

Judicial Colloquium in Abuja, Nigeria
9-11 December 1991

Developing Human Rights Jurisprudence, Volume 4

Fourth Judicial Colloquium on
The Domestic Application of
International Human Rights Norms



Commonwealth Secretariat

interights

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**Fourth Judicial Colloquium on
The Domestic Application of
International Human Rights Norms**

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Preface

The fourth judicial colloquium to consider international human rights norms was convened by the Hon Mohammed Bello, CON, Chief Justice of Nigeria, in Abuja, Nigeria, from 9-12 November 1991. It was the largest gathering of senior Commonwealth judges in this series of meetings.

As on earlier occasions, the Abuja colloquium was concerned with the development of international jurisprudence in human rights and, in particular, with the domestic application of international human rights norms. The inaugural session in 1988 produced what has become known as the **Bangalore Principles**, a concluding statement of that meeting which seeks to chart the way forward for judges throughout the Commonwealth and pointing them in the direction of a consistent and creative development of human rights jurisprudence. With similar objective the second colloquium in 1989 produced the concluding statement now known as the **Harare Declaration of Human Rights**, and the third colloquium in 1990 the **Banjul Affirmation**. The texts of all these concluding statements appear in this report from page ...

The colloquium in Abuja considered a number of presentations on the developing body of international human rights jurisprudence relating particularly to the application of the International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights, the European Convention on Human Rights and the African Charter on Human and Peoples' Rights. Particular note was taken of remarkable international and national events having important human rights implications, including the Commonwealth Heads of Government declaration in 1991 giving special emphasis to democracy, human rights, accountable government, independence of the judiciary and the rule of law.

The special importance of the Abuja colloquium was its strong endorsement and confirmation of the **Bangalore Principles**, and the identification of practical measures for their implementation. The text of the 1991 concluding statement, known as the **Abuja Confirmation**, appears at page ... of this report. In Abuja, Commonwealth judges also called for the establishment of a Commonwealth Judicial Human Rights Association for the furtherance of their concerns and work in this area.

Like all previous colloquia, the Abuja one was organised jointly by the Commonwealth Secretariat and Interights, with funding from the Ford Foundation. Sincere gratitude is expressed to the Ford Foundation for its continuing and generous support.

**Legal Division
Commonwealth Secretariat**

Interights

June 1992

Abuja Confirmation
of
The Domestic Application of
International Human Rights Norms

- 1 Between 9 and 12 December 1991 there was convened in Abuja, Nigeria, a high level judicial colloquium on the domestic application of international human rights norms. The colloquium followed earlier meetings held in Bangalore, India in February 1988, Harare, Zimbabwe in April 1989 and Banjul, The Gambia in November 1990. The operative parts of the principles accepted in Bangalore (the Bangalore Principles), affirmed and reaffirmed in Harare and Banjul are annexed to this Statement. Once again, they were confirmed by all the participants in Abuja.
- 2 The Abuja colloquium was, alike with the Bangalore, Harare and Banjul meetings, administered jointly by the Commonwealth Secretariat and Interights (the International Centre for the Legal Protection of Human Rights) on behalf of the Convenor, the Hon Justice Mohammed Bello, CON, Chief Justice of Nigeria, with the approval of the Government of Nigeria and with assistance from the Ford Foundation.
- 3 Following opening addresses by Chief Justice Bello and on behalf of Prince the Hon Bola Ajibola, SAN, KBE, and an address of welcome by the Hon the Minister of the Federal Capital Territory, Abuja, Major-General Muhammadu Gardo Nasko, FSS, PSC, MNI, the colloquium was opened in the name of the Vice President of the Federal Republic of Nigeria, His Excellency Admiral Augustus Akhomu (rtd), PSC, FSS, MNI. A message of greeting and encouragement was read from the Commonwealth Secretary-General, Chief Emeka Anyaoku, CON.
- 4 The participants in the Abuja colloquium were:

Australia	Justice Michael D Kirby, AC, CMG
Brazil	Justice Celio Borja
European Court of Human Rights	President Rolv Ryssdal
The Gambia	Chief Justice E O Ayoola
Ghana	Chief Justice P E Archer
India	Justice P N Bhagwati
Nigeria	Chief Justice Mohammed Bello, CON - Convenor Justice A G Karibi-Whyte, Justice of the Supreme Court Justice P Nnaemeka-Agu, Justice of the Supreme Court

Justice Aloma Mukhtar, Justice of the Court of Appeal
 Justice Niki Tobi, Justice of the Court of Appeal
 Chief Judge M B Belgore, Federal High Court
 Acting Chief Judge E A Ojuolape, Ondo State
 Chief Judge M U Usoro, Akwa-Ibom State
 Chief Judge L A Ayorinde, Lagos State
 Chief Judge T A Oyeyipo, Kwara State
 Chief Judge K M Kolo, Borno State
 Chief Judge G I Uloko, Plateau State
 Chief Judge I B Delano, Ogun State
 Chief Judge S U Minjibir, Kano State
 Chief Judge S E J Ecoma, Cross-River State
 Judge R H Cudjoe, High Court of Justice, Kaduna State
 Chief Judge A Idoko, Benue State
 Acting Chief Judge T A A Ayorinde, Oyo State
 Judge A N Maidoh, Delta State
 Chief Judge F I E Ukattah, Abia State
 Judge M O Nweje, Anambra State
 Chief Judge S S Darazo, Bauchi State
 Judge A C Orah, High Court of Justice, Enugu State
 Chief Judge A O Aparara, Osun State
 Acting Chief Judge Tijjani Abubakar, Jigawa State
 Acting Chief Judge Mahmud Mohammed, Taraba State
 Chief Judge Ibrahim Umar, Kebbi State
 Chief Judge M D Saleh, Federal Capital Territory
 Abdulkadir Orire, Grand Kadi of Kwara State
 President Y Yakubu, Customary Court of Appeal, Plateau State
 Judge R N Ukeje, Federal High Court, Jos
 Judge A O Ige, High Court of Justice, Oyo
 Judge E E Arikpo, High Court of Justice, Cross-River State
 Justice Kayode Eso, CON, Supreme Court (rtd)
 Professor U O Umozurike, Member, African Commission on Human and Peoples' Rights

Sierra Leone Chief Justice S M F Kutubu

United Kingdom Recorder Anthony Lester, QC

United States of America Judge Nathaniel R Jones

Zimbabwe Justice Enoch Dumbutshena

- 5 The participants had before them a number of papers which were presented for their study and critical attention. These papers examined the developing body of international human rights jurisprudence, with particular emphasis on the application of the International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights, the European Convention on Human Rights, and the African Charter on Human and Peoples' Rights. They noted that the principles contained in these instruments enshrine general principles of customary international law of universal application.
- 6 The participants also heard oral presentations on the operation of the African Charter on Human and Peoples' Rights and the European Convention on Human Rights. The review of the operation of the Charter was led by Professor U O Umozurike (Nigeria), immediate past Chairman of the African Commission on Human and Peoples' Rights. The review of the jurisprudence which has been developed by and under the European Court of Human Rights was led by the Court's President, the Hon Justice Rolv Ryssdal. This was the first occasion in the series of judicial colloquia that the participants have had the benefit of the participation of a member of the European Court of Human Rights, the jurisprudential influence of which now extends far beyond Europe. Also participating for the first time in the Abuja colloquium was a Judge from the civil law tradition, The Hon Justice Celio Borja (Brazil).
- 7 The remaining sessions were spent discussing papers presented as well as contributions made by judges from Australia, The Gambia, India, Nigeria, Sierra Leone, the United Kingdom, the United States of America and Zimbabwe.

The international and national contexts

- 8 The participants were keenly aware of the remarkable international and national contexts in which their deliberations were taking place, affecting the international community, the Commonwealth of Nations, Africa and specifically the host country, Nigeria.
- 9 In the world community the processes of globalisation, stimulated by technology, continues apace. But it is now taking place in a rapidly changing international political context, reflected most visibly in the end of the Cold War, the rapid political and legal changes in Central and Eastern Europe, and the Soviet Union, accompanied by the decline of totalitarianism, and moves to strengthen the United Nations Organisation and its commitment to the furtherance of human rights protection.
- 10 In the Commonwealth of Nations, the gradual dismantling of the apartheid regime in South Africa and the inevitable moves towards freedom and democracy in that country, and popular pressures across Africa, have stimulated renewed attention by Commonwealth Heads of Government to the issues

of human rights in the Commonwealth more generally. This was reflected in the closing statement of the Commonwealth Heads of Government Meeting in Harare in October 1991, with its particular emphasis on democracy, human rights, accountable government, independence of the judiciary and the rule of law.

- 11 In Africa, recent political and legal changes provided an encouraging context for the Abuja colloquium. The peaceful change of government in Zambia, the abandonment of the single party state announced in Kenya, and the changes in South Africa creating the prospect of majority rule, all reflect the movement in Africa today towards democracy and respect for human rights and the primacy of the rule of law.
- 12 In Nigeria, the participants carefully noted the steps being taken towards the restoration of civilian democratic government by the end of 1992.
- 13 Judges have a key role to play in the renewal in countries in all parts of the world of principles of democracy, human rights and the rule of law - to do justice to everyone within their jurisdiction by due process of law. It was with this consciousness of the importance of the role of the independent judiciary, especially at this point of time in history, that the participants in this colloquium approached the subject matter of their work.

The legitimacy of judicial interpretation

- 14 The participants reaffirmed the principles stated in Bangalore, amplified in Harare, and affirmed in Banjul. These principles reflect the universality of human rights - inherent in humankind - and the vital duties of the independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. This process involves the application of well-established principles of judicial interpretation. Where the common law is developing, or where a constitutional or statutory provision leaves scope for judicial interpretation, the courts traditionally have had regard to international human rights norms, as aids to interpretation and widely accepted sources of moral standards. This process is all the more necessary where a national Bill of Rights is inspired by international human rights instruments (as in the case in many Commonwealth African countries, including Nigeria). Obviously the judiciary cannot make an illegitimate intrusion into purely legislative or executive functions; but the use of international human rights norms as an aid to construction and a source of accepted moral standards involves no such intrusion.
- 15 The participants recognised that, as befits a community of individuals answering only to the law and their conscience, different judges may perceive in different ways the choice available to them in particular cases - whether in interpreting constitutional or legislative provisions, or in developing the common law. What to one judge may seem clear

and unambiguous may to another seem unclear or ambiguous and such as to require a choice between competing interpretations. It is in such a situation that the international human rights norms provide useful guidance in making the choice. The Bangalore Principles do no more than call to the judge's notice the need to make relevant choices in a principled way.

Personal liberty, access to justice, and the rule of law

- 16 During the course of discussion, the participants called particular attention to the paramount importance of preserving *habeas corpus*, and effective access to counsel and to bail; of ensuring fair and public trials within a reasonable time by independent and impartial courts and tribunals established by law; of respecting the presumption of innocence; of prohibiting arbitrary detention or imprisonment without trial, and all forms of torture and inhuman or degrading treatment or punishment; and of implementing the humane treatment of prisoners in accordance with United Nations minimum standards.

Confirmation of Bangalore Principles

- 17 Having regard to the central place and importance of the Bangalore Principles, the Harare Declaration and the Banjul Affirmation, the participants in the Abuja colloquium issued this Statement in confirmation of the Bangalore Principles, as developed in the Harare Declaration and the Banjul Affirmation, and noted as follows:
- (i) in the legal systems of the Commonwealth, international human rights norms appearing in international treaties are not, as such, part of the domestic law, unless and until they are specifically incorporated by national legislation; for example, the African Charter of Human and Peoples' Rights is not yet part of the national laws of Nigeria because the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 has not been brought into force;
 - (ii) the general principles of international human rights instruments are relevant to the interpretation of national Bills of Rights and laws, where choices have to be made between competing interests in the discharge of the judicial function;
 - (iii) there is an impressive body of case law which affords useful guidance to the national courts - notably, the judgments and decisions of the European Court and Commission of Human Rights, the judgments and advisory opinions of the Inter-American Court of Human Rights, and decisions and general comments of the United Nations Human Rights Committee. There is also an important body of comparative constitutional law, for example, from the Supreme Courts of Commonwealth jurisdictions. This is also an area in which resort

can be had to the writings of eminent scholars and jurists.

Practical measures of implementation

- 18 The participants, as in earlier colloquia, acknowledged practical needs for the effective implementation of the Bangalore Principles in the day to day discharge of their judicial function, which include the following:
- (a) the need to protect and strengthen the independence, impartiality and authority of the judiciary, both collectively and individually; noting with satisfaction the establishment by the International Commission of Jurists in Geneva of the Centre for the Independence of Judges and Lawyers (CIJL), and the establishment by the General Assembly of the United Nations of the Basic Principles on the Independence of the Judiciary 1985;
 - (b) the need to protect and strengthen the independence of the legal profession, and the highest standards of integrity and professionalism in the practice of law;
 - (c) the need to avoid any undue delay in the adjudication of human rights cases;
 - (d) the need to provide judges and lawyers with the basic texts of the main international and regional human rights instruments;
 - (e) the need to provide judges and lawyers with up-to-date information about the jurisprudence of the major international, regional and national courts, tribunals and decision-making and standard-setting authorities;
 - (f) the need for programmes of continuing judicial studies and professional legal training in international and comparative human rights jurisprudence;
 - (g) the need for courses in law schools and other institutions of learning to educate the next generation of judges, legislators, administrators and lawyers in human rights jurisprudence;
 - (h) the need to ensure effective access to justice by providing adequate funds for the proper functioning of the courts, and adequate legal aid, advice and assistance for people who cannot otherwise obtain legal services;
 - (i) the need to enable independent non-governmental organisations to provide *amicus curiae* briefs, and other specialist legal advice, assistance and representation in important cases involving human rights issues;

- (j) the need to establish an independent African Court of Human Rights with jurisdiction over inter-state and individual cases, and with the power to give binding judgments; and
- (k) the need for further Commonwealth initiatives and support for the effective implementation of the Bangalore Principles in each of these respects.

Commonwealth Judicial Human Rights Association

- 19 The participants resolved to establish, as a further practical step in communicating information about international and comparative human rights law to judges and lawyers and non-governmental organisations, an informal body - to be known as the Commonwealth Judicial Human Rights Association (CJHRA). The Association will include, if they so wish, all judges who have participated in the series of colloquia in Bangalore, Harare, Banjul and Abuja (including judges from outside the Commonwealth). It will be open to other judges to join the Association.

- 20 Members will send to Interights in London published judgments in which they or their colleagues have applied or otherwise made use of international and comparative human rights norms. The participants request Interights, in co-operation with the Commonwealth Secretariat, to obtain the necessary resources to act as a clearing-house of information on these subjects for the Association, and to publish practical digests of human rights decisions for use by judges, lawyers, public authorities and non-governmental organisations.

Participants

Australia	Justice Michael D Kirby, AC, CMG
Brazil	Justice Celio Borja
European Court of Human Rights	President Rolv Ryssdal
The Gambia	Chief Justice E O Ayoola
Ghana	Chief Justice P E Archer
India	Justice P N Bhagwati
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Chief Judge Ibrahim Umar, Kebbi State
Chief Judge M D Saleh, Federal Capital
Territory
Abdulkadir Orire, Grand Kadi of Kwara State
President Y Yakubu, Customary Court of
Appeal, Plateau State
Judge R N Ukeje, Federal High Court, Jos
Judge A O Ige, High Court of Justice, Oyo
Judge E E Arikpo, High Court of
Justice, Cross-River State
Justice Kayode Eso, CON, Supreme Court (rtd)

Sierra Leone Chief Justice S M F Kutubu
United Kingdom Recorder Anthony Lester, QC
**United States of
America** Judge Nathaniel R Jones
Zimbabwe Justice Enoch Dumbutshena

ALSO PRESENT

African Commission on Human and Peoples' Rights

Professor U O Umozurike, Commission Member

Commonwealth Secretariat

Mr Richard Nzerem, Legal Division
Mr Neroni Slade, Legal Division

Ford Foundation

Ms Mora McLean
Ms Azuka Ilukwe

Interights

Ms Beverley Byfield
Mr Nasir Mir

Programme

Monday, 9 December 1991

0930 Opening ceremony

1100 Tea

1130 First Session

(A) Domestic Application of International Human Rights Norms

1. Presentation by the **Justice Bhagwati**

1230 Lunch

1400 2. Presentation by the **Justice Eso**

3. Presentation by the **Justice Karibi-Whyte** on the circumstances of birth as a human rights norm

1530 Tea

Discussion on:

- The role of the courts in the domestic application of international human rights norms

- The development of the common law by judicial techniques by reference to or direct application of international human rights norms

- The balancing of personal liberty and reasons of state

- The constitutional provisions for the protection of citizens against disability or deprivation by reason of origin or circumstances of birth

- The extent to which international and regional human rights standards are given domestic constitutional or legislative protection with respect to civil and political rights, and economic, social and cultural rights

Tuesday, 10 December 1991

0900 Second Session

4. Paper by **Mr Markus Schmidt** of the United Nations Human Rights Centre on the International Human Rights Norms with particular emphasis on the application of the International Covenant on Civil and Political Rights by the Human Rights Committee (to be delivered by **Mr Recorder Anthony Lester, QC**)

Discussion on the sources of international human rights, with particular reference to the UN Charter, the Universal Declaration of Human Rights, the declarations and resolutions of the General Assembly and the UN Human Rights Committee

1030 Tea

1100 **(B)The African Charter on Human and Peoples' Rights**

Third Session

5. Presentation by **Professor Umozurike** on the procedures under the African Charter for the protection and redress of human rights

Discussion on the mandate, proceedings and procedures of the African Commission on Human and Peoples' Rights

1230 Lunch

1400 6. Paper by the **Justice Maman Nasir**, President of the Court of Appeal, on the African Charter on Human and Peoples' Rights (to be delivered by **Justice Niki Tobi**)

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

- The civil, political, economic, social and cultural rights elaborated in the African Charter

- The concept of 'duties of the individual' in the African Charter

- The African Charter and the freedom and independence of the African judiciary

1530 Tea

1600 Fourth Session

7. Presentation by the **Justice Ryssdal** on the European provisions and experience

8. Presentation by **Mr Recorder Anthony Lester, QC** on the European Human Rights Convention

Discussion on:

- The types and adequacy of international human rights procedures for the protection and realisation of human rights

- The human rights jurisprudence and system of Europe, and the impact on and implications for the Commonwealth

Wednesday, 11 December 1991

0900 Fifth Session

(C) Role of the Judge in Advancing Human Rights

9. Presentation by the **Judge Nathaniel Jones**
10. Presentation by the **Justice Enoch Dumbutshena**

1030 Tea

1100 11. Presentation by the **Justice Michael Kirby**

Discussion on:

- Judicial techniques and strategies to translate human rights and fundamental freedoms into practical reality through the interpretation of legislation and common law including rules of procedure, evidence, *amicus curiae* briefs, *locus standi* etc
- The question of funding of public interest litigation and legal aid, the role of national human rights commissions, etc

1230 Lunch

1400 Sixth Session

(D) Human Rights Proceedings

12. Presentation by the **Justice Nnaemeka-Agu** on the domestic provisions and experience of Nigeria

Discussion on:

- The types and adequacy of international human rights procedures for the protection and realisation of human rights
- The regional application of human rights proceedings and procedures in the African context for the strengthening, promotion and safeguard of the civil, political, economic, social and cultural rights elaborated in the African Charter

1530 Tea

1600 Abuja Confirmation statement

Closing remarks

OPENING ADDRESSES

Introductory Speech

by

**The Hon Justice Mohammed Bello, C.O.N.,
Chief Justice of Nigeria**

at the Opening Ceremony of the International Judicial Colloquium
held at the Sheraton Hotel, Abuja, Nigeria, from 9 - 13 December 1991

I deem it a great privilege to have the honour to introduce this Colloquium to so distinguished an audience. When in February this year, we decided to explore the possibility of hosting this Colloquium, I did not foresee that it would attract such a keen and widespread interest. As I look round this hall and note the presence of distinguished Judges and Jurists from different parts of the Commonwealth and beyond, I cannot but pleasantly pat ourselves at the back. I welcome you all to Nigeria.

Our distinguished visitors have come to the country at the very critical stage of our transition programmes for the return to civil rule and constitutionalism. Local Government Councils elections had already been conducted throughout the Federation at which the Chairmen and the Councillors for the 600 Local Government Councils had been democratically elected by their peoples.

Only nine days ago, on 30th November, 1991, our National Census Commission completed the enumeration for the 1991 National Census. Nigerians have been anxiously looking forward to the result because we have not had an acceptable census result since 1963.

Our visitors are going to be eye-witness to the transfer of the seat of the Federation from Lagos to here, Abuja, during this Colloquium. The President, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, General Ibrahim Badamasi Babangida, C.F.R., fss, mni, will on 12th December, 1991 bring the official seat and inaugurate Abuja as the Federal Capital of Nigeria. Thereafter, on the 14th of December, 1991, there will be elections throughout the country when the Governors and Members of the Houses of Assembly of the 30 States of the Federation will be democratically elected by the people. On the 2nd of January, 1992, the executive and legislative powers of the States will be formally handed over to the civilians. The Military will finally withdraw from the Government of the Federation by the end of the said year and hand over power to the elected representatives of the people.

I have summarised the transition programmes of the Federal Military Government for the return to civil rule because I consider them relevant to the topic for deliberation at the Colloquium, to wit: the Domestic Application of International Human Rights Norms.

This Colloquium is the fourth in a series which commenced in Bangalore, India, in 1988. There eminent Judges and Jurists from nine countries of the Commonwealth and the United States gathered at a Judicial Colloquium to deliberate on different aspects of

the Domestic Application of International Human Rights Norms. In the end, they not only identified the international character of human rights norms but also reached far-reaching decisions embodied in what have since then been known as the "Bangalore Principles". A second Colloquium in Harare in 1989 produced the "Harare Declaration of Human Rights". The third, which was the first in this sub-region was held in Banjul, The Gambia, in 1990 and produced the "Banjul Affirmation". Without trying to pre-empt this Colloquium, it is my hope therefore that, at the conclusion of this fourth Colloquium, we shall be able to produce the Abuja Confirmation.

I do hope that it will be a confirmation because Nigeria was the first country in Africa to entrench the internationally recognised human rights norms in its 1960 Constitution based mainly on the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. It is pertinent to state that the Nigerian model was adopted for all the Constitutions of all the African Commonwealth countries including Botswana, The Gambia, Kenya, Madagascar, Mauritius, Sierra Leone, Zambia, Uganda, Malawi, Lesotho and Zimbabwe. It may be confidently asserted that the constitutional seeds of internationally recognised human rights norms were first sown in Nigeria and their shoots spread all over Africa.

Furthermore, our Constitution has not been static. We have been changing it frequently. In the course of those changes, our Constitution makers have been incorporating therein most of the principal human rights norms formulated during the years by international fora. The sources include Universal Declaration of Human Rights, African Charter on Human Rights and the major international covenants and conventions relating thereto.

The internationally recognised substantive human rights norms entrenched in the 1989 Nigerian Constitution may be summarised in three categories.

Firstly, the rights which are exclusively reserved for the Nigerian citizens for the protection of the privacy of themselves, their homes, correspondence, telephone conversation and telegraphic communication; for their freedom of movement in and residence in any part of Nigeria and of entry therein; right to freedom from discrimination on ground of ethnic grouping, sex, religion or political opinion or by reason of the circumstances of their births.

Secondly, the right of dignity to human person, which includes citizens and aliens as well, which relates to the prohibition of torture, inhuman or degrading treatment, slavery or servitude and forced or compulsory labour.

Thirdly, the rights of every person, whether human or corporate or unincorporate, citizen or alien, to life; to personal liberty; to compensation and public apology from the appropriate authority or person for unlawful arrest; to freedom of thought, conscience and religion; to freedom of expression including to hold opinions, receive and impart ideas and information and to own, establish and operate any medium other than television and radio broadcasting for the dissemination of information, ideas and

opinions; to peaceful assembly and association and particularly to form or to belong to political party, trade union or any other association for the protection of his interest.

With regard to the entrenched procedural rights, every person accused of criminal offence is accorded the rights to remain silent, to be informed of the reason for his arrest within 24 hours; to be taken to court within reasonable time; to fair hearing in civil cases and fair trial in criminal cases in public within a reasonable time by an independent and impartial court or tribunal; to presumption of innocence; to be informed of the offence with which he is charged; to be given adequate time and facilities to defend himself; to have a counsel of his choice; to cross-examine prosecution witnesses and to examine his witnesses and to have a free interpreter.

Every person also enjoys the immunity against retrospective legislation and against double jeopardy; and the right of noncompellability as a witness if accused of a criminal offence.

It must be emphasised, however, that the aforesaid rights are not absolute because in addition to the several provisions to the relevant section relating to a particular right, qualifying and limiting the right, the Constitution enjoins that any law that is reasonably justifiable in a democratic society in the interest of peace, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedoms of other persons or for measures taken during periods of emergency shall not be invalidated by reasons of the provisions of the fundamental rights.

Moreover, the Constitution of the Federal Republic of Nigeria is the fundamental law of the land which has binding force on all authorities and persons and any other law which is inconsistent with its provisions shall to the extent of the inconsistency be null and void. Consequently except in accordance with the provisions of the Constitution, a Nigerian civil government or authority cannot deprive any persons from the enjoyment or exercise of his constitutional human rights.

One of the most important aspects of the Nigerian Constitution worth noting for the purpose of this Colloquium is that the incorporation of the fundamental human rights therein has not been a mere declaration of intention. Those rights have been concretised by the Constitution itself by providing that any person who alleges that any of his constitutional human rights has been, is being or likely to be contravened in any State in the Federation may apply to a High Court in that State for redress.

The procedure for obtaining redress for contravention or likely contravention of the said rights is spelt out by the Fundamental Rights (Enforcement Procedure) Rules 1979 made by the Chief Justice of Nigeria under the authority of the Constitution. The procedure provides easy and speedy access to courts. The aggrieved person may apply ex parte in any court in the State, whether Federal or State court, where the infringement occurs or is likely to occur, for leave to apply for the order being asked for and, if leave is granted, the application for such order is

required to be made by motion on notice or by originating summons. The court must enter the motion or summons within 14 days after leave has been granted. Upon grant of leave, the court may stay all actions or matters relating to or connected with the complaint until the court otherwise orders. Indeed, since their entrenchment in 1960, the Nigerian courts have made far reaching decisions regarding the observance, protection and enforcement of fundamental human rights.

The human rights stance of the present Nigerian Military Government is material to the issue. On taking over the Government, it declared that except in special circumstances, it would not interfere with the fundamental rights provisions of the Constitution. To its credit, its first act was the repeal of the Decree enacted by its predecessor which gagged the press and also released from detention political office holders and businessmen who had been detained by the former Military Regime.

It is to the credit of the present Military Regime that it has not suspended the fundamental rights except in relation to the State Security (Detention of Persons) Decree 1984 which permits detention of persons without trial in a court of law on security grounds. The Regime has also ousted the jurisdiction of the courts of law to try armed robbery cases, economic crimes and political offences. The jurisdiction for the trial of cases on all these matters has been conferred on Military Tribunals established for the purpose. The tribunals are chaired by serving or retired High Courts Judges. It is a notorious fact that security detention and ouster of jurisdiction of the courts have been the scud missiles with which the Human Rights Activists and the Critics of the Regime have been making onslaught on the Federal Military Government. However, on the whole, the humane human rights stance of the Regime has been universally recognised.

As I see it, the success or failure in the advancement and enforcement of human rights norms in any country depends squarely on two institutions, namely: the courts of law and the courts of public opinion. The former adjudicate on human rights cases. The latter sensitise citizens about their rights, educate them about their violations and inform them that they can get appropriate remedy in the courts of law. Those courts of public opinion are under the control of the press and the media. As these are outside the scope of this Colloquium, it is enough to say that in a country in which the press is supine, timid, ignorant or not resourceful or constructive enough, human rights aspirations are as good as dead.

It is, however, with the other institution, the courts of law, that we are concerned in this Colloquium. It is very good indeed that many countries in their several constitutions and other laws have set out different human rights norms. But these abstract statements of principle will be useless unless their violations are brought before the court, adjudicated upon and enforced by the appropriate and efficient machinery for administration of justice. It is of course a truism that the types of judgments to be expected of Judges in such cases will invariably depend upon the quality of legal and judicial education of the Judges, their character of courage and discipline as well as their exposure to such cases.

It has been said that human rights norms ante-date human society itself. The American Declaration of Independence 1786 in Philadelphia proclaimed it as self-evident truth that:

"... all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness; "

That proclamation has found broad expressions in the several modern international statements of principles, declarations, covenants and conventions on human rights. A plethora of internationally recognised human rights norms has been comprehensively documented. All that a country, which wishes to entrench in its Constitution or domestic law any of such rights, has to do is to select from such plethora.

For this Colloquium we have assembled the representatives of all the thirty-four Judiciaries in Nigeria and of each of the Judiciaries in Anglophone West Africa except Liberia, to listen to the eminent and distinguished resource persons and other participants and to make their contributions at the Colloquium. I have the hope that it will in the end be seen as a useful and worthwhile exercise.

Finally, the recent collapse of communist totalitarian regimes in Eastern Europe and the violent overthrow of dictatorial presidencies in some African countries provide a bitter lesson and inducement to all developing countries to embrace true constitutional democracies in order to ensure peace, stability and enjoyment of human rights for their peoples. Judges and jurists, I believe, have an important role to perform in this great endeavour.

I thank you all for listening.

Human Rights Posture of the Present Regime

Address by

The Hon Prince Bola Ajibola, SNA, KBE

Attorney-General and Minister of Justice of the Federation

The Vice-President of the Federal Republic of Nigeria, Admiral Augustus Aikhomu,

The Chief Justice of Nigeria, Hon Justice Mohammed Bello, CON,

The President, European Court of Human Rights,

The Chief Justices of Other Countries here present,

The Chairman, African Commission on Human and People's Rights,

Representatives of Interight, Ford Foundation and the Commonwealth Secretariat,

Distinguished Ladies and Gentlemen.

INTRODUCTION

First of all I wish to thank the organisers of this Colloquium and in particular, the Chief Justice of Nigeria, Hon Justice Mohammed Bello, CON for very kindly extending to me an invitation to attend and participate in it. This is the second judicial colloquium in the series organised by the Commonwealth Secretariat to be attended by me, having had the privilege and pleasure of participating in the 3rd Colloquium held in Banjul, The Gambia in 1990. It is with immense delight that I join all well meaning Nigerians in welcoming the delegates to this 4th Colloquium which is being held here in 'this' new Federal Capital of Nigeria - Abuja.

In the letter of invitation which was addressed to me I was requested to speak very briefly on the topic "Human Rights Posture of the Present Regime".

I make bold to say that the general issue of human rights is particularly appropriate for a forum of this nature and at this time having regard to its prominent currency on the international plane. Almost at every nook and corner of the world today people talk of or react in one way or the other on the issue of fundamental human rights or its sister topic - democracy. We all are living witnesses to the recent wave of popular agitation for either the one or the other or even both in South Africa, in Eastern Europe, in the Middle East, in East Africa, in the far East and in several other places on the globe.

JUSTIFICATION FOR MILITARY INTERVENTION IN CIVIL ADMINISTRATION IN NIGERIA

My Lords, allow me to preface my thoughts on the posture of the present Administration on human rights with a few words about what I consider to be the justification for the intervention of the Armed Forces in civil administration in Nigeria, a phenomenon which, as you may recall, came on the scene for the first time in this country in 1966. The political upheavals of the years which immediately followed our year of Independence from colonial rule are still fresh in the memories of some of us today. Those years were perhaps the politically stormiest years in Nigeria's history. There were three main political parties at the time - the Northern Peoples Congress, the National Council of Nigerian Citizens and the Action Group, each of which derived its strength from the loyalty and patronage of one of the three dominant tribes. Tribalism and ethnicity featured prominently and played a decisive role in the politics of the time. Political elections which formed the vehicle to political power at every level of government were fought to the bitterest end and indeed, towards the end of the first Republic they were a matter of do or die. In the late 1965 early 1966 period party politics degenerated into actual physical encounters as between supporters or sympathisers of one political party and those of another. The situation then is better described in the words of President Babangida. In one of his recent addresses to the nation he said in part as follows:

"Our history shows that independence transformed our nationalist leaders into professional politicians who have always sought not only to run for and hold office democratically but to monopolise the opportunities for running for office. It is this monopolistic interest of our civilian leadership that transformed political parties into war machines of the electoral processes. It is our view that, constitutionally, electoral democracy could not be instituted in such a situation of factional and combative contests; neither can it thrive in an atmosphere of such contests. Our experience has also indicated that all that was promised in finely written constitutional documents, manifestos and popular expectations were destroyed in the struggles by politicians over control of access to the powers of office. Thus, the purposes of constitutional government became relegated to the background. As I put it once, the lack of adequate and guided political culture had led to the politics of intolerance and indiscipline among politicians. A political failure in one election meant failure for all time. The incumbent political actors closed all re-entry channels. The crisis of political succession which we experienced are linked to this political attitude".

Things came to a head in the mid 1966 so much so that human lives and limbs were constantly in danger. This was the time of the so called operation "wet e" - a slogan that inspired the pouring of petrol on a political opponent or his property and setting him or it ablaze. And that was in fact the order of the day. The situation got so bad that the law enforcement agencies could no longer cope and it was clear that unless the military intervened the corporate existence of Nigeria as one political entity was in grave danger. This was why the military for the first time ever, came on the scene to arrest the trend and restore sanity and order. Unfortunately, the intervention was itself mismanaged and subsequent events ultimately led to the Nigerian Civil War which lasted for some 30 months.

The ravages and disruption which the war brought with it and another coup d'etat which was staged in 1976 while the military were still in power necessitated the stay of the military in government up to the end of September, 1979.

As we all may also recall, the military quit the political scene on the 1st of October, 1979 and handed over power to a democratically elected government both at the State and the Federal levels and we all looked forward with hope for a successful second civilian administration. But before long our hope started to fade away, for the civilian rulers of the 2nd Republic appeared to have learnt very little from the mistakes of the 1st Republic. Indeed, not only was there very little and insignificant difference between the party political power pattern of the 1st and 2nd Republics, it would be right to say that the three political parties that dominated the scenes in the two Republics were the same in everything but names and so their power bases, memberships and followerships were in essence largely the same. Little wonder therefore, that the same problems which rocked the boat of the 1st Republic reared their heads again in the 2nd Republic and prepared a predisposition for yet another and popular military intervention. The President, Commander-in-Chief of the Armed Forces epitomised the situation graphically in the following few words:

"When in December 1983, the former military leadership headed by Major-General Muhammadu Buhari assumed the reins of government, its accession was heralded in the history of the country. With the nation then at the mercy of political misdirection and on the brink of economic collapse, a new sense of hope was created in the mind of every Nigerian."

It will be seen from this brief background account that military interventions in the administration of this country have always been called for by the circumstances created by civilian rulers. The military recognise their professional, basic, and primary role in the scheme of things as that of the protector of the nation's territorial integrity and the protection of the nation from external aggression. It was only when the ship of state was in grave danger as a result of the mismanagement of the affairs of State by the civilians and there is no feasible alternative

solution to the national problem thus created by the situation that they had intervened in Nigeria. This so far has been our experience. The military's role in government has, therefore, always been equivalent to a rescue mission, a mission which demands that everything possible must be done to preserve the corporate existence and unity of Nigeria, to protect the nation's territorial integrity and save the national economy from collapse.

HOW ARE HUMAN RIGHTS FARING UNDER THE PRESENT MILITARY ADMINISTRATION?

In attempting to answer this question I should like to start by submitting that a military government, though not a formally and democratically elected government, does not necessarily lack the will and the disposition for the observance of human rights. Indeed, speaking from experience as a keen observer of Nigeria's political and constitutional development I would submit, without any fear of contradiction, that paradoxically, there is always a greater scope and pre-disposition for the observance of human rights during military interregnums in Nigeria than there is during civilian administration. The observance of human rights is eminently possible only in an atmosphere devoid of rancour, violence and social unrest and upheavals. Human rights cannot thrive in an environment constantly inundated with acrimonious ranglings and bitter contests for political offices, ills that unfortunately characterised the practice of politics during Nigeria's first two Republics. This is why it is not difficult to find court cases decided during the first and second Republics on the issue of human rights in our law reports. Let me illustrate the point by referring to one or two of them. The first one is *Alhaji Adegbenro v Attorney-General of the Federation*: In the wake of political crises which engulfed the Western Region of Nigeria in the period 1961 - 1962 so serious was the situation that the Federal Government of the time thought it necessary to invoke and use emergency powers vested in it by the 1960 Constitution of Nigeria. The Government accordingly declared a state of emergency in the Region and appointed an Administrator whom it gave wide powers, including the power to restrict the movement of people who were either involved or were likely to be involved in the crises. The plaintiff - Alhaji Adegbenro, who claimed to be the Premier of the Region, was confined to a particular section of the Region by an order issued by the Administrator. He challenged the constitutional validity of both the principal law, that is, the Emergency Powers Act 1961 and the regulations made under it. In the ultimate judgment delivered in the matter the Supreme Court held that the steps taken by the Federal Parliament were reasonably justifiable preventive measures taken for the purpose of obtaining peace and order in the Western Region and avoiding bloodshed.

The second case is that of the *Minister of Internal Affairs v Shugaba Darman*. It is a Second Republic case. On the ticket of one of the political parties of the Second Republic, Shugaba successfully contested an election for a seat in the Borno State House of Assembly in which he also later became the leader of the

majority party in the House. The minority party in the House was the National Party of Nigeria which was also the majority party at the centre and formed the Federal Government. After some time the Minister of Internal Affairs (a Federal Government functionary) issued an order purportedly deporting Shugaba from Nigeria on the pretext that he was not a Nigerian citizen and was a Chadian national. Shugaba's passport was also impounded by the Minister. All this, do doubt, must have been inspired by the bitterness of the politics of the time. In deciding the case, the trial court held inter alia, that Shugaba's right to freedom of movement as a Nigerian citizen had been infringed and it consequently awarded him aggravated and exemplary damages and ordered that his passport be returned to him.

One relative advantage which military regimes have is the absence of politics and politicking. As a result of this, while such regimes last the country enjoys a period of relative social tranquility and peace, a condition that is conducive to the observance and enjoyment of human rights.

How then have human rights been fearing since the inception of this particular military Administration? In answering this question let me first of all mention that one of the grounds on which the present rulers based their action of wresting power from the hands of their military predecessors in office is the issue of human rights. Let us listen again to a part of the maiden speech which President Babangida delivered to the nation on his assumption of office. In referring to methods used by the Government of his immediate predecessor in office to correct the ills of the past and bring the wrong doers to book, the President said (and I quote)

"While this government recognises the bitterness created by the irresponsible excesses of the politicians, we consider it unfortunate that methods of such nature as to cause more bitterness were applied to deal with past misdeeds. We must never allow ourselves to lose our sense of natural justice. The innocent cannot suffer for the crimes of the guilty. The guilty should be punished only as a lesson for the future. In line with this government's intention to uphold fundamental human rights, the issue of detainees will be looked into with dispatch."

The President thus declared the policy of his government as far as human rights were concerned right from the time of his assumption of office, a policy which, as will be seen, had since been faithfully executed. In order to have a balanced and honest picture let me first of all make some remarks about some acts or omissions which seem to adversely affect human rights or impede their full enjoyment but which can be justified on the grounds of expediency and national interest. Let me for instance refer to the Constitution (Suspension and Modification) Decree No.1 of 1984 which, among other things, circumscribe some of the rights guaranteed by the Constitution of the Federal Republic of Nigeria, 1979. For example the right to personal liberty of the

individual is contained by removing the time limit within which a person suspected of having committed a crime must be charged to court. But in considering this kind of action on the part of government it is necessary to remember that in some cases the extent to which certain rights are protected varies from jurisdiction to jurisdiction and depends on the prevailing circumstances. As the case of Alhaji Adegbenro to which reference was made earlier in this paper shows even during periods of democratic rule it is possible to pass laws and make regulations that would adversely affect the rights of the citizenry. Anthony Lester, QC has had occasion to concede that the free speech doctrine as preached and practised in the United States has received "hostility" from the courts of England.

I therefore make bold to say that inspite of the circumscription of a few of the rights guaranteed by the 1979 Constitution of Nigeria by Decree No.1 of 1984 none of Nigeria's military regimes, including the present one, can really be described as totalitarian in the sense in which that term can be used to characterise the regimes in some other third world countries. Several Constitutionalists in Nigeria concede this point. For instance, Professor Abiola Ojo is of the view that "on no occasion has there been a military regime that had done away completely with the legal system and introduced martial law, the varying severity notwithstanding. Nigeria has never laboured under a dictatorship." Chief Rotimi Williams, a Senior Advocate of Nigeria who is one of the foremost legal practitioners this country has ever had, unequivocally expressed a similar view when he said:

"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."

Therefore, from a Constitutional point of view, the various military regimes do recognise the need to govern within the framework of a written Constitution as modified. Making this point with regard to the saving of judicial powers provided for in the Constitution, Hon Justice Kayode Eso, a retired and respected Justice of the Supreme Court of Nigeria had this to say very recently:

"By virtue of the Constitution (Suspension and Modification) Decree No.1 of 1984 a good number of the provisions of the Constitution were suspended. Indeed, what was left was what had been permitted by the Federal Military Government to exist. All the provisions relating to the Judiciary were saved. Section 6 of the Constitution,

the most important provision, in so far as the Institution known as the judiciary is concerned which vests in Courts the judicial powers of the Federation was left extant. The military government had the power and still has to put an end to the existence of that provision. It has not done so, and that must have been advisedly. For it does intend that the Rule of Law should prevail".

Justice Eso was right when he concluded that this regime had the intention to preserve the Rule of Law because it truly does. Significantly, when this Administration came to power against the background of the prevailing condition, the nation was assured that this regime would be gentle, open and humane and that its policies would be anchored on human rights. One of the first steps taken by this Administration in demonstrating its stand on human rights was the repeal of the obnoxious provisions of the Public Officers (Protection Against False Accusation) Decree which made it an offence to publish any matter considered embarrassing to a public officer. It did not matter that what was published was true in any material particular as truth of the publication was no defence under the Decree. This regime considered the existence of such a law inimical to the pursuit of open government and freedom of the Press and therefore repealed it. The Press has since then, despite occasional wrangles with Government, remained free to discharge its functions to the best of its ability.

It is my view that the response of the present Administration to the enforcement of human rights may also be viewed from an economic perspective, for a school of thought considers human rights to encompass economic rights. Economic rights, which include the right to work and the right to own property, can be expanded to include the right of the citizens to better their lot economically to the limit of their capabilities without hindrance. Since our economy is modelled on the laissez-faire principles, this regime has continued to encourage Nigerians to develop themselves to the limit of their abilities.

This Administration has taken extraordinary and very far reaching measures that are designed to promote the economic rights of Nigerians. It must be mentioned that the adoption of such measures is aimed at restructuring the depressed Nigerian economy, hence the dogged implementation of the Government Structural Adjustment Programme (SAP). This Programme provides citizens and foreigners alike with a favourable investment climate which ultimately will lead to the creation and stimulation of more job opportunities. Under its well thought out scheme for the privatisation of certain business concerns, including corporations, formerly wholly owned by it, the Federal Military Government gave all Nigerians an opportunity to purchase and own shares in such corporations without discrimination. All in all, the Government can be said to have so far lived up to its avowed human rights posture on economic matters.

Another area in which this regime has faithfully demonstrated its commitment to the upliftment of human rights is in connection

with the mass arrest and detention of the leaders of the political class after the collapse of the second Republic. When this Administration came into office in August 1985, approximately 2,000 politicians were serving jail terms in different parts of the country. This Administration bowed to public opinion and immediately constituted three judicial panels which reviewed the cases of approximately 1,700 persons then under detention. All those who were found not guilty after due process of the law were released from detention. Most of those politicians were initially held under the provisions of the State Security (Detention of Persons) Decree which, as it was then framed, empowered the Chief of Staff, Supreme Headquarters to detain without trial, any person who he had reason to believe had engaged in or was planning to engage in committing acts prejudicial to the security of the nation or had contributed to the nation's economic adversity. The period of detention was three months and was subject to renewal. A few years ago in answer to popular demand, this Administration set up a Review Panel which meets from time to time to look into the cases of all those detained under the Decree. If the Panel is satisfied that the continued detention of a detainee is no longer justifiable under the Decree, it advises the Vice-President accordingly.

May I observe in parenthesis that it is not uncommon to have preventive detention in one form or another in various jurisdictions of the world during periods of civil unrest or emergency dictated by political or economic considerations. However under Nigeria's State Security (Detention of Persons) Decree, a person can now be detained only for a period of 6 weeks.

A permanent feature of this and other military administrations which has constantly drawn criticism is the obvious preference of tribunals to regular courts for the adjudication of certain matters. Each of such tribunals is usually imbued with jurisdiction over such matters. The usual argument of the antagonists of the tribunals is that there is nothing preventing the regular courts from trying or exercising jurisdiction over such causes or matters that are reserved for the tribunals, that the creation of new tribunals is tantamount to an erosion of the duties and functions of regular courts and, therefore constitutes an infringement of the rule of law. In that regard, it is often conveniently forgotten that the Constitution of 1979 confers power on the Federal Government to create any court or tribunal as it may deem necessary. Furthermore, it is often forgotten that it is in fact in the overall interest of the judiciary as a whole that some of the matters which go to the tribunals should be treated to finality at that level in view of the already heavy work load of the regular courts.

Besides, there is also the problem of technicalities and formalities which often impede the progress of proceedings in regular courts. My Lords, allow me to digress a little by illustrating the point being made here with the story of the case *Ariori & Others v Elemo & Others*. The case was filed in court on the 15th of October 1960 and after innumerable adjournments, the trial began on the 18th of November, 1964 and hearing was concluded on the 18th July, 1974 - fourteen years after the action commenced.

Judgment in the case was delivered on the 3rd day of October, 1975 after a period of fifteen years. The appeal to the Supreme Court was disposed of on the 21st day of January, 1983 - roughly twenty-two years after the case began. One question which Hon Justice C A Oputa, another retired and respected Justice of the Supreme Court of Nigeria, recently posed with respect to this kind of experience is this (and I quote)

"How far; how just, is a trial conducted five or six years after the event - say a road accident that was all over in twenty or thirty seconds? The most honest witness cannot remember accurately what happened during twenty seconds, five years ago. But a liar's memory is always fresh. Something has to be done."

My Lords, one of the principal objectives underlying the establishment of tribunals is the speedy and uninhibited disposal of the matters that go before them, consistent, of course, with a standard of justice that is in no sense lower than that obtainable in the ordinary courts of the land. One must concede that there were a few features of these tribunals that warranted criticism at the time they were set up, that is, before the present Administration assumed office. During the period January 1984 to August 1985, tribunals existing at the time were allowed to sit in camera. The tribunals were also presided over by non-judicial personnel who were usually senior military officers. Furthermore, no right of appeal was conferred on any Court or other tribunal to hear appeals from any person wishing to appeal against the decisions of any of the tribunals. It is important to emphasise that upon assuming office, this regime, in consonance with its human rights posture, corrected these anomalies. Today, all tribunals are presided over by serving or retired Judges. Trials are held in public and appeals lie from the decision of a tribunal to an Appeal tribunal manned by three Judges. It is significant to also mention that only the accused has a right of appeal, the prosecution has none. Furthermore, Military and Police Personnel no longer sit in the tribunals. It may therefore be said that no Tribunal at the moment can be correctly characterised as 'military' in any real sense. My Lords, Military Governments in Nigeria have always recognised and emphasised the temporary nature of their tenure. In recognition of this fact, General Ibrahim Babangida has since 1986 initiated a process of disengagement that will ultimately culminate in the handing over of power to a civilian government on October 1, 1992. To this end, government has initiated its disengagement agenda by drawing up a transition programme. The programme so far has seen the inauguration of the Political Bureau, the Constitution Review Committee, the Constituent Assembly, the National Electoral Commission, a Centre for Democratic Studies and MAMSER. In addition, a new Constitution which will come into force in 1992 has been promulgated.

Furthermore, we have witnessed the enthronement of democracy at Local Government Council level under the umbrella of two grass root Political Parties set up by the Federal Government - the National Republican Convention and the Social Democratic Party.

We have also undertaken the national census and the Political Parties have concluded election at the primaries aimed at selecting candidates for the office of governor. It is a fitting tribute to this government's position on human rights to mention that the Directorate for Mass Mobilisation was set up in order to educate the people and to ensure that each citizen exercises his voting right wisely. In addition, the Centre for Democratic Studies was set up to ensure that aspiring leaders in the new dispensation fully appreciate the nuances of the democratic process. With the creation of nine additional states on the 27th of August, 1991, government can clearly be seen to have added fresh impetus to the demand by Nigerians for a right to determine their destiny within the heterogeneous context of this country.

My Lords, one particular trait which characterises the style of government of the present Administration and enhances its human rights posture is its respect for public feelings and popular opinion. It is a listening government. At least on one major national issue it called for public debate and discussion before taking a final decision. The issue was whether or not Nigeria should take a loan from the International Monetary Fund (IMF) with a view to revamping its ailing economy. Nigeria had applied to the IMF in 1983 for a balance of payment support loan as a result of the serious economic conditions in which it found itself. The proposal to obtain the loan triggered off a controversy and this Administration referred the issue to the people for debate. In the end after weeks of spirited arguments and discussions the consensus emerged that the loan should not be taken and Government bowed to the wish of the people. In the words of the President (and I quote)

"After due consideration of all the opinions expressed by Nigerians and other residents as embodied in the Interim Report on the IMF loan, government has come to the conclusion that for now the path of honour and the essence of democratic patriotism lies in discontinuing the negotiations with the IMF for a support loan. This is clearly the will of the majority of our people on the issue. We have therefore decided to face the challenge of restructuring our economy not through an IMF loan, but a determination of our own people to make all the sacrifices necessary to put the economy on the path of sustained growth, doing so at our own pace and on our own volition."

Similarly on the issue of creation of more States this Administration gave due consideration to the wishes and aspirations of the people. The issue had for long been agitating the minds of many a community in the Nigerian society and all efforts made by the people to get the former Civilian Administration to meet their demands met with no success. The present Administration, after due considerations of all the issues involved carved out 9 new States out of the extant 19 States Structure of Nigeria and thus gave fruition to a long-standing yearning of the people.

Finally, I must not end this discourse without making mention of the respect and concern which this Administration has for the Judiciary. As stated earlier in this paper, in 1984 after the Military had taken over the reins of office from the erstwhile Civilian Administration they promulgated a Decree called Constitution (Suspension and Modification) Decree, No.1 of 1984 as a result of which certain provisions of the 1979 Constitution of Nigeria were either suspended from operation or modified. However, those provisions which relate to the judicial powers of the nation were not affected. When the present Administration assumed office in August, 1985 it maintained that position even though it itself promulgated one other such Decree in that year. I make bold to say that this gesture was borne out of the recognition of the crucial role which the Judiciary plays in the affairs of state. It was also borne out of a realisation of the fact that the Judiciary is truly the last hope of the common man and that the rule of law and fundamental human rights would have very little meaning unless the Judiciary is not only independent and fearless, but also respected and assisted so that it may be able to function conveniently. Its personnel must also be happy and contented.

The Federal Military Government has expressed its avowed concern for the Judiciary in concrete terms by taking necessary measures through legislation to ameliorate the conditions of service of judicial officers throughout the length and breadth of Nigeria. The first Decree that was promulgated in this regard was the Pension Rights of Judges Decree of 1985. Later Government went further to give a special attention to the conditions of incapacitated judicial officers by promulgating the Pension Rights of Judges (Amendment) Decree of 1991. A second amendment designed to further better the welfare of judicial officers even after their retirement from service is at present in the pipeline and is likely to become law before long. Furthermore, a few years ago this Administration took the necessary action as a result of which for the first time ever the Judiciary became a self-accounting institution.

