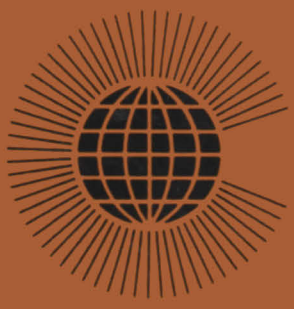
Judicial Colloquium in Harare
19-22 April 1989

Developing Human Rights Jurisprudence, Volume 2

A Second Judicial Colloquium on The Domestic Application of International Human Rights Norms



Commonwealth Secretariat

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A Second Judicial Colloquium on The Domestic Application of International Human Rights Norms

Legal Division

International Affairs Division
Human Rights Unit
Commonwealth Secretariat
Marlborough House
Pall Mall
London SW1Y 5HX

November 1989

Participants and observers at the Second Judicial Colloquium, Harare, Zimbabwe, 19-22 April 1989.

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PREFACE

Senior Commonwealth judges traditionally gather from time to time for informal and private exchanges on matters of special interest. The Harare colloquium was the second of its kind dealing with the domestic application of international human rights norms, the first being held in Bangalore, India, in February 1988.

The second colloquium took place in Harare from 19-22 April 1989 and was hosted by the Government of Zimbabwe. It was formally opened by President Mugabe, and the sessions were chaired by Justice Enoch Dumbutshena, the Chief Justice of Zimbabwe.

Discussion focussed on recent developments in international human rights jurisprudence and norms from which judges and lawyers are beginning, increasingly, to draw to augment the domestic law of their jurisdictions. Resource papers for discussion at the meeting were prepared by Chief Justice Dumbutshena, Justice Michael Kirby, Justice Rajsoomer Lallah, Justice P Bhagwati, Mr Justice Ademola, Dr Rose D'Sa and Ms Beverly Byfield.

There was a comprehensive exchange of views which, in accordance with the 'Chatham House' rules which prevail in these types of meetings, were off-the-record and non-attributable. It was felt nevertheless that it was important for the Chairman of the meeting to sum up the proceedings in the statement reproduced herein which has become known as the 'Harare Declaration'.

Funds provided by the Ford Foundation were fundamental to the success of the colloquium, and we record here our deepest gratitude to the Ford Foundation for its generosity and continuing support in this endeavour. On behalf of all of the participants we would also extend to the Government, judiciary, and the people of Zimbabwe our gratitude and sincere appreciation for the warmth of our reception and for the excellent arrangements for the colloquium. Likewise we are most grateful to the New Zealand High Commission and the Legal Resources Foundation of Zimbabwe for their hospitality and assistance. There were many others, groups and individuals, who supported the colloquium in various ways and we extend to them as well our deep appreciation.

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INTRODUCTION BY THE COMMONWEALTH SECRETARY-GENERAL TO THE REPORT OF THE FIRST COLLOQUIUM

The quest world-wide for the effective realisation of fundamental human rights in all their manifestations - economic, social, political, cultural - is one which has come to characterise much of the twentieth century. This was a process which could only begin once the universality of the human condition and of the rights and needs fundamental to it, were clearly and unambiguously recognised. It needed, first, a renunciation of human bondage in all its forms, like slavery and indenture, and of course commitment to the decolonisation process. This process of change is by no means ended, as the persisting stain of apartheid in South Africa bears sordid witness. But the quest for respect for the wider rights of humanity is well underway.

Within both Commonwealth and non-Commonwealth countries, there is a constant process of defining and applying human rights norms under national rules and procedures. Coinciding with this development of national formulations of human rights, is the international process of developing and refining international human rights norms. These global norms are not the invention of international civil servants but the evolution, after considerable debate and deliberation of common standards for all nations based on generally accepted principles of law. They reflect concepts of basic human rights which have been long recognised in domestic law and frequently spelt out in the Constitutions of countries.

Some of these internationally recognised principles are comparatively well-known: expressed, for example, in the Universal Declaration itself and the two International Covenants of 1966. Others are of general application but concerned with specific areas; others still are regional, with varying degrees of acceptance in their particular regions: such as the European Convention on Human Rights, the Inter-American Convention on Human Rights and the African Charter on Human and Peoples' Rights. Others are less well-known and not yet accorded general acceptance in the community of nations. Thus the international process continues.

Until quite recently, the legal training of most lawyers has neglected specific instruction in international human rights norms. This reflects, and in turn induces, many inadequacies: a lack of awareness by educators of the legal profession, the unavailability of relevant materials to the legal profession - even to judges themselves, the absence of resource institutions to advise lawyers and judges about international human rights norms and jurisprudence. There are exceptions; but, together, all this has led to a general lack of awareness of the relevance and utility of developing and applying international human rights norms within domestic jurisdictions. Recently, however, a new process has begun. Judges in jurisdictions as diverse as Britain, Zimbabwe and Australia, have begun to have recourse to, and to interpret fundamental rights and obligations against the background of, international human rights norms. This process will be stimulated and be better informed if legal practitioners are encouraged to highlight relevant international human rights jurisprudence in domestic courts.

The time has come for the legal profession to look afresh at the flowering of the international jurisprudence of human rights, and for judges and lawyers everywhere to consider the relevance of such norms and their possible application in the resolution of practical questions determined in their courts according to law on a daily basis. This need is reinforced by the fact that so many states are now parties to the relevant international instruments and therefore have a common need to translate the fine words and sentiments of these instruments into practical application and reality. There is, therefore, a mutuality of interest - both of individuals and of governments - in the process of universalising human rights norms in the application of domestic law.

The legal profession, with its special role in the administration of justice, has much to contribute in its daily work to the advancement of the human rights of all. The initiative taken by Justice P N Bhagwati in bringing together an international gathering of judges in Bangalore, India, to discuss the domestic application of international human rights norms deserves our collective gratitude. The thoughtful and constructive statement made at the conclusion of the deliberations, charts the way forward to judges throughout the Commonwealth, and points them in the direction of a creative, yet consistent, development of human rights jurisprudence.

It is a particular pleasure that the Secretariat could play its part in the organisation of this Meeting, since the values and principles which lie at the core of the Commonwealth association, and which were expressed in such simple but eloquent terms by Commonwealth Heads of Government in Singapore in 1961, embody the Commonwealth message of concern for fundamental rights in all their manifestations. This concern, based on the principles adopted by successive Heads of Government Meetings, pervades the work of the Secretariat at many levels - whether through economic development, law, health, women and development issues, education or public administration. In recent years, Heads of Government Law Ministers and Senior Officials have given particular attention to ways of actively promoting human rights within the Commonwealth. The Report of the Commonwealth Working Group on Human Rights which was set up in 1979 to advise on the possibility of a human rights role for the Commonwealth, resulted in the establishment, in January 1985, of a special Unit within the Commonwealth Secretariat for the promotion of human rights and the provision of appropriate assistance to governments in the development of domestic measures to promote human rights and sustain and nourish human dignity.

There is a great opportunity ahead for new initiatives in the domestic application of international human rights norms. At Bangalore, a pebble was cast into the waters of the common law. I share the hope that the ripples it created will reach into the farthest corners of the Commonwealth.

Shridath S Ramphal
Commonwealth Secretary-General
Marlborough House, London

HARARE DECLARATION OF HUMAN RIGHTS

Between 19 and 22 April 1989 there was convened in Harare, Zimbabwe, a high level judicial colloquium on the Domestic Application of International Human Rights Norms. The colloquium followed an earlier meeting held in Bangalore, India in February 1988 at which the Bangalore Principles were formulated. The operative parts of the Principles are an annexture to this Statement.

As with the Bangalore colloquium, the meeting in Harare was administered by the Commonwealth Secretariat on behalf of the Convenor, the Hon Chief Justice E Dumbutshena, (Chief Justice of Zimbabwe) with the approval of the Government of Zimbabwe and with assistance from The Ford Foundation and Interights.

The colloquium was honoured by the attendance at the first session of His Excellency the Hon R G Mugabe, President of Zimbabwe, who opened the colloquium with a speech in which he reafffirmed the commitment of his Government to respect for human rights, the independence of the judiciary, the rule of law and a bill of rights which is justiciable in the courts.

The participants were:

Chief Justice E Dumbutshena, Zimbabwe (Convenor)
Justice A Ademola, Nigeria
Chief Justice E O Ayoola, The Gambia
Justice P N Bhagawati, India
Chief Justice B P Cullinan, Lesotho
Justice A R Gubbay, Zimbabwe
Justice M D Kirby, CMG, Australia
Justice Rajsoomer Lallah, Mauritius
Mr Recorder Anthony Lester, QC, United Kingdom
Chief Justice E Livesey Luke, Botswana
Chief Justice F L Makuta, Malawi
Chief Justice Cecil H E Miller, Kenya
Chief Justice F L Nyalali, Tanzania
Justice E W Sansole, Zimbabwe
Chief Justice E A Seaton, Seychelles
Chief Justice A M Silungwe, Zambia
Jutice J N K Taylor, Ghana
Justice L E Unyolo, Malawi

The participants examined a number of papers which were presented for their consideration. These included papers which reviewed the development of International Human Rights Norms particularly in the years since 1945; a paper which examined the domestic application of the African Charter on Human and Peoples' Rights; a paper on personal liberty and reasons of State and a paper on ways in which judges, in domestic jurisdiction, may properly take into account in their daily work the norms of human rights contained in international instruments whether universal or regional.

The participants paid especially close attention to the provisions of the African Charter on Human and Peoples' Rights. That Charter was adopted as a regional treaty by the Organisation of African Unity in 1981 and entered into force on 21 October 1986. At the time of the Harare meeting, 35 African countries had ratified or acceded to the Charter.

Various opinions were expressed by the participants concerning ways of strengthening the implementation of the Charter including:

- the interpretation of the provisions in the light of the jurisprudence which has developed on similar provisions in other international and regional statements of human rights;

- the clarification and strict interpretation of some of the provisions which are derogating from important human rights; and

- enlargement, at an appropriate time, of the machinery provided by the Charter for the consideration of complaints and the provision of effective remedies in cases of violation.

In particular the participants noted that:

- The opening recital of the Charter of the United Nations contains a ringing re-affirmation of 'faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women';

- The Charter of the Organisation of African Unity includes reference to "freedom, equality, justice and legitimate aspirations of the African peoples";

- The Preamble to the African Charter of Human and Peoples' Rights proclaims that fundamental human rights stem from the attributes of human beings and that this justifies their international protection;

- The freedom movement in Africa has had as a central tenent the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence which dignity and independence can only be realised fully if the internationally recognised human rights norms are observed and fully protected;

- There is a close inter-linkage between civil and political rights and economic and social rights; neither category of human rights can be fully realised without the enjoyment of the other. Indeed, as President Mugabe said at the opening of the colloquium: "The denial of human rights and fundamental freedoms is not only an individual tragedy, but also creates conditions of social and political unrest, sowing seeds of violence and conflict within and between societies and nations."

The participants were encouraged in their work by the declaration of President Mugabe that the nations of Africa, having freed themselves of colonial rule and the derogations from respect for human rights involved in such rule, have a particular duty to observe and respect the fundamental human rights for which they have sacrificed so much to win, including the struggle against racial discrimination in all its aspects. The ultimate achievement of

the freedom struggle in Africa will not be complete until the attainment throughout the continent of proper respect for the human rights of everyone - as an example and inspiration to humankind everywhere. In the words of Nelson Mandela, to which President Mugabe drew attention, "Your freedom and mine cannot be separated".

The participants agreed as follows:

1 Fundamental human rights and freedoms are inherent in humankind. In some cases, they are expressed in the constitutions, legislation and principles of common law and customary law of each country. They are also expressed in customary international law, international instruments on human rights and in the developing international jurisprudence on human rights.

2 The coming into force of the African Charter on Human and Peoples' Rights is a step in the ever widening effort of humanity to promote and protect fundamental human rights declared both in universal and regional instruments. The gross violations of human rights and fundamental freedoms which have occurred around the world in living memory (and which still occur) provide the impetus in a world of diminishing distances and growing interdependence, for such effort to provide effectively for their promotion and protection.

3 But fine statements in domestic laws or international and regional instruments are not enough. Rather it is essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect. They must not be seen as alien to domestic law in national courts. It is in this context that the Principles on the Domestic Application of International Human Rights Norms stated in Bangalore in February 1988 are warmly endorsed by the participants. In particular, they reaffirmed that, subject always to any clearly applicable domestic law to the contrary, it is within the proper nature of the judicial process for national courts to have regard to international human rights norms - whether or not incorporated into domestic law and whether or not a country is party to a particular convention where it is declaratory of customary international law - for the purpose of resolving ambiguity or uncertainty in national constitutions and legislation or filling gaps in the common law. The participants noted many recent examples in countries of the Commonwealth where this had been done by courts of the highest authority - including in Australia, India, Mauritius, the United Kingdom and Zimbabwe.

4 There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms - stated in international instruments and otherwise. In this respect the participants endorsed the spirit of Article 25 of the African Charter. Under that Article, States Parties to the Charter have the duty to promote and ensure through teaching, education and publication, respect for the rights and freedoms (and corresponding duties) expressed in the Charter. The participants looked forward to the Commission established by the African Charter developing its work of promoting an awareness of human rights. The work being done in this regard by the publication of the Commonwealth Law Bulletin, the Law Reports of the Commonwealth and

the bulletin of Interights (The International Centre for the Legal Protection of Human Rights) was especially welcomed. But to facilitate the domestic application of international human rights norms more needed to be done. So much was recognised in the Principles stated after the Bangalore Colloquium which called for new initiatives in legal education, provision of material to libraries and better dissemination of information about developments in this field to judges, lawyers and law enforcement officers in particular. There is also a role for non-government organisations in these as in other regards, including the development of public interest litigation.

5 As a practical measure to carrying forward the objectives of the Principles stated at Bangalore, the participants requested that the Legal Division of the Commonwealth Secretariat arrange for a handbook for judges and lawyers in all parts of the Commonwealth to be produced, containing at least the following:

- the basic texts of the most relevant international and regional human rights instruments;

- a table for ease of reference to and comparison of applicable provisions in each instrument; and

- up to date references to the jurisprudence of international and national courts relevant to the meaning of the provisions in such instruments.

6 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.

In this way the noble words of international instruments will be translated into legal reality for the benefit of the people we serve but also ultimately for that of people in every land.

Harare
Zimbabwe

22 April 1989

LIST OF PARTICIPANTS

Delegates

Chief Justice E Dumbutshena, Supreme Court, Zimbabwe
(Convenor)
Justice A Ademola, Court of Appeal, Nigeria
Chief Justice E O Ayoola, Supreme Court, The Gambia
Justice P N Bhagwati, India
Chief Justice B P Cullinan, High Court, Lesotho
Justice A R Gubbay, Supreme Court, Zimbabwe
Justice M D Kirby, CMG, President, Court of Appeal,
New South Wales, Australia
Justice Rajsoomer Lallah, Supreme Court, Mauritius
Mr Anthony Lester, QC, United Kingdom
Chief Justice E Livesey Luke, Botswana
Chief Justice Cecil H E Miller, Kenya
Chief Justice F L Nyalali, Tanzania
Justice E W Sansole, Zimbabwe
Chief Justice E A Seaton, Seychelles
Chief Justice A M Silungwe, Zambia
Justice J N K Taylor, Supreme Court, Ghana
Justice L E Unyolo, High Court, Malawi

Observers

Mr David Bonbright, Oak Foundation, Zimbabwe
Ms Alice Brown, Ford Foundation, USA
Mr Arthur Chaskalson, Legal Resources Foundation, South Africa
Mr Roger Chongwe, African Bar Association, Zambia
Mr David Coltart, Legal Resources Foundation, Zimbabwe
Mr Geoff Feltoe, University of Zimbabwe
Ms Elizabeth Lapham, Catholic Commission for Justice and Peace,
Zimbabwe
Mr Wilson Manase, Legal Resources Foundation, Zimbabwe
Mr Welshman Ncube, University of Zimbabwe
Mr Nick Ndebele, Catholic Commission for Justice and Peace,
Zimbabwe
Ms Eileen Sawyer, Legal Resources Foundation, Zimbabwe
Dr Peter Slinn, School for Oriental & African Studies, UK
Mr Sheppard Zombe, University of Zimbabwe

Commonwealth Secretariat

Mr Jeremy Pope, Director, Legal Division
Mr Paul LaRose-Edwards, Head, Human Rights Unit,
International Affairs Division
Mr Peter Dunne, Conference Officer

Resource Persons

Ms Beverley Byfield
Dr Rose D'Sa

AGENDA

Wednesday, 19 April 1989

p.m. Reception for delegates and invited guests hosted by the Chief Justice of Zimbabwe, The Hon. Justice Enoch Dumbutshena followed by dinner for delegates.

Thursday, 20 April 1989

9.00 a.m. Opening Ceremony presided over by Chief Justice Dumbutshena.

Inaugural Address by the President of Zimbabwe, The Hon. R.G. Mugabe.

10.30 a.m. First Session

1. Presentation by the Hon. Justice Lallah on "International Human Rights Norms".

Discussion of the sources of International Human Rights including:

(a) International and Regional Treaties relating to human rights

(b) Customary international law with particular reference to:

- The UN Charter
- The Universal Declaration of Human Rights
- Declaration, Resolutions of the General Assembly, Declarations by Commonwealth Heads of Government, etc.

(c) The jurisprudence of the various international mechanisms

- The UN mechanisms
- The European system
- The Inter-American system
- The African system (in outline only)

p.m. Second Session

2. Presentation by H.E. Justice Keba M'Baye on "The African Charter on Human and Peoples' Rights, 1981"

Discussion on the regional application of human rights norms in the African context including:

(a) The civil, political, economic, social and cultural rights elaborated in the African Charter;

(b) The concept of "duties of the individual" in the African Charter;

(c) The mandate and jurisprudence of the African Commission on Human and People's Rights;

(d) The relevance of the African Charter to the freedom and independence of African judiciary.

Evening: Reception by the Law Society of Zimbabwe.

Friday, 21 April 1989

a.m. Third Session

3. Presentation by the Hon Justice Kirby on "The Role of the Judge in Advancing Human Rights".

Discussion on:

4. Judicial techniques and strategies to translate human rights and fundamental freedoms into practical reality through the interpretation of legislation and the common law including rules of procedure, evidence, amicus curiae briefs, locus standi, etc.

5. The question of funding of public interest litigation and legal aid, the role of national human rights commissions, etc.

p.m. Fourth Session

The Relationship between International and Regional Human Rights Norms and Domestic Law.

6. Presentation by Mr Anthony Lester, QC., on "Personal Liberty and Reasons of State".

This session will focus on the role of courts in balancing personal liberty and reasons of State having regard to the following:

7. The incorporation of international and regional human rights norms in relevant African national constitutions.

8. The extent to which the international and regional African human rights standards are given domestic constitutional or legislative protection in the field of civil and political rights.

9. Locating the lacunae: if there are gaps, how can these be filled by:

   (a) The development of the common law by judicial techniques with reference to international human rights norms, or

   (b) The direct application of international or regional customary law by domestic courts.

Evening: Dinner hosted by the Minister of Justice for Zimbabwe, The Hon. Emmerson Mnangagwa, M.P.

Saturday, 22 April 1989

a.m. Fifth Session

10. Presentation by the Hon Justice P N Bhagwati on "Fundamental Rights in their Economic, Social and Cultural Context".

Discussion on:

11. The extent to which the international and regional African human rights standards are given domestic, constitutional or legislative protection in the field of Economic, Social and Cultural Rights.

12. Locating the lacunae: if there are gaps, how can these be filled?

Sixth Session

13. Close of conference and discussion on follow-up.

INAUGURAL ADDRESS

by His Excellency The President Cde Robert Gabriel Mugabe

Their Lordships Chief Justices, Honourable Ministers, Your Excellencies, Members of the Diplomatic Corps, Ladies and Gentlemen, Comrades and Friends:

It is a great pleasure for me, on behalf of my Government and the people of Zimbabwe, to welcome you all here to the second Judicial Colloquium on the Domestic Application of International Human Rights Norms.

I have heard from the Honourable Chief Justice, Judge Enock Dumbutshena, how much success attended the first Colloquium at Bangalore, India in February 1988. That meeting, I am informed, was inspired and convened by former Chief Justice Bhagwati of India. It led to the publication by the Commonwealth Secretariat of a comprehensive report on the very subject with which this present Colloquium is concerned, that of human rights.

The report contains two issues of special interest and value: the first is an enumeration of what are called "The Bangalore Principles" - a ten-point statement on the Interaction of International and Domestic Human Rights Norms. The second is a series of Annexures bringing together, in one conveniently accessible publication, basic documents such as the Universal Declarations, including the African Charter on Human and Peoples' Rights. The Universal Declaration of Human Rights is, as we know, the basic International pronouncement of the inalienable and inviolable rights of all members of the human family and it is important that its principles and provisions are as widely publicised as possible. It is, therefore, my sincere wish that this your Second Judicial Colloquium will be as fruitful and as much of a success as the first one.

The importance of human rights, both at the domestic level and internationally, can never be over-emphasised. The Declaration of human rights correctly asserts that all human beings are born free and equal in dignity and rights and that everyone has the right to life, liberty and security. It also declares that no one shall be held in slavery or solitude or be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Human rights and fundamental freedoms allow us fully to develop and use our human qualities, intelligence, talents and conscience to satisfy our spiritual and other needs. It follows, therefore, that the denial of Human Rights and Fundamental Freedoms is not only an individual and personal tragedy, but also creates conditions of social and political unrest, sowing seeds of violence and conflict within and between societies and nations.

My country's history during the long years of colonial oppression bears strong testimony to the truth of this statement. During the years of white rule in Zimbabwe, abuses against the black majority which included arbitrary arrests, detentions without trial, torture, unwarranted searches, seizures and summary killings, were the order of the day. I am happy to report that all this is now behind us and that since Independence in 1980, Human Rights conditions for the majority of Zimbabweans have greatly improved.

Prior to Independence in Zimbabwe, there existed what was known as a non-justiciable Bill of Rights. It served no useful purpose and was certainly no protection for those of us who struggled for the attainment of basic human rights for all the people of Zimbabwe.

Since Independence, however, we have had a justiciable bill of rights as part and parcel of our constitutional order. Any one who contends that his fundamental human rights are being infringed may approach even the highest courts of the country for relief. The importance attached to this provision of our constitution is demonstrated by the fact that the Supreme Court, which in all other cases is a Court of Appeal, has original jurisdiction in respect of any alleged infringements of the Bill of Rights.

Constitutionally, therefore, Zimbabwe has adopted the basic framework necessary for the protection of human rights.

Politically, I believe it is the duty of government to create an environment of peace, because it goes without saying that human rights can more easily flourish in times of peace, while in times of conflict they come under pressure.

In this connection, we in Zimbabwe are able to point with pride at two major steps we have taken in order to create that environment of peace. The first was the policy of National Reconciliation, which I enunciated in my first major public address on the attainment of Independence. That policy was a cardinal factor in the successful transition from war to peace in those potentially explosive few months at the beginning of 1980. The second was the signing by myself as leader of ZANU (PF) and Cde Joshua Nkomo as leader of PF (ZAPU) on 22nd December 1987, of a Unity Accord which brought peace to the southern and western parts of Zimbabwe.

The protection of basic human rights is the duty and responsibility, both of the executive and the legislature on the one hand, and of the judiciary on the other. We have an independent judiciary and as recent events have indicated, we are not afraid to bring whatever matters affect us in the legal sphere into the open before our judges. My Government is firmly committed to the rule of law and to the maintenance of a justiciable Bill of Rights. It respects judicial decisions and avoids confrontation with the judiciary.

It cannot be denied that the difficult task of interpreting constitutional guarantees of fundamental rights and freedoms, of giving life to them and of determining whether a statute or other state action breaches those rights, is entrusted, in democratic countries in the Commonwealth and elsewhere, to an independent judiciary. I am proud to report in this respect that our judiciary has not failed in its task. A significant example of this was the 1987 Supreme Court decision in the case of Ncube, Tshuma and Ndlovu v State. In that case, which concerned the issue of whether the imposition of a sentence of whipping (in this case six strokes of the cane) upon a male adult offender was inhuman or degrading punishment in contravention of Section 15(1) of the declaration of rights contained in the constitution, the Supreme Court held, and I quote "The whipping each appellant was ordered to receive breaches Section 15(1) of Zimbabwe as constituting a punishment which in its very nature is both inhuman and degrading ...". This decision rectified and changed a situation that had obtained in our system of justice for many years.

The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan in 1985 adopted twenty basic principles on the Independence of the judiciary and I would urge all members of the judiciary to uphold, respect and comply with those principles that impose a duty on, or require a certain code of conduct from them. Examples are the duty to decide all matters before them impartially and to ensure that judicial proceedings are conducted fairly and the rights of the parties respected.

Mr Chairman, the universality of human rights is the prime reason for your being gathered here and, as stated already, it is also a principle which Zimbabwe cherishes. One of your major concerns is to share experiences, because the challenges to human rights come in different forms in different parts of the world.

There is also another context in which the universality of human rights is important. Abraham Lincoln spoke of his wish "That all men everywhere could be free". Nelson Mandela said "Your freedom and mine cannot be separated". Freedom is indeed indivisible, and this is why we in Zimbabwe have upheld the efforts of those who have fought for the freedom of Namibia, and of those who are struggling to bring an end to the negation of fundamental rights which is the apartheid system in South Africa. For us in Southern Africa the universality of human rights remains limited as long as those rights are denied to our brothers and sisters in South Africa. Indeed, we in Zimbabwe, and the sub-region generally, are painfully experiencing very serious limitations to our human rights because of the gross violation of those rights caused by the Pretoria regime's destabilization policies and actions.

The Commonwealth has a special responsibility in respect of the situation in South Africa. Not only is that country a former member of the Commonwealth and a former British colony, the Commonwealth itself has since at least the early 1950s recognised the fact that the political problems of this region are inextricably bound up with the situation in South Africa.

We must all agree therefore on the imperative need for the immediate elimination of the inhumanity that is apartheid and for its replacement politically by a fully democratic order in that country.

There are those who think and say that apartheid is on its way out and reform is now under way on many fronts in South Africa. This optimism is unfortunately quite unwarranted. No meaningful reform of apartheid is to be observed. Indeed, quite the contrary. In any event, how does one go about "reforming" a system whose underlying philosophy, namely white racial superiority and white domination of the black majority, is the negation of all humane and civilised values?

Apartheid, it has repeatedly been stated, should be eradicated, not reformed. Fascism cannot be reformed. It can only, and should be, uprooted. Any wishful thinking on this score is therefore not only futile but positively harmful as it raises false hopes and deflects attention and energies away from the struggle against apartheid to the purely tactical and cosmetic "reforms" the Botha regime has been so assiduously purveying.

It is the duty of those who lead always to strive to translate ideals into practice. In Bangalore, Mr Justice Bhagwati spoke of the need to convert the rhetoric of Human Rights into reality. I hope that during the next few days you will be able to take that process measurably further forward.

I commend you to your task and wish you success in your deliberations.

Finally, may you all have a pleasant and productive stay in Zimbabwe.

Thank You.

Paper prepared by
The Honourable Mr Justice Enoch Dumbutshena
Chief Justice of Zimbabwe

I would like to deal with the role of the people, the ordinary citizens, in the promotion of human rights. My concern is confined to people who might not even know that their rights are protected by Declarations of Human Rights enshrined in their Constitutions.

It has been our experience in Zimbabwe that only those people who are educated and financially well-off challenge in the Courts any breaches of their rights. They do so because they know that their rights are protected by the Constitution of Zimbabwe.

The most important duty of those citizens who know their rights is the imparting of education to those who do not know. It is only those who are equipped with knowledge who can influence governments, through the democratic process, to be effective and to be capable of yielding the best results in the political, social and economic fields.

It is therefore "necessary that the people should not only be literate, but should have a proper understanding and appreciation of the principles of democracy, the functions of the different branches of the government and the rights and duties of the citizen vis-a-vis the State. An opportunity should therefore be provided to every citizen for an adequate civic education, equipping him to exercise his political rights on the basis of informed political judgment rather than emotional considerations" (The Dynamic Aspects of the Rule of Law in the Modern Age, page 49).

The same applies to education in human rights. To achieve an understanding of the rights of the citizens of Zimbabwe we have set up The Legal Resources Foundation, with at present two operative arms: the Harare Legal Projects Centre, and the Bulawayo Legal Projects Centre. The Centres have libraries for the use of the public and legal practitioners. Paralegals explain to citizens their rights and advise them on legal practitioners who can assist them defend or protect their rights. The Legal Projects Centres have established advice centres in high density suburbs. The Legal Resources Foundation has a Publications Unit, which has published a number of legal books and pamphlets explaining legislation and the rights of the individual.

We hope that the efforts of The Legal Resources Foundation will supplement the enormous strides made by the government in advancing the social and economic rights of the black majority population. It is an enlightened population that appreciates human rights and fundamental freedoms.

The Courts of Zimbabwe have in no small measure furthered the development of a human rights jurisdiction. Judges have applied international human rights norms in the interpretation of domestic human rights provisions.

In a speech I delivered recently I said of the rights of detainees:

> "The Constitution [specifies] certain rights which a person placed in preventive detention has. These rights include:
>
> - The right to be informed not later than seven days after his detention of the reasons for the detention in a language which he understands.

- The right to have his case referred to the Detainees' Review Tribunal for review within 30 days of his detention.

- The right to have his case heard 'forthwith' by the Tribunal after referral of the case to it.

- The right to employ a lawyer at his own expense to represent him, the right of access to this lawyer and the right to appear in person before the Detainees' Review Tribunal or to be represented at his own expense by his lawyer.

- The right to have his case reviewed at intervals of 180 days after the first review."

Unfortunately, conditions prevailing since Independence have not allowed the government to dispense with the system of detention without trial. Quite a number of cases have been brought to the higher courts on behalf of detainees and the courts have adopted an approach which ensures the fullest possible protection of the rights of the persons who are detained. Thus the following principles have been established in this series of judgments:

1. The detention provisions cannot be used for an illegitimate purpose such as for the purpose of investigating ordinary criminal offences or for the purpose, not of preventing a threat to security, but simply as a device for imposing further punishment for past activities which the Minister considers to be deserving of such further penalty.

2. If a prerequisite for the making of a valid detention order is not observed and the detention is thus invalid ab initio, then the court will order the release of the detainee.

3. If a detainee, after being validly detained, is thereafter not accorded the rights set out in the Constitution, the Court will order the responsible authority to comply with the Constitutional provisions and grant the detainee his rights. The detaining authority could thus be ordered to allow the detainee proper access to his lawyer or to provide adequate reasons for the detention or to refer the matter for review to the Detainees' Review Tribunal and so on.

As regards the obligation to provide reasons to the detainee for his detention, the Supreme Court in a number of judgments has ruled that the detainee is entitled to be provided with sufficient information to enable him to know what it is that is alleged against him so that he can make meaningful representations when the case comes before the Review Tribunal. It has stated that he cannot defend himself unless he has been appraised properly of the allegations against him and the detainee must thus be provided with the basic facts and all material particulars which form the foundation of the detention. The reasons which are provided must not be so vague that the detainee is unable to make any meaningful representations before the Review Tribunal.

As regards the right of access to a lawyer, the Courts have stressed the importance of this right and have taken firm action to stop any denial of this right.

So, too, on the actual decision to detain, the Supreme Court has ruled that, despite the fact that this decision-making capacity is couched in subjective terms, the Courts are still entitled to investigate on review whether there

were facts which were reasonably capable of supporting the decision taken, whether the Minister had applied his mind to the decision, whether the decision was entirely irrational or was arrived at in bad faith. If therefore it found, for instance, that the decision was not taken on the basis of any facts which were reasonably capable of supporting the decision, the court could rule that the decision was invalid and could then order the release of the person wrongly detained.

"In Simon Gregory John Bull v Minister of State (Security) and Others, 1987 (1) SA 422 (ZHC), the High Court decided that despite the Regulations being silent as to the conditions under which a detained person was to be held, there were certain basic rights to which he was entitled in the absence of any statutory authority to the contrary. These rights included proper housing and clothing, adequate food and medical aid, protection against assalt, the right not to be held in solitary confinement and the right to adequate exercise. Thus the Court was able to establish and enforce certain minimum standards of detention. The Court then proceeded to order that the detainees in question should not be transferred to a detention centre where these minimum conditions could not be met".

I feel that the Judges are doing their best to uphold human rights, and in that process to apply international human rights norms to our domestic human rights. Judges have managed to do this in spite of the number of people who are ignorant of their rights and the lack of suitable human rights literature.

Chapter III of the Constitution of Zimbabwe contains a declaration of fundamental human rights which are enforceable through the Courts. There are detailed provisions on the following:

- The right to life, personal liberty, protection of the law, and freedom from arbitrary search and arrest.

- The right to freedom from slavery, forced labour and inhuman treatment.

- The right to freedom of conscience, expression, assembly, association and movement.

- The right to freedom from race discrimination.

- The right to protection against deprivation of property.

These rights are derived from the International Bill of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. These rights are of universal application. There are differences in some areas, dictated by local conditions and circumstances.

Article 17 of the International Bill of Human Rights reads:

> "1. Everyone has the right to own property alone as well as in association with others.
>
> 2. No one shall be arbitrarily deprived of his property."

Article 17 forbids the arbitrary deprivation of another person's property. It does not spell out what happens if one's property is arbitrarily taken by government or other authority.

Section 16 of the Zimbabwe Declaration of Rights reads as follows:

> "16. (1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that -
>
> (a) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition;
>
> (b) requires that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning, the utilisation of that or any other propery for a purpose beneficial to the public generally or to any section thereof or, in the case of land that is under-utilised, the settlement of land for agricultural purposes;
>
> (c) requires the acquiring authority to pay promptly adequate compensation for the acquisition;
>
> (d) requires the acquiring authority, if the acquisition is contested, to apply to the High Court or some other court before, or not later than thirty days after, the acquisition for an order confirming the acquisition; and
>
> (e) enables any claimant for compensation to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition and for the determination of any question relating to compensation, and to appeal to the Supreme Court."

The American Convention on Human Rights, in Article 21, sets out the right to property in a different style and content. It states:

> "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest and in the cases and according to the forms established by law.
>
> 3. Usury and any other form of exploitation of man by man shall be prohibited by law."

What is important for the purposes of this Paper is the fact that it has a similar provision to the Zimbabwean Section 16, which allows deprivation of property only upon payment or a just or adequate compensation. This encourages transactions of property on a willing seller and willing buyer basis. It means that if an authority requires the property "for reasons of public utility or social interest", it must pay compensation to the owner who is being deprived of his property "according to the forms established by law".

The provisions of Section 16 of the Zimbabwe Constitution are set out in full because one of the key issues in respect of which the liberation war was fought was land rights. The Constitution of Zimbabwe sought to protect private property rights acquired before Independnece under circumstances that discriminated against black people. Section 16 acts as a barrier to the full-

scale redistribution of land and restructuring of the economy which government would have wished to institute as soon as Independence was won.

When government sought to take certain measures which interferred with property rights the aggrieved parties brought cases to our Courts.

One case brought to the Courts was May v The Reserve Bank, (1986) (3), SA 107 (ZS). In that case residents of Zimbabwe had purchased shares in South African companies on the Zimbabwe Stock Exchange. From 1965, the first year of UDI, as a result of exchange control measures to prevent currency leaving the country, investors in foreign securities had to pay a premium for the right to participate in external securities plus the market value of the shares. In 1984 the Reserve Bank appropriated all external securities.

Subsection (6) of Section 12A of the Exchange Control Regulations, 399 of 1977 as amended by the Exchange Control Regulations, 1984 (No 3), as well as Section 16(1) of the Constitution of Zimbabwe, provided for payment of adequate compensation for external securities expropriated by the State in terms of subsection (6) of Section 12A of the Regulations, which required that the compensation paid "shall be the market value of the security".

At the time the external securities were expropriated the premium payable on external securities on the Zimbabwe Stock Exchange was 30%. The Reserve Bank paid compensation without taking into account the premium paid. The appellants said the compensation they were paid was inadequate.

In the High Court Smith, J said the compensation paid to the appellants was adequate in terms of Section 16 of the Constitution. The Supreme Court, by a majority of three to two, held that the premium was not part of the integral value of the shares. It was further held that Section 12A(6) of the Regulations bore an ordinary meaning and the term "market value" meant the best price which could be reasonably obtained on the open market, that is, the Johannesburg Stock Exchange. It was therefore held that the Reserve Bank had paid adequate compensation in terms of Section 16 of the Constitution. The compensation paid was held to have been adequate.

In Minister of Home Affairs v Bickle, (1983) (2) ZLR 400, the Supreme Court had to decide whether a person whose property had been declared forfeit because he was thought to be an enemy of the State was in fact an "enemy". Subsection (4) of Section 16 of the Constitution allows for the compulsory acquisition of property during a period of public emergency. Zimbabwe has been in a continuous state of emergency since 1965. The Supreme Court held that Bickle was not an "enemy" of the State and his property could not, therefore, be declared forfeit to the State.

