FUNDAMENTAL HUMAN RIGHTS: ROOTS, FRUITS, MYTHS AND REALITIES

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INTRODUCTION

Authority is not lacking in support of the thesis that the whole idea of basic human rights and their protection stems directly from a specific philosophy - the philosophy of natural law.[1] Indeed the question of the survival of human rights cannot be divorced from a philosophy of life; when Lord Henry Bracton uttered the immortal words:

> The King ought not to be under any man but he ought to be under law, since the law makes the King. Therefore, let the King render to the law what the law has rendered to the King, namely dominion and power; for there is no King where will prevails,....[2]

He was expounding the philosophy of government under law, a legal order in which human dignity and freedom can be maintained. Both power and freedom must be exercised under law. Where power is unlimited, despotism or tyranny reigns; and unrestrained freedom also connotes licence or anarchy.

In England, during the seventeenth century, Parliament supported by the Judiciary symbolised by Chief Justice Edward Coke curbed the pretentions and absolutism of the Stuart Kings. No sooner did Parliament dethrone regal supremacy than it enthroned the supremacy of Parliament. Today Parliament is still the highest court in the land. An English court cannot declare an Act of Parliament duly passed unconstitutional; the will of Parliament is the supreme law. It was to protect the ordinary citizen from what would appear to be the tyranny of the majority that recourse was had to a higher law not made by men or Parliament. About this higher law Blackstone wrote thus:

> This law of Nature being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe, in all countries and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or intermediately from the original.[3]

Some tenets of this higher law may be found in principles of equity, in the requirement of the reasonable man's standard and in the interpretation of statutes in a manner that will avoid injustice.[4]

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1. D.V. Cowen, *The Foundations of Freedom* (Cape Town: O.U.P. 1961), 198.

2. Quoted in R. Bilder, *'Re-Thinking Human Rights,'* [1969] *Wisc. L.R.* 171, 174.

3 Blackstone, *Commentaries on the Law of England*, Vol.1 (Chicago: Callaghan & Co., (1884), 41.

4. See S. Rao, 'Fundamental Rights Under the Constitution of India', The V.S. Sastri Memorial Lecture, Madras University (1969) p.19; See also A.L. Goodhart, *England and the Moral Law*, The Hamlyn Lectures Series (London: Stevens & Sons, 1953); R. Pound, *Law and Morals*, (Chapel Hill; University of North Carolina Press, 1926), *passim*.

In the New World the founding fathers rejected the idea of the supremacy of Parliament and enthroned instead the supremacy of the Constitution (containing entrenched rights) as interpreted by the courts. The will of the courts is the supreme law.[5]

It is not intended to review the copious literature on natural law here. It must be mentioned in passing however that in Craeco-Roman thought natural law was attributed to man's reason.[6] That which is natural to man qua man is his reasoning faculty which enables him to discern between right and wrong conduct. In medieval times Catholicism as espoused by St. Thomas Aquinas and the Scholastic philosophers perceived natural law as the revelation of God to man - which man received by application of his mental faculty.[7]

This is not to intimate that there was no inclination towards positivism in classical times. It would be recalled that one of Plato's youthful friends, Thrasymachus offered his definition of justice as that which is in the interest of the stronger person. Pato himself and Polemachus another friend who defined justice (i.e. right conduct) as 'giving each person his due.'[8]

Much later, John Locke, Thomas Hobbes and Jean Jacque Rousseau tended to view man as anthropocentriic and individualistiic. They stressed man's will instead of his reason. Thus the will of the people became the measure of right and wrong. 'The idea of a God-created order of things came to be denied'.[9]

Natural law it would seem is a flexible tool which may be applied to different times and places depending upon the exigencies of the occasion. One thing is clear however, viz, it is natural to man's nature and it is therefore universal.

But if we may reflect soberly and realistically, there are pracical reasons why certain freedoms and rights may be considered basic and fundamental. First among all Nature's creation, only man is rational and must seek self-knowledge,[10] the truth of being, to

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5. *Marbury v. Madison* 1 Cranch. 137 (1803).

6. C. Morris, *The Great Legal Philosophers*, (Philadelphia: University of Pensylvania Press 1959), 17.

7. *Ibid.*

8. Plato, *The Republic* (London: Penguine Books 1966), 5.

9. Cowen, *op.cit.*, note 1, *supra*, 219 also his article 'Human Rights in Africa' (1964) 9 *Natural Law Forum* 1; G. Ezejiofor, *Protection of Human Rights Under Law*, (London: Butterworths 1964), passim.

10 The quest for self-knowledge is the root cause of the existence of several occult societies. These are Brotherhoods and Lodges which offer instructions in things hidden from the eyes of most ordinary people. The word occult is derived from Latin - *ex occulus* - i.e. hidden or away from sight or the eyes. It was the Christ who told his secret disciple Nicodemus: 'Except a man be born again he will in no wise enter the Kingdom of God'. "Being born again" means self-discovery, i.e. finding answers to questions such as; Who am I? Why am I here? Where do I go from here? Am I a spiritual entity occupying a body or a mere corpus? The average person is so reoccupied with the things of life, i.e material things as to have little or no time to attend to the things of the spirit. Only those who are concerned about the "hereinafter" give any thought to these questions and they try to find the answers by associating with those who have developed their faculties to perceive and hear things not seen or heard by the materialistic. Man is an end in himself, not a means to an end. Greek philosophical thought to which we owe our modern methods of thinking, which

understand his place in the universe and the purpose of his being.[11] He cannot do this unless he is alive. Therefore the right to life is a categorical imperative. Secondly the search for truth involves the capacity to be where he wills to be, and to determine for himself what he is made of and what he should do. And this means he should be free to act according to his convictions: his freedom or liberty must be assured. Thirdly because man cannot exist without some material comfort, he must necessarily have the freedom to own property. Fourthly the search for the truth of being will entail discussion and exchange of views, opinions and expression. Freedom of speech thus becomes necessary. Fifthly since man will need the services and help of his fellowmen, freedom of association also becomes a necessity. Since the family is the basis of the community the right of privacy must be assured. Sixthly since the enjoyment of these rights and freedom must be regulated to avoid conflict, the right to justice becomes important.

Practically all other preserved rights in all nations can conveniently be subsumed under one or other of these rights and freedoms. For example the right to education may be subsumed under freedom of speech or association or religion. In a rich country, to require the government to provide free education as a fundamental right may make sense; but in a poor country, the resources may simply not be there to provide free education for all and to require the government to do this would simply be to ask for the impossible.[12] The same argument could be made with regard to housing, health care, social security etc. Where people are encouraged to associate freely and to seek their own welfare through cooperative ventures and the tradition firmly established that people should learn to do things for themselves and not look to government as the universal provider, the attitude of slavish dependence on government would be eradicated. Unfortunately, as will be demonstrated presently, colonial governments neglected this aspect of colonial tulelage, consequently, people look to government to cater for all their needs.

CONSTITUTIONS AND ATTITUDES TO FUNDAMENTAL RIGHTS

(i) British and Traditional Response to Fundamental Rights

Fundamental rights also called fundamental human rights incorporated very often in a Bill of Rights are essential hall marks of constitutions based on democratic ideas. They are tantamount to a restriction on sovereignty for the benefit of the individual. The

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whether syllogistic, inductive, deductive or logical relates all things to man, the total man; man becomes the system of reference by which all things must ultimately be measured. Man exists to seek his own good and must be aided in this by the State - "polis". The aphorism "To know thyself is better than to try to know the gods" is attributed to Socrates.

