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NATION BUILDING AND HUMAN RIGHTS
IN EMERGENT AFRICAN NATIONS*

S. K. B. Asante**

I

SOURCES AND MANIFESTATIONS

The second half of the twentieth century has witnessed the emergence of some thirty new nations in Africa. Independence evoked sanguine expectations; it meant the end of alien rule, but the vast majority of Africans also saw in nationhood the promise of firm human rights guarantees. National independence was in fact identified with individual liberty. Nor was this identification surprising. African nationalist movements after all flourished in a world which had emerged from Nazism and Fascism-- a world which had proclaimed a new order imbued with a profound concern for human rights. The struggle for self-determination was itself regarded as an aspect of this human rights movement, and nationalist leaders freely invoked affirmations of human rights in international as well as national thinking.

Internationally, three factors were basic in creating a favorable atmosphere for human rights: first, the United Nations Charter, which devotes six articles to "encouraging" or "promoting" respect for human rights. Second, the adoption by the UN of the Universal Declaration of human rights in 1948. This Declaration has become an international yardstick for determining the content of human rights and has been a powerful source of inspiration for the founding pattern of African nations. Third, there is the European Convention of Human Rights which translated human rights into precise legal rights and has directly influenced the framing

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of the constitutions of several African nations, such as Nigeria and Sierra Leone.

The impact of these international factors on the development of African human rights principles was, needless to say, reinforced by the political and constitutional ideas of the metropolitan powers formerly in Africa and of other western nations. The human rights provisions of the constitutions of French-speaking African countries are directly traceable to the French Declaration of Rights in 1789, as restated in the French Constitutions of 1946 and 1958. Africans familiar with Anglo-American history are fully conversant with the Magna Carta, the English Bill of Rights, the American Declaration of Independence and, of course, the Bill of Rights of the American Constitution. The British may not have a written constitution with a justiciable Bill of Rights, but those of us who have been exposed to British institutions are assured that fundamental rights are located in the interstices of the ordinary law of the land. In any case the British appear to have overcome their objections to a justiciable Bill of Rights since nearly all the constitutions which the British have imposed on their dependencies in Africa within the past decade have elaborate Charters of Human Rights.

Furthermore the concept of human rights is by no means alien to indigenous African legal process. Professor Max Gluckman has very ably demonstrated¹ that despite occasional aberrations on the part of a despotic ruler, African legal systems have had an articulate concept of natural justice and legality. The notion of due process of law permeated indigenous law; deprivation of personal liberty or property was rare; security of the person was assured, and customary legal process was characterized not by unpredictable and harsh encroachments upon the individual by the sovereign, but by meticulous, if cumbersome, procedures for decision-making. The African conception of human rights was an essential aspect of African humanism sustained by religious doctrine and the principle of accountability to the ancestral spirits. In any case indigenous African culture revolved around the family

¹ Gluckman, Natural Justice in Africa, 1964 NATURAL L.F. 25.

or the clan; government by the sovereign was essentially limited. The concept of accountability of the chief to the people was well-settled and so there was little opportunity for violation of human rights. Violation of community norms invariably led to the deposition of the chief.²

Thus, national independence in Africa arrived in an era replete with concepts of human rights. In these circumstances entrenchment of human rights was virtually automatic. The political situation in several African countries also made constitutional guarantee of human rights a political necessity. For example, before Nigeria attained independence, the ethnic or tribal minorities in that country had demanded the creation of new States to diffuse the power and influence of the dominant tribes in the three regions of Nigeria. Since a further division of Nigeria would have delayed independence it was found necessary to allay the fears of the minorities by an emphatic 'Guarantee of human rights in the Constitution of 1960.³ So also in Kenya where the special status accorded to property rights under the Kenya Constitution of 1963 reflects the European minority's concern about the security of their property interests.

The overall effect of the factors mentioned is that human rights concepts are, with varying degrees of emphasis, embodied in the constitutions of nearly all the new African nations. The human rights provisions of these constitutions follow three main patterns:

First, the Nigerian type. The Nigerian Constitution of 1960 contains an elaborate charter of human rights, spelled out in precise legal terms.⁴ The Constitution expressly invests the courts with jurisdiction to enforce such rights, and defines the limitations on human rights in specific terms. The Constitutions

²M. FORTES & E. EVANS-PRITCHARD, AFRICAN POLITICAL SYSTEMS 12 (1961). See also A.N. ALLOTT, ESSAYS IN AFRICAN LAW 69 (1960).

³See K. EZERA, CONSTITUTIONAL DEVELOPMENTS IN NIGERIA (1964).

⁴The Constitution of Nigeria, Articles 18-33.

of Kenya, Uganda, Zambia and Sierra Leone follow the Nigerian pattern. Under these constitutions the people are guaranteed inter alia the right to life and liberty, respect for private life, home and correspondence, protection from slavery and forced labor, protection from inhuman treatment and deprivation of property, the sanctity of the domicile, protection of the law, and freedom of conscience, of expression, of assembly and association. Discrimination on any grounds is specifically prohibited.

Second, the Chad pattern. The Preamble of the Constitution of Chad of 1962 proclaims in general terms its attachment to the principles set forth in the Declaration of Rights of Man of 1789, and the Universal Declaration of Human Rights, 1948. The Preamble then goes on to guarantee, more specifically, freedom from arbitrary arrest or detention, inviolability of domicile, prohibition of oppression by one section of the people or of ethnic propaganda, freedom of association, petition and expression, freedom of the press, free education, freedom from distinctions of birth, class or caste, the right to work, and equality in respect of taxes. Unlike its Nigerian counterpart, the Chad Constitution does not spell out the human rights provisions in a special chapter. The Preamble guarantees these rights in categorical terms, but in the form of general directive principles rather than precise legal rights. The precise limitations of and provision for judicial enforcement of these rights are presumably reserved for subsequent legislative action. Most of the French-speaking African countries have adopted substantially similar declarations of human rights.

Third, the Ghana type. The Republican Constitution of 1960 did not incorporate a Bill of Rights in the usual sense; nor was any institution set up to protect the rights of the ordinary citizen. The concept of human rights was barely acknowledged in a provision requiring the President, on the assumption of office, to declare his adherence to certain fundamental principles among which were:

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.

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 or of the right to move and assemble without hindrance 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.⁵

The contention that this Presidential Declaration was a justiciable bill of rights was firmly rejected by the Supreme Court of Ghana in 1961.⁶ The Supreme Court held that the Presidential declaration was merely the goal to which the President must pledge himself, comparable to a coronation oath, therefore not a standard which might be invoked to impeach the constitutionality of the Ghana Preventive Detention Act, 1957.

Article 13 of the Ghana Constitution was unprecedented in Africa. The new government of Ghana which took power in February 1966 suspended the 1960 Constitution. The Constitutional Commission recently appointed by the Government of Ghana to make proposals for a new Constitution emphatically rejected this lukewarm approach to human rights, and recommended the promulgation of an elaborate Bill of Rights, fully enforceable in the Courts.

