The Potential Relevance of the European Convention on Human Rights

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The European Convention on Human Rights[1] 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.

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[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 membership[2]. 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 Convention[3] 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

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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 with[4] 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

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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 binding[5] 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. France[6], the Commission found, by 10 votes with one abstention, that the applicant's rights under Article 5(3) had been violated in that,

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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 agenda[7] 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

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

8 11 EHRR [1988] 117.

v. United Kingdom[9] 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

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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 Commission[10] and only one has reached the Court[11].

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

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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 years[12]. 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 judgments[13]. 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).

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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. Ireland[14], 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 6[15] and 8[16] of the Convention. In doing so, the Court observed that

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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

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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]

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[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
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> - the objective of seeking practical ways of realising international human rights standards;
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> - 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,
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> - 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. 1[19], 2[20] and 13[21].

Nigeria has played an important role in the formulation of

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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' Rights[22], 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

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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 exists 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

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[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 avoid. 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 State[25], a leading case from Zimbabwe

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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 Convention[26]. 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

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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' case[28] to challenge the Commonwealth Immigrants Act 1968, which sought to impose immigration controls on British citizens

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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 Kingdom[30]. Ireland challenged

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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 Kingdom[31], 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

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[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 Charter[32] and the Nigerian Constitution 1979[33] 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

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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 & Ors[35], 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 Kingdom[36] 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

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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 necessary [38] 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

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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]

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[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 Choudhury[41], the Divisional Court considered the relevance of Articles 9,[42] 10[43] and 14[44] of the European Convention and the European Commission's decision in Ahmad v. United Kingdom[45]. 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

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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 5[46] 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 Kingdom[47] 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

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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 Hartley[49] 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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48 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 Ireland[51] 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 reasonably, 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

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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 8[53] of the Convention was interferred with in Malone v. United Kingdom[54] 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

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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 safeguarded[55].

Similarly, in Kruslin v. France[56] 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

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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 case[58], 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

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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. Austria[60], 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

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59 Id. para. 65.

60 8 July 1986, Series A No. 103; [1986] 8 EHRR 407.

61 Id. paras. 41 and 42.

v. Austria[62] 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. Sweden[63] 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

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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 case[65]. 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.

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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 Kingdom[67] the European Court held that interferences with prisoners' correspondence by British prison authorities on the basis of unpublished orders and instructions violated Article 10[68]. 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]

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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 AG[70], 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.

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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 independant 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 Court[72] 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.

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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 case[73] 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

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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 case[75], 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,

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[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 Kingdom[76], 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

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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 Soering[78], 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 Spycatcher[79] 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

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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.