The question of the distribution of land is a very important problem. The vast majority of our people have no land. They want land. Yet those who hold land are entitled to it and in most cases they are using it to the benefit of the country and its people. The right of protection from deprivation of property assumes, in my view, a greater significance than it does in more developed countries. The Courts of this country will therefore look for assistance in the interpretation of Section 16 of the Constitution of Zimbabwe to countries with the same colonial background and circumstance.

Article 14 of The African Charter on Human and People's Rights says:

> "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

It can be seen that the right to property under the African Charter is not as jealously guarded as it is in the Constitution of Zimbabwe. It guarantees the right to property. The word "guarantee" is not defined. It, however, connotes a whole or part indemnity for loss suffered through deprivation of property. The right of compensation is therefore assumed, and not certain, in terms of Article 14 of the Charter. There is, however, something more than is contained in Article 17 of The International Bill of Human Rights, in that infringement of Article 14 of The African Charter can be dealt with "in accordance with the provisions of appropriate laws".

In the case of Zimbabwe, if the property acquired is land, the person whose land has been acquired can apply for compensation in terms of Section 19 of the Land Acquisition Act, No 21 of 1985, and Section 16 of the Constitution of Zimbabwe. Section 19 of Act No 21 of 1985 reads as follows:

> "19. (1) Subject to the provisions of this Part, an acquiring authority shall pay adequate compensation promptly to the owner of land and any other person who suffers loss or deprivation of rights by any action taken by the acquiring authority in terms of subsection (1) or (3) of section eleven or section fifteen or eighteen.
>
> (2) Any person who wishes to claim compensation payable in terms of subsection (1) shall, subject to the provisions of subsection (3), submit a claim in writing to the acquiring authority specifying in detail:
>
> (a) the nature of his loss or deprivation of rights; and
>
> (b) the amount of the compensation claimed by him and the basis on which he has calculated such amount and any actual expense or loss which has been or may be reasonably incurred or suffered directly as a result of the action taken by the acquiring authority."

The African Charter provides regional protection which is not based on the nationality of the person whose rights have been breached. Whatever shortcomings there might be in the Charter, these can be supplemented or reinforced by the domestic law of the individual States.

In S v Ncube and Others, 1988 (2) SA 702 (ZS), the Supreme Court ruled that whipping of an adult offender was a contravention of Section 15(1) of the Constitution of Zimbabwe. Section 15(1) reads:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

The Supreme Court held that such punishment was inherently brutal and cruel and was degrading to both the punished and the punisher alike. Now corporal punishment applied to adults is unconstitutional.

In arriving at this decision the Supreme Court relied on the judgment of the European Court of Human Rights in Tyrer v United Kingdom, (1978) 2 EHRR 1. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Inter-American Convention on Human Rights has a similar provision. Article 5(2) reads:

> "No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

Unfortunately Zimbabwe has no access to judgments of the Inter-American Court of Human Rights.

Article 3 of the European Convention for the Protection of Human Rights is almost in identical words to Section 15(1) of the Constitution of Zimbabwe. In Tyrer's case, supra, the court was of the view that:

> "... in order for a punishment to be 'degrading' and in breach of Article 3, the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding subparagraph."

The Supreme Court of Zimbabwe was of the view that Section 15(1) of the Constitution of Zimbabwe does not permit or condone any punishments which are contrary to Section 15(1).

In Ncube's case, supra, we applied international human rights norms to our domestic human rights law. In the session just past we were faced with the issue of whether the imposition of a moderate correction of cuts upon a juvenile offender likewise violated the prohibition against inhuman or degrading punishment contained in section 15(1). We have not yet handed down judgment. In that appeal it was common cause that the method of administering a moderate correction of cuts was the same as in the case of an adult offender, although the size of the cane was different. The State conceded that there was little room to distinguish between the inherent nature of the two punishments.

Zimbabwe is a developing country, the majority of whose people were denied by the colonial power their civil, political and economic rights. Because of its history there are no economic and cultural rights enshrined in the declaration of fundamental rights. Yet economic rights for a nation in a state of development are as essential as any other right.

The African Charter of Human and People's Rights fills the gap. Its preamble states:

> "Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."

These rights are repeated in the body of the Charter. It may be the protection of economic, social and cultural rights is a phenomenon of the Third World. One finds in the Inter-American Convention on Human Rights an undertaking to adopt these rights. Article 26 reads:

> "The States Parties undertake to adopt measures, both internally and through international co-operation, especially those of an economic and technical nature, with a view to achieving progressively by legislation

or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific or cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires."

Domestic human rights norms are enforced by the courts of each member country. The Inter-American Convention on Human Rights has an Inter-American Court of Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms has a European Court of Human Rights. The jurisdiction of these Courts extends to all cases concerning the interpretation and application of their Conventions which are referred to them by the States Parties or the Commissions. The European Court of Human Rights has built up a substantial human rights jurisprudence through its decisions. Its judgments are widely known and renowned.

Sadly in my view, the African Charter has no Human Rights Court. The Commission is not a Court. One of its mandates is to "interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU." While one should not criticise unduly the omission without having seen or read the Commission's Rules of Procedure, I am however of the opinion that a Court of highly qualified and eminent Judges would, by its considered and impartial judgments, render to Africa a human rights jurisprudence which the States Parties would be compelled by its weight to follow and emulate. There are people at this Colloquium more qualified than I am to talk on the African Charter of Human Rights. My comment is only an observation and a passing shot.

Developing countries cannot afford to dissociate civil and political rights and freedoms from economic, social and cultural rights, because they guarantee the enjoyment of civil and political rights. I have said at other Conferences that "in a developing country, the right to development is one of the most vital rights. For persons who live in abject poverty, the right to food is by far the most important right."

International Human Rights Norms

A paper prepared by Justice Rajsoomer Lallah of Mauritius

1. General Background

This colloquy being a meeting of highly experienced persons in the daily application of laws in the field of human rights, it might be more fruitful to concentrate on norms that are by now generally accepted and only refer, necessarily briefly, to matters of purely historical or academic interest for the purpose of reviewing the development of those norms from what, it is hoped, is the right perspective in a field of international law which, in the last 40 years or so, has known a most remarkable and vigorous growth.

Historically, concern for the protection of human rights found expression almost exclusively at the national or domestic level in accordance with the varying notions of changing times. Even in the national sphere prevailing power structures in many countries resisted acceptance, beyond the purely metaphysical or philosophical, of the very notion of human rights, the dignity of the human person and the humanity of man. Violations occurred and were wide-ranging. In the result great popular upheavals took place and gave birth to charters in some states e.g. Magna Carta, the French Declaration of the Rights of Man and of the Citizen of 1789, followed two years later by the American Bill of Rights. These instruments were by modern standards, undeniably limited in content and focus and were not perceived as being of universal application though they undoubtedly inspired and influenced reform in many countries in the field of human rights.

At the international level before the turn of this century, notions of human rights were no more than selective extensions of certain rights which powerful nations wanted their own co-religionists or nationals to enjoy elsewhere and hence their justification for certain religious wars or, upon the expansion of international commerce, the inclusion in bilateral treaties of provisions for the protection of their nationals. Again, humanitarian laws regulating the conduct of war depended on mutual agreement between states. It could not be said, therefore, that the norms of human rights on which states acted had any claim to universality or were other than those which some states bilaterally accepted or else found it convenient to impose, not from any ethical considerations but rather from the practical need to safeguard their own national interests.

After the First World War, however, the beginnings of universality, though still restricted in content and scope, began to emerge. This was, in great measure, due to the founding of the League of Nations and the imposition of certain safeguards in peace treaties in the treatment of minorities. But it was not until the aftermath of the Second World War that the international community became dramatically convinced of the real and pressing need to protect and promote human rights. The promotion and protection of human rights were seen as an integral and essential element for the preservation of world peace and co-operation, not only within the confines of particular states but universally. To achieve this end, the need was also felt to create the necessary mechanisms to deal with the highly complex questions that would inevitably arise in the systematic

quest for generally acceptable norms and their implementation within all national jurisdictions. There were two catalytic factors and, at the risk of repeating the obvious, these may perhaps be recalled.

First, unlike in the past when there was no permanent institutional machinery for the regular discussion of matters of common concern and when international meetings only took place at ad hoc diplomatic conferences with well defined and limited mandates (e.g. the Vienna Congress (1815), the Berlin Conference (1855), the Hague Conferences (1899 and 1907)), the creation of the United Nations system after the Second World War provided a permanent structure for systematic work in the fulfilment of its mandate.

Secondly, following the horrors of the Second World War which humanity had inflicted upon itself and possibly, as well, the need felt to extend to everyone the benefits of the protection given to minorities in those provisions of peace treaties which had been imposed on certain states in the inter-war period, the promotion and the protection of human rights were seen as an inseparable part of the principal objectives which states set for themselves (Articles 1(3) and (4) and 55 of the UN Charter). To achieve this end, they pledged themselves "to take joint and separate action in co-operation with the Organisation" for the achievement of that objective (Article 56 of the Charter). Further, within the system, functional machinery was specifically assigned particular tasks (ECOSOC and its subordinate bodies, specially the Commission on Human Rights and its expert Sub-Commission) to assist the General Assembly in its quasi-legislative functions in the human rights field (adoption of conventions, some eventually with independent treaty supervisory bodies like the Human Rights Committee, adoption of resolutions or declarations of general application). In addition, there was the general mandate of the General Assembly to ensure that the Article 56 pledges were fulfilled by states in which the situation of human rights became a matter of concern to the international community (e.g. in the case of Chile in these past years).

To conclude this general background, mention should be made of the enormously useful parallel work accomplished in the field of human rights by the UN specialised agencies within their field of competence (ILO and UNESCO in particular, the former even before the General Assembly came into being) and by regional organisations like the Council of Europe, the Organisation of American States and the Organisation of African Unity.

2. Sources and Content of Human Rights Norms

Enough has been said so far to suggest that, in relation to human rights norms, customary international law in the orthodox or traditional sense of unwritten non-treaty law based on state practice has largely, if not completely, been overtaken or else subsumed in an ever growing corpus of norms fixed in the form of instruments like resolutions, declarations or else conventions, all adopted by the great majority of states through the international machinery they have created, whether at the regional or global level.

This is not to say that, at any rate with regard to declarations or resolutions which by their very nature do not have the binding character of a multilateral treaty provision, doubt may not be cast on a particular norm. The result may still depend on certain factors e.g. whether the resolution or declaration was adopted by consensus or a substantial majority, with only unimportant abstentions in terms of numbers or whether, on the other hand, it was adopted against strong opposition. In the latter case, state practice would still be relevant. With regard to declarations and resolutions, although great efforts are deployed in the preparatory work with a view to obtaining consensus or universality even at the cost of compromises and minimalist achievements, their value as legal norms always remains uncertain when compared with provisions of widely accepted treaties. This is why, as later indicated, treaties are subsequently worked out to incorporate norms which first achieve some degree of recognition by way of a declaration or a resolution.

Some idea of the quasi-legislative activity of the UN and the specialised agencies may be gathered from both the number of instruments adopted in the last 40 years or so as well as the variety of particular aspects of human rights that they deal with. These instruments are listed in Annex 8 to this paper and the list does not purport to be complete. As may be seen from a quick reading of the list, the Universal Declaration (1948) and its two implementing International Covenants of 1966 on Civil and Political Rights and on Economic Social and Cultural Rights (hereinafter referred to as the ICCPR and ICESCR respectively) cover what, at the time of their adoption, was considered to be the whole range of basic or fundamental rights which states agreed the individual should have. These three instruments together have come to be known as the International Bill of Human Rights and, in view of their global importance, they are reproduced in Annexes 1 to 3 and will be discussed below.

It is interesting to note that, although a particular right is covered in an instrument of general application, it can nevertheless also be the subject matter of another instrument on its own, in a more complete form and having enforcement or monitoring machinery of its own. This is also the case with regard to instruments governing matters which also fall within the competence of specialised agencies (e.g. the 1957 ILO Convention No. 105 on the Abolition of Forced Labour c.f. Article 8(3) of the ICCPR). This is also the case with regard to some UN instruments (e.g. Article 7 of the ICCPR on the prohibition of torture or of cruel, inhuman or degrading treatment or punishment c.f. the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

It is worth noting that, in very much the same way as was the case with the Universal Declaration and its two Covenants (the ICCPR and the ICESCR), some rights achieve recognition by way of a general Declaration first and are subsequently made the subject matter of a specialised Convention. Such has been the case with the 1963 Declaration and the 1965 Convention on the Elimination of All Forms of Racial Discrimination, including the subsequent (1973) Convention on the Suppression and Punishment of the Crime of Apartheid, the 1967 Declaration on the Elimination of Discrimination against Women and its 1979 Convention and, lastly, the 1975 Declaration and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Work is in progress on draft Conventions to give effect to the 1959 Declaration on the Rights of the Child and the 1967 Declaration on Territorial Asylum.

Before I conclude on the aspect of sources of international law with regard to human rights and go on to review the content of generally accepted norms, it would not be out of place to refer, if only in brief terms, to significant regional international concerns relating to the evolution of the norms of human rights and the Conventions that have been born out of those concerns. These concerns have exercised all continents.

Because Europe was the main theatre of the horrors of the Second World War, following an era spanning centuries of internecine conflict often extending beyond its borders, the need for greater political, economic and social unity was most felt there. It was also deeply felt, as is clear from the preamble to the Convention that it adopted, that a meaningful common human rights policy in addition to arrangements covering other fields, would be one of the means of achieving that unity. It was understandable, therefore, that the first regional instrument (1950) concerning a broad spectrum of fundamental rights came into being there shortly after the adoption of the Universal Declaration by the General Assembly. As is evident from the express terms of the preamble to the European Convention and the contents of the Convention itself, the latter was greatly inspired and influenced by the Universal Declaration. Although Europe chose to adopt at the time only the civil and political rights proclaimed in the world instrument, it did a decade later (1961) adopt the European Social Charter which is the equivalent of the ICESCR. The European Convention and the European Social Charter are reproduced as Annexes IV and V. What has so far been said should not give the impression that the world had thrust upon Europe its global philosophy and concepts of human rights. Although the Universal Declaration had provided the inspiration, and the first draft of the implementing Covenants (the ICCPR and the ICESCR) had already been produced, it remains true that Europe or the West exercised a dominating influence in those early years of the UN.

The second regional instrument, in point of time, that requires to be mentioned is the American Convention on Human Rights, 1969. That Convention is reproduced as Annex VI. It was inspired by the global instruments of the UN and of the European Convention.

The most recent regional instrument to have come into force is the African Charter on Human and Peoples' Rights is reproduced as Annex VII. It did so only in 1987 although it had been approved in 1981 by the Heads of State and Government, in Nairobi. The determining reason would appear to have been that the minimum ratifications required to trigger its coming into force was a majority (26) of member states of the OAU membership, whereas the level generally required for such treaties is a quarter or at most a third. This leaves only Asia to have a regional charter of its own.

Insofar as the Commonwealth is concerned, the Singapore Declaration of 1971 incorporates the resolute commitment by the Commonwealth to the effective enjoyment and protection of human rights. At the Lusaka Meeting of 1979, Commonwealth Heads of Government appointed a Working Party to examine and make recommendations on a memorandum by The Gambia for the establishment of a Commonwealth Commission for Human Rights. Commonwealth Heads of Government considered the Report of the Working Party at the Melbourne HGM in 1981 and, after further consideration by Commonwealth Law Ministers in 1983, it was decided to establish a Human Rights Unit within the Commonwealth Secretariat to undertake such activities as might assist member states in the promotion of human rights, leaving for further study

and deliberation the question of appropriate machinery for the protection of human rights.

3. Content of Human Rights Norms

As is apparent from the above discussion of the sources of human rights norms, there is a whole host of instruments and quite a number of rights. This paper will restrict itself to civil and political rights as these are rights which most states are bound to implement within their legal system. Economic, social and cultural rights will be dealt with only to a limited extent. It may be said that international law regards these as matters for progressive achievement and protection. In effect, therefore, this part of the paper will deal with the Universal Declaration (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the European Convention (EHR), the American Convention (AMR) and the African Charter (AFR).

Though the Universal Declaration is of prime importance, it is not a treaty and therefore technically it is weak as an instrument of protection. But its moral force and persuasive character have never been in doubt and it is universally regarded as expounding generally accepted norms. It is a charter for objectives and policy and was drafted in broad and general terms. That was the reason which made it necessary to implement those objectives by more precise and detailed formulation in the form of conventions which would be binding on states parties and hence the adoption of the two International Covenants (ICCPR and ICESCR) which, in the original draft, were one. It will be recalled that the sister Covenants were split into two since the ICCPR created civil and political rights which would be immediately enforceable whereas the ICESCR imposed obligations "to take steps..... to the maximum available resources, with a view to achieving progressively the full realisation of the rights" (Article 2(1) of ICESCR). The ICCPR gives treaty effect to the substance of Articles 1 to 21 of the UDHR whereas the ICESCR, broadly speaking, gives effect to Articles 22 to 28 of the UDHR.

The following is a comparative list of rights recognised in the several instruments to which this part of the paper relates, with indications in abbreviated form of the relevant instrument and the relevant article of the instrument:

Right of peoples to self-determination	ICCPR 1(1), ICESCR 1(1), AFR 20.
Right of peoples to dispose of its natural wealth and resources	ICCPR 1(2), ICESCR 1(2), AFR 21.
Right to equality and non-discrimination	UDHR 1,2,& 7, ICCPR 2(1), 3 & 26, EHR 14, AMR 1(1) & 24, AFR 2 & 3.
Right to effective judicial remedies	UDHR 8, ICCPR 2(3), EHR 6 & 13, AMR 25, AFR 7(1)(a) & 26.
Right to life	UDHR 3, ICCPR 6, EHR 2, AMR 4, AFR 4.

Protection from torture or cruel, inhuman or degrading treatment or punishment	UDHR 5, ICCPR 7 & 10, EHR 3, AMR 5(2) to (6), AFR 5.
Protection from servitude and forced labour	UDHR 4, ICCPR 8, EHR 4, AMR 6, AFR 5.
Right to liberty and security of the person	UDHR 3 & 9, ICCPR 9, EHR 5, AMR 7, AFR 6.
Protection from imprisonment for inability to fulfil a contractual obligation	ICCPR 11, EHR Protocol 4 Art. 1, AMR 7(7).
Freedom to movement	UDHR 13, ICCPR 12, EHR Protocol 4, Art. 2, AMR 22(1) to (5), AFR 12(1) to (3).
Protection of alien from arbitrary expulsion	ICCPR 13, EHR Protocol 4, Art. 4 (restricted to collective expulsions), AMR 22(6) to (8), AFR 12(4) & (5).
Fair and public hearing, presumption of innocence, procedural guarantees, protection from double jeopardy	UDHR 10 & 11(1), ICCPR 14, EHR 5 & 6, AMR 8, AFR 7(1).
Non-retroactivity of offences and punishments	UDHR 11(2), ICCPR 15, EHR 7, AMR 9, AFR 7(2).
Recognition as a person before the law	UDHR 6, ICCPR 16, AMR 3, AFR 5.
Protection of right to property	UDHR 17, EHR First Protocol Art. 1, AMR 21, AFR 14.
Protection of privacy, family, home, correspondence, honour and reputation	UDHR 12, ICCPR 17 & 19(3)(a), EHR 8 & 10(2), AMR 10 & 14, AFR 18 & 27.
Freedom of thought, conscience and religion	UDHR 18, ICCPR 18, EHR 9, AMR 12, AFR 8.
Freedom of opinion and expression and of seeking, receiving and imparting information	UDHR 19, ICCPR 19, EHR 10, AMR 13, AFR 9.
Freedom of Assembly	UDHR 20, ICCPR 21, EHR 11, AMR 15.

Freedom of association and to form and join trade unions	UDHR 20, ICCPR 22, EHR 11, AMR 16, AFR 10.
Right to marry, equality of rights of spouses and protection of the family	UDHR 16, ICCPR 3 & 23, EHR 12, AMR 17, AFR 18.
Rights of the child	ICCPR 24, AMR 17(4) & (5), 18, 19 & 20, AFR 18(3).
Political rights and access to public office	UDHR 21, ICCPR 25, EHR First Protocol Art. 3, AMR 23, AFR 13.
Right of ethnic, religious or linguistic minorities with regard to culture, religion or language	ICCPR 27.
Prohibition of war propaganda and protection from advocacy of racial or religious hatred.	ICCPR 20.
Limitations on derogation in emergencies	ICCPR 4, EHR 15, AMR 27.

It will have been apparent that, although these instruments generally have much in common, there are some differences which might perhaps be highlighted. First, as between the UDHR and the ICCPR, the former instrument does not whereas the latter does cover the right to self-determination, the right for a people to dispose of its natural wealth and resources, protection from imprisonment for a civil debt, the protection of the alien from arbitrary expulsion, the rights of the child, certain rights of minorities and the outlawing of war propaganda and racial or religious hatred. These matters, with the exception of imprisonment for civil debts, are also excluded from the EHR. These were developed in the aftermath of the adoption of the UDHR. Secondly, the ICCPR contains the notable omission of protection of property rights, which initially was also absent from the EHR but was later included in the EHR's First Protocol with certain limitations. Thirdly, both the rights and the permissible limitations are formulated in greater detail in the ICCPR than in the UDHR and become susceptible of better implementation in national legal systems.

As between the ICCPR and the EHR, the AFR and, to a lesser extent, the AMR (which appears much closer to the ICCPR), the ICCPR appears to give wider protection with regard to the treatment of detainees (Article 10), recourse to the death penalty, access to public office, as well as the right of free consent as a pre-condition to marriage and the equality of spouses as to their rights in marriage.

It remains to be seen whether certain new concepts of a collective character such as the right to development and the rights of peoples as set out in Articles 20 to 26 of the AFR would be so interpreted as to narrow rather than strengthen the scope of the rights and freedoms of the individual. These concepts are not, from the strictly juridical point of view, entirely new. There are certain rights already recognised which could be exercised by the individual in community with others, for example

self-determination (ICCPR 1), freedom of association (ICCPR 22) or minority rights (ICCPR). What is worth noting also is the concept of duties formulated in express terms in the African Charter, whereas these remain implied in similar instruments. The extent to which this notion of duties will or will not have an adverse impact on the content of individual rights remains to be seen.

Although there are differences in content and scope as between the various regional instruments and as between these instruments and the ICCPR, it nevertheless remains a fact that a great many states from all regions (88 as at March 1988) are already parties to the ICCPR. Of these, 17 are from Western Europe, 10 from Eastern Europe, 19 from Africa, 21 from the Americas (USA signed in 1977 but has not so far ratified), 10 from Asia and 11 from the Middle East. There are some 19 states parties to the Inter-American Convention, 21 to the European Convention and about 27 to the African Convention.

Insofar as the Optional Protocol to the ICCPR is concerned, whereby states parties have accepted the competence of the Human Rights Committee to receive individual petitions against them, there are 40 states parties of which 11 are from Africa, 17 from the Americas and 12 from Western Europe.

4. Regional and International Mechanisms

The European Convention has established three organs "to ensure the observance of the engagements undertaken" by states parties. These organs are the Commission, the Committee of Ministers, and the Court. The Commission may receive applications either from a state party against another (Article 24), or from an individual, group or organisation (Article 25) concerning a violation. The jurisdiction of the Commission is integral or automatic under Article 24 but depends on whether or not the state concerned has accepted its jurisdiction under Article 25. The difference between an inter-state application and an individual one is that the complaining state need not show that it is in any way a victim whereas an individual must do so in order to have locus standi. The other difference also is that an inter-state application may be in respect of alleged incompatibility between the laws and practices of the respondent state and the Convention whereas the individual must establish that those laws or practices, in their application to him, have been violated. There are a number of provisions relating to the admissibility of an application before it is considered on the merits. Briefly, it may be rejected because:

(a) it is incompatible with the provisions of the Convention, for example, the complaint relates to a right not provided for by the Convention,

(b) domestic remedies have not been exhausted,

(c) the application has not been lodged within six months of the exhaustion of domestic remedies, or

(d) because it is manifestly ill-founded (no prima facie case disclosed in the application),

(e) the application is anonymous.

The Commission has developed a rich jurisprudence on the rules governing admissibility. Once the Commission has declared an application admissible, it ascertains the facts and proceeds to examine the matter on the merits. It then offers an opportunity to the parties to settle the matter. If a friendly settlement is not achieved, the Commission refers a detailed but confidential report to the parties and the Committee of Ministers, together with its opinion on whether there has been a breach of the Convention. Within three months, the Commission or the state party whose national is alleged to be a victim or either party in an inter-state dispute (but not private parties) may refer the matter to the Court, provided that the state or states concerned have accepted its jurisdiction.

Where the matter is not referred to the Court, the Committee of Ministers, here acting in a quasi-judicial capacity, decides by a two-thirds majority whether there has been a violation of the Convention. Occasionally the Committee of Ministers overturns the finding of a violation. It does not, however, find a violation where the Commission has found none. Its decision is binding and, where it does find a violation, it is empowered to prescribe a time period within which the offending state must take remedial measures. If these are not compiled with in time, the Committee decides upon further measures and usually publishes the report of the Commission. However, the Commission may do nothing as a result of the Commission's findings and is sometimes seen as a weak link.

When a matter is referred to the Court, the Commission assists the Court in very much the same way as an advocate-general and not in the spirit of an advocate for the individual applicant. All decisions of the Court are binding and the Committee of Ministers supervises the execution of the Court's judgment.

The Inter-American machinery under the American Convention on Human Rights is somewhat similar to that of the European Convention, but does not have a Committee of Ministers. Its two organs are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The American Convention reverses the traditional pattern utilised by the European Convention in that the right of individual petition to the Commission is the norm (Article 44 of the Convention) whereas an interstate petition is only admissible by special acceptance (Article 45 of the Convention). It should be noted that the Commission is empowered to undertake promotional activities for the better observance of human rights and to make on-site visits. It is unfortunate, as regards the competence of the Court, that there have so far been only a few acceptances of its contentious jurisdiction. The Court has, in addition to its contentious jurisdiction, broad advisory jurisdiction at the request of any OAS member state (and not just states parties to the American Convention), as well as all organs of the Organisation of American States.

The African Charter was adopted by the OAU Conference of Heads of State and Government at Nairobi on 28 June 1981 and came into force on 21 October 1986. It has so far been ratified by 34 States. The Charter provides for a single organ: the African Commission on Human and Peoples' Rights. The Commission has started its work. It consists of 11 members elected from among those persons of highest repute, nominated by States Parties, who are known for their high moral principles, integrity,

impartiality and competence in the field of human and peoples' rights (Article 31). The term of office of the members is for a period of six years and members may be re-elected. However, at the first election, in accordance with Article 36, four of the members were elected for a period of two years and three others for a period of four years.

The Commission is vested with well defined functions to promote and protect human and peoples' rights. In addition it has competence to interpret any provision of the Charter and to perform any other functions that may be conferred upon it by the Conference of Heads of State and Government.

The functions of the Commission geared towards the promotion of human rights are fundamental and require to be highlighted. The Commission is charged in particular with the duty to -

(a) gather documentation; conduct studies and research on African problems in the field of human and peoples' rights; organise meetings, seminars and conferences; disseminate information; encourage national or local organisations dealing with human and peoples' rights; and what is significant, give advice or make recommendations, in case of need, to governments;

(b) elaborate principles and rules permitting the solution of juridical problems relating to the enjoyment of human and peoples' rights and fundamental freedoms with a view to assisting governments in their legislation;

(c) co-operate with other African or International organisations concerned with the promotion and protection of human and peoples' rights.

With regard to the functions relating to the protection of human and peoples' rights, the Commission is invested with competence to receive petitions alleging violations by a State Party of rights recognised in the Charter. The procedure would differ depending on whether a petition emanates from a State Party or an individual or organisation.

A State Party may either petition the Commission directly or do so after unsuccessful negotiations with the other State Party. The Commission can only consider the petition where domestic remedies have been exhausted.

After considering the matter, the Commission determines the facts and draws its conclusions. It then reports to the States Parties concerned and to the Conference of Heads of State and Government and makes such recommendations as it deems appropriate.

Individuals and organisations cannot petition the Commission directly. It is the Commission itself, on a request by an absolute majority of its members, which decides to seize itself of the matter. The main rules relating to the admissibility of individual petitions require that the author discloses his name or, in the case of an organisation, the name of the organisation even where non-disclosure of the name is requested; that the petition is compatible with the Charter; that it is not simply based on news reported by the media; that domestic remedies have been exhausted unless these are unreasonably prolonged and that the matter

has not already been dealt with under the aegis of the United Nations, the OAU or under the Charter itself.

The Commission may decide, after considering the matter, that there is no cause to proceed further. However, where the Commission considers that a petition (or a number of them) appears to suggest the existence of a situation where gross and massive violations of human and peoples' rights are taking place in a particular State Party, the Commission brings the matter to the attention of either the Conference of Heads of State and Government or, if the situation is urgent, to the attention of the President of the Conference. The Commission may, if the Conference or the President so requests, conduct a full study of the situation and report thereon to the Conference.

The procedure relating to petitions is confidential and the reports of the Commission may only be made public by the Heads of State and Government.

Given the wide competence of the Commission both in the promotion and protection of human and peoples' rights, there is every reason to hope that its work will be most valuable and will add a further dimension to the growth of the rule of law and the effective enjoyment of human and peoples' rights. It is to be hoped that the work of the Commission will be widely disseminated not only to students of law, organisations dealing with human rights, the different organs of administration of the States Parties and, in particular, to the Judiciary which in effect deals every day with grass roots problems in the field of human rights.

The machinery established by the Covenant on Civil and Political Rights is a single organ called the Human Rights Committee consisting of 18 members periodically elected or re-elected by the states parties. As in the case of the regional mechanisms, members of the Committee serve in their personal capacity. The functions of the Committee are three-fold:

(a) It examines the periodic reports of states parties regarding implementation of the Covenant and adopts general comments in the light of experience gathered in the course of the examination of States Reports.

(b) It considers communications from individuals complaining of a breach of the Covenant by a state party which has acceded to the Optional Protocol to the Covenant.

(c) It considers communications lodged by one state party against another but only in the case of states which have accepted this kind of jurisdiction under Article 41 of the Covenant.

Regarding its functions under (a) above, it must be noted that the reports are required to be extremely detailed covering the particular laws, regulations and administrative practices adopted by the state to give effect to each and every right recognised in the Covenant and any limitations to which the various rights may be subject. The Committee has issued guidelines to ensure that the reports are comprehensive. The examination of a report of a state party takes place in public in the presence of its representatives who are questioned over a number of meetings. As is apparent from the terms of Articles 2 and 40 of the Covenant, the report deals not only with legal but also other measures

designed to give effect to the Covenant and, in particular, deals with any factors or difficulties encountered in the implementation of the Covenant within the internal system of the state.

Since the reports are from states which cover all continents and thus a much wider spectrum of political ideologies, of economic, social and cultural situations and of constitutional and legal systems than would have been possible under regional instruments, the general comments adopted by the Human Rights Committee from this enormously varied and rich source of experience has been the result of extremely patient and extensive deliberations from the 18 experts who come from a wide variety of systems and countries. For this reason, these general comments are, from an unpretentious start, gradually being regarded as representing the best attainable standards of universality in the evolution of human rights norms.

The inter-state communications procedure at (c) above has not so far been engaged in the absence of any communication, but communications under the Optional Protocol have been quite substantial and the jurisprudence evolved by the Committee is growing in importance, both at the international level and the domestic level, in the case of states which are parties to the Optional Protocol. Over the last ten years, communications have been received from some 23 out of the 38 states that are parties to the Optional Protocol. It may very well be that individuals or even the legal profession in the remaining states are not aware of the Optional Protocol or of the fact that their countries are parties to it.

5. Emerging Jurisprudence on International Norms

As already noted in the part of this paper dealing with the content and sources of human rights norms, although the various regional instruments are all inspired from the Universal Declaration, they differ somewhat in substance, formulation and detail not only as between themselves but also as between themselves and the International Covenant on Civil and Political Rights. This part of the paper will deal only with the jurisprudence and standards evolved by the Human Rights Committee in the performance of its functions under the Covenant. Even then only some idea of its jurisprudence could be given in a paper of this kind, since the period covered is one of some 11 years and the number of cases placed before the Committee is 236 of which some 190 have been completed. Suffice it to indicate that the work of the Committee is recorded in the following among other documents:

(a) Official Records of the UN bearing General Assembly Supplement No. 40 for the years 1978 to 1987.

(b) Human Rights Committee Selected Decisions under the Optional Protocol No. CCPR/C/OP/1 obtainable from the Centre for Human Rights, UN, Geneva.

(c) "Application of the International Covenant on Civil and Political Rights" by A de Zayas, J Moller and T Opsahl published in the Canadian Human Rights Yearbook (1986). The first two authors are part of the Secretariat serving the Committee and Mr Ophsal was a member of the Committee for ten years and also a member of the European Commission.

(d) Periodic surveys in the Human Rights Law Journal (HRLJ) published by N P Engel in Strasbourg (France) and in Arlington (USA).

(e) Interights Bulletin published by INTERIGHTS of Kingsway Chambers, 46 Kingsway, London WC2B 6EN.

With regard to the question whether a communication is admissible or not, more or less the same rules apply to the ICCPR as to individual communications under the EHR. Briefly the rules regarding admissibility relate to:

(a) The standing of the author (Articles 1 and 2 of the Optional Protocol), i.e., the communication must emanate from the victim himself or, if he is unable to present the communication himself (if he e.g. is held incommunicado or has "disappeared") from a relative or next friend or else a legal representative. On the other hand, "busy-bodies" cannot submit communications on behalf of others. Any third party submitting a communication would have to justify his personal authority: J T v/s Canada (104/81), C and Ors v/s Italy (163/84);

(b) the violation complained of affects the victim and is not a complaint about law or practices in general which are alleged to violate human rights recognised under the Covenant. In other words, the Covenant does not recognise an actio popularis: Aumeeruddy-Cziffra and Ors v/s Mauritius (35/78); further the violation complained of must be supported by sufficiently precise factual averments: J H v/s Canada (187/85);

(c) The violation complained of was committed after the entry into force of the Covenant and the Optional Protocol with regard to the State Party concerned or else a previous violation continues to have effect after the date of entry into force, i.e., the ratione temporis rule: J Manera v/s Uruguay (123/82). There is not, as in Article 26 of the EHR, a limit of six months from the exhaustion of domestic remedies;

(d) The victim was at the time of the violation subject to the jurisdiction of the State Party against which the complaint is made. Territoriality or residence is not always a deciding factor as rights recognised under the Covenant may be violated even when the victim is outside the territory of the respondent State. This is the case where the right which is claimed to have been violated is regulated by the law of the state concerned e.g. the refusal by a state to renew the passport of a national who is abroad and who finds his freedom of movement thereby affected: Martins v Uruguay (57/79).

(e) The complaint is not already under investigation under another procedure of international investigation or settlement (e.g. the regional mechanisms): A Estrella v/s Uruguay (74/79), except where the complaint under the other procedure was by an unrelated third party without the authority of the alleged victim;

(f) The victim has exhausted all domestic remedies except when these remedies are ineffective or would require unreasonable delay. An extraordinary remedy of seeking the annulment of a decision of the Ministry of Justice would not qualify as an effective remedy within the meaning of Article 5(2)(b): Mulhonen v/s Finland (89/81);

(g) The subject matter of the complaint is not incompatible with the rights recognised under the Covenant, the ratione materiae rule : I M v/s Norway (129/82);

(h) The alleged violations are sufficiently supported by at least prima facie allegations, more or less the equivalent of the "manifestly ill founded" rule applicable under the European Convention.

Jurisprudence and standards on some of the substantive issues considered under the Covenant which may be mentioned relate to the rights referred to below.

Right to Life (Article 6). The general comments made by the Human Rights Committee reject a narrow interpretation of the right to life as not being restricted simply to the abolition of capital punishment. The Committee has interpreted the commitment undertaken by states under this Article to include, for example, a duty to take steps to reduce infant mortality, to eliminate malnutrition, to prevent epidemics and to banish weapons of destruction. These issues however, are not easily justiciable. With regard to the death penalty as a form of punishment, there is a resolution of the General Assembly (32/61) proclaiming that the objective is that of "progressively restricting the number of offences for which the death penalty may be imposed" until its eventual abolition. The Committee has observed that, while Article 6(2) and (6) does not require states to abolish capital punishment totally, they are obliged to limit its use and, in particular, to abolish it for other than the most serious crimes. Article 7 which is designed to prevent cruel and inhuman treatment would obviously also have an impact on the kind of offences for which the death penalty may be imposed. The Committee has further observed that the right to life cannot, under Article 4, be derogated from even during an emergency.

The cases that have come before the Committee have generally been violations of the right to life by law enforcement officials: (P Camargo v/s Columbia (45/79) or else by the phenomenon of "disappearances": Eduardo Bleier v/s Uruguay (30/78). In such cases, the Committee has held that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities since the state has a duty to protect life and that, where violations occur, there is a duty to establish what has happened and to bring the culprits to justice and to pay compensation.