Tanzania's Interim Constitution of 1965 does not include a Bill of Rights but instead establishes a novel institution which, while safeguarding the rights of the ordinary citizen, "will not have the effect of limiting the actions of the Government and Party in a way which could hinder the task of nation building." This institution, called the Permanent Commission of Enquiry (Interim Constitution, Chapter VI), composed of a Chairman and two other members, all appointed by the President of Tanzania, is invested with power to inquire into the conduct of any person in

⁵Republican Constitution of Ghana Article 13.

⁶Baffuor Osei Akoto v. Minister of Interior [1961] GHANA L. REP. 523.

the exercise or abuse of his office or authority. Its jurisdiction extends to public officers in the service of the United Republic (except the President and Vice President and the Judiciary), party functionaries, members and officers of local government authorities, corporate statutory bodies and non-statutory organizations.⁷ The Commission reports its findings and recommendations to the President who may direct appropriate action thereon. So this Tanzanian institution really amounts to a variant of the Ombudsman in a one-party state. It is, in a sense, quite unique in Africa.

It is evident then that constitutions of the new African nations north of Rhodesia generally make impressive reading for the advocate of human rights. The critical question, though, is whether adherence to human rights concepts in practice is equally impressive.

II

PRACTICE

Many incidents on the continent of Africa raise disturbing questions regarding the human rights record of the new African States. To gain a better perspective of this record, we shall examine some of the more encouraging developments in this area. First of all, any visitor to black Africa will readily agree that racial discrimination is largely non-existent. In striking contrast to the situation south of Zambia, men of all races are able to work together, mix socially and enjoy the resources of their respective countries without the corroding tension and mutual distrust which pervade racist societies.⁸ In this respect, the demands of human dignity as stipulated in the various constitutions have been met.

On the whole, property rights have also been respected in African States. However, attempts in several countries to assure

⁷Interim Constitution of Tanzania (Amendment) Act 1965.

⁸R. THURNWALD, BLACK AND WHITE IN EAST AFRICA, passim (1935).

their citizens effective and meaningful participation in the economic lives of their respective countries have had an adverse effect on the commercial interests of resident aliens--Africans and non-Africans alike. Thus Ghanaian fishermen in Sierra Leone have been affected by protectionist measures in Sierra Leone; Nigerian and Lebanese traders have been threatened by new restrictions on alien trading in Ghana; and Asian non-citizens of Kenya have felt compelled to leave Kenya because of the measures of the Kenya Government to bring the bulk of Kenyans into the mainstream of the commercial life of Kenya.⁹ In several African countries the structure of the economy in the colonial era virtually excluded Africans from any meaningful role, and Minister Kibaki of Kenya went to the heart of the problem when in defending the Kenya Trade Licensing Act, 1967, he said:

The Government fully realizes that the present political stability in the country can only be underpinned by giving the majority of the people a stake in the economy....

The Government believes in the Kenyanisation of the economy because there can be no economic growth without economic development. In many Latin-American countries

⁹The Kenya Trade Licensing Act, 1967, provides that no person shall conduct any business, except under and in accordance with the terms of a current license. A non-citizen is prohibited from conducting business (a) in any place which is not a general business area; or (b) in a number of specified goods, unless his license specifically so authorizes. Section 11 of the Act provides that in considering applications for licensing, licensing officers shall:

- (a) be guided by the principle that businesses carried on in any place which is not within a general business area ought, where practicable, to be controlled by citizens of Kenya, and that specified goods ought, where practicable, to be dealt in by citizens of Kenya, and in particular take into consideration--
 - (i) whether the activities in respect of which the license is applied for ought to be and could be carried on by a business conducted by citizens of Kenya;
 - (ii) whether the activity will be in the public interest; and
 - (iii) any special programme of development in the area concerned.

statistics are bandied about claiming increases in income per head when there is no noticeable change in the people's standard of living.

In his Mulungushi Speech of April 1968, President Kaunda of Zambia announced similar measures designed to curb monopolistic tendencies in business and to protect Zambian nationals from undue competition by aliens. But it is worthy of note that the President saw these measures as the imperatives of humanism. The President stated:

Humanism abhors the exploitation of human beings. Exploitation, whether it is done by people of one racial group against another or done by the same racial group against their own kith and kin, is wrong. We will not glorify it in Zambia by allowing it a place.¹⁰

The Zambian Government through its Attorney General has made clear that any discrimination such as in the granting of trading licenses, in implementing these reforms would be illegal.

The right, if it is not a duty, of a Government of a country to take appropriate steps to ensure that citizens share effectively in the economic resources of the country is beyond question. Thus, although property rights are to some extent abridged, this is proper when done within the framework and on the basis of justifiable economic reforms implemented with serious efforts to avoid discriminatory application.

The attitude of African governments to property rights is best exemplified by their record on nationalization. Where expropriation has taken place, as in Tanzania, satisfactory arrangements have been made as to compensation for those affected by the measure.¹¹ In 1962 the Nkrumah Government purchased a mining interest in Ghana from an English concern on terms which were hailed by financial circles in England of London as exemplary.¹²

One could also cite a number of cases where a confrontation

¹⁰Government Printer, Lusaka, Zambia, 1968.

¹¹On the Tanzanian nationalization programme see Bradley, Legal Aspects of Nationalisation in Tanzania, 3 EAST-AFRICAN L.J. 149 (1967).

between an African Government and an individual concerning human rights has been resolved in favor of the individual. In the famous Ugandan case of Uganda v. Mayanja,¹² the judiciary upheld human rights in unmistakable terms. Mayanja, a Ugandan politician, published a letter in the journal Transition, in which he alleged that the Uganda Government had been slow in appointing Uganda Africans to the High Court even though Uganda had a number of Africans with the requisite qualifications for the Bench, and then went on to say:

Why don't we take even a first step? I do not believe the rumour circulating in legal circles for the past year or so that the Judicial Service Commission has made a number of recommendations in this direction, but that the appointments have for one reason or another, mostly tribal considerations, not been confirmed. But what IS holding up the appointment of Ugandan Africans to the High Court?

Mayanja and the editor of Transition were subsequently charged with sedition on the grounds that the letter carried an implication that the Government had denied judicial appointment to qualified Africans for reasons of tribal discrimination, and that this allegation clearly showed a seditious intention, namely, the intention of "bringing into hatred or contempt, or exciting disaffection against, the Government as by law established." Tribal discrimination is the gravest charge that can be leveled against an African Government which regards itself as progressive, and the Government's reaction to this letter was to some extent understandable. Nevertheless, a Magistrate's Court ruled that the observation in the letter was not seditious; it was a legitimate comment on a matter of public concern which was duly sanctioned by the constitutional guarantee of freedom of expression. It should however be pointed out that Mayanja and the editor were subsequently detained by the Uganda authorities.¹³

A study of the practice of the Tanzanian Permanent Commission of Enquiry also reveals several cases where individual rights have

¹²Criminal Case No. KNU. 7995 (1968).

¹³According to a government statement, the grounds of the detention were unconnected with the publication of the letter in Transition.

been enforced upon the intervention of the Commission. For example, Case No. 1057 reads:

The Complainant alleged that a Regional Commissioner suspended his trading license without any reason.

