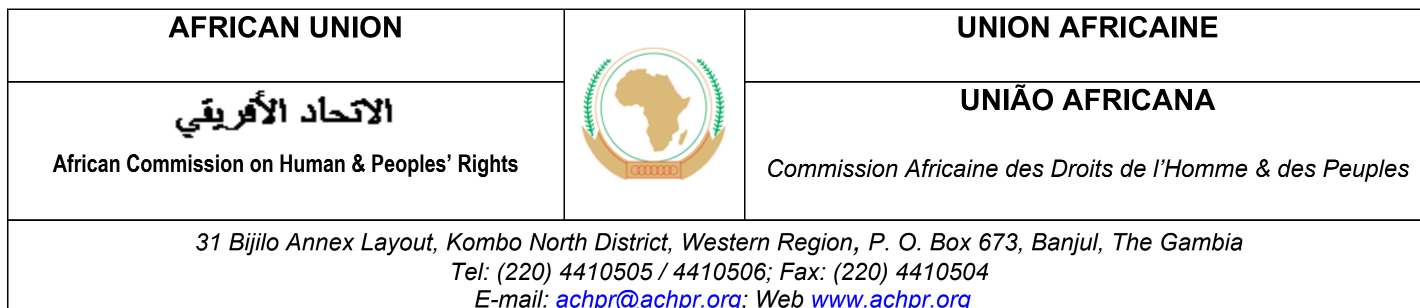

The Independence of the Judiciary through the eyes of the African Commission on Human and Peoples' Rights

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JUDGES' SYMPOSIUM ON JUDICIAL INDEPENDENCE, IMPARTIALITY AND ACCOUNTABILTY

28-29 July 2010

MASERU, LESOTHO

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By Mumba Malila•

1. Introduction

I am delighted and humbled by the invitation to present a paper on the jurisprudence of the African Commission on Human and Peoples' Rights on judicial independence. To have the privilege of addressing a distinguished gathering of learned judges and jurists is an honour of which I am fully conscious. But what encourages me and makes me particularly delighted is that I had occasion earlier this year in this same great capital of Lesotho to address the learned members of the legal profession on the same topic. I benefited immensely from the constructive and sometimes critical comments that followed my presentation. Those comments and observations have only made this second 'bite at the cherry' better and judiciously more palatable, I hope. By accepting to present a paper on this topic for a second time I did not intend to arrogate to myself any superior knowledge or expertise on the subject of judicial independence, except so far as has come to me as a member of the African Commission on Human and Peoples' Rights in the last five years and as a student of legal theory in the last twenty-seven years.

There can be no better starting point to this important exercise than with the quotation of a concern expressed by Aniagolu JSC in the case of **Oba Lamidi Adeyemi (Alafin of Oyo) and Others v Attorney General, Oyo State and Others**[1] in the Supreme Court of Nigeria when he proclaimed:

"It cannot be too often repeated . . . that the jurisdiction of the courts must be jealously guarded if only for the reason that the beginnings of dictatorships in many parts of the world had often commenced with the usurpation of the authority of courts and many dictators were often known to become restive under the procedural and structural safeguards employed by the courts for purposes of enhancing the rule of law and protecting the personal and proprietary rights of individuals. It is in this vein that the courts must insist, wherever possible, on a rigid adherence to the Constitution of the land and curb the tendency of those who would like to establish what virtually are Kangaroo courts, under different guises and smoke-screens of judicial regularity..."

That the judiciary as an institution in any system of democratic governance plays a central role in the protection, promotion and enforcement of human rights is beyond debate. If we accept, as we should, that the judiciary is the custodian of the rule of law and justice in any country we should have no difficulty in asserting that the concept of the independence of the judiciary is an important facet of the doctrine of separation of

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* Paper presented at the symposium on Strengthening the Independence, Impartiality and Accountability of the Judiciary in the context of Lesotho organized by the International Commission of Jurists in conjunction with the Judiciary of Lesotho 4-5 March 2010, Maseru, Lesotho

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[1] (1984) 1SCNLR 525, at 602 as quoted in HB Jallow, *The Law of the African(Banjul) Charter on Human and Peoples' Rights* (Trafford Publishing, Canada, 2007) p.235

powers of the three branches of government.It is with the realisation of this principle in mind that the African Commission on Human and Peoples' Rights candidly declared in its decision in **Civil Liberties Organisation v Nigeria**[2] that:

"a government that governs truly in the best interest of the people . . . should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For a government to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and the rule of law."

We should have no hesitation in admitting that the theme of this symposium 'Strengthening the Independence, Impartiality and Accountability of the Judiciary' is one that has been a subject of extensive discourse. It has been debated and discussed at various fora by eminent jurists, legal scholars and political scientists alike. Mr Justice Sydney L Robin once remarked that

"everything which can be said (on the topic of judicial independence) has already been said and repeated on so many occasions and in so many learned article that any further observations are inevitably redundant."[3]

Seductive as this submission may sound, it should be resisted for a variety of reasons. The fact that the subject of judicial independence has attracted so much interest should be reason enough for those interested in legal and political scholarship not to ignore further discussion of the ever evolving dimensions to the concept. Considerable amounts of literature in the form of articles, books, commentaries and judicial decisions on the subject already exist and there does not appear to be too much controversy as to meaning, need or relevance to good governance human rights and the rule of law of the concept of judicial independence. It is, however, fitting that we should assemble to examine the importance of the independence of the judiciary in the system of checks and balances in democratic governance and in upholding human rights and the rule of law. A discussion on judicial independence in the human rights discourse is important for a variety of reasons not the least important of which are, firstly that the judiciary is probably the weakest of the three arms of government in terms of defending itself. Its institutional independence as well as a substantial part of the judges' individual independence is generally undermined by other arms of government, especially the executive. Weak and inadequate constitutional guarantees couples with the absence of commitment by political leaders to observe the independence of the judiciary have made the position of the judiciary relative to the other two branches of the government

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[2] Communicatin No. 129/94

[3].See 'Judicial Independence,' Remarks of Right Honourable Beverly Mclachlin, PC Chief Justice of Canada during the 300th Anniversary of Settlement Conference, Vancouver, British Columbia also marking the retirement of Chief Justice Alan McEachern of Canada, May, 2001 as quote by Justice RR Mzikamanda "The place of the Independence of the Judiciary and the Rule of Law in democratic Sub Sahara Africa", paper presented on 14 November 2007 at South African Institute of Advanced Constitutional Public Human Rights and International Law p1

fragile and constantly in need of nurturing. Secondly, the imperious need for balance between the growing demands for an independent and impartial judiciary and the increasing politicization of the judiciary on the other hand requires constant reassessment.