Torture or Other Prohibited Treatment (Article 7). The numerous cases that have come before the Committee mostly concerned Uruguay, under its previous repressive regime, where victims were held incommunicado and were subjected to treatment outlawed under this Article and from which no derogations can be made even in times of emergency. It has sometimes been difficult to characterise particular treatment as amounting to torture or some other form of treatment and the Committee has on a few occasions applied this Article together with Article 10(1) which imposes an obligation to treat detainees with humanity and respect the inherent dignity of the human person: D Marais v/s Madagascar (49/79).

The Committee has issued a general comment about the obligations imposed upon states parties in addition to the enactment of legal provisions. Since violations occur in spite of legal provisions, the Committee has held that states must ensure effective protection through effective administrative machinery for control and special measures of investigation when complaints are made. Among other safeguards which may make controls effective are provisions against incommunicado detention, the allowing of visits to detainees by doctors, lawyers and relatives, the requirement that detainees should be held in places that are publicly recognised, measures requiring the names of the detainees and the places of their detention to be entered in a special register available to relatives and officials alike, provisions in the law or judicial practice making confessions or other evidence obtained as a result of violations of this Article inadmissible as evidence and, lastly, the effective training and instruction of law enforcement officials so as to ensure that they do not resort to this kind of treatment.

Right to Liberty and Security of Individuals (Article 9). The Committee has adopted a general comment on this Article indicating that paragraph one of the Article applies to all deprivations of liberty, whether in criminal or other cases such as mental illness, vagrancy, drug addiction, educational purposes, and immigration control, among others. The Committee has indicated that the individual must have a right in these cases to have the reasons for his or her detention investigated by a court and to be given compensation or other effective remedy in cases of a violation (Articles 2(3) and 9(5)).

Complaints have so far touched on three main aspects of the Article. Firstly, many communications have been made under Article 9(1) complaining of arbitrary arrest and detention, for example, without a warrant, release not having been effected promptly after an order to that effect: Soriano de Bouton v/s Uruguay (37/79), abduction in another country and bringing the victim over, the combined effect amounting to arbitrary arrest and detention: Lilian Celiberty v/s Uruguay (56/79) or detention for months without charge: Mbenge v/s Zaire (16/77). Secondly, some complaints have related to a failure to bring the victim to a judicial authority within a reasonable time either for the purposes of a trial or of a remand in custody, in breach of Article 9(3): Barbato v/s Uruguay (84/81) and Lueye v/s Zaire (90/81). Thirdly, some complaints have related to the unavailability of the remedy of habeas corpus or amparo to challenge the lawfulness of detentions (Article 9(4)): Fals Borda and Ors v/s Columbia (46/79).

Human treatment during detention, imprisonment (Article 10). In its general comment, the Committee has indicated that this Article requires positive action by the state to ensure humane treatment and is thus a supplement to Article 7 which prohibits torture and other like treatment. The Standard Minimum Rules for the Treatment of Prisoners adopted under the aegis of the UN is also relevant, but the scope of the Article is broad enough to ensure humane treatment.

Cases before the Committee have involved solitary confinement in small cells for prolonged periods: Marais v/s Madagascar (49/79) or else incommunicado detention over a prolonged period at an unknown place of detention: Romero v/s Uruguay (85/81).

The Right of an Alien not to be expelled arbitrarily from his Country of Residence (Article 13). In its general comment on this Article, the Committee has noted that it is applicable to all procedures leading to the obligatory departure of an alien, whether this departure is described in the national law of a state as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (Articles 9 and 10) may also be applicable. If the arrest is for the particular purpose of extradition, other provisions of national and international law would also apply. The Committee has also indicated that the Article applies only to aliens who are lawfully in states, but not illegal entrants or aliens who have overstayed their permits. However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his deportation ought to be taken in accordance with Article 13. Although the Article directly regulates only the procedure and not the substantive grounds for expulsion, nevertheless by recognising only those decisions carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions. The Committee has also understood from the nature of Article 13 that its provisions would not be satisfied by laws or decisions providing for mass or collective expulsions and that the procedures for appeal or review against expulsions may only be departed from when "compelling reasons of national security" so require.

Very few cases have been brought before the Committee concerning this Article. In one case, the Committee has held that, in order to determine whether an expulsion was effected in accordance with law, the Committee could not substitute itself for the national courts in the interpretation of national laws, unless there are indications that those laws were not applied in good faith or else that there has been an abuse of power: Anna Marafidou v/s Sweden (58/79).

The Right to a Fair Hearing (Article 14). This right constitutes the basic guarantee made available to the individual who, more often than not, is in an unequal situation vis-a-vis the state. It is not surprising that the Committee has made a general comment compromising about 20 paragraphs, which would be too long to reproduce. A few points may, however, be highlighted in conjunction with communications which have been considered. First, in view of the different words used for the term "suit at law" in the various language texts of the Covenant, the Committee has been faced with the difficulty of deciding to what extent this Article applies to proceedings of an administrative nature but which nevertheless involves a civil right, particularly, in common law systems where there is no strict division between administrative and civil jurisdiction. The

Committee decided to give a broad meaning to the term, in order to ensure to the individual a fair hearing where primary jurisdiction regarding the right that is in dispute has been conferred by statute to a tribunal other than a court of law where the right concerned is essentially a civil one: Y L v/s Canada (112/81). The Committee has further indicated that all the guarantees would apply not only where normal courts exercise jurisdiction but also where special courts, like military courts or tribunals, have jurisdiction.

Secondly, most of the cases in which the first paragraph has been invoked have in the past come from repressive regimes. Thus the Committee has found violations of Article 14(1), where the trial took place in camera or in the absence of the accused, or else where the judgment was not made public: Altesor v/s Uruguay (10/77), Cubas v/s Uruguay (70/80).

Thirdly, the Committee has found violations where, because of the conditions of his detention, an accused party could not have access to legal assistance or did not have adequate time and facilities to prepare his defence (Article 14(3)(b): Wight v/s Madagascar (115/82).

Fourthly, the Committee has held that the right to a review of a conviction or sentence as provided in Article 14(5) does not leave the existence of the right to review to be regulated by domestic law, but rather the modalities of the review: Salgar de Montego v/s Colombia (64/79). The Committee has further held that "the right under Article 14(3)(c) to be tried without undue delay should be applied in conjunction with the right under Article 14(5) to review by a higher tribunal and that, consequently, there was in this case a violation of these provisions taken together. The case in question, Pinkney v/s Canada (27/78), concerned a complaint that the exercise of an appellant's right of appeal had been prejudiced because the transcripts of the lower court's proceedings had taken two-and-a-half years to be produced.

The Right to Freedom from Interference with Privacy, Family, Home or Correspondence (Article 17). In one case where immigration laws provided less generous treatment to foreign husbands than to foreign wives, the Committee held that, since the common residence of husband and wife is normal, the exclusion of one of the spouses from a country where close members of the family normally live can amount to an interference within the meaning of Article 17(1), even though the spouse is an alien : Aumeeruddy Cziffra v/s Mauritius (35/78). In that case, the Committee considered that the precarious residence of a foreign husband amounted to an interference with the family life of his wife and, although this interference could not be described as "unlawful or necessarily arbitrary", nevertheless the position resulted from an adverse distinction based on sex, in violation of Articles 2(1) and 3 taken in conjunction with Article 17(1). In another case, Estrella v/s Uruguay (74/90), the Committee had occasion to hold that, although the authorities were entitled to exercise control over the correspondence of prisoners, that control had to be subject to legal safeguards against arbitrary application and that the degree of restriction exercised had to be consistent with the standard of humane treatment of detained persons as prescribed under Article 10(1).

The Right to hold Opinions and to Freedom of Expression (Article 19). Few cases have come before the Committee concerning this right. Violations of Article 19(2) have been found in a case where a person was detained for having disseminated information relating to trade union activities: Weiz v/s Uruguay (28/78) and in another case where a person had been arrested on a charge of subversive association and conspiracy, when in fact he had only been engaged in the conduct of political and trade union activities: Pietroroia v/s Uruguay (44/79).

In a general comment concerning this Article, the Committee has stressed that, under Article 19(3), the exercise of the right carries with it special duties and responsibilities and may be subject to restrictions which relate either to the interest of others or those of the community, but that, where restrictions are imposed, they may not put in jeopardy the existence of the right itself. Paragraph (3) lays down conditions and restrictions may only be imposed subject to those conditions. In any case, those conditions must be "provided by law" and must be justified as being necessary for one of the purposes described in Article 19(3) sub-paragraphs (a) or (b).

Freedom of Association (Article 22). The freedom of association of the individual under this Article includes in express terms "the right to form and join trade unions for the protection of his interests". In J B and Ors v/s Canada (118/82), members of The Alberta Union of Provincial Employees complained that a law depriving them of their right to strike constituted a breach by Canada of this Article. The Committee, by a majority, declared the communication inadmissible ratione materiae on the ground that the right to strike was not protected by the Covenant on Civil and Political Rights but by the Covenant on Economic, Social and Cultural Rights. The minority was of the opinion that, inter alia, in covering the "right to form and join trade unions", Article 22 expressly envisaged the purpose for which this right was to be exercised by the individual, i.e., "for protection of his interests" and that this necessarily included the means by which that protection could be achieved. Article 22 also expressly made provisions for the permissible limitations on the exercise of the right, but that was a question relating to the merits of the communication and not to its admissibility.

The Right of the Family to Protection (Article 23). In the case already referred to under Article 17 (Aumeeruddy Cziffra v/s Mauritius (35/78)), the Committee also considered the matter in the perspective of Article 23. The Committee held that a couple, the more so where there are children, constitutes a "family" and as such is "entitled to protection by society and the State". Although the content of that protection may vary from country to country depending on different social, economic and other conditions, the principle of equal treatment of the sexes applies by virtue of Articles 2(1), 3 and 26, the last of which is also relevant because it guarantees the "equal protection of the law". Where the Covenant requires a substantial protection of the kind referred to in Article 23, it follows that the protection must be equal and not discriminatory since the protection of the family cannot vary with the sex of the one or the other spouse. The Committee therefore found a violation of Articles 2(1), 3, and 26 of the Covenant in conjunction with Article 23(1).

Equality before the Law and Equal Protection of the Law (Article 26). The Committee had long been in doubt as to whether this Article guarantees merely formal equality before the law rather than substantive equality protected by the law. In a case: Zwaan de Vriez v/s The Netherlands (182/84), where the law granting social security rights treated men and women differently, the Committee came to the conclusion that the question at issue was not whether the Covenant on Civil and Political Rights imposed an obligation on states to provide social security but whether, where a state decided to institute a system of social security, it could do so in breach of Articles 2(1), 3 and 26 read together. In effect, the Committee considered that Article 26 imposed a code of behaviour on the state, whether in the exercise of its legislative, administrative or judicial activity.

6. Incorporation of International Norms into National Legal Systems

6.1 International law leaves it to states to adopt such legislative and other measures, consistent with their own constitutional processes, to give effect to the obligations which they undertake to implement and, more importantly, to ensure that any person whose rights or freedoms are violated have an effective remedy justiciable before independent and impartial tribunals. This is reflected in Article 2(2) of the Covenant on Civil and Political Rights.

Three main methods have generally been discussed for the implementation of the Covenant in domestic law:

(a) Direct incorporation of the rights recognised in the Covenant into what may be called a "bill of rights" in the national legal order.

(b) Enactment of different legislative measures in the civil, criminal and administrative laws to give effect to the different rights recognised in the Covenant.

(c) Self-executing operation of the Covenant in the national legal order.

Two sets of problems have bedevilled the question of implementation. The first of these arises from the fact that law-making powers are vested in Parliament and not the Executive, except to the extent that the latter has delegated powers. These powers may not, however, be exercised contrary to the Constitution and existing law. Furthermore, it is the Executive which enters into treaties. Such treaties therefore can only have legal effect to the extent that they have been implemented in one way or another in domestic law, since the Courts will only apply the law. Even in systems where the Constitution itself provides that a treaty which has been entered into in accordance with the constitutional processes will be binding internally, the problem still arises where there is an inconsistency between the Constitution and the treaty.

There is, in this regard, a difference in perspective between a domestic court and, for example, the Human Rights Committee established under the Covenant. Whereas the domestic court will pronounce on the constitutionality of legislative or other measures, the Committee has jurisdiction to pronounce on their (if I may coin a word) "covenantability"

or their consistency with the Covenant. In other words the Committee has jurisdiction to pronounce on the consistency of the national constitution itself with the Covenant. In practice, there need be no conflict between the two jurisdictions if the technique of interpretation is resorted to by the domestic jurisdiction so as to avoid any inconsistency with the treaty provisions. But this may not always be possible.

The second set of problems arises from the fact that treaty provisions are often general in character and need to be implemented by specific detailed provisions in the internal law. For example, the right to life, liberty and security of the person requires to be implemented not simply by a legal provision proclaiming the right but also by detailed provisions in the criminal, civil and administrative laws to provide appropriate remedies, sanctions and other measures designed to guarantee this right. In the same way, family, social, economic and other rights require a whole corpus of family codes, including welfare and industrial codes to ensure implementation which will, in turn, depend on the particular circumstances and traditions of each country.

6.6 For those states which are parties to, for example, the Optional Protocol, it is essential that the rights recognised in the Covenant should be given effect to in the legal system for two reasons. First, because of the rule relating to the exhaustion of domestic remedies, states thereby ensure that alleged violations are investigated in the first place, within their own internal system, and if need be, remedied. Secondly, the international control mechanism will have had the benefit of the thinking of the highest courts in the country against which violations are alleged.

In the case of those countries which are not parties to the Covenant, it is still relevant for the courts to ensure that generally accepted standards of human rights prevail since, by virtue of the obligations which states have undertaken under the UN Charter, they might still, in certain circumstances, be answerable to the various procedures established within the United Nations system in the perspective of the mandate of the General Assembly under sections 55 and 56 of the UN Charter.

One last thought needs perhaps to be expressed. Far too often in the past, the question of human rights at the international level has tended to be dealt with solely by foreign ministries, admittedly with the assistance of Home Office legal advisers. It is to be wondered whether that is enough. It is the courts which normally deal with the implementation of human rights or their violations at grassroots level. The time has perhaps come to ensure that the thinking of the judiciary should be tapped in a systematic way, and that it should be involved at the international level.

Implementing the Bangalore Principles on Human Rights Law*

by the Hon Justice Michael Kirby, CMG**

THE BANGALORE PRINCIPLES

In February 1988, in Bangalore, India, a number of principles were adopted concerning the role of the judiciary in advancing human rights by reference to international human rights norms. The principles were stated at the end of a judicial colloquium brought together by Justice P N Bhagwati, the former Chief Justice of India. The participants in the colloquium included the Chief Justice of Zimbabwe (Dumbutshena CJ) who has now taken the initiative of organising this colloquium of African judges. As in the case of the Bangalore meeting, the organisational skills of the Legal Division of the Commonwealth Secretariat have proved indispensable to bringing the meeting about. When the Bangalore Principles were formulated, the participants also included high judicial officers from India, Pakistan, Papua New Guinea, Mauritius, Sri Lanka, Malaysia, the United Kingdom and the United States of America. I attended from Australia. The meeting was not an exclusively Commonwealth affair as the participation of judges from Pakistan and the United States shows. The link between us was the link of the common law.

The idea of the Bangalore meeting - and of this meeting in Harare - is to plant the seed of a very simple idea. In the world of jumbo jets, telecommunications and nuclear fission, it is vital that civilized leaders should contribute to, promote and stimulate an internationalist approach to common problems. International law must be seen not as a remote compilation of high sounding rules, political in character addressed to governments and not to people. It must be seen rather as the rules of humanity, defined by experts and deriving authority from international agencies and multi-national acceptance. In such a world, it becomes the duty of the judges in domestic courts, dealing with the practical problems of litigants before them, to endeavour, so far as possible, to bring their decisions into harmony with

the developing body of international law. To do this, judges must become familiar with that body of law. Because many decisions in our busy courts depend upon the arguments which lawyers place before judges, it is also necessary in law schools, and in continuing education, that practitioners of the law should become familiar with the growing body of international law.[1] Of course, judges owe their first duty to their local constitutions and to the statutes and common law applicable in their own jurisdictions. Save possibly for Crimes against Humanity, there is no warrant for a local judge to override the constitutional or other laws of the jurisdiction which he or she is sworn or affirmed to uphold.

This said, the Bangalore Principles recognise that, particularly in common law countries, judges typically have a wide leeway for choice in many decisions which they have to make. True, it is not always so. Sometimes the law is clear and the facts require but one outcome to a case. In such a circumstance, the judge's duty is plain, whatever may be the strictures of international law or of internationally accepted human rights norms. However, it is now increasingly recognised that the law is rarely so mechanical. Many are the choices which judges must make whether in developing the common law[2] or in giving meaning to statutes which are ambiguous.[3] The judge works with words. The English language, so rich in literature, is frequently ambiguous - a treasure-house of multiple meanings. In part, this is so because of the fact that, following the Norman Conquest, English became the marriage of two linguistic streams: the one Germanic and the other Romance. Ambiguity and uncertainty of meaning frequently give rise of the judge's opportunity. This is not an opportunity to indulge idiosyncratic opinions. Still less is it an occasion to fall prey to the temptations of social engineering by reference to a pre-conceived strategy. But is is important for judges, especially, to recognise the opportunities for choice and the obligations and responsibilities which those opportunities place upon them.

Once it was faithfully taught that the judicial task was almost exclusively automatic and mechanical in nature. But now, judges, scholars and other academics throughout the common law world teach otherwise.[4] They have done so with increasing conviction since Lord Reid in 1972 asserted that the declaratory theory of judicial decision-making was a "fairytale".[5]

Upon some subjects which come before domestic courts international law has little, if anything, to say. But one topic upon which a growing body of international law has developed since the Second World War has been that of human rights. The process which has occurred is well described by Stephen J, in the High Court of Australia, in these terms:

> "The post-war history of this new concern is

illuminating. The present international regime for the protection of human rights finds its origin in the Charter of the United Nations. Prominent in the opening recitals of the Charter is a re-affirmation of 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women'. One of the purposes of the United Nations expressed in its Charter is the achieving of international co-operation in promoting and encouraging 'respect for human rights and for fundamental freedoms for all without distinction as to race...' Ch 1, Art, 1:3; see too Ch IX Art, 55(c). By Ch IX, Art 56 all member nations pledge themselves to take action with the Organisation to achieve its purposes. The emphasis which the Charter thus places upon international recognition of human rights and fundamental freedoms is in striking contrast to the terms of the Covenant of the League of Nations, which was silent on these subjects. The effect of these provisions has in international law been seen as restricting the right of member States of the United Nations to treat due observance of human rights as an exclusively domestic matter. Instead the human rights obligations of member States have become a 'legitimate subject of international concern': Judge de Aréchaga, Recuil des Cours, vol 178 (1978) at p 177. Sir Humphrey Waldcock, also a judge of th International Court of Justice, had earlier noted this development in Recuil des Cours, vol 106 (1962) p 200. To the same effect are Lauterpacht's comments in International Law and Human Rights (1950), pp 177-178 and those in Oppenheim's International Law 8th ed (1958) vol 1 p 740. The views of other distinguished publicists are summarised in Schwelb in 'The International Court of Justice and the Human Rights Clauses of the Charter', American Journal of International Law, vol 66 (1972) 337 at pp 338, 341. He concludes at p 350 that the views of Lauterpacht and others on the effect of the human rights provision of the Charter were affirmed by the Advisory Opinion of the International Court in the Namibia case [1971] ICJ at p 51.... These matters having, by virtue of the Charter of the United Nations become at international law a proper subject for international action. There followed in 1958 the Universal Declaration of Human Rights and thereafter many General Assembly resolutions on human rights and racial discrimination ... There have also been various regional agreements on human rights, perhaps the

leading example being the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950."

To the regional agreements on human rights which Stephen J mentioned, he could now have added the African Charter of Human and Peoples' Rights which has lately come into force with the deposit of the requisite number of ratifications.[7]

This brief sketch of the background to the development of international human rights law is essential to an understanding of the milieu in which judges in domestic jurisdiction today operate. It would, of course, be possible for those judges completely to ignore the developments of international law. They could leave it to their legislatures to provide, in domestic legislation, for the local operation of the international law rule, giving no credence to the international law rule in the meantime. There are still many lawyers in the common law world who would adhere to this opinion.

The thesis of the Bangalore Principles was not that international legal norms on human rights are ipso facto incorporated as part of domestic law. Still less was it that domestic judges could override clear domestic law by reference to such international norms. But it was that judges should not ignore the international rules, safe in their parochialism. Instead, they should become familiar with the international norms. And when appropriate occasions present, either in the construction of an ambiguous statute or in the declaration and extension of the common law, they should attend to the international norms in the course of performing their duties.

If there is a choice, as is now increasingly recognised in studies of the judicial function, that choice must be made by reference to criteria. If the criteria are to be more than the whims of a particular judge, the last minute thoughts of busy barristers presenting the case or ideas snatched, often out of context, from earlier judicial decisions upon different topics, it is important to provide the judge with a coherent body of principle by which to make his or her choice on relevant occasions. The thesis of the Bangalore Principles is that, in matters touching human rights, judges do well to consider the implications of international human rights norms. In them will usually lie the wisdom of scholars and other experts, the consensus of representatives from many nations and the guidance of distilled human experience.

I do not say that every nation obeys the fine principles adopted in the many international declarations now made on human rights questions. I do not say that fine words alone are enough. Nor do I overlook the fact that, quite

frequently, such international statements appear in language of such generality as to give little immediate practical guidance for the resolution of a particular case. Often they leave a great deal of the content to be determined by the individual decision-maker. But not infrequently, the international instrument will provide an indication - pointing the decision-maker in the right direction. It will frequently be a direction of fundamental principle. Human rights, being universal in character inhere in the very nature of humanness. This is why we, the judges, do well to keep our eyes on fundamentals. Those fundamentals include the human rights principles which are finding their way into the body of international law. The ignorance in the legal profession, and let it be said, in the judiciary of most common law countries, concerning this large and growing body of international jurisprudence is alarming. One of the practical purposes of the Bangalore Principles was to turn this tide of ignorance. It was to put the basic principles on the shelf of every judge so that they are at the judge's elbow to be used whenever the occasion arises. The purpose of this paper is to demonstrate how this is happening - and how it can be done by all of us.

PART OF LOCAL LAW?

It is important to recognise clear-sightedly the fact that the noting of such an indirect incorporation of international human rights norms into domestic lawmaking will engender resistance in some quarters. The traditional view adopted in common law countries which have derived their legal tradition from England other than the United States of America is that international law is not part domestic law. This traditional view has been expressed in the High Court of Australia in a number of cases.[8] Dixon J said in 1948 that the theory of Blackstone in his Commentaries[9] that:

> "The law of nations (whenever any question arises which is properly the object of its jurisdiction) is here (i.e. in England) adopted to its full extent by the common law, and is held to be part of the law of the land."

was now regarded as being "without foundation".[10]

More recently the present Chief Justice of Australia, then Mason J, put it this way[11]:

> "It is a well stated principle of common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law by its ratification by Australia. ... In this respect Australian law

> differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress. Foster v Neilson 2 Pet. 253 at 314; 27 US 164, 202 (1829). As Barwick CJ and Gibbs J observed in Bradley v The Commonwealth (1973) 128 CLR at DP 582-3, the approval by the Commonwealth Parliament of the Charter of the United Nations in the Charter of the United Nations Act 1945 (Cth) did not incorporate the provisions of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law whether by Commonwealth or State statute. Section 51(xxix) [the external affairs power] arms the Commonwealth Parliament with the necessary power to bring this about. ...[That] power enables the Commonwealth Parliament to legislate so as to incorporate into our law the provisions of [international] conventions."

The differing approach to the direct application of international law in domestic law of the United States can probably be explained by the powerful influence of Blackstone's Commentaries upon the development of the common law in that country after the Revolution. Cut off from the English courts, judges and lawyers were sent back to Blackstone and other general text writers for guidance of principle. In many respects, the common law in the United States remains truer to the principles of the common law of England at the time of the American Revolution than does the common law in the countries of the Commonwealth. Both by reception and legal tradition those countries have tended to follow more closely the dynamic developments of legal principles in England well into the 20th century. That is certainly the case in Australia.

But it is not simply legal authority which is called in aid to justify the necessity of positive enactment by the domestic lawmaker to bring an international legal norm into operation in domestic jurisdiction. At least two arguments of legal policy are usually invoked. The first calls attention to the different branches of government which are involved in the processes of effecting treaties which make the international law and making local law. Treaties are made on behalf of a country by the Crown or the Head of State. This fact derives from history and the time when international relations were truly the dealings between sovereigns. But that history is now supported by the necessity to have a well identified single and decisive voice to speak to the international community on behalf of a nation. Hence the role of the Crown or its modern equivalent, in negotiating, singing and ratifying treaties.

In the modern state the Crown or its equivalent is normally symbolic. It represents, in this connection, the Executive Government. Thus, it is the executive branch of government which is, virtually without exception, involved in the international dealings of a modern state. This is so nowadays for the reason that international dealings are difficult enough without having to treat with the numerous factions and interests typically present in the legislative branch of government of any country.

In some countries there may be little or no tension between the executive and the legislative branches of government. But in many countries there is a tension. For example, in Australia it is rare for the Executive Government, elected by a majority of representatives in the Lower House of Federal Parliament, to command a majority in the Upper House. At present, the Australian Government must rely upon the support of minority parties to secure the passage of its legislation through the Senate. Accordingly, it is perfectly possible for the Executive Government to negotiate a treaty which would have the support of the Executive and even of the Lower House but not of the Upper House of Parliament. The objects of a treaty, ratified by the Executive Government may be rejected by the Senate. Legislation to implement a treatment, if introduced, might be rejected in the Senate. It might thus not become part of domestic law as such. If, therefore, by the procedure of direct incorporation of international legal norms into domestic law, a change were procured this would be to the enhancement of the powers of the Executive. It would diminish the powers of the elected branch of government, the legislature. As the Executive may be less democratically responsive than the legislature, in its entirety, care must be taken in adopting international legal norms incorporated in treaties that the democratic checks necessitated by a requirement of legislation to implement the treaty, are not bypassed.

There is an old tension between the Crown [today the Executive] and Parliament. That tension exists in many fields. One of them is in the responsibility for foreign affairs and treaties. In the development of new principles for the domestic implementation of international human rights norms, it is important to keep steadily in mind the differing functions of the Executive and of the legislature respectively in negotiating treaties and making domestic law.

A second reason for caution is specifically relevant to federal states. There are many such states in the Commonwealth of Nations.[12] Speaking of the division of responsibilities in respect of lawmaking in such states, in the context of treaties and legitimate matters of international concern, the Privy Council in 1937, writing of the Canadian constitution said this:[13]

> ... In a Federal State where legislative

> authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several legislatures; and the Executive has the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how the obligation is formed, that is the function of the Executive; but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures."

This particular problem for the domestic implementation of international norms expresses in treaties is one which arises in all federal states. In the context of the Australian Federation the difficulty posed is well appreciated. Thus, in New South Wales v The Commonwealth, Stephen J said:[14]

> "Divided legislative competence is a feature of Federal Government that has, from the inception of modern Federal States, been a well recognised difficulty affecting the conduct of their external affairs... Whatever limitation the Federal character of the constitution imposes on the Commonwealth's ability to give full effect in all respects to international obligations which it might undertake, this is no novel international phenomenon. It is no more than a well recognised outcome of the Federal system of distribution of powers and in no way detracts from the full recognition of the Commonwealth as an international person in international law."

The fear that is expressed, in the context of domestic jurisdiction of federal states, is that the vehicle of international treaties (and even of the establishment of international legal norms) may become a mechanism for completely dismantling the distribution of powers established by the domestic constitution. this was the essential reason behind the dissenting opinion of Gibbs CJ in an Australian case concerning the Racial Discrimination Act 1975. That statue was enacted by the Federal Parliament to give effect to the International Convention on the Elimination of all Forms of Racial Discrimination. Australia is a party to that Convention. Gibbs CJ (who on this issue was joined by Wilson and Aickin JJ) expressed the fear that if a new federal law on racial discrimination could be enacted based upon such a treaty - simply because it was now a common concern of the

community of nations - this would intrude the federal legislature in Australia into areas which, until then, had traditionally been regarded as areas of State lawmaking. Such approach would allow "no effective safeguard against the destruction of the federal charter of the constitution".[15]

The majority of the High Court of Australia held otherwise. It upheld the validity of the Racial Discrimination Act. But the controversy posed by minority opinion is important in the present context. In federal states at least it must be given weight. The question is poses is this: if judges by techniques of the common law introduce principles of an international treaty or of other international human rights norms into their decision-making, may they not thereby obscure the respective lawmaking competences of the federal and state authorities? An international human rights norm may have been accepted by the Federal authority. But it may accept a principle which is not congenial to the State lawmakers. In these circumstances, should the judge simply wait until the local lawmaker, within constitutional competence, has enacted law on the subject? Should the judge wait until the federal lawmaker has enacted a constitutionally valid law on the subject? Or is the judge authorised to cut through this dilatory procedure and to accept the principle for the purpose of interpreting ambiguous statutes or developing local common law?

These are not entirely academic questions, at least in Australia. There has been a large debate in Australia over more than a decade concerning whether there should be adopted a statutory or constitutional Bill of Rights such as is now common in most parts of the world and many parts of the Commonwealth. The Australian constitution when enacted in 1901 included relatively few such rights. Proposals to incorporate them have not found popular favour. A referendum in 1988, for the purpose of incorporating provisions on freedom of religion and for just compensation for compulsory acquisitions of property in some circumstances failed overwhelmingly. Many people in Australia believe that Bills of Rights are undemocratic and that the assertion and elaboration of rights is a matter for the democratic Parliament not for unelected judges. This is not an eccentric view. Whether one accepts it or not, it has legitimate intellectual support including amongst lawyers.[16]

It is in the context of such debates that differences arise concerning the legitimacy of judges picking up internationally stated human rights norms and incorporating them in domestic law. If the people will not accept a Bill of Rights at an open referendum, do judges have the entitlement to adopt them by an indirect method, from statements in international instruments?

IT IS A SOURCE OF LAW

Judges do make law. They make law just as surely as the Executive and the legislature make law. The foregoing concerns are reasons for judges, in referring to international human rights or other legal norms, to attend carefully to the dangers which may exist in indiscriminately picking up a provision of an international instrument and applying it as if it had the authority of local law:

(i) Unless specifically implemented by domestic lawmaking procedures, the international norm is not, of itself, part of domestic law;

(ii) The international instrument may have been negotiated by the executive Government and may never be enacted as part of the local law either because:

  (a) The Executive Government which ratified it does not command, upon the subject matter, the support of the legislature to secure the passage of a local law on the same subject; or

  (b) In a federal state, the Executive which negotiated the treaty may for legal reasons, political reasons or conventions concerning the distribution of power within the Federation not have the authority or desire to translate the norms of the international instrument into authentic and enforceable rules having domestic legal authority; or

(iii) The subject matter of the international instrument may be highly controversial and upon it there may be strongly held differences of view in the local community. In such an event the judge, whether in construing ambiguous legislation or stating and developing the common law, may do well to leave domestic implementation of the international norm to the ordinary process of lawmaking in the legislative branch of government.

These cautions having been stated, they do not provide a reason to doubt the legitimacy of the Bangalore Principles. It cannot now be questioned that international law is one of the sources of domestic law. So much was said as long ago as 1935 by Professor J L Brierly.[17] It has been accepted in Australia by the High Court of Australia.[18] In the time of the British Empire, the Privy Council accepted that domestic courts would, in some circumstances at least, bring the common law into accord with the principles of international law.[19]

Commenting on the advice of the Privy Council in the case just mentioned, the biographer of Lord Atkin (who delivered the judgement of the Board) wrote:

> "Lord Atkin's advice in this case is remarkable for its erudition. Because the subject matter was international law, the relevant rule neither need nor could be proved in the same way as rule of foreign law. The range of inquiry is necessarily wider; and here there is a far-ranging discussion of legal writings. Atkin placed most reliance of the decision of Chief Justice Marshall in Schooner Exchange v M'Fadden 7 Cranch 116, a judgment which he said 'has illuminated the jurisprudence of the world'. But he also made reference to evident enjoyment but the debate which took place in 1875 on the treatment of fugitive slaves and which was started by a letter to The Times from the Whewell Professor of International law. ... In the course of his judgment Atkin said:
>
> > 'It must always be remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save insofar as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statute or fully declared by their tribunals.'[20]

This statement provoked a number of fears on the part of academic writers at the time.[21] However, I agree with Atkin's biographer that the commentators misunderstood what Atkin had said. what he said is guidance for us in approaching the Bangalore Principles. The rules are simple -

(i) International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;

(ii) It does not become part of such law until Parliament so enacts or the judges (as another source of lawmaking) declare the norms thereby established to be part of domestic law;

(iii) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty - even one ratified by their own country;

(iv) But if an issue of uncertainty arises [as by a lacuna in the common law, obscurity in its meaning or ambiguity in a relevant statute] a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and

(v) From this source of material, the judge may ascertain what the relevant rule is. It is the action of the judge, incorporating that rule into domestic law, which makes it part of domestic law.

There is nothing revolutionary in this, as a reference to Lord Atkin's advice demonstrates. It is a well established principle of English law which most Commonwealth countries have inherited and will follow. But it is an approach which takes on urgency and greater significance in the world today.

In 1936 in the High Court of Australia, Evatt and McTiernan JJ wrote of the growing number of instances and subject matters which were, even then, properly the subject of negotiation amongst countries and which resulted in international legal norms:[22]

> "It is a consequence of the closer connection between the nations of the world (which has been partly brought about by the modern revolutions in communication) and of the recognition by the nations of a common interest in many matters affecting the social welfare of their peoples and of the necessity of co-operation among them in dealing with such matters, that it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement."

If this was true in 1936 how much more true is it today? Not only have the revolutions in communication proceeded apace to reduce distance and to enhance the numerous features of the

global village. We have, since 1936, seen the destruction during the Second World War, the terrible evidence of organised inhumanity during the Holocaust, the post-War dismantlement of the colonial empires, the growth of the United Nations Organisation and numerous international and regional agencies, the advent of the special peril of nuclear fission and the urgent necessity of arms control over weapons of every kind. The wrongs of racial discrimination, apartheid and other forms of discrimination against people on the basis of immutable characteristics of such people, endanger the harmony of the international community. They also do offence to individual human rights. They are therefore of legitimate concern of all civilized people. That includes judges. Judges must do their part, in a creative but proper way, to push forward the gradual process of internationalisation which the developments just mentioned clearly necessitate. This is scarcely likely to imperil the sovereignty of nations and the legitimate diversity of communities and cultures throughout the world. But it is likely to enhance, in appropriate areas, the common approach of judges in many lands to problems having an international character. Human rights represent one such field of endeavour. This is so because many cases coming before courts in every country raise questions of human rights. they are therefore the legitimate concern of lawyers and judges.

HOW TO DO IT

Keeping the problems which have been mentioned in mind, it is appropriate for judges and lawyers nowadays to have close at hand the leading international instruments on human rights norms. These include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Convention for the Elimination of all Forms of Racial Discrimination. There are many other such instruments.

In Australia the process of making reference to these instruments, in the course of domestic decision-making, really began in the last decade. Leadership was given in this respect by Murphy J of the High Court of Australia. A number of his decisions can be cited as illustrations.

In Dowal v Murray & Anor [23] Murphy J came to a conclusion about the constitutionality of a provision relating to custody of children by making reference to two treaties to which Australia was a party. One, the International Covenant on Economic, Social and Cultural rights, provides for the recognition of special measures for the protection and assistance of children and young persons without any discrimination for reasons of parentage. The other, the International Covenant on Civil and Political Rights contains

in article 24 a provision relevant to the rights of the child.

In McInnis v The Queen,[24] Murphy J wrote a powerful dissent concerning the right of a person charged with a serious criminal offence to have legal assistance at his trial. In his judgment he referred to the provisions of the International Covenant on civil and Political Rights, article 14(3).[24] This provided the intellectual setting in which he sought to place an understanding of the way in which the common law of Australia should be understood and should develop.

In Koowarta v Bjelke-Petersen[26], Murphy J examined the Racial Discrimination Act 1975 in the context of the "concerted international action" taken after the Second World War to combat racial discrimination. He traced this action through the United Nations Charter of 1945, the work of the Commission on Human Rights established by the United Nations in 1946, the Universal Declaration of Human Rights adopted in 1948 by the General Assembly and the International Covenants. He asserted that an understanding of the "external affairs" power under the Australian Constitution could only be derived by seeing Australia today in this modern context of international developments and international agencies capable of lawmaking on a global scale.

