# INTERNATIONAL HUMAN RIGHTS NORMS IN THE DOMESTIC ARENA

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## I. INTRODUCTION

The current emphasis on the promotion and protection of human rights is rooted in upheavals, revolutions and monstrous atrocities committed against humankind. The Magna Carta of 1215 and the Bill of Rights of 1688 are perhaps the oldest known bills of rights. Both were forced on the English Kings by their subjects. The guiding principles of the French revolution were contained in the Declaration of the Rights of the French Citizen issued in 1789 whereas the American Bill of Rights of 1791 followed the American war of Independence and the civil war. In the same way, the United Nations Charter which laid down the foundation of the universality of human rights norms in 1945 was but a reaction to the horrendous atrocities of the two world wars.[1] The human rights documents issued before the UN Charter can be regarded as having been almost exclusively concerned with Britain, France, the United States, and a handful of Western democracies. The United Nations Charter universalized and concretized human rights norms and was fortified by the Universal Declaration of Human Rights (UDHR) of 1948.[2] The UDHR finds more concise expression in two covenants promulgated in 1966, one on Civil and Political Rights and the other on Economic, Social and Cultural Rights.[3] There are other important human rights conventions and treaties, most notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[4] These international instruments are supplemented by regional ones such as the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[5], the European Social Charter of 1961[6] and the more recent African Charter on Human and Peoples' Rights (hereinafter the Banjul Charter) of 1981.[7]

Even the regional Charters draw their inspiration from the UN Charter and the UDHR. The European Convention states in its preamble that, ". . . considering the Universal Declaration of Human Rights, the governments of Europe take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration." The American Convention and the Banjul Charter contain similar sentiments. The Banjul

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1. United Nations Charter, Preamble, June 1945, 59 Stat. 1031 No. 993 Barens 1153.
2. *See* General Assembly Res. 217A(III), Dec. 10, 1948.
3. *See* General Assembly Res/ 2200 A(XX), Dec. 16, 1966.
4. General Assembly Res. 34/180, Dec. 18, 1979.
5. *See* The European Convention for the Protection of Human Rights and Freedoms, 1950.
6. *See* The European Social Charter, 1961.
7. *See* The African Charter on Human and Peoples' Rights (hereinafter, the Banjul Charter), 1981.

African scholars and legal practitioners have a role to play, not only in advocating the protection and development of human rights, but also in espousing the jurisprudential tenets which should form the fundamental basis of such a task. The political impetus, especially the trend towards multi-party democracy and the liberalization and democratization of the political system has blown winds of hope for the enhanced protection of human rights in Africa.

Charter acknowledges the universality of human rights norms and affirms that its Human Rights Commission,

> [S]hall draw inspiration from international law on human and peoples rights . . ., the Charter of the United Nations . . ., the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights as well as from the provisions of various instruments adopted within the specialized Agencies of the United Nations . . . .[8]

The Commission is also required to take into consideration "African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrines."[9] From the above, human rights are universal and connected in their historical setting, motivation and concept.[10] Therefore decisions on any of them in one country or region will have a persuasive effect on a court in another country faced with the same problem in similar circumstances. Because these norms are universal any court ought to be freely guided by reference to the experiences in similar situations from other countries.

In short, the principle of universality of human rights norms must be accepted. Such norms are clearly stated in international or regional instruments, customary international law, principles of common law and the growing body of international human rights jurisprudence. In Uganda, as is the case with many other countries, they are also expressed in the 1995 Constitution.

## II. THE CONSTITUTIONAL BASIS FOR THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS

Article 50(1) of the Uganda Constitution stipulates that any person who claims that a fundamental right or freedom guaranteed under the instrument has been infringed or threatened shall be entitled to apply to a competent court for redress including the payment of compensation. Paragraph I on the implementation of the National Objectives and Directive Principles of State Policy states that these shall, *inter alia,* guide the Judiciary in interpreting the Constitution or any other law. Article 20(1) declares the fundamental rights and freedoms to be inherent and not granted by the state. Furthermore, all persons who complain about human rights abuse shall have easy access to legal institutions, including regional, continental and international institutions charged with the protection and

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8. *Id.* art. 60.
9. *Id.* art. 61.
10. *See* P. Nuameka-Agu, *Discrimination and the African Charter on Human and Peoples' Rights* 19 C.L.B. 1670 (1993). *See also id.* at 1762.

enforcement of human rights and freedoms.[11] Paragraph XXVIII of the National Objectives mandates that Uganda shall respect international law and treaty obligations.