CONCLUSION

My Lords, the foregoing represents an attempt to treat the subject - human rights posture of the present Nigerian regime in outline only. Of course, it is not for me to suggest the mark that should be awarded having regard to all that has been said. It is history that awards marks in respect of the performance of public administrators on any issue. However, I believe that when the time comes for marks to be awarded this Government will receive its rightful due from history which sees and knows all, including those which we cannot understand.

I wish this august colloquium stimulating and fruitful deliberations.

Thank you.

Address

by

CHIEF EMEKA ANYAOKU
Commonwealth Secretary-General

The demands of office will detain me elsewhere and, sadly, I am unable to be in Abuja on the occasion of this most important judicial colloquium. But I want to seize the opportunity to extend to your Lordships my warm support for the special judicial endeavour you have embarked on in broadening the reach of human rights.

In Bangalore in 1988, you took the first step to pioneer the development of a human rights jurisprudence. You sought, in particular, to examine ways in which the law permitted recourse to international human rights norms in shaping your domestic jurisprudence. In doing so, you have drawn on the richness of the common law, one of the Commonwealth's prized possessions.

You will know that there was a special focus on human rights at the recent Commonwealth summit in Harare when Heads of Government reaffirmed their strong collective commitment to the principles of justice and human rights, including the rule of law, the independence of the judiciary, equality for women and accountable administrations. It is my own belief that human rights, including civil and political rights as well as economic, social and cultural rights, must be central to any development process. In all this, you, the Judges, and the judicial administrations over which you preside have a precious and vital role. It is a matter of the greatest importance to me, and to the Commonwealth we all serve, to know that by your endeavours in this series of colloquia you demonstrate not simply commitment but a resolve to put principle into practice.

I am particularly delighted to know that several of your Lordships who inaugurated this movement in Bangalore will be present in Abuja. I extend to you all warmest good wishes for the success of your meeting.

PAPERS

Domestic Application of Human Rights Norms

by

Hon Justice P N Bhagwati

This is the fourth in the series of Judicial Colloquia which are being organised by the members of the judiciary throughout the Commonwealth under the sponsorship of Inter-rights with the assistance of the Legal Division of the Commonwealth Secretariat. The first was convened by me in Bangalore, India where predominantly South Asian and South East Asian Judges of Superior Courts met in order to discuss the topic "Domestic Application of International Human Rights Norms". A number of principles were adopted at the Bangalore Colloquium concerning the role of the judiciary in advancing human rights by reference to international human rights norms. These principles have come to be known as the Bangalore principles and they have inspired a good number of judges in the Commonwealth to develop human rights jurisprudence in conformity with the International Human Rights Norms. When the Bangalore principles were formulated, the participants included high judicial officers not only from the Commonwealth countries of South Asia and South East Asia but also from Australia, Pakistan, United Kingdom and the United States of America. The meeting was not an exclusively Commonwealth affair as there were Judges from Pakistan and United States of America who participated in the colloquium.

Thereafter a second judicial colloquium was held in Harare where Chief Justices and Judges from Commonwealth Africa participated. I also had the privilege of participating in the colloquium and at the end of the deliberations, we came out with the Harare Declaration of Human Rights. I understand that thereafter a third judicial colloquium was held in Banjul some time in 1990 and though I did not have the privilege of participating in that colloquium, the proceedings of that colloquium when printed were sent to me by the Legal Division of the Commonwealth Secretariat.

I am glad that this wonderful work of familiarising the judges of the Superior Courts with the norms of the international human rights law so that they can endeavour, so far as possible, to bring their decisions into conformity with such norms, which began in Bangalore, is now being systematically carried forward to different parts of the Commonwealth. The Judges in the Commonwealth countries are all united by the bond of common law. The Judges administering the common law have a considerable margin of choice in the decisions which they have to make and that explains how the common law has developed and grown over the years by responding to the changing needs and requirements of the Society. We have all inherited the common law tradition and we are trying to build our own national jurisprudence on the solid foundations of the common law tradition. We have taken common law as the base and with the emerging national consciousness and the growing realisation that law is not a theoretical abstraction but a dynamic instrument in the hands of the Society to meet the needs and satisfy the wants and desires of the people, it has become

necessary to adapt the common law and each of the countries to which we belong is trying in its own way to grapple with the problem of adaptation. In fact the problem of adaptation is a general problem applicable in case of all normative systems and the necessary adaptation is carried out not only by legislative intervention which is sometimes slow and tardy but also through the judicial process. The judiciary has an important role to play in adapting the common law so as to bring it in harmony with the International Rights Norms.

The same responsibility rests on the judges while interpreting their national constitution which embodies, in most of the countries, basic human rights. You will forgive me if I dwell a little on the significance of human rights in so far as the Judicial function is concerned. The basic theme in the discourse of human rights to which we in the judiciary must address ourselves is how we can convert the rhetoric of human rights into reality. The rhetoric of human rights draws on the moral resources of our belief in the significance of an underlying common humanity and points in the direction of a type of society which ensures that the basic human needs and reasonable aspirations of all its members are effectively realised in, and protected by law. Human rights discourse can therefore serve both as a potent source for radical critiques of actual social arrangements and also as a powerful basis for working out and presenting alternative institutional practices. The language of human rights carries great rhetorical force of uncertain practical significance. At the level of rhetoric, human rights have an image which is both morally compelling and attractively uncompromising. But what is necessary is that the highly general statements of human rights which ideally use the language of universality, inalienability and indefeasibility should be transferred into more particular formulations, if the rhetoric of human rights is to have major impact on the resolution of social and economic problems. The meaning and scope of each right has to be clarified, the content and location of any co-relative duties to which it gives rise must be spelt out and the permissible range of exceptions and limitations specified. Whether this work is done by the framers of the Constitution or by the ordinary law making procedures or by the activities of the judicial organs, it may be regarded as particularisation or positivization of human rights through law. The most obvious forms in which this is usually done is through specific constitutional provisions which incorporate a statement or bill of rights which are given the status of fundamental law. These rights are then regarded as superior to ordinary legislation and are used to render invalid any legislative action or administrative or other governmental decisions which are held to run counter to the enumerated rights. Institutionally this invalidation is normally achieved through the medium of courts whose task it is to rule on the constitutionality of ordinary legislation as also executive action and to determine whether the fundamental rights of the citizen have been infringed in particular cases. This model which had its origin in the United States has been adopted with variations in most of the countries which attained independence after the Universal Declaration of Human Rights was adopted on 10th December 1948 and recently it has been incorporated also as part of the Canadian Constitution. This mechanism gives major power in positivizing

human rights to courts, since the type of decision to be made in applying highly general statements of rights to specific circumstances results in effect and substance, in creating detailed formulations which are applicable in the particular circumstances of each case. This mechanism has the advantage that there is an institutional avenue for challenging violations of human rights by Governments though it is open to the charge that it is undemocratic. It is perhaps for reasons of democracy and accountability that the protection of human rights is left to elected legislative bodies like Parliament in the United Kingdom where courts are in effect limited to the determination of whether the executive organs of Government have acted within the law. However, this apparently more democratic process leaves human rights vulnerable to the decisions of bodies which have much more on their collective minds than the protection of human rights and are subject to majoritarian populist pressures and reasons of state which so often lead to human rights violations. It is, therefore, believed in many jurisdictions such as the United States, Canada and most of the countries which have followed the American model, that the special function of human rights in placing limits on State action cannot be left safely in the hands of the legislatures or the ordinary processes of law. It is the firm conviction of the people of these countries that the best mechanism for positivizing human rights and realising human rights through law is through the enactment of basic or fundamental rights in the Constitution and entrusting constitutional courts with the power and duty to interpret and enforce these human rights. It is to my mind not an effective answer to the acceptance of this mechanism that it is anti-majoritarian, because it is precisely in order to protect the individual or minority group against majoritarian excess, that fundamental rights have been found necessary to be provided in the Constitution and moreover, while it is true the judges who are called upon to interpret the scope and applicability of the fundamental rights are not elected by the people, they are still accountable to the people, for their constituency is not a geographical sector of the country or a section of the people but the entire people themselves and they are expected to be judicial statesmen - visionary architects in tune with the constitutional values and not just masons piling up one brick upon another in shaping a judicial decision.

It is necessary to point out that there are certain human rights which operate as a restraint on the power of the State and such restraint is necessary because of the possibility of abuse and misuse of power by the State which is inherent in the legitimate possession of the monopoly of force within a society and equally there are certain other human rights which require affirmative action to be taken by the State, particularly in cases where the realisation of a given human right requires to be facilitated by State action. It would not therefore be incorrect to observe that the State is the necessary friend as well as the recurrent enemy of human rights. It would be no exaggeration to state that human rights would remain safe in a society governed by a written Constitution so long as its judges are strong and independent, do not cave in to pressures or influences of centres of power and are committed to the cause of human rights. The judiciary has to be ever alert to repel all attacks, gross or subtle, against

human rights and they have to guard against the danger of allowing themselves to be persuaded to attenuate or constrict human rights out of misconceived concern for State interest or concealed political preference or sometimes ambition or weakness or blandishments or fear of executive reaction. Judicial somnolence, indifference or timidity can be the source of greater threat to human rights enforcement than the aggression of the violators, for the greatest bulwark against State authoritarianism or arbitrariness would then be gone.

It would be useful at this stage to consider the nature of the judicial function because without a proper understanding of it, it will not be possible to appreciate the creative role that the judiciary can play in evolving human rights jurisprudence either through adaptation of common law or through interpretation of the Bill of Rights in the national Constitution.

Aristotle believed that the Government should be of laws and not of men, because he said "law is reason free from desire and passion perverts rulers even though they be the best of men." Plato on the other hand believed in the philosopher king who would do justice to every one according to his need. Almost all countries have adopted the Aristotelian ideal of Government of laws and not of men but it is obvious that the generalities of law falter before the specifics of life and moreover laws cannot operate automatically; they are not self-speaking, self-applying and self-executing. Thus, though our ideal is Government of laws and not of men, we cannot eliminate men from law. Law has to be interpreted in view of the imperfections of the human language and the inherent impossibility of encompassing the complex reality within the neat and logical framework of law and law has to be applied to the endless diversity of human situations. This task is assigned to the judge under our system of jurisprudence. The result is that though we banish the philosopher King from our democratic realm, we bring him back in the form of a Judge. It is for the Judge to discover what the law is in a given situation and to apply it with a view to doing justice between the parties. Now in this process of discovering law and interpreting and applying it, the Judge performs a highly creative function and he really makes the law. It is vehemently asserted by Anglo-Saxon lawyers that judges do not make or change the law but merely apply it. Law is there existing and imminent and they merely find it. They no more make or invent law than Columbus made or invented America. Law-making function belongs to the legislature and the judges merely reflect what the legislature has said. This formalist theory which I sometimes describe as the phonographic theory of the judicial function, does not in my opinion represent a correct view of the judicial function. It hides the real nature of the judicial process. It has been deliberately constructed in order to insulate judges against vulnerability to public criticism and to preserve their image of neutrality. It is regarded as necessary for enhancing their credibility. It also serves an important social function. While the law is presented and accepted as impersonal, objective, logical scientific timeless and gapless system, the judges can, without provoking controversy, impose their own principles and policies to resolve complex social problems which the legislature has not considered. This theory also helps judges to escape accountability for what they

decide, because they can always plead helplessness even if the law they declare is unjust, by saying that it is the law made by the legislature and they have no choice but to give effect to it. It is only natural that judges should wish to exercise power and yet not be accountable to anyone for such exercise. It is natural for them too to indulge in the fiction that they are merely carrying out the intention of the legislature or discovering the immanent something called the law. The tradition of law and the craft of jurisprudence offer such judges plenty of dignified exits from the agony of self-conscious wielding of power. Yet there can be no doubt that judges do take part in the law making process. It was Sir Frederick Pollock who said "No intelligent lawyer would in this day pretend that the decisions of the Court do not add to and alter the law." You have merely to look at the decisions of the Supreme Courts of various countries in order to realise how the Supreme Courts have been continuously making and changing the law. Law making is an inherent and inevitable part of the judicial process. Even when a judge is concerned with interpretation of a Bill of Rights or a statute, there is ample scope for him to develop and mould the law. He it is who infuses life and blood into the dry skeleton painted by the legislature and creates a living organism appropriate and adequate to meet the needs of the Society and by thus making and moulding the law, he takes part in the work of creation and this is much more true in the case of interpretation of the constitution as I shall presently show. Greatness on the Bench lies in creativity and it is only through bold and imaginative interpretation that the law can be moulded and developed and human rights advanced. It does not matter that in this process of creation a Judge makes what conservative and staid judges might describe as "mistake". As pointed out by Mr Justice Holmes, "A Judge who is not prepared to make mistakes will never make anything. Such a Judge may be regarded as sound and safe in his own times but he will not leave any impact on the law". C K Allen also says "Our legal history shows that all our greatest Judges have been those of the more adventurous type, whatever error they may have committed and howsoever much criticism they may have incurred. Those who have insisted merely on standing super anti quas vias have usually stood nowhere at all and have soon been forgotten."

Now once it is conceded that the judicial function is a creative function and that the judges do make law in the process of interpretation, a heavy responsibility immediately falls on the shoulders of the judges in discharging the judicial function particularly in relation to enforcement of human rights. The approach of the judiciary in the interpretation of human rights should be creative and purposive and the judiciary must adopt an activist goal oriented approach in the interpretation of the fundamental rights embodied in the Bill of Rights or in statutory legislation. The Judges must boldly interpret the charter of human rights enshrined in the Constitution and take into account international human rights norms embodied in the two international instruments for expanding the reach and ambit of the human rights. There is considerable scope for creativity for a judge if only he is dedicated to the cause of human rights and is prepared to advance human rights jurisprudence by a process of judicial interpretation. That is why Jackson J said in the U.S. that "The Constitution is what we say it is." The judges can and must so

interpret the Constitutional guarantees so as to expand their meaning and content and widen their reach and ambit. That is what the Indian judiciary has done in the last few years by adopting a creative and purposive approach. The Indian judiciary has adopted an activist goal oriented approach and expanded the frontiers of fundamental rights. It has through judicial activism found a new historical basis for the legitimation of judicial power and acquired a new credibility with the people. This is an approach which must be adopted by the judiciary in the Third World, if human rights are to become meaningful and effective. When the judiciary interprets the words of the charter of human rights embodied in the Constitution in a creative and goal-oriented manner, it is not defying the words used in the Constitution nor is it going contrary to the constitutional mandate but it is merely interpreting the Constitution - giving meaning to it - which is its legitimate function. The judiciary therefore, can and must internalise human rights norms embodied in the various international instruments adopted by the United Nations and its allied organs such as I.L.O. Even if the judiciary finds that a particular human rights instrument has not been ratified by its country, it must have regard to the human rights embodied in such instrument because these human rights represent norms accepted by the entire international community. We in India have done it in a fairly large measure through judicial creativity and activism. I shall give you some examples of the way in which this has been done by the Indian judiciary. I do not wish to suggest that the other countries have not done so, but it is only because I am familiar with the Indian experience that I am giving examples from India.

The judiciary in India has expanded the frontiers of fundamental rights and in the process re-written some parts of the constitution through a variety of techniques of judicial activism. Now when I talk of judicial activism I mean not merely technical activism where judges declare the breadth of their power and are willing to exercise such power, nor do I mean juristic activism which is concerned not with just appropriation of increased power but is concerned with the creation of new concepts, irrespective of the purpose which they serve. I refer to what I would call social activism or human rights activism, where techniques of judicial activism are employed for the achievement of certain definite objectives such as distributive justice or realisation of basic human rights. It is this social or human rights activism which has invested the Supreme Court of India with a high socio-political visibility and provided a new credibility to it.

I propose now to give a few examples of the manner in which the judiciary in India has tried to give effect to human rights norms embodied in the two international Covenants. The Covenant on Civil and Political Rights provides that persons awaiting trial should be released subject to guarantees to appear for trial and Article 28 of the Principles of Equality in the Administration of Justice lays down that "national laws concerning provisional release from custody pending or during trial shall be so framed as to eliminate any requirement of pecuniary guarantees" and so also Article 16 Clause (2) of the Principles of Freedom from Arbitrary Arrest and Detention provides that "to ensure that no person shall be denied the possibility of obtaining provisional

release on account of lack of means, other forms of provisional release than upon financial security shall be provided". These human rights norms have been incorporated in the domestic law of India by a process of judicial interpretation. The Indian Constitution has Article 21 which says that "No person shall be deprived of his life or personal liberty except by procedure established by law". The view was held by the Supreme Court of India for a long time that this Article merely embodied the Dicyian concept of the rule of law, namely, that no one can be deprived of his life or personal liberty by the Executive without the authority of law. It was enough so long as there was some law authorising such deprivation and it did not matter what was the nature or character of such law. But in the decision in Maneka Gandhi's case which marks a watershed in the history of Constitutional law in India, the Supreme Court of India held that it is not sufficient merely to have a law in order to authorise constitutional deprivation of life and personal liberty but such law must prescribe a procedure and such procedure must be reasonable, fair and just. The Supreme Court of India thus by a process of judicial interpretation brought in the procedural due process concept of the American Constitution, though the original intent of framers of the Constitution was to exclude the due process clause. The Supreme Court of India then proceeded to hold that insistence on monetary bail in case of a poor accused should be inconsistent with reasonable, fair and just procedure and it would be violative of the constitutional guarantee under Article 21. The view was taken for the first time that more liberal norms consistent with human rights should be adopted, on which accused persons may be allowed to remain at liberty pending trial. It was observed by the Supreme Court that the risk of monetary loss is not the only deterrent against fleeing from justice but there are other factors which act as equal deterrents against fleeing. The entire law of bail was humanised by judicial interpretation of Article 21 and the Supreme Court of India held that a new insight should inform the judicial approach in the matter of pre-trial release and if the Court is satisfied after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is not likely to abscond, it need not insist on monetary bail and may safely release the accused on his personal bond. The human rights norm set out in the international instruments was thus translated into national practice.

The Supreme Court of India also in the same case adopted an activist approach and took positive steps in the direction of implementing Article 14 Clause (3) of the International Covenant on Civil and Political Rights which lays down that everyone shall be entitled in the determination of any criminal charge against him "to be tried without undue delay" and Article 16 of the Principles of Equality in the Administration of Justice which reiterates that every one shall be guaranteed in the examination of any criminal charge against him, the right to prompt and speedy hearing. The Supreme Court of India held that the right to a reasonably expeditious trial is an integral and essential part of reasonable, fair and just procedure in case of an accused who is in jeopardy of his life or personal liberty and that it is therefore implicit in the fundamental right to life and personal liberty enshrined in Article 21 and the State is accordingly

under a constitutional mandate to do whatever is necessary to ensure expeditious investigation and speedy trial. The Supreme Court of India for the first time read the fundamental rights as imposing an affirmative obligation on the State instead of merely reading them as negative restraints on the power of the State. The Supreme Court of India, in another case following upon this view, held that so far as juveniles are concerned, the criminal trial against them must be completed within a period of two years at the outside and if it is not so completed, the criminal prosecution must be quashed. The Supreme Court of India thus not only gave effect to the right to speedy trial enshrined in the International Instruments but also gave effect to the right of an accused to expeditious disposal of any criminal proceedings against him.

Nationally and internationally access to justice has now been recognised as one of the most important basic human rights without which it is not possible to realise many of the human rights, whether they be civil and political or social and economic. There is in fact considerable literature on access to justice as a human right. The Constitution of India included an amendment made in 1976 Article 39A in the Directive Principles of State Policy with a view to ensuring equal access to justice to the people, irrespective of their caste, creed or resources. But this Directive principle was not being implemented by the State and the Supreme Court of India found that the State was dragging its feet in enforcing this basic human right and that large masses of people in the country who were leading a life of want and destitution were, on account of lack of awareness, assertiveness and availability of machinery, priced out of the legal system and were denied access to justice. The Supreme Court of India accordingly, in Hooseinure Khtoon's case, held that in a criminal case which imperils the life or personal liberty of an accused, if the accused is, on account of his poverty or ignorance or socially or economically disadvantaged position, unable to afford legal representation, it would be violative of Article 21 of the Constitution to proceed to try him without giving him proper and adequate legal representation. The Supreme Court of India took the view that providing proper and legal representation to a poor accused in a criminal trial is implicit as a fundamental right in Article 21 of the Constitution. The Supreme Court of India in keeping with its newly found role of protector and promoter of human rights, directed the State to provide free legal assistance to a poor accused in a criminal trial, through creative judicial interpretation of Article 21. When the State pleaded lack of adequate funds to finance the legal aid programme, the Court pointed out that poverty is no defence for failure to enforce a fundamental right. The Court thus spelt out the right to legal aid in a criminal proceeding from the language of Article 21 and evolved an affirmative obligation on the State to provide legal assistance. The Supreme Court of India also held in a subsequent case that if the Magistrate does not inform the accused that he is entitled to free legal assistance or the accused is not provided such free legal assistance in a criminal trial, the conviction would be liable to be set aside.

The Judiciary in India had also occasion to interpret the expression "right of life" and in a seminal decision, the Supreme Court

held that life does not mean merely physical existence but it also includes the use of every limb or faculty through which life is enjoyed and there is also implicit in it the right to live with basic human dignity because without basic human dignity life would not be worth living. The right to live with basic human dignity was thus spelt out by the Court from the language of Article 21 and it was held to comprise the basic necessities of life. The State could, on the words of Article 21, deprive a person of the right to live with basic human dignity by a law which prescribes reasonable fair and just procedure but the Court held that no procedure which deprives a person of the right to live with basic human dignity can ever be reasonable, fair and just and therefore the State is prohibited from acting in a manner which would tread upon the basic human dignity of the individual. The right to live with basic human dignity was thus elevated to the status of a fundamental right which cannot be abridged, defeated or taken away by the State and this was achieved through a process of judicial interpretation.

I may also refer to Article 7 of the Covenant on Civil and Political Rights which provides that no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. This human right does not find a place in the Indian Constitution which was framed in 1948-1950. Again the Supreme Court had to fill up the void and bring the Bill of Rights into conformity with the International norm set out in Article 7. The Supreme Court therefore held in Francis Cratie Mullen's case that the right to live with basic human dignity implicit in the right to life guaranteed under Article 21 included the right not to be subjected to torture or to cruel, inhuman or degrading punishment or treatment. This all-important right was therefore read by the Supreme Court into the right to life and made part of domestic jurisprudence. Taking this right of protection against torture or cruel, inhuman or degrading punishment or treatment, as the base, the Supreme Court proceeded to hold that public hanging was violative of the right to life and hence prohibited under the Indian Constitution. In a dissenting judgement I also condemned the death penalty as cruel, inhuman or degrading punishment and therefore violative of the right to life. But my dissent was a lone dissent, the other four judges taking the view that the death penalty was constitutional.

The human right embodied in Article 11 of the Covenant on Civil and Political Rights was also incorporated as part of domestic jurisprudence by judicial intervention. This article provides that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. The Supreme Court read it as protection against arbitrary and irrational interference with the right to personal liberty and hence a guarantee implicit in Article 21 of the Indian Constitution.

The Supreme Court also incorporated as part of domestic jurisprudence the right to seek and receive information guaranteed under clause 2 of Article 19 of the Covenant on Civil and Political Rights. The right is not a specifically enumerated right in the Bill of Rights under the Indian Constitution but it was spelt out as a right implicit in the right of free speech and expression enshrined in Article 19(1) (a) of the Indian Constitution.

This was done by the Supreme Court in the famous Judge's Appointment case.

Let me now give a few examples of the way in which the judiciary in India has internalised the rights embodied in the Covenant on Economic and Social Rights. But before I do so, I may refer to one instance in which an ILO Convention was used by the Supreme Court for granting relief to tribes who were being displaced by the construction of a large dam, without any adequate provision being made for their rehabilitation. Now there was no legislation which required the Government to rehabilitate the displaced tribes. The only obligation of the Government under the law was to pay to those tribes who owned land and whose land would be submerged by the construction of the dam, market value of such land by way of compensation. The payment of a lump-sum representing the market value of the land would hardly provide adequate means of subsistence to the displaced tribes. The Supreme Court had therefore to innovate and for this purpose the Supreme Court relied on Convention 107 of ILO which provided inter alia that tribes who are being displaced must be provided alternative land of equal quality or other suitable employment, the object being that they should have means of subsistence. This Convention was ratified by India but it had not been made part of the domestic law by legislation. The Supreme Court incorporated it in the domestic law through a process of judicial interpretation. The Supreme Court took the view that the right to life guaranteed to the tribes under Article 21 of the Indian Constitution included the right to live with basic human dignity and not to be deprived of their means of subsistence and hence it also comprised the right under Convention 107 and hence the tribes could not be displaced by the Government unless they were given alternative land or suitable employment and until this was done, the Government must go on paying minimum wages to them.

Turning now to economic and social rights, there are a few rights in the Covenant on Economic and Social Rights to which I would like to refer and which we have tried to enforce by incorporating them in our domestic jurisprudence. Article 7 provides, inter alia, that everyone shall have the right to the enjoyment of just and favourable conditions of work which ensure amongst other things, safe and healthy working conditions. The right embodied in this Article is, on the plain terms of Article 2 of the Covenant, not enforceable in a Court of law and under the Indian Constitution also, it is part of the Directive Principles of State Policy and hence not justifiable in a Court of law. The question was how to internalise it in our domestic jurisprudence. A case came before the Supreme Court by way of social action litigation complaining that a large number of workers employed in stone quarries near Delhi are working under abnormal conditions. They do not have clean, healthy drinking water: they have no medical help - no medical services: they do not have any schools with the result that their children are going without education and the stone crushers in which the quarried stone is being crushed, emit a lot of dust which is affecting the lungs of the workers. There was clear violation of the right embodied in Article 7 of the Covenant. The Supreme Court held that this right was a part of the right to live with basic human dignity which was implicit in the right to life and hence it was enforceable

under Article 21 of the Indian Constitution. The Supreme Court accordingly gave a direction to the Government that the workers must be supplied clean and healthy drinking water, a mobile medical van must visit them once in a week, provision must be made for taking the children of the workers to school and the stone crushers must be fitted with devices which would prevent emission of dust.

Then there is Article 21 of the Covenant on Economic and Social and Cultural Rights which provides that everyone shall have the right to the enjoyment of the highest attainable standard of physical and mental health and one of the steps required to be taken to this end shall be the "improvement of all aspects of environmental and industrial hygiene". But the right to a clean and healthy environment is not a specifically enumerated right in the Bill of Rights under the Indian Constitution. The Supreme Court of India however held in a decision, with a view to incorporating this right set out in Article 12 of the Covenant in the domestic jurisprudence, that the right to a clean and healthy environment is implicit in the right to life, because life would be seriously imperilled if the environment is not clean and healthy environment must be taken to be part of the right to life guaranteed under Article 21 of the Indian Constitution. The Supreme Court thus elevated the right to a clean and healthy environment to the status of a fundamental right which could be enforced by the courts, even if there was no legislation on the subject. Thus conformity with Article 12 of the Covenant was ensured through judicial interpretation.

These are only some of the examples which I have tried to place before you. They exemplify the crucial role which the judiciary can play in advancement of human rights provided the judges are committed to the cause of human rights and are not timorous souls and they have the requisite judicial craftsmanship to mould and shape the provisions of the Constitution and the law so as to bring them into accord with the international human rights norms. It is a daunting task which calls for a high degree of creative skill and statesmanship from the judiciary, but however daunting such task, we judges must rise to the challenge of making human rights a reality and not just an aspiration. In the words of Don Quixote's heroine, Dulcinea: "You have shown me the skies, but what good are the skies to a creature who will never do better than crawl". While man's reach should indeed exceed his grasp, we need to both reach and grasp and play a determined and prophetic role in making international human rights a reality for all.

The Domestic Application of International Human Rights Norms

by

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INTRODUCTION

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

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

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

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

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

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

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

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

WHY HUMAN RIGHTS?

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

1. On 21st August, 1990

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

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

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

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

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

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

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

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

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

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

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

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

He went on -

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

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

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

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

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

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

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

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

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

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

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

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

tors vested transiently with the power to govern."

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

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

CONTENT OF INTERNATIONAL HUMAN RIGHTS NORMS

A BRIEF HISTORICAL SURVEY

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

The Magna Carta declares that -

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

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

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

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

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

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

imposed nor cruel and unusual punishment inflicted.¹

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

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

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

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

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

1. Bill of Rights 1688

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

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

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

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

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

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

Like its predecessors, the Universal Declaration of Human Rights,

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

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

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

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

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

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

MANDATE OF THE COMMISSION

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

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

thus equipping the Commission with a euphoric quasi-judicial

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

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

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

ROLE OF DOMESTIC TRIBUNALS VIS-A-VIS THE CHARTER

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

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

"Article 60"

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

Bashesar Nath case.¹ He had said:

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

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

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

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

ATMOSPHERE FOR SUCCESSFUL APPLICATION OF HUMAN RIGHTS

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

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

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

2. (1988) 12 NWRLR 45.

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

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

EXAMPLE OF NIGERIA

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

"total freedom is anarchy".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WIND OF CHANGE

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

SEARCH FOR JUSTICE

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

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

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

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

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

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

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

Chief Justice Charles Evan Hughes was once claimed to have said⁴

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

Two hundred years earlier Bishop Hoadly in 1717 had said⁵ -

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

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

Omotosho J¹ once declared -

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

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

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

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

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

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

ROLE SATISFIED BY INCORPORATING THE BANGALORE PRINCIPLES

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

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

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

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

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

said Nnaemeka-Agu J S C,²

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

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

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

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

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

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

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

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

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

1. Justice Lord Denning and the Constitution 219.

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

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

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

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

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

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

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

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

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

1. (1954) AER 15 at 22.

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

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

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

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

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

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

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

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

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

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

1. 222 NY 88.

2. De Juristisch Logth 295

3. The Two Gentlemen of Verona, Act 1 Sc. II.

4. (1986) LNWLRL (PL37)576 at 596-597.

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

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

Ubi Ius Ibi Remedium

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

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

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

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

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

1. (1986) 5NWLR 828.
2. (1976) INRLR 169 at 177

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

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

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

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

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

He (Karibi-Whyte JSC) concluded -

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

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

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

ATTITUDE OF DOMESTIC TRIBUNALS TO INTERNATIONAL LAW

All the Bangalore Principles require in international law is -

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

The Principles have never advocated overriding clear and unambig-

1. (1983) ISCNLR 142 at 160.

2. (1941) AC 1 at 29.

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

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

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

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

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

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

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

Uwais J S C, explained, relying on Parliament Belge¹, that treaties do not constitute part of the law of the land by virtue of their conclusion by a country. The point made by the learned Justice is important in the status the domestic courts would accord a Charter of the like of the African Charter.

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

1. (1879) 4PD 129.
2. (1979) 3-4SC 58 at 71.

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

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

NATIONAL SECURITY: BALANCING PERSONAL LIBERTY WITH REASONS OF STATE

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

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

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

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

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

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

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

Justice who shall be the Chairman;

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

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

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

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

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

(emphasis supplied)

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

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

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

and I have not changed my mind on this subject¹ -

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

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

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

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

I answered the question thus -

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

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

This is still my answer.

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

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

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

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

FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES

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

The Objectives span over -

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

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

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

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

CONCLUSION

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

Kayode Eso, Nigeria

Circumstances of Birth as a Human Right

by

Hon Mr Justice A G Karibi-Whyte,
Justice of the Supreme Court of Nigeria

The end of the First World War in 1918 gave birth to the organisation known as the League of Nations. Soon after the end of the Second World War in 1945, the principal actors who were the victors in the war, reminiscent of its unprecedented horrors, came together to declare from their experience the preconditions they considered desirable for the preservation of world peace, future survival, the maintenance of the dignity and integrity of homo sapiens. This arrangement replaced the League of Nations and gave birth to the present world body, known as the United Nations Organisations. The objectives of both organisations are identical. And this is the realisation of global peace and harmony through respect for human dignity and the recognition of the fundamental rights of man. The movement immediately gathered momentum.

It is pertinent to observe that the catalytic idea was the disregard by states of what we generally considered as the basic minima of rights which they ought to accord to their citizens. This consideration was based on the appreciation of the incontrovertible fact that every individual born into society is entitled to the enjoyment of the ordinary basic requisites of a decent and meaningful living.

The state has, though recognising the rights of the individual, formulated restrictions in their enjoyment in the interest of order and good government. These restrictions result in a combination of the rights to which the individual is entitled, first as homo sapiens and secondly as a member of the political community.

The movement which had a modest beginning from Europe¹ has blossomed in that continent², spread to the Americas³, Africa⁴ and the Commonwealth of Nations⁵. Asia is yet to make its independent contribution, and has now become a flood. What then are these

1. The Universal Declaration of Human Rights (1948); International Convention on Civil and Political Rights in 1956. International Convention on Economic Social and Cultural Rights, 1966.
2. European Convention for the Protection of Human Rights and Fundamental Freedoms.
3. See The American Convention on Human Rights; inter-American Convention on Human Rights.
4. The African Charter on Human and People's Rights 1981.
5. Singapore Declaration 1971.

rights? Concisely stated they can be regarded as the considerations for the dignity of homo sapiens and the recognition that the individual is entitled to certain basic rights as a human being which are fundamental to his existence, decent living and participation in the affairs of his society. These are the norms which constitute the human rights regarded as fundamental to the individual.

These human rights norms owe their origin essentially to considerations of justice derived from Natural Law theories. The universality of these human rights has engendered uniformity in the application of the norms. To a very large extent the universality of these norms is the result of the effect of both multilateral and bilateral treaties to which Nations are signatories. For instance all members of the United Nations Organisations are bound by Article 55 of the Universal Declaration of Human Rights which provides as follows:

"... the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".¹

Again, this is re-enforced by Article 56, which provides that "All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55, The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1951, The African Charter on Human and People's Rights, 1981, to all of which member states are parties". The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its Optional Protocol, which in Article 60 affirms its adherence to general international law is also an avenue through which accepted international norms on human rights may be incorporated into the domestic law of African States. Already, the European Court of Human Rights has held as with the Courts of most African countries that fundamental rights form an integral part of the general principles of law which it enforces². It seems to me reasonable to postulate that the real motivation for the protection of human rights was the desire for world peace. The protection of the individual is an inevitable concomitant of the pursuit of the objective. Undoubtedly the individual being the actor, protection of his interest in the preservation of his inalienable and other fundamental rights seems to be the only safe and sure method of achieving the goal. Admittedly the protection of these rights belongs to national jurisdictions, the recognition of their universality transcends national frontiers. Accordingly, the possibility for agreement among nations rendered the discussion of the declarations of these rights attractive in the contemporary movement of agglomeration of Nations.

1. See UDHR 1948.

2. See Nold v The Commission, Case 4/73 (1974) C.M.L.R. 338.

The meaning and content of human rights norms

Human rights norms as universally accepted may be classified into those which belong to the individual and inherent by virtue of his being homo sapiens; and those which are conferred on him in his privilege of membership of a political community. It is generally assumed that rights in the first category have no more than a moral force. No modern state recognises the application of natural law proper. All modern states assert absolute powers within their territories. It is therefore inconceivable that any modern state will tolerate the existence, and accept the enforceability of, natural law independent of and over-riding its own enacted positive law. Modern states undoubtedly recognise the existence of natural law, but consider them enforceable only to the extent that the all pervasive authority of positive law will allow. Hence rights derived from natural law have their potency in the extent to which they have been recognised and enacted by positive law. In the absence of such recognition, natural rights have no legal potency and remain enforceable only on moral grounds.

Despite the above observation, consistent persistent political experience over the centuries disclose the inevitability of recognition of natural law as the veritable source of fundamental rights. Because these rights are regarded as fundamental to the existence of the individual, Modern States have taken them into account in determining the nature and scope of rights that should be accorded him in the protection of his rights. These are rights regarded by the State as a sine qua non in the enjoyment of ordinary human existence, and meaningful participation in the affairs of the society. But these rights have not been regarded as absolute. They have invariably been made subject to restrictions imposed by the State in the interest of peace, order and good government of the political society. Hence the human rights conceded consist of a delicate balance between the interests of the State and the individual, for the survival of both.

Nature of human rights norms

Jeremy Bentham has contemptuously dismissed Natural Rights simply as "nonsense, imprescriptible rights, rhetorical nonsense, nonsense upon stilts."¹ He however admits that "immediately a list of the pretended natural rights is given, and those are so expressed as to present to view legal rights". Bentham's criticisms should be viewed within its context of positivism; to which natural law theories are most vulnerable. Since after the universal declaration of human rights in international bodies, States have adopted the practice of making similar provisions in their constitutions.² The constitutional provisions about individual

1. See "Anarchical Fallacies" in Works (ed. Bowring), Vol.2 pp.497, 501.
2. See Chapters on Fundamental Rights in many Commonwealth Constitutions - see Chapter IV, Constitution of the Federal Republic of Nigeria, 1979.

human rights are far from being homogenous. The extent of the restriction of these rights vary as between countries depending upon the political philosophy of the government, whether authoritarian or libertarian. Similarly variable are the provisions for their protection.¹ In Nigeria, fundamental human rights are protected both by the ordinary laws of the land and are specially entrenched in the Constitution which renders the provisions inviolable, by the ordinary process of legislation. These protections notwithstanding, they are nevertheless subject to various exceptions with a view to safeguarding the interest of the state.

Like the provisions of the European Convention on Human Rights, Chapter IV of the 1979 Constitution reflect the classical liberal freedoms. Contrary to the reasons for their inclusion in the Constitution which was for the protection of minorities, the emphasis is almost exclusively on individual rights, liberties and immunities. This is unlike in many European and Latin American Constitutions which have provisions on the rights and duties of the citizen. The most recent of them, the African Charter on Human and People's Rights has provisions on the duties of the citizen.²

The nature of the rights provided in Chapter IV of the 1979 Constitution of Nigeria, may be grouped into two classes. There are those rights which are inherent in the individual and are regarded as inalienable, subject to such restrictions as may be imposed in the circumstances prescribed by the Constitution. There is the right to life, s.30; right to dignity of human person, s.31; right to personal liberty, s.32; right to fair hearing s.33; right to private and fairity life, s.34; right to freedom of thought and conscience and religion, s.35; right to freedom of expression and the press, s.36; right to peaceful assembly and association, s.37; right to freedom of movement, s.38; right to freedom from discrimination, s.39; compulsory acquisition of property, s.40.

The prohibitions are absolute as regards the rights to freedom from torture, inhuman or degrading treatment, freedom from slavery or servitude, the right to impartial justice, freedom from discrimination. On the other hand, the right to life, freedom from forced labour and protection of personal liberty may be restricted during an emergency, and only to the extent that such restriction is reasonably justifiable for the purpose of dealing with the emergency situation. There are yet other rights the exercise of which may be restricted in favour of a law that is reasonably justifiable in a democratic society, in the interest of defence, public safety, public order, public morality, public health or the protection of the rights and freedoms of other

1. See Chapter IV of the Nigerian Constitution 1979, compared with the Latin American and Francophonic African Constitutions.

2. See Part 1, Chapters 1 and 11.

persons.¹

A careful analysis of the rights enumerated above clearly disclose that they fall within the three instruments known as the International Bill of Rights, namely the Universal Declaration 1948 and its two implementing Covenants of 1966, on Civil and Political Rights, and on Economic Social and Cultural Rights, ICCPR, ICESCR respectively. In addition to these, there subsequently have been, the European Convention on Human Rights 1956, The American Convention on Human Rights, the African Charter.

The nature of all the fundamental rights enumerated seem to me to pertain essentially, if not entirely, to rights enforceable against the state or its functionaries. None of the rights relate to or concerns the exercise by private individuals of their ordinary rights of actions contractual or otherwise. Although public morality is indicated in Section 41 as one of the conditions for restricting the right to the exercise of some of the fundamental rights, the enforcement of this provision has posed some undeserved difficulty and anxiety.

Section 39 which protects citizens from discrimination on the grounds of ethnic group, place of origin, sex, religion or political opinion, has specifically in sub-section 2 provided as follows -

"(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."

The novelty in sub-section 2 of section 39 of the Constitution is that it adds circumstances of birth to the fundamental rights protected by the Constitution.

Genesis of the provisions of s.39(2)

This new norm was introduced in the Constitution unilaterally after bitter debates on the provisions of the Constitution of 1979 between advocates of the retention of the concept of illegitimacy in our family law and proponents of those who were in favour of abolition. Religious organisations, Women Societies, and groups basing their arguments on accepted morality and of the protection of the marital status contended that the retention of the status of illegitimacy was fundamental to the preservation of the institution of marriage and a veritable pre-condition for the maintenance of public and private morality. They contended and still do, that abolition of the status will render nugatory the very basis of the unit of the family and make nonsense of the necessity for marriage.

On the other hand the advocates of the liberalisation of the recognition of the status of legitimacy rely equally on moral arguments. They point out the biological identity of children and the irrationality in the artificial distinction. They contend

1. See Chapter IV, Sections 34, 35, 36, 37 and 38.

that the child, the only victim of the distinction, is completely innocent and has not contributed to the status. Finally, they point out the legal and social disadvantages suffered by this category of citizens merely because of the circumstances of their birth.

There seems to be little doubt that in many societies the circumstances of birth of a person determines his status and has considerable bearing on the determination of the rights and duties of his status in that society. It is therefore a fundamental norm determining certain rights and duties which the child can enjoy as a member of such society.

In our plural society as in many others, the legal system recognises the legal dichotomy created by the operation of the two legal systems when they are not in conflict. It is universally accepted that the family is the most elementary unit of the society, and marriage is the fundamental institution of the family. Accordingly, membership of the family is essentially through marriage or by vestitive acts regarded as marriage substitutes.

All known legal systems recognise and accept the status of the child born to persons who are married as their legitimate child.¹ Many accept the regularisation of the status of children born outside marriage by the subsequent marriage of the parents.² There is yet another situation recognised by some societies where the father of a child who was born without the marriage of his parents is accorded rights, if the father acknowledged his responsibility for the birth of the child.³ The situations where the parents marry after the birth of the child, and where the father acknowledges the paternity of the child, are in many societies equated with the status created by the birth of the child born during a valid marriage. There are situations where the child was born when the marriage of the parents was void.⁴ The status of legitimacy created by these situations is generally distinguished from the status of illegitimacy created in the absence of all these situations.⁵

It is important to point out that the legal and social distinc-

1. The Common Law concept of the acquisition of Legitimacy Status through marriage of the parents is universal.
2. This is by subsequent marriage of the parents after birth known as Legitimation.
3. This consists of vestiture acts indicative of acknowledgement of responsibility. See Salvage v Macfoy (1909) Ren. G.C.R. 50.
4. See s.38 (2) Matrimonial Causes Act 1970, the Legitimacy Act has many no provision. But see Adegbola v Folaranim (1921) 3 NLR.89 Coker v Coker 17 NLR.55.
5. See Legitimacy Act.

tion between the two kinds of status is inveterate in our societies. It is however an artificial distinction created by society for its own protection, but attributable essentially to circumstances of the birth of the child. The child who is subject matter of the distinction and who suffers from the disabilities created by the distinction has not contributed to the status attributed to him.

Conflicting marriage laws

The more complex and complicated legal situation arises when a child is born in circumstances of conflicting marriage laws. There are two systems of legally approved marriages in our society. Marriage under the Marriage Act,¹ which prohibits a plurality of wives and forbids the co-existence of a marriage whatsoever with any other person, before or after. Any valid marriage with another before a marriage under the Marriage Act, renders the subsequent marriage invalid.² All marriages subsequent thereto are also invalid.³

On the other hand, marriage under customary law does not prohibit the existence of any other marriage with any other woman before or after the marriage. This includes marriage under the Marriage Act. This, however, is not the position now. The intervention of modern legislation renders subsequent marriages under the Marriage Act invalid.

A marriage under Islamic Laws allows the man to have not more than four wives at the same time. It seems to me this contemplates marriages under Islamic Law.

The situation is more complicated when a man married under the Marriage Act, and whilst so married marries another woman at Customary Law or Islamic Law.⁴ Or where a man married under Customary Law, marries another woman under Islamic Law. The status of a child born to the parties may give rise to difficult legal consequences notwithstanding the appearance of legality of the conduct of the parents. In the aforementioned circumstances, the birth will result in questionable status of the children. The child may be regarded legitimate as to one law, and illegitimate as to the other, resulting in a situation of limping legitimacy.

The circumstances we have enumerated above can be classified into birth during marriage, or its amelioration thereof, or as birth outside marriage. Whereas the first circumstance results in the legitimacy of the child, the latter results in illegitimacy.

1. See the Marriage Act.
2. See s.33(i), 35, 47, 48 Marriage Act.
3. See Cole v Akinyele (1960) S.F.S.C.
4. See s.47 Marriage Act.

Consequences of the status

The norms produced by these situations are those recognised in legal terms as the status of legitimacy and illegitimacy. Legitimacy is the status of being born in lawful wedlock. Illegitimacy is the converse. These are the only status which can arise from circumstances of birth. Legitimacy is an indicium of birth in lawful marriage. It is conceded that marriage is not the only situation which can result in legitimacy of a child. Birth in lawful marriage is a criterion of all valid marriages. It is not peculiar to monogamous marriages. This was very lucidly pointed out in Bamgbose v Daniel¹ when construing section 36 of the Marriage Act, where it was said:

"As a matter of construction and on the authorities referred to, it cannot in their Lordships' opinion be limited in its local application to children who are the issue of monogamous unions ..."

The somewhat rigid, and in some societies inflexible, dichotomy between legitimacy and illegitimacy which follows circumstances of birth appears to have governed the rights and duties which attach to the relationship of parent and child in almost all societies. Legitimacy makes the issue the lawful child of his father. It vests in the child the right to demand the care and support of the father inter vivos and also confers on him succession rights to the estate of his father on intestacy. Among the Binis of Nigeria, which follow the primogeniture principle, the first son born in a valid marriage cannot be excluded from inheritance.

An illegitimate child is in strict sense not in law the child of the man regarded as his father. This is founded on the principle that a man having not married the mother is not entitled to benefit from the product of her womb. It is couched in the aphorism that a man cannot profit from his own wrong doing. The two concepts are antithetic. They are mutually exclusive.

The plural nature of our society and the operation of conflicting moral and social values governing the marriage institution has complicated the issues further. I have already referred to the systems of marriage recognised by our legal system. The liberal policy of customary law and the essential accommodating nature of polygamous marriages allows the co-existence of marriages under customary law which are polygamous with marriage under the Marriage Act which are monogamous. Customary law regards as his legitimate children, issues born to a man by various women in such circumstances. Customary law goes further to confer legitimacy status on children born to a man by a woman or women outside his monogamous marriage.²

1. See (1955) AC 107 Savage v Macfoy Ren. G.C.R.50.
2. See Savage v Macfoy (1909) Ren. G.C.R.50.

Judicial determination of circumstances of birth

Although there is no legislation protecting the afore-stated situation, the courts by analogical judicial reasoning of the essential character of monogamous marriages¹, and the interpretation of assumed public policy in protection of monogamous marriages have extended the meaning and adopted the view that a man who has married under the Marriage Act, cannot whilst so married confer the status of legitimacy to any child born to him outside his marriage². The effect of this view is that a child born under such circumstances cannot be rendered legitimate by any act of his putative father during the existence of the monogamous marriage³.

This situation was considered in Alake v Pratt & Ors⁴ where the court found that although the children were acknowledged by their putative father who was married under the Marriage Act to a woman not their mother, they could not be regarded as his legitimate children. This is because

"... although legitimate under the laws of this country, it was incompatible with public policy that children born out of wedlock should be placed on the same footing as children born in wedlock".⁵

It seems this view was influenced by the earlier position of the court in In re Adadevoh, where the Court declared,

"where there are children born in lawful wedlock, children born out of wedlock should be excluded from participating in the distribution of the estate of their father, but if the children of the deceased are all of the same status, that is born without marriage, they could inherit their father's property."⁶

The ordinary interpretation of this dictum is that both categories of children, namely, those born in lawful wedlock, and those born outside marriage are entitled to inherit their father's property. However, all those born out of lawful wedlock are not entitled to participate in the inheritance together with those born in lawful wedlock. The situation is different where there is no conflict. That is, where each group of the children are those either born in lawful wedlock, or without marriage, they will be

1. See In re Somefun 7 W.A.C.A. 156.
2. See In re Sarah Adadevoh, 13 W.A.C.A. 304.
3. See Alake v Pratt (1955) 13 W.A.C.A. 20.
4. Ibid.
5. Ibid.
6. See 13 W.A.C.A. 304.

entitled according to the laws governing them to inherit.

Our law has not accepted the insular common law view that legitimacy of issue is tied inextricably to the marriage of the parents of the de cujus in Re Herbert Macaulay,¹ the Federal Supreme Court referring to the concept said:

"... it was only intended as a warning that great caution ought to be exercised in accepting a contention that in certain circumstances a person born out of wedlock must be regarded in law as legitimate. I do not think for one moment that the court intended to suggest that if such Native Law and Custom were proved, and a child born out of wedlock was to be held legitimate under the law in Nigeria, there could in effect be different grades of legitimacy so as to affect their rights of succession".²

The court went on to hold in favour of the legitimacy of children notwithstanding that they were not issues of a valid marriage. The court did not regard the marriage of the parents as a relevant subject for investigation. It also was of the view that public policy demanded that the courts should not hold otherwise. This is because since Yoruba Customary Law held the children to be legitimate by acknowledgement of paternity; the question of marriage of their parents was irrelevant in considering the question of their status.

From the early decisions of Savage v Macfoy,³ Cole v Cole⁴ to the later decisions of Alake v Pratt⁵, Bamgbose v Daniel⁶ and Cole v Akinyele⁷ our courts have consistently wrestled with the difficulties posed to the moral ethos of our society by the intractable issues of reconciling the conflicting moral values on which the two cultural values supporting the concepts of legitimacy in our legal system are founded.

The norms created by circumstances of birth are legal consequences. Our law recognises the status of legitimacy and the different situations that can produce that status. Again the status of illegitimacy is recognised. The question we have posed to ourself is whether circumstances of birth can constitute a

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1. Ibid.
 2. (1909) Ren. G.C.R.I.
 3. (1908) INLR 15.
 4. (1955) 15 W.A.C.A. 20.
 5. (1955) A.C. 107.
 6. (1960) 5 FSC.84 In re Odulaya (1964) LLR.108; Abisogun v Abisogun.
 7. (1963) IAIINLR 248.

human rights norm?

Critical appraisal of the position

I have already set out the provisions of section 39(2) of the Constitution 1979 which prohibits the subjection of any person to disability or deprivation merely by reason of the circumstances of his birth.

The initial reaction is that since the circumstances of birth give rise to the status of legitimacy and illegitimacy, and the fact that the illegitimate qua the legitimate suffers a disability or deprivation arising from his birth, section 39(2) has provided a remedy. Again, even within the status of legitimacy recognised by the law there are different grades with different incidents attaching to each. It is these incidents attendant on the birth of a person which are the fundamental inalienable rights the enjoyment of which has been protected by the Constitution. Having been born, a child is entitled naturally to all the incidents of such birth.

The legal and moral rules relating to the discrimination between children born in a valid marriage and those not so born have been created and developed by society to protect the institution of marriage, which is the foundation of its primary unit. The protection is from dilution and subsequent disintegration arising from the moral laxity of its members. The rules which are properly directed at the parents, unfortunately now operate harshly against the innocent child, who is the inevitable product of these legal prohibition and moral lapses. The criticism of the injustice of these attitudes has been too weak against the considerable weight and influence of public opinion in support of the morality of the rule and justice of the provision. It is not so comforting to observe that the negative attitude towards the circumstances of the illegitimate is somewhat universal. All hope is not lost. There is a progressive thinking towards ameliorating the situation. In the United States of America, where the law and social situation are similar to that in Nigeria, Justice Douglas has observed of the distressing effects of the discrimination. He queried in Levy v Louisiana¹

"why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied rights which other citizens enjoy?"

