

PRESENTATION

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**REMARKS AT THE WORKING SESSION ON IMPLEMENTATION OF  
INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND RESPECT  
FOR INTERNATIONAL STANDARDS IN THE  
INTER-AMERICAN SYSTEM  
ON THE SEGMENT:  
IMPLEMENTATION THROUGH JUDICIAL,  
QUASI-JUDICIAL AND OTHER  
SUPERVISORY MECHANISMS**

At the Hall of the Americas –

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1. Two hundred years ago this year, a small pebble, was thrown in the vast sea of the common law by the seminal decision of the U.S. Supreme Court in **Marbury v Madison** **5 US (1 Cranch) 137 (1803)**, when Chief Justice Marshall pronounced that it is:  
  
“the province and duty of the judicial department to say what the law is.”
2. The ripples created by this pebble have today swelled into a tidal wave called **judicial review**, by which a court of law reviews some act, or a failure to act, by a government official or entity, to ensure conformity with the law.
3. Chief Justice Marshall is, so far, recorded to be the person to have served longest as Chief Justice of the U.S. – some 34 years! (Marshall also had the distinction of serving concurrently as Secretary of State and Chief Justice, having been appointed to the former office by President John Adams who nominated him as well for the office of Chief Justice in 1801, to which position he was confirmed in January of that year). As Chief Justice, Marshall pioneered the establishment and affirmation of the U.S. Supreme Court as the final authority on the meaning and interpretation of the U.S. Constitution.
4. It is for course now impossible for any latter-day judge, including any Chief Justice for that matter, to repeat the double incumbency of Chief Justice Marshall!
5. But the legacy he bequeathed, that is, that it is the province and duty of the judicial department to say what the law is, has had a poignancy and resonance for all who hold judicial office throughout the ages and the very development of the law itself.

6. This is particularly true in the field of human rights.
7. Human Rights have today, in a material sense, become the theology, if not the dogma, of the new millennium; for there can be no doubt that the Twenty First Century has dawned with the centrality of human rights not only **within** states, but also **between** states at the international level. Today, respect for and observance of the human rights of its own people have become a kind of litmus test for good governance and the legitimacy of any government. The present hue and cry over President Robert Mugabe in Zimbabwe and others of the same ilk, are cases in point.
8. Increasingly therefore, human rights have come to feature in the relationships **between** States. The on-going case between Mexico and the United States of America before the International Court of Justice (I.C.J.) in the Hague over the alleged denial of the right to Consular access to some Mexicans charged and convicted for capital offences in the U.S.A. is a case also in point. Although this case is nominally about disputes arising out of the interpretation or application of the Vienna Convention on Consular Relations, it is in substance, about the right of a foreign national to have the benefit and advice of his Consular representative on arrest and accusation and trial in a foreign country.
9. The I.C.J. issued on 5<sup>th</sup> February of this year, what is, in effect, a stay of the execution of the Mexican nationals convicted of capital offences, until its final judgment in the case. The Court decided to issue this stay (in the phraseology of the practice and procedure of the I.C.J. “provisional measures”) because it reasoned that it was

*“apparent from the information before the Court in this case that ... (the) Mexican nationals ... are at risk of execution in the coming months, or possibly even weeks; whereas their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico; and that the circumstances require that it indicate provisional measures to preserve those rights, as Article 41 of its Statute provides.”*

The Court also ordered the Government of the U.S.A. to inform it of all the measures taken to implement the stay it granted – (I.C.J. 2003 – 5<sup>th</sup> February, General List No. 128).

10. Underlying this case is the issue of capital punishment as is made clear in the Declaration of Judge Oda who, although concurring in the unanimous stay granted, appended a separate Declaration in which he recalled his previous statement in the **LaGrand case (Germany v U.S.A.) Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999(1)** in which he said:

*“Whether capital punishment would be contrary to Article 6 of the 1966 International Covenant on Civil and Political Rights is not a matter to be determined by the International Court of Justice – at least in the present situation.”*

11. **Judicial Review**, in the broadest sense of the expression, to include the adjudication by a court of law, whether on an application for habeas corpus or a constitutional motion, of some act or omission of an agency of the state or public body or authority to determine its legality, is the primary vehicle through which human rights have come to be pursued and

advanced in the judicial context. I include, of course, constitutional challenges under **judicial review**.

