NON-CONFORMING POLITICAL OPINION AND HUMAN RIGHTS: TRANSNATIONAL PROTECTION AGAINST DISCRIMINATION*

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In a world arena characterized by persisting expectations of violence and a concomitant trend toward politicization, there has been a deepening community concern for outlawing intolerance toward non-conformists. Expectations of violence and perception of crisis within a particular territorial community often lead to the mobilization of group defenses, with ruthless suppression of dissident views and discrimination against the holders of such views. The concern of the larger community both builds upon and expresses a more general norm of nondiscrimination which seeks to forbid all generic differentiations among human beings in the shaping and sharing of values for reasons irrelevant to individual capabilities and contribution.[1] The particular norm against discrimination on the ground of nonconforming opinion finds expression in many authoritative communications, at both transnational and national levels, and, under appropriate conditions, could be made an important bulwark for the protection of political freedom.

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1. For a detailed elaboration of the general norm of nondiscrimination, see McDougal, Lasswell & Chen, "The Protection of Respect and Human Rights: Freedom of Choice and World Public Order," 24 Am. U. L. Rev. No. 4 (Summer 1975); McDougal, Lasswell & Chen, "Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination," 69 AJIL 497 (1975).

I. Factual Background

The deprivations to which reference is here made are those imposed upon individuals characterized in terms of their political or other opinions. Manifestations of intolerance toward "political" heretics, as toward religious, have long historical roots. In the earliest days there could of course be no distinction between discriminations on the ground of religious and political beliefs since the organized community and the established religion were largely one and the same and little or no difference was made between religion and law.[2] In more modern times, while intolerance toward religious non-conformists has waned, intolerance toward political non-conformists has significantly waxed, especially with the rise in the twentieth century of totalitarian regimes.[3] The political or other opinions that are frequently made ground for discrimination include a broad spectrum of articulated views on power and the other components of social process. As with religious discriminations, deprivations may be imposed upon an individual because he refuses to accept an established political orthodoxy, or adheres to a different set of political prefer-

2. Cf. Bertholet, "Religion," 13 Encyc. Soc. Sc. 228, 229-31 (E. Seligman ed. 1934).

3. On totalitarianism, see generally H. Arendt, The Origins of Totalitarianism (1958); K. Bracher, The German Dictatorship (1970); H. Buchheim, Totalitarian Rule: Its Nature and Characteristics (R. Hein transl. 1968); B. Chapman, Police State (1970); C. Friedrich & Z. Brzezinski, Totalitarian Dictatorship and Autocracy (1961); C. Friedrich, M. Curtis, & B. Barber, Totalitarianism in Perspective: Three Views (1969); E. Fromm, Escape from Freedom (1941; 1965); F. Hayek, The Road to Serfdom (1944); S. Neumann, Permanent Revolution: Totalitarianism in the Age of International Civil War (2d ed. 1965); W. Reich, The Mass Psychology of Fascism (1946); L. Schapiro, Totalitarianism (1972); J. Talmon, The Origins of Totalitarian Democracy (1960); E. Tannenbaum, The Fascist Experience: Italian Society and Culture 1922-1945 (1972); Totalitarianism (C. Friedrich ed. 1964); World Revolutionary Elites: Studies in Coercive Ideological Movements (H. Lasswell & D. Lerner eds. 1966).

ences, or expresses doubts about existing systems, or attempts peacefully to evangelize for a new set of preferences, or openly impugns the validity of prevailing systems. While dissenters in the power sector are the primary targets of deprivation, non-conformists in sectors other than power are by no means immune from discriminatory deprivations: witness the treatment accorded in recent years to the hippies, flower children, and others who have espoused counter-cultures in their search for distinct life styles and new modalities of interpersonal and social relationships.[4]

The history of deprivations imposed because of political or other opinion is vividly registered in the rise and fall of practically every known body politic. While it is true that most deprivations are imposed through community processes of authoritative decision, some measures are direct expressions of unauthorized though tolerated effective power. Impositions range from minor irritation and harassment to torture and death. The danger to a public order of human dignity of deprivations of this kind, which know no national or ideological boundaries, is of course immense. Characterizing the 1970s "not as a golden Space Age, but rather as a new era of political barbarism,"[5] Shelton has sharply observed:

> Most amazingly, the ninety countries known to hold political prisoners run across all socio-political lines. There is nearly as much use for the jailer of ideas in the "free world" as there is in the Communist bloc. The supposedly idealistic emergent group of Third World nations is not only not immune to the

4. Power is a function of perspectives and operations in all other value processes. Hence the preferences of elites for a general orthodoxy.

On Counter-culture, see two contemporary classics: T. Roszak, The Making of a Counter Culture (1969); C. Reich, The Greening of America (1970). See also Counter Culture (J. Berke ed. 1969); R. Johnson, Counter Culture and the Vision of God (1971).

5. Shelton, "The Geography of Disgrace: A World Survey of Political Prisoners," Saturday Review/World, June 15, 1974, 14, at 14.

> jailing fever but also is in fact heavily into the business of locking up dissenters. In many such nations, to paraphrase the German military theoretician Karl von Clausewitz, the imprisonment of dissenters is simply the continuation of state policy by other means.[6]

The analysis of political deprivations may well begin with enlightenment as a value base of power. We refer to denials of or restrictions upon individual participation in articulating and expressing opinions. Non-conformists may, when political orthodoxy is made decisive, be denied access to the media of mass communication and to institutions of higher learning, not only as channels through which to express their views, but as means of obtaining knowledge of the views of others.[7] A blanket prohibition may be levied against the formation of alternative or competing channels and institutions. Dissent may, therefore, be suppressed by monopolizing and exploiting all media of public expression, eclipsed by an educational regime of systematic indoctrination, and policed by routinized or sporadic recourse to coercion.[8] In communities exhibiting

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6. Id.

7. C. Ammoun, Study of Discrimination in Education 60-61, 65, U.N. Doc. E/CN.4/Sub.2/181/Rev.1 (1957).

8. Cf. T. Chen, Thought Reform of the Chinese Intellectuals (1960); A. Dallin & G. Breslauer, Political Terror in Communist Systems (1970); J. Hazard, The Soviet System of Government (1957); International Press Institute, The Press in Authoritarian Countries (1959); R. Lifton, Thought Reform and the Psychology of Totalism: A Study of "Brainwashing" in China (1963); S. Neumann, supra note 2, at 205-29.

