedience it seems relevant to explore the extent to which these fundamental rights have independently achieved acceptance as international norms, their content and legitimate restrictions on their exercise.

FUNDAMENTAL RIGHTS AS INTERNATIONAL NORMS

The following points must be flagged.

(1) The major human rights treaties recognise these rights but also recognise that there may be qualifications and derogations from them (9).

(2) All these treaties define the rights in very similar language. The rights are defined as free standing. In other words they are not directly linked although the alleged infringement of one right will often involve the infringement of another.

(3) There is an assumption by many common-law writers: that these rights derive from Western Europe. Some writers see them as closely tied to common law countries. For example, the right to peaceful assembly is described as being closely connected with the old English right of petition for redress of grievances. Mentioned in the Magna Carta (1215) it was recognised in the British Bill of Rights (1689), It was embodied in the United States constitution First Amendment and carried into many modern post world War II constitutions such as the Japanese 1947 Constitution, However the right also developed in European civil law countries, and it is worth noting that, for example, the Japanese Meiji period (1868-89) produced a charter which came to assume importance in Japan analogous to the British Magna Carta. This Japanese Charter recognised in a primitive form a right akin to the right of assembly. (11)

(4) The separation of the fundamental freedoms of speech and assembly into separate treaty obligations should not be allowed to obscure that freedom of assembly is a form of - freedom of speech. As identified earlier in the context of the right of civil disobedience, its special need for separate recognition is partly historical (right of group petition) but fundamentally it is a response to the perception by the executive or majority that a group may represent more of a threat than the individual.

RIGHTS VERSUS QUALIFICATIONS

As stated at the outset it is proposed to concentrate on the right of peaceful assembly. The treaties listed above recognise this right but, as illustrated by Article 22, 2 the International Covenant on Civil and Political Rights (ICCPR), these treaties also recognise restrictions 'imposed in conformity with the law and which are necessary in a democratic society in the interests of national security of public safety, public order (ordre Public), the protection of public health or morals or the protection of the rights and freedoms-of others.' The earlier.

European Convention on Human Rights in article 11,2 contains the same formula with the important omission of the reference to 'ordre public' instead there is a reference to 'prevention of disorder or crime'. The textual change is important, it could - justify restrictions designed to enforce government policy- the policy of apartheid -and suppression of any assembly which was convened with the intention of protesting against such a policy.

More directly relevant to the focus of this seminar is the way in which the institutions of the European Convention Commission, Court and Committee of Ministers - have approached arguments raised by defendant governments based on the qualifications restricting enjoyment of the fundamental freedoms.

The relevance of this body of jurisprudence to Australia is at present indirect in the sense that it cannot be directly impleaded in Australian courts. It is relevant for two reasons. First there is a tendency in recent decisions of some members of the judiciary to recognise, in the quite different sphere of rights of the family and children, that reference to international standards is of legitimate assistance in testing executive decisions relating to non-Australians. Judicial attention has naturally focused on the International Covenant provisions, (11) with respect to which there is as yet relatively little authoritative interpretation. However, the formula in the European Convention is virtually identical to the language of the Covenant in the case of the 'fundamental freedoms' including the right of peaceful assembly and there are cases which could provide useful guidance to our courts and decision-makers.

The jurisprudence of the European institutions deals with laws' and practices very similar to our own. Accordingly, decisions made under this convention would seem more relevant to Australian courts than American decisions based on 'the First Amendment with its doctrine of the need for the executive to show-a "clear and present danger' as the defence for infringement of of ' expression.

Second, the same thrust of reasoning suggests that the body, responsible for the supervision of the Covenant standards in Australia - the Human Rights Commission - should also find this material directly relevant. Resort to this jurisprudence is all the more important in Australia where it would not be unfair to say that under the common law the fundamental freedoms, such as the right to peaceful assembly have been treated as comprising what is not lawfully prohibited and that the executive may do everything except that which is prohibited by law. This sort of reverse perception leaves Australians with a bundle of fundamental rights which is the residue of what a person can do after Parliament and the Executive has determined what he cannot do.