This provision is similar to Article 51(c) of the Indian Constitution which provides that the state shall endeavour to foster respect for international law and treaty obligations. It might be argued that the provision seems to have displaced the pre-independence requirement of enabling legislation. It appears that in India there is an internal application of international treaties. If this is true of India, then I submit that the position should be the same under the above-referenced section of the Ugandan Constitution.

In any case, the stipulation that Ugandans will have a right of access to regional and international enforcement fora means that local tribunals should apply the laws in conformity with Uganda's treaty obligations under the human rights instruments. Otherwise, the local statute may be overturned by the regional or international tribunal. Moreover, according to the United States case of *Edye v Robertson*,[12] if a municipal statute conflicts with a treaty, the latter repeals the former to the extent of the inconsistency. A similar decision was reached in the European Court decision of *Lingens v Austria*[13] which decided that a court can overturn a local law should it run counter to the tenor of Article 10 of the European Convention.[14]

Whether this may be true with respect to a situation in which the treaty has not been ratified remains unclear. In *Attorney-General v. British Broadcasting Corporation*[15] the court observed as follows: "There is a presumption, albeit rebuttable, that our municipal law will be consistent with our international obligations." Similarly a New Zealand court has held that: "An international treaty, even one not acceded to . . . can be looked at by the court on the basis that in the absence of express word Parliament would not have wanted a decision maker to act contrary to such a treaty."[16]

## III. A CONTRARY VIEW

Under the Uganda Constitution, treaties are to be negotiated by the President or a person authorized by him on the advice of the Attorney-General.[17] They are also subject to ratification by Parliament. The same provision of the article provides that no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.[18] Obviously the exception is intended to cover subsidiary legislation; and the legal implications of these provisions are self-evident. Where the treaty is negotiated by the Executive (President), such

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11. *See* UGANDA CONST. 1995, art. 50.
12. 112 S. Ct. 580 (1984).
13. [1986] Series A No. 103 8 EHRR 407.
14. Art. 10.
15. [1981] A.C. 303.
16. *Birds Galore Ltd. v Attorney-General and another* (1989) L.R.C. (Const.) at 939.
17. UGANDA CONSTITUTION 1995, art. 123.
18. *Id.* art. 132(4).

a treaty cannot affect private rights without enabling legislation. This is because at no stage is parliamentary intervention necessary. On the other hand, treaties which are negotiated by the Executive and ratified by Parliament become part of the municipal law and stand at par with other Acts of Parliament. It consequently follows that unless the international norm is specifically implemented by Parliament, it is not part of the domestic law simply because it has been negotiated by the Executive and not enacted as part of the local law. Thus in *R. v. Home Secretary ex parte Brind*,[19] Ralph Gibson stated that:

> An international treaty such as the Convention for the Protection of Human Rights and Fundamental Freedoms is made by the Executive. It does not directly affect the domestic law of this country, which can be changed only by Parliament. It is not within the powers of the court, by application of a rule of statutory construction, to import into the laws of this country provisions of a treaty for direct application by the court. Only Parliament can do that. It would be an usurpation of the legislative power of Parliament for the court to do more than construe the legislation which Parliament has passed in order to establish a meaning . . . .[20]

The above statement is consistent with a preponderance of precedents. In *Saloman v. Commissioners of the Customs and Excise*,[21] it was stated that "if the terms of the legislation are clear and unambiguous they must be given effect, whether or not they carry out . . . treaty obligations.[22] And in *Chundawadra v. Immigration Appeal Tribunal*,[23] the court decided that in the absence of ambiguity in the provisions of a statute, the European Convention had no place as a guide to their interpretation.

## IV. JUDICIAL RESTRAINT AND THE BANGALORE PRINCIPLES

The judicial approach of common law courts in the cases cited above is also reflected in two important Bangalore Principles.[24] While recognizing that in most countries international rules are not directly enforceable unless incorporated into domestic law by legislation, the following recommendation was made:

> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been

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19. [1991] 1 A.C. 696.
20. *Id.* at 726.
21. [1976] 2 Q.B. 116 (C.A. 1966).
22. *Id.* at 143 (Diplock L.J).
23. [1988] Imm. A.R. 161
24. *See* DEVELOPING HUMAN RIGHTS JURISPRUDENCE (Commonwealth Secretariat, 1988).

> incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.[25]

These principles do not significantly rise above the current common law position. But it seems the Balliol and Bloemfontein statements went further than the Bangalore principles. The Balliol statement put the issue in perspective:

> The general principles enunciated in the colloquia reflect the universality of human rights—inherent in human kind—and the vital duty of an independent judiciary in interpreting and applying national constitutions, ordinary legislation, and the common law in the light of these principles. These general principles are applicable in all countries, but the means by which they become applicable may differ.[26]

> The international human rights instruments and their developing jurisprudence enshrine values and principles long recognized by the common law. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. They should be interpreted with generosity appropriate to charters of freedom. They reflect international law and principle and are of particular importance as aids to interpretation and in helping courts to make choices between competing interests . . . both civil rights and economic and social rights are integral and complementary parts of one coherent system of global human rights. They serve as vital points of reference for judges as they develop the common law and make choices which it is their responsibility to make in a free and democratic society.[27]

And the statement concludes:

> In democratic societies fundamental rights and freedoms are more than paper aspirations. They form part of the law. And it is the special province of the judges to see to it that the law undertakings are realized in the daily life of the people."[28]

In reaffirmation of the basic thrust of the Balliol spirit, the Bloemfontein statement contains the following principle:

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25. *Id.* Principle No. 7.
26. *See* Statement No. 4, 2 J. HUM. RTS. L. & POL'Y 54 (1992).
27. *Id.* Statement No.5.
28. *Id.* Statement No.6.

> The Colloquium affirmed the importance both of international human rights instruments and international and comparative case law as essential points of reference for the interpretation of National Constitutions and legislation, and the development of the common law.[29]

To paraphrase Justice Kirby,[30] these principles seem a timely corrective to the insularity to which any legal system is prone. If the organized institutions of the international community reached conclusions on issues analogous to those arising in a local court, it is evident that a judge would wish to inform him or herself about the thinking of jurists tackling similar problems and drawing upon the developing jurisprudence of the international community. Moreover, the principles enunciated in the colloquia also contain the necessary tools for adopting international human rights norms in our domestic law.

The old precedents concerned themselves with the question of how far the courts should go in making use of the provisions of treaties and other international instruments in domestic law. There were three positions. The first concerned a treaty that had been legislatively adopted, in which case it was at par with other local legislation. The second case related to the Executive having ratified a treaty, but which treaty was not locally adopted in domestic law. In such a case, the rule was that domestic law should conform to or be consistent with international obligations. The third was where a state had not become a party to a treaty. Such a treaty would only serve as a guide to interpretation if it created an international regime within international law recognized by the vast majority of states. However, my view is that the current position is closer to what Justice Kirby says:

> It is scarcely surprising, with international principles addressing international problems through international institutions, that international human rights norms will exert their influence upon the development of domestic law, even of a country which has no Bill of Rights and which has refrained from incorporating those norms expressly into domestic law.[31]

This has come about due to the influence of the Balliol statement and the consequent change of attitude by the courts to the application of international and regional human rights instruments as well as a generous approach to human rights issues.

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29. Statement No. 4, 10 C.L.B. 1644.

30. M. Kirby, *The Australian Use of International Human Rights Norms from Bangalore to Balliol—A View from Antipodes,* 2 J. HUM. RTS. L. & POL'Y 21 (1992).

31. *Id.* at 51.

## V. HUMAN RIGHTS INSTRUMENTS AS DECLARATION OF COMMON LAW

As early as 1991 there were signs that the courts in Britain were about to change their attitude towards the application of international human rights norms. In *Reg v. Home Secretary ex. parte Brind*[32] the Court of Appeal stated that:

> [T]he courts of this country now refer—and must refer—to the relevant provisions of the convention and to judgments of the European Court of Human Rights, interpreting those provisions for the purpose of ensuring, where possible, that our domestic law is in conformity with the Convention. That must be done when construing legislation as when reviewing the exercise of administrative discretion or declaring and applying the common law. Only if an Act of Parliament cannot be construed so as to be consistent with the Convention must the courts of this country apply the statute and leave the complainant to seek redress in Strasbourg.[33]

The Court of Appeal's view that the complainant must seek redress outside the domestic tribunals was endorsed by the House of Lords. Lord Bridge noted:

> When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the Judiciary had, without Parliament's aid, the means to incorporate the Convention into such [an] important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.[34]

Such reasoning is underpinned by the "big lie" that judges do not make law. A complete metamorphosis arose with the case of *Attorney-General v. Guardian Newspapers (No. 2)*.[35] In the trial court J. Scott said:

> Mr. Alexander submitted that judgments of the European court of Human Rights did not bind an English court as to the manner in which paragraph 2 of Article 10 should be construed or applied. But if it is right to take into account the government's treaty obligations under Article 10, the article

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32. *Id.*
33. *Id.* at 725 (citing Ralph Gibson L.J.)
34. *Id.* at 749.
35. *Attorney-General v. Guardian Newspapers No. 2* (1990) 1 A.C.109.