"A totalitarian government will naturally organize a totalitarian educational system. In Nazi Germany, the objectives of Aryan or Nordic supremacy were applied in such a way as to deprive Jews and other non-Aryans of access to higher education, as well as to persecute them in countless ways. The authorities of Fascist Italy imposed their political credo--'Believe, obey, fight!' and 'Mussolini is always right!'--upon all pupils and students and monopolized all media of public expression. The rules of the U.S.S.R. prohibit the teaching of religion, non-Marxian economics, and other doctrines deemed to be incon-

high degrees of political intolerance, as in a totalitarian state, it is commonplace that

> Nonconformity of opinion is treated as the equivalent of resistance or opposition to the government, and a formidable apparatus of compulsion, including various kinds of state police or secret police, is kept in being to enforce the orthodoxy of the proclaimed doctrines of the state.[9]

For political non-conformists deprivations of power are especially severe. Non-conformists are commonly denied access to appointive and elective public office, notably where one-party rule prevails.[10] In a body politic

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sistent with Communist ideology. Nations officially committed to the principles of democratic government and life tend to reveal a more pluralistic attitude toward other viewpoints and peoples." "Education, Systems of," 6 Encyc. Brit. 417, 418 (15th ed. 1974).

9. "Political Systems," 14 Encyc. Brit. 707, 715 (15th ed. 1974).

"[I]n a totalitarian state, in which only one party is permitted, views opposed to the policy of that party are necessarily and permanently opposed to the government and are therefore regarded as being opposed to the state. In a multiparty state, an opposition party that has a reasonable opportunity of gaining power in the future will not see its conflict with the government as a conflict with the state." "State, The" 17 Encyc. Brit. 609, 614 (15th ed. 1974).

In a non-totalitarian context, cf. A. Wolfe, The Seaming Side of Democracy: Repression in America (1973); Preston, "Shadows of War and Fear," in The Pulse of Freedom 105-53 (1975) (A. Reitman ed.); Preston, "The 1940s: The Way We Really Were," 2 Civil Liberties Rev. No. 1, at 4-38 (Winter, 1975).

10. Conversely, in many one-party states, especially Communist, elections become an instrument to demonstrate the unity of the people, and to generate (or, fabricate) their "unanimous" support and fortify their identification with the regime in power. As voting is thus conceived as a test of loyalty, non-voting, though not proscribed by law, may entail severe deprivations.

with de jure or de facto one party rule, the party identification, party membership and loyalty are the required credentials for governmental positions, high or low.[11] Even if non-members of the ruling party are allowed to compete for elective office, the opportunity is entirely nominal, since coercion, fraud, and related methods of harassment preclude any chance of success.[12] Typically, dissenters are forbidden to organize political parties and other associations.[13] They may be barred from holding meetings

11. "A single party, centrally directed and composed exclusively of loyal supporters of the regime, is the other typical feature of totalitarianism. The party is at once an instrument of social control, a vehicle for ideological indoctrination, and the body from which the ruling group recruits its members." "Political Systems," supra note 9, at 715. Cf. also M. Djilas, The New Class: An Analysis of the Communist System (1957); C. Friedrich & Z. Brzezinski, supra note 3, at 27-47; J. Hazard, supra note 8, at 12-73; S. Neumann, supra note 3, at 118-41; F. Schurmann, Ideology and Organization in Communist China (2d ed., enlarged 1968); R. Solomon, Mao's Revolution and the Chinese Political Culture 160-242 (1971); World Revolutionary Elites, supra note 3.

12. For an illustration, see the practice of the Nationalist Chinese regime in Taiwan: Axelbank, "Chiang Kai-shek's Silent Enemies," Harper's Magazine, September 1963, at 46-53; The Economist, May 11, 1963, at 536. Cf. also L. Chen & H. Lasswell, Formosa, China and the United Nations 132-36, 151, 164-65, 170-73, 251-53, 275-82 (1967).

13. See C. Friedrich & Z. Brzezinski, supra note 3, at 27-39; H. Santa Cruz, Study of Discrimination in the Matter of Political Rights 37-38, U.N. Doc. E/CN.4/Sub.2/213/Rev.1 (1962). Cf. also generally Authoritarian Politics in Modern Society: The Dynamics of Established One-Party Systems (S. Huntington & C. Moore eds. 1970); Regimes and Oppositions (R. Dahl ed. 1973); and compare with Political Oppositions in Western Democracies (R. Dahl ed. 1966).

Dahl has sharply observed "a self-fulfilling prophecy" of "the hegemonic regime" in these terms: "Since all opposition is potentially dangerous, no distinction can be made between acceptable and unacceptable opposition, between loyal and disloyal opposition, between opposition that is protected and opposition that must be repressed. Yet if

and assemblies.[14] They may be put into isolation or banished to remote areas. Often they are denied opportunity to go abroad, either temporarily or permanently.[15] Conversely, non-conformists may return to their own land at their peril. In extreme cases dissenters may be deprived of nationality and banished abroad.[16] To an increasing extent political refugees of today have taken the place formerly occupied by religious refugees.[17] For non-conformers in general due process of law is a luxury: arbitrary arrest, detention, trial (or non-trial), and imprisonment are the trademarks of contemporary political barbarism.[18]

all oppositions are treated as dangerous and subject to repression, opposition that would be loyal if it were tolerated becomes disloyal because it is not tolerated. Since all opposition is likely to be disloyal, all opposition must be repressed." Dahl, Introduction, in Regimes and Oppositions, supra at 1, 13.

14. Cf. D. Bayley, Public Liberties in the New States 75-92 (1964); V. Chalidze, To Defend These Rights: Human Rights and the Soviet Union 67-91 (G. Daniels transl. 1974).

15. J. Ingles, Study of Discrimination in respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country 29-30, U.N. Doc. E/CN.4/Sub.2/220/Rev.1 (1963). Cf. also V. Chalidze, supra note 14, at 92-114; W. Korey, The Soviet Cage: Anti-Semitism in Russia 184-200 (1973); A. Sakharov, Sakharov Speaks 159-63 (H. Salisbury ed. 1974).

16. The denationalization and banishment of Alexander I. Solzhenitsyn by the Soviet Union in February, 1974 are of course the most recent dramatic illustration. For details, see McDougal, Lasswell, & Chen, "Nationality and Human Rights: The Protection of the Individual in External Arenas," 83 Yale L.J. 900, 959-60 (n. 280) (1974).

17. For a concise account of the figures of political refugees in recent history, see "Refugees," 15 Encyc. Brit. 568, 569 (15th ed. 1974).