The Commission took the matter and after an investigation, it was revealed that one day the Regional Commissioner concerned while visiting certain villages happened to pass near the shop of the Complainant. The Regional Commissioner saw a little scuffle occurring between children of the Shop Keeper (who apparently was an Asian) and an African. The scuffle was put to an end and the Regional Commissioner tried to find out the cause of the fight. The Regional Commissioner alleged that the Asian boys and their mother answered him rudely and that they had no reason to beat the African. Thereupon he ordered that the license be suspended.

The Commission examined the facts as above outlined and left the Criminal aspect of it aside and dealt with the point of suspending the trading license. Here the Commission found that the owner of the license was not on the spot when the fight occurred and the fight itself is irrelevant to the trading license. The Commission reported the matter to the President and the license was given back to the owner.¹⁴

Human rights concepts have provided the yardstick for evaluating the performance of regimes and, ironically, the justification for ousting oppressive governments by violent means. The military officers who deposed President Nkrumah were clearly motivated by a passionate attachment to human rights. The present Chairman of the National Liberation Council, Brigadier A. A. Afrifa, states his personal credo in these ringing terms:

I am not a lawyer to interpret the provisions of liberty, freedom, bill of rights, etc. But to me the concepts are as clear as the Ten Commandments. Among others are the freedom of worship, of speech and of the press, the right of peaceable assembly, equality before the law, just trial for crime, freedom from unreasonable search, and security from being deprived of life, liberty or property, without due process of law. Herein are the invisible sentinels which guard the door of every home from invasion, coercion, intimidation and fear. herein is the expression of men who would be forever free.

Under Kwame Nkrumah these principles were repudiated every day. Freedom of worship was denied, because he was held as the incarnation of God. Freedom of speech was suppressed. The press was censored and distorted

¹⁴[1966-67] Annual Report, Permanent Commission of Enquiry of Tanzania, Case No. 1057.

with propaganda. The right of criticism was denied. Men were detained and even sent to the gallows for holding honest opinions. They could not assemble for a discussion. We spoke of public affairs only in private. We were subject to searches and seizures by spies and inquisitors who haunted this land of ours.¹⁵

Furthermore in appointing a Commission to draft proposals for a new Ghana Constitution, the National Liberation Council specifically charged the Commission to submit such proposals as would:

- (a) ensure the inclusion of the Constitution for Ghana of a provision which will guarantee that so far as is consistent with good government, the Executive, Legislative and Judicial powers of the State shall be exercised by three separate and independent organs;
- (b) ensure that the said Constitution contains a provision guaranteeing the enjoyment by every individual in Ghana of the maximum freedom within the law consistent with the rights of others also to enjoy such freedom and consistent also with the security of the State and with the requirements of public order and morality with the welfare of the people of Ghana as a whole and that the said Constitution provides an effective machinery for the protection of such freedom from violation by the State or by any other body or person; and
- (c) ensure in particular, under and subject to the provisions of sub-paragraph (b) of this paragraph, that the said Constitution guarantees the enjoyment by every individual in Ghana of the following fundamental freedoms,
 - (i) freedom of opinion and expression,
 - (ii) freedom of assembly and association,
 - (iii) freedom from arbitrary arrest and detention, and
 - (iv) freedom of thought, conscience and religion.¹⁶

Paradoxically, human rights have sometimes been more rigorously enforced under a military regime than under its civilian predecessor. This has certainly been the case in Ghana. Again, although the Constitution of Dahomey was suspended in December 1965, the Dahomey Minister of Justice could claim, with justification, before a Conference of French-speaking African jurists in January 1967 that Human Rights were not endangered. Human rights have been effectively enforced and popularized in that country, and the distinguished President of the Supreme Court of

¹⁵A.A. AFRIFA, THE GHANA COUP, 24th FEB. 1966 (1967).

¹⁶Government Printer, Accra, Ghana 1967.

Dahomey, H. E. Ignatio Pinto, has gained international acclaim for his resolute championship of human rights.

Thus far this discussion has focused on some of the more positive developments in the field of human rights within a decade of African independence. The progress made by a number of African countries in this area is comparable with the contemporary blend of some of the so-called Western democracies. Nevertheless an honest appraisal of the African political process in this era can hardly escape the conclusion that the human rights record in the emergent African nations still leaves much to be desired. The numerous violations of human rights which have characterized certain regimes in Africa, particularly in the area of personal liberty are well-known. We are all familiar with the grim catalogue of transgressions -- the capricious use of preventive detention acts, the proscription of freedom of movement and association, the stifling of free speech, the condemnation of thousands to exile and the tragic destruction of life in the name of national unity. Ten years of independence have brought home the sobering realization that the end of alien rule does not necessarily assure respect for fundamental rights.

III

A REALISTIC APPRAISAL

We must now examine the causes of this distressing record and consider the validity of the much canvassed thesis that the stark realities of nation-building in Africa do not admit of the luxury of human rights.

A. Compatibility of Nation Building and Human Rights

Nation-building in Africa is indeed fraught with formidable difficulties. The typical new African state was originally an artificial creation of the metropolitan power, encompassing a heterogeneous collection of tribes, and representing at best a colonial administrative or economic convenience. National boundaries are not referable to any criteria other than the accident of colonial partition. This means that upon attaining independence,

African governments are confronted with a situation in which the very existence of their respective nations has yet to be established as a meaningful concept. Development is further be-
develed by poverty, disease and illiteracy and a serious dearth of human and material resources. On this fragile foundation, the leaders of an emergent African nation are charged with accomplish-
ing at least four herculean tasks in their lifetime: First, to forge the bonds of unity and nationhood, and to foster wider loyalties beyond parochial, tribal or regional confines. Second, to convert a subsistence economy into a modern cash economy without unleashing social turbulence and economic chaos. Third, to industrialize the country and to introduce a sophisticated system of agriculture. Fourth, to erase poverty, disease and illiteracy, raise the standard of living of the people, and in short create a modern state with all its paraphanelia. The ex-President of Ghana, Kwame Nkrumah, proclaimed that he had to accomplish in ten years what the developed countries had achieved in a hundred.¹⁷

This unprecedented pace of development and modernization can only be feasible, if at all, within a stable political framework; and there can be no political stability without a national political consensus. Most African nations are yet to attain this consensus; the frequent incidence of coups d'etat graphically demonstrates the terrible convulsions through which African nations are passing. Political instability obviously militates against the establishment of any articulate body of social or political values, but further it undermines the inculcation of healthy and meaningful human rights traditions. But political instability apart, there is no genuine consensus as to the proper role of a bill of rights in the prevailing conditions of Africa.

