

The Domestic Application of International Human Rights Norms

by

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INTRODUCTION

THE JOURNEY FROM BANGALORE TO NIGERIA: SHOW THE LIGHT AND THE PEOPLE WILL FIND THE WAY

A Colloquium of this nature, which tends to be more informal than formal, and which characterises frank exchange at this level, is extremely useful and fruitful, especially on such issues as Human Rights, which now pervade the globe. The recent trend in international relations, the fall of the Berlin Wall, the resistance to fascism and totalitarianism in Soviet Russia, culminating in a high-decimation of that world power, and the emergence of Republics therefrom, the power struggle between the Yugoslavians and the Croeatiens; and coming nearer to more familiar grounds, the re-opened debate in Great Britain as to the advantages vel-non of a written Constitution over the unwritten - all these show that the mission which commenced in Bangalore, India in February 1988, and which has now reached Nigeria is in the right direction.

I would like to congratulate the Chief Justice of Nigeria, the Hon. Chief Justice Mohammed Bello, the Government of the Federal Republic of Nigeria and the organisers, for hosting this all important Colloquium in Nigeria at this crucial time of the country's transition from military rule to a Civil Third Republic, with all the usual attendant scare, during such transition, of the breach of Rule of Law and violation of Fundamental Human Rights. The Colloquium which is currently being held is the fourth in its series. In Bangalore, India, both West Africa and East Africa were not represented; however, from Southern Africa, was the then Chief Justice of Zimbabwe, Chief Justice E Dumbutshena who hosted the second Colloquium. The Bangalore Principles were declared at the first Colloquium. I should believe we, all here, are conversant with these principles but as I intend to refer to these principles henceforth, in the course of this paper, simply, as the Bangalore Principles, and as all the subsequent colloquia have been a follow-up of these principles, I would like to restate some of their pertinent provisions:

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.

3. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete.
4. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
5. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
6. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
7. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
8. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experiences.
9. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

The fact, as stated in the last paragraph of the Declaration, of the special contribution of judges and practising lawyers in the administration of justice, is sufficient justification for a continuation and indeed perpetuation of this type of dialogue amongst judges. The Bangalore Principles were affirmed at the Second Judicial Colloquium in Harare, Zimbabwe. By this time, East Africa, as per Kenya and Tanzania and West Africa qua Nigeria and The Gambia were represented thus radiating the light of the Bangalore Principles deeper into Africa. The Harare Declaration, in affirming the Bangalore Principles emphasised the expression of fundamental human rights not only in constitutions, legislation and principles of common law, but also in customary international law. The Declaration referred, for the first time, to the African Charter on Human and People's Rights. It is significant to note that though the African Charter, by virtue of its Article 63(3), came into force on 21st October, 1986, the main organ, which is responsible for its enforcement, interpretation and promotion - the African Commission on Human Rights - only came into being in 1987. The Harare Declaration concluded -

"If the judges and lawyers in Africa - and indeed of the Commonwealth and of the wider world - have ready access to reference material of this kind, opportunities will be enhanced for the principles of international human rights norms to be utilised in proper ways by judges and lawyers performing their daily work. In this way, the long journey to universal respect of basic human rights will be advanced. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights. So far as they may lawfully do so, they have a duty to reflect the basic norms of human rights in the performance of their duties".

The third in the series was held in Banjul, The Gambia.¹ The Banjul Declaration re-affirmed the Bangalore Principles and emphasised the importance to Commonwealth West Africa the complete independence of the judiciary and the legal profession. The significance of the Abuja Colloquium which we are now holding, the fourth in the series, will be to show the light more to Africa and in particular to common law West Africa where governments are shedding the rule of the militia for an unadulterated rule of law.

WHY HUMAN RIGHTS?

This is a question which has agitated mankind throughout ages and one that has ceased to be cosmetic. A question that has given rise to a formalisation and justiceability of Human Rights; a question that could be associated with the origin of the world itself, and even when God, in the first trial ever recorded, that

1. On 21st August, 1990

is, the one that took place in the Garden of Eden, was Investigator, Prosecutor, Judge and Jury all rolled together, the rule of audi alteram partem had been established.

In R v Chancellor, Masters and Scholars of the University of Cambridge¹ Fortesque J, gave a romantic re-enactment of that trial in the Garden of Eden -

"Adam (says God) where art thou? Hast thou not eaten of the tree whereof I commanded thee that shouldst not eat? And the same question was put to Eve also".

Thus Adam and Eve were given opportunity of hearing before their condemnation.

Mukhijin C J (India), however took Human Rights out of the cloister of Religion. He regarded the rights as neither a new morality nor a lay religion. He was of the view that -

"They (are) requirements which every civilised State is expected to ensure to its citizens".

Idigbe J S C in the All Nigeria Judges Conference, 1982, postulated -

"The striking features of fundamental rights provisions in the Constitution is that they provide a just balance between the rights of the subject on the one hand and that of the government or state on the other".

Thus, to these two jurists, human rights is more of an earthy subject. In Saude v Abdullahi², I regarded them as

"not just mere rights. They are fundamental. They belong to the citizen. These rights have always existed even before orderliness prescribed rules for the manner they are to be sought".

Indeed, these rights have to stand above the ordinary law of the land. They are antecedent to the political society itself. Human rights are, and must be, a primary condition to a civilised existence. Thomas Paine,³ one of the greatest thinkers on rights of man, vilified governments without Constitutions for the reason that the laws of such governments would be irrational and tyrannical. He said of the British system of government as -

"one of the vilest that can be set up".

He went on -

1. (1716) 1 S. 557.
2. (1989) 4 NWLR (p.2 116) 387 at 418-419.
3. Thomas Paine: Common Sense (1776).

"Government without a constitution is power without a right. For the want of a constitution in England to restrain and regulate the wild impulse of power, many of the laws are irrational and tyrannical, and the administration of them vague and problematical."

Of course, this is debatable, but the same arguments seem to be present today in those advocating a written constitution for Great Britain. The same Paine, after Edmund Burke, whom Paine only knew slightly, had attacked the French revolution, in his work - Reflections on the Revolution in France - wrote his classic - the Rights of Man (1791-1792). Therein he defended lustily the principles of the French revolution, the battle cry of which revolution had been "Liberty, equality and fraternity". The book circulated in England and Pitt (though he had admitted privately the rightness of some of Paine's arguments) expressed an open fear that the writing might incite the masses in England to a bloody revolution and so he had Paine indicted for treason, branded his writing as wicked and seditious. Paine escaped and he was declared an outlaw.

While the battle cry in France was "Liberty, equality and fraternity", the Romans B.C. had shouted -

"Liberty freedom, tyranny is dead ...¹
Liberty freedom and enfranchisement"

after the Roman citizens had been persuaded by an almost jejune oratory that the death of Julius Caesar was to grant them the rights of liberty, freedom and enfranchisement. Such is the prime placed on rights of man which have been regarded inalienable and fundamental.

The Americans, after the War of Independence, formulated the basis of human rights in the second Declaration of Independence as

"a self-evident principle that the creator - the Creator - has endowed man with certain inalienable rights - life, liberty and the pursuit of happiness".

That is, the rights are attributes of Nature, fundamental to man and inalienable.