12. Despite the admittedly qualified record, perhaps the most abiding legacy of the Twentieth Century in the social and political fields, and some would argue even in the economic sphere as well, is the heightened awareness and spread of human rights. This was achieved through various Treaties, Conventions, Declarations and Protocols and Standards, at both the international and regional levels. As a result, it can be said today that there is a veritable **International Bill of Rights**, encompassing among others, the human rights provisions of the U.N. Charter, the Universal Declaration of Human Rights, the two International Covenants on Human Rights (the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights) and the Optional Protocol to the Covenant on Civil Rights.
13. The reproduction of most of the substance of the provisions of the International Bill of Human Rights in Fundamental Human Rights Chapters of most national Constitutions has, with progressive judicial interpretation, whittled down the resistance to the application of international treaties by domestic courts in the absence of incorporation in domestic laws.
14. There is therefore today, a perceptibly growing body of jurisprudence that in fleshing out the provisions on fundamental human rights and freedoms declared in national Constitutions, international treaties, conventions and Declarations are a relevant source material for interpretation.
15. This trend is especially noticeable in Commonwealth Caribbean countries, where, increasingly, the courts are having recourse to these international sources to amplify their interpretation of national Constitutional provisions on fundamental human rights.
16. **The Bangalore Principles** on the domestic application of international human rights norms, sponsored by successive Commonwealth judicial colloquia, continue to provide inspiration to the courts as they stress the need for the incorporation of international human rights law into domestic jurisprudence.
17. Some Commonwealth Courts, notwithstanding the non-incorporation of some international human rights provisions in domestic legislation, have taken and continue to take these provisions into account in interpreting national Constitution and domestic law.
18. It is an undeniable fact that however laudatory the provisions for the protection and advancement of human rights may be, whether in international instruments or domestic legislation, it is the courts which in reality, ultimately determine the contours and contents of these provisions. Therefore, a progressive and proactive judiciary, as well as an acute and vigilant Bar, is necessary for the meaningful protection of human rights provisions. Very often the vigour and salience of the judgment of a court are materially influenced by the submissions of counsel, especially in the adversarial setting.
19. Perhaps no single issue in the administration of justice in Commonwealth Caribbean countries has produced as much emotion, debate, anguish and divisiveness, even in judicial circles, as that of capital punishment.

This is as it should be, for capital punishment concerns the most fundamental and elemental of all human rights – **the right to life**, without which, of course, all other rights

become academic, if not plain useless.