Considered logically it is both inappropriate and an abuse of language to speak of illegitimate children without at the same time referring to its natural correlative of illegitimate parents. The former cannot come into existence without the latter. In reality there can only be illegitimate parents. If illegitimate children are deprived of any rights as they now general-

1. 391 vis 68 (1968).

ly are, this is because they fall within a sociologically approved and accepted test which has denied them the equality which their common biological origin with the legitimate bestows. The discrimination against them is founded on the moral disapproval and legal prohibition of the conduct of their parents. It is hardly therefore fair to punish the illegitimate child who is merely the result of the conduct of his parents and in respect of which he cannot share any responsibility. In Labine v Vincent,¹ Justice Brennan of the United States Supreme Court has made the apt observation that "it is certainly unusual in this country for a person to be legally disadvantaged on the basis of factors over which he had no control."²

Notwithstanding these judicial homilies in favour of the illegitimate child and in support of the demolition of the legal prohibitions and moral disapprovals erected against the concept of the equality of children arising from the circumstances of their birth, the dichotomy is still persisting. It has not been contended that the illegitimate is biologically inferior or different. The effect of the prevailing legal position and moral sanctions is to deprive the illegitimate of a father despite positive assertions to the contrary.

It is pertinent to point out the absurdity of the concept, by illustration of the presumption of paternity.³ A child born in adultery by presumption of legitimacy remains the legitimate child of the husband and the mother. This is an artificial distinction between illegitimates born in adultery and others. Whereas those born in adultery are conferred with fathers by presumption of law and legal fiat the others are left desolate and considered moral aberrations and rejects of the society. In such a situation, the industrious bastard enjoys an advantage, when his is a more reprehensive social condition.

A cursory review of the legislations of the country governing the duties of the citizen or other rights discloses that illegitimacy is not one of the conditions for determining the obligations of the citizens. The status of illegitimacy does not enjoy any tax rebates, reliefs, or dispensation in respect of any duties expected of the citizen. Notwithstanding, prima facie, the father of an illegitimate has no statutory legal duties towards the child. It is true that in many jurisdictions legislation compelling the father to contribute to the maintenance of the child have been enacted. This expedient is generally relied upon. But this is because the putative fathers shirk their responsibilities towards the children.

In the face of the ever expanding role of the state in the ordering of the society, it cannot ignore its responsibility to the

1. 81 S.ct. 1017 (1971).
2. ibid.
3. See s.147 Evidence Act. See also Cole v Akinyele (1950) 5 F.S.C. 84.

innocent child and the society. The million dollar questions asked have always been, why should children, legitimate and illegitimate, not have the same or equal rights to their parents? Why should the illegitimate be deprived of the right to a family in the interest of and in protection of the legitimate? Should the law protect the legitimate from the illegitimate at any time or for any reason when both are the direct consequences of the act of the same person? It is understandable for the mother of the legitimate child who voluntarily enters into a legally recognised status, to be protected against the mother of the illegitimate, whose position is both legally and morally disapproved.

It is difficult to appreciate why the state which has eschewed distinguishing legitimate and illegitimate children in their obligations towards it should consider it reasonable to allow and encourage private individuals to enjoy the right to discriminate. Society is being progressively more aware of the need for the proper care and comfort of children. It will be retrogressive to allow the ostrich-like common law morality to perpetuate the invidious distinction arising merely from circumstances of birth. The fact of illegitimacy is now generally being regarded as relatively irrelevant. The burdens of illegitimacy in purely social relationships should be enough. Society no longer takes for granted the irresponsibility of the father of an illegitimate child. The father of an illegitimate child can now be compelled to pay sufficient allowance to the mother for the maintenance and education of the illegitimate child. The state has, consistent with prevailing social mores and disapproval, ceased to be less insensitive to parental irresponsibility of the illegitimate father.

The discriminatory classification of children into legitimate and illegitimate undoubtedly enjoys both legal backing and social approval. It is an act of unjustifiable discrimination which perpetuates injustice. It is an imposition of punishment on the results of conduct instead of on the parties responsible for conduct by the Legitimacy Laws. This is tantamount to punishing the child for his status, in respect of which he has no responsibility. Since he cannot alter the status, he cannot avoid the punishment.

In its strict juridical context it will be safe to assume that the Legitimacy Act and all legislative provisions which recognise the distinction between legitimate and illegitimate children offend against the provisions of the Constitution. It is one of the basest acts of irrationality for a legal system to encourage the continuance of such a painful and unjustified dichotomy. It is indisputable that the status attributed to a child is the consequence of the acts of others. Whatever might be the moral culpability of the parties, which has resulted in the status of the illegitimate child and its accompanying deprivations, a state should not irrationally subject a status to legal and moral degradation for the act of others. As sedulous as the moral arguments in support of maintaining the discriminatory legal classification of children is, it seems to me unreasonable to attempt to regulate a relationship by punishing the consequences. If the legal prohibition is aimed at promiscuity and adultery,

the most effective targets should be the actual participants¹. It is accepted fact that neither adultery nor promiscuous sexual relationship necessarily terminates in birth of children. It may or may not. The parties do not necessarily in the Benthamite fashion have intestacy statutes in mind when taking part in the disapproved conduct. The logical result of the present attitude is that there is no punishment in many jurisdictions for adultery or sexual promiscuity simpliciter. What is punished is the consequences thereof, that is the illegitimate child. Where there is no child the conduct of the parties does not incur any legal sanction.

The above arguments accentuate some of the absurdities of the reasons for the retention of the classification based on the protection of the sanctity of marriage and the encouragement of the institution of marriage. A state should not impose restrictions broader than it is necessary for the purpose of realising its desired objective. Instead of punishing the results of conduct, it is manifestly preferable to impose punishments for fornication and adultery. This expedient will sufficiently reflect societal attitude towards the disapproved conduct. It is clearly not correct to regard the reasons of the encouragement of marriage and family life as sufficient grounds for rejecting potential members of the family, whose involuntary membership is the result of an indisputable and sometimes undisputed conduct of the head of the family.

It is a grievous injustice to allow the moral lapses of the parents to determine the status of the child at birth. An appropriate comment about the injustice of the situation has observed that

"... it is evident that no rational relation, much less a compelling justification, can be presented by a policy which punishes the children for their father's and mother's offences against public morality. Such state action merely succeeds in punishing a scape-goat, and an extremely vulnerable one at that, a child."²

Another discriminatory application of the concept of legitimacy resulting from the circumstances of birth is the operation of the intestacy laws in favour of the legitimate child. The intestacy laws clearly exclude illegitimate children, probably on the presumption that if the father had left a Will, such would have been his intention. Hence where in a Will reference is made to children, the presumption is that legitimate children alone are intended, unless it could be gathered from the Will that illegit-

1. See sections 47, 48 of the Marriage Act, and sections 384, 387, 388 of the Penal Code prescribing punishments.
2. See Boltz "Inherit the whirlwind. The illegitimate child and the need for statutory equal protection" New Dimensions in Legislation, Vol.2, Number 1.

imate children were also in contemplation of the maker.¹

At least two decisions of our courts have illustrated that the presumption though useful in theory, is not always followed. In re Egbuna,² and in Onwudinjoh v Onwudinjoh³ where the father left a Will, his illegitimate children were not excluded. In the light of our local experience and the general consideration of the position of children qua their father, it is doubtful whether the presumption in favour of legitimate children is in the best interest of the state and the family.

The injustice of the law and the social sanction attendant upon circumstances of birth makes a certain measure of state intervention not only desirable but imperative. The recognised biological equality of all children irrespective of the circumstances of their birth should be extended by legal recognition of all the rights which are fundamental to a child. The state by recognising the prevailing classification is in a subtle and sophisticated manner discriminating against a group who are not responsible for their status, and are impotent in effecting alteration, because they cannot effectively reject the status. The chief malady with the problem of the discrimination against circumstances of birth which section 39(2) prohibits is the distinction between those who are legitimate and those who are not. This distinction involves both legal and social disabilities approved and supported by the law.

Conclusion

It cannot now be denied that a child, whatever the circumstances of his birth, is entitled to certain inalienable rights. He has a right to be maintained by his parents. He is entitled to enjoy his innocence and should not be subjected to any legal disability or moral sanction because of the conduct of his parents or any other person. The deprivation of these rights concisely stated are the consequences of discriminatory legislation and moral sanctions arising from the prevailing concept of illegitimacy. The most effective way, however, of securing compliance with the constitutional provision is the recognition by the courts that the legal position has been abolished on a proper interpretation of s.39(2). The new legal position is that a child however born should be regarded as the legitimate child of the father. This will obviate the necessity of resorting to the other expedients such as marriage and acknowledgement of paternity as acts constitutive of the status of legitimacy. The provisions of section 39(2) of the Constitution 1979 are clear and unambiguous.

It is without doubt discriminatory to deny a child the rights of a legitimate child merely because the law classifies him as illegitimate merely because of the circumstances of his birth. This

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1. See Re Bleckly (1920) 1 Ch.450 at p.461.
 2. (1945) 18 N.L.R.1.
 3. (1957) 2 E.A.L.R.1

is precisely what the constitutional provision prohibits. Accordingly circumstances of birth is a human rights norm which enjoys constitutional protection.

The courts are now free and sufficiently armed with the provisions of section 39(2) of the Constitution 1979, to strike down any legislation or private acts which discriminates against any person on grounds of the circumstances of his birth. The courts will, in doing this, be giving effect to the constitutional provision and doing justice to a class long oppressed by negative misdirected moral sanctions. It is the sacred function of the courts to interpret public policy correctly and redirect the trend of public opinion in a more meaningful manner for the realisation of the goals of society. The conditions for regarding circumstances of birth as a human rights norm have always been present in the society. Section 39(2) of the 1979 Constitution has accomplished the objective. A child having been born irrespective of the circumstances should be accorded its proper status in the scheme of legal rights. This right is basic and fundamental to all that subsequently follows.

Nov. 1991

Judicial Colloquium on the Domestic Application of Human Rights Norms

by

Markus G. Schmidt

International Human Rights Norms, with particular emphasis on the application of the International Covenant on Civil and Political Rights by the Human Rights Committee

Distinguished participants,

It is, virtually to the day, twenty-five years ago that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted by the General Assembly of the United Nations. Together with the Universal Declaration of Human Rights, these Covenants form what has come to be called the International Bill of Rights, the cornerstone on which all subsequent efforts to define and implement human rights standards in the U.N. framework have been based.

Today's working session therefore presents a fitting opportunity to examine in some detail a number of critical aspects of the implementation of these instruments. For practical reasons, much of my presentation will focus on the work of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. This is because of all the treaty-based monitoring bodies established under U.N. human rights instruments, it is undoubtedly this body which has developed the most impressive body of international human rights jurisprudence, and it has been likened, not without some justification, to a nascent international court of human rights.

Most of you will be familiar with the drafting history of the two Covenants. In 1948, the General Assembly instructed the UN Commission on Human Rights to prepare one Draft Covenant on Human Rights as well as draft measures of implementation. After three years of arduous debates, it requested the Commission to instead draft two covenants, one on civil and political rights and one on economic, social and cultural rights; the idea being, with some degree of simplification, that civil and political rights do not lend themselves to gradual implementation, whereas economic, social and cultural rights were more programmatic in nature, thus allowing for gradual implementation. The Commission reviewed the two drafts in 1953 and 1954, and the General Assembly, after thorough scrutiny, recommended that its Third Committee initiate an article-by-article review of the texts at its 1955 session. Although the review began as scheduled, it took another eleven years to complete work on the Covenants, and it was not until 16 December 1966 that they were adopted. At the time, Secretary-General U Thant observed that "it is my sincere belief that our decision today will bring us nearer to the kind of world our organisation is committed to build". I propose to examine whether, a quarter of a century later, we have indeed moved nearer to that kind of world.

As of November 1991, 104 States had ratified the International Covenant on Economic, Social and Cultural Rights; 100 had ratified the International Covenant on Civil and Political Rights, and 60 had ratified the First Optional Protocol to the latter. We may assert with some confidence that since their adoption, these instruments have moved considerably towards their universal acceptance. It is the task of the two respective monitoring bodies, the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, to watch over their universal implementation.

The first and most visible strand of the activity of the treaty-based human rights bodies consists in the examination of periodic State reports, which are submitted to them by the States parties to the various instruments. The idea underlying the reporting procedures is simple: standard-setting alone cannot ensure the enjoyment of human rights, and some monitoring responsibilities must be at the disposal of the treaty bodies.

States ratifying or acceding to one of the Covenants or a Convention are normally expected to file an initial report on the implementation of the instrument within one year; thereafter, so-called periodic reports are due, normally at two to five year intervals. During the examination of reports, the respective treaty body, consisting of independent experts sitting in their individual capacities and chosen on account of their high moral character and recognised competence in the field of human rights, "takes stock" of the measures States parties have adopted to achieve the observance of, for instance, civil and political rights. Committee members engage in an open dialogue with States party representatives and put detailed questions to them; they do not shy away from asking potentially embarrassing questions.

The Human Rights Committee has formulated detailed guidelines concerning, inter alia, the objectives of the reporting process, the most appropriate way to address the implementation of substantive rights, and the review of administrative policies. Over the years, the Human Rights Committee has established rather comprehensive guidelines¹ for initial, second and third periodic reports; the Committee on Economic, Social and Cultural Rights, the Committee against Torture and the CERD have their own reporting guidelines. Most states, today, endeavour to follow these model guidelines in the preparation of their periodic reports.

Another means of improving the comprehensiveness of reports and thus the effectiveness of the reporting procedure is to impress upon States parties, at the appropriate diplomatic level, that reports should not be prepared in a formalistic manner by Foreign Ministry officials who may not always have a solid grasp of all the details of the actual human rights situation, but in conjunction with the relevant national ministries or other authorities responsible for policy-making.

For the Human Rights Committee, Special Rapporteurs chosen from among the Committee members prepare, in collaboration with the UN Secretariat, detailed lists of questions on each report to be considered; these are reviewed and completed by the Committee's

Working Group on article 40 of the Covenant. Since the scope of the rights enshrined, to take an example, in the ICCPR, call for a high degree of expertise on the part of State representatives, it is obvious that a high-level delegation with solid support of various Ministry advisors from the capital is more conducive to constructive dialogue than a delegation consisting of Permanent Mission advisors in Geneva or New York.

Upon termination of the consideration of a report, Committee members will formulate their individual conclusions and recommendations to the State party delegation. The adoption of collective Committee conclusions, while actively considered for some time, in particular during the Human Rights Committee's 43rd session in October-November 1991, has not yet been carried through into practice. It is to be hoped that such collective conclusions will be adopted by the summer of 1992.

It has occurred that the Committee, upon concluding its consideration of a periodic report, is not satisfied with the explanations and clarifications provided by the State party delegation. In this situation, it may request the submission of additional clarifications, for consideration by the Committee's subsequent session(s); this recently occurred in the case of Morocco. Similarly, if apprised of developments that seriously jeopardise the respect of civil and political rights in a State party, the Committee may decide to request, under article 40, paragraph 1(b), the submission "without further delay" of an overdue report from that State party. Two such decisions were adopted by the Human Rights Committee in the course of 1991: the first in April in respect of Iraq, the second on 4 November 1991 in respect of Yugoslavia.²

A survey of State reports reveals that States are mindful of the Committee members' recommendations: a sizeable number of States has, in response to criticism formulated by the Committee, amended or abrogated legislation considered to be incompatible with the Covenant, or promulgated legislation aiming at an improved respect of Covenant rights. This, it is submitted, is a positive development, and bears out the fruitfulness of the dialogue between the Committee and States parties.

Useful as the reporting procedures are, they are not without their dilemmas. In 1987, the Committee on Economic, Social and Cultural Rights was told by one State party to the ICESCR that the State had achieved nothing less than the status of paradise on earth, at least as far as enjoyment of economic, social and cultural rights was concerned.³ Such an assessment will be greeted, to say the least, with considerable skepticism, but it is not an isolated one.⁴ It raises two questions:

- (a) how can Committees persuade States parties to human rights instruments to be more forthcoming in outlining the extent of the problems which they face in seeking to realise the relevant rights? and
- (b) how can the effectiveness of reporting procedures be improved, given that they remain one of the most important means by which the international community seeks to promote

the implementation of States' human rights treaty-based obligations?

A second strand of the treaty bodies' activities is the formulation and adoption of so-called "General Comments". These may address States parties' general obligations under a convention or a covenant or, more commonly, spell out the treaty body's interpretation of the scope of application of the substantive provisions of which it monitors the implementation. While these General Comments are certainly not legally binding, it is wrong to dismiss them as useless. At worst, they merely couch in different terms the provision of which they seek to clarify the scope; generally they represent what I would call "authoritative interpretative guidelines" on the provisions of the Covenants and on the relationship between the domestic law of the States parties and the Covenants' international standards. Indeed, they have created what one observer has called "a new species of soft law".⁵

Both the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination have adopted such valuable General Comments, but again, it is the Human Rights Committee which has formulated the most complete set of interpretative guidelines to the provisions of the Covenant on Civil and Political Rights. By November 1991, the Committee had adopted 20 General Comments on important issues such as the right to life, prohibition of torture and other forms of cruel, inhuman and degrading treatment, equality before the courts, the position of aliens under the Covenant, liberty and security of the person, freedom of expression, or the right to privacy. The most noted is perhaps the General Comment on article 26 of the ICCPR, adopted in 1989, in which the Committee considered that the prohibition of discrimination may extend into areas not specifically covered by the Covenant, such as social security rights.⁶ The Committee will start work on other General Comments, especially on articles 25 (equal access to public service) and 18 (freedom of religion and of conscience), in the near future.

That these General Comments are valuable tools of interpretation is borne out by the practice of States both under the reporting and the Optional Protocol procedure: States parties frequently invoke the Committee's General Comments, in particular those on article 6 (right to life) and on article 14 (right to a fair trial) in their submissions to U.N. human rights instances. Thus, they serve to strengthen the Committee's role as "supreme interpretative authority" of the Covenant.

The right of individuals to seize UN human rights bodies of complaints about alleged violations of their human rights brings us to the third major activity of the treaty bodies. Three expert committees currently implement treaty-based individual complaints procedures: the Human Rights Committee under the Optional Protocol to the ICCPR (since 1977); the Committee on the Elimination of Racial Discrimination (CERD) pursuant to article 14 of the International Convention on All Forms of Racial Discrimination (since 1982); and the Committee against Torture under article 22 of the Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment (since 1988).

Article 77 of the Convention on the Rights of Migrant Workers and Their Families, which will enter into force three months after the twentieth ratification of the Convention, will add another procedure to this panoply.

Of these procedures, that under article 14 of the Convention on the Elimination of All Forms of Racial Discrimination has seldom been resorted to since 1982; few communications have thus far been considered and disposed of by CERD.⁷ While only 14 States have recognised CERD's competence to consider individual complaints, one may nonetheless wonder why the procedure has been used so sparingly; CERD intends to investigate ways and means to encourage the submission of individual complaints.

The procedure under article 22 of the Convention against Torture became operative in the spring of 1988, and several cases have since been considered by the Committee against Torture which continues, in that particular aspect of its activities, to explore new terrain.

Undoubtedly, the procedure under the Optional Protocol to the ICCPR has developed into the most visible and effective of all the complaints procedures administered by human rights treaty bodies. I mentioned that as of 20 November 1991, 60 States had ratified the Optional Protocol⁸; it is interesting to note that in the past five months, ratifications have literally been "pouring in", most recently from the Ukrainian SSR, Australia, Estonia, the USSR, Poland and Lithuania; other countries have expressed their intention of ratifying the Protocol in the near future⁹. Since 1987, the number of complaints received and registered has not only grown exponentially, the cases themselves have also tended to become far more legally complex. While many of the Committee's decisions adopted during the early years of operation concerned human rights violations which were relatively easy to pinpoint from a legal point of view, such as ill-treatment of political prisoners or arbitrary detention, the Committee has since been called upon to consider, for example, allegedly discriminatory aspects of social security legislation in certain countries, or the economic aspects of the enjoyment of minority rights¹⁰.

Under the Optional Protocol, the Committee operates as a quasi-judicial body, which may account for the growing popularity of the procedure - out of all the cases submitted since the entry into force of the Optional Protocol on 23 March 1976, roughly 60% were submitted in the past five years. Some 485 communications have been registered for consideration by the Committee; consideration of 125 communications has been concluded by the adoption of meritorious decisions (so-called "final Views" under article 5, paragraph 4, of the Optional Protocol); 138 cases have been declared inadmissible; 73 were discontinued; and some 150 cases are currently pending¹¹. The number of cases has been rising at such a rate that the Committee was forced to amend its rules of procedure in the summer of 1989 to enable it to streamline the procedure and improve its effectiveness¹². Still, additional improvements are necessary if the Committee is to avoid a catastrophic backlog in the consideration of communications, and if it

does not wish to open itself to charges of "justice delayed is justice denied"¹³. The remainder of this presentation will be devoted to the operation of the Optional Protocol procedure.

With some degree of simplification, individual complaints registered under the Optional Protocol (and any of the other above-mentioned procedures) are considered in three stages¹⁴:

1. Pre-admissibility

Every complaint received goes through a preliminary screening by the Communications Section of the Centre for Human Rights, based in Geneva, whose staff routinely ascertains whether the complaints received raise any issues under the Covenant. There is no requirement as to the form in which a complaint is presented: a one page letter from a prisoner on death row is as acceptable as a submission of many hundred pages made on behalf of an applicant by a prestigious law firm. If the Secretariat considers that the complaint is not properly presented or incomplete, it contacts the author and informs him about the modus operandi of the procedure.

If a prima facie case is deemed to have been made by the complainant, his complaint will be forwarded to the Committee's Special Rapporteur for New Communications, who will decide on appropriate action. If the case is transmitted to the State party, the latter will be given a specific time limit - usually two months¹⁵ - for the submission of its observations and comments on the admissibility of the communication. It should be noted that the deadlines determined by the Committee's rules of procedure are not sacrosanct: the Committee has, in the past, consistently approved requests for reasonable extensions of deadlines. Similarly, where the deadline was exceeded by the applicant or the State party without prior notification to the Committee, this does not automatically result in a default decision declaring the communication admissible or inadmissible, as the case may be. There are, however, examples of the Committee running out of patience and proceeding to adopt decisions on the basis of the information available to it. Thus, although extensions of deadlines should not be encouraged, individuals and States parties should let the Committee know if they cannot observe given deadlines¹⁶.

The mandate of the Special Rapporteur for New Communications was created in 1989 and is an interesting example of how the Committee endeavours to manage an increasing workload through procedural flexibility. So as to take pressure off the plenary and in order to avoid wasting precious plenary meeting time, the Special Rapporteur screens new communications in cooperation with the Secretariat; he does take action throughout the year, thereby expediting the handling of new complaints. In instances of manifest inadmissibility, he is entitled to make an inadmissibility recommendation directly to the Committee¹⁷; perhaps more significantly, he may request interim measures of protection, such as stays of execution, where State party action may cause irreparable harm to a petitioner¹⁸.

2. Adoption of a decision on admissibility or inadmissibility

It is worth recalling that since the amendments to the rules of procedure in 1989, the Committee's Working Group on Communications may declare complaints admissible if the Working Group is composed of five members and the members unanimously support a finding of admissibility (rule 87, paragraph 2). This procedural device, again, has been designed to enable the Committee plenary to handle a larger number of final decisions (that is, of inadmissibility and on the merits). At the admissibility stage, several issues must be determined:

- (a) The standing of the authors (articles 1 and 2 O.P.). The communication must emanate from the victim him/herself, from a duly authorised legal representative or, where the victim is unable to submit the complaint, from relatives or close friends. On the other hand, commercial enterprises have no standing under the Protocol, and non-governmental organisations who simply purport to be acting in the best interest of the alleged victim(s) have no standing either¹⁹.
- (b) The violations complained of must personally affect the victim(s) and not merely relate to legislation or general administrative practices deemed to be incompatible with the provisions of the Covenant. The Committee has emphasised on numerous occasions that it is precluded from entertaining an actio popularis under the Covenant.
- (c) The author's claims must have been sufficiently substantiated (rule 90 (b) of the rules of procedure); it is obvious that generalised and unsupported claims of judicial bias, sex-based discrimination or arbitrary detention do not meet this requirement. On the other hand, there is no rule, similar to that of article 27, paragraph 2, of the European Convention, that would enable the Committee to declare a complaint inadmissible as "manifestly ill-founded".
- (d) The violation(s) complained of must have occurred after the entry into force of the Covenant and the Optional Protocol for the State party concerned, unless said violation continues to produce effects after the entry into force which in themselves constitute an independent violation of the Covenant. Several communications have thus been declared inadmissible ratione temporis²⁰.
- (e) The complaint shall not constitute an abuse of the right of submission (article 3 of the O.P.). The Committee has hitherto been extremely reluctant to invoke the abuse clause. In the author's opinion, this approach has been overly cautious and opened the door to the consideration of a number of frivolous cases. In the past six months, however, the Committee appears to be willing to reconsider its position²¹.
- (f) The allegations must be compatible with the provisions of the Covenant (article 3 of the O.P.). A rich body of jurisprudence has developed around the criterium of inadmissibility ratione materiae. A number of complaints concerning, in

formula that domestic remedies only must be exhausted to the extent that they are both available and effective - where the applicant demonstrates that such remedies as exist are merely hypothetical, because never used, or that judicial precedents preclude a positive result in the domestic courts, the rule does not apply. It further does not apply where the process of exhaustion of domestic remedies is unduly prolonged.

For a considerable number of communications from Commonwealth jurisdictions, the issue of exhaustion of domestic remedies has played a crucial role. Thus, in many cases against Jamaica, the authors contended that recourse to the Judicial Committee of the Privy Council in London was not an effective remedy within the meaning of the Protocol, mostly on account of the limited jurisdiction of the Judicial Committee, or because of the absence of reasoned judgments from the Court of Appeal of Jamaica. The Committee has held that in principle, recourse to the Judicial Committee is a remedy within the meaning of article 5(2)(b) - but the matter is looked at on a case-by-case basis, and several communications have been declared admissible although no petition for special leave to appeal had been lodged with the Privy Council by the applicant²⁶.

Problems of a different nature arise where criminal appellate remedies co-exist with constitutional remedies. Is an applicant required to exhaust both his criminal and his constitutional remedies, and does he have to do so even where no legal aid is made available for constitutional motions? An affirmative answer has been given forcefully in a number of cases by the Trinidadian and Jamaican Governments. The Committee has disagreed with this approach: it has held that in the absence of legal aid, constitutional motions do not constitute an available remedy which must be exhausted for purposes of the Optional Protocol adding that once provision for legal aid is made, this legal aid "should enable counsel to prepare his client's defence in circumstances that can ensure justice. This does include adequate remuneration for legal aid"²⁷.

On balance, the requirement of exhaustion of domestic remedies is determined by the Committee on a case-by-case basis. Over the years, it has tended to become stricter in its interpretation of the rule; certainly, if the applicant merely contends that recourse to the local courts would be futile or too costly, his communication will be declared inadmissible without further ado²⁸.

In admissibility decisions, the Committee occasionally adds that the decision may be reviewed under rule 93, paragraph 4, of the rules of procedure, in the light of pertinent information submitted by the State party. Numerous such requests have been made in capital cases submitted against Jamaica; some have been rejected, others remain pending. Furthermore, in several inadmissibility decisions, the Committee has added that its decision may be reviewed pursuant to rule 92, paragraph 2, of the rules of procedure, if either author or counsel plausibly submit that the reasons for inadmissibility no longer apply. This implies that, once domestic remedies have been exhausted, the complaint may be

essence, the violation of the right to property or inadequate compensation for expropriation have been declared inadmissible on that ground²². Another example concerns situations in which the Committee is, in essence, called upon to determine whether the domestic courts properly evaluated the evidence in a case, or whether the domestic judge properly instructed the jury. The Committee has recently been seized of many such complaints in relation to capital cases from the Caribbean, and its conclusions deserve a longer quotation:

"With respect to the author's claims of unfair trial, the Committee observes that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts and to review the interpretation of domestic law by national courts. Similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality."²³

Where such defects cannot be ascertained, the Committee considers that the claim falls outside the scope of protection of article 14, paragraph 1, of the Covenant, and declares the communication inadmissible as incompatible with the provisions of the Covenant.

- (g) The Committee must ascertain that the "same matter" is not being examined under another instance of international investigation or settlement (article 5, paragraph 2(a), of the Optional Protocol²⁴), such as the Inter-American Commission on Human Rights or the European Commission of Human Rights. Many cases have been declared inadmissible under this rule; on the other hand, the Committee has had occasion to rule that the examination of the human rights situation in a particular country under ECOSOC Resolution 1503(XLVIII) (governing a procedure for the consideration of situations which appear to "reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms") does not constitute examination of the "same matter" within the meaning of article 5, paragraph 2(a)²⁵. Furthermore, the rule does not apply where the claim under the regional procedure was lodged by an unrelated party acting without the express authority of the alleged victim.
- (h) Finally, the applicant must have exhausted all available domestic remedies (article 5, paragraph 2(b), O.P.). The requirement that domestic remedies be exhausted before an international instance of investigation and settlement is seized of the matter is a practical one, predicated upon the principle of State sovereignty. In the majority of instances, States parties deny that the author has exhausted available domestic remedies: the Committee thus has had the opportunity to develop its jurisprudence on article 5, paragraph 2(b). It has, for example, developed the standard

re-submitted to the Committee.

3. Meritorious stage

Once a communication is declared admissible, the State party is given a time limit of six months to submit to the Committee its written explanations or statements on the substance of the complaint (article 4, paragraph 2, of the O.P.). Under rule 93, paragraph 3, of the rules of procedure, the author is then provided with another opportunity to comment on the State party's submission.

It is important to note that the procedure throughout is a written one (article 5, paragraph 1, of the O.P.); the Committee may request supplementary information by interlocutory decision from the parties, even after the complaint has been declared admissible. Only if it is satisfied that it has collected all the necessary information does the Committee proceed with the adoption of its final views. Thus, what was observed in respect of deadlines above also applies to the merits stage.

In the course of the past fifteen years, the Committee has created an impressive body of jurisprudence covering just about all the substantive provisions of the Covenant. This makes it impossible to provide an extensive survey of the Committee's jurisprudence, and I shall confine myself to those decisions that have attracted extensive attention and criticism from the legal and academic community. Suffice it to point out that the Committee's jurisprudence is recorded faithfully in the following documents²⁹:

- The Annual Reports of the Committee to the General Assembly (Supplement No.40 to official General Assembly records for the years 1978 to 1991);
- The "Selected Decisions of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights", Vol.1 (second to sixteenth sessions)(1985); Vol.2 (seventeenth to thirty-second sessions)(1990);
- An article by A.de Zayas/J.Th.Möller/T.Opsahl in: German Yearbook of International Law Vol.28 (1985), Reprint No.1, Centre for Human Rights, Geneva (June 1989);
- The periodic surveys in the Human Rights Law Journal (published by the N.P.Engel Verlag, Strasburg/Kehl a.Rhein/Arlington);
- The periodic surveys in the Netherlands Quarterly of Human Rights (published by the Netherlands Institute of Human Rights [S.I.M.], Utrecht, The Netherlands);
- The quarterly Bulletin published by INTERIGHTS, London;
- The recent book by Dominic McGoldrick on the Committee's "Role in the Development of the International Covenant on Civil and Political Rights"³⁰;

- The impressive commentary on the Covenant and the Optional Protocol written by Professor Manfred Nowak (published in German in 1989 [N.P.Engel Verlag: Strasburg/Kehl/Arlington], to be released in English in the spring of 1992).

Articles 1 and 27 of the Covenant

In a number of complaints, the Committee has had the opportunity to deal with the question whether the right of self-determination, and other rights conferred on peoples under article 1 of the Covenant, can be invoked in a communication under the Optional Protocol, as well as to elaborate on its case law concerning the meaning and scope of article 27 on minority rights³¹. Communication 197/1985 (Kitok v. Sweden) concerned an ethnic Sami and reindeer breeder, who alleged violations of articles 1 and 27 of the Covenant, since he had been excluded from membership in his native Sami village (Sameby) by decision of the Sami community, on the basis of the Swedish Reindeer Husbandry Act. Communication 167/1984 (B.Ominayak and the Lubicon Lake Band v. Canada) was submitted by the Chief of the Lubicon Lake Band, a Cree Indian Band living within the Canadian province of Alberta. Simplified, this case concerned the right of self-determination and right of members of the Lubicon Lake Band to dispose freely of their natural wealth and resources.

Others have aptly reviewed the Committee's Views on these complaints³², but the two important conclusions to be remembered are the following: Firstly, that neither an individual or a group of persons, no matter whether they consider themselves to be a people or not, may invoke the right of self-determination (article 1 of the Covenant) in a complaint brought under the Optional Protocol; while individuals cannot claim a right conferred upon peoples, as such, a group of individuals cannot use the individual complaints procedure under the Optional Protocol as a vehicle to assert the right of self-determination or any of the other rights enshrined in article 1. Secondly, the protection provided under article 27 to persons belonging to ethnic, linguistic or religious minorities, which includes the right for such individuals, in community, to enjoy their own culture, extends to economic activity, if such activity is considered an essential element in the traditional way of life of that community.

Article 14 of the Covenant

The right to a fair hearing (article 14, paragraph 1) as well as the minimum defence guarantees laid down in article 14, paragraph 3, have been the subject of numerous recent decisions, and any survey must necessarily be selective. In communication 213/1986, the author alleged a violation of article 14 because a police officer he accused of having maltreated him had not been criminally prosecuted. In declaring the communication inadmissible under article 3 of the O.P., the Committee observed that "the Covenant does not provide for the right to see another person criminally prosecuted"³³. This statement has since become established jurisprudence.

In its Views on communication 203/1986, the Committee reaffirmed the principle that "justice delayed is justice denied". The author, who had been dismissed from public service, sought relief through various administrative and judicial channels. After more than ten years of litigation, and in spite of two favourable court decisions, he had not been reinstated in his post, nor obtained any compensation. The Committee considered that article 14 had been violated: "[w]ith respect to the requirement of a fair hearing....., the Committee [noted] that the concept of a fair hearing necessarily entails that justice be rendered without undue delay"³⁴.

Several communications submitted against Jamaica, many of them involving capital punishment, have raised issues under article 14, paragraph 3(d), of the Covenant (right to have legal assistance assigned). In communication 250/1987, the author contended that his representation before the Court of Appeal by a legal aid attorney not of his choosing, who effectively withdrew the appeal without prior consultation with his client, violated article 14, paragraph 3. The Committee affirmed "that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. This applies to the trial in the court of first instance as well as to appellate proceedings". Having ascertained that the author had not been present in court for the hearing of his appeal and that counsel was not prepared to advance arguments in favour of the appeal being granted, thereby effectively leaving the author without representation, the Committee considered "that the State party should have appointed another lawyer for [the author's] defence or allowed him to represent himself at the appeal proceedings. To the extent that the author was denied effective representation at the appeal proceedings, the requirements of article 14, paragraph 3(d), have not been met"³⁵.

It is noteworthy that, in capital punishment cases, the Committee considers that a violation of article 14 may entail a violation of the right to life, protected under article 6. Thus, it has held that if a final sentence of death was passed without having met the requirements for a fair trial set out in article 14, the right to life has also been violated³⁶.

Article 26 of the Covenant

Probably the most noted and most contested recent decisions of the Committee have related to right of equality before and equal protection of the law, enshrined in article 26 of the Covenant. Until 1987, one of the unresolved issues before the Committee had been whether the non-discrimination clause in article 26 applied only to the rights enshrined in the ICCPR, or whether non-discrimination should be seen as an autonomous right applicable to civil and political rights not protected under the Covenant or even to economic, social and cultural rights protected under the International Covenant on Economic, Social and Cultural Rights. States parties had favoured a restrictive interpretation of article 26 on the ground that the two Covenants established different monitoring systems and that an individual complaints procedure was only envisaged under the ICCPR. In three Dutch communications examined in April 1987, the Committee boldly

decided that it could examine allegations of discrimination with regard to economic, social and cultural rights. Having affirmed its competence, it went on to ascertain whether certain facts presented by the authors constituted prohibited discrimination within the meaning of article 26:

"The right to equality before the law and equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26"³⁷.

On the basis of this observation, the Committee found violations of article 26 in two of the three communications under consideration³⁸. These decisions have been criticised by a number of scholars, including Prof. Christian Tomuschat, former member of the Committee³⁹. It remains open to debate whether the Committee has been swayed by these comments, but, since 1989, it has itself somewhat circumscribed the earlier, sweeping statements; in any event, alleged discrimination in the field of social security rights will be carefully monitored on a case-by-case basis⁴⁰.

Since its creation, the Committee has adopted its final decisions by consensus. The Committee's rules of procedure (or, for that matter, of any other treaty body) do not prescribe consensus as the modus operandi for the examination of complaints. In practice, the Committee has opted for a consensual procedure since it considered it the most appropriate way of avoiding deadlock attributable to unspoken but nonetheless existing political alignments in the plenary. One may hypothesize about the reasons for such alignments, and the former East-West confrontation that long bedevilled the work of UN human rights bodies provides undoubtedly part of the explanation.

Deciding by consensus in such instances has occasionally contributed to the gradual watering-down of the legal content of decisions: as it is sufficient for one expert to oppose a draft text that would otherwise be acceptable to all the others, the search for consensus not only necessitates protracted consultations on a compromise text, it has also at times resulted in final decisions in which it is difficult to follow the legal argument⁴¹.

I submit that, as political alignments in UN treaty-based human rights fora are becoming increasingly rare, it is appropriate to consider alternative decision-making mechanisms. The recent practice of the Committee may provide some guidelines in this context: over the past three to four years, its members, rather than formally insisting upon the adoption of decisions by consensus, have instead resorted to the formulation of individual opinions, which are appended to the Committee's decisions. Thus, out of 34 final decisions adopted between October 1989 and July 1990, 10 had a total of 14 individual opinions appended to them⁴². I submit that this development is a positive one - it has not diminished the authority of the Committee's decisions. On the contrary, in the view of one close observer, it testifies to the "quasi-judicial nature" of the procedure⁴³. Furthermore, it merely reflects the fact that in complex factual and legal situa-

tions, deciding by consensus has become a fiction. Notwithstanding, the search for consensus continues to apply to the consideration of the majority of cases, thus often necessitating protracted debates and sometimes causing a loss of cogency of the legal argument.

Compliance by States parties with the Committee's decisions

The Optional Protocol does not envisage a mechanism whereby the Committee would monitor the extent to which States parties give effect to its Views, or fail to do so. This reflects, in the first instance, the fact that the Committee's decisions lack legal enforceability, such as the judgments of the European Court of Human Rights. In the first years of its existence, the Committee did not follow up with States parties as to the measures taken to implement its Views.

Notwithstanding the above observation, the record of compliance with the Committee's decisions is positive. It should be candidly admitted that some States parties have simply ignored the Committee's Views; others have simply contested the Committee's findings as devoid of a factual, or legal, basis. On the other hand, the Committee has been informed by several States parties that they changed or amended national legislation in response to the Committee's Views, or awarded compensation to victims of violations of rights protected under the Covenant⁴⁴. In other instances, concerning notably Uruguay and Madagascar, political prisoners were released subsequent to findings of violations of the Covenant by the Committee.

The Committee has been mindful of the necessity to strengthen the legal value of its decisions, and it has realised that an institutionalised follow-up mechanism is needed if Governments and an informed public opinion are to keep faith in the effectiveness of its implementation machinery. At its thirty-ninth session in July 1990, therefore, it created the mandate of a Special Rapporteur for the Follow-Up on Views and spelled out his powers in its Annual Report to the General Assembly⁴⁵. Under his mandate, the Special Rapporteur requests detailed information from States parties as to the measures they have taken to implement the Committee's recommendations, and regularly reports on his findings to the Committee.

The first responses from States parties to requests for follow-up information from the Special Rapporteur have been encouraging; yet, at the same time, they have displayed a certain reticence on the part of States parties to recognise the Committee's decisions as binding. One State, while making compensatory payments to a victim of violations of the Covenant, emphasised that the payments were made ex gratia.

The Committee members have emphasised the necessity of endowing the Rapporteur with all the necessary powers to perform his mandate. Thus, it is envisaged to publish an annual list of States parties that ignore his requests for follow-up information. It is too early to draw detailed conclusions from the Special Rapporteur's experience. In the medium-term future, it would be desirable to strengthen his powers by, for example,

granting him some measure of fact-finding capabilities, especially wherever States parties refuse to implement a final decision or simply ignore requests for follow-up information. Other treaty bodies, such as the Committee on the Elimination of Racial Discrimination or the Committee against Torture, should emulate the example of the Human Rights Committee.

Incorporation of the Covenant Rights into Domestic Legal Systems

One last issue to be considered is the way in which the rights enshrined in the Covenant have been incorporated into the national legal systems of States parties to the Covenant. Generally, international law leaves it to States to enact such legislative and other measures as are deemed necessary to give effect to the obligations they have pledged to implement, and to make sure that individuals whose rights have been violated dispose of effective remedies before independent and impartial tribunals. This is spelled out clearly in article 2, paragraph 2, of the Covenant.

Three principal methods for the incorporation of Covenant rights into domestic law may be distinguished⁴⁶:

- (1) Incorporation of the Covenant rights into the national legal order;
- (2) Enactment of specific legislative measures in the domain of civil, criminal and administrative law to give effect to the rights enshrined in the Covenant;
- (3) Self-executing operation of the Covenant in the domestic legal order.

For States parties to the Optional Protocol, one would consider it essential that the rights protected under the Covenant be given some form of recognition in the domestic legal system. This is because, firstly, of the requirement of exhaustion of domestic remedies, under which States are expected to investigate alleged violations of human rights and, wherever appropriate, remedy them. Secondly, it would assist an international instance of investigation or settlement in its activities if it is aware of the reasoning of the highest courts in the country against which violations of civil and political rights have been alleged.

As far as the Optional Protocol work is concerned, there were few, if any, cases during the first ten years of the Committee's existence in which the place of the Covenant in the domestic legal system was addressed at all. Fortunately, this situation appears to be changing slowly: since 1987, the matter is addressed by Governments in an increasing number of communications. Furthermore, it is clear that domestic courts appear to be more inclined to ponder the importance of Covenant rights in the domestic legal system.

Thus, in communication No.224/1987, the Norwegian Government observed that the Norwegian courts had given considerable weight to international treaties and conventions in the interpretation of domestic rules, even if these instruments had not been formal-

ly incorporated into domestic law. The country's Supreme Court has expressed the view that international rules, including in the field of human rights, are to be taken into consideration in the interpretation of domestic law⁴⁷.

Similarly, in the Finnish legal system, domestic courts have begun to take the human rights treaties ratified by Finland into consideration in their decisions. Furthermore, it is possible to affirm that the individual communications pending against Finland under the Optional Protocol have promoted the general awareness among Finnish judges that decisions of Finnish courts, even of the Supreme Court and the Supreme Administrative Tribunal, may be scrutinised by UN human rights treaty bodies⁴⁸. In a case pending before the Committee, the Government observed that in "the Finnish legal system, ...Parliamentary legislation coexists with the Covenant, which has been incorporated into domestic law. Thus, article [] is directly applicable before the Finnish authorities".

In the case of the Netherlands, the Committee's decisions on the applicability of article 26 of the Covenant in social security matters have had their undoubted impact on the Dutch court system. Thus, the Central Board of Appeal (Centrale Raad van Beroep), the highest domestic instance for the adjudication of social security disputes, has invoked the Committee's jurisprudence in the ratio decidendi of several of its more recent decisions dealing with alleged discrimination in the application of the Widowers' and Orphans' Act (AWW) or the Unemployment Benefit Act (WWV)⁴⁹.

In Canada, finally, there have been a number of references to the Committee's decisions in the decisions of lower courts. In its judgment of 13 December 1990, the Supreme Court of Canada referred for the first time to the Committee's jurisprudence, i.e. the decision in J.R.T. and the W.G. Party v. Canada⁵⁰.

The above references serve to underscore the fact that the Committee's jurisprudence is gradually being recognised and applied, albeit slowly, by the local courts of States parties to the Covenant. This brings me back to the remark made by Secretary-General U Thant in December 1966: has the international community, by virtue of the adoption and subsequent implementation of the Covenants, moved towards a better world? I submit that it has. The field of human rights is not among those where quick and facile successes may be expected: the Human Rights Committee, for its part, has contributed to the development of an impressive body of international human rights jurisprudence which, for domestic and international instances alike, has become a source of inspiration.

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- (2) See document CCPR/C/SR.1112
- (3) See P. Alston, Bulletin of Human Rights, 89/1 (New York, 1990), pp.5-11.
- (4) A Central American country presented a similarly rosy picture of the implementation of civil and political rights during the presentation of its report during the Human Rights Committee's 38th session in March 1990.
- (5) Yogesh Tyagi, "The work of the Human Rights Committee under the ICCPR", pp.350 et seq. (Manuscript to be published shortly).
- (6) For the text of the Human Rights Committee's General Comments, see Doc. CCPR/C/21/Rev.1 (19 May 1989); General Comment 18[37] (article 26), CCPR/C/21/Rev.1/Add.1 (21 Nov.1989); General Comment 19[39] (article 23), CCPR/C/21/Rev.1/Add.2 (19 Sept. 1990).
- (7) See communication 1/1984 (Yilmaz-Dogan v. Netherlands), opinion of 10 August 1988; and 2/1989 (D.T. Diop v. France), opinion of 18 March 1991.
- (8) On the African continent, 15 States have ratified the Protocol. They are Algeria, Cameroon, Central African Republic, Congo, Equatorial Guinea, Gambia, Libyan Arab Jamahiriya, Madagascar, Mauritius, Niger, Senegal, Somalia, Togo, Zaire and Zambia.
- (9) These states include Belgium, Brazil, Bulgaria, the Republic of Belarus, and Rumania.
- (10) See, for instance, the Views on Communication No.182/1984 (Zwaan-de Vries), in: Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol.II, pp.209-214; Views on Communication No.197/1985 (Kitok v. Sweden), Doc.CCPR/C/33/D/197/1985.
- (11) Statistical survey as of early December 1991.

- (12) Rules of Procedure of the Human Rights Committee, Doc. CCPR/C/3/Rev.2 (14 Dec.1989), rules 87 to 94.
- (13) See Schmidt, "The future of individual human rights complaints procedures under United Nations treaty-based instruments" (forthcoming).
- (14) A Chart explaining the different stages of the Optional Protocol procedure can be found in Schmidt, 4 Interights Bulletin (1989), pp.27-30, at 29.
- (15) See rule 91 of the rules of procedure of the Human Rights Committee.
- (16) See Schmidt, 4 Interights Bulletin (1989), p.28
- (17) The mandate of the Special Rapporteur is spelled out in the Committee's Annual Report to the General Assembly, 1991, Doc. A/46/40, Annex X., p.218.
- (18) Rule 86 of the Committee's rules of procedure is the basis for such requests.
- (19) See decision of 14 July 1989 on communication 360/1989 (A Newspaper Publishing Company v. Trinidad), Annual Report, 1989, (A/44/40), Annex XI.L.
- (20) The latest example is Communication No.457/1991 (A.I.E. v. Libyan Arab Jamahiriya), decision of 7 November 1991.
- (21) See Communications No.367/1989 (J.J.C. v Canada), decision of 5 November 1991; No.448/1991 (H.J.H. v Netherlands), decision of 7 November 1991.
- (22) See, for instance, decision of 6 November 1990 on communication 419/1990 (O.J. v. Finland), paragraph 3.2.
- (23) See decision of 11 April 1991 on Communication No.304/1988 (D.S. v. Jamaica), paragraph 5.2.
- (24) Many European parties to the Protocol have entered reservations in respect of this provision, to the effect that the Committee's competence is precluded once the case has been examined by the European Commission of Human Rights.
- (25) See "Selected Decisions of the Human Rights Committee under the Optional Protocol", Vol.I (1985), p.17.
- (26) See Views on Communications 229/1987 (Irvine Reynolds v. Jamaica) and 253/1983 (Paul Kelly v. Jamaica), Annual Report of the Human Rights Committee, 1991, A/46/40, Annex XI.C. and D; Views on Communication No.240/1987 (Willard Collins v. Jamaica), adopted on 1 November 1991, paragraphs 7.2-7.5.
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- (39) Cf. his annotations to the Committee's Views in Europäische Grundrechte Zeitschrift (EuGRZ) (1989), pp.37-38.
- (40) See the decisions on communications 218/1986 (H S Vos v. Netherlands) Annual Report 1989 (A/44/40), Annex X.G; 273/1988 (B d B v. Netherlands) Annual Report 1989, Annex XI.F.
- (41) The Committee's decision on Communication No.167/1984 (B.Ominayak and the Lubicon Lake Band v Canada) has been criticized as having fallen victim of the search for consensus.

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- (43) G. Cohen-Jonathan, in: Mélanges René-Jean Dupuy (Pédone, Paris: 1991), p.92.
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- (46) Cf. the survey given by Lallah in op.cit. (note 29), pp.47-48.
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The Procedures of the African Commission on Human and Peoples' Rights for the Protection and Promotion of Human Rights

by

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1. INTRODUCTION

The African Charter on Human and Peoples' Rights was adopted at the Nairobi Conference on Heads of State and Government in 1981 and came into force on 21 October 1986, three months after its ratification by a simple majority of OAU members. The African Commission on Human and Peoples' Rights was inaugurated on 2 November 1986 and consists of 11 members elected by the Assembly of Heads of State and Government so as to represent the different parts of the continent. In 1988 the Commission adopted its Rules of Procedure consisting of 120 rules but these are in the process of being revised. The Commission's working languages are the same as the OAU's - English, French and Arabic.¹ The 10th anniversary of the signing of the Charter and the 5th of the inauguration of the Commission were celebrated at the Commission's 10th session held in Banjul 8 - 15 October 1991.

It is intended to divide the procedures of the Commission into:

- (a) protective
- (b) promotional
- (c) administrative.

2. PROTECTIVE PROCEDURES

The protective process begins with a communication to the Commission that a party has committed a breach of the provisions of the Charter. Such communication may come from:

- (a) a state party
- (b) a non-state party.

(a) Communication from State Party

Under Article 47 of the Charter, a state that considers that another state member has committed a breach of the Charter may address a communication to that state and send copies to the Secretary-General of the OAU and to the Chairman of the Commission. The state complained against has three months to give a written information on the matter including the action taken, the

- 1. Rule 34, Rules of Procedure.

relevant laws and procedure applied and the redress given. If the matter defies a peaceful and satisfactory settlement within three months, either state may refer the matter to the Commission. A state may however communicate directly to the Commission about a breach by another state as well as to the Secretary-General of the OAU and to the state concerned. The Commission is expected to ensure that all local remedies have been exhausted. The Commission then tries to reach an amicable settlement between the parties and makes its recommendations to the parties and reports to the Assembly.²

The Commission has not had the opportunity of testing its procedure on state communications for no state has as yet sought to utilise it. This is not unusual. Governments are usually reticent to pick up quarrels with other states on human rights issues except they have nothing to lose or something to gain. A confrontation with another state may call attention to the skeletons in its own cupboard or the complaint or non-complaint may be simply an instrument of diplomacy. From the number of governments on the continent that still have to learn about democratic governance - regular submission to the will of the electorate, the right of other parties to contest elections etc - a plethora of complaints against other states for breaches of human rights cannot be expected. Even in Europe with a long tradition of democratic rule, even if autocratic in dealing with non-Europeans and with a human rights convention that is over forty years old, the number of complaints by states is minimal and can be counted on the finger-tips of the hands.

The only occasion that the procedure could have been tested was misdirected during the 9th session in Lagos. The Libyan Ambassador in Lagos submitted a communication complaining that Libyan prisoners of war in the Republic of Chad were, on the change of Government from Higenne Habre to Col. Derby, taken under duress, first to Nigeria and then to Zaire and on to Kenya from where some had been compelled to go to the US. There was no complaint against Nigeria and Zaire, parties to the African Charter, nor against Kenya, a non-party but against the USA, a non-party both of the Charter and of the OAU. The communication was obviously incompetent. All the communications so far have come from non-states parties.