Meanwhile, it is also interesting to observe that, that iconoclast, Jeremy Bentham, did not accept the tracing of human rights to the Creator, nor did he accept Locke's view as observed by Pollak J that -

"Some individual rights exist in perpetuity apart from the above the laws periodically prescribed by kings and legisla-

1. L H Pollak: The Constitution and the Supreme Court (1968)
Vol.1 p.18.

tors vested transiently with the power to govern."

Bentham scorned the characterisation of human rights as being natural and inalienable. He held the view that -

"Natural rights is simple nonsense: natural and imprescriptable rights, rhetorical nonsense, nonsense upon stilts".¹

CONTENT OF INTERNATIONAL HUMAN RIGHTS NORMS

A BRIEF HISTORICAL SURVEY

Even before the Second World War, human rights have found protection in domestic courts. The National Court of each country gave expression to the protection according to the socio-economic problems and the political demands of the State at the point in time. There was no recourse to international norm however. Let us take the example of Great Britain which founded the common law. In 1215, the Magna Carta was signed at Runnymede, which is now in Surrey, by King John of England and a committee of feudal barons with their baronial powers spreading all over Great Britain. Therein, the King promised to administer a fair legal system and end corruption. This could be the first instance of the British formalised and justiceable human rights provisions following on the pattern of XII Tables in ancient Rome.

The Magna Carta declares that -

"No freeman may be taken or imprisoned or deseised of his freehold or liberties, or free customs or be outlawed or exiled or in any way molested or judged or condemned except by lawful judgement or in accordance with the law of the land; nor may justice be sold, or denied or delayed to any subject. And the Crown or its ministers may not imprison or coerce the subject in any arbitrary manner."²

(cf Arts 1, 3, 4, 9, 17 of the Universal Declaration of Human Rights 1948).

The Petition of Rights and Bill of Rights provide inter alia -

"(a) no person owing allegiance to the Crown may be committed to prison or detained by special command of the Sovereign without any cause shown."³

(b) excessive bail or fines ought not to be required or

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1. Hart: Essays on Bentham: p.79.
 2. Magna Carta 1215 Arts 39, 40.
 3. Petition of Rights 1627 sc 5 and 8.

imposed nor cruel and unusual punishment inflicted.¹

- (c) the Crown may not suspend laws or the execution of laws without the consent of Parliament, nor may it dispense with laws, or with their execution".

(cf Art 10, 11 of the Universal Declaration of Human Rights 1948).

This 1688 revolution is usually regarded as the Glorious Revolution. Bloodless as it was, Parliament was by an Act, signed by William of Orange (1650-1702) empowered to protect the rights of the individual. In 1701, still during the reign of William of Orange, judges were given security of tenure and it was by this that they were able, finally, to establish their independence from the Government.

In the 19th century, the Reform Act of 1832 extended voting rights to men of substantial property, thereby widening voting rights, while fifty years later, that is in 1884, male householders were granted the vote. But the 19th century did not actually see a total enfranchisement for Britain, for it was only in 1918, after the First World War, that women got voting rights. Even then, the right was for women of over 30 years, and women of 21 and over, had to wait till as recently as 1928, just two generations ago, to have equal enfranchisement with men and their more older counterparts. This inward-looking phenomenon, in regard to fundamental human rights no longer had support after the Second World War or rather, after the Universal Declaration of Human Rights as a global affair in 1948. Paine, in presenting his book "Rights of Man" to George Washington in 1791 had prayed "that the Rights of man may become universal". Those prayers were not to be answered until 1948, when the United Nations adopted the Universal Declaration of Human Rights. The General Assembly of the United Nations adopted and proclaimed these rights by resolution 217 A(iii) of 10 December 1948.

On 4th November 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by government signatories who were members of the Council of Europe. Great Britain was a party to this Convention. The Convention was fashioned on the International Bill of Rights. The 66 Articles contain and consist of the first generation rights of life, that is, right to life, protection from torture or degrading treatment, and also non-discrimination. Of importance to the advance of Human Rights is the fact that United Kingdom citizens can enforce the rights at the European Commission and Court of Human Rights in Strasburg, France. This individual right of access to the Court has been attained by United Kingdom citizens since 1966. This is laudable and a point to note in the advancement of human rights in Africa when a Court, similar to the European Commission and Court of Human Rights, would be established under the African Charter to supplement the African Commission which, as would be

1. Bill of Rights 1688

seen anon, is for all intents and purposes toothless and a fortiori impotent.

The extent of the insularity of Great Britain in regard to Human Rights could be measured by the fact that the United Kingdom has been found guilty at the European Court of Human Rights of more breaches of the Convention than any other State, apart of course, Italy, which holds the unenviable record of being adjudged guilty in practically every reference made to the Court since 1966, when individuals rather than states have been given right of petition to the Court. Incidentally, such rights as non-discrimination, degrading treatment, protection from torture and use of corporal punishment in schools (which was abolished by the Court in 1987) can be enforced by the United Kingdom citizens at the Commission and the Court. Greece has the least of guilt-adjudgements by the Court and indeed, the lowest reference to the Court; this was followed by Denmark. Luxembourg has had no cases preferred against her up till the third quarter of this year.

One would at this stage perhaps leave Europe and go to South Africa, where apartheid, up till the very recent, was valid law, where the question of human rights was never raised, where the Courts hardly, if at all, had any experience of even ordinary constitutional matters and where the Judges, even now, would rather wish to be relieved of constitutional cases in postapartheid South Africa; and after South Africa would have been acceptable to the human rights-conscious-global society!

The Inter-American Convention on Human Rights came into being in 1969. Known as the Inter-American Convention on Human Rights, it was within the Organisation of American States and of interest is Chapter VIII which, like the European Commission, sets up an Inter-American Court of Human Rights.

The African Charter is important, having regard to the fact that this Colloquium should be focused on Africa at this auspicious period of its human rights quest. In June 1981, the Heads of States and Governments of the Organisation of African Unity adopted the African Charter on Human and People's Rights. This was at Nairobi, Kenya. The Charter, which has been ratified by upwards of forty African States, guarantees right to equality before the law, human dignity and inviolability - in the words of Prof. Umozurike¹

"perhaps nowhere else is a continental organisation for the protection and promotion of human rights more desirable than in Africa which has experienced some of the worst abuses of human rights".

Like its predecessors, the Universal Declaration of Human Rights,

1. Umozurike U Oji: Paper on the African Charter on Human and People's Rights given at Banjul - Judicial Colloquium November 1990. For a full treatment of the African Charter, see the Paper under reference.

the European Convention for the Protection of Human Rights And Fundamental Freedoms, the African Charter provides for political and civil rights, economic rights, social and cultural rights and group rights for the individual vis-à-vis the State.

There are 68 Articles in all and they also, apart from providing for rights, provide for duties (Articles 27-44) of the individual to the State. The Charter establishes the Commission which is to be within the Organisation for African Unity and invests it with a mandate inter alia to -

"ensure the protection of human and people's rights under conditions laid down by the (present) Charter".