Admittedly there is authority for the assertion that there is no need for constitutional protection of our fundamental freedom because such rights have been recognised since 1215 or 1699. Cases such as Meriton Units Pty v Rule (1983) ACLD 342 provide recent support for such a view. There, Needham J was asked by a construction company for an injunction to restrain local residents from holding protest meetings on the footpath with the aim of disruption work on the site. He stated:

"It may Create an annoyance but unless otherwise shown (to- be an actionable nuisance) the courts would protect common law rights of freedom of speech and association,"

Such statements are in accord with the earlier minority judgement of Denning MR in the English Court of Appeal in Hubbard v Pit [1975] 3 WLR 201 holding that picketing is not a nuisance in itself nor is it a nuisance for a group of people to attend premises in order to peacefully assemble.

These cases were concerned with claims by private persons that a group should be restrained. The role of the courts when confronted with challenges to laws and administrative practices founded on such laws has been less trenchant. Essentially, our

courts recognise the right of parliament and the executive to abridge such rights. Persons exercising freedom of assembly-must stop short of breaking laws outlawing unlawful assembly and riot. They must comply with a range of local council or government requirements regarding notification and permits. As Cotter (12) observes in the Canadian context, even where these rights are declared as absolute the Canadian courts have read them down as subject to the laws of libel, obscenity and 'unlawful assembly.

He expresses the hope that the 1982 Canada Act May make it possible to say that 'fundamental freedoms are inherent in Canadian citizenship'. (13)

Under the existing laws in Australia the development of a right of freedom of assembly has been distinguished by the emphasis on the right as residual in the sense discussed. Analysis by writers like Brennan (14) and Handley (15) provides useful illustrations. Brennan's analysis leads him to conclude that at the time Of writing (1982) the position in England required that liberty to protest is denied Only when order is actually endangered. For Brennan, public protest is part of 'English constitutional democracy, part of the political process. (16) He suggests that the same constitutional basis underlies the legal position in Australia. However, his analysis of Australian legislation shows that it either does not recognise any right of people to demonstrate or imposes restrictions such as permit requirements which are within the discretion of the authorities and are accompanied by penal sanctions for breach. On reading his book it is difficult not to agree with his conclusion that the techniques employed: in states like Queensland and Western Australia in the period he reviews have cut across constitutional doctrine recognising the fundamental right of peaceful assembly and public protest He concludes that these rights can no longer be assured without specific guarantees of individual' right "The general democratic tight to protestagainst' unwelcome political decisions must become a juristic right":. (17)

INTERNATIONAL REGIONAL JURISPRUDENCE: THE EUROPEAN HUMAN RIGHTS CONVENTION

The relevance of the European Human Rights Convention jurisprudence in the context of the right to protest and legitimate limitations on that right has been identified.

Restrictions on any right to peaceful assembly recognised in the context of the convention fall into three types:

- (1) Derogations
- (2) Qualifications or 'accommodation clauses'
- (3) Reservations

This paper will concentrate on the second type - 'accommodation clauses'. The first category - derogations from rights of expression, assembly and the like - are allowed in 'national emergencies'. We have contemporary problems with the use of this means of eroding human rights in Australia but in essence the fetters on the use of such power are known if not always properly applied. The third type of restriction - Reservations, or declarations by governments qualifying acceptance of an international standard, are equally most serious in their implications for proper application of the human rights standard, but are divorced from the focus of the paper.-

The attitude of the European Convention institutions to the existence of a right of peaceful assembly is stated by the Commission in Rassemblement of Jurassich and Unite of Urassich v Switzerland. (18)

The Commission wishes to state at the outset that the right of peaceful assembly stated in this article is a fundamental right in a democratic society end, like the right to freedom of expression, is one of the foundations of such a society (Handyside case, judgement of 7 December 1976, Series A para 50). As such, this right covers both private meetings and meetings in

public thoroughfares. Where the latter are concerned, their subjection to an authorisation procedure does not normally encroach upon the essence of the right. Such a procedure is in keeping with the requirements of article 11,1 if only in order that the authorities may be in a position to ensure the peaceful nature of a meeting, and accordingly does not as such constitute interference with the exercise of the right." (19)

In the case before the Commission the Swiss applicants complained of two measures imposing a complete ban on demonstrations. In the Commission's view these measures indisputably constituted interference by Swiss public authorities with the exercise of the right guaranteed by Article 11. The issue then became whether such interference complied with the qualifying criteria set out in Article 11,2 - as set out at page 11 Of this paper.

