companies are completely or partially owned by foreign investors, and any new foreign investments in Tanzania may be placed under this act. It is almost certain that this act will discourage some potential foreign investors from investing in Tanzania. One of the most important concerns of a foreign investor is to have a large degree of freedom to remit profits, and the power given to the Minister for Finance by this act is especially annoying to foreign investors since it is, in principle, unlimited. The Tanzanian Government is well aware of this, but it considers the act necessary for the Government control of the economy. Its basic principle is that if foreign investors cannot adapt themselves to the regulations considered necessary by Tanzania, she is better off without their investments.

The tightening of restrictions on remittance of profits has made it even more tempting to the foreign companies to manipulate transfer prices for deliveries between the parent companies and the subsidiaries in Tanzania to shift profits from Tanzania to the home countries of the parent companies. In this way, a foreign company can make the Tanzanian restrictions on remittance of profits ineffective; and if the corporate income tax in the home country is lower than the Tanzanian tax (including the withholding tax), then the foreign company also gets a tax reduction by this manipulation. Companies and individuals can also export capital from Tanzania illegally by collusion with a foreign business partner. They can sell goods from Tanzania to their foreign partner and receive, e.g., 90 per cent of the amount in Tanzania and 10 per cent in an account in a foreign country. A similar manipulation can be made when goods are imported into Tanzania. The importing companies and individuals can pay, e.g., 110 per cent of the agreed amount, and receive the balance of 10 per cent from their partner on an account in a foreign country. It is a general opinion in Tanzania that such manipulations are common with both locally owned and foreign owned companies. Because the manipulations are considered to cause a serious drain on Tanzania's foreign reserves, the Bank of Tanzania is taking steps to cope with them. With effect from 1st November 1972, the Swiss General Superintendence Company has been employed to conduct inspection of shipments of goods to Tanzania in order to check that qualities, quantities and prices are correct. In this way the Bank of Tanzania hopes to eliminate that part of illegal capital exports from Tanzania which takes place by overinvoicing of imports. If the control of transfer prices is efficient, it will be a hard blow to those companies which manipulate transfer prices in order to evade taxes and restrictions on repatriation of profits. There may be some investors who are willing to accept restrictions on remittance of declared dividends because they feel confident that they can remit an additional amount through manipulated transfer prices. Such people will be discouraged from investing in Tanzania by this new move. But this step is one more indication that Tanzania is not making any effort to create a 'favourable investment climate'. On the contrary, she is determined to make foreign investors comply with her aspirations; and if they are not willing to do this, she is determined to achieve development without their cooperation.

Prospects for International Protection of Human Rights in Africa

OSITA C. EZE*

INTRODUCTION

We have come a long way from the Bill of Rights[1] and the Declaration of the Rights of Man and of the Citizen.[2] Both instruments, dating from the end of the eighteenth century, had as their main objectives the guaranteeing and protection of human rights and freedoms. It was natural that in an age when inter-State intercourse was by present-day standards limited, and opportunity did not arise for the creation of universally acceptable mores on the question of human rights, it was left to the States concerned to achieve within their respective spheres a medium of protection for human rights. The scourge of the two World Wars, epitomized as they were by Nazi atrocities, the emergence of progressive forces, and the attainment of independence by States hitherto under colonial yoke, have added greater impetus to the realization that the world can no longer tolerate, without question, the unjustified and unwarranted abrogation or erosion of human rights.

Prior to the twentieth century there had been attempts to deal with the protection of human rights at the international level. Thus as early as the nineteenth century slavery was prohibited.[3] By the early twentieth century

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1 The Bill of Rights, a result of the American War of Independence which erupted in 1775, was only embodied in the Constitution in 1791. It provided *inter alia* for the freedom of religion, of speech and of assembly. Other provisions worth mentioning are those which provide that no individual shall be deprived of life, liberty and property without due process, and that which forbids slavery and involuntary servitude.

2 The *Declaration des droit de l'homme et du citoyen* was drafted at the upsurge of the French Revolution at the initiative of the French Third Estate. It was an attempt by the bourgeois class to destroy the feudal institutions of the *ancien régime* which had imposed unbearable limitations on the rights of the citizens. It enumerates rights akin to those of the American Bill of Rights which must have served as a model to its draftsmen. For the text of the Declaration see G. Ezejiofor, *Protection of Human Rights under the Law* (London: Butterworths, 1964), Appendix II. Cf. the English *Magna Carta* of 1215 which was intended to protect the rights of the "freeman" who at that time was meant to include the barons and the nobles of the realm.

