

THE PROTECTION OF HUMAN RIGHTS IN AFRICA

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PREFACE

The beginnings of this research project were quite humble: in 1986, after a symposium on a Bill of Rights for South Africa held in Pretoria, I was asked by the editor of the Journal for Contemporary African Studies Dr Denis Venter to write an article to be published in that journal on a "Bill of Rights for South Africa." He also asked me to incorporate the African perspective. Not only did he do that, but he also provided me with information on the position of human rights in Africa.

My doing research on this issue and the writing of the article coincided with my study leave in 1987. I had the opportunity to do this at the University of Illinois Urbana-Champaign where I was exposed to one of the top three libraries in the United States of America. This was made possible by the Faculty Fellowship that I received from the University of Illinois. I am infinitely grateful to the University of Illinois for that opportunity.

The information that I collected for this article was far more than I needed for this limited project. I only used a small portion thereof. I thought it would be wise to use the remainder for another purpose namely the acquisition of a further qualification. Moreover, it could still be a further contribution to the Bill-of-Rights debate in South Africa. This was made more attractive by the fact that 1988 was among other things, the fortieth anniversary of the Universal Declaration of Human Rights. No more fitting way of participating in this momentous international event was thought of than this.

I am immensely indebted to Dr Venter for being responsible for the conception of this project and for assisting with some valuable research material. I also wish to thank the Research

Committee of the University of Zululand for the funds it made available to me to complete this research. To Prof ES Mchunu I owe a debt of gratitude for his willingness to supervise this project.

Mr AM Ndlovu, my colleague from the Department of Political Science, greatly assisted me with the proofreading of certain chapters. I am extremely grateful for his assistance. The usual disclaimer, of course, applies. For whatever assistance my student assistants, Mr CS Zondi and Miss MM Malatji gave me, I thank them sincerely.

Miss TA Ngema deserves to be complimented for her patience in typing and retyping the manuscript.

I am also grateful to my family for all the sacrifices they made during this research project and my whole academic career.

To God alone be glory!

This dissertation is dedicated to
OLIVIA for all she has meant to me.

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SUMMARY

Human rights are rights which a person has or should have by virtue of his being a human being. This implies that a state should allow a certain measure of individual liberty. Although the idea of human rights has become accepted in the international community, the observance of human rights varies from place to place.

On the attainment of independence most of the African states adopted constitutions enshrining bills of rights justiciable by the courts. Despite these bills of rights, many of the African states have been guilty of gross and systematic violation of human rights. This can be ascribed to social economic and political factors. These largely stem from the colonial background from which these states emerged. Colonial rule was extremely authoritarian and did not provide encouragement for the protection of human rights. This tradition was extended to the post-independence era. Although the independence constitutions provided for the protection of human rights, these constitutions were largely imposed on the independent states and consequently lacked legitimacy.

The Organization of African Unity initially did not have the protection of human rights as one of its major objects largely because of the prevailing political circumstances at the time of

its establishment. When member states violated human rights the OAU raised the defence of non-interference in the domestic affairs of a sovereign state. In this way African states applied double standards when it comes to the violation of human rights especially because they were critical of the racist policies of the South African government.

The adoption of the Charter of Human and Peoples' Rights in 1981 by the OAU has provided a regional mechanism for the promotion of human rights in Africa. Despite its limitations this charter will contribute towards the observance of human rights in Africa. Moreover, it implies an end to the non-interference defence.

The African experience provides a significant lesson for the bill-of-rights debate in South Africa.

OPSOMMING

Menseregte is regte wat 'n persoon besit of moet hê vanweë sy menswees. Dit impliseer dat die staat aan die individu 'n mate van individuele vryheid moet vergun. Alhoewel die idee van menseregte in die internasionale gemeenskap reeds aanvaar is, verskil die beskerming van menseregte van plek tot plek.

By onafhanklikheidwording het die meeste van die Afrika - state konstitusies wat aktes van menseregte verskaans, aangeneem. Ten spyte van hierdie menseregteaktes is baie van die onafhanklike Afrika - state aan verspreide en sistematiese verkragting van menseregte skuldig. Hierdie toestand kan aan sosio-ekonomiese en politieke faktore toegeskryf word. Hulle oorsprong is die koloniale agtergrond. Koloniale bewind was uiters outoritêr en het nie die beskerming en bevordering van menseregte aangemoedig nie. Hierdie tradisie het na onafhanklikwording voortgeleef. Alhoewel die onafhanklikheidskonstitusies vir die beskerming van menseregte voorsiening gemaak het, is hierdie konstitusies vir die onafhanklike state voorgeskryf en het dit gevolglik geen wettigheid gehad nie.

Die organiesasie van Afrika Eenheid het aanvanklik as gevolg van die destydse heersende politieke omstandighede nie die beskerming van menseregte as een van sy doelstellings gehad nie. As die

ledestate van die organisasie menseregte geskend het, het die OAE die verweer van nie - inmenging in die binnelandse sake van 'n soewereine staat geopper. In hierdie opsig het Afrika - state waar dit om die beskerming van menseregte gaan dubbele standaarde toegepas veral as mens in ag neem dat hulle teenoor die rassistiese beleid van die Suid-Afrikaanse regeringg krities was.

Toe die OAE in 1981 die handves van Mense-en Volksregte aangeneem het, is voorsiening vir 'n regionale meganisme vir die beskerming van menseregte in Afrika gemaak. Ten spyte van die beperkte waarde van die handves, sal dit tot groter bevordering van menseregte in Afrika bydra. Dit het ook gevolg die einde van die verweer van nie-inmenging in die interne sake van 'n land, tot gevolg gehad.

Afrika se geskiedenis in soverre dit die beskerming van menseregte betref, is van groot belang in die debat oor die moontlikheid van 'n handves vir menseregte vir Suid-Afrika.

ABBREVIATIONS

<u>CILSA</u>	:	<u>Comparative and International Law Journal of Southern Africa.</u>
<u>IPSVT Bulletin</u>	:	<u>Bulletin of the Institute for Public Service and Vocational Training.</u>
<u>JAL</u>	:	<u>Jornal of African Law.</u>
<u>SAJHR</u>	:	<u>South African Journal on Human Rights.</u>
<u>SALJ</u>	:	<u>South African Law Journal.</u>
<u>SAYIL</u>	:	<u>South African Yearbook of International Law.</u>
<u>THRHR</u>	:	<u>Tydskrif vir Hedendaagse Romeins-Hollandse Reg.</u>
<u>TRW</u>	:	<u>Tydskrif vir Regswetenskap</u>

CHAPTER 1

THEORETICAL AND CONCEPTUAL FRAMEWORK

1.1 Introduction

The issue of human rights has been quite topical in contemporary international politics owing largely to the zealous efforts of the United Nations and its specialized agencies and the transnational organizations to promote respect for and observance of basic human values by all governments of the world. So profound has been this dedication that today political systems and governmental structures are evaluated according to their conformity with the current views on human rights.¹

The United Nation's approach to human rights is enshrined in the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights and its Optional Protocol of 1966 as well as the International Covenant on Economic, Social and Cultural Rights of 1966. These four instruments

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1. JD van der Vyver "The Concept of Human Rights. Its History, Contents and Meaning" in CF Forsyth and JE Schiller (eds) Human Rights: The Cape Town Conference (1979) 10; A Naidu Fundamental Human Rights: A Bill of Rights for South Africa (1988) et seq. For a bird's eye view of the literature on human rights see JP Martin and L Henkin Human Rights Bibliography (1983).

constitute the "International Bill of Rights."²

It is therefore no longer an issue whether human rights are really rights or merely moral claims; it is today accepted that "human rights are claims asserted and recognized 'as of right,' not claims upon love, or grace or brotherhood, or charity: one does not have to earn or deserve them. They are not merely aspirations or moral assertions but, increasingly, legal claims under some applicable law."³

Notwithstanding the cogency of the above statement, it needs some qualification. Although some human rights have become protected by law in many countries and jurisdictions, others still remain aspirations to be attained in future.⁴ Moreover, the distinction

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2. The United Nations Charter of 1945, in its preamble and human rights provisions, asserts the need for states to observe fundamental freedoms within their jurisdictions. The Universal Declaration of Human Rights contains detailed provisions of these fundamental rights. The International Covenant on Civil and Political Rights of 1966 which came into operation in 1976, provides a multi-lateral treaty which contains important civil freedoms. The European Convention on Human and Fundamental Freedoms affords protection to millions of Europeans with an International Bill of Rights. See P Sieghart The International Law of Human Rights (1983); CJR Dugard Human Rights and the South African Legal Order (1978) 46 et seq; E Kannyo Human Rights in Africa: Problems and Prospects (1980) 5; JD van der Vyver Seven Lectures on Human Rights (1976) 83 et seq.
 3. Henkin The Rights of Man Today (1978) 1-2.
 4. OC Eze Human Rights in Africa: Some Selected Problems (1984) 5; contra M Cranston What are Human Rights? (1973) 1-7.

between moral and legal rights is misleading. It creates a mistaken impression that there is always a clear distinction between the two, whereas they often overlap and legal rights are usually premised on some moral claim. What is beyond dispute is that the idea of human rights has been accepted, at least in principle, by almost all the governments of the world. Practice, however, often differs from theory and the observance of human rights varies from country to country.

If the protection of human rights is the yardstick whereby the international community judges states and governments, it, inevitably, follows that all states should clamour for this ideal in order to be acceptable to the international community. But, what has been the position in Africa? Before this question can be addressed, it is essential to define the concept of human rights.

1.2 The concept of human rights

It is not the aim here to be enmeshed in a political and theoretical controversy on the meaning of rights, their source, the basis of their authority and the relationship between rights and duties; considerable ink has been spilled on these issues over the centuries. Suffice it to say that a right is a legally

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protected interest. The foregoing statement is, however, begging the question because it does not spell out the criteria for determining the reason for such legal protection. The decision to have an interest legally protected depends largely on the legal views and convictions of a particular society. More precisely, it is the policy-makers of a particular society who decide on which interest is to be protected by law. Their views are often based on the historical development and values of that society. Broadly speaking, it can be said that whatever a human being has or has acquired to which he attaches some value, that he would like to have legally protected especially if there is competition from others for the same commodity or thing. Human rights, however, have an international dimension. They are defined by the international community in terms of what is perceived to be fundamental to human existence irrespective of what different societies may hold.

Rights in themselves may sometimes be controversial. To add a qualification of "human" to rights has some further implications. It implies that they are the rights of men and women, and not of animals or other entities although these entities may benefit

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5. WJ Hosten et al Introduction to South African Law and Legal Theory (1977) 277.
 6. On the question whether animals have rights see JMT Labuschagne "Regsubjektiviteit van die Diere" 1984 THRHR 344 et seq; contra JA Robinson "Labuschagne en Diere as Regsubjekte" 1985 THRHR 343 et seq.

therefrom. They are the rights which all human beings everywhere have or should have equally by virtue of being human irrespective of race, gender, or perhaps age, noble or ignoble descent, social class, national origin or ethnic or tribal affiliation, and regardless of wealth or poverty, occupation, talent, merit, religion, ideology or other personal idiosyncrasy.⁷

Although this is the view today, it was not always so. Significant questions have been posed about these rights in particular the extent to which these are universally applicable and whether there are any international standards for human rights. These questions are particularly important in the present discussion especially because the idea of human rights largely developed from the west.

That constitutional government and the framework for the rule of law evolved from the west has sometimes led some observers to question the universality of the philosophy and politics of human rights. But the emergence in the west of the state as an institution separate from kinship and socio-economic institutions, raised the fundamental question of the relationship of the citizen to the state. "In the absence of previous

7. Henkin 3; JS Scarritt "Socialist States and Human Rights Measurement in Africa" 1985 Africa Today 26.

personal intermediary relationships with the ruler, an individual could not be assured of protection from potential abuse and repression without institutional guarantees of justice and constitutional government."⁸

The spread of the western model of the state to other parts of the world, has resulted in "the factors which gave rise to the need for constitutional guarantees and led to the evolution of the philosophy of human rights in the west" becoming equally relevant to other parts of the world. Moreover, the essence of the concept of human rights is not alien to non-western cultures. Most of these cultures have traditionally emphasized the preservation of life and the promotion of human welfare.⁹

Ascribing these rights to one's humanity means that they are inalienable. This implies that they cannot be transferred, forfeited or lost by having been usurped or by failure to exercise or assert them, for whatever length of time.¹⁰

These rights are also commonly referred to as "fundamental." This means that they are important, that life, dignity, and other

8. Kannyo 3.

9. Kannyo 4; Scarritt 26.

10. Henkin 3; R Dworkin Taking Rights Seriously (1977). 184 et seq.

high human values depend on them. It does not imply that they are absolute and may never be curtailed for any purpose in whatever circumstances. No individual right is absolute; every right is limited by the rights of others. What it means is that "they are entitled to special protection enjoying at least a prima facie, presumptive inviolability, bowing only to compelling societal interests, in limited circumstances, for limited times¹¹ and purposes, and by limited means."

Human rights are rights against or rather upon society as represented by government and its officials. A good society therefore, according to the ideology of human rights, is one where individual rights flourish, and where the promotion and protection of individual rights constitute a public good. Although conflict often arises between protection of individual rights and some other public good, according to the ideology of human rights, in the resolution of this conflict individual rights should not be lightly sacrificed on utilitarian grounds even for the greater good of the greater number, or even for the general good of all. In accordance with this view the dichotomy between the individual and society is only temporary and superficial. In the long run it is in the interests of society¹² if the individual's right is protected.

11. Henkin *ibid*.

12. Henkin 2-3.

1.3 The rationale for the protection of human rights

The underlying reason behind the protection of human rights on the part of the government is an expression of the truism that the government is for the people. It emphasises that the government rules with the consent of the people. The government can be said to be truly representative of the people if it furthers the interests of the people it represents. No sane person will support a government that jeopardizes his interests. This is also a manifestation of the fact that a constitutional government involves limited government, a limitation which allows some scope for the freedom of the individual. Consequently, a constitutional government does not have unlimited powers.¹³

It is not the intention here to be embroiled in the controversy whether the protection of rights should also extend to group rights.¹⁴ The point of departure adopted here is that the effective protection of individual rights, especially the freedom

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13. BO Nwabueze Constitutionalism in the Emergent States (1973) 1; CH McIlwan Constitutionalism: Ancient and Modern (1974) 21-2; KC Wheare Modern Constitutions (1966) 137; DV Cowen The Foundations of Freedom (1961) 192.
 14. For this see F Venter "Menseregte, Groepsregte en 'n Proses na Groter Geregtigheid" 1986 SA Public Law 202 et seq; G Erasmus "n Akte van Menseregte vir Suid-Afrika" 1987 SA Public Law 100-103.

of association, effectively protects the rights of groups as well. There is no need to have special protection for certain groups. This is not to espouse extreme individualism. Certain rights have to be exercised in the context of society and have to take into account the interests of society. What is patently unacceptable is to protect the privileges of certain groups, based on race or colour or some other irrelevant consideration.

1.4 The classification of human rights

Although it is difficult to draw up a closed list of human rights, these are generally grouped into civil, political, social, economic and cultural rights. Civil and political rights include the right to self-determination, the right to life, freedom from torture and inhuman treatment, freedom from slavery and forced labour, the right to liberty and security, freedom of movement and choice of residence, the right to a fair trial, the right to privacy, freedom of thought, conscience and religion, freedom of opinion and expression, the right of assembly, freedom of association, the right to marry and found a family, the right to participate in one's government either directly or through freely elected representatives, the right to nationality and equality before the law.

Economic, social and cultural rights on the other hand embrace,

inter alia, the right to work; the right to just conditions of work; the right to fair remuneration; the right to an adequate standard of living; the right to organize, form and join trade unions; the right to collective bargaining; the right to equal pay for equal work; the right to social security; the right to property; the right to education; the right to participate in the cultural life and to enjoy the benefits of scientific progress. The grouping of these rights into various categories, however, should not be considered rigid because they are¹⁵ interrelated and inter-dependent. Moreover, some of these¹⁶ rights are not free from controversy.

It must be pointed out, however, that traditional civil and political rights are aimed at the protection of the citizen against arbitrary actions of the state. They are, therefore, negative in nature. They do not impose any positive obligation on the government, but merely require the government to refrain from interfering with certain rights and freedoms of the individual. Consequently, they are freedoms from and not freedoms to. Social and cultural rights, on the other hand, postulate the

15. Eze 5-6.

16. Dworkin 267 et seq; DM Davis "Human Rights - A Re-examination" 1980 SALJ 99 et seq; CF Forsyth "Human Rights and Ideology: A First Examination" 1980 SALJ 102 et seq; DM Davis "Human Rights - A Rebutter" 1980 SALJ 616 et seq; CF Forsyth "Human Rights and Ideology; Litis Constestatio" 1980 SALJ 622.

obligations of the state to provide or at least to create the conditions for access to those facilities which are now considered essential for modern life, among which are sufficient nutrition, housing, health care, and education.¹⁷ Consequently, these are much more difficult to implement on the part of the government.

1.5 The aim of the study

The aim of the study is to investigate the extent of observance or non-observance of human rights in the independent states of Africa. It is also aimed at ascertaining the reasons behind such observance or non-observance of human rights. The main focus of the study will be on independent Africa. It will not extend to South Africa. It is well known that South Africa is regarded by the international community as one of the chief violators of human rights as a result of its policy of apartheid. In fact, apartheid has even been declared an international crime against humanity.¹⁸ The position of human rights in South Africa is well

17. Kannyo 4.

18. International Convention on the Suppression and Punishment of the Crime of Apartheid; see also H Booysen "Convention on the Crime of Apartheid" 1976 SAYIL 56; Eze 103 et seq.

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documented.

The findings of this study will hopefully be of benefit in providing a scenario for the possible future constitutional and political development of South Africa. They may throw light on what may be the result of constitutional change in South Africa and assist in avoiding some of the unhappy events which have characterized the rest of the continent of Africa.