In the Tasmanian Dams case[27] the members of the High Court of Australia had to consider the operation in Australian law of a UNESCO Convention. It is now tolerably clear that by the time at least of this decision, a majority in Australia's highest court had come to recognise the importance of ensuring that the Australian Federal Parliament had the power to enact legislation or matters which by now had become legitimate subjects of international concern.
The procedure of referring to international legal norms, particularly in the field of human rights, is gathering momentum in many countries. Two recent instances in England deserve mention. In 1987 courts in England, Australia and several other jurisdictions were confronted with the proceedings by which Attorney General of England and Wales sought to restrain the publication of the book Spycatcher. I participated in a decision of the New south Wales Court of Appeal refusing that relief.[28] Our decision was later confirmed on appeal by the High Court of Australia. Neither in the High Court nor in the Court of Appeal was the argument presented in terms of the conflict between basic principles about freedom of speech and freedom of the press (on the one hand) and duties of confidentiality and national security (on the other). But in the English courts the fundamental principles established by the European Convention on Human Rights (to which the United Kingdom is a party) were in the forefront of the arguments of counsel and the reasoning of the judges. In Attorney General v Guardian Newspapers

Limited & Ors (No 2) [29] both the trial judge (Scott J)[30] and the Judges of the Court of Appeal were at pains to demonstrate that their decisions were consistent with the obligations of the United Kingdom under the European Convention and the decisions thereon of the European Court of Human Rights. Counsel for the Attorney General argued that the judgments of the European Court did not bind an English Court concerning the construction of the relevant provisions of the Convention. Scott J concluded:

> "But if it is right to take into account the government's treaty obligations under article 10, the article must, in my view, be given a meaning and effect consistent with the rulings of the court established by the treaty to supervise its application. Accordingly, in my judgment, Mr Lester is entitled to invite me to take into account article 10 as interpreted by the two judgments of the European Court that I mentioned. These authorities establish that the limitation of free speech and the interests of national security should not be regarded as 'necessary' unless there is a 'pressing social need' for the limitation and unless the limitation is 'proportionate to the legitimate aims pursued'.[31]

In the Court of Appeal Sir John Donaldson MR (as the Master of the Rolls was) likewise acknowledged the importance of bringing English domestic law into line with the European Convention:[32]

> "The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law including the law of contract, or by statute. ... The substantive right to freedom of expression contained in article 10 [of the European Convention] is subsumed in our domestic law in this universal basic freedom of action. Thereafter, both under our domestic law and under the Convention, the courts have the power and the duty to assess the 'pressing social need' for the maintenance of confidentiality 'proportionate to the legitimate aim pursued' against the basic right to freedom of expression and all other relevant factors. ... For my part I can detect no inconsistency between our domestic law and the Convention. Neither adopts an absolute attitude for or against the maintenance of confidentiality. Both contemplate a balancing of competing private and public interests."

There were similar considerations of the European Convention by Dillon LJ[33] and by Bingham LJ[34]

It might be said that the particular English consideration of the European Convention arises from the fact that the United Kingdom may be taken to the European Court of Human Rights by any citizen of that country with standing to complain about the disharmony between the English law and the obligations of the Convention. Doubtless, this entitlement, together with the numerous cases in the European Court of Human Rights in which the United Kingdom has been held to be in breach of the Convention, explains the growing willingness of the English courts to attend to the convention and the developing jurisprudence which has built up around it.[35] However, whilst this may provide a practical explanation for the heightened sensitivity of English judges to the provisions of the European Convention, it does not affect the legal status, in England, of the Convention or its jurisprudence. So far as English domestic law is concerned, that status is precisely the same (federation apart) as the status in Australia of the International Covenant on Civil and Political Rights. Neither the European Convention nor the International Covenant are, as such, part of domestic law. Each is a source for domestic law. The point being presently made is that the English courts are increasingly looking to the source and deriving guidance from it for decisions on the content of domestic law.

Another recent case in England also demonstrates this trend. In In re K D (a minor) (Ward: Termination of Access)[36], the House of Lords in 1988 had to consider an order terminating parental access to a ward of court. The mother appealed. She asserted that, unless access were affirmed as a parental right, English law would deny a parent a fundamental human right recognised by the European Convention. This argument was not met by the judges with the assertion that the European Convention was not part of English law and that its requirements were therefore irrelevant to the determination of that law. Instead, their Lordships took pains to reconcile their opinion (which was to dismiss the appeal) with consistency with the European Convention and the European Court of Human Right's view of its requirements. Lord Oliver of Aylmerton gave the judgments of their Lordships. He asserted that:[37]

> "such conflict as exists is ...semantic only and lies in differing ways of giving expression to the single common concept that the natural bond and relationship between parent and child gives rise to universally recognised norms which ought not be gratuitously interfered with and which, if interfered with at all, ought to be so only if the welfare of the child dictates it. ... [T]he description of ... familial rights and privileges enjoyed by parents in relation to

> their children as 'fundamental' or 'basic' does nothing in my judgment to clarify either the nature or the extent of the concept which it is sought to describe."

These and many other recent cases demonstrate the growing care that is paid in the United Kingdom to ensure that the international human rights norms established by the European Convention on Human Rights are translated into practical operation in the day to day business of the courts. Not only in leading cases but many other instances, the English courts have taken pains to bring English law into harmony with international human rights norms.[38] The same should happen in other Commonwealth countries.

RECENT AUSTRALIAN EXPERIENCE

In Australia, the steps towards a similar movement have been taken somewhat more cautiously. This may partly be explained by the Federal nature of the Australian constitution and the limited power which, it has long been assumed, the Federal Executive and Federal Legislature have over international treaties and participation in international lawmaking where this would conflict with the "basic structure" of the Australian constitution That assumption must itself now be reconsidered in the light of recent decisions of the High Court to some of which I have referred.[38]

I have already mentioned the initiatives taken by Murphy J during the late 1970s and early 1980s to call attention to relevant international human rights norms. Now other Justices of the High Court of Australia are beginning to do likewise. In J v Lieschke[40], Deane J had to consider the right of a parent to participate in proceedings which affected the custody of a child. He denied that the interests of the parents in such proceedings were merely indirect or derivative in nature:

> "To the contrary, such proceedings directly concern and place in jeopardy the ordinary and primary rights and authority of parents as the natural guardians of an infant child. True it is that the rights and authority of parents have been described as 'often illusory' and have been correctly compared to the rights and authority of a trustee (see e.g. the Report by Justice, the British Section of the International Commission of Jurists, Parental Rights and Duties and Custody Suits (1975) pp 6-7 ... Regardless, however, of whether the rationale of the prima facie rights and authority of the parents is expressed in terms of a trust for the benefit of the child, in terms of the right of

> both parent and child to the integrity of family life or in terms of the natural instincts and functions of an adult human being, those rights and authority have been properly recognised as fundamental (see e.g. Universal Declaration of Human Rights, Arts. 12, 16, 25(2) and 26(3) and the discussion (of decisions of the Supreme Court of the United States) in Roe v Conn 417 F Supp 769 (1976) and Alsager v District Court of Polk County, Iowa 406 F Supp 10 (1975). They have deep roots in the common law."[41]

Deriving authority for fundamental principles (both of the common law and of international human rights norms) by reference to international treaties is now increasingly occurring in Australian courts.

In Daemar v The Industrial Commission of New South Wales & Ors a question arose before me as to whether the Bankruptcy Act 1966 enacted that proceedings for the vindication of a public right were stayed during the bankruptcy of the petitioner. There was no doubt that he had been made bankrupt. He wished to bring proceedings, prerogative in nature, against a court of limited jurisdiction which had made an order against him. For default of compliance with that order (which he wished to challenge) he had been made bankrupt. He asserted that he should be entitled to argue the point concerning the jurisdiction of the Court, notwithstanding his supervening bankruptcy. The Court held that the provision of the Federal Bankruptcy Act providing for a stay in the event of bankruptcy was unambiguous. In the course of my judgment, by reference to the International Covenant on Civil and Political Rights, I expressed the opinion that, were the statute not unambiguous, the importance of a right of access to the courts would have suggested a construction that limited the effect of the statutory stay:[42]

> "The importance of an action for relief prerogative in nature for the vindication of duties imposed by law, the observance of which the Court supervises, needs no elaboration. 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 invoked where the allegation is made that public officials have not performed their legal duties or have gone beyond their legal powers. This starting point in the approach by a court to the construction of the Act derives reinforcement from the International Covenant on Civil and Political Rights: see articles 14.1 and 17. Australia has ratified that covenant without relevant reservations.

> The entitlement of persons with a relevant interest to invoke the protection of the courts to ensure compliance with the law is so fundamental that the Act would be interpreted, whenever it would be consonant with its language, so as not to deprive a person of that entitlement."[43]

The other judges of the Court did not refer to the International Covenant. But I took it as a touchstone for indicating the basic matters of approach which should be taken by the Court in tackling the construction of the statute. Had there been any ambiguity, the Covenant provisions would have encouraged me (as would the equivalent rules of construction in the common law) to adopt an interpretation of the Bankruptcy Act which did not deprive the individual of the right to challenge in the Court, the compliance of the Act complained of with the law.

In S and M Motor Repairs Pty Limited & Anor v Caltex Oil (Australia) Pty Limited & Anor[44] a question arose as to whether a judge should have disqualified himself for reasonable apprehension of bias. It was discovered after the case was underway that the judge had, whilst a barrister two years earlier, been for many years on a retainer for the companies closely associated with the plaintiff. That company was seeking various remedies, including punishment for contempt against a subcontractor who was alleged to have breached a contract and a court order based on it. The judge was asked to stand aside. He declined to do so. The subcontractor was convicted of contempt. He appealed. The case raised important questions concerning judicial disqualification for the appearance of bias.

In the course of giving my minority opinion, to the effect that the judge ought to have disqualified himself in the circumstances, I referred to the importance of having a court manifestly independent and impartial.[45]

> "It would be tedious to elaborate the antiquity and universality of the principle of manifest independence of the judiciary. It is axiomatic. It goes with the very name of a judge. It appears in the oldest books of the Bible: see e.g. Exodus 18 : 13-26. It is discussed by Plato in his Apology. It is elaborated by Aristotle in The Rhetoric, Book 1, Chapter 1. It is examined by Thomas Aquinas in part 2 of the Second Part (Q 104 AA2) of Summa Theologica. It is the topic of Lambent Prose in the Federalist Papers ... In modern times it has been recognised in numerous national and international statements of human rights. For example, it is accepted in Article 14.1 of the

International Covenant on Civil and Political Rights to which Australia is a party. That article says, relevantly:

> '14.1 All persons shall be equal before the courts and tribunals. In determinations of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law.'"

Again, the International Covenant became for me a starting point in the statement of principles which placed in context the dispute between the parties. It provided an international setting for the issues involved in the dispute.

In Jago v District Court of New South Wales & Ors[46] the question arose as to whether, under the common law of the State, a person accused of a criminal charge had a legally enforceable right to a speedy trial. There had been a delay of many years in bringing the accused to trial and he sought a permanent stay of proceedings. A majority of the Court (Samuels JA and myself) held that whilst there was a right to a fair trial, there was no right, as such, under statute or common law to a speedy trial. Speed was however an attribute of fairness. McHugh JA (now a Justice of the High Court of Australia) held that the common law did provide a right to speedy trial. Both Samuels JA and I referred to the provisions of the International Covenant on Civil and Political Rights.

A great deal of time in the Court was taken exploring ancient legal procedures in England back to the reign of King Henry II. In Independent Australia in 1988, this seemed to me a somewhat unrewarding search. I wrote:

> "I regard it to be at least as relevant to search for the common law of Australia applicable in this State with the guidance of a relevant instrument of international law to which this country has recently subscribed, as by reference to disputable antiquarian research concerning the procedures that may or may not have been adopted by the itinerant justices in Eyre in parts of England in the reign of King Henry II. Our laws and our liberties have been inherited in large part from England. If an English or Imperial statute still operates in this State we must give effect to it to the extent provided by the Imperial Acts Application

Act 1969 ... but where the inherited common law. One such reference point may be an international treaty which Australia has ratified and which now states international law.

The International Covenant on Civil and Political Rights contains in Art 14.3 the following provisions:

> '14.3 In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality:
>
> (a) To be informed promptly ... of the charge against him;
>
> (b) To be tried without undue delay.'

If the right to be tried without undue delay is appropriately safeguarded, a denial of an asserted "right" to a "speedy trial" would not bring a court's decision into conflict with the standard accepted by Australia upon the ratification of the covenant. ... Australia appended a 'Federal Statement' to the ratification of the Covenant. This may affect the direct applicability of Article 14 to a criminal trial in this State. But it does not lessen the authority of the covenant as a relevant statement of internationally accepted principles which Australia has also accepted, by ratification."[47]

Samuels JA, on the other hand, conducted a careful analysis of the history of English law and procedures from which Australian law are derived. So far as the Covenant was concerned, he was more cautious:

> "I appreciate that the right to speedy trial, or to a trial within a reasonable time, has now been entrenched by statute in many jurisdictions in both the common law and Romanesque systems. Moreover there are international Covenants and Conventions which prescribe such rights. For example, the International Covenant on Civil and Political Rights (to which Australia with certain reservations and declarations is a party) provides in Art 14(3)(c) that in the determination of any criminal charge against him everyone shall be entitled 'to be tried without undue delay'. The Covenant is not part of the

> law of Australia. Accession to a treaty or international covenant or declaration does not adopt the instrument into municipal law in the absence of express stipulation such as that which may be derived from the Racial Discrimination Act 1975 (Cth) ... See the remarks of Lord Denning MR in R v Secretary of State for the Home Department; ex parte Bhajan Singh [1976] QB 198 at 207 ... It was suggested nonetheless that International Covenants of this kind might provide better guidance in a search for the principles of the common law than eight hundred years of legal history; and reliance was placed upon what Scarman LJ as he then was said in R v Secretary of State for the Home Department; ex parte Phansopkar [1976] QB 606 at 626. However, the statement does not seem to me to support the proposition and has, in any event, been roundly criticised ... Certainly, if the problem offers a solution of choice, there being no clear rule of common law or of statutory ambiguity, I appreciate that considerations of an international convention may be of assistance. It would be more apt in the case of ambiguity although in neither case it would be necessary to bear in mind not only the difficulties mentioned by Lord Denning but the effect of discrepancies in legal culture. In most cases I would regard the normative traditions of the common law as a surer foundation for development. but granted that a Convention may suggest a form of rational and adequate solution it cannot explain whether a particular right was or was not an incident of the common law. That was the question in the present case."[48]

Another case in which the International Covenant was considered was also one in which Samuels JA sat with me and with Clarke JA. I refer to Gradidge v Grace Brothers Pty Limited.[49] That was a case where a judge had ordered an interpreter of a deaf mute to cease interpretation of exchanges between the judge and counsel. The mute remained in court and was the applicant in workers' compensation proceedings. The judge refused to proceed when the interpreter declined to cease interpretation. The Court of Appeal unanimously answered a stated case to the effect that the judge had erred. In doing so both Samuels JA and I referred to the International Covenant on Civil and Political Rights. I mentioned in particular, in criticising certain earlier decisions in Australia about the entitlement to an interpreter, the provisions of Articles 14.1, 14.3(a) and (f). I stated that those provisions are now part of customary international law and that it was desirable that

"the [Australian] common law should, so far as possible, be in harmony with such provisions".

Samuels JA said this:

> "For the present purposes it is essential to balance what procedural fairness requires in circumstances such as this against the necessity to permit a trial judge to retain the ultimate command of order and decorum in his or her court. It seems to me that the principle which applies is clear enough; it must be that any party who is unable (for want of some physical capacity or the lack of knowledge of the language of the court) to understand what is happening. That party must, by the use of an interpreter, be placed in the position which he or she would be if those defects did not exist. the task of the interpreter, in short, is to remove any barriers which prevent understanding or communication ... The principle to which I have referred so far as criminal proceedings are concerned is acknowledged by the International Covenant on Civil and Political Rights, Article 14, which is now found as part of Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth)."

The final example of the use of the International Covenant to which I would refer is Cachia v Isaacs & Ors.[50] A litigant in person had successfully appeared for himself to defend, in a number of levels of the court hierarchy, proceedings brought against him by his former solicitors. Various orders for "costs" were made in his favour. Invoking such decisions as London, Scottish Benefit Society v Chorley[51] and Buckland v Watts,[52] the solicitors urged that the litigant in person should only recover expenses which were strictly out of pocket. He should be denied the loss of income in attending court because this was something a lawyer could charge for and only lawyers had the privilege to so charge in our courts. The argument succeeded with a majority of the Court (Samuels and Clarke JJA). But I rejected it. I preferred the view that a litigant in person could recover all costs and expenses, necessarily and properly incurred to represent himself in the court. I derived support for my view from (amongst other things) the International Covenant on Civil and Political Rights, Art 14.1. That article provides that all persons "shall be equal before the courts and tribunals". I suggested that from this fundamental principle should be derived the principle that litigants should not suffer discrimination because they are not represented by lawyers. Access to the courts should be a reality and not a shibboleth.

It will be observed that this is yet another case which reference has been made to the International Covenant for the purpose of stating what may be self-evident: a universal truth and part of the common law. But the reference to the Covenant is an intellectual starting point to the consideration by the court of the law to be applied in a particular case. It puts the judge's decision in context. It puts it in a context of universal, international principles. In uncertain and busy litigious seas, it is often helpful to have the guiding star of international human rights norms. That, in essence, is what the Bangalore Principles assert.

CONCLUSIONS

The purpose of this essay has been to bring up to date some of the developments in my own and other jurisdictions since the Bangalore Principles on the Domestic Application of International Human Rights Norms were declared a year ago. Since that time, in a number of practical instances, the court of which I am a member has had the occasion to consider international human rights norms, as stated in international conventions. Illustrations of the use made of the, have been given. There are reasons for caution, in every country, and particularly federal states, in the use made of international principles stated in treaties negotiated by the Executive Government and not translated into domestic law by the legislature. But judges also make law. In doing so they frequently have choices. Those choices arise in the construction of statutes and in the development, clarification and restatement of the common law. In performing such functions, judges of today do well to look to international instruments. Particularly is this so where the international instrument has been accepted and has itself become part of the customary law of nations.

Judges of today are amongst the intellectual leaders of their communities. Those communities find themselves in a world of growing interdependence and intercommunication. Law has, until now, traditionally been a parochial jurisdiction-bound profession. But judges of today, accompanied by the lawyers of today, must begin the journey that will take them into an international community in which internationally stated norms are given active, practical work to do. For the sake of humanity and the respect of human rights in all countries, the Bangalore Principles show the way ahead. The opportunity exists for all judges an lawyers in every country of the common law to pick up the challenge presented by the Bangalore Principles. In their daily lives they can find a framework of principle in the international human rights and other norms from which to derive guidance for the performance of their important duties.

APPENDIX

THE BANGALORE PRINCIPLES

(See (1988) 62 ALJ, 531.

Between 24 and 26 February 1988 there was convened in Bangalor India, a high-level judicial colloquium on the Domest Application of International Human Rights Norms. The Colloqui was administered by the Commonwealth Secretariat on behalf of t Convenor, the Hon Justice P N Bhagwati (former Chief Justice India), with the approval of the Government of India, and wi assistance from the Government of the State of Karnataka, India.

The participants were:

Justice P N Bhagwati (India) (Convenor)
Chief Justice E Dumbutshena (Zimbabwe)
Judge Ruth Bader Ginsburg (USA)
Chief Justice Mohammed Haleem (Pakistan)
Deputy Chief Justice Mari Kapi (Papua New Guinea)
Justice Michael D Kirby CMG (Australia)
Justice Rajsoomer Lallah (Mauritius)
Mr Anthony Lester QC (Britain)
Justice P Ramanathan (Sri Lanka)
Tun Mohamed Salleh Bin Abas (Malaysia)
Justice M P Chandrakantaraj Urs (India)

There was a comprehensive exchange of views and full discussi of expert papers. The Convenor summarises the discussions in t following paragra[illegible]s:

1. Fundamental human rights and freedoms are inherent in a humankind and find expression in constitutions and leg systems throughout the world and in the international hum rights instruments.

2. These international human rights instruments provi important guidance in cases concerning fundamental hum rights and freedoms.

3. There is an impressive body of jurisprudence, bo international and national, concerning the interpretati of particular human rights and freedoms and the application. This body of jurisprudence is of practic relevance and value to judges and lawyers generally.

4. In most countries whose legal systems are based upon t common law, international conventions are not direct enforceable in national courts unless their provisions ha been incorporated by legislation into domestic la However, there is a growing tendency for national courts have regard to these international norms for the purpose

deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete.

5. This tendency is entirely welcome because it respects the niversality 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.

6. 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.

7. 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 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.

8. However, where national law is clear and consistent 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.

9. 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 an 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 experience.

10. 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.

Bangalore
Karnataka State
India
26 February 1988

FOOTNOTES

* The Bangalore Principles are an Appendix to this paper. See (1988) 62 Aust LJ 531-2.

** President of the Court of Appeal of New South Wales, Australia. Commissioner of the International Commission of Jurists. Member of the World Health Organisation Global Commission on AIDS. Personal views.

1. Simon Lee, Judging Judges, Faber & Faber, London, 1988, 38. Lee points out, with illustrations, the way in which leading decisions are, in part, fashioned by the arguments of counsel.

2. See e.g. Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 62 Aust. Law J. Reports 389, 413 (High Court of Australia); Halabi v Westpac Banking Corporation, unreported, Court of Appeal (NSW) 8 February 1989. (S.L.R., HCA, 17 March 1988).

3. See M D Kirby, "Statutory Interpretation and the Rule of Law - Whose Rule, What Law?" in D St L Kelly Essays on Legislative Drafting, Adelaide Law Rev Assn, Adelaide, 1988, 84.

4. See e.g. R Clinton, "Judges Must Make Law : A Realistic Appraisal of the Judicial Function in a Democratic Society", 67 Iowa L Rev 711 (1981-2); M Cappetti, "The Lawmaking Power of the Judge and its Limits", (1981) 8 Monash Uni L Rev 15; B Dickson, "The Judiciary - Law Interpreters or Lawmakers" (1982) 12 Manitoba LJ 1; H Lücke, "The Common Law as Arbitral Law : A Defence of Judicial Lawmaking" (1983) 8 Adel L Rev 280; S D Smith, "Courts, Creativity and the Duty to Decide a Case", Uni Illinois L Rev 573 (1985); M H McHugh, "The Lawmaking Function of the Judicial Process" (1988) 62 Aust LJ 15; and M D Kirby "The Role of Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 Aust. LJ 514.

5. Lord Reid, "The Judge as Lawmaker" (1972) 12 Journal of the society of Public Teachers of Law 22.

6. Koowarta v Bjelke-Petersen (1983) 153 CLR 168, 218-9.

7. African Charter on Human and Peoples' Rights, Division of Press and Information, Organisation of African Unity, General Secretariat, June 1982.

8. Chow Hung Ching v The King (1948) 77 CLR 449.

9. 1809, vol 4, 67.

10. (1948) 77 CLR 449, 477.

11. (1983) 153 CLR 168, 224. See also Gibbs CJ ibid at 193.

12. e.g Australia, Canada, India, Malaysia, Nigeria Tanzania etc.

13. Attorney General (Canada) v Attorney General (Ontario) [1937] AC 326, 348.

14. (1975) 135 CLR 337, 445.

15. Koowarta (above) at 200. (Gibbs CJ).

16. A C Hutchinson and A Petter, "Private Rights - Public Wrongs : The Liberal Lie of the Charter" (1988) 38 Uni Toronto LJ 298.

17. J L Brierly (1935) 51 LQR 31.

18. Chow Hung Hing at 477.

19. See Chung Chi Cheung v The King [1939] AC 160, 168 (PC).

20. G G Lewis, Lord Atkin, Butterwo⁻ths, London, 1983, 97f.

21. See e.g. H Lauterpacht International Law : Collected Papers (vol 2), The Law of Peace, 560.

22. R v Burgess; ex parte Henry (1936) 55 CLR 608, 680-1.

23. Dowal v Murray & Anor (1978) 143 CLR 410.

24. McInnis v The Queen (1979) 143 CLR 575.

25. Ibid, 588.

26. Kootwarta v Bjelke-Petersen (19835) 153 CLR 168.

27. Tasmania v Commonwealth of Australia. (The Tasmanian Dams Case) (1984-5) 158 CLR 1.

28. Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd (1988) 10 NSWLR 86 (CA).

29. [1988] 2 WLR 805.

30. Ibid at 850-51. (CA)

31. Id, 851.

32. Id, 869.

33. Id, 897.

34. Id, 907.

35. T C Hartley, "Federalism, Courts and Legal Systems : The Emerging Constitution of the European Community" (1986) 34 Am J Comp Law 229, 247; Nigel Foster, "The European Court of Justice and the European Convention for the Protection of Human Rights" [1987] ECJ and ECHR Vol 8 245.

36. [1988] 2 WLR 398.

37. Ibid, 410, 412.

38. See, eg, X v Sweden (1981) 4 EHRR 398 at 410; X v United Kingdom (1981) 4 EHRR 1988; East African Asians v United Kingdom (1973 3 EHRR 76 at 91; Her Majesty's Attorney-General v The Observer Ltd and Guardian Newspapers Ltd and Ors (Eng CA 10 February 1988; Waddington v Miah [1974] 1 WLR 683, (HL); Blathwayt v Baron Cawley [1976] AC 397, (HL); R v Lemon [1979] AC 617, (HL); Science Research Council v Nasse [1980] AC 1028, (HL); Attorney-General v British Broadcasting Corporation [1981] AC 303, (HL); United Kingdom Association of Professional Engineers v Advisory Conciliation and Arbitration Service [1981] AC 424, (HL); Gold Star Publications Ltd v DPP [1981] 1 WLR 732; Raymond v Honey [1983] AC 1 (HL); Home Office v Harman [1983] AC 280, (HL); Cheall v Apex [1983] 2 WLR 679 (HL); and cf R v Barnet LBD [1983] 2 AC 309, (HL); R v Secretary of State for the Home Department; Ex parte Bhajan Singh [1976] QB 198 at 207 (CA); R v Secretary of State for the Home Department; Ex parte Phansopkar [1976] QB 606 at 626, (CA).

39. See e.g. Koowarta (above).

40. (1986-7) 162 CLR, 447.

41. Ibid, 463.

42. Daemar v Industrial Commission of New South Wales & Ors (1988) 12 NSWLR 45.

43. Ibid, 53.

44. (1988) 12 NSWLR 358.

45. Ibid, 360-361.

46. (1988) 12 NSWLR 558.

47. Ibid, 569-70.

48. Ibid, 580-2.

49. Unreported, Court of Appeal (NSW) 4 December 1988; (1988) 5 NSWJB 219.

50. Unreported, Court of Appeal (NSW), 23 March 1989.

51. (1884) 13 QBD 872.

52. [1970] 1 QB 27 (CA).

Fundamental Rights in their Economic, Social and Cultural Context

by Justice P N Bhagwati, former Chief Justice of India

This is the second in the series of judicial colloquia which are being organised by members of the judiciary throughout the Commonwealth assisted by the Commonwealth Secretariat. The first, as you know, was held in Bangalore, India, where predominantly South Asian and South East Asian Chief Justices met in order to discuss the topic of "The Domestic Application of International Human Rights Norms". It was a highly stimulating experience for all of us who attended the colloquium. The host of the present colloquium, Chief Justice Dumbutshena, was also good enough to respond to my invitation and participate in the Bangalore Colloquium.

At the end of the deliberation, we came out with "The Bangalore Principles", a copy of which has been supplied to each of the participants present here.

When I refer to the Bangalore Principles, I cannot help recalling the calamity that befell my friend Salleh bin Abbas, ex-Lord President of Malaysia. It has a direct relevance to the topic we are discussing at this Colloquium. It is only a strong and independent judiciary that can internalise in its domestic jurisdiction the international human rights norms. In fact, it would be no exaggeration to state that human rights would be safe in a society only so long as its judges are bold and independent. Salleh bin Abbas paid the price for his integrity and independence and he has left us a glorious example to follow. He has taught us that we judges should not be timorous souls, anxious to cling to our positions; but we should rather be bold, adventurous spirits prepared to make any sacrifice demanded of us in our pursuit to advance and enforce human rights.

But what are the human rights which need to be advanced and enforced? So far as the Western developed countries are concerned, the emphasis has always been on civil and political rights, and human rights are sought to be equated only with civil and political rights. The reason for this is that the concept of human rights assumed great importance after the holocaust of the Second World War, when civil and political rights were completely suppressed by the Nazi fascist regime. Therefore, after the conclusion of the Second World War, when the Western powers came to formulate the Universal Declaration of Human Rights, they were naturally more concerned with civil and political rights than with any other category of human rights.

They realised that peace is indivisible: if there is violation of civil and political rights in one country, it is bound to have repercussions in other countries, leading to strife and instability. Moreover, the Western countries having attained a fairly high stage of development in material and economic resources, social and economic rights did not find much pre-occupation in

their minds, and their concern was largely confined to civil and political rights. That is why in the Universal Declaration of Human Rights, there are only a few articles - and then towards the end - which deal with social and economic rights. It may also be noted that when the Universal Declaration was adopted, most of the Third World countries had not yet achieved political independence and so did not have the opportunity of participating in the framing of the Universal Declaration.

But soon it came to be realised, both by reason of the Third World countries becoming active members of the United Nations - and also the influence of the socialist countries - that though civil and political rights are precious and invaluable, because without them freedom and democracy cannot strive, they just do not exist for the vast masses of people in the developing countries who are subjected to exploitation and are suffering from want and destitution. It is only if economic and social rights are ensured to these large masses of people that they will be able to fully enjoy civil and political rights. That is why the International Human Rights Conference called by the General Assembly in Tehran in 1968 declared in its final proclamation: "Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights is impossible".

It is now being increasingly realised that civil and political rights have no meaning and value unless they are accompanied by economic and social rights. This is particularly important in Third World countries. We in the Third World countries have unique problems, totally different from those in the Western countries. In Western countries democracy and individual freedom came at the end of a period of sustained industrial revolution and therefore they had no particular difficulty in reconciling the claims of individual freedom with the collective welfare of the society. But we in the Third World are trying to bring about change in the social and economic conditions of the large masses of people with a view to uplifting them from the quagmire of poverty and ignorance and so making basic human rights meaningful for them while at the same time guaranteeing freedom of the individual such as freedom of speech and expression, freedom of association, etc. This exercise in which we are all engaged does apparently seem to involve a clash between the individual freedoms which are enshrined in civil and political rights and the collective advancement of the large numbers of deprived persons which requires realisation of economic and social rights. We seem to be dividing two unruly horses which are apparently clashing with each other, but yet we cannot afford to give up either. At times this apparent conflict between the freedom of the individual and the collective rights of the poor and under-privileged segments of the society fails to be resolved by the judiciary and a balance has to be achieved - a solution has to be found. This delicate task requires wisdom, courage and judicial statesmanship with social vision and an insight for perception of the people, and it raises challenges for the judiciary. These challenges can be met successfully only by an activist goal-oriented judiciary which is imbued with a determined spirit for the promotion and enforcement of both categories of human rights, namely, civil and political rights, and economic and social rights. The judiciary

must also possess the requisite judicial craftsmanship for doing so.

If human rights are to become a reality for the large masses of people, the judiciary has to play an activist role, and this activist role becomes all the more necessary in cases of economic and social rights. Judicial activism is an undeniable feature of the judicial process in a democracy, and the necessity of it flows directly from the nature of the judicial function itself. It is now acknowledged, even by British jurists, that judges do in reality make law, whether interstitially as Justice Holmes would have it, or otherwise. It must also follow as a necessary corollary from this position that judicial activism is a necessary and inevitable part of the judicial process.

Judicial activism can take many forms. It may be what I would describe as "technical activism", which ensures that judges have the necessary freedom of action - i.e. freedom to choose between alternative courses of action. It consists of a declaration of the freedom to have recourse to a wide range of techniques and choices. I call this activism "technical" because it is concerned merely with keeping juristic techniques open-ended.

"Judicial activism" may be contrasted with what I would call "juristic activism". Juristic activism is not concerned merely with the appropriation of increased power but is concerned as well with the creation of new concepts, irrespective of the purpose which they serve. In this kind of juristic activism, the judge is not concerned with the social consequences generated by new concepts or principles, or with the question as to whom these new concepts or principles will serve. This kind of juristic activism may help to preserve the status quo, or it may impel the realisation of social and economic human rights. But what is needed is to use juristic activism for the advancement and realisation of human rights. We must move away from formalism and use judicial activism for achieving the objective of making human rights a living reality for the people we serve. Human rights must not remain merely paper declaration or mere hortative statements. They must be invested with meaning and content. The modern judiciary, particularly in Third World countries cannot afford to hide behind notions of legal justice and plead incapacity when human rights issues are addressed to it. The judges must boldly and imaginatively resolve human rights issues. Most of the Third World countries have written constitutions which contain a charter of human rights. But the charter can at best only enunciate broad and general statements of human rights. It is to the judiciary that the task is assigned to positivise human rights; to spell out their contours and parameters; to narrow down their limitations and exceptions; and to expand their reach and significance by evolving component rights out of them while deciding particular cases.

The judges must therefore boldly and creatively interpret their charters of human rights. But in so doing, they are not adrift on an unchartered sea. They can and must take into account international human rights norms for expanding the reach and ambit of the human rights. Enumerated in their domestic law

international human rights norms are to be found in various international instruments, such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. These international instruments have been ratified by some of the States, while some others have not yet ratified them. But, whether ratified or not, these international instruments embody human rights norms which are broadly accepted by the entire international community and they should and must be incorporated into national jurisprudence through a process of judicial interpretation.

I may point out that sometimes a question is raised by judges as to how we can incorporate into our domestic jurisprudence economic and social rights embodied in the International Covenant on Economic, Social and Cultural Rights, if they represent merely objectives which are to be attained by a State to the extent to which its resources may permit. But I do not think this question presents any real difficulty. In the first place, while interpreting and applying the human rights embodied in the charter of human rights in our respective constitutions, we can certainly take into account economic and social rights and interpret and apply the specifically enumerated human rights in such a manner as to advance and achieve economic and social rights. The scope and ambit of the specifically enumerated human rights can and must receive colour from economic and social rights. Secondly, there are certain economic and social rights (such as those set out in Articles 6,7 and 10) which can be spelt out from the specifically enumerated human rights and thus become enforceable by the judiciary. Everything depends on the creativity, valour and activism of the judge deciding the particular case.

Some of us in India have internalised in our national jurisprudence to a fairly large measure many of the international human rights norms through our own judicial creativity and activism. But this has to become a global phenomenon, or at least a Commonwealth phenomenon since Commonwealth countries have inherited elements of the common law system and are developing their own jurisprudence on the secure foundations of that system. I would like to illustrate what I have said by giving a few examples.

I will first refer to Article 2(3)(a) of the International Covenant on Civil and Political Rights which seeks to ensure that any person whose rights or freedoms are violated shall have an effective remedy, and Article 14 (3)(d) of the same Covenant which requires that every person charged with an offence shall be entitled to have legal assistance assigned to him without payment by him, if he does not have sufficient means to pay for it. We found that the poor and the disadvantaged were unable to afford the luxury of legal assistance in order to be able to vindicate their rights, but the State was dragging its feet and not setting up any legal aid programmes. The judiciary therefore stepped in to remedy this state of affairs. We have in the Indian constitution Article 21 which provides that no one shall be deprived of his life or personal liberty except by procedure established by law. We interpreted this Article to mean that no one can be deprived of his life or personal liberty unless there is law which authorises it, that law must prescribe a procedure for such

deprivation and that such procedure must be reasonable, fair and just. We thus introduced the American procedural "due process" concept into our constitution, though it was contrary to the original intent of the founders of the constitution who in their deliberations had decided to omit any reference to it. We did so because we thought it was necessary to advance human rights jurisprudence. We then, in subsequent cases, laid down new and more liberal norms for pre-trial release as part of a reasonable, fair and just procedure so as to incorporate in our national jurisprudence the right in Article 9(3) of the International Covenant on Civil and Political Rights. We also held that legal aid to an indigent accused in a criminal trial where he was in jeopardy of his life or personal liberty was a basic human right, because any procedure which does not provide legal representation to a poor accused cannot be regarded as reasonable, fair and just under an adversarial system for the administration of justice. We took the view that in a criminal trial where the accused is poor and cannot afford legal representation, the State must provide it at State cost, and the magistrate must inform the accused of this right. We thus brought into our natural jurisprudence, through a process of judicial interpretation, the rights to access justice and to have legal assistance free of cost, which rights are enshrined in Article 2(3)(a) and Article 14(3)(d) of the International Covenant on Civil and Political Rights.

