Communications LAW

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THE OFFICIAL PUBLICATION OF THE COMMUNICATIONS AND MEDIA LAW ASSOCIATION INCORPORATED

Print Post Approved PP: 234093/00011 EDITED BY NIRANJAN ARASARATNAM AND SHANE BARBER Vol 22 No 2 2003

UN Communication Process and Free Speech

Paul Reidy and Kate Fitzgerald examine the workings of the United Nations Human Rights Committee, particularly in the light of recent petitions against Australia.

INTRODUCTION

Mr William Alpert, a Dow Jones journalist, has lodged a complaint with the United Nations Human Rights Committee (**Committee**) alleging that the decision of the High Court of Australia in *Dow Jones & Company Inc v Gutnick*[1] infringes his right to freedom of expression.

Mr Alpert's communication is the first matter submitted to the Committee alleging violation of freedom of expression against Australia and it has attracted the attention of international publishers and lawyers as that international body will now have an opportunity to consider the unique challenges that the 'new economy' presents to traditional legal principles.

This article summarises the result of some recent petitions made to the Committee against Australia, considers the way in which the Committee has dealt with previous complaints alleging violation of freedom of speech and outlines broadly the way in which a complaint is made to the Committee.

PREVIOUS COMMUNICATIONS AGAINST AUSTRALIA UNDER THE ICCPR

Australia has ratified the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *First Optional Protocol to the International Covenant on Civil and Political Rights* (**First Optional Protocol**) on 25 December 1991. As a result, Australia has agreed to be bound by the terms of the ICCPR and individuals can complain directly to the UN Human Rights Committee about their treatment in Australia.

53 communications have been lodged against Australia. To date, 36 communications have been finalised by the Committee: 7 of these were discontinued, 21 were held to be inadmissible, 3 were held not to have violated the ICCPR, and 5 were successful for the complainant.[2]

Recent examples include *Toonen v Australia* (1994). That case resulted in changes to Australian laws. In *Toonen*, the Committee held that the Tasmanian Criminal Code provision criminalising various forms of sexual contact between men contravened Mr Toonen's right to privacy under Article 17 of the ICCPR. As a result, the *Human Rights (Sexual Conduct) Act* 1994 (Cth) was enacted which gave legislative effect to the terms of Article 17 of the ICCPR.

By comparison, in the later case of *A v Australia* (1997), Australia has rejected the views and recommendations of the Committee in relation to the rights of an asylum seeker[3].

PREVIOUS COMMUNICATIONS INVOLVING FREE SPEECH

The ICCPR guarantees a number of civil and political rights, including freedom of expression under Article 19.

None of the 53 communications made to the Committee against Australia have specifically addressed the right to free expression. Mr Alpert's communication is the first lodged against Australia with respect to Article 19 of the ICCPR. However, the Committee has considered a number of communications made against

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other countries claiming an infringement of rights protected by Article 19 of the ICCPR.

Freedom of expression is a derogable civil and political right. The special importance of the right to freedom of expression in a democratic society is widely recognised in international law. In *Handyside v United Kingdom* (1976), the European Court of Human Rights stated:

> *"Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man... it is applicable not only to information or ideas that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society."*[4]

A similar view has been adopted by the UN Human Rights Committee. In *Tae-Hoon Park v Republic of Korea*[5] the Committee held that:

> *"The right to freedom of expression is of paramount importance in any democratic society and any restrictions to the exercise of this right must meet a strict test of justification."*

Further, in *Gouthier v Canada*[6] the Committee stated:

> *"The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."*

Article 19 does contain an inherent qualification. Freedom of speech may be restricted if it meets three requirements. First, the restriction must be prescribed by law. The legislation which prescribes the restriction must itself be in accordance with human rights principles set out in the ICCPR.[7]