20. In historical context, capital punishment was part and parcel of the penal armoury of these countries, as it was in almost every other jurisdiction, long before they achieved independence. However, at independence every Commonwealth country, including, of course, Commonwealth Caribbean countries, acquired or adopted a panoply of **fundamental human rights**, as an entrenched part of their national Constitutions.
21. Over time, the imposition of the death penalty has, in various Commonwealth Caribbean countries, come to be tested, impugned and challenged in the light of the fundamental human rights provisions in national Constitutions with increasing invocation of international human rights provisions and jurisprudence in the process.
22. The responses of the courts have not been uniform or predictable. In particular, the responses of the Privy Council, which is the ultimate final court of appeal for almost all Commonwealth Caribbean countries (except Guyana), have been the focus of the controversy.
23. The challenges would stem almost from cases in which the conviction for the offence (invariably murder) would have been upheld on appeals through the hierarchy of the courts. The focus then shifts to impugning the imposition of the sentence (capital punishment) flowing from the conviction.
24. The strategies deployed in this process have been to invoke one or the other, sometimes in combination, of the fundamental human rights provisions of the Constitution in order to nullify or negate the conviction for murder and sentence of capital punishment.
25. The Constitutional provisions to which recourse has often been made to impugn capital punishment are to be found in virtually every Commonwealth Caribbean Constitutions. These are 1) **the right to life**, 2) **the protection against inhuman or degrading punishment or treatment** and 3) **the guarantee of the protection of the law**.
26. For example, after some hesitant and reluctant stance to hold that the length of time spent in the condemned cell since sentence and proposed execution of capital punishment could not be regarded as cruel, inhuman or degrading punishment – in **de Frietas v Benny (1976) A.C. 239**, **Abbott v A.G. of Trinidad and Tobago (1979) 1 WIR 1342 (P.C.)** and **Riley and Others v A.G. of Jamaica (1982) 3 All E.R. 469**, the Privy Council (whose decisions are of course binding in the jurisdictions where it is the final Court), did what, with respect, can be described as a **volte face** in 1993, in the celebrated **Pratt and Morgan v A.G. of Jamaica (1993) 43 WR 30**.
27. No doubt, the groundwork for this sea change was laid in the powerful dissenting judgments of Lord Scarman and Lord Brighman and in **Riley supra** in which, after reviewing a number of authorities relating to ‘cruel and inhuman punishment’ their Lordships stated:

*“It is no exaggeration, therefore, to say that the jurisprudence of the civilized world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognized and acknowledged that prolonged delay in executing a sentence of*

*death can make the punishment when it comes inhuman degrading” – at p. 479.*

28. This dissentient view was the rather bold precursor, as events were to show later, in 1993, some eleven years afterwards proving that "a dissenting judgment anchored in the circumstances of today sometimes appeals to the judges of tomorrow."
29. Then came **Pratt and Morgan** – where 23 prisoners had been awaiting execution for more than 10 years after their conviction and sentence, while some 82 had been under sentence of death for more than five years. The Privy Council sitting **en banc**, as it were, with an exceptional panel of seven judges, instead of the usual five, decided to overrule its previous decision in **Riley supra** and affirmed that prolonged delay in carrying out capital punishment, amounting to five years might be unconstitutional as inhuman treatment.
30. **Pratt and Morgan** unleashed shock waves in the Caribbean: given the reality of the constraints of social and economic factors that the administration of justice labours under in most of the region, it came to be viewed as almost an affront for a Court far removed from the scene, albeit, the highest Court, to attempt to put a stop to the carrying out of what in the eyes of many was only the sentence imposed by law.
31. This view was reminiscent of the opinion of a former Chief Justice in the region who regarded a constitutional challenge to the death sentence as tantamount to the exertion by (the) Court of a forbidden power to declare as a nullity a valid and subsisting law of the land.
32. But dye was cast, the Rubicon had been crossed: in subsequent cases, such as **Guerra v Baptiste (1995) 47 WIR 439**; and **Henfield v A.G. of Bahamas (1996) 49 WIR**, the Privy Council refined its decision as it were, in **Pratt and Morgan**, holding that the five year period was not a rigid yardstick but **a norm** from which the Courts were free to depart if they considered that the circumstances warranted such departure. In **Henfield** the period that had elapsed since the death sentence was imposed was three and a half years.
33. I had the opportunity in the Supreme Court of Belize in 2001, in light of these authorities to commute to life imprisonment, death sentences that had been imposed on prisoners for murders, on a constitutional challenge that it would, in view of the time that had elapsed since their sentencing, be cruel and inhuman to then execute them – **Mejia and Guevara** (Judgment dated 11 June 2001).
34. Progressively however, with increasing refinement and sophistication, legal strategies based on Constitutional provisions and international human rights instruments came to be deployed to hold in check the imposition and carrying out of capital punishment.
35. The case of **Neville Lewis and others v The A.G. of Jamaica** decided by the Privy Council on 12 September 2000 marked a further landmark in this process. In this case six appellants had been sentenced to death after conviction for murder. They raised two important issues before the Privy Council, viz., a) whether on a petition for mercy (after all domestic attempts to set aside their convictions or to prevent execution have been exhausted) they were entitled to know what material the Mercy Committee had before it and to make representations as to why mercy should be granted; and b) whether the appellants had a right not to be executed before the Inter-American Commission on

Human Rights or the United Nations Human Rights Committee had finally reported on their petitions.