Despite the ringing declarations of human rights in African constitutions the classical concept of fundamental rights has been

¹⁷K. NKUMAH, DARK DAYS IN GHANA 67 (1968).

attacked by a substantial number of thoughtful Africans as unsuitable for Africa for the following reasons:

First, it is said that the notion of a bill of rights is essentially a bourgeois concept, rooted in nineteenth century individualism and best suited to a society with a substantial degree of economic affluence. The concept of human rights demands limited government; it is laissez faire and negative in character. But a new African state, confronted with the baffling problems of nation building, the problems of creating political stability, and eradicating disease, poverty and illiteracy, cannot afford the luxury of limited government. Freedom of speech is meaningless to a people with empty stomachs. The emphasis should be on strong government, armed with the necessary powers to perform the urgent tasks of integrating the various communities in a state into one nation, raising standards of living and establishing the foundations of a modern state. A bill of rights, rigidly enforced by a judiciary which looks to precedents in America and Western Europe for inspiration, would mean the importation of values and solutions quite inappropriate for a developing African country, and might well impede not only social and economic progress but also national unity. Those who attack the use of classical human rights on this theory would point to the fact that the judiciary in most newly-independent African countries consists of foreign or foreign-trained personnel, whose juristic ideas were formed in an atmosphere radically different from those of new African nations, and who might therefore be unresponsive to local aspirations. They would cite the jurisprudence of courts of other countries with respect to the enforcement of human rights to sustain the assertion that the judiciary could stand in the way of vital social and economic reforms. In this regard, much reliance is placed on the record of the courts of the United States in resisting social legislation as violative of liberty of contract and the due process clause. The argument's conclusion is that the courts should not be entrusted with the awesome responsibility of determining

the extent to which individual rights must give way to the wider considerations of social progress; that responsibility properly belongs to political leaders responsible to the electorate.

Second, it is contended that political stability and internal security in a new African state can only be assured at the expense of the fundamental liberties of the individual. Many African states have at some stage or another, either resorted to, or seriously considered the introduction of, preventive detention acts on the grounds that the critical formative years of a new nation demand firm, indeed, stern measures to avert subversion and political disintegration. They maintain that freedom of association cannot be invoked in aid of tribalistic and parochial interests inimical to the preservation of the larger national entity, nor can freedom of speech be tolerated as a vehicle for disseminating what they call subversive falsehoods among a gullible and impressionable public. In expounding this thesis, a former Attorney General of Ghana, G. Bing used the following justification of preventive detention in Southern Rhodesia in 1959:

In fairness to the Government it must be conceded that political subversion, preached and practiced among illiterate and semi-illiterate African masses can spread like a forest fire unless subjected to the most strict police and governmental surveillance.... The normal trappings of a democratic judicial system are ill-equipped to deal effectively with such threats to public safety¹⁸

Apologists for authoritarian regimes in Africa have always castigated the Courts as unequal to the urgent task of containing civil disruption and suppressing political subversion. They maintain that the rules of evidence and procedure established by the former metropolitan powers are rigid, cumbersome, and regaled with archaic technicalities. Others claim that what makes preventive detention indispensable in a developing African state is not so much the cumbersome nature of "the normal trappings of a democratic judicial system" as the defective methods of the police.

¹⁸See G. BING, REAP THE WHIRLWIND 276-77 (1968).

The police cannot be relied upon to marshal the evidence required to sustain indictments for offenses against the state in the normal judicial process. Due process of law, it would seem, might well endanger the security of the state. This, so the argument goes, is particularly relevant to the exercise of freedom of the person. In a society where opposition factions are prone to resort to violence in pursuit of their political goals, the authorities must mobilize promptly and without ceremony the full panoply of the state's powers and resources against any potential or, indeed, imagined threat to public safety. Detention, so the argument goes, without trial is therefore an imperative postulate of national security and reliance on the normal judicial process may be fatal.

Third, the question is raised whether every aspect of human rights need necessarily be accorded equal status in Africa. Should the classical concepts of property rights, freedom of movement and freedom of association be enforced with the same rigor as the right to life and immunity from inhuman treatment, slavery and discrimination? Should not a developing African nation determine its own priorities of political and social values untrammelled by the preferences of the western world?

Finally, it is said that the emphasis on fundamental rights is misconceived inasmuch as it detracts from the duties which citizens of a developing country owe to the State and to their fellow citizens. The constitutions of Africa should proclaim a Bill of Duties alongside of a Bill of Rights. Furthermore, the constitution should prescribe the minimum duties of the State to individuals, such as the duty to provide education, health and similar essential services. A Bill of Rights merely imposes restrictions on the sovereign; what is needed is a positive indication of the State's role in a developing society.

B. Problems Faced by African Leaders

These are familiar arguments: they have been used in defense of one-party regimes and authoritarian rule in Africa.¹⁹ Do they

¹⁹See, e.g., K. NKRUMAH, supra note 17, at 64.

have any validity? In answering this question it would be helpful to candidly acknowledge some of the difficulties and temptations which face the new leaders of Africa.

1. Strong Government: Heritage

African governments inherited essentially authoritarian state machinery from the colonial powers. It comes as no surprise that some of the most repressive measures of the former imperial authorities were justified on the very grounds on which the new leaders of Africa seek to base their authoritarian regimes. Preventive detention was unabashedly employed in colonial days to stamp out "tribal conspiracies" and to contain "political agitators." Illiberal deportation and sedition laws promulgated by colonial governments provided handy models for their African successors. Thus, the Ghana Deportation Act of 1957 which, inter alia, empowered the Government to deport any alien "whose presence in Ghana is not conducive to the public good" was defended on the grounds that it represented no departure from pre-independence laws. The melodramatic flight of the Kabaka of Buganda from his throne in 1966 is reminiscent of his deportation to England in 1953 by the British Colonial Governor on the grounds that the Kabaka had refused to cooperate with the Governor in constitutional arrangements devised by the Colonial Government.

The Nigerian case of Director of Public Prosecutions v. Chike Obi²⁰ demonstrates the extent to which legal principles and traditions well-settled in the colonial era can resist the liberalizing influence of a Bill of Rights. In this case the accused was charged with sedition under Sections 50 and 51 of the Nigerian Criminal Code²¹ for publishing a criticism of the Federal Nigerian Government in the following terms: "Down with the enemies of the people, the exploiters of the weak and the oppressors of the poor."

²⁰[1961] ALL NIGERIA L. REP. 277.

²¹Caption 42 of the 1958 Edition of Nigerian Laws.

Section 50 of the Nigerian Criminal Code defines the crime of sedition, inter alia, as to bring into hatred or contempt or to excite disaffection against the Government of Nigeria or that of any region or against the administration of justice in Nigeria. Section 50 (2) d (ii) of the Code exempts from such crime any publication with intent "to point out errors or defects in the Government or Constitution or in legislation or in the administration of justice with a view to remedying such errors or defects." The accused challenged the constitutionality of Section 50, contending that it was incompatible with Section 25 of the Nigerian Constitution which guarantees freedom of expression. However, under Section 25 of the Constitution there is no prohibition of "any law that is reasonably justifiable in a democratic society in the interest of defense, public safety, public order, public morality or public health." In attacking Section 50 of the Criminal Code, the accused argued that a law which punishes a person for making a statement which brings a Government into discredit or ridicule, irrespective of any repercussions on public order or security, is not reasonably justifiable in a democratic society.