The setting up of a Commission conforms with the norm of the Charter of the European (Art 19 of the European) Convention and the American (Art 33 of the American) Convention but as earlier indicated, unlike the provisions of those other Conventions, the African Charter, apart from the provision of the Commission and vesting the Commission with a mandate, (Chapter II of Part II) there is regrettably no provision for a court. It is clear therefore that if the provisions of the Charter are to be given a real effect to, the domestic courts of the member nations of the Organisation of African Unity would, to an almost total extent, have to be relied upon. It is humbly submitted that for the Commission to be relied upon eo ipso to ensure the protection of human and people's rights, would amount to capitulation of the rights as a non-event. And, I believe, in any event, that it would prove an Herculean task for the Commission to ensure, in all the African States, the protection of human rights all by itself. Such assurance would have, firstly, to be predicated on the good faith of member nations. Good faith, it is further submitted, could not prove a good guarantee of ensuring compliance with human rights, having regard to the political social and economic status of the African States at the present, especially when most of these States accept a veiled totalitarianism or neo-totalitarianism as the accepted norm of the day!

Non-provision for a Court, would appear to be deliberate. For the framers of the Charter lay emphasis on customary and traditional methods of reconciliation in contradistinction to the adversarial procedures which permeate all common law legal and judicial establishments.

MANDATE OF THE COMMISSION

The mandate given to the Commission, with due respect, is more rhetorical than effective. The Commission, by its mandate would appear to have been reduced to a research centre of -

"collecting documents and undertaking studies and researches on the African problem in the field of the rights, formulating and laying down principles aimed at solving legal problems attendant thereto; interpreting all the provision of the Charter:"

thus equipping the Commission with a euphoric quasi-judicial

power of interpretation instead of setting up a forum which could both interpret the provisions of the Charter and adjudicate among the people of the States.

If the mandate appears functionally rhetorical, the procedure to be followed by the Commission is more cunctatious. There could be communications from the States where a State has good reasons to believe that another State, party to the Charter, has violated its provisions (Art. 47). If after three months of the original communication, the issue is not settled, then, either State submits the matter to the Commission (Art 48). The Commission can only deal with matters referred to it. In other words, jurisdiction to act under the Charter can only be conferred by the States in dispute. The Commission indeed has to be satisfied that all local remedies, if they exist, have been exhausted. All these would take years.

The Commission should inform the world of its success or failure in the pursuance of its mandate. One sure way to do so is to provide statistics of the cases, the nature of the cases, the States concerned and the success or failure of the Commission in regard to its mandate.

ROLE OF DOMESTIC TRIBUNALS VIS-A-VIS THE CHARTER

There being no forum, similar to the European and American Conventions, whereto disputes could be addressed, and whereby solutions to human rights could be expected, more attention would necessarily have to be focused on the domestic (national) judicial tribunals of member States as regards breach of human rights by authorities against individual citizens of the State. The National Tribunals would however still have no jurisdiction of determination of a breach committed by one State against another.

In the application of international human rights norms in each domestic (national) tribunal, it is submitted that the tribunal concerned, in exercise of its interpretative jurisdiction should have present in its mind, Arts 60 and 61 of the Charter. It is further submitted that, bearing these Articles in mind, each tribunal should imaginarily substitute itself for the "Commission" and exercise the powers therein as much as possible, but without doing violence to the domestic laws. The Articles provide

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"Article 60"

The Commission shall draw inspiration from international law on human and people's rights, particularly from the provisions of various African instruments on human and people's rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and people's rights as well as from the provisions of various instruments

adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

"Article 61"

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by member States of the Organisation of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.

In doing this, and as there is no appreciable visible activity of the Commission yet in the area of that part of its mandate to ensure the protection of human and people's rights - and more especially as there is no machinery provided in the Charter by which the Commission could so do in the like manner of its European and American counterparts - practically all activities to ensure the protection of human rights or prevent violation thereof of the individual in the States which have subscribed to the African Charter - would be centred in the domestic (national) courts of these States. The courts (national) therefore should have a greater responsibility, in ensuring application of international human rights norms than the domestic (national) courts in Europe or America.

NATIONAL COURTS AND HUMAN RIGHTS: ATTITUDE OF

That national courts generally, that is, whether in Africa or elsewhere, have a sacred duty in the area of human rights, especially in developing democracies had been appreciated by judges of some of the participating countries in this Colloquium in their various jurisdictions for a long time. Bhagwati J in India, as far back as 1959, in Bheshwar Nath v I T Commissioner For Income Tax¹ had emphasised the nascence of the Indian Constitution, the social, economic, educational and political status of invoking the sacred duty of the Indian Supreme Court to safeguard fundamental rights. Even in the developed democracy of Australia, Kirby J, in 1988, the year of Bangalore, in Daemar v Industries Commission of New South Wales and Others was of the view -

"It is obviously a serious matter to deprive any person of the important civil right of access to the courts, especially one might say where the public law is involved where the allegation is made that public officials have not performed their legal duties or have gone beyond their legal powers".

Subba Rao J in India took the same view as Bhagwati J in the

1. (1959) 46 AIR (S C) 14.

Basheshar Nath case.¹ He had said:

"a large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights It is the duty of the court to protect their rights against themselves".

In 1983, even before Bangalore, the Supreme Court of Nigeria had respectfully taken heed of the Indian example, and in Ariori v Elemo², I said -

"The courts in this country (Nigeria) especially this court (the Supreme Court) being a court of last resort have a duty to safeguard fundamental rights. They have that duty and in particular the reason relating to the stage of development of the country".

In that case, I noted that Nigeria was still having an experiment in democracy, and for that reason, and also for the reason of the general atmosphere in the country, reliance has to be placed by the generality of the people on the court.

ATMOSPHERE FOR SUCCESSFUL APPLICATION OF HUMAN RIGHTS

Whether the organ for the application of international human rights norms, national or international, is the court, the executive or the legislature of the State, the exercise is much easier and more successful where there exists an atmosphere of democracy. And talking about democracy, only very recently and in Abuja here, the Vice-President of the United States of America declared

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"Democracy is indivisible ... it must be governed by laws not men. And no man, be he rich or powerful, can be above the law".

I would respectfully agree with the American Vice-President's descriptive analysis of democracy. The rule of law could only blossom and thrive in a democracy. Indeed, it is in a democracy that the rule of law could be properly appreciated. An authoritarian regime, or a rule by the militia could at the very best be benevolent. No military rule could afford to be truly democratic, as a military rule per se is antithetic to democracy. This is not saying that the rule of law does or must advocate total freedom, for the right to freedom must not exist to injure others. To the extent of its non-interference with the freedom of others freedom and right of the individual should be inviolable.

2. (1988) 12 NWRLR 45.

3. (1983) ISCNLR1, at 8-13.

WHAT IS A MILITARY RULE VIS-A-VIS HUMAN RIGHTS?

EXAMPLE OF NIGERIA

Alhaji Gambo, the National Security Adviser to the President of Nigeria said in a paper on a symposium on National Security and Human Rights only few months back, and I agree that -

"total freedom is anarchy".

That could be so, for one cannot dangle about his right without taking note of the correlative duty to the State or his neighbour. The National Adviser went on and admitted publicly that -

"military rule is certainly not better than civil democratic rule its chances of guaranteeing long term national security and human rights are also highly limited indeed." (emphasis supplied).

One would agree again with this, for, in my submission, where there is no democracy, human rights could not thrive. Of course, the converse is not necessarily true. It does not necessarily follow that where there is Democracy rule of law will thrive. Human Rights have been known to suffer, despite lip-service to its norm, in well established democracies. If, however, a regime can truly protect human rights as internationally accepted, it must necessarily have to have been democratic. Gambo's thesis went further. He said and this is relevant to this paper and should be illuminating to this colloquium. Even though the thesis is about the Nigeria military, it could also be true of other military rules in Africa. Gambo said -

"Basically, two types of military cultures that have influenced the Nigerian military can be identified. Each of these cultures has different implications for the capability of the military to promote a democratic society that ensures human rights and national security.