18. In addition to the works concerning torture cited below, see generally C. Belfrage, The American Inquisition 1945-1960 (1973); A. Davis, If They Come in the Morning: Voices of Resistance (1971); M. Djilas, Land Without Justice (1958); C. Goodell, Political Prisoners in America (1973); O. Kirchheimer, Political Justice: The Use of Legal Procedure for Political Ends (1961); J. Mitford, The Trial of Dr. Spock (1969); W. Preston, Aliens and Dissenters:

The plight of the dissenter goes far beyond the interferences mentioned above to the enduring of deprivations of well-being by jailing and torture. On every continent political dissenters are, as spotlighted in Solzhenitsyn's recent masterpiece, The Gulag Archipelago,[19] imprisoned in

Federal Suppression of Radicals, 1903-1933 (1963); B. Ruo-Wang (J. Pasqualini) & R. Chelminski, Prisoner of Mao (1973); R. Sherrill, Military Justice is to Justice as Military Music is to Music (1970); United Nations, Freedom from Arbitrary Arrest, Detention and Exile (Yearbook on Human Rights: First Supplementary Volume) (1959); United Nations, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, U.N. Doc. E/CN.4/826/Rev.1 (1964); Inter-American Commission on Human Rights, "Report on the Status of Human Rights in Chile," Doc. OEA/Ser.L/V/II.34/doc.21 corr.1 (25 October 1974) (Findings of 'on-the-spot' observations in the Republic of Chile, July 22-August 2, 1974); "Hearings on Human Rights in Chile Before the Subcomms. on International Organizations and Movements and on Inter-American Affairs of the House Comm. on Foreign Affairs," 93rd Cong., 2d Sess. pts. 1 & 2 (1974); "Hearings on Refugee and Humanitarian Problems in Chile Before the Subcomm. to Investigate Problems Connected with Refugees and Escapees of the Senate Comm. on the Judiciary," 93rd Cong., 1st Sess. (1973); "Hearing on Refugee and Humanitarian Problems in Chile Before the Subcomm. to Investigate Problems Connected with Refugees and Escapees of the Senate Comm. on the Judiciary," 93rd Cong., 2d Sess. (1974); "Hearings on Human Rights in South Korea: Implications for U.S. Policy Before the Subcomms. on Asian and Pacific Affairs and on International Organizations and Movements of the House Comm. on Foreign Affairs," 93rd Cong., 2d Sess. (1974); Oberdorfer, "South Korea: The Smothering of Dissent," The Washington Post, July 28, 1974, sec. C, at 3; Report on an Amnesty International Mission to the Republic of Korea, 27th March-9th April 1975 (unpublished paper, 1975); Fraser, "Political Repression in 'Free China'" 116 Cong. Rec. E7953-56; Ginsburg, Repression in Taiwan, The New Republic, July 17, 1971, at 15-16; Peng, "Political Offences in Taiwan: Laws and Problems," 47 The China Quarterly 471 (1971).

19. A. Solzhenitsyn, The Gulag Archipelago, 1918-1956 (T. Whitney transl., 1974). For a brilliant review, see Lipson, "Book Review," 84 Yale L.J. 952 (1975).

large numbers in concentration camps, local jails, national prisons, or other detention centers.[20] "Conditions in these prisons," as Shelton has summarized, "are, needless to say, usually sub-human and insupportable: Torture, painful shackling, perennial semi-starvation, and carefully calculated breakdown of prisoner morale are the very grammar and rhetoric of political detention."[21] Torture, described in a recent study by Amnesty International, as a "cancer,"[22] "the most flagrant denial of man's humanity,"[23] and "the ultimate human corruption,"[24] has practically become "a worldwide phenomenon"[25] as an instrument of silencing political dissent. In crowning indignity dissenters are on occasion sent to lunatic asylums in the guise of treatment.[26]

Insofar as wealth processes are concerned, we find that deprivations against non-conformists increase correspondingly as the public sector expands. As indicated in a Report of the Committee of Experts under the ILO auspices:

> It is in the specific field of public, or state-controlled, employment that legislative provisions or administrative practice seem most often liable to run counter to equality of employment and occupation for purely political reasons.[27]

Such discrimination may be manifested in "appointments, transfers, promotion, allocation of persons to responsible or confidential positions," as well as in "access to training facilities and to special courses, conditions of em-

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20. Shelton, supra note 5, at 14-19.

21. Id. at 14.

22. Amnesty International, Report on Torture 22 (1973).

23. Id. at 23.

24. Id.

25. Id. at 7. We propose to deal with the problem of torture in a separate article.

26. See V. Chalidze, supra note 14, at 247-94; Reddaway, "The Soviet Treatment of Dissenters and the Growth of a Civil Rights Movement," in Rights and Wrongs: Some Essays on Human Rights 79, 92-97, 118-20 (C. Hill ed. 1969); Shelton, supra note 5, at 14.

27. International Labour Conference, Report of the Committee of Experts on the Application of Conventions and Recommendations 218 (1963).

ployment and termination of employment."[28] Loyalty tests may be indiscriminately applied in government employment, including teaching, even in a body politic that prides itself of the tradition of democracy.[29] The invidious effect of such a program is underlined by Emerson:

> Generally speaking, cutting a person off from employment or career because of his beliefs, opinions, or associations has a grossly inhibiting effect upon the free exercise of expression by that person and by many others. Where, as in this country, loyalty qualifications are demanded for a substantial proportion of available employment, the impact is widespread and deep. Moreover, certain aspects of loyalty oaths and loyalty programs magnify the total effect.[30]

Discrimination against non-conformists is not, however, confined to the public sector. Even employers in the private sector are often reluctant to hire those who are labelled politically undesirable or those whose life styles are unconventional.[31] Confiscation of property is sometimes imposed upon dissenters. In relation to livelihood, deprivations of skill may take the form of denying "professional people and artists the right to pursue their occupations," reducing "countless scientists, historians and writers," and so on, to do "menial labor."[32]

Deprivations against political dissenters extend also to the intimate world of affection values and institutions. Harassed by the tactics of asserted "guilt by association,"

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28. International Labour Office, Fighting Discrimination in Employment and Occupation 108 (1968).

29. Consult generally R. Brown, Loyalty and Security (1958); T. Emerson, The System of Freedom of Expression 205-46 (1970); H. Hyman, To Try Men's Souls: Loyalty Tests in American History (1959); D. Williams, Not in the Public Interest (1965); Caughey, McCarthyism Rampant, in The Pulse of Freedom, supra note 9, at 154-210.

30. T. Emerson, supra note 29, at 207.

31. Fighting Discrimination in Employment and Occupation, supra note 28, at 112.

32. Shelton, supra note 5, at 14.

non-conformists often find themselves stifled in social isolation. They often find it impossible, for reasons beyond their control, to maintain prior congenial personal relationships or to establish new ones. Fear and anxiety are manipulated by oppressors in such a way as to frighten relatives and friends. In a prevailing atmosphere of fear and mutual suspicion, non-conformists are made social as well as political outcasts. They become public and private targets of ridicule, contempt, and shame. With the consummation of these orchestrated punishments, deprivations of respect and rectitude reach their full potential.[33]

II. Basic Community Policies

The differential treatment of individual human beings entirely on the basis of political and other opinions is clearly incompatible with the values of human dignity. Shared respect alone requires freedom from such discrimination. The sharing of power, further, depends upon a free exchange of opinion; a democratic society can only thrive by cultivating and testing a great pluralism of ideas and alternatives.[34] Any realization of shared enlightenment,

33. Friedrich and Brzezinski describe it in terms of "Islands of Separateness." See C. Friedrich & Z. Brzezinski, supra note 3, at 239-89. Aware of the disruptive potential that may be generated by small challenging groups, totalitarian regimes have generally sought atomization of interpersonal relations of groups below the level of the State. It may also be of interest to note: "Apart from religion, the state sometimes imposes purely secular restrictions. The more totalitarian a government, the more likely it is to restrict or direct sexual behavior. . . . sex, being a highly personal and individualistic matter, is recognized as antithetical to the whole idea of strict governmental control and supervision of the individual. This may help explain the rigid sexual censorship exerted by most totalitarian regimes. It is as though such a government, being obsessed with power, cannot tolerate the power the sexual impulse exerts on the population." "Sexual Behavior, Human," 16 Encyc. Brit. 593, 599 (15th ed. 1974). See also J. Hazard, supra note 8, at 121-37; S. Neumann, supra note 3, at 142-204.