When the banning orders were challenged the Swiss courts considered that the measures taken were lawful. The complainants argued that what had happened constituted a breach of the constitutions of Berne and the Swiss Confederation both of which guaranteed freedom of assembly, expression and opinion. In the view of the Swiss court such rights had to give way to the constitutional principle of the need to maintain public order. In all the circumstances the authorities had not exceeded their powers.

The approach of the European institution in examining alleged excesses under article 11, 2 is to check first to see whether the requirement that the interference be 'prescribed by law' is satisfied and then turn to an examination of whether the measure is 'necessary in a democratic society for the purposes of one of the specified grounds set out in article 11,2. (eg public safety, or rights of others).

The requirement that the interference be 'prescribed by law' has been construed to include both legislation and judge made law

(Sunday -Times Case. (20)). The same case recognised that the impact on the individual must comply with the requirement of certainty. This 'jurisprudence has been established primarily through cases brought against United Kingdom law dealing with freedom of expression. (21)

So far as the requirement that the measure is 'necessary in a democratic society' is concerned, O'Donnell (22) has offered an analysis based on the doctrine of allowing the defendant governments a 'margin of appreciation' when the executive resorts to the criteria set out in article 11,2 as a defence to breaches of the right of: peaceful assembly. This is, if you like, doctrine of judicial self restraint employed by the Commission and Court. Originally devised to deal with derogations from the convention in times of national emergency, it has been extended to the limitations on the right to freedom of thought, expression, assembly and association. O'Donnell suggests that three lines of jurisprudence have developed.

(1) Where there is a consensus in the law and practice of member states as to the existence and content of a right then only a narrow margin of appreciation will be permitted. He uses the Sunday Times Case and Handyside Case as authority.

(2) Where the Convention institutions are dealing with what are regarded as rights fundamental to society - only a narrow margin of appreciation is allowed.

(3) There some authority for suggesting that where resort is had by the Commission of Court to a textual analysis, a broad margin of appreciation has resulted.

There is no doubt that O'Donnell is Correct in his view that the Commission and Court in examining whether a measure is 'necessary in a democratic society' employ the margin of appreciation doctrine, Moreover, an examination of the cases dealing with the right of peaceful assembly reveal that While the starting point is that this freedom is viewed as one fundamental to a democratic

society, the clear tendency is to give the governments the benefit of the doubt, in other words to allow them a wide margin of appreciation. This compares with cases dealing with freedom of expression involving the laws of freedom of the press and obscenity where as O'Donnell observes the margins of appreciation have been drawn in favour of the citizen.

Further, by subsuming claims of breach of a right to freedom of expression into the claim of right to peacefully assemble, the Convention institutions have made it clear that they are not prepared to let fundamental freedoms survive the responsibility of state as perceived by the state. Perhaps the Swiss Jura case was not the occasion to attempt to carry the jurisprudence of the court in favour of liberty of the subject as laid down in cases dealing with freedom of the press and obscenity to cases involving political protest. The difference in approach is highlighted by a freedom of expression case -the case Of Pat Arrowsmith, a pacifist who was convicted under the British Incitement to Disaffection Act 1934 for distributing leaflets to troops at an army camp in a effort to dissuade them from serving in Northern Ireland (23). The Commission by majority judgement (10-2) found that there was a difference between expressing political opinions about the situation in Northern Ireland and distributing leaflets which could lead to troops defecting with consequent damage to public security and order.

The dissenting judgement of Commissioner Opsahl provides a useful counter point. He emphasised the fact the legislation was originally passed in circumstances which could be seen as threat to political freedom and that the legislation was cast in terms which made it irrelevant whether what was done in fact constituted a threat to public security. The margin of appreciation doctrine was not even mentioned by the majority decision, but the dissenting judge insists that it may only be invoked when the national authorities have in fact undertaken at the relevant time, such an appreciation, at least in substance. He considered that the authorities had not done so. He concluded:

That tolerance for the views of dissidents which we expect of other countries should not be abandoned in Western Europe even in times of crisis. Although the applicant's action remotely threatened public policy, this is not in my opinion a sufficient justification for interference under the system of the European Convention whose claim to credibility it is very - important to preserve in the world-wide debate on human rights. (para 12)