The first is the 'totalitarian military culture' which has its origins in the British, German and French military traditions. The totalitarian military tradition tends to emphasise total obedience, subordination and submission to higher authority defined purely in terms of the hierarchy of command and rank. It calls for total regimentation and allows no room for persuasion, argumentation, dialogue or discussion.¹

It is totally opposed to claims of human rights insisting that this undermines 'national security'. It basically expresses itself in the phrases 'Obey the last Order' and 'Obey Before Complain'. Thus, any attempt by a subordinate soldier to question the basis for particular order or command is regarded as an act of insubordination and meted with severe punishment.

1. Gambo: National Security and Human Rights - A paper presented to the National Day Symposium September 1991.

The military coming from this totalitarian tradition will not be able to promote democratic rule that will protect citizens' human rights and guarantee real national security when it assumes power in a civil society. It is most likely going to use the notion of national security as a scapegoat for its various human rights abuses. This is so because such a totalitarian military will try to transfer the same mode of governance of military formations into the civil society. Since the basis for the governance of civil society is compromise, persuasion, dialogue and argumentation of alternative courses of actions or policies, it is not surprising that military leaders, derived mainly from totalitarian military culture, tend to be unable to promote human rights and national security. This is because they tend to be preoccupied with coerced political stability and order, mistaking these for the essence of national security. The goals of total discipline, obedience and law and order become pursued to an extent whereby human rights become totally undermined.

The second military tradition is the 'pseudo-democratic military culture'. This has its origin from the American military establishment. In a typical pseudo-democratic military culture, some dialogue is allowed even in military formations. Because the American military establishment is made up of men and women of different skills and level of expertise, it is no longer simply rank that is worshipped as is the case with the French, German and British military traditions. Here, a lower rank officer or soldier who nonetheless has some expertise in a particular field is allowed to discuss, argue and engage in dialogue with his/her superior officers.

Under this circumstance, there is no blind acceptance of command. Agreement tends to be reached in consultation with the experts on the subject regardless of their ranks before orders are issued. Thus, a pseudo-democratic military culture is not very strict on issues of rank and blind obedience to orders. Instead, it relies heavily on persuasion even in purely military establishment.

The military coming from a pseudo-democratic military culture can promote human rights when it assumes power in a civil society. This is because it will not simply emphasise law and order. It will also emphasise human rights, dialogue, debates, discussion and argumentation in carrying out its governance."

To which of these two categories does Nigeria belong? Gambo answered the question. He said -

"The Nigerian military culture is a mixture of these two military cultures, i.e. the totalitarian military culture and the pseudo-military culture".
(emphasis supplied)

This, coming from the National Adviser on Security, is a revelation - the internal working of military rule made public; it is illuminating and it explains the flirtation of the Military Government with human rights on one hand, while at the same time enacting such draconian anti-human rights Decrees as the Decree No.2 of 1984 - State Security (Detention of Persons) Decree 1984; as amended by Decree No.12 of 1986, No.30 of 1988 and lastly by Decree No.3 of 1990. Also Decree No.13 of 1984 which bars access to court in regard to some matters even when human rights are involved. And this the Decree did after declaring the military action as a revolution. The Decree is still extant. I intend to return to these Decrees anon.

The totalitarian military culture, as portrayed by Gambo, that is "obey before complain" could be a practical exposition of what Sir Edward Coke had labelled as "condemnation without notice and hearing which is highly unreasonable and tantamount to injustice." Coke said further -

"The philosophical poet (Virgil) doth notably describe the damnable and the damned proceedings of the judge of hell-first he punisheth, and then he hearethbut good judges and justices abhor these course".

Bangalore Principles are opposed to the judge of hell but welcome the 'good judges'.

Practically, the whole of common law Africa, and indeed Franco-phone and the other-phone-Africa, have been immersed in non-democratic rule for some time. In Nigeria, for instance, military rule is more easily definable than civil rule. There are those in the present generation who because they have not experienced it since they became sui juris would not understand the true meaning of democratic rule, especially as the spate of military rules had tended to turn civil rule to an aberration. Or what would be the defence to such irrational statements made by some non-military citizens? Statements emanating from quarters as high and important as the Labour Congress, clamouring for extension of the military rule far beyond the military's own appointed time-limit, even against the will of the militia? Such, mirabile dictu, could be the mentality.

When a military junta takes over power, the Constitution of the country is immediately set aside. The junta rules by Decrees which are like the old Roman prescriptions. Such act of governance is obviously opposed to acts of deliberation by people elected so to do. All a Decree requires, for its validity, is the signature of the President, Commander-in-Chief of the Armed Forces in a military regime and it is not even necessary that as a legal requirement to have the precise wordings of the Decree's provision. There is usually a provision in the Decree, on assuming power vi, which suspends the provision that has provided the Constitution with supremacy over other laws. Though in a civil regime, laws which are inconsistent with the Constitution become null, in a military regime the provisions of the Constitution which is inconsistent with the Decree falls into disuetude. The

Decree takes precedent over the Constitution. What would remain of the Constitution is what has been permitted by the Military Decrees.

If one needs an example of a Decree that triumphs over the Constitution one does not go beyond Decree No.13 of 1984. Known as the Federal Military Government (Supremacy and Enforcement of Powers) Decree, it excludes all civil procedures in respect of "any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict". Such actions were by the Decree rendered void. A writer - Akpezi Eleyee Oguigwe asked impertinently, but correctly, if this Decree could not be regarded as the Constitution of the Federal Military Republic of Nigeria. With respect, I believe the answer to this question is in the affirmative most especially as the Decree, though enacted by the acknowledged draconian regime which is the predecessor of the present military government, still governs the country up till this day of human rights protestation. It is therefore submitted that the organic law of this country, Nigeria, as at present could be found in the following provisions:

- (a) Decree No.1 of 1985 which provides for the suspension of some of the provisions of the Constitution as modified by the others.
- (b) Decree No.2 of 1984 as amended and further amended by Decree No.3 of 1990 which provides for power to detain persons for acts prejudicial to state security review of the detention and establishment of a Review Panel.
- (c) The unsuspended sections of the 1979 Constitution.
- (d) Decree No.13 of 1984 (still extant) which declared the Military intervention as a revolution and abrogated the pre-existing legal order. It further excludes all civil procedures in respect of any 'act, matter or thing done'.

Prof. Nwabueze in a paper titled "Government mustn't be a lawless Leviathan" gave an objective summation of this situation and suggests a recipe. He said¹

"The legislative absolutism and supremacy of military government is an uncontrovertible fact, which all must acknowledge. But orderly and disciplined administration of government demands that executive acts of the military government which are not in conformity with its own laws should be open to challenge in the courts. This point should be as incontrovertible as the legislative supremacy of the military government. If executive acts of the Military government which are not in conformity with their enabling legislation

1. New Nigeria Newspaer; October 1, 1984. This is before the bulk of the present Military Government but Decree No.13 of 1984 which formed the basis of the criticism is still extant.

cannot be questioned in a court of law, then the military might just as well go ahead and perform them without any enabling legislation."