34. Shils offers this apt summary: "Liberalism is a system of pluralism. It is a system of many centers of power, many areas of privacy and a strong internal impulse

likewise, must include broad freedom of political and other opinion. In a word, abundant production and wide sharing of all values are profoundly affected by the degree to which the members of a community enjoy freedom of opinion.

The justification most commonly invoked in support of discrimination based upon political and other opinions, like that in support of religious intolerance and persecution, is phrased in terms of the necessities imposed by the need of maintaining unity, of avoiding community fragmentation in consequence of many diverging views.[35] The allegation of unity may build variously upon asserted needs of national solidarity against real or imagined external threat, upon the imperatives of pent-up nationalism, upon the task of nation-building in a traditional society, or upon the critical need for economic development, or, more crudely, upon the latent consolidation of power by an effective ruling elite.[36] Not infrequently, suppression of

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towards the mutual adaptation of the spheres, rather than of the dominance or the submission of any one to the others." E. Shils, The Torment of Secrecy 154 (1956). For a concise overview on pluralism, see Kariel, "Pluralism," 12 Int'l Encyc. Soc. Sc. 164 (D. Sills ed. 1968). Pluralism was championed with special vigor, in reaction against the alienation and dehumanization of the individual caused by excessive capitalism, in the early part of the twentieth century by a group of writers in England, including Frederic Maitland, Harold J. Laski, R.H. Tawney, and G.D.H. Cole. See, e.g., H. Laski, Authority in the Modern State (1919); R. Tawney, The Acquisitive Society (1920).

35. In view of the very nature of intolerance, political or religious, Maurice Cranston has observed that "the argument both for and against political toleration in the twentieth century cannot be said to have differed greatly from the debate concerning religious toleration that exercised the minds of earlier generations." Cranston, Toleration, 8 The Encyclopedia of Philosophy 143, 146 (P. Edwards ed. 1967).

36. Excessive emphasis on this theme often leads to a misconceived dichotomy of "nation-building" and "human rights"--i.e., freedoms are a luxury for a developing nation and people preoccupied with the task of nation-building. The falsity of such an assertion will become clear as we deal with other value processes. Nation-building is a multi-dimensional task that involves all aspects of national life and all important value-institutions

dissent is further justified in terms of governmental efficiency, or the maintenance of internal order.[37] The most dogmatic oppressors of dissent may upon occasion assert a monopoly of the truth of their proclaimed political orthodoxy, exhibiting a zeal no less intense than that of religious fanatics.[38]

The search for unity through the repression of political opinion would appear to be gravely misconceived. "There is," Emerson writes, "no fundamental conflict between freedom of expression and national unity or consensus."[39] "It would contradict," he continues, "the basic tenets of a democratic society to say that the greater the freedom of expression, the less the area of agreement among its members."[40] He elaborates:

> [A] healthy consensus is possible only where freedom of expression flourishes. Such freedom is essential to the whole process of legitimation of social decisions. Suppression not only is ineffective in promoting general agreement or stability, but hinders the process by engendering hostility, resentment, fear, and other divisive forces.[41]

Given the diversity and dynamics of the political systems prevailing in the past, present, and future of human society, any claim to monopolize truth in a particular political doctrine would appear to carry about as much persuasiveness as a comparable claim in the realm of religion. The strength of a society that honors human dignity must rest upon genuine pluralism rather than coerced monolithism.[42] The alleged "conflict" between freedom of opinion

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of a body politic; it can be viewed as progress toward a self-sustaining process of value accumulation and distribution. Thus, it would be a hollow exercise to talk about nation-building without high regard to human rights, the core reference of which is the wide shaping and sharing of values by community members.

37. Cf. T. Emerson, supra note 29, at 44-46, 97-399.

38. A notable example is of course claims about ultimate orthodoxy of Marxism.

39. T. Emerson, supra note 28, at 44.

40. Id.

41. Id.

42. See note 34 supra.

and expression and governmental efficiency would, finally, appear "more apparent than real."[43] Again the point is well made by Emerson: "In the long run, open criticism of the government's operations results in a more responsible, alert, and fair administration, and hence in more effective government."[44]

It is not being suggested that the accommodation of one individual's freedom of political opinion and expression with the comparable rights of others and the aggregate common interest, especially in the maintenance of internal public order, is an easy task. Whether the problem is formulated in terms of a dichotomy of "expression" and "action,"[45] "clear and present danger,"[46]

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43. T. Emerson, supra note 29, at 45.

44. Id. at 45-46. For expositions of the policy considerations underlying freedom of expression, see generally, among others, C. Black, Jr., Perspectives in Constitutional Law 83-93 (1970); Z. Chafee, Jr., Free Speech in the United States (1941; 1969); T. Emerson, supra 29; H. Laski, Liberty in the Modern State (1930); H. Lasswell, National Security and Individual Freedom (1950); J. Locke, Two Treaties of Government (P. Laslett ed. 2d ed. 1967); J. Mill, On Liberty (1859; 1956); J. Milton, Areopagitica (1644); A. Sakharov, Progress, Coexistence, and Intellectual Freedom (The New York Times transl. 1968); D. Sandifer & L. Scheman, The Foundations of Freedom 69-82 (1966); M. Shapiro, Freedom of Speech: The Supreme Court and Judicial Review (1966).

45. T. Emerson, supra note 29, at 8, 17. In Emerson's words: "The central idea of a system of freedom of expression is that a fundamental distinction must be drawn between conduct which consists of 'expression' and conduct which consists of 'action.' 'Expression' must be freely allowed and encouraged. 'Action' can be controlled, subject to other constitutional requirements, but not by controlling expression. A system of freedom of expression cannot exist effectively on any other foundations, and a decision to maintain such a system necessarily implies acceptance of this proposition." Id. at 17. His expression-action theory first appeared in Emerson, "Toward a General Theory of the First Amendment," 72 Yale L.J. 877 (1963), later published as a paperback: T. Emerson, Toward a General Theory of the First Amendment (1966).

46. The famous "clear and present danger" test was formulated by Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919), in which the Supreme Court of the

"bad tendency,"[47] "incitement,"[48] or "ad hoc balancing,"[49] it would appear that the only rational procedure for accommodation is a disciplined, contextual analysis that takes fully into account all the relevant variables and evaluates the consequences of available alternatives in the light of goals, trends, conditions, and projections. For the purposes of such an inclusive and contextual analysis it is essential that appropriate principles of content and procedure be devised and employed to guide and assist in the making of rational decisions and in the reduction of

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United States unanimously sustained a conviction, under the Espionage Act of 1917, for causing insubordination in the armed forces. In the words of Justice Holmes: "[T]he character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." Id. at 52.