3 By 1815 the Declaration of Vienna Conference prohibited trade in Negro slaves. In 1841 an international convention was signed on the suppression of the slave trade. See J. Halasz, ed., *Socialist Concept of Human Rights* (Budapest, 1966), p. 268. The 1841 Convention signed at the initiative of Great Britain was mainly motivated by British economic interests. The prospect of negro slaves working on cotton plantations posed a threat to British cotton produced in her colonies. Humanitarian considerations were therefore incidental rather than the motivating factor behind the Convention.

one saw an attempt to institutionalize the protection of human rights. The League of Nations machinery for the protection of minority rights was the earliest attempt in this respect. Also to be noted was the creation of the International Labour Organization within the League system. The ILO has, since its inception and up to the present date, sought to protect at the international level certain categories of human rights relating *inter alia* to the rights of workers, collective bargaining and conditions of work in general.[4] The United Nations Charter contains some substantive provisions on human rights[5] and the main organ charged with the protection of those rights is the Economic and Social Council.

The first attempts at the protection of human rights were thus at the national level and it was not until the nineteenth century that statesmen sought to protect these rights at the international level. The first basic and comprehensive international document on the subject was the 1948 Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948.[6] The Declaration "sets out the common standards that should apply to human society, irrespective of race, colour, sex, language, birth and other status. In effect it sets forth the attributes of a democratic system, with respect to the function of the Rule of Law. . . ."[7] Other documents, tending to elaborate and further define certain aspects of human rights, have since been formulated.[8]

Concrete expression was first given to certain aspects of the Declaration of Human Rights at the international level in Europe with the establishment of the European Court of Human Rights and the European Commission of Human Rights and Freedoms, of 4 November 1950.[9] The Latin American States, within the framework of the Organization of American States, have also attempted to institutionalize the process for the protection of human rights.[10]

In Africa the call for the creation of an international machinery which would encourage and secure the protection of human rights was made at the Lagos Conference of 1961. The African Conference on the Rule of Law consisting of 194 judges, practising lawyers and teachers of law from 23 African nations, as well as nine countries of other continents found it fit to declare:

4 For an assessment of the work of the ILO see E. Landy, *The Effectiveness of International Supervision: Thirty Years of ILO Experience* (London: Stevens and Sons, 1966).
5 See the Preamble of the *Charter of the United Nations*, art. I, secs. 2 and 3; art. 62, etc.
6 For the text of the Universal Declaration see International Commission of Jurists, "The Rule of Law and Human Rights: Principles and Definitions," (Geneva, 1966), Appendix A.
7 Ibid., p. 1.
8 International Convention on the Elimination of All Forms of Racial Discrimination, 1965; International Covenant on Economic, Social and Cultural Rights, 1966: International Covenant on Civil and Political Rights, 1966, etc.
9 For the text of the Convention see A. H. Robertson, *Human Rights in Europe* (Manchester University Press, 1963), Appendix I.
10 See Lalive Jean-Flavien in *Human Rights in National and International Law*, by A. H. Robertson, ed. (Manchester University Press, 1965), pp. 335-337.

> That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention on Human Rights in such a manner that the conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states.[11]

A similar call has been made at seminars on human rights organized by the United Nations Organization.[12]

The E.C.A. Conference on "Legal Process and the Individual," held at Addis Ababa in 1971 was yet another occasion to pronounce on the desirability of establishing a regional commission for Africa. The relevant section of the Resolution adopted by the conference, which went further than the previous declarations on the same subject by being more specific in its recommendations, reads as follows:

> (i) that an African Commission on Human Rights be established and charged with the responsibility of collecting and circulating information relating to legislation and decisions concerning human rights in annual reports devoted to the question of civil rights in Africa;
> (ii) that an African Convention on Human Rights be concluded;
> (iii) that every effort be made to harmonize legislation in the different African countries in this regard;
> (iv) that an Advisory Body be established to which recourse may be had for the interpretation of the terms of the African Convention on Human Rights;
> (v) that the various Afican States be urged to take speedy measures to accede to or ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all forms of racial discrimination and the OAU Convention governing specific aspects of refugee problems in Africa; and
> (vi) The Conference welcomes the recommendations of the aforesaid United Nations Seminar held in Cairo in 1969 entrusting the Organization of African Unity with the establishment of a Commission for Human Rights for Africa and invites the Organization of African Unity to hasten the implementation of the said recommendations taking account of existing international instruments that have been drafted by the United Nations in this connexion.[13]