But still there was difficulty in enforcing the human rights of the poor and the disadvantaged, because they are not aware of their rights, they lack the capacity to assert those rights and they do not have the material resources to approach the courts in cases other than criminal. As a result a large range of human rights remain unenforced. We therefore developed the strategy of public interest litigation. We held in a seminal decision that the ordinary rule of Anglo-Saxon jurisprudence is that an action can be brought only by a person to whom legal injury is caused. However, this rule must be departed from in the cases of poor and disadvantaged classes of people where legal injury is caused to a person or class of person who, by reason of poverty or disability or socially or economically disadvantaged position, cannot approach the courts for judicial redress. Thus we held that any member of the public, or social action groups acting bona fide, can approach the court seeking judicial redress for the legal injury caused to such person or class of persons, and that in such a case the court will not insist on a regular petition being filed by the public spirited individual or social action group espousing their cause and will readily respond - even if its jurisdiction is invoked merely by means of a letter addressed to it, as can happen in the case of habeas corpus actions. This widening of the rule of locus standi introduced a new dimension in the judicial process and opened a new vista of a totally different kind of litigation for enforcing the basic human rights of poor and underprivileged sections of the community, and ensuring basic human rights dignity. Much of the human rights jurisprudence in India has been built-up by the courts as a result of public interest litigation. The courts have been enforcing basic human rights of the deprived and vulnerable sections of the society in cases under trial as well as convicted prisoners,

women in distress, children in jails and juvenile institutions, bonded and migrant workmen, unorganised labour, "untouchables" and "scheduled tubes", landless agricultural labourers who are denied minimum wages or who are victims of faulty mechanisation, slum and pavement dwellers and victims of extra-judicial executions and many more. It would be no exaggeration to say that almost the entire body of human rights activism has been initiated and built up by the judiciary in India.

Now turning to the International Covenant on Economic, Social and Cultural Rights, I will cite one example to show how Article 7 of that Covenant has been enforced. This Article confers the right to enjoyment of just and favourable conditions of work which ensure inter alia minimum wages, equal remuneration for work of equal value and safe and healthy conditions of work. We had a case where large numbers of workers were working in stone quaries under unhealthy and inhuman conditions of work. They were not getting clean drinking water, they had no medical attention at all, and the dust flying from the stone crushers was affecting their lungs. We took the view that the right to life enshrined in Article 21 of the Indian constitution comprised not only the right to physical existence but also the right to every limb and facility through which life is enjoyed, as also the right to live with basic human dignity which includes adequate food, clothing and shelter. The workmen were therefore entitled to just and humane conditions of work which would ensure them their "right to life" in this judicially-expanded sense and we accordingly directed the State to ensure that the workmen got clean drinking water and proper medical attention, and that the stone crushers were fitted with devices which would prevent the emanation of harmful dust.

In another case there were two categories of workers employed by State, one a category of casual workers and the other a category of permanent workers. The casual workers were paid daily wages without any holidays or other peripheral benefits while the permanent workers were getting monthly wages with all benefits which amounted to much more than the casual workers were getting, though both were doing the same kind of work. We directed that the same remuneration be paid to both categories of workers since they were doing the same kind of work. There have been numerous other cases where the economic rights set out in Articles 6,7 and 10 have been incorporated into natural jurisprudence and enforced through a process of creative judicial interpretation.

If we judges want to advance human rights jurisprudence, a task which is committed to our care by the society we serve, it is essential that we be fearless in the discharge of our functions, that we adopt an activist, goal-oriented approach and that we creatively build up our national jurisprudence by incorporating into it the international human rights norms which have received broad acceptance by the entire international community. There is a considerable body of human rights jurisprudence evolved by the United Nations Human Rights Committee, the European Court of Human Rights and the national courts of many countries around the world which can afford guidance to us in our task of building up our own human rights jurisprudence. We have to expand the reach

and ambit of human rights in the light of international human rights norms and render them meaningful to the people. We have to be ever alert to repel all attacks, obvious or subtle, against human rights and we have to guard against the danger of allowing ourselves to be persuaded to attenuate or constrict human rights out of a misconceived concern for State interest, concealed political preferences, or sometimes ambition, weakness or fear of executive reaction. Human rights in all our countries will be safe for so long as we are deeply committed to human rights and imbued with the spirit of international human rights norms.

The Role of the Judiciary in a Military Non-Constitutional Situation

Paper prepared by Mr Justice Adenekan Ademola of Nigeria

Between the time of the Nigerian army take-over of the Government of the Federal Republic of Nigeria on 15 January 1966 and the passage by the Federal Military Government of the Supremacy and Enforcement of Powers Decree No 28 of 1970, it was safe to assert that the courts in Nigeria had a power of review over the Decrees and Edicts of the Federal Military Government.

The high water mark for this attitude was reached in the famous judgment of the Supreme Court in E O Lakanmi and Another v. The Attorney-General, Western State and Others wherein the court declared as invalid the decree of the Federal Military Government on forfeiture of assets of public officers and characterised the Federal Military Government as a continuation of a civilian government which has ceased to function through the intervention of the military on 15 January 1966.

The reaction of the military government under General Gowon was quick and swift. The judgment of the court in the Lakanmi's case was annulled by a decree which also spelt out the true nature of the military intervention of the 15th day of January 1966 describing same as a revolution and not a transfer of power from the civilian authorities to the military.

Thus the popular notion of a constitutional transfer of power to the military suffered a demise and thereafter the legal foundation for the military regime in Nigeria is to be found in the text of a decree styled the Federal Military Government (Supremacy and Enforcement of Powers) No. 28 of 1970 which goes thus:

> "Whereas the military revolution which took place on 15 January 1966, and which was followed by another on 29 July 1966, effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree 1966; and whereas each military revolution involved an abrupt political change which was not within the contemplation of the Constitution of the Federation 1963 (hereinafter referred to as the 'Constitution of 1963'):
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> And whereas by the Constitution (Suspension and Modification) Decree (1966 No. 1) there was established a new government known as the 'Federal Military Government' with absolute powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever and, in exercise of the said powers, the said Federal Military Government permitted certain provisions of the said Constitution of 1963 to remain in operation as supplementary to the said Decree:

And whereas by section 6 of the said Constitution (Suspension and Modification) Decree 1966, no question as to the validity of any Decree or any Edict (in so far as by section 3(4) thereof the provisions of the Edict are not inconsistent with the provisions of a Decree) shall be entertained by any court in Nigeria:

And whereas by Schedule 2 of the said Constitution (Suspension and Modification) Decree 1966 the provision of a Decree shall prevail over those of the unsuspended provisions of the said Constitution of 1963:

Now therefore, the Federal Military Government decrees as follows:

1. (1) The preamble hereto is hereby affirmed and declared as forming part of this Decree.

(2) It is hereby declared also that:

(a) for the efficacy and stability of the government of the Federation, and

(b) with a view to assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federation, any decision, whether made before or after the commencement of this Decree, by any court of law in the exercise or purported exercise of any powers under the Constitution or any enactment or law of the Federation or of any State which has purported to declare or shall hereafter purport to declare the invalidity of any Decree or of any Edict (in so far as the provisions of the Edict are not inconsistent with the provisions of any of a Decree) or the incompetence of any governments in the Federation to make the same is or shall be null and void and of no effect whatsoever as from the date of making thereof.

(3) In this Decree -

(a) 'decision' includes judgment, decree or order of any court of law, and

(b) the reference to any Decree or Edict includes a reference to any instrument made by or under such decree or Edict.

Professor Abiola Ojo formerly of the Faculty of Law in the University of Lagos has this to say about the event then in his book titled "Constitutional Law and Military Rule in Nigeria":

"It is the author's view that the Supreme Court was mistaken in its assessment not only of the factual events but also of the legal situation. The view that government was transferred to the Army was misconceived because the 1963 Republican Constitution made no

provision for such a transfer of power. And the events which transpired between the group of Ministers and the armed forces could not be regarded as a voluntary transfer of power but an unavoidable abdication of power by the remaining Ministers left in the Cabinet. And even assuming that such a 'transfer' was possible under the old Constitution, there was no validly constituted Cabinet to do it. Neither the Prime Minister nor an acting one participated in the meeting. What took place was a deliberately contrived illegal exercise uncontemplated by the old Constitution".

Professor Ojo supported his view by what Kelsen said in the "Pure Theory of Law" 1934-1935 LQR Vols. 50 and 51 thus:

"A revolution ... occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is, in a way not prescribed by the first legal order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the legitimate organs competent to create and amend the legal order ... From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated".

It is sufficient to say here that not many members of the legal profession share that view of events. Some historians certainly defer from Professor Ojo in their assessment of what happened in 1966 but the point about a change to a new legal order after every successful coup d'etat was underscored recently by a Decree of the Federal Military Government No. 13 of 1984 entitled Supremacy and Enforcement of Powers Decree which text reads as follows:

(i) that the military revolution which took place on 31 December 1983 effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree 1984;

(ii) that the military revolution aforesaid involved an abrupt political change which was not within the contemplation of the Constitution of the Federal Republic of Nigeria 1979;

(iii) that the Constitution (Suspension and Modification) Decree 1984 established a new government known as the 'Federal Military Government' with absolute powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever and, in exercise of the said powers, the said Federal Military Government <u>permitted</u> certain provisions of the said Constitution to remain in operation;

(iv) that by section 5 of the said Constitution (Suspension and Modification) Decree 1984, no question as to the validity of any Decree or any Edict (in so far as the provisions of the Edict are not inconsistent with the provisions of a Decree) shall be entertained in any court of law;

(v) that by section 1(2) of the said Constitution (Suspension and Modification) Decree 1984 the provisions of a Decree shall prevail over those of the unsuspected provisions of the said Constitution.

But the Decree contains a provision which is new in the history of the military regime in Nigeria. It says in section 1(2) of it as follows:

> "that for the efficacy and stability of the government of the Federal Republic of Nigeria and with a view to assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federal Republic of Nigeria, (i) "that no civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if any such proceedings are instituted shall abate, be discharged and made void". And as if enough damage had not been done to the Rule of Law, it further provides that that (ii) "the question whether any provision in Chapter IV of the Constitution has been, is being or would be contravened by anything done or proposed to be done in pursuance of any Decree or Edict shall not be inquired into in any court of law and, accordingly, no provision of the Constitution shall apply in respect of any such question."

From all these the question might be asked what then is the nature of the military government in Nigeria? The answer for this was given by a distinguished senior advocate of Nigeria in the person of Chief Rotimi Williams thus:

> "Military government in Nigeria, as we have come to know it since the coup in January 1966, is not a system of government in which a despot or a military oligarchy operating above the law exercises absolute power. It is rather a system of government which after coming into existence by overthrowing the existing legal order, replaces it by a new legal order. No military government in Nigeria has ever wiped out the entire provisions of the constitution which it overthrew..."

In such a situation what chance has the court to develop constitutional law under the military government in Nigeria? Or to put the question another way, has constitutional law developed in Nigeria since the army take over in 1983? If so, what is the evidence of it?

In the pages that follow, I shall within the constraint of time at my disposal show such evidence. Before going any further I might point out that over a number of years now the Nigerian courts have developed important interpretative techniques in dealing with factual situations where Decrees or Edicts passed by the various military governments have been challenged.

The first technique of interpretation that has been developed can be said to go as follows:

> Where a decree or an edict had been enacted by a military government the court does not inquire into whether it had been validly passed or

not but nevertheless it can say and has said in some cases that a law purported to be made under a Decree or an Edict was not so made and therefore ultra vires of a Decree or the Edict under which it was purported to have been made. Similarly, an action purported to have been done under a Decree was either done under such Decree or not so done under the Decree as the case may be.

The second technique which had been developed is that the courts had been jealous of their jurisdictions and had always watched that enactments taking away their jurisdiction had been done in very clear and unambiguous way; see the case of Federal Civil Service Commission v. Seida Garba.

The third technique follows directly from the second and it can be broadly stated thus:

> That the courts have the responsibility to protect the citizen from those who tend to regard the taking away of the jurisdiction of a court as a shield from judicial inquiry into arbitrary or capricious use of power. The court has always held that to do otherwise would be to create a regime of lawlessness wherein a body created to act within the law would claim immunity from the control of the law if it was to act outside the law that created it, see the case of Port Decongestion Committee v Moosa Yacubu Farm (Nigeria) Limited and Others.

As you would have observed these interpretative techniques are not new nor had they been developed by the courts to meet the circumstances of Nigeria under the military rule which seem to occur cyclically in the political history of the country.

The first technique mentioned above has now become part of Nigerian Law Whenever the military regime appears on the stage the courts abandon the attitude of striking down the enactments of a legislature that runs contrary to the provisions of the Constitution, that which they have been used to doing during the civilian regime. It is, I suggest, the failure of the then Supreme Court of Nigeria in 1966 to make this necessary mental change that led to the conflict between it and the military government of General Gowon in 1970 which led to the annulment of the judgment of that court in the case of Lakanmi and Others v The Attorney-General of Western Nigeria.

In retrospect it is an understandable conflict between a group of men who over a decade have been used to striking down enactments of the legislature when they conflicted with the provisions of the Constitution and a new group of men who paid scant attention to the due process of law and fundamental rights of citizens. It is not as the critics of the courts said at that time that the court was out "to encourage fraud by legal technicalities". The court was concerned in that case to uphold high values and respect for human dignities. As if to anticipate its critics on this point the court said in the penultimate paragraph of its judgment in that case, that

> "We are in no doubt that the object of the Federal Military Government, when it engaged in this exercise, is to clean up a

section of the society which had engaged itself in corrupt practices - those vampires in the society whose occupation was to enrich themselves at the expense of the country. But if, in this pursuit, the Government, however well-meaning, fell into the error of passing legislation which specifically in effect, passed judgment and inflicted punishment or in other words eroded the jurisdiction of the courts, in a manner that the dignity and freedom of the individual, once assured, are taken away the courts must intervene. Every case, we reiterate must be considered on its own facts and the materials placed before us in this matter lead to no other conclusion than that the provisions in the Decree No. 45 of 1968 are such as not reasonably necessary to achieve the purpose which the Federal Military Government set out to fulfil. This appeal will therefore be allowed and both the Edict No.5 of 1967 and the Decree No. 45 of 1968 are declared ultra vires; they are null and void".

The second technique of interpretation mentioned above is so familiar and had been so developed over the years that it does not need a military regime for its deployment. It is used against the enactment of any government be it civilian or military. Therefore we need not waste much time saying much about it.

The third technique of interpretation which flows directly from the second as I have said earlier, is beneficial to the military regime itself because the regime always seek justification for its action in the various Decrees and Edicts it has enacted. In so doing it keeps the image of arbitrariness or capriciousness of the regime out of the body politic. It is also useful to the general public given the tendency of officials in administrative positions in Nigeria to be high-handed and callous in their dealings with the members of the public during the period of the military rule.

Having thus stated the various interpretative techniques that are commonly used by the courts during the period of the military regime in Nigeria, the rest of this paper would be devoted to the application of these techniques to the specific areas of fundamental human rights that have come in factual situations before the courts. The areas that we shall touch here are the freedom of the individuals that has been guaranteed by a section of the constitution; freedom of expression also so guaranteed; that property shall not to be taken away from the individual without adequate compensation which has also been guaranteed; the presumption of innocence of a person accused of criminal offences; the security of employment for officials of the government, just to mention a few areas. These areas that I have mentioned have come under some form of modification by the various decrees promulgated by the military regime in Nigeria.

Another feature of the military era is the enactment of retrospective legislation; legislation that takes away the jurisdiction of the courts; legislation that excludes the fundamental human rights as enshrined in the constitution; legislation that shifts the onus of proof of particular facts to the individual who is before the various tribunals that have been established for various offences under various Decrees.

During a military regime the establishment of tribunals to adjudicate some specific matters is very common. Normal courts are left with the

administration of laws dealing with civil matters, some criminal matters, and property. The tribunals that are set up are quasi military in their composition and have dealt with such problems as the investigation of assets of public officers, exchange control matters and related currency problems, drug trafficking, armed robbery and other miscellaneous offences.

One encouraging feature of trial by tribunals is the provision made for persons who appear before them to be represented by lawyers of their choice. Another hopeful feature about the tribunals is in their composition in that they are presided over by High Court judges still on the Bench or retired. Another encouraging feature is the provision for appeals from judgments of the tribunals to a special appeal tribunal headed by retired justices of the Court of Appeal. All these encouraging features in the trials by tribunal have been brought about by the activities of the Nigerian Bar Association. An aspect of trial by tribunals is that the judgments and sentences ace subject to confirmation or variation by the Head of State and not by the Supreme Court, a clear departure from the Rule of Law.

After a successful military take over of a civilian regime, the first casualty of the fundamental rights enshrined in the Constitution is the freedom of the individual. The real and imagined enemies of the military regime are put in prison or under house arrest. These are usually members of the ousted regime. Their detentions are effected by means of detention orders issued under a decree. In Nigeria the decree is the State Security (Detention of Persons) No. 2 of 1984. The Decree empowers the Chief of Staff to issue a detention order on any person who has recently been engaged in activities prejudicial to the Security of the state or have contributed to the economic adversity of the country. Many members of the former civilian regime and other people who are not in politics but suspected to have contributed to the economic adversity of the country by activities such as false invoicing of goods, exchange control falsification and all other false bank documents leading to the drainage of monies out of the country were also detained under the Decree. This Decree had gone beyond what previous Decrees with the same object in a mind had done. The detention of persons under it is not only for political offences but also for economic crimes that have prejudiced the state - see the case of Wang Ching-Yao and others v. Chief of Staff Supreme Headquarters and Others.

Under this Decree the court has not jurisdiction to question any challenge to a detention made under it. It also abolished the application of fundamental human rights to the person detained and also directed that no action can be entertained in court regarding the legality of the detention and if there are proceedings in court challenging the legality of such detention or anything purported to be done under the Decree on or after the commencement of the Decree such proceedings shall be declared null and void and of no effect.

Before the promulgation of this Decree the attitudes of the court to detention orders have been to construe the document detaining the persons very strictly against the authority who his responsibility for the detention. The court had always employed the provisions of the Evidence Act to determine whether the original documents of the detention were before the court and if not to declare such duplicate documents

authorising the detention as inadmissible. The court has also questioned the genuineness of the signature of the person who has signed an order, not dated, or a detention order which does not correctly describe where the detainee is to be detained. The court also would hold the detention order invalid if the reasons for the detention are vague or ambigious. The invalidation of such detention orders are well illustrated in the following cases i.e. Commissioner of Police v Alhaji A M F Agbaje; - Re Mohamed Olayori; Onwundiwe v Commissioner of Police; Eyo v. Chief of Staff.

But under the present decreee, that is the State Security (Detention of Persons), detention orders have been held to be subsidiary legislation and not public documents under the Evidence Act. The provisions of the Evidence Act are not applicable to them - see the case of Wan Ching Yau v Chief of Staff Supreme Headquarters.

Professor Ojo has commented on this Decree and related Decree

> "But need the government completely bar judicial questioning of any act, matter, or such thing purported to be done under or pursuant to any Decree or any edict? Should government protect what might be illegal act under the cloak of a Decree or Edict? The fact of unlimited legislative power does not necessarily preclude illegality. Might it have been better for the government to completely abrogate all fundamental rights and say so clearly----. These provisions are just a step removed from complete emasculation of the adjudicatorial role. The summation of all these is that not only legislative and executive acts of government are shielded from questioning but also the judiciary has been disfunctionalised".

As I will show, I do not think the situation is that helpless for the courts. The courts have been up to it and have used interpretative techniques which I have described above to get over some of the difficulties that these Decrees may seem to have presented.

Under a military regime freedom of expression is limited not necessarily by law but by common sense. Fundamental political issues are hardly subjects for discussion. Nobody in his senses would get up and advocate that political parties that have been banned should begin to function. The Press becomes circumspect in what is reported or commented upon. However a military regime leaves no room for any chance. In Nigeria under the Buhari regime a Decree entitled Public Officers (Protection against False Accusation) Decree was enacted, but this was quickly repealed by the Babangida government after the overflow of the Buhari regime. But before it's repeal a newspaper named the Guardian carried news about persons who had been appointed to diplomatic posts in foreign countries. The Buhari government then contended that the report was false and prosecuted the newspaper, the editor and the reporter. Under the Decree it was a duty cast upon the defendant to show that what was published by them was not false. They failed to do so and they were duly convicted by a tribunal that handled the matter. There was no appeal under the Decree that set up the tribunal that created the offences. A challenge however was made in the High Court as to the validity of the exercise of power under that Decree. That challenge also failed. There was an appeal to the Court of

appeal but in between that and the hearing of the appeal the Babangida administration repealed the Decree and declared that anything done under it was void and of no effect. The sentence of imprisonment and fines imposed on the journalists and the press were quashed. Thus there was no opportunity to know what the attitudes of the court would have been to what was then regarded as a denial of freedom of expression.

You may recall that what caused a confrontation between the military governments and the Supreme Court in Nigeria in the famous case of Lakanmi and others versus The Attorney-General of Western Nigeria and others was the order of forfeiture of the public officer concerned. After a tribunal had investigated the asset of the public officer, Mr Lakanmi, the Supreme Court struck down the Edict validating the forfeiture of Mr Lakanmi's property on the ground that it contravened provisions relating to fundamental human rights. However the court said it sympathised with the broad intention of the government then to clean up the society from corruption and other ill-gotten gains. It held that the government was going about it in the wrong way in the case. You will also recall that that judgment of the Supreme court was nullified by a Decree by the government in 1970. But it appeared the military government thereafter heeded the admonition of the court and set up a Code of conduct bureau; promolgated a code of conduct for public officers; and established a tribunal to investigate the asset of public officers who come before it. The tribunal set up under the Decree known as Recovery of Public Property (Special Military Tribunal) is to follow broadly the procedure laid down in the Criminal Code. The onus is on the public officer to explain any excess of income which is found on him and which exceeds his known income which he had declared. The public officer is to bring out facts before the tribunal to establish that the excess of income had been legitimately and not corruptly acquired. This shifting of the usual onus is another example of a departure from the Rule of Law. In matters of this nature the tribunal is not to observe provisions of the constitution relating to the presumption of innocence of persons who are accused of corruption who are being tried or investigated.

There are three cases among many that have been tried by tribunal which call for comment here. My comment relates to the application and eventual discharge of the persons concerned regarding the onus of proof under this Decree. The cases are those of three former civilian governors and the issue of security monies voted by a state legislature which came into their hands. The money involved in each case ran into millions of Niara for the security expenditure of the state. The Governors were tried by tribunals. At their trial, it was conceded by the state that they had a right to draw the money for the purpose of security of the state. The former governors did not deny receiving the money but claimed that they expended the same for the security of the state.

In the case of Alhaji Attah ,the governor of Kwerra state in Nigeria, he claimed that members of the legislature got money from him and signed for the money received. He gave the money to them in order to buy support for his measures and bills in the state legislature. The tribunal held that this was not sufficient explanation to satisfy it that the governor concerned was not corrupt and that money was not ill-gotten gains. He was duly convicted and sentenced to terms of imprisonment.

The other two cases are those of Chief Mbakwe of Imo State and Chief Okilo of River State. Chief Mbakwe claimed that the amount received by him was spent to lobby the then President of Nigeria and other officials to site a petro-chemical industry in the State. He also claimed that the money was spent in buying judges new cars for their official duties. Chief Mbakwe claimed that he spent the money he received as a security measure to gather information about his political opponents.

In the case of Chief Okilo he explained that that he had to spend the money to build barraks for the Nigeria Police, set up a security organisation of his own, finance students and market women unions in the state. The tribunal discharged and acquitted both governors for offences of ill-gotten gain and corruption on the grounds that there was no guideline statutory or otherwise for how the security vote was to be used and that the governors had given an account of the disbursement of the money to the satisfaction of the tribunal.

In my view, to say the least the reasons given by the tribunals are very disturbing. Granted there are no guidelines on what "security vote" is to be, but what are the reasons for discharging them when the purposes for which the monies were spent often did not meet security needs? The more fundamental objection to the judgments of the tribunal lies in the fact that the prosecution should not have been brought under a law relating to the recovery of property declared to be illegally or corruptly acquired. The monies the governor had were not income but monies given for a purpose which in the particular circumstances of these cases were to be applied to such purpose. The simple question here is whether they have been so applied or not. What had been received by them is not excess income as gives rise to the presumption of corruption. The courts in Nigeria have not had the opportunity to make a pronouncement as to what the requirements of the law should be for an explanation in matters relating to corruption and ill-gotten gains.

Therefore it will be premature to say whether such judgments that the tribunal have handed down can be regarded as satisfactory on this burning issue of corruption and ill-gotten gains which seem to have plagued the Nigeria society even before army take-over of the civilian government. The judgments of the tribunal are very conflicting and until there is a right of appeal to the normal courts of the land we shall forever live with these contradictory judgments and pronouncement which cannot be reconciled one with the other.

In 1975, after the military government of General Gowon had been overthrown, the military government that took over dealt a severe blow not to the politicians but to members of the Public Service, army, police, universities and other public institutions. Prominent and less prominent members of these institutions were compulsorily retired from their posts with loss of retiring benefits. The criteria for such retirement exercise were corruption, old age, reclining productivity, divided loyalty.

The statutory bodies dealing with discipline, promotion and retirement of members of the public service were not used in the process. It has been revealed recently by General Obasanjo that over 10,000 people lost their jobs.

I am not aware that any due process of law was resorted to in carrying out this retirement exercise at that time,or even now. I am also not aware of any challenge in court by any of the public officers who were retired.

After another army take over in December 1983, the military government of General Buhari repeated the same exercise of retirement of public officers as was done in 1975.

The military government brought out a Decree entitled Security of Employment of Public Officers and Public Officers (Special Provisions) No. 17 of 1984 in April 1984 but made retrospective from 31st December 1983. Its aim was to legalise the dismissal of public officers that had taken place and was going on at the time. It was also to abate any pending proceedings in court with regard to dismissal of such public officers.

Under the Decree, an appropriate authority can enforce the Decree. In the context of Nigeria, the appropriate authority is the President or the Armed Forces Ruling Council, or the Governor of a State who can summarily dismiss a public officer or compulsorily retire him if satisfied that such retirement would facilitate the improvement of the department or the service to which the officer belong. The employment can also be terminated summarily if the authority is satisfied that by reason of age or ill-health or due to any other causes the public officer has been inefficient in the performance of his duties or he has been engaged in corrupt practices or has in any way corruptly enriched himself or any other person or his general conduct in the performance of his duties would not be in the public interest. There is power under the decree for the appropriate authority to delegate the exercise of his powers. The decree has rendered the disciplinary powers of the Federal Civil Service Commission, State Civil Service Commission, Police Service Commission and other Statutory Institutions redundant.

The security of employment of a public officer is based on the fact that before he is sacked from his post he must be accused of an offence and be given an opportunity to defend himself. The decree does not seem to protect this time honoured remedy. The appropriate authority need only be satisfied before he acts. How he is to be satisfied is not prescribed. Must the satisfaction be objective or subjective? These are questions for the court to determine whenever there is a challenge to the authority. But such challenge seemed to be ruled out by sections 1(2) and 3(3) of the Decree which states:

> Sec. 1(2) For the avoidance of doubt, it is hereby declared that any act or thing done at any time between 31st December 1983 and the making of this Decree by the appropriate authority in respect of
>
> (a) dismissal, removal from office or compulsory retirement of any public officer or
>
> (b) the conduct of any inquiry into any aspect of the exercise shall be deemed to have been done pursuant to this Decree.
>
> Sec. 3(3) No civil proceedings shall lie or be instituted in any court for or account of or in respect of any act, matter or thing

done or purported to be done or purported to be done by any person under this Decree and if any such proceedings have been or are instituted before, on or after the making of this Decree, the proceedings shall abate, be discharged and make void.

The Supreme Court of Nigeria had the opportunity to make its attitude clear to this Decree in a judgment, Seidu Garba v. Federal Civil Service Commission, the facts of which are as follows:

> The Appellant was a Fire Officer. On 24th January 1983 there was a fire incident at NECOM House building in Lagos City. The fire according to the Appellant was put out by him and men under his department. Two persons died in the building while more than six hundred other lives were saved. On 31st January 1983 the Appellant was charged with nineteen other persons for the murder of the two persons who died in the fire. On 16 February 1983 upon the appellant's application, the High Court of Lagos quashed the indictment. On 21st February, the Appellant was interdicted. The letter of interdiction was renewed on 6th April 1983. On the 25th May 1983, the Appellant challenged these two letters of interdiction by proceedings in the High Court as being void for non-compliance with the Federal Civil Service Rules. The action was still pending when the military coup took place in December 1983. The new military rulers proceeded to have a mass purge of civil servants of all categories from High Court Judges to messengers. To legalise such dismissals and retirements, the Military government enacted this Decree on 27th June 1984 with retrospective effect to 31st December 1983.
>
> On 11th April 1984, the appellant was dismissed from the public service. On 19th July 1984, the Respondent filed a motion in the High Court objecting to the continuation of proceedings. The High Court ruled against the Respondent, continued the case and ruled that the Decree does not affect the question of interdiction of the Appellant. The Respondent appealed to the Court of Appeal.
>
> In the Court of Appeal, the Court ruled that the abatement section of the Decreee covered the matter and that the issue of interdiction of the Appellant had been subsumed into the subsequent dismissal on the principle of DE MINIMIS. In allowing the appeal, the Supreme Court rejected the proposition put forward by the Respondent that the Decree created a regime of a public officer not being worthy of his hire! Eso.J.S.C. said thus:
>
> > "I shudder to think that the Decree was ever contemplated to be penal or that a regime that comes in corrective stance and legislates to correct the ills and stamp out the corrupt practices and inadequacies of the past regime, would mean Decree No. 17 to create a regime that would reduce a public officer to a status of not being worthy of his hire! With utmost respect to the learned counsel for the Respondents, I cannot accept that proposition. I think the tenor is to safeguard the Military Government from an avalanche of litigation that might necessarily follow acts of dismissal,

removal or compulsory retirement of the Public Officers affected ....."

On the Decree itself, the court applying the technique of construction that preserves the jurisdiction of the court if even words depriving it of jurisdiction are used, construed S.1 (2) of the Decree to mean that the Decree would only apply to any act or thing done in after 31st December 1983. Any act of interdiction that took place or any legal proceedings after such an act of interdiction before December 31st December 1983 is not affected by the Decree. Also, the power of the appropriate authority is limited only to dismissing, or summarily removing, the public officer from his office and does not extend to interdicting the public officer. The Court then applied the NOSCITUR A SOCIS rule of construction to the abatement of proceedings contained in S3(3) of the Decree and removed any obscurity from its meaning by saying that what is abated could only be proceedings which are in respect of any act, matter or thing done or purported to be done under the Decree i.e after 31st December 1983.

During the trial in the High Court, MR GARBA was dismissed from the public service. The Court dealt with this aspect in the following words. Again Eso. J.S.C. said:

> "What remains now is an examination of the act of the Respondents in dismissing the Appellant from office during the pendency of the action. Such action, I think is contempuous of the judiciary, which has been seized with determination of Civil right under the constitution and which has been left unscathed by all military coups. For the judiciary, a powerful arm of government to operate under the rule of law, full confidence, and this must be unadulterated, must exist in that institution. It must indeed be demonstrably shown especially if it is the other arms of government that are involved. In civil days, both the Executive and the Legislation must show to the entire nation their demonstrable confidence in the judiciary. The responsibility is greater during military rule. The military in coming to power is usually faced with the question as to whether to establish a rule of law or rule of force. While the latter could be justifiable a rule of terror, once the path of law is chosen the mighty arm of government, the militia which is an embodiment of legislature and executive must in humility bow to the rule of law thus permitted to exist.

MR GARBA was ordered to be re-instated into the Civil Service.

I would like to end the narration of this episode by a few comments. Security of employment of a public officer is an important matter in developing countries of the world. Nothing contributes less to stability than to have members of the Civil Service that live in fear. The purge of the service that happened during the military regimes had not been in the best interest of the service. Its image had been dented and the public service has lost its lustre.

One important issue before I conclude this survey and that is, the reaction of the military regime to orders by the courts over laws passed by it. Put shortly in the context of what I have been saying about Mr Garba, can the

order to re-instate him be carried out by the Federal Civil Service Commission? The rule of law enjoins that the executive organs of the state should not only respect the orders of the court but help to enforce it. The military regime like most governments in the world today does not hesitate to make its annoyance known if and when the court makes an order which it regards as unacceptable to it. Such an order or judgment is just set aside by a Decree or Edict or it may be ignored by failing to carry out the order.

We can now come to some conclusions about the subject matter of this paper. The Military government in Nigeria is a government established by law after a successful revolution. It is not a government of a group of persons. It is a government that rules partly by the Decrees or Edicts it promulgates and partly by the provisions of the Constitution of 1979 that have not been suspended.

The unsuspended provisions of the constitution can be suspended at any time by a Decree or Edict which under a military regime is a superior law to any of the provisions of the constitution of 1979. The validity of a Decree or Edict is not a matter to be enquired into in any court of law in Nigeria. A Decree or Edict is not informed by norms of constitutionalism in the sense that such a decree or edict must conform and not infringed basic principle of the Rule of Law and of a person's Fundamental Human Right.

The courts under the military regime have developed the law by the usage of well known rules of statutory interpretation and the employment of weapons from the ancient armoury of prerogative orders and declaratory actions.

The courts have by their judgments and orders upheld the dignity of man and the stability of Nigeria.

The Domestic Application of the African Charter on Human and Peoples' Rights

by Dr Rose D'Sa*

1. Introduction

The African Charter on Human and Peoples' Rights[1] was adopted as a regional treaty by the Organisation of African Unity (OAU) in 1981. It entered into force, contrary to most expectations, only five years later on 21 October 1986. To date, it has been ratified or acceded to by a total number of 35 African countries,[2] representing approximately two-thirds of the entire membership of the OAU. This makes it the largest regional human rights system in existence.[3]

The adoption of the Charter represents an important landmark in the protection and promotion of human rights on the African continent for a number of reasons. Firstly, it should be noted that the majority of African States are not parties to the treaties which are regarded as the main international human rights instruments, namely the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its Optional Protocol[4]. Thus, the adoption of this regional instrument, which affirms in its Article 60, adherence to general international law on this subject, is therefore an important additional means by which generally accepted international norms on human rights may have application in the domestic law of African States. It is an instrument to which the African judiciary may undoubtedly refer in the context of decision-making in the courts, since there is a general presumption in domestic law that whenever possible domestic law is to be applied and interpreted so as not to conflict with a State's international obligations.[5]

Secondly, the adoption of the Charter is an important milestone in the history of the OAU itself, which as an inter-governmental organisation representing all independent African States, has attracted criticism in the past for an apparent indifference to the suppression of human rights in some African countries which have at various times been evident on a massive scale.[6] The Charter envisages in Article 31, the establishment of an African Commission on Human and Peoples' Rights of 11 members chosen to serve in their personal capacity from among African personalities of the highest reputation, particular consideration being given to those with legal experience. Its functions include the promotion and protection of the rights enumerated in the Charter, as well as the additional function of interpreting the Charter. This Commission has now been established[7] and it remains to be seen whether its influence and its jurisprudence will make any significant contribution to the cause of human rights in Africa. Despite some inherent limitations in its mandate, which will be discussed below, it remains significant for Africa that the OAU, which hitherto has had a very restrictive legal and political approach to the concept of non-interference in the domestic affairs of its member countries[8], should have established such a body at all. Viewed against this background, the decision by the OAU to adopt a regional treaty on the subject of human rights is a welcome initiative.

Thirdly, the African Charter has a special significance for African judges and lawyers because it purports to reflect "the African conception of human rights" and is intended "to take as a pattern the African philosophy of law and meet the needs of Africa".[9] There is now ample evidence in the context of the European Convention[10] of the significant contribution which can be made to human rights through the application and enforcement of regionally accepted norms. The acceptance by the majority of African states of this regional Charter is an unprecedented opportunity for the African judiciary and the African Bar to apply in domestic law, concepts of human rights which reflect African legal perspectives and social needs. However, it is naive to suppose that the emergence of this document alone will dramatically alter the enforcement of human rights in Africa. Many African States face the prospect of both internal and external subversion caused for example, by the fact that many of them encompass a heterogeneous collection of tribes, artifically drawn together as a result of colonial and administrative or economic preference and convenience.[11] Furthermore, the severe under-development of many African nations (with the attendant problems of poverty, malnutrition and disease) creates considerable problems for African governments and poses a dramatic human rights dilemma. Nevertheless, the existence of the African Charter and its clear affirmation that all human beings are entitled to certain fundamental rights does reinforce the legal and moral framework laid down in many African constitutions. By virtue of Article 1 of the Charter, States parties to it have an obligation to "recognise the rights, duties and freedoms enshrined" in it and "undertake to adopt legislative and other measures to give effect to them". This suggests that the rights protected by the Charter are intended to be binding on States[10]. It is therefore an important tool in the context of domestic law for the development of jurisprudence and the advancement of human rights for all.