The situation in Nigeria is not an isolated phenomenon. Rawlin's Ghana, Arap Moi's Kenya, with the qui timet sword of inflicting perpetual life presidency rule, Zeze Seiko's Zaire, Kaunda's Zambia - all these are not better posited or even as posited for the application of human rights norms than Nigeria. But perhaps each country should speak for itself, for it is on record that the Courts in Nigeria as would be seen anon, and notwithstanding the draconian atmosphere viewed from the human rights angle, are operating in the path of the Bangalore principles even in the circumstances that are.

WIND OF CHANGE

The resistance to autocratic rule which inhibits the development of human rights jurisprudence and, in particular stems the progress of application of human rights is not limited to Europe - Germany, Soviet Union, Yugoslavia which are currently in the news. The wind is also sweeping across Africa. Nigerian rulers are in the vanguard of preparing the country for civil domestic rule. And this action is pursued with vigour. The courts remain open, the press not gagged, since the demise of Decree No.4 Public Officers (Protection Against False Accusations Decree 1944); the transition programme is on-course and the fact that questions are raised, in regard thereto, suspecting the bona fides of the Military rulers shows the degree of openness (the equivalent of the Russian glasnost) that exists. Open discontent to a continued and almost unabated military rule in Ghana is being exhibited, there are challenges against autocracy in Kenya and Zambia. Zaire is experiencing turmoil and the right of a dictator to continue to rule in perpetuity is being challenged. Quayle, the American Vice President is right - the age of the dictator is over. In South Africa, there are open debates and seminars on human rights. Draft Bills of Rights are being drawn up by political parties and these are circulated and debated. The Judges in South Africa are in informal discussions with their counterparts outside the apartheid enclave, the domestic application of international human rights norms is no longer a mission impossible. Though in Nigeria the stance taken by the militia is that the Military is no longer interested in a rule, it is here submitted that the recipe against coups could only be in a good government which is seen by the people globally to observe the human right norms even at international level.

SEARCH FOR JUSTICE

In the Romanes Lecture which was delivered by Lord Denning in 1959 titled "From Precedent to Precedent" the Law Lord propounded a most interesting theory which is that a judge should serve the fundamental principles of truth and justice and though lawyers sometimes take pride in Tennyson's words about freedom broadening slowly from precedent to precedent, to stand by precedent, howev-

er wrong they may be and whatever injustices they inflict, does nothing to broaden freedom -

"Just as the scientist seeks for truth, so the lawyer should seek for justice".¹

In common law countries, the idea has for some time gained ground that judges do not make law. The sole duty of the judge, it was for a long while accepted, though not without debate, is jus dicere and not jus dare. It is true as Lord Hailsham declared, only as recently as seven years ago, that -

"We who have taken the judicial oath cannot choose what laws we enforce or what acts we allow to go unpunished, by reference to our private standard or values".²

but, if it is only for the purpose of seeking truth and justice, the application by the domestic courts of the international human rights norms is justified. As I have tried to seek in this paper, human rights now pervade the globe and non-domestic application of human rights norms is out of touch with justice. Now the application of human rights - indeed, the international human rights norms, is not to impose an idea of the justice of the individual judex. Where legislation is so plain, as to admit of nothing more than its plain dictionary meaning, then it is not within the Bangalore principles, to read more into it than what it contains. When the Act of Parliament admits of more than one interpretation, it hails in justice that the liberal interpretation that safeguards human rights be given. The English language, said Lord Denning, is not an instrument of mathematic precision.³ Before returning to the Bangalore principles, one question must be answered -

Is the Law or the Constitution what the Judges say it is?

Chief Justice Charles Evan Hughes was once claimed to have said⁴

"The Constitution is what the judges say it is."

Two hundred years earlier Bishop Hoadly in 1717 had said⁵ -

1. At the Sheldonian Theatre on 21st May 1959.
2. Hailsham L C: Guidance for Magistrates on sensational cases: Financial Times, October 13, 1984.
3. Seaford Court Estates Law v Asher (1949) 2NB 481 at 498.
4. Speech at Elmina N.Y., May 3, 1907.
5. Quoted in Thayer, the Origin and Scope of the American Doctrine of Constitutional Law 7 Har v L.Rev. 129, 152 (1893) and L. Levy, Original intent and the framers Constitution 56 (1988).

"(W)hoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law giver, to all intents and purposes!"

Omotosho J¹ once declared -

"It is very doubtful whether the draftsman, however ingenious, can effectly and completely annul the jurisdiction of the Courts."

These three dicta might lead a Judex to assume moral power of the legal right. Though it is a truism that the law or the provision is what the Judex says it is, for whether the Judex is right or wrong one finds a statute being declared null and void, and once it is so declared, it is null and void. Behind that realism, is another fact, which is also real, that an Act has a meaning which was understood by those who enacted it and the Court, rather than inflict its own value judgement, would seek the intention of the makers. If it were not so, law would just amount to a naked power and a usurpation of the functions of him that makes the law.

One could turn to G K Chesterton who illustrated what naked power could mean, and what authority it could possess. In a discussion in a restaurant, Chesterton said -

"If a rhinoceros came in through that door it would have considerable power. I should be the first to rise, however, and to assure the creature it had no authority."

Robert H Bork, in the "Tempting of America" seemed to have presented the correct attitude. He referred to John Hart Ely who argued that the interpretation of the Constitution cannot be confined to discerning the meaning of its various clauses. Interpretation, that is, the philosophy of original understanding Ely conceded, seems to retain the substantial virtues of fitting better our ordinary notion of how law works to wit: if your job is to enforce the Constitution, then Constitution is what you should be enforcing, not whatever may happen to strike you as a good idea at the time.

THE ROLE OF THE COURTS IN THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS

ROLE SATISFIED BY INCORPORATING THE BANGALORE PRINCIPLES

This is - that where words are clear and unambiguous, then the literal meaning should be given to them. That is within the Bangalore Principles. It follows that the clear and unambiguous words will be given effect to, notwithstanding what the international norms on the subject are. But the solution is not that foreboding for most national Constitutions have incorporated in them human rights provisions. And even in the literal interpreta-

1. Suit M/106/84 delivered on 28th May 1984 in Lagos.

tion of the domestic human rights provisions in the national constitution, justice could still be done and more essentially, appear to have been done.

In the exercise of the Courts interpretative jurisdiction, it is now settled that the age of mechanism in law is gone. What the Court enquires into is the substance of the case and not form. In this country, the Supreme Court has in many dicta frowned against mechanistic justice. As would be expected, this has not gone down well with some common-law lawyers whose positing is that there is nothing known as "substantial justice". Law has ceased to be, just, law. The declaratory theory of judicial decision-making, asserted Lord Reid in 1972¹, was a fairy tale. When in the matter of international law, or domestic law, which imports reasoning, having regard to the socio-economic situation of the times, 'law is not just law'.

"The interpretative jurisdiction of this court (the Supreme Court of Nigeria)

said Nnaemeka-Agu J S C,²

"has been preserved by section 4(8) of the Constitution of the Federal Republic of Nigeria 1979. That interpretative jurisdiction is, in my view, essential for the purpose of giving full effect to the true meaning and intendment of the provisions of the Constitution".