11. On the universal nature of the law Aristotle said: 'There will not be different laws at Rome and at Athens or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times'. *De Republica* III xiii 33 quoted in D'Entreves, *Natural Law*, (1960), 21. The theme was re-echoed in Fawcett: 'Human rights are natural in that they belong to every man and woman as an expression of their humanity; they are fundamental in that unlike many rights established by law or custom, they could not be denied or taken away in any circumstances by any person or authority'. 'The International Protection of Human Rights' in *A Study Guide for the International Year for Human Rights*, (London: Heinemann Educational Books 1967) 9.

12. D.V. Cowen, 'Human Rights in Africa' *op.cit.* n9, 20-21. It is erroneous to think that human rights concept is a Western contraption. Dr. Lakshman Marasinghe has demonstrated amply that the right to family membership, freedom of thought, belief and association and the right to enjoy private property are not alien concepts but known to most indigenous African societies; see his 'Traditional Concepts of Human Rights in Africa', in Welch, E.C. and Meltzer, R.I. ed. Human Rights and Development in Africa, (Albany, N.Y.: State University of New York Press 1984) 32 ff.

attitude of legal systems reveals divergencies varying from indifference, special and privileged status to extreme antagonism and ostracism. English political theorists have traditionally scoffed at the idea of enshrining fundamental rights in a solemn document and giving it a more preferred status than that enjoyed by other provisions of a constitution. It was the English political theorist Jeremy Bentham, who incensed by the French Declaration of the Rights of Man called fundamental rights "rhetorical nonsense - nonsense upon stilts".[13] Dicey on his part said:

> Now most foreign constitution-makers have begun with declarations of rights. For this they have often been in no wise to blame. Their course of action has more often than not been forced upon them by the stress of circumstances, and by the consideration that to lay down general principles of law is the proper and natural function of the Legislators.[14]

Sir Ivor Jennings says:

> In England we have no Bill of Rights, we merely have liberty according to law; and we think truly, I believe - that we do the job better than any other country which has a Bill of Rights or a Declaration of the Rights of Man.[15]

Professor Wheare says an ideal constitution should contain few or no declarations of rights although the ideal system of law may define and guarantee many rights. He concludes: "Rights cannot be declared in a constitution unless indeed they are so qualified as to be meaningless.[16]

Even case law is not wanting in English attitude towards guaranteed freedoms. In *Liversidge v. Anderson* Lord Wright states: The safeguard of British liberty is in the good sense of the people and in the wisdom of the representative and responsible government which has been evolved.[17]

The same attitude has been expressed towards the constitutional needs of English dependencies. The Simon Commission on Indian Constitutional Reform reported:

> Many of those who came before us have urged that the Indian Constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all citizens. We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the War of 1914-1918. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless unless there exists the will and the means to make them effective".[18]

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13. 'Anarchical Fellacies' in *Works* Vol.2, (ed. Bowring 1965), 497.

14. A.V. Dicey, *Lectures Introductory to the Study of the Constitution*, (London: MacMillan & Co. 1885), 21.

15 I. Jennings, *The Approach to Self-Government*, (Boston: Beacon Press 1963), 20.

16 K.C. Wheare, *Modern Constitution*, (London: Oxford U.P. 1966), 49.

17 [1942] A.C. 206. Lord Atkin's famous dissenting opinion, however, demonstrates the susceptibility to arbiitrariness of the society which lacks a written Bill of Rights.

18 Cmmd. 3569 (1930), 22-23.

Several reasons have been advanced for this lukewarm attitude in the British towards guaranteed freedoms. In the first place, as Hood Phillips says most provisions are not absolute but qualified and after the qualification what remains are, obvious ordinary legal propositions.[19] Secondly the English have not been impressed by the record of countries which have guaranteed Bill of Rights embodied in their constitutions. The U.S.S.R. Constitution of 1936 for instance contains such rights as freedom of speech, of the press, of assembly, yet in practice Soviet citizens do not enjoy these rights.[20] Thirdly it has been said a determined parliamentary majority backed by the electorate may make nonesense of these right as has happened in South Africa.[21] Finally it is argued that no constitution can possibly provide a complete and impenetrable defence against human passion and artfullness.[22]

Professor Cowen attempts to answer some of these arguments. On the question of the USSR type of Bill of Rights he says the rights purport to be state policy objectives, undertakings of sorts, of what the State would do for the citizens. As compared with those of the US the emphasis in the US constitutional guarantees is on what the state cannot do. On the issue of the state's inability to provide against every human passion he counterargues that freedom is founded in jealosy and not in confidence. On the question of the determined legislature backed by the electorate he says that this may well be so but a Bill of Rights makes 'the way of the transgressor, or the tyrant more difficult'.[23]

Professor de Smith refers to the danger of regarding constitutional prescriptions as maximum rather than as minimum standards, and says that important aspects of freedom not guaranteed may be accorded less legal respect. Of course there is the example of the US where the Ninth Amendment says.... 'the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people'.[24]

Then there is the paradox that whenever freedom is most needed for instance in time of war or emergency they are wittled down or completely abrogated.

It must not be forgotten, however, that though the English have no entrenched or constitutionally guaranteed rights - a necessary adjunct of the supremacy of parliament yet most famous declarations of individual rights are ultimately traceable to inspiration drawn from English constitutional sources: The Magna Carta (1215), the Petition of Right (1928) and the Declaration of Bill of Rights (1689) and from legal and philosophical treatises on fundamental law and so-called natural law.

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19. *Constitutional Law*, (London: Sweet & Maxwell, 1973), 36-37.

20. M. Chalidze, *To Defend These Rights: Human Rights and the Soviet Union*, (Daniels Transl., New York: Random House 1974). See also J. Hazard, *The Soviet Legal System*, (Rev.ed. New York: Oceana, 1970), 72; Hazard, 'The Soviet Union and a World Bill of Rights', (1947) 47 *Columbia L.R.*, 1095; M. Loeber, 'The Soviet Procurator and the Rights of the Individual against the State', (1957) 1 *J.I.C.J.*, 59.

21. Cowen, *op.cit.* note 1, *supra*, 115.

22. *Id.* 118.

23. *Id.* 119.

24. See also Article 28(5), Constitution of Ghana 1957.

(ii) The Attitude of some Other Western Countries

Peaslee's *Constitution of Nations* contain the constitutions of some eighty-nine nations.[25] All these constitutions recognise some fourteen basic rights. Eighty-four recognise the right of personal liberty, fair trial and freedom of conscience and religion; eighty-one recognise freedom of assembly and association and the inviolability of correspondence and domicile; eighty recognise the right to private property; seventy-nine recognise the right to freedom of education; seventy-seven recognise the right of equality before the law; seventy-six the right to freedom of labour; sixty-three the right to petition government authorities, sixty recognise certain rights relating to health as well as motherhood; fifty-nine the right to social security; fifty-six the right to freedom of movement within the state and fourty-nine give protection against retroactive legislation.

The degree of security and guarantee vary from country to country. Some guarantees are absolute, others are partial or qualified; some of the guaranteed rights are notorious if only because of what they hide and not what rights they actually confer. Some of the rights are justiciable and others are not.[26]

The position of the US is unique in this scheme of things. Deriving their inspiration from the Magna Carta which was in the main to ensure civil liberty of the English nobility - 'No freeman shall be deprived of life or liberty, save by judgement of his peers (Lords not equals) or the law of the land' - fundamental rights in the US were first developed in the American Declaration of Independence (1776) which proclaimed the equality of all men with inalienable rights to life, liberty and the pursuit of happiness. The Constitution of 1787 was not encumbered with a prosaic Bill of Rights which for most part limit the powers of the Federal Government.[27]

Again unlike their brethren the British, the Americans settled for the supremacy of the judiciary which assumed for itself the power to declare unconstitutional congressional legislations which violate the provisions of the monumental constitution. It of course took time to secure the same legal equality of all men. It also took three years after the promulgation of the Constitution to limit state power, to abridge the immunities of citizens to deprive persons of life, liberty or property without due process.