Thirdly, by meeting to discuss the independence of the judiciary we can demonstrate once again our concerns about what may be going wrong in the relations of the three arms of government in the wake of growing public militancy and expectation. Any debate on the independence of the judiciary keep the subject alive and asserts our continuing relevance as jurists directly concerned with the universal values that go with the independence of the judiciary.

The purpose of this discourse is in the main to give an insight of the treatment of the all important topic of independence of the judiciary in the African system of human rights protection by the hitherto only promoting and protecting body, the African Commission on Human and Peoples' Rights. There is no intention to delve into the history of the concept of judicial independence or indeed the substantive arguments on the subject as this would require a great deal of time. The paper sets out to show the African Commission's own interpretation of the principles of the independence of the judiciary over the years, focussing largely on carefully identified aspects of concept of judicial independence to show how the African Commission has hitherto interpreted these. To this extent, it is proposed to examine the Commission's jurisprudence around issues like the competence of judicial officers (i.e., the qualification of adjudicators), nullification of judicial proceedings by the executive, refusal to enforce judicial decisions by the executive, failure to provide the necessary resources and structures for the judiciary and limiting or removing the jurisdiction of the courts.

2. Standard setting measures on judicial independence

Various standard setting measures have been undertaken at international level in relation to the independence of the judiciary. Without attempting to be exhaustive in the consideration of these measures aimed at defining, explaining and ensuring the observance of the facets of judicial independence, it is instructive to mention, albeit briefly, some of the major defining events at both international and regional levels.

The human rights imperative of the independence of the judiciary is pre-eminent in the evolution of the concepts of the independence of the judiciary, the rule of law and the separation of powers. This is clear from any examination of United Nations documents. In its background note for example the United Nations acknowledged quite candidly that the protection of human rights require as a priority the independence of the judiciary.[4]

The United Nations Universal Declaration of Human Rights provided a starting point in considering the independence of the judiciary from the point of view of human rights. The Declaration proclaimed that every individual "is entitled to a fair and public hearing by an independent and impartial tribunal."[5] This position was reaffirmed in the

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[4]United Nations Background Note. The Independence of the Judiciary: A Human Rights Priority htt:www.un.org/rights

[5] Articles 8 and 10 of UN Universal Declaration on Human Rights adopted in 1948

International Covenant on Civil and Political Rights adopted in 1966 which provides that "All persons shall be equal before the Courts and tribunals. In the determination of any criminal charges against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." [6]

The process of standard setting in the area of judicial independence was further boosted when the Seventh UN Congress on the Prevention of Crime and Treatment of Offenders[7] adopted the United Nations Basic Principles on the Independence of the Judiciary which were then adopted by the United Nations General Assembly. The procedures for the implementation of these basic principles were adopted by the United Nations Economic and Social Council in 1989 – Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary. Because of the importance attached to the need to ensure implementation of these principles, UN Special Rapportuers for the Independence of Judiciary are appointed from time to time to monitor implementation of the basic principles and reports periodically to the UN Commission on Human Rights.
In addition to the three United Nations approved instruments on standards for the independence of the judiciary, lawyers and prosecutor, other regional and international instruments dealing with judicial independence have been adopted. In 2003, the Commonwealth Heads of Government adopted the Commonwealth Principles on the Accountability of the Relationship between the Three Branches of Government (the Latimer House Principles). These principles provide that each Commonwealth country should provide an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values one of which is the independence of the judiciary. Those principles recognized that "an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country".

Commonwealth African countries took the matter further by drawing a plan of Action on the Commonwealth (Latimer House) Principles of the Accountability of the Relationship between the Three Branches of Government. The aim of the Plan of Action was to provide for ways and means of promoting and advancing Commonwealth Principles including the independence of the judiciary.

The Bangalore Principles adopted following the work of the Judicial Integrity Group[8] also underscore the principle of the independence of the judiciary by setting out principles intended to establish standards for ethical conduct of judges. Those principles are designed to provide guidance to judges and to afford the judiciary a

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[6] Article 14 of the Covenant on Civil and Political Rights
[7] Held in Milan in 1985

[8] The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002

framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. The principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge. These principles which were adequately elaborated are; independence, impartiality, integrity propriety, equality, competence and diligence and implementation.

Other instruments intended to enhance the independence of the judiciary have been concluded. The Universal Charter of Judge[9]; the European Charter on the Statute for Judges[10], Statement of Principles of the Independence of the Judiciary[11] and the Suva Statement on the Principles of Judicial Independence and Access to Justice August 2004. The American Convention on Human Rights also provides for protection human rights through a competent, independent and impartial judiciary.[12]

3. The African Charter on Human and Peoples' Rights and Independence of the Judiciary

3.1 *Background to the African human rights system*

In Africa, we have the African Charter on Human and People's Rights. June 27, 2011 will signify thirty years of its adoption.[13] The Charter contains an extensive list of fundamental rights and freedoms of individuals and peoples. The implementation of the Charter was, until the establishment of the African Court, the preserve of the African Commission on Human and Peoples' Rights. According to Article 45 of the African Charter, the following are the functions of the Commission:

1. To promote human and peoples' rights and in particular

(a) To collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences and disseminate information, encourage national and local institutions concerned with human and peoples'

[9] Adopted on the 17th November 1999 by the International Association of Judges

[10] Adopted by the Council of Europe in July 1998 to give effect to Article 6 of the European Convention on Human Rights which provides for the independence of the Judiciary statement of Principles of the independence of the Judiciary and the UN Basic Principles on the Independence of the Judiciary. See Justice RR Mzikamanda Note p 37

[11] 6th Conference of Chief Justice of Asia and the Pacific (Beijing, 1995)

[12] Article 8

[13] It was adopted by the then Organization of African Unity (OAU) on 27th June 1981 and all African countries except Morocco which withdrew its membership from the OAU on 1st January 1983, are parties to the Charter.

rights, and should the case arise, give its views or make recommendations to governments.