In seeking the true meaning and intendment of the provisions of the Constitution, including provisions on human rights, recourse should not be limited to domestic law, so far as the human rights provisions are concerned. The experience by other courts, internationally, should be examined. The writings of jurists in international law should be studied; all these, before coming to a decision of the intendment of the Constitution, for human rights, as has been emphasised, has been internationalised and no longer within the straight jacket of domestic law.

The attempt to seek the intendment of the makers of the Constitution and leave the realm of mechanistic justice has not always been strewn with roses. Some lawyers still resist this in common law countries on the argument that the only justice known to law is justice according to law (which is true) and there is nothing known as technical justice (which is not correct).

In a virulent attack against the decision of the Supreme Court of Nigeria³ in the case of Prof. Fassassi v Architects Registration Council³ where the Supreme Court ordered compliance with an order

1. Lord Reid: The Judge as Lawmaker (1972) 12 Journal of the Society of Public Teachers of Law, p.22.
2. Ohulia v The State (1988) 1 NWLR 539.
3. (1987) 3 NWLR 42.

which was made by the lower court in the case (and which order had not been challenged or appealed against) before it settles the dispute which has been brought by the defaulters to that order of the lower court, Mr B O Ogundipe, one of the lawyers in the case wrote:

"The Supreme Court have spoken in much obiter dicta of doing justice shorn of legal technicalities. Well, splendid as such a declaration might sound to the great, unwashed and unlearned masses of society, such a declaration coming from a lawyer (and worse still from a judge) amounts to nothing short of heresy. A lawyer by his training, is out to secure justice. The lawyer knows (or should know) only one type of justice. That is justice according to law. That is the only type of justice a lawyer should recognise when he speaks as a lawyer. Journalists and other lesser beings are entitled to speak of moral or social justice. Lawyers have no business speaking of such thing. There is no such thing as a legal technicality. There is simply the law. The law is what the courts say it is. (Sic a contradiction of himself). The law must be certain, and it must be adhered to by everyone. The law with regard to the case, is crystal clear. It has not been adhered to. It has been blatantly ignored in favour of some nebulous and capricious form of justice".

It is submitted that to enthrone justice by technicality in the present day of conforming with international human rights norms will be retrograde. For it is these "unwashed and unlearned masses of society" that are on the awkward receiving end when justice is obtained by technicalities. To postulate that lawyers have no business to speak of social justice, is to live in the past far behind the school of social engineering. The lesser beings referred to by Ogundipe are not only the journalists nor only the Supreme Court of Nigeria in its frown against justice by technicalities and a smile for social justice; jurists like Roscoe Pound who gave birth to the school of social engineering; eminent Judges like Cardozo J who wrote volumes on social justice; Earl Warren C J of the Supreme Court of the United States whose liberalism in the interpretation of the American Constitution and pronouncement on the human rights of the region have become legendary; William O Douglas who has retired from the Supreme Court Bench of the United States; Lord Denning of England acknowledged as one of the greatest jurists of this age and who has been associated with "law for the little man" and whose law has been the equity of his judicial mind¹; and Lord Atkin, probably the most humane and far-sighted of English Judges of this century, all these great must belong to the class of journalists and lesser beings for the protestation in the article aforesaid to be valid. They must be part of the unwashed and unlearned masses of their various societies. They ought to have been heard of by Mr B O Ogundipe of our counsel.

In the case of Ohuka v The State on the fundamental human rights

1. Justice Lord Denning and the Constitution 219.

to life, the Supreme Court was called upon to interpret section 31 (2) (b) of the Supreme Court Act. The provisions stipulate thirty days within which an appellant could file his appeal from the decision of the Court of Appeal. That period by virtue of Section 31 (4) of the same Act could not be extended. Ohuha's appeal was filed ninety-two days after the decision of the Court of Appeal, that is, he was sixty-two days out of time, which, by virtue of Statute, could not be extended. Literally, the Supreme Court's jurisdiction had been ousted by time. The relevant provisions are -

31(2) The period prescribed for the giving of notice of appeal or notice of application for leave to appeal are -

(b) In an appeal in a criminal case, thirty days from the date of the decision appealed against.

(4) The Supreme Court may extend the periods prescribed in sub-section (2) except in the case of a conviction involving sentence of death.

To apply justice by technicality on the premise of Ogundipe's "law is law" the Supreme Court no longer had jurisdiction in the case for technically, thirty days means thirty days nor to extend the period as the conviction in the case was death. Technically, the law here, to use the language of Ogundipe is crystal clear. Oputa J S C, who spoke for the Supreme Court, said -

"This Court (the Supreme Court) is not a mechanical and automatic calculator. No. It is a court of law dealing with varying situations and applying the same law to these situations in order to do justice in each and every situation according to its surrounding circumstances ... It is a recognised rule or canon of interpretation of Statutes that they be interpreted so as to respect the vested and or constitutional rights of the subject. It is the construction that preserves rather than destroys the constitutional and vested rights of the appellant (his constitutional rights to appeal to the Supreme Court) to this appeal that should be adopted and preferred".

The Supreme Court circumvented the hardship which would have been suffered by the appellant by interpreting the thirty days to commence from the date of the appellant's knowledge of the determination of the case against him by the Court of Appeal and not from the date of that Court's decision.

After all, as Lord Denning L J had asked in Parker v Parker ¹

"What is the argument on the other side? Only that no case has been found in which it has been done before. That argu-

1. (1954) AER 15 at 22.

ment does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and this will be bad for both".

With adherence to the Bangalore Principles, the common law courts are bound to move pari-passu with the rest of the world. Human rights can no longer be compartmentalised, whilst the rest of the world moves on with the international human rights norms; let us move along with them.

"The law has outgrown its primitive stage of formative, when the precise word was the sovereign talisman and every slip was fatal.¹

For as Ehrlich said, the conception of a law suit is no longer a mathematical problem or a sportsman's game.²

Surely to adopt the international human rights norms in domestic courts could not amount to usurpation of justice by the Judges' own ipse dixit. Shakespeare put such usurpation dramatically:

"I have no other but a woman's reasoning; I think him so because I think him so".³

I still maintain it to be the correct attitude, what I said in Trans Bridge Co Ltd v Survey Int Ltd⁴:

"It would be tragic to reduce Judges to a sterile role and make an automaton of them. I believe it is the function of Judges to keep the law alive, in motion, and to make it progressive for the purpose of arriving at the end of justice, without being inhibited by technicalities, to find every conceivable but acceptable way of avoiding narrowness that would spell injustice. Short of a Judge being a legislator, a Judge to my mind must possess aggressive stance in interpreting the law".

And this is more valid in the realm of fundamental human rights. In incorporating international human rights norms, attitude of foreign courts must be noted. It is true that as far back as 1981, I had said of reliance on foreign judgments -

"Gone should be the days, if ever they were, when the decisions of other courts in any common law country are to be accepted in this country as precedents in the like of the Delphic oracle. The decisions of any court other than those

1. 222 NY 88.
2. De Juristisch Logth 295
3. The Two Gentlemen of Verona, Act 1 Sc. II.
4. (1986) LNWLRL (PL37)576 at 596-597.

of this Court (the Supreme Court of Nigeria), are only to be treated as the respected opinions of these courts, which were given in their wisdom, under given circumstances and given environmental and cultural background, and no more. They are at best to give a guidance of what those courts in those circumstances and the wisdom to be drawn from them by this Court (the Supreme Court) would be reflected in its dealing with the peculiar problems of this country to which the Constitution which this country operates, is peculiar".