France in 1789 proclaimed the Rights of Man and Citizen which was embodied in the French Constitution of 1793. These principles however found no place in the Napoleonic constitutions. In the 1946 Constitution however they reappeared. It is generally recognised that events in the American colonies greatly influenced the course of events in France. Thus in proclaiming "Liberte" the French relied on the American ideals particularly the idea that all men are born equal; other ideals consist in the assertions that sovereignty resides in the nation, that nobody can exercise authority not expressly emanating from it. And just as in the case of the Americans, the French assert that the purpose of all political rights is to preserve the natural rights of man: liberty, property, security and resistance to oppression. Liberty is the power to do that which does not

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25. A.J. Peaslee, *Constitution of Nations*, (4th ed., The Hague: M. Nijhoff 1974).

26. A. Gledhill, 'India's Fundamental Rights, (1959) 1 *Indian Yb I.A.* 110; also his 'Fundamental Rights' in J.N. Anderson, ed. *Changing Law in Developing Nations*, (1970), 82.

27. See I. Brant, *The Bill of Rights Its Origin and Meaning*, (New York: The Bobbs Merrill Co. 1965); B. Schwartz, *The Great Rights of Mankind*, (New York: Oxford U.P. 1977). The First Ten Amendments adopted in 1791, however, have become the Bill of Rights and have since then been regarded as such.

injure another.[28] Freedom of opinion is one of the precious rights and nobody shall be punished for his opinions unless their manifestation affects public order. Property is an inviolable right and no person shall be deprived of it except in the public interest and that, on payment of just compensation. Taxation goes with representation. No person shall be accused, arrested or held in detention except in accordance with law and prescribed procedure. A man is presumed innocent until proved guilty. If it is necessary to detain a man prior to trial this must not be more rigorous than is necessary to ensure his appearance at the trial. No one may be punished under a retroactive law. The law may forbid only conduct injurious to society and provide punishments which are necessary.

The American and the French Declarations influenced many constitutions which have since been established but since they enshrine bourgeois ideals the proletariat would soon take issue with them. The Constitutions of Germany, Norway, Switzerland all regarded the same rights as fundamental. But the history of fundamental rights in Europe between the two World Wars was one of subversion of popular liberties and the establishment of dictatorships. And it was as a reaction mainly to the excesses of Nazism and Fascism that the UN Declaration of Human Rights was born.

(iii) The Attitude of Third World Nations to Human Rights

The attitude of Third World nations to human rights concepts generally reflects a spectrum ranging from complete rejection, through partial acceptance to exaggerated embrancement of the ideals. This attitude is not surprising since the new states are merely reflecting attitudes formed during colonial tutelage. The English colonies would undoubtedly nurse suspicion for concepts which were played down in colonial times but which are now supposed to be special or entrenched provisions in Independence Constitutions.[29] Indeed with the notable exception of the 1950 and 1954 Constitutions of Ghana the provisions of which were expanded in the Independence Constitution of Ghana and perhaps that of Ceylon which was based on the Soulbury Commission of 1945 no commitment was made by the British to the idea of incorporating a Bill of Rights in colonial Constitutions until the promulgation of the Nigeria Independence Constitution which contained an elaborate charter of human rights, and defined also the limitations on human rights in concrete specific terms.[30] The Constitution of Kenya, Sierra Leone, Uganda and Zambia were later patterned after the Nigerian model. Under the above named constitutions there were guaranteed rights which included the right to life, liberty and personal security; protection against deprivation of property; right of privacy, including the inviolability of homes and correspondence; prohibition of slavery and forced labour; freedom from inhuman and degrading treatment, freedom of conscience, thought and religion; freedom of association, movement and assembly; procedural protection in the dispensation of criminal justice; and avoidance of discrimination on any ground - race, colour, religious status, political affiliation etc.

The adoption of the much cited Nigerial model was accompanied by some scepticism which is illustrated by this passage from the Minorities Commission:

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28. E. Burke, *Reflections on the Revolution in France*, (Grieves ed. Everyman's Library Series London: Dent & Sons 1964). passim.

29. Gledhill, *op cit.*, note 26, *supra*, 87.

30. Britain no doubt was influenced by the European Convention (1950) and the Protocol (1951) to which she was a party. Britain undertook to extend the treaty to her colonies. It is true that Britain's colonial subjects were also conversant with the provisions of the Magna Carter, but these have been regarded more as historical documents than as legal precepts - C.J. Holt, *Magna Carta*, (New York: Cambridge University Press 1976).

> Provisions of this kind in the constitution are difficult to enforce and sometimes difficult to interpret. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them. But they are of great value in preventing a steady deterioration in standards of freedom and the unobstrusive encroachment of a government on individual rights.[31]

In the case of other European colonies notably the French colonies, the French Declaration of Rights of Man 1789, restated in the French Constitutions of 1946 and 1948 was a notorious phenomenon to the Africa scholars most of whom were deputies in the French National Parliament and who later became leaders of their countries - Houphet Boigny, Leopold Senghor and others. Thus in the Constitution of the Chad Republic (1962) for example, the Preamble proclaims the attachment of the Chadians 'to the Principles of democracy as set forth in the Declaration of the Rights of Man and of the Citizen of 1789 and the Universal Declaration of 1948'.[32]

There is no special chapter on Human Rights. But the Preamble sets out guaranteed freedoms: freedom from arbitrary arrest and detention, freedom of association, freedom of conscience religion and thought, freedom of expression, freedom of the press, the inviolability of the home, freedom from discrimination based on sex, religion etc. There is also the right to work and equality in relation to taxes.

Of those countries which adopt lukeworm attitude to fundamental rights, the Malawi Constitution (1964) stands out conspicuously. Art.2 reads:

> (iii) The Government and the people of Malawi shall continue to recognize the sanctity of the personal liberties enshrined in the United Nations Universal Declaration of Human Rights and of adherence to the Law of Nations;
>
> (ii) No person should be deprived of his property without payment of fair compensation, and only where the public interest so requires.
>
> (v)All persons regardless of colour, race or creed should enjoy equal rights and freedoms.

Since the word "should" imports no obligation and since the UN Declaration above has no binding effect in the territory of members, the Malawi provision is anything but a facade behind which authoritarianism parades.

As indicated above some new states reject in *toto* the idea of including fundamental rights in a constitution. Most of the new nations face a variety of problems: man's very survival in tropical climates where disease, ignorance and poverty are scourges; there is the problem of development, communication, transportation and capital; there is the problem of educating the people to appreciate the good things of life generally. All this has to be done by Government and quickly too. People are impatient and want to see the

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31. de Smith, *The New Commonwealth*, (London: Stevens & Sons 1964), 177; see also D.O. Nwabueze, *Constitutionalism in Emergent States*, (Rutterford: Fairleigh Dickinson University Press 1973), 51.

32. See *Secretariat of Asian - African Legal Consultative Committee, New Delhi*, (New York: Oceana Publications 1972), 167. See also D.O. Aihe, 'Neo-Nigerian Human Rights in Zambia' (1971) 5 *Zambia L.J.*, 43.

economic paradise which the politicians promised. The problems are admirably summed up in Asante's article.