Second, the restriction must serve the legitimate purpose of respecting the rights or reputations of others, or protecting national security, public order, public health or morals. And finally, the restriction must be necessary to achieve this purpose. [8] This requirement of necessity is a high barrier to restrictions on freedom of expression. For instance in *Mukong v Cameron* the Committee accepted that maintaining public order and national unity in difficult political circumstances was a legitimate objective, but that attempting to silence the complainant's advocacy of democratic reform could not be considered 'necessary' to achieving it.[9]

An example where such measures were held to be necessary was in *Faurisson v France*[10]. The Committee declared that a French enactment making it a criminal offence to deny the holocaust did not violate the right of free expression. The complainant in that case was an academic who denied the existence and use of gas chambers for extermination purposes at Auschwitz and in other Nazi concentration camps during World War II. The complainant submitted that the French enactment promoted the Nuremberg trial and judgment to the status of dogma, by imposing criminal sanctions on those who dare to challenge its findings and premises. The Committee justified its declaration as protecting the right of the Jewish community to live free from the fear of anti-Semitism. The Committee noted that its function is not to criticise the abstract laws of States, but to "*ascertain whether the conditions of the restrictions imposed on the right to freedom of expression are met in the communications which are brought before it*"[11]. As a result, the Committee decided unanimously that there was no violation on the academic's freedom of expression.

UNITED NATIONS HUMAN RIGHTS COMMITTEE PROCESS

The Committee is petitioned by way of a communication to it. There is no fee for this process.

A communication must be made in writing and must set out all of the background giving rise to the violation. It must allege a specific breach of an article contained in the ICCPR by a federal, state or local government department or agency. Generalised allegations are not admissible.

In the case of Australia, the Commonwealth of Australia is the respondent to any complaint made to the Committee, regardless of whether it is a Commonwealth, state or local body that is alleged to have committed the violation.

There are two main prerequisites to the Committee's jurisdiction that must be satisfied before the Committee can review the merits of the communication, namely:

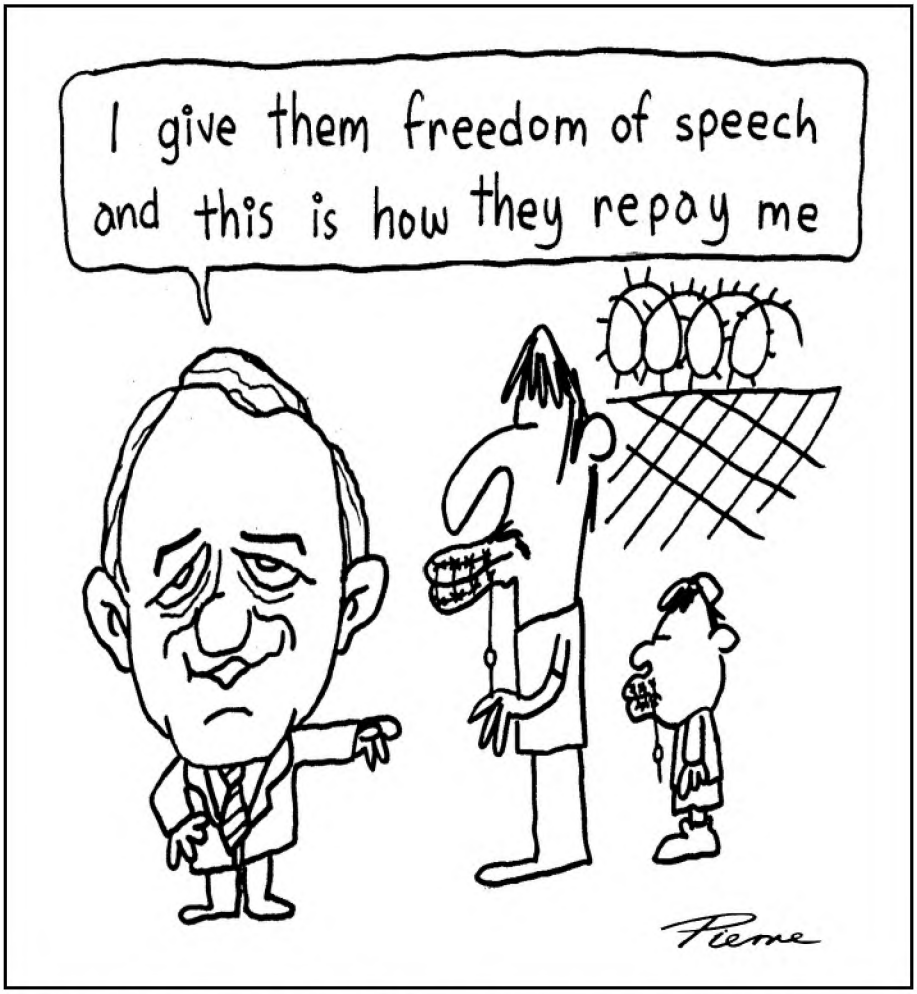
- the complaint must be made by an individual; and
- all available domestic remedies must have been first exhausted.