47. E.g., Gitlow v. New York, 268 U.S. 652 (1925), especially at 666-72. Upholding the constitutionality of a New York statute outlawing "criminal anarchy," the U.S. Supreme Court said: "That a State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." Id. at 667.

48. Cf. T. Emerson, supra note 29, at 16, 105, 156-57, 314, 324, 717-18.

49. See Emerson, "Toward a General Theory of the First Amendment," 72 Yale L.J. 877, 912-14; T. Emerson, supra note 29, at 116-18 et seq. For further analysis and comments, see also W. Mendelson, Justices Black and Frankfurter: Conflict in the Court (2d ed. 1966); Frantz, "The First Amendment in the Balance," 71 Yale L.J. 1424 (1962); Meiklejohn, "The Balancing of Self-Preservation Against Political Freedom," 49 Calif. L. Rev. 4 (1961).

arbitrary elements.[50]

Appropriately characterized as "the matrix, the indispensable condition of nearly every other form of freedom,"[51] freedom of opinion and expression is indeed the "touchstone of all the freedoms to which the United Nations is consecrated."[52] The destructive impact of deprivations of this fundamental freedom extends far beyond the direct victims themselves. In the words of John Stuart Mill,

> It is not the minds of heretics that are deteriorated most by the ban. . . . The greatest harm is done to those who are not heretics and whose whole mental development is cramped and their reason cowed by the fear of heresy. No man can be a great thinker who does not recognize that as a thinker it is his first duty to follow his intellect to whatever conclusions it may lead. Truth gains more even by the errors of one who, with due study and preparations thinks for himself than by the true opinions of those who hold them only because they do not suffer themselves to think.[53]

In comparable vein, Justice Hugo L. Black said:

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50. Consult McDougal, "Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies," 14 Va. J. Int'l L. 387 (1974); McDougal, Lasswell, & Chen, "The Protection of Respect and Human Rights: Freedom of Choice and World Public Order," 24 Am. U. L. Rev. No. 4 (Summer 1975). See also M. McDougal, H. Lasswell, & J. Miller, The Interpretation of Agreements and World Public Order: Principles of Content and Procedure (1967); Lasswell, "The Public Interest: Proposing Principles of Content and Procedure," in The Public Interest 54-79 (C. Friedrich ed. 1962); Lasswell, "Clarifying Value Judgments: Principles of Content and Procedure," 1 Inquiry 87 (1958).

51. Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J.).

52. "Annotations on the text of the draft International Covenants on Human Rights" (prepared by the Secretary-General), 10 U.N. GAOR, Annexes, Agenda Item No. 28, at 50, U.N. Doc. A/2929 (1955).

53. Quoted in D. Sandifer & L. Scheman, supra note 44, at 77.

> Centuries of experience testify that laws aimed at one political or religious group, however rational these laws may be in their beginnings, generate hatreds and prejudice which rapidly spread beyond control. Too often it is fear which inspires such passions, and nothing is more reckless or contagious. . . . Under such circumstances, restrictions imposed on proscribed groups are seldom static, even though the rate of expansion may not move in geometric progression.[54]

III. Trends in Decision

Historically, it must be conceded that the transnational community has afforded individuals but meager protection against discriminations that are grounded on political or other opinions. In the rare instances in which the doctrine of humanitarian intervention has been

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54. American Communications Association v. Douds, 339 U.S. 382, 448 (1950) (Justice Black's Dissenting opinion).

On a more positive note, the importance of the freedom of expression and freedom from discrimination on account of opinions cannot be overemphasized. Justice William O. Douglas has written: "Full and free discussion keep a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart. Full and free discussion has indeed been the first article of our faith." Dennis v. U.S., 341 U.S. 494, 584 (1951) (dissenting opinion). Similarly, an Oriental philosopher writes: "In order to contribute fully to the society, each individual should have the fullest degree of self-expression. Social progress depends on each individual's freedom of expression." Lo, "Human Rights in the Chinese Tradition," in Human Rights: Comments and Interpretations 186, 189 (UNESCO ed. 1949).

Emerson summarizes: "Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society." Emerson, supra note 49, at 878-79.

invoked, since groups protected have in fact been characterized by a complex of religious, racial, ethnic, cultural, linguistic, or political factors, it is highly probable that some groups have exhibited highly distinctive political opinions.[55] Similarly, the earlier transnational protection of minority groups during the era of the League of Nations could not but protect non-conformist views when the particular racial, religious, or linguistic groups held distinctive, non-conforming political opinions.[56] From a somewhat different perspective, it may be observed that freedom from discrimination on account of political or other opinion was, not insignificantly, protected in the instances in which people were given opportunity, through plebiscites or comparable arrangements, to express their political preferences and to choose their affiliations before a transfer of territory was consummated.[57]

In projecting its general norm of non-discrimination, the United Nations Charter is relatively short in its illustrative list of impermissible grounds of differentiation: "race, sex, language, or religion."[58] The context suggests that the framers of the Charter and their audience shared the expectation that more detailed and elaborate provisions for the global protection of human rights would soon find place in a contemplated International Bill of Rights.[59] The Universal Declaration of Human Rights

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55. See M. Ganji, International Protection of Human Rights 39-41 (1962); McDougal, Lasswell, & Chen, supra note 50.

56. Cf. McDougal, Lasswell, & Chen, supra note 50.

57. See H. Johnson, Self-Determination Within the Community of Nations (1967); J. Mattern, The Employment of the Plebiscite in the Determination of Sovereignty (1920); S. Wambaugh, A Monograph on Plebiscites (1920); S. Wambaugh, Plebiscites Since the World War (1933); Chen & Reisman, "Who Owns Taiwan: A Search for International Title," 81 Yale L.J. 599, 660-69 (1972).

58. U.N. Charter, Arts. 1(3), 13(1)(b), 55(c), and 76(c).

59. L. Goodrich, E. Hambro & A. Simons, Charter of the United Nations: Commentary and Documents 371-74 (3d & rev. ed. 1969).

presently made it clear that the itemization of impermissible grounds of differentiation in the Charter was indeed illustrative, not exhaustive. In Article 2 of the Declaration the itemization is expanded as follows:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[60]

The comprehensiveness of this itemization is strengthened by Article 7, which accords "equal protection of the law" to "all" against "any discrimination" and "any incitement to such discrimination."[61] Further substance is added to freedom from discrimination because of political or other opinion in Article 19:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[62]

The same theme is stressed in the International Covenant on Civil and Political Rights. Adopting the wording of Article 2 of the Universal Declaration, the Covenant, in Article 2(1), specifies "political or other opinion" as among the impermissible grounds of differentiation.[63] Individuals, pursuant to Article 26, are further accorded access to law to challenge any such discrimination:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political

60. United Nations, Human Rights: A Compilation of International Instruments of the United Nations 1, U.N. Doc. ST/HR/1 (1973) [hereinafter cited as U.N. Human Rights Instruments].
61. Id.
62. Id. at 2.
63. Id. at 8.