The condition of human rights in Africa evokes both cynicism and despair. The cynic will be able to stand up and say there is no example to follow from any of the African states when it comes to the protection of human rights. The despairing one will wonder whether there is any hope for the future protection of human rights in Africa and even in South Africa. An attempt will be made to have a calm and dispassionate evaluation of the position in Africa. The aim of this is undoubtedly not to create the impression that what has happened in Africa will happen in South Africa, but that given the same conditions it may happen. We must, therefore, take precautions to forestall this.

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19. On this see inter alia JD van der Vyver Die Juridiese Sin van die Leerstuk van Menseregte unpublished LLD thesis Pret (1974); JD van der Vyver Die Beskerming van Menseregte in Suid-Afrika (1975); JD van der Vyver Seven Lectures on Human Rights (1976); CJR Dugard Human Rights and the South African Legal Order (1978); AS Mathews Law, Order and Liberty in South Africa (1971); A S Mathews Freedom State Security and the Rule of Law (1986); ST van der Horst (ed) Race Discrimination in South Africa (1981); A Rycroft (ed) Race and the Rule of Law in South Africa (1987).

1.6 Scope of the investigation

The present study is a general one. It does not focus on any particular country in Africa. But, there are certain states in Africa which will enjoy frequent reference. Most of them belong to the British commonwealth. Some of these merit mentioning. These are Ghana, Nigeria, Kenya, Tanzania, Malawi, Zambia, Uganda, Lesotho, Swaziland, Botswana and Zimbabwe. The choice of these was dictated by their importance in the history of the protection of human rights in Africa. Significant events have taken place in these countries in the area of human rights: either gross violations, or modest attempts in the protection, of human rights.

A major limitation of this investigation is that it is based only on literature study and not on empirical research. Even some literature on Africa is not easily accessible. This accounts for the limited scope of this investigation. Yet the major thrust of this investigation is a theoretical one, namely the drawing of inferences on certain events which have taken place in Africa and their causes with the object of providing a scenario for future constitutional development in South Africa. This is because most of the African states have shared a common historical background, namely colonialism.

The weakness of this broad comparison is that it may be superficial and lack any systematic treatment of any one country. The advantage of it, on the other hand, is that it may provide a more objective and realistic appraisal of the state of human-rights protection in Africa.

1.7 Statement of the problem

Independent Africa has been characterized by the gross consistent and wide-spread violation of human rights. This seems to be strange because one would have expected the new states to be paragons of liberty as a result of their experience of colonialism. It is a notorious fact that colonialism was extremely authoritarian and repressive. African national leaders were critical of this. When many of the African states emerged from colonialism, hopes were high that at last the era of liberty had dawned. The picture has been totally different. High hopes were dashed and replicas of authoritarian regimes have emerged.

The picture of human rights in Africa has been pretty grim. The traditional political rights respected in the western world have been violated. These include freedom of association, personal liberty, freedom of thought, conscience and religion, freedom from torture, freedom to participate in the government of one's country, the independence of the judiciary coupled with fair

trial procedures, and members of certain ethnic groups have suffered gross violations of the most basic right, namely the right to life. No less than twenty-one countries in Africa have been listed by Amnesty International as violators of human rights. The result has been coups and military take-overs which have been no less repressive. This is a cause for concern. Recently, we have experienced the consequences of authoritarian rule on our doorsteps; two successful but bloodless coups took place in Lesotho and Transkei and an abortive one occurred in Bophuthatswana.

What has complicated the picture is that many of these countries emerged from colonial rule with impressive bills of rights enshrined in constitutions modelled on western libertarian traditions. Although many of these bills of rights have been retained, many of their provisions have been violated. The fundamental question then is: what is the effect and value of a bill of rights? Moreover, which is the most effective way of protecting human rights? These questions are undoubtedly based on the assumption that the protection of human rights is a desirable objective in that it leads to stability and human fulfilment. For that reason ways and means should be devised to secure this effective protection.

1.8 Conclusion

Put in simple terms, human rights emphasize that people should

be treated as human beings, that the government and the law are made for the people and not vice versa and that law is an essential foundation of the life of man in society and it is based on the needs of man as a reasonable being and not on the arbitrary whim of a ruler. It is an attempt to preserve as great a scope of individual liberty within a political system as peace and security allow. It is also an endeavour "to secure respect by the government of a state of this private enclave of the individual freedom by defining and entrenching, by means of legal restrictions, those rights and competencies of every individual that cannot be abridged by the despository of state authority, either at all or unless certain specified circumstances are present."²⁰

Human rights are really rights and not merely moral claims. The idea of human rights has been so much accepted in the international world that to argue to the contrary would be merely ploughing the sands. The effective way of enforcing or protecting those rights, however, still remains the search of many countries especially in the African continent.

20. Van der Vyver (1976) 57.

CHAPTER 2

THE HISTORICAL DEVELOPMENT OF THE WESTERN IDEA OF HUMAN RIGHTS

2.1 Introduction

In the previous chapter it was pointed out that although the idea of human rights has become universally accepted, at least in principle, it was not always so. It largely developed in the west. But, events in the rest of the world developed which led to the protection of human rights being of universal concern. It is interesting to note that individual liberty was secured in the west not as a result of a deliberate aim, but as a by-product of a struggle for power.¹ It is intended in this chapter to trace briefly the historical development of the western idea of human rights and what led to its universal applicability. No more than a cursory treatment will be attempted.

2.2 The origins of the human rights idea

The conception of human rights as an individual's politico-legal claims, implying limitations and obligations upon society and government, is a product of modern history. There is, however,

1. HA Hayek The Rule of Law (1975) 5.

no single or simple source or ancestry of these ideas. But it would appear that these are a synthesis of the eighteenth-century thesis and the nineteenth-century antithesis.² This does not mean that this idea started in the eighteenth century. Ideas on which the concept of human rights is based predate the eighteenth century. But, the form which they now have crystallized in the eighteenth century

The bible, for instance, does not stress rights but duties and these are, essentially, duties to God although fellow man was and still is the ultimate beneficiary. In early biblical times "society" and "government" were not central conceptions in the life of a people governed by God through his prophets, judges, and others chosen, ordained or anointed. The "higher law," God's law was in principle the only law. Although the individual had free will and freedom of choice, he was not autonomous, but subject to God's law, and he was not supposed to do "that which³ was right in his own eyes."

The major religions, philosophies and poetic traditions, on the other hand, claim some ideas and values central to human rights, namely "right and wrong good and evil; law, legality and

2. Henkin 45.

3. Deuteronomy 12:8; Judges 17:6.

illegality, justice and fairness; the equal protection of the laws; the significance of individual man and the essential⁴ dignity and equality of men." In the bible justice is particularized in various precepts but is also prescribed generally. In the old testament justice means what is right. It refers to "an encompassing state of being 'good' and upright, while law denotes the proper conditions in which the said⁵ 'goodness' and 'uprightness' prevail."

Although the bible does not refer to human rights by name, it is not opposed to the idea. The equality and dignity of man find support from the Genesis story which relates the common ancestry⁶ of mankind and that God is the creator of them all. Moreover, although the bible does not define justice and fairness as such, it enjoins treating others in the same way you would like to be⁷ treated. That is the essence of justice. It also commands that⁸ one should love one's neighbour as oneself. That constitutes the fulfilment of the law and the prophets.

4. Henkin 4.

5. LM du Plessis "Justice or Judgment? The Biblical Concept of Social Justice Applied in Southern Africa" 1986 Orientation 2. For a more detailed discussion of the Christian concept of justice see LM du Plessis Die Juridiese Relevansie van Christelike Geregtigheid unpublished LLD thesis PUCHO (1978).

6. Genesis 1:26-27; 2:7; Malachi 2:10.

7. Matthew 7:12; Luke 6:31.

8. Matthew 22:39; Luke 10:27

The idea of human rights can also be traced to the theory of natural law.⁹ The Stoics, Cicero and their jurist successors viewed natural law as providing a standard for making, developing and interpreting law.¹⁰ According to this view, law should be made and developed so that it will correspond to nature.¹¹ The church later Christianized Roman ideas, based natural law on divine authority, and gave it the quality of "highest law." Although some of this law was revealed, most of it could be discovered by man through the exercise of his God-given "right reason."¹²

Natural-law theory stressed the duties which God imposes on every human society in an orderly cosmos. As the time went on these duties came to be regarded as natural rights for the individual. It was, however, not easy to agree on the content of the early

9. See generally P d'Entrevies The Case of Natural Law Re-examined (1956); P d'Entrevies Natural Law (1965); E Bodenheimer Jurisprudence (1962) 13 et seq; W Friedmann Legal Theory 5ed (1967) 95 et seq; RWM Dias Jurisprudence 3ed (1970) 544 et seq; N Anderson Liberty, Law and Justice (1978) 34.

10. On Cicero and natural law see DH van Zyl "Cicero and the Law of Nature" 1986 SALJ 55 et seq.

11. Henkin 5.

12. For a discussion of the views of the church fathers on natural law see St Augustine The City of God (1963) trans JWC Ward 344 et seq; W Ebenstein Great Political Thinkers: Plato to the Present (1969) 176 et seq, 233 et seq.

natural rights other than perhaps the rights of "conscience" - to¹³
 worship the true God and to desist from unjust acts.

Although natural-law theory and natural rights have vacillated, they still remain influential on the idea of human rights even today. Yet, politically and intellectually human rights today derive their authentic origins from seventeenth- and eighteenth-¹⁴
 century concepts.

2.3 The eighteenth-century thesis

The American and French revolutions, and the declarations that were based on the principles that emanated from them, took "natural rights" and made them secular, rational, universal, individual, democratic, and radical. For divine foundations for the rights of man they substituted (or perhaps only added) a¹⁵
 social-contractual base." For Paine there is a distinction between "that class of natural rights which man retains after entering society," because he cannot exercise them personally. For him rights derive from and are retained by the people; they are not special privileges or favours granted to them. "Society grants him nothing. Everyman is a proprietor in

13. Henkin 5.

14. Henkin *ibid*.

15. Henkin *ibid*.

society and draws on the capital as a matter of right."¹⁶

2.3.1 John Locke (1632-1704)

The first theoretical design of the idea of human rights was expressed by John Locke.¹⁷ His efforts to define and justify the "natural rights" of man must be considered and evaluated as a product of the seventeenth-century constitutional crisis in England which arose from the autocratic reign of the Stuart kings. In the struggle that ensued, he supported the cause of parliament in protecting the libertarian aspirations of the oppressed people.¹⁸

In his Two Treatises of Civil Government (1698), published immediately after the Glorious Revolution which marked the end of the regime of the Stuart dynasty, he laid the foundations of the doctrine of human rights. These were calculated to assert the inalienable title of the people against the claim to unlimited powers of the executive, to certain basic rights and fundamental freedoms. Seen in proper historical perspective, the doctrine of human rights was closely related to the struggle against too much

16. The Rights of Man (1871) 88-90.

17. On this see W Ebenstein Great Political Thinkers: Plato to the Present (1969) 401 et seq.

18. Van der Vyver (1979) 11.

governmental power.¹⁹ The idea was that some rights could not be subjected to the government even if the people wished, because of the inalienable nature of these rights.²⁰

Locke identified the basic rights of people by constructing an imaginary existence of the human person in a stateless state of nature which he depicted as the idyllic coexistence of individuals in "peace, goodwill, mutual assistance, and preservation." Using this construct he construed the natural rights of man to life, liberty and property.

In Locke's contention, the state of nature suffered from certain inconveniences as a result of the absence of a superior organ to regulate the conflicting claims of individuals living in such a state. As a result the individuals entered into a social compact (a pactum unionis) to form a civil society. By means of a second social compact, (the pactum subiectionis), they formed a government endowed with political power to safeguard their respective human rights. The individual members of the newly-established political community, therefore, retained their natural rights, but on entering into the civil state they relinquished their natural competency to protect those rights by means of self-help.

19. Van der Vyver (1979) 11.

20. Henkin 7.

The only justification for the existence of political power was, according to Locke, to safeguard the natural rights to life, liberty and property of the subjects. He viewed the government as a trustee to protect the rights of the subjects. Its failure to do so led automatically to the dissolution of the trust which gave the subjects freedom to conclude a new social compact with another sovereign.

Employing this theory to the political turmoil of the time, Locke asserted that King James II (1685-8), the last of the Stuart kings, had failed to execute the function of the trust, namely that of safeguarding the rights of his subjects, and the Glorious Revolution was simply a manifestation of the king's having forfeited his throne. The English people, therefore, exercised their natural power to vest the protection of their rights to a new sovereign William III and Mary.

Locke was actually not the original author of many of these ideas, but he took them from the English antecedents, the Magna Carta (1215), the Petition of Rights (1628), the Agreement of the People (1647) and the Bill of Rights (1688).²¹

21. Henkin 9-10.

2.3.2 Jean Jacques Rousseau (1712-78)

Although some other philosophers than John Locke concerned²² themselves with the concept of human rights, it is safe to say that the next important contributor to this idea was French philosopher Jean Jacques Rousseau (1712-78)²³ whose ideas inspired the French Revolution and have been influential on modern conceptions of human rights.

Rousseau utilised Locke's analysis. He designed the natural rights of the individual in the light of the hypothetical condition in an idyllic state of nature. Rousseau differed from Locke in that he stated that the individual, on entering into a civil society subjected his individuality to the general will, undefined and amorphous, of the body politic and exchanged his natural rights to life, liberty and equality for certain civil rights, which the government had to protect.

2.3.3 Sir William Blackstone (1723-80)

The ideas of John Locke filtered through to Blackstone.²⁴ Thomas

22. See Van der Vyver (1979) 12.

23. For Rousseau's views see Ebenstein op cit 450 et seq.

24. Henkin 9.

Paine drew his inspiration from both Locke and Blackstone. Blackstone supported, besides certain rights, the claim of every citizen to his individual security, personal liberty and private ownership.²⁵

2.3.4 Emmanuel Kant (1724-1804)

Emmanuel Kant distinguished only one basic right, namely innere Freiheit (inherent freedom), which is manifested in the independence of one's will within the context of the categorical imperative and which leads to every person's acting in such a way that the volition from which his actions derive would coexist with the similar volition of all others under a general law of freedom.²⁶ By this Kant meant that everyone should have the freedom to act as his will directs him as long as he makes an allowance for the equal freedom of others.²⁷

2.4 The Nineteenth-century antithesis

Although the nineteenth-century also contributed significantly to the development of human rights, emphasis shifted from the idea

25. Commentaries on the laws of England in Four Books (1775) 1 123.

26. I Kant The Foundations of the Metaphysics of Morals 10ed (1959)

27. Van der Vyver (1975) 7; Van der Vyver (1979) 13.

of natural rights to utilitarianism or even evolutionism. To the nineteenth-century thinkers human rights were perceived as necessary for the good life in society or even perhaps for the survival of the human species. During this century strides were achieved in human freedom by the abolition of slavery in many countries and by the international prohibition of the slave trade. This century also produced some apostles of liberty like²⁸ John Stuart Mill.

The emergence of positivism on the other hand, during the early part of the nineteenth century, led to the virtual antithesis of human rights as a result of the decline of natural-law theory. The ideas of the positivists like Bentham, John Austin, and even Stuart Mill, were not ideologically hostile to human freedoms and welfare. But positivism is diametrically opposed to natural law in which human rights are deeply rooted. According to positivism only empirical data really exist and can therefore "be subjected to truly scientific analysis." In the sphere of law positivism postulates that positive law, namely the law promulgated by a competent legislature, is the only juridical reality, and concepts such as "natural law" and "human rights" have been²⁹ regarded by positivists as arbitrary speculation.

28. Henkin 14

29. Van der Vyver (1975) 8; Van der Vyver (1979) 13; Henkin 15.

The impact of the nineteenth-century ideas on human rights has been aptly summed up by Henkin in the following words:

Rationalism, secularism, and humanism in the nineteenth century rejected natural rights based on divine natural law; the foundation of rights in the equality of all men as children of God, descended from the common ancestor, was dealt a stunning blow by the theory of evolution. In jurisprudence, natural law suffered the onslaughts of positivism; and who shall arbitrate between good law and bad law, moral law and immoral law? Law is and can only be the edict of the sovereign; how, then, can there be legal rights against the sovereign?³⁰

Another element of the antithesis to eighteenth-century human rights arose from the "burgeoning socialism." Although socialism is not hostile to human rights, it has a negative effect on them. By its emphasis of society, "the group, subordinating the individual or seeing his salvation in the group" and by stressing duties to society rather than individual rights against society,³¹ socialism tends to undercut individual rights.

30. 16.

31. Henkin 16-18.

2.5 The twentieth-century synthesis

The twentieth-century has been a turning point in the development of human rights. Since the Second World War (1939-45) human rights had a considerable revival. Positivists could not reconcile themselves with the equal validity of all law in the face of the "lawful" atrocities perpetrated by Hitler's regime. Consequently, protagonists of democracy have proclaimed the "natural" legitimacy of positive law only when made by representative democratic majorities. This often led to natural law becoming positive law, "higher law" that binds to some extent even the legislature.³² A further outcome of this was the "internationalization" of human rights.

This was largely due to the efforts of the United Nations to achieve international respect for and observance of human rights and fundamental freedoms.³³ Experience, especially during the Second World War, taught many people that certain values and guarantees, although susceptible to change like all human designs, should be protected from excessive and easy violation or change.