36. In **Neville Lewis**, the Privy Council affirmed that the process of mercy was reviewable to ensure its compliance with the rules of natural justice and found that in that case there was present “a breach of the rules of fairness, of natural justice which means that the appellants did not enjoy the ‘protection of the law’ either within the meaning of section 13 of the Constitution or at common law. **In considering what natural justice requires, it is relevant to have regard to international human rights norms set out in treaties to which the state is a party whether or not those are independently enforceable in domestic law.**” (emphasis added)
37. The Privy Council also affirmed that the appellants had the right to the disclosure of all materials before the Mercy Committee. It is important to note here that the Board relied on the Advisory Opinion of the Inter-American Court on Human Rights on Article 4 of the American Convention on Human Rights 1969 (The Pact of San Jose Costa Rica) (Advisory Opinion OC - 3/83, Restrictions to the Death Penalty) of 8 September 1983) to hold that states’ obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end **are subject to judicial review** ... “The procedures followed in the process of considering a man’s petition are thus in their Lordships’ view open to judicial review.”
38. The Board also affirmed that if the opinion of the Mercy Committee was taken in an arbitrary or perverse way – “on the basis of a throw of a dice or the basis of the convicted man’s hairstyle” – or was otherwise arrived at in an improper or unreasonable way, the Court should **prima facie** be able to investigate it.” This, I submit, is not far from saying that the merit of a decision of a mercy committee may be subject to judicial review.
39. In the present context, significantly the Privy Council held that the execution of the appellants consequent upon the decision of the Mercy Committee but without consideration of the report of the Inter-American Commission on Human Rights (to which some of the appellants had sent petitions) would be unlawful. As the Board stated:
- “In their Lordships’ view when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions, the petitioner became entitled under the protection of the law provision in section 13 (of the Constitution) to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the (Mercy Committee) to consider before it dealt with the application for mercy and to the staying of execution until those reports have been received and considered.”*
40. Another significant landmark in judicially narrowing the scope of capital punishment as a sentence for the offence of murder was, again, registered by the Privy Council last year in a trilogy of cases: **Reyes v The Queen** (2002) 2 WLR 1034; **R v Hughes** (2002) 2 WLR 1058; and **Fox v The Queen** (2002) 2 WLR 1077.
41. **Reyes v The Queen** is a case emanating from Belize. It is, I think, important to quote extensively from the reported headnote of the case, where the facts and conclusions are conveniently set out. This reads as follows:

*“The defendant was convicted on two counts of murder by shooting, which by*

*section 102(3)(b) of the Criminal Code of Belize Criminal Code, s 102, as amended: see post, para 4 was classified as a class A murder. Pursuant to section 102(1), which prescribed a mandatory death penalty for class A murder, he was sentenced to death on each count. By the proviso to section 102(1) in the case of a murder classified as class B the court might, where there were special extenuating circumstances, refrain from imposing a death sentence and instead pass a sentence of life imprisonment. The defendant's appeal against conviction and sentence was dismissed by the Court of Appeal of Belize. The Judicial Committee of the Privy Council dismissed his petition for special leave to appeal against conviction but granted leave to appeal against sentence so that he could challenge the constitutionality of the mandatory death penalty for class A murder on the ground, among others, that it infringed his right not to be subjected to inhuman or degrading punishment or other treatment, contrary to section 7 of the Constitution of Belize. Constitution of Belize s2: see post, para 6. By section 2 any law inconsistent with the Constitution was void to the extent of the inconsistency.*