The accused's submission was in effect an attempt to import into the requirements of the crime of sedition the element of incitement to violence which is a salient ingredient of the definition of sedition under English law. The Federal Supreme Court of Nigeria rejected this contention, holding that it was justifiable for a government to take reasonable precautions to preserve public order, and that such measures might necessitate the prohibition of acts which, if not restrained, might lead to disorder even if these acts would not themselves do so directly. It is to be noted that unlike its English counterpart, the crime of sedition is not triable in trial by jury, nor is truth a defense if the seditious intent is proved. In Queen v. The Amalgamated Press (of Nigeria) Ltd. and Fatogun,²² the fundamental right of freedom of expression was held to guarantee

²²[1961] All NIGERIA L. REP. 199.

"nothing but ordered freedom." The Supreme Court ruled that such right could not be used as a license to spread false news likely to cause fear and alarm to the public, which constituted an offence under Section 59(i) of the Criminal Code.

The legacy of the colonial powers is in covenant with the prevailing political practices in the second half of the 20th century. We have to recognize that we live in a world where strong government is either widely practiced or very much extolled. To many authoritarian rule is synonymous with efficient government. The concept of strong government has of course been consummated and perfected in the peoples democracies, but it is by no means unknown in the so-called Western democracies. The British concept of Parliamentary sovereignty, transported into alien soil, and unrestrained by the inarticulate conventions and mores which make up the British political genius, could be an ideal prescription for despotism. A former Cabinet Minister in Ghana, after the barest acquaintance with British Constitutional doctrines, proclaimed with all the zeal of a new convert to the Westminster pattern, that the Ghanaian Parliament could do anything except change a woman into a man! He could of course have dropped that qualification, as a matter of strict doctrine.

The Constitution of the Fifth Republic of France was of course devised to create a strong government revolving round an Executive-President, and the concept of a strong Executive-President virtually immune from parliamentary restrictions seems to have taken firm root in nearly all the former African dependencies of France. It so happens that the Fifth Republic came into existence immediately before the inauguration of the era of political independence in French Africa; and the influence of the Constitution of the Fifth Republic on the Constitutions of French Africa is very apparent. Indeed some constitutional theorists maintain that the Gaullist influence went considerably further; they assert that the robust presidentialism of the Fifth Republic had a profound impact on the Constitution of Guinea (1958), that through its brief union with Ghana, Guinea influenced the

Republican Constitution of Ghana (1960), and that the Ghanaian Constitution in turn influenced the independence Constitution of Tanzania.

2. Strong Government: A Practical Necessity

Strong government is of course the invariable prescription of economic advisers to the new governments of Africa. Clearly if economic and social development is to be realized at the pace set by African leaders, then there is need for vigorous social discipline. Professor Myrdal has deplored what he calls the "soft state" in underdeveloped countries. He maintains that the various laws and regulations introduced to establish new economic systems in underdeveloped countries are not being enforced because the governments have not fully appreciated the need for compulsion and vigorous discipline in development.

Instead of resorting to compulsion, governments in the newly independent Asian countries, particularly India, have chosen to rely on persuasion as the main method of effecting changes in social and economic patterns. Furthermore, lack of compulsion is being rationalized as an application of Western democratic principles. The "soft state," asserts the learned professor will not insure rapid economic development. There is some truth in this, of course. Any student of industrial relations in Africa will readily appreciate the dangers inherent in guaranteeing an unqualified right to strike. In countries where the government is the largest employer, indiscriminate resort to strike is bound to jeopardize the execution of rational economic policies.²⁴

Strong government as manifested by the stringent enforcement of laws and regulations or by bold and imaginative direction in vital economic reforms is of course imperative in the prevailing conditions of Africa. But there are some economic ex-

²³Myrdal, The "Soft State" in Underdeveloped Countries, 15 U.C.L.A. L. REV. 1105 (1968).

²⁴B.C. ROBERTS & L.G. BELLECOMBE, COLLECTIVE BARGAINING IN AFRICAN COUNTRIES 64-68 (1967).

perts and prospective foreign investors who go much further; they demand "stability," i.e., a guarantee against a change of government for ten years or so, severe curtailment of fundamental liberties -- no trouble-makers or agitators -- and absolute prohibition of strikes or other labor pressures. Thus, stability is here equated with insulation of certain commercial interests from developments which might prejudice the realization of the profit targets although the developments may be in the best interests of the countries involved over the long-term. Unscrupulous businessmen have played a highly pernicious role in underwriting despotism and corruption in the new nations of Africa.²⁵

The most pressing problems now facing African leaders revolve around the preservation of the new nations from disintegration and their security against internal and external subversion. It is in the protection against the dangers in these critical areas that the rights of the individual are most likely to be overridden by the compelling claims of the State.

A new African State has to tackle the fundamental problem of welding a heterogenous conglomeration of tribes and communities into a united nation. The withdrawal of the imperial powers often means the removal of the only rationale holding a country together, and the fear of disintegration haunts every African nation. The turn of events in the Sudan, Nigeria, Uganda and Ruanda-Urundi graphically shows that this fear is well-founded. If colonial powers had some plausible excuses to resort to high-handed measures, the situation facing newly-emergent African States bristles with problems which sometimes defy a tidy distinction between firm government and despotism. The colonial powers at least accepted

²⁵The Ollennu Commission Report, Government Printer, Accra, Ghana (1969), probed into irregularities in the granting of import licenses to commercial concerns under the Nkrumah Government and revealed that respected western companies had paid commissions which were in effect bribes to the governing party, the Convention People's Party (C.P.P.). The consequence of such payments is to economically strengthen the government giving it more power to maintain its grip on the country.

some ground rules for defining their respective spheres of influence on the continent of Africa, and there was little evidence in the twentieth century of one imperial power encroaching on the colonial preserve of another. No such ground-rules apply to the new African States; external powers vie with each other to subvert these States or establish their influence over them, and this competition does not necessarily follow ideological lines. Subversion from without is often compounded by subversion from within. Whether out of frustration over the denial of legitimate constitutional processes or impatience with the normal course of such processes, some opposition groups within some African countries have resorted to violence as a means of realizing their objectives.

To avert social and political disintegration, many African governments have resorted to measures which can hardly be reconciled with the classical concept of human rights. Are these measures justified? Take, for instance, the laws in several countries, proscribing regionalist and tribalist propaganda, or political organization based on tribal, ethnic or religious affiliation. Thus Article 3 of the Constitution of the Democratic Republic of the Congo (1966) prohibits any regionalist propaganda liable to endanger the internal security of the State or the integrity of the territory of the Republic. Article I (8) of the Constitution of Gabon (1961) which guarantees freedom of association stipulates the following qualification:

Associations or societies whose aims or activities are contrary to the penal law and to the good understanding of ethnic groups are forbidden. All acts of racial, ethnic or religious discrimination, as well as all regional propaganda which may threaten the internal security of the State or the integrity of the Territory of the Republic, are punishable by law.