32. Henkin 18-21

33. On the efforts of the United Nations see I Brownlee (ed) Basic Documents on Human Rights (1981); Naidu 65 et seq.

Towards the end of the Second World War, the leaders of the allied nations joined hands to establish a formula for lasting peace and to prevent the scourge of war for the future. In 1944 the governments of the Union of the Soviet Socialist Republics, the United Kingdom and the United States of America, met in Dumbarton Oaks, Carlifornia, USA, and formulated proposals for the establishment of an international organization that would "facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms."³⁴ These proposals culminated in the charter of the United Nations which was prepared and opened for signature at the San Francisco Conference. In its preamble the charter reaffirmed faith in fundamental human rights for achieving lasting world peace. It was believed at the time that if all governments of the world could be persuaded or forced to recognize and respect the basic rights of their citizens, friction and conflict would be obviated, and international peace would be secured. This was the epoch where human rights "entered a new phase in which the protection of human rights by national governments came to be regarded as a matter of international concern."³⁵

34. Van der Vyver (1979) 14.

35. Van der Vyver (1979) *ibid*; Henkin 93.

The purpose of the United Nations includes international cooperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."³⁶ Human rights constitute one of the responsibilities for the study and recommendation for the General Assembly³⁷ and a Commission on Human Rights³⁹ is expressly provided for. Human-rights provisions feature prominently in chapters XI and XII which deal with non-self-governing territories and international trusteeship. Members pledged themselves to cooperate with the United Nations for the attainment of its human-rights objectives.⁴⁰

The United States played a significant role during the early deliberations for the establishment of the United Nations for the promotion of human rights as a basis for the peaceful coexistence of the peoples of the world. This was largely because of the past experience of the USA. Ironically, the then South African prime minister General Jan Smuts, was the author of the preamble to the United Nations charter which affirms the importance of human rights.⁴¹

36. Articles 1, 55(c).

37. Article 13.

38. Article 62 (2).

39. Article 68.

41. Van der Vyver (1979) 15.

The various United Nations bodies have devoted years of strenuous effort to promote human rights. Since then human rights have featured prominently "on every agenda of every body and have⁴² become a staple of United Nations activity."

When the United Nations was established in 1945, its founders toyed with the idea of providing a bill of rights in its charter. This idea was, however, abandoned because of the fear at the time that divergent opinions on the proper contents of an international bill of rights having binding force would delay the inauguration of the world body. A commission was created with the object of drafting a human-rights charter. In 1948 the⁴³ commission produced the Universal Declaration of Human Rights.

The Universal Declaration of Human Rights provides for a variety of civil-political and economic-social rights "with equality and freedom from discrimination a principal and recurrent⁴⁴ theme." Although the directions of the Declaration are generally not perceived as law, they provide "a common standard⁴⁵ of achievement for all to aspire to."

42. Henkin 93.

43. Van der Vyver (1979) 15.

44. Henkin 96.

45. Henkin *ibid*; Van der Vyver (1979) 15.

The United Nations did not abate in its efforts to create an international bill of rights that would give binding effect on the principles stated in the Universal Declaration of Human Rights. It, however, took the United Nations eighteen more years to produce such a charter and ten further years to secure the prescribed number of signatories required for its coming into operation. The ultimate result was the International Covenant on Economic, Social and Cultural Rights of 1966, which became operative on 4 January 1976 and the International Covenant on Civil and Political Rights of 1966 which came into operation on 23 March 1976.⁴⁶

The zealous efforts of the United Nations to propagate the idea of human rights on an international scale have been supplemented by transnational activities of various regional organizations, such as the Council of Europe and the Organization of American States, and specialized agencies.⁴⁷

These developments resulted in the "constitutionalization"⁴⁸ and "internationalization"⁴⁹ of human rights. They further led to

46. Van der Vyver (1979) 15.

47. Van der Vyver (1979) *ibid*; Naidu 85 et seq.

48. Henkin 31 et seq.

49. Henkin 105 et seq.

the synthesis between natural law and positive law. Moreover, they resulted in a "marriage more or less convenient and comfortable, between the emphasis on the individual, his autonomy and liberty, and the emphasis by socialism on the group and on economic and social welfare for all; between the view of government as a threat to liberty, a necessary evil to be resisted and limited, and the view that sees government as a beneficial agency to act vigorously to promote the common welfare."⁵⁰

This fusion did not come easily, but took serious efforts and compromises. Although there have been widespread steps to protect human rights in constitutions, there has been no uniform pattern. Three approaches to human rights protection are discernible. There is the negative approach of the English, the intermediate approach of the USSR, France and the European People's Democracy and the positive approach of the USA and the Federal Republic of West Germany.⁵¹

Britain has no bill of rights or constitutional protection of human rights. Fundamental rights have emerged from tradition,

50. Henkin 24.

51. Henkin 31 et seq; M Cappelletti "Fundamental Guarantees of Parties in Civil Proceedings (General Report)" in M Cappelletti and D Tallon (eds) Fundamental Guarantees of the Parties in Civil Litigation (1973) 665-666.

education and general behaviour, based on "profound traditionalism and the proverbial Englishman's pride."⁵² From a strictly formal point of view human rights in England have no juridical significance. Yet it should be remembered that tradition and education can even be more effective instruments in the implementation of these fundamental rights than written constitutions, international documents and legal institutions devised for their enforcement. But even in England it has been debated whether these precarious traditions can continue to be effectively safeguarded by reliance on the ordinary legislature. Calls for the adoption of a bill of rights even for Britain have⁵³ gone out. They have been based on the grounds that the United Kingdom has assumed international obligations under the European Convention on Human Rights in 1953 and by entering into the European Economic Community in 1973. This obviously implies that

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52. JD van der Vyver "Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights" 1982 SALJ 569; see also JD van der Vyver "The Bill-of-Rights Issue" 1985 IRW 8.
53. J Jaconelli "The European Convention on Human Rights - The Text of a British Bill of Rights" 1976 Public Law 225, L Neville Brown "A Bill of Rights for the United Kingdom?" 1977 Parliamentarian 79; Samuel Silkin "The Rights of Man and the Rule of Law" 1977 Northern Ireland Legal Quarterly 3; OH Phillips "Self-limitation by the United Kingdom Parliament" 1957 Hastings Constitutional Law Quarterly 474; HO Phillips & P Jackson Constitutional and Administrative Law 6 ed 446 et seq; Sir Leslie Scarman English Law - The New Dimension (1974) 10 et seq; M Sornarajah "Bill of Rights: The Commonwealth Debate" 1976 CILSA 163; Anderson 49 et seq; contra AJM Milne "Should We Have a Bill of Rights?" 1977 Modern Law Review 389 et seq.

the idea of parliamentary sovereignty espoused in Britain has been modified. Moreover, the argument goes, it is necessary to restrain excess or abuse of power on the part of public authorities and officials, to provide a forum for the judicial enforcement of rights contained in the European Convention rather than that complaints should be brought by individuals against Britain before European tribunals, and to provide moral and educational force for the moulding of public opinion.

The socialist countries have adopted written constitutions, with elaborate provisions for fundamental rights, which are more elevated than and binding upon ordinary legislation and for which special procedures and majorities are required for their amendment. These constitutions, however, reveal fundamental differences from the constitutions of libertarian countries like the USA. The constitution of the Soviet Union for instance appears to be essentially descriptive and not prescriptive. "It does not set forth legal prohibitions ordained by the people upon its government; it is rather, an ideological statement, a declaration by the government to the world (and perhaps to the people) describing the condition of human rights in the Soviet system and perhaps indicating also the Soviet Union's compliance⁵⁴ with the international obligations it has assumed."

54. Henkin 64.

This type of constitution, however, should not be regarded as of no value. It may be a goal or ideal to which the government has to aspire. A prescriptive constitution on the other hand may not be honoured in practice whereas a descriptive constitution may be accurately reflective of the system of rights already existing. "Constitutional descriptions or promises, moreover, tend to deter⁵⁵ deviations and serve as a basis for domestic protection."

According to the third positive approach of the United States and the Federal Republic of West Germany, there is both a rigid constitution entrenching fundamental rights and a system of judicial review of the constitutionality of legislative action. Judicial review in the USA is, however, not derived from the constitution, but is to be traced to the decisions of⁵⁶ Marbury v Madison. This approach affords maximum juridical significance to the constitutionalization of fundamental rights.⁵⁷ Statutes which violate these rights are null and void.

Although international concern for human rights has cut across ideological boundaries, socialist societies exhibit differences of perspective and emphasis from the western democracies.

55. Henkin 65.

56. 1 Cranch 137 (1803); see also the provisions of the Basic Law for the Republic of West Germany of 1949 which stipulated for a number of fundamental rights.

57. Cappelletti 56.

Whereas western democracies still emphasize individual freedom, which implies limited government, socialism accentuates the society and is averse to limitations on a socialist government's freedom to act for the common benefit even at the expense of some individuals.⁵⁸

2.6 Conclusion

At the root of the human rights idea is that there are certain values which people hold dear and wish to be respected by individuals and governments. History has revealed that failure to respect these values has led people in various societies and nations standing up in rebellion against repressive regimes. It is not enough just to have law, but people should feel that the law is there to protect and promote their fundamental interests.

From the foregoing, it is clear that the idea of human rights has become universally accepted. This does not mean that human rights flourish everywhere and are observed effectively in all states by virtue of a bill of rights or by adherence to the international law of human rights. Nor does it imply that human rights have been incorporated into all cultures and are coveted by all people. It only means that philosophical and political

58. Henkin 56.

objections to the idea of human rights have been discredited and become irrelevant. Philosophical thinkers and the United Nations have propagated the idea of human rights. There has, however, been no consistency or uniformity of practice. But human rights are today "finding place in contemporary political, ethical, and moral philosophy, now again preoccupied with 'justice,' 'liberty' and 'rights.'" They have become the focus of national law and not any other unenterprising consideration. The idea of human rights is pervasive in national and international law. It has been accepted by governments with differing ideologies. Although this universal acceptance may only be formal or superficial, and although emphasis differs, some stressing individualism and others fraternity and community, no government today can seriously contest the ideology of human rights.

It is accepted that every individual has claims against his society which entail freedom from too much governmental interference and support for economic and social welfare. "Human rights include an area of autonomy, a core of freedom from majority rule, from official intrusion even for the general good." There has, however, been a shift from the original idea based on the social contract. Today they are based on the "contemporary values that are derived from

human psychology and from sociology and that are expressed in
positive law, national and international.⁶⁰"

Although the contemporary idea of human rights developed from the west, it has already been accepted by almost all governments of the world. The activities of the UN and other transnational organizations and specialized agencies have so popularized the idea of human rights that today they form part of customary international law. The above exposition has set the tone for the consideration of the observance and protection of human rights in Africa.

60. Henkin 28-29.

CHAPTER 3

THE HISTORY OF THE PROTECTION OF HUMAN RIGHTS IN PRE-COLONIAL
AFRICA

3.1 Introduction

The aim of this chapter is to trace in broad outline the history of the protection of human rights in pre-colonial Africa, not for reasons of historical curiosity, but because, as Cardozo once asserted, "history in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future."¹ Moreover, it has been said that any "worthwhile study of the problem of government and politics of Africa must necessarily take account of its past forms of political, social and cultural organizations."²

3.2 The pre-colonial period

The protection of human rights in pre-colonial Africa is quite controversial and a little obscure largely because of the absence of writing before the arrival of whites. There are two opposing

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1. BN Cardozo The Nature of the Judicial Process (1921) 53.
 2. TO Elias Government and Politics in African Context 2ed (1963) 1.

views in this regard. The one seeks to create the impression that before the advent of Europeans, Africa was a "Dark Continent;" the other one tends to romanticize the African past uncontaminated by European influences. Both views are liable to exaggeration. In this study a via media will be adopted. An attempt will be made to be as dispassionate as is humanly possible.

The view which regards pre-colonial Africa as an unorganized and undeveloped part of the world "is a parochial European notion," which arose from European feelings of cultural superiority which reached the peak of their development during the latter portion³ of the nineteenth and the beginning of the twentieth centuries. This view is unacceptable. It suited the early colonists to bolster the virtues of European culture which was to replace "primitive backwardness in the process of 'civilizing' the 'native' peoples, who were characterized as childlike or mentally retarded and therefore unable to take care of themselves."⁴ The irony of this is that when Africans were converted to western civilization, they were denied the enjoyment of the benefits

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3. AJGM Sanders International Jurisprudence in African Context (1979) 49; I Schapera Government and Politics in Tribal Societies (1956) 1 et seq; Elias 1 et seq.
 4. Hernan Santa Cruz Racial Discrimination (1971) 8; See also George M Fredrickson White Supremacy (1981) note 2 at 7 et seq.

produced by this civilization and encouraged to revert to their own traditional institutions.

One of the criteria which was used by Europeans to classify people into superior and inferior categories, was the presence or absence of a centralized system of government in the European fashion. Although pre-colonial Africa did not pass this test, most of the African peoples had for centuries been organized⁵ politically beyond the family, clan or tribe.

In the words of Simons:

In spite of their technological backwardness, Africans could cope with their environment, and achieved a fair amount of security against famine, disease, disorder and aggression. They had attained a high standard of political and legal organization; observed a strict moral code, and governed themselves with dignity, discipline and self-restraint.⁶

Although nineteenth-century scholars doubted that law existed in countries with a level of development similar to Africa,

5. Sanders 49.

6. HJ Simons African Women: Their Legal Status in South Africa (1968) 15.

twentieth-century scholars with more advanced science techniques than their predecessors, have generally agreed that "underdeveloped people" did possess legal systems in the proper sense of the word. The system varied considerably among different peoples dependent on their level of development, and it was not only flexible but also capable of development and adaptation.⁷

The notion that traditional societies did not possess a legal system owed itself largely to analytical positivism which regards law as emanating from the state. This view was based on insufficient information and lack of appreciation of the true nature of pre-colonial African societies. It overlooked the fact that law did exist outside the framework of a state in the modern sense. A contrary view would imply that African societies operated in a legal vacuum, a contention that is completely insupportable.⁸

Although it is alleged that African government tended to be authoritarian, the African chiefdoms and empires were more or less "democratic" in the sense that the will of one man, whether chief or king, rarely determined the fate of those societies. The rulers often knew that the safety of their rule depended on the

7. Eze 10.

8. Eze *ibid*; AN Allott The Limits of Law (1980) 15 et seq.

support of the people. Many African sayings attest to this. A Zulu example is the one which says "inkosi yinkosi ngabantu bayo," which means "a king is a king by virtue of his people." A contrary view was based on a distorted idea of African government.⁹

Although there were chiefly and chiefless societies, their common denominator was that they were government by consensus where decisions were reached "by majority after the fullest debate and discussion of different points of view expressed by duly accredited representatives of the people."¹⁰

This does not mean that there were no exceptional cases. Exceptional cases are well known the world over. The western world has produced exceptional cases like Hitler. But any ruler who disregarded the wishes and aspirations of his people was risking the security of his reign. Admittedly, there were no formal restraints on the ruler or whatever restraints existed were weak. But the very fact that the king or ruler knew that if

9. Elias 15-16; D Welsh "The State President's Power under the Bantu Administration Act" 1968 Acta Juridica 82.
10. Elias 19-20; Schapera 38 et seq; Sanders 51-52 refers to acephalous societies and centralized societies. This means the same thing the difference being in terminology only; see also PF Gonidec African Politics (1981) 22.

he abused his powers to the detriment of his subjects he would be deposed, was a sufficiently real deterrent.

Even if it may be contended that African government was authoritarian, there is no reason to believe that this would not change if African people were subjected to new ideas or if the need arose. Nor is there evidence that African people were bankrupt of any ideas to improve their form of government. Many of these western democracies did not start as such, but developed from monarchies, some of them ruthless. Some of them still retain monarchies as national symbols even today. Britain is a good example.

This is not to espouse evolutionism, namely that democracy is the ultimate of human development starting from complete anarchy. It merely demonstrates that people generally dislike rulers who abuse their power. They will always seek ways and means to limit this power. Government is essential if there is to be order and the necessary processes of life have to continue, but unlimited government becomes an evil to be restrained. This is what the whole question of constitutionalism is about, and this is not confined to Africa but is a world-wide concern.

Pre-colonial Africa knew of a system of human rights adapted to the political and social situation of the time. These rights

were, however, recognized and protected, but must be viewed "in the context of societies that were atomised and hierarchical," as a result of the caste system, but at the same time were unified by mythological beliefs.

African society possessed an integrated culture where the law occupied a central position. The law was known to everybody and had to maintain society in the state in which it was handed down¹¹ by ancestors. African law expressed the common moral code of the people. There was no sharp cleavage between what ordinary members of the community regarded as proper conduct and what the official organs of society decreed as law. Nor were there classes or categories with critically opposed economic interests. Most interactions took place in small areas with permanent relationships serving a variety of purposes. This integrated society was to be disrupted by the advent of white political rule, western commerce and an alien religion.

Although the recognition and protection of human rights existed in the pre-colonial period, African definitions of human rights differed in important respects from those prevalent in the

11. Eze 12; L Marasinghe "Traditional Conceptions of Human Rights in Africa" in CE Welsh Jr & RI Meltzer (eds) Human Rights and Development in Africa (1984) 31; AN Allott "African Law" in JDM Derrett (ed) An Introduction to Legal Systems (1968) 135-136.

¹²
west. Because of this, some of the views on the protection of rights and the rights protected are liable to be romantic and should be subjected to careful scrutiny in the light of the then prevailing conditions.¹³ The context of family, clan, and ethnic solidarity or the kinship network, provided the frameworks within which individuals exercised their economic, political, and social liberties and duties, and provided restraints to arbitrary official action that might otherwise have prevailed.¹⁴

For this reason it has often been contended that African law is essentially a law of groups where the individual has little or no rights. Although there is some merit in this argument in that African law was dominated by group rights, African law did accord legal capacity to individuals to have interests in property and in their lives, to contract with each other and to sue each other in court. The rights of individuals were, however, often limited by the rights of the communities of which the holders formed part. There was no apotheosis of the individual. Moreover,

12. CE Welch Jr "Human Rights as a Problem in Contemporary Africa" in Welch Jr & Meltzer (eds) op cit 11.

13. Eze 15.

14. Welch Jr 11; KA Busia Africa in Search of Democracy (1967) 19 has said: "In Africa kinship has been, and still to a large extent is, the bond of union." See also R Lemarchand (ed) African Kingships in Perspective (1977); CP Potholm Four African Political Systems (1970).

famiy units often functioned as corporate legal entities. As a result members of the family co-operated closely in the exploitation of family resources and in the protection of their interests.¹⁵ It is interesting to note that in some quarters in South Africa today there has been a shift of emphasis from individual rights to group rights.