*It was held, allowing the appeal, that since the character of the offence of murder by shooting could vary widely the imposition of the death penalty for some such offences would be plainly excessive and disproportionate, and so to deny a person convicted of murder by shooting the opportunity to seek to persuade the court, before sentence was passed, that in all the circumstances to condemn him to death would be disproportionate and inappropriate would be to treat him as no human being should be treated and thus to deny his basic humanity; that section 102 of the Criminal Code, in requiring a mandatory sentence of death to be passed on the defendant on conviction of murder by shooting and thereby precluding any judicial consideration, of the humanity of condemning him to death, therefore subjected him to inhuman or degrading punishment or other treatment incompatible with the right afforded to him by section 7 of the Constitution; that that constitutional defect in the sentencing process could not be remedied by the subsequent opportunity to seek mercy from the executive pursuant to sections 52 and 53 of the Constitution; that section 102(3)(b) of the Code, to the extent that it indiscriminately referred to any murder by shooting, was thus void by virtue of section 2 of the Constitution, and, in accordance with section 134(1) of the constitution, any murder by shooting was to be treated as a class B murder as defined in section 102(3) of the Code; and that, accordingly, the death sentences would be quashed and the case remitted to a judge of the Supreme Court of Belize to pass appropriate sentence on the defendant after hearing or receiving any evidence and submission on his behalf."*

42. The offence of murder is punished on conviction by the imposition of capital punishment in all Commonwealth Caribbean countries. Some have, like Belize, introduced some legislative measure of flexibility by dividing the offence of murder into **Class A** and **Class B**. For the former, capital punishment is, or rather was, until **Reyes**, regarded as **mandatory**, leaving the sentencing court no choice in the matter. For **Class B**, the sentencer is given a discretion whether to impose capital punishment or not: if he finds special extenuating circumstances, which he should record in writing, he need not impose the death penalty.
43. But the principal effect of the three cases is to take away the **mandatoriness** from the sentence for murder, regardless of the type, whether class A or B, because in **Hughes** and

- Fox** there is no such classification in the laws of St. Lucia and Saint Christopher and Nevis (from whence they originated). The Privy Council held that the mandatory nature of the death sentence which the criminal law of those countries required to be imposed for all murders, made it inhuman or degrading punishment proscribed in the national Constitution.
44. Therefore, short of saying that capital punishment is unconstitutional, the decisions of the Privy Council regarding it today are perilously close to this position.
  45. This has regrettably, in my view, led to a rash of proposed constitutional amendments in some Commonwealth Caribbean countries, that would undermine the whole thrust and vitality of human rights. I say regrettable because, although these constitutional amendments are designed to counter the effects of the various decisions of the Privy Council, relating to capital punishment, there is nothing to stop amendments of constitutional provisions in future that would encroach on **other** human rights provision. That is, except the Courts!
  46. These ominous developments were presaged in a document circulated to the various Attorneys-General of the region in 2000 entitled: **Measures to Restore Confidence in the Criminal Justice System Arising from the Decisions of the Privy Council**.
  47. The proposed amendments would provide that prolonged delay and detention in inhuman conditions do not constitute bars to carrying out the death penalty and that Mercy Committee proceedings are non-justifiable either as to the procedure adopted or the substantive decision reached.
  48. Jamaica and Trinidad and Tobago, had much earlier, in fact, contracted their participation in some of the international human rights instruments and processes in reaction to some of the decisions of the Privy Council on capital punishment.
  49. The recommendations in the document have now appeared within prospect of adoption and realization, as Belize and Barbados have embarked on constitutional amendments that come perilously close to negating the string of decisions of the Privy Council regarding capital punishment.
  50. For example in the **Belize Constitution Fifth Amendment** published on 7<sup>th</sup> September 2002, it is proposed to amend section 7 (protecting against inhuman treatment) along the following lines:

*“Section 7 of the Constitution is hereby amended by renumbering the existing section as subsection (1) and by adding the following as subsection (2) immediately thereafter –*