(b) To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations.

(c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter

3. Interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African Organization recognized by the OAU.

4. Perform any other tasks, which may be entrusted to it by the assembly of Heads of States and Governments.

One of the principal means of protection within the African Commission is through the complaints/communication procedure provided for in Chapter III of the African Charter, that is, from Articles 46 – 59.

The complaints or communication procedure entail Commission receiving complaints or petitions from individuals Non Governmental Organizations etc., alleging human rights violations by states parties to the Charter. While examining these communications, the Commission as a quasi judicial body seeks amicable resolution where possible and when that fails, undertakes a hearing and makes it findings and recommendations. Since its inception, the African Commission has received over 370 communications.

Article 31 of the African Charter requires that the African Commission "*shall consist of persons of the highest reputation, morality, integrity, impartiality and competence in matters of human and peoples' rights".* This implies that the impartiality, independence and competence that applies to the judiciary, equally apply to the African Commission. However one of the challenges of the African Commission is that it does not have an independent follow-up mechanism on the implementation of its recommendations. It therefore relies on the political organs of the African Union, to ensure that its recommendations are complied with.

In considering communications /complainants from various State Parties, NGOs, and individuals, the African Commission has considered communications/complaints against various States in which the independence of domestic judiciaries of states parties have been called in question.

The Charter implores all states parties to adopt effective legislative and other measures to ensure the realization of these obligations set forth in the Charter. The core of these obligations lies in Article 26, which together with Article 7 of the Charter seem to be the

key provisions for the realization of the provisions of the Charter. The relevant provisions are Article 7 that:

Every individual shall have the right to have his cause heard: this comprises:
The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions laws, regulations and customs in force; The right to be presumed innocent until proven guilty by a competent court or tribunal; The right to defence, including the right to be defended by counsel of his choice; The right to be tried within a reasonable time by an impartial court or tribunal.

It is clear that Article 7 defines the right to a fair trial and sets out the procedural guarantees in realizing that right. Of particular note is that Article 7 refers to the right to appeal to competent and impartial national organs, courts or tribunals.
Article 26 on the other hand requires guarantees on the independence of the judiciary and of the national institutions established for the promotion of the rights enshrined in the Charter. It in part reiterates the general provision of Article 1 as follows;

"State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

There is a clear interrelation between the provisions of Article 7 and 26 of the Charter in that they are mutually supportive in guaranteeing the rights enshrined in the Charter. This was recognized by the African Commission on Human and Peoples Rights in **Civil Liberties Organization v Nigeria** [14] when it observed that

Article 26 of the African Charter reiterates the rights enshrined in Article 7 but is even more explicit about State Parties' obligations to "guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter". While Article 7 focuses on the individual's right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This Article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of State power.

In a span of nearly twenty five years of the existence of the African Commission it has in numerous communications brought before it by aggrieved parties and their representatives against states parties to the Charter interpreted and breathed life in the provisions of the Charter guaranteeing the independence of the judiciary and the right to a fair trial. This has been done principally at two levels; firstly at the level of admissibility and secondly at merit stage. It must be pointed out that military coups, which were somewhat a common occurrence in some parts of Africa, considerably enriched the jurisprudence of the Commission in as far consideration of the independence of the judiciary is concerned at both admissibility and merit stages. As far as determination on admissibility goes, it is pertinent to state that under Article 56 (5) of

[14]Communication 129/94 9th Annual Activity Report 1995 – 1996

Charter the Commission is enjoined to consider communications referred to it if they are sent after the petitioner has exhausted local remedies, if any, unless it is obvious that this procedure is unduly prolonged or the remedies are non existent or ineffective. Over the years, the African Commission has through numerous communications brought before it given its own interpretation of the import of Article 56 (5). It is obvious that as a body charged with both the promotional and protective mandates the Commission has adopted a stance of unparallel activism rather than restraint in its interpretation of the Charter. Admittedly, it is sometimes difficult for an ordinary follower of the Commission's work to accept that the Commission's jurisprudence on the issue of exhaustion of local remedies has been consistent[15] Yet, as will become apparent later in this discourse, it is fair to state that when it comes to determining admissibility in the background of ouster of the ordinary courts' jurisdiction the Commission has pronounced itself clearly and emphatically.

Impartiality and independence of the judiciary in the African context has been considered by the Commission principally but not exclusively in the context of the right to a fair trial. Individual factors which go to the heart of the concept of judicial independence namely, the rendering the courts dysfunctional through removal of jurisdiction; qualifications and competence of adjudicators; failure to provide requisite structures and facilities for the courts to perform their function; and refusal or neglect to enforce court judgements, have been considered on divers occasions by the Commission. These will now be examined in detail. Admittedly, these factors are all interrelated and it is sometimes not easy to draw a clear line between one or another of these.

3.2. *Removing cases from the jurisdiction of the ordinary courts*

It is not uncommon in extra-ordinary times during times of war or state of emergency for governments to create parallel or alternative bodies other than the regular courts and invest these with the powers which are ordinarily reserved for ordinary courts. In extreme circumstances, the executive branch of government has gone further and out rightly ousted the jurisdiction of the courts. This is particularly so under military rule. The African Commission has consistently ruled that this practice violates the independence and impartiality of the judiciary as it renders the judiciary ineffective since any person aggrieved by human rights violations is unable to access the courts. In effect where a country's executive takes action that renders the judiciary ineffective, the Commission has taken the view that such action amounts to a violation of Article 26 of the Charter which guarantees the independence of the judiciary. In **Civil Liberties Organization v Nigeria**[16] a Nigerian NGO filed a communication before the Commission alleged that the military government of Nigeria has enacted various decrees in violation of the African Charter, specifically the Constitution (Suspension and Modification) Decree No. 107 of 1993 which not only suspended the Constitution of Nigeria but also specified that no decree promulgated after December 1983 could be

[15] See for example, the introduction in Decisions of the African Commission on Human and People's Rights on Communications 2002 - 2007.

[16]Communication 129/94 (supra)

examined in any Nigerian court; and the Political Parties (Dissolution) Decree No. 114 of 1993, which apart from dissolving parties, ousted the jurisdiction of the courts and nullified any domestic effect of the African Charter.