> or other opinion, national or social origin, property, birth or other status.[64]

As in the Universal Declaration, freedom from discrimination because of opinions, political or other, finds its deepest support in a prescribed basic freedom of opinion and expression. Article 19 of the Covenant stipulates that "Everyone shall have the right to hold opinions without interference"[65] and "the right to freedom of expression," including "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[66] The exercise of this right is, not inappropriately, made subject, in paragraph 3, to such "restriction" as "provided by law and are necessary" for "respect of the rights or reputations of others" and for "the protection of national security or of public order (ordre public), or of public health or morals."[67] The International Covenant on Economic, Social, and Cultural Rights, similarly, specifically forbids, in Article 2(2), discriminations on the ground of opinions, political or other, in regard to the rights protected in the Covenant.[68]

The Proclamation of Teheran, emanating from the International Conference on Human Rights in 1968, is emphatic in its reaffirmation of freedom from discrimination on the ground of opinion. Observing that discriminations because of "expressions of opinion" "outrage the conscience of mankind and endanger the foundations of freedom, justice and peace in the world,"[69] the Proclamation considers it imperative, for "the achievement of each individual of the maximum freedom and dignity,"[70] that "the members of the international community fulfil their solemn obligations to promote and encourage respect for human rights and fundamental freedoms for all" without distinctions on such grounds as "political or other opinions."[71]

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64. Id. at 11.
65. Id. [Art. 19(1)].
66. Id. [Art. 19(2)].
67. Id. [Art. 19(3)].
68. Id. at 4.
69. Id. at 19 (para. 11).
70. Id. at 18 (para. 5).
71. Id. (para. 1).

In certain human rights conventions, with more restricted focus, discrimination on the basis of political or other opinions is also proscribed. Thus, the Discrimination (Employment and Occupation) Convention prohibits, in Article 1, any "distinction, exclusion, limitation or preference" on account of "political opinion" that "has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."[72] The Convention against Discrimination in Education prohibits, in Article 1, any "distinction, exclusion, limitation or preference" based on "political or other opinion" which "has the purpose or effect of nullifying or impairing equality of treatment in education."[73] Similarly, the Employment Policy Convention, adopted by the General Conference of the International Labour Organization in July 1964, seeks to ensure, in Article 1(2), "freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited," without distinction on such grounds as "political opinion."[74] The Genocide Convention, finally, through the protection it extends to "national, ethnical, racial or religious" groups could be made to protect groups with distinctive political opinions.[75] Group identifications under all these labels are often less than clear cut.

On the regional level, the double emphasis on freedom from discrimination because of opinions, political or other, and freedom of expression is equally evident. Thus, the European Convention on Human Rights includes "political or other opinion" among the impermissible grounds of differentiation in Article 14[76] and provides the core freedom of expression in Article 10.[77] The American Convention on

72. Id. at 29.
73. Id. at 31.
74. Id. at 88.
75. Id. at 41.
76. Basic Documents on International Protection of Human Rights 130 (L. Sohn & T. Buergenthal eds. 1973).
77. Article 10 reads: "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Human Rights obliges the contracting parties to "respect the rights and freedoms" provided in the Convention and to "ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" without any discrimination for such reasons as "political or other opinion."[78] The "right" of everyone to "freedom of thought and expression" is given detailed formulation in Article 13.[79]

The same double emphasis on freedom from discrimination on account of political or other opinions and freedom of expression is carried forward on the national level, as demonstrated in many national constitutions. The protection of freedom from discrimination because of opinions is variously sought by general incorporation of the Universal Declaration of Human Rights in the constitution,[80] by gen-

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(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." Id. at 129.

78. Id. at 210 [Art. 1(1)].

79. Id. at 214-5.

80. The Constitutions of the members of the French Community are especially noteworthy in this regard. For example, the Constitution of the Republic of Senegal of 1963 proclaims, in the preamble, that "The Senegalese people hereby solemnly proclaims its independence and its attachment to the fundamental rights as defined by the Declaration of the Rights of Man and the Citizen of 1789 and by the Universal Declaration of December 10, 1948." 1 A. Peaslee, Constitutions of Nations 697, 697 (rev. 3d ed. 1965). See also Constitution of the Federal Republic of Cameroon, 1961, Art. 1, id. at 34, 34; Constitution of the Republic of Chad, 1962, Preamble, id. at 65, 65; Constitution of the Republic of the Congo (Brazzaville), 1963, Preamble, id. at 85, 85; Constitution of Dahomey, 1964, Preamble, id. at 151, 151; Constitution of the Republic of Gabon, 1961, Preamble, id. at 194, 194; Consti-

eral provision of equality or non-discrimination without specification of impermissible grounds of differentiation,[81] or by specific inclusion of political or other opinions among the impermissible grounds of differentiation. Such specifications include the following references: "political or other opinion,"[82] "political opinions,"[83] "political belief,"[84] "opinion[s],"[85] "creed,"[86] and "political or social opinion."[87]

tution of the Ivory Coast, 1960, Preamble, id. at 242, 242; Constitution of the Republic of Madagascar, 1959, Preamble, id. at 456, 456; Constitution of Niger, 1960, Preamble, id. at 578, 578; and Constitution of Upper Volta, 1960, Preamble, id. at 1012, 1012.

81. E.g., Constitution of Tunisia, 1959, Art. 6, id. at 909, 910; Constitution of the Republic of Costa Rica, 1949, as amended to 1963, Art. 33, 4 A. Peaslee (1970), supra note 80, at 328, 333; Constitution of Ecuador, 1967, Art. 4, id. at 460, 460.

82. E.g., Constitution of Bolivia, 1967, Art. 6, 4 A. Peaslee, supra note 80, at 100, 101.

83. E.g., Constitution of Kenya, 1963, Art. 26(3), 1 A. Peaslee, supra note 80, at 257, 276; Constitution of Malawi, 1964, Art. 23(3), id. at 476, 492-93; Constitution of Nigeria, 1963, Art. 28(1), id. at 592, 606; Constitution of Sierra Leone, 1961, Art. 11, id. at 715, 719; Constitution of Tanganyika, 1962, Preamble, id. at 860, 860; Constitution of Uganda, 1962, Art. 29(3), id. at 921, 938; Constitution of Zambia, 1964, Art. 25(3), id. at 1027, 1042; The Constitution of Barbados, 1966, Art. 23(2), 4 A. Peaslee, supra note 80, at 31, 47; Constitution of the Republic of Guatemala, 1965, Art. 43, id. at 564, 571.