*(2) The following shall not be held to be inconsistent with or in contravention of this section or anything in this Constitution or any other law:*

*(a) the imposition of a mandatory sentence of death or the execution of such a sentence;*

- (b) *any delay in executing a sentence of death imposed upon a person in respect of a criminal offence under the Laws of Belize of which has been convicted;*
- (c) *the holding of any person in prison or other lawful place of detention pending execution of a sentence of death imposed upon that person as provided in paragraph (a) in conditions or under arrangements which immediately before the coming into the force of the Belize Constitution (Fifth Amendment) Act 2002:-*
  - (i) *were prescribed by or under the Prisons Act, as then in force*
  - (ii) *were otherwise practised in Belize*

*in relation to persons so in prison or so detained.”*

51. I think it is a grave thing to embark on constitutional amendments for whatever reasons that would contract or read-down fundamental human rights enshrined in any national Constitution. It is salutary to remember the affirmation issued by a distinguished list of participants at the Judicial Colloquium on the Domestic Application of International Human Rights Norm in Bangalore from 27 – 30 December 1998. In a Declaration entitled **The Challenge of Bangalore: Making Human Rights a Practical Reality**, the participants reaffirmed that:

*“1. Fundamental human rights and freedoms are universal. They find expression in constitutional and legal systems throughout the world; they are anchored in the international human rights codes to which all genuine democratic states adhere, their meaning is illuminated by a rich body of case law, both international and national*

...

*17. It is a matter of public concern that some legislatures pass amendments to their constitutions or laws designed to erode or diminish fundamental and freedoms as interpreted and applied by national courts and by international human rights fora. This practice should not be resorted to and no amendment should be made which would destroy or impair the essential features of democratic societies governed by the rule of law.*

*19. The death penalty should not be extended to any offences to which it is not now applied in the particular country. States whose Constitutions preclude the determination by the Courts as to whether the sentence is inhuman and degrading should amend their constitutions to remove this fetter on judicial determination. The death penalty should be carried out, if at all, only after the exhaustion of all domestic and international legal remedies.”*

52. I conclude on the premise that even with the proposed constitutional amendments regarding capital punishment, the debate will continue for a long time to come, therefore

the ripples produced by the pebble in Marbury v Madison, judicial review, will continue as well, to have relevance and vitality.

### THE PATRICK REYES CASE

1. In the Patrick Reyes litigation the Privy Council, in effect, rendered capital punishment non-mandatory, by finding that even where the law provides for its mandatory imposition for the offence of murder, it would be unlawful to impose it without taking into account the individual circumstance of the commission of the offence, and the offender and affording him the opportunity to urge not to have the death sentence imposed; for otherwise the sentence would be inhuman and to deny the basis humanity of the convicted person and therefore unconstitutional.
2. In the light of this decision of the Privy Council, it set aside the sentence of death passed on Reyes and remitted the case back to Belize for the Supreme Court to pass appropriate sentence on him.
3. I had the unenviable task of having carrying out that exercise not having been the original trial judge.
4. In the course of my judgment and guided by the Privy Council's decision and other international decisions, I outlined some practice guidelines for the prosecution, trial and sentencing of accused persons charged with the offence of murder, along the following:
  1. As from time of committal, the prosecution should give notice as to whether it proposes to submit that the case is one for which the death penalty would be appropriate.
  2. The prosecution's notice should contain the grounds on which it submits that the death penalty is appropriate.
  3. In the event of the prosecution so indicating, and the trial judge considers that the death penalty may be appropriate, the judge should, at the time of the allocutus, specify the date of the sentence hearing which should provide reasonable time for the defence to prepare.
  4. The trial judge should at that stage give directions in relation to the conduct of the sentence hearing, as well as indicating the materials that should be made available – so that the person who has been convicted, may have reasonable materials for the preparation and presentation of his case on sentencing.
  5. At the same time, the judge should specify a time for the defence to provide notice of any points or evidence it proposes to rely on in relation to the sentence.
  6. The sentencing judge should give reasons for his decision including a statement as to the grounds on which he finds that the death penalty must be imposed, in the event that he so conclude. The judge should also specify the reasons for rejecting any mitigating circumstances.