Few African Heads of State have come out unequivocally in support of the establishment of a regional organ entrusted with the protection of human rights in Africa. Despite these forces, which one would have hoped would have encouraged the creation of some form of international human rights machinery for Africa, nothing has progressed beyond the level of discussion.

11 For the resolution known as the 'Law of Lagos' see "The Rule of Law and Human Rights. . . ," op. cit., Appendix D.
12 Seminar on Human Rights in Developing Countries, Dakar (Senegal) 8-22 Feb., 1966; United Nations, New York, Doc. ST/TAO/HR/25, para 241; Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference To Africa, Cairo, U.A.R., 2-15 Sept. 1969; United Nations, New York, 1969, Doc. ST/TAO/HR/38 paras. 40-55.
13 "Legal Process and The Individual African Source Materials," presented by the Centre for African Legal Development, Faculty of Law, Haile Selassie I University, edited by Thiery G. Verhelst, pp. 372-373.

The Charter of the OAU[14] while containing provisions concentrating on human rights, has not been able to provide an answer to the problem.

We seem to be jumping the gun. Perhaps the first question to ask is whether in fact an international machinery for the protection of human rights is desirable and feasible in the present African context. Even if we answer the first question in the affirmative we still have to surmount the obstacle of finding ways and means of persuading States to expose themselves to adjudication or judgment by an organ or body external to themselves.

If the purpose of the international apparatus is to ensure the protection of human rights then we imply that the State organs cannot be trusted to carry out this function fully. There is no denying that while the primary function of the State is the protection and promotion of life and well-being of the people who compose it, the State could be used as an instrument of oppression and for the perpetration of the most flagrant injustices. Power within the State could be wielded by a group of individuals who have neither respect for the law nor for the safeguards necessary for the application of the law. Even worse, power might be wielded by a dictator whose whims represent the law and whose orders must be complied with or else.

Examples such as these are rare perhaps, but they serve to point out that in the context of Africa, subjugated, impoverished and underdeveloped by colonialism, the countries must search to rid themselves of all forms of human indignities such as disease, illiteracy and hunger and these are some of the main concerns of any effort towards the protection of human rights. But the frustrations produced by this search, unless proper care is taken, may lead to situations which produce oppressive or unconscionable Governments, or provide occasion for the oppression of one group by another in circumstances which are beyond the control of the Governments. There would thus seem to be a need to establish an international organ for the protection of human rights in Africa. Be that as it may, the basic problem is that of getting the African States to establish that organ. We shall now proceed to examine in greater detail some of the questions raised above.

The National Regimes for the Protection of Human Rights in Africa

Most of the African Constitutions contain in varying degrees provisions governing the protection of human rights. Some of the countries include in the Preamble, declarations accepting either the Declarations of Rights of Man or the Universal Declaration of Human Rights, or both.[15] A number of countries

14 The signatories to the Addis Ababa Charter were "persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights . . . the principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among states." See the Preamble to the OAU Charter.

15 Constitution of the Republic of Senegal, 3 March 1963, *Projet de Loi Constitutionelle, Imprimerie Nationale*, D. L. 746, contains in the Preamble a declaration accepting both the Universal Declaration of Human Rights and the Declaration of Rights of Man and Citizen. The Constitution of the Republic of Congo (Brazzaville) 8 Dec. 1963, contains in its Preamble a reference only to the Universal Declaration of 1948. See *La Constitution de la République du Congo-Brazzaville, Mars 1964* published by the Ministry of Interior.

also declare adherence to the provisions of the United Nations Charter governing human rights.[16] Others are content with limiting the rights enshrined in the Preamble to a selected list which have as their basis either the Declarations of Rights of Man or the Universal Declaration of Human Rights.[17] There are yet those who provide in the body of the Constitution detailed rules and procedures for the protection of human rights.[18] In Ghana, Senegal and Tanzania the institution of the Ombudsman has been established to supplement the judicial and other institutions which have as part of their functions the protection of human rights.[19]