84. E.g., The Constitution of the Republic of Ghana, Art. 1, 1 A. Peaslee, supra note 80, at 213, 213.

85. E.g., Constitution of Somalia, 1960, Art. 3, id. at 776, 777; Constitution of Togo, 1963, Art. 6, id. at 890, 891.

86. E.g., Constitution of the United Arab Republic, 1964, Art. 24, id. at 991, 994.

87. E.g., Constitution of Libya, 1951, as amended in 1962 and 1963, Art. 11, id. at 436, 437. In recent times some of these Constitutions have been suspended or changed. In a crisis-ridden world, changes both favorable and unfavorable to the protection of political freedoms must be expected. For some of these changes, see 1 A. Peaslee,

The comprehensiveness of these national constitutional provisions was foreshadowed in the legislative history of Article 2 (the non-discrimination clause) of the Universal Declaration of Human Rights which, it may be recalled, has become a prototype for the comparable provisions in many other contemporary human rights instruments.[88] This legislative history amply establishes that the term "political or other opinions" was intended to refer to views not only about the shaping and sharing of power but about other components of the social process. From the beginning when the Sub-Commission on Prevention of Discrimination and Protection of Minorities was engaged, in November 1947, in the task of formulating a draft Universal Declaration, Mr. Masani (India) proposed that "political opinion" be included among the impermissible grounds of differentiation in the non-discrimination clause (then draft Article 6, and ultimately Article 2).[89] His reasoning was that the future problems of discrimination "would be more in the nature of political minorities than the traditional religious minorities, which were tending to disappear."[90] Mr. Spanien (France) suggested, invoking the wording "opinions" contained in Professor Rene Cassin's original draft,[91] that the adjective "political" be dropped so that the very comprehensiveness of its intended reference would not be misconstrued.[92] In appreciation of this deep concern, the final wording, as suggested by Mr. McNamara (Australia), was "political or other opinion."[93]

It is worth noting that some of the older prescriptions developed by the international community about refugees and asylum can be employed to mitigate the plight of political dissenters.[94] When such dissenters find them-

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Constitutions of Nations (rev. 4th ed. 1974) at 308; 433, 436; 623; 722; 926; 984; 1000.

88. See McDougal, Lasswell, & Chen, supra note 49.

89. U.N. Doc. E/CN.4/Sub.2/Sr.4, at 2 (1947).

90. Id. at 6.

91. Id. at 5.

92. Id. at 5-6.

93. Id. at 7, 12-13.

94. See generally M. Garcia-Mora, International Law and Asylum as a Human Right (1956); A. Grahl-Madsen, The Status of Refugees in International Law (1966, 1972); L. Holborn, The International Refugee Organization, A Specialized Agency of the United Nations: Its History and Work, 1946-1952 (1956); F. Norwood, Strangers and Exiles (1969);

selves the targets of discrimination and of threats of more severe deprivation they often seek security in other lands. There has been continuous transnational effort, beginning in 1921 under the League of Nations and extending through the United Nations system under the auspices of the Office of the United Nations High Commissioner for Refugees, toward improving the status and treatment of those who flee their country in fear of persecution because of political opinions or other grounds.[95] Thus, while side-stepping the prior question of whether refugees are to be accorded a right of asylum under international law, the Convention Relating to the International Status of Refugees of 1933,[96] and the Convention Relating to the Status of Refugees of 1951,[97] whose scope of application

J. Schechtman, The Refugee in the World: Displacement and Integration (1963); S. Sinha, Asylum and International Law (1971); J. Stoessinger, The Refugees and the World Community (1956); United Nations High Commissioner for Refugees, A Mandate to Protect and Assist Refugees (1971); Evans, "The Political Refugee in United States Immigration Law and Practice," 3 Int'l Lawyer 92 (1969); Krenz, "The Refugee as a Subject of International Law," 15 Int'l & Comp. L.Q. 90 (1966); Read, "The United Nations and Refugees: Changing Concepts," 537 Int'l Conciliation (1962); Rees, "Century of the Homeless Man," 515 Int'l Conciliation (1957); Weis, "The Concept of the Refugee in International Law," [1960] Journal du droit international 928 et seq.; Weis, "The International Protection of Refugees," 48 AJIL 193 (1954).

95. See especially A Mandate to Protect and Assist Refugees, supra note 93; L. Holborn, supra note 94; Read, supra note 94; Van Heuven Goldhart, "The Problem of Refugees," 82 Hague Recueil 265 (1953).

96. 159 L.N.T.S. 199; the Convention was signed at Geneva on October 28, 1933.

97. The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, convened in July 1951 at Geneva under General Assembly Resolution 429(V) of 14 December 1950. It has been in effect since April 22, 1954. For its text see 189 U.N.T.S. 137; U.N. Human Rights Instruments, supra note 60, at 66-73. For a commentary, see Weis, The International Protection of Refugees, 48 AJIL 193 (1954).

has been significantly expanded by the adoption of the Protocol Relating to the Status of Refugees in 1967,[98] offer an abundance of provisions about the treatment of refugees.[99] The reluctance to confront the question of asylum has derived, understandably, from deference to the sensitivity of state elites in relation to political dissenters and refugees.

The first significant attempt to remedy this basic inadequacy in prescription was manifested in 1948 in the Universal Declaration of Human Rights, Article 14 of which provides that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[100] Although the critical wording, "enjoy" instead of "be granted," is commonly recognized as weak,[101] this prescription unmistak-

98. 606 U.N.T.S. 267; U.N. Human Rights Instruments, supra note 60, at 74-75. In effect since October 4, 1967, the Protocol has sought wider protection of refugees by removing the temporal and geographic limitations inherent in the 1951 Refugees Convention. For a detailed treatment, see Weis, "The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties," 42 Brit. Y.B. Int'l L. 39 (1969).

99. For a comparison with the treatment accorded stateless persons, see McDougal, Lasswell, & Chen, supra note 16, at 977-81.

A refugee, in the popular U.N. parlance derived from the 1951 Refugee Convention, refers to "any person" who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." Convention relating to the Status of Refugees, 1951, Art. 1(A)(2), U.N. Human Rights Instruments, supra note 60, at 67. See also Protocol relating to the Status of Refugees, Art. 1, id. at 74.

100. U.N. Human Rights Instruments, supra note 60, at 2.

101. N. Robinson, The Universal Declaration of Human Rights 119-23 (2d ed., 1958); A. Verdoodt, Naissance et Signification de la Declaration Universelle des Droits de l'Homme 150-56 (1964).

ably signifies a deep community concern to transform the matter of asylum from the realm of "state discretion" to that of international humanitarian concern. Regrettably the International Covenant on Civil and Political Rights fails to incorporate even a comparable, much less a stronger, provision. This deficiency has in part been remedied by the adoption of the Declaration on Territorial Asylum by the General Assembly of the United Nations in December 1967,[102] in clear recognition of the ever increasing importance of affording asylum to the politically persecuted. This Declaration, in Article 1(1), provides:

> Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.[103]

Individuals thus protected shall not, according to Article 3(1), be "subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."[104]

It may require underlining that the effective and ultimate protection of freedom from discrimination on account of political or other opinions rests upon the realization of many related rights, which, though not directly applicable in a particular instance, have significant bearing upon aggregate protection. Notable among such rights are freedom of assembly and association,[105] freedom from torture and other inhuman treatment,[106] freedom of personal

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102. G.A. Res. 2312, 22 U.N. GAOR Supp. 16, at 81, U.N. Doc. A/6716 (1967). Its text is reprinted in U.N. Human Rights Instruments, supra note 60, at 77-78. For a detailed analysis, see Weis, "Recent Developments in the Law of Territorial Asylum," 7 Canadian Y.B. Int'l L. 92 (1969).