The other dissenting judge also made a telling point. After observing that Arrowsmith had been shown to have also exhorted the IRA to lay down their arms, and had thus manifested Pacifist beliefs, he noted that her position was in part that soldiers in Northern Ireland had been ordered to commit acts which are in violation of international law. Since the European Court had sustained this view in relation to some British military activities (Ireland v United Kingdom) he thought it strange that the majority of the Commission found it 'necessary' to restrict a person who tries to prevent violations of the law (para 11) Commissioner Klecker went on to suggest:

At a time in our history, when so many are prepared to either advocate the use of violence to achieve political ends or adopt violent means themselves, a large measure of protection should be afforded to those who seek to express their voice of disapproval in moderate non-violent terms. It must be clear that there are alternatives to violence in a society that claims to be democratic. If freedom of expression and freedom to manifest beliefs in practice are to be worthwhile values then ideas which are provocative and 'anti-establishment' must be given wide berth unless a case is made out that a real threat is posed. This is not the case here. It might have been had the campaign been more widespread or where there were signs that army morale was being affected or if the leaflets carried threats. However,

these factors are not present. In essence this application concerns an ineffective troop of leafleteers. (para 12)

The majority decisions by the Commission in the Arrowsmith case was ,clearly- based on the view that the government could rightly claim that the measure was necessary in a democratic society for the purposes of ensuring public security. It seems that where this ground is used as defence the Commission applies a wide margin of appreciation compared with its attitude when dealing with restrictions based on the other grounds in article 10,2.

A recent case dealing with freedom of expression Barthold v, Germany (24) confirms this approach. The case seemed trivial - the issue was the Validity of an injunction restraining a veterinary surgeon for criticising lack of services for sick animals in Hamburg in a way which made it clear that he did provide a service. However, the case reached European Court of Human Rights which by a vote of five votes to two held that there had been a breach of article 10, (freedom of expression). They found that the gist of the notion of expression of 'opinion', and the imparting of 'information' on a topic of general interest could not be divorced from publicity aspects. On the question whether the interference - and injunction - was 'necessary in a democratic society' - the court noted that the adjective 'necessary' within the meaning of article 10,2 of the Convention is not synonymous with 'indispensable', neither does it have the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'; rather it implies a 'pressing social need'. The contracting states enjoy a power of appreciation in this respect but that power of appreciation goes hand in hand with European supervision which is more or less extensive depending on the circumstances; it is for the Court to make the final, determination as to whether the interference in issue corresponds to such a need, whether it is 'proportionate to the legitimate aims pursued', whether the interference in issue corresponds to such a need, and-whether the reasons given by the national authorities to justify it are relevant and sufficient' (Sunday Times Case 2 EHRR 245 at para 62).

The court found that the standards applied by the German courts in making the injunctions cut too far into the right of freedom of expression in the context of advertising and publicity of the liberal professions. Freedom of the press would also be hampered. Accordingly the injunctions were not proportionate to the legitimate aim pursued and accordingly were 'not necessary in a democratic society' for the protection of the rights of others. The two minority judges considered that the issue was whether the decisions of the German courts were proportionate to the legitimate aim pursued and concluded that the German courts had not acted unreasonably in taking into account the publicity-like effect of the newspaper article. One of the concurring judges in a separate judgement offers some comments on the importance, in the context of freedom of expression, of recognising that the right includes commercial speech. (26)

Turning to European cases dealing with the right of peaceful protest two decisions by the commission in the 1980s demonstrate that for the most part the approach to the right of protest is very much in line with that shown in Arrowsmith v UK. The first G & E v Norway of 3 October 1983 (unpublished) dealt with a complaint regarding Lapp protests starting in 1979 about the construction of a hydro-electric power plant in an area which formed part of the Lapps traditional grazing grounds. The story is one with which Australians are familiar. The Lapps are a minority. They claim that their land is being taken away and their culture destroyed. When the hydro-electric work was decided upon, compensation to those affected was offered by the government. Instead the Lapps claimed that the decision was void on the ground of failure to take account of the Lapps as a minority group, an obligation arising under international law. This challenge failed. The Norwegian court took the view that if there was any obligation to minorities under international law this did not arise unless there were substantial and very damaging interferences with minority interests. On the facts, the reindeer business would not suffer such damage. The present applicants were apparently not involved in these legal

proceedings. They opted to draw attention to their situation by the technique of public protest. They were given permission to do so for three hours. Instead they erected a Lapp tent directly outside Parliament and stayed there for four days until removed by force after refusing to comply with a police order to leave.. They were convicted and fined with the option of five days imprisonment. An appeal to the Supreme court failed,

The Lapp's petition under the European Human Rights Convention was brought under articles 10 and 11 they were to be disillusioned. The petition was dismissed as inadmissible. The Commission held that the convention does not guarantee any specific rights to minorities and found that the controls exercised on their protest were lawful under Norwegian law and were based on the legitimate aim of maintaining public order.. 4 demonstration by setting up a tent for several days in an area open to public traffic must necessarily cause disorder. The complaint of a violation of articles 10 and 11 was rejected.