3.3 The colonial period

Although customary law existed in pre-colonial Africa, after the advent of whites it ceased to be indigenously developed. It no longer developed in response to African needs, but to those of the political overlords. African societies became subject to political, economic and social domination. The deculturation that followed resulted in those in contact with the colonial administration being dissatisfied with their own traditional systems of education and the values of African civilization. This paved the way for the imposition of European education and values. The cumulative effect of these, coupled with the translocation of the capitalist mode of production which gave rise to new forms of social classes different from those under feudalism, culminated in the alienation of the elite from the African masses, "a phenomenon which persists to a great extent in post-colonial Africa."¹⁶

15. Allott (1968) 147 et seq.

16. Eze 15.

17

Colonial rule was authoritarian to the core. There were no representative institutions. "The administration not only implemented policy. They made it as well." ¹⁸ Even the policy of "indirect rule" which emphasized the powers of traditional rulers and the creation of special "native courts" to administer unwritten customary law was conceived for the benefit of the white administrators and not necessarily for the benefit of Africans. ¹⁹ "Colonialism founded as it was on racism and naked exploitation, not only denied and inhibited fundamental human rights, but was essentially against the promotion and protection of human rights in Africa." ²⁰

The exploitative nature of colonialism necessitated a certain degree of repression of rights of the African people despite the

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17. RB Seidman "Judicial Review and Fundamental Freedoms in Anglophonic Independent Africa" 1974 Ohio State Law Journal 820; JS Read "Bills of Rights in 'The Third World': Some Commonwealth Experiences" 1973 Verfassung und Recht in Ubersee 29; Eze 15; on the impact of colonialism in general see Liebenow African Politics: Crises and Challenges (1986) 13 et seq.
 18. RB Seidman "Law and Stagnation in Africa" 1973 Zambia Law Journal 56.
 19. Eze 21; FD Lugard The Dual Mandate in British Tropical Africa 4ed (1929) 193 et seq; TO Elias The Nature of African Customary Law (1956) 187 et seq; HF Morris "Framework of Indirect Rule in East Africa" in HF Morris & JS Read (eds) Indirect Rule and the Search for Justice (1972) 3 et seq; LCB Gower Independent Africa: The Challenge of Legal Profession (1967) 7 et seq; AN Allott "What is to be Done with African Customary Law?" 1984 Journal of African Law 58 et seq.
 20. Eze 18, 22.

importation into many African countries of British laws which favoured the promotion of human rights. The introduction of English law which formed the basis of the local legal systems did not result in the colonial subjects' enjoyment of the full rights of liberty, due process, free speech and the rest which the common law is reputed for guaranteeing to the Englishman himself.²¹

The framing and use of arbitrary powers of political detention or deportation and the utilization of the laws of sedition and censorship which were more widely framed than in England violated the rule of law which preserves English liberties.²² In this way the colonial powers applied double standards when it came to the treatment of people of colour.

When external rule was imposed, Africans lost the opportunity to define and control human rights. Conflicts arose between indigenous and European conceptions. "The 'redomestication' of human rights in Africa, adapting and adopting rights appropriate to existing circumstances, required both political independence²³ and growing domestic awareness of the issues involved."

The fight for independence in Africa was largely predicated upon the fundamental human-rights principle that rejected foreign

21. Read 29.

22. Eze 21.

23. Welch Jr (1984).

domination of nations and peoples and stressed the right of each nation or people to self-determination. The African national leaders especially castigated colonialism for its authoritarian²⁴ and undemocratic nature.

On the eve of independence constitutions based largely on eighteenth-century constitutional theory were prepared by the colonial service for the emergent states. In these constitutions great emphasis was laid upon free elections, and democratic liberties like a free press and free speech; freedom of religion; freedom of association; and freedom from discrimination, unlawful searches and seizures, arbitrary arrest and imprisonment. Emphasis on these was perceived by many Africans to arise from the colonial service's distrust of the new²⁵ African politicians.

The African elite, who were in the forefront of the struggle for independence, had been schooled in the colonial administration or raised in colonial academic institutions. They had acquired western values and were mostly eager to import western institutions and policies which they regarded as objectives worthy to be attained. The independence constitutions were intended to serve as instruments for "extending and consolidating the value system of the former colonial powers." They were imposed on leaders who were anxious to achieve political

24. Eze 23.

25. Seidman (1974) 820.

independence which they regarded as a priority and a prelude to
²⁶
 economic independence.

When colonialism came to an end, high aspirations existed both in Africa and in the international community as a whole. It was generally believed that at last the epoch of liberation and democracy had arrived in Africa, "individuals' standards of living would rise, political freedoms and opportunities would increase, cultural development would occur unskewed by external constraints, and the 'authentic' African personality could
²⁷
 flower." In 1957 Ghana was the first African state to become independent from Britain and was followed by Nigeria in 1960 and many other African states in the subsequent decades.

3.4 The post-independence era

That the expectations of independence and what it would bring were unrealistically high, considering the background from which these states were emerging, is quite obvious. The termination of colonial rule and the euphoria of independence did not automatically usher in a new era of basic liberties, nor did it
²⁸
 bring any noticeable and immediate economic benefits for many.

26. Eze 23.

27. Welch Jr (1984) 11.

28. Welch Jr (1984) 12.

In the area of human rights the new states eagerly adhered to the UN charter as well as other international instruments, whether legally binding or not, aimed at the enhancement of the promotion and protection of human rights. This was a good ideal in itself. Most of the constitutions of the African states contained, either in their preambles and/or their substantive provisions, elaborate guarantees for the promotion and protection of human rights. Despite adherence and commitment to the protection of human rights, the experience in most African countries has ranged from complete anarchy, as in Uganda under Amin, "to modest progress in the field of human rights promotion and protection." There is²⁹ mostly a gap between "declaration and actual practice."

Some have doubted the wisdom of including these highly democratic ideals in the independence constitutions of most of the African states.³⁰ What is clear is that these constitutions were simply imposed on the African societies and from the beginning lacked³¹ popular support and legitimacy.

Generally, reference to human rights may be embodied in the preamble, in the objectives and principles of a constitution, in

29. Eze 23; DO Aihe "Neo-Nigerian-Human Rights in Zambia: A Comparative Study with some Countries in Africa and West Indies" 1971-73 Zambia Law Journal 43 et seq.

30. Aihe 61; Read (1975) 27.

31. Welch Jr 14; Nwabueze Constitutionalism 24 et seq.

its substantive parts, or in an oath of office to be taken by the head of state. Their locus in the constitution as well as the precision with which they are formulated determines not only³² their legal nature but also the extent of their justiciability.

Where references to human rights are contained in the preamble or in the objectives and principles, they are regarded in common-law jurisprudence as not conferring rights and obligations and are therefore not justiciable. At most they are viewed as a declaration of "philosophical and moral principles." Where they are embodied in the substantive provisions of the constitution, they are in general regarded as legally binding although the wording of such provisions may render them non-justiciable in³³ practice.

With the exception of Ghana and Tanzania, where reference to human rights was to be found in the preamble to the constitution, and Malawi, where human rights provisions of the independence constitution were replaced by generalized references to human rights in the "fundamental principles of government" section when the constitution was adopted in 1966, most African constitutions embody in their substantive sections provisions of human

32. Eze 27; Nwabueze Judicialism 9 et seq.

33. Eze 30.

rights.³⁴ These are modelled either on the Universal Declaration of Human Rights (1948) or the European Convention on Human Rights³⁵ (1950).

In spite of the impressive and kaleidoscopic guarantees which adorn the African continent, the picture of human rights in Africa has been uninspiring. This might lead the cynic to doubt the efficacy of bills of rights even more. Mauritius, however, provides the proverbial exception to the rule that bills of rights do not work in developing countries. This is reflected in a number of decisions of the Mauritius supreme court concerned³⁶ with or touching upon the country's bill of rights. This apparent inconsistency can be explained in the light of the background to the granting of independence to Mauritius, namely that democratic institutions had been introduced in Mauritius some time before the granting of independence.

Although the bill of rights was initially rejected by the government, the people of Tanzania later clamoured for this. After 23 years of independence the government yielded to the inclusion of a bill of rights in the substantive parts of the constitution. This was introduced by the Fifth Constitutional³⁷ Amendment Act of 1984 and came into effect on 15 March 1988.

34. Eze 27; Read 21 et seq.

35. Read 22; Kannyo 10.

36. AJGM Sanders "A Bill of Rights for South Africa?" 1986 SA Public Law 2.

37. Act 15 of 1984. On this see Peter 249-252.

This further demonstrates the popularity of bills of rights in Africa.

It is interesting to note the reasons that inspired the exclusion of a bill of rights in Tanzania for instance. The leaders of Tanganyika rejected the bill of rights proposed at independence and the Presidential Commission which designed the constitution for the one-party state in 1965 also rejected the inclusion of constitutional guarantees as "neither prudent nor effective." In the light of the current English debate, it is ironical that the United Kingdom was cited as "a striking example of the force of a national ethic in controlling the exercise of political power... there is a consensus between the people and their leaders about how the process of government should be carried. It is on this that the traditional freedoms of the British depend." The commission concluded that human rights "depend more on the ethical sense of the people than formal guarantees in the law." The exclusion of a bill of rights was also aimed at forestalling fettering government in advance of the uncertain events that might threaten democracy and would be inimical to the revolutionary changes in the social structure which dynamic plans for economic development necessitated.

38. Read (1979) 161-162.

These views contain some element of the truth, but it is not the whole truth. While it is true that respect for human rights flows from the ethical sense of the people, and that the British traditional freedoms are not enshrined in any constitution, it does not tell us how this ethical sense is inculcated. It fails to reveal to us that in the history of English constitutional development there were a number of instruments which were provided to concretize the rights of the people. But what of a people without that tradition? One might even be tempted to say that even the form of government which these states adopted was not based on African traditions and values. But why adopt it then?

The views expressed above remind one of what Judge Learned Hand once declared namely:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no laws, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court.³⁹

39. The Spirit of Liberty (1959) 144.

Lord Wright in Liversidge v Anderson was saying the same when he stated that "(t)he safeguard of British liberty is in the good sense of the people and in the wisdom of the representative and responsible government which has been involved."

The remarks by Judge Learned Hand have been countered by Muir in the following words:

There are however fallacies in Hand's argument. First, while it is true that law is unlikely to save any important attitudes if it is solidly opposed by all other social institutions, the same holds true of any institution which breeds moral attitudes... the churches and schools, for example... which also would be unable to preserve a spirit of liberty if it were alone in a hostile world. Where there is no monolithic trend, however, where the population is ambivalent or indecisive or divided, where life or death of a deep-rooted attitude is still uncertain, the legal institutions can and apparently do shore up the partisans (or detractors) of that attitude. For every situation where all institutions disintegrate at once (as Hand's remarks presuppose), there are a dozen marginal situations where opposing factions are nearly equal and where a small but decisive factor (such as a legal decision) can make a difference.

40. (1942) AC 206. For the South African equivalent of this see HJ Coetsee "Hoekom nie 'n Verklaring van Mensregte nie?" 1984 IRW 10-11.

Which leads to the second fallacy, the fallacy of ignoring contexts. Hand wrote 'while (the spirit of liberty) lies (in the hearts of men), it needs no constitution, no law, nor court to save it.' It depends.⁴¹

These two fallacies Muir calls, the fallacy of cataclysm and the fallacy of overabstraction. The fallacy of cataclysm implies ignoring the importance of small factors in a state of near equilibrium, while the fallacy of overabstraction refers to ignoring the differences in social contexts in which persons live.

The views of the presidential commission therefore appear to have ignored the effect which a bill of rights could have. History, experience, and the laws (which include a bill of rights) all contribute in one way or another to the moulding of the character of the people. Moreover, these views ignore a point of fundamental importance, namely that those who are in power tend to abuse their power. The general problem of human nature is hunger for and abuse of power. This is a perennial problem. A bill of rights attempts in a limited manner, no doubt, to limit the power of those who are in power. While bills of rights have their limitations, this does not mean that we must deny all practical efficacy to them.

41. WK Muir Jr Law and Attitude Change (1967) 135-136.

Admittedly the character of the people for whom a constitution is made is in the last analysis of decisive importance. "But it does not follow from this that one should go to the opposite extreme and deny all efficacy of written constitutions and entrenched bills of rights. Merely because no constitution can possibly provide a complete and impregnable defence against human passion and artfulness, it does not follow that one may legitimately deduce from this the virtue of necessity of leaving everything to the unfettered will of the legislature... or ...of the people."⁴²

To view a bill of rights as an obstacle to rapid socio-economic changes is equally misconceived. The protection of civil rights and the supply of socio-economic security are not mutually exclusive but rather complementary ideals; "without some amenities the traditional freedoms are small comfort, and without freedom the amenities are not worth having. The question... is⁴³ how to strike a wise balance; where to draw a line?"

While it may be difficult to draw up a comprehensive and detailed code of conduct for the guidance of rulers in all communities at all relevant times, and while there is room for flexibility at

42. Cowen 118.

43. Cowen 121.

many points, it is quite possible to lay down basic principles which will ensure that the furnishing of social and economic services does not take place only at the expense of the obliteration of human freedom. Moreover, and this is much more iconoclastic, the provision of social and economic services is not incompatible with most of the really basic rights and freedoms. The rights to personal freedom and free trial, freedom of speech and the press, and freedom of worship for instance are not in conflict with economic and social security. "And if it is, then the state in question, ... is not worth living in."⁴⁴

The crucial question is, why have the African leaders and governments not lived up to the promises and expectations born of independence and human rights provisions? Before the question is addressed, it is essential to outline briefly the content of these bills of rights as well as the nature and extent of the infringement of these rights. This will form the subject matter of the next two chapters.

3.5 Conclusion

There is no doubt that pre-colonial Africa did know of the protection of human rights. Obviously ideas on human rights were

44. Cowen 122.

in many respects underdeveloped than or differed from the notion of human-rights protection propounded by western thinkers. African ideas would have been enriched by western ideas. But westerners seemed to think that authoritarian rule was what Africans were used to and desired. It is, however, true that no nation favours repression. Liberty lies in the hearts of all people.

Colonial rule was extremely authoritarian. There were no representative institutions. Africans were excluded from government. Their institutions did not develop and adapt to the needs of the people. When colonial rule came to an end, many African leaders had no experience of democracy. It should therefore have been predictable that they would carry none into independence despite the impressive constitutions which guaranteed human rights which they received on the eve of independence. To adopt a bill of rights is one thing; to make it work is another.

For these efforts to succeed and be meaningful, it is necessary to have an appreciation of the real nature of the rights themselves and the philosophy on which they rest. This also calls for an understanding of the historical roots and evolution of these ideas. These ideas are rooted in natural law. For a bill of rights to be effective there must be serious commitment

to these ideals and the values which a democracy ought to serve. A genuine bill of rights cannot succeed in a country committed to authoritarianism or communism; for a bill of rights⁴⁵ is antithetical to a government by arbitrary will.

⁴⁶
Cowen has aptly stated this in the following terms;

Government under law is the antithesis of unfettered power. It is the antithesis of sheer domination of man over man, of arbitrariness and caprice. And only where government under law exists, is it possible for human dignity to be maintained, and for men to be free to live the good life.

45. Cowen 198 et seq; L Schlemmer "Social Foundations of Human Rights" in Forsyth & Schiller (eds) op cit 34 et seq.

46. 197.

CHAPTER 4

THE PROTECTION OF CIVIL AND POLITICAL RIGHTS IN AFRICA

4.1 Introduction

As pointed out above, most of the independent African states possess impressive bills of rights which guarantee fundamental rights. These have largely been modelled on the Nigerian example¹ which was in turn modelled on the European Convention on Human Rights. It has been said that in 1984/1985 out of 46 African states only nine had constitutions which did not provide² for the protection of human rights. Judged in terms of this practice, African states should be paragons of liberty, but, as will appear presently, this has not been so.

The protection of fundamental rights in a constitution has been a departure, especially on the part of the commonwealth countries, from the British tradition where fundamental rights are not entrenched in a written constitution (Britain does not have a³ written constitution), but derive from the common law. For this

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1. Aiche 53.
 2. R. M. M. "Africa and Human Rights" 19 Verfassung Und Recht Übersee 7-13.
 3. AV Dicey An Introduction to the Study of the Law of the Constitution 10 ed (1959) 199.

reason Dicey could proudly declare that the "Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles⁴ guaranteeing individual liberty." Yet despite their practical inefficacy, these provisions have proved so tenacious to the extent of surviving when new constitutions have been adopted after independence to establish republics, as happened in Kenya or the Gambia, or one-party systems, as in Zambia or Sierra Leone. They have even remained in force under military⁵ governments. In Malawi, however, the bill of rights was abandoned when a new republican constitution was adopted. It was replaced by a brief declaration affirming "the sanctity of the personal liberties enshrined in the United Nations Declaration of Human Rights"⁶ as a founding principle of the constitution.

The adoption of bills of rights in the independent African states can be attributed to three main considerations. Firstly, most of the national leaders who fought for independence interpreted their colonial subjection as a violation of their human rights. Consequently the struggle for political independence was based on human rights. Secondly, these states obtained their independence

4. Dicey *ibid.*

5. Read (1979) 161.

6. S2 2nd schedule to the Republic of Malawi (constitution) Act 23 of 1966.

at a time when the idea of human rights had been internationalized by the UN in the Universal Declaration of Human Rights and by the European colonial powers in the European Convention on Human Rights and Fundamental Freedoms. Post-World War II constitutions as a general rule all contain provisions of human rights. Thirdly, the colonial powers were directly involved in the making of the new constitutions and the independence constitutions were perceived by them as instruments for perpetuating their legal views and traditions even after independence.⁷

It is necessary to consider in general the contents of these bills of rights and to evaluate the impact they have had. It is also essential to consider the attitude of the courts towards the protection of human rights.

4.2 The contents of bills of rights

The bills of rights generally contain detailed provisions on the protection of human rights.⁸ These provisions form part of the

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7. IM Rautenbach "Mensregte-aktes: 'n Vergelykende Oorsig" in JV van der Westhuizen & HP Viljoen (eds) A Bill of Rights for South Africa (1988) 48.
 8. For this see AJ Peaslee Constitutions of Nations Vol 1 - Africa 3ed (1965); Asian-African Legal Consultative Committee Constitutions of Africa States (1972).

supreme law in the constitutions. They override both enactments of parliament and acts of the executive. They are justiciable in the ordinary courts and the constitution contains a specific provision for their enforcement.