The communication alleged that the ousting of the jurisdiction of the courts in Nigeria to adjudicate the legality of any decree threatened the independence of the judiciary and violated Articles 7 and 26 Africa Charter. The Commission was categoric in its finding at admissibility stage that since the decrees complained of ousted the jurisdiction of the courts to adjudicate their validity "*it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results*." The Commission accordingly found that the requirement of exhaustion of domestic remedies had been technically satisfied and accordingly declared the communication admissible. At merit stage, the Commission had occasion to make the comments and observations already quoted above on the obligation of the states parties to the African Charter to observe Article 26 of the Charter which guarantees the independence of the judiciary. Similarly, in combined communications involving **International PEN, Constitutional Rights Project**, **Interights and Civil Liberties Orgainsation (on behalf of Ken Saro-Wiwa Jnr v Nigeria**[17] the Commission commented as follows:

"Removing cases from the jurisdiction of the ordinary courts and placing them before an extention of the executive branch necessarily compromises their impartiality which is required by the African Charter. This violation of the impartiality of tribunals occurs in principle, regardless of the qualifications of the individuals chosen for a particular tribunal . . .It is not safe to view the Provisional Ruling Council as impartial or independent. . ."

In a similar communication the African Commission maintained its position as regards the independence of the judiciary in times of a military coup. In **Media Rights Agenda v Nigeria**[18], where the Complainants allege that the Special Tribunal that tried the victim was neither competent, independent nor impartial in that members of the tribunal were hand picked by the Head of State and the Provisional Ruling Council (PRC) against whom the alleged offence was committed and the President of the tribunal was also a member of the PRC, which empowered by the Treason and Other Offences(Special Military Tribunal) Decree No.1 of 1996, confirm the death sentence passed by the tribunal the Commission held that *"the arraignment, trial and conviction of a civilian, by a Special Military Tribunal, presided over by serving military officers, who are still subject to military commands, without more, is prejudicial to the basic principles of fair hearing guaranteed under Article 7 of the African Charter". Further that "the setting up of the said tribunal for the trial of treason and other related offences as impinging on the independence of the judiciary, in as much as such offences are being recognized in Nigeria as falling within the jurisdiction of the regular courts"*
In various other communications brought against Nigeria all relating to ouster clauses, the Commission held consistently that ouster clauses have the effect of rendering the judiciary ineffective and therefore that the State party is in violation of its obligation under Article 26 of the African Charter.

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[17] 137/94, 139/94, 154/96 and 161/97

[18] Communications 105/93, 128/94, 130/94, 152/96 12th Activity Report

In **Centre for Free Speech v Nigeria**[19], the Complainants allege that the arrest, detention, trial and conviction of four Nigerian journalists by a military court was unlawful because the journalist were tried in secret and were not allowed access to counsel of their choice. When convicted the journalists could not appeal against their sentences because the various decrees promulgated by the military regime, which oust the jurisdiction of the regular courts from hearing appeals on cases decided by a military tribunal was a violation of Article 7 and the UN Basic Principles on the Independence of the Judiciary. The African Commission held that *" it could not be said that the trial and conviction of the four journalists by a Special Military tribunal presided over by a serving military officer who is also a member of the PRC, the body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in Article 7 of the African Charter and the act is also a contravention of Article 26 of the African Charter".*
Away from Nigeria a similar communication involving substantially identical circumstances was that of **Sir Dawda K Jawara v The Gambia**[20]. The complainant who was the former Head of State of the Gambia alleged that after the military coup of July 1994 that overthrew his government, there was blatant abuse of power by the military junta which was alleged to have incited a reign of terror, intimidation and arbitrary detention. Furthermore, the complainant alleges that the abolition of the Bill of Rights as contained in the 1970 Gambia Constitution by Military Decree No, 30/31 ousting the competence of the courts to examine or question the validity of any such decree violated the provisions of the Charter. As regards exhaustion of local remedies, the Commission remarked, among other things, that

"considering the fact that the regime at the material time controlled all the arms of government and had little regard for the judiciary, as was demonstrated by its disregard of a Court Order …. It would be reversing the clock of justice to request the complainant to attempt local remedies…"

That special military tribunals do not constitute competent independent and impartial tribunals or courts within the confines of the principle of judicial independence for purposes of Articles 7 and 26 of the Charter, was reiterated by the Commission when it aptly summed up its position in the joint communications[21] of **Malawi Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de Homme v Mauritania** when it observed:

"Special Military Tribunals … constituted a violation of Article 7 (1) (d) of the Charter by the very virtue of their composition, which is reserved to the discretion of the executive organ. Withdrawing criminal procedures from the competence of the courts established within the judicial order and conferring onto an extention of the executive necessarily compromises the impartiality of the Courts, to which the African Charter refers. Independently of the qualities of

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[19]Communication 206/97. 13th Activity Report

[20] Communication 147/95 and 149/96

[21] 54/91, 61/91, 164/97 and 196/97, 210/97 13th Annual Activity Report 1999 -2000

the persons sitting in such jurisdictions, their very existence constitutes a violation f the principle of impartiality and independence of the judiciary and, thereby of Article 7 (1) (d)."

Similarly, in **Constitutional Rights Project and Civil Liberties Organisaitons v Nigeria**[22], the Commission declared the communication admissible at admissibility stage on grounds that the decrees promulgated by the military regime ousting the jurisdiction of the courts effectively made domestic remedies prolonged and uncertain to yield any result. In this communication, it was alleged that following the Presidential election held in Nigeria in June 1993, the Federal Military announced the annulment of the June 1993 because, among other reasons, the Military Government was not happy that Abiola, the Social Democratic Candidate appeared to have won the election. When Abiola and Governors of all the states controlled by the Social Democratic Party went to the Supreme Court to seek redress, the Military Government reacted by promulgating several decrees ousting the jurisdiction of the Courts and restating the decision of the Government to annul the election results.