While the case is acceptable on its facts it does not throw much light on what has to be shown to establish that the fundamental right of freedom of assembly (as asserted by the Commission in the Swiss canton case), has been improperly interfered with. Clearly no special status based on minority claims is recognised. Nor on the facts is the invasion of private property rights. It would seem that while the European institutions are firm in emphasising the fundamental nature of the right to peaceful assembly they are reluctant to find the government concerned in breach of the convention.

The second case confirms this but offers some comfort.

The second case which I shall call Doctors against Abortion in Austria involved the anti-abortion issue -social as opposed to political ground was the basis for the demonstration. (27) The applicant 'Platform Arzte fur das Leben^s' was a private association composed of doctors opposed to legalised abortion.

They sought through their activities to bring a change to Austrian abortion legislation. In November 1980 the Applicant gave 'notice' of a proposed demonstration under the theme of a 'memorial to the deaths of unknown number of children unborn through abortion'. No objections were raised by the authorities to the plans to hold a religious mass and then to stage a procession along a public road to the surgery of a doctor known to carry out legalised abortions. Several counter-demonstrations were also notified including one by a group of socialist women and a group of local residents. However, these two demonstrations were prohibited because they conflicted in time with the first and it was feared that this might endanger public order and security. The Socialist women obtained permission to hold their counter-protest by the device of moving it forward ending just prior to the doctor's protest. Despite the fact that police had been organised to line the route which the doctors' group proposed to take, the doctors' changed their plans and obtained reluctant consent of the authorities to march from church to a nearby hill and hold a mass there and then return to the church for a third service.

During the first Mass in the church a large number of counter-demonstrators gathered outside. The police took no action to disperse the group although it constituted a counter-demonstration which had not been notified to the authorities. Not surprisingly, the match by the 500 strong group of doctors and supporters and the second mass on the hill was interspersed with egg throwing and loud speaker interjections by a crowd of anti-demonstrators of similar size. A force of 100 police attended and took no action until the end of the mass on the hill when they formed a cordon to 'Allow the applicant doctors to march back to church.

A complaint to the authorities was rejected on the basis that the measures were adequate in the circumstances. The police had been instructed to intervene only if there was danger of violence

resulting in physical injury. If the police had intervened in, . an open air demonstration of this nature 'violence between police and counter-demonstrators would almost inevitably have occurred. In fact, various criminal prosecutions were successfully brought against some of the counter-demonstrators.

The doctors' group appealed to the Austrian constitutional court claiming that the authorities' inaction resulted in a failure to secure the exercise of constitutionally guaranteed. rights to freedom of assembly and religious practice. As it turned out , Austrian court powers are limited to complaints of administrative compulsion against the interested party. The association was complaining of inaction. After the doctors' association had further difficulties during 4 protest held in 1982 they decided to petition the European Human Rights Commission, The Commission's examination of the complaint focussed on Article 11 and on the Austrian Government's-argument the article 11 does not include a right to the protection of demonstrations against interference by private persons. Citing earlier cases the Commission found that:

Accordingly, in the Commission's view, the right to freedom of assembly as guaranteed by Art. 11, para. 1 must include the right to protection against counter-demonstrators, because it is only in this way that its effective exercise can be secured to social groups wishing to demonstrate for certain principles on highly controversial issues. This interpretation is also in line with the case-law of the Commission according to which restrictions on a peaceful demonstration can be justified under Art. 11, para. 2 only if disorder arising as a consequence of violent counter-demonstrations cannot be Prevented by other less stringent measures (cf. application No. 8191/78, loc. cit., p.121 and application No. 8440/70, 10C. cit., p.150). The right to the taking of such measures, including measures to Protect must therefore necessarily be included in Art. 11, para. 1.(para 6).