The bills of rights guarantee protection of inter alia the rights to life, liberty, due process of law; freedom from slavery, inhuman treatment, deprivation of property without compensation and discrimination; freedom of conscience, expression, assembly, association and movement; protection of the privacy of the home and other property and basic standards of protection in legal processes in criminal and civil cases. Each right is defined in detail with exceptions and limitations also defined.

Each of these constitutions includes a detailed provision prohibiting discrimination on the grounds of race, colour or creed. Some of the constitutions even outlaw private behaviour which discriminates in respect of access to shops, hotels, restaurants, theatres and cinemas.⁹ The emphasis on the prohibition of discrimination is to be ascribed to the fact that Africans were in the past subjected to discrimination based on race and colour. This has given Africans a generally unifying factor. African leaders have been sensitive to the issue of

9. Read (1973) 29; Read (1979) 163.

racial discrimination. Admittedly it is a cruel form of treatment to prejudice a person on account of his race or colour because these are involuntary attributes about which one can do nothing. As the saying goes, the leopard cannot change its spots.

One of the features of the African constitutions is that they concentrate on civil and political rights. Little attention is paid to economic, social and cultural rights like rights to full employment, education, food, shelter and health services. This is no doubt due to the influence of the colonial powers which contributed to their drafting. These emphasized civil and political rights. There is, however, a more fundamental reason; it is easier to protect civil and political rights than to ensure the acquisition or enjoyment of economic and social rights. Civil and political rights are essentially negative. They impose limitations on governmental action whereas economic rights impose obligations. Even if a state can provide for economic and social rights in its constitution, if it does not have the financial resources, those rights remain empty shells. African states are generally poor and can hardly afford these. The debatable issue is where to lay emphasis.

Some do argue, however, that even if these rights are not enforced or are unenforceable, they nonetheless have some

symbolical importance. Their importance lies in their effect on the attitudes of the people on the question of rights even if they may be merely declaratory of goals.¹⁰ But it can also be equally argued that a right is worth nothing unless it can be enforced.

It was for some of the above reasons that the constitution drafting committee in the Federal Republic of Nigeria felt that these should be dealt with in a separate part of the constitution concerning "fundamental objectives and directive principles."¹¹ In Chapter 11 the 1979 constitution enumerates some of these principles. The provisions are more detailed than in other contemporary African constitutions.¹²

In article 13 all organs of state, government authorities and persons who exercise any legislative, executive or judicial powers are enjoined to conform to, and observe and apply the provisions of the chapter.

According to the provisions of article 14 sovereignty vests in the people and public officers are merely servants and not

10. AH Amankwah, "Constitutions and Bills of Rights in Third World Nations. Issues of Form and Content" 1981 CILSA 194.

11. Articles 13-22.

12. Amankwah 185-197.

masters of those they govern. The primary purpose of government is the security and welfare of the people and the government is supposed to ensure the participation by the people in their government. Owing to the diverse nature of the peoples, it is provided that the federal government or any of its agents should conduct its affairs in such a manner as to reflect the federal nature of Nigeria.

In terms of article 15 the state is supposed to foster national integration of facilitating mobility, inter-tribal marriage, residence and the formation of cross-cultural and cross-sectional associations. Steps ought to be taken to eliminate corruption and the abuse of power. Article 16 provides that the state should ensure that the operation of the economic system does not result into the concentration of wealth in the hands of a few people and that it should provide "suitable and adequate shelter, food, reasonable national minimum living wage, old age care and pensions and unemployment and sick benefits" for all members of the public.

Some of the fundamental rights guaranteed in chapter IV of the constitution are reiterated. These include the conventional rights like equality before the law, the sanctity of the human person and equal access to justice. The state is enjoined to ensure that it exploits the human and natural resources of the nation for the common good and that there is sufficient opportunity for all to acquire a decent livelihood. The state is further enjoined to ensure that the health, safety and the welfare of

workers are not endangered and that equal pay for equal work is guaranteed, that children and young persons are safeguarded from vice and material neglect. The needy should receive public benefits in deserving cases although not in all cases.

According to article 18 the state should eradicate illiteracy, promote science and technology and provide free and compulsory universal primary education as well as free secondary education and a free adult literacy programme. Article 19 stipulates that the state has the duty to promote African unity and to combat racial discrimination.

The protection and sustenance of the Nigerian culture is the subject matter of article 20 while article 21 enjoins the state to ensure freedom of the press for facilitating the effective maintenance of the principles and objectives of state policy and also for ensuring public accountability. Article 22 provides that the national ethic shall be "discipline, self-reliance and patriotism."

These are indeed noble goals and objectives. To implement them, however, is another matter. This view does not imply that these are not important. Although these fundamental objectives and directive principles are not justiciable, they are important. Their importance lies in their being "the beacon to guide the

government in steering the ship of State."¹³ Supporters of the entrenchment not only of civil and political rights, but also economic social and cultural rights, argue correctly, it is submitted, that the meaningful and successful exercise of civil and political rights depends on socio-economic and cultural considerations. This is because social rights and social justice are prerequisites for freedom and equality in democracy. In their absence individual rights suffer in the poor sections of society. Poverty makes people vulnerable to all sorts of temptations. In this way the socio-economic conditions of people adversely affect democracy in a variety of ways. As democracy requires informed participation in government processes, it means education is essential for such informed participation. Illiteracy therefore seriously undermines democracy. The poor, weak and illiterate in society depend on the powerful, influential and wealthy. A by product of poverty is "apathy and cynical unconcern for the government process."¹⁴ This is because interest in liberty is a product of economic sufficiency and leisure for thought and for reflection over one's situation.¹⁵

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13. BO Okere "Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution" 1983 International and Comparative Law Quarterly 221.
 14. Amankwah 185-197.
 15. H Laski Liberty in Modern State (1948) 88 et seq.

A point of fundamental importance therefore is that civil and political rights on the one hand and economic, social and cultural rights on the other are not mutually exclusive. They are complementary. A right means nothing if a person does not have the means to acquire and enforce it. This further demonstrates the interdependence of various aspects of society.

Another point of seminal importance is the consideration of the scope and application of the entrenched rights. What are the limits of these rights? Are there any objective criteria for determining these limits, and what are the implications thereof?

4.3 Limitations on the constitutional guarantees

As pointed out already, human rights are not absolute. Limitations on constitutional guarantees take two forms: a general provision may authorize intrusion into some of the rights during a "period of public emergency." This may include a period of war or a state of emergency declared by parliament for a limited period. The second form of limitation involves the definition of a guaranteed right together with the exceptions to it. Deprivation of personal liberty may for instance be allowed in the execution of the sentence of a court. Since the right to personal liberty is of overriding importance, no general provision for derogation from it is made except under emergency

laws. Derogation is, however, possible for certain other rights like freedom of assembly and association. Derogation from such rights is often authorized by law in the interests of defence, public safety, order, morality or health, protecting the rights and freedoms of others or restricting public officers. These are not regarded as inconsistent with the constitution unless demonstrated "not to be reasonably justifiable in a democratic society."

The interpretation of the last phrase presents endless problems and imposes an onerous burden on the courts.¹⁶ It is often difficult to define what a democratic society is and what a democratic society can find reasonably justifiable. For this reason it will only be in exceptional cases that a court will declare a law passed by a democratically elected legislature to¹⁷ be not reasonably justifiable.

If human rights guaranteed in a constitution are to have real meaning, the institutions designated for interpreting and applying them must have a degree of independence from the legislature and the executive. It is therefore essential to consider the independence of the judiciary. African

16. Read (1973) 40 et seq; Read (1979) 163.

17. Read (1973) 42-44; Read (1979) 164.

constitutions expressly guarantee the independence of the judiciary. Yet the construction of juridical independence may vary considerably and ways for ensuring such independence may have different degrees of efficacy.¹⁸

4.4 The independence of the judiciary

In a democratic society the independence of the judiciary is firmly upheld. This means, in the words of Beinart, that

the law-deciding and law-applying agency must be one in which those whose rights are affected will have confidence, that is confidence that the agency will administer justice according to law and will do so impartially, predictably, fearlessly and as far as possible uniformly - free of outside pressure, governmental, legislative or otherwise.¹⁹

This principle has been immortalized in the words of Lord Hewart C J that:

(i)t is not merely of some fundamental importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to

18. Eze 40.

19. "The Rule of Law" 1961 Acta Juridica III.

be done ... Nothing is to be done which creates even a suspicion that there has been improper interference with the course of justice.²⁰

There are four possible attitudes towards judicial independence in Africa, namely: (a) a complete disregard of the doctrine of separation of powers as a western import unsuited to developing countries; (b) an official commitment to judicial independence unsupported by adequate legal guarantees; (c) a comprehensive set of legal safeguards occasionally violated by interference from the executive in politically sensitive issues; and (d) effective institutionalized judicial independence.²¹ Whereas the first three categories reflect the position of different African governments, it is doubtful whether the fourth category exists anywhere in Africa. Most African governments fall within the third category.²²

20. R Sussex Justice, ex parte McCarthy (1924) IKB 256 259.

21. Eze 40; on the ways of ensuring judicial independence see JA Jolowicz "Fundamental Guarantees in Civil Litigation: England" in Cappelletti & Tallon 130 et seq; Z Stalev "Fundamental Guarantees of Litigants in Civil Proceedings; A Survey of the Laws of the European People's Democracies" in Cappelletti & Tallon 377 et seq; H Smit "Constitutional Guarantees in Civil Litigation in the United States of America" in Cappellett & Tallon 445 et seq; GD Watson "Fundamental Guarantees of Litigants in Civil Proceedings in Canada" in Cappelletti & Tallon (eds) 195 et seq; HR Hahlo & E Kahn The South African Legal System and its Background (1968) 326; JMT Labuschagne "Regswetenskap, Regspleging en Regsakademie: Enkele Opmerkinge" 1982 De Jure 332; BO Nwabueze Judicialism in Commonwealth Africa (1975) 191 et seq.

22 Eze 40; Nwabueze Judicialism 212 et seq.

Many African governments, including one-party states and those under military government, have affirmed and recognized the functions and responsibilities of the judges, courts and lawyers. There have, however, been exceptions. President Nkrumah dismissed judges in Ghana without giving reasons and obtained special power for him to reverse the decision of a criminal court.²³

The first black chief justice of Uganda, Mr Justice Kiwanuka was abducted from his court by men dressed as soldiers and was subsequently murdered in September 1972. He had angered Amin by releasing, owing to lack of evidence, a Briton arrested by Amin's security men. He was seized from the high court, his shoes were removed and he was forced downstairs in the full view of other judges and pushed into a car. This episode seriously harmed the independence of the judiciary. Under these circumstances it is impossible for the judge to discharge his duties fearlessly unless he is prepared to make the supreme sacrifice or to escape the country.²⁴

The disappearance of the chief justice of Uganda under these humiliating circumstances virtually paralysed and demoralized the

23. Read (1979) 157.

24. Read (1979) *ibid*; Eze 46-47.

entire legal profession. There was even a comment that the judiciary in Uganda was no longer independent and judges and magistrates were cautious about making legal decisions which might hurt the government's interests. This really endangered justice itself. With the overthrow of Amin things were expected to return to normal.

Even where an accused had been acquitted, he could usually be rearrested or murdered by non-judicial officials. In one case a man had been acquitted, and he was chased and shot after he had left the court. This led many people taken to court to prefer being sent to gaol even if they had been found innocent, or else they would not survive. Magistrates were also reluctant to acquit persons charged with serious crimes even if the men were innocent.

These actions caused members of the judiciary to send a formal protest to Amin. In a memorandum of February 1973 they stated that members of the security forces would turn up in court and demand that someone be sent to gaol, or that someone be prosecuted. When called to testify, members of the security forces would not turn up without any explanation. Sometimes when they did, they would refuse to answer questions put to them. Although President Amin had promised to rectify this situation there was no evidence that there would be any meaningful change

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as long as the chaotic situation in Uganda prevailed.

A former chief justice of Zambia resigned after a demonstration in court by members of the ruling party. In Malawi many judges resigned when legislation was passed increasing the jurisdiction of the traditional courts to try serious cases, including capital offences.²⁶

Despite various degrees of protection of the independence of the judiciary, judges in African states have performed a valiant task under trying circumstances and deserve appreciation for this especially under abnormal conditions like those that prevailed in Uganda.²⁷ This should also be understood in the light of the prevailing political conditions. Although processes of litigation and legal argument were known in most traditional African communities, the concept of an independent judiciary was unknown. Settling disputes constituted an integral part of the chief's role. As judges have no armies, they have to find juristic grounds for accommodating the usurpers after coups or resign.²⁸

25. Eze 47.

26. Read (1979) 157; LC Chimango "Tradition and Traditional Courts in Malawi" 1977 CILSA 56.

27. Eze 47.

28. Read (1979) 157-158.

Examples are found in Africa where retrospective legislation was
resorted to reverse inconvenient judicial decisions.²⁹

Retrospective legislation is generally regarded as a legal
monstrosity because it flouts the principle of legality.³⁰

The Nigerian military government enacted that it had come to power
by revolution, to reverse a supreme court decision. The basis of
its rule was founded in necessity, but judicial review of
legislation was retained because necessity did not require
otherwise.³¹

Some of the events which have taken place in Africa have led some
commentators to regard the principle of a totally independent
judiciary as merely a legal fiction.³² The case of
Ngwenya v The Deputy Prime Minister³³ is one example. Although
Ngwenya had been elected to the Swaziland Assembly, he was a
South African expatriate. After his election he was served with

29. See constitution of Western Nigeria (Amendment) Law I 1963
which reserved Adegberno v Akintola (1963) AC 614 (PC);
see also SA de Smith The New Commonwealth and its
Constitutions (1964) 90.

30. L Fuller The Morality of Law (1964) 51 et seq.

31. Federal Military Government (Supremacy and Enforcement of
Powers) Decree of 1970; Read (1979) 158.

32. J Hund "Aspects of Judicial Review in Southern Africa"
1982 CILSA 285.

33. Swaziland Law Reports 1973 119.

a deportation order on the ground that he was a prohibited immigrant. On his application to the high court, the court set the order aside. Then the Swaziland Immigration Amendment Act 22 of 1972 was passed, which established a tribunal for determining matters of citizenship and the decisions of which would not be subject to judicial review. When the high court failed to declare the Immigration Amendment Act ultra vires, Ngwenya appealed to the Swaziland court of appeal. The court declared the Immigration Amendment Act null and void as being ultra vires the constitution. Thereupon parliament passed a resolution declaring the constitution unworkable and the king suspended the constitution, vesting all legislative, executive and judicial powers in him.³⁴

The Lesotho coup of 1970 is another illustration. After the general election of 1970, the prime minister Chief Leabua Jonathan declared a state of emergency and suspended the constitution. Some members of the opposition were incarcerated and the king was placed under house arrest. Chief Jonathan declared the election invalid. On the wake of these developments³⁵ the chief justice suspended all sittings of the high court.

34. H Kuper Sobhuza II: The Story of an Hereditary Ruler (1978) 315 et seq.

35. Hund 284.

Surprisingly the independence of the judiciary and the maintenance of the rule of law were emphasized in the establishment of the single-party systems of government in Tanzania and Zambia.³⁶ High court judges in Zambia are appointed on the advice of a judicial service commission presided over by the chief justice. In Tanzania and Zambia a judge may be removed only as a result of incompetence or misbehaviour on the recommendation of a judicial tribunal. In Tanzania, however, a magistrate sits with two assessors appointed and removable by the party committee where the majority view prevails. Moreover, the jurisdiction of the courts has been reduced by the practice of withdrawing many processes entailing administrative discretions³⁷ from judicial review.

In the light of the above discussion, it will be illuminating to consider the attitude of the judiciary towards fundamental rights in Africa in general.

4.5 The approach of the judiciary towards fundamental rights

The attitude and approach of the judiciary towards the protection

36. Tanzania Report of the Presidential Commission on the Establishment of a Democracit One Party State (Dar es Salaam) (1965); Zambia Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia (Lusaka) (1972)

37. Read (1979) 158.

of fundamental rights in Africa in general has not been one of enthusiastic support or judicial activism, but rather one of caution or conservatism.³⁸ Understandably so. Not only have governments succeeded in refuting complaints of infringements of fundamental rights, but the courts have also been reluctant to declare legislation passed by parliament unconstitutional. There³⁹ have no doubt been exceptions, but they have been few.

The courts have shown reluctance to reach decisions which are politically controversial. In this way they have attempted to eschew conflict with the government. This may be understandable because they, unlike the government, do not have armies to enforce their decisions. In avoiding conflict they have adopted various strategies. One of these has been the use of the common law in the interpretation of fundamental rights. Although bills of rights have been, in the commonwealth, a departure from the English common law, judges have generally interpreted them in the⁴⁰ light of the common law. The judges have also adopted "the presumption of constitutionality" of legislation. This tends to impose an onerous burden on the complainant even if he has

38. Read (1979) 158.

39. The Sierra Leone Case of Akar v Attorney-General 1967-8 ALR SL 283, 381; 1968-9 ALR SL 58; P (1969) 2 AII 384 (CP).

40. A Typical example is the Jamaican case of King v R (1969) AC 304 (PC).

established a prima facie case of interference with his rights.⁴¹
 This seems to defeat the purpose of entrenched fundamental rights⁴²
 which is to forestall easy interference or infringement.
 American courts on the other hand have adopted a via media of
 "strict scrutiny" to statutes which interfere with certain
 sensitive areas.⁴³ Court decisions have been criticized for
 following a literal rather than a liberal approach in interpreting
 constitutional provisions.⁴⁴

There are, however, certain areas where the courts have
 demonstrated a degree of activism. These include personal
 liberty, fair trial procedures and the defence of the judicial
 role.⁴⁵ But, as is quite evident, the judiciary is in a weak
 position to effectively protect individual rights without the
 support of the other branches of government. This tends to
 confirm the views of some writers who contend that what is

41. Read (1979) 166.

42. The Zambian case of Kachasu v Attorney-General (1969)
Zambia Law Journal 44.

43. On this see inter alia West Virginia State Board of
 Education v Barnett 319 US 624 (1943); Schneider v
 Irvington 308 US 147 (1943); McLaughlin v Florida 379 US
 184 (1964); Kramer v Union Free School District 395 US
 621 (1969).