103. U.N. Human Rights Instruments, supra note 60, at 78.

104. Id.

105. E.g., Universal Declaration of Human Rights, Art. 20, U.N. Human Rights Instruments, supra note 60, at 2; International Covenant on Civil and Political Rights, Arts. 21 and 22, id. at 11.

106. E.g., Universal Declaration of Human Rights, Art. 5, id. at 1; International Covenant on Civil and Political Rights, Art. 7, id. at 9.

security,[107] due process of law,[108] the right to participate in the political process,[109] the right to education,[110] and the right "freely to participate in the cultural life of the community."[111] These rights, as will be elaborated in detail in appropriate contexts, are protected in numerous transnational human rights instruments, universal and regional, general and specific.[112]

It is relevant to note, finally, that there has been a conspicuous lack of demand, comparable to that in relation to the elimination of racial, sex-based and religious discrimination, by state officials for the making of a special declaration or convention banning discrimination on account of political or other opinions. This conspicuous omission does not of course signify that this problem is unimportant for human dignity values; such importance is, as already outlined, abundantly clear. Official reluctance stems, understandably, from the very fact that the established power elites of the states simply have no desire to see their own positions weakened by subjecting themselves to elaborate prescription under which they might be obvious and primary offenders. What is at stake in needed prescription is precisely the very core of the power processes within the respective national communities. Hence there is cogency in Falk's proposal that there be established "an international

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107. E.g., Universal Declaration of Human Rights, Art. 9, id. at 1; International Covenant on Civil and Political Rights, Arts. 9 and 10, id. at 9.

108. E.g., Universal Declaration of Human Rights, Arts. 8, 10, and 11, id. at 1-2; International Covenant on Civil and Political Rights, Arts. 14 and 15, id. at 10.

109. E.g., Universal Declaration of Human Rights, Art. 21, id. at 2; International Covenant on Civil and Political Rights, Art. 25, id. at 11.

110. E.g., Universal Declaration of Human Rights, Art. 26, id. at 3; International Covenant on Economic, Social and Cultural Rights, Art. 13, id. at 5.

111. Universal Declaration of Human Rights, Art. 27(1), id. at 3. See also International Covenant on Economic, Social and Cultural Rights, Art. 15, id. at 6.

112. See especially the chapter relating to the shaping and sharing of power (in forthcoming Human Rights and World Public Order).

committee organized along the lines of the Red Cross, to deal with the problems of political repression," designed "as a complement to the work being done by Amnesty International and other organizations."[113] Observing that "the subject of political repression is one on which governments are not to be trusted as the most reliable actors,"[114] Falk stresses the critical need of having "a nongovernmental actor with a great deal of stature in the world which is concerned not with the plight of particular individual prisoners of conscience, but with the general situation of repression, an organization which prepares authoritative reports on short notice, recommends action, and tries to gain access to the societies where these situations exist."[115] With political discrimination and persecution showing no signs of abatement, Falk's proposal merits serious consideration.

IV. Future Developments

The question remains of the future of freely exchanged controversial opinion in the world community. Any disciplined expectation must rest, in part, upon an analysis of factors that have worked for or against freedom of expression in the past. Will future circumstances favor one set of conditioning factors over another and tip the changing balance of effective public policy in a predictable direction? Will new elements enter the global arena and exert a decisive influence over the outcome?

Enough has been gleaned from a brief review of the past to emphasize the relatively recent and precarious deference and defense that have been given to opinions that contravene the doctrines, formulas and folklore of an established order.[116] The devastation in Western Europe

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113. "Hearings on International Protection of Human Rights Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs," 93d Cong., 1st Sess., at 248 (1973).

114. Id. at 249.

115. Id. at 248-49.

116. The recent tragic events, including the large-scale arrest and imprisonment of opposing political leaders in the name of national security, in India, the world's most populous democracy, bear compelling testimony to the fragility of the protection of political non-conformists.

that accompanied the bipolar confrontation between Protestants and Catholics eventually generated an accommodation that substitutes a limited degree of toleration for outright coercion. In varying degree, secular conflicts have taken the place of religious contradictions. In the global community of the future it may be possible, we suggest, to maintain a sufficiently harmonious or ambiguous situation to permit the pluralizing diversity of world interdependence to work itself out, and incidentally to strengthen a growing unity of demand for protected freedom of opinion.

Interdependence does not, however, spread automatic acquiescence in or support for unpopular views. In the immediate future local pockets and larger regions will probably continue as battlegrounds among programmatic groups who mobilize coercive instruments for the suppression of dissent. The critical factors may be exceptionally rapid or unequal change in political, economic, religious and other relationships; and the dissolution of belief in the beneficial consequences of maintaining a forum for the exchange of opinions of every kind.

The implications for the policy initiatives of all members of the world community who support freedom of opinion are evident. The friends of freedom must generate and sustain unceasing activity on behalf of the theory and practice of open and diverse expression. Officials and private persons, governmental and private organizations, must be perpetual targets of praise or blame, reward and punishment, for the role that they play as defenders or assaulters of free opinion. Active assistance must go to the victims of suppression regardless of their location or social position. The channels of education and information must celebrate the

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The events demonstrate the difficulties in the application of both transnational and national prescriptions. Despite the still murky information about these events, enough is known to raise grave questions about the necessity and proportionality of the measures taken in reference to national security. See N.Y. Times, June 13, 1975, at 1, col. 1 (city ed.); id., June 27, 1975, at 1, cols. 6 & 8; id., June 28, 1975, at 1, col. 6; id., June 29, 1975, at 1, col. 5; id., June 30, 1975, at 1, col. 8; id., July 1, 1975, at 1, col. 1.

contributions made to contemporary problem-solving by past dissenters, and do all possible to nullify regressive manifestations of "political barbarism."

In tradition-bound societies an effective barrier exists in practice between freedom of opinion pertaining to village matters and opinions about national or transnational relations. It is frequently remarked that the old-style peasant has no conception that his business is national business. The vaguely inclusive world "up there" seems to operate on a mysterious dynamic of its own, rarely affected by the prayers or curses of the villager. In a technologically interactive global community the pre-conditions are ever more widely spread for the populace to acquire "pride of opinion" on issues both large and small. The expeditors of change cannot wisely assume that protected freedom of opinion will easily triumph. Nonetheless, the inference is possible that the future can be at least partially shaped in harmony with the requirements of a free forum for the dissemination and voluntary evaluation of controversial opinions in the world exchange.