In principle then, some measure of national protection is required in the case of rights guaranteed under the European Convention in order to prevent such rights from becoming illusory. In the Austrian anti-abortion case the complaint was inactivity by the authorities to the point where it was impossible for the authorised protest to properly take place.

The Commission found Austrian domestic law did fulfill the Convention's obligations to take positive action. Provisions in the Penal Code which makes it an offence to disrupt, prevent or disturb lawful assemblies along with Assembly Act which gives the authorities power to dissolve or disperse counter-demonstrations provided evidence of this. Accordingly, the Success of the complaint on this head turned on the alleged failure of the authorities to discharge their obligations by resort to such laws.- Here, the Commission was persuaded that the 'inactivity' was justified on the principle of proportionality - to have intervened in the counter demonstration would in the authorities' judgement have produced worse disorder than in fact occurred.

The Commission also noted that the Austrian authorities had acted with proper regard for the rights of others - the counter - demonstrators - as required under article 11,2 of the convention.

This last case deals with content to the right of peaceful assembly, the legitimacy of restrictions on the exercise of that right and the issue raised **at** the outset of this paper - the need to provide - rights with enforceable remedies. On the first two issues the value of the Commission's reasoning lies in the application of its previous jurisprudence dealing with protests on political grounds to protests based on religious or ethical conviction. The Commission implicitly declines to make any distinction by treating the complaint of a breach of religious freedom as subordinate to 'the special' rule for assemblies'. Obviously the scales are Weighted in favour of the legitimacy of government restrictions but at least in principle there is a fundamental tight to peaceful assembly.

In the third area the decision could be said to break new ground by insisting that the obligation (in Article 1 of the convention to secure effective exercise of the Convention rights may involve positive obligations on the State in a number of areas - even in the sphere of the relations of individuals between themselves.

On the basis of this jurisprudence it can be tentatively suggested:-

(1) The fundamental right Of peaceful assembly is an international human right which is guaranteed to every on involved. It covers public processions and can be exercised not only by the individual participants in a demonstration but also by those organising it. The possibility of violent counter-demonstration or the possibility of extremists with violent intentions, not members of the organising association, joining. the demonstration cannot as such take away that right. (28)

(2) Restrictions on a peaceful demonstration can be justified only if disorder arising out of violent counter-demonstrations cannot be prevented by less stringent measures. The primary judgement of the need for a particular restriction rests with the authorities but the power of appreciation given to States goes hand in hand with a European supervision which is more or less extensive 'depending on the circumstances.(29)

(3) The right to freedom of assembly must include the right to protection against counter-demonstrators, because it is only in this way that its exercise can be secured to social groups wishing to demonstrate for certain principles on highly controversial issues. It must be assumed, that the same protection applies to groups demonstrating on political grounds. (30)

(4) The first line of defence to a complaint that fundamental rights are not adequately protected will be to show that the legal system does provide for such protection. Regard will be had both to laws and to practices such as provision of police protection aimed at preventing public order or violence from occurring (31)

(5) Once the criteria in (4) are established it will be for the State to make a judgement as to what is appropriate in all the circumstances to discharge the obligation to protect the fundamental right. While it will in the end be for the European institutions to decide whether the measures taken were proportionate to the situation, in cases involving potentially inflammatory situations (which are most likely to occur in the context of protest), it will be difficult to persuade the Commission or Court that the matter of deciding between different methods of protecting a demonstration is one which they are better able to determine than the authorities who were faced with the decision at the time. In particular the use of police to repress counter-measures may be withheld for fear of provoking an outburst of violence. Further, sight must not be lost of a state's obligation under article 11,2 to have regard for the rights of Others - in this case the counter-demonstrators. (32)

CONCLUSION

The survey of European jurisprudence indicates that the right of peaceful assembly „like the right of freedom of expression is regarded as -a fundamental right. Restrictions on its exercise must be justified. In other words it is-not viewed as a residual right. In the cases under review the Convention' institutions have been careful to recognise the need to avoid substituting- their judgement of the need for particular restrictions imposed by states to deal with the exigencies of the time. However, insistence on the overriding responsibility of the institutions to assist governments in what Frank Brennan has described as 'striking of the balance so that the liberty to protest is denied only when public order is actually endangered' emphasises that

the right is not viewed as what is left after the state has set perimeters. That being said one cannot but observe that despite the principles laid down by the Convention's institutions they have not so far been persuaded that the defendant governments have exceeded their powers under article 11,2.