The African Commission established under the Charter may in the context of its functions to protect human rights, entertain a "communication" from a State party (Article 47) or from entities other than States (Article 55). Thus communications from individuals or groups may be considered providing that a simple majority of the Commission decides to do so (Article 55(2)) and the provisions of Article 56 are also satisfied. The latter includes a requirement in Article 56(5) that local remedies, if any, must first be exhausted unless it is obvious that this procedure is unduly prolonged. Therefore it is clear that, as in the case of other regional systems, a complaint about an alleged violation will normally first have to be pursued via the domestic court system before it can be considered by the Commission. It is therefore necessary for domestic courts to have regard to the effect of the Charter's provisions in the context of domestic litigation. However, most African States ascribe to the dualist legal system whereby an international treaty cannot be applied in the domestic courts until it has undergone some process of "transformation" or "incorporation" and thus become directly applicable in domestic law. It is therefore important that African States give early consideration to the question of incorporation of the Charter into domestic law either by way of constitutional amendments in respect of relevant Charter provisions or by the enactment of appropriate legislation.

The decision by the OAU not to establish an African Court of Human Rights to which the Commission can transmit cases for judicial determination, (as under the European and American Conventions), was taken apparently on the basis that African tradition emphasises conciliatory rather than judicial procedures for settlement. Certainly OAU organisational history favours this approach since one of the OAU's principal organs for the peaceful resolution of disputes was the Commission on Mediation, Conciliation and Arbitration. However it eventually became defunct from lack of use. The African Commission is similarly not a formally constituted judicial organ, but is a fact-finding and conciliatory body with a mutual responsibility to try to reach an amicable solution (Article 52). The fact that measures taken by the African Commission under the Charter remain confidential until the OAU Assembly of Heads of State and Government decides otherwise (Article 59(1)) and that the latter, which is primarily a political organ, also decides whether the Commission's report is to be published (Article 59(2)) may significantly reduce the impact of the Commission's findings. However, it does not affect the ability of the African judiciary to apply the relevant human rights norms in the context of their domestic law whenever applicable. In this context it is relevant to note that although the United Kingdom, for example, has neither a written constitution nor legislation incorporating the European Convention into domestic law, and subscribes to the dualist legal system, the Convention has nevertheless come to be treated by judges as relevant for the purpose of resolving uncertainties in statute law, and also as being relevant to public policy.[12] It is therefore necessary to analyse the specific nature and extent of the rights to be protected by the Charter so as to determine their relevance and application in domestic law.

2. Civil and political rights under the African Charter

The African Charter enumerates a number of civil and political rights attributable to the individual, many of which are formally recognised in African constitutions. These include the right to non-discrimination (Article 2) the right to equality and equal protection of the law (Article 3), the right to life (Article 4), the right to the respect of human dignity (Article 5), the right to liberty (Article 6), the right to have one's cause heard, i.e. minimum standards during legal proceedings (Article 7), the right to freedom of conscience and religion (Article 8), the right to expression and dissemination of opinion, the right to freedom of association (Article 10), and the right of assembly (Article 11), the right to freedom of movement (Article 12), the right to participation in government and access to public service and public property (Article 13), and the right to property (Article 14).

In respect of the content of these rights it is not surprising that the Charter shares much in common with other regional instruments such as the European Convention and the American Convention, since there are several international human rights documents from which the drafters of the African Charter could draw inspiration. It is clear that whilst striving to reflect an African conception of human rights, the drafters

recognised that it would be imprudent to deviate too much from international norms already established in other international human rights instruments.[13] This is also to be expected in view of the fact that human rights are by their nature attributable to human beings wherever they happen to live and to that extent "transcend the boundaries of nation, race and belief."[14] There are, however, a number of specific points of interest in respect of the civil and political rights enumerated in the Charter.

(a) Some lacunae in the Charter

In respect of the right to life (Article 4) and the right to liberty (Article 6) it is clear that no one may be arbitrarily deprived of these rights and Article 6 includes a prohibition against arbitrary arrest and detention. Article 7 provides some procedural safeguards in criminal trials which include the right to have one's cause heard, the right of appeal, the right to be presumed innocent until proved guilty by a competent court or tribunal, the right to defence including the right to a defence counsel of one's choice and the right to be tried within a reasonable time by an impartial court or tribunal. In addition there is a prohibition against retrospective penal legislation in Article 7(2). However, it has been pointed out that certain additional safeguards found in both the European and American Conventions are missing,[15] and these broadly relate to the lack of a requirement that the accused be notified in advance of the charges against him,[16] the right to request witnesses to attend the trial,[17] the absence of legal representation paid for by the State if the accused cannot afford to hire a lawyer[18] and the right of the accused to aid where there is a language problem.[19]

Unless one took the view that the right to defence implies a right to e.g. call witnesses, these omissions (if not covered by domestic legislation) would mean in effect that the accused person might not be able to defend himself to the fullest possible extent and hence might lead to a miscarriage of justice or infringement of his rights. Some, but not all of these omissions such as the absence of State-funded legal aid, are understandable if one bears in mind the deficiences of the legal process in many African states owing to the lack of trained legal personnel and the paucity of financial resources to bring the legal system in line with standards common in Western, developed countries. The concept of State-funded legal aid for all criminal cases though clearly a goal to be aimed at, is totally unrealistic at the present time given the poor economic condition of most African States.[20] This is therefore an instance where the universal "right to a fair trial" may have to be modified to take into account regional differences and practical realities.

On the other hand, the improvements which are necessary to the administration of justice will not come about unassisted. They require support from the judiciary and lawyers generally as well as from the African public, through its elected representatives, so that they can legitimately and successfully press for improvements which will enhance the protection of human rights. It is therefore important that unlike the European Convention, the African Charter does place on all States

parties to it the duty, in Article 25, of promoting and ensuring through teaching, education and publication, understanding and respect for the principles of the Charter. By virtue of Article 26, States parties also have the duty to guarantee the independence of the courts and must allow the establishment and improvement of institutions entrusted with the promotion and protection of rights under the Charter. The Charter also entrusts in the African Commission the function in Article 45(1) of promoting human and peoples' rights through appropriate research and dissemination of information, as well as to act as a spur to African Governments in the resolution of legal problems associated with the proper implementation of these rights and fundamental freedoms. It is important that the legal profession in Africa actively associates itself with these worthy objectives.

(b) The use in the African Charter of "clawback" clauses and its effect on domestic law

In view of the relative political instability which has been witnessed in various parts of Africa over the past two decades, it would seem reasonable for the Charter to have addressed itself to the question of exceptions to or derogations from, the rights of individuals and the circumstances in which the suspension of rights may be permissible. Both the European and American Conventions contain derogation clauses, that is clauses which temporarily suspend the rights guaranteed under the Charter in certain circumstances[21] Derogation clauses can also list certain rights as being non-derogable[22] even when circumstances permitting derogation exist. The effect of a derogation clause is therefore to provide some protection to the individual at periods of national or other emergency when his fundamental rights would be most at risk, by limiting the situations when these rights can be suspended.

By contrast, however, the African Charter does not contain any derogation clause. Instead it uses "clawback" clauses. This type of clause has been defined as a clause that "permits, in normal circumstance, breach of an obligation for a specified number of public reasons."[23] Such a clause therefore differs from a derogation clause in that it applies in everyday circumstances, while the latter allows suspensions only in circumstances of war or public emergency. The clawback clause may provide that the circumstances when rights may be suspended or breached are to be determined by domestic law.

For example, Article 6 (the right to liberty) provides that individuals may not be arbitrarily deprived of their freedom but that "reasons and conditions" (i.e. the "clawback" clause) must previously have been laid down by law. This therefore leaves a considerable margin of discretion to individual States to enact legislation to provide in what circumstances preventive detention or other suspensions of civil and political rights may be allowed, and may thus exclude judicial control over state behaviour other than to determine whether such suspensions have occurred in accordance with domestic law. The use of such clauses is encountered in the Charter in respect of many other rights apart from the right to life (Article 4) and the right to liberty (Article 6) and includes the right to freedom of conscience and religion (Article 8), freedom to receive information and disseminate opinion

(Article 9), freedom of association (Article 10), freedom of assembly (Article 11) and freedom of movement (Article 12). In each case, the State is permitted to justify limitations on individual rights and freedoms by reference to its own domestic law, which could be restrictive.

However, it must be borne in mind that the Commission (and thereby African judges by implication) is able to have regard to other international instruments in the field of human and peoples' rights by virtue of Article 60, as well as to legal precedents and doctrine in this area. This will therefore include not only other regional instruments but more importantly the UN's International Covenant on Civil and Political Rights which defines the scope and limitations of permissible state derogation in its Article 4.

Under this Article the public emergency must threaten the life of the nation and be officially proclaimed and the measures taken in derogation must be non-discriminatory, strictly required by the exigencies of the situation, and not incompatible with other international legal obligations. Thus it is important to recognise that the provisions of the African Charter should be viewed in the context of internationally accepted standards under international law as evidenced in the jurisprudence of the UN and other regional institutions. In the interests of greater coherence and clarity in the law, it is important that African judges and lawyers generally have improved access to the relevant jurisprudence so as to be in an informed position to apply the appropriate internationally accepted norms.

Furthermore, it is arguable that the existence of a clawback clause does not invariably mean that the relevant domestic law should be given a narrow or restrictive interpretation which limits human rights. The courts still retain an inherent jurisdiction to decide if a law is reasonably justifiable. In other words, the courts may legitimately consider whether the relevant domestic provisions comply with general principles of law including those of fairness, proportionality and the absence of arbitrariness.

Not all the individual rights are subject to the wider type of clawback clause discussed above. For example, Article 11 of the African Charter guarantees the right of every individual to assemble freely with others. Although this is subject to a clawback provision, this clause specifies the circumstances when domestic law can restrict this right. These require restrictions to be "in the interests of national security, the safety, health, ethics and rights and freedoms of others". However, these restrictions are potentially capable of covering a very wide number of situations so that wide restrictions on the right of assembly may in fact be permitted. The two other regional Conventions, the European Convention (Article 11(2)) and the American Convention (Article 15) arguably adopt a narrower formulation by merely permitting only such restrictions on this right as are prescribed by law and necessary in a democratic society.

3. The legal effect of the economic, social and cultural rights in the Charter

The African Charter is unique among international human rights treaties in that it enumerates both civil and political rights as well as economic, social and cultural rights in one document. By doing so it confirms that both categories of rights are fundamentally important and interlinked. It also leaves the matter open for argument that there are no reasons in principle why both kinds of rights should not be justiciable.[24] This is further supported by the fact that alleged violations of both categories of rights may be brought before the African Commission. The economic, social and cultural rights guaranteed to individuals under the African Charter include the right to work and equal pay for equal work (Article 15), the right to health (Article 16) and the right to education (Article 17). There is no support in the Charter provisions for any proposition that civil and political rights take less precedence or may even be suspended in order to promote economic, social and cultural rights; or vice-versa.

In terms of the practical application in domestic law of economic rights, it is difficult to see how certain rights e.g. the right to health (Article 16) can be guaranteed where the necessary economic infrastructure is lacking. However, that is to miss an important point which is that while some of these rights may only be capable of full implementation by progressive State action over time, access to whatever public facilities may be currently available must apply to all individuals and groups without discrimination under Article 2 and Article 19 of the Charter. In practical terms, the exploitation of a State's economic resources are usually managed by the State through the government of the day and whether individuals or groups ultimately benefit will depend on the propensities of that government. However, the Charter does provide for the relevant minimum standards by which to judge its actions. Interestingly, it also includes a right to property ownership (Article 14) which is also included in the First Protocol to the European Convention but which was not included in either of the UN Covenants on Human Rights. It also applies a principle of non-discrimination to the allocation of economic resources. It is arguable that for instance, evidence of the misallocation of resources so as to deprive some sections of the community of services essential to development for reasons not justifiable by reference to economic viability or feasibility or general principles of proportionality may very well be unlawful. It is important to note that Article 13 of the Charter whilst guaranteeing the civil and political right of participation in government also incorporates the economic right, in Article 13(2), of equal access to the public service and extends to all individuals, (and not just citizens)[25] in Article 13(3) the right of access to public property and services in strict equality of all persons before the law.

The possible role of the judiciary in the enforcement of economic rights has been demonstrated in recent years through the evolving jurisprudence of the Indian Supreme Court although the inclusion in the Constitution of India of specific Directives in this area has clearly been of assistance in providing judges with a directly

applicable source of legal norms with which to develop the common law.[26] The African Charter may not as yet have come to enjoy such a status in domestic law but it remains relevant that the economic, social and cultural rights in the Charter are viewed as part of a movement towards development in a general sense. The Preamble to the African Charter makes it clear that the African perception of human rights requires "particular attention" to be paid to the "right to development". It also points out that:

> "Civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".

This phraseology seems to suggest an equal emphasis on both types of rights but at the same time the strong link between development and human rights is stressed. For example, Article 22(1) states that:

> "all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity in the equal enjoyment of the common heritage of mankind".

Thus the "right to development" is not limited strictly to development in economic terms, the usual measure of which is in real per capita gross national product (GNP), but accords with the more "modern" definitions of development[27] which includes taking into account the standard of living and opportunities for advancement of the individual as a member of society.

The existence of a human right to development seems to have been acknowledged within the UN as being a right in international law but the precise content of the right has yet to be comprehensively analysed.[28] Article 22(2) of the African Charter places a duty on States to "individually or collectively" ensure "the exercise of the right to development". This affirmative action at national and international level will, however, require some change in the present international economic system in order to bring about effective realization of the economic, social and cultural rights in the Charter. So long as the claims for the establishment of a New International Economic Order remain unrecognised, it is doubtful whether the "right to development" is indeed a legal right in international law. This reasoning is also supported by the fact that the existence of such a legal right implies that there is an obligation on developed countries to render assistance to developing countries in the latter's efforts to promote this right, in particular through development assistance, but such an obligation has not yet been authoratively established or accepted. However, this should not be allowed to obscure the point that the African States themselves also have a duty under the African Charter to ensure that they make best use of the resources which they already have available, to ensure the most equitable distribution of wealth among their peoples.[29]

4. The concept of "peoples" rights in the African Charter and its application in domestic law

(a) The importance of "group" rights in the African context

One of the unique features of the African Charter is its inclusion of rights attributable to "peoples". This addition, which is included in the title of the Charter itself, is clearly of central importance in the document and is a distinguishing feature from the European and American Conventions. Its inclusion was specifically intended to reflect its importance as part of the "African" conception of human rights. The importance of the community in traditional African culture is apparent, especially since collective agricultural and other efforts were often necessary to ensure the survival of the people. Thus it was within the group that individuals had identity in African customary law and expulsion from the group was one of the most serious punishments that could be inflicted on the individual.[30]

However, it is important that the concept of "peoples rights" in the African Charter is correctly interpreted and understood. The term "peoples rights" was included at the instance of some socialist States, notably Ethiopia and Mozambique, who maintained that the individual had no greater rights than that attributable to the society as a whole.[31] The emphasis on group rights in the Charter was intended not only to reflect a truly African conception of human rights but also voiced an implicit criticism of the existing human rights concepts, as formulated for example in the human rights Covenants of the UN, which has been accused of an inherent bias towards individual rights in preference to group rights.[32] However the crucial issue is whether the Charter in fact creates any new "group" rights which have not been recognised by other international treaties and which thereby have special relevance for domestic law in African countries. It is submitted that no new legal rights have been created, and that therefore no substantially new rights will arise for determination in the context of domestic law, but that the Charter does serve to reaffirm the validity of the concept of group rights as part of internationally recognised human rights.

In order to examine this issue, it is necessary to look at the Charter as a whole. Firstly, the principle of non-discrimination in Article 2, which prohibits discrimination against the individual, is extended to peoples, who are declared in Article 19 to be equal and who are entitled to "enjoy the same respect and to have the same rights". Article 19 further states that "nothing shall justify the domination of a people by another". What constitutes "a people" has not been defined in the Charter and there is some suggestion that this was a deliberate decision of the drafters.[33] This term is also not clearly defined in international law, but one view is that both an objective as well as subjective element must be satisfied. Thus the people in question must be capable of showing some common link, usually of an ethnic or historical kind, and must itself be capable of identifying its members.[34] This could therefore include ethnic groups, tribes and racial groups.

(b) The concept of "group" rights in international human rights law

International human rights law, as exemplified in the UN Covenants of 1966, clearly envisages the individual as the primary subject of international human rights law. However, it also recognises both the existence of groups and the fact that such groups are capable of having rights and obligations. For example, the collective right of self-determination of peoples is given pride of place (in identical terms) in Article 1 of both of the human rights Covenants. Collective rights are also asserted through the recognition of the need for the special protection of minorities. For instance, under Article 27 of the International Covenant on Civil and Political Rights:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language".

However, there has been some reluctance to accept that collective rights are also human rights. Classical theories of human rights suggest that "human rights" are by definition attributable only to individuals as human beings, and not to groups. Some of this reluctance stems from the fact that in the past violations of human rights have taken place on a massive scale (as in Nazi Germany) in the pursuit of a "collective" goal, on behalf of "the nation" or of "the State". However, the possibility of having to resolve conflicts between kinds of rights does not mean that groups may not claim or assert human rights. For instance some groups, notably minorities, colonised peoples, and to a lesser extent indigenous populations, [35] are recognised in international law as distinct groups capable of enjoying rights. The better view, and the one adopted by the Charter, is that collective rights are also human rights even though they have a different conceptual basis. This different but related conceptual basis for collective and individual rights is helpfully explained by Louis Sohn:

> "One of the main characteristics of humanity is that human beings are social creatures. Consequently, most individuals belong to various units, groups and communities; they are simultaneously members of such units as a family, religious community, racial group, people, nation and state. It is not surprising therefore, that international law not only recognises inalienable rights of individuals, but also recognises certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. These rights are still human rights; the effective exercise of collective rights as a precondition to the exercise of those other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights." [36]

This explanation as to why collective rights exist as a separate, distinct category of human rights is further developed by Richard Kiwanuka, by drawing an analogy between a group and a tennis club. In an inter-club tennis tournament, only clubs have the right to participate even if they are represented by individuals. Thus even world famous players like Boris Becker or Steffi Graff would not have the automatic right to play in such a tournament unless they were entered by their clubs in accordance with those clubs' rules. Thus:

> "The individual's right to play can only be expressed in and through the club. This right is actualised first, by protecting the club's rights in the wider setting; and then by the individual's rights in the club. Individual and collective rights are no different".[37]

However, the fact that collective rights may be legitimately asserted as a matter of international law, does not resolve the question of how they may be relevant to domestic law. In this context the African Charter offers little guidance to domestic lawyers and judges as to the domestic application of group rights. One possible example from the Indian context is provided in the constitutional law of India where the Supreme Court has a developed practice for hearing petitions brought by way of "public interest" litigation. Such cases are often sponsored by social action groups who wish to challenge or clarify the law in areas where it may affect the economic or social welfare of a section of the community. For example, in Mehta, M.C and Another v Union of India and Others,[38] the Supreme Court considered (in the light of the Bhopal tragedy) the relevance of the possible hazard to the health and well-being of workmen and people living in the vicinity, of allowing a caustic chlorine plant to restart after an earlier industrial accident at the plant which had caused death and injury to members of the community. Although, as in this case, the court in fact permitted the plant to re-start and the extent of the court's power of intervention was limited by the fact that the substantive issue was one of policy to be determined by the Government, it nevertheless illustrates the relevance of group interests and rights in the context of domestic litigation.

(c) The civil and political rights of "groups" or "peoples" under the African Charter

The concept of group or peoples rights therefore has a legitimate place in international human rights law. The question is whether the African Charter adds anything further to this understanding of group rights. Article 20 of the Charter gives to "all peoples" the unquestionable and inalienable right to self-determination. Analysis of Article 20(2) suggests that this clearly applies to "colonised or oppressed peoples" such as the people of Namibia and the Black population of South Africa who are further entitled, by virtue of Article 20(3) to assistance in their liberation struggle. This corresponds with the UN interpretation of the right to self-determination and does not imply any extension of its application to include a right of "internal" self-determination for peoples already within independent and sovereign states amounting to a right of

secession, except for people living under racist regimes.[39] This interpretation is also supported by OAU practice since that Organisation has since its inception expressly stated a policy of adherence to the state boundaries inherited at the time of independence of its Member States.[40] However, with regard to the right of peoples within independent African states to exercise other forms of internal self-determination,[41] it is relevant to note that under Article 13(1):

> "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".

Political participation by the population is clearly fundamental to any dicussion of human rights. It is relevant to note in the context of the Charter that the right to participate in the benefits and decision-making powers of the community is a traditional right in African customary law.[42] Thus although the African Charter does not link "peoples rights" with a right of secession, it does clearly recognise individual rights of participation in government. Since tribal or separatist groups are often in reality groups protesting against the denial of effective participation in the decision-making process of the State, or constitute a reaction to oppression by the authorities, the Charter does thereby address a fundamentally important issue. It is therefore in this context for example, that the issue of collective rights may arise in domestic litigation.

d) The economic, social and individual rights of "peoples" under the Charter

The remaining "peoples" rights in the Charter fall broadly in the category of economic, social and cultural rights, but these essentially equate peoples rights with the rights of the State. For example, Article 21 proclaims that "all peoples shall freely dispose of their wealth and natural resources". This right is also given to African States themselves in Article 21(4). It therefore reflects the aspiration of African States which have achieved political independence, to gain effective control over the resources of their nations so as to achieve economic independence as well. State parties have a further duty to enable their peoples to fully benefit from the advantages derived from their natural resources in Article 21(5), by having the duty to eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies. It has been argued that the forceful language of Article 21(5) is tempered somewhat by the obligation in Article 21(3) to "promote international economic co-operation based on mutual respect, equitable exchange and the principles of international law"[43]. This would imply that nationalisation of foreign property and business assets would only be lawful if the appropriate international legal standards were compiled with, and this would include the payment of compensation. However, the African Charter gives no specific direction as to the level of compensation payable, except with regard to the "spoliation" of people, who are given in Article 21(2), the right both to the lawful recovery of

their property as well as to adequate compensation. The compulsory acquisition generally, of property by the State is made subject in Article 14, to a requirement for the existence of "public need" or that it is "in the general interest of the community and in accordance with the provisions of appropriate laws". There is some evidence for suggesting, however, that this requirement goes beyond that now required in international law since the public utility principle is no longer regarded as a necessary requisite for the legality of a nationalisation.[44] Thus the State is free to judge for itself when to nationalise, so long as its motivation does not take on a discriminatory character. The right to freely dispose of wealth and natural resources in the African Charter is of course part of a wider, international campaign, particularly within the UN to gain international recognition for the concept of permanent sovereignty over natural resources.[45] As such it is not a matter which broadly speaking, is justiciable in the domestic law context.

e) Third generation "peoples" rights

The debate about human rights has been in continuous evolution ever since the adoption of the International Covenants in 1966. The category of civil and political rights and that of economic, social and cultural rights have sometimes been referred to as "first" and "second" generation rights respectively. There are also various rights which are sometimes described as newly "emerging" human rights or the "third generation of human rights".[46] The African Charter includes a reference to three such rights, namely the right to development (Article 22), the right to peace (Article 23), and the right to a satisfactory environment (Article 24). These rights are also viewed as "peoples" rights under the Charter.

Their inclusion in the Charter is of interest because it is the first human rights treaty to include a detailed reference to these "rights" and to that extent it encourages the development of new perspectives for Africa. However, the effect of their inclusion in terms of the domestic law in African States is limited. This is inevitable because the specific legal content of such rights has yet to be fully conceptualised as a matter of international law. Furthermore, although such "rights" may be embodied in the Charter, it is doubtful whether the necessary opino juris i.e. the actual expectations of States, as evidenced by state practice, is present such that the "right" can be regarded as being accepted in international customary law.[47] Even it were, it is difficult to ascertain how and in what context these rights may become justiciable in domestic law and this is a matter on which the African Commission may wish to undertake further research.

(f) Positive or affirmative action in the context of "peoples" rights

One further aspect of peoples' rights which merits attention, is the extent to which the recognition of group rights as such implies any duty upon the State to take any positive action to secure these rights. It will be recalled that Article 27 of the International Covenant on Civil and Political Rights in dealing with the protection of minorities,

formulates a 'static' guarantee namely that such persons "shall not be denied the right" to enjoy their culture, and so forth. The question arises as to whether the African Charter places any obligation on States to take positive steps for example, to ensure not merely a right to education but to education or teaching in conformity with the religious convictions of the parents or group in which the individual belongs, or in the particular language of a community.[48]

It is of interest that a number of newer African constitutions have not only recognised that the best guarantee of unity and harmony is a serious commitment to minority rights but also that this may require mention of specific, affirmative action for disadvantaged groups.[49] However, the African Charter is silent on this question of positive or affirmative action with respect to group rights, with one exception - the reference to the family, in Article 18. This Article states that the family "shall be the natural unit and basis of society". It places on the State the duty of taking care of the physical, health and moral welfare of the family (Article 18(1)), the duty to assist the family, which is the custodian of morals and traditional values recognised by the community (Article 18(2)), the duty to eliminate discrimination against women and the protection of internationally recognised women's and children's rights (Article 18(4)). In respect of women's rights, the acceptance of the principle of non-discrimination in domestic law is in practice only the first step torwards the elimination of discrimination against women in Africa. [50]

In general Article 18 places a great deal of emphasis on family life as such, and adopts a different approach to that in the European and American Convention which in Article 8 and 5 respectively, merely provide for the absence of interference in family life, rather than for a positive commitment towards the protection of the family, such as that contained in the African Charter. The emphasis on the family is to be regarded as being in keeping with traditional African values and tradition, which it is part of the Charter's function to respect and promote. The concept of the "family" has a much wider connotation in traditional African society than it does in the European context; it involves an extended family which is a most important unit of social life, functioning for many purposes as an economic unit under the direction of its head.[51] However, the application of this principle of affirmative support for family life in domestic law remains unclear. It is perhaps to be viewed as a guiding principle to African States in the enactment of social legislation and the formulation of social policies, rather than a principle which gives to individuals or groups some specific right which is capable of being enforced in domestic law.

5. The concept of "duty" of the individual

The African Charter is unique among regional human rights instruments in that it contains in Article 27(1) a requirement that "every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community". This differs from both the European and American Conventions, neither of which mention obligations by the individual to the State, although Article 32 of the American Convention recognises the

obligation of the individual to his family, community and mankind. However, unlike the African Charter, it does not enumerate these duties.

Article 28 of the African Charter provides for a general duty by an individual to respect and consider his fellow human beings without discrimination, but also includes in Article 29 specific duties. These include respect for the family, the maintenance of parents in case of need, and the preservation of the family's harmonious development. Wider social duties are also included, such as the duty to place one's intellectual and physical abilities at the service of the community, to work to the best of one's ability and competence, and to preserve positive African cultural values in one's relations with other members of the society, in a spirit of tolerance. The individual also has further duties towards the State to preserve national unity and the territorial integrity of his country and to contribute to the defence of his country, in accordance with the law. Some of these duties do not appear to be capable of effective implementation in law, such as the duty in Article 29(8) to promote African unity, but others such as the duty to maintain parents in need or to pay taxes, may properly be regarded as legal rather than merely moral obligations.

The section on duties as a whole certainly provides a code of good conduct for all African citizens.[52] However it may also involve some difficulties for implementation in domestic law. For example, Article 28 appears to extend the general principle of non-discrimination, to relations between individuals. It is unclear whether it would thereby have application within the sphere of private as opposed to public law, such as in the context of contractual rights between private individuals. In the context of international law, the principle of non-discrimination tends to be applied only in the context of the provision by public authorities of public facilities such as housing, or public services such as transport. The principle of freedom of contract however tends to prevail in other contexts. For example, Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) refers to racial disrimination in the "political, social, cultural or any other field of public life" (emphasis added). Discrimination in a private or social context is therefore not covered.

Furthermore, it is not clear from the African Charter whether the "duties" imposed on individuals thereby exonerate or exclude State obligations. For instance does Article 29(1) which places an obligation on the individual to maintain his parents "in case of need" mean that the State does not have any or only a secondary responsibility to look after the welfare of elderly parents? Furthermore, the concept of "duty" may arguably be interpreted as limiting the application of certain rights. For example, the right to freedom of expression in Article 9 could, in some circumstances, conflict with the duty of the individual to promote African unity in accordance with Article 29(8). These are the kinds of issues on which the African Commission can usefully provide guidelines for member States so that the implications for domestic law can be more fully considered. It is of interest in this context that among the promotional functions of the Commission in Article 45(1)(b) is a mandate "to formulate and lay down, principles and rules arrived at solving legal problems relating to human and peoples'

rights and fundamental freedoms on which African governments may base their legislation".

6. Conclusions

The African Charter on Human and Peoples' Rights is a considerable political achievement for African States and the OAU. It also presents an unique challenge for African lawyers and the African judiciary in the context of the domestic implementation of these new regional norms and in giving substance and day-to-day relevance to the Charter in the lives of African citizens. The Charter incorporates a number of distinctive features which reflect African cultural values. It also reinforces the applicability of international legal norms in this area. It confirms the applicability of both civil and political rights as well as economic, social and cultural rights to the people of Africa. It also affirms groups or "peoples" as the legitimate subject of human rights and obligations although the manner in which these will apply in the domestic context is left undetermined. It is a forward-looking document in that it includes references to a possible new category of "third generation" human rights the legal content of which remain unclear but which will no doubt continue to be the subject of international and regional debate.

In the context of domestic law the Charter allows a considerable degree of autonomy to African Governments in respect of civil and political rights by the extensive use of "clawback" clauses, although this need not necessarily impose a fetter on purposive interpretation of human rights norms by the judiciary. Some emphasis is placed on the concept of "peoples" rights but it is most unlikely that the intention is to expand or alter in any way contemporary African political thought on such issues as secession. The enumeration of economic, social and cultural rights and the articulation of the right to development of African peoples is to some extent a goal limited by external factors relating to the international economic system.

The Charter envisages procedures for the protection and promotion of human and peoples' rights through the institution of the African Commission on human rights, but strictly legal methods of dispute resolution are not envisaged and an African Court on Human Rights is not included. This increases the scope for and the responsibility of the African judiciary, to interpret and apply, where appropriate, the relevant principles in domestic law so as to comply with the commitments of African governments in ratifying the Charter. Regular discussions between the senior judiciary in African countries about common difficulties faced in respect of legal implementation of certain rights will be of assistance. The availability of international and regional jurisprudence to African judges will be an important factor in assisting them to meet this challenge, which is ultimately expected of them by Article 26, which places on all States Parties the duty to guarantee the independence of the courts and to allow the establishment and development of appropriate national institutions to promote and protect the rights and freedoms guaranteed by the Charter.

FOOTNOTES

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1. The African Charter on Human and Peoples' Rights is also known as the "Banjul Charter" after the city of Banjul, The Gambia, in which it was drafted. It is referred to in this paper as the "African Charter" or as "the Charter". (For the text, see Annex).

2. The following OAU Member States are parties to the African Charter: Algeria, Benin, Botswana, Burkina Faso, Cape Verde, Central African Republic, Chad, Comoros, Congo, Egypt, Equatorial Guinea, Gabon, Gambia, Guinea, Guinea-Bissau, Liberia, Libya, Mali, Mauritania, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome & Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia, Uganda, Tanzania, Zaire, Zambia and Zimbabwe.

3. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1951 ("the European Convention") has 21 parties and the Inter-American Convention on Human Rights ("the American Convention") has 19 parties.

4. As at 14 July 1988 there were 87 State Parties to the International Convenant on Civil and Political Rights, of which 24 were from Africa. As at 5 July 1989, 45 State Parties have accepted the competence of the U.N Human Rights Committee under the Optional Protocol of which 12 were from Africa. As at 18 November 1988, 92 States were Parties to the International Covenant on Economic, Social and Cultural Rights of which 24 were from Africa.

5. See further I. Brownlie, Principles of Public International Law, (3rd Ed.), 1979 at p. 51.

6. See further U.O. Umozurike, "The Domestic Jurisdiction Clause in the OAU Charter" (1979) African Affairs, 197 at 199.

7. The inaugural session of the Commission was held in Addis Ababa, Ethiopia in November 1987.

8. See the writer's unpublished Ph.D thesis, "The Relationship Between the UN and the OAU in the Fields of International Peace and Security and of Economic and Social Development", Faculty of Law, University of Birmingham, UK., Vol.I pp 147-151. See also Umozurike, op cit; Akinyemi "The OAU and the Concept of Non-Interference in the Internal Affairs of Member States" (1972/73) 4 BYBIL, 393; Okungwu, "The OAU Charter and the Principle of Domestic Jurisdiction in Intra-Africa Affairs" (Oct/Dec 1973) 13 Ind. J.IL 589. See also the Nationality Decrees issued in Tunis and Morocco Case, P.C.I.J. Rep., Series B, No. 4 (1923) p.24: the presence of a treaty obligation may remove an item from domestic jurisdiction.

9. See OAU Doc CAB/LEG/67/3/ rev. 1 (1979) Dakar Draft at 1.

10. This formulation is arguably weaker than the equivalent Articles 1 and 13 of the European Convention, and Article 1 of the American Convention. Nevertheless, it is submitted that the intention was to make the Charter a binding instrument on State Parties as evidenced by Article 45(2) which confers a duty on the African Commission to ensure the protection (and not merely the promotion) of the rights in the Charter.

11. Mojekwu, "International Human Rights: The African Perspective" in Nelson and Green (Eds), International Human Rights, Contemporary Issues, (1980) 15 at 91.

12. See e.g. Waddington v. Miah [1974] 1WLR 683 (HL) at pp. 693H-94E., Attorney-General v Guardian and Times Newspapers [1987] 1 WLR 1248 at pp. 1296E and comments thereon by A Lester, Q.C., in his paper on "Freedom of Expression: Relevant International Principles" published in the Report of the Judicial Colloquium in Bangalore, 24-26 February 1988, Commonwealth Secretariat, at p. 25 et seq.

13. OAU Doc. CAB/LEG/67/3 rev. 1 (1979) at p.2.

14. See the reasoning of Judge Tanaka in the South West Africa Case, 2nd Phase, ICJ Rep 1966 p 6 at 296 et seq. (dissenting opinion).

15. Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis" (1982) 22 Virginia Journal of International Law, 669 at 685.

16. European Convention Article 6(3)(a); American Convention Article 8(2)(b). In addition, these two Conventions extend the right to a hearing to civil proceedings, whereas the African Charter appears to restrict it to criminal trials.

17. European Convention Article 6(3)(d); American Convention Article 8(2)(f).

18. European Convention Article 6(3)(c); American Convention Article 8(2)(e); International Covenant on Civil and Political Rights Article 14(3)(d).

19. European Convention Article 6(3)(e); American Convention Article 8(2)(a).

20. However, other possible methods for improving access to justice have been proposed. See Reyntjes, "Africa - South of the Sahara" in Zemans (ed), Perspectives on Legal Aid: An International Survey, (1979) 12.

21. See generally Higgins "Derogations Under Human Rights Treaties", (1978) 48 BYBIL 281.

22. The non-derogable rights in the European Convention (Article 15) include the right to life, freedom from torture, freedom from slavery and freedom from ex post facto laws. The non-derogable rights in the American Convention (Article 27(2)) are the right to life, freedom from torture, freedom from slavery, freedom from ex post facto laws, freedom from imprisonment for failure to fulfil a contractual obligation, right to recognition as a person before the law, rights of the family, right to a name, rights of a child, right to nationality and right to participate in government. The guarantees essential for the protection of such rights are also non-derogable.

23. Higgins, op cit 281.

24. For example, some economic rights can be claimed before international bodies such as the I.L.O and the E.E.C Court. See further M. Addo, "The Justiciability of Economic, Social and Cultural Rights", Vol. 14, Issue 4, Commonwealth Law Bulletin, October 1988 pp. 1425-1432.

25. The African Charter is more liberal than either the American Convention (Article 23(1)(c)) or the International Covenant on Civil and Political Rights (Article 25(c) in that they only apply this right to citizens.

26. See further the Colloquium paper prepared by Justice P N Bhagwati, "Fundamental Rights in their Economic, Social and Cultural Context", Report of the Judicial Colloquium in Bangalore, 24-26 February 1988, Commonwealth Secretariat.

27. See further Moskowitz, International Concern with Human Rights, (1974) 155 and Study of the UN Secretary-General on the "International Dimension of the Right to Development as a Human Right in Relation with other Human Rights Based on International Co-operation, including the Right to Peace, Taking into Account the Requirements of the NIEO and

Fundamental Human Needs", UN Doc. E/CN 4/1334(1979) paras 14-17 (hereinafter cited as Right to Development Study) and the Report of the Working Group of Fifteen Governmental Experts, UN Doc E/CN 4/1983/11 (1983).

28. See The Right to Development Study, op cit at 157. It states that "The analysis of legal norms ... indicates that there is a substantial body of principles based on the Charter of the UN and the International Bill of Human Rights reinforced by a range of Conventions, Declarations and resolutions which demonstrate the existence of a human right to development in international law". See also confirmation of this in U.N General Assembly Resolution 34/46 November 23, 1979 and the 1986 "Declaration on the Right to Development" U.N General Assembly Resolution 41/128 of 4 December 1986. However the right to development in the African Charter only appears as a "peoples" right whereas the Right to Development Study, op cit suggests that it has both an individual and collective dimensions.