> must, in my view, be given a meaning and effect consistent with the rulings of the court established by the treaty to supervise its application. Accordingly, in my judgment, Mr. Lester is entitled to invite me to take into account Article 10 as interpreted by the two judgments of the European Court . . . .[36]

This view was impliedly upheld by the Court of Appeal when L.J. Dillon stated,

> We have been referred in the course of argument to Article 10 of the Convention . . . as interpreted by the European Court of Human Rights . . . . Although the U.K. Government adhered to the convention, it is technically not part of English law. But that does not matter, since in my judgement there is no significant difference between Article 10 as interpreted by the European Court and the law of England . . . . I do not find this in the least surprising, since at any rate since 1688 it has been a major concern of the courts to present a barrier to inordinate claims by the Executive . . . .[37]

In fact, after noting that the Convention has never been incorporated into domestic English law, Bingham went on to apply both the case and the decisions of the European Court presumably because "its terms were not in conflict with the common law."[38] The House of Lords expressly approved Scott's application of the Convention:

> I can see no inconsistency between English law . . . and the European Convention on Human Rights. This is scarcely surprising since we may pride ourselves on the fact that freedom of speech has existed in this country, perhaps as long, if not longer than, it has existed in any other country in the World . . . . In any event I conceive it to be my duty . . . to interpret the law in accordance with the obligations of the Crown under this treaty . . . . It is established in the jurisprudence of the European Court of Human Rights that the word "necessary" in this context implies the existence of a "pressing social need" and that interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the courts, leads to any different conclusion.[39]

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36. *Id.* at 159.
37. *Id.* at 203.
38. *Id.* at 219.
39. *Id.* at 283-4.

This statement by Lord Goff was endorsed by a unanimous decision of the House of Lords in *Derbyshire CC v. Times Newspapers Ltd and others.*[40] Lord Keith who read the decision of the court had this to say:

> My Lords, I have reached my conclusions upon the common law of England without finding any need to rely upon the European Convention. Lord Goff of Chieveley . . . expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and Article 10 of the Convention. I agree and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligation assumed by the Crown under the treaty in this particular field.[41]

The decision in the *Derbyshire* case was read on February 18, 1993. On March 31, 1993 the Court of Appeal applied the above decisions in *Rantzen v. Mirror Group Newspapers*[42] and stated:

> "[R]ecent authorities lend support for the proposition that Article 10 has a wider role and can properly be regarded as an articulation of some of the principles underlying the common law."[43]

It is interesting to note that in the above decisions the courts freely relied on American precedents interpreting the first amendment to the US Constitution. Similar developments have taken place in some other jurisdictions of the Commonwealth. After a long struggle by Justice Murphy and his colleague on the Bench, Justice Kirby, Australia's highest Court handed down the decision in the now famous case of *Mabo v. Queensland.*[44] A unanimous court observed thus:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. *The expectations of the international community accord in this respect with the contemporary values of Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law*

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40. [1993] 1 All ER1011. This decision liberally applied American precedents.
41. *Id.* at 1024.
42. [1993] 4 All ER 975.
43. *Id.* at 993.
44 [1992] 66 A.L.J.R. 408 (HCA)

> *the powerful influence of the covenant and the international standards it imports.* The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of common law, especially when international law declares the existence of universal human rights . . . . It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule.[45]

As Justice Kirby[46] notes, the Mabo decision pointed the way to the future development of the common law in harmony with developing principles of international law. One must add that the decision accords with the Bangalore and Balliol principles. International human rights treaties have even been used to strike down a statute in a country that has not even become a party to such a treaty. The Court of Appeal of Botswana justified its striking down of the Citizenship Act in *Attorney-General v. Unity Dow*[47] on the following premise:

> If [the treaty] has been signed but not incorporated into domestic law one must accept the position that the Legislature or the Executive will not act contrary to the undertaking given on behalf of the country by the Executive in the convention, agreement, treaty, protocol or other obligation. However, where the country has not in terms become a party to an international convention, agreement, treaty, protocol or obligation it may only serve as an aid to the interpretation of domestic law or the construction of the constitution if such convention . . . etc. purports to or by necessary implication, created an international regime within international law recognized by the vast majority of states.[48]