44. Read (1979) 167.

45. Read (1979) 168-169.

necessary is good government and not necessarily a bill of rights. Good government, as the argument goes, can dispense with a bill of rights, and good government is evidenced by the respect for the judiciary.⁴⁶ This argument, however, begs the question. It does not state how good government is attained. Good government does not grow like weeds; it is cultivated and a bill of rights is one of the ways of cultivating good government.

4.6 Other means of protecting human rights

Many African countries especially with a common law background have established the institution of an ombudsman the primary purpose of which is to review the acts of the administration and the executive.⁴⁷ The institution of an ombudsman is well known and started in the Scandanavian countries with a long tradition for stable government. Because of its function of supervising the activities of government officials, one would not expect an authoritarian government to create such an institution. Yet strangely enough, quite a number of African governments which may be characterized as authoritarian have established this institution.

46. Sanders 8.

47. Eze 49; Read (1979) 173.

This institution was mostly necessitated by the desirability of enabling the judiciary to remain independent of both the executive and the legislature. Moreover, the courts are often inaccessible to the ordinary citizen because they are inundated with a lot of criminal and civil cases and because they adhere to many formalities and technicalities. This is further exacerbated by the expense involved in bringing an action in courts. For this reason the courts are not readily available for dealing with
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purely administrative acts or decisions.

This ombudsman type of institution which has spread in Africa was first established in Tanzania in 1966 with wide-ranging powers to investigate allegations of misconduct or abuse of office or authority by public officers, or the ruling party or of local government and public corporations. A similar institution was created in Zambia in 1973 and in other countries in subsequent years. These have been regarded as the "most successful organs
49
of this type in Africa."

Although this institution has been modified to suit the prevailing political climate where it operates, it has been a more appropriate instrument for the effective protection of

48. Eze *ibid.*

49. Read (1979) 173.

certain basic rights of the individual because it is more accessible to the individual. Its major deficiencies are that it lacks the judicial remedies available to enforce constitutional guarantees and does not have the power to question the validity of legislation.⁵⁰

This institution is a further indication that African states are either committed to effectively protect human rights or that they wish to conform or adhere to institutions which have been adopted by western countries. The success of those institutions depends on the exigencies of the situation.

4.7 Conclusion

The protection of human rights is indispensable for democratic stability. The provision for the protection of fundamental rights in a constitution, coupled with an independent and fearless judiciary as a watchdog, constitutes the essential ingredient that makes democracy work. The provision for the protection of human rights in a constitution is not the only way, but it has been the one chosen by most independent African states. Britain does not have a bill of rights, but effectively protects human rights by virtue of her long-established

50. Read (1979) *ibid*; Eze 51.

tradition. In the African context, bills of rights were necessary because these states had no well-established tradition for the protection of human rights.

The provision for the protection of civil and political rights in a constitution is important. But the effective exercise of these rights depends on a number of socio-economic and cultural considerations. For this reason a right is worth nothing unless a person has the means whereby to exercise and enforce it. This implies that socio-economic rights are interdependent and influence civil and political rights.

The reason why some feel that civil and political rights should enjoy priority is that civil and political rights have a considerable impact on the acquisition of economic and social rights. For this reason they are relevant to the real satisfaction of basic needs. This interaction and interdependence has been aptly articulated by Donnelly in the following words:

One aspect of this interdependence is conceptual and can be summarized in a matched pair of one-sided ideological slogans: a well-fed slave is still a slave; a starving voter is still starving. Human beings are not entirely economic creatures; the denial of basic civil and political rights is an affront to human dignity, a denial of the basic humanity of the person - no matter how well fed, clothed, housed and attended to he

or she may be. Denial of food, shelter, health care, work and education, however, is no less a denial of basic human dignity. Alone each set of rights has considerable intrinsic value, but it is only together that they can realize the underlying moral vision of human possibilities that gives them life and meaning. While it is better to be fed and free than not, a truly human life requires the enjoyment of both civil and political and economic and social rights, which reinforce and profoundly enrich one another.⁵¹

The reason why perhaps more emphasis is often placed on civil and political rights rather than on economic and social rights is because civil and political rights give the individual political power. Political power is decisive on the distribution of resources for satisfying basic needs.⁵² This is the justification why most African constitutions contain detailed provisions of civil and political rights. Economic and social rights are either entirely lacking or merely constitute non-justiciable fundamental objectives and directive principles of the constitution.

51. J. Donnelly "Satisfying Basic Needs in Africa: Human Rights, Markets and the State" 1985 Africa Today 19-20.

52. Donnelly 20-21

CHAPTER 5

THE VIOLATION OF HUMAN RIGHTS IN AFRICA

5.1 Introduction

Despite considerable human rights gains that political independence has meant, and despite the constitutional protection of human rights, civil and political rights have not flourished in Africa. Opposition parties have been proscribed and political opponents incarcerated either without or after shortened trials; elections have been rigged, and coups and military take overs have been a familiar occurrence; the independence of the judiciary, coupled with open trials and procedural rights, have in some places largely disappeared; and members of certain ethnic groups have suffered gross violations of the most basic¹ right, namely the right to life. Many countries in Africa have

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1. For a discussion of this see Welch Jr (1984) 12 et seq; Eze 23 et seq; Nwabueze Constitutionalism 23 et seq; LS Wiseberg "Human Rights in Africa: Towards a Definition of the Problem of a Double Standard" Paper Presented at the Eighteenth Annual Meeting of the African Studies Association, San Francisco, October 29 - November 1 1975 (1975) 1 et seq; W Wenstein "Africa's Approach to Human Rights at the United Nations" Paper Presented at the Eighteenth Annual Meeting of the African Studies Association, San Francisco, October 29 - November 1 1975 (1975) 1 et seq; HL Bretton "Human Rights in Africa: Further Thoughts and Agenda for Action" Paper Presented at the Joint Annual Meeting of the African Studies Association (Twentieth Meeting) and Latin American Studies Association Houston, Texas, November 2-5 1977 (1977) 1 et seq; C Berhane "Africa and Human Rights" 1984 New Africa 39; P Jason "Human Rights and African Leaders' Wrongs" 1985 New African 19; A Wako "Human Rights: Little Cause for Joy" 1985 The Weekly Review 11-12; M Yahya "Aliens and Human Rights in Africa" 1985 The Weekly Review 25-27; Sithole "Monitoring African Human Rights" 1986 American Review 8-9.

been listed by Amnesty International as violators of human rights. Of these Uganda topped the list especially under Idi Amin. Even when Obote took over, the massacre that had taken place under Amin did not abate.

In the socio-economic field the record has been equally dismal. Population increases have exceeded economic growth; the gap in the standards of living between urban and rural areas has mostly widened; the clash between "ethnic" and "national" identity has not disappeared and in some respects has intensified. Various economic development strategies have not reaped the desired fruits. Natural disasters such as droughts and famines,² exacerbated by government inefficiencies, have taken their toll.

Underdevelopment policies have precipitated a decline in the production of food. Damage to the environment has also reduced Africa's capacity for food production. Nine of the poorest twenty countries in the world are in Africa. These include Mali, Mozambique, Guinea, Ethiopia, Chad, Uganda, Tanzania, Togo and Angola.³ It has also been predicted that conditions are likely⁴ to continue to deteriorate before they can improve.

2. Welch Jr (1985) 12; GW Shepherd Jr "The Tributary State and 'Peoples' Rights' in Africa: The Banjul Charter and Self-Reliance" 1985 Africa Today 39.

3. Shepherd 40; Donnelly 7.

4. Donnelly *ibid*.

It will not be possible to discuss the full extent of the violation of human rights. Only a few examples in the area of civil and political rights need elaboration. These include personal liberty and freedom of association. The choice of these two is dictated by their seminal importance and by the extent to which they have been infringed in many African states.

5.2 Personal liberty

Personal liberty has been defined as "the freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons."⁵ This freedom does accommodate the "peace and good order of the community in which we live." For the "freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief."⁶ Thus each society must have powers to arrest, to search or to detain in order to deal with those who break the law. Properly exercised these powers themselves are the safeguards of liberty. But if improperly exercised they lead to the atrophy of the liberty of the individual.⁷

5. A Denning Freedom Under the Law (1949) 5; Anderson 5.

6. Denning *ibid*; Anderson *ibid*.

7. Denning 5-6; Anderson 5-6.

Personal liberty is a comprehensive right which includes freedom of religion, thought and conscience; freedom to accept responsibility and to take decisions; free access to justice; freedom of movement which includes the right not take the liberty of an individual without due process of law; the right freely to participate in the political process; freedom of speech, which includes freedom of the press and other news media; freedom to choose work and place of residence; freedom to participate in the economic life of the country and in particular freedom to earn a living and not to be compelled to work under inhuman conditions; the right not to infringe the proprietary rights of a person without due process of law; the right to receive proper education and training in the language and institution of one's choice; the right freely to practise and build one's culture and to write and speak a language of one's choice; and the right⁸ freely to associate with others.

Personal liberty is the most important human right on which other human rights depend. For this reason it has been said that other freedoms may as well be meaningless if individuals can be

8. LM du Plessis "Filosofiese Perspektief op 'n Menseregtehandves vir Suid-Afrika" in JV van der Westhuizen & HP Viljoen (eds) A Bill of Rights for South Africa (1988) 14-15.

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deprived of their liberty indefinitely without recourse to law.

Regrettably, respect for the personal freedom of individuals has not been the chief characteristic of African governments. Detention without trial of political opponents has been
10
extremely prevalent in Africa. Ironically this is a practice for which colonial governments were severely castigated by African national leaders before independence. Yet many African countries of the post-independence era have been supporters of detention without trial: Angola, Cameroon, the former Central Empire, Chad, Comoros, Congo, Djibouti, Equatorial Guinea, Ethiopia, Ghana, Ivory Coast, Lesotho, Liberia, Malawi,
11
Mozambique, Somalia, Swaziland, Tanzania, Togo and Zaire. The list could be extended.

In many of these countries there has been limited or no freedom
12
of thought, opinion and expression and no freedom of assembly.

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9. Read (1979) 168; A Brecht "European Federation - The Democratic Alternative" 1942 Havard L R 561; Denning 6; on the importance of this right see A Naidu "The Right to Liberty and Security of Person" 1987 IPSVT Bulletin Vol II No.1 16 et seq.
 10. Read (1979) 168; see also L Zimba "The Constitution of Zambia (Amendment) Act No. 18 of 1974" 1978 Zambia Law Journal 86 et seq; J Hatchard "Detention Without Trial and Constitutional Safeguards in Zimbabwe" 1985 Journal of African Law 38 et seq.
 11. Kannyo 9.
 12. On these rights see A Naidu "The Rights of Freedom of Thought and Religion and Freedom of Expression and Opinion" 1987 Obiter 59 et seq; see also A Naidu Fundamental Human Rights: A Bill of Rights for South Africa (1988) 165 et seq.

Sometimes the violations have gone beyond mere restriction of personal liberty and have included the taking of life itself. In the 1960's there were widespread and periodic killings in Burundi and Ruanda for a variety of ethnic, political and socio-economic reasons. In later years the elimination of political opponents or suspected opponents took place in the former Central African Empire, Equitorial Guinea, Guinea and Uganda.¹³

In some of the African countries the courts have, within limited constraints, tried to protect the liberty of the individual. In the Zambian case of *Chipango v Attorney-General*¹⁴ for instance Silungwe J, as he then was, asserted:

The individual's right to personal liberty is one of the pillars of the fundamental rights and freedoms under the constitution of the land and is so clear in the minds of the Zambian people that it ought not to be allowed to pass through their fingers like quicksilver; it should be jealously guarded against any illegal encroachment from any source no matter how great or powerful.

5.3 Freedom of association

Although freedom of association is one of the rights often

13. Kannyo 8.

14. (1970) Select Judgments of Zambia 179.

guaranteed in constitutions, international declarations and conventions and in standard references to liberties and privileges of a citizen, restrictions on this are often imposed in the name of higher objectives. It is often subordinated to pressing rights¹⁵ like the elimination of tribalism divisions and factions and the promotion of national unity. For this reason the idea of a one-party state has been in vogue in Africa. Ghana led in 1964, followed by Tanzania in 1965 and Malawi in 1966. Zambia joined in 1972¹⁶ and many others later. Despite the criticism of the one-party system, "the progressive adoption of the single party by one African country after another attests to its popularity with African leaders."¹⁷

5.3.1 The one-party state

In Ghana and Tanzania, within a few months of independence the legislatures, at the instance of their prime ministers, imposed significant limitations on the right of association by restricting opposition parties, leading to their constitutional

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- 15. CE Welch Jr "The Rights of Association in Ghana and Tanzania" 1978 The Journal of Modern African Studies 639.
 - 16. Aihie 63.
 - 17. Busia 123.

prohibition, and by the establishment of a single party to which all other associations were affiliated. This the leaders did on account of what they considered to be extremely important national needs in the consolidation of independence, namely the reduction of tribalism, divisions and factions in the national interest.¹⁸

The events that led to the adoption of a one-party in Zambia are particularly intriguing. When ex-ministers levelled tribal and corruption charges against members of the ruling party the United National Independence Party (UNIP), this culminated in the resignation of Mr Kapwepwe and his followers from the party and the government and the subsequent formation of the United Progressive Party (UPP). The remaining UNIP followers not only demanded the banning of the new party, but they also called for the immediate introduction of the one-party system. This led to the cabinet decision that Zambia would become a one-party participatory democracy. This had further implications which resulted in the detention of the opposition leaders. Although the intention had always been to go one party, the official policy as expressed by the president had been to achieve it "according to the wishes of the people... as expressed at the

18. Welch Jr 639; SV Mubako "Zambia's Single-Party Constitution - A Search for Unity and Development" 1973 Zambia Law Journal 69; AM Ndlovu "Single-Party States in Africa" 1978 IPSVI Bulletin 60 et seq; Liebenow 221 et seq.

polls." But the split led to this being achieved by an act of parliament and without a referendum. This was also caused by the possibility of UNIP's losing to the combined ANC and UPP.¹⁹

In Africa in general the tendency has been that no ruling group is prepared to countenance the very idea of being ousted from power. Political insecurity has therefore given rise to authoritarianism. Consequently the banning of opposition parties and the detention of opposition leaders have been perceived as a pre-emptive coup. "Altering the rules of the political game in the circumstances may also be seen as an adroit tactic to buy time by a government beset by numerous political, economic and security problems."²⁰

The commission that was established in Zambia to consider the desirable changes, was not asked to consult people on whether or not they wanted the change - the cabinet had already decided for them - but they were to take written or oral evidence on "the form it should take in the context of the philosophy of humanism and participatory democracy."²¹

19. Mubako 68-69.

20. Mubako 69.

21. Mubako 70.

Some of the recommendations which would have curtailed the power of the president were rejected by the government. The one-party system came into existence on 13 December 1972 by virtue of the One-Party State Act.²² The act declares UNIP to be the only party and outlaws any other party and proscribes belonging to and sympathising with any other political party. It also amended various provisions of the constitution by stipulating that holders of a number of constitutional posts should be members of the party, namely the president, vice-president, ministers, attorney-general, speaker and deputy speaker. The act assigns to the UNIP a central position in the constitution unlike is the position in the Westminster and American traditions where political parties are regarded as informal extra-legal associations.²³

In Nkumbula v Attorney-General,²⁴ the ANC leader challenged the legality of this step on the grounds that the appellant's fundamental rights were likely to be infringed. The Court of Appeal rejected the petition on the basis that if the government first amended the constitution in the appropriate manner, the

22. Act 5 of 1972.

23. Mubako 71; Ndlovu 58-59.

24. (1972) Select Judgments of Zambia 40. On this judgment see CP Gupta "Harry Mwaanga Nkumbula and Attorney-General for the Republic of Zambia " 1973 Zambia Law Journal 147 et seq.

appellant had no right to be infringed. Moreover, the courts have no power to prevent or question any bill, before it becomes law even if it aims at removing fundamental rights. The One-Party Bill followed all the required amendment procedures, and²⁵ when it became law, it amended any conflicting provisions. This decision effectively slammed the door to the right to freedom of association in Zambia.

A similar process had taken place in Ghana. In September 1962 a motion had been passed by the National Assembly for the creation of a single-party state. No doubt this was encouraged by the dwindling opposition parties. This issue was presented to the people to vote upon in a referendum in 1964. Although according to the official figures 92.81 percent of the 93.69 percent voters who went to the polls voted in favour of the establishment of the one party, foreign observers reported that this had been secured through intimidation and the rigging of the ballots in various ways. Yet President Nkrumah in a broadcast message to the nation after the referendum declared that they had reached a stage that "demands that everyone within our society must either accept the spirit and aims of our revolution or expose

25. This included s 23 on the fundamental rights of association, and s 25 on the fundamental protection against discrimination on grounds of race, tribe, political opinion, colour or creed.

themselves as the deceivers and betrayers of the people."

The Tanzanian experience is equally interesting although a little different from that of Ghana and Zambia. The Tanganyika African National Union (TANU), the ruling party already had overwhelming support before its national executive committee decided in 1963 that Tanganyika should become a single-party state. Many of the party's candidates would have been returned unopposed in national and local elections. Although the overwhelming support which TANU enjoyed had virtually made Tanganyika a one-party state, when it was proposed to make it by law, it was challenged by a small opposition party. When the decision had been taken by the national executive of TANU that Tanganyika should become a one-party state, the opposition party was dissolved. The report of the commission on the constitution was published in April 1965. The new constitution based on its recommendations was passed by the National Assembly in July. Parliamentary and presidential elections based on the new constitution were held in October 1965.