Likewise, in the communication involving **Marcel Wetsh'okonda Koso and Others v Democratic Republic of Congo**[23] the Commission had to decide among other things whether article 26 of the African Charter had been violated by the actions of the respondent State .This communication was filed on behalf of five individuals who included two traders and three soldiers. It alleged that, in July 1999, the trader placed an order for the supply of a quantity of fuel at a petroleum company which he was supposed to collect some three days later at a named outlet. He apparently collected 40 drums of fuel instead of the 34 he had ordered. He was arrested and charged jointly with the other four complainants. They appeared before a Military Court comprising five judges only one of whom was a trained jurist. They were tried for "partaking, during war time, in the commission of acts of sabotage by the diversion of 70 drums of gas-oil and of 40 drums of gas-oil belonging to the Congolese Armed Forces," were found guilty of the offences as charged and were sentenced to death without any prospect of review or appeal as the decisions of the Military Courts were by decree establishing them neither susceptible to review nor appeal. Relying on the Commission's decision in **Civil liberties Organisation, Legal Defense Center, Legal Defense and Assistance Project v Nigeria**[24] the complainants contended that the establishment of that court, whose impartiality and competence were seriously compromised and whose decision was final, to try the complainants was a violation of the African Charter particularly Articles 7 and 26. In response the respondent State submitted that establishment of the Military Court was in conformity with article 156 (2) of the Constitution of the DRC which empowered the Head of State to suspend regular courts in some or all parts of the territory, and to replace them by Military Courts in times of war. As the Congolese state was in an armed conflict situation following the armed aggression led by its neighbours, the State was merely implementing the said provisions of the constitution. After referring to its decision in Communication No. 218/94 the Commission went on to surmise that;

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[22] communication 143/95 13th Annual Activity Report 1999 – 2000

[23] Communication No. 281/2003

[24] Communication No. 218/98

"The general content of the guarantee of sound justice which is the subject of articles 7 and 26 brings two sorts of obligations to bear. The obligation of having an accessible and appropriate court and the obligation of a fair trial (the right to have one's cause heard fairly). In its decision in the **Civil Liberties Organization v Nigeria** *Communication, the Commission made a clear distinction between these terms: "while article 7 focuses on the rights of individual to be heard, article 26 speaks of the Institutions which are essential to give meaning and content to that right. This article clearly envisions the protection of the rights of individual against the abuses of state power."*

The obligation of having an established court implies that the court exists and it is accessible to all persons subject to trial. For this right of access to a competent court to be effective, there shall be no obstacles which practically impede the beneficiary from enjoying same. In the abovementioned decision, the Commission also ruled that the usurpation of the powers of the common law courts to hear any cases whatsoever constitutes an aggression of untold proportions on the article of the Charter which protects the right to effective remedy before national courts. Mere accessibility of the competent court is not enough the latter should be adequate, that is to say independent, impartial, established by the law and capable of ruling.

According to the African Commission, the independence of a court refers to the independence of the court vis a vis the executive. This implies the consideration of the mode of designation of its members, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence: as the saying goes "justice must not only be done: it must be seen to be done."

The obligation of independence is bound to the obligation of impartiality. Impartiality may be perceived in a subjective and objective manner. In a subjective manner, the impartiality of a judge is gauged by his internal inclinations. Since it is impossible to infer this inclination objectively, it was simpler to conclude that subjective impartiality be assumed until proven otherwise."

3.3. *Provision of structures necessary to dispense justice*

The UN Basic Principles on the Independence of the Judiciary, state in Article 1 that "the independence of the Judiciary shall be guaranteed by the state and enshrined in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary." Article 11 of these Principles states that "the term of office of judges, their independence, security . . .shall be adequately secured by law" while article 18 declares that judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties." The International Bar Association in its Minimum Standards of Judicial Independence has similar provisions.

What this requirement entails is that not only should the executive branch make available physical infrastructures for the dispensation of justice but should also provide properly set out court structures allowing for an appropriate system of appeals and embodying the principle of separation of powers manned by competent individuals.

The Communications between **Amnesty International v Sudan, Comite Loosli Bachelard v Sudan, Lawyers Committee for Human Rights v Sudan and Association of Members of the Episcopal Conference of East Africa v Sudan**,[25] dealt with arbitrary arrests and detentions that took place following the coup of 30 July 1989, in Sudan. It was alleged that hundreds of prisoners were detained without trial or charge and since June 1990 members of the opposition groups, among them Abdal-Qadir, Mohammed Salman and Babiker Yahya had been arrested, detained, and subjected to torture. Other detainees include lawyers, members of opposition groups and human rights activists. The Commission observed that:

National legislation permitted the President, his deputies and senior military officers to appoint Special Courts to consist of "three military officers or any other persons of integrity and competence". The composition alone creates the impression, or indicates the reality, of lack of impartiality, as a consequence violates Article 7(1) (d). ***The government has a duty to provide the structures necessary for the exercise of this right.*** *By providing for courts whose impartiality is not guaranteed, it has violated Article 26.*

Further more, the fact that the government does not contest the allegation of dismissal of over one hundred judges who were opposed to the formation of special courts and military tribunals, to deprive courts of the personnel qualified to ensure that they operate impartially thus denies the right to individuals to have their case head by such bodies. Such actions by the government against the judiciary constitute violations of Article 7(1) (d) and 26 of the African Charter.

In **Sir Dawda K Jawara v The Gambia**[26] the Commission reiterated the need for states parties to the African Charter to ensure that they provide appropriate structures in the form of courts for the redress of human rights violations. Failure to have independent, impartial and competent violates article 26 of the Charter. The Commission concluded boldly that:

"The rights and freedoms of individuals enshrined in the Charter can only be fully realized ***if governments provide structures which enable them to seek redress if they are violated****. . ."*

In the communication involving **Lawyers for Human Rights v Swaziland**[27] the complainant alleged that the King's Proclamation to the Nation No. 12 of that year made by King Sobhuza II of Swaziland on 12 April 1973 violated various provisions of the African Charter including Article 26 guaranteeing the independence of the judiciary. By that proclamation, the King declared that he had assumed supreme power in and over the Kingdom of Swaziland and that all legislative, executive and judicial power vested in him. Furthermore he repealed the Constitution of Swaziland which was enacted in 1968.

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[25]Communication 48/90,50/91,52/91,89/93. 13th Annual Activity Report: 1999-2000-(Compilation of Decisions of The African Commission on Human and Peoples' Rights, 1994-2001, pg 335.