The assertion that international human rights norms are only declaratory of the common law finds favour with Justice Kirby. In *Director of Public Prosecutions for Commonwealth v. Saxon*[49] the learned judge said:

> If there is ambiguity in the Act, it should be construed in such a way as to be compatible with the fundamental rights which are guaranteed by the common law, including as that right is illuminated by international principles of human rights . . . . our courts will continue to impute to Parliament an intention to respect fundamental rights because they are

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45. *Id.* at 422 (emphasis added).
46. Kirby, *supra* note 30, at 47.
47. C.A. 4/91-33 at 5 (July 1992).
48. *Id.*
49. Kirby, *supra* note 30, at 49.

> enshrined in the common law for centuries and now collected in fundamental principles which Parliament . . . has itself acknowledged.

As early as the Bangalore Judicial Colloquium, Justice Kirby had stated,[50]

> In the functions of courts giving meaning to a written constitution, to legislation on human rights expressed in general terms or even to old precedents inherited from judges of an earlier time, there is often room for judicial choice. In that opportunity for choice lies the scope for drawing upon each judge's own notions of the content and requirements of human rights. In doing so, the judge should normally seek to ensure compliance by the court with international obligations of the jurisdiction in which he or she operates. An increasing number of judges in all countries are therefore looking to international developments and drawing upon them in the course of developing solutions which they offer in cases that come before them.[51]

It appears that the judges have used the route of common law to enforce human rights norms because of the "fiction" that judges do not make law but merely declare it.

## VI. JUDGES AS LAW MAKERS AND THE CONCEPT OF JUDICIAL ACTIVISM

Mr. Justice P.N. Bhagwati of India has posed the following question: "What is the role or function of a judge in a democracy, and that in turn raises a further question: is the function of a judge merely to declare law as it exists or make law?"[52] Answering his own question Bhagwati observes that in a democratic society which has a Constitution with a Bill of Rights or which has subscribed to regional or international instruments on human rights and which is seeking to build a fair and just society, judicial activism on the part of the Judiciary is an imperative both for strengthening democracy and the realization of basic rights by large numbers of people in the country. He asserts that judges in fact take part in the law-making process. As early as 1972 Lord Reid declared that the notion that a judges's role is simply to declare the law is a "fairy tale" which they did not believe any more.[53] And Justice Kirby succinctly states: "Judges make law. They make law as surely as the Executive and Legislature make law."[54]

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50. M. Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, in DEVELOPING HUMAN RIGHTS JURISPRUDENCE, *supra* note 24, at 68-84.
51. *Id.* at 78.
52. P. N. Bhagwati, *The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint*, 2 J. HUM. RTS. L. & POL'Y 8 (1992).
53. Lord Reid, *quoted in* Kirby, *supra* note 50, at 77.
54. Kirby, *supra* note 30, at 28.

There is a growing body of opinion calling on judges to come out openly and make law rather than doing so in secret. This has become more urgent because of the need for the domestic application of international human rights norms. Justice Mohammad Haleem[55] reminds us that:

> The relation between international law and municipal law is a question of determining what are the most appropriate juridical means of achieving, in state legal systems, the aims and intentions lying behind the rules established by international law.[56]

Haleem goes on to say that the domestic application of human rights norms is now regarded as a basis for implementing constitutional values beyond the minimum requirements of the constitution. He further contends that "the International human rights norms are in fact part of the constitutional expression of liberties guaranteed at the national level." He elaborates as follows:

> The domestic courts can assume the task of expanding these liberties. The exercise of judicial power to create an order of liberties on a level higher than the respective constitutions is now considered to be an ingredient of judicial activism. The present thinking at the international level supports an expanded role of domestic courts for the observance of international human rights norms. This reappraisal enables domestic courts to extend to citizens, via state institutions, greater protection of the recognized human rights. This type of court activism is commanding appreciation all over the world.[57]

Similarly, an international workshop held in Kenya recommended judicial activism as an innovative approach to legal training required to effectively evolve devices of judicial activism for Asia and Africa.[58] The Workshop noted that: "Judicial activism, far from being a threat to national security or the development of a nation-state, is imperative for the attainment of such objectives."[59]

It was also observed that adopting judicial activism would do away with the "incredibly persistent attempts on the part of lawyers and judges to convince the people

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55. M. Haleem, *The Domestic Application of International Human Rights Norms*, *in* DEVELOPING HUMAN RIGHTS JURISPRUDENCE, *supra* note 24, at 92.
56. *Id.* at 101.
57. *Id.* at 101-102.
58. Kirby, *supra* note 24, at 70.
59. *Id.*

about the truth of the lie that judges do not make law."[60] Nevertheless, there are also weighty reasons against judicial activism in favour of judicial restraint.[61]

The case of *Attorney-General v. Unity Dow*[62] is a good example of judicial activism. In fact the court relied on the United Nations Declaration of the Rights of the Child of 1959 and the United Nations General Assembly Declaration on the Elimination of Discrimination Against Women of 1967, even though Botswana had not ratified the Conventions based on these declarations.