29. Recent efforts by the OAU Member States in this connection include the adoption of the 1980 Lagos Plan of Action which aims at a successful regional strategy for African development, culminating by the year 2000 with the creation of an African Common Market: See Lagos Plan of Action for the Economic Development of Africa, 1980-2000, OAU 1981, published by the International Institute of Labour Studies, Geneva. See further R M D'Sa, "The Lagos Plan of Action - Legal Mechanisms for Co-operation between the Organisation of African Unity and the United Nations' Economic Commission for Africa", (1980) No. 1, 27 Journal of African Law 4-21. It has been further argued that under the provisions of Article 22 of the African Charter, African states have a duty to co-operate in these groupings to ensure the right to development: see Benedek, "Human Rights in a Multi-Cultural Perspective: The African Charter and the Human Right to Development" in Ginther and Benedek, New Perspectives and Conceptions of International Law: An Afro-European Dialogue (1983) at 157.

30. See Hannum, "The Butare Colloquium on Human Rights and Economic Development in Francophone Africa", (Butare, Rwanda, 1979), Universal Human Rights 63. Other important discussions include the Seminar on Human Rights in a One-Party State (Dar-es-Salaam), International Commission of Jurists, 1978, at p 65.

31. See Gittleman, "The African Charter on Human and Peoples' Rights; A Legal Analysis" (1982) 22 Virginia Journal of International Law, 669 at 673.

32. Howard, "Evaluating Human Rights in Africa"; Some Problems of Implicit Comparisons" (1984) No. 2, 6, Human Rights Quarterly, 160 at 163.

33. See Report of the Secretary-General on the Draft African Charter on Human and Peoples' Rights, June 1981, CAB/LEG Draft Rapt. Rpt (II) Rev. 4, p.4.

34. Mumba, "Prospects for Regional Protection for Human Rights in Africa" (1982) Holdsworth Law Review, 101 at 106. See further Dinstein, "Collective Human Rights of Peoples and Minorities" (1976) 25 ICLQ 102.

35. See for example ILO Convention No. 107 (1957) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, ILO, International Labour Conventions and Recommendations, 1919-1981, at 858 (1982). (This Convention is currently under review by the ILO). See further R.L. Barsch, "Indigenous Peoples: An Emerging Object of International Law", (1986) 80 A.J.I.L., pp. 369-385; G. Nettheim, "'Peoples' and 'Populations': Indigenous Peoples and the Rights of Peoples" in J Crawford (Ed) The Rights of Peoples, Clarendon Press, Oxford, 1988 pp. 107-126.

36. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than State, 32 Am. U.L. Rev. 1, (48) (1982).

37. Kiwanuka, "The Meaning of "People" in the African Charter on Human and Peoples' Rights" (1988) 32 A.J.I.L. pp. 8-101 at p.85.

38. Supreme Court of India, 17 February 1986 (Writ Petition (Civil) No. 127 39 of 1985.

39. See in particular the 1970 UN General Assembly "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations", GA Res 2625, 1970 adopted by consensus, which supports the right of self-determination but does not authorise the impairment of the "territorial integrity or political unity of sovereign and independent States". The African Charter appears to support this UN interpretation in its Article 23. See further, Gittleman op cit. 679. This position may be contrasted, for example, with the Helsinki Act, which though not a legally binding instrument, appears to embody a broader concept of self-determination than than found in the African Charter and in UN practice: see the Conference on Security and Co-operation in Europe, Final Act August 1, 1975 which was signed by 35 European States and commentary thereon by Cassese, "The Helsinki Declaration and Self-Determination" in

Buergenthal (ed) Human Rights, International Law and the Helsinki Accord, (1977) 83 at 85. For a broader interpretation of African Charter Article 20 see Kunig "The Role of "Peoples" Rights in the African Charter" in Ginther and Benedek, op cit. 162 at 168.

40. See for example OAU Res. AHG/16(I) July 1964 on African Boundaries.

41. Total independence is not the exclusive form in which the right of self-determination is realisable. See further Brownlie, "The Rights of Peoples in Modern International Law" 9 Bulletin of the Australian Society for Legal Philosophy, 104 at p. 108, also reprinted in Crawford, op cit.

42. Hannum, op cit at 66, 67. See also Hersche (ed) Le Droit d'etre un Homme, (1968) para 606 and Gluckman., The ideas in Barotse Jurisprudence (1965) (later edn. 1972) 27-71. For an emphasis on the absolute power of the traditional Chief see Seydon Badian, Les dirigeants africains face a leur peuple (1964).

43. Gittleman, op cit 682.

44. See Award in Dispute between Libyan American Oil Co (LIAMCO) and the Government of the Libyan Arab Republic relating to Petroleum Concessions, April 12, 1977 (1981)XX ILM, Sole Arbitrator Dr S. Mahmassani at 114 et seq.

45. See further Gittleman, op cit 680.

46. See further P Alston, "A Third Generation of solidarity rights: progressive development or obfuscation of international human rights law?" (1982) 29 Neth. Int. L. Rev. 307; "Conjuring up new human rights: prospects for quality control" (1984) 78 A.J.I.L. 607; S Marks, "Emerging human rights: a new generation for the 1980s" (1981) 33 Rutgers L. Rev, 435.

47. See Brownlie op cit at p. 115.

48. See for instance, in the context of the European Convention, the Belgian Linguistics case, European Court of Human Rights, Ser A No. 6 (1968).

49. See for example, Article 3 of the 1979 Constitution of Benin (Formerly Dahomey):

"The Popular Republic of Benin is a unified multi-national state. All nationalities are equal in rights and duties. Consolidating and developing their union is a sacred duty of the State, which shall assure to each one a full development in unity through a just policy toward nationalities and an inter-regional balance.

All acts of regionalism shall be rigorously prohibited.

All nationalities shall be free to use their spoken and written language and to develop their own culture.

The State shall actively aid those nationalities living in under-developed areas to attain the economic and cultural level of the country as a whole".

See also Article 9 Djibouti Constitutional Law No. 2 (LR)77-002, 1977).

50. See further R M D'Sa, "Women's Rights in Relation to Human Rights: A Lawyer's Perspective", Vol. 13 No. 2, Commonwealth Law Bulletin, April 1987, pp. 666-676 at p. 675 et seq; Mintah, "The Law and Women in Contemporary African Legal Systems", in Takirambudde, (ed) The Individual Under African Law, Proceedings of the first All-Africa Law Conference, October 11-16, 1981, Swaziland, 30 at 30, 31. See further the Nairobi Forward-Looking Strategies for the Advancement of Women adopted by consensus by the World Conference to Review and Appraise the Achivements of the UN Decade for Women in Nairobi in July 1985.

51. See Nwabueze, "Family Law in Nigeria", in M'baye (ed) Le Droit de la Famile en Afrique Noire et a Madagascar, (1968) 117 at pp. 117,118. See also Marasinghe, "Traditional Conceptions of Human Rights in Africa" in Welch and Meltzer (Eds) Human Rights and Development in Africa (1984) 32-45 at pp 33-38.

52. Mumba, op cit at 114.

Personal Liberty and Reasons of State

by Beverley Byfield

INTRODUCTION

In his celebrated dissent in Liversidge v. Anderson ([1942] AC 206 (HL)), Lord Atkin described the order of preventive detention as follows:

> "[it] does not purport to be made for the commission of an offence against the criminal law. It is made by an executive minister and not by any kind of judicial officer, it is not made after any inquiry as to facts to which the subject is party, it cannot be reversed on any appeal, and there is no limit to the period for which the detention may last" (at 225 to 226).

These formidable emergency powers are conferred on the Executive in furtherance of their duty to protect and preserve the security and sovereignty of the State against actual or perceived threats, that is, for reasons of State. In short, notwithstanding guarantees of fundamental rights, an individual, in certain exceptional circumstances, may be deprived of personal liberty on mere suspicion of involvement in certain activities, or to prevent the commission of acts, which the administrative authorities believe to be prejudicial to the security of the State.

Such emergency powers are specified in some national constitutions and, with the exception of the African Charter on Human and Peoples' Rights, in regional and international treaties for the protection of fundamental rights[1]. These instruments expressly acknowledge the right of State authorities to take measures that derogate from certain of the rights guaranteed, where a situation of emergency or other national crisis exists. They also prescribe the circumstances in which such measures may be taken.

A. PRINCIPLES APPLICABLE TO THE INTERPRETATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Before turning to a consideration of the way in which derogation provisions have been interpreted, it is pertinent to consider the approach taken by national courts in the task of giving meaning and effect to constitutional guarantees of fundamental rights. It is also appropriate to have regard to the relevance and persuasive value of international and comparative human rights law in this context.

1. The approach of national courts

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[1] The importance attached to the protection of the rights of detained persons is underscored by the General Assembly's recent adoption of a "Body of Principles" for that purpose (see UNGA Resolution 43/173 of 9 December 1988).

The principle that a "generous approach" should be taken to the interpretation of constitutional rights has been articulated by the Judicial Committee of the Privy Council on a number of occasions. Delivering the judgment in Minister of Home Affairs v. Fisher ([1980] AC 319 (PC)), a case from Bermuda, Lord Wilberforce stated that a constitutional instrument should not be treated as if it were an Act of Parliament. Rather, the proper approach was to construe it:

> "as sui generis, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law" (at 329C-D).

This approach, Lord Wilberforce said, derived from the strong influence of the European Convention on Human Rights and, in turn, of the Universal Declaration of Human Rights, on the formulation of the Fundamental Rights Chapter of the Constitution of Bermuda, as well as on other Constitutions based on the Westminster model. These antecedents called for:

> "a generous interpretation avoiding what has been called the 'austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

These words were quoted with approval by Lord Diplock, on behalf of the Privy Council, in the subsequent case of Ong Ah Chuan v. Public Prosecutor ([1981] AC 649), from Singapore. The principle was again affirmed in Attorney-General of The Gambia v. Momodou Jobe ([1984] 1 AC 689). There, Lord Diplock stated that:

> "[a] constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction" (at 700H).

The Judicial Committee has also had regard to decisions of other national courts, including the Supreme Courts of India and the United States, in the interpretation of constitutional guarantees. In Bell v. Director of Public Prosecutions of Jamaica ([1985] 2 All E.R. 585) for example, their Lordships expressly recognised the relevance and importance of the interpretation placed on the Sixth Amendment to the Constitution of the United States by that country's Supreme Court. In the case referred to - Barker v. Wingo ([1972] 407 US 514 at 521-531) - the U.S. Supreme Court enumerated four criteria which it stated were relevant to the assessment of whether an accused person had enjoyed the constitutional right to a speedy trial. The Judicial Committee then acknowledged

> "... the desirability of applying the same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings" (Bell v. DPP, p.591h-j).

As the Judicial Committee further noted, the same factors which were considered relevant in the Barker v. Wingo case have also been applied by the Alberta Queen's Bench Court in the interpretation of the analogous right under the Canadian Charter

of Rights (in R v. Cameron [1982] 6 WWR 270).

2. Relevance of international and comparative human rights law

The growing awareness of the highly persuasive value and potential impact of international and comparative human rights law is by no means confined to the Judicial Committee of the Privy Council. A few recent examples from Commonwealth jurisdictions serve to illustrate the widening influence of this body of law. In a unanimous decision in the case of Stephen Ncube and Others v. The State (judgment of 14 December 1987, 1988 (2) SA 702), the Supreme Court of Zimbabwe declared judicial corporal punishment of an adult unconstitutional[2]. The Court was concerned with the interpretation of Section 15(1) of the Zimbabwe Constitution which, in terms virtually identical to Article 3 of the European Convention, prohibits torture, inhuman or degrading punishment or treatment. In arriving at its decision, the Court relied particularly on the decision of the European Court of Human Rights in the case of Tyrer v. United Kingdom ([1978] 2 EHRR 1). Giving the judgment of the Court Gubbay J.A., described the penalty of whipping as:

> "... not only inherently brutal and cruel ... [I]t is relentless in its severity and contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency".

In reaching its conclusions, the Court also had regard to decisions of the U.S. Supreme Court and to Commonwealth authorities in which the punishment had been declared unconstitutional. The Court also considered the progressive moves which had taken place in a number of other countries, to restrict or abolish the punishment of whipping.

The decision of the Court of Appeal of Botswana in The State v. Petrus and Another ([1985] LRC (Const) 699) is another important case in point. In a unanimous judgment, Maisels, P., on behalf of the Court, stated:

> "... it is only right that the indebtedness of the Court should be expressed to counsel for the accused for having made available to it, by means of photocopies, the numerous judgments, Articles and Conventions to which reference was made by them in the course of argument. But for this many would have been inaccessible to the Court; and, speaking for myself, the existence of many of them was quite unknown" (at 702).

A full bench of five judges had been constituted for the purpose of deciding, inter alia, whether corporal punishment, as prescribed by the Criminal Procedure and Evidence Act, was ultra vires section 7 of the Constitution of Botswana which prohibits inhuman or degrading punishment. The Court concluded that the

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2 In a judgment of 29 June 1989, the Court similarly ruled that judicial corporal punishment of juveniles was unconstitutional (A Juvenile v. The State, Crim. Appeal No.156/88, Judgment No. S.C. 64/89).

manner of punishment, which was administered by repeated and delayed instalments, was ultra vires the Constitution. In the course of its decision, the Court of Appeal drew support from decisions of the European Court of Human Rights, the United States Supreme Court, and to a strong dissenting opinion of the Privy Council in Riley and Others v. Attorney General of Jamaica ([1982] 3 All E.R. 469).

The Supreme Court of India has also looked to decisions of the European Court of Human Rights. In Rangarajan v. Jagjivan Ram & Ors and Union of India v. Jagjeevan Ram & Ors (Civil Appeal Nos. 13667-69 of 1988, judgment dated 30 March 1989, as yet unreported), the Supreme Court had to consider the validity of film censorship in the context of the freedom of expression guarantee under Article 19(1)(a) of the Indian Constitution. In allowing the appeal against a decision to revoke the film's certificate, the Supreme Court stated:

> "[O]ur commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg' ".

The Supreme Court cited, with approval, the decision of the European Court of Human Rights in Handyside v. United Kingdom ([1976] 1 EHRR 737) and concluded that the European Court's approach to the protection of freedom of expression was similar to its own, notwithstanding the extensive limitations imposed on the right under Article 10(2) of the European Convention. Both Courts have held that the right freely to exchange ideas and information is a fundamental feature of the democratic process. In the words of the European Court, the right to freedom of expression is applicable not only to information that is:

> "favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the State or any sector of the population" (Handyside, para.49).

The Court of Appeal of Singapore has expressly acknowledged that it was persuaded by the arguments, and by the powerful decisions of the Supreme Courts of Zimbabwe, South Africa and Namibia, of the English Courts and of the Privy Council, in its decision to overturn some twenty years of case law. In the far-reaching judgment, given on 8 December 1988 in the case of Teo Soh Lung and Others v. The Minister of Home Affairs, The Attorney-General of Singapore and The Commissioner of Police (Civil Appeal No.81 of 1988, as yet unreported), the Court unanimously asserted its authority to review the exercise of discretion by the President and relevant Minister, to order preventive detention under the Internal Security Act, where the President is "satisfied" that it is necessary on grounds of national security. The decision is considered more fully below.

The approach to constitutional interpretation adopted by the

Courts in the decisions cited above has been strongly endorsed by a group of Commonwealth Judges at a meeting in Bangalore, India, in February 1988. The "Bangalore Principles" which that meeting adopted, recognised and affirmed the relevance and importance of:

> "... 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" (Principle 4).

The guidance provided by the case law of regional and international tribunals is all the more important when one recalls that the concept of constitutional interpretation is a relatively new one for most Commonwealth lawyers.

B. DEROGATIONS UNDER INTERNATIONAL LAW

1. The European Convention on Human Rights

The derogation provision under the European Convention on Human Rights is to be found in Article 15(1), which states:

> "[I]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".

The European Court of Human Rights has had occasion to consider Article 15 and to rule on its scope and effect. In Lawless v. Ireland (No.3) ([1961] 1 EHRR 15), the Court stated that the words "other public emergency threatening the life of the nation" when given their natural and ordinary meaning, referred to:

> "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".

It was against these requirements, the Court held, that the Applicant's detention had to be examined. The Court said that, contrary to the Irish Government's claims, Article 5(1)(c) of the Convention did not authorise preventive detention. Rather, it permits the arrest or detention of a person only:

> "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ... ".

In the absence of any of these specified circumstances, the Article could not be relied on to justify the detention. It could only be justified if the State Party could show that a state of emergency existed, and that the detention was strictly

required by the exigencies of the situation. Furthermore, the Court observed, the obligation to permit a judicial determination of the merits of the deprivation of liberty was reinforced when read in conjunction with paragraph 5(3), with which it forms a whole. Any other interpretation of these two paragraphs would mean, in effect, that:

> "...anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention. Such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention" (para.14).

The European Court reaffirmed that the purpose of the Convention was, inter alia, to protect the freedom and security of the individual against arbitrary detention or arrest. It also noted, in the present case, that the Applicant had not been brought before a 'competent legal authority' during the period of his detention, which had lasted nearly five months.

In the later case of Ireland v. United Kingdom ([1978] 2 EHRR 25), the European Court confirmed that the determination whether the conditions laid down in Article 15 have been fulfilled, is a matter for the Court. It acknowledged, however, that States Parties,

> "[b]y reason of their direct and continuous contact with the pressing needs of the moment ... are in principle in a better position than the international judge to decide both on the presence of an emergency and on the nature and scope of derogations necessary to avert it ... " (para.207).

Notwithstanding this "wide domestic margin of appreciation" however, the Court has made clear that States Parties do not enjoy an unlimited power in this respect, but are subject to a European supervision. Responsibility rests with the European Court and Commission to ensure that States comply with their obligations and do not go beyond that which is 'strictly required by the exigencies of the crisis'.

In both the Lawless and the Ireland v. U.K. cases, the European Court concluded that the domestic authorities' declaration that a state of emergency existed was reasonably justifiable in all the circumstances of each case. The Court arrived at its findings after examining the conditions prevailing at the time. It had regard, for example, to the existence of a secret terrorist army and to the gravity of the threat posed to the security of each State by the activities of that army. In assessing whether the exceptional measures taken were necessary, the Court also took account of the fact that powers available to the authorities under ordinary laws were inadequate to combat the serious escalation of violence and intimidation. In the circumstances, the Court concluded that the authorities' resort to extrajudicial deprivation of liberty did not contravene the Convention.

2. The American Convention on Human Rights

Equally strict conditions govern the suspension of the fundamental rights guarantees which is permitted by Article 27 of the American Convention on Human Rights. That Article provides:

> "1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin".

Paragraph 2 of Article 27 lists a number of non-derogable rights, among them "the judicial guarantees essential for the protection of such [non-derogable] rights". In a recent and highly significant Advisory Opinion (OC-8/87 of 30 January 1987, Series A, No.8), the Inter-American Court of Human Rights held that the writ of habeas corpus was one of the judicial remedies which may not be suspended in emergency situations. The Court stated that the purpose of the writ, which is guaranteed by Articles 7(6) and 25(1) of the American Convention on Human Rights, is to protect personal freedom or physical integrity against arbitrary detentions. As such, and in order to achieve its primary objective of obtaining a judicial determination of the lawfulness of a detention, the Court held that:

> "... it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment".

The Court was giving its Opinion in response to a request from the Inter-American Commission of Human on whether the writ of habeas corpus was one of the judicial guarantees, referred to in Article 27(2), which may not be suspended by States Parties to the Convention. The Commission explained that its request was prompted, inter alia, by the assumption on the part of some States Parties that the writ could be suspended in emergency situations. The Commission also remarked that some States had already enacted special laws to facilitate incommunicado detention for prolonged periods.

The Inter-American Court emphasised the exceptional situations - specifically referred to in paragraph 1 of Article 27 -in which derogations are permitted. The Court further noted that the permitted derogation was not absolute but merely a suspension or limitation of the full and effective exercise of certain rights "to the extent and for the period of time strictly required by the exigencies of the situation". In order to ensure strict compliance with these requirements, the Court observed that:

"... it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency" (para. 40).

This was particularly so in a system governed by the rule of law. The Court concluded that the writ of habeas corpus was one of the judicial remedies essential "for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society" (para. 42). It followed, therefore, that those States Parties which had expressly or impliedly suspended the legal remedy of habeas corpus were in contravention of their international legal obligations under the Convention.

3. The International Covenant on Civil and Political Rights and The African Charter on Human and Peoples' Rights

The International Covenant and the African Charter are the two major human rights treaties to which member States of the Organisation of African Unity may become party. Twenty-two African countries[3] have now ratified the International Covenant on Civil and Political Rights (ICCPR) and, as of 15 September 1988, twelve of these[4] count among the forty-three States Parties which have accepted the right of individual petition under the Optional Protocol. This means that any derogation measures adopted by these States Parties will be subject to the supervisory powers of the Human Rights Committee, which is charged with the implementation of the Covenant and Optional Protocol. The Committee's powers are activated when States Parties comply with their obligation to submit periodic reports under the Covenant. They may also be triggered by inter-State applications under Article 41 or, in respect of those States Parties to the Optional Protocol, on receipt of individual complaints.

The Human Rights Committee has not yet had occasion to rule extensively on the scope of the derogation provision contained in Article 4 of the Covenant. Nevertheless, the similarities in the phrasing of this Article and the analogous provisions of the European and American Conventions, mean that the interpretation of the two latter treaties is relevant for purposes of interpreting the Covenant obligations. The case law under these two instruments also provide important guidance for States Parties when enacting or implementing security regulations.

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[3] Cameroon, Central African Republic, Congo, Equatorial Guinea, Gabon, The Gambia, Guinea, Kenya, Libyan Arab Jamahiriya, Madagascar, Mali, Mauritius, Morocco, Niger, Rwanda, Senegal, Sudan, Togo, Tunisia, United Republic of Tanzania, Zaire and Zambia.

[4] Cameroon, Central African Republic, Congo, Equatorial Guinea, The Gambia, Madagascar, Mauritius, Niger, Senegal, Togo, Zaire and Zambia (source: Human Rights Centre, Geneva).

The growing body of jurisprudence may also provide valuable assistance to the African Commission on Human and Peoples' Rights as it seeks to give effect to the guarantees set out in the African Charter. The Charter, to which there are now thirty-five States Parties[5], contains no specific derogation clause and could well give rise to State Party claims that the suspension of rights in the interest of State security is a matter purely for the domestic authorities. However, the African Commission is by no means confined to the prescriptions of domestic law in the discharge of its functions. Articles 60 and 61 set out the principles applicable to the interpretation of the Charter and directs the Commission to "draw inspiration from international law on human and peoples' rights" and particularly from other instruments adopted by the United Nations and its Specialised Agencies. The Commission is therefore at liberty to apply the case law referred to above when considering, inter alia, the guarantee of liberty and security of person contained in Article 6, and the further stipulation in that Article that any deprivation of freedom must be "for reasons and conditions previously laid down by law". Any other approach would lead to the odd situation that external restraints could be imposed on African Governments by an international tribunal, as a result of the application of stricter standards, but not by the African Commission.

C. DEROGATIONS IN DOMESTIC LAW

Although derogation provisions under domestic law may be differently worded, the decisions and views of the international tribunals referred to above provide important guiding principles for domestic courts concerned with interpreting and applying similar concepts. They are also of value in the courts' assessment of whether or not the authorities have complied with those requirements of domestic law that regulate the declaration of an emergency and the suspension or limitation of rights.

Chandrachud, C.J. (as he then was), when delivering the judgment of the Supreme Court of India in State of Punjab and Others v. Talwandi ([1985] LRC (Const) 600), stated that:

> "Preventive detention is a necessary evil but essentially an evil. Therefore, deprivation of personal liberty, if at all, has to be on the strict terms of the Constitution. Nothing less" (at pp. 607-8).

Despite this unequivocal statement, it is not always clear from the decisions of national courts that equally rigorous tests are applied, for example, to the question whether a state of

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5. As at 28 April 1988, at the end of the African Commission's Third Session, the following States had ratified or acceded to the Charter: Algeria, Benin, Botswana, Burkino Faso, Cape Verde, Central African Republic, Chad, Comoros, Congo, Egypt, Equatorial Guinea, Gabon, Gambia, Guinea, Guinea-Bissau, Liberia, Libya, Mali, Mauritania, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Sao Tome & Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Tunisia, Uganda, Zaire, Zambia and Zimbabwe.

emergency exists in fact, and whether the exceptional measures taken are only such as are necessary to deal with the prevailing situation. The following sections examine the scope of judicial scrutiny of executive exercise of discretion in relation to the right to personal liberty and security.

D. REVIEWABILITY BY NATIONAL COURTS

The problem of balancing the enjoyment of liberties against the security interests of the State is one that arises in all societies. It is also a common and legitimate concern of all governments to be able to respond rapidly and effectively to thwart acts that are considered prejudicial to that security. In practice, an inevitable consequence of this executive response is the infringement of civil liberties - personal liberty being one of the most frequent victims. Infringements may often be justifiable on national security grounds. However, abuses of civil liberties may also occur, not in the genuine defence or protection of State security, but where politicians are determined to retain power at all costs, notwithstanding widespread opposition and the loss of popular support.

The need to ensure that wide discretionary powers of preventive detention are not abused, contrary to the Rule of Law, in the words of the Hon. Chief Justice Dumbutshena:

> "... create[s] unnecessary conflict between the Judiciary, which is the custodian of the rights of the citizens who seek protection in the Courts, and the Executive, the guardian of the security of the State" (Minister of Home Affairs & Anor v. Austin & Anor [1987] LRC (Const) 567 at 571 to 572).

The scope for conflict is increased by the fact that information on which the decision to detain is based, is necessarily within the exclusive domain of the executive. Concerned as it is with matters of national security, the latter is often reluctant to disclose any of that information to the courts. In the absence of adequate information, the courts are effectively prevented from making any meaningful assessment of the validity of the detention order. This presents a curious dichotomy since the courts are charged with ultimate responsibility for interpreting and enforcing fundamental rights. Their inability to inquire into, or to look behind detention orders as a result, casts serious doubts over their competence properly to discharge this responsibility. This dilemma also raises the important question whether matters of preventive detention are properly susceptible to judicial review.

These considerations - as well as Executive-mindedness in some cases - have led a number of courts to adopt a very restrictive approach to their jurisdiction. Thus, in R. v. Halliday [1917] AC 260, where the applicant was detained under reg. 14B of the Defence of the Realm (Consolidation) Regulations, Lord Finlay, LC, delivering the judgment of the House of Lords, declared:

> "[i]t seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court

of law. No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy" (at p.269).

Halliday's case, and other restrictive wartime decisions such as Liversidge v. Anderson and Greene v. Secretary of State for Home Affairs ([1942] AC 284 (HL)), have been followed by the Courts of Malaysia. Thus, in Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129, Azmi, LP, in the Federal Court of Appeal of Malaysia, quoted with approval the words of Lord Macmillan in Liversidge:

> "But how could a court of law deal with the question whether there was a reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, not of fault? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share" (at p.140, right hand column).

In the same case, Ong, CJ, similarly opted for this "more realistic view of things" taken by the English Courts. He did so after surveying and rejecting a number of Indian authorities which favoured a more objective approach. In a passage which is reminiscent of Lord Atkin's reference in Liversidge v. Anderson to judges who 'show themselves more Executive minded than the Executive', Ong, CJ went on to remark that:

> "Indian judges ... impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers" (at p.141, left hand column).

In the later case of Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293, Salleh Abas, LP, delivering the judgment of the Supreme Court of Malaysia stated that:

> "the intention of the framers of the Constitution is that judges in the matter of preventive detention relating to the security of the Federation are the executive".

The Supreme Court of Malaysia has since gone further and ruled, in Karpal Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia (1988) 3 MLJ 293, that even where the exercise of discretion is on irrelevant grounds or in bad faith, it will not be susceptible of judicial review.

1. The South African and Namibian Courts

These restrictive decisions are in sharp contrast with those of the South African or Namibian Courts. In Hurley and Another v. Minister of Law and Order ([1985] (4) SA 709 (D)), the Durban and Coast Local Division was faced with an application for habeas corpus of the Director of an umbrella church organisation who had been detained under Section 29 of the Internal Security Act 74 of 1982. Leon, Acting Deputy Judge President, in a decision that was unanimously upheld by five South African judges sitting in the Appellate Division (1986 (3) SA 568), declared the detention unlawful and released the detainee. In doing so he pointed out

that the South African Courts had not adopted the same construction as was applied in the Liversidge case and that:

> "[t]his case raises matters of great constitutional importance affecting the liberty of the subject, the security of the State and the jurisdiction of the Courts. In dealing with this kind of legislation, KOTZE JA said the following in Union Government v. Fakir 1923 AD 466 at 471:
>
> > 'I should like, without attempting to dictate to the Legislature, to point out the great danger involved in departing from a well-known rule of constitutional law in all civilised countries - namely, that the courts of law alone are entrusted with deciding on the rights and duties of all persons who are within the protection of the courts.'
>
> "The great danger to which KOTZE JA correctly referred would, in my judgment, be increased enormously were the judiciary to approach such legislation in a spirit of compliance rather than one of independent scrutiny" (715).

The Supreme Court of South West Africa (Namibia) has also implicitly rejected the majority decision in Liversidge v. Anderson. In an application for habeas corpus on behalf of Josef Katofa who was detained under Section 2 of Proc AG 26 of 1978 (SWA), the Supreme Court stated, in Katofa v. Administrator-General for South West Africa and Anor ([1985] (4) SA 211 (SWA)), that:

> "[i]llegal deprivation of liberty is a threat to the very foundation of a society based on law and order. Through the centuries the courts in democratic countries have jealously guarded and protected the rights of the individual to his liberty and their own jurisdiction in respect of such matters. This is indeed the position in South West Africa and the very legislation which this Court is now considering spells out the protection of those inalienable rights as its very objective" (at pp.220-221).

A shadow has since been cast over the decision in this case by the Supreme Court of South Africa, which exercises appellate jurisdiction over the Namibian Courts. Although it affirmed the decision of the lower court in the Katofa case, the South African Supreme Court has offered different reasons for doing so. Whereas the applicant's release had been ordered in the earlier decision on the basis that the Administrator-General had not discharged the burden on him to justify the detention, the South African Supreme Court subsequently held that the words "if the Administrator-General is satisfied" are not objectively justiciable. The appellate Court did, however, distinguish the Hurley case, among others, on the basis of the requirement in those cases for the relevant authority to have "reason to be satisfied" or to "believe on reasonable grounds" (Tussentydse Regering Vir Suidwes-Afrika v. Katofa [1987] (1) 695).

2. The English Courts since Liversidge v. Anderson

Despite the professed preference for the "more realistic" English view of things, the Malaysian Courts have also failed to

keep pace altogether with the advances made by the English Courts in developing the scope of judicial review. The English Courts are increasingly inclined to exert their review function to control abuse of executive discretion. As a result, judicial review now constitutes a growing, though by no means sufficient, protection for the citizen in his or her dealings with the government. This is demonstrated by Lord Scarman's statement in R v. Home Secretary, ex parte Khawaja [1984] AC 74 (HL) that:

> "The classic dissent of Lord Atkin in Liversidge v. Anderson [1942] AC 206 is now accepted (Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd [1980] AC 952, 1011, 1025) as correct not only on the point of construction but in its declaration of English legal principle. Lord Atkin put it thus, at p.245: 'that in English law every imprisonment is prima facie unlawful and that it is for the person directing imprisonment to justify his act'".

In fact, in the Rossminster case, the House of Lords expressly overruled the majority decision in Liversidge, not just in the context of Rossminster, but generally. Lord Diplock stated, at p.1011 that:

> "For my part I think the time has come to acknowledge openly that the majority of this House in Liversidge v. Anderson was expediently and at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was correct".

And Lord Scarman, in even stronger terms, declared at pp.1024-1025:

> "The ghost of Liversidge v. Anderson [1942] AC 206 therefore casts no shadow upon this [Taxes Management] statute. And I would think it need no longer haunt the law. It was laid to rest by Lord Radcliffe in Nakkuda Ali v. Jayaratne [1951] AC 66, 77, and no one in this case has sought to revive it. It is now beyond recall".

The majority in Liversidge had held that, where the Secretary of State, acting in good faith under regulation 18B of the Defence (General) Regulations, 1939, made an order in which he recited that he had reasonable cause to believe a person to be of hostile associations and that by reason thereof it was necessary to detain him, a court of law could not inquire whether in fact the Secretary of State had reasonable grounds for his belief. The matter was one for the executive discretion of the Secretary of State.

The approach affirmed in Rossminster now holds sway in the English Courts and has influenced subsequent decisions concerning judicial review of administrative action. Thus, in the recent immigration case of Bugdacay v. Secretary of State for the Home Department ([1987] 1 All E.R. 940 (H.L.)), Lord Templeman stated that:

> "where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process" (at p.956).

And at p.952, Lord Bridge said that the courts were entitled, within limits,

"to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision under challenge must surely call for the most anxious scrutiny".

The Courts have even demonstrated a readiness to overturn longstanding barriers to the review of prerogative powers. Lord Roskill in Council of Civil Service Unions and Others v. Minister for the Civil Service [1984] 3 All E.R. 935 (HL), while acknowledging that certain prerogative powers were not susceptible to judicial review, stated:

"I am unable to see ... that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory" (at 956).

He listed, among the powers that were not reviewable, the making of treaties, the defence of the realm, the prerogative of mercy, appointment of ministers, the grant of honours and the dissolution of Parliament.

Lord Scarman, who agreed with this view, said at p.948:

"...I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power".

The case, otherwise referred to as the GCHQ case, raised the issue whether the withdrawal of trade union rights, without consultation and where the union had a legitimate expectation of being consulted, was justified on grounds of national security. Lord Scarman, giving the judgment of the House of Lords, concluded:

"I am in favour of dismissing the appeal only because the respondent has established by evidence that the interests of national security required in her judgment that she should refuse to consult the unions before issuing her instruction. But for this I would have allowed the appeal on the procedural ground that the respondent had acted unfairly in failing to consult unions or staff before making her decision".

3. Other Courts of the Commonwealth

This positive approach is evident in the decisions of other Commonwealth Courts where Lord Atkin's dissent in Liversidge v. Anderson also finds expression. The importance of the developing

case law is demonstrated by the significant impact which it has recently had on the course of judicial review in Singapore. The case of Teo Soh Lung, referred to above, concerned an appeal from the High Court's dismissal of the Appellant's application for a writ of habeas corpus following her arrest and detention, together with thirteen other persons, for alleged involvement in a Marxist conspiracy to subvert and destabilise the security of the State. The Appellant was detained for one year pursuant to Section 8(1)(a) of the Internal Security Act which provides:

> "(1) If the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof ..., it is necessary to do so, the Minister shall make an order -
> (a) directing that such person be detained for any period not exceeding two years; ...".

She was conditionally released some four months later but again detained after issuing a press statement in which she denied the government's accusations.

In allowing the appeal, the Court of Appeal of Singapore acknowledged that the time had come to recognise that the subjective test in respect of Sections 8 and 10 of the Internal Security Act could no longer be supported. The Court rejected the Respondent's contention that the discretion was not justiciable, stating that:

> "... the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power".

The Court continued:

> "[i]f the discretion is not subject to review by a court of law, then, in our judgment, that discretion would be in actual fact as arbitrary as if the provisions themselves do not restrict the discretion to any purpose and to suggest otherwise would in our view be naive".

These decisions are also very much in keeping with those of international tribunals which are charged with interpreting and implementing international human rights treaties. In the Inter-American Court's important Advisory Opinion referred to above, the Court quoted with approval, a decision of the Criminal Division of the Federal Court of Appeal of Buenos Aires, Argentina (Case No. 1980 of April 1977), which, in granting a writ of habeas corpus, ruled that:

> "It is not possible to accept the argument that the President of the Republic is alone empowered to examine the situation of those who are detained at his order. ... [I]t is equally clear that it is the duty of the Judiciary of the Nation to examine exceptional cases such as the present as to the reasonableness of the measures taken by the Executive..." (para.41).

The Inter-American Commission expressed similar views when submitting its request for an Advisory Opinion to the Court. It

said:

> "To hold the contrary view - that is, that the executive branch is under no obligation to give reasons for a detention and may prolong such detention indefinitely during states of emergency, without bringing the detainee before a judge empowered to grant the remedies set forth in [specified articles] of the Convention - would ... be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems" (para. 12).

E. ATTEMPTS TO OUST THE JURISDICTION OF THE COURTS

Executive attempts to exclude judicial review have taken various forms: statutory exclusion clauses, the assertion of executive privilege and public interest immunity, or subjectively formulated discretionary powers. Where these devices have failed to exclude or restrict the courts' review powers, some governments have even resorted to legislative enactments to override the court's judgment. Difficulties with regard to the enforcement of the courts' judgments will also be looked at under section G below.