I was influenced in this exercise by the realisation that sentencing is quintessentially a judicial act – and a non-judicial body cannot decide what is the appropriate measure of punishment to be visited on a defendant for the crime he has committed.

I realise of course in some jurisdictions, like in some states in the U.S.A., the sentence for the offence in capital cases is left to the jury to determine. There may be some merit in this.

## THE AFRICAN SCENE

1. The scene in Africa in relation to human rights does not readily inspire confidence. In fact from media reports, it is all too easy to be dismissive about human rights in Africa.
2. It is undeniable that Africa's autocratic colonial past has cast a baleful shadow over human rights in that continent even after the advent of independent national governance.
3. Military coups, despotic and undemocratic regimes and civil wars, in an environment of divisive tribal and clan loyalties have all combined, to produce weak fragile governance and economies not conducive to advancing human rights.
4. But it is, to my mind, precisely in this context that the struggle for the advancement of human rights should be intensified.
5. Regrettably however, despite impressive constitutions guaranteeing human rights, much, much more, needs to be done to make human rights a reality in most of Africa.
6. There is a statist culture prevalent in much of Africa that is centered on the executive, often the president. In much of Africa the president as the "Head of State" means precisely what it really states. The president as Head of State, is often the focus and repository of much of the powers of governance to the virtual exclusion or only sufferance of other vital governmental or public institutions like the Legislature and the Judiciary.
7. In most African countries, the judiciary which should be the bulwark of human rights, is reduced to the status of the "Lion under the Throne." Courts are often reluctant or hesitant to declare unconstitutional legislation which is passed by the Legislature that is often itself, under the influence of the executive.
8. Where the judiciary has the temerity to pronounce the invalidity of legislation or governmental action, the outcome is often completely disregarded with impunity. There is no doubt that judicial independence is very precarious in much of Africa.
9. There are however refreshing and isolated examples. **The Catholic Commission for Justice and Peace in Zimbabwe v The A.G. and others (1993) LLRC 279**, the Supreme Court of Zimbabwe considered that delays of 52 months and 72 months from the date of imposition of sentence of death to proposed date of execution fell foul of the condemned prisoner's rights guaranteed in section 15(1) against inhuman punishment.

It is refreshing to remember this decision which was given even the teeth of the refusal of executive clemency, came ahead of the **Pratt and Morgan** decision in the Privy Council.

10. There is also the seminal decision in **The State v Makwanyane and Another** where the Constitutional Court of South Africa virtually held capital punishment unconstitutional in the light of some human rights provisions in the Constitution of that country. The Court said:

"Taking in account the fact that the carrying out of the death sentence destroyed life (protected without reservation under section 9 of the Constitution); that it annihilated human dignity (protected under section 10); that its enforcement was subject to arbitrariness and inequality due

to the differences in the application of the law in different parts of the country and the inability of most accused through poverty and other factors to obtain a level of legal advice and representation commensurate with the seriousness of the offence with which they were charged and the penalty with which they were threatened; that the wrongful carrying out of the death penalty through miscarriage of justice was irremediable; and notwithstanding its value as a deterrent and the fact that public opinion might still be in favour of its retention; in the context of the Constitution and purposively construed, and giving the words of section 11(2) the broader meaning to which they were entitled at this stage of the inquiry, the death penalty was indeed to be categorised as a cruel, inhuman and degrading punishment.”