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26. Busia 126-129; CP Gupta "Harry Mwaanga Nkumbula and Attorney-General for the Republic of Zambia" 1973 Zambia Law Journal 147 et seq; N Chazan "Ghana! Problems of Governance and the Emergence of Civil Society" in L Diamond, JJ Linz and SM Lipset (eds) Democracy in Developing Countries: Africa Vol II (1988) 93 et seq. On the position in Nigeria see L Diamond "Nigeria: Pluralism, Statism, and the Struggle for Democracy" in Diamond et al (eds) op cit 33 et seq.
 27. Busia 134-140; see also U Kumar "Justice in a One-Party African State: The Tanzanian Experience" 1986 Verfassung Und Recht in Ubersee 255 et seq; CM Peter "Justice in a One-Party African State: The Tanzanian Experience: A Re-joinder" 1987 Verfassung Und Recht in Ubersee 235 et seq.

5.3.2 The one-party state and democracy

The cardinal question is whether the adoption of the one-party system in Africa is compatible with democracy and in particular the individual's freedom of association. In attempting to answer this question three attitudes towards democracy in African states can be discerned. There are those who regard democracy as understood in western countries as desirable for all people and would like to see it translocated to Africa lock-stock-and-barrel. According to others democracy is a luxury Africa cannot afford. All that Africa needs, in their perception, is economic development based on strong government. As a result, authority in the communist fashion, and not liberty in the western style is what Africans need.

An extreme version of this is presented by Huntington who asserts that "the thing communists do is govern. Their ideology furnishes a basis for legitimacy, and their party organization provides the institutional mechanism for mobilising support and executing policy... Amidst social conflict and violence that plague modernising countries they provide some assurance of political order."^{27(a)}

27(a). SP Huntington Political Order in Changing Societies (1968)
8.

The third approach to democracy, accepts democracy and authority as essential in developing countries as well, but would like to see them transformed into an African shape in Africa. It is largely the last school of thought which most African states purport to espouse.²⁸

There is definitely nothing wrong if Africans seek to establish their own institutions or to give them an African character. But the problem with a one party is that it is neither an original nor a unique African institution. It can be found in other parts of the world.²⁹ The Communist Party of the Soviet Union is a good example. Unfortunately the Soviet Union is not well known for its democratic character. One does not know why of all the models the African leaders chose the Soviet one. It is perhaps because it has a semblance of democracy while it is authoritarian.

Democracy is based on effective participation by the people in their government. It involves a number of checks on the rulers, lest they become authoritarian. Busia expresses this in the following words:

28. Mubako 80-81; Liebenow 225-229; Eze 57.

29. Busia 143; see also HQ Msimang "The Real Source of the Law of the USSR and the Influence of the Communist Party of the USSR on the USSR's Organs of State Power" 1977 Politikon 77 et seq; FM Mc A Clifford-Vaughan "The Soviet Concept of Legality and State" 1976 Politikon 51.

Every democratic community must have effective checks on its rulers. Democracy rejects the view that the leader, and the group around him who lead the single-party always infallibly seek the interests of the people, or embody the will of all. The leader and the group and all who constitute the party are fallible men and women, on whom there must be effective checks in the exercise of the powers they wield.³⁰

It is really questionable whether democracy is compatible with a single-party state. President Nyerere used to be a strenuous protagonist of the single-party system. His contention was that democracy is not synonymous with the two-party system, but that a single party given certain conditions, is more conducive to democracy than a two- or multi-party system. The contention is that the two-party system by its very nature limits the members' freedom to participate in elections at any level or to speak in parliament for fear of giving inadvertent support or encouragement to the opposition party as a result of lack of unity between the leaders and the other members. But in a one-party system, the argument continues, there is no reason why debate in parliament should not be as free as it is in a party's national executive.³¹

30. 140.

31. JK Nyerere Democracy and the Party System 4-7 as cited by Mubako 81.

Despite the theoretical cogency of this argument, it is not borne out by the facts. Democracy is, moreover, a term that is much misused.³² Most states claim that they are democratic. Many of the one-party states in Africa are authoritarian party dictatorships of the extreme kind.

Free elections are generally seen as the lifeblood of democracy. Rightly so, it is submitted. Thus when a nation abandons elections by the general public as is the case when there is a military take over, this is ample evidence that it is undemocratic. Before independence the denial of the franchise to the Africans used to be a rallying cry of nationalist leaders whereby they strongly condemned the undemocratic nature of the colonial regimes. But many of the one-party states are replicas of the undemocratic colonial regimes although in different forms.³³

Notwithstanding Nyerere's posttestations, it is doubtful whether elections and debate are freer in a one-party state. Many would claim that elections there are often rigged.³⁴ Although there is freedom to stand for elections, there will obviously be some

32. Mubako *ibid*; Busia 125-126.

33. Mubako 81.

34. Busia 126-127.

restrictions and controls by the party. Even freedom to speak in parliament is a dubious option. Restrictions on party members' freedom at the time of election and in parliament also exist in a single-party system because any ruling group will not want to display disunity which may lead to loss of credibility and loss of power. In this way a one-party system does not facilitate³⁵ democracy more than a multi-party one.

It is for these reasons that Lewis, concludes that the single party fails in all its claims. "It cannot represent all the people, or maintain free discussion; or give stable government; or above all reconcile the differences between various regional groups... It is partly the product of the hysteria of the moment of independence, when some men found it possible to seize³⁶ the state and suppress their opponents."

By far the most fundamental argument against the one-party system is that it limits a person's freedom of association, and although freedom of debate is allowed, no member may speak against the policy of the party. Moreover, even though certain members of the party may in some countries like Kenya and Tanzania lose the election, the electorate is limited in voting. They can only

35. Mubako 82; Busia 140; contra Eze 58-59.

36. As quoted by Busia 123.

vote for the candidates of the one party; "they therefore can choose persons, but there is not a choice of policies or programmes or leadership."³⁷

The one-party system virtually leads to one-man rule. Since it imposes unity of purpose among the party, the assembly and the government, the president becomes the political power in the country, presiding over the state and the party as the chief executive, legislator and party boss. As one Ivory Coast politician said, "this is why you find at the head of the government a chief, Houphouet Boigny; at the head of the elected bodies a leader, Houphouet Boigny; at the head of the party a president, Houphouet Boigny."³⁸ Moreover, the one-party system leads to a party dictatorship where the legislature is reduced to a mere rubber stamp.

This system also leads to a caste of rulers who perceive themselves as indispensable and a class of perpetual underdogs, who have no access to power. This often results in difficulty to change government in a constitutional way and consequently precipitates coups which have so much been a feature of Africa.³⁹

37. Busia 139; Mubako 82.

38. Cited by Nwabueze Constitutionalism 159; on the incident of the presidentialism in Africa see BO Nwabueze Presidentialism in Commonwealth Africa (1974).

39. Nwabueze Constitutionalism 173 et seq.

A one party therefore does not offer democratic stability. Although even in multi-party systems democratic instability may be experienced, in one-party states it is even worse. This is not to eulogize a multi-party system, but simply to point out that despite its deficiencies, it offers a better alternative to the single-party system.

5.3.3 The one-party and stability and development

Sometimes the contention is raised that a single party is aimed at promoting stability and development. This is equally spurious. Disunity and tribalism are not the products of a two party, but they are even there in a one party. Disunity is often caused by the struggle for power with all the paraphernalia of economic benefits that it brings about. The experience of countries like Ghana and Uganda bear eloquent testimony that one-partyism is not synonymous with national unity, stability and security. The introduction of a single party, despite some advantages it may have, is per se not a prescription for national integration and political stability. Nor is there evidence that the one party is more conducive to development than a two-party system.

40. Mubako 83-85.

The criticisms which have been levelled against a multi-party system in favour of a one-party one must therefore be rejected as unconvincing. Although it has been said that a one-party system violates the individual's freedom of association, it must be conceded, however, that the right of association is relative and not absolute even in western democracies.⁴¹ What distinguishes Africa, however, is that this right is often almost completely permanently abrogated. It is also striking that in none of these states were the one parties adopted by popular will but by coercion, elimination of opposition leaders through detention and execution and by outlawing opposition parties. The adoption of a one party was therefore not a natural development. As Busia points out, single-party regimes

have been achieved through various ways in different countries, by mergers, dissolution, absorption, or suppression of opposition parties... Single-party power was seized not granted by voters.⁴²

In the light of the background of Africa this is not surprising. Personal economic and other considerations play a role.

In the words of Welch Jr:

41. Welch Jr. (1978) 655.

42. Busia 123.

For most men, short-term personal interest is more palpable than potential, long-term, national interest. Those in power wish to retain control. In any system dominated by a self-perpetuating group, be it a single party or not, the 'ins' can readily slam the door shut on the 'outs.' Special steps must be taken to prevent this. Those at the top must press for continuing renewal of the political bloodstream; they require - as the International Commission of Jurists has recognised - a vigorous press, an independent judiciary, and informed public opinion. Conditions of this sort lie outside the right of association, irrespective of the legal terminology in which it is expressed. A right on paper becomes an actuality only with strong willing, and continuous encouragement and leadership. ⁴³

What is definitely beyond dispute is that democracy in Africa has failed or at least the European model of democracy. ⁴⁴

The gross and consistent violation of human rights can be attributed to a variety socio-economic and political considerations.

5.4 Reasons for the violation of human rights

5.4.1 Social factors

In the social sphere a number of factors can be identified. The European colonizers changed many existing indigenous practices.

43. (1978) 656.

44. A Bockel "On Democracy in Africa" 1985 Codicillus Vol. XXVI No. 1 7-8.

The values of the colonizing powers were presumed to be superior to those indigenous to African societies. As is evident in the field of family relations European rulers "had both the inclination and the strength to impose new procedures and values."⁴⁵

Although traditional African societies recognised certain rights, these rights existed within collective contexts, and were often expressed in ways unusual to Europeans. Ignorance of African norms and practices, coupled with a strong belief that European norms were superior induced colonial powers to curtail many rights that had been protected prior to colonialism. External rule brought about a change in the right of association, as well as in the rights of thought, speech, and belief often to their prejudice.

There was also a difference of emphasis. Whereas European conceptions of political and civil rights stressed individual protection, African conceptions emphasized collective expression. The former was premised on certain value assumptions about the rights of persons as against the government whereas the latter was based on the kinship foundations, in which legal, political and social institutions were interwoven. While the idea of a

45. Welch Jr (1984) 15.

legal and political system enshrined in separate institutions was characteristic of what Europeans considered appropriate, or "civilized," traditional African societies were typified by unified institutions. These contrasting expectations, however, did not imply that human rights did not exist in pre-colonial Africa, although their expression could not be abstracted from the context in which they were recognised and protected. They did exist, but they did not exist in the abstract as rights inherent in all human beings. They were applicable within cultural boundaries where kinship played an important role.⁴⁶

5.4.2 Economic factors

The right to life and to work in traditional Africa depended on the use of land for pasture and cultivation. Landlessness was relatively rare. There was collective control of the land with individual heads of households enjoying the right to cultivate. The alienation of land from the group was not possible without the assent of the whole group. Land problems resulted from the imposition of white rule and in areas of white settlement. During the colonial era the central government came to exercise a direct economic role quite different from the pre-colonial period.⁴⁷

46. Welch Jr idem 16-17.

47. Welch Jr (1984) 17.

Four sets of economic factors influenced the recognition and application of human rights in Africa, namely low levels of economic development; uneven but readily politicized expectations regarding the distribution of economic benefits especially towards the end of colonialism; the expectations of African leaders that the post-independence state should take a major role in economic leadership; and the further desire of African leaders for substantial change in economic relations.

Colonialism created greater economic disparities. The unequal distribution of economic resources led to anti-colonial feeling. The differences in the standards of living which widened as a result of European rule gave the aspirant African leaders an issue for mobilizing support. This meant that the major question after independence "was a reslicing of the economic pie."

The prevalent popular concern for the redistribution of wealth was coupled with the desire of African leaders to bring about major economic changes. "Confronted simultaneously with pre-independence norms of relative egalitarianism and with colonial patterns of skewed income distributions, nationalist spokesmen saw political action as the most appropriate vehicle for development." The popular belief was that although the colonial era had been one in which administrative actions had often

increased inequalities in income levels, the epoch of independence would result in the betterment of all. The desires of the leaders thus reinforced the pressures of the public. The result was "a set of expectations that gave governments a significant agenda for economic and social action."⁴⁸

This resulted in a belief that collective achievement could be done through the government. As Welch Jr points out:

Carried from traditional societies was a sense that mutual efforts were necessary; added from the colonial interlude was a belief that what governmental actions had failed to accomplish under European auspices could be achieved under African leadership. Recent African perceptions of human rights thus came to be heavily influenced by the desire and the political need to enhance living standards. Widespread economic improvement became a sine qua non for leaders, both domestically and internationally. The emphasis became increasingly collective, economic, and oriented toward 'peoples' with the achievement of independence."⁴⁹

Despite all this many African states have not been able to provide for basic needs. Failure to satisfy basic needs is a serious denial of basic human rights. To be able to provide these implies that the state should target "both existing

48. Welch Jr idem 17-18.

49. idem 18-19.

resources and growth and development at the poor." This means that human rights require state intervention in the economy. Yet state intervention is economically inefficient; it reduces total output. Notwithstanding their shortcomings, free markets do produce resources more effectively. This results in a dilemma. "Whatever is done to better satisfy basic needs whether it encourages growth or equitable distribution, will in another way reduce a state's ability to satisfy these needs."⁵⁰ And this is the dilemma African leaders have to grapple with. This has led many African leaders to reject capitalism in favour of a form of socialism, but this in itself has not succeeded.

Another major problem is that African states are entangled "in the rivalry between two hegemonic tributary systems." The capacity of African states to restructure their economies and to provide for their own security largely depends upon the centres of world power. The centres of world power organized by the United States and the Soviet Union share the common characteristics of increasing militarization and the use of that power to extend their influence in competition to the developing countries. This has resulted in both "an arms race and an economic system competition in which the political fortunes of the rulers of these centres of power are closely related to their

50. Donnelly 9-10.

allies and tributary states." The conflict of interests that ensues often leads to the human rights of those in declining states being sacrificed. This results in the deterioration of the economies of the states caught up in this conflict. A further result is the increased militarization of their political systems. "The economic decline is a result of the extraction in trade of raw materials in an unequal exchange... in which the peasants produce crops for export and luxury goods for the ruling
51
tributary class are imported."

Shepherd Jr explains the further consequences of this in the following terms:

New Western technology is often counter-productive, resulting in high prices and lost markets. Heavy taxes on export commodities and the foreign exchange earned are used for the purchase of sophisticated military equipment. Public displays of military power have taken precedence over reducing the adverse balance of trade. A temporary respite is gained by new loans to cover the trade deficit and the public debt. The rise in the debts of African states is in direct proportion to their decline in the terms of trade. Western banking creditors then demand budgetary austerity and devaluation. The cost of this is passed on through devaluation of currency to the peasants and growing urban populations in the price of food and necessities. When people protest by rioting the heavily-armed and well-trained forces are

51. Shepherd Jr 40-41.

called in to maintain order. As this cycle continues, the repression grows. The military and external creditors combine forces to assure that order is maintained and the hegemonic sphere of national interest is not threatened. Those who resist are imprisoned, tortured, forced into exile or armed struggle campaigns.⁵²

5.4.4 Political factors

Politically colonialism has largely been responsible for a number of political constraints on the exercise of human rights in Africa. The basic form of the states themselves was a result of European administrative convenience or imperial competition so that what African nationalist leaders criticised as artificial frontiers arose from imperial rivalries and compromises. Colonialism created states where the promotion of self-government was not a major priority for the ruling powers until towards the end of colonial rule. After independence there was no opportunity to redraw boundaries, which led to later attempts at secession.⁵³

Colonial local administration was extremely authoritarian and reduced most indigenous rulers to relatively "minor cogs" in the administrative machinery. The creation of democracy was never attempted until the last days of colonialism.⁵⁴ As Diamond

52. 42.

53. Welch Jr (1984) 13; Nwabueze Constitutionalism 257 et seq; Liebenow 17 et seq.

54. Welch Jr *ibid*; RB Seidman "Administrative Law and Legitimacy in Anglophonic Africa" 1970 Law Society Review 162 et seq; Seidman "Judicial Review" 820 et seq; L Diamond "Introduction: Roots of Failure, Seeds of Hope" in Diamond et al (eds) *op cit* 7.

points out:

To this model of authoritarian power and privilege must be added the colonial precedent of state violence and repression... 'The colonial state was conceived in violence rather than by negotiation' and 'it was maintained by the free use of it.' Resistance and protest were forcibly, and often bloodily, repressed, although the colonial military machine was quite small by present standards. 'It must be remembered too that the colonial rulers set the example of dealing with... opponents by jailing or exiling them, as not a few of those who eventually inherited power knew from personal experience.' As Sithole argues for Zimbabwe, the intolerant and antidemocratic character of post-independence politics must be traced, in part, to the repressiveness and lack of democratic preparation during colonial and settler rule.⁵⁵

European legal systems were introduced and widely applied, especially in urban areas, while traditional legal systems were relegated to an inferior position to the civil law particularly in rural areas. This led to confusion over the applicable law. The creation of the dual legal system resulted in conflicts and areas of overlap. Another consequence was the significant alteration and reduction in the rights that individual Africans enjoyed.

55. Diamond *ibid.*

The recognition and protection of rights in constitutions was more an after-thought incorporated for the first time in the constitutions at independence. Specific provisions dealing with human rights tended to be most elaborate in African states where there were large European expatriate populations and tended to promote minority rights rather than majority rights. It was perhaps this tactic which led some African leaders to distrust the call for a bill of rights as aimed at palming off a second-class democracy by circumscribing the sovereignty of the people. It was said that the real reason why some whites favoured a bill of rights was not primarily because they desired to guarantee those rights for Africans, but because they did not trust Africans and felt that if they were an enfranchised majority, they would prejudice the whites. Consequently, the argument continued, the whites wanted to erect a barrier in the form of a bill of rights, against the democratic expression of African desires and aspirations.⁵⁶ It is unfortunate that the actions of the colonial rulers led to the discrediting of a bill of rights, an instrument that is aimed at facilitating democracy and the protection of the rights of all citizens.

What cannot be disputed is that the period of colonial rule did not provide encouragement for respecting and protecting human

56. Welch Jr 13-14; Cowen Foundations 115.

rights. No tradition of democracy was created, and none would be expected to continue after independence. To have expected the epoch of independence to be an era of bliss was therefore misguided.