It is submitted that this is not contradictory, but complimentary to the stance of the domestic application of international human rights norms, which application is not limited to the decisions of foreign courts but it also incorporates the writings of international law and constitutional law jurists globally.

Ubi Ius Ibi Remedium

The case of Nosiru Bello v Attorney General of Oyo State¹ illustrates the attitude of the Supreme Court to the rights of a deceased's dependants to take action based on his premature execution and reliance on the maxim of Ubi ius ibi remedium. Such I believe should be the attitude of the Courts in the forum of fundamental human rights. The court held unanimously on the issue of right to life, a fundamental human right, and right to prosecute the appeal by the deceased -

"The premature execution of the deceased by the Oyo State Government, while the deceased's appeal against his conviction was still pending, was not only unconstitutional, but also both illegal and unlawful. By it the deceased has lost both his right to life and his right to prosecute his appeal. Also his dependants have been unjustly deprived of the benefits of the life of their bread winner".

The action was brought under the international law. The Court of Appeal, in disallowing the claim held -

- (1) that in so far as the claim before the Court is based on the torts law, its many provisions have not been complied with and the claim can therefore not succeed on that basis.
- (2) the fact that the appellants rely on the maxim 'ubi ius ibi remedium' shows that they never adverted their minds to the torts law and never based their claim on it."

Bello J S C (as he was then) - on the authority of Falobi v Falobi² that the remedy under the law cannot be denied to the

1. (1986) 5NWLR 828.

2. (1976) INRLR 169 at 177

appellants on account of the mere fact that they did not base their claim on the law but on the doctrine of Ubi ius ibi remedium after relying on my decision in the State v Gwonto¹ wherein I had said -

"The Court has for some time now laid down as a guiding principle that it is more interested in substance than in mere form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice"

held that the pleadings in the instant case before the Supreme Court had substantially averred the essential facts for a claim under the law.

Karibi-Whyte JSC would not permit the forms of action to inhibit justice in this matter of fundamental rights. Referring to Lord Atkin, who had said in the United Australia Ltd v Barclays Bank Ltd.²

"When these ghosts of the past (meaning forms of action) stand in the path of justice clanking their mediaeval chains the proper cause for the judges is to pass through them undeterred".

He (Karibi-Whyte JSC) concluded -

"I think a cause of action is constituted by the bundle of aggregate facts which the law will recognise".

Oputa J S C painted the picture of law and justice. He said -

"The picture of law and its technical rules triumphant and justice prostrate may no doubt have its admirers. But the spirit of justice does not reside in forms and formalities, nor in technicalities, nor in the triumph of the administration of justice to be found in successfully picking one's way between pitfalls of technicalities."

ATTITUDE OF DOMESTIC TRIBUNALS TO INTERNATIONAL LAW

All the Bangalore Principles require in international law is -

- "(1) familiarity by the judges in domestic jurisdiction with international norms;
- (2) when appropriate, that is where there is ambiguity in a statute, apply international norms".

The Principles have never advocated overriding clear and unambig-

1. (1983) ISCNLR 142 at 160.

2. (1941) AC 1 at 29.

uous domestic law by reliance on international law or international human rights law.

It has not been accepted by jurists that international law is part of domestic law of the land. For international law to be part of domestic law, the domestic law-making-process must accept it as the law of the land. However though international law per se is not part of domestic law, it could constitute a source of that law. The courts in Nigeria on the determination of rights to waiver of rights or the application of the doctrine of implied mandate as propounded in international law, applied international law to a domestic rebellion.

In African Reinsurance Corporation v Fantaye (1986) 3 NWLR 811, the issue was the diplomatic immunity of public ministers.

The Supreme Court (as per Eso JSC) looked into the common law of England for assistance which common law recognised the usages of nations. The recognition had been threefold -

- (1) writers of great authority - Coke and Blackstone
- (2) judicial pronouncements - Lord Mansfield upholding Blackstone's view and
- (3) statute.

The English statute was applicable in Nigeria until the Nigerian Statute on Diplomatic Immunity was passed.

Karibi-Whyte J S C also examined the common law and the Statute in England and in Nigeria before declaring what the domestic law was on the subject. As international law put a lot of illumination on the subject and assisted the Court to come to what the domestic law is, this is in effect applying international law and in the instant case, international human rights norms to diplomatic immunity by the domestic tribunal.

Uwais J S C, explained, relying on *Parliament Belge*¹, that treaties do not constitute part of the law of the land by virtue of their conclusion by a country. The point made by the learned Justice is important in the status the domestic courts would accord a Charter of the like of the African Charter.

In Oguebie v Odunwoke², the Supreme Court, in applying the doctrine of necessity, relied much on the learning of international law jurists - Grotius: De Jure Belli ac Pacis; Pufendorf's De Jure Naturae et Gentium; Suarez's Tractatus De Legibus and Lessuis' De Justicia el de Jure. After examining these writings, the Court first decided on the reasonableness of the doctrine propounded by the authors, declared the doctrine reasonable and concluded -

1. (1879) 4PD 129.

2. (1979) 3-4SC 58 at 71.

"the doctrine, though essentially one of international law, has been extended to domestic rebellion".

It is in this fashion of appreciating the norms, awareness of the authorities, that there could be a domestic application of international human rights norms.

NATIONAL SECURITY: BALANCING PERSONAL LIBERTY WITH REASONS OF STATE

No nation could exist in the international community without national security. The degree however varies from time to time according to circumstances. Atkin's dictum in Liversidge v Anderson¹ was a minority voice, the majority believed they were justified by the clash of arms during the Hitleric war. In Nigeria, in 1970, the military government that ruled declared itself a revolution (Decree No.28 of 1976). Similarly in 1984, the Military Government that preceded the present one declared itself a revolution (Decree No.13 of 1984); I have already discussed this Decree. The clash of arms of the Liversidge v Anderson case pales to insignificance when the situation is compared with a revolution which determines existing legal order.

To sustain the revolution, the State Security (Detention of Persons) Decree 1984, was passed. The Decree as amended reads -

"If the Chief of General Staff is satisfied that any person is or recently has been concerned in acts prejudicial to State security or has contributed to the economic adversity of the nation, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may by order in writing direct that that person be detained in a civil prison or police station or such other place specified by him; and it shall be the duty of the person or persons in charge of such place or places, if an order made in respect of any person is delivered to him, to keep that person in custody until the order is revoked.

(2) An order made under subsection (1) above shall be full authority for any police officer or any member of the armed forces or any of the security agencies to arrest the person to whom an order relates and to remove him to a civil prison or police station or such other place as specified by the Chief of General Staff.

2(1) There is hereby established a panel to be known as the Detention of Persons Review Panel (hereafter in this Decree referred to as "the Review Panel") which shall consist of -

(a) the Attorney-General of the Federation and Minister of

1. 1942 A.C. 206; (1945) 3 ALL ER 338.

Justice who shall be the Chairman;

- (b) two religious leaders;
- (c) a retired Judge;
- (d) the Director Nigeria Prisons Service;
- (e) one person not below the rank of Deputy Inspector General of Police to represent the Nigeria Police Force and who shall be appointed by the Inspector-General of Police;
- (f) one person to be recommended by the Nigeria Bar Association; and
- (g) two other persons.