Of the African countries which did not find it necessary to embody fundamental rights provisions in their constitutions Tanzania and Ghana stand out prominent. The Preamble to Tanzania's Interim Constitution, 1965 makes reference to fundamental rights but goes further to state the nation's socio-economic policy. The preamble reads:

> Freedom, justice, fraternity and concord are founded upon the recognition of the equality of all men and of their inherent dignity and upon the recognition of the rights of all men to protection of life, liberty and property, to freedom of conscience, freedom of expression and freedom of association, to participate in their own government, and to conduct the affairs of the State so that its resources are preserved, developed and enjoyed for the benefit of its citizens as a whole and so as to prevent the exploitation of one man by another.

The Tanzanian model influenced greatly the drafting of the Zambian Constitution 1973,[33] which similarly incorporated in the Preamble the Tanzanian Preamble. Professor Mc-Auslan says this is a device to emasculate African governments on the eve of the departure of imperial powers.[34]

The Ghana approach affords an apposite example for a detailed treatment in this respect.

The Ghana Independence Constitution and Fundamental Rights

Ghana became independent on March 6, 1957. The Independence Constitution 34 contained only two Articles which touched on the question of fundamental rights. They are Articles 31 and 34. Article 31 provides:

(1) Subject to the provisions of this Order, it shall be lawful for Parliament to make laws efor the peace, order and good government of Ghana.

(2) No law shall make persons of any racial community liable to disabilities to which persons of other such communities are not made to be liable.

(3) Subject to such restrictions as may be imposed for the purposes of preserving public order, morality or health, no laws shall deprive any person of his freedom of conscience or the right to profess, practise or propagate any religion.

(4) Any laws in contravention of subsection (2) or (3) of this section or section 34 of this Order shall to the extent of such contravention, but not otherwise, be void.

(5) The Supreme Court shall have original jurisdiction in all proceedings in which the validity of any law is called in question and if any such question arises in any lower court the proceedings in that court shall be stayed and the issue transferred to the Supreme Court for decision.

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33. J. McAuslan, 'Prolegomenon to the Rule of law in East Africa', East Africa Institute of Social Research Conference Proceedings, Kampala (1964) 15 quoted in R. Martin, *Personal Freedom and the Law in Tanzania*, (Dar Es Sallam; O.U.P. 1974), 5.

34. The Ghana (Constitution) Order-in-Council No.277 (1957).

Article 34 provides in part:

> (1) No property, movable or immovable, shall be taken possession of or acquired compulsorily except by or under the provisions of a law which of itself or when read with any other law in force in Ghana -
>
> (a) requires the payment of adequate compensation therefor;
>
> (b) gives to any person claiming such compensation a right of access, for the determination of his rights (if any), including the amount of compensation to the Supreme Court of Ghana;
>
> (c) gives to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.[35]

Article 34(2) deals with the usual exceptions relating to the treatment of enemy property, trusts, corporate property etc.

There were thus only three justiciable fundamental rights: freedom of conscience and religion, freedom from discrimination and the right to property. It has been suggested that Nkrumah and his Government did not at the time evidence dissatisfaction with this constitutional arrangement.[36] This view is probably correct in view of the Revised Constitutional Proposals to include a Bill of Rights of the Indian type in the Constitution of Ghana. However, Nkrumah wrote that in order not to delay independence he agreed to what the British offered.[37] Be that as it may, Prof. de Smith himself indicates: 'To attempt to forecast the future course of constitutional development in Ghana would be foolhardy. The institution of Parliament is deeply respected, but the successful working of parliamentary government in Britain has been founded on traditions and assumptions that are largely absent in Ghana' [38] He even predicted accurately that the Constitution of Ghana was not likely to remain for long, set 'in the mould hastily cast for it in 1957'.[39]

The Republic Constitution and Fundamental Rights

On assumption of office the President was required under the 1961 Republican Constitution to make a declaration in terms of Article 13(1) and affirm his adherence to the following fundamental principles:

> That the power of Government springs from the will of the People and should be exercised in accordance therewith. That freedom and justice should be honoured and maintained. .
>
> That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.

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35 In *Tsiboe v Kumasi Municipal Council*, (1959) G L R 253 where the State's demolition of plaintiff's house was declared illegal, a law was quickly passed legalising the action of defendants

36 de Smith, *The New Commonwealth, op cit* note 31, *supra* 240

37 K Nkrumah, *Africa Must Unite*, (New York Internation Publishers 1963), iv

38 de Smith, "The Independence of Ghana" (1957) 20 *M.L R* 347, 363

39 *Ibid*

That Chieftaincy in Ghana should be guaranteed and preserved.

That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country.

That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hinderance or of the right of access to courts of law.

That no person should be deprived of his property save where the public interest so requires and the law so provides.

That power to repeal this Article, or to alter its provisions otherwise than by the addition of further paragraphs to the declaration, is reserved to the People."

In *Re Akoto* a case which arose under the Preventive Detention Act 1958, the Supreme Court of Ghana said:

> In our view the declaration merely represents the goal to which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts.... The declaration however imposes on every President a moral obligation and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration, is through the use of the ballot box and not through the courts.[40]

The Court was asked to decide whether the import of Article 13(1) was not tantamount to a Bill of Rights capable of being constitutionally enforced in a court action. As a matter of statutory interpretation the Court observed that Article 13(1) was in the nature of a personal declaration and was not part of the general law and that while in other parts of the constitution the word "shall" was used to imply the imposition of an obligation, throughout the declaration the word used was "should".

In *Government Proposals for a Republican Constitution*[41] it is stated:

> The Draft Constitution is not copied from the Constitution of any other Country. It has been designed to meet the particular needs of Ghana and to express the realities of Ghana's Constitutional position.

Nkrumah admitted however elsewhere that in adopting the executive type of President he and his Government were influenced more by the American executive type of President than by any other.[42] The question is: which of the several foreign constitutional concepts influenced the content of the First Republic Constitution in particular the question of fundamental rights?

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40. (1961) G.L.R. 523, 528.

41. Accra: Government Printer (1960), 2.

42. *Africa Must Unite, loc. cit.*

Of the nine principles only three concern fundamental rights - principle (5) prohibited discrimination based on sex, race, religion or political belief; principle (8) provided for "qualified" freedom of religion, freedom of speech and freedom of movement and assembly and principle (9) provided for the right to property. The rest dealt with the realization of African Unity, the preservation of the institution of chieftaincy, the equitable distribution of the country's resources (which related to economic and social policy) the will of the people as the source of governmental power and the maintenance of freedom and justice; clearly the principles dealt with different topics and were thus manifestly not akin to the traditional type of fundamental rights which are usually found in written constitutions.

The provisions of Art 13(1) of the Ghana Republic Constitution (1960) are not unique. In fact several constitutions contain principles which traditionalists might find uncomfortable to live with. The Republican Constitution of Germany (1919)[43] set forth the now famous "Fundamental Rights and Duties of Germans". In five separate sections the Constitution dealt with (1) the individual, (2) community life, (3) religion and religious associations, (4) education and schools and (5) economic life. It touched on matters which may properly be categorized civil and political rights and liberties analogous to the First Ten Amendments to the Costitution of the United States. It also set forth a series of policies which later in the context of the UN came to be known as economic, social and cultural rights.

The Republican Constitution of Spain, 1937[44] it would seem contained many of the principles of the Weiman Constitution. In the "Rights and Duties" of the Spaniards there was a clear separation between "Individual and Political Guarantees" and "Family, economic conditions and culture".