(b) Communications from Non-State Party

A non-state party is not defined either in the Charter or in the Rules of Procedure but the Commission interprets it to include individuals and organisations, including non-African ones. The Commission has received communications from non-governmental organisations concerned with human rights including Amnesty International, International Commission of Jurists, Africa Watch, Lawyers' Committee for Human Rights, Civil Liberties Organisation, Constitutional Defence Project as well as from individuals. It may be that a communication from a non-party, but member of the OAU, may be entertained as the principle of reciprocity is

2. Chapter XVI Rules of Procedure.

not required in human rights law and in humanitarian law.

On the receipt of a complaint, described innocuously as a communication in both the Charter and the Rules of Procedure, the Commission sends a copy to the state concerned for its comments and requests for more information from the complainant as to whether local remedies have been exhausted. A few cases are terminated on the receipt of the information that were confirmed that, for instance, the matter was still sub judice. That was the situation with the complaint by Civil Liberties Organisation that the Nigerian Government or its agents moved a large number of people from the Island of Maroko without sufficient notice and without adequate preparation on relocation. The complaint by the Constitutional Defence Project about the detention of the prominent Lagos business woman, Jennifer Madike and her cousin, suffered the same fate. It is necessary for non-governmental organisations to study the conditions of admissibility spelt out in the Charter.

A communication from a non-state party must pass a more stringent test to be admissible:

- (a) It must indicate its author even if he requests anonymity.
- (b) It must be compatible with the Charter and with the OAU Charter.
- (c) It must not be written in language disparaging or insulting to a state or its institutions or to the OAU. It is doubtful if the Commission will interpret this literally but will seek the substance rather than the shadow of the case.³
- (d) The complaint must not be based exclusively on the mass media. Indeed this may be the only source of information; the necessity to be an eye-witness or the direct victim will be too limitative. The general idea is to avoid action based on unsubstantiated hearsay evidence.
- (e) Local remedies must have been exhausted unless prolonged.
- (f) The communication must be submitted within a reasonable time.
- (g) And does not relate to a case that has been settled through other procedures.

On receiving the reply from the state and further information from the complainant, the Commission decides on admissibility and calls on the parties to give further oral evidence if they wish to do so. It then decides on the merits of the complaint.

3. See also Ojo and Sessay, The OAU and Human Rights: Prospects for the 1990s and Beyond 8 H.R. Quarterly 1986 No.1 p.89 at 98.

At the 10th session, the Commission found from evidence received from two reputable NGOs the existence of a series of serious or massive violations of human and peoples' rights in Southern Sudan and in Rwanda in terms of Article 58 and decided to inform the Chairman of the Assembly. The Charter stipulates in that regard that the Chairman may ask for in-depth study.

Does this mean that the Commission cannot conduct in-depth study unless at the request of the Assembly or the Chairman? The Commission is expected to carry out some study before reporting a series of massive or serious violations. If it is necessary to conduct an in-depth study to come to that conclusion, it should do so proprio motu. These issues are yet to be definitively settled by the Commission although individual Commissioners have expressed various views. A reasonable finding of the Commission at any stage warrants a preceding study which may be in depth.

The Commission had in the past been delayed from taking action because a state failed to send its comments on a communication. Was the Commission to proceed on the basis of evidence from one side? Should the protective action be halted by the silence of the state in question? It was agreed at the 10th session that where a state delays to send its comments, it should be informed that the Commission will have no alternative than to proceed after two months on the basis of the information it has so far received. It is considered that this will expedite the process by quickening the response or proceeding with the action with the full knowledge of the state concerned.

Should the Commission act only on a complaint or can it act proprio motu? The Commission had in the past been criticised for failing to take action or at least make a statement when there were reports of alleged massive violations. There may not have been a communication to the Commission on the breach. During and shortly before the 7th session, there were news reports of massive violations of human rights by the two sides of the civil war in Liberia. Some extra-continental organisations had expressed their concern. In the absence of a communication, the Commission decided to act proprio motu and asked for details of the violations, if any, and the Chairman offered to visit to verify and report back to the Commission as well as offer his services with a view to a return to normalcy. There was no reply. In the same vein, the Chairman expressed the concern of the Commission with the trial and execution of 28 military officers within 24 hours following an alleged but failed attempt to overthrow the Government of Sudan. The Chairman asked for information and also to be invited to ascertain the facts and report back; but again, there was no reply. There was also no reply when information from the media alleged the massacre of hundreds of University students in Lumumbashi, Zaire in 1990. The only exception was the failed coup of 22 April 1990 in Nigeria when hundreds of people were arrested for complicity. The Chairman wrote a similar letter and expressed the hope that the suspects would be dealt with according to the Charter. There was a reply from the Government of Nigeria that the suspects would be tried according to law.

It is submitted that this cautious initiative by the Commission is justified. Often the only source of information is the media.

The situation may be too serious to await a communication and irreparable damage may be caused before one is received, if any. In the absence of its own observers in all states parties and in the absence of viable NGOs or individuals that may respond quickly to such situations, the Commission may draw inspiration from Article 46:

"The Commission may resort to any appropriate method of investigation; it may hear from the Secretary-General of the Organisation of African Unity or any other person capable of enlightening it."

3. THE CONFIDENTIALITY CONUNDRUM

Article 5 provides:

- "(i) All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly shall otherwise decide.
- (ii) However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly
- (iii) The report of the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly"

The interpretation of this provision has been the hardest nut to crack and comes up frequently in the work of the Commission in promotional or protective activities or even in reporting to the Assembly. Quot sententiae tot homines. The Commission continues to grapple with the problem. Is it a breach of the confidentiality principle to discuss specific cases outside the Commission before an agreement has been reached on a report to the Assembly? To what extent should the complaints or the names of the states complained against remain confidential?

It makes sense that the Commission should not conduct negotiations or investigations in a blare of publicity. its powers are essentially diplomatic, administrative, reconciliatory and recommendatory. However, total confidentiality removes one of the potent sanctions of all human rights organisations. Not having a Police or Army and lacking even the power to make a binding recommendation, its mooted and unpublicised recommendation may not have an echo, may be totally ignored and may not have an impact. Should the facts of the complaint and the name of the states complained against be kept from the Assembly? How would the activities, including the recommendations, of the Commission be studied and assessed by the human rights public? How would the activities, including the recommendations, of the Commission be studied and assessed by the human rights public? Disagreement on how to report the cases of individuals released on the intervention of the Commission delayed the report of those events to the Assembly in 1991. In the event, the public was not informed for the published report contained no information on the cases. Although a summary of the activities of the Commission is issued at the end of a session, there are not enough facts on protection

to guide the public. The published annual reports have so far not been very helpful to the researcher or indeed to the public.

The principle of confidentiality must not be pushed so far as to be detrimental to human rights. The victims and the complainants are members of the public who must have passed on information about their plight to the immediate public. There is no compelling state security requirement that necessitates a blanket cover over protective activities. A distinction can be made between measures in the sense of recommendations actually made and the bare facts of human rights breaches as well as the states involved. Needless to say that the NGOs that enjoy observer status share the view that the Commission should be more open.

Human rights have become matters of greater international concern than they were in the past. Extra-continental powers are showing much more concern about breaches of human rights and democracy to the extent of making the grant of aid contingent on their implementation. This indicates the present status of human rights. The clothing of human rights breaches with secrecy is not compatible with the present status of human rights in international relations. The confidentiality principle in Article 59 should be restrictively interpreted in accordance with what Judge Huber referred to in Island Palmas Case⁴ as inter-temporal law i.e. an international instrument should be interpreted in a way to accord not only with the law at the time of its creation but also with the law at the time of application including the developments that had taken place.

4. PROMOTIONAL PROCEDURES

The Commission has the duty of promoting the Charter through organising conferences, symposia and seminars and through the dissemination of information. The Commission is also expected to encourage and cooperate with African and international organisations concerned with human rights. This power is extensive; what the Commission lacks in protection through imprecision and vagueness, it gains in promotional power and yet these are not elaborated in the Rules of Procedure.

The Commission has not on its own funded a conference, symposia or seminar but it has collaborated with organisations, e.g. UNESCO, International Commission of Jurists, Friederich Naumann Foundation and Fund for Peace in organising such meetings.

At its 8th session, the Commission divided the members of the OAU, whether or not they have ratified the African Charter, among the eleven Commissioners for promotional purposes. Commissioners are expected to contact the governments intimating them in advance about their intention to visit. While in those countries, they are expected to make discreet inquiries about communications that may have been sent about their hosts from the government and

4. Report of International Arbitral Awards Vol.2 p.829; AJIL 1928 p.867.

others and establish contact with NGOs.

The Commission will have to collaborate closely with national and international human rights organisations in effectively promoting the Charter. In its judicial colloquium in Banjul on the national implementation of international human rights norms in 1990, the Commonwealth judges suggested the formation of national committees of the African Charter in each state to foster promotional activities and cooperate with the Commission. This suggestion had, in fact, been adopted earlier by the Commission although it had not been fully implemented. For our part efforts are being made to summon a meeting of Nigerian NGOs to consider the matter.

In 1990 the Raoul Wallenberg Institute, in cooperation with the Namibian Ministry of Justice, organised a national seminar for top officials on the implementation of international human rights norms in their activities. Both the human rights provision of the Namibian Constitution and the African Charter on Human and Peoples' Rights were thoroughly discussed. It is strongly recommended that this seminar should be replicated in every other African state.⁵ Arrangements have been completed between the Wallenberg Institute and the Nigerian Federal Ministry of Justice in collaboration with the African Commission for a similar national seminar in Nigeria. At its 10th session, the African Commission chose as one of its priorities in the Programme of Action submitted by its consultants the implementation of the Charter in national legal systems.

The African Commissioners work part-time and meet twice a year for about 10 days. A substantial part of its function falls to be performed by its secretariat which has to be substantially strengthened. The non-governmental organisations must be encouraged for, without them, the high hopes of the Charter will not be realised.

5. ADMINISTRATIVE PROCEDURES

The secretariat of the African Commission is an integral part of the OAU Secretariat. In fact the Secretary-General of the OAU appoints the Secretary of the Commission and provides the staff and services for the effective discharge of the Commission's duties. The administrative expenses of the Commission thus falls on the OAU. The Rules of Procedure provides that the Secretary of the Commission shall be appointed by the Secretary-General of the OAU in consultation with the Commission's Chairman⁶.

The Secretary is a most important person in the Commission and should have qualifications no less than those of a Commissioner. As its top permanent official, he should be in a position to advise and guide the Commission from his wealth of experience and

5. A similar seminar was organised in Togo in 1988 by the UN Centre for Human Rights, Geneva.

6. Rule 22(2).

competence. It is only proper that the Commission, through the Chairman, should make an input in his appointment.

The Secretariat of the Commission was inaugurated in Banjul in June 1989 with a headquarters agreement between the OAU and the host state, The Gambia. Official communications are sent to the Secretary. The Secretary maintains constant contact with the Commissioners especially the Chairman in the inter-session period.⁷ There is a confusion both in the Charter and in the Rules of Procedure as to which functionary - the Secretary-General of the OAU or the Secretary of the Commission - carries out certain activities.⁸ Even as an organ of the OAU it is desirable for the Commission to maintain sufficient autonomy politically and financially to perform its functions effectively. Inquiries are normally directed to the Secretariat and communications sent there-to.

6. CONCLUSION

The African Commission has only been in operation for 5 years, a relatively short time to develop and confirm its procedures. The Inter-American Commission found it necessary to draw up its rules long after it began to function. The danger of drawing up the rules too early is that they may prove to be an impediment in certain respects. With regard to protective actions, the Rules have not produced results as soon as expected. Rule 120 provides for the temporary suspension of the Rules and this provision should be liberally used if they prove obstructive. The watchful eyes of the public and the NGOs will help the Commission in its arduous task. It requires more funds and needs to meet for longer periods to make thorough discussions possible. The strengthening of the Secretariat is absolutely necessary. It is necessary for Commissioners themselves to be available to carry out the onerous duties of protection and promotion. A determined effort must be made to develop procedures that will achieve early results and these must come from those operating the Charter - the Commissioners.

7. The first Chairman was Mr Isaac Nguema of Gabon 1987-89; the second Prof U O Umozurike of Nigeria 1989-1991 and the third Dr I Badawi el Sheith 1991.

8. As in Article 47 of the Charter and Rule 7 of the Rules of Procedure. See also E V O Dankwa, 'Commentary on the Rules of Procedure of the African Commission on Human and People's Rights', Proceedings of the Second Annual Conference of the African Society of International and Comparative Law, 4-7 March 1990 pp.29-34.

The African Charter on Human and Peoples' Rights

by

**Hon Justice M Nasir
President, Court of Appeal, Nigeria**

With the three conferences on the regional basis for the Domestic Application of International Human Rights Norms successfully held¹, the idea has by now crystallised that there is need to hold regional conferences on human rights particularly in Africa where the roots of Human and Peoples' Rights have not been solidly established in very firm ground. In a continent where governments range from those elected by popular vote to those which are absolute dictatorships, it will not be out of place to remind the leaders that the African Charter for Human and Peoples' Rights is now in force since 1986. It may be recalled that the movement for Human Rights re-emerged after the Second World War. It may be said that Sir Winston Churchill and Mr F D Roosevelt may be said to usher the first modern "cry" for Human Rights when they introduced in the Atlantic Charter in 1941 their four freedoms, namely, freedom of life, freedom of religion, freedom from want and freedom from fear. No doubt these freedoms reflected the mood of the world at that time.² After the Second World War the United Nations Organisation was formed. In December 1948 the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. This document is important in the sense that it is the first international declaration of human rights. It is however toothless as it has no machinery for enforcement of the human rights. It is not even clear whether it is binding on any nation.

Whatever might be the weakness of the U.N. Universal Declaration of Human Rights it has succeeded in giving birth to some regional human rights charters at the international level. The most important and successful regional international charter was the European Convention on Human Rights concluded in 1950. The next regional international Charter was the American Convention on Human Rights concluded in November, 1969. The youngest international Charter is the African Charter on Human and Peoples' Rights which was adopted by the members of the Organisation of African Unity in June 1981 at Nairobi, Kenya.

It may be recalled that the State parties to the Charter of the Organisation of African Unity were very conscious of the hard won independence of the member countries and they were very much determined to respect the independence, territorial integrity and the non-interference in the affairs of each member country. The issue, in 1963, when the treaty for the Organisation was signed was the unity of the African States and the protection of the political independence recently acquired by most of the States. This raises a number of relevant issues in respect of human rights. Firstly, when the Universal Declaration of Human Rights was made in 1948 most African countries were then colonies and therefore not independent. Secondly, when the Charter of the

United Nations (adopted in 1945) and the Universal Declaration of Human Rights (adopted in 1948) were adopted most African countries were not independent. They were therefore not parties to these enactments but the colonial masters said they had adopted for all their colonies.³ Thirdly, even though the movement for human rights started as far back as 1945 when the Pan-African Movement tried to link human rights with the fight against colonialism,⁴ not much was achieved until after the creation of the Organisation of African Unity in 1963 and excessive and persuasive campaigns for the establishment of human rights Charter for Africa. The culmination came at Banjul, The Gambia, when the African Charter on Human and Peoples' Rights was drafted. It was adopted by the Organisation of African Unity in June 1981 at the 18th Assembly of the Heads of State and Governments in Nairobi, Kenya. The Charter came into force in 1986 after it has been ratified by more than a simple majority of the members of the Organisation of African Unity.⁵

Salient points in the Charter

The adoption and ratification of the African Charter on Human and Peoples' Rights by the majority members of the O.A.U. within a short period (1981-1986) was by itself a very important achievement. The Charter however ought to be highlighted in different aspects in order to show the amount of work and devotion dedicated to the making of the Charter. The Preamble recalls the provisions of the Charter of the O.A.U. on "freedom, equality, justice and legitimate aspirations of the African Peoples". It further reaffirmed the pledge for the eradication of all forms of colonialism, to intensify coordination and cooperation of African peoples and promote international cooperation having regard to the Charter of the United Nations and the Universal Declaration of Human Rights. In addition to affirming the desirability of freedom and human rights, the Preamble emphasised the importance of "taking into consideration the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights" and "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". Based on the above Preamble, the Charter is divided into three parts, thus:-

- Part I Rights and Duties
- Part II Measures of Safeguard, and
- Part III General Provisions.

The theme of the present paper is "Discussion on the Regional Application of Human Rights Norms in the African Context." This will be discussed hereinafter.

It is important to re-state here that part of the consideration guiding the heads of state and governments in the framing and adoption of the Charter was historical African background with its immense culture based on the long and rich history of the different parts of Africa. Each part, with its own peculiarities,

geographical, environmental and social conditions, has evolved traditions influenced by the various climatic conditions

influenced by the Mediterranean sea, the Sahara desert, savannah, rain forest, the Atlantic and the Pacific Oceans. It is natural in such situations to have different cultures and different peoples. It is therefore a very great achievement to produce a single document on human rights acceptable to all the State parties. A little more detailed considerations will be made in respect of the provisions of the Charter and the forces influencing these provisions.

Regional Application of Human Rights

All the state parties to the Charter are also members of the O.A.U. and of the United Nations. Many are members of the Movement of Non-Aligned Countries. As such members the state parties had by treaties, conventions and other agreements accepted and are bound by the Charter of the United Nations, the Charter of the Organisation of African Unity and the Universal Declaration of Human Rights. What the African Charter for Human and Peoples' Rights did was to put in a separate document all the known and internationally recognised norms of human rights in an African document with necessary modifications and additions including some measures of safeguard, with bias for egalitarian pan Africanism and cultural African outlook. The main distinction of this African Charter with the other Charters is that it is made more binding and more enforceable against each state party. It is in this context that Part I, Chapter 1 Article states:

"The member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".

By subscribing to the Charter each state party undertakes to enforce the human rights provisions in the Charter. Divergent as the customs and traditions of the various countries are, there is no special reservation made for any country as to the implementation of the Charter. In the Charter for the Inter-American Convention on Human Rights a special reservation was made for Uruguay in respect of suspension of citizenship of a person accused of a criminal offence punishable with imprisonment.⁶ The binding effect of this Charter and the procedure for enforcement will be further discussed when we come to consider the Commission established under Part II which deals with Measures of Safeguard.

As clearly indicated in the African Charter, and elsewhere⁷ by learned authors, a lot has been discussed on the regional Charter on Human Rights. When the African Charter ultimately came into being it was not only hopefully being expected but it was highly welcomed. Thus Professor U O Umozurike said in Banjul:-⁸

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

Thus the African Charter is here to stop all abuses whether by governments or individuals.

Contents of the African Charter

It will not be possible to give details of all the provisions of the African Charter. It is however important to highlight some of the salient provisions. It is desirable at this stage to draw the attention of the readers to the fact that the O.A.U. has no machinery for enforcing the provisions of the fundamental rights enshrined in the Charter. As will be seen later, the Commission established in the Charter is advisory to the Heads of State and Governments of the O.A.U. The Commission can however influence compliance with the Charter. It is better than what the United Nations has been able to achieve but not good enough as the European Convention for the Protection of Human Rights and Fundamental Freedoms or the Inter-American Convention on Human Rights. Both the European and the Inter-American Charters have special Courts with jurisdiction to enforce the provisions of the Conventions.

For the present purpose the important issue is to highlight the main provisions. As earlier stated the African Charter is in three main Parts:-

PART I:

This part deals with (a) Human and Peoples' Rights and (b) Duties. The Rights include:

- (1) Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter.
- (2) Every individual shall be equal before the law.
- (3) Every individual to have equal protection of the law.
- (4) Every individual to have respect for his life and dignity of his person.
- (5) Every individual to have dignity of his being and legal status.
- (6) Every individual shall have right to liberty and security of his person.
- (7) Every individual to have right to have his cause heard including:
 - (i) the right to appeal
 - (ii) presumption of innocence
 - (iii) to defence himself or by counsel of his choice
 - (iv) to be tried within reasonable time.
- (8) No one to be punished by ex post facto legislation.
- (9) Every one to have freedom of conscience, profession and religion.

- (10) Every individual to have right to receive information and express and disseminate opinion.
- (11) Every individual to have free association and free assembly with others.
- (12) Every individual to have (a) freedom of movement within and to go outside his country and (b) non-nationals not to be molested and (c) no mass expulsion of non-nationals.
- (13) Every citizen to have right to (a) participate in government (b) equal access to public service (c) public property (d) work and equal pay for equal work (e) enjoy best attainable state of physical and mental health (f) education.

Articles 17-26 provide for:-

- (a) Participation in cultural life.
- (b) Promotion and protection of morals and traditional values.
- (c) The family to be unit of the society.
- (d) The state to assist and protect the family.
- (e) The state to stop discrimination against women, the children, the aged and the disabled.
- (f) All peoples shall be equal and shall have same respect.
- (g) All peoples shall have right to existence and self-determination and shall have political freedom.
- (h) Colonised or oppressed peoples to have right to free themselves. Other states to assist them.
- (i) All peoples to have the right to own and dispose of their wealth and natural resources.
- (j) All peoples to have the right to economic, social and cultural development. State to assist development.
- (k) All peoples to have national and international peace and security under the Charters of the United Nations and of the OAU.

For the purpose of strengthening peace, solidarity and friendly relation, State parties to the Charter shall ensure that any individual enjoying right of asylum does not engage in subversive activities against his country and State parties shall not tolerate in their territories any subversive or terrorist activities against other peoples or States.

There shall also be general satisfactory environment for development. The State parties shall have the duty to promote and ensure through teaching, education and publication the

respect of the rights and freedoms in the Charter. The State parties shall have the duty to guarantee the independence of the Court and shall allow the establishment and improvement of institutions for human rights.

Under Part I, Chapter II, Articles 27-29 the African Charter introduced duties of every individual. These include:

- (a) duties towards his family and society.
- (b) due regard to rights of others, collective security, morality and common interest.
- (c) duty to respect fellow beings without discrimination.
- (d) duty to (i) preserve and develop the family (ii) to serve community (iii) to serve the State and not compromise its security (iv) to preserve and strengthen social and national security, independence, territorial integrity and to contribute to the defence of his State (v) to work to the best of his ability and pay taxes (vi) to preserve and strengthen African cultural values and contribute to the promotion of the moral well being of the society and (vii) to contribute to the promotion and achievement of African unity.

The above rights and obligations signify the serious attempt made by the OAU to entrench human rights in Africa. These rights incorporate to a great extent the civil, political, cultural, social and economic rights not only of the individual but also of the State party to the convention. Some of these rights are strictu sensu human rights in the popular and accepted concept of the term and others are fundamental rights in the sense that they have generally speaking been accepted as such both in domestic and international law. It was said in Chief O Ransome-Kuti & ors v Attorney General of the Federation and ors (1985) 6 S.C. 246 that a fundamental right is a right "which stands above the ordinary laws of the land" and what has been done in Nigeria "is to have these rights enshrined in the Constitution." It was further said in Uzoukwu & ors v Ezeonn II and ors (1991) 6 NWLR (Part 200) 708 at 760 that human rights were derived from and out of the wider concept of natural rights and that they were rights which every civilised society must accept as belonging to each person as a human being. Fundamental rights were said to be fundamental because they had been guaranteed by the fundamental law of the country ie the Constitution. The modern trend at present is that certain rights which are purely social and economic are being elated to the level of not only human rights but also fundamental. Thus the African Charter (Articles 22-24) has enumerated such rights as the right to economic, social and cultural development with due regard to the freedom and identity and has imposed on the State to protect and ensure the exercise of the right to development. There are also provisions for the right to national and international peace and security. There is finally the right to general satisfactory environment favourable to the development of all peoples. These rights no doubt bind the state parties but they cannot strictly be enforceable for two main reasons. Firstly, the African Charter has no provisions for enforcing any breach. To this extent the African Charter falls far behind the European or the Inter-American Charters which provided for Courts to implement the provisions of the Charters.

The Commission, provided for in Part II, Articles 30-44, cannot take the place of a Court and nor was it intended so to do. To understand the application one must take the practice in Nigeria as a case study.

Fundamental Rights in the Nigerian Constitution

The second world war was a great catalyst to the demand, and at times fight, for freedom in many developing countries in Africa and elsewhere. Nigeria was not an exception. After a number of political and constitutional conferences a Constitution for Nigeria was drawn up in 1954⁹. This Constitution however did not sufficiently, or at least reasonably, cover the aspirations of the diverse and numerous ethnic, tribal and geographical groups constituting Nigeria. In particular the minority tribes, of which there were many, felt that an added security was required. After further conferences and a Royal Commission¹⁰ on the minorities' problems the Constitution was amended in 1959 and a Chapter on Fundamental Rights was added.¹¹ These fundamental rights were incorporated as Chapter III of the Constitution of the Federation of Nigeria.¹² Almost identical provisions were repeated in the Republican Constitution - The Constitution of the Federation.¹³ In all these four Constitution which were based on the Westminster democracy the provisions for fundamental rights were almost identical.

The provisions of Chapter III of the Constitution of the Federation consist of the usual and accepted human rights such as deprivation of life, protection against inhuman treatment, slavery and forced labour, deprivation of personal liberty, freedom to private and family life, freedom of conscience, freedom of expression, freedom of peaceful assembly and association, freedom of movement, freedom from discrimination, freedom to have any infringement of the fundamental rights to be determined by an independent court or other tribunal with a guarantee of fair hearing. The Courts in Nigeria have given wide interpretation to these fundamental rights as well be shown later.

A glance at the provisions of the Nigerian Constitution will show that none of the modern and wider concept of human rights, eg social, political and economic rights, has been incorporated. In fact there is no country in Africa which has covered more aspects of human rights than Nigeria. It is not surprising therefore that Nigeria played prominent roles both in the formation of the OAU itself and in the adoption of the African Charter for human and peoples' rights.

When Nigeria decided to have another look at its Constitution the Constitution makers resolved to do away with the British Westminster type of democracy and to adopt the American type of presidential system. It did more. It also decided to incorporate in the new Constitution a lot of the provisions of the African Charter of Human and Peoples' Rights. So in the Constitution of the Federal Republic of Nigeria, 1979¹⁴ the provisions of Fundamental Rights were incorporated, and in addition, the provisions of the Fundamental Objectives and Directive Principles of State Policy were also incorporated. These Objectives and Principles cover most of the other provisions of the African Charter which have not been enacted as Fundamental Rights. Thus Nigeria has shown sufficient and

determined intention to observe and apply the provisions of the African Charter.

As with the provisions of all treaties there is no satisfactory concept of enforcement except through the application of domestic law made for the implementation of the treaties. The Preamble and Article 1 of the African Charter put an obligation on the Member States of the OAU to recognise and enforce the provisions and "shall undertake or adopt legislative or other measures to give effect to them." The problem in implementing the provisions of the African Charter is not the weakness or ineffectiveness of the Courts or other arms of government but in the general problem of under-development with its consequent economic backwardness, social and political inadequacies. In addition to these natural phenomenon the leadership in many countries contributed to the slow pace of developing human rights. In some of these countries the interpretation given to human or other rights of the individual was very negative. The irony is that it is not necessarily the countries which have military dictatorship which have the worst government. Some military dictatorships are very much more democratic than some of the "popularly" elected Presidents with a majority of 99% and also the only candidate. Some of them were "so popular" as to be "unanimously" elected life Presidents of their countries.¹⁵

In a country like Nigeria, which has a military dictatorship, the respect for the African Charter is very much real. The Federal Government projects itself as a government with human rights posture and believes in the rule of law. There are always cases either on human rights or other rights instituted against the Government. The Government always complies with Court orders and no judge was ever removed or molested for giving judgment against the Government. Nigeria is probably one of the best countries in which respect for the Rule of Law, Fundamental Rights and Independence of the Judiciary are real and thriving. In considering the independence of the Judiciary I shall show by decided cases what has been achieved in Nigeria.

Civil, Political and Other Rights

In addition to the conventional human rights the African Charter protects civil, political, economic, social and cultural rights of the individual or of the people as members of their own society.¹⁶ These rights which are very broad and at times very expensive to provide cannot be uniformly applied by the State parties to the convention. In ordinary context the civil and political rights are broad enough to cover such rights as the right to life, freedom of speech, freedom of movement and all the other conventional rights. It is however the right to property, the right to participate freely in the government, the right to public service and so on that are more difficult to provide by government.

The basic problem confronting African countries is that of under-development. In addition to the serious handicaps caused by geographical locations many countries suffer from the multi-tribal or racial groups which constitute the various African countries. The colonial masters in their greed for power never considered the wish or welfare of the citizens before carving out various portions of the continent as their 'estate'. To add to the destabilisation of the people each of the colonial powers

brought with them their language, culture and their own understanding and respect for the African people. In many cases the African was treated as a sub-human and barbaric. The education meted out to the people was that sufficient to serve the requirement of the colonial government. It is not surprising that the Charter emphasised the importance of education, information and respect for the African culture.

The most serious price being paid for being under-developed is the lack of economic and political stability. Many African countries suffer from serious lack of material resources insufficient for the too numerous needs of competing groups, eg ethnic and political groupings, which usually lead to instability. The destabilisation effect of the lack of political and economic base usually results in coups and counter-coups, political assassination and, at times, attempted secessions. To this extent the State parties to the African Charter are almost all at par in their inability to provide economic and political stability. As long as African countries continue to suffer from poverty, lack of health care, ignorance and lack of information or education, so long will the enforcement of human rights continue to elude the majority of the people. In countries where legal aid is limited to capital offences or is non-existent at all, nobody can boast of equal opportunity or equal protection of the law. One must therefore accept the reality that African States can only implement the African Charter gradually at different speeds. This does not mean that such basic rights as the right to life, property or freedom of speech or fair hearing in the Courts can be denied.

The African Charter has introduced new concepts of rights. I need only refer to two of them here. Firstly, the family has been made the basic unit of society and it has been provided that the State shall assist the family. This is a truly African concept. The family in Africa and what it connotes and encompasses can only be fully understood by people who belong to or live in close contact with the system. Some members of the family may not be known to each other and cannot by any stretch of imagination all be known by any one individual. But you have affinity, traditional and cultural ties. You have a duty to belong to the family and serve the family. The enforcement of this duty is not done by the Courts but by the various elders in the family. The quality of the recognition of the family as the basic unit of society is that of laying solid foundation for unity, discipline and morals. This is probably one aspect of the African Charter which the majority of State parties will be very willing to support.

Secondly, the cultural rights which the Charter very much emphasises, have the cementing effect of uniting African peoples. It may be recalled that the political boundaries of many African countries put tribes and even families into different countries. There is however the influence of culture which can be used to unite citizens of different States. If this is achieved, and I believe it can be, then the hope of all African leaders of the unity of the continent can be assured.

Duties of Individual in the African Charter

The concept of public rights brings to the forefront the necessity of getting the society closely knitted in order to identify and protect the rights which belong to a family, a group or a tribe or even a nation. The rights belonging to the people under the African Charter are in many respects also rights belonging to the individuals. They are however of such general nature that 'the people' as a unit have the control of such rights. The African Charter is therefore trying to enshrine all those rights which the people have by their very existence as human beings. They include some political rights such as right to self-determination, right to existence and to property. The essence of peoples' rights connotes more than the authority or validity of using the rights but also the duty to use such rights prudently and with the express determination to preserve the rights for the use of future generations where such is desirable.

If the peoples have such rights as a group and have such rights as individuals or as citizens, the African leaders very prudently and wisely brought into focus the corresponding responsibility of duties to the society or the State. These duties as stated in Part 1, Chapter II Articles 27-29, have always been accepted by all well thinking people as the responsibility of an individual. The entrenchment of such duties is therefore within the African tradition and culture of the African society.

It is important to mention here how far the State parties to the African Charter have implemented the provisions. Again we use Nigeria as an example. No doubt Nigeria is not the only country which respects the African Charter but I believe it is one of the countries which has faithfully tried to comply with the provisions of the Charter. This has been done by incorporating most of these provisions, as earlier stated, in the Constitution either as Fundamental Rights or as Fundamental Objectives and Directive Principles. What is important is not the mere entrenchment of the various rights but the practical application of the provisions when the need arises.

The Commission in the African Charter

As can be seen, there is no provision in the African Charter for Courts with powers to decide on compliance or breach of any provision of the African Charter. There are however in Articles 1 and 26 provisions directing the States to see that the provisions of the Charter are incorporated in the domestic law and that Courts are guaranteed their independence to decide on all these matters. As already stated, the African Heads of State considered the relevance and importance of the African tradition and culture in resolving human rights matters. In a typical African setting the need for settling disputes or other disagreements by arbitration and reconciliation has very high premium. It is only in rare cases that disputes go to ordinary courts as leaders of families or groups or countries can amicably settle them. These may be the reasons why the African Charter has made no provisions for Courts but only for an African Commission on Human and Peoples' Rights. This Commission of eleven members has the mandate to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights. In addition to its power to interpret the African Charter it has power to consider and submit to the Heads

of State and Governments its opinion on any matter considered by it either at the instance of a State party or other sources.

At the moment not much has been practically achieved by the Commission. There is more protection given to the individual through ordinary court process in different countries. It may be that more time is required before full assessment on the Commission can be given. The modern trend however is that the idea of having Courts of Human and Peoples' Rights as established by the European and Inter-American Conventions, are more likely to help as measure to safeguard the rights.

Independence of the Judiciary

It is difficult to write on the independence of the Judiciary in all the African countries. It is I believe reasonable to make a case study on the Nigerian Judiciary. In his Paper at the Judicial Colloquium in Harare (19-22 April 1989) the Honourable Mr Justice E Dumbutshena, former Chief Justice of Zimbabwe, has given very clear and highly commendable examples of cases in his country in which the Courts have courageously and faithfully tried to implement the provisions of human rights. It may be that a few cases showing the Nigerian approach may show how far the Nigerian Courts have enjoyed independence. I wish however to put on record that throughout my stay in the Supreme Court of Nigeria and in the Court of Appeal there was no occasion when any member of the Executive (Military or Civilian) or of the Legislature ever contacted me or members of my Court for any special consideration in any pending case before the Courts.

The locus classicus in Nigeria is the case of E O Lakanmi & an v The A G Western State & ors (1974) 4 EC SLR 713. This case challenged the powers of the Military Government and declared that the Military could not legislate contrary to the provisions of the Constitution. It was a bold decision which almost decided the Military Government to be unconstitutional. The Military Government did not seriously panic. It certainly did not act in a way suggesting panic. A new Decree was enacted which gave supremacy to the Military Government over the Constitution. About that time the Chief Justice who presided in the case was about to retire by virtue of the retiring age provided in the Constitution. The Head of State however extended his term by a special Decree.

There was the case of Seidu Garba v Federal Civil Service Commission (1988) 1 NWLR (Pt. 71) 449. This was a case in which a civil servant who went to court in defence of his right was dismissed by the Government. In the judgment on appeal to the Supreme Court, the Court held as follows:-

"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 contemptuous 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."

After further demonstration of its independence the Appellant was restored to his office.

Finally let me deal with the famous case of Governor of Lagos State and ors v Ojukwu (1986) 1 NWLR (Part 18) 621. In this case, a case between the parties was going on in the High Court. Lagos State Government, without any Court order, went forcefully and took over the property in dispute. As part of the judgment on an appeal to the Supreme Court, it was held that:

"To use force to effect an act and while under the marshall of that force seek the Court's equity, is an attempt to infuse timidity into Court and operate a sabotage of the cherished rule of law. It must never be."

These examples show in a nutshell the stand of the Nigerian Supreme Court in defence of human rights and the independence of the Judiciary.

1. Conferences held at Bangalore in India in February, 1988, the Harare Conference in Zimbabwe in April, 1989 and the Banjul Conference in The Gambia in November, 1990.
2. The Second World War 1939-1945 was on. Sir Winston Churchill was the war time Prime Minister of the United Kingdom and Mr F D Roosevelt was the President of the United States of America at that period.
3. See e.g. Article 63 of the European Convention on Human Rights of 1950. Also Article 73 of the United Nations Charter.
4. See paper for United Nations on Problems concerning the setting up of Regional Commissions on Human Rights, with special Reference to Africa - Cairo 2nd to 15th September 1969 by Karel Vasak.
5. See Article 63(3) of the Charter.
6. See Statements and Reservations at the end of the Charter of 22 November 1969. Also called the Pact of San Jose, Costa Rica.
7. Eq. by Prof. Osita C. Eze in Human Rights in Africa and other writings.
8. The African Charter on Human and Peoples' Rights. A paper by Prof. O. Umozurike delivered at the Judicial Colloquium in Banjul, The Gambia, 7-9 November, 1990.
9. The Nigeria Constitution Order in Council 1954 (S.I. 1954 No. 1146)
10. Minorities Commission, popularly called Willink's Commission (1958 Cmd 505).

11. See L.N. 228 of 1959. The Nigeria (Constitution) (Amendment No. 3) Order in Council, 1959 which came into operation on 24 October 1959.
12. See the Nigeria Constitution Orderr In Council 1960 (S.I. 1960 No. 1652).
13. See The Constitution of the Federation (Act No. 20 of 1963).
14. See The Constitution of the Federal Republic of Nigeria (Enactment) Decree, 1978 (No. 25 of 1978). All these provisions of Fundamental Rights and Fundamental Objectives and Directive Principles have also been incorporated in Chapters II and IV of the Constitution of the Federal Republic of Nigeria, 1989 which is to come into force on 1 October 1992.
15. See the Nigerian Newspapers such as Guardian (page 7) the New Nigerian (page 16) and the Daily Times (page 5) all of 1 October 1991, all in respect of Kenya's one party system and president for life.

See African Charter, Articles 13-24.
16. See Articles 16 to 22 of the African Charter.

**Human Rights Proceedings:
European Provisions and Experience***

Presentation by

ROLV RYSSDAL

**President of the European Court of Human Rights,
at the Judicial Colloquium on the domestic application
of international human rights norms**

Abuja, Nigeria

12 December 1991

* This address is largely based on a lecture given in March 1990 at King's College, London, the text of which is to be published in the "International and Comparative Law Quarterly".

Mr Chairman, Ladies and Gentlemen,

First of all I should like to say how pleased I was to be invited by the Chief Justice of Nigeria, the Commonwealth Secretariat and Interights to address such a distinguished audience - especially in this country which I have never previously had the privilege to visit. I am grateful for an opportunity to speak on a subject which is of course close to my heart but one which is also, I believe, of relevance to current developments on this continent. I refer to the system of human rights protection embodied in the European Convention on Human Rights, and its machinery - in particular the European Court of Human Rights. Nigeria and the community of the States which are parties to that Convention have in common that their fundamental rights provisions are, to use the words of our colleague Nnaemeka-Agu, largely based on the norms set out in the Universal Declaration of Human Rights adopted in 1948 by the General Assembly of the United Nations.

The Nigerian Constitutions and the European Convention on Human Rights therefore have the same origin as regards the rights and freedoms which they guarantee. What is more, the African Charter on Human and Peoples' Rights of 1981 is also to be viewed, just like the European Convention, within the context of the broader human rights landscape of the Universal Declaration. Because of these common roots - and therefore common responsibilities - the European experience may be of some value to our African colleagues, while their experience is of course of great interest to us.

I. THE CONVENTION SYSTEM

1. The European Convention on Human Rights was introduced as a response to the horrors and atrocities experienced in Europe in the 1930s and 1940s and in particular during the Second World War. The lesson learnt was that observance of human rights is not exclusively a matter between the State and its citizens: the international community as a whole has responsibility for safeguarding the fundamental rights and freedoms of human beings.

2. On 4 November 1950, eighteen months after the signature of the Statute of the Council of Europe and barely nine months after the first meeting of the governmental experts appointed to draft the text, the Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome. In present-day terms it is little short of miraculous that it proved possible to establish a system as far-reaching as that of the Convention in such a short time. Evidently there existed a political consensus as to the need for European protection of human rights.

3. By virtue of the Convention the Contracting States undertake to secure to everyone within their jurisdiction a number of rights and freedoms set forth in the Convention. In sum, these are the classic civil and political rights. In addition, the Convention sets up a control machinery for enforcing the undertakings of the Contracting States. The Convention allows not only States but also individuals to take proceedings against a

Contracting State responsible for an alleged breach of the Convention. It is thus a legally binding instrument under which sovereign States agree to accept positive duties and to recognise that individuals have rights under international law. As such the Convention represented a historic and unprecedented step forward in international law. There can be no doubt that the right of individual petition is of crucial importance and lies at the very heart of the Convention's system of protection.

4. Three institutions are vested with the function of ensuring observance of the undertakings contained in the Convention: the European Commission of Human Rights, the European Court of Human Rights, both of which were created by the Convention itself, and the Committee of Ministers of the Council of Europe.

The Convention entered into force on 3 September 1953. The Commission was established in 1954 and the Court in early 1959.

5. All applications under the Convention are examined in the first place by the Commission. An application may be introduced against a Contracting State either by another Contracting State or by any person, non-governmental organisation or group of individuals.

The Commission's task is threefold. It has first to determine whether the application satisfies the requisite conditions for admissibility. It then holds itself at the disposal of the parties with a view to securing a friendly settlement. And finally, if no settlement is reached, it draws up a report in which it establishes the facts and expresses an opinion as to whether the facts found disclose a breach of the Convention. This opinion is not binding on the parties but is intended to assist the body which has to take the final decision, namely the European Court of Human Rights or the Committee of Ministers of the Council of Europe.

6. The Court is an independent judicial institution in the normal sense of the term, with one judge from each member State of the Council of Europe and a public procedure.

The Committee of Ministers, which is the executive "organ" of the Council of Europe, decides those cases not referred to the Court, albeit in a procedure which can hardly be said to be judicial.

A case may be brought before the Court by the Commission or by a Contracting State concerned in the case, but, as a result of a compromise reached when the Convention was being drafted, not by the individual complainant who instituted proceedings before the Commission. However, there now exists a protocol, which will, it is hoped, enter into force next year, conferring on the individual applicant a right of access to the Court in cases admitted by the Commission.

7. The Court's judgments are final and binding. They are declaratory in nature. If the Court finds a violation of the Convention, it has no power to quash the decisions of the national authorities or to order consequential measures. It may however award "just satisfaction" in the form of financial

compensation. The judgments are transmitted to the Committee of Ministers, which supervises their execution.

8. This, in brief, is how the Convention functions. It was some time before the Court could play to the full the role entrusted to it under the Convention. Several States were slow to recognise the right of individual petition and/or the compulsory jurisdiction of the Court. Besides, the Commission and the States concerned were somewhat reluctant to refer admitted cases to the Court. This explains why one of my predecessors, Judge Rolin, in a lecture some 25 years ago discussed whether the Court had a future and why the first Danish Member of the Court, Judge Ross, in a paper given at about the same time, spoke of us as a court seeking employment.

Today the situation is totally different. First, with the temporary exception of Hungary, Czechoslovakia and Poland, which only recently joined the Council of Europe and signed the Convention, all member States have accepted both the right of individual petition and the compulsory jurisdiction of the Court. Furthermore, in admitted cases raising legal issues of importance, not only the Commission but also a growing number of governments now consider it appropriate or even necessary that the final decision should be given by the Court. The increase in the Court's activities is strikingly demonstrated by the fact that whereas in the first 15 years on average only one case a year was brought before the Court, the yearly figure was 31 cases in 1989, 61 cases in 1990 and (81) in 1991. The Court took 26 years to deliver its first one hundred judgments, whereas it reached its second hundred in only a little more than 4 years and its third hundred in about 2 years.

9. The Convention does not - and I wish to emphasise this point - institute a system intended to replace national human rights protection. On the contrary, as the Court has said on several occasions, the Convention system is of a subsidiary nature. The primary responsibility for the effective safeguarding of human rights and freedoms lies with the Contracting States, in particular with their judiciary. This is reflected in the rule that no State has to answer before the Convention bodies for its acts before it has had an opportunity to redress the alleged wrong within the context of its own legal order.

A number of States have incorporated the Convention into their domestic law. The Contracting States are, however, not required to do this in order to enable their authorities to secure the rights and freedoms guaranteed. Several States, including the United Kingdom and my own country, Norway, have not incorporated the Convention. Nevertheless, as regards those States also, it is, of course, a legally binding instrument. At the time of ratification the British and the Norwegian Governments assumed that their domestic law was in full conformity with the Convention's provisions. It is, however, undeniable that the Convention as interpreted by the European Court has had some impact upon the domestic legal systems in both countries.

As regards Norway, some important human rights which are not contained in the Norwegian Constitution are included in the

European Convention, and the Norwegian courts seek to interpret national law in such a way as to avoid conflict with the Convention. In order to justify its reasoning the Norwegian Supreme Court has thus in several judgments cited the Convention as an authoritative reference text for the interpretation of fundamental rights and also relied on the case-law of the Strasbourg Court. If there were to be a conflict between national law and the provisions of the Convention, it would be for the courts to decide. I should perhaps mention that in a lecture in 1981 I said that in my opinion it could be argued that precedence should be given to the Convention.

I am aware that the position is different in the United Kingdom. I know, however, that the United Kingdom courts have also referred in some instances to the European Convention and to the case-law of the Strasbourg Court.

II. THE IMPACT OF THE COURT'S CASE-LAW

10. After these summary observations concerning the Convention system in general, I should like now to focus a little more closely on the Court and on the impact of its case-law within and outside the Convention community.

1. The Kind of Case Dealt With by the Court

11. The States which are parties to the Convention are already committed to upholding human rights, since by virtue of their membership of the Council of Europe they have undertaken to "accept the principles of the rule of law and of the enjoyment by all persons within [their] jurisdiction of human rights and fundamental freedoms". The Strasbourg Court as a consequence does not in practice have to deal with allegations of serious and wide-scale violations of human rights of the kind that occurred in Europe before and during the Second World War and which even today are sadly too frequent in other parts of the world.

12. This is not to say, however, that the cases which come before our Court may not be of great significance for the States involved. This can be seen by looking at the subject-matter of some of the judgments delivered in the last three or four years. The Court has naturally retained its staple diet of "judicial procedure" cases concerning the arrest and detention guarantees and the right to a fair administration of justice in civil and criminal matters. In addition, the range of issues coming up for decision has been extended beyond these classic grievances to cover, to cite but a few examples: the risk alleged by Chilean nationals and Sri Lankan Tamils of being exposed to torture or inhuman treatment in the event of being expelled to Chili by Swedish authorities (in the first case) or to Sri Lanka by the British authorities (in the second case); application of the immigration rules in the United Kingdom, and of expulsion or deportation rules in the Netherlands, in Belgium, in France and in Sweden; the constitutional prohibition of divorce and the status of children born out of wedlock in Ireland; issues related to the taking of children into public care in Sweden and the United Kingdom; various aspects of freedom of expression in member countries; security vetting for government employees in

Sweden; homosexuality laws in Ireland; absence of access to the courts to challenge decisions of administrative authorities and professional bodies in the Netherlands, Sweden and Belgium; compensation for nationalisation of the British shipbuilding and aircraft industries; the language provisions in Belgian legislation governing elections to Regional Legislative Assemblies; succession and rent control laws in Austria. And the list could be continued. The short point is that the Court's judgments are more and more concerned with issues going to important aspects of social or even economic life in the Convention countries.

2. The Nature of the Review Carried out by the Court

13. The European Court of Human Rights is thus called on to review the actions of legislative, executive and judicial authorities in the democratic countries subscribing to the Convention. The Convention strikes a subtle balance between the sovereignty of the Contracting States and the power of review of the Convention institutions. To take account of the special character of the Convention, the Convention institutions have developed a number of principles of interpretation, the most important of which may be briefly described as follows:

(a) "Autonomous" Nature of the Concepts in the Convention

14. In many of its provisions, the Convention refers back to concepts found in the domestic legal systems of the Contracting States, for example a "criminal charge". If the concrete meaning to be given to those concepts in relation to a specific case were invariably to be the meaning found in the domestic law of the respondent State, this would lead to unequal protection under the Convention in the various Contracting States as a result of the "accident" of the way in which the domestic law happened to be framed. In order to avoid such inequality of treatment and to ensure consistency in the content of the Convention's guarantees from country to country, the Court has enunciated the principle of the "autonomy" of the meaning of the expressions used in the Convention, as compared with their meaning in domestic law.

The legislation of the respondent State is not, however, without importance: it provides the starting-point for the analysis. Similarly a comparative study of the legal systems of all the Contracting States may well disclose the existence of a common approach and thus a uniform core to the Convention concept.

(b) Evolutionary Interpretation

15. The vast majority, if not all, of the concepts stated in the Convention are directly linked to social and legal conditions in democratic society. As a result, they are not static, but, on the contrary, are susceptible of evolution and development with the passage of time. There is thus a concurrent need for an evolutionary interpretation of such concepts, reflecting relevant changes in the life of democratic society, if the Convention is not to become progressively ineffective. "The Convention", the Court stated in a 1978 judgment, "is a living instrument which

must be interpreted in the light of present-day conditions". In some of the cases so far referred to the Court, the changes were judged to be decisive, so that State action - or omission - which may once have been permitted by the Convention now became prohibited, as for example in a Belgian case concerning the legal status of unmarried mothers and illegitimate children. In other cases the admitted changes had not reached a critical stage justifying such a conclusion.

This technique of treaty construction of course has its limitations. Extending the list of guaranteed rights can only be achieved by "legislative" action, that is by elaboration by the Contracting States of additional Protocols to the Convention. Evolutive interpretation nevertheless has a significant role to play in ensuring that the existing rights in the Convention are not overtaken by events but remain adapted to our European society of today and tomorrow.

(c) Margin of Appreciation

16. On the whole the Convention, with its general language, sets standards rather than imposing inflexible uniform rules. The manner of meeting the required standard will vary from country to country, depending upon the prevalent legal, social and political conditions and traditions. The national authorities have a choice, in other words a discretion, as to the means to be employed for implementing the Convention standard. This notion has been expressed in the Strasbourg case-law by saying that in such instances the Convention leaves the Contracting States a "margin of appreciation". In cases where this doctrine applies, for a violation of the Convention to be found, the national authorities must have exceeded their margin of appreciation.

Of course, the margin of appreciation and, correspondingly, the bite of the Court's review will vary according to the context. In areas where there is a legitimate range of difference of opinion in democratic society, the decision falls within the sphere of responsibility of the national authorities acting in accordance with democratic processes. Provided that the national authorities remain within the legitimate range of difference of opinion, it is not for the European Court of Human Rights to substitute its own view as to what would have been a preferable solution. In other areas, for example where the language of the text is restrictive rather than flexible, the Convention leaves lesser scope for national discretion, it imposes greater restraints on national sovereignty; consequently, the margin of appreciation is narrow.

As the renowned international jurist Sir Humphrey Waldock, former President of both the European Commission and the European Court of Human Rights and thereafter the President of the International Court of Justice, has written:

"The doctrine of the 'margin of appreciation' ... is one of the more important safeguards developed by the Commission and the Court to reconcile the effective operation of the Convention with the sovereign powers and responsibilities of governments in a democracy."

Criticism of the Court's use of the margin of appreciation doctrine has focused on its lack of precision, its use without principled standards. It may be that such criticism is justified to some extent. However, the Court needs flexibility to deal with vague concepts in the Convention and the diversity of legal systems and practices in member States. I agree with Sir Humphrey Waldock that the doctrine of the margin of appreciation is important, and I am convinced that it is an enduring concept in the jurisprudence of the Court.

(d) Effects of the Court's Judgments

17. A judgment by the Court is binding only for the State or States party to the particular case. (50) Its judgments do however furnish guidance to the other Contracting States, depending of course on the subject-matter which was in issue before the Court. Indeed it is by no means unusual for the legislature or the judiciary of a State which was not a party to a given case to act upon a decision of the Court by amending its legislation or adapting case-law. To give but one example: the 1988 judgment in the case of Brogan and Others v. United Kingdom led the Netherlands Government to reconsider whether the time which, under the Dutch Criminal law, may elapse between the arrest of a person and his or her appearance before a judge can still be deemed to satisfy the requirement of "promptness" laid down by Article 5 of the Convention. The Netherlands Parliament is currently examining a Bill providing for an amendment of the Code of Criminal Procedure on this point.