Finally there is the Ghanaian Avoidance of Discrimination Act of 1957 which was enacted "to prohibit organizations using or engaging in tribal, regional, racial or religious propaganda to the detriment of any other community, or securing the election of persons on account of their tribal, regional or religious affiliation and for other purposes connected therewith." The Ghanaian Act made

it a criminal offense for "any organization whose membership is substantially connected to one community or religious faith to have as one of its objects the exposure of any other organization however constituted or of any part of the community, to hatred, contempt or ridicule on account of their community or religion."

The issue posed by these provisions is a difficult one: to what extent can the concept of free association admit of unfettered tribal or religious grouping for political purposes in a new African nation? Most progressive Africans would have no hesitation in subordinating the concept of free association to that of national unity. The term tribalism has of course a perjorative connotation in contemporary Africa. An association, movement or party composed of people belonging to a political tribe or ethnic group is presumed to be subversive of national unity. However in our concern to eliminate divisive forces, we sometimes fail to realize that a so-called tribalist or separatist movement may be no more than a protest against denial of effective participation in the life of the new nation, or what is worse, revulsion against oppression by an insensitive central authority. As Professor Arthur Lewis has pointed out,²⁶ effective participation by all the diverse communities in the life of the new national entity is the key to national unity and stability in Africa. Where such participation is denied, or the security of one community is threatened, the most natural form of protest is to cry secession. This cry comes naturally to a people who saw the first modern political party organized on national, non-tribal lines barely twenty years ago. Before the foundation of the Nkrumah's Convention People's Party in The Gold Coast (now Ghana), effective political organization throughout Africa found expression almost exclusively within tribal frontiers. Apart from such tribal organizations, there were perfunctory, progressive unions such as Danquah's Gold Coast Youth Movement, Azikiwe's National Council of Nigeria and Cameroons and Casely Hayford's West African Congress which

²⁶W.A. LEWIS, POLITICS IN WEST AFRICA (1965).

attracted the elite into some sort of faculty lounge discussions, but had no direct role in shaping political developments.

A little more than twenty years ago, traditional patterns still dominated political activity in Africa. Political organization revolved around the village, clan, and the traditional state, and a so-called tribalist organization now condemned by progressive Africans may be the only meaningful form of political organization known to the vast majority of Africans. The Action Group of Western Nigeria grew out of a Yoruba Cultural Group and would presumably be branded as tribalistic by the progressives these days. In my opinion the bogey of tribalism should not be invoked to stifle legitimate political expression; it certainly should not be invoked to gloss over the fundamental requirement of effective participation by all groups in the national political process and the critical problems posed by such requirement. Nation-building is a long and painful process; it is a protracted process of accommodation and adjustment. It defies facile generalizations and glib slogans. In striving towards the goal of national unity, divisive forces should be discouraged and prohibited outright wherever feasible. Tribal arrogance and parochial intransigence should therefore be resisted, and the compelling claims of national security in the formative stages of nationhood may well justify some limitations on freedom of association such as the above-mentioned provisions of the Constitutions of Congo and Gabon. But the Ghanaian Avoidance of Discrimination Act went further than these provisions.

This Ghanaian Act did more than merely ban political organizations using or engaging in tribal, racial or religious propaganda to the detriment of any other community; it also forbade the election of persons on account of their tribal or religious affiliation--in my view an unwarrantable fetter on the principle of free elections. Furthermore, the Act prohibited the exposure of any organization "however constituted" (it could be a political party) to ridicule, hatred or contempt by a tribal or religious organization. Such a provision could be used to curtail the right to protest the measures of a Government or party

in power, and shows the extent to which the bogey of tribalism could be invoked to suppress legitimate political activity. Where the Government pursues policies inimical to the interests of a particular region or community, and provokes a reaction in such community or region, can the Government legitimately proscribe organized political activity among the disgruntled people on the grounds of national security?

The Ghanaian Avoidance of Discrimination Act of 1957 may be contrasted with the Political Parties Decree issued by the Ghana Government on April 28, 1969, which is again designed to prohibit the formation of political parties on a tribal or religious basis or the use by any political party of names, any words or symbols intended by such party to arouse tribal or religious feelings. The Decree ordains that no party shall be registered unless at least three founding members of such party are ordinarily resident, or registered as voters, in each of the regions of Ghana. It goes on to provide that no more than six of the founding members of a political party shall belong to any one tribe. This measure quite evidently attempts to foster the organization of political activity on a broader basis and to promote inter-communal harmony. Unlike the 1957 Act it is not primarily motivated by the desire to punish a particular group stigmatized by the Government as "tribalist." However the question may be raised as to whether the 1969 Decree is practical. What, for example, is a founding member? And what exactly is meant by, arousing the tribal or religious feelings of groups? Are all tribal or religious feelings suspect and subversive of natural unity?

IV

AN OVERVIEW

I turn now to the vexed question of the conflict between the demands of national security and the rights of the individual. I have already mentioned the potential sources of subversion in a new African nation. But the authority of a newly-established African Government is not only threatened by subversion in the

sinister sense; it is sometimes undermined by the refusal of the bulk of citizens to accept the fact that with the end of colonial rule, ultimate power now resides with fellow-Africans. This challenge to governmental authority may take the form of non-cooperation, a refusal to accept the verdict of the electorate, a general state of lawlessness or even an epidemic of crimes. In its concern to consolidate its authority an African government may prove incapable of distinguishing between political opposition and subversion against the State. African leaders are understandably sensitive to this kind of affront to their authority. The critical question then is: to what extent should individual rights be curtailed in the interests of public safety and national security in an emergent African nation? This question cannot be answered without reference to the prevailing social and political conditions in Africa.

It is clearly pertinent to ask whether a particular country in a particular situation can absorb the strains and stresses of exuberant enjoyment of the fundamental freedoms. It seems quite obvious that the limits of freedom of association and expression, for example, in a stable democracy are not necessarily coterminous with those of an infant nation, threatened by disintegration and menaced by subversion. What constitutes an emergency situation justifying derogation from human rights may vary from country to country. Many African leaders maintain, with some force, that the immediate post-independence era is a continuing emergency requiring stringent measures to ensure the public safety. The problem here is of course the definition of the public interest. African leaders, particularly in the immediate post independence period, tend to equate the public interest with the hegemony of the ruling party. Legitimate exposé of the Government's shortcomings may be characterized as subversion. The Nigerian Press Act of 1964²⁷ raises interesting questions as to the definition of the public interest. Before the enactment of this Act, the

²⁷See W. SCHWARZ, NIGERIA 126-27 (1968).

Nigerian Press enjoyed a degree of freedom unknown to its counterpart in many African countries. However this freedom degenerated into what one knowledgeable author calls "editorial exuberance in political lies," and the Nigerian Government undoubtedly had legitimate ground for concern. To counteract these excesses, the Act provided:

any person who authorizes for publication, publishes, reproduces or circulates for sale in a newspaper any statement, rumour or report, knowing or having reason to believe that such statement, rumour or report is false, shall be guilty of an offense and liable on conviction to a fine of £ 200 or to imprisonment for a term of one year.