The same dichotomy was evidenced in the Constitution of Ireland (1937)[45] where "fundamental rights" were separated from the "directive principles of social plicy" which in the making of laws "shall be the care of the Oireachtas exclusively and shall not be cognizable by any courts...."[46]

The same formula was adopted by India which juxtaposes fundamental rights and "directive principles of State policy". The Constitution of Pakistan (1956)[47] similarly drew a distinction between "fundamental rights" and "directive principles of State policy"[48] by which "the State shall be governed in the formulation of its policies" which however "shall not be enforceable in any court".[49]

The status of Ghana's fundamental principles would however appear to be different from that of the nations just considered above in some significant ways:

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43. The Constitution of Weiman, (1919) Arts. 109-165.

44. The Constitution of Spain (1931) Arts. 25-44.

45. The Constitution of Ireland (1937) Arts. 40-44.

46. *Id.* Art. 45.

47. Abrogated is 1958 when General Ayub Khan took over forcibly the government.

48. Arts. 3-22.

49. Arts. 23-31.

First, in the Constitutions of Ireland, Indian and Pakistan, the directive principles form part and parcel of their operative texts although the courts were enjoined not to enforce them. In Ghana they are introduced into the body of the Constitution in the form of a declaration by one officeholder, viz, the President.[50] Secondly, in the Constitutions of Republican Germany and Spain, India, Ireland and Pakistan, the principles are placed against a Bill of Rights and are additional to it. Some of the principles which the President of Ghana declared himself to be bound by, are in these Constitutions, part of the Bill of Rights and are therefore legally enforceable rights of the Constitution. In the case of the Ghana Republican Constitution on the other hand three traditional civil and political rights as already noted are commingled with other principles together with policy declarations on foreign affairs and social and economic policy. And the Supreme Court held correctly that a declaration did not confer rights which were justiciable.[51]

Of the African countries which incorporated fundamental human rights into their various constitutions at independence, Kenya,[52] Uganda,[53] Sierra Leone[54] and Nigeria[55] stand out prominent.

They were designed in most cases for the protection of minorities. In Nigeria in particular, they were designed to maintain tribal balance and to allay the fear of minority tribes of domination by the majority. Thus no matter which tribe is in the majority at the centre, minorities were assured of their survival. Enforcement of human rights, happily, has been a hall-mark of the Nigerian post-independence judiciary. Both the First and Second Republic Constitutions, 1963 and 1979 contained elaborate provisions on human rights. Even with the suspension of the 1979 Constitution by the present military administration, Chapter IV, i.e., Articles 30-40 of that Constitution which deal with fundamental human rights has been preserved. Indeed concern and respect for human rights is a major policy of the present military administration.

The Constitution of Jamaica, 1961[56] provides a bridge between a declaration of moral standards and legally enforceable rights.

Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following namely,

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

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50. E. Schwelb, 'The Republican Constitution of Ghana', (1960) 9 *A.J.C.L.* 634, 650.

51. See *Re Akoto*, note 40, *supra*. The 1969 Constitution of Ghana gave Ghanaians the first opportunity ever to enshrine a Bill of Rights in their Constitution which was only to be swept away three years later and never to be resurrected since.

52. Kenya, (Independence Constitution) Order-in-Council, 1963. S.I. No 1968, Arts. 1-18.

53. S.I. (1962) No. 405, Arts. 1-25.

54. S.I. (1960) No. 741, Arts. 1-125.

55. Nigeria (Constitution) Order-in-Council (1960) No.1652, Arts. 17-32.

56. Arts. 13-16.

(b) freedom of conscience, of expression and of peaceful assembly and association; and

(c) respect for his private and family life.

The subsequent provisions shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Article 14-26 then elaborate on the rights enunciated in Article 13.

The Constitution of Papua New Guinea (PNG)

The Independence Constitution of PNG is perhaps an apposite example of what a people determined to ensure that a legislature justifies each and every one of its actions can do with a Bill of Rights.[57] The Constitution is perhaps one of the world's most prolific constitutional documents.[58] It is buttressed by a myriad of Organic Laws.[59] The Bill of Rights is also one of the most detailed[60] and indicative of the fact that its "framers rejected the approach of judicial legislation" of the type often engaged in by the US Supreme Court in interpreting the US Constitution.[61]

The PNG Bill of Rights would appear to be based on the philosophy of Natural Law and the uniqueness of man's place in Nature. In interpreting s.36 provision of the Constitution on "cruel or otherwise inhuman" punishment or treatment, the Supreme Court observed, per Kapi Dep.CJ

> This special protection under the *Constitution* is given only to mankind and not other animals. Man is special and unique. Man is created in the image of God: Genesis Ch.1 v.27. In my view, the dignity of the human person stems from the Christian philosophy of mankind. These Christian principles are a foundation upon which our nation has been built. See preamble to the *Constitution.* When we get away from the uniqueness of mankind, there is a threat to the dignity of the human person. The value and worth of mankind which the *Constitution* has entrenched, let no authority undermine. This is a significant protection because a government which does not believe in the uniqueness of mankind may treat its people like animals. This theme also runs right through the other provisions of the *Constitution,* s.37(17), s.38(1), ss.39, 40 and 41 of the *Constitution.*[62]

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57. See L. Young ed., *Constitutional Developments in Papua and New Guinea* (Sydney: Halstead Press 1971), 123.

58. It contains 153 pages, 275 sections and 6 Schedules. See B. Brunton, 'Human Rights in Papua New Guinea and the Prospect for International Supervision' (1980) 8 *M.L.J.*, 143; also Brunton and Colquhoun-Kerr, *The Annotated Constitution of Papua New Guinea,* (Port Moresby: UPNG Press 1984), 91-213.

59. About 19 Statutes in all.

60. It covers some 16 pages ie. ss.32-37; 42-56.

61. See In *S.C.R. No.1 of 1984; Re Minimum Penalties Legislation* (1984) PNGLR 314, 317.

62. *Id.* 326.

Interestingly, in 1970, a missionary, Mr. Percy Chatterton spoke against the Public Order Bill introduced by the Australian Government in that year.[63] The consequence of his outspoken criticism of the Bill was the enactment of the Human Rights Act 1971. This legislation in turn influenced the deliberations of the Constitutional Planning Committee which was charged with the task of devising an appropriate Constitution for Independent Papua New Guinea. The CPC considered all the arguments for and against the inclusion of a Bill of Rights in the Constitution of Papua New Guinea. It rejected the American type brief statements of justiciable rights as unsuitable for PNG and favoured instead the more detailed provisions of the present Constitution.

It must be noted however, that only the right to life, freedom from cruel or inhuman treatment or punishment and the right to the protection of the law are expressed in absolute terms. All other rights are qualified in some way.

Another interesting aspect of the PNG Constitution is the fact that while grating rights to the people, the Constitution also imposes "Basic Social Obligations" on them including "the obligation to respect the nation, to exercise constitutional rights, to protect the nation and to work". The purpose of the social obligations is to protect the interest of the whole society, while basic rights are directed at the individual only.[64]

(iv) The Attitude of the USSR

Although it would have been more appropriate to discuss the attitude of the Socialist nations here, it is proposed to discuss the USSR only because its attitude epitomises that of the entire Socialist world. 'If you have seen one, you have seen them all' so goes a popular aphorism.

Although the practice of including economic and social rights as fundamental rights in the organic law or constitution of a nation may be said to have socialist origin, it is important for us to bear in mind the fact that even the USSR is not immune to ideas prevailing in other parts of the world, and that the revised 1977 Constitution of the USSR has incorporated in the human rights provisions of the Constitution similar provisions of the UN International Covenants.[65] Thus the provisions today are fundamentally different

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63. See, J. Goldring, *The Constitution of Papua New Guinea*, (Sydney: LDC 1978), 212-247 for an account of this event.