A communication to the Committee must come from an individual or his or her authorised representative (e.g. non-government organisations, legal representatives, etc). In the latter case, proof of the authorisation must be contained in the complaint. It is sufficient that the individual is subject to the jurisdiction of the State against whom the violation is alleged and the individual does not have to be a citizen or resident of that State.

A communication to the Committee is a mechanism of final resort. The complainant must first exhaust all domestic remedies because it is assumed that domestic laws are most likely to provide the best redress for an individual whose rights are violated. In addition, the complaint must not simultaneously be under consideration by another international investigatory body or involved in another settlement procedure.

Once the Committee assesses the preliminary matters set out above and determines the complaint to be admissible, the investigation or consideration of the merits commences. The Committee asks the State (i.e. the respondent) for its submissions to explain or clarify the alleged violation and to indicate whether there has been a resolution. The State must reply within six months. It cannot respond to the allegations by refuting them in general terms. It is implicit in Article 4(2) of the First Optional Protocol that the State concerned has a duty to investigate the matter in good faith and respond with satisfactory information.

The complainant is then given an opportunity to reply. The procedure is somewhat flexible – the Committee is able to receive further information from either party and each party is given an opportunity to respond to the contentions of the other party.



The Committee is not a court and does not have an independent fact-finding function. As such, the Committee does not hear oral testimony from witnesses, leaving the process solely based on written submissions. This makes the process fairly slow – in fact, a communication can take a number of years to be resolved.

The Committee does not have legally binding authority and can only provide one remedy. It will express a view or opinion as to whether a right has been violated and it is then left to the State to adopt or reject the Committee's views. The actions taken by the State to remedy the complaint are noted in the Committee's annual report to the UN General Assembly[12].

CONCLUSION

Mr Alpert's communication to the Committee is novel in the way it tackles the modern complexities of internet technology and appeals to fundamental human rights in the new economy. It is appropriate that it is being considered on the global stage by the United Nations.

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1 [2002] HCA 56, 10 December 2002

2 Human Rights Committee website: http://www.unhchr.ch/html/menu2/8/stat2.htm (accessed at 2 June 2003).

3 See www.unhchr.ch/tbs/doc.nsf/MasterFrameView/e1015b8a76fec400c125694900433654?Opendocument (accessed at 30 April 2003).

4 *Handyside v United Kingdom* (1976) Series A No. 24 before the European Court and Commission of Human Rights at par [49].

5 (1999) (633/1995) at par [13.9].

6 (1998) (628/1995) at par [10.3].

7 *Faurisson v France* (1996) (550/1993)

8 Article 19(3)(a) and (b) of the *International Covenant on Civil and Political Rights* and see, for example *Mukong v Cameron* (1994) (458/1991) at par [9.6] and [9.7].

9 *Mukong v Cameron* (1994) (458/1991) at par [9.7].

10 *Faurisson v France* (1996) (550/1993)

11 *Faurisson v France* (1996) (550/93) at par [9.3].

12 For further information: visit http://www.austlii.edu.au/au/other/ahric/booklet/index.html, Human Rights Committee website: http://193.194.138.190/html/menu2/6/hrc.htm (accessed at 30 April 2003).