Emphasis should not be laid only on the rights which the individual may claim to have. As a member of society the rights of the individual are not to be exercised excessively or arbitrarily so as to infringe the rights of others. Hence as a corollary to the protection of individual rights, there must be imposed on the individual the obligation to abstain from infringing on the rights of others without due process. Some of the African Constitutions which incorporate provisions on human rights in fact lay emphasis on such obligations.[20] The State and its organs must be organized in such a way as to avoid arbitrariness and abuse of power leading to unjustified denial or restriction of individual rights. It is arguable thus that the judiciary, to the extent that it is free from Executive interference, certain decisions of the Executive to the extent that they are subject to review by an independent body, and a responsible Government are factors which may tend towards a more effective protection of human rights.

So far we have assumed that there exists a universal standard of human rights. In fact there is, but one must not seek to compare the level of achievement reached in the more developed countries with those of countries newly independent and striving to get there but somehow constrained by so many factors not easily surmountable. While there is no, and cannot be, any hierarchy based on racial or religious grounds, in the categories of human rights to be protected, the question of conformity or non-conformity must not be judged from the mere fact that a particular conduct falls short of a right as proffered in the Declaration of Human Rights. As embodied in those instruments they

16 The Constitution of the Federal Republic of Cameroon, 1 Sept. 1961, adheres in the Preamble to "the fundamental freedoms set out in the Universal Declaration of Human Rights and the Charter of the United Nations". See *Constitutions of Nations*, revised third edn. prepared by Dorothy Peaslee Xydis, *Africa*, I, pp. 34 ff.

17 See the Constitution of Central African Republic: Constitutional Laws of 9 Feb. 1959, 17 Nov. 1960, 20 April 1961 and 21 Dec. 1962, ibid., pp. 50 ff.

18 The Constitution of Ghana 1969 reprinted in *Yearbook for Human Rights For 1969* (United Nations, New York, 1971), Chap. 4, pp. 79-86 Sales No. E. 73.XIV.I. See also Constitution of Republic of Kenya, Act No. 5, *Laws of Kenya*, 1969, Ch. 5, secs. 70-86.

19 See Ghana Ombudsman Act, No. 340, *Acts of Ghana*, 1970; Permanent Commission of Enquiry Act, No. 25 of 1966, *Law of Tanzania*, 1966 as amended by Act No. 2 of 1968.

20 See Constitution of Dahomey of 11 January 1964, Title II: "The rights and duties of the citizen"; Constitution of Congo Brazzaville of 8 December 1963, arts. 15 and 16; Constitution of Ethiopia, 4 November 1955, reprinted in *Constitutions of Nations*, op. cit., pp. 170 ff., but in particular Chapter III entitled "Rights and Duties of the People". The reader is warned that the Constitutions cited above may have been modified or abrogated

must be seen as *de lege ferenda* and not *lex lata*. That this was the intention is evident from the provision of the Universal Declaration of Human Rights which proclaims "This Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to that end every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance. . . ."[21]

It has been noted that some of the African Constitutions incorporate by reference the provisions of the Universal Declaration of Human Rights in their Preambles. If such incorporated rights are intended as rights *stricto sensu* then they would provide occasion for discontent because, within the present context of Africa, some of them are almost impossible to achieve. It is our impression that in cases where the Constitution has adopted in their entirety the provisions of the Declaration they are regarded simply as declarations of intent and are thus not enforceable at law.[22] The practice discussed above is probably explicable on the grounds that Africa has been a continent more sinned against than sinning. Colonialism by itself implied dehumanization and exploitation and these amount to fundamental denials of human rights. Colonialism has also meant that the African countries are not only underdeveloped but also dependent. It is the degree of dependence occasioned in part by a great degree of foreign penetration which makes it difficult to argue, at the moment, for the protection of those rights which are enunciated in the Declaration.

We shall look at some of the provisions of the Universal Declaration of Human Rights and see to what extent their objectives are achievable in present-day Africa. There are certain basic rights which must be regarded as minima for any civilized community and which are embodied in the Universal Declaration of Human Rights. Thus everyone has a right to life, liberty and security of person;[23] no one shall be subject to slavery or servitude;[24] all are equal before the law and are entitled without any discrimination to equal protection of the law.[25] Generally, the civil and political rights are guaranteed to a greater or lesser extent in most countries including the developing ones of which Africa forms a part. But because Africa is in a period of transition and experimentation, changes may occur which tend to derogate from one or the other of these rights. Army takeovers, one-party systems, while not *per se* incompatible with the declared objectives, may provide occasions for abuse of human rights.