In *S. v. Ncube and others*[63] the Supreme Court of Zimbabwe held that the whipping of an adult offender contravened section 15(1) of the Constitution which provides that "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment." This section is in *pari materia* with Article 24 of the Uganda Constitution. The court held that such punishment was inherently brutal and cruel and was degrading to both punished and punisher alike. In holding that the administration of corporal punishment to adults was unconstitutional, the court relied on the case of *Tyre v. United Kingdom*[64] which interpreted Article 3 of the European Convention. This judicial activism enabled the court to apply international human rights norms in the context of domestic law. The same court in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*[65] extensively relied on international human rights norms and precedents from diverse jurisdictions to hold that delay in the execution of condemned prisoners was unconstitutional because it amounted to torture.[66] In the case of *Mgomongo v. Mwangwa*,[67] the Tanzania High Court followed the European Court of Human Rights' decision[68] in striking down a local statute as infringing human rights, even though Tanzania did not have a Bill of Rights in its Constitution.

## VII. RULES OF INTERPRETATION

In many instances some judges have approached interpretation of the Constitution with the same rules used to interpret ordinary statutes. But it has been said in *Bronik Motors Ltd. v Wema Bank Ltd.* that:

> [A] constitutional instrument should not necessarily be construed in the manner and according to rules which apply to Acts of Parliament. Although the manner of interpretation of a constitutional instrument should give effect to the language used, recognition should also be given

60. Bhagwati, *supra* note 52, at 8.
61. *Id. See also supra* note 24, at 72-82.
62. *See*, *supra* note 44.
63. [1988] 2 S.A. 702(25).
64. [1978] EHRR.
65. [1993] 19(3) C.L.B. 1393.
66. *Id.*
67. Civil App. No. 22/1992.
68. Silver (1993) 5 EHRR 247.

> to the character and origins of the instrument. Such an instrument should be treated *sui generis* calling for principles of interpretation of its own suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of the private law.[69]

In similar vein, Sir Udo Udoma J.S.C.[70] stated that:

> [The] function of the constitution is to establish a framework and principles of government, broad and general in terms intended to apply to varying conditions which our several communities must involve . . . and, therefore, mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the constitution . . . this court should, whenever possible and in response to the demands of justice, lean to the broader interpretation. . . . the approach of this court to the construction of the constitution should be and so it has been one of liberalism . . . .[71]

The Privy Council[72] warned that a Constitution should not be treated as an Act of Parliament but "[As] *sui generis,* calling for principles of interpretation of its own, suitable to its character . . . without necessary acceptance of all the presumptions that are relevant to legislation of private law.[73] Again in *Attorney General of the Gambia v Momodu Jobe*[74] the Privy Council reiterated that "A Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposeful construction."[75] The Federal Court of Malaysia[76] made the following pertinent observation: "A Constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way."[77] Lord Wilberforce, while commenting on the Constitution of Bermuda, opined,

> This constitutional instrument has certain special characteristics. 1) It is, particularly in Chapter I, drafted in broad and ample style which lays down principles of width and generality. 2) Chapter I is headed "Protection of Fundamental Rights and Freedoms of the Individual." It is known that this

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69. 6 S. C. 158 (1983).
70. *Nafiu v. The State*, 2 N.C.L.R. 293 (1981).
71. *Id.* at 326.
72. *Minister of Home Affairs v. Fisher*, [1980] A.C. 319.
73. *Id.* at 329.
74. [1984] A.C. 689.
75. *Id.* at 700 (Lord Diplock L.J.)
76. *Dato Mentarii Othman bin Baginda v. Dato Ombi Syed Alwibin Syed Idrus*, 1 L.L.J. 29 (1981).
77. *Id.* at 32B.

> Chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Fundamental Rights and Freedoms. That convention was. . . in turn influenced by the Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for generous interpretation avoiding what has been called the "austerity of tabulated legalism" suitable to give to the individuals the full measure of fundamental rights and freedoms referred to.[78]

Lord Scarman, commenting about the American Bill of Rights, notes that:

> The American Bill of Rights is a common law document. Strangely enough the European Convention of Human Rights borrows an enormous amount from the American Bill of Rights . . . . Therefore it is really a chimera to think that the Bill of Rights is something as vague and so uncertain that it will mystify . . . judges. It is no more uncertain than the common law, and indeed I would say it is very much more precise.[79]

The above citations demonstrate that most constitutions of the English speaking world have been profoundly influenced by common law and by the human rights guarantees in the amendments to the American Constitution.[80] This leads logically to the conclusion reached by Lester:

> [T]he judgments of constitutional courts in common law jurisdictions, such as the United States Supreme Court, the Indian Supreme Court, the Privy Council and other Constitutional courts (e.g. Canadian Supreme Court) are of strong persuasive authority in cases involving the interpretation of constitutional guarantees of fundamental Rights.[81]

It may safely be added that the decisions of regional and international courts and committees on human rights issues are of equal value. These views are in line with the Balliol Statement which advocated a "generous" interpretation of constitutions. In interpreting constitutions the judges must adopt an activist, purposeful and goal-oriented approach for purposes of achieving social justice. Judges find themselves in some difficulty because Constitutional

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78. *Minister of Home Affairs v. Fisher, supra* note 72 at 329.
79. Kirby, *supra* note 30, at 71.
80. *See* A. Lester, *Freedom of Expression: Relevant International Principles, in* DEVELOPING HUMAN RIGHTS JURISPRUDENCE, *supra* note 24, at 23.
81. *Id.* at 24.

law marks an intersection between law and politics. They fear to make political decisions. But as Lord Scarman has observed, it is a fundamental truth that law and politics cannot, and at a higher level must not, be kept separate.[82] Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can therefore fail to be political.[83] The words of Justice Bhagwati eloquently capture this sentiment:

> If (we) judges want to advance human rights jurisprudence, a task which is committed to our care by the society we serve, it is essential that we be fearless in the discharge of our functions . . . . We have to be ever alert to repel all attacks, obvious or subtle, against human rights and we have to guard against the danger of our allowing ourselves to be persuaded to attenuate or constrict human rights out of a misconceived concern for state interest, concealed political preferences or sometimes ambition, weakness or fear of executive reaction.[84]

It is doubtful whether the Ugandan Constitutional Court was aware of this important advice from such an eminent judge before it decided the case of *James Rwanyarare and others v. Attorney-General.*[85] What is not in doubt is that the Court must have been aware of the observation in the Report of the Uganda Constitutional Commission (the Odoki Report) that:

> Many people have expressed deep concern about the way the executive arm of government has interfered with the Judiciary over the years. . . . The courts are widely perceived as being unwilling to take stands against the Executive especially in constitutional and human rights cases.

Rwanyarare's case arose out of an application challenging the constitutionality of the regulations made under the Constituent Assembly Statute which prohibited candidates from publicly soliciting votes other than at candidates meetings, and from being supported by a political party.

To say, as the court did in Rwanyarare's case, that it could not apply a mass of cases from other jurisdictions on substantially similar issues was bewildering, to say the least.

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82. *See* Bhagwati, *supra* note 52, at 13.

83. *Id.*

84. Bhagwati, *Fundamental Rights in Their Economic, Social and Cultural Context*, *in* 2 DEVELOPING HUMAN RIGHTS JURISPRUDENCE 85 (1989).

85. Misc. Application No. 85 of 1993.

## VII. THE DEVICE OF SELF-EXECUTING TREATIES

As was pointed out in *Maharaj v. Attorney-General of Trinidad and Tobago*[86] international conventions have provisions which are not described with the particularity appropriate to an ordinary act of Parliament. Neither are they expressed in words that bear precise meaning as terms of legal art. They are often statements of principle of great breadth and generality and expressed in a language more familiar to politics than to legal draftsmanship. However, where the language of the treaty shows an intention that it would be enforceable in courts without an implementing statute, such a treaty is self executing. Thus in *Sei Fujii v. State of California*[87] the court said:

> A treaty does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing . . . In determining whether a treaty is self-executing, courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution . . . . In order for a treaty provision to be operative without the aid of implementing legislation and to have effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that standing alone would be enforceable in the court.[88]