(e) Conclusion

18. My distinguished colleague Judge Walsh, who until his recent retirement also went by the title of Mr Justice Brian Walsh of the Irish Supreme Court, has said that the European Court of Human Rights acts rather like a constitutional court. Whilst the particularities of the Convention system render it dangerous to push the analogy too far, it is true that the kind of issue that comes before the European Court of Human Rights has much in common with the civil-liberties or fundamental-rights issues commonly adjudicated upon by constitutional or supreme courts in political democracies. Equally, the judicial review carried out by the European Court is similar in nature to that carried out by constitutional or supreme courts.

3. The Convention and the Outside World

(a) The Soering Judgment

19. This move towards a constitutional role clearly has effects within the Convention community itself, but it can also be seen to have an increasing influence on the community's relations with the outside world. A striking indication of this development is the case of Soering v. United Kingdom, decided in July 1989, where the European Court unanimously held that the extradition of a young German national to the United States of America to face a capital murder charge and the attendant risk of the death penalty would involve inhuman or degrading treatment contrary to Article

3 of the Convention, notably because of his exposure to the so-called "death-row phenomenon".

The Soering judgment confirmed the case-law of the European Commission of Human Rights that extradition by a Contracting State may under certain conditions involve the responsibility of that State under the Convention for foreseeable ill-treatment which the extradited person is liable to suffer in the receiving country. The primary purpose of Article 3 is clearly to proscribe ill-treatment by the Contracting States' own agents, whether by overt or covert action; but the obligation imposed by Article 3 is such a fundamental one in a democratic society that it also embraces not sending an individual to a destination where he faces a likely fate of prohibited ill-treatment. There consequently exists a degree of extra-territorial responsibility under Article 3.

(b) The Convention and the European Community

20. As I have endeavoured to explain, the Human Rights Convention has been assuming over the years the mantle of a basic law for Europe on fundamental rights. This being so, it is evident that the Convention community of twenty-six States cannot remain indifferent to human rights protection within the European Community of the Twelve - what used to be known in ordinary parlance as the Common Market -, which does not have a human rights constitution of its own. Two solutions to fill this void have been under discussion for many years, namely the adoption of a catalogue of fundamental rights by the European Community itself and the accession of the European Community as a full Party to our Convention. The latter solution is favoured by the Parliamentary Assembly of the Council of Europe, the European Parliament and the Commission in Brussels which, following a proposal of its President, sought last year the authorisation of the Council of Ministers, to enter into negotiations with a view to the possible accession of the European Community to the Convention.

In the meantime it is the European Court of Justice in Luxembourg which ensures the protection of the fundamental rights and freedoms of the individual in his or her relations with the European Community institutions. It does so on the basis of general principles of law, which are deemed to be an inherent part of European Community law. In identifying the principles material for the safeguarding of fundamental rights and freedoms, the European Court of Justice draws inspiration not only from the constitutional traditions common to the twelve member States but also from international treaties for the protection of human rights on which those member States have collaborated or of which they are signatories, including in particular the Strasbourg Convention.

(c) The Convention as a Model outside Europe

21. Furthermore, the Convention's influence has extended beyond the frontiers of Europe and it is seen as an example in countries and continents where attempts have been made to secure a better protection of human rights. Thus it provided the model for the American Convention on Human Rights of 1969, which came into

force in 1978; it also served as one of the reference texts for those drafting the African Charter on Human and People's Rights. Its reach can perhaps be said to be worldwide, not only because of its influence as a model, but also because more and more often courts in countries such as Canada, Australia and India are seeking interpretational guidance in the case-law of our Court.

3. Conclusion

22. Mr Chairman, Ladies and Gentlemen, my attempt to outline to you the European Court of Human Rights and its work was intended to explain what has been achieved so far under the Convention system and thereby to point to its potential. It is my firm conviction that if the Court continues in the course that it has followed since its early days it will consolidate more and more its emergent role as a European constitutional court. This evidently calls for a certain amount of "activism" from the Court in interpreting the Convention in order to ensure that it remains a "living instrument", allied with some caution in applying the Convention to the remarkably varied spectrum of cases nowadays submitted for decision, "judicial self-restraint" also being an essential element of the equation. On the other hand, there is no future for the Court unless the Contracting States are willing to preserve actively what has been achieved so far, and to adapt the machinery where changing circumstances so require.

III. REFORM OF THE CONVENTION SYSTEM

23. This brings me to the question of the reform of the Convention system, which has been under discussion since the Ministerial Conference on Human Rights held in Vienna in March 1985. The call for reform was prompted by the ever increasing growth in the workload of the Convention institutions and the consequential adverse effect on the length of the Strasbourg proceedings. I referred earlier to some statistics concerning the Court's activities. As to the Commission, I would mention that whereas 596 applications were registered in 1985, the figure in 1990 was 1,657.

The reasons for such a substantial increase are doubtless manifold and careful analysis is needed to explain fully this progression. Evidently it has something to do with the fact that over the last ten years more and more States have joined the Council of Europe and accepted the Convention as well as the right of individual petition to the Commission and the compulsory jurisdiction of the Court. But there is also a more fundamental reason. It certainly cannot be said that the rights of the individual are today more frequently disregarded within the Council of Europe member States. Many of the applications to the Convention institutions may be explained rather by the fact that citizens, who are now generally more conscious of their individual rights than ever before, believe that a European remedy is the best remedy for their grievances. Indeed, it is not surprising that in our "shrinking" and homogeneous society at the end of the 20th Century the citizen should seek to take this supranational route.

24. The Commission and the Court operate within a framework which was conceived and established some 40 years ago and which has undergone only minor changes in the intervening period. As to length of proceedings I am able to say that so far the Court has succeeded in maintaining an average of some 12 to 15 months for the examination of cases brought before it. For a court which is not in permanent session this is perhaps not unreasonable. But the total duration of proceedings before the Convention institutions - from introduction of an application before the Commission until the Court's delivery of judgment - is clearly overlong.

25. Various schemes for preserving the effectiveness and thus the future of the Convention system have been suggested, including the three following possibilities:

1. the Commission and the Court should become permanent within the existing framework;
2. the Commission should be converted into a first-instance court, the Court into a court of appeal;
3. a single permanent court should be instituted with competence to decide on both the admissibility and the merits of applications.

The Court has not yet been invited to express an opinion on the possible restructuring of the Convention control machinery. On the three proposals canvassed I would only say the following:

26. The first solution has an advantage which is by no means negligible, that it could be achieved fairly easily and rapidly: to make the Commission and the Court permanent institutions, otherwise functioning within the present framework of the Convention, requires no more than the funds necessary for them to operate as such. It can also be expected that proceedings under the Convention would on the whole be shorter if the Commission and Court could sit on a permanent basis. However, the conferring of permanent status on the institutions will not in itself help to overcome the complexity of the present control machinery. The problem here is that, under the Convention, two independent institutions were set up, one of which is primarily competent to consider the admissibility of applications, while the other has jurisdiction to decide finally on the merits. To understand fully this special structure, it should be recalled that in 1950 the creation of a court as a control body under the Convention did not meet with the agreement of all the member States of the Council of Europe. Today one must ask whether it is really the best solution to continue with a system that requires cases to be examined by two institutions, one of which serves more or less as a filter for the other. Such separation involves a duplication of effort and an in-built factor of delay. It is also, of course, a drain on resources. Furthermore, with the likelihood that, after Hungary, Czechoslovakia and Poland, more new European democracies will join the Council of Europe and ratify the Convention, it may be questioned whether it is reasonable to envisage a permanent Commission and Court, each with perhaps thirty members.

27. Under the second solution the Commission would operate as a court of first instance. Individual applicants and States would be accorded the right to appeal to the Court against the Commission's decision, possibly subject to leave to appeal being granted, a decision which would obviously fall to the appellate court.

The introduction of such a system may have the advantage that it would not necessitate a complete remodelling of the Convention control machinery. Furthermore an examination of a case at two levels of jurisdiction may enhance the quality and authority of the final decision. Nevertheless, I am afraid that I do not find this proposal convincing.

The Strasbourg proceedings have to be seen as a last resort in human rights cases. As the Court has said many times, the Convention system is of a subsidiary nature: it is in the first place for the national authorities and in particular for the domestic courts in our countries to secure the protection of the human rights and freedoms set forth in the Convention. This is reflected in the rule that no State has to answer before the Convention bodies before it has had an opportunity to redress the alleged wrong within the context of its own legal order. The practical consequence of this pre-condition is that complaints lodged in Strasbourg will usually have been examined by two or more national courts and, in most Convention States, already under the very same provisions which are later at issue in Strasbourg. In this respect there is an important difference in relation to the usual situation in the European Communities. It is therefore misconceived to point to the establishment of a court of first instance in Luxembourg as a model to be followed in Strasbourg.

The setting up of a Convention control mechanism in the form of two courts - either both having full competence or one having full competence and the other being an appellate court with limited competence - is not likely to meet the challenge of dealing with cases within a reasonable time. It is significant that none of the Contracting States which have instituted a specific judicial mechanism of human rights protection have opted for a system with two levels of jurisdiction.

28. The third solution is that of the creation of a single court vested, as the courts in Europe traditionally are, with jurisdiction to decide on both the admissibility and the merits of a case brought before it. Such a reform of the control machinery, which would have the advantage of avoiding the delays inherent in a two tier system, would obviously be a radical and substantial one. It requires careful reflection, intellectual ingenuity and imagination. To mention only one aspect, it would be important to retain the possibility of a friendly settlement procedure, which has proved so valuable in proceedings before the Commission.

29. It came as no surprise at the Vienna Ministerial Conference when the Swiss Government advocated an amendment of the Convention along the lines of a single court. Several years have passed since then and the enlargement and possible further enlargement of the Convention community following the recent

political developments in Central and Eastern Europe have made it quite plain that a solution has to be found in the near future. The problem is currently under examination within the Council of Europe Steering Committee for Human Rights. Without underestimating in any way the difficulty of its task, I hope very much that the Committee will be able to report soon, so that the Commission and the Court will have sufficient opportunity and time to study and comment on the results of its work. The reform of the Convention system has indeed become a matter of urgency. In any event an appropriate solution will have to be found so as to maintain the effectiveness of the Convention system in the face of all the attendant difficulties, not least those which the growth and very success of the system are generating.

* * * *

Mr Chairman, Ladies and Gentlemen,

Last year, we celebrated the 40th Anniversary of our Convention. Over the years the Court has developed from a minor organ in the European legal framework to an institution of considerable significance, not only for the lives of individual European citizens but also for the Convention community as a whole. The achievement of the Strasbourg institutions goes beyond remedies afforded in specific cases. There is an awareness in Europe, at government level as well as amongst ordinary citizens, that proper respect for human rights is essential for the functioning of political democracy as we know it. The Convention is the expression of that awareness. The Convention institutions have been entrusted with the task of giving body, continuity and consistency to the aspirations for a greater unity between the member States of the Council of Europe based on the principles of political democracy and the rule of law as articulated in the Convention.

This task entails a great responsibility especially, as far as the future is concerned, as a result of the events in the countries in Central and Eastern Europe. The Convention community is open to those countries; the construction of the European Home, to use President Gorbachev's expression, began forty years ago with the Council of Europe, an idea launched by Winston Churchill even before the end of the Second World War. This solid and existing foundation should not be overlooked in amid the current proliferation of new ideas and concepts concerning the future landscape of Europe. The breakthrough, if I can put it like that, of political democracy on our Continent at the close of this century gives us the opportunity to extend the unification process in Europe, but it is in our interests to do so on the foundation of what has been achieved over the past forty years, in particular in the field of the protection of the individual's fundamental rights and freedoms.

However, and I wish to emphasise once again what I said at the beginning: the main protection of human rights and fundamental

freedoms has to be secured by national authorities, in the last resort by domestic courts. Accordingly, the success of the Convention system will depend on whether or not there is to be some sort of "co-operation" between national courts in member countries and the European Court.

Under the African Charter of Human and Peoples' Rights there is no Human Rights Court. In the light of our experience in Europe I should like to suggest that every effort should be made to establish such an institution within the framework of your Charter. I am convinced that, for an international human rights protection system to be effective, it is essential to make provision for the possibility of a final and binding decision on human rights complaints by a court.

Mr Chairman, Ladies and Gentlemen, I thank you for your attention.

The Potential Relevance of the European Convention on Human Rights

Anthony Lester QC, Lisa Tedeschini and Beverley Byfield

The European Convention on Human Rights¹ represents an historic step forward in international law. The Convention was adopted in 1950 and came into force on 3 September 1953. It was the first international human rights treaty to provide individuals with legally enforceable rights against states. Such a development was never previously contemplated under traditional international law which made redress for the individual dependent upon the decision of his or her national State whether to take up a claim or not. Consequently, the European Convention established a truly remarkable advance in the effective protection of human rights under the rule of law. Even more significant, the Convention affords the same protection to every individual - regardless of nationality - provided the individual is "within the jurisdiction" of the relevant State Party.

The European Convention on Human Rights is today considered to be the most advanced and effective of all the existing international systems for the protection of human rights. Itself modelled on the Universal Declaration of Human Rights, the Convention has served as a model in the drafting of many national Bills of Rights as well as other regional human rights treaties.

¹ All figures are taken from the Council of Europe Survey of Activities and Statistics 1990 and the Council of Europe Press Communique dated 31 January 1990.

The Convention's case law increasingly provides guidance on the interpretation of fundamental rights guarantees to national courts and to other regional and international human rights tribunals. The influence of its jurisprudence has spread far beyond the borders of Europe.

All of this is not to say that the system is a perfect one. It embraces a limited number of basic civil and political rights, for example, the right to life, liberty and security of the person, the prohibition of forced labour and of torture, inhuman and degrading treatment or punishment, the right to a fair trial, to freedom of expression, religion and association. Some of the most glaring omissions - the right to freedom of movement, to property, education, and the right to vote - have since been remedied by the adoption of a number of Protocols to the Convention.

However, other deficiencies remain. Absent is any specific guarantee of equal protection of the law. Although such a right is afforded to individuals, it exists only by virtue of the Treaty of Rome (which set up the European Community) and relates only to discrimination based on nationality or gender. (It is worth noting here that the European Community has made compliance with the European Convention a condition of membership in the European Community). The right of non-discrimination under the European Convention does not stand alone but instead, applies only in respect of the enjoyment of the other rights which it guarantees. Except to the extent mentioned above, economic and

social rights, too, are excluded.

The European Convention on Human Rights has now been ratified by 24 Member States of the Council of Europe, under whose auspices it was adopted. They have also accepted the European Court's jurisdiction to render decisions which are legally-binding on them. The preamble to the European Convention states:

"[c]onsidering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms" (underlining supplied).

The Council of Europe is in the process of embracing a wider membership². The impact of its case law is likely to have an ever wider impact.

THE SUPERVISORY MACHINERY

The task of supervising Contracting States' compliance with their obligations under the Convention lies with the European Commission and Court of Human Rights and that of enforcement with the Committee of Ministers. These bodies were established by the Convention³ and the selection process for the membership of each body follows a similar procedure. Article 20 requires that the European Commission be composed of a number of members equal to

² Hungary became a member on 6 November 1990, Czechoslovakia on 21 February 1991, Poland on 26 November 1991 and Bulgaria on 7 May 1992. Yugoslavia made an official application on 6 April 1990. Romania and a number of republics of the former USSR have also expressed an interest in joining (see Interights Bulletin Vol.5 1990 No.1 and Vol.6 1991 No.1).

³ see Article 19.

that of the States Parties to the Convention while Article 38 requires membership of the Court to be equal to the number of Member States in the Council Europe. Commission Members are elected by the Committee of Ministers (by the Consultative Assembly in the case of the Court) from a list of nominees submitted by each Member State. While no two Members of the Commission or Court may be nationals of the same State, a Contracting State may nevertheless nominate a non-national to represent it on either body. Commission candidates must be persons "of high moral character and must either possess the qualifications required for appointment to high judicial office or be persons ["jurisconsults" in the case of the Court] of recognised competence in national or international law" (Article 21(3)).

The Commission's principal function is to conduct preliminary investigations into allegations of violations of Convention rights. Article 25 enables individuals to submit their complaints to the Commission where the applicant claims to be the "victim" of a violation by his or her Contracting State, of any of the rights guaranteed under the Convention. The Convention jurisprudence has now broadened this notion to include "indirect victims", for example, the widow or widower of, or those standing in a particular relationship to, the alleged victim.

Once the Commission has established that all the procedural

rules have been complied with⁴ and that the case is admissible, it will then embark on a fact-finding procedure to establish the facts of each application. It initiates negotiations between the Applicant and the Respondent State in an attempt to secure a "friendly settlement" of the dispute in question (Article 28). However, any such "friendly settlement" may only be achieved if the terms accord with the Convention guarantees.

In general, monetary compensation is considered appropriate only in cases where a repetition of the alleged breach is unlikely. This will be the case where, for example, new legislation has been enacted or new administrative directions issued by the government concerned. From the time of its inception to 31 December 1989, the Commission has succeeded in bringing about 84 friendly settlements.

Where the negotiations provided for under Article 28 prove unsuccessful, the Commission draws up its report on the facts and states its opinion as to whether there has been a breach of any of the Convention rights. This report is then sent to the Committee of Ministers - together with any proposals the Commission may think appropriate - and to the State Party or Parties. Within three months thereafter, the case may be referred to the Court, either by the Commission itself or by the

⁴ For example, that effective domestic remedies have been exhausted, that the six month time limit has been complied with, that the alleged violation relates to a Convention-guaranteed right and that the application is not anonymous or an abuse of the right of petition.

Contracting Party or Parties involved. If no such reference is made, it is for the Committee of Ministers to determine the fate of the application, and its decision is final and binding⁵ on the Contracting States (Article 32).

This provision has given cause for concern for a number of reasons. The Committee of Ministers is not a judicial authority but a political body; it comprises the Foreign Ministers of the Council of Europe. The Commission's legally-based finding of a violation is not automatically upheld by the two-thirds vote of the Committee of Ministers. Furthermore, the Committee of Ministers often allows the Respondent State a very lengthy period of time - sometimes up to two or three years - in which to implement measures called for by the Committee. The Committee's lack of judicial competence and independence from the Governments of the States Parties also means that it is not well placed to ensure that the remedial measures taken by a State Party are in fact in conformity with the Convention.

Another major concern is that Committee decisions can also result in an inconsistent application of the Convention guarantees. For example, in the case of Dobbertin v. France⁶, the Commission found, by 10 votes with one abstention, that the applicant's rights under Article 5(3) had been violated in that,

⁵ A two-thirds majority of the Committee of Ministers is required to establish a violation of the Convention (Art. 32 para.1).

⁶ Application Nos. 9863/82 and 10924/84.

inter alia, he had not been brought promptly before a judicial authority to have the lawfulness of his six-day administrative detention reviewed. The case was not referred to the European Court and it was therefore for the Committee of Ministers to decide whether there had been a violation of the Convention. The Committee was unable to reach the necessary two-thirds majority, concluded that no further action was called for, and therefore removed the case from its agenda⁷ without a final decision on the merits of Mr. Dobbertin's complaint.

This case contrasts sharply with that of Brogan and others v. United Kingdom.⁸ which was referred to the European Court for a legally-binding decision. The Court held, inter alia, that the four men held on suspicion of involvement in terrorist offences without being charged or brought before a judicial authority for periods ranging from four days and six hours to nearly seven days, had suffered a violation of their rights under Article 5(3).

In those cases where the Commission declares an application inadmissible, that is the end of the matter; there is no provision for appeal to the Court. This is so even if the Commission exceeds its mandate and considers the merits at the admissibility stage. This has occurred in a number of cases, perhaps most notably in Council of Civil Service Union and Others

⁷ Committee Resolution DH (88) 12, adopted 29 September 1988.

⁸ 11 EHRR [1988] 117.

v. United Kingdom⁹ which concerned the security vetting of trade union members. In ruling the application inadmissible, the Commission held that the interference with the applicant's freedom to join a trade union was justified under Article 11(2) of the Convention. The Commission arrived at its conclusion even though the case raised novel and important questions of interpretation of the Convention in the light of International Labour Organisation (ILO) Conventions, and even though it raised novel and important questions about the application of the requirement contained in the first sentence of Article 11(2) that any restriction on the right must be "necessary in a democratic society in the interests of national security or public safety". There is also a worrying tendency of the Court to give Member States a very wide "margin of appreciation" in exercising powers which interfere with fundamental human rights and freedoms.

EFFECTIVENESS OF THE CONVENTION SYSTEM

In spite of these shortcomings, there is no denying the effectiveness and the positive and far-reaching impact of the Convention case law.

While compliance with the Court's judgments is generally satisfactory among Member States, this does not represent the complete picture. Friendly settlements play a significant part. Increasingly also, States Parties are more conscious of the

⁹ 10 EHRR [1987] 269.

Convention jurisprudence and will review proposed legislation to ensure conformity with the Convention. They may also amend existing legislation or alter their administrative practices so as to pre-empt an adverse finding by the Commission or Court.

Each year the Commission receives approximately 5,000 individual communications. Of those received in 1990, the Commission registered 1,657 applications. To January 1991, the Commission has received a total of 20,853 individual applications and of these, has declared 821 admissible.

The Commission's case load is not limited to individual applications. Article 24 provides for inter-state complaints to be lodged by one Contracting State against another, in respect of any alleged breach of the Convention. However, Member States are reluctant to lodge such complaints - possibly influenced by economic, political or other considerations of international relations. Inter-state cases therefore form a very small proportion of the Commission's case load; between the coming into force of the Convention and up to 1989, only 18 such applications have been lodged with the Commission¹⁰ and only one has reached the Court¹¹.

Article 48 limits standing to bring cases before the European Court, the final supervisory body in the Convention system, to the Commission and the Contracting States involved in

¹⁰ These appear in the bilingual series (English and French) entitled "Decisions and Reports" which can be ordered free of charge from the Publications and Documents Division of the Council of Europe, F-67006 STRASBOURG CEDEX.

¹¹ Ireland v United Kingdom, [1978] 2 EHRR 25

any alleged breach. Consequently, neither the Court nor the applicant (except in the case of inter-state applications) has any part in determining the number of cases or the issues which appear in its docket. The Court's case load has nevertheless grown significantly in recent years¹². Between 1959 and 1975 - a period of almost 17 years - the Court gave only 20 judgments. In almost 15 years from 1976 to 1990, the Court gave 214 judgments¹³. This represents an eleven-fold increase in the Court's caseload during the second period.

ACCESS TO COURT

A prerequisite for the effective protection of human rights is real and effective access to equal justice under the law. Before turning to examine some of the Convention jurisprudence and its impact in a number of national jurisdictions, particular mention should be made of the right of access to an independent and impartial court.

The Banjul Affirmation highlighted this crucial issue when it confirmed that it is :

"essential for there to be real and effective access to the ordinary courts for the determination of criminal charges and civil rights and obligations by due process of law. These safeguards are necessary if the rule of law is to be meaningful, and if the law is to be of practical value to ordinary men and women" (page 3).

¹² The Court's judgments may also be ordered free of charge from the Council of Europe.

¹³ from "The Future of the European Court of Human Rights", Public Lecture given by Rolv Ryssdal, President of the European Court of Human Rights, at King's College, London, 22 March 1990.

If individuals are to fulfil the requirement contained in international and regional human rights treaties that domestic remedies be exhausted before they can resort to lodging complaints under the appropriate instrument then, indeed, effective access to national courts must be ensured. Without such access, the justiciable Bill of Rights in domestic constitutions becomes meaningless.

The European Court of Human Rights has upheld this right in a number of cases. In Airey v. Ireland¹⁴, the applicant wished to obtain a judicial separation from her husband but lacked the means to employ a lawyer. No legal aid was available for civil proceedings. A judicial separation was only available in the Irish High Court and the prescribed procedure was very complex. Mrs. Airey complained to the Commission that the prohibitive cost of litigation prevented her from instituting the proceedings she wished to and that her right of access to the courts was, as a result, effectively denied. The European Court upheld her complaints, finding a violation of her rights under Articles 6¹⁵ and 8¹⁶ of the Convention. In doing so, the Court observed that

¹⁴ 2 EHRR [1980] 305; Judgment of 9 October 1979, Series A No. 32.

¹⁵ Article 6 of the European Convention states:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...". cf. African Charter, Art. 7.

¹⁶ Article 8 of the Convention states that everyone has the right to respect for his private and family life, his home and his correspondence. Interferences with the exercise of this right by a public authority must be in accordance with the

[j]udicial separation is a remedy provided for by Irish law and, as such, it should be available to anyone who satisfies the conditions prescribed thereby; ..." (para. 23).

and further, that "hindrance in fact can contravene the Convention just like a legal impediment ...". The State in this case had failed to provide an accessible legal procedure for the determination of the rights and obligations created by Irish family law. In rejecting the State Party's contention that it had in no way deliberately impeded Mrs. Airey's access to justice, the Court noted that the Convention at times imposes positive obligations on States in order to give practical value to the Convention rights. This is so in order to ensure that the guarantees are, in reality,

"not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial ..." (para.24).

Under the European Convention system, legal aid is available but the scheme is very limited. Legal aid only becomes available once the government has lodged its views on admissibility. There is no legal aid to cover the cost of lodging an application and an applicant frequently does this preliminary work without being aware of the services of an organisation such as Interights, or of a public-minded lawyer with the necessary expertise. The initial submissions may have a decisive role in whether the application is ruled admissible or not and the applicant's

law and necessary in a democratic society in the interests of matters specified in Article 8(2). Cf. African Charter, art. 18 and The Constitution of Nigeria 1979, s. 34.

chances of success would certainly be improved if legal aid were to be made available at an earlier stage. As it stands, if a case calls for an exchange of arguments between the respondent State and the applicant, the latter must establish his lack of means by producing an officially certified document, before legal aid will be granted. As at 31 January 1990, legal aid has been granted to 468 applicants. Even where it is granted, however, the level is derisory.

INTERPRETATION

The jurisprudence of international and regional courts and tribunals provides useful examples of the purposive approach to constitutional interpretation and of ways in which international human rights norms may usefully be applied in domestic law. Some national courts are already adopting this international and comparative approach. At the Banjul Colloquium in 1990, Professor Umozurike, the then Chairman of the African Commission on Human and Peoples' Rights, acknowledged the trend towards an internationalist approach to common problems in an increasingly interdependent world when he stated that

"human rights have grown beyond the exclusive concern of individual states ...".

In this context, he emphasized that African States cannot contract out of the international customary law of respect for human rights.¹⁷

¹⁷ Developing Human Rights Jurisprudence, Vol. 3: The Third Judicial Colloquium on The Domestic Application of International Human Rights Norms, 1990, p. 51.

The Banjul Colloquium gave senior Commonwealth Judges from around West Africa and elsewhere the opportunity to examine the issue of the domestic application of international human rights norms (including those prescribed by the European Convention on Human Rights) through constitutional and administrative law cases. The Banjul Affirmation - issued by participants in that Colloquium -recognises the importance and relevance of international human rights norms and acknowledges that fundamental human rights and freedoms are inherent in humankind. The Affirmation further reinforces:

- the need to include human rights in legal education and professional legal training so as to improve and widen the dissemination of information about basic human rights and freedoms, and
- the objective of seeking practical ways of realising international human rights standards;
- the need for closer links and cooperation across national boundaries, by the judiciary of Commonwealth and non-Commonwealth Africa, on the interpretation and application of human rights law,
- the Harare Declaration that such co-operation must be brought about, in part, by the development of effective arrangements for the publication and exchange of judgments, articles and other information and special expertise in the realm of fundamental human rights and freedoms.

On October 23, 1953, the Government of the United Kingdom extended the European Convention on Human Rights to those overseas territories for whose international relations they retained responsibility, including Nigeria. Following the Constitutional Conference in London, an enforceable Bill of Rights - the first of many Commonwealth Bills of Rights to be modelled on the European Convention of Human Rights - was

incorporated into the pre-independence Nigerian Constitution.¹⁸ These rights formed an important part of the 1979 Constitution of Nigeria and included the right to personal liberty, the right to a fair hearing, the right to freedom of expression and the press, and the right to the dignity of the human person. Since then, important sections of the Bill of Rights have been over-ridden by military decrees - in particular, Decree Nos. 1¹⁹, 2²⁰ and 13²¹.

Nigeria has played an important role in the formulation of

¹⁸ Nigeria (Constitution) (Amendment No. 3) Order in Council 1959 (S.I. 1959 No. 1772), Art. 69 and Schedule. The code of fundamental rights was subsequently reproduced in Chapter III of the independence Constitution of the Federation of Nigeria, set out in the Second Schedule to the Nigeria (Constitution) Order in Council 1960 (S.I. 1960 No. 165); Chapter IV, ss. 30-40 of the 1979 Constitution and substantially re-enacted in ss. 32-42 of the 1989 Constitution, to be fully operational in 1992.

¹⁹ Decree No.1 of 1983 suspends substantial sections of the 1979 Constitution - including the right to personal liberty - and modifies others; it conferred power on the Federal Military Government "to make laws for the peace, order and good government" of Nigeria.

²⁰ Decree No.2, entitled State Security (Detention of Persons) Decree 1984, provides for the detention of persons if the Chief of Staff "is satisfied that [that person] is or recently has been concerned in acts prejudicial to state security or has contributed to the economic adversity of the nation ...".

²¹ Decree No.13 of 1984 removes the right to institute civil proceedings in respect of "any act, matter or thing done" by the Military Government.

the African Charter on Human and Peoples' Rights²², many of whose provisions were also influenced by the European Convention on Human Rights. Similarities between the fundamental rights embodied in the African Charter and those in the European Convention illustrate the potential relevance of the European Convention system and case law for the effective protection of human rights throughout Member States of the Organisation of African Unity. Opportunities for realizing this potential will hopefully be greatly increased once the African Commission starts to develop its own body of jurisprudence. However, this appears to be a distant prospect as the Commission has yet to make public the results of its examination of any individual or inter-state communication referred to it under the Charter's complaints provisions.

Meantime, the Commission's progress in this direction is keenly watched and awaited. Practitioners and the judiciary in a number of African countries continue to make references to the Charter principles and provisions in the course of constitutional litigation. That there is pressing need for the African Commission's jurisprudential guidance is demonstrated, for example, by the uncertainty surrounding the status of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act of 1983, which seeks to incorporate the African

²² The Charter came into force on 21 October 1986 following ratification by a majority of OAU Member States as provided by Article 63(3). As of October 1991, the Charter has been ratified by 41 OAU Member States.

Charter into Nigerian law.

In the most recent of two conflicting judgments from Nigeria - both from the High Court of Lagos State - the Court rejected the Applicants' request for an order restraining the authorities from carrying out their execution pending determination of complaints filed on their behalf before the African Commission on Human and Peoples' Rights. In doing so the Court stated that it was precluded from considering the matter because its jurisdiction had been unambiguously ousted by Section 10(2) of the 1984 Robbery and Firearms Decree No.5 under which the Applicants had been convicted. Further rejecting the submission by Counsel for the Applicants that the African Charter was part of the laws of Nigeria and as such, was enforceable in a court of law, the Court stated:

"As for the African Charter on Human Right (sic), this cannot override the Laws of the Land. ... The Applicants are Nigerians residing in Nigeria. They were charged in Nigeria for Armed Robbery and were convicted and sentenced to death by a Competent Tribunal on the Law of the Land" (Wahab Akanmu & Anr. v. Attorney-General of Lagos State & Anor., Suit No. M/568/91, judgment of 31 January 1992, as yet unreported).

This is in sharp contrast to the position adopted in the earlier case of Muhammed Garuba & Ors. v. Lagos State Attorney-General & Ors. (Suit No. ID\559M\90). The Applicants in this case were 12 boys who had been convicted of armed robbery and sentenced to death by the Lagos State Armed Robbery and Firearms Tribunal. In an ex parte application for leave, they sought a

declaration that the authorities' decision to carry out their execution (by firing squad) was unconstitutional and violated their right to life, to a fair hearing and to freedom from discrimination. On the hearing of the substantive issue, the High Court granted leave to the Applicants to enforce their rights and further granted an interim order to restrain the State Government from carrying out the executions. Referring to the incorporating Act which had been cited by counsel for the Applicants, the Court observed:

"As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and powers exercising legislative, executive or judicial powers in Nigeria" (Judgment of 31 October 1990, unreported)²³.

No such uncertainty appears to exist in Tanzania where the Court of Appeal recently decided the first of three constitutional cases to have come before it since the Fundamental Rights and Duties chapter of the Constitution came into force in March 1988.

In the case of DPP v Pete (Criminal Appeal No. 28 of 1990), the Court had to determine the constitutionality of an impugned section of the Criminal Procedure Act of 1985 which denied bail to persons charged, inter alia, with the offence of robbery with violence. Dismissing the appeal by the DPP, the Court ruled that

²³ See case review in Journal of Human Rights Law & Practice, Vol. 1 No. 1, May 1991 p.123.

the section was violative of the constitutional right to personal liberty and was therefore null and void. Delivering the judgment of the Court, Nyalali, CJ., referred to Tanzania's ratification of the African Charter in February 1984 and had this to say:

"Since our Bill of Rights and Duties was introduced into the Constitution under the Fifth Amendment in February 1985, that is, slightly over three years after Tanzania signed the Charter, and about a year after ratification, account must be taken of that Charter in interpreting our Bill of Rights and Duties" (judgment of the Court of Appeal of Tanzania, 16 May 1991, as yet unreported).

Referring to the preamble to the African Charter, the Chief Justice continued:

"It seems evident in our view that the Bill of Rights and Duties embodied in our Constitution is consistent with the concepts underlying the African Charter on Human and Peoples' Rights as stated in the Preamble to the Charter".

IMPORTANCE AND RELEVANCE OF THE EUROPEAN CONVENTION JURISPRUDENCE FOR THE AFRICAN CHARTER, NIGERIA AND OTHER COMMONWEALTH COUNTRIES

The Banjul Affirmation recognises and affirms 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).

A number of national courts already refer to European Convention case law in the interpretation of their constitutional guarantees and administrative law. This domestic application of Convention case law demonstrates the persuasive value and influence of its jurisprudence. A few practical examples may usefully serve to illustrate the potential for making use of this body of case law.

INHUMAN AND DEGRADING TREATMENT

Article 3 of the European Convention states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".²⁴

An important instance of the domestic application of European Court case law may be seen from the case of Stephen Ncube & Others v. the State²⁵, a leading case from Zimbabwe

²⁴ Cf. African Charter, art. 5 and the Constitution of Nigeria 1979, s. 31.

²⁵ Judgment of 14 December 1987; [1988] LRC (Const.) 442.

concerning the constitutionality of judicial corporal punishment of adults. Section 15(1) of the Constitution of Zimbabwe prohibits torture and inhuman or degrading punishment in terms almost identical to the analogous Article 3 of the European Convention. In ruling the punishment violative of Section 15(1) of the Constitution, the Supreme Court of Zimbabwe referred to decisions of the European Court under Article 3 of the European Convention²⁶. The Supreme Court was fortified by these decisions, and by the progress made in a number of other countries to restrict or abolish whipping.²⁷ The Supreme Court subsequently applied the same reasoning in the case of S v. A Juvenile ([1990] (4) SA 151 (ZSC)), in which it also held that judicial corporal

²⁶ The Supreme Court relied particularly on the judgment of the European Court of Human Rights in Tyrer v. United Kingdom ([1978] 2 EHRR 1) which held that judicial corporal punishment (birching) on the Isle of Man amounted to "degrading punishment" and violated Article 3 of the European Convention notwithstanding the fact that birching did not outrage public opinion of the Islanders. In coming to its decision, the European Court was much influenced by developments and commonly accepted standards in penal policy of member States of the Council of Europe. See also Campbell and Cosans v. United Kingdom ([1982] 4 EHRR 293) in which it was held that although the disciplinary practice of birching in schools in Scotland did not, as such, violate Article 3, suspension of the applicants from school for refusing to submit to the disciplinary measures (on parental instructions) breached the respect for parental convictions against corporal punishment protected under Article 2 of Protocol No. 1.

²⁷ In a subsequent judgment of 29 June 1989, the Court similarly ruled judicial corporal punishment of juveniles to be also unconstitutional in A Juvenile v. The State ([1989] LRC (Const.) 774). See also judgment of the Court of Appeal of Botswana in The State v. Petrus and Another ([1985] LRC (Const.) 699) which held that corporal punishment was ultra vires s. 7 of the Constitution of Botswana which prohibits inhuman or degrading punishment.

punishment of juveniles was unconstitutional.

One of the landmark decisions under Namibia's Constitution centres on this same issue. The judgment of the Supreme Court - sitting as a court of first instance - is remarkable as much for its substance as for the fact that it was given in response to a reference by the State's Attorney-General who also engaged counsel to assist the Court with argument both for and against the proposition. The Supreme Court had been asked to determine whether

"... the imposition and infliction of corporal punishment by or on the authority of any organ of state contemplated in legislation is ... in conflict with any of the provisions of Chapter 3 (fundamental rights and freedoms) ... and more in particular with Article 8 (prohibition of torture, cruel, inhuman or degrading treatment or punishment) thereof ...".

Responding affirmatively, the Supreme Court issued a declaratory judgment which struck down a series of pre-independence legislative and other instruments which had sanctioned the imposition of corporal punishment on adults and juveniles alike in Namibia. The Court also ruled that the Code (formulated and administered by the Ministry of Education, Culture and Sport), under which corporal punishment was inflicted on school children, violated Article 8 of the Constitution. Mohamed, AJA, delivering the judgment of the Court, cited with approval the statement by Dumbutshena C.J. in the Juvenile's case to the effect that:

"... in a system of education which has formal rules on corporal punishment drawn by a competent authority, the same considerations governing judicial corporal punishment must apply" (in Re: Corporal Punishment by organs of State, Judgment of 5 April, 1991).

The Court therefore concluded that corporal punishment, whether imposed judicially or quasi-judicially, was an invasion of the inherent dignity of the individual and constituted inhuman and degrading punishment contrary to Article 8 of the Constitution. Pointing to an "impressive judicial consensus" in support, the Court listed a number of general objections to corporal punishment, inter alia, it was retributive, open to abuse, in part irrational and as demeaning of the society which permitted it as much as of the recipient.

This decision was affirmed in an appeal judgment (also on 5 April 1991) in which Berker, CJ, on behalf of the Supreme Court, emphasized that the Court had taken full cognisance of the social conditions, experiences and perceptions of the people of Namibia. He said that these considerations had influenced the Court's judgment even more than legal rules or precedents. The Chief Justice noted the deep revulsion which the people of Namibia had developed towards corporal punishment and other extreme forms of punishment, and that this had found expression in the Bill of Fundamental Human Rights enshrined in the Namibian Constitution.

Article 3 of the European Convention was successfully used in argument before the European Commission in the East African Asians' case²⁸ to challenge the Commonwealth Immigrants Act 1968, which sought to impose immigration controls on British citizens

²⁸ [1973] 3 EHRR 76.

of Asian descent who were not themselves, or did not have at least one parent or grandparent, born, naturalized or adopted in the United Kingdom. The legislation was neutral on its face but racially discriminatory in intent - as was clear from the Parliamentary debates which preceded its rapid enactment - and discriminatory in effect. The Act was passed to put an end to the unrestricted immigration of British passport holders who were being made destitute in East Africa, victims of a policy of "Africanisation", designed to give preference to citizens of Kenya and Uganda in many areas of trade and employment, following independence.

The Commission concluded that the racial discrimination to which the applicants had been publicly subjected by application of the immigration legislation constituted an interference with their human dignity, which amounted to degrading treatment and violated Article 3.²⁹ The United Kingdom Government accepted the Commission's opinion in 1974 and changed its administrative policy, rather than challenging the decision before the European Court of Human Rights. Thereafter, there was a marked increase in the rate of entry of the British Asian passport holders.

The same issue of inhuman and degrading treatment came before the European Court more directly in the inter-state application of Ireland v. United Kingdom³⁰. Ireland challenged

²⁹ Id. at 86.

³⁰ [1978] 2 EHRR 25.

certain techniques of interrogation which involved the combined use of five methods of "sensory deprivation". These included deprivation of sleep, food and drink, hooding, wall-standing and subjection to noise. The techniques were employed by the British security forces in Northern Ireland pursuant to emergency powers conferred on them. The European Court held that these methods of interrogation constituted inhuman and degrading treatment in breach of Article 3.

Again in the case of Soering v. United Kingdom³¹, the European Court of Human Rights was faced with an important claim under Article 3. The United States, a non-signatory to the Convention, had sought the extradition from the United Kingdom of a United States resident who was also a German national. The request was made pursuant to the Extradition Treaty 1972 between the United Kingdom and the United States, so that Soering could face trial in Virginia on a charge of capital murder. The decision by a Contracting State (the United Kingdom) to extradite a fugitive may give rise to an issue under Article 3 where substantial grounds exist for believing that the person extradited faces a real risk of being subjected to torture, or inhuman or degrading treatment or punishment in the requesting country - in this case, the United States.

While Article 3 cannot be interpreted as generally prohibiting the death penalty, circumstances relating to the

³¹ 7 July 1989, Series A No. 161; [1989] 11 EHRR 439

penalty may nevertheless give rise to an issue under Article 3. The European Court referred to these circumstances as the "death row phenomenon", which involves long periods of detention on death row while awaiting execution, combined with Soering's related mental and physical suffering. If returned to Virginia to face trial, Soering faced a real risk of receiving a death sentence on conviction and of being exposed to the "death row phenomenon". The Court held that if the decision to extradite Soering to the U.S. was implemented, it would expose him to a real risk of inhuman and degrading treatment or punishment which would constitute a violation of Article 3 of the European Convention.

Both the African Charter³² and the Nigerian Constitution 1979³³ prohibit torture, inhuman or degrading treatment and slavery. The Nigerian Constitution of 1979 also prohibits forced or compulsory labour, subject to certain enumerated exceptions, including labour imposed by the sentence or order of a court and labour required of members of the armed forces or police.³⁴

FREEDOM OF EXPRESSION

³² Article 5 of the African Charter states that "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".

³³ The Constitution of Nigeria 1979, s. 31.

³⁴ The Constitution of Nigeria 1979, s. 31(2).

In India, the Supreme Court has also referred to decisions of the European Court of Human Rights. In Rangarajan v. Jagjivan Ram & Ors and Union of India v. Jagjeevan Ram & Ors³⁵, the Court had to consider film censorship under Article 19(1)(a) of the Indian Constitution which guarantees freedom of expression. The European Court's decision in Handyside v. United Kingdom³⁶ was cited with approval and the Supreme Court concluded that the European Court's approach to the protection of freedom of expression under Article 10 of the Convention was similar to its own in interpreting the constitutional guarantee of free speech. Both Courts agree that the right to freedom of expression is fundamental in a democratic society. In allowing the appeal against a decision to revoke the film certificate in question, the Indian Supreme Court stated that any

"restriction must be justified on the anvil of necessity and not the quicksand of convenience ...".

The Inter-American Court of Human Rights has also looked to European Convention case law as providing the clearest source of guidance in assessing the necessity for restrictions imposed by public authorities upon the right to freedom of expression. Unlike Article 10 of the European Convention, the analogous Article 13 of the American Convention does not require restrictions on the right to be justified as necessary "in a democratic society"; it stipulates only that a restriction must

³⁵ [1989] Vol. 2 SCJ 128.

³⁶ [1976] 1 EHRR 737.

be "necessary" for one of the stated purposes. Nevertheless, in a powerful Advisory Opinion on the legality of the compulsory licensing of journalists, the Inter-American Court has held that for a restriction on free speech to be "necessary" under Article 13(2), the government must satisfy the test articulated by the European Court of Human Rights.³⁷ In other words, even without being a democratic society, it must show that the restriction is required by a pressing social need, and that it is necessary³⁸ or proportionate to achieve a legitimate objective.

Freedom of expression is also a qualified right under the African Charter; it may be limited or derogated from by law but such limitations need not be "reasonably justifiable in a democratic society"³⁹. However, it is relevant that Articles 60 and 61 of the African Charter, which set out the principles applicable to the interpretation of the Charter provisions, call upon the African Commission to "draw inspiration from international law on human and peoples' rights" as it seeks to give effect to the guarantees set out in the Charter. If the

³⁷ Compulsory Membership of Journalists' Association, Advisory Opinion OC-5/85 of 13th November 1985 (8 EHRR 165 at para. 46).

³⁸ "The necessity for restricting them (rights and freedoms under Article 10(1)) must be convincingly established". (Autronic, 22 May 1990, Series A No. 178, para. 61, citing Barthold, 25 March 1985, Series A No. 90, p. 26 para. 58; [1990] 12 EHRR 485).

³⁹ Article 9 of the African Charter states that
"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".

African Commission adopts this guidance, then it is to be expected that in time, it will have regard to the jurisprudence of other international and regional bodies as a matter of course, when interpreting and applying the provisions of the African Charter, including the need to interpret exception clauses strictly so as not to dilute the rights and freedoms guaranteed.

In the United Kingdom, a country without a written Bill of Rights and which has still not incorporated the European Convention into its domestic law, the Judiciary has also referred to Convention case law where the common law is uncertain or statutory law is ambiguous.

For example, the United Kingdom Government instituted proceedings to restrain British newspapers from publishing extracts from Spycatcher, the memoirs of Peter Wright, a former member of the British Security Services. The newspapers relied upon the public interest in freedom of speech, recognised by the United Kingdom's adherence to Article 10 of the European Convention. The House of Lords (by 3 votes to 2) granted interlocutory injunctions to restrain publication of the extracts but in doing so, they accepted the potential relevance of international guarantees of free speech.⁴⁰

⁴⁰ Lord Templeman, with whom Lord Ackner agreed, accepted that the House of Lords should have regard to the standards contained in Article 10 for the purpose of determining whether to continue the interlocutory injunctions against publication. See Attorney-General v. Guardian, Observer and Times Newspapers ([1987] 1 WLR 1248 at pp. 1296E-97E and 1307E). In its judgment of 26 November 1991, the European Court of Human Rights held that the injunction had been granted in breach of

FREEDOM OF RELIGION

In the recent English case of Regina v. Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury⁴¹, the Divisional Court considered the relevance of Articles 9,⁴² 10⁴³ and 14⁴⁴ of the European Convention and the European Commission's decision in Ahmad v. United Kingdom⁴⁵. The applicant, who sought summonses against the author and the publisher of "The Satanic Verses" for blasphemous and seditious libel, relied on these sources to contend that the absence of a domestic law of blasphemy relating to Islam was in breach of the European Convention.

The Divisional Court found that freedom of religion under Article 9 of the Convention is not absolute, but subject to limitations prescribed by law and necessary in a democratic society for the purposes of, among other things, the protection

Article 10. In its judgment in Derbyshire County Council v Times Newspapers, 19 February 1992 (as yet unreported), the English Court of Appeal applied Article 10 in holding that it would be an unnecessary interference with free speech to permit a corporate public authority to invoke libel law to protect its "governing reputation". The case is pending on appeal to the House of Lords.

41 [1991] 1 Q.B. 429.

42 Cf. African Charter, art. 8 and The Constitution of Nigeria 1979, s. 35.

43 Cf. African Charter, art. 9 and The Constitution of Nigeria 1979, s. 36.

44 Cf. African Charter, art. 2 and The Constitution of Nigeria 1979, s. 39.

45 [1981] 4 EHRR 126.

of public order or the protection of the rights and freedoms of others (including freedom of speech). Freedom of religion is subject to certain restrictions including that "of it not including the right to bring criminal proceedings for blasphemy where it cannot be shown that a domestic law has been offended against". The Divisional Court also held that the difference of treatment made in English blasphemy law between the Anglican faith and Islam was not discriminatory because any extension of blasphemy to other religions would increase the anomalies inherent in the existing law. The Court was plainly influenced by the importance of the competing interests inherent in freedom of expression and the need to prevent blasphemy law from being used as a sword by supporters of one religion against supporters of another. (The European Commission subsequently declared a complaint in this case to be inadmissible).

DEPRIVATION OF PERSONAL LIBERTY

Article 5⁴⁶ of the European Convention guarantees the right to liberty and security of the person. Any deprivation of liberty or security must fall within specified circumstances and be implemented in accordance with a procedure prescribed by law. The case of Brogan and others v. United Kingdom⁴⁷ involved the validity of the arrest and detention, executed under Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984, of persons suspected of involvement in acts of terrorism in

⁴⁶ Cf. African Charter, art. 6 and The Constitution of Nigeria 1979, s. 32.

⁴⁷ 29 November 1988, Series A No. 145; [1988] 11 EHRR 117.

Northern Ireland.

The European Court had to consider the meaning of the word "promptly" in paragraph 3 of Article 5.⁴⁸ Effective judicial control of interferences by the executive with an individual's right to liberty is an essential feature of the guarantee under Article 5(3), which is intended to minimise the risk of arbitrariness. The Court agreed that the special context of terrorism in Northern Ireland has the effect of prolonging the period during which persons suspected of serious terrorist offences can be kept in custody before being brought before a judge or other judicial officer, subject to adequate procedural safeguards. The applicants had been detained for periods ranging from four days six hours to seven days without being brought before a judge or other judicial officer. The Court considered that this amounted to an unjustifiable delay which denied the applicants their right to prompt judicial control of their detention, in violation of Article 5(3).

Fox, Campbell and Hartley⁴⁹ also involved the arrest and detention in Northern Ireland of persons suspected of being terrorists, this time under Section 11 of the Northern Ireland (Emergency Provisions) Act 1978. The issue was whether the

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Article 5(3) provides that everyone arrested or detained in accordance with paragraph (1)(c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Cf. African Charter, Arts. 6 & 7.

49 30 August 1990, Series A No. 182.

arresting officers had a "reasonable suspicion" that the applicants committed the offences for which they were arrested and detained. The requirement of "reasonable suspicion", upon which an arrest may be based, forms an essential part of the safeguard against arbitrary arrest and detention guaranteed by Article 5(1)(c) of the Convention.⁵⁰

The Court referred to the United Kingdom case of McKee v. Chief Constable for Northern Ireland⁵¹ in which the House of Lords had applied a subjective test of in assessing the state of mind of the arresting officer in determining whether he had properly exercised the power of arrest conferred by Section 11(1) of the 1978 Act. Lord Roskill had explained that the suspicion need not be reasonable, but merely honestly, held. The Court could only enquire as to the bona fides of the existence of the suspicion in the mind of the arresting officer.

The European Court rejected this lower threshold applied by the House of Lords and held that "reasonable suspicion" under Article 5(1)(c) imports an objective test requiring the Government to demonstrate the existence of facts or furnish information that would satisfy an objective observer that the

⁵⁰ Article 5(1)(c) states: "Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...".

⁵¹ 1 All E.R. [1985] (HL).

person concerned may have committed the alleged offence. On the facts, this test was not satisfied by either the previous convictions of the applicants for the alleged acts of terrorism or questioning during detention about specific terrorist acts; without more the applicants' rights under Article 5 had been violated.⁵²

RIGHT TO RESPECT FOR PRIVATE LIFE

The right to respect for private life guaranteed by Article 8⁵³ of the Convention was interfered with in Malone v. United Kingdom⁵⁴ by interception of the applicant's postal and telephone communications by the police, in the course of a criminal investigation. The secret surveillance system in the United Kingdom was not "in accordance with the law" as required by Article 8. The scope and manner of the exercise of discretion conferred on the police as public authorities was not indicated with reasonable clarity. This constituted a lack of adequate safeguards and effective control in domestic law against arbitrary interferences by the public authorities, on which the

⁵² The United Kingdom Government subsequently failed to comply with the judgment. This failure is now being challenged under the Convention.

⁵³ Article 8 of the Convention protects the right to respect for private and family life, home and correspondence, not to be interfered with by a public authority except in accordance with the law and where necessary in a democratic society in the interests of "... the prevention of disorder or crime ..." Cf. The Constitution of Nigeria 1979, s. 34 which protects and guarantees the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications.

⁵⁴ 2 August 1984, Series A No. 82; [1982] 5 EHRR 385.

discretion was conferred, with the rights safeguarded⁵⁵.

Similarly, in Kruslin v. France⁵⁶ the Court held that interception by the police of the applicant's telephone conversations had infringed his right to respect for private life and correspondence. Mr. Kruslin was committed for trial on charges of aiding and abetting a murder, aggravated theft and attempted aggravated theft. One item of evidence in the case was the recording of a telephone conversation involving the applicant, on a line belonging to a third party, made at the request of an investigating judge in connection with other proceedings.