There are those rights which in an underdeveloped country prove impossible to achieve immediately. These include the right to private

21 See Ezejiofor, "Protection of Human Rights under the Law," op. cit., p. 259.
22 See *H. Adamji v. E.A.P. & T. Corporation* (1973) L.R.T., No. 6, p. 10 where it was in fact held that "the Preamble to a Constitution does not in law constitute part of the Constitution and so does not form part of the law of the land".
23 Art. 3.
24 Art. 4.
25 Art. 7.

property,[26] freedom of associations,[27] right to work and protection from unemployment,[28] right to education.[29] These are typically termed economic rights and their fulfilment would depend on the ability of the economy to provide for them. In relation to some of these rights (i.e., civil, political and economic) some questions have been succintly put by Vassak:

> Dans l'état de sous-dévelopment ou se trouvent presque tous les pays africains, il peut à première vue paraître théorique de parler des droits de l'homme. Comment un paysan de la brousse peut-il apprécier la liberté d'expression, alors que la possibilité de disposer d'engrais modernes aurait été pour lui beaucoup plus précieuse? Comment l'ouvrier habitant un bidonville peut-il comprendre la notion de droit de propriété, alors que tout ce qu'il possède se réduit à sa paire de bras et à une famille souvent nombreuse? En sens inverse, n'est-il pas injuste de protéger le droit de propriété des grandes entreprises étrangères dont le budget total dépasse, quelquefois de beaucoup le budget de l'Etat où elles occupent la place dominante? Comment ne pas limiter la liberté d'expression, alors que les journaux se trouvent souvent entre les mains de sociétés ayant leur siège hors d'Afrique?[30]

In essence Vassak clearly makes the point that one should not think in terms of protection of human rights without taking into account the objective conditions created by underdevelopment and, one may add, dependence of African countries. Instead of seeking the final solution to all the problems of human rights immediately, one might begin by laying greater emphasis on those rights which provide the background and basis for the attainment of our declared intentions. One may begin by pursuing a policy of educating the people so as to enable them to know and understand the rights which are attributable to them.[31] In this connection the Tanzanian experiment which provides free education at certain levels and education for adults who would otherwise have been left out of the educational system, offers a useful and commendable example. There are factors however, for example, insufficient human and financial resources, which pose serious obstacles to achievement of universal literacy. It is hoped that UNESCO in participation with the Governments concerned, will encourage and finance mass education in Africa. The illiteracy rate in Africa is very high and a premium should be placed on giving the individual a modicum of education compatible with human dignity.

Even where the individual has been educated to be aware of his rights, he might be frustrated to realize, for example, that while lip service is being paid to the protection of property for all, only a few are privileged with the possession of private property which merits any protection. State intervention in varying degrees might be needed either to abrogate private ownership or to

26 Art. 17.
27 Art 20, sec. 2.
28 Art 25.
29 Art. 26.
30 K. Vassak, "Less Drotis De L'Homme Et L'Afrique (Pour une Convention Africaine des Droits de L'Homme)," *Revue Juridique et Politique* (Avril-Juin 1967), p. 274.
31 This could be done at different levels and by different institutions. Lawyers, whether they be teachers or practitioners, have a moral duty to educate the people in the field of human rights. The practice of the Tanzanian Permanent Commission of Enquiry in this respect should provide a model for other African countries.

achieve a more equitable distribution of national wealth. Yet if the first measure were adopted one would be defeating the basic human right to own private property which is posited in the Universal Declaration of Human Rights. Unless, therefore, ownership of property is clearly defined to take into account the different philosophies of economic development, one would find that a right meant primarily to protect private property in the framework of a capitalist system would be meaningless once it is sought to extend that concept to a society where a socialist or communist system of organization is preferred. And there is some indication that some African States are opting for socialism. It may also be added that the protection of private rights and the freedom of the press, except in those situations where the national economy is to a great degree self-reliant and the degree of dependence has been minimized, might aim at the protection of those rights which have as their main consequence the inhibition of the development and fulfilment of the aspirations of the natives in so far as the protection of their human rights are concerned.