If the Act had stopped here, there probably would have been no outcry; but it went further to provide:

It shall be no defense to a charge under this section that he did not know or did not have reason to believe that the statement, rumour or report was false unless he proves that, prior to publication, he took reasonable measures to verify the accuracy of such statement, rumour or report.

The press understandably reacted sharply to the requirement of prior verification before publication which made newspaper business a highly hazardous venture. It should be pointed out that the Nigerian Government has not made any sinister use of this Act.

In Africa the conflict between the demands of national security and the claims to individual rights has been most acute in the area of personal liberty. Detention without due process of law in the name of national security is a familiar practice in many African states. We have discussed above the policy reasons advanced in support of preventive detention. However, experience in several African countries provides ample proof that high-sounding reasons may be invoked to perpetuate a corrupt, repressive and irresponsible regime. Preventive detention, which has been employed with restraint and good sense in countries like India, has been indiscriminately used in certain African countries to victimize political opponents and to terrorize innocent citizens. In Ghana preventive detention defeated the very objective

it was supposed to achieve; it caused that fatal disaffection which ultimately led to the overthrow of the Nkrumah regime. Nor can the policy of repression at that time be credited with the by-product of accelerated economic development. By stifling dissent, curbing individual initiative and so blatantly invading personal liberty, this policy deprived Ghana of a vital economic resource--qualified personnel. Hundreds of Ghanaian intellectuals and professionals preferred self-exile to Nkrumah's Ghana. Having immunized themselves from that rigorous discipline which a climate of legality induces, Ghanaian leaders virtually abandoned a rational approach to the problems of development and plunged the country into economic chaos.

Revulsion against preventive detention in Ghana is now total and unqualified; the Ghanaian people made this clear in no uncertain terms to members of the constitutional commission who recently toured the country in connection with the formulation of proposals for a new constitution. A preventive detention act is not likely to be restored to the statute books of Ghana in the foreseeable future. Nevertheless, a realist cannot entirely rule out the possibility that preventive detention could, with certain safeguards notoriously absent under the Ghana Preventive Detention Act of 1957, be a legitimate exercise of state power in certain situations in any emergent country. Preventive detention may, in certain circumstances, indeed be unavoidable as a means of preserving democracy in the formative stages of some emergent nations, provided it is hedged about with safeguards such as the following:

- (i) Irrespective of the nature of the prejudicial activity sought to be prevented, all cases of preventive detention should be referred to an impartial panel, not necessarily a Court, for review.
- (ii) Such an impartial panel should be furnished with the grounds for detention, and the detainee's reply to such grounds or such other representations as he may make against the detention. The panel should be empowered to call for any other information from any governmental or non-governmental source pertinent to the review of the case.

- (iii) The Preventive Detention Act should make provision for the release of the detainee if the panel should conclude that there is no sufficient cause for detention.
- (iv) The detainee should have a right of oral hearing before the panel.
- (v) Detention should be for a limited period, say for a maximum of six months, unless the authorities successfully establish that fresh facts implicating the detainee have arisen.
- (vi) The ordinary Courts should have jurisdiction to determine certain formal aspects of the detention; e.g., whether the detainee comes within the ambit of the act, whether the alleged prejudicial activity falls within the grounds for detention specified in the act, whether the detainee's right of making representations has been derived, and whether the authorities continue to detain the detainee notwithstanding a finding by the panel that there is no sufficient ground for detention.

In evaluating the African record on human rights, one should not lose sight of the fact that there has been little opportunity for the classical western concept of human rights to be assimilated into the mores and constitutional conventions of Africans. True, traditional indigenous political systems were predicated on some notion of a rule of law, but the norms prevailing in traditional Africa were essentially concerned with regulating interaction between groups--families, clans and the like--and with ensuring equilibrium of the whole community. The individual had status and security within his immediate group, but it was unusual for the individual to be involved in a direct confrontation with the sovereign, outside the criminal law. Legality did not so much involve issues between the individual and the tribe or state, as issues between various groups in the State. In any case, whatever may have been the case in small pre-literate societies, the norms and restrictions established in such societies are not particularly relevant to the relations between the much larger and more complex modern African State and its individual citizens.

Nor did the colonial connection make a profound impression in this regard beyond exposing Africans to Western literature on

human rights. We have seen that colonial governments hardly applied to their African subjects the principles dictated by metropolitan liberal traditions. The gap between the liberal protestations of imperial governments and the actual rights enjoyed by Africans under colonial rule provided much of the fuel for the anti-colonial movements in Africa. It follows then that the solemn declarations of individual rights to be found in African constitutions are not restatements of values and principles already embedded in the society, but, at best, a declaration of ideals to aspire to. Human rights charters are therefore instruments of education, and performance should be evaluated in terms of what impact these ideals are making on the thinking and traditions of the people as a whole, not in terms of how many strict violations have been committed.

Thus, the dimensions and complexities of the problems relating to the enforcement of human rights in Africa are indeed formidable. Nevertheless, this writer cannot subscribe to the thesis that the present circumstances of Africa render a Bill of Rights a luxury in the African political system. The need for firm and bold leadership in a new African nation is beyond question and a laissez faire conception of government is quite inappropriate to the stark realities of development needs in Africa. But strong government, rapid economic development, high standards of living, and internal security are ideas which are meaningful only insofar as they enrich the lives of individual citizens. As Aneurin Bevan said:

Not even the apparently enlightened principle of the 'greatest good for the greatest number' can excuse indifference to individual suffering. There is no test for progress other than its impact on the individual. If the policies of statesmen, the enactments of legislatures, the impulses of group activity, do not have for their object the enlargement and cultivation of individual life, they do not deserve to be called civilized.²⁸

²⁸BEVAN, IN PLACE OF FEAR 200 (1964).

A Bill of Rights proclaims this philosophy in no uncertain terms; it is a cogent reminder to those temporarily entrusted with the affairs of the nation that the ultimate objective of state power is to promote the welfare of the ordinary citizens of the land.

I reject the notion that human rights concepts are peculiarly or even essentially bourgeois or Western, and without relevance to Africans. Such a notion confuses the articulation of the theoretical foundations of Western concepts of human rights with the ultimate objective of any philosophy of human rights. Human rights, quite simply, are concerned with asserting and protecting human dignity, and they are ultimately based on a regard for the intrinsic worth of the individual. This is an eternal and universal phenomenon, and is as vital to Nigerians and Malays as to Englishmen and Americans. I have already indicated that traditional African concepts of humanism unequivocally asserted the dignity and worth of man. The problem which faces modern Africa is not so much the problem of recognizing the values underpinning human dignity as the problem of devising effective structures for asserting and safeguarding human dignity in the larger and more complex national entities which have recently been established in Africa. It may well be that Africans cannot uncritically accept some of the Western theories of human rights, whether they be predicated on various concepts of natural law, divine law, civil contract or nineteenth century individualism. But the struggle for human dignity is universal. This, after all, is the essence of one of the great dramas of the twentieth century--the struggle of the black man for human dignity. This struggle is manifested by three main movements: first, against colonial domination in black Africa; second, against racial oppression by the white minority regimes in Southern Africa; and, third, against racial injustice in America and Europe.