The Court was required to consider whether the interferences were "in accordance with the law" and held that they had a legal basis in French law, namely the Code of Criminal Procedure. The Court pointed out that tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence, and therefore must be based on a "law" that is particularly precise. It is essential to have clear, detailed rules on the subject, particularly given that the technology available is continually becoming more sophisticated. Notwithstanding a number of safeguards provided for in French law, the system did not afford adequate safeguards against possible abuses. The practice in relation to interceptions

⁵⁵ The decision was followed by legislation which introduced stricter controls on telephone tapping.

⁵⁶ 24 April 1990, Series A No. 176; [1990] 12 EHRR 547.

lacked the necessary regulatory control in the absence of legislation or case law. As in Malone, the French law did not indicate with reasonable clarity the scope and manner of exercise of discretion conferred on the public authorities.

FREEDOM OF EXPRESSION

a. The Press

Freedom of expression and the press is protected by Article 10 of the European Convention on Human Rights.⁵⁷ Article 10 does not expressly mention freedom of the press but the Court has emphasised the importance of this freedom to ensure proper discussion of matters of public interest.

The European Court of Human Rights first affirmed the importance of freedom of the press in the Sunday Times case⁵⁸, which concerned an injunction ordered by the House of Lords to restrain the Sunday Times newspaper from publishing an article about the drug thalidomide which had caused birth deformities. The injunction was granted on the ground that publication would interfere with the administration of justice in pending proceedings concerning alleged negligence in the manufacture and distribution of the drug and so could constitute criminal contempt. The European Court held that the injunction violated Article 10 because it was not "necessary" in that it did not satisfy a "pressing social need". The Court emphasised that it was incumbent on the mass media to keep the public informed on

⁵⁷ Cf. African Charter, art. 9 and The Constitution of Nigeria 1979, s. 36.

⁵⁸ 26 April 1979, Series A No. 30.

judicial proceedings as a matter of public interest, and that the public had a right to receive such information.⁵⁹ This landmark decision compelled the passage of the Contempt of Court Act, 1981 in the United Kingdom.

In Lingens v. Austria⁶⁰, the Court emphasised the vital role of the press in fostering political debate:

"Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention".⁶¹

The case concerned a successful criminal prosecution brought against a journalist for articles he wrote impugning the political morality and integrity of a leading Austrian politician. The Court found Austrian criminal libel law to be in violation of Article 10, stressing the chilling effect of the fine imposed upon the journalist. Although the penalty did not, strictly speaking, prevent him from expressing himself (the articles had already been widely circulated) it would be likely to discourage him from making future criticisms of a similar kind and to deter journalists from contributing to public discussion of issues affecting the life of the community.

The Court followed Lingens in the recent case of Oberschlick

⁵⁹ Id. para. 65.

⁶⁰ 8 July 1986, Series A No. 103; [1986] 8 EHRR 407.

⁶¹ Id. paras. 41 and 42.

v. Austria⁶² and found that the applicant's publication in a review, of a criminal information laid against a politician, contributed to public debate on a political question of general importance (differential treatment of nationals and foreigners in providing family allowance benefits).

The Court affirmed the principle that the limits of acceptable criticism are wider with regard to a politician than in relation to a private individual and that the requirements of protection of his reputation must be weighed against the interests of open discussion of political issues. The allegations of the applicant were characterised as value-judgments and the requirement by domestic courts that he prove the truth of those value-judgments, being an impossibility, infringed his freedom of opinion and violated Article 10 of the Convention.

b. Right to Receive Information and Ideas

Article 10 also guarantees the right to receive information and ideas without interference by public authorities. It does not, however, expressly impose a duty upon the State to provide information. In Leander v. Sweden⁶³ the European Court interpreted the right to receive information under Article 10 to mean that it

"basically prohibits a Government from restricting a person from receiving information that others may wish or may be

⁶² 23 May 1991, Series A No. 204.

⁶³ 26 March 1987, Series A No. 116; [1987] 9 EHRR 433.

willing to impart to him".⁶⁴

The applicant did not have a right of access to a government register containing information on his personal position compiled for security reasons, nor was there any obligation on the Government to impart the information to him.

This approach was affirmed in the Gaskin case⁶⁵. The applicant, a former child in care, was refused unrestricted access to social services case records containing personal information compiled while he was in state care. The Court found that there was no obligation under Article 10 to impart the information to the applicant.

It did hold, however, that Article 8 (guaranteeing personal privacy)⁶⁶ imposes a positive obligation upon the State to ensure that the interests of an individual seeking access to confidential records, relating to his private and family life, is secured when a contributor to the records is not available or improperly refuses to consent to access to the records. The absence of an independent authority with the power to decide whether access must be granted in cases where the contributor is not available, or improperly withholds consent, violated Article 8 of the Convention.

⁶⁴ Id. para. 74.

⁶⁵ 7 July 1989, Series A No. 160; [1989] 12 EHRR 36.

⁶⁶ Cf. African Charter, art. 18 and The Constitution of Nigeria 1979, s. 34.

In Silver v. United Kingdom⁶⁷ the European Court held that interferences with prisoners' correspondence by British prison authorities on the basis of unpublished orders and instructions violated Article 10⁶⁸. The orders and instructions did not satisfy the test of legal certainty because they were not adequately accessible or sufficiently precise to enable the prisoners to regulate their conduct. In addition, the authorities' powers to control prisoners' correspondence were not subject to adequate safeguards against abuse. There was no effective remedy to challenge and secure redress of an alleged violation of prisoners' rights under the Convention; the jurisdiction of the English Courts was limited to examining whether the measures were taken arbitrarily, in bad faith, for improper motives or were ultra vires.

c. Means of Transmission and Reception of Information

The European Court has also considered the application of Article 10 to the means of transmission or reception of information and free speech in the context of electronic media.⁶⁹

⁶⁷ 25 March 1983, Series A No. 61; [1983] 5 EHRR 347.

⁶⁸ The Commission had held that various interferences were unnecessary, in breach of Article 8. The United Kingdom Government abolished these interferences before the case reached the Court.

⁶⁹ The third sentence of Article 10(1) states that Article 10 "shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

In Autronic AG⁷⁰, the Swiss Government had prohibited the applicant from retransmitting television signals received from a Soviet satellite. The Swiss Government argued that the Soviet satellite signal was telecommunications rather than broadcasting and that they were required to prohibit the retransmission of telecommunications signals because the applicant had not obtained permission from the Soviet Government. The Court refused to distinguish between signals communicated to the general public in the 'footprint' of a direct broadcasting satellite and similar signals transmitted by a telecommunications satellite. It accepted the applicant's argument that the Convention protects the content of the information and the means of transmission or reception because any interference with the means necessarily interferes with the right to receive and impart information. It stated that

"Where, as in the instant case, there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established".⁷¹

With the proliferation of electronic broadcasting across national boundaries more cases in this area are likely to come before the European Court, as well as other international and national courts, in the future.

⁷⁰ 22 May 1990, Series A No. 178; [1990] 12 EHRR 485.

⁷¹ Id. para. 61.

ROLE OF AMICUS CURIAE BRIEFS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

The Banjul Affirmation encourages the use of amicus curiae briefs and concludes that it is

"important to adopt a generous approach to the matter of legal standing in public law cases, while ensuring that the Courts are not overwhelmed with hopeless cases. Courts would be assisted by well-focused amicus curiae submissions from independent non-governmental organisations, such as Interights, in novel and important cases where international and comparative law and practice might be relevant" (page 4).

Since 1983, the European Court of Human Rights has enabled third parties, with the President's leave, to make written comments on issues specified by the President. This significant procedural change gives new and important opportunities for third parties to submit information and arguments, gathered from comparative and international sources, to the Court. The Revised Rules of Court⁷² do not provide a right of intervention for Contracting States or for other third parties. It is entirely within the discretion of the President to grant or refuse leave to intervene and to specify the issues upon which the third-party intervention may be made. The President must be satisfied that the intervention is "in the interests of justice" in the sense that it is likely to assist the Court in carrying out its task.

⁷² Rule 37, s. 1 of the Revised Rules states: "The President may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant such leave to any person concerned other than the applicant".

In the Malone case⁷³ which concerned the interception of telecommunications, the Post Office Engineering Union (whose members were involved in the interception of the telecommunications complained of by the applicant) requested leave to submit written comments, indicating inter alia the Union's "specific occupational interest" in the case and five themes it wished to develop in those comments.⁷⁴ The President granted leave but on narrower terms than those sought. He specified that the comments should bear solely on the first three of the five themes and

"in so far as those matters relate to the particular issues of alleged violation of the Convention which are before the Court for decision in the Malone case".

The intervention had an important effect upon the Court's judgment. The applicant complained that his telephone had been "metered" by the Post Office on behalf of the police, and details of the numbers he had called had thus been recorded and communicated to the police. The Court made factual findings about the process of "metering" and held that the practice was not "in accordance with the law" within the meaning of Article 8(2) of the Convention. These factual and legal findings were strongly contested by the United Kingdom Government, until the third-party intervention. The Court was able to make these

⁷³ 2 August 1984, Series A No. 82; [1984] 7 EHRR 14.

⁷⁴ The Union was assisted by Interights and by Justice (the British section of the International Commission of Jurists) in the preparation both of its initial request for permission to submit written comments and of the written comments themselves.

findings as a direct result of the Union's intervention in the proceedings, because the relevant evidence was within the Union's, as well as the respondent Government's, knowledge.

The most significant third-party intervention occurred in the Lingens case⁷⁵, concerning freedom of expression in the context of the application of the Austrian law of defamation to politicians. The International Press Institute (IPI) sought leave, through Interights, to submit written comments in order to assist the Court in interpreting and applying the test of necessity in Article 10(2) in the circumstances of the Lingens case. Interights' letter explained that the IPI wished to submit evidence of law and practice in certain member States of the Council of Europe and North America on how far it is necessary in a democratic society to restrict the expression of opinion in the press in order to protect the reputation of the individual affected, where the individual is a politician or holds public office. In particular, it wished to provide information on:

"(1) how far the protection afforded to 'public figures' differs from that afforded to other individuals under the law of defamation; and
(2) how far a distinction is drawn between the expression of fact and the expression of opinion".

The written comments submitted on behalf of the IPI contained a survey of the relevant law and practice of ten Contracting States and of the United States. The United States was chosen because its Supreme Court has dealt specifically with the issue under consideration in Lingens, and, more generally,

⁷⁵ 8 July 1986, Series A No. 103; [1986] 8 EHRR 407.

because of its wealth of jurisprudence on the interpretation of the constitutional guarantee of freedom of expression.

In Monnell and Morris v. the United Kingdom⁷⁶, which concerned detention pursuant to orders of loss of time made by the English Court of Appeal after dismissing a criminal appeal, Justice sought leave to submit written comments. The application explained the particular interest of Justice (the British Section of the International Commission of Jurists) in the functioning of the Court of Appeal in criminal cases. It stated that its unrivalled experience of conducting cases before the Criminal Division of the Court of Appeal

"would enable us to provide the Court with a useful, broader view of the matters currently under review".⁷⁷

Leave was granted, but the Court specified that

"(1) the 'useful, broader view' which Justice proposes to present should be strictly limited to matters directly connected with the issues before the Court for decision in the case of Monnell and Morris";
(2) the comments should be submitted in as concise a form as possible".

The Justice submission drew attention to statements made in the United Kingdom Government's memorial to the Court suggesting that loss of time is ordered only where a prisoner seeks leave to appeal against the advice of his counsel, and pointed out that there is in fact no limitation on the power of the Court of Appeal. As a result of this intervention, the

⁷⁶ 2 March 1987, Series A No. 115.

⁷⁷ Applications nos. 9562/81 and 9818/82. The report of the Commission was adopted on 11 March 1985.

Government wrote to the Registrar correcting the statements in its memorial. The Court's judgment referred to the intervention by Justice but did not discuss its content or effect.

Amnesty International submitted written comments to the European Court in the case of Soering⁷⁸, to which reference has already been made. Amnesty International argued that evolving standards in Western Europe regarding the existence and use of the death penalty required that it should now be considered as an inhuman and degrading punishment within the meaning of Article 3 of the European Convention. The Court held that if the decision to extradite Soering to the U.S. was implemented, it would expose him to a real risk of inhuman and degrading treatment or punishment (the "death row phenomenon") and would constitute a violation of Article 3.

Amicus curiae briefs have also been submitted in the Spycatcher⁷⁹ and Dublin Well Woman Centre Ltd.⁸⁰ cases. The brief submitted in the Spycatcher case consists of a survey of cases from German, Swedish, Norwegian, Danish and American law, as well as references to international law. It addresses the juridical difference between prior restraints on publication and

78 7 July 1989, Series A No. 161, paras. 101-102; [1989] 11 EHRR 439.

79 Written comments were submitted by Article 19, The International Centre Against Censorship.

80 Written comments have been drafted by Article 19, The International Centre Against Censorship, with assistance from Interights.

post-publication remedies, such as criminal prosecution and civil damage, and the relevance of this difference for the alleged violation of Article 10 presented by the interlocutory injunctions ordered by the House of Lords.

The comments submitted in the Dublin Well Woman case address "the correct approach to the interpretation of the test of necessity and the concept of the margin of appreciation in the circumstances of the present case" (paragraph 1). The central issue, in the view of the written comments, is whether the public authorities of Ireland (where abortion is unlawful under the Constitution and ordinary law) may, compatibly with Article 10 of the European Convention, forbid everyone within their jurisdiction, including doctors and nurses and private clinics, from imparting any information which may assist pregnant women in Ireland to know about the identity, location of, and means of communication with, British clinics in which abortions may lawfully be carried out in accordance with British law, and hence, if they so choose, to travel to such clinics to obtain an abortion (paragraph 4). The written comments include evidence of relevant comparative law or practice in Member States and in the United States.

CONCLUSION

The European Convention system and its case law demonstrate the viability of reconciling respect for the universality of fundamental human rights and freedoms with local laws, traditions, circumstances and needs. It is not intended to

replace national human rights protection. The primary responsibility for the effective safeguarding of human rights and freedoms lies with the public authorities of the States themselves, including courts with the necessary independence, impartiality and authority to protect individuals against the misuse of public powers. European Court case law provides a rich potential source of interpretational guidance for national lawyers and judges in Commonwealth Africa, as elsewhere, in translating the fundamental rights and freedoms enshrined in international law into practical reality for ordinary men, women and children.

The Role of Judges in Advancing the Protection of Human Rights in Domestic Courts

by

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Sixth Circuit Cincinnati, Ohio**

I am pleased to be here to talk with you today, on this most appropriate occasion of International Human Rights Day. I would like to address the unique role of judges in advancing the protection of human rights. My remarks will focus on the experience of the American judiciary, since that is the area with which I am most familiar. One inspiration for my talk was Mr. Lester's perceptive journal article, regarding the impact of the American Bill of Rights in other nations.¹ He notes that many nations follow with interest the constitutional decisions of courts in the United States. He refers to this as the "overseas trade in the American Bill of Rights." Because of this phenomenon, the role of the American judiciary in the promotion of human rights, whether it leads in advancing human rights or instead lags behind, can have international ramifications.

As Mr. Lester suggests, the international trade in legal developments regarding individual rights should be a "two-way" trade. At times, courts around the world have built upon American innovations to expand human rights in ways not recognized by the United States. Therefore, it is worthwhile for the United States to study developments in the law worldwide. The lives of many people could be improved if the norms of international human rights are better protected in the United States as well as in all other nations.

How can judges, be they American, Nigerian or any other nationality, make international human rights effective at home? Home is, after all, the place where the enforcement of human rights counts. As Eleanor Roosevelt, one of the drafters of the Universal Declaration on Human Rights, observed, human rights begin in "small places, close to home, so close and so small that they cannot be seen on any map of the world. Unless these rights have meaning there, they have little meaning elsewhere."²

1. Anthony Lester, the overseas trade in the [U.S.] Bill of Rights, 88 COLUMBIA LAW REVIEW 537-61 (1988).

2. Eleanor Roosevelt, quoted in Joseph P. Lash, Eleanor: The Years Alone (New York, New American Library, 1972).

We as judges have a unique ability and responsibility for the enforcement and promotion of human rights. As I will discuss, there are both direct and indirect ways of enforcing international human rights standards. Human rights norms may be directly binding on a court and therefore legally enforced if they are contained in a ratified treaty. Additionally, judges can directly enforce a human rights norm if it is universally accepted as evidence of customary international law, irrespective of whether or not it is found in a ratified treaty. Alternatively, a court can always use a human rights norm, even if not directly binding on the court as treaty law or customary international law, indirectly to aid in the interpretation of domestic law.

As I just mentioned, human rights standards can be directly binding on a court if contained in a ratified treaty.³ Direct enforcement of treaty law has not led to great advances of human rights in the U.S., due partly to the United State's poor record of ratifying human rights treaties. The United States, like Nigeria, has failed to ratify either the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social, and Cultural Rights. It is encouraging, however, to see that President Bush has recently urged the Senate Foreign Relations Committee to give priority consideration to the ratification of the Civil and Political Covenant. In any event, the judiciary in the U.S. has constructed an obstacle to the direct enforcement of human rights norms even in the few treaties that it has ratified.⁴ Because direct enforcement of human rights provisions in treaty law has not added much to the protection of human rights in the United States, I will focus on the more fruitful approaches.

The application of customary international law is one such approach. Human rights norms will be considered to be customary international law if they are so widely accepted by the international community that they are binding on every nation even if

3. Richard Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in Hurst Hannam, ed., Guide to International Human Rights Practice at 223 (1985); see also Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 UNIVERSITY CINCINNATI LAW REVIEW 367 (1985).
4. Unless a court deems the treaty to be "self-executing", the court will not be bound by the treaty terms unless Congress has passed legislation for the specific purpose of implementing the treaty terms domestically. U.S. judicial rulings have generally held that the few human rights treaties that the U.S. has ratified are not self-executing. See *Sei Fuji v. California*, 38 Cal. 2d 718, 721-22, 242 P.2d 617, 619-21 (1952). Hence, these treaties are regarded as lacking direct legal force. See also Lillich, *supra* note 3 at 225.

the nation has not ratified any treaty embodying them.⁵ The application of customary international law has led to a few spectacular advances in the protection of human rights in the United States. The most notable example of this is the case filed in the United States by a citizen of Paraguay, Dr. Filartiga, who was living in New York at that time.⁶ He sued a former Paraguayan police official, Pena-Irala, contending that his teenage son had been tortured to death in Paraguay by the police official in retaliation for Dr. Filartiga's political activities. The Court held that the right to be free from torture had become accepted as customary international law, as defined and evidenced by the Universal Declaration. The Court held that the action of the police official violated customary international law, and awarded a very large monetary damage award in favor of Dr. Filartiga. The enforcement of customary law has been a well established means for advancing the protection of human rights even before the Filartiga case. However, its application to further the protection of human rights has been fairly rare, and I will not belabor its use.

Human rights norms are most widely applied in domestic courts as an aid in interpreting domestic legislation.⁷ This indeed can be a powerful strategy in the promotion of human rights. The judiciary in the United States has now progressed to the point where reliance on international human rights law has become an accepted means of providing useful content for identifying, clarifying,

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5. Lillich, *supra* note 3 at 232. See also Nadine Strossen, Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis, 41 HASTINGS LAW JOURNAL 805, 816 (1990).
 6. *Filartiga v. Pena-Irala*, 630 F.2d 876 (Cir. 1980). The action was brought under the little known Alien Tort Statute, 28 U.S.C. 1350 (1988), which confers jurisdiction on federal courts of suits filed by aliens for torts committed in violation of the law of nations or a treaty.
 7. Hans Linde, in Proceedings, 1982, Symposium on International Human Rights Law in State Courts, 18 THE INTERNATIONAL LAWYER 59 (1984). See also, Jordan Paust, On Human Rights: the Use of Human Rights Precepts in United States Historical Origins and the Rights to an Effective Remedy in Domestic Courts, 10 MICHIGAN JOURNAL INTERNATIONAL LAW 543, 596 (1989) (showing that throughout U.S. history, the Supreme Court's reliance on human rights to provide useful content for domestic law has steadily increased).

and supplementing constitutional and strategy norms.⁸ However, courts in the United States have not always been ready or willing to acknowledge their use of international human rights norms to give content to domestic law. Civil rights cases in the United States in the post-World War II period of 1946-55 serve as interesting examples of cases where human rights norms played a significant, but unacknowledged, role in the assault upon American apartheid.⁹

In the specter of the atrocities of World War II, the United States shed, at least to some degree, its earlier isolationist posture when it ratified the United Nations Charter in 1945. The Charter reflected the post-war consensus that governments should no longer be able to deprive citizens of their fundamental human rights, such as racial equality.¹⁰

However, during this era, racial discrimination became an issue of national embarrassment. Although the American Constitution guaranteed equal protection of the law to all, segregation was considered lawful. Separate but equal had been the law since a 1896 Supreme Court decision.¹¹ Segregation and discrimination displayed their ugly faces in many arena, including employment, voting (where poll taxes and white primaries disenfranchised most Southern blacks), and housing (where racially restrictive covenants in private agreements prevented black ownership or occupancy). A chilling wave of racially inspired violence against blacks

8. Linde, supra note 7.

9. Bert Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA LAW REVIEW 901 (1984).

10. The U.N. Charter was signed at San Francisco on 26 June 1945. Article 55 of the Charter provides that the United Nations shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Article 56 states that all Members pledge themselves to take action to achieve the purposes set forth in Article 55. It is not a treaty, but a declaration enumerating important civil and political rights.

11. *Plessy v. Ferguson*, 163 U.S. 537, 550-52 (1896). In *Plessy*, the Court upheld a statute requiring that railroads provide separate but equal accommodations for black and white passengers. The decision amounted to no more than giving a constitutional imprimatur to racial discrimination.

by whites spread. Murders, such as the murder of a black resident of a small town in Georgia who angered some whites because he dared to exercise his right to vote, were included in the rash of violence.¹²

The media around the world focused attention on America's racial discrimination.¹³ America's cold war enemy, the Soviet Union, capitalized on the discrepancy between the lofty ideals of the United States Constitution and the harsh reality of race discrimination. In fact, in 1947, when the NAACP (National Association for the Advancement for Colored Persons) filed a petition in the United Nations protesting the treatment of blacks in the United States, the Soviet Union proposed that the U.N. investigate the charge. In the end, the U.N. took no action.¹⁴ However, it became very clear that in order to sell democracy to the world and prevent the spread of communism, America had to dismantle its own apartheid.

During this period, numerous lawsuits were filed challenging various racially discriminatory laws or practices, including school segregation. The U N Charter and the Universal Declaration

12. Information regarding the cultural and political context in this era was obtained from the fascinating and thorough work by Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 *STANFORD LAW REVIEW* 61, 71-72, 84 (1988). Macio Snipes, the only black in his district in Georgia to vote in a state election was killed by four whites in 1946. *Id.* at 84.
13. For example, a newspaper in Fiji reported that Negroes existed in economic conditions worse than that of "out-and-out slavery." Dudziak, *id.* at 81. A Greek newspaper writer noted that after visiting the American South, she understood the bitter response of a black child who, when asked by his teacher what punishment he would impose on Adolph Hitler, said "I would paint his face black and send him to America immediately." *Id.* at 87-88.
14. Dudziak, *supra* note 12 at 94-96. It is also interesting to note that in 1951 the Civil Rights Congress filed a petition in the United Nations charging that the United States' government committed genocide against American blacks, thereby violating the Convention on the Prevention and Punishment of the Crime of Genocide. The petition contained documentation of 153 killings on the basis of race. The petition drew much international attention toward American racism. The State Department responded by seizing the passport of the organization's executive director. However, as with the NAACP petition, the U.N. took no action on the petition of the Civil Rights Congress. *Id.* at 97-98.

of Human Rights had recently become available as additional legal weapons that could be used to proscribe these discriminatory practices, and attorneys, including those from the United States Justice Department, repeatedly invoked them. There is support for the idea that international human rights law played a role in influencing the Supreme Court to finally end the national pattern of racial segregation.¹⁵ In the landmark case, Brown v. Board of Education, the issue was the segregation of public schools in several states.¹⁶ In a companion case, which dealt with the same issue in the Washington D.C. schools, attorneys argued that education was a fundamental human right recognized in the Charter and alternately, that the Charter's human rights provisions should aid in interpretation of state and federal constitutions.¹⁷ The Supreme Court determined that segregation in public schools violated the constitutional right to equal protection.¹⁸ Although the Supreme Court did not mention the Charter or the Universal Declaration in the decision, the Brown Court was no doubt well informed of Charter obligations. While there is no way to assess the extent of the effect of human rights law on the judges in this milestone case, it is more than plausible that American pride would not allow the Supreme Court to recognize that the Constitution was inadequate in protecting these civil rights. Instead of referring to international norms, the Supreme Court may have preferred the method of redefining an existing provision of the Constitution so as to proscribe segregation.

15. Lockwood, *supra* note 9 at 931-48.

16. Brown v. Board of Education, 347 U.S. 483 (1954), supplemented by Brown, 349 U.S. 294 (1955). Brown involved four consolidated cases, each in which blacks sought admission to public schools on a non-segregated basis.

17. Bolling v. Sharpe, 347 U.S. 497 (1954), Brief for the Petitioners at 57-58.

18. Brown, *supra* note 16 at 495. The Court did not specifically overrule Plessy, but held that segregation had no place in education. The doctrine of "separate but equal" was not finally eradicated until a series of rulings has invalidated every type of state enforced segregation. The equal protection clause of the Fourteenth Amendment served as the basis of Brown. Bolling, which was decided on the same day as Brown, differed only in that the defendant was the federal government, rather than a state. Because the Fourteenth Amendment does not apply to the federal government, the due process clause of the Fifth Amendment was the decisional basis of Bolling.

Thus, the Charter may have played a significant, but uncredited role in helping the United States define constitutional provisions to put an end to America's previously sanctioned apartheid.¹⁹

More recently, United States courts, both state and federal, have been far more willing to acknowledge the use of human rights law as an interpretive aid to define rights under state and federal law. The power of international legal norms to fill in the gaps of incomplete domestic law was firmly established by the case of Pedro Rodriguez-Fernandez. Fernandez was a Cuban national who arrived in the United States as part of a Cuban refugee freedom flotilla. The U.S. immigration agency determined that Fernandez was not eligible for admission into the United States because of his criminal history, and had him jailed pending possible deportation. He sued, claiming the detention violated his statutory and constitutional rights.²⁰

The circuit court looked to the international human rights norms against arbitrary detention to provide content to the relevant federal statute and the Constitution. Fernandez was released based on domestic grounds, but the court relied on international legal principles as support for its construction of the applicable statute.

19. Lockwood, *supra* note 9 at 948. As further support for this thesis, Professor Lockwood also refers to the Supreme Court case, *Shelley v. Kraemer*, 334 U.S. 1 (1948), regarding state court enforcement of racially restrictive covenants. The United States attorneys filed amicus briefs urging that the anti-discrimination norms of the Charter were evidence of public policy. The Court found that judicial enforcement of the covenants, rather than the covenants themselves, violated the equal protection clause. Again, although the Court did not mention the Charter arguments in its decision, the Charter may well have been a motivating factor in the result. *Id.* at 943-45.

20. *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980) *aff'd* on other grounds *sub nom*, *Rodriguez-Fernandez v. Wilkinson* 654 F.2d 1382 (10th Cir. 1981). It is interesting to note that the trial court afforded Fernandez relief based on a violation of customary international law. It found that customary international law secured the right to be free from arbitrary detention, and that Fernandez's right was being violated. The district court took a far more cautious approach. See also Hassan, *The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights*, 5 HUMAN RIGHTS QUARTERLY 68 (1983); Martineau, *Interpreting the Constitution: The Use of International Human Rights Norms*, 5 HUMAN RIGHTS QUARTERLY 87 (1983).

International human rights law has been used to provide content to domestic law in many contexts, including the rights of prisoners, welfare rights, the right to maternity leave, and the right to education.²¹ In fact, we as judges need not wait for the parties to refer to human rights instruments: we can apply human rights norms as aids to interpretation even if the parties fail to appreciate the significance of the norms. A California state court judge did just this in a case involving welfare rights.

In that case, county welfare recipients filed a lawsuit when the public assistance grant monies they received were reduced to the minimal level necessary for food and shelter.²² State law required that the poor be given enough money to adequately "relieve and support" them. The attorneys never raised the applicability of any international instrument, but the judge did himself. The judge relied on the Universal Declaration of Human Rights (which provides that everyone shall have the right to a standard of living adequate for the health and well-being of oneself and one's family) to interpret the California welfare statute as guaranteeing the grant of funds sufficient not only for food and shelter, but also for clothing, transportation, and medical care.

The use of human rights norms to interpret domestic legislation has achieved success outside of the United States as well. A very recent example occurred in Botswana.²³ A female citizen of Botswana challenged a provision of the Citizenship Act as discriminatory against women. The Act provided that children born in Botswana to a male citizen married to a female non-citizen were citizens, but children born to a female citizen married to a male non-citizen were not granted citizenship. Botswana's Constitution prohibits discriminatory laws, and specifically mentions discrimination based on race, tribe, place of origin, political opinions, colour, or creed. Sex is not mentioned.

The judge in the case took a progressive stance by stating that he found it "difficult, if not impossible" to believe that the word "sex" was left out of the Constitution because Botswana

21. See Stephen Rosenbaum, *Lawyers Pro Bono Publico: Using International Human Rights Law on Behalf of the Poor*, in Lutz, Hannam, and Burke, eds., *New Directions in Human Rights* at 109 (1989).

22. *Boehm v. Superior Court*, 178 Cal. App. 3d 496 (1986) (invalidating the grant reduction).

23. *In the Matter of Unity Dow v. Attorney General*, in the High Court of Botswana, held at Lobatse, Misca. 124/90, Judgment, 1991, reprinted in 13 HUMAN RIGHTS QUARTERLY 614 (1991).

wanted sex discrimination to be permitted. The judge confirmed his belief by reliance on Botswana's status as a signatory to the Organization of African Unity (O.A.U.) Convention on Non-Discrimination. Although the terms of the Convention did not have the power of law in Botswana, the judge recognized that the State had obligations under the treaty. Due to Botswana's adherence to the treaty, the court was bound to construe its domestic legislation consistently with the Convention unless such construction is impossible.²⁴ The judge also noted that it would be "difficult if not impossible to accept that Botswana would deliberately discriminate against women in its Legislation whilst at the same time internationally support non-discrimination against females". The judge thus used international human rights norms to fill in gaps in the Constitution by creating a rule of statutory construction.

As discussed, great potential exists for the advancement of human rights through the use of international human rights instruments as aids in providing substantive content to statutory or constitutional law. There is yet another way in which international human rights law may also be used to expand domestic protection of individual rights. International human rights law can be used as a guide to develop the judicial process or analysis for reviewing claimed infringements of rights.²⁵

For example, the equal protection guarantee has become the most important concept for the protection of individual rights in the United States. Thus, the method or analysis used by the court in determining whether governmental laws or policies violate the equal protection clause is a very important facet in the protection of rights.

The United States Supreme Court, in recent years, has tended to apply analytical techniques that take a narrow view of the judicial power to protect individual rights and a broad view of the power of the legislative or executive branches of the government to invade individual rights. International human rights law can be used to counter this trend - to move toward a broader definition of prima facie rights and a narrower construction of permis-

24. Id. at 624.

25. Strossen, Recent U.S. and International Judicial Protection of Individual Rights, *supra* note 5 at 866. See also Gordon Christenson, the Uses of Human Rights Norms to Inform Constitutional Interpretation, 4 HOUSTON JOURNAL OF INTERNATIONAL LAW 39 (1981).

sible government limitations on rights.²⁶

Specifically, international human rights law can be used to define rights more broadly, by giving a broader scope to the right²⁷ or by determining that a right is defined in positive terms. If a right is defined in positive terms, the government is not only prohibited from interfering with it, but is required to undertake affirmative actions to safeguard the right. The European Court has recognized this. It has imposed positive obligations upon states to facilitate individuals' enjoyment of their privacy rights even when such obligations are not commanded by express language. For example, the European Court has compelled respondent governments to take affirmative measures to reform their domestic law as a remedy for impermissible limitations upon the right to privacy.²⁸ In one case, the Court has gone even further, ruling that the State has an affirmative duty to protect privacy against interference not only by state agents, but also

26. This concept is fully presented in Strossen, *Recent U.S. and International Judicial Protection of Individual Rights*, supra note 5. Professor Strossen asserts that contrary to the American trend, "[t]he international human rights law approach to legal process appears to be moving in the opposite direction: toward modes of judicial review that result in more expansive interpretations of rights and more restrictive interpretations of the government's power to circumscribe those rights." *Id.* at 807. Her observations are premised largely on her study of the decisions of the European Commission and Court concerning the right to privacy.

27. For example, the European Court and Commission have uniformly recognized that the right to respect for one's private life includes protection for "honor," "dignity," and "reputation," even though such interests are not expressly protected. See Strossen, supra note 5 at 843. For an example of a case in which the United States Supreme Court could have afforded a broader scope to a particular right, see *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2341-46 (1989) (court narrowly defined scope of father-child relationship).

28. See *Marckx Case*, 31 Eur. Ct. H.R. (ser. A) at 15, (1975). For a discussion of affirmative obligations in this context, see Strossen, supra note 5 at 847.

by non-governmental actors.²⁹

A judge's discretion in determining how broadly to define a right dovetails with the choice of the appropriate level of judicial scrutiny to employ. Invoking a heightened standard of judicial review is a powerful means of restricting the government's power to circumvent human rights. Often, the ultimate conclusion as to whether a governmental law or policy satisfies the equal protection guarantee depends in large measure upon the degree of independent review exercised by the judiciary.³⁰

Judges in the United States, Nigeria and all other nations may choose to evaluate deprivations of internationally recognized rights under a higher level of judicial scrutiny. This approach can have dramatic consequences in an area such as the protection of economic rights.³¹ For example, the International Covenant on

29. X and Y v. the Netherlands, 91 Eur. Ct. H.R. (ser. A) (1985). In this case, the European Court required the Dutch Government to reform its law to allow the prosecution of a man who had allegedly raped a mentally retarded sixteen year old girl. Under Dutch law, neither she nor her father were able to initiate a criminal prosecution. The Court held this gap in the law violated the father's and daughter's privacy rights. The Court declared that a state's "positive obligations inherent in an effective respect for private or family life ... may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves." See Strossen, *supra* note 5 at 849.

30. Under current law, if a "fundamental right" or a "suspect class" is at issue, the court must apply a strict standard of review. Where strict scrutiny is invoked, the challenged law or practice will be upheld only if necessary for a compelling governmental reason. Alternatively, if the right being limited is not deemed fundamental, the court will only apply a low level of scrutiny. The legislation will be upheld if it bears any conceivable rational relationship to a legitimate governmental interest. Fundamental rights include but are not limited to those listed in the Bill of Rights as well as the right to vote, to privacy and to freedom of association. Suspect classifications include those based on race or national origin. See Nowak and Rotunda, Constitutional Law at 568-82 (West Publishing, 1991).

31. Bert Lockwood, Toward the Economic Brown: Economic Rights in the United States and the Possible Contribution of International Human Rights Law, in Mark Gibney, ed., World Justice? U.S. Courts and International Human Rights (Westview Press, 1991).

Economic, Social, and Cultural Rights includes the right to safe and healthy working conditions and the right to an adequate standard of living, including adequate food, clothing and housing, education and social insurance. Presently, none of these rights is recognized as fundamental under the United States Constitution. Therefore, any legislation infringing upon such rights would only be subject to the lowest level of review, and would be upheld if there is any rational relationship to a legitimate governmental interest.

A judge could invoke a treaty such as the Covenant on Economic and Social Rights to determine that a right included within the treaty was a fundamental right, even where the United States Constitution does not implicitly recognize the right as fundamental.³² The level of scrutiny would then be heightened, resulting in a greater protection of the right.

Other methods of using international human rights to narrow construction of the permissible governmental limitations upon rights include:

- determining that an asserted government justification for limiting a right should be assessed in light of democratic values,
- assessing the proportionality between a challenged measure's invasion on rights and its promotion of governmental goals, and
- determining which party bears the burden of proof, and what type and quantum of evidence are necessary to meet that burden.³³

Finally, I would like to mention how judges can play a prominent role in the promotion of human rights by exercising jurisdiction to the fullest extent permissible over human rights claims. For example, the concept of standing (*locus standi*) is designed to ensure that the plaintiff has actually suffered some personal loss. However, standing, as a practical matter, can be used by a court as a decisional basis to avoid deciding difficult cases. In order to more fully promote human rights, judges should avoid

32. See Christenson, *supra* note 25. See also Strossen, *supra* note 5 at 838.

33. Strossen, *supra* note 5 at 848. Professor Strossen lists numerous other examples of legal process issues that may affect the boundaries of permissible governmental restrictions upon rights.

dismissing a case involving human rights for lack of standing unless strictly necessary under the circumstances.³⁴

Moreover, judges can effectively increase the protection of human rights by limiting the extent of deference that the court exhibits toward the political branches of the government. As judges, we are mindful of not interfering in the domain of the legislative and executive branches of government. In the United States, long standing doctrines prohibit courts from rendering a decision in cases that involve "political questions" or "sovereign immunity." However, a court must counterbalance these abstention doctrines with its obligation to interpret and apply international law.³⁵

Pressure to dismiss a case in deference to political decision makers surfaces often in human rights litigation which involves the consequences of United States foreign policy abroad. The judiciary has recognized that attacks on foreign policy making are not proper subjects for judicial decision, but that claims alleging noncompliance with the law are justiciable. This is true even though the limited review that the court undertakes may have an effect on foreign affairs.³⁶

34. The case of Unity Dow in Botswana, which I discussed earlier, illustrates how the judge refused to allow the case to be disposed on the ground of standing. The State's attorney claimed that the plaintiff lacked standing to challenge the Citizenship Act because she herself was not personally injured. The judge took a broad view of the standing requirement, finding that all the plaintiff had to show was that the application of the law would adversely affect her in some way. See supra note 23 at 622-23.

35. See Ralph Steinhardt, Human Rights Litigation and the "One-Voice Orthodoxy in Foreign Affairs", in Gibney, World Justice?, supra note 31 at 24.

36. DKT Memorial Fund, Ltd. v. Agency for International Development, 810 F.2d 1236, 1238 (D. Cir. 1987). Despite this recognition, the outcomes in similar cases have not been consistent. See Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985) (holding justiciable a claim for damages and injunctive relief against the U.S. for the expropriation of land in Honduras for training of Nicaraguan resistance forces); Chaser Shipping Corp. v. United States, 649 F.Supp. 736 (S.D.N.Y. 1986), aff'd mem., 819 F.2d 1129 (2d Cir. 1987), cert. denied, 108 S.Ct. 695 (1988) (where related policy of mining the Nicaraguan harbors gave rise to a similar injury, the destruction of private property, but claim held to be nonjusticiable).

Human rights claims that beg for justice can go unanswered when a judge dismisses a case on the grounds of a political question or sovereign immunity. An illustration of this occurred in a suit brought by Nicaraguan civilians against the United States government for the human consequences of the United States foreign policy forays in Nicaragua.³⁷ In simplistic terms, the Nicaraguan plaintiffs suffered horrible personal losses perpetrated by members of the contra rebel forces in their homeland. The plaintiffs alleged that the United States gave aid to the contra rebel forces, who in turn committed the terrorist raids. The case was dismissed as involving a nonjusticiable political question and sovereign immunity.

The extent of judicial deference to the political branches exhibited in this case does not appear to be necessary.³⁸ The Court focused on the danger of citizens using the courts to obstruct foreign policy. It also envisioned judicial control over U.S. military policy in Central America, but this by no means had to be the result of a lawsuit by individuals for their personal harm. By ignoring vital issues which the court was capable of addressing, such as the plaintiffs' claim for compensatory damages for past harm, this court missed an opportunity to remedy potentially egregious violations of human rights.³⁹

Thus, we as judges can better advance the protection of human rights by exercising deference to the political branches of the government only in narrow circumstances. Overstating the political magnitude of a case or underestimating the ability of the court to decide a case inflates the perceived need for judicial inactivity, and denies to individuals the chance to have human

...Continued...

37. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), aff'd, 770 F.2d 202 (D.C. 1985). The district court justified the dismissal on political question grounds, arguing that the suit would require the court to oversee U.S. military affairs in Central America. The appellate court upheld the dismissal on the basis of sovereign immunity.

38. Mark Gibney, Courts as "Teachers in a Vital National Seminar" on Human Rights, in Gibney, ed., World Justice?, supra note 31 at 81.

39. Id. A claim for compensatory damages for past harm would not involve the judiciary in any degree of judicial control over the carrying out of U.S. foreign policy in Central America. See Gibney, supra note 36 at 92.

rights abuses remedied.⁴⁰

In conclusion, I hope that I have conveyed to you a sense of the importance of the role of judges in advancing human rights. International human rights law can come into play at any stage in a proceeding, from guiding us into accepting jurisdiction over a matter to serving as the basis for the decision. If we downplay our role in the promotion of human rights, the interests of justice may suffer. I would like to leave you with the wisdom of Albert Camus, who commented that "[f]reedom is not a gift received from the state or a leader, but a possession to be won everyday by the effort of each and the union of all."

40. Professor Steinhardt concludes that deference should be exercised in narrower circumstances, "namely, when the political branches have actually committed the United States internationally pursuant to a delegated and exclusive power in the Constitution, when there are no international standards to apply, and when individual rights are not at issue." See Steinhardt, *supra* note 35 at 44.

The Role of the Judge in Advancing Human Rights Norms

by

The Hon Justice Enoch Dumbutshena

The list of participants is impressive. This must be the highest number of participants of all the Judicial Colloquia so far held. I congratulate the Government of Nigeria and the convenor, Chief Justice Bello.

This Colloquium marks a significant turning point in the thinking of judges of this region. In Banjul, Gambia, there was a moment when I thought judges in West Africa were immovably settled in their judicial thinking. I was wrong.

It used to be thought that judges were a different species of humanity. They were serious, dressed in dark suits and black or red robes. They neither saw nor heard what was going on outside their courtrooms and chambers.

Times are changing. Judges were required, at least by me during my time as Chief Justice, to look out through the windows and see what is happening outside there. It is there that their judgments have an effect. It is outside there where justice is seen to be done or to be denied to the real people.

The world in which we live is shrinking. Political ideologies are converging. One cannot pretend that the world is not dominated by one political philosophy and one economic ideology. Under these circumstances there is no justification any more to divide judges into political and social compartments. We, judges, are being driven by force of circumstances to creating an international justice system unencumbered by international boundaries and social and political ideologies. One unifying force is the Universal Declaration of Human Rights. We all believe that: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.

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

"Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-selfgoverning or under any other limitation of sovereignty."

Because of information technology the world belongs to us all. We know what is happening around the globe. We know countries that deny their people justice. We know countries that deny their people fundamental human rights.

There are few countries without Bills of Human Rights. The majority of countries have them. They may not be used but they are there to be used. It may be said some governments feel threatened by provisions of Bills of Rights entrenched in their constitutions. Let me in this regard refer to Section 15 of the Constitution of Zimbabwe.

Section 15(1) stated as follows before it was amended: "No person shall be subjected to torture or inhuman or degrading punishment or treatment". Article 5 of the Universal Declaration of Human Rights states: "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". There are many Constitutions which have this provision in identical words.

The Zimbabwe Government did not pay heed to those immortal words when it amended Section 15 (1) in order to allow the imposition of judicial corporal punishment which the Supreme Court had declared unconstitutional in S v Juvenile 1990(4) SA 151 (ZS).

The Government in its amendment gave authority to inflict moderate corporal punishment on juveniles under the age of eighteen years to parents, guardians or to people in loco parentis and by the courts.

The Government of Zimbabwe was party to the Banjul Charter. Article 5 of the Charter (the African Charter on Human and People's Rights) which prohibits cruel, inhuman or degrading punishment and treatment, does not permit the derogation of this provision. Gino J Naldi, Lecturer in Law at the University of East Anglia wrote on Zimbabwe's position in the African Society of International and Comparative Law Journal, Volume 3. The article was entitled: "Constitutional Developments in Zimbabwe and their compatibility with International Human Rights". The learned author remarked: "... Zimbabwe is a party to the Banjul Charter; Article 5 of the Charter, from which no derogation is permitted, prohibits cruel, inhuman or degrading punishment and treatment. The principles invoked as interpretation aids to Article 5 of the Banjul Charter, and given that Zimbabwe has ratified the Banjul Charter it would seem that Section 15(3) (b) as amended could be regarded as incompatible with the said Charter.

Subsection (3)(b) of Section 15 reads:

"(3) No moderate corporal punishment inflicted - (b) in execution of the judgment or order of a court upon a male person under the age of eighteen years as a penalty for breach of any law, shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading".

It is instructive to look at the position in Namibia whose Constitution has a similar provision. Article 8(2) (b) of the Namibian Constitution reads:

"No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

The Attorney-General of Namibia requested the Supreme Court "to

determine whether the imposition and infliction of corporal punishment by or on the authority of any organ of State contemplated in any legislation is:

1. per se; or
2. in respect of certain categories of persons; or
3. in respect of certain crimes or offences or misbehaviours; or
4. in respect of the procedure employed during the infliction thereof in conflict with any article provision of the Constitution of the Republic of Namibia and more in particular Article 8 thereof and, if so, to deal with such laws as contemplated in Article 25(1) of the Namibian Constitution".

To assist the Supreme Court the Government of Namibia engaged counsel to argue on both sides of the issue. The Supreme Court in a judgment prepared by Mohamed AJA, made the following order:

- "1. It is declared that the imposition of any sentence by judicial or quasi-judicial authority, authorising or directing any corporal punishment upon any person is unlawful and in conflict with Article 8 of the Namibian Constitution.
2. It is further declared that the infliction of corporal punishment in Government Schools pursuant to the existing Code formulated by the Ministry of Education, Culture and Sport or any other direction by the said Ministry or any organ of the Government, is unconstitutional and unlawful and in conflict with Article 8 of the Namibian Constitution."

In Namibia the Government referred the constitutionality of corporal punishment to the Supreme Court. There was no appeal by an aggrieved party. The judgment of the Supreme Court was well received. In Zimbabwe the first reaction to the judgments on corporal punishment was favourable. It appears the Zimbabwe Government developed cold feet and amended the Constitution in order for the Courts to continue imposing moderate corporal punishment on juveniles. Parents were granted a constitutional right to beat their children.

It is interesting to note that the question of the legality of corporal punishment in schools which seemed to worry the Zimbabwe Government did not worry the Namibian Government. It is difficult to guess the reasons for different reactions. In Zimbabwe girls under the age of 18 years and adults are not subjected to corporal punishment. In the case of male adults the Supreme Court declared corporal punishment unconstitutional. There is here discrimination against male juveniles. In my view provisions of Bills of Rights should never be amended. And if they are to be amended the amendment must be supported by all members of the House of Assembly. In my country there are some members of Parliament who do not seem to understand why they were elected. In their hands Bills of Rights are not safe because they do not understand them. I am sure there are many members of Parliament

in Africa who think that whatever the Government wants to accomplish is right.

In S v Juvenile 1990 (4) SA 151 the reaction of Government was directed against an obiter dictum on corporal punishment in schools. In Namibia the Court decided that corporal punishment in Government schools was unconstitutional for the reasons I gave in S v Juvenile (supra). I cite below what Mohammed AJA said in:

See Exparte Attorney-General, Namibia: In Re Corporal Punishment 1991 (3) SA 76 at 94 A-H.

"The real distinction between corporal punishment imposed in government schools and corporal punishment inflicted on offenders in consequence of a sentence imposed by a judicial or quasi-judicial tribunal is said however to be based on legal grounds.

"The judicial tribunal which imposes a sentence of corporal punishment, it is argued, obtains its authority to do so from governmental legislation or regulations, whereas the school authorities who do so obtain their authority from the common law just as parents do. It is accordingly argued that the rights of the school authorities to impose corporal punishment are no more subject to review in terms of art 8(2) (b) of the Constitution than the rights of parents to do so. If punishment is so excessive as to be unlawful at common law it could be assailed in terms of art 8(2) (b) as being inhuman or degrading, but corporal punishment per se at schools, it is argued, cannot be unconstitutional.

"The Courts outside Namibia which have addressed themselves to the issue of corporal punishment in Government Schools have expressed divergent views. In the case of S v Juvenile (supra) Dumbutshena CJ expressed himself strongly against corporal punishment inflicted on school children but the Court in that case was not called upon to decide that issue and his remarks were therefore obiter. The remarks of Dumbutshena CJ however are supported by German Constitutional law which holds that the imposition of corporal punishment on children at schools violates the German Constitution. (Ingo von Munch Grundgesetz- Kommentar 3rd ed vol. 1 at 154.) The approach of Dumbutshena CJ also finds support in the dissenting opinion of Mr. Klecker in the case of Campbell and Cosans v United Kingdom (1980) 3 EHRR 531 at 556 and in the dissenting opinion of Mr. Justice White in the case of Ingraham v Wright 430 US 651 and in the opinion of the European Commission of Human Rights in the case of Canecom Warwick v United Kingdom report dated 18 July 1986 referred to in the case of S v A Juvenile at 161G-H.

"Support for the contrary view appears from the remarks of McNally JA in the case of S v Juvenile at 169J and in various observations of the majority in the case of Campbell and Cosans v United Kingdom (1980) 3 EHRR 531

and (1982) 4 EHRR to 93.

"The system of corporal punishment at schools sought to be protected in the present matter is regulated by a formal Code formulated and administered by a Government Ministry. This was also substantially the position in Zimbabwe and it was this distinction which influenced Dumbutshena CJ in Juvenile's case to state that

'... in a system of education which has formal rules on corporal punishment drawn by a competent authority, the same consideration governing judicial corporal punishment must apply'.

"I am in respectful agreement with this approach.

"Whatever the position might be in cases where a parent has actually delegated his powers of chastisement to a schoolmaster, it is wholly distinguishable from the situation which prevails when a schoolmaster administers and executes a formal system of corporal punishment which originates from and is formulated by a governmental authority. Such a schoolmaster does not purport to derive his authority from the parent concerned who is in no position to revoke any presumed 'delegation'."

The point I want to make is this: The decisions of the Supreme Court of Zimbabwe in S v Ncube and Others 1988 (2) SA 702 (ZS) and S v A Juvenile (supra) have had a far reaching effect in different jurisdictions and more so in the Southern African region. These cases and those relating to the compulsory acquisition of land in terms of Section 16 (1) of the Constitution which were decided before Parliament amended sections 15 and 16 when it passed the Constitution of Zimbabwe Amendment (No. 11) Bill 1990 which made judicial corporal punishment on juveniles and the execution of the death penalty by hanging constitutional, have already had an impact in Southern Africa. I believe when South Africa comes on stream judicial corporal punishment in that country will be abolished.

The judges' opinions expressing different views on these important Human Rights provisions have been read by judges, lawyers and academics in the Commonwealth and elsewhere. The role of the judges in interpreting and in giving effect to Human Rights in Zimbabwe was enhanced by the controversy.

Because a Bill of Rights entrenched in a constitution gives power to the judiciary, judges become the most effective arm of Government. They make the rights of the citizens more meaningful by striking out provisions of statutes which are contrary to those of the Constitution.

No one doubts the power judges have in implementing procedural rights. Courts have absolute power in this regard. The Courts of Zimbabwe have in S v Slatter and Others 1983 (2) ZLR 144; 1984(1) ZLR 306 (ZS) emphasised the right of an accused person to access

to his legal advisers. It is a fundamental right enshrined in the Constitution. This right is also found in the Criminal Procedure and Evidence Act (Chapter 59). Section 101 reads as follows:

"101 (1) The Friends and legal advisers of an accused person shall have access to him, subject to the provisions of any enactments relating to the management of prisons.

(2) An accused person, while the preparatory examination is being held, shall be entitled to the assistance of his legal advisers."