1. Statutory exclusion clauses

In Wang and Others v. Chief of Staff, Supreme Headquarters, Lagos and Others [1986] LRC (Const) 319, the Nigerian Federal Court of Appeal had to consider, inter alia, the effect of the Military Government's Decrees Nos. 2 and 13 of 1984 in relation to constitutional rights. Section 4(1) and (2) of the State Security (Detention of Persons) Decree (No.2 of 1984) purported to remove the right to institute legal proceedings, to suspend the fundamental rights Chapter of the 1979 Constitution, and to oust the jurisdiction of the courts in relation to anything done or intended to be done "in pursuance of this Decree". Decree No. 13, entitled "Supremacy and Enforcement of Powers Decree", similarly mandated that anything done "in pursuance of any Decree or an Edict" which allegedly contravened Chapter IV (fundamental rights) of the Constitution "shall not be inquired into in any court of law".

The applicants had been held under detention orders made by the Chief of Staff who had power, under Decree No.2, to issue such order where he is satisfied, in respect of any person, that that person has been "recently concerned in acts prejudicial to the State's security" or has "contributed to the economic adversity of the country". On appeal, the Federal Court of Appeal held that the combined effect of Decrees Nos. 2 and 13 of 1984 had been to oust the jurisdiction of the Courts. It therefore struck out the Appellants' appeal against the dismissal of their application for a writ of habeas corpus and stated that the Federal High Court should have done the same. In doing so, the Court concluded:

> "... on the question of civil liberties, the law courts of Nigeria must as of now blow muted trumpets" (at 330).

However, the decision in this case must be read in the light

of Decree No. 13 which also declared that the military take-over of 31 December 1983 "effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved ...". It would therefore seem that the Courts were here faced with the application of a new legal order in which the fundamental rights chapter of the Constitution was not part of the preserved laws.

In Hurley and Another v. Minister of Law and Order [1985] (4) SA 709 (D), the Durban and Coast Local Division of the South African Court was also required to rule on the validity of an ouster clause, and on its effect on the courts' review powers. Leon, Acting Deputy Judge President, rejected a restrictive approach to the construction of Section 29(6) of the Internal Security Act 74 of 1982 which states that no court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of the section or to order the release of any person detained under the provisions of the section. The Learned Judge held that the ouster clause did not preclude the court from investigating whether, on an objective test, the necessary jurisdictional facts existed.

The decision was unanimously upheld by five judges sitting in the Appellate Division. They held that the arresting officer's decision to arrest Mr. Kearney was objectively justiciable, and that Section 29(6) did not preclude the court from reviewing the decision to arrest and detain.

The same issue came before the House Lords in the earlier case of Anisminic v. Foreign Compensation Commission [1969] 2 A C 147 (HL). The clause under consideration was section 4(4) of the Foreign Compensation Act 1950, which provided that:

> "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law".

The House of Lords held that the Commission had misconstrued the enabling statute concerning its jurisdiction and the Court was therefore not precluded from inquiring into the validity of the Commission's order. The Commission had been set to determine entitlement claims under a compensation fund set up in respect of sequestrated and/or damaged property. However, the Commission rejected a substantial part of the appellant's claim on the grounds that they were not, at the time of their claim, title holders to the property. The case established the principle that where an authority exceeds its jurisdiction, its decision will be regarded by the courts as invalid and beyond the protection of any exclusionary formula.

2. Subjectively framed discretionary powers

The subjective formulation of discretionary powers represents a further attempt by the executive to restrict the scope of judicial review. The usual formula is for the regulations to authorise the exercise of discretion where "it appears" to the Minister or other authority, or where he or she "is satisfied" as to certain specified matters. The proposition that such clauses restrict the courts' review power has been upheld in a long line of Malaysian cases since Karam Singh's case in which the Malaysian Federal Court of Appeal stated that:

"... when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation. Indeed, the logical result of [this] argument ... would be to invalidate section 8 of the Internal Security Act in so far as it purports to make the satisfaction of the Government the sole condition of a lawful detention" (per Suffian F J, at p.150, left hand column).

On this view, the courts would be denied any opportunity to rule on the validity of detention orders, except on the basis of a breach of natural justice or other procedural impropriety. It would also place impossible obstacles in the path of any aggrieved detainee seeking to challenge the validity of his detention order. However, as Lord Wilberforce pointed out in Secretary of State for Education and Science v. Metropolitan Borough of Tameside [1976] 3 All E R 665:

"This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the Court must enquire whether those facts exist, and have been taken into account, whether judgment has been made on a proper self direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge" (at 681-682).

This reflects the objective approach taken in the Hurley case with regard to the interpretation of the words "if he has reason to believe" in section 29(1) of the Internal Security Act 74 of 1982. There, Leon, ADJP, held that the ordinary grammatical meaning of the phrase "reason to believe" was a belief based upon reason and did not mean "thinks he has reason to believe". In other words, there had to be a factual basis for the belief.

The Supreme Court of Zimbabwe has likewise held, in Austin, that judicial review was not excluded by section 17(1) of the Emergency Powers (Maintenance of Law and Order) Regulations 1983 which permitted the making of a detention order "if it appears to the Minister that it is expedient in the interests of public safety or public order" to do so. Although the discretion was a subjectively framed one, the Court said that there had to be reasonable grounds to support the action. Furthermore, the detaining authority was under a duty to act fairly, and it was the court's duty to determine, on well-established administrative law grounds of illegality, irrationality and procedural impropriety, whether the detaining authority had in fact acted

fairly in coming to its decision.

The Judicial Committee of the Privy Council took a similar approach when considering Regulation 3 of the Emergency Powers Regulations 1967 in Attorney-General of St. Christopher, Nevis and Anguilla v. Reynolds [1980] AC 637. That regulation empowered the Governor, where he "is satisfied" as to certain matters, to order the detention of any person who "has recently been concerned in acts prejudicial to the public safety ...". The Privy Council declared the detention unlawful because, it said, there were no grounds capable of amounting to reasonable grounds on which to justify the detention. In coming to this conclusion, the Privy Council implied a requirement of reasonableness, derived from the Constitution, into the emergency powers regulations. Lord Salmon, delivering the judgment of the Court, stated:

> "Their Lordships consider that it is impossible that a regulation made on May 30, 1967, under an Order in Council which, on its true construction, conformed with the Constitution on that date, could be properly construed as conferring dictatorial powers on the Governor: and that is what the regulation would purport to do if the words 'if the Governor is satisfied' mean 'if the Governor thinks that etc.' No doubt Hitler thought that the measures - even the most atrocious measures - which he took were necessary and justifiable, but no reasonable man could think any such thing" (at 656).

It is these decisions which so strongly influenced the Court of Appeal of Singapore in the Teo Soh Lung case, referred to above, to overturn longstanding decisions of the Courts of that country which had applied a subjective test in reviewing the exercise of discretion.

3. Executive privilege and public interest immunity

The administrative authorities have also sought to immunise their actions against judicial scrutiny by claims that disclosure of information or materials in their possession would be detrimental to the public interest. The effect of such a claim, if successful, is to make it very difficult, and often impossible, for the applicant for habeas corpus to show that the detention is unconstitutional, illegal or irrational, so as to make the detention unlawful.

Notwithstanding Lord Parker's statement in The Zamora [1916] 2 AC 77 that:

> "[T]hose who are responsible for the national security must be the sole judges of what the national security requires. [and that] [I]t would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise be discussed in public" (at 107),

the Courts have since been asserting their authority to mitigate the hardship that a detainee would otherwise suffer. They have made clear that claims of national security and of public interest cannot operate to exclude judicial review. The scope of the review power in this context was set out in R v. Governor of Brixton Prison ex parte Soblen [1963] 2 QB 243, where Lord

Denning M R, stated that:

> "The court cannot compel the Home Secretary to disclose the materials on which he acted, but if there is evidence on which it could reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the court can call on the Home Secretary for an answer; and if he fails to give it, it can upset his order" (at p.302).

In the GCHQ case, Lord Roskill, at p.958 stated:

> "The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. But even in that field the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds".

These views received strong support and were further elaborated in the subsequent case of R v. Secretary of State for the Home Department, ex parte Ruddock and others [1987] 2 All E R 518 (QBD) where Taylor J., stated:

> "in all such cases, cogent evidence of potential damage to national security flowing from the trial of the issues would have to be adduced, whether in open court or in camera, to justify any modification of the court's normal procedure. Totally to oust the court's supervisory jurisdiction in a field where ex hypothesi the citizen can have no right to be consulted is a draconian and dangerous step indeed. Evidence to justify the court's declining to decide a case (if such a course is ever justified) would need to be very strong and specific" (at 527).

While accepting that there are limits to the review powers, the courts have therefore clearly shown that they will not hesitate to intervene to prevent an excess or abuse of power, even where claims of national security are advanced.

On this issue, the domestic courts have been more courageous than the European Convention organs. A recent example is provided by the complaint submitted to the European Commission of Human Rights in Council of Civil Service Union and Others v. United Kingdom ([1987] 10 EHRR 269). In ruling the complaint inadmissible, the Commission held that the interference with the applicants' freedom to form and to join a trade union was justified under Article 11(2) of the Convention. Article 11(2) permits the imposition of lawful restrictions on the exercise of the right by "members ... of the administration of the State". Without defining the meaning of this phrase, the Commission accepted that it also embraced GCHQ employees. Surprisingly, the Commission gave its ruling without even considering whether the important requirement in the first sentence of Article 11(2) that the restriction must be "necessary in a democratic society in the interests of national security or public safety" had been met.

When viewed alongside the decision of the European Court in Leander v. Sweden (Judgment of the European Court,26 March

1987, Series A, No.116), the GCHQ case indicates that the European Convention organs are more willing to give greater breadth to the "domestic margin of appreciation" when national security issues are invoked by States Parties. Mr. Leander, a civilian carpenter, was refused employment at a Swedish naval museum on unstated security grounds. The security report, to which he was denied access, was not made available either to the Commission or Court. Although the Court found that the secret police-register system interfered with Mr. Leander's right to respect for his private life, it nevertheless concluded that the interference was necessary in a democratic society in the interests of national security. The Court stated, in fact, that the "margin of appreciation ... for achieving the legitimate aim of protecting national security, was a wide one" (para.59).

The European Court of Justice

By contrast, the European Court of Justice, the judicial organ of the European Community, has issued important and authoritative statements on the scope of judicial review in the context of national security and public order in Johnston v. Chief Constable of the Royal Ulster Constabulary (Case No.222/84) 3 CMLR. 240. Following a policy decision to arm male members only of the Royal Ulster Constabulary, the Applicant, Mrs. Johnston, was denied a renewal of her full-time employment contract. The Secretary of State issued a "conclusive certificate" stating that the decision had been taken for the purpose of safeguarding national security and for protecting public safety and public order. The certificate, issued under Section 53 of The Sex Discrimination (Northern Ireland) Order 1976, effectively barred access to the courts for victims of sex discrimination, although the 1976 Order purported to give domestic effect to Council Directive 76/207 concerning equality of treatment for men and women in relation to employment.

The Court concluded that provisions such as Article 53 of the Order were not compatible with Article 6 of the Directive which required an effective judicial control. The Court stated that the provision was:

> "contrary to the principle of effective judicial control laid down in Article 6 of the Directive"

because it enabled the individual to be deprived of the possibility of asserting, through the judicial process, the rights that the Directive conferred. The Court further stated that the derogation provisions under European Community law did not lend themselves to a wide interpretation and no general proviso covering measures taken in the interests of public safety could therefore be inferred from them.

In the Court's opinion, derogations had to be within the limits of what was appropriate and necessary for achieving the objective in question. Furthermore, it was for the domestic court to ensure respect for this principle of proportionality and to determine:

> "whether the refusal to renew Mrs. Johnston's contract could not be avoided by allocating to women duties which, without jeopardising the aims pursued, can be performed without

firearms" (para.39).

F. PROCEDURAL SAFEGUARDS

Whether the courts adopt an objective or subjective approach in the determination of the validity of any detention order will have important implications for the outcome of the case as a whole. In particular, it will affect the detainee's ability to to make effective representations before the tribunal. The right to be informed of the reasons for the detention is an important procedural safeguard which forms an integral part of the right to liberty and security. A proper assessment of the lawfulness of the detention must therefore also encompass an examination of the authorities' observance of this safeguard.

1. Right to be informed of reasons for detention

This guarantee requires the detaining authority to supply the reasons for the deprivation of liberty on arrest or as soon thereafter as is reasonably practicable. The information provided must be sufficient to enable the detainee to know the allegations against him and to make an effective representation before the relevant tribunal. His right, in other words, is to receive "every material particular without which a full and effective representation cannot be made" (State of Punjab and Others v. Talwandi [1985] LRC (Const) 600 at 609b). Referring to this latter requirement, Chandrachud, C J, as he then was, had this to say:

> "[t]he obligation which rests on the detaining authority in this behalf admits of no exception and its rigour cannot be relaxed under any circumstances" (at 607b).

The Supreme Court of Zimbabwe, elaborating on this requirement has said that:

> "[i]n drawing up the grounds of detention it is incumbent upon the detaining authority to appreciate that the detainees will prepare their representations to the review tribunal on inadequate grounds. It is more important that the detainee be furnished with sufficient information or particulars to enable him to prepare his case and to make effective representations before the review tribunal. A bare or bald statement that the detainee is a spy is not good enough" (Minister of Home Affairs and Another v. Austin and Another [1987] LRC (Const) 567 at 574).

In the Talwindi case, the Indian Supreme Court also held that copies of any statements or other documents referred to in the detention order should also be supplied to the detainee. The information, however, is not required to be in technical or precise language. In the particular circumstances of the Talwindi case, the Court concluded that the respondent had failed to establish his claim that the grounds given for his detention were insufficient to enable him effectively to make representations to the advisory board, as required by Article 22(5) of the Indian Constitution.

The respondent had been arrested in pursuance of a detention order under s.3 of the National Security Act 1980 on the basis

of two speeches he was alleged to have made. On appeal, the Supreme Court of India found that the information provided to him mentioned the place, date and time of the alleged meeting; it described the occasion on which the meeting was held; it mentioned the approximate number of persons who were present at the meeting and, with particularity, the various statements made by the respondent in his speech. In the circumstances, the Court rejected the respondent's challenge to the validity of the detention.

Where, however, the reasons for the detention are so vague that the petitioner is unable to make any meaningful representations concerning the propriety of his detention, the Court will strike down the order (Paweni v. Minister of State (Security) and Another) [1985] LRC (Const) 612).

2. Right to be brought promptly before a court

A second and equally important procedural safeguard is the right to be brought promptly before a judicial authority. The European Court of Human Rights has recently had occasion to consider and rule on the meaning of this requirement. The Court's judgment in the case of Brogan and Others v. United Kingdom (judgment of the Court of 29 November 1988, Vol. 145-B, Series A), highlights a distinct departure from the approach of many domestic courts concerning the period of time within which the detainee is required to be brought before a judicial authority. The four applicants were arrested under special powers conferred by s.12 of the 1984 Prevention of Terrorism (Temporary Provisions) Act which provided for the detention of persons suspected of involvement in terrorism in Northern Ireland. Before the Commission, they contended, inter alia, a violation of their rights under Article 5(3) of the Convention which states that:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...".

In assessing the meaning and scope of the word "promptly", the European Court had regard to the importance of the Article in the context of the Convention as a whole. It observed that:

> "[j]udicial control of interferences by the State with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law [and is] "one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention" (para.58).

Consequently, the Court took the view that the scope for flexibility in interpreting and applying the notion of "promptness" was very limited. While the term has to be assessed having regard to the special features of each case:

> "... the significance to be attached to those features can never be taken to the point of impairing the very essence

of the right guaranteed by Article 5(3), that is to the point of effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority" (para. 59).

Although the Court acknowledged the difficulties with which the authorities were confronted in the investigation of terrorist offences, and notwithstanding the legitimate aim of protecting the community as a whole from terrorism, neither of these considerations was sufficient, in the Court's opinion, to justify the lengthy period of detention without appearance before a judicial authority. To hold otherwise would be to attach an unacceptably wide interpretation of the plain meaning of the word "promptly" and

> "... would import into Article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision" (para. 62).

The Court therefore concluded that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following arrest; even the shortest of the four periods of detention, namely four days and six hours, fell outside the strict constraints of the time permitted by Article 5(3).

The Court's interpretation of this requirement is of importance for national courts which are faced, in many cases, with the interpretation and application of statutory provisions which permit detention for considerable periods of time. In the Austin case, for example, section 17(2) of the Emergency Powers (Maintenance of Law and Order) Regulations - which reflects the wording of the Constitution - allows the Executive a period of up to seven days within which to furnish the detainee with reasons for his arrest. This, despite the requirement in Section 13(4)(b) of the Constitution that a detainee should be brought "without undue delay" before a court. Similarly, in Attorney-General v. Reynolds, Section 5(3) of the Constitution of St. Christopher and Nevis stipulates that a person detained

> "... shall be brought before a court without undue delay and in any case not later than seventy-two hours after his arrest or detention".

In that case the detainee was only served with the written reasons for his detention some five days after his detention. Furthermore, during the course of an inquiry held approximately one month after the arrest, the State conceded that it had no evidence for the detention. Nevertheless, it continued the detention for another month.

Clearly, if detainees are to be given the full protection of the law, the courts must exercise closer scrutiny over all aspects of preventive detention, particularly these procedural safeguards.

The Inter-American Commission and Court have also examined the scope of this provision. In submitting its request for an Advisory Opinion to the Inter-American Court, the Inter-American

Commission expressed the opinion that the immediate aim of the remedy of habeas corpus is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. In the Commission's view, the importance of the remedy could not be overstated, particularly in view of the fact that the right to humane treatment recognised in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances. The Inter-American Court endorsed these views in its Advisory Opinion, adding that such a conclusion was buttressed by the realities of disappearances, torture and murder committed or tolerated by some governments of the hemisphere. Furthermore, these experiences had demonstrated again and again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended.

G. PROBLEMS OF ENFORCING THE COURTS' JUDGMENTS

The inherent conflict between the executive and the judiciary is perhaps most apparent so far as the enforcement of the courts' judgments is concerned. The Executive may express its displeasure at a particular judgment by disregarding the court's order to release the detainee. Alternatively, it may enact legislation to override the decision, or seek to justify the detention by declaring a state of emergency where previously it had not sought to do so.

The United Kingdom's decision to avail itself of the right of derogation under Article 15(3) of the European Convention in response to the European Court's decision in the Brogan case is an example of the latter course. By letter dated 23rd December 1988, the United Kingdom's Permanent Representative to the Council of Europe advised the Secretary-General of the Council to this effect. The Government based its decision on the need to continue to exercise powers of preventive detention for periods of up to seven days to enable the police to counter terrorism. The Government also indicated that it was continuing the search for a solution that would comply with Article 5(3) of the Convention. That is, it was examining the possibility of introducing a judicial element into the powers under the 1984 Prevention of Terrorism (Temporary) Provisions) Act, which is to be re-enacted following its expiry this year.

In Singapore, the Government has enacted legislation to amend the Constitution and the Internal Security Act so as to nullify, retrospectively, the effects of the Court of Appeal's decision in the Teo Soh Lung case. The amendments purport to to remove the right of appeal to the Judicial Committee of the Privy Council; they also exclude judicial review of preventive detention except for failure to satisfy the procedural requirements of the Internal Security Act. The amendments further expressly exclude the constitutional guarantees of separation of power, including the protection of the independence of the

judiciary[6]. It remains to be seen how the Courts of Singapore will respond to the challenge which has been made to the validity of these amendments.

These actions emphasise the vulnerability of the rule of law, particularly in times of national crisis. The primary purpose of constitutional and treaty guarantees of liberty and security, and of the Habeas Corpus Act of 1816, is to protect the right to personal freedom of those who are detained or who have been threatened with detention. Failure to give effect to decisions of the courts means that individuals do not enjoy the full protection of these guarantees and that the power of interpretation and enforcement entrusted to the courts is usurped. It also denies the "generous approach" to constitutional instruments which the Judicial Committee of the Privy Council, as well as other national and international courts advise is necessary to give effect to fundamental rights.

In dealing with the issue of constitutional amendments, the Indian Supreme Court has given powerful decisions to limit the effects, on constitutional rights, of the liberal use of Parliamentary powers of amendment. While conceding that Parliament does have power to amend the Constitution, the Court rejects the validity of any amendment which would have the effect of damaging the basic features of the Constitution or destroying its basic structure (Kesavananda Bharati v. State of Kerala [1973] 4 SCR 1). The Court has also frequently asserted its authority by refusing to declare cases non-justiciable on the grounds that they involve political issues which may be regarded by the executive as being within its exclusive domain. In the Kesavananda Bharati case, for example, the Court stated that:

> "[e]very constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political".

However, the Court has not always been consistent and a major departure from this approach is evident in the case of A.D.M. Jabalpur v. Shivkant Shukla (AIR [1976] SC 1207). In that case, the Supreme Court, by a majority, upheld the Presidential Order which denied standing in the courts in any habeas corpus or other writ proceedings to challenge the validity of detention orders during the state of emergency.

CONCLUSION

It is evident that the efficacy of safeguards for the protection of fundamental rights, particularly in times of serious conflict, depends on the willingness of the courts to undertake a rigorous scrutiny of the exercise of executive discretion and to impose legal limits on the scope of those powers. Without this independent scrutiny and control by the courts, there is a serious risk of the situation envisaged by Lord Shaw in his dissenting opinion in R. v. Halliday [1917] AC

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6 The Internal Security (Amendment) Act 1989 (Act No.2 of 1989) and The Constitution of the Republic of Singapore (Amendment) Act 1989 (Act No.1 of 1989), respectively.

260 of a rapid transition to "arbitrary government".

It is also clear, however, that a courageous judiciary cannot, by itself, protect against such arbitrary government. There must be a willingness on the part of governments to respect the judgments of the courts and the rule of law; there must be, too, an informed and vigilant public opinion. As the Hon. Chief Justice Dumbutshena cautioned in Minister of Home Affairs & Anor v. Austin & Anor ([1987] LRC (Const) 567):

> "[w]hen the Executive ignores the orders and judgments of the Courts there is the inevitable breakdown of law and order, resulting in uncivilised chaos because the Courts cannot enforce their own orders" (at p.572).

In this context, it is also apposite to recall the observation of the Inter-American Court of Human Rights that there is "an inseparable bond between the principle of legality, democratic institutions and the rule of law" (A.O. OC-6/86 of May 9, 1986. Series A No.6, para.32), and that "in a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad".

Beverley Byfield
Commonwealth Legal Officer
Interights

ANNEXES

ANNEX I

ADDRESS BY MR ARTHUR CHASKALSON, NATIONAL DIRECTOR, LEGAL RESOURCES CENTRE, JOHANNESBURG, AT THE BAR DINNER

I am grateful to the Bar for the invitation to speak to you tonight. Bar dinners, even one such as this, which is being held to honour distinguished guests who have travelled from afar, are occasions for relaxation and enjoyment. The speaker's job is to entertain: to increase the mood of festivity rather than to contribute to the underlying purpose that has brought the guests together. This, however, was quite explicitly not the scope of the invitation put to me. I was, so I was told, to speak on the issue of human rights and South Africa. I have too much respect for the people involved in that struggle to treat it with levity, and you will therefore forgive me if I choose tonight to strike a sober rather than a festive note.

For over 300 years policies of segregation and discrimination have been pursued by white-controlled governments in South Africa. There is no need to discuss the details of these policies. They are well known and involve the manipulation of political power to advance the social and economic interests of the whites, at the expense of the majority of the population. As a result of these policies black South Africans have become substantially a voteless, landless and impoverished community.

There has been resistance to these policies but it has been curtailed by the enactment and enforcement of security legislation. This security legislation consists of a network of laws built up over a period of more than forty years. The process began, as it so often has in other places during the course of this century, with the passing of a law against communism. This was in 1950, and that law was followed by a series of statutes which curtailed civil liberties and proscribed political opposition. Bit by bit the edifice was constructed and over these forty years it has become as rigid and unyielding as the iron cage that Weber saw as the inevitable consequence of the modern bureaucratic state. An early part of the structure was the Unlawful Organisations Act passed in 1960 to empower the government to ban political organisations. First to be banned were the African National Congress and the Pan African Congress and over the years since then a large number of other organisations have also been banned. In 1963 provision was made for the detention of persons without trial which has since become a permanent feature of South African law and the cornerstone of security legislation.

Under the Internal Security Act and other legislation, state officials have been given a vast array of discretionary powers. In effect these powers enable state officials to control the flow of information, to proscribe political opposition, to break up political organisations that are seen to be threatening to the State, to cut off an organisation's source of funds, to pick off leaders of particular organisations and render them ineffective by detention, house arrest or other restrictions, to extract information from detainees to enable the security police to bring to trial persons alleged to have committed offences under the security legislation, and to instil fear in the hearts and minds of ordinary people who might otherwise have felt inclined to voice their opposition to the actions of the government. In June 1985 a state of emergency was declared, and this empowered the President to rule by decree.

The President has used his powers to vest in the security forces what for practical purposes are untrammelled powers of arrest, detention, interrogation, search, seizure and censorship.

This is the situation in South Africa today, yet it is not the entire story. There has been and still is an ongoing struggle against racism and all forms of discrimination, and as a result of that struggle, apartheid is slowly crumbling. There has been and still is an ongoing struggle against impoverishment and powerlessness, as a result of which workers and peasants have made gains and their interests have been advanced. This struggle for human rights in South Africa is part of a broader struggle. It has its roots in the history of Africa and is linked to the demand for self-determination. This demand for self-determination fanned the winds of change that have blown down Africa for more than thirty years. The winds were first felt in Algeria, and since then a familiar pattern has been witnessed, which has been repeated time and again. Colonial communities sought to cling to their privileges. Arab and African communities demanded change. Oppressive laws were enacted by colonial governments in an attempt to stem the resistance and stifle demands, but in vain. The sequence was oppression, resistance, repression and rebellion. In the process, societies were torn apart, countries impoverished by Civil War and at times violence and anarchy flourished. The last scene of this act is now being staged in South Africa. I believe that it may end sooner than most of us would have thought possible a few years ago. Certainly I hope that it will end in my lifetime, but that is not the issue. Time is not what I want to talk about. The point is that when the curtain comes down on that part of the struggle, the larger struggle for human rights, a struggle which involves Africa as well as other continents, will continue.

The present fight for human rights in South Africa is part of this larger struggle, and recent South African history shows just how tenuous human rights can be.

Racial discrimination had been present in South Africa for centuries prior to 1950. But the country had a well-developed legal system, an independent Bar and judiciary, and a tradition, if not of respecting universal political rights, at least of respecting other important freedoms. Yet precisely at a time when countries in the rest of the world, shocked by the events of the Hitler war and the disclosures concerning the Nazi regime, were moving away from racial discrimination, South Africa moved in the opposite direction institutionalising racial discrimination and becoming an increasingly repressive State. At the time of this crisis, the legal profession and the judiciary proved too weak to counter the ideology of apartheid, or to resist the oppression and injustices that accompanied it.

Why was it that the courts were unable to perform the traditional role to which they aspired, of protecting citizens against the State? To understand the answer to this question, we need to look at the process whereby the State gained power and rode roughshod over the rights of most of its citizens.

The technique adopted by the South African parliament to assert its supremacy is that commonly applied by oppressive regimes. First to make inroads into institutions which have been developed over the years to protect individuals and groups against arbitrary action. At the same time to create an atmosphere in which it would seem to be dangerous - and in fact became dangerous - to offer resistance. The first assault was directed against political opponents of the State. Its severity intimidated ordinary people who were reluctant to endanger their own position by resisting the inroads being made into their freedom and autonomy. One inroad after another was made, and on each occasion, decisions had to be taken whether or not to oppose the

actions of the State. Multiple delays weakened the will to resist until the time was reached when there no longer appeared to many people to be ways of opposing State policies effectively. Predictably, those who benefitted from these policies tended to rationalise their fears and anxieties, deluding themselves that conditions were not as bad as many in the outside world saw them to be, and that the victims of the State's actions were people who deserved to be punished, and had only themselves to blame for what had happened to them.

Some people were led to cooperate with the State by their fears or by opportunism, their mistaken assumption being that co-operation with the State might soften the worst excesses. In fact, inroads into freedom call for resistance as they occur: otherwise incursions become increasingly difficult to resist.

The process that I have described has taken place within South Africa over the past forty years. During this period there has on the one hand been a steady increase in the level of resistance to State policies, and on the other hand to fight off this resistance, a steady increase in the degree of coercion imposed by the State. The courts have remained open throughout this time. They function within a construction of the Roman Dutch Common Law which is of course also the common law of Zimbabwe, and which denies all forms of discrimination, and recognises and seeks to protect fundamental rights and freedoms. The South African courts have had to confront this conflict between the common law infrastructure, and the superstructure of apartheid laws built upon it. They have also had to deal with the conflict between the bureaucratic state which increasingly claimed the right to decide for people how they should lead their lives and how privilege should be distributed, and the demands for justice made by those who were the victims of the policies of the State.

These confrontations could not be avoided. There was and still is a vigorous human rights Bar within South Africa which continually brought and still brings issues before the courts and demands decisions upon them. The result has been that the courts were at one and the same time being asked to articulate and give effect to equitable common law principles, and to uphold and to enforce discriminatory laws: at one time to be an instrument of justice and at another to be an instrument of oppression. Through all this they have attempted to steer a course between Scylla and Charibydis clinging to the doctrine of parliamentary supremacy as the method whereby they could best serve two masters. The State proved to be the stronger of the two, and the result has been a steady but persistent narrowing of human rights protection, and a steady but persistent erosion of the powers and standing of the courts.

What is important for a proper understanding of what has taken place, is to appreciate that there has not been a total abdication of power by the South African Bar and judiciary.

Their role within South Africa has been and still is a complex one, and it would be an oversimplification and incorrect to see the South African courts and legal profession as being no more than instruments of a repressive State. The South African State is based on legal structures, and legalism had been an important feature of its government's policies and traditions. This means that the State and its officials are required to adhere to the forms of law, and as a result there are restraints upon the exercise of absolute power. True, laws can be changed when the courts rule against the State, as they often do, but there are political costs to such actions, and there are spaces and constraints which no government and no official is willing openly to claim.

Thus the forms of law do impose a restraining influence upon the State. If such restraints were to disappear, there would be no control whatever over the use or abuse of power; no restraint whatever over arbitrary or extralegal action. In such a situation the most oppressed section of the population, might prove to be the most vulnerable.

The balance sheet then shows that in South Africa there has been a persistent struggle within the forms of law in relation to the exercise and abuse of State power. It is a struggle in which the State has made gains, but has never achieved a total victory. Although the powers of the courts have been cut back, they remain independent and an important institution within which common law concepts have been kept alive. At times, within the spaces that do in fact exist in the network of apartheid, these principles have been allowed to flourish. It is the job of courts and lawyers to occupy these spaces, and to endeavour to make them wider. And that is what many South African lawyers are attempting to do.

Ultimately the protection of human rights depends to a material extent upon the powers and the will of the courts. Whatever merit the doctrine of parliamentary supremacy may have in a political system in which parliament reflects the will of the people, it can have none in a system in which the majority are voteless, and parliament is controlled by a small elite. What has happened in South Africa lays bare the hollowness of that doctrine. And although South Africa is ruled by a minority regime, the same course can be followed by other unrepresentative governments, and also by majority governments, where the opposition is weak, and the courts and legal profession are either not powerful enough, or not vigilant enough to resist incursions upon freedom. Judge Leared Hand told us that "liberty lies in the hearts of man and women; when it dies then no constitution, no law, no court can save it".

That may be true. But ordinary men and women need support in their fight to claim and to protect their liberties. And their natural protectors are courts, not governments. After all, most governments think that they know best what the public interest requires, and are inclined to play down, if not to ignore, the rights of those opposed to their policies. Courts need the power, as well as the will, to help governments resist such temptations. What the recent history of South Africa shows, is that slavish adherence to the doctrine of parliamentary sovereignty, is wholly inadequate for that purpose. There may come a time when courts all over the world will be able to shake off the shackles of parliamentary supremacy, and insist that legislation is not law if it is wholly unreasonable or immoral. Until that day, those of us who practice where parliamentary supremacy holds sway, will have to do the best we can within the spaces.

Albert Camus, writing about Algeria in 1958, said:

> "There is no ideal freedom which will some day be given us all at once, as a pension comes at the end of one's life. There are liberties to be won painfully, one by one, and those we still have are stages, most certainly inadequate, but stages nevertheless on the way to total liberation. If we agree to suppress them, we do not progress nonetheless. On the contrary we retreat, we go backwards and some day we shall have to retrace our steps along that road, and that new effort will once more be made in the sweat and blood of men."

That is where we are in South Africa. And elsewhere, in other parts of the world, there are other people at different places on the same road. All of us, need all the help that we can get, to enable us to move along that road.

TEXT PREPARED WITHIN THE ORGANISATION OF AFRICAN UNITY

THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Nairobi, June 1981

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights" ;

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and legitimate aspirations of the African peoples" ;

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples' of Africa and to promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights ;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights ;

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1. Text provided by the Division of Press and Information of the OAU General Secretariat.

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights ;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone ;

Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights ;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neocolonialism apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions ;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations ;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa ;

Have agreed as follows :

PART I — RIGHTS AND DUTIES

Chapter I - Human and Peoples' Rights

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises :

a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force ;

b. the right to be presumed innocent until proved guilty by a competent court or tribunal ;

c. the right to defence, including the right to be defended by counsel of his choice ;

d. the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 10

1. Every individual shall have the right to free association provided that he abides by the law.

2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

2. Every citizen shall have the right of equal access to the public service of his country.

3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17

1. Every individual shall have the right to education.

2. Every individual may freely, take part in the cultural life of his community.

3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal ; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.

4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively to ensure the exercise of the right to development.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that :

a. any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter.

b. their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Article 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Chapter II - Duties

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty :

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family ; to respect his parents at all times, to maintain them in case of need ;

2. To serve his national community by placing his physical and intellectual abilities at its service ;

3. Not to compromise the security of the State whose national or resident he is ;

4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened ;

5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law ;

6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society ;

7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.

8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

PART II — MEASURES OF SAFEGUARD

Chapter I - Establishment and organisation of the African Commission on Human and Peoples' Rights

Article 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Article 31

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights ; particular consideration being given to persons having legal experience.

2. The members of the Commission shall serve in their personal capactiy.

Article 32

The Commission shall not include more than one national of the same State.

Article 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

Article 34

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States parties to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

Article 35

1. The Secretary General of the Organisation of African Unity shall invite States parties to the present Charter at least four months before the elections to nominate candidates.

2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

Article 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

Article 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

Article 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 39

1. In case of death or resignation of a member of the Commission the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.

3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

Article 40

Every member of the Commission shall be in office until the date his successor assumes office.

Article 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear cost of the staff and services.

Article 42

1. The Commission shall elect its Chairman and Vice-Chairman for a two-year period. They shall be eligible for re-election.

2. The Commission shall lay down its rules of procedure.

3. Seven members shall form the quorum.

4. In case of an equality of votes, the Chairman shall have a casting vote.

5. The Secretary General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

Article 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and immunities of the Organization of African Unity.

Article 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

Chapter II - Mandate of the Commission

Article 45

The functions of the Commission shall be :

1. To promote Human and Peoples' Rights and in particular :

a. to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.

b. to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.

c. co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

3. Interprete all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU.

4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

Chapter III - Procedure of the Commission

Article 46

The Commission may resort to any appropriate method of investigation ; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

Communication from states

Article 47

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

Article 48

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

Article 49

Notwithstanding the provisions of Article 47, if a State party to the present Charter considers that another State Party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

Article 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

Article 51

1. The Commission may ask the States concerned to provide it with all relevant information.

2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.

Article 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report to the States concerned and communicated to the Assembly of Heads of State and Government.

Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

Article 54

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities.

Other communications

Article 55

1. Before each Session, the Secretary of the Commission shali make a list of the Communications other than those of States parties to the present Charter and transmit them to the Members of the Commission, who shall indicate which communications should be considered by the commission.

2. A communication shall be considered by the Commission if a simple majority of its members so decide.

Article 56

Communication relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they :

1. indicate their authors even if the latter request anonymity,

2. are compatible with the Charter of the Organization of African Unity or with the present Charter,

3. are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,

4. are not based exclusively on news disseminated through the mass media,

5. are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged,

6. are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter, and

7. do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

Article 58

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.

2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations.

3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

Article 59

1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.

2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.

3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Chapter IV - Applicable principles

Article 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization 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 peoples' 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 recognized by member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights,

customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.

Article 62

Each State party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

Article 63

1. The present Charter shall be open to signature, ratification or adherence of the Member States of the Organization of African Unity.

2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.

3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the member States of the Organization of African Unity.

PART III — GENERAL PROVISIONS

Article 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.

2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

Article 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of deposit by that State of its instrument of ratification or adherence.

Article 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

Article 67

The Secretary General of the Organization of African Unity shall inform member States of the Organization of the deposit of each instrument of ratification or adherence.

Article 68

The present Charter may be amended if a State Party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

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