64. D. Chalmers and A.H. Paliwala, *An Introduciton to the Law of Papua New Guinea*, (Sydney: LBC 1977), 46-48. See also, H.A. Amankwah, 'Constitutions and Bills of Rights in Third World Nations: Issues of Form and Content', (1989) 12 *Adel. L.R.* 1-22 in which he stressed the need for a Bill of Rights to impose duties as well on citizens in respect of their obligations to the State. The Socialist nations incorporate such provisions in their Bills of Rights.

65. J. Hazard, 'Explanatory Note on the 1977 USSR Constitution', in *Constitutions of Countries of the World*, Vol. XVII. A.P. Blaustein and G.H. Flanz, eds. *The Constitution of the USSR*, (New York: Oceana, 1978). According to Hazard, the delay in the work of the Constitution Drafting Committee set up in 1962 to revise the 1936 Constitution was occasioned partly by the fact that the Bill of Rights required redrafting to conform to obligations assumed by the USSR when it ratified the UN International Conventions on Civil and Political Rights and Economic, Social and Cultural Rights. See also, V. Chirkin, *Constitutional Law and Political Institutions* (Moscow: Progress Publishers 1985), 255.

66. State medical service and social security have been in existence in the UK since 1947.

67. Art. 42.

from what they were when they were first promulgated in 1936. It may therefore be argued that the USSR is not necessarily the leader in these matters.[66] Again, the fact that the Soviet Bill of Rights has not only been revised but has been repositioned to place it ahead of the Chapter on state structure rather than behind it as was the situation under the Constitution of 1936 is indicative of the importance that the USSR now attaches to its prestige in the scheme of constitutional developments. This increase in the importance and prestige of the Soviet Bill of Rights may have been occasioned by the realisation on the part of the Russians of the increasing emphasis other nations throughout the world have been placing on fundamental rights.

The provisions of the USSR constitution which are based on UN International Covenants are: (1) the right to health protection which in the USSR is ensured by the state's provision of free medical care, hygienic environment and the prohibition of child labour;[67] (2) the right to housing which is guaranteed by the development and upkeep of state-owned housing and the provision of government assistance for individual and cooperative house building, low rent and low charges for utilities;[68] (3) the right to enjoy cultural benefits ensured by the preservation of state and world treasures and other collections, fair distribution of education and cultural institutions throughout the nation and the provision of television and literally information;[69] and (4) the right to family life which is ensured by state provision of child care institutions.[70]

Other important human rights provisions of the constitution include: the right to work, guaranteed by state ownership of the means of production and pay in accordance with the quantity and quality of work performed;[71] indeed every ablebodied citizen is under an obligation to work concienciously;[72] and "evasion of socially useful work is incompatible with the principles of so-cialist society".[73] There is the right to leisure,[74] the right of education,[75] which is ensured by the free provision of all forms of education, the institution of universal and compulsory and secondary and technical education, free text books, and the provision of scholarships for tertiary education. Of particular interest is the "right to maintenance in old age, in sickness and in event of complete or partial disability of the bread winner".[76] This right is guaranteed through social insurance of workers and the provision of retirement and disability pensions for all the workers.[77] It is

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68. Art. 44.

69. Art. 46.

70. Art. 52.

71. Art. 40.

72. Art. 60.

73. *Ibid.*

74. Art. 41.

75. Art. 45.

76. Art. 43.

77. *Ibid.*

78. Art. 54.

79. Art. 50.

to be observed that there is no that there is no provision for the maintenance of the poor. There are, of course, the traditional rights: freedom of the person,[78] speech,[79] conscience,[80] the right to privacy,[81] and freedom from arbitrary arrest.[82] Freedom of assembly does not mean that people are free to organise themselves into political parties in opposition to the Communist Party.[83] All rights must be exercised: in conformity with the interests of the working people and for the purpose of strengthening the socialist system.[84] This places a severe limitation on the enjoyment of all rights. An interesting provision is that on the reciprocal obligation of citizens to the state. If citizens have rights, the state also has rights, and the citizens rights are inseparable from their duties and obligations to the state, in particular, their observance of the Constitution and the laws of the USSR and their compliance with the standard of socialist conduct,[85] and the maintenance of the honour and dignity of Soviet citizenship. Finally, the enjoyment of the rights must not be detrimental to the interest of the state, or infringe the rights of others.[86]

It is for this reason that the 1969 Constitution rather than the 1979 Constitution has been used as the focus of reference throughout this work.

FUNDAMENTAL RIGHTS AND INTERNATIONAL LAW

It is not clear how much is left of the principle of customary international law that the individual as an object lacks international personality and that with the exception of such controversial issues as humanitarian intervention, other subjects of international law may not come to the assistance of the individual against his own state. Treaties may moreover, provide a means by which persecuted or oppressed groups as happened with slaves or some minorities may receive effective international protection.

1. The United Nations.

The peoples of the world through their representative governments at the United Nations affirmed faith in human rights in the preamble of the UN Charter. One of the purposes of the UN is 'to achieve international cooperation... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.'[87] By Articles. 55 and 56 the achievement of universal respect for human rights is made the obligation of the UN membership. The General Assembly and the Economic and Social Council are charged with the responsibility of making

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80. Art. 52.

81. Art. 51.

82. Art. 54.

83. Hazard, *op.cit.*, note 20, *supra.*

84. Art. 125.

85. Art. 59.

86. Art. 39.

87. Art. 1 (3); also L. Sohn. and T. Buergenthal, *International Protection of Human Rights*, (New York: Bobbs Merrill & Co. 1973), passim.

88. Arts. 13, 16, and 62.

recommendations to promote human rights.[88] A Human Rights Commission is provided for by Article 68 which shall promote human rights.

The Charter however leaves to individual states the task of ensuring the observance of human rights provisions of the Charter since Governments and not peoples are the parties to the Charter.[89] There is indeed no power to enforce human rights except where a situation becomes so aggravated as to be categorized a threat to international peace and security under Chapter VII in which case the Security Council would be justified in taking enforcement or other actions.[90]

The ILO and UNESCO also provide a link between citizen groups in the member states and the UN and are charged with the task of providing the necessary protection for certain guaranteed rights.[91]

Of paramount importance however are the UN Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights etc. In view of the lead which the global organisation has taken in this direction, the difficult question is: what are human rights? It would appear to draw the response: they are what the UN General Assembly says.[92] The UN list of human rights would seem to fall within the following categories:

1. an International consensus of moral aspirations regarding the conditions to be found in some utopian future;

2. an International consensus as to the fundamental rules for the treatment of man in society which are accepted as inherent in philosophical or religious concepts or deductively derived from the biosocial facts of human existence;

3. an International consensus of practical judgments as to the most rational and enlightened relation of man and authority under the actual conditions and values of most present societies;

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89. Concluding para. of The Preamble.

90. On the proposal to set up a UN Permanent Human Rights Commission, See St. J. McDonald, 'A UN. High Commission for Human Rights', (1967) 5 *Canadian Yb.I.L.* 54; J. Humphrey, 'A UN High Commission for Human Rights', (1973) 11 *Canadian Yb I.L.* 220. However, J. Carey, *UN Protection of Civil and Political Rights*, (Syracuse, N.Y. Syracuse University Press 1970) 11 lists the following modes of protection of human rights: international legislation, investigation, legal aid, adjudication, negotiation, education and publicity focusing the international searchlight on a certain situation.

91. Some agencies of the UN notably the ILO and UNESCO have sponsored a great number of conventions aimed at securing the rights of the working class for example the Minimum Wage Convention, (Industry) 1919, Minimum Wage Convention (Sea) 1920, Convention Concerning Freedom of Association and Protection of the Right to Organize (1948) 68 *UNTS* 17; Convention Concerning Forced or Compulsory Labour (1932) 39 *UNTS* 55; Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, (1951) 165 *UNTS* 303. Convention on the Right to Organize and Collective Bargaining 1949.