Much has been achieved by these movements, but the struggle is by no means over. Political independence has been attained in black Africa, but this would be meaningless unless political

power is used effectively to enrich the life of the ordinary African and to assure human dignity. Effective participation by black Americans in the mainstream of the political, social and economic life of America has not yet been fully realized; and the movement against racial oppression in Southern Africa has not yielded any significant results. While this struggle persists, it would be tragic to give comfort to the enemies of these movements by misusing political power now available to African leaders to the detriment of ordinary Africans. Whether we like it or not, and however illogical it may appear, the moral force of the Negro cause in America and South Africa is bound to be undermined by African inhumanity to the African.

These philosophical underpinnings for some notion of human rights in Africa are self-evident. But the case for human rights in Africa can also be predicated on practical grounds. The limitation on state power implicit in a Bill of Rights need not necessarily be a fetter upon bold government; it merely asserts a principle which needs to be reiterated in Africa that a good government must necessarily be a disciplined government. Such a rationale is clearly inapplicable to the realities of a developing country. We cannot insist on limited government in Africa, but we can and must insist on a disciplined and restrained government, unequivocally committed to the concept of legality.

The short history of independent Africa is replete with the stories of regimes which, having amassed unlimited powers in the interest of public welfare, have proceeded to abuse state powers in furtherance of their personal interests and in cynical disregard of every concept of legality. A discerning observer makes a telling point:

If the tone of public life is sufficiently honest and fair-minded, formal norms are relatively unneeded. That is not the position in Africa; on the contrary, there is a notable lack of restraints upon the exercise of state power. This betrays itself most blatantly in the widespread corruption that seems to exist, especially in West Africa. When corruption permeates the entire

fabric of government, legality is the first sufferer, for state power is exercised on grounds unrelated to its nominal purposes.²⁹

Concentration of excessive powers unrestrained by legality or fidelity to the public interest has not led to prosperity; on the contrary, governments intoxicated with power have proved themselves woefully incapable of discipline or rational analysis of development needs and have consequently unleashed economic chaos. The Tanzanian constitutional innovation clearly demonstrates that scrupulous regard for individual rights is compatible with "strong government." The exacting implications of development in Africa indeed demand discipline both of the governed and the Government; any constitutional devices which underline this need are therefore of critical importance to nation-building in Africa.

If state power is to be subjected to healthy restraints, then the judiciary has a vital role to play in defining such restraints, clarifying and enforcing individual rights and in acting as the final arbiter of the balance between governmental authority and individual liberties. True, the judiciary in some African states may be still predominantly foreign-oriented, but the danger arising from such a situation can be exaggerated. With a few notable exceptions, judges in independent Africa have displayed a genius for adapting themselves to the prevailing political conditions.³⁰ They have in the main avoided a head-on collision with the Executive, and in some cases, have proved themselves fervent advocates of state powers. The jurisprudence of African courts hardly bears out the allegation that judges stand in the way of social and economic progress. Furthermore, any obstructive decisions rendered by the Courts can usually be counteracted or at

²⁹Seidman, Law and Economic Development in Independent, English-Speaking Sub-Saharan Africa, 1966 WIS. L. REV. 999, 1065.

³⁰SAWYERR, EAST AFRICAN LAW AND SOCIAL CHANGE, passim (1967).

least neutralized by the rapid turnover of judges; the circumstances of African public life are too fluid to admit of judicial attitudes crystallizing into an articulate "philosophy of the Court." It is my fervent hope that when such a philosophy does emerge it will have a distinct libertarian ingredient. A vigilant judiciary, deeply committed to the protection of individual rights, will help to create an atmosphere which compels the Executive to justify its impositions on the individual.

The next question that arises is whether equal status should be accorded to all aspects of human rights. There is a strong case for devising some sort of hierarchical scheme for human rights in Africa. Clearly, the prevailing political philosophy in a nation will determine whether property rights are to be accorded equal status with the right to life and personal liberty. In many African countries, the requirements of development would appear to justify a less reverent attitude to private property than is the case in, say, the United States; and the guarantee of property rights would therefore not be in such quasi-absolute terms as are applicable to the guarantee of the right to personal liberty. Thus, where a government is engaged upon establishing an equitable economic system, it could, within limits, legitimately dispose of private property rights in the public interest. Rights pertaining to the enjoyment of material resources or participation in the economic system may vary from country to country; but any advocate of human rights would assert the right to personal liberty in absolute terms. Democratic-minded persons may debate over the merits of free enterprise but not the essential validity of the right to freedom of conscience or freedom from inhuman treatment.

Even aspects of personal liberty may be treated differently in accordance with the mores of a particular people. Thus, while Section 20(1) of the Nigerian Constitution imposes an absolute prohibition on slavery, Section 23 qualifies the right to respect private and family life by sanctioning any law that is

reasonably justifiable in a democratic society "in the interest of defence, public safety, public order, public morality, public health or the economic well-being of the community" or "for the purpose of protecting the rights and freedom of other persons." This type of gradation seems quite legitimate, and provides a means of injecting local considerations into a Bill of Rights.

African countries could also make a distinctive contribution to human rights concepts by including in a Bill of Rights not only the classical rights to personal liberty, property, equality, freedom of expression, association, assembly and movement, but also rights to some of the more basic requirements of life: rights to shelter, employment, education and medical services. These are rights available to ordinary citizens in a welfare state. The value of such rights in the established democracies of the western world has been debated over the years. But these welfare benefits are fundamental and essential prerequisites to the successful launching of a modern African state and should be unequivocally guaranteed in the Constitution. These rights prescribe wholesome objectives of bold and positive government; they should direct state powers into constructive channels. Instead of imposing limitations on state power, they provide legitimate grounds for meaningful state action.

Such an addition would amount to incorporating into a Bill of Rights the equivalent of "Directive Principles" under the Indian Constitution. These "welfare" rights are not susceptible to the same enforcement provisions as are applicable to the classical human rights, since it may be difficult to define, in precise terms, the full implications of, say, the right to shelter. Nevertheless, they should be unequivocally guaranteed in the Constitution in the same way as the classical rights are guaranteed under the Constitutions of the French-speaking African countries. They would require further elaboration, but should provide guidelines for social and economic legislation.

CONCLUSION

Whatever may be the philosophical basis of western concepts of human rights, some scheme of human rights appropriately modified to respond to the demands of nation-building has unquestionable validity in contemporary Africa. Such a scheme is as important to Africa as raising the standard of living of the population; and nationalism would indeed be playing a perverse role in Africa if it led to the dismissal of any theory of human rights as alien to the African way of life. Human rights concepts revolve around the fundamental values postulated by human dignity, and these values have as much meaning for an American Negro, a Kenyan or a Ghananian as they have for a Frenchman or a Pole. The particular circumstances of a developing African country may dictate varying methods of attaining these values and, indeed, some departures from classical western models, but they cannot diminish the fundamental truth that an African is equally entitled to human dignity.