What is more section 105C (1) reads:

"Where an accused has been brought before a magistrate, the prosecutor may apply to the magistrate for the confirmation of any statement alleged to have been made by the accused whether in writing or orally and reduced to writing."

In S v Slatter and Others (supra) the accused were Air Force officers. Slatter was an Air Vice-Marshal and the Chief of Staff of the Air Force. On 25 July 1982 saboteurs entered the Thornhill Air Force Base and destroyed or damaged by means of explosives, a number of aircraft. The estimated damage and loss was at over \$7 million. The officers were arrested and charged with aiding, abetting, inciting or procuring the sabotage. In order to extract confessions from them the police moved them from one remote police station to another.

The police did not want them to see their lawyers before they had recorded confessions. Subsequently those confessions were confirmed by a magistrate in terms of section 105 of the Criminal Procedure and Evidence Act.

At the trial the accused challenged the admissibility of the statements on several grounds. One of the grounds was that they had been refused access to their lawyers until after confirmation proceedings. The Court ruled that the confirmation proceedings were irregular, and therefore unlawful and invalid, by reason of the denial of the accused's right to legal assistance.

This case established for the first time in Zimbabwe that confirmation proceedings should be attended by legal representatives, should an accused person ask for one. The early participation of lawyers from the time an arrest is made lays the foundation of justice. Both the Constitution and the Criminal Procedure and Evidence Act require access by lawyers to their clients. Procedural rights are the rockbed of justice. To me justice begins when police start their enquiries and ends when the Court pronounces its verdict.

The right of an accused to legal advice or representation was emphasised by the Court of Appeal of England and Wales in the cases of Regina v Silcott; Regina v Braithwaite; Regina v Raghip reported by the Independent Newspaper on 6 December, 1991. The Court of Appeal in its judgment delivered on 5 December, 1991 allowed the appeals of the three appellants and set aside convic-

tions of murder. In the case of Braithwaite the ground of referral from the Home Secretary to the Court of Appeal related to whether his admissions should have been excluded since he had been denied access to legal advice. Legal authorities in England and Wales have established that access to legal advice pursuant to section 58 was an important and fundamental right. Police had extracted admissions from Braithwaite in the absence of his lawyer just as was the case in Slatter and Others. The Court of Appeal said that it did not matter how strongly or justifiably the police might feel their investigation was being hindered by the presence of a lawyer coupled with the right to silence, they were nevertheless confined to the narrow limits imposed by section 58(8) of the Police and Criminal Evidence Act 1984 on the right to delay access. The Court decided that there was a breach of section 58. The court should first consider whether section 76 dealing with confessions was applicable and if the confession was not excluded under section 76 the court should go on to consider section 78 which allows the exclusion of unfair evidence.

I have mentioned this case because criminal justice in England and Wales has received a battering. The system of justice seems not to be working well. However the Court of Appeal in this case emphasised the right of access to lawyers. Not only that the Court of Appeal had previously refused, in the case of Raghip, to allow evidence of a psychologist to be led. The Court of Appeal hearing the referral said that in assessing the reliability of a confession pursuant to section 76(2) (b), the trial judge should pose the question: was the mental condition of the defendant such that the jury would be assisted by an expert in assessing it? In Raghip's case the Court of Appeal admitted the fresh psychological evidence and decided that his conviction was unsafe and unsatisfactory.

What is interesting in England is that justice is being done, although belatedly, to people unfairly convicted albeit after spending a long time in prison. In this respect one has to mention the work done by two Law Lords, Lord Devlin and Lord Scarman in an attempt to expose the miscarriages of justice in the case of the Guildford Four and the Maguire family. I should mention other members of the team, Cardinal Hume, Merlyn Rees and Lord Jenkins, two former Home Secretaries. The important thing is judges were in it. One shudders to think of the many convicted prisoners in Commonwealth Africa convicted of murder and sentenced to death who might have been wrongly convicted and yet were executed because we do not have a system that reviews doubtful cases. This is an area in which retired judges can play a meaningful role and assist in upholding a fair and just system of justice.

This influence of judges has become more apparent in the Southern African region. With the political changes being negotiated in South Africa a sense of justice is beginning to manifest itself in recent judgments on the death sentence. Firstly the superior courts in South Africa have a discretion to impose the death sentence or a sentence of imprisonment. Secondly the Appellate Division can, when seized with an appeal involving a sentence of death, make up its own mind. If the judges believe that they themselves would not have imposed a sentence of death, they can

set aside that sentence and impose a sentence they consider proper, that is, a proper sentence.

This latitude is a creature of statute. South Africa is in the process of considering an appropriate Bill of Rights. It is my belief that when a new political dispensation does come, there will be a Bill of Rights and the judges will interpret it in a way that will bring justice to all the citizens of South Africa. At present the power to strike out legislation is denied to the judiciary because Parliament is supreme.

And with Botswana, Namibia and Zimbabwe firm in the belief that the judiciary is the custodian and guardian of the rights of the citizen, the Southern Africa region cannot fail to do justice to its various peoples. Yes judges have a role to play in the application of international human rights norms to domestic human rights. They are the only people who give effective and meaningful interpretation to human rights instruments, domestic and international.

Yet judges must speak out on human rights. Because in our work and in our judgments we reach a very few people, it is important that we speak to a wider audience. I see nothing wrong in talking to people about human rights. There must, in my view, be some honour in explaining to people what effect they have on one's life. In Zimbabwe, the Legal Resources Foundation, teaches the public about their rights. It runs a Human Rights Programme designed to explain to security agencies how an understanding of fundamental human rights would improve the quality of their work and their relationships with the public. They like the programme. Judges play a vital role in the Foundation. Some of them are trustees. I also play my part in the capacity of Chairman of the Foundation. When judges understand human rights and the people also do, the quality of justice improves.

**The Judge in the New World Order -
A Role in Advancing Human Rights? ***

by

The Hon Justice Michael Kirby AC CMG**

HUMAN RIGHTS IN THE NEW WORLD ORDER

In the midst of our daily duties as judges, it is all too easy for us to overlook the contributions we make to building the foundations of the new world order. With our gaze steadily fixed on the cases before us, we may overlook the great mosaic to which each, in his or her humble way, makes a contribution. Each of us serves the people who come before us (and also those who do not) in accordance with law. Looking down from the bench at the lawyers who argue before us or at the litigants and witnesses paraded through our courts, it is easy to lose sight of the gigantic world context in which our daily activities must, upon one level, be viewed.

In his speech to the United States Congress on 11 September 1990, President George Bush, justifying and explaining the course later taken by the United Nations in the Gulf Crisis, declared that there was:

* This is an updated and amended version of a paper presented by the author to the Judicial Colloquia on the Domestic Application of International Human Rights Norms held at Harare, Zimbabwe, April 1989 and Banjul, The Gambia, November 1990. Those papers are published by the Commonwealth Secretariat, vol.2, Judicial Colloquium in Harare, Developing Human Rights Jurisprudence, vol.2: A Second Judicial Colloquium on the Domestic Application of International Human Rights Norms, November 1989, 49 ff and *ibid*, vol.3, A Third Colloquium on the Domestic Application of International Human Rights Norms, November 1990. See also M D Kirby, *Implementing the Bangalore Principles on Human Rights Law* (1989) 106 South Africa LJ 484.

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"... [A] new world ... struggling to be born, a world quite different from the one we have known, a world where the rule of law supplants the rule of the jungle, a world in which nations recognise the shared responsibility for freedom and justice, a world where the strong respect the rights of the weak."¹

Earlier, General Secretary Gorbachev, in his 1988 address to the General Assembly of the United Nations, referred to:

"... a quest for universal consensus in the movement towards a new world order."²

In fact, that quest began long before these speeches were made. It came to an important watershed in the establishment of the United Nations Organisation by the adoption of the United Nations Charter with its dedication to respect for universal human rights.³ That Charter stimulated first the adoption of the Universal Declaration of Human Rights and then the process which led to the development and adoption of the International Covenants which make up the International Bill of Rights. Since 1945 there has been a quite revolutionary development in the international legal order. The ideas affirming the basic right to self-determination of peoples has led to the liberation first of colonised peoples, then of many in the trusteeship territories and lately of peoples in Central and Eastern Europe, Asia, Africa and elsewhere who had been denied the right to self-determination. This process is continuing.

Clearly, the end of the Cold War and of the tensions which for four decades perilously divided the world, present an extraordinary opportunity to humanity. Indeed, it is an opportunity never before in prospect. Its potential is reinforced by the technological wonders of our time which link all the peoples of this planet to their common destiny. It is a moment when the fundamental right to political self-determination and to the protection of basic human rights stand a better chance to be realised than ever before.

Following the Gulf War, the leaders of the world's seven major industrialised countries declared in London in July 1991:

"[T]he conditions now exist for the United Nations to fulfil completely the promise and the vision of its founders. A revitalised United Nations will have a central role in strengthening the international order. We commit ourselves to making the UN stronger, more efficient and more effective in order to protect human rights, to maintain peace and

1. See G Bush quoted in G J Evans, "The New World Order and the United Nations" in M R Bustelo and P Alston, *Whose New World Order: What Role for the United Nations?*, Federation, Sydney, 1991, 1.

2. M Gorbachev quoted *ibid.*

3. United Nations Charter, article 1(2).

security for all and to deter aggression."⁴

Allowing for the hyperbole which typically accompanies the new world optimism about security, democracy and human rights,⁵ and facing squarely the discouraging failures of the United Nations (as in the case of the Kurds and East Timor) as well as its prospects for success,⁶ it is nonetheless true that the current events in which all of our countries play out their rôle on the international stage are propitious for democracy and self-determination and for fundamental human rights.

So much was recognised at the recent meeting of Commonwealth Heads of Government in Harare, Zimbabwe. The dramatic changes which have occurred in South Africa allowed the Commonwealth, for the first time in twenty years, to give priority to new issues. Amongst the items given the highest ranking in the agenda was a renewed attention to global human rights. The Secretary General of the Commonwealth, Emeka Anyaoku of Nigeria, declared at the opening ceremony that there was an increased desire within the Commonwealth to promote values such as democracy, human rights and the rule of law. President Mugabe of Zimbabwe recognised that the "gales of change" unleashed by the end of the Cold War demonstrated not only the urgency of the quest for democracy "representative and responsive government" but also the:

"... insistent demand by millions for social justice and respect for the fundamental rights of peoples and nations."

The inter-relationship between law and social justice in Africa was also the theme of the biennial conference of the African Bar Association held in Abuja in March 1991. According to the report of that meeting, participants urged the need for fearless lawyers and the defence of the rule of law and human rights throughout Africa whose history had been full of derogations from these precious values.⁷ It seems likely that the self-same "gales" which have swept through Eastern Europe are now reaching Africa. Early signals of change include the abandonment of the single party state proposal in Zimbabwe, the peaceful change of government achieved by the election of a new President in Zambia

4. Political Declaration; Strengthening the International Order, issued on 16 July 1991. See Bustelo and Alston, Appendix C, above n.1, p.155.
5. See R Hill, "International Disputes and a New World Optimism", in Bustelo and Alston, above, 22.
6. P Alston, "Human Rights in The New World Order: Discouraging Conclusions from the Gulf Crisis" in Bustelo and Alston, above, 98.
7. International Bar News, 1991, 36. See also International Commission of Jurists, Adama Dieng (French text) Report of the ICJ on the participation of Non-Governmental Organisations in the African Commission of Human and Peoples' Rights, Banjul, The Gambia, 5-7 October 1991; B K A Amoah, Participation of Non-Governmental Organisations in the Work of the African Commission on Human and Peoples' Rights, loc cit.

and the steps taken in fulfilment of the promise of the restoration of civilian democracy in Nigeria.

These great changes may seem remote from the daily activities of judges and lawyers. But they are not. Judges are part of the governmental machinery of their countries. They are, in the words of Alexander Hamilton, the least dangerous branch of government. But they are a branch of it nonetheless. Lawyers minister to justice and are officers of the courts. Inescapably, the law reflects the social and political environment in which it operates. Because the idea of individual rights and representative democracy are so deeply imbued in the thinking of the common law, to which we the judges are all heirs, it is inevitable that, in our daily work, we should reflect many of the universal values now expressed in the international instruments which state universal norms of human rights.

It is no accident that there is an abiding synchrony between the norms of international human rights and the principles of the common law. The linkages may derive, in part at least, from the very universality of human rights and the notion that basic rights inhere in individuals everywhere simply because they are human beings, each deserving of individual respect. But in an institutional sense, the Anglo-American global dominance at the end of the Second World War, during that time when the United Nations Charter was adopted, the Universal Declaration of Human Rights accepted and the International Bill of Rights drawn up, ensured that on the modern statements of international law affecting human rights was left the indelible stamp of the thinking of the great judges of the common law.⁸

This is why, as judges, even when we are unfamiliar with the verbiage and jurisprudence of international human rights norms, when we stumble upon them (or research and discover them for a particular purpose) we are very rarely surprised. On the contrary, the discoveries tend to confirm and reinforce our own thinking as common lawyers. And this is precisely because of the very great impact which common lawyers have had upon the preparation, expression and implementation of universal human rights, especially in the age of the true new world order since 1945.

FROM NOBLE THOUGHTS TO STRATEGIES FOR ACTION

I presume to commence my paper with these remarks because of the need, as I see it, for judges of our generation to confront honestly and boldly their place as servants of the law in a new world order concerned with "democracy, human rights and the rule of law", as the Secretary General of the Commonwealth described it.

One of the dangers of a life in the law is the ever present

8. R B Lillich and H Hannum, "Linkages Between International Human Rights and US Constitutional Law", in 79 American J of Int. L, 158 (1985); see also G A Christenson, "Using Human Rights Law to Inform Due Process and Equal Protection Analyses" 52 Cincinnati L Rev 3 (1983).

tendency to parochialism. In a sense, this is enforced on us every day by the jurisdictional borders which divide us into disparate legal régimes. In federations (such as Australia and Nigeria) there is a still further subdivision of legal régimes. Yet at least federalism opens the eye of the lawyer to the necessity to live every day with two legal régimes. In some unitary states, the lawyer may feel completely unconcerned with what happens across the frontier. But the new world order necessitates that the human rights of neighbours, and the provision to them of democratic means to achieve self-determination and self-government, are the legitimate concerns of those who live next door. Indeed, they are of concern globally because of the universality of these values and the danger to international peace and security from derogations from them.

It is in this context that consideration of international human rights norms must be placed today. It must be seen as a building block of the new world order. That is not an order which abolishes the nation state or denies respect for the multitude of different peoples who make up the world. On the contrary. But it is a world of close interdependence and a shared concern about basic rights of fellow human beings. Out of recognition of this concern we can see many initiatives of government, academe and the legal profession.

One important illustration of the movement to which I refer is the establishment of the Advisory Group of the Commonwealth Human Rights Initiative. That Group prepared a report for the recent Harare meeting of Commonwealth leaders titled "Put our World to Rights."⁹ If the purpose of the report was to stimulate discussion and action in Harare on the themes of human rights, it would appear to have found willing ears amongst the Commonwealth leaders. Boldly, the report suggests that:

"Human rights have always underpinned the Commonwealth. The evolution of the empire into the Commonwealth was itself a testimony of the most basic of human rights, self-determination. The sense of family between peoples of diverse races within the Commonwealth was a powerful repudiation of one of the major threats to human rights, racism. Close and friendly relations between members of the Commonwealth have emphasised the common humanity of mankind, transcending differences of race, religion, language and culture. The Commonwealth has cooperated in pushing the frontiers of freedom internationally, particularly in its fight against colonialism and racism. Individual member states have played valuable roles in formulating international or regional instruments for the protection of human rights.

The members of the Commonwealth share the legacy of the common law with its strong emphasis on the rule of law and procedural safeguards secured through an independent judiciary."¹⁰

9. Advisory Group, Commonwealth Human Rights Initiative, Put Our World to Rights, 1991.

10. Id, 2ff.

Yet the authors of this report contend that, on the whole, the record of the member countries of the Commonwealth in the field of human rights has been "poor".¹¹ Signing and ratifying international instruments is not enough. Both at a Commonwealth level and in the individual countries of the Commonwealth there is a need for new attention so that the noble words of human rights will be translated into a strategy of action. Such a situation necessitates many initiatives at the international and national level. One of the chief of these is "strengthening [of] the legal system":¹²

"It is essential to the effectiveness of the legal system that judges and lawyers should be well qualified, courageous and independent ... Governments need to discard the notion that a human rights oriented judge or lawyer is ipso facto subversive. The courts must give a liberal and broad interpretation to human rights provisions, as many of them, including the Privy Council have now accepted. It is necessary that all individuals or groups should have easy access to courts for the protection of their rights. The procedures for bringing suits should be simplified, and the rules as to who may bring actions relaxed, as the Indian Supreme Court has done ...; relevant NGOs should be permitted to bring actions on behalf of individuals or in the public interest. Legal aid should be provided where an individual or group cannot afford legal costs. Human rights instruments and legislation and case law should be readily available."¹³

Judges and other lawyers cannot (except as prominent and educated citizens) be specially concerned in the national and international initiatives within and beyond the Commonwealth for the protection and advancement of democracy, human rights and the rule of law. As lawyers and citizens in their own countries they can and should take part in appropriate non-governmental organisations, such as Amnesty International and the International Commission of Jurists. And because their daily work involves actions which affect, inescapably, the basic rights of fellow human beings who come before the courts and tribunals of their country, they have an inescapable and personal responsibility to play a worthy and relevant part in the development and application of the norms and standards of human rights. They cannot wash their hands of this part, asserting that these are functions for international agencies, national governments, politicians or administrators. Because they are involved in decisions which require the making of choices, their legal functions inescapable involve their playing a rôle in the advancement of a civilized "new world order".

Of course, that role is distinctly in the minor key. Not for judges and lawyers, ordinarily, are the grand gestures reserved

11. Id, 6.

12. Id, 22.

13. Id, 22.

to political leaders. Nonetheless, in their daily lives, judges and lawyers make a multitude of decisions and take countless actions which, individually may be insignificant but collectively are of tremendous importance for the practical attainment of basic rights. It was in this way that the Royal Courts of England, over many centuries, gradually put together the coherent body of the common law. In a similar way, it falls to contemporary lawyers to play a constructive part in building, by their daily activities, a new world order in which domestic law reinforces and gives substance to the noble ideas of international human rights law.

It should not be expected that the harmonious relationship between domestic and international law will be created overnight. It will not be, any more than was the common law of England which we have inherited. By the same token, domestic respect for basic norms of international human rights will also not come about unless the judges and lawyers of today are aware of their terms and sensitive to the need to reflect international norms in their decisions. Their worthy part in the new world order of human rights will not be attained unless they are sympathetic to this global development and conscious of the sources to which they may turn for the intellectual guideposts for their individual contributions.

I have now sufficiently sketched the contemporary context in which the rôle of the judge in advancing basic human rights should be seen. Beyond doubt, it is a challenging moment in legal history to serve as a judge. I turn, next, to a reminder of the stage which has been reached in the debate about the precise legal relationship between international human rights law and national law as applied in municipal courts which follow the common law tradition.

FOURTH STEP, LONG JOURNEY

This meeting, convened by the Supreme Court of Nigeria, is the fourth in a series facilitated by Interights and the Commonwealth Secretariat. The first was held in Bangalore, India in February 1988. It was convened by Justice P N Bhagwati, a former Chief Justice of India. It formulated the Bangalore Principles.¹⁴ The thesis of those principles was not that international legal norms on human rights are incorporated, as such, as part of domestic law. Still less was it that domestic judges could override clear domestic law by reliance on such international norms. But it was that judges should not ignore such international rules in a comfortable world of judicial provincialism and blinkered jurisdictionalism. Instead, they should become familiar with the international norms. When appropriate occasions present themselves, as in the construction of an ambiguous statute or the declaration and extension of the common law, they should ensure, so far as possible, that their statement of the local law conforms to the basic principles of human rights collected in

14. The Bangalore Principles are published in the Commonwealth Secretariat document, 73-74. They are also published in (1988) 14 Commonwealth Law Bulletin, 1196 and in (1988) 62 ALJ 531.

international law.

Judges of the common law have choices. Their task is by no means mechanical. To exercise their choices they must have points of reference or criteria. Choices should not be made upon the idiosyncratic whim of a particular judge. They should be made by reference, amongst other things, to the fundamental principles of international human rights norms.

On the initiative of Justice Enoch Dumbutshena, then Chief Justice of Zimbabwe, a second colloquium was convened in Harare in April 1989. It was opened by President Mugabe. He stressed on that occasion the imperative duty of all countries to create an environment of peace (without which human rights can not flourish) and to assure the independence of the judiciary as a means of upholding such rights.¹⁵ At the end of the Harare conference, the participants joined in the Harare Declaration on Human Rights. This contained the reminder that:

"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."¹⁶

The participants noted many cases in courts of high authority where international human rights norms had been utilised to resolve ambiguity or uncertainty in written law or to fill gaps in the common law. They called for the preparation of a practical manual, containing basic instruments, as a practical means to further the process of implementation.

The third meeting was held in Banjul, The Gambia between 7 and 9 November 1990. This meeting was convened on the initiative of the Government of the Gambia and of Chief Justice Ayoola. It resulted in the Banjul Affirmation. By it, the participants in Banjul accepted "in their entirety" the Bangalore Principles and the Harare Declaration. They acknowledged that:

"... [F]undamental human rights and freedoms are inherent in mankind ... [A]ny truly enlightened social order must be based firmly on respect for individual human rights and freedoms, peoples' rights and economic and social equity."¹⁷

15. R G Mugabe, Inaugural Address to the Harare Judicial Colloquium in Commonwealth Secretariat, Developing Human Rights Jurisprudence, vol.2, 17.

16. Harare Declaration of Human Rights. This declaration is published in Commonwealth Secretariat, *ibid*, vol.2, 9. See also (1989) 15 Commonwealth Law Bulletin 999.

17. Banjul Affirmation in Commonwealth Secretariat, Developing Human Rights Jurisprudence, vol.3, "A Third Colloquium on the Domestic Application of International Human Rights Norms", London, 1991, 1 at 3.

The participants in Banjul pledged their commitment and dedication to the goals and principles collected in the statements issued at Bangalore and Harare. They called attention to the need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international instruments and national constitutions and laws. They recalled the particular provisions of the African Charter on Human and Peoples' Rights and suggested that the African Commission on Human Rights should consider establishing local associations in each member state to facilitate the process of education, training and dissemination of human rights information. They urged the sharing of experience within and beyond Commonwealth Africa so that the jurisprudence on human rights could be shared, reinforcing a dedication to their attainment.

After the Harare Colloquium and before the meeting in Banjul, one of the regular participants in this series, Mr Anthony Lester QC sought to persuade the English Court of Appeal to accept the principles of the Bangalore Statement. That distinguished Court would go only part of the way. In *Regina v Secretary of State for the Home Department; ex parte Brind and Ors*¹⁸ the question was whether a declaration by the United Kingdom Home State requiring United Kingdom broadcasters to refrain from broadcasting words spoken by alleged Irish terrorists was ultra vires and unlawful. Amongst other arguments, it was claimed that the directive, made under the Broadcasting Act 1981 (UK), contravened article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Divisional Court dismissed the challenge. So did the Court of Appeal. It held that the European Convention was not incorporated by statute into English domestic law. Accordingly, its provisions were not applicable as a rule of statutory construction except to help resolve ambiguity in primary legislation of the United Kingdom, enacted subsequently. Such a limited utility was explained upon the presumption that Parliament would endeavour to legislate consistently with the United Kingdom's treaty obligations once entered. Otherwise, where powers were provided by Parliament to permit the Executive Government to make subordinate legislation, and expressed in language which was unambiguous, the court would not presume that such powers were intended to be limited by the terms of the convention.

These remarks were, in one sense obiter dicta. The Court of Appeal held that the empowering language of the Broadcasting Act was clear and unambiguous. That alone might be said to justify its conclusion that the terms of the European Convention were not relevant to the Court's determination of the application. In 1967, Diplock LJ had said:¹⁹

"If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out

18. [1991] 1 AC 696; [1990] 2 WLR 787 (CA).

19. *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143 (CA) followed in *Garland v British Rail Engineering Limited* [1983] 2 AC 751, 771 (HL). See also *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161, 173.

Her Majesty's treaty obligations..."

This foregoing decision in *Brind* was disappointing to many of the apostles of Bangalore.

Never daunted, Mr Lester took the decision to the House of Lords. Although their Lordships dismissed the appeal, some of the speeches nudged English law a little closer to the principle embraced in Bangalore, Harare and Banjul. Lord Bridge of Harwick, for example, declared that there was "considerable persuasive force"²⁰ in Mr Lester's argument. He asserted that the preference of a construction of a statute which avoids conflict between domestic legislation and international treaty obligations was a "canon of construction which involves no importation of international law into the domestic field".²¹ But in the end, Lord Bridge's opinion did not embrace the Bangalore idea:

"When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.

In a way, *Brind* was a difficult case to use as a vehicle for advancing the Bangalore principles in England. The legislation in question, involving as it did a response to the special problem of terrorism, presented difficulties which other legislation might not have done. Hard cases still make good law, we are told. So much appears to have been recognised by Lord Roskill.²² And by Lord Templeman.²³ Lord Ackner, whilst accepting as well settled that a Convention:

"... may be deployed for the purpose of the resolution of an ambiguity in English primary or subordinate legislation".²⁴

could find no ambiguity or uncertainty in the legislation to fetter the exercise of discretion provided in it. He rejected the view that the courts should:

"... police the operation of the Convention and ... ask themselves in each case, where there was a challenge, whether the restrictions were 'necessary in a democratic society ...' applying the principles enunciated in the decisions of the European Court of Human Rights. The treaty, not having been incorporated in English law, cannot be a

20. [1991] 2 WLR 588 (HL) at 592.

21. *Ibid*, 592.

22. *Id*, 594.

23. *Id*, 595.

24. *Id*, 603.

source of rights and obligations ..."²⁵

Lord Lowry agreed with Lord Ackner. At first blush, then, the decision in *Brind* seems very disappointing.

But we are on a long journey. Distinguished though the English Court of Appeal and House of Lords are, their decisions are no longer binding on the courts of the independent countries of the Commonwealth. The principle in *Brind* may one day and in a better case be reviewed in the United Kingdom. Meanwhile, it is for other Commonwealth countries to fashion their own principles. Perhaps *Brind* is as important for the scope it acknowledges for the application of international human rights law as for that which it denies. Lord Donaldson MR, for example, agreed with the:

"... assertion, in which I would concur, that you have to look long and hard before you can detect any difference between the English common law and the principles set out in the Convention, at least if the Convention is viewed through English judicial eyes. ... [W]hen the terms of primary legislation are fairly capable of bearing two or more meanings and the court, in pursuance of its duty to apply domestic law, is concerned to divine and define its true and only meaning. In that situation various prima facie rules of construction have to be applied, such as that ... in appropriate cases, a presumption that Parliament has legislated in a manner consistent, rather than inconsistent, with the United Kingdom's treaty obligations."²⁶

As against the somewhat discouraging messages of *Brind*, it can be noted that in other countries of the Commonwealth, judges of the highest authority have publicly acknowledged the "growing familiarity with comparative law and a greater willingness to borrow from other legal systems". Chief Justice Mason, of the High Court of Australia, in an address in August 1990 to the 64th Conference of the International Law Association held in Queensland, Australia, catalogued the many instances in which the High Court of Australia had made reference to international law, including to human rights norms:

"[T]here is a prima facie presumption that the legislature does not intend to act in breach of international law. Accordingly, domestic statutes will be construed, where the language permits, so that the statute conforms to the State's obligations under international law. The favourable rule of statutory interpretation goes some distance towards ensuring that the rules of domestic law are consistent with those of international law. In construing a statute giving effect to a convention, the Court will resolve an ambiguity by reference to the Convention, even where the statute is enacted before ratification of the Convention, as I did in one case some years ago. And there are many instances here and elsewhere in national courts taking into account the provisions of the Universal Declaration on Human Rights in interpreting national statutes and shaping the rules of

25. *Id.*, 605.

26. Lord Donaldson of Lynton MR in *Brind*, above in 18, 797-8.

municipal law. ... [J]udges and lawyers in this country and in other jurisdictions are developing a growing familiarity with comparative law and showing a greater willingness to borrow from other legal systems. Ultimately, the new spirit will facilitate the moulding of rules of international law suited to incorporation into national law and create a climate in which acceptance by national courts is more readily attainable."²⁷

Still more recently, at a meeting of the Australian Academy of Forensic Sciences in Sydney in October 1991, the President of the Australian Human Rights and Equal Opportunity Commission (Sir Ronald Wilson) explored the domestic impact of international human rights law.²⁸ He traced the adoption of standards accepted by the world community as part of international law and expressed in a series of conventions. He also traced the developments in Australia - including adherence to international treaties and the creation of local bodies to receive and investigate complaints and to stimulate compliance with human rights norms. Sir Ronald, a past Justice of the High Court of Australia, went on to express the way in which:"

"Recourse to international principles of human rights may be just as relevant to the moulding of the common law as it is to statutory interpretation."

As an example, he made reference to the landmark decision of the House of Lords restating the law of rape in marriage first expressed in 1736 by Hale CJ, by reference to modern "social, economic and cultural developments". He pointed out that those developments lie at the heart of the Convention on the Elimination of Discrimination Against Women. By adopting and applying international human rights norms, courts of the common law tradition are playing their part in a peaceful process of change. This avoids social upheaval but pushes forward the cause of human freedom.

Against the background of the ancient legal system of which we are inheritors, we, the judges, may consider the way in which, lawfully and legitimately, we can translate the brave words of international human rights law into our daily professional work. I will devote the rest of this essay to three questions which arise from the foregoing:

- (a) Is international law (including that of human rights) directly incorporated, by the common law, into local law so as to become part of it?

27. A F Mason, "The Relationship Between International Law and National Law and its Application in National Courts", address to the 64th Conference of the International Law Association, Broadbeach, Queensland, 24 August 1990, as yet unpublished.

28. R D Wilson, "The Domestic Impact of International Human Rights Law", unpublished paper for the Australian Academy of Forensic Science, 29 October 1991.

- (b) If not a part of local law, is international law (including on human rights) nonetheless a proper source for domestic law, and if so in what circumstances? and
- (c) If so, how may a judges in municipal cases, in conformity with constitutions, statutes and common law binding on them, actually use international human rights norms in their daily work?

PART OF LOCAL LAW?

It is important to recognise the fact that urging the 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 of the common law has been expressed in the High Court of Australia in a number of cases. Dixon J said in 1948 that the theory of Blackstone in his Commentaries 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".²⁹

In 1983 the present Chief Justice of Australia, then Mason J, put it this way:³⁰

"It is a well settled 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 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 to legislate so as to incorporate into our law the provisions of [international conventions]."

29. Chow Hung Chin v The King (1948) 77 CLR 449, 477.

30. (1983) 153 CLR 168, 224. See also Gibbs CJ *ibid* at 193. Cf Kioa & Ors v West and Ors (1985) 159 CLR 550, 570; 604.

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 of the American republic were frequently 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 and, I suspect, Nigeria.

But it is not simply legal authority which is used 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, signing 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 treaty, 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.³¹ Writing of the division of responsibilities in respect of lawmaking in one such state, Canada, in the context of treaties and legitimate matters of international concern, the Privy Council in 1937 said this:³²

"... 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 expressed 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:³³

"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

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

32. *Attorney-General (Canada) v Attorney-General (Ontario)* [1937] AC 326, 348 (PC).

33. (1975) 135 CLR 337, 445.

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 statute 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 law making. Such approach would allow "no effective safeguard against the destruction of the federal charter of the constitution".³⁴

The majority of the High Court of Australia held otherwise. It upheld the validity of the Racial Discrimination Act. But the controversy posed by the minority opinion is important in the present context. In federal states at least it must be given weight. The question it 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 this may import 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

34. *Koowarta v Bjelke-Petersen*(1985) 153 CLR 168,200. (Gibbs CJ).

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.³⁵

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 Federal 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.

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

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.³⁶ It has been accepted in Australia by the High court of Australia.³⁷ 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.³⁸

Commenting on the advice of the Privy Council in the case just mentioned, the biographer of Lord Atkin (who, it is noted, delivered the judgment 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 needs nor could be proved in the same way as rule of foreign law. The range of inquiry is necessarily wider; and here there is the 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 of 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.'³⁹

Atkin's statement provoked a number of fears on the part of academic writers at the time.⁴⁰ However, I agree with Atkin's biographer that the commentators misunderstood what his Lordship said. What he said is guidance for us in approaching the Bangalore Principles. The rules are simple -

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

37. Chow Hung Hing at 477.

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

39. G G Lewis, *Lord Atkin*, Butterworths, London, 1983, 97f.

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

- (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:⁴¹

"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,

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

the advent of the special peril of nuclear fission, the urgent necessity of arms control over weapons of every kind and now the end of the Cold War and dismantlement of the Soviet Empire. The wrongs of racial discrimination, apartheid and other forms of discrimination against people on the basis of immutable characteristics 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 basic 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 today 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*⁴² 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 *McInnes v The Queen*⁴³ 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

42. (1978) 143 CLR 410.

43. (1979) 143 CLR 575.

Civil and Political Rights, article 14(3).⁴⁴ 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*,⁴⁵ 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* case⁴⁶ 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 on matters which 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 the 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.⁴⁷ Our decision was later confined 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 other 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)*⁴⁸

44. *Ibid*, 588.

45. (1985) 153 CLR 168.

46. *Tasmania v Commonwealth of Australia*. (The *Tasmanian Dams Case*)

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

48. [1988] 2 WLR 805 (HC).

both the trial judge (Scott J)⁴⁹ and the Judges of the English 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'."⁵⁰

In the Court of Appeal in different circumstances and eighteen months before Brind, Sir John Donaldson MR (as Lord Donaldson then was) also acknowledged the importance of bringing English domestic law into line with the European Convention:⁵¹

"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 references to the European Convention by Dillon LJ⁵² and by Bingham LJ.⁵³

It might be said that, from the perspective of Realpolitik, the particular English consideration of the European Convention

49. Ibid at 850, 51 (CA).

50. Id, 851.

51. Id, 869.

52. Id, 897.

53. Id, 907.

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.⁵⁴ 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. As Lords Bridge and Donaldson were at pains to stress in *Brind*, neither the European Convention nor the International Covenant are, as such, part of English domestic law. Each may be a source in certain circumstances for the court's approach to determining domestic law. The point being presently made is that, despite *Brind*, the English courts are increasingly looking to those sources and deriving guidance from them 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)*,⁵⁵ 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 Law Lords with the assertion that the European Convention was not part of English law and that its requirements were therefore irrelevant to the determination of the 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 Rights' view of its requirements. Lord Oliver of Aylmerton gave the judgments of their Lordships. He asserted that:⁵⁶

"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 ... familiar rights and privileges enjoyed by parents in

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

55. [1988] 2 WLR 398 (HL).

56. *Ibid*, 410, 412.

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, by various techniques, to bring English law into harmony with international human rights norms.⁵⁷ The same should happen in other Commonwealth countries.

RECENT AUSTRALIAN EXPERIENCE

In Australia, the steps towards a similar movement have also been taken cautiously. The caution 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.⁵⁸

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*,⁵⁹ Deane J had to consider the right of a parent to participate in proceedings which affected the custody of the child. He denied that the interests of the parents in such proceedings were merely indirect or derivative in nature:

57. See e.g. *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).

58. See e.g. *Koowarta* (above).

59. (1986-87) 162 CLR, 447.

"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 eg 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 eg 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."⁶⁰

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 & Ors⁶¹ 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:

"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

60. Ibid, 463.

61. (1988) 12 NSWLR 45; 79 ALR 591 (CA).

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 this language, so as not to deprive a person of that entitlement."⁶²

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*⁶³ a question arose as to whether a recently appointed 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.⁶⁴

"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 eg 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.

62. Ibid, 53, 599.

63. (1988) 12 NSWLR 358 (CA).

64. Ibid, 360-361.

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*⁶⁵ 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 provisions of the International Covenant on Civil and Political Rights.

A great deal of time in the Court in *Jago* 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 is uncertain, Australian Judges, after the Australia Act 1986 (Cth) at least do well to look for more relevant and modern sources for the statement and development of the 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:

65. (1988) 12 NSWLR 558 (CA).

- (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."⁶⁶

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 Racia 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 either 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

66. Ibid, 569, 70.

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."⁶⁷

The decision of the Court of Appeal was confirmed by the High Court of Australia, affirming the common law right to a fair trial. In that Court no reference was made to the international human rights instruments.⁶⁸

Another case in which the International Covenant was considered was also one in which Samuels JA sat with me and with Clarke JA in *Gradidge v Grace Brothers Pty Limited*.⁶⁹ 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 a certain earlier decision 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 acknowledge 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)."

A still further recent example of the use of the International Covenant is *Cachia v Isaacs & Ors*.⁷⁰ A litigant in person had

67. Ibid, 580-2.

68. *Jago v District Court of New South Wales* (1989) 168 CLR 23.

69. (1988) 93 FLR 414 (CA).

70. Unreported, Court of Appeal (NSW), 23 March 1989; (1989) NSWJB 46.

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 English decisions as *London, Scottish Benefit Society v Chorley*⁷¹ and *Buckland v Watts*,⁷² 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. Equal access to the courts should be a reality and not a shibboleth.

Many are the occasions when it is useful to refer to international human rights law in resolving a local dispute. Just before I left for Abuja a decision of my Court was published in which a majority upheld an application for a stay of proceedings in a disciplinary matter involving three medical practitioners. They had earlier secured a permanent stay of proceedings before the disciplinary tribunal, on the basis of gross delays in the prosecution of complaints.⁷³ Five years later, following a Royal Commission, public and political pressure, an attempt was made to revive the prosecution upon reworded particulars. The majority of the Court maintained the order for a stay. It did so upon the basis that a revival of the case would be unfairly and unjustifiably oppressive. In the course of giving my reasons, I referred to the basic principle of the common law⁷⁴ that a person should not suffer double jeopardy. I went on:

"Protection against double jeopardy is not only a fundamental feature of our legal system, reflected in the many circumstances collected in my reasons in Cooke v Purcell (1988) 14 NSWLR 51, 56ff. It is also a feature of basic human rights found in the International Covenant on Civil and Political Rights which Australia has ratified. See eg Article 14.7. Although expressed in the Covenant in terms of criminal charges, the principle applies equally, I believe, to an inquiry into the right of a person to continue the practice of his or her profession, the denial of which would have grave consequences for that person's reputation and livelihood. ... The European Court of Human

71. (1884) 13 QBD 872.

72. [1970] 1 QB 27 (CA).

73. *Herron v McGregor* (1986) 7 NSWLR 246 (CA).

74. See *Green v United States* 355 US 184, 187 (1957) (USSC).

Rights has stressed, as this Court also has, the importance of promptness in dealing with allegations of professional misconduct. See Konig v Federal Republic of Germany (1978) 2 EHRR 170; cf The New South Wales Bar Association v Maddocks (1988) NSWJB 143.⁷⁵

Familiarity with basic principles of human rights (and the jurisprudence which have collected around their elaboration) will arm the judge with means to respond, in a thoroughly professional way, to perceived injustice. It will provide the judge with a body of principle by which to explain the reasons in a particular case. Another recent decision of my Court provides my final illustration. On this occasion, I was in the minority. In Arthur Stanley Smith v The Queen⁷⁶ a prisoner had refused to take the oath in the trial of a co-accused. He had appealed against his earlier conviction and sentence of life imprisonment, imposed after a separate trial upon a charge of murder. He was told that he could object to particular questions but not to taking the oath. Upon his persistent refusal, for suggested fear of self-incrimination, he was charged with and convicted of contempt and fined \$60,000. It was proved that he was a bankrupt, an invalid pensioner, had no assets and that his only income was \$12 per week as a gaol sweeper. The majority of the Court (Mahoney and Meagher JJA) upheld the sentence. But for me, it was an "excessive fine" forbidden by the Bill of Rights 1688 which still applies in Australian jurisdiction as part of the constitutional legislation inherited by Australia from England.⁷⁷

In explaining my opinion, I was able to call upon the large body of jurisprudence which has gathered around the 8th Amendment to the Constitution of the United States of America prohibiting excessive fines and cruel and unusual punishments. Reference was made to the laws of other countries in which similar human rights prohibitions on excessive fines and punishments exist. It is, after all, basic that a person should not be punished with a fine that he or she has absolutely no chance of ever paying. The basal feeling that to fine a \$12 a week sweeper \$60,000 is absurd finds its legal exposition by reference to international human rights law. But I will not re-argue any dissenting opinion here. Leave it to the law books.

It will be observed that the cases in which reference has been made to the International Covenant for the purpose of stating a guiding principle may be seen, in one sense, as stating the 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 a universal context. It puts it in a context of international principles. On uncertain and busy litigious seas, it is often helpful to have the guiding star of international human rights norms. That, in

75. Gill v Walton & Anor, Court of Appeal (NSW), unreported, 19 November 1991, per Kirby P, p.5-6.

76. Court of Appeal (NSW), unreported, 12 September 1991.

77. In New South Wales by virtue of the Imperial Acts Application Act 1969, s.6, Schedule 2.

essence, is what the Bangalore Principles and Harare Declaration and the Banjul Affirmation assert.

CONCLUSIONS - CONTRIBUTING TO THE NEW WORLD ORDER

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 were declared in 1988 and restated in Harare in 1989 and reaffirmed in Banjul in 1990. 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 them 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 by their country or has itself become part of the customary law of nations.

Today's judges are amongst the intellectual leaders of their communities. Those communities find themselves in a world of growing interdependence and intercommunication on the brink of new world order. Law has, until now, traditionally been a parochial jurisdiction-bound profession. But judges of today, accompanied by modern lawyers, 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 and the Harare Declaration and the Banjul Affirmation show the way ahead. The opportunity exists for all judges and 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 useful reference in the international human rights and other norms from which to derive guidance for the performance of their important duties. If we rise to this challenge we, the judges, will make our own proper contribution to the building of the new world order.

Human Rights Proceedings: Domestic Provisions and Experiences in Nigeria

by

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INTRODUCTION

It is necessary to introduce this paper by adverting to one important feature of every human right enforcement. It is this that although, as has been shown by many distinguished speakers, human rights norms are international in the sense that they relate to standards of behaviour in civilised societies all over the world, in the end its enforcement in every State is domestic in that it is essentially a matter between a citizen and his state. Apart from resolutions and imposition of limited sanctions, there are limited machineries for international enforcement of human rights violations within a particular state in the international community. By insisting on non-interference in the internal affairs of member States,¹ the Charter of the United Nations introduced a very effective shackle against international enforcement of human rights. This was for many decades the protective cover-shed for the human rights violators in apartheid South Africa, universally recognised as the worst anti-human rights violations since the abolition of slave trade and slavery and the elimination of colonialism. Admittedly, there are various measures for implementation contained in the two Covenants and in other legal instruments of the Organisation and also efforts to improvise international enforcement procedure, as in the recent case of South Africa, within the framework of the United Nations, yet in the end, the issue of human rights becomes one essentially between a citizen and his state. David Owen underscored this point in 1978 when he said:

"The debate on human rights is often depicted as an issue between countries, but it is primarily an issue within countries. The espousal of human rights involves a commitment to values at home before, as individuals or as a State, we can expect to carry conviction abroad."²

So, although human rights norms are international in content, and it is doubtless the only system which stands between an oppressed or deprived citizen and tyranny, effectiveness of their enforcement in individual cases must, of necessity, depend on the available machinery for their enforcement which in turn brings into

1. See Article 2.4 of the Charter of the United Nations Organisation, 1945.

2. Owen: Human Rights, p.1 (London, 1978).

focus the existing practice and procedure for their enforcement in the particular State. In considering human rights norms and their international character in the abstract, it is necessary to bear in mind the fact that these rights antedate political society itself. They have always existed, the role of individual States being to recognise and declare them. Judge Tanaka said much the same thing in the case of South West Africa³ where he stated:

"A state or states are not capable of creating human rights by law or by convention; they can only declare their existence and give them protection. The role of the state is not more than declaratory. Human rights have always existed in the human being. They existed independently of and before the state. Alien and even stateless persons must not be deprived of them."

This is true. But the difference between the effective enforcement of these rights in one State from the other where it is not effectively enforced lies in the existing machinery for their declaration, determination and enforcement by the courts.

Relatively few lawyers ever stop to consider the importance of practice and procedure in relation to the rights of man. Very few give due recognition to the fact that abstract statements of rights no matter how benevolent or grandiose in themselves can be of no avail in the absence of a proper forum and an effective and efficient set of rules of practice and procedure, which will, of necessity, define the entire cursus curiae. Unless one can initiate proceedings and continue them on to judgment, and have an effective machinery for the enforcement of the judgment, all the abstract statements of one's rights will come to nothing.

A contrast between the practical effects of the African Charter and the European Charter will bring home my point. In terms of abstract statements of human rights norms, both will pass as great documents on the matter. But then the European Charter has a forum and an effective procedure for challenging human rights violations, for adjudicating on cases thereon and for enforcement of the decisions of the European Court of Human Rights. On the other hand, there is no court, and therefore no forum, for the enforcement of human rights carefully selected and stated in the African Charter. The provision for an African Commission on Human Rights is not enough. Indeed the provisions on the mandate and procedure of the Commission in Articles 45 and 46 of the Charter do not go far enough. In the end, the African Commission without a forum or procedure for enforcement, leaves it looking like, in appropriate metaphor, a toothless bulldog.

It can now be assumed that generally the accepted norm in the whole of the Commonwealth, indeed in all common law countries, is that the responsibility for the enforcement of human rights is mainly placed on the judiciary. This responsibility may be said to broadly extend to safeguarding of personal freedoms, protec-

3. (1951) 1 CJ Reports 1.

tion of political, private and moral rights, guaranteeing proprietary rights, ensuring fair hearing of disputes according to law and the rules of natural justice, and prohibition of inhumane and discriminatory treatment. These rights can, in the constitutions of most civilised common law countries, be lawfully derogated from only in the interest of public order, public safety, natural defence, public health and public morality and, even so, in accordance with rules acceptable in a civilised society.

It is from the above backgrounds that I shall now consider the legal provisions on rules of procedure as well as experience in Nigeria.

HUMAN RIGHTS PROCEEDINGS IN NIGERIA BEFORE 1979

It is useful for our present purpose to consider the Nigerian situation from two historical standpoints, to wit: the period before 1979 and after.

Now as a result of the Willink Commission of Inquiry in 1958, fundamental rights provisions were introduced into one Nigerian Constitution one after another i.e. in 1960, 1963, 1979, and also 1989 to be fully operational in 1992. These provisions, initially intended for the protection of the so-called minorities, became applicable to every Nigerian. It is enough for this paper to state that they were largely based on the norms set out in the UN Universal Declaration of Human Rights 1948 and that only two Articles, to wit: the right to enjoy political asylum in other countries in Article 14 and that to freedom of marriage in Article 16 have not found a place either as fundamental rights in Chapter IV or the fundamental objectives and directive principles of state policy in Chapter II.

From the beginning, the founding fathers of the Nigerian Constitution recognised the importance and significance of effective provisions on practice and procedure in order to make the statement of rights work at all. For it was provided in section 31 of the 1960 Constitution as follows:

- "31. - (1) Any person who alleges that any of the provisions of this Chapter has been contravened in any territory in relation to him may apply to the High Court of that territory for redress.
- (2) Subject to the provisions of section 108 of this Constitution, the High Court of a territory shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement, within that territory of any rights to which the person who makes the application may be entitled under this Chapter.

- (3) Parliament may make provision with respect to the practice and procedure of the High Courts of the territories for the purposes of this section and may confer upon those courts such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling those courts more effectively to exercise the jurisdiction conferred upon them by this section."

It is noteworthy that the responsibility of making the rules of practice and procedure was squarely placed on Parliament. As could be expected, Parliament was not alive to its responsibility in this respect. So no rules were made for the purpose between 1960 and 1979.

What did the Nigerian courts do in the unhappy position in which they found themselves due to the absence of rules of practice and procedure? Did they allow this to defeat justice? Or did they, like in some countries such as Ghana and the United States, resort to procedure by way of the prerogative writs? They did neither. Rather, they held the view that an aggrieved person could come to court by any of the usual methods of initiating process, and not necessarily by way of prerogative writs. The attitude of Nigerian courts was summarised by this Court, per Coker, J S C, in the case of In Ref: G M Boyo⁴ where he held:

"No rules of court exist at present specifying the particular practice and procedure by which these Constitutional rights may be protected and it must be protected and it must be accepted that no formal way is required for the invocation of the court's powers to protect the invasion of such rights. See Sanni Akande v Sanusi Araoye (1968) NMLR 283. If the Constitution is to be upheld, and undoubtedly it must be, then a breach of it must be capable not only of being vindicted but also of being prevented. This is the substantive matter to be decided in this appeal and it would be perverse to argue that if the present proceedings are not halted it would still be impossible to rule out the likelihood that a decision on this matter by this Court might be rendered nugatory."

The attitude of the courts was a wise expedient to ameliorate the harshness of a bad situation; but it was certainly not the best. The result was that cases on the fundamental rights enshrined in the Constitution had to compete with other cases on the crowded court lists. They, therefore, got equally bogged down by all the known causes of delay in our courts. This irked our jurists and administrators of justice; but there was not much they could do.

4. (1970) 1 ALL NLR (Pt.1) 111, at p.115, see also Fajimi v Speaker, Western House of Assembly (1962) 1 ALL NLR (Pt.1) 205; Akande v Araoye (1968) NMLR 283; Aoko v Fagbemi and DPP (1961) 1 ALL NLR 400; and Olawoyin v Attorney-General (1961) 1 ALL NLR 269.

They were, however, able to identify the fact that rules of court should normally be made by leaders of courts and not by politicians in Parliament, some of whom could not see why fundamental rights provisions should be made at all. When the Military took over the reigns of power (1966 - 1979) they did not see much need to advance human rights beyond where the civilians left them. Rather, they suspended them altogether⁵ beyond where the civilians left them. The end result, therefore, was that human rights cases were few and far between in Nigeria between 1960 and 1979.

THE PROMULGATION OF RULES OF PROCEDURE

When the need came for a review of the Nigerian Constitution before the Military handed back power to the civilians in 1979, our lawyers in the Constitution Drafting Committee and the Constituent Assembly were quick to act. The provision in section 32(3) of the 1963 Constitution which required that the rules of practice and procedure for the enforcement of fundamental rights would be made by Parliament was amended. The power to make the rules was handed over to the Chief Justice of Nigeria.⁶ The then incumbent Chief Justice moved quickly to fulfil his constitutional obligation in the matter. So between the commencement of the new Constitution on the 1st October 1979 and the end of the year he drafted and promulgated the Fundamental Rights (Enforcement Procedure) Rules 1979. It was printed, gazetted and became operative from 1st January 1980 for the enforcement of fundamental rights in Nigeria.

THE NATURE AND CONTENTS OF THE RULES

The Fundamental Rights (Enforcement Procedure) Rules (to be hereinafter referred to simply as the Enforcement Rules) are analogous to the procedure for application for the prerogative orders of mandamus, prohibition and certiorari (to be referred to as prerogative order Rules) under our various High Court Rules;⁷ but the Enforcement Rules are made up of six different Orders, each dealing with different aspects of the procedure.

The following are the main features/provisions of the new Rules:

1. Like the Prerogative Order Rules, proceedings under the Enforcement Rules are commenced by an ex parte application for leave to apply, to be accompanied by a statement setting out the particulars of the applicant, the relief sought, the

5. See Section 1 and Schedule 3 of Decree No.1 of 1966.

6. See Section 42(3) of The 1979 Constitution.

7. See 0.22 (Eastern States); 0.41 and 53 (Lagos) and RSC - 0.53 applicable in some other States by implication.

grounds therefore, and by an affidavit verifying the facts relied on.