92. See Bilder, *op cit.* note 2, *supra*, 172.

93 *Id.* 173-174.

4 a compilation of those claims of individuals and groups respecting their relation to authority and society which most contemporary societies perceive as basic and which the claimants assert with particular energy;

5. those claims of individuals and groups respecting their relation to authority and society which the international community, through its organized institutions, is prepared to formally recognise as having a high order of legitimacy and support by its own authority, and such pressure or sanctions as it can practically bring to bear.[93]

The Universal Declaration of Human Rights consists of thirty articles, Articles 1 and 2 proclaim the equality of man and declare that all men are entitled 'to all the rights and freedoms set forth in this Declaration without distinction of any kind such as race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Articles 3-12 deal with personal civil and political rights namely freedom from slavery and servitude; freedom from torture or cruel, inhuman or degrading treatment or punishment, the right to equal protection of the law, to effective judicial remedy against violations of constitutional or other legal rights; freedom from arbitrary arrest, detention without trial or exile, the right to a fair trial; the right to be presumed innocent until proved guilty; freedom from *ex post facto* penal legislations; freedom from interference with privacy, family, home or correspondence; freedom of movement; the rights of asylum and of nationality; the right to own property; the right of marriage; freedom of thought, religion, conscience, freedom of expression and opinion; the right of assembly and association; the rights to participate in governments and of equal access to public service.

Articles 22-27 relate to so-called economic, social and cultural rights i.e. the right to social security, to well-being, to education and to participation in community and cultural life.

Articles 28-30 recognize everyone's right to a social internal order and emphasize the individual's correlative responsiblities to the community and his obligations to his fellow men.

It must be remembered that the Declaration is a mere standard of achievement for all peoples and nations, and that every organ of society, keeping the Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedom by progressive measures, national or international, to secure their universal and effective recognition and observance, both among the peoples of the Member State themselves and among the peoples of territories under their jurisdiction...[94] It is not a programme for action; it is a set of ideals to which all nations must aspire. It does not purport to confer on any persons or groups legally enforceable rights. The principal criticism often levelled against the Declaration is directed at the vagueness of some of the ideas. For, how for instance may states ensure everybody's "right to work"? It has been said also that the Declaration constitutes eloquent evidence of the well-nigh impossibility of making a reality of catalogues of liberal, democratic and social democratic principles within the loose framework of a world confederation.[95] Some commentators believe that the Declaration serves as a handy weapon of ideological warfare against other states. The West it is believed is imposing its moral standard on the world as a universal

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94. D.A. Boyle, 'International Law and Human Rights'(1960) 23 *M.L.R.* 167.

95. G. Schwarzenberger, *International Law*, 5th ed. (1978), 220.

96 J.H. Morrow, *Human Rights: Comments and Interpretation* (New York: Columbia University Press, 1949).

imperative.[96] Finally it has been said 'A mere definition of human rights without setting up international machinery for their enforcement is to be clearly recognized as a road to frustrations'.[97] Although these are weighty objections there is no doubt today that the Declaration has influenced a great number of states particularly the new ones. They have in some form or degree incorporated human rights provisions in their constitutions, and although practice has fallen short of what may be desirable, the new states have been sensitive to charges of violation of human rights within their boarders.[98] Indeed as Asante indicates: 'National Independence was identified with individual liberty.... The struggle for self-determination was itself regarded as an aspect of ... human rights movement, and nationalist leaders freely invoked affirmation of human rights in international as well a national thinking'.[99]

(ii) Regional Organizations

The Organisation of American States (OAS) came into existence with the signing of the Charter of the OAS in 1948. There is no direct reference in the Charter to human rights although this can be inferred from the Charter's reference to the dignity of man in the Preamble. As if to make up for this lapse in the Charter, in 1959 the Organisation issued the Declaration of Rights and Duties of man. This was followed in 1965 by the setting up of the Inter-American Human Rights Commission to monitor the observance of human rights in the American Sub-region.

It is not necessary to repeat here the provisions of the Declaration since they are the same traditional rights in typical American mould. On the regional level the European Convention on Human Rights (1951) which was adopted under the auspices of the Council of Europe is also of special importance. One of the aims of the Council of Europe is to foster unity among members by common action in the observance and further realisation of human rights and fundamental freedoms.[100] The parties were motivated by the adverse effects of totalitarian governments in Europe in the period between the First and Second World Wars. It is significantly different from the UN Declaration of Human Rights in that it imposes an obligation on the signatories to ensure that their laws conform with it. It sets up machinery to secure compliance with the provisions. Complaints of breaches of the Convention may be addressed to the European Commission on Human Rights.[101] Its hall-marks include the following: the rights to life, liberty and security; freedom from torture or degrading and cruel punishment; freedom from slavery and forced labour; the right to fair hearing; the right to privacy, family life, home and correspondence; freedom of thought, conscience and religion; freedom of

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97. A. Martin, 'Human Rights and World Politics' (1959) *Yb.W.Aff.* 37, 39.

98. E. Schwelb, 'The Influence of the Universal Declaration of Human Rights on National and International Law' *Proceedings of the American Society of International Law*, Washington D.C. (1959). Also S.K. Asante, 'Nation Building and Human Rights' (1969) 2 *Cornell I.L.J.* 107.

99. 119 *UNTS* 48-92. Revised in 1967 - SAO. Off. Rec. QEA/SER. A/2. Add. 2 (1967).

100. Art. 1, Statute of the Council of Europe. Cmnd. 7778 (1949).

101 A. Verdross, 'The Status of the European Convention for the Protection of Human Rights as Fundamental Freedom in the Hierarchy of Rules of Law', (1965) 5 *Indian J.I.L.* 455. See also A.H. Robertson, 'The European Convention for the Protection of Human Rights', (1958) 27 *Brit. Yb. I.L.* 356; A.B. McNultry et al, 'The European Commission of Human Rights Procedure and Jurisprudence', (1957/58) 1 *J.I.C.J.*, 198; and C.C. Morrison, 'Restrictive Interpretation of Sovereignty Limiting Treaties', (1970) 19 *I.C.L.Q.* 361.

102. Art.2.

opinion and expression; freedom of peaceful assembly and association which includes the right to form trade unions, the right to education. The Convention also provides for presumption of innocence; it prescribes minimum safe guards for accused persons and it prohibits retroactive criminal legislation. It also enjoins the parties to hold free elections. All these rights are to be enjoyed by all equally regardless of a person's sex, race, colour, language, religious opinion, origin, associations, property, birth or status. Recourse may be hard to a national authority in the event of violation of the rights even though the respondent acts in official or government capacity.

Unlike the UN Declaration of Human Rights, the European Convention is devoid of generalities and vagueness. For instance although it proclaims the rights to life, liberty and security and prohibits unlawful arrest, detention and exile, it recognises that in four instances a man may lawfully be deprived of his life[102] and that in six instances a man may be deprived of his liberty.[103] Again although the Convention recognises freedom of speech it defines the range of premissible restriction on freedom of speech with great particularity.[104] In times of emergency parties may derogate from certain rights to a limited degree.[105] No wonder certain recent constitutions in Africa have incorporated lock, stock and barrel the provisions of the Convention.

Social, economic and cultural rights only became issues of concern to the member nations of the Council of Europe eleven years after the sigining of the Rome Convention,and prompted the signing of the European Social Charter of 1961 at Turin.