The purpose of the above discussion is to point out that while there should be a universal standard of human rights, these rights can only be protected to the extent that the prevailing conditions make them possible. Any derogation from the set standard should therefore be examined individually, taking into account all the relevant factors rather than acclaiming or rejecting the act on the basis only of its conformity or non-conformity with the relevant provisions of the Universal Declaration of Human Rights. What has been said above in relation to underdevelopment and its attendant consequences should on no account be understood as providing excuses for disrespect for human rights. On the contrary, any attempt to rid the African countries of underdevelopment must ensure a progressive maximization of protection of human rights.

It is perhaps more meaningful to include detailed provisions for the protection of human rights in the Constitutions rather than merely declaring adherence in the Preamble to either the Declaration of the Rights of Man or the Universal Declaration of Human Rights. The reason is that in the former case these rights are more easily maintainable and enforceable at law. There would also be the obvious advantage of avoiding debates as to whether the provisions embodied in the Preamble are enforceable or not. There are those Constitutions, however, which reinforce declarations in the Preamble with more substantive provisions forming part of the body of the Constitution.[32]

We have maintained above that most African States have included in their Constitutions provisions relating to human rights. But the written word or the provisions of the Constitution do not by themselves ensure that the rights are protected. Surely the final determinant of the actual implementation of these objectives is whether the judges chosen to run the human rights machines are men of integrity and are able to carry out their functions without undue interference. Thus one might argue that the independence of the judiciary is a *sine qua non* for a meaningful protection of human rights. But Africa is a continent in transition and one may find that often a constitutionally elected Government

32 See, for example, The Constitution of Ghana 1969, Ch. 4.

has been toppled by force. Once there is a *de facto* control by the new regime the judge can either carry on as if nothing has happened or resign if he feels too strongly about the change. In the former case the judge might either follow sheepishly the directives of the new regime, even where he does not agree with them, or try to carry out his functions to the best of his abilities in the circumstances. In the latter case refusal to serve the new regime might bring the wrath of the new regime upon the judiciary leading to some degree of interference. It is not unusual for the Constitution to be suspended under the guise of a state of emergency and the entrenched provisions with it.

There may also be occasions when a country is trying to reorganize the internal structures of the economy when certain policies may be formulated which, even though widely accepted, may not have been expressly incorporated in the law. Where there is the possibility of progressive or extensive interpretation, the judge may avoid possible conflict between the written law and such policy. Where, however, it becomes difficult by any stretch of imagination to interpret the existing law in the light of the new policy, the judge is put in a most difficult position. A decision which is clearly contrary to such a policy could in certain situations lead to conflict between the judiciary and the Government.

Problems of Establishing a Regional Organ for the Protection of Human Rights in Africa

We have demonstrated in the above discussion certain factors which may create obstacles to protection of human rights in Africa. While underdevelopment and dependence of African States have been so far emphasized there are yet other stumbling blocks to the establishment of a regional organ for the protection of human rights.

The first and foremost obstacle derives from the fact that most of the African States have been independent for a relatively short time and are in the process of eliminating the ethnic, tribal and other conflicts which are the result of superimposed State boundaries and structures. It often happens that a State, because of its military weakness and absence of national loyalty, is not able to ensure that such conflicts do not arise, or if they do arise are not in a position to control them. Under such circumstances a State would be reluctant to expose itself to the hazards of international adjudication or other non-etatic methods of settling disputes. Such conflicts are not likely to be submitted to local organs either, except where they are loyal to the authorities. Yet such conflicts arise in situations where fundamental human rights are traversed or trampled upon.

The second factor is that, except in those Constitutions where the rights to be protected have been drafted in such a manner as to take into account the objective conditions imposed by underdevelopment, those 'rights' may be no more than empty declarations. Where the relevant provisions of the Constitution are couched in terms of the Universal Declaration of Human Rights it has been maintained that in most cases they will be incapable of immediate

achievement. A State is not likely to accept international settlement on the basis of 'rules' which are taken as no more than declarations of intent. A State which has taken upon itself not only to decide the kind of education the individual should have, but also his future employment, would not be seen accepting an international settlement of a dispute based on the right to choose a job.