It would be going too far at this stage in Australian jurisprudence to ask our courts to strike down. legislation which conflicts with principles developed in the context of the European Convention on Human Rights. However, it may be possible to use this body of case law to assist in persuading an Australian court that a particular exercise of power did not meet 'a pressing social need', that it was not 'proportionate to the legitimate aims pursued' and that the court is entitled to examine whether the reasons given to justify the interference with the right are 'reasonable and sufficient'. These are objective tests with which our courts are familiar in their task of reviewing the legality of administrative decision-making. They do not take the court across the invisible line between judicial review and merits review.

A frontal attack on legislation which is out of step with the European Convention standards is a task for the Human Rights Commission or for non-governmental associations which may lobby politicians.

Arguably, given the preamble to the Human Rights Commission Act 1981, this body of case law is also relevant to those responsible for bringing down and amending Australian legislation. In this context the recognition, by the European Human Right Commission of an obligation on states to provide effective mechanisms for Enforcement of the right of peaceful assembly as well as other fundamental rights would seem to be an important development which can be expected to be utilized by United Kingdom protestors.

To the extent that the issue is addressed by British courts it will be especially relevant in the Australian context.

Footnotes

- (1) Brown. Civil Disobedience 58 J Philosophy (1961) 669, 672.
- (2) T I Emerson. Towards a General Theory of the First Amendment
72 Yale Law Journal (1963) 877-956.
- (3) Delbert D Smith. The Legitimacy of Civil Disobedience as a Legal Concept. 36 Fordham Law Review (1968) 707-730.
- (4) Frankel. Is It Ever Right to Break the Law NY Times 12 Jan 1964 cited in Smith supra fn 3.
- (5) Civil Disobedience: A Definition 3 Am. Crim L Q (1964) 11,14.
- (6) Francis A Allen. Civil Disobedience and the Legal Order. 36 U Cm n L Rev (1967) 1.-36 and 175-195.
- (7) op cit fn.
- (8) Quoted in Hook. Paradoxes of Freedom (1962)
- (9) European Convention for the Protection of Human Rights, International Covenant on Civil and Political Rights. American Declaration and Convention on Human Rights
- (10) L. W. Beer. Freedom of Expression in Japan. (Kodansha International Ltd) 1984, 163-5, and see Argentine Constitution of 1853 guaranteeing freedom of expression.
- (11) Kioa an others v West 62 ALR (1985) 321.
- (12) Coter. Freedom of Assembly, Conscience and Religion in Canadian Charter of Rights of Freedoms: Commentary ed

Tarnopolsky and Beaudoin (Carswell Coy) 1982, 134 citing Rv Praine Schooner News Ltd. (1970) 1 CCC (2d) 251 (Man C.A.).

(13) *ibid* 154.

(14) F Brennan, S.J. Too Much Order With Too Little Law (Univ Queensland Press.) 1983.

(15) R. Handley The Right of Peaceful Assembly in the ACT. Human Rights Commission Occasional Paper No 8, (AGPS) 1985.

(16) Brennan *op cit* 31.

(17) *ibid* 273.

(18) Application No 8191/78.

(19) *ibid* para. 3.

(20) Sunday Times v UK 2 EHRR 245 paras. 47 and 49.

(21) *ibid* and see Silver v UK (1983) 5 EHRR 347. paras. 85-88; Malone v UK (1985) 7 EHRR 14, paras. 66-68.

(22) T. A. O'Donnell. The Margin of Appreciation Doctrine and Standards in the Jurisprudence of the European Court of Human Rights 1982 Human Rights Quarterly.

(23) Arrowsmith v UK. Application No. 7050/75 (1978) Report of the Commission.

(24) Barthold v Germany 7 EHRR 383.

(25) *ibid* para. 55.

(26) *ibid* 407-8.

(27) application 10126/82. Commission Decision on Admissibility 1985.

(28) *ibid* para. 5.

(29) *ibid* para. 6.

(30) *ibid* and Barthold v Germany fn 24 above.

(31) *ibid* para. 11.

(32) *ibid* and cases cited above.

University of Toronto Faculty of Law Rev. 43 No 1 1985

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