In the case of the Organisation of African Unity (OAU) the Charter of 1963 made no direct reference to fundamental human rights except as may be inferred from the Organisation's commitment to the eradication of colonialism and the rights of self-determination of peoples.

The preamble, however, reaffirms the Organisation's adherence to the principles of the UN Charter and the Universal Declaration of Human Rights, and again in Article 2(1)(e).

Given the continent's unenviable record of human rights violations as documented copiously by Amnesty International, several efforts were made to draw up an African Human Rights Charter. As far back as 1958, when the First Conference of Independent African States was held in Accra, concern for human rights has been demonstrated. A resolution was passed which affirmed the participating nations' respect for human rights and the purpose of the UN Charter. Again in 1961 at the Lagos Conference of African Jurists on the Rule of Law, a suggestion was made for the drawing up of an African Human Rights Charter. The theme was re-echoed in 1967 at the Dakar Conference of French-speaking African Jurists. In 1970 at the meeting of the African Bar Association another call was made for the drafting of an African Human Rights Charter. The Freetown Declaration of 1978 was to the same effect. All this culminated in 1979 in the UN sponsored conference in Monrovia on Human Rights in Africa. Here a committee

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103. Art.5.

104. Art.10.

105. Art.15; see also the *Lawless* case Reported in (1961) *J.I.C.L.*, 3.

106. CAB/LEG/67/3/REV. 3, Addis Ababa. See also E. Kanyo, 'The Banjub Charter on Human and People's Right: Genesis and Political Background' in *Human Rights and Development in Africa, op.cit.*, note 12, *supra* 125.

was finally set up to work on a Charter. The end result is the OAU Charter on Human and People's Rights.[106]

The Charter incorporates all the traditional political and civil rights - Articles 1-12. The rights to property, work and education are covered by Articles 14-18. As to be expected, the Charter pledged members States' support for the elimination of foreign economic exploitation of the continent, and also prohibits the mass expulsion of non-nationals by member States. Again as in the case of the Universal Declaration of Human Rights no provision is made for the observance and enforcement of these rights between individuals although there is a provision for the setting up of an eleven-member commission to enforce the provisions of the Charter against erring nations.

(iii) Other Non-State Entities

In international law today, not only individuals are regarded as beneficiaries of human rights but also groups, communities and aggregations of poeples. This is the right to self-determination.[107] Human rights it would seem has traversed a long distance.

Libertarians like Bentham, Mill and Rousseau had in their life-time given prominence to the concept of 'self-determination' of the individual and of the state.[108] In the New World the idea found express in the Monroe Doctrine and President Wilson applied it to the solution of European nationhood and self-sufficiency.[109] The founding-fathers of the United Nations, realising that the subjugation of one people by another was dangerous and created a potentially explosive situation not conducive to the international peace and security desired by a world which in one generation had witnessed two wars and was intent on removing all the causes of war from international life, gave expression to the concept in the UN Charter.[110]

In the Advisory Opinion of the ICJ in *the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution* 276 (1970), the Court said:

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107. See generally Articles 1 (2) and 73 of the UN Charter. The General Assembly Declaration on the Granting of Independence to Colonial Countries and Territories is generally considered the cornerstone of the principle of self-determination. See also Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance with the UN Charter, Res. 2625 (XXV) of Oct. 24, 1970; R. Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey; (1971) 65 *AJIL* 714; C.D. Johnson, 'Towards Self-determination: An Appraisal as Reflected in the Declaration on Friendly Relations' (1973) 3 *Georg..J.I.& C.L.*, 155; M. Sahovic ed. *Principles of International Law Concerning Friendly Relations and Cooperation*, (New York: Oceana Press 1973) 9.

108. C.L. Wayper, *Political Thought* (London: Teach Yourself Books, 1974), 113-114, 146-150.

109. W. R. Bisschop writing on sovereignty said: 'Self-determination is based on the principle of decision by a majority of those who are directly concerned'. (1921-22) 2 *BYIL* 130.

110. Reference has been made to Arts. 1(2) and 55 of the UN Charter. See also Chapter XI of the UN Charter.

111. [1971] ICJ Rep. 31.

> The subsequent development of international law in regard to non-self governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.[111]

In the Court's Advisory Opinion in the *Spanish Sahara* case, the Court said:

> An Advisory Opinion of the Court on the legal status of the territory at the time of Spanish colonization and on the nature of any ties then existing with Morocco and with the Mauritanian entity may assist the General Assembly in the future decisions which it is called upon to take, the General Assembly has referred to its intention to 'continue its discussion of this question' in the light of the Court's advisory opinion. The Court when considering the object of the question in accordance with the text of Resolution 3292 (XXIX) cannot fail to note that statement. As to the future action of the General Assembly various possibilities exist, for instance, with regard to consultation between the interested states, and the procedures and guarantees required for ensuring *a free and genuine expression of the will of the people*. In general an opinion given by the Court in the present proceedings will furnish the General Assembly with elements of a legal character relevant to its futher treatment of the decolonization of Western Sahara.[112]

The bulk of the law, however, is embodied in a number of United Nations' resolutions. Reference has been made to Resolution 1514[113] which provides the basis for the process of decolonization which has since 1960 resulted in the creation of many states which are today members of the United Nations.[114] It is complemented by General Assembly Resolution 1541 (XV).[115] Resolution 1541 contemplates more than one possibility for nonself-governing territories, viz:

(a) emergence as a sovereign independent state,

(b) free association with an independent state, and,

(c) integration with an independent state it nonetheless recognises the essential feature of the self-determination as established by 1514 (XV).

Thus on free association, Principle VII states that it shall come about as the 'result of a free and voluntary choice by the people of the territory concerned expressed through informed and democractic process'.[116] On integration, Principle IX states:

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112. [1975] ICJ Rep. 31, 36, emphasis added.

113. Note 103 *supra*. Art.2 provides: All peoples have the right to self-determination, by virtue of that right they freely pursue their economic, social and cultural development.' By Art.6 Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

114. *Decolonization: Fifteen years of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples.* (Vol. II No.6 December 1975) 47.

115. G.A. Res. 1514 15 U.N. GAOR Supp. 16 29-30 U.N. DOC A/6316 (1966).

116. *Idem.*

117 *Ibid.*

> The integration should be the result of the freely expressed wishes of the Territory's people acting with a full knowledge of the change in their status, their wishes having been expressed through informed and democractic process, impartially conducted and based on universal suffrage. The United Nations could when it deems it necessay supervise these process.[117]

General Assembly Resolution 2625 XXV[118] (Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations) indicates other possibilities besides independence, association and integration but reiterates the fundamental and basic necessity of taking the wishes of the people concerned into account. It states:

> The establishment of a sovereign and independent state, the free association or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination.[119]

It provides further:

> Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter and to render assistance to the United Nations in its responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order .... to bring a speedy end to colonialism, having regard to the freely expressed will of the people concerned.[120]

CONCLUSION

The universal nature of the human rights concept is firmly established today. What was seen at first as a philosophical explanation of the humanity or attributes of man *qua* man which no power or authority can take away is today not only the law of different nations of the world: Western, Eastern, Asian, African but also the law of the international community generally symbolised by the United Nations Organization, thus rendering moot Donneley's view that 'most non-Western cultural and political traditions lack not only the practice of human rights but the very concept ....the concept of human rights is an artifact of mordern Western Civilization'.[121]

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118. GA Res. 2625; 21 UN GAOR Supp. 16, 103; UN DOC A/6316 (1966).

119. *Ibid.*

120. *Ibid.*

121. J. Donnele, 'Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights'. (1982) 76 *Am. Pol.Sc Rev* 30.