11. On the continental level, the Organization of African Unity (OAU) adopted in 1981, the **African Charter on Human and People’s Rights**. This instrument entered into force on 21<sup>st</sup> October, 1986. It has been ratified by at least 50 African States. The African Charter established a system for the promotion and protection of human rights that is designed and intended to function within the institutional framework of the OAU, now replaced by the African Union (AU) since last year.
12. This linkage with the institutional framework of what is undoubtedly a political organization, is in my view, the weakest factor in the African Charter. The Assembly of the Heads of States and Government, which meets once a year, is the highest policy-making and decision-taking body of the AU. This is because such a body would hardly be expected to hold one of its members readily to account.
13. The African Charter differs from both the European and American Conventions on Human Rights –
  - 1) The African Charter provides for not only **rights** but also **duties**
  - 2) The Charter, in addition to guaranteeing civil and political rights, it also guarantees economic, social and cultural rights
  - 3) As its title states, it provides not only for individual rights but also **peoples’ rights**
  - 4) The African Charter also grants to States Parties to it, because of the way it is drafted, the right to impose very extensive restrictions and limitations on the various rights it provides. It contains very extensive “claw back” provisions such as for example, **Article 8** of the Charter which provides freedom of conscience, the profession and free practice of religion however also declares “no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.”

**Article 9(2)** stating the right to freedom of expression declares that “every individual shall have the right to express and disseminate his opinions within the law.”

Also, **Article 10(1)** provides that “every individual shall have the right to free association provides that he abides by the law.”
14. The words “Peoples’ Rights” are not defined as such, but it is a reflection of the struggle for the right to self-determination that accompanied the attainment of independence for

some of the African States. In fact the expression “Peoples’ rights” was a last minute addition.

15. Unlike other regional provisions concerning human rights, especially in the area of enforcement, the African Charter notably does not provide for a Human Rights Court.

Instead, the emphasis is on negotiations and conciliation.

16. The basic obligation of the States Parties to the African Charter is stated as follows in **Article 1** which provides that they “shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.”

**Article 62** requires the States Parties to report biennially “on the legislative or other measures” they have adopted to give effect to the rights the Charter guarantees.

17. The African Charter however provides for the **African Commission on Human Peoples’ Rights** as part of the institutional framework of the OAU (now the AU). This Commission is charged with the responsibility “to promote human and peoples’ rights and ensure their protection in Africa.”

18. This Commission is composed of 11 members elected by the Assembly of Heads of States and Government from a list of names presented by the States themselves, although the members serve in their individual capacities and not as government representatives.

19. The Commission’s functions are principally two: promotional and quasi-judicial. Under its promotional functions, the Commission:

- i) undertake studies
- ii) convene conferences
- iii) initiate publication programmes
- iv) disseminate information and collaborate with national and local institutions concerned with human and people’s rights
- v) may give its views or make a recommendations to government.

20. Under the quasi-judicial functions of the Commission, it has interpretative powers which are extensive, akin to Advisory Opinions: “to interpret all the provisions of the Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU.

21. The Commission can also deal with interstate complaints.

22. The Commission may also deal with individual complaints – however, the mechanism is not designed to deal with individual cases of violations of human rights – only in “special cases which reveal the existence of a **series of serious** or **massive violations** of human and peoples’ rights.”

The violations therefore have to be **large scale** and not **isolated**.”

23. But the need for the Commission to refer after its determination or admissibility of complaints, to the Assembly of Heads of State is in my view, the weakest link in the

African mechanism, for the Commission can only investigate if the Assembly requests it to.

Also, the report of the Commission remains confidential until allowed by the Assembly to publish it.

24. This limitation on publicity severely compromises the ability of the Commission to sanction errant states by publishing its report!
25. One of the tragedies that visited on the African mechanisms for the promotion and protection of human rights was when the military seized power in June 1995 in The Gambia. Banjul, The Gambia was the headquarters and seat of the African Commission on Human and Peoples' Rights. The illegal seizure of power by the military resulted, as in the case of all military regimes set up as a consequence, in massive and sustained violations of the very rights the Commission was established to further."
26. More sustained dissemination of the provisions of the African Charter and civic education on human rights will help to reinforce the admittedly weak fabric of human rights in African as a whole.