[26] Supra note 25

[27] Communication No. 251/2002

The complainant alleged that the Proclamation which, among other things, outlawed political parties, had the effect of was to diminish significantly if not fundamentally wipe away all manner of rights and freedoms enjoyed by the Swazi people such as freedom of association, and assembly and freedom of expression which were enshrined in the African Charter. The Complainant further alleged that the Swazi people had been deprived of the right to effective remedies since the King retained the power to overturn any judicial decision thereby removing any legal meaningful redress that could be accessed. The complainant also raised issue with decree No. 3 of 2001 which ousted the court's jurisdiction to grant bail in matters listed in the Schedule arguing that this was plain evidence that the courts were not independent. After quoting article 1 of the UN basic Principles on the Independence of the Judiciary and article 30 of the International Bar Association's Minimum Standards of Judicial Independence, the Commission declared;

"By entrusting all judicial powers to the Head of State with power to remove judges, the Proclamation of 1973 seriously undermines the independence of the judiciary in Swaziland. The main raison d' être of the principal of separation of powers is to ensure that no organ of government becomes too powerful and abuse its power. The separation of power amongst the three organs of government – executive, legislature and judiciary ensures checks and balances against excesses from any of them. By concentrating the powers of all three government structures into one person, the doctrine of separation of powers is undermined and subject to abuse . . . . Clearly, retaining a law which vests all judicial powers in the Head of State with possibility of hiring and firing judges directly threatens the independence and security of judges and the judiciary as a whole. The Proclamation of 1973, to the extent that it allows the Head of State to dismiss judges and exercise judicial power is in violation of the African Charter."

3.4. *Qualification of persons who adjudicate*

All the international standards alluded to earlier, require that the judiciary should be competent. For the judiciary to be truly independent, its judicial officers must posses the requisite qualifications to dispense justice. When persons who are entrusted to adjudicate are well versed in the law, they will enjoy the confidence and esteem of the many litigants and accused persons whose affairs are in their hands. On the other hand, a judiciary made up of unqualified or ill-qualified adjudicators, apart from not inspiring any confidence in the whole system of justice dispensation in a general way, is also amenable to easy manipulation and improper influence, particularly from the executive branch.

The Commission held in **Media Rights Agenda v Nigeria**[28] that the selection of serving military officers with little or no knowledge of law as members of a Tribunal constitutes a contravention of the UN Basic Principle on the Independence of the Judges which require the holder of a judicial office to be not only a person of integrity but with the requisite training or qualification in law. It stated;

[28] Communication No. 224/98

The complainant alleged that the Special Military Tribunal which tried the victims was neither competent independent nor impartial because members of the Tribunal were hand picked by the Head of State, General San Abacha, and the Provisional Ruling Council, which is empowered by the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986, to confirm the sentences passed by the Tribunal against whom the alleged offence was committed and the President of the Tribunal was also a member of the PRC, which was empowered by the Treason and Other Offences(Special Military Tribunal) Decree No.1 of 1986, to confirm the death sentence passed by the Tribunal. The Commission held that;

"the selection of serving military officers, with little knowledge or no knowledge of law as members of the tribunal is in contravention of Principle 10 of the Basic Principles on the Independence of Judges which states that persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualification in law".This is a breach of the right to a fair trial as stipulated in Article 7(1)(d) of the Charter. . ."

In **Constitutional Rights Project (in respect of Akamu and Others) v Nigeria**[29] the communication was brought on behalf of persons sentenced to death under the Robbery and Firearms (Special Provisions) Act No. 1 of 1984. The decree created special tribunals composed of a retired judge, an army officer and a police officer. No appeal was provided for from the decision of the tribunal though the sentence could be confirmed or disallowed by the Governor of a State. The Commission concluded that the remedy available is not of a nature that requires exhaustion of local remedies. The Commission concluded that "jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of the government the same branch that passed the Robbery and Firearms (Special Provisions) Act whose members do not necessarily possess any legal expertise. Article 7 (1) (d) of the African Charter requires the Court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7 (1) (d).

Equally, in **Constitutional Rights Project (in respect of Zamani Lekwot and Six Others) v Nigeria**[30] which was brought on behalf of several men from Nigeria sentenced to death under the Civil Disturbances (Special Tribunal) Act No 2 of 1987 the Commission came to the same conclusion, namely that the composition of the tribunal, made up of one judge and four members of the armed forces created the appearance, if not actual lack, of impartiality and thus violated article 7(1) (d) of the Charter.

3.4. *Obligation to enforce judicial orders and decisions*

[29] Communication No. 60/91, 8th Activity Report

[30] Communication No. 87/93 8th Activity Report

The Commission has consistently held that the right to have one's cause heard by competent and independent courts must naturally comprise the duty of everyone, including the state, to respect and follow those judgments. Failure to respect and follow such judgments as where for instance the Nigerian government refused to release Chief Abiola despite the order for his release on bail made by the Court of Appeal undermined the independence of the judiciary and was a violation of Article 26 of the Charter which obliges states to ensure the independence of the judiciary. This was in fact the holding of the Commission in **Constitutional Rights Project and Civil Liberties Organization v Nigeria.**[31] The Commission stated that:

"The fact that the Government refuses to release Chief Abiola despite the Order for his release on bail made by the Court of Appeal is a violation of Article 26 which obliges states parties to ensure the independence of the judiciary. Failing to recognize a grant of bail by the Court of Appeal militates against the independence of the judiciary."

In **Sir Dawda K Jawara v The Gambia** (supra) the Commission remarked that

By ousting the competence of the ordinary courts to handle human rights cases, and ignoring court judgments, the Gambia Military Government demonstrated clearly that the courts were not independent. This is a violation of Article 26 of the Charter."