(2) The persons referred to in paragraph (b), (c), (f) and (g) of subsection (1) of this section shall be appointed by the President, Commander-in-Chief of the Armed Forces.

(3) The Review Panel shall be charged with the duty of reviewing the case of every person detained pursuant to an order made under this Decree and, if satisfied, that the circumstances no longer require the continued detention of the person, it shall make recommendation to the Chief of General Staff for the revocation of the detention order.

(4) If the Chief of General Staff accepts a recommendation made to him under subsection (3) of this section, he shall revoke the order and order the release of the person forthwith.

4. No suit or other legal proceedings shall be against any person for anything done or intended to be done in pursuance of this Decree.

(emphasis supplied)

There is no doubt that the Decree, as amended by the 1990 Decree, has a lot of its harshness watered. There is no doubt either that the main power to impose detention and to order a release is with the Executive. There is, further, no doubt that the Courts are excluded from looking into the Decree. And the Decree as amended still falls far short of the provisions in the Fundamental Human Rights provision in the Constitution or as has been recognised internationally.

In balancing the interest of State security with the rights of the individual fundamental to him, it is debatable whether or not the amendment to the Decree has gone far enough.

In a paper I presented to the Bar Association in late 1989, some while before the 1990 amendment to Decree No.2 of 1984, I wrote

and I have not changed my mind on this subject¹ -

"Permit the Courts to be the Judge of Use and Abuse of Decree No.2. Even without questioning the bona fides of the Chief of Staff ... it must be shown that he is not a judge in his own cause, thus preserving the stance of a fundamental Human Rights concept. It is a truism that militarism hardly yields to blackmail. Indeed, a government, vi, thrives better ab vi when confronted ad vim It is therefore suggested that, as a media via, that benevolent situation calls for an amendment of the Decree No.2 of 1984 to the effect, that, after the first twenty-eight days of detention, there is no continuation of the detention until the Court certifies that there is no abuse of the situation, and that in fact, the detention is in pursuance of the State security or economic security".

The Courts should determine the Use and Abuse of Decree No.2 of 1984. That still leaves the revolution great. For it is to be noted, "The abuse of greatness is when it disjoins remorse from power (quoting Shakespeare + Julius Caesar). But before an abuse, or even an imaginary abuse, destroys or attempts to destroy a cause, the call should be for a review and not be, in the language of Hannibal - "delenda est", and so (again Shakespeare) lest it may, prevent".²

This I recommend should happen in assisting the application by our Courts in Nigeria of the international human rights norms. I asked in that paper the question -

"What then is the human rights posture of the Nigeria Government purely from the jurisprudential point of view?"

I answered the question thus -

"It could only mean that the revolutionary government, even with its draconian constitution, which has to be the base of a revolution, but not only that, which revolution is so declared, could still be humane, could listen to public opinion, could bend over backwards in its enforcement of its stern laws. Indeed it could temper militarism with benevolence".

And except the governed understand it that wise, both the Government which is military, and which operates per vim and the governed, would run, what the musicians would term 'scales in contrary motion'.

This is still my answer.

1. Eso: The Nigerian Grundunum - A critical appraisal, see A Journal of Contemporary Legal Problems, June 1990.
2. Shakespeare Julius Ceasar Act II. Sc.1.

Abuse of power reminds me of the Statute of Uses. Once upon a 1536, the Statute of Uses was enacted. It was good. History was later to prove the Statute as "Statute of Abuses". Megarry wrote a pun (a jeu de mots) on the Statute. Let me end this part of the paper with the pun - not totally on all fours with reform of Decree 2 of 1984 as amended -

"Unfortunately the Use conflicted in some points, not only with the eternal policy of the law, but also with the empirical policy of feudalism, and to end these conflicts a disastrous remedy was found. For the Use was made to enter the valley of Humiliation, goaded by the two pronged fork wielded by Henry VIII, on one prong of which had impaled the landowners, and on the other the lawyers, the two classes most friendly to the preservation of the Use. The name of that valley was the Statute of Uses, and amidst the horrors of that valley, we wandered for nearly 400 years. We have at last emerged, guided by the Earl of Birkenhead, but the hateful murk of the statute still encompasses old titles to land, which will continue to occupy the attention of the Courts for some time to come".

It could at the worst take till entry into the third Republic (1992) and not 400 years before this country emerges into the end of military Decrees and to emerge from Decree 2 of 1984 as amended by Decrees 12 of 1986; 30 of 1987 and 3 of 1990.

FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES

In the 1979 Constitution of the Federal Republic of Nigeria, Chapter II thereof provides for Fundamental Objectives and Directive Principles of State Policy (see Sections 13 to 22). As if the Chapter has no relationship with Fundamental Rights (Chapter IV) a Chapter (Ch.III - Citizenship) is inserted between the Fundamental Objectives and Fundamental Rights. Section 13 of the Constitution makes it the duty and responsibility of all organs of government and of all authorities and persons exercising legislative, executive or judicial powers to conform to, observe and apply the Objectives and Principle, ergo the Courts in exercise of their jurisdiction have power not only to observe but to apply the Objectives and Principles.

The Objectives span over -

- (a) Political (see. 14 and 15 of the Constitution): permitting free mobility of people, goods and services throughout the Federation, preserving the right of the people to participate in their government (c/f Arts 10, 11, 12 and 13 of the African Charter).
- (b) Economic Social and Cultural (Sc. 16, 17 and 20 of the Constitution) c/f Arts 21, 22 of the Charter).
- (c) Educational (s.18 of the Constitution) c/f Art 17 of the Charter.

The Charter came after the enactment of the Nigerian Constitution and the provisions of the Constitution could not have been influenced by the Charter, but the Constitution could have been influenced by the Universal Declaration of Human Rights provisions on economic, social and cultural rights (see Arts 21, 22, 23, 25 and 26 of the Declaration).

The Nigerian Constitution (s.6 (6)(c)) precludes the Objectives from being justiceable. Incidentally the same non-justiceability provision has been inserted in the 1989 Constitution which Constitution is to govern Nigeria of the Third Republic. It is interesting to note that the Nigeria Constitution Review Committee that advised the Government in the type of the Constitution the country should have recommended justiceability of the Principles.

The reasons given by the Executive for the non-justiceability are multifarious but the most recent and yet, with respect, unacceptable, is financial constraint. I would not understand what finances would be required if our Courts are given jurisdiction to deal with the Objectives and Principles in the manner of fundamental rights. It is submitted that with the situation being what it is the courts should take advantage of S.13 of the Constitution which gives the Judiciary power to conform to, observe and apply the Objectives and Principles, even though per se, they are not justiceable. India has done this successfully; Hogeale and Mukhajeen J J believed that both the Principles (similar to ours) and the fundamental rights (also similar to ours) constitute the conscience of their country's Constitution. Chandrachud J, felt there should be an admixture of both the Principles and fundamental rights. "Together not individually" said Ray J "they form the core of the Constitution". The jurists are right - "Together not individually, the Principles and the Constitution constitute its true conscience."

CONCLUSION

For the Bangalore Principles to be meaningful, the direction should not be left solely to the executives and the legislatures. The Courts must regard it as a duty to pursue the Principles positively for it is only when this is done that justice, as understood within the context of the international human rights norms, which now form the main debate all over the world, which is the main theme of the Commonwealth meeting of October 1991, subscribed to by practically all the Commonwealth Heads of State, would be done and also seen to have been done.

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