2. In place of one Order of eight paragraphs in the existing Rules in the East, and two Orders in Lagos, and Orders 53 and 54 of the RSC the Enforcement Rules have six Orders which consolidate and make detailed provisions on different aspects of the proceedings. It is now, by and large, a comprehensive code of procedure for judicial review of administrative action.
3. But the Enforcement Rules provides that if the ex parte application sufficient copies for service on all who may be affected in the proceedings should be filed. This enhances speed in the proceedings.
4. Like in the prerogative orders (Order 22 of the High Court Rules in the Eastern States; Orders 41 and 53 of the Lagos State Rules, Orders 53 and 54 of the RSC applicable by implication in other states), if the court directs, the grant of leave shall operate as a stay of all action or matters relating to, or connected with the complaint until the final determination of the application.
5. Under the prerogative rules, the period of limitation for bringing the application is 6 months from the act of the commission or omission complained about. But under the Enforcement Rules, it is now 12 months. Moreover, the court can entertain an application even though it is being brought more than 12 months of the act of commission or omission complained about.
6. By far the most important provision in the Enforcement Rules is that it has given such proceedings a statutory precedence over all other proceedings - in our over-congested court lists. For it is provided in Order 2 rule 1 (2) thus:

"(2) The motion or summons must be entered for hearing within fourteen days after such leave has been granted."

In a country like Nigeria where systemic and procedural delays are the hallmarks of the judicial system, this new provision is revolutionary. But considering the importance of human rights and the place given to fundamental rights in the Nigerian Constitution, this revolution is justifiable.

7. In furtherance of the intention to expedite the proceedings, evidence is by statements and affidavit and even though the provision of eight days between service of the motion/summons is retained, the court now has the power to direct a shorter period.
8. Order 4 now contains detailed provisions for the production and/or release of persons unlawfully detained. Perhaps to underscore the importance of these provisions in a country where, under our now endemic military regimes, detention of

persons without trial has been one of our main causes for complaint, the rule (Order 4 rule 1(2)) reduces the period between service and hearing to five days. And, to guard against any bureaucratic causes of delays in the release of persons who have been ordered to be released by a court, it is also provided:

"Without prejudice to rule 1(1), the Court or judge hearing an application where the applicant complains of wrongful or unlawful detention may, in its or his discretion, order that the person restrained be produced in court, and such order shall be a sufficient warrant to any Superintendent of a Prison, Police Officer in charge of a police station, Police Officer or Constable in charge of the complainant, or any other person responsible for his detention, for the production in court of the person under restraint."

Also, provision is made for making of returns with respect of the order of release.

9. The Enforcement Rules have made a serious attempt to nibble at and remove some fangs off the vexed question of locus standi. The rule provides in Order 5:

"Any person or body who desires to be heard in respect of any application, motion, or summons, under these Rules, and appears to the Court or judge to be proper person or body to be heard, shall be heard notwithstanding that he or it has not been served with the copy of the application, motion, or summons."

Thus it gives the status of amicus curiae to "any person who desires to be heard in respect of any application."

In Nigeria, locus standi is a constitutional issue. For section 6(6)(b) of the Constitution of 1979 limits exercise of judicial power to:

"... all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."

I shall return to this later on. Suffice it to say at the moment that Order 5 of the Enforcement Rules has not given a locus standi to every person who wishes to be heard in a human right matter. Rather it gives to every body who desires to be heard in such a cause that right, once the action has been properly commenced by a person who has a locus. To my mind, it is an important step forward. But we look forward to a time when Nigeria will advance to the position of Canada where every citizen has not only the right to be heard, but also the locus standi to challenge

such breaches of the provisions of the Constitution.⁸

10. Finally, worthy of special mention is the remedy which is available to an applicant under the Enforcement Rules. The court is empowered to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental rights provided for in the Constitution to which the complainant may be entitled. The court may commit a party disobeying such an order to prison in order to compel obedience.

SIGNIFICANCE OF THE FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES

Every lawyer or student of the English and Nigerian legal histories knows that one of the principles which our law received from the British on the 1st of September, 1900 was the theory that the Crown could do no wrong. An extension of this was the theory that no sovereign could be compelled to answer in his own court.⁹ In spite of the protestations of common law judges, the theory persisted giving rise to special procedure, such as petition of rights against the Crown. The Petition of Rights Ordinance of Nigeria, which first found its way into our statute books on the 1st of December 1915, was a perpetuation of this feudal concept. As late as 1958, it was re-enacted as Petition of Rights Act.¹⁰ Under these laws, such suits were commenced by a special procedure. It was only with a fiat of the Governor-General or the President that the suit could be prosecuted. Quite often, no fiat ever came. What is more irksome is that when the British, from whom we borrowed this whole concept, in their wisdom tried to abolish or at least mellow the rigours of the obnoxious practice by the Crown Proceedings Act of 1947, the Act of 1947 did not apply in Nigeria and so the old concept and practice persisted. It took the interpretative skill of the Court of Appeal and the Supreme Court in the case of Chief Dr (Mrs) Olufunmilayo Ransome-Kuti & Others v The AG of the Federation & Others¹¹ to state categorically that section 6(6)(b) of the 1979 Constitution had impliedly abolished state immunity from suits.

It is from this background of state immunity from suits that we can see the real significance of the fundamental rights provisions in the Constitutions (which have been adequately dealt with in another paper), as now reinforced and given real teeth by the

8. See Thorson v AG of Canada (1975) 1 SCR 138; Nova Scotia Board of Censors v McNeil (1976) 2 SCR 265.

9. See Pollock & Maitland: History of English Law, 2nd Edition 518.

10. i.e. Cap.149 of 1958.

11. (1985) 2 NWLR (Part 6) 211.

Fundamental Rights (Enforcement Procedure) Rules. Such provisions as are designed to enhance expeditious disposal of cases on human rights, the simplified procedure, the machinery for enforcement, and the wide variety of reliefs now possible, all give the much desired impetus to the civil rights activist. To have also given him the right to be heard in such proceedings only if he so desires is to give him all he wanted. Surely Nigerian courts can no longer complain that they have not been given the free hand and the effective procedure to deal with human rights cases. So, if we fail, we are bound to admit, like Cassius in Shakespeare's Julius Caesar that the fault is not in our stars (or the government) but in ourselves.

In the case of Shugaba Abdulrahman Darman v The Federal Minister of Internal Affairs & Others¹² the Maiduguri High Court held that where a person alleges an infraction of his fundamental rights under Chapter IV of the 1979 Constitution, he can only approach the court under the Fundamental Rights (Enforcement Procedure) Rules, 1979. This is probably an over-statement. I may observe that when the issue of breach of a fundamental right arises not as a substantive, but a subsidiary issue, the courts will not ignore it simply because the above Rules have not been followed. Examples are where the right to fair hearing under section 33 of the Constitution arises incidentally in the course of any court proceeding.¹³ Furthermore Shugaba's case (supra) illustrates the wide range of reliefs, including damages, which could be granted under the Enforcement Rules for breach of a fundamental right.

Between 1960 when fundamental rights provisions were first written into the Nigerian Constitution and the end of the First Republic on the intervention of the Military on January 15, 1966, and all through the thirteen years of military administration from 1966 to 1979, cases on fundamental rights were few and far between. Indeed all the reported cases all over the country from 1960 to 1979 were not more than twenty. True, the fact that the country had just emerged from colonialism and that human rights were a new experience might have contributed to the paucity of the number of cases. True the Military, during the thirteen years they were in power, deliberately discouraged or completely blocked the exercise of human rights by their ouster provisions in Decrees.¹⁴ Yet the fewness of number of cases in my view, owed so much to the uncertainty of the enforcement process and the inevitable delay which competition of such cases with other cases in our over-congested court lists entailed. For aggrieved persons appeared to have asked, what use was it to go to court to contest

12. (1981) 2 NCLR 459.

13. See e.g. Grace Akinfe v The State (1988) 3 NWLR 729; also Sunday Okoduwa & Ors. v The State (1988) 2 NWLR 333.

14. See e.g. S.1 (1) 8 and Sch.1 of Decree No.1 of 1966 and Decree No.28 of 1970.

a hot issue such as unlawful detention if the person affected must wait for several years to get relief?

But as if the Fundamental Rights (Enforcement Procedure) Rules, 1979, were the tonic which citizens were waiting for, from 1979, litigation over human rights issues swung into accelerated action. Chief Gani Fawehinmi's Constitutional Law Reports which cover the period 1979 to 1983 cover six large volumes of law reports and reported over three hundred and sixty cases which span over 4000 pages of print. An overwhelming percentage of these cases is on human rights.

In those cases, the courts enforced a variety of human rights - the right to freedom of movement,¹⁵ to personal liberty,¹⁶ to property,¹⁷ to freedom to own, establish and operate any medium for the dissemination of information, ideas and opinions,¹⁸ to fair trial,¹⁹ and the right against various executive abuses, termed executive lawlessness,²⁰ among many others.

When the Military took over the reigns of Government at the end of 1983, human rights enforcement suffered its worst debacle since its inception. Powers and jurisdictions of courts to adjudicate in human rights cases were suspended by many Decrees.²¹ In 1984 alone human rights were suspended or jurisdictions of courts to adjudicate over them ousted by about eleven different Decrees. Although the situation improved considerably when the present Military Administration came to power in August, 1985, some of the ouster provisions still exist. When there were such ouster provisions, the courts merely applied their interpretative jurisdictions to inquire whether the matter in litigation came squarely within the gambit of the ouster provision.²² Once it was

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15. See Shagaba Abdurahaman Darman v Federal Ministry of Internal Affairs (supra).
 16. See Folade v AG Lagos State & Ors (1983) 4 NCLR 771 Onu Obekpa v Commissioner of Police (1983) 4 NCLR 420.
 17. See Peenok Investments Ltd. v Hotel Presidential Ltd. (1983) 4 NCLR 122.
 18. See AG Imo State v Ukaegbu (1981) 2 NCLR 568.
 19. See Uzodinma v COP (1982) 3 NCLR 325.
 20. See Ojukwu v Governor of Lagos State (1985) 2 NWLR 806; Ekeocha v Civil Service Commission, Imo State & Anor. (1981) 1 NCLR 154.
 21. See Decree Nos.1 and 13 of 1984.
 22. See Barclays Bank of Nigeria Ltd. v Central Bank of Nigeria (1976) 1 ALL NLR 409; Sod AG Federation (1986) 2 NWLR 568.

satisfied that it did, it declined jurisdiction to adjudicate.²³ But, as shown by the decision of the Supreme Court in The Governor of Ondo State v Adewunmi²⁴ and many other cases, the courts guarded their jurisdictions jealously and so critically examined such ouster provisions. In the final analysis, considering the ouster provisions and other constraints during the period 1985 - 1991, it can be stated that strikingly a large number of cases on human rights went through the courts. Prominent among them were cases on fair hearing and cases in which some government agencies tried to abuse human rights. I shall only mention this fact here in passing in view of the theme of this paper. Suffice it, however, to say that on the balance, the courts tried to live up to the standards expected of them as stated by Eso, JSC in Ariori v Elemo²⁵ where he stated:

"Having regard to the nascence of our Constitution, the comparative educational backwardness, the socio-economic and cultural background of the people of this country and the reliance that is being placed and necessarily have to be placed as a result of this background on the courts, and finally the general atmosphere in the country, I think the Supreme Court has a duty to safeguard fundamental rights in this country which, from its age and problems that are bound to associate with it, is still having an experiment with democracy."

FACTORS MILITATING AGAINST EXERCISE OF HUMAN RIGHTS

Enforcement of human rights is largely a responsibility of the courts which are, under the Constitution of the Federation 1979 vested with judicial power.

In a recent essay,²⁶ I identified the exercise of judicial power as an act which entails six processes, or some of them, namely:

- (i) Ascertainment, or sometimes particularly in the case of the Supreme Court or sometimes the Court of Appeal, laying down the law relevant to the particular case in hand.
- (ii) Particularly in the Supreme Court expressing its opinion on any judicial policy as may be relevant to the case in hand.
- (iii) In line with the law, as ascertained or laid down, and the

23. See Civil Service Commission of Bendel State v Okonjo (1987) 3 NWLR 166.

24. (1988) 3 NWLR (Part 82) 280.

25. (1983) 1 SCNLR 1.

26. P Nnaemeka-Agu, JSC, "Judicial Powers: Quo Tendimus" in Nigerian Essays in Jurisprudence (1991).

judicial policy, when relevant, determine the issues in contention by applying the law to the facts of the particular case.

- (iv) Sometimes, particularly in the highest appellate court, that is the Supreme Court, when called upon to do so, review the authority of previous decisions not only in the British sense, as illustrated by the case of Cornway v Rimmer;²⁷ that is bringing the law up-to-date having due regard to recent developments in society by over-ruling the previous decisions; but also, in the American sense, of seeing that the decided case relied upon is in accordance with the letter and spirit of the Constitution;²⁸
- (v) Making binding declarations of right or such consequential orders as flow from the judgment; and
- (vi) Enforcing, by due process of law, those orders which it has made.

I must emphasise that sometimes no positive or negative orders are made. The court merely makes a declaration of right. All parties, be they governments, authorities corporations or private citizens are bound by, and expected to obey, such declarations. As for governments, it must be borne in mind that the courts are also a part of the government. It would be tantamount to executive lawlessness for the same government to refuse, fail or neglect to obey and respect an order or declaration made by its own court.

When a Nigerian court is carrying out any or all of the above functions, it invokes its statutory, interpretative and inherent powers and imposes some sanctions. So judicial powers encompass not only the power of a court to decide issues in litigation but also power to enforce its judgment. It is from these premises that I shall now examine the factors which adversely militate against the enforcement of fundamental rights.

OUSTER OF COURTS' JURISDICTION

Paradoxically, every military regime in Nigeria began by declaring that it would respect all existing laws and obligations and would rule according to law. Often in the same Decree, it suspended or modified sections of the Constitution - not in exercise of any constitutional power but by sheer military power. Invariably, it suspended the Chapter of the Constitution dealing with

27. See (1968) AC 910 in which the decision in (1967) 2 All ER 1260 was over-ruled.

28. See for example: Bucknor-Mclean v Inlax (1980) 8-11 SC 35.

fundamental rights,²⁹ often in the declared intention to be able to deal with the abuses of the civilian regime which preceded it and whose wrongful acts of omission or commission afforded the reason for the intervention of the Military. These Decrees and Edicts which followed in their wake put the provisions of certain Decrees and Edicts beyond the scope of judicial power. It is a truism that the Courts are by their very nature and position in the Nigerian State as spelt out by the Constitution, a "constitutional opposition" to arbitrariness and other abuses of human rights and an effective bulwark against tyranny and oppression.

By the very practice of ouster of the jurisdictions of courts, particularly under Military regime, it appears that the judiciary is regarded as an apposition to government. But that type of "opposition" as constituted by the courts is necessary for the stability of the State in every democracy. The only alternatives to it are repression and anarchy. Experience in Russia and other countries of Eastern Europe shows clearly that one can repress a people for some time; not for all the time. For, with repression, an explosion at some stage becomes inevitable.

It is refreshing to note that in Nigeria, a newspaper recently reported on a front page banner headline, thus:

"MILITARY TIRED OF RULING." Col. Ajiborisa

"The Military is tired of running the government and would be happy to go back to the barracks at the earliest time possible ..."³⁰

This is welcome news. As usual, this return to the barracks, which is scheduled for September 1992, will be heralded by a suspension of all the ouster provisions in our laws. But I dare say that in the absence of repression the only way to keep the apparatus functional and smooth is to allow the courts to function as an independent and co-equal third arm of government, in accordance with the spirit and letter of the Constitution. In that respect, ouster of the jurisdictions of courts over human rights questions - or on any justifiable issue for that matter - is a contradiction in terms. It is bad for democracy when, as has happened often, the Constitution, the organic law of the land, has to be tampered with, by suspending its operation, in order to remove the sting of unconstitutionality from an obviously unconstitutional act, particularly when such an act impinges on human rights norms which have been selected and guaranteed by the Constitution. It is, perhaps, worse when the courts which have been created by the Constitution to safeguard those rights have been compelled not to inquire into them at all. It is hoped that there will be no ouster of courts' jurisdictions in the Third Republic come 1992.

29. See e.g. Decrees No.1 of (1966); No.28 of 1970; No.1 of 1984; and No.13 of 1984.

30. See The "Daily Champion" Newspaper of October 8, 1991, at page 1.

Systemic Constraints to Enforcement of Human Rights

Since 1979, Nigeria has embraced the Presidential system of government. But regrettably, perhaps due to its long connection with the Westminster system, there still survive in the country many features which had worked in the former system but are alien to the present. I can only deal with some of these in outline in a paper like this.

(a) The potential weakness of the judiciary in the enforcement of its process and execution of its process and execution of its judgments

As I said above, judicial power includes the power not only to adjudicate but also to enforce and execute the decision of the particular court. But in our system our courts have no independent organ or machinery of its own for the execution and enforcement of its decisions. They have to rely upon the Executive arm of government to enforce and execute judgments are de jure vested in the Sheriff and Bailiff (court officials) aided by the coercive force of the Police who are themselves a part of the Executive. The powers to serve processes and execute judgments of court are directly vested in the Police by Law.³¹ The Police are fully equipped with the wherewithal to perform these functions. What happens, one may ask, if the Police should refuse to cooperate with the courts generally or in any particular case? Certain events which took place in some parts of the Federation during the Second Republic (1979-1983) show that this is not a far-fetched question. Professor Nwabueze catalogued many instances in which some members of the Nigeria Police Force in some parts of the country openly defied or refused to enforce court orders.³² What will happen where the enforcement order is made against a top member of the police force for the violation of a citizen's civil right? This is why I had to opine elsewhere.³³

"It is obvious that in the Nigerian context to leave the courts in a situation in which they cannot even enforce their decisions is to guarantee perpetual impotence of the Judicial arm of government. The only answer appears to me to be the creation of the position of armed court marshals for the enforcement of court decisions and processes. The reliance upon the Police, now an important part of the Executive arm of government, was suitable and served its purpose under a Unitary, Regional, and Quasi-Federal forms of government. But, in my opinion, it is out of tune with, and ineffective in, the present Federal Presidential System in which there are sharp divisions of areas of sovereignty and authority between the Federal and State authorities as

31. See ss.4 & 22 of the Police Act, Cap.154.

32. See Prof Nwabueze: Nigeria's Presidential Constitution 1979 - 1983, pp.308-323.

33. In my paper on "Judicial Powers: Quo Tendimus" at p.33.

well as clearer separation of powers among the three arms of government."

An important element in the systemic weakness of the Judiciary in the scheme of things is that it is neither in control of its purse, nor of its staff, nor even of its services. It depends upon the legislature to vote the funds, the Executive to release the funds, the Executive to (until the recent civil service reforms) provide it with its staff and provide it with shelter, repair and maintain the residences of judicial officers - indeed with even providing it with water, cold air and security. If the enforcement of human rights in Nigeria must have any meaning, then the courts must be given the power and the wherewithal to run their affairs and enforce and execute their decisions. They must be given a Judicial Service Commission which is not just one of the Federal or State Executive Bodies, but one which is so structured, funded and equipped, to cater fully for the Judiciary. In the United States which we have usually looked up to as model because we run a system similar to their own, such is the case.³⁴ Provision of armed court marshals who will serve court processes and execute court decisions is the only answer.

(b) Non-Justiciability

Our Constitution of 1979 is very much unlike that of the United States in one important respect. In the United States any law which purports to exclude the jurisdiction of ordinary courts is unconstitutional:³⁵ it is left for the courts to decide such issues that it is expedient that they do not adjudicate upon because they raise political questions.³⁶ But in Nigeria, rather like in India, the Constitution itself has selected certain norms which form part of either the Universal Declaration of Human Rights or the two Covenants on social economic and political and educational rights and declared them unjusticiable.³⁷ They are merely "fundamental objectives and the directive principles of state policy," expected to be observed and applied by all authorities and persons exercising legislative, executive, or judicial functions. This situation is repeated in the 1989 Constitution which will come fully into force in 1992. Considering the difficulties in any amendment to the Constitution in a democratic set-up, it is submitted that this limitation by the Constitution itself is unwise. When it is remembered that all the principles set up in Chapter II of the Constitution under political objectives, economic objectives, social objectives and educational objectives and declared unjusticiable, are well-known human rights norms under the Declaration and the Covenants, one doubts

34. See (1911) Muskrat v United States 219 US 341.

35. See Toth v Quarless 350 US 11 (1965).

36. See Finkelstein: Judicial Self Limitation - Harv. L Rev. 37 (1923) 3381 at p.344-345.

37. See Chapter II of the 1979 Constitution.

very much the wisdom of the constitutional exclusion of exercise of judicial power from those provisions. In practice, members of the Executive pay little or no heed to those objectives, as they cannot be taken to court for failure to do so. And these breaches by them invariably form a good part of the reason why the military intervenes from time to time.

(c) The position of the Attorney-General

During the Westminster model of democracy which Nigeria operated till 1979, the Attorney-General was the spokesman for the Judiciary and its representative in the cabinet. Since 1979, the position has changed because the Attorney-General is now a member of the Executive. Before 1979 by some provisions in our laws³⁸ a successful litigant could not execute a court decision over money under the control of a public officer in his official capacity or in custodia legis without the consent of the Attorney-General. From this and similar provisions in the Laws of The Regions, a view was developed that government funds could not be attached in execution, and that execution should not issue in respect of money debt owed by a government, without the consent of the Attorney-General. The argument was that the private interest of the creditor should not be allowed to over-ride the community interest represented by the State. What happens, one may ask, where a citizen's fundamental right has been infringed and he goes to court and is awarded damages against a government or its agency? Granted that the power to execute a judgment is part and parcel of judicial power as vested in the courts under section 6 of the Constitution, it is not an unconstitutional erosion of judicial power to prevent a court from due execution of such a judgment simply because the Attorney-General has not given his consent therefore. Is that provision in the Sheriffs and Civil Process Act still constitutional? In view of the interpretation given to the scope of section 6(6)(b) of the Constitution in the case of Ransome-Kuti v A.G. Federation and Others,³⁹ one wonders whether such a restraint on due exercise of an aspect of judicial power can still be supported. It cannot be doubted that it is a serious constraint against due enforcement of human rights where a person who has been awarded damages for the unlawful infraction of his right cannot execute the judgment against the government because the Honourable Attorney has withheld his consent. I suggest that such requirements of consent of the Attorney-General before execution be expunged from our statute books and that, pending that, our courts examine critically its constitutional implication.

The court's own responsibility

So far I have dealt with constraints against due exercise of human rights where the blame and the remedy are extra-judicial in that it is for the legislator or the executive to find the solu-

38. See Section 84 of the Sheriffs and Civil Process Act.

39. (1985) 2 NWLR (Part 6) 211.

tion. I shall now consider some constraints over which the solution lies wholly or partly on the judiciary.

The problem of Locus Standi

Like in all common law countries, a plaintiff's having a locus standi is a pre-condition to his right to sue in any particular cases. The courts will not invoke their judicial powers in favour of a plaintiff who has not shown that he has locus standi.⁴⁰ In countries like England which have no written constitutions the principles upon which the courts determine the issue of locus are worked out by the courts. But in most countries with written constitutions, the parameters of locus standi are fixed by the constitution: but even so, it is left for the courts to adumbrate and determine when a plaintiff has locus standi. In Nigeria, it is fixed by section 6(6)(b) of the Constitution of 1979 which states that the judicial powers vested in accordance with that section:

"(b) shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."

The Supreme Court interpreted this provision in the case of Senator Abraham A Adesanya v President of the Federal Republic and Anor⁴¹ where it unanimously held that the Senator had no locus standi to challenge the appointment of the 2nd defendant as the Chairman of the Federal Electoral Commission - an appointment the plaintiff had unsuccessfully opposed in the National Assembly. His civil rights and obligations were not involved; he had no right to litigate over a right common to all the citizens, unless he could show that he had suffered a damage special to himself, the court reasoned. The argument that every Nigerian had an interest to see that every holder of a public office performed it properly was not accepted by the court. What is striking is that even the respected Chief Justice agreed with his learned brethren, even though he had observed:

"... In the Nigerian context, it is better to allow a party to go to court and to be heard than to refuse him access to our courts. Non-access, to my mind, will stimulate the free-for-all in the media ..."

However, the principle in Adesanya Case (supra) has been applied in several scores of cases.

40. See Thomas v Olufosoye (1986) 1 NWLR 669 Ugo v Obiekwe (1989) 1 NWLR (Part 99) 566.

41. (1981) 1 All NLR (Part 1) 1.

In Attorney-General, Kaduna State v Hassan⁴² the court opened the gate for access to court wider by giving locus standi to a father to challenge the act of the Solicitor-General (in the State where there was no Attorney-General at the time) who entered nolle prosequi on a charge against those standing trial of unlawfully killing his son. It may be observed that right to life is a fundamental right under our Constitution.⁴³ Also, in Fawehinmi v Akilu & Anor⁴⁴ the gates were thrown wider open in criminal cases on the premises that every Nigerian was his brother's keeper. So a lot of progress has been made on the law since the Adesanya decision. Some of the learned Justices who participated in Fawehinmi's case (supra) made it clear that they were changing the law. Yet a good number of Judges still feel that more could and ought to be done with respect to locus standi in human rights cases. They urge that whatever might be the position with respect to locus standi in respect of civil rights of Nigerian citizens constitutional rights, particularly human rights should be different: every Nigerian citizen ought to have a locus to challenge an unconstitutional act of a public functionary as well as any abuse of fundamental rights guaranteed by the Constitution, they argue. Kayode Eso, JSC in a paper which he read at the All Nigeria Judges' Conference held at Abuja in 1988 said:

"Whatever one may say of the decision of the Supreme Court in the Akilu Case and the previous decision in Abraham Adesanya Case, the last has not been heard or read on the locus standi issue."

What position should the Nigerian courts therefore take on the matter? It is useful to look at the position in two Commonwealth countries with Federal constitutions.

In Canada, the Supreme Court has recently come out to draw a distinction between locus standi in a litigation over private rights and obligations and one in which the constitutionality of a public legislation or act is being challenged. It has come to the conclusion that unlike in the former class of cases, in the latter case a person who has just as much interest as any other member of the community can maintain an action. Reference may be made to the cases of Thorson v Attorney-General of Canada⁴⁵ and Nova Scotia Board of Censors v McNeil.⁴⁶

In India, the relaxation in what have been termed "public interest litigations" is still more far-reaching. Locus standi can be given to any person who writes a letter of complaint from any

42. (1985) 2 NWLR (Part 8) 483.

43. See Section 30 of the 1979 Constitution.

44. (1989) 2 NWLR 122.

45. (1975) 1 SCR 138.

46. (1976) 1 SCR 265.

part of the country in the name of the People's Union for Democratic Rights to the Chief Justice. Justifying the rationale, Dayal, J, in People's Union for Democratic Rights v Minister of Home Affairs⁴⁷ said:

"Following English and American decisions, our Supreme Court has of late admitted exceptions from the strict rules relating to locus standi and the like in the case of a class of litigations which have acquired classification known as "public interest litigation" that is, where the public in general are interested in the enforcement of fundamental rights and other statutory rights ... Today it is perhaps commonplace to observe that as a result of a series of judicial decisions since 1950, there has been a dramatic and radical change in the scope of judicial review. The change has been described ... as an upsurge of judicial activism."

With the benefit of these two situations in other jurisdictions with similar background with us, I now return to the Nigerian situation, and make the following suggestions.

First: Where the issue is that of infringement of public right, duty, or obligation, every citizen should, following the Canadian example, have a locus. This is the only way by which public accountability can become meaningful. In the peculiar situation which exists in Nigeria, to go to the extent to which India has gone is to kill the judiciary.

Secondly: But when the issue is the enforcement of private rights and obligations, only a person directly affected should have the locus standi to enforce his personal rights and obligations.

Delay

The next impediment to due enforcement of human rights and one which is largely traceable to the courts is the problem of delay. Admittedly the courts in this respect would include judges, lawyers for litigants and officers of courts. Each of them has his own share of blame in the delay of cases on civil rights. Not less important of course is the congestion of case lists, as ordinarily human rights cases must have to compete with other types of cases on the cause list.

But, by their very nature most human rights cases raise issues which ought to be gone into and adjudicated upon as soon as possible. A person who is unlawfully detained without trial, or who is subjected to dehumanising ordeal, or whose freedom of expression is interfered with, or whose right to private life is invaded or right to peaceful assembly is unlawfully interfered with, or a public servant who feels that he has been thrown out of his job without a hearing, needs to go to court and get a verdict one way or the other as soon as possible. A long delay at the trial could defeat the whole purpose of his guaranteed right.

47. (1986) LRC (Const.) 547

This is why the provision of a sort of time table in the Enforcement Rules for the enforcement of fundamental rights is not only apt but desirable. The time frame runs like this:

- (i) File an application for leave to apply for the fundamental right on a motion ex parte just one day before the date of hearing. Enough copies for service are exhibited. The next day the motion may be granted and, in a deserving case, a stay of action or proceedings in the matter complained of granted.
- (ii) Then the application is filed by a motion on notice or originating summons and served on the respondent. Not earlier than eight days or later than fourteen days the motion must be set down for hearing.
- (iii) On the hearing the applicant gets any relief he is entitled to, including damages, order for release of the person or his property, order nullifying or setting aside the act complained of, and so on.

It follows from the above that given a diligent counsel and a conscientious and hard working court, proceedings in an important human rights case can be over within one month.

But what has been happening in practice? The true position is that these cases when filed just take their turn on the case lists of Nigerian courts. The journey of a case from the High Court to the Supreme Court lasts quite often to about ten years. In the recent case of Alhaji Abdullahi v Nigerian Civil Aviation Training Centre, Zaria & Anor,⁴⁸ the plaintiff was on the 27th October 1981 terminated from his employment as the Chief Security Officer of the first defendant. He went to court for a declaration that the termination was void and of no effect on the ground that he was not given a fair hearing. He therefore claimed consequential relief including his salary up to the date of judgment. The dismissal of his claims by the Kaduna High Court was affirmed by the Court of Appeal. His further appeal to the Supreme Court was dismissed only in July, 1991. Thus it took about ten years for him to know his fate over a right guaranteed by the Constitution. I shall give one more set of examples. In 1988 the Military Governor of a State decided to meddle in the administration of a State University in Nigeria. He ordered the termination of the appointment or downgrading of thirteen members of staff of the University including two professors for reasons which would appear to be political. Each of them went to court on the ground that, contrary to the provisions of section 33 of the Constitution they were not heard at all, much less fairly, before their fates were determined. Most of those cases are still pending in the High Court. Political pressure on the courts has been alleged or suspected. If this is so, then the Judges concerned have done a serious damage to the image of the judiciary. Be that as it

48. (1991) 7 SCN J1

may, it is clear that the spirit and letters of the provisions of Enforcement Rules have not been reflected by the inordinate delay. In my respectful opinion, one resolve I would urge this colloquium to make is to enhance the enforcement of human rights in our courts by giving precedence and priority to human rights cases as against other civil cases. That is, to my mind, the clear intendment of the entrenched rights read together with the provisions of Order 2 rule 1(2) of the Enforcement Rules. Speedy hearing of those cases on human rights is the only way to give a meaning to those rights.

There can be only one answer to the problem of political pressure as often constituting a major source of delay of human rights cases. This is the establishment of a supra-national, perhaps a regional, court of human rights in the pattern of the European Court of Human Rights, with wide powers of adjudication and enforcement. If it is granted, as it must be, that these rights are essentially rights against governments, and their agencies, it can be seen that it is not always easy to enforce them in State High Courts in an atmosphere free from local political pressure or influence. Indeed, State governments, more often than not, see these cases as signs of confrontation by both the litigant and any court which gives a decision against the government, no matter the merit or otherwise of their case. It, therefore, often demands a lot of courage for Judges to decide such cases. Some Judges take the line of least resistance - to the chagrin of the law and the Constitution - by simply adjourning the cases, hoping that the political atmosphere might cool. But in such cases, even if they eventually decide against the government, the long delays might have defeated justice: the popular aphorism that justice delayed is justice denied can scarcely have a more apt illustration.

Lack of necessary equipment in Court

I am aware that many of learned colleagues will plead in defence the lack of necessary equipment in our courts - typewriters, law books and stationery, computers and automatic recording equipment. It is true that we are under-equipped for efficient judicial work. Nigerian Judges have complained about these for quite some time - with every amount of justification. Something ought to be done in this respect as a matter of urgency. But this is not the only cause of delay. For, after all, other cases still go on. Much more relevant to what I am talking about is the fact that Judges, particularly at the trial courts, do not seem to advert their minds to the fact that it is the intendment of Order 2 rule 2(1) of the enforcement rules which I have set out above that human rights cases should be set down for hearing and be disposed of as expeditiously as possible. They should take precedence over other cases, save, perhaps capital cases if the courts must keep to the set out time frame. But because courts do not seem to advert to this at all, they compete with other civil cases on the case list and therefore suffer inordinate delay. This should not be so.

Factors Inhibiting The Right to Personal Liberty

The right to personal liberty of the subject is clearly guaranteed by the Constitution.⁴⁹ Right to personal liberty is one of the entrenched rights in the 1979 (as well as the 1989) Constitution. Each clearly spells out circumstances in which a person could lawfully be deprived of that right as well as its wide implications. Order 4, rules 1-7, of the Enforcement Rules makes adequate provisions on the application which could be made by a person who has been unlawfully detained or restrained. It provides for not only the return that should be made therefore but also for the expeditious hearing of such an application; also for the production to court of the person unlawfully restrained and his release. On the whole the rules are a more comprehensive code of procedure for such matters than the provisions in the Rules of the Supreme Court on habeas corpus and other related proceedings. Besides, section 32 and 33 of the Constitution give various rights to a person charged with or suspected of having committed a criminal offence. In particular, I would quote the provision of sub-section (4) and (5) of section 32. They provide:

"(4) Any person who is arrested or detained in accordance with subsection (1)(c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of -

(a) 2 months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or

(b) 3 months from the date of his arrest or detention in the case of a person who has been released on bail,

he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

(5) In subsection (4) of this section the expression "a reasonable time" means -

(a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of 40 kilometres, a period of one day; and

(b) in any other case, a period of 2 days or such longer period as in the circumstances may be considered by the court to be reasonable."

49. See section 32 of the 1979 Constitution.

Considering the fact that a Constitution usually states rights in general terms and leave it to the courts to fashion out the details, the contents of the Constitution are not only unusually detailed but also highly commendable. What is more, these provisions are supplemented by provisions in the Criminal Procedure Act and Laws and the Criminal Procedure Code with respect to bail to suspects and accused persons. Most importantly, the Chief Judge of each State is empowered by law to go on jail delivery from time to time and order the release of those who are overstaying in prison custody awaiting trial.

All these are highly commendable provisions: but there are still problems. Indeed the Decree empowering Chief Judges to go round prisons on jail delivery from time to time was informed by the over congestion of prisons by persons awaiting trial who stay in custody some time for periods longer than those of likely sentence if they were expeditiously tried, convicted and sentenced.

The Police sometimes have practical problems in dealing expeditiously with suspects and releasing them on bail. These include communication, transportation and logistical problems of the police force as well as the attitude of some police personnel to bail to accused persons. The funding and equipment of the police do not appear to adequately keep pace with the rapid growth of crime and criminality in society. Also some of the police personnel do not appear to have the correct attitude to the problem of bail. They do not often see it as a right which a suspect has in all bailable offences. A complete orientation, re-equipment and fuller funding of the police are necessary.

The courts, too, are not free from blame. Magistrates who deal with a bulk of criminal cases do not appear to always realise that an accused person has a constitutional right to bail in all bailable offences. The typical guideline in all our laws is as follows:

- (1) A person charged with any offence punishable with death shall not be admitted to bail, except by a judge of the High Court.
- (2) Where a person is charged with any felony other than a felony punishable with death, the court may, if it thinks fit, admit him to bail.
- (3) When a person is charged with any offence other than those referred to in the two last preceding subsections, the court shall admit him to bail, unless it sees good reason to the contrary.⁵⁰

In spite of these, magistrates refuse bail altogether or impose harsh and difficult conditions in many cases.

50. See section 118 of The Criminal Procedure Act. There are similar provisions in The CPC.

It is common in Lagos State, for example, to come across a condition such as that the surety shall be a person who has a house in Lagos. The number of house-owners in Lagos cannot match the number of crimes in Lagos. Furthermore many of the criminals do not know any house-owner who might be willing to risk taking him on bail. We do not have, as in the United States, companies or professional bailers who can take accused persons on bail. The end result is that our prisons are bursting with persons awaiting trial because the right to bail has been reduced to a sham. Even High Courts do not seem to always remember that under section 118(1) of the CPA they can grant bail to a person charged with a capital offence. I hope that this Colloquium will seize this opportunity to give an indepth consideration to the question of bail as an aspect of human right.

Other Cause of Delay in Criminal Cases

I can only make a passing mention of the way the right of a person charged with a criminal offence to have it tried within a reasonable time by a court of competent jurisdiction (section 33 (4) of the Constitution) is exercised. Even cases of murder sometimes last for over ten years from their inception to the judgment of the Supreme Court; and the accused person is invariably in custody all the time. This is due to the delay which derives from many problems, including competition with other cases, time spent in getting the opinions of, say, forensic and handwriting experts who are mostly based in Lagos and copying case files in order to get the opinion of the Director of Public Prosecutions. As I said in Abuja in September 1990, I believe the only answer is to follow the example of Britain, which was informed by several centuries of similar experience, by establishing for each State of the Federation and Abuja centrally organised and well funded Directorate of Public Prosecutions to which all the Ministries and Departments of Government concerned with public prosecutions will post the necessary personnel to ensure speedy processing of case files through inter-agency co-operation and thereby minimise delay in getting criminal cases to trial. Time wasted in the passage of cases from one court to another can be minimised if all courts borrow a leaf from the Court of Appeal wherein records for appeal to that court are supplied in sufficient numbers as to leave over some for transmission to the Supreme Court in case of further appeal.

Conclusion

My brother Judges, I have tried to focus on domestic enforcement of international human rights norms with particular reference to Nigeria. I have dealt with the procedure before and after 1979. In particular the contents, significance and impact of the enactment of Fundamental Rights (Enforcement Procedure) Rules which came into force on the 1st of January, 1980 have been examined. I have also tried to identify some of the factors still militating against the enforcement of human rights norms in Nigeria - in both civil and criminal cases. In hoping that all Nigerian Judges will see the whole situation as I see it - id est: a great challenge - I would like to end with the message of Honourable Justice Kirby during the Banjul Colloquium, in 1990, in his paper on

The Role of the Judge in Advancing Human Rights where he stated:

The simple message of this colloquium can be stated in a sentence. When common law judges are faced (as so often we are) with ambiguities of legislation or uncertainty of the common law, it is appropriate and legitimate, in filling the gap to have regard to international human rights norms. The international statements of principle concerning human rights are found in the Universal Declaration of Human Rights, the international covenants, regional human rights instruments, specific treaties, the jurisprudence of international and regional courts, the determinations of international agencies of high authority, and the writings of scholars on international law. In the age of the jumbo jet and rapid developments of international tele-communications, it is necessary to adjust our legal perspective. We must lift our eyes from our own jurisdictions. We must escape the intellectual prisons to which we have been consigned by parochial attitudes, legal training and statements of the law fashioned for the quite different circumstances of earlier times. It falls to us, the common law judges of today, in the post-Hiroshima age, to make a practical contribution to the peaceful evolution of a new international legal order.

This order will not come overnight, any more than the authority of the Royal Courts of England was established without travail. But it will also not come about unless the judges of today are aware of the need for it, sympathetic to its development and aware of the sources to which they may turn for the intellectual guideposts for individual contributions.⁵¹

Now that our peculiar problems have been highlighted, let us rededicate ourselves to come to firm grips with them, for the enhancement of human rights.

51. Developing Human Rights Jurisprudence, Vol.3 at p.55.

Closing Remarks

In the course of the closing ceremony, one of the participants from overseas (Justice Michael Kirby, Australia) expressed the thoughts of overseas participants in words which, it was agreed, would be included in the record. Justice Kirby said the following:

Since the last business session of this Colloquium, the non-Nigerian participants have been accorded the rare (indeed unique) privilege of joining their Nigerian judicial colleagues in a ceremony of great historical importance for Nigeria. By a coincidence of the calendar of events, the Judicial Colloquium was held in Abuja, the new capital of Nigeria, at the very time of the transfer of the Seat of Government of Nigeria from Lagos, on the coast, to Abuja.

The participants were also present in the run-up to the elections of State Governors which will take place in every State of Nigeria on the day following the conclusion of the Judicial Colloquium. These elections represent a further step in the plans adopted by the President of Nigeria (H E General Ibrahim Badamasi Babangida) to return Nigeria to democratic civilian rule. Any group of judges, brought up in the traditions of the common law, with knowledge of the importance of the rule of law and aware of the developments in other parts of the world at this time could not but welcome the steps taken in this process. The friends of Nigeria from beyond its borders will pray for the orderly return of civilian democracy and the re-establishment of elected representative institutions which provide the best guarantee, over the long term, for the defence of the rule of law, protection of human and people's rights and preservation of the independence of the judiciary and of the legal profession so vital to the enjoyment of freedom.

I am sure I speak for all of those who participated in the ceremonies at Abuja when I say how grateful we, the foreign participants, were for the privilege of witnessing such historical events and of doing so from the places of honour which were accorded to us by our Nigerian hosts. We were all very conscious of privilege of participating in an important moment of history. Justice Bhagwati, the former Chief Justice of India, said earlier that we would be leaving something of our hearts in Nigeria. That is true. But we will also take with us vivid memories of the colourful ceremonies which accompanied an event of great constitutional and political importance for the peoples of Nigeria and for its future as a democratic state.

For my part, I have two special reasons for expressing

my thanks. As an Australian, I am aware of the difficulty of securing a Federal capital which has the support of all the people. Nearly a century ago plans were laid down for the establishment of a Federal Capital Territory in Australia. Provision for the capital was contained in the Australian Constitution adopted in 1901. The capital was not formally inaugurated until 1927. On the 9th May of that year the Duke of York (later King George VI) representing King George V, accompanied by the Duchess of York, opened the first Australian Parliament in the new capital. It was the culmination of the achievement of a distinctive new capital. The transfer of all branches of government and of the bureaucracy took much time. Indeed, it is still incomplete. The High Court of Australia did not move to Canberra until 1980. But the establishment of Canberra is now well accepted by all Australians. It is a remarkable sign of the continuity of institutions to reflect upon the fact that the Duchess of York who took part in that ceremony so long ago is still alive, HM Queen Elizabeth, the Queen Mother. I hope that we will all live to see a robust parliamentary democracy established in Abuja, as in Canberra. Nigeria must set an example in this regard for Africa.

The second reason why these ceremonies were of special significance to me derived from the fact that in 1963 I travelled to all parts of Nigeria as leader of an Australian delegation of University students. My sponsor was the then National Union of Nigerian Students (NUNS). Nigerian independence was at that time very fresh. Its democracy was fragile. But I have always carried with me the most vivid recollections of my travels to the four corners of this great land. Fresh in my memory are the images of its friendly diverse people, of its music and of its abounding culture and energy. Yesterday, we the overseas visitors did not have to travel as I then did by third class rail from Ibadan to Zaira. Nigeria came to us. We saw that varied culture, still alive and preserved as I hope it always will be.

Amongst people so confident and assertive the future of the rule of law and of freedom looks bright. From my youth I have a special love of Nigeria. So I hope that that will be so.

On behalf of all of the overseas participants, but for special reasons on my own behalf, I express the thanks of the participants for the opportunity to witness a moment of great historical potential for Nigeria and for Africa.

ANNEXES

Concluding statement of the Judicial Colloquium held in Bangalore, India, from 24-26 February 1988

Bangalore Principles

Chairman's Concluding Statement

Between 24 and 26 February 1988 there was convened in Bangalore, India, a high level judicial colloquium on the domestic application of international human rights norms. The colloquium was administered by the Commonwealth Secretariat on behalf of the Convenor, the Hon Justice P N Bhagwati (former Chief Justice of India), with the approval of the Government of India, and with assistance from the Government of the State of Karnataka, India.

The participants were:

Australia	Justice Michael D Kirby, AC, CMG
India	Justice P N Bhagwati - Convenor Justice M P Chandrakantaraj Urs
Malaysia	Tun Mohamed Salleh Bin Abas
Mauritius	Justice Rajsoomer Lallah
Pakistan	Chief Justice Muhammad Haleem
Papua New Guinea	Deputy Chief Justice Mari Kapi
Sri Lanka	Justice P Ramanathan
United Kingdom	Recorder Anthony Lester, QC
United States of America	Judge Ruth Bader Ginsburg
Zimbabwe	Chief Justice E Dumbutshena

There was a comprehensive exchange of views and full discussion of expert papers. The Convenor summarised the discussions in the following paragraphs:

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.

4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete.
5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
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 a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
8. However, where national law is clear and inconsistent with the international obligations of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
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 and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.
10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in administration of justice in fostering universal respect for fundamental human rights and freedoms.

Harare Declaration of Human Rights

- 1 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 annexure to this Statement.
- 2 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 International Centre for the Legal Protection of Human Rights).
- 3 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 reaffirmed 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.
- 4 The participants were:

Australia	Justice M D Kirby, AC, CMG
Botswana	Chief Justice E Livesey Luke
The Gambia	Chief Justice E O Ayoola
Ghana	Justice J N K Taylor
India	Justice P N Bhagwati
Kenya	Chief Justice Cecil H E Miller
Lesotho	Chief Justice B P Cullinan
Malawi	Chief Justice F L Makuta Justice L E Unyolo
Mauritius	Justice Rajsoomer Lallah
Nigeria	Justice A Ademola
Seychelles	Chief Justice E A Seaton
Tanzania	Chief Justice F L Nyalali
United Kingdom	Recorder Anthony Lester, QC

Zambia

Chief Justice A M Silungwe

Zimbabwe

Chief Justice Enoch Dumbutshena - Convenor

Justice A R Gubbay

Justice E W Sansole

- 5 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.
- 6 The participants paid especially close attention to the provision 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.
- 7 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.
- 8 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 on 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 tenet 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."

9 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 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."

10 The participants agreed as follows:

- (a) 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.
- (b) 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.
- (c) 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.

- (d) 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 *Interights Bulletin* 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.
- (e) 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 a 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.
- (f) 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*

Concluding statement of the Judicial Colloquium held in
Banjul, The Gambia, from 7-9 November 1990

The Banjul Affirmation

- 1 A high level judicial colloquium on the domestic application of international human rights norms was held in Banjul, The Gambia, from 7 - 9 November 1990. It was the third in a series of judicial colloquia begun in Bangalore, India in February 1988, followed in Harare, Zimbabwe in April 1989. The Bangalore Principles formulated at the first colloquium, and the Harare Declaration of Human Rights produced at the second are annexed to this Statement.
- 2 The Banjul colloquium was administered jointly by the Commonwealth Secretariat and Interights (the International Centre for the Legal Protection of Human Rights) on behalf of the Convenor, the Hon E O Ayoola, Chief Justice of The Gambia, with the approval of the Government of The Gambia and with assistance from the Ford Foundation, the Danish International Development Agency and the British Overseas Development Agency.
- 3 Following an opening address by Chief Justice Ayoola the colloquium was formally opened on behalf of His Excellency Alhaji Sir Dawda Kairaba Jawara, President of The Gambia, by the Hon Hassan B Jallow, Attorney-General and Minister of Justice.
- 4 The participants were:

Australia	Justice Michael D Kirby, AC, CMG
The Gambia	Chief Justice E O Ayoola - Convenor Justice P D Anin Justice M E Agidee
Ghana	Acting Chief Justice N Y B Adade Justice G L Lamptey Justice M Abakah
India	Justice Y V Chandrachud
Nigeria	Justice Kayode Eso, CON Justice P Nnaemeka-Agu Justice A B Wali, OFR Justice S U Onu Justice A O Ejiwunmi Professor U O Umozurike
United Kingdom	Recorder Anthony Lester, QC
Zimbabwe	Justice Enoch Dumbutshena

Representatives of the African Commission on Human and Peoples' Rights, the Commonwealth Secretariat, the Ford Foundation, Interights and the International Commission of Jurists were also present.

- 5 There was a searching exchange of views on the wide range of subjects covered by the various papers. There were papers on the development of international human rights norms, including a survey of the practice and jurisprudence of international and regional supervisory organs; the domestic application of international human rights norms in Nigeria; and the African Charter on Human and Peoples' Rights and the work of the African Commission. In addition there was an account from the International Commission of Jurists on international developments on human rights, as well as papers on the role of the judge in advancing human rights presenting the viewpoints and experience of several Commonwealth jurisdictions. Interights presented a study on personal liberty and reasons of state which examined the relationship between international human rights norms and domestic law; and there was an essay which considered fundamental rights in their economic, social and cultural context in India.
- 6 The participants welcomed the opportunity to address the issues in a practical way and to carry forward the Bangalore Principles and the Harare Declaration . Both documents stood at the core of the important judicial endeavour inaugurated in Bangalore and were kept clearly in mind throughout the discussions.
- 7 The Banjul colloquium was seen as having the particular objective of affording Commonwealth judges in the West Africa region the opportunity to study the domestic application of international human rights norms to constitutional and administrative law. It was important to do this on the basis of a comparative study and a free exchange of views in seeking practical ways to realise the ideals of the international human rights standards. The participants were concerned to develop for Commonwealth Africa a system of justice having common application in every country based on their common heritage of democracy and the rule of law. The participants were also concerned to include non-Commonwealth countries in Africa in the process. They recognised the pressing need to include human rights in legal education, in formal professional teaching and other training activities and to have wide and popular dissemination of information about basic human rights and freedoms.
- 8 Accepting in their entirety the Bangalore Principles and the Harare Declaration , the participants acknowledged that fundamental human rights and freedoms are inherent in humankind. They were convinced that any truly enlightened social order must be based firmly on respect for individual human rights and freedoms, peoples' rights and economic and social equity. They pledged their commitment and dedication to these goals and principles and decided to issue this Statement of Affirmation of the Bangalore Principles and the Harare Declaration on Human Rights .

- 9 They called attention to the need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international instruments and national constitutions and laws. For the purposes of Articles 25 and 26 of the African Charter on Human and Peoples' Rights the participants suggested that the African Commission on Human Rights should consider establishing local associations in each member state to facilitate the process of education and training and dissemination of human rights information.
- 10 The importance of complete judicial independence was underlined, as well as the complete independence of the legal profession. The colloquium also emphasised that it is essential for there to be real and effective access to the ordinary courts for the determination of criminal charges and civil rights and obligations by due process of law. These safeguards are necessary if the rule of the law is to be meaningful, and if the law is to be of practical value to ordinary men and women.
- 11 The participants urged closer links and cooperation across national frontiers by the judiciary of Commonwealth Africa on the interpretation and application of human rights law. In particular they called for effective arrangements for the publication and exchange of judgments, articles and other information and where appropriate the use of special expertise. They believed also that these links and cooperation should include non-Commonwealth African jurisdictions, many of which are also concerned with upholding and promoting human rights and with attaining the objectives of the African Charter.
- 12 Adequate resources of way of library stocks and other material should urgently be made available for all judges for their information and assistance and by way of dissemination and teaching of international human rights law. They noted in this respect and fully endorsed the proposals made in the Harare Declaration for the preparation and dissemination of human rights material.
- 13 The participants recognised the need to adopt a generous approach to the matter of legal standing in public law cases, while ensuring that the courts are not overwhelmed with frivolous or hopeless cases. They also considered that the courts would be assisted by well focussed *amicus curiae* submissions from independent non-governmental organisations, such as Interights, in novel and important cases where international comparative law and practice might be relevant.
- 14 National laws should enable non-governmental organisations and expert advocates (whether local or otherwise) to provide specialist legal advice, assistance and representation in important cases of public interest.
- 15 It was agreed that it is essential for the exceptions and derogations contained in the African Charter to be strictly construed, including an interpretation of "law" which rejects arbitrary or unreasonable "laws" in Chapter 1 of the Charter. Otherwise these exceptions and derogations would destroy the

very principles guaranteeing fundamental human rights and freedoms.

- 16 They expressed their belief that the time may have come for an independent African Court on Human Rights, whose decisions would be binding.

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