3.5. *Other pronouncements by the Commission on judicial independence*

The communications procedure is just part of the process by which the Commission conveys it interpretation of the Charter provisions regarding the independence of the judiciary. During promotional missions to member states, the Commission engages the domestic judiciaries, law societies, NGOs and other stake holders and gathers useful information on the independence of the judiciary and thereafter makes appropriate recommendations to governments when mission reports are sent to these countries. The Commission has undertake various promotional visits to many countries in Africa with a view to sensitising the public in those countries about the Commission's existence and mandate and engaging governments into dialogue as to what measures they should be taking to ensure that the rights contained in the Charter including the guarantees contained in Articles 7 and 26, are realized in these countries. The Commission has also passed numerous resolutions which have informed and influenced policy and legislation on judicial independence in many countries. The resolutions have in some cases had the effect of calling to the attention of member states urgently undesirable developments which impact negatively on human rights the rule of law and the independence of the judiciary. The effect has been that those to whom the resolutions have been addressed have felt the need in the wake of public exposure to urgently do something about the concern to protect their reputation and image. Just after the military coup in the Gambia, for example, the Commission at its sixteenth Ordinary Session adopted a resolution calling upon the "the incumbent military governments to hand over power to democratically elected governments without prolonging their incumbencies and unnecessarily delaying the return to democratic civilian rule" On the

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[31] Communication No. 143/95, 13th Annual Activity Report 1999 – 2000

Gambia itself the resolution adopted reiterated that "the military coup in the Gambia is a flagrant violation of the right of the Gambian people to freely choose their government" and called upon the military government to "transfer power to freely elected representative of the people". The Commission has adopted numerous other resolutions either in respect of specific human rights situations in some countries or generally reflecting a thematic issue. As regards the independence of the judiciary the Commission meeting at its eleventh Ordinary Session, in March 1992 adopted the Resolution on the Right to Recourse and Fair Trial [32] in elaboration of the right to a fair trial as set out in Article 7. That resolution invariably recognizes that the independence of the judiciary is indispensable to the right to a fair trial.

In1996, the Commission at its 19th Ordinary Session in Burkina Faso, adopted the Resolution on the Respect and the Strengthening of the Independence of the Judiciary in Africa. That resolution reiterated the importance of an independent and impartial judiciary in any state. It urged African judges to organize nationally and regionally, periodic meetings in order to exchange experience and evaluate efforts undertaken in various countries to bring about an efficient and independent judiciary.[33]

In 1999, the Commission in collaboration with the African Society of International and Comparative, Law and Interights organized a seminar on "The Right to Fair Trial" in Dakar, Senegal. The participants while identifying diverse issues that inhibit the realization of the right to a fair trial and measures which could lead to the effective protection of this right in Africa, declared that while there are constitutional and legal provisions which provide for the independence of the judiciary in most African countries, the existence of these provisions alone do not ensure the independence and impartiality of the judiciary. Issues and practices which undermine the independence of the judiciary include lack of transparent and impartial procedures for the appointment of judges, interference and control of the judiciary by the executive, lack of security of tenure and remuneration and inadequate resources for the judicial system. The Seminar thus defined practical steps and recommendations which need to be taken by various actors such as the African Commission, African States, judicial officers, legal practitioners and non governmental organizations to ensure and enhance the implementation of fair trial standards[34]. Later that year, in November, the Commission at its 26th Ordinary Session, adopted the Resolution on the Right to Fair Trial and Legal Aid in Africa. The Dakar Declaration and Recommendations on the Right to Fair Trial in Africa was adopted. A Working Group on the Right to a Fair Trial to prepare a draft general principles and guidelines on the right to fair trial and legal assistance under the African Charter was constituted. The result was the preparation and adoption of "*Principles and Guidelines* on the *Right to a Fair Trial and Legal Assistance in Africa.*"[35]

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[32] ACHPR/Res.4(XI)92:Resolution on the Right to Recourse and Fair Trail (1992)

[33]ACHPR.Res.21(XIX)96: Resolution on the Respect and the Strengthening on the Independence of Judiciary (1996)

[34] Dakar Declaration and Recommendations on the Right to Fair Trial. 9-11 September 1999. Dakar, Senegal.

[35] ACHPR/Res.41(XXVI)99:Resolution on the Right to Fair Trail and Legal in Africa (1996)

These documents play a significant role in interpreting and supplementing the provisions of the Charter. They also mirror the Commission's understanding of the provisions which the Commission would be quick to uphold in any communication before it in which questions covered in those documents are raised. In fact, in many communications referred to in this paper, the Commission referred to its own resolutions and guidelines on the independence of the judiciary.

4. What, though, is the value of the Commission's jurisprudence in the municipal jurisdiction?

The African Commission has over the years sought to ensure, wherever possible, that the independence of the judiciary is respected by member states to the African Charter. Its jurisprudence on this important topic is consistent and accords with international standards set around the issue. The all important question as to what the value of the Commission's pronouncements are on this important topic, bearing in mind that the decisions of this continental quasi-judicial body only have the status of recommendations as opposed to binding judgments, brings home the status of the African Charter in municipal legal systems of states parties to the Charter. That is a large subject in its on right and will be left for another occasion. Suffice it to point out that the Charter and the interpretations thereof by the African Commission can, at the very least, serve as an important aid to interpretation to clarify uncertainties and ambiguities. Furthermore, it could be usefully invoked to fill in the gap or lacunae in municipal law. What cannot be ignored altogether is that the African Charter has domestic value and relevance in municipal legal systems of state parties to the Charter. A few examples from African jurisdictions can be cited to illustrate this position.[36] In Tanzania, for example, in the case of **Peter Ngomongo v Mwangwa and Attorney General**[37] the High Court relied on international and regional human rights law including the European Convention on Human Rights and a judgment of the European Court[38] to determine the question whether the right of access to the courts which was not expressly provided for in the Tanzanian Constitution could be, nonetheless, inferred from other provisions of the Constitution. The Court stated inter alia observed that;

*"It is a general principle of law that the interpretation of the provisions in our Constitution has to be made in the light of jurisprudence which has developed on similar provisions in other international and regional systems of law. That was the view taken by Nyalal CJ in the case of **AG v Lesinoi Ndainai & Another** (1980) TLR 214 where he said. 'On a matter of this nature it is always very helpful to consider what solutions to the problems other courts in other countries have found, since basically human rights are the same though they may live under different conditions.' The same view was repeated by the Tanzanian Court of Appeal in the case of **DPP v Ally Ahmed and 10 Others** (criminal Appeal Nos. 44 and 45 of 1985 [unreported]) where the court emphasized that in interpreting the Constitution the courts have to take into account the provisions of the Universal Declaration of Human Rights (1948) and other treaties*

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[36] These and other examples are give I detail in HB Jallow, Op cit

[37] Civil Case No. 22 of 1992, High Court at Dodoma

[38] Golder v UK (1975) ECHR judgment of 21 February, 1975

which Tanzania has ratified. That view is also in line with the Harare Declaration of Human Rights issued at the end of a high level judicial colloquium of Commonwealth Judges on the topic of the Domestic Application of International Human Rights Norms, convened in Harare, Zimbabwe. . . .In their declaration they endorsed the Bangalore Principles (1988) to the effect that it is within the proper nature of the judicial process for national courts to have regard to international human rights norms(whether or not incorporated in domestic law) for the purpose resolving ambiguity or uncertainty in national constitutions and legislation . . . ."