Thirdly, the categorization of human rights which lays emphasis on those rights which are peculiar to the free enterprise system would not be acceptable to those States which have chosen the socialist way of development. Whether it is possible to arrive at a compromise is difficult to say since some aspects of human rights, particularly those relating to property, form the basis and diverging points of the two systems. While the one system emphasizes individualism the other insists on collectivity. Put more broadly, the concepts of relationship between the State and the individual are different.

Fourthly, because of the penetration of foreign culture and values in Africa and because of overdependence on the global system, there have not been developed truly African values of the kind one finds in Europe and to a lesser degree in Latin America. There are, however, areas of agreement such as the elimination of colonialism, slavery and apartheid, but these are not areas directly subject to their jurisdictions. The essence of the regional organ for the protection of human rights is to ensure that States share their jurisdiction over matters of human rights with such organs.

Finally, as long as Africa remains poor it is meaningless to talk in terms of protection of human rights in the same manner as one does in relation to Europe. The very existence of the rich and poor nations is by itself a negation of the very concept of human rights, the protection of which we advocate. It creates different classes of men: those who have the right to be rich and others who are apparently condemned to perpetual poverty. In the last resort it is the degree of disengagement[33] and self-reliance attained by the African States that will lead to the ultimate internationalization of some of the basic precepts of human rights embodied in such instruments as the Universal Declaration of Human Rights.

Ironically, it is the underdevelopment of the African States coupled with the precarious process of nation building which constitute obstacles to the international protection of human rights that should provide the *raison d'être* for it. It is precisely because of these factors that the protection of human rights at the national level is hampered, thus creating the need for supplementary means of protecting those rights. To put it differently, it is the realization that the subject and object of human rights is the individual and that the States in many cases might not be able to protect such rights that should serve as a motivating force for the creation of an international machinery for the protection of human rights. Yet the obsession with sovereignty—by no means

33 'Disengagement' as used in this paper should not be understood to mean total voluntary isolation. It means temporary withdrawal from international involvement to the extent permitting an objective appraisal of national policies and some degree of self-reliance.

peculiar to African States—has made it difficult for the States to give away some of that sovereignty even for humanitarian considerations. Any attempt to create a regional organ or body must take the above mentioned points into account.

In the light of the above it will be seen that the European experiment is not suited to Africa. This may explain why the initial enthusiasm sparked off by the European Covenant and continued by the 'Law of Lagos' seems to have died down. There has been little or no political support for the establishment of a regional organ by the African Heads of State. But what about the Latin American experiment? The continent for the most part is underdeveloped and therefore has at least that denominator in common with Africa? Underdevelopment apart, differences exist which, from the point of view of international protection of human rights, put the two continents apart. The Latin American countries or the governing groups transferred from Europe European culture and values. They have been independent for a much longer period and they have achieved greater levels of transaction and integration. They also share a common ideology. The European model, therefore, with some slight modifications could serve as a basis for the Latin American experiment.

For Africa a different solution must be sought and this will not lead, at least in the immediate future, to the creation for Africa as a whole of a court or machinery for the international protection of human rights. The battle must be waged by first consolidating the national fronts. This can be done by minimizing ethnic rivalries, establishing responsible Governments, minimizing corruption and ensuring the existence of impartial organs to decide on issues of alleged infractions of human rights. All these objectives can and should be achievable in an atmosphere of increasing economic development and prosperity which depends not only on internal mobilization within the African countries but also on the global system.

In the meantime we should try to create less ambitious organs and maximize the use which is made of international institutions which at the moment have achieved near universality in the protection of certain categories of human rights. In this connection, the work of the ILO in standardizing and protecting international labour standards comes to the fore. The possibility of using other United Nations organs to protect other aspects of human rights should be explored. The United Nations Commission on Human Rights could be further developed to achieve this end.

While it has been contended that it is not feasible to establish an all African machinery for the settlement of disputes arising from alleged infractions of human rights, it may yet be possible to set up a watchdog committee within the framework of the OAU. The African Commission of Jurists established in 1964 could be used as such a committee which would have the capacity to receive information on the infractions of human rights both from individuals or groups of individuals as well as from States party to the OAU Charter. From the nature of things, the Commission would be limited to recommendatory and, subject to acceptance by the States concerned, investigatory functions. The investigatory powers, if judiciously exercised, could

contribute to the prestige and possibly to the willingness of the States to increase the powers of the Commission.