I submit that some of the treaties which Uganda has ratified are self-executing and do not require enabling local legislation. This would include the Banjul Charter. The applicable legal principle in such a case was stated in *Aeroflot v. Air Cargo Egypt*:[89] "The provisions of an international treaty. . . which has been ratified, prevail over rules of domestic law which are incompatible with the latter."[90]

And in *Oshevire v. British Caledonia Airways Ltd.*[91] the Nigerian Court of Appeal held that any domestic legislation in conflict with an international convention is void. Using these principles and the provisions of the Banjul Charter, the court has reinstated dismissed academics because they were not given a hearing in violation of Article 7 of the Charter.[92] In another case the court refused to accept the ouster of its jurisdiction by a decree of the Military government because the Banjul Charter preserves and saves the jurisdiction of the court.[93] In the opinion of the court, the decree was in conflict with the Charter and was

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86. [1979] A.C. 385 at 388 and 395.
87. 242 P.2d 617 (1952).
88. *Id.* at 620.
89. *See* 1 UNIFORM L. REV. BIANNUAL 669 (1987).
90. *Id.*
91. [1990] 7 NWLR (PT163) at 519-520.
92. *M. Opayemi Bamidele & others v. Prof. Grace Alele Williams and the University of Benin*, Suit No.13/6M/89 (Benin).
93. *The Registered Trustees of Constitutional Rights Project v. The President of the Federal*

consequently void for inconsistency. In view of these authorities as well as Article 9 on freedom of information, Article 10 on the right of association and Article 11 on the right of assembly, did the court in Rwanyarare's case not miss the opportunity to advance human rights norms and jurisprudence in the local Ugandan context?

## IX. CONCLUSION

This article has put forth the proposition that all the international human rights instruments have a common origin and the same philosophical underpinnings. It has also been demonstrated that the Bills of Rights in constitutions around the world owe much of their content to the international human rights instruments and the amendments to the American Constitution. It must be emphasized that customary international law which was regarded as applicable to domestic law has now been largely replaced by international human rights instruments stating precisely what the law is or ought to be. Accordingly, as interpreters and guardians of civil liberties, judges are free to employ the various tools at their disposal to incorporate international human rights norms in domestic law. In the case of Uganda, the following tools have been identified:

1. The constitutional provisions that enshrine sufficient authority for the judges to incorporate such norms. Moreover, since the constitution has borrowed liberally from international human rights instruments, the logical assumption is that it also borrowed their philosophy and jurisprudence which have grown up around them. Therefore, decisions from other common law jurisdictions and from regional and international courts are a proper guide to the interpretation of our constitutional guarantees of fundamental rights and freedoms. This is more so because Ugandans are given access to international fora for the enforcement of their human rights. The local tribunals must adhere to international values and standards as demanded by the emerging human rights jurisprudence.

2. The old concept that treaties need local legislation to be domesticated has been watered down by the decisions which have declared that international human rights instruments and norms are mere declarations of common law. In all commonwealth countries and jurisdictions which are descendants of the common law tradition, these international human rights norms will automatically apply. In the case of Uganda, this is particularly so because the 1967 Judicature Act, which ranks second in importance to the constitution, enjoins us to apply the common law. It would also follow that decisions of courts from common law areas, although not binding, are highly persuasive. Hence, they provide a proper guide as to what the common law is and will accordingly be used to give content to the protected rights and freedoms.

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*Republic of Nigeria and two others*, Suit No. M/02/93.

3. Judicial restraint which was contained in the Bangalore principles has been largely superseded by the more pragmatic approach of the Balliol statement. There is a need for a liberal and purposive approach to constitutional interpretation. This has opened the way for the courts to use both international human rights instruments and international comparative case law in domestic law.

4. Judges have to admit that they make law. When faced with choices in the course of interpreting laws, they should consequently lean heavily on the side of human rights as declared by the international human rights instruments and comparative case law irrespective of whether the instrument has been ratified or not. This flows directly from the assertion that international human rights instruments are declaratory of common law. If common law is already part of the applicable law one does not need another domesticating statute or ratification of the instrument. This, unfortunately, involves a rather high degree of judicial activism.

5. Another device available to judges is the concept of self-executing treaties. This can be applied where the treaty has been ratified but not domesticated. The local legislation must be interpreted to give effect to the state's treaty obligations. And if there is any conflict between a local statute, other than the constitution, and a treaty the latter must prevail. The former will be void to the extent of the inconsistency. Such a methodology of interpretation will be a valuable tool in implementing the Banjul Charter and the Conventions which Uganda and numerous other common law countries have ratified but which have not been domesticated by local statute.