Ultimately the Court relied on the right to unimpeded access to the courts provided for under Article 8 of the Universal Declaration on Human Rights, article 7 of the African Charter on Human and Peoples' Rights and Article 2(3) of the International Covenant on Civil and Political Rights[39]

In Ghana, the Supreme Court equally relied on international and regional human rights instruments to interpret domestic provisions where these were unclear. The question that the Court had to determine in the case of **NPP v Inspector General of Police and Others**[40] was whether the requirement under the Public Order Act (1961) (Act No. 58) to obtain police permits for meetings and processions in public places contravened Article 21 of the Constitution of Ghana which guaranteed freedom of assembly, procession and demonstration. The Court relied on Article 11 of the African Charter which states that *"every individual shall have the right to assemble freely with others. The exercise of this right should be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."* The Court invoked the provisions of the African Charter notwithstanding that Ghana had not incorporated the provisions of the Charter in domestic law. And in justifying the position, the court went further and observed that;

"Ghana is a signatory to this African Charter and member states of the Orgainsation of African Unity and parties to the Charter are expected to recognize the rights and duties and freedoms enshrined in the Charter and undertake to adopt legislative or other measures to give effect to the rights and duties. I do not think that the fact that Ghana has not passed specific legislation to give effect to the Charter, the Charter cannot be relied upon. On the contrary, article 21 of our Constitution has recognized the right of assembly mentioned in article 11 of the African Charter.

It follows that section 7 of the Public Order decree 1972 (NRCD.68) is not only inconsistent with Article 21(1)9d) of our Constitution but also in contravention of Article 11 of the African Charter on Human and Peoples' Rights adopted by the Assembly of African Heads of state and Government in 1981 in Nairobi, Kenya."

In much the same way, the Court of Appeal of Botswana relied on the provisions of the African Charter to fill the lacunae that existed in domestic legislation. The issue in the case of **Attorney General v Unity Dow**[41] was whether the provisions of the Botswana

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[39] See HB Jallow, Note 1 p. 80

[40] Supreme Court of Ghana 1996

[41] Court of Appeal, Botswana, 1992

law on citizenship which allowed citizenship rights in some cases to descendants of Botswana males and not females amounted to discriminatory treatment permitted by the Constitution since 'sex' distinction was omitted from the Constitution as one of the distinctions which could in law amount to discrimination.[42] The trial Court invoked international instruments to come to the conclusion that in spite of the omission, distinction on the basis of sex was discriminatory and, therefore, contrary to the Constitution. The Court referred to Articles2 and 12 of the African Charter and declared that;

"Botswana is a signatory to this Charter. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter. The learned Judge a quo made reference to Botswana's obligations under such treaties and conventions. Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until parliament has legislated its provision into the law of the land, so far as relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in the manner in the interpretation of what no doubt are some difficult provisions of the Constitution. The reference made by the learned judge a quo to these materials amounted to nothing more than that. . . . That does not seem to me to be saying that the O.A.U. Convention, or by its proper name the African Charter on Human and Peoples' Rights, is binding within Botswana as legislation passed by its Parliament. The learned judge said that we should, so far as possible, so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations. . . it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken . . . ."

The foregoing examples, though by no means exhaustive, of the approach of the judges in municipal courts when it comes to the treatment of international and regional treaties and jurisprudence speaks volumes as to the value that domestic courts could and should attach to the African Charter and the jurisprudence of the African Commission.

5. Conclusion

It is pertinent to conclude on a more optimistic note by making reference to the general perception of the independence of the judiciary by member states of the African Union.

The Member States of the African Union (then OAU) adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights as an attainment to the objectives of the African Charter on Human and Peoples' Rights[43].

[42] HB Jallow, Opcit p.81

[43] Protocol to the African Charter on Human and Peoples' Right on the Establishment of an African Court on Human and Peoples' Rights was adopted in Addis Ababa, Ethiopia in June 1998 and entered into force in January 2005. See Preamble.

In complementing the protective mandate of the African Commission[44], Article 17 of the Protocol states that:

The independence of the judges shall be fully ensured in accordance with international law. No Judge may hear any case in which the same judge has previously taken part as agents, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this pint shall be settled by decision of the Court.

The Judges of the Court shall enjoy, from the moment of their elections and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law. At no time shall the judges of the Court be held liable for any decision or opinion issued in the exercise of their functions.

This is a fairly encouraging position taken by African States as a group.

The desire to ensure the independence of the Court is also reflected in the Oath of Office subscribed to in terms of the provisions of Article 16 of the Protocol. The judges of the Court make a solemn declaration to discharge their duties impartially and faithfully. State Parties have a duty to execute the decisions of the Court as stipulated in Article 30 of the Protocol.

Although the African Commission has no implementation mechanism for its decisions it has against all odds set a serious platform to interpreting Articles 7 and 26 of the Charter.
The Commission's views on the independence of the judiciary do not depart in any significant way from those obtaining in domestic, international and other regional settings. They confirm the universality of the concept of judicial independence. In fact it is true to say there is unanimity in the perception of the need for the observance and protection of the independence of the judiciary.

It cannot be denied that the Commission has, over the years, and in the process of examining communications brought before it around the concept of judicial independence, developed a system of norm-clarification and standard-setting, which can otherwise be referred to as "quasi-judicial activism". It has addressed and elaborated on a wide range of substantive issues which were otherwise not clearly articulated in the Charter. Another area in which the Commission has demonstrated commendable innovativeness is in its resolutions on diverse human rights issues and situations, sometimes, as they affect specific countries. As pointed out already some of these have touched on the independence of the judiciary. These formal expressions of the Commission's opinion in relation to the independence of the judiciary have helped to provide clarity and predictability and have significantly guided potential authors of communications.

[44] Article 2. Protocol to the African Charter on Human and Peoples' Right on the Establishment of an African Court on Human and Peoples' Rights