Alternatively one might concentrate on subregional organs for the protection of human rights. Ideally this should be on the basis of subregional groupings advocated by the Economic Commission for Africa.[34] Unfortunately, apart from Eastern Africa where a reasonable degree of integration has been achieved within the framework of the East African Community, the level of transaction is too low in the other regions to warrant such an ambitious plan. If the Nigerian plan to create a West African Community which embraces both the French-speaking and English-speaking countries materializes, we might have laid the foundation for such an enterprise in West Africa. The position in Central Africa is difficult to assess at the moment. It may be that with the reduction of dependence on France, some of these countries might begin to discover those factors which could bring them closer together.

Conclusion

Africa, perhaps more than any other continent, needs to ensure the protection of fundamental human rights and freedoms. The past experiences of almost total negation of human rights and dignity must certainly create an incentive for the eradication of any obstacle to the fulfilment of the hopes born from independence. Yet because there exists a world order or disorder which maintains one part of the world in poverty and the other in riches, it has proved difficult to achieve even a modest success in the field of protection of human rights in Africa. It is not surprising that in some States the need for economic development is given a premium while human rights may be relegated to the background. We hold that economic development is compatible with the protection of human rights and human rights should only be abrogated where it is intended to achieve a greater protection of those rights. We are, however, aware that in some cases the emphasis on faster economic development may produce undesirable consequences which cannot be justified on the basis that such emphasis is intended to promote, in the long run, greater protection of human rights. The weaknesses inherent in the State structure resulting from underdevelopment, and the need to create Nation States would mean that in any attempt to foster the protection of human rights on a regional level or even subregional basis, that approach which least encroaches on national sovereignty must be adopted. Only an advisory or recommendatory and perhaps an investigatory international body will be acceptable in the present context of Africa. In the meantime the war against illiteracy, disease and want should be relentlessly waged because victory over these represents the backbone to a meaningful protection of human rights both at national and international levels.

34 At its seventh session in 1965, ECA recommended through its resolution 142 (vii) the early establishment at the subregional level of inter-Governmental machinery responsible for the harmonization of economic and social development in subregions of North, West, Eastern and Central Africa. At the moment the proposition is far from taking a concrete shape. See O. C. Eze, "Legal Status of Foreign Investments in the East African Common Market," forthcoming, p. ix.

The Role of Utani in Eastern Tanzanian Clan Histories

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Introduction

The major theme of this paper is suggested by oral traditions collected from the clans of the Doe, Kwere and Zaramo peoples of Eastern Tanzania.[1] For the history of the areas in which these peoples lived during the nineteenth century is presented in oral tradition as essentially an ensemble of clan histories through which run certain common themes and related cultural and structural concepts. It was during research on the origins of utani in Eastern Tanzania that the role of this rather special social institution in clan history became evident.

According to most of the oral traditions in the area, the origin of the clan (and particularly of its name) was contemporaneous with the origin of utani, which is a system of ritual interaction closely linked to cultural and, to a lesser extent, socio-economic differentiation between the groups and individuals who practise it. The second part of this paper will be devoted to an overview of utani itself, its definition, theories which have been advanced to explain its role in society, and current research efforts.

As will be pointed out below, much of the analysis of utani has been structural-functionalist and hence ahistorical, when not outright anti-historical. The third part of this paper attempts, through examination of some themes common to the clan histories in question, to demonstrate how utani not only serves as an interaction mechanism but also operates conceptually to order and rank local groups (clans and lineages) in terms of their social histories.

The central proposition that this paper is directed to examine is the degree to which utani provides an ideological framework which justifies differential access to resources while affirming social equality of the participants. This fundamental contradiction underscores with no little irony the political aptness of the English translation of utani, *the joking relationship*!

The Meaning of Utani

Utani is a Swahili word which is used to cover a very wide range of social institutions and practices in East Africa. Up to the present day, many writers

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1 As is pointed out by T. O. Beidelman in *The Matrilineal Peoples of Eastern Tanzania* (London: International African Institute, 1967), there is a certain homogeneity which allows (with caution) for generalization about social institutions among the Kwere, Zaramo, Kutu, Luguru, Vidunda, Sagara, Kaguru, Ngulu, and Zigua. Beidelman does not make a separate entry for the Doe.