Some would doubt the above contentions. Hund, for instance, argues that the violation of human rights and the tendency towards authoritarian rule in Africa stems from the Gemeinschaft values rather than those deriving from colonialism.⁵⁷ The distinction between Gemeinschaft and Gesellschaft values and ideals is often misleading. How does one classify the South African situation? Moreover, if these were based on the supposed Gemeinschaft values, there would be no reason for political uprisings in many African states. But most of the African states have experienced one or other form or attempt to overthrow repressive regimes. This contention also creates a false impression that precolonial institutions were unaffected by the colonial interlude. In this way the argument has some ethnocentric bias as it rests on the false assumption that Africans are incapable of change or adaptation to altered socio-economic and political circumstances. This is not to deny the

57. "Judicial Review" 283 note 25. He refers also to the views of WHB Dean referring to the views of Ghanaian lawyer JA Benyon (ed) Constitutional Change in South Africa (1978) 91. He refutes the arguments of this Ghanaian lawyer.

influence of traditional norms and practices, but merely to point out that these were adversely affected by colonial rule. What emerged after the colonial era was a mixture of traditional norms and expectations coupled with colonial influences. The result was a mess which it will take time to clear up.

What has been regarded as the major cause of the gross and systematic violation of human rights in Africa is the intolerance of political opposition and the greed for and obsession with power. Obviously the idea of a loyal political opposition is foreign to African ideas. African leaders have been quick to point this out. This has often led to the elimination of political opponents, the abuse of the electoral process, and the entrenchment in power of those who were the first to obtain it.⁵⁸

To do this in the name of tradition has, however, been not genuine because it has been done in a different context. The one party has been a convenient instrument for this purpose. Although some apologists for repressive regimes in Africa have endeavoured to justify the democratic character of a one party,⁵⁹ there is no doubt that it is definitely undemocratic and violates the individual's freedom of association.⁶⁰ This often

58. Jason 19; Nwabueze Cosntitutionalism 139 et seq; Mubako 67 et seq.

59. Eze 57 et seq; cf Mubako 80-81.

results in difficulty in changing government in a constitutional way and consequently precipitates coups d'etat.⁶¹ Soldiers, who ostensibly take over power to save the people, themselves become entangled in the same struggle for power especially because they are trained in the art of violence and because of the awesome power they have at their disposal.⁶² A vicious cycle is created.

There is no doubt that colonial rulers, although not to blame for all the ills of post-colonial Africa, provided a bad precedent. They preached democracy, but never practiced it and this would be followed by their African successors. These leaders realized this; they had never enjoyed the benefits of democracy. Although many of the African politicians admire democracy, they have never developed a democratic ethic. They act like their former masters. People learn more from example than from precept and, human nature being what it is, it is always easy to follow a wrong precedent. Moreover, because of the material benefits of government prestige and power, despite their admiration of democracy as an ideology of government, "the wealth and prestige of power are far too great to be sacrificed upon its altar." As a result for them "democracy must remain a high-falutin ideal, to be talked about in lofty speeches, but not to be observed in

61. Nwabueze Constitutionalism 173 et seq.

62. Jason 19.

practice. To acquire and retain power is the overriding motive in politics, and to that end opposition of any kind must be eliminated."⁶³

Although constitutions modelled on the departing colonial powers were bequeathed to the various independent African states, there was no adequate preparation for independence. During the period of European rule the right to vote and to participate in "modern" political institutions hardly existed for Africans. Colonial policies placed indigenous institutions in subordinate positions. Means of popular consultation and participation in the traditional set up lost much of their importance. Chiefs and other leaders became more loyal to the government than to the people. "Institutions and values were in essence imposed; 'real' adoption required subsequent adaptation, which could be⁶⁴ meaningfully undertaken only after independence."

Undoubtedly, precolonial African societies did not have many civil rights familiar to the colonial powers which are now desired by African leaders such as universal suffrage, separation

63. Nwabueze Constitutionalism 162.

64. Welch Jr (1984) 14.

of powers, or the rights of women⁶⁵ and persons of different religious backgrounds to participate in political matters.

On the whole European administration undercut pre-colonial norms and expectations of political rights. Admittedly such rights had not been exercised on an equal level among all adult members of particular African societies. The frameworks brought by colonialism were based on western liberal assumptions. The result was "one of weakening the effectiveness of indigenous standards and traditional institutions without firmly implanting new ideas."⁶⁶

Only a small segment of the populace that benefitted from extensive education and opportunities to participate in the political institutions created by colonial masters, felt the impact of European norms. "For the great majority of the population, however, the colonial period was a time during which various rights defined within existing groups were abridged, without corresponding advances in establishing and maintaining individual political liberties."⁶⁷

65. R Howard "Human Rights and Personal Law: Women in Sub-Saharan Africa" 1982 Issue 45 et seq; see also R Howard "Women's Rights in English-speaking Sub-Saharan Africa" in Welch Jr & Meltzer (eds) op cit 46 et seq; Eze 141 et seq.

66. Welch Jr (1984) 14.

67. Welch Jr idem 15.

5.5 A positive note

Although the general picture which has been painted above is that of gross and systematic violation of human rights in Africa, it does not mean that there are no attempts at maintaining or developing democracy. Put differently, the picture has not been one of total gloom. Some states have endeavoured to protect democracy and in others although there have been violations of human rights, the extent of such violations has been limited.

The states where a semblance of democracy has been maintained are Botswana, Mauritius and Zimbabwe. The situation in Mauritius has already been referred to above.

The upholding of democratic standards and the protection of human rights in Botswana has been applauded.⁶⁸ Despite the occasional crises, the record has been impressive. "What is remarkable is not that there are some blemishes on Botswana's record, but that substantial regard for human rights and democratic norms has⁶⁹ flourished throughout times of intense pressure."

68. RF Weisfelder "Human Rights under Majority Rule in Southern Africa: The Mote in Thy Bother's Eye" in Welch Jr & Meltzer op cit 94; for a more comprehensive discussion of this see JD Holm "Botswana: A Paternalistic Democracy" in Diamond et al (eds) op cit 179 et seq.

69. Weisfelder 97.

Botswana's relative democratic success may be attributed to "the greater commitment to democratic values of its leadership."⁷⁰ In Botswana the ruling party "has built on the tradition of the Kgotla, a communal assembly to consult public opinion and mobilize public support, in seeking local approval for development policies before any implementation." It has also utilized traditional chiefs, "who retain popular esteem, to legitimate the new political structures and solicit community support." Despite the authoritarian nature of the traditional political structure, "the emphases in Tswana traditional culture on moderation, non-violence, and obedience to the law, along with public discussion and community consensus, have clearly facilitated the development and persistence of democratic government."⁷¹

The two leaders of Botswana since independence Seretse Khama and Quett Masire, "have been moderate, pragmatic, tolerant, competent and uncorrupt, and these qualities also characterize the ruling elite more generally."⁷² Yet Botswana's ruling party, the Botswana Democratic Party (BDP) remains essentially a party of notables rather than a mass-based party. This is because the political elite is highly paternalistic, "fearing that the bulk

70. Diamond 13.

71. Diamond 14-15.

72. Diamond 18.

of the population, which is not formally educated, cannot be trusted with democratic rights and responsibilities." For this reason parliamentary eligibility remains restricted. Despite this limitation Botswana has effective structures for controlling⁷³ corruption.

Although the present government of Zimbabwe was brought about by "free and fair" elections held within the framework of a competitive multi-party system, Zimbabwe cannot be classified as absolutely democratic. The conflict in Matebeleland has resulted in a state of emergency that has considerably limited civil liberties in the area for a protracted period. Because of this conflict Zimbabwe can only be characterized as "semi-democratic"⁷⁴ and "partially unstable."

The success of Zimbabwe's democratic rule has been ascribed in large measure to Mugabe's personality and leadership ability. He has been regarded as a person of integrity who hates corruption and indiscipline. Moreover, he has shown respect for the country's political institutions and has not unnecessarily⁷⁵ interfered with the country's press and system of justice. On

73. Diamond 19-20.

74. M Sithole "Zimbabwe: In Search of a Stable Democracy" in Diamond et al (eds) op cit 245; for a discussion of the history of the conflict in Zimbabwe see Sithole 217 et seq.

75. Sithole 245.

the contrary he has resisted concerted pressure from within his ruling party to violate constitutional limits by immediately declaring a one-party state. He exerted himself in search of harmony with his opponents after assuming control in 1980. This conciliatory attitude was, however, adversely affected by the discovery of arms caches of the opposition in 1982. Nonetheless he has continued to accommodate the white economic elite "in pragmatic fashion and to discourage political corruption."⁷⁶

Mugabe's government has been relatively effective in delivering the goods of development in health, education and agriculture. This has in turn increased its legitimacy and that of the democratic system. Moreover, the government has not been perceived as the government of the wealthy.⁷⁷

The examination of human-rights patterns of the independent black-ruled states of Southern Africa, is no doubt quite controversial. Many would offer excuses for that and wish that more emphasis were focussed on the "flagrant crimes of the Pretoria regime. In their view research of this sort plays into the hands of the apologists for apartheid who are already convinced that most African states have abysmal human rights

76. Diamond 18.

77. Sithole 246.

records. Identification of the moles in the eyes of South Africa's neighbours may become a spurious rationale for tolerating the enormous beam in South Africa's eye which blights human relationships within that country and throughout the region."⁷⁸

To use double standards which shield African states from the searchlight of their human rights records is not an appropriate way of emphasizing South Africa's abuses. It would equally be inappropriate not to point out that some countries under black majority rule have performed well. This would only perpetuate invalid negative stereotypes. Even where abuses have occurred, it may be possible to offer justifications and on careful analysis it may become quite clear that certain segments of the society do seek to enhance certain basic liberties of free⁷⁹ speech, equal justice, due process and public accountability.

In contrast to what has been said of Botswana and Zimbabwe, Lesotho has been characterized by a repressive regime that has used security legislation of a draconian type to suppress opposition and to eliminate dissent. Authoritarian rule and the subjugation of human rights to political convenience commenced

78. Weisfelder 90.

79. Weisfelder 90-91.

when chief Leabua Jonathan ignored defeat at the polls in 1970. The 1966 constitution with its detailed bill of rights, was suspended and "rule by decree and draconian legislation occasionally reminiscent of South African security laws," began. This provided for a prolonged detention without trial and exempted public officials from prosecution for human-rights violations committed in the course of duty during periods of unrest. Despite this, it must be conceded that the use of unrestrained violence against political opponents has been confined to periods of intensive unrest and conflict which ensued upon Chief Jonathan's failure to surrender power and the abortive opposition uprising of 1974. But the treatment of the detainees⁸⁰ was quite moderate, and none of them was executed.

Similarly King Sobhuza II of Swaziland suspended the constitution in 1973 dismissed parliament, prohibited opposition parties and detained various active critics of the government without trial. The violation of human rights was largely imputable to the traditional monarch's unwillingness to make compromises in established structures, procedures or prerogatives to conciliate emergent social classes. But it must be pointed out that the

80. Weisfelder 98.

level of derogation of human rights in Swaziland has⁸¹
 comparatively been minimal.

President Banda of Malawi, on the other hand has unequivocally asserted that autocratic power alone can provide an order and stable basis for domestic tranquility, institution building and prosperity in Africa. He amended the constitution of Malawi in 1968 to permit the suspension of broad guarantees of civil and political rights. He ignored court decisions that contradicted his executive orders. His rule has been repressive and intolerant of any opposition. Detention without trial has been⁸²
 rife.

Although the single-party Marxist regimes of Angola and Mozambique have limited to a considerable extent a variety of basic civil and political rights, they have not been characterized by the massive use of terror widespread brutality, recurrent atrocities, or a systematic pattern of repressive excesses. Their violation of human rights therefore in contrast⁸³
 to some other African states can only be regarded as moderate.

81. Weisfelder 102.

82. Weisfelder 105.

83. Weisfelder 109 et seq.

5.6 Conclusion

The gross violation of human rights in many African states despite the provisions for the entrenchment of those rights in constitutions is evidence that to provide for a bill of rights is one thing, to make it work is another. To provide for a bill of rights is the first step; the next step is to provide effective means for the exercise of these rights. This requires the education of the public on a bill of rights and the rights they have. It also requires that the members of the public should have the means to enforce these rights coupled with the state's willingness to respect those rights. Moreover, the effectiveness of a bill of rights depends on religious commitment to liberal values. Such ethical commitment has been entirely lacking in many African states.

Civil and political rights on the one hand and economic, social and cultural rights on the other are interdependent. Civil and political rights seem to be of overriding importance because they relate to power and power is decisive in the distribution of goods and services in society. Civil and political rights provide power. In many western countries civil and political rights have been used to secure social and economic rights.⁸⁴

84. Donnelly 21.

It is patently clear that the disregard of especially civil and political rights of individuals has largely been the major source of political instability in Africa. A government which disregards the rights of its citizens will in turn not be respected by such citizens.

CHAPTER 6

THE OAU AND THE PROTECTION OF HUMAN RIGHTS

6.1 Introduction

The Organization of Africa Unity (OAU) was established in Addis Ababa, Ethiopia, in May 1963 for the purpose of creating a unified African front on the international scene. This was coupled with the desire to safeguard the independence of the African states and to fight against all forms of colonialism and racism especially as manifested in Southern Africa.¹ At that time many African states were not yet independent. What therefore gave impetus to the formation of the organization was "the strong and unanimous desire to complete the process of decolonization and dismantle the system of apartheid in South Africa."²

In the preamble to the charter of the OAU, the framers stated that they were persuaded that "the Charter of the United Nations and the Universal Declaration of Human Rights, to the principles

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1. Article 2(1) of the charter of the OAU.
 2. Kannyo 15; see also D Venter "Black Africa and the Apartheid Issue; A South African Response?" 1981 Journal of Contemporary African Studies 84 et seq.

of which we affirm our adherence, provide a solid foundation for peaceful and positive cooperation among states..."

The charter stipulates that the members shall co-ordinate and harmonize their general policies, especially in the areas of political and diplomatic co-operation; economic co-operation, including transport and communications; educational and cultural co-operation; health, sanitation and nutritional co-operation; scientific and technical co-operation; and co-operation for defence and security.³

The purpose of this chapter is to determine the role which the OAU has played in the protection of human rights in Africa. This is important because of the role the OAU has played among African states.

2. The OAU and human rights

Unlike the charter of the United Nations, the OAU charter does not provide for the protection and promotion of human rights as one of its major goals. The only issue related to human rights which the OAU charter specifically refers to is the eradication of "all forms of colonialism" from Africa.⁴ Consequently members

3. Article 2(2) of the OAU charter.

4. Article 2(1) (d) of the OAU charter.

of the OAU did not spare any effort in deploring the racist policies of apartheid pursued by the South African government. Besides the issues of apartheid and decolonization, the only sense in which the OAU can be considered as an organization for the promotion of human rights is in relation to its generalized goal of the "total advancement of our peoples in spheres of human endeavours."⁵ The reason for the absence of human rights provisions in the OAU charter is to be attributed to the circumstances in which the organization was established, when the termination of foreign domination was the major preoccupation of the African leaders.⁶ African leaders must have erroneously assumed at the time that human rights would not be an issue in independent African states.

This contention, is buttressed by the fact that although, the OAU has, among its organs, specialized commissions concerned with the activities in which member states have to co-operate, it does not have a commission on human rights. These specialized commissions are the Economic and Social Commission; the Educational and Cultural Commission; the Health Sanitation and Nutrition Commission; the Defence Commission; and the Scientific, Technical and Research Commission.

5. Preamble to the OAU charter.

6. Kannyo 17.

A significant development towards the establishment of a human-rights regime in Africa was the addition of the Commission of African Jurists to the specialized commissions provided for in the charter at the OAU summit in Cairo in 1964. The commission had developed out of the two meetings of African jurists held in August 1963 and January 1964 in Lagos, Nigeria.⁷

The purposes of this commission, according to its statute were: (1) the promotion and development of understanding among African jurists; (2) the promotion of the concept of justice; (3) the consideration of legal problems of common interest and those which may be referred to it by any of the members and the OAU and the making of recommendations thereon; (4) the encouragement of the study of African law, especially African customary law; and (5) the consideration and study of international law in its relation to the problems of African states.⁸

The Commission of Jurists, however, did not develop into an African human-rights system. When the OAU in 1969 approved that the number of specialized commissions be reorganized and reduced, the Commission of Jurists was simply dropped. This was an unfortunate step as this commission could have contributed

7. Kannyo 17-18.

8. Z Cervenka The Organization of African Unity and its Charter (1969) 75 et seq; Kannyo 18.

considerably towards the promotion and protection of human rights. Although the OAU established its own legal commission, this latter commission did not have issues of human rights falling within its purview.⁹

The one key area of human rights where the OAU has made some significant contribution is the protection of refugees. In the 1969 OAU summit conference held in Addis Ababa the OAU Convention Governing the Specific Aspects of Refugees in Africa was adopted. This convention came into force on 27 November 1969. It was intended to complement the 1951 United Nations Convention on the Status of Refugees. The OAU also created a special section in its administrative set up known as the Bureau for the Placement and Education of African Refugees.¹⁰ This in itself was a commendable step.

6.3 Human rights and the principle of non-interference

A major pretext which has been used for not condemning violations of human rights in the dependent African states by other African states "either individually or collectively" has been the principle of non-interference in the internal affairs of other

9. Kannyo 18.

10. Kannyo 19; Eze 163 et seq.

states."¹¹

This principle underlies the independence and sovereignty of each state. It is also evidence of the weakness of sanctions in international law. International law depends on the voluntary¹² co-operation of states for its efficacy. Moreover, the fragile OAU might have died prematurely if member states started hurling accusations at each other.

Ironically the principle of non-interference in the domestic affairs in terms of article 2(7) of the UN charter was consistently raised by South Africa against those states which severely condemned her for her domestic policy of apartheid. This defence was repeatedly rejected by the international¹³ community. A number of resolutions were adopted calling on South Africa to desist from her racial policies. There is obviously no difference between the defence raised by the South African government and that raised by the independent African

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- 11. Article 111(2) of the OAU charter; see also article 2(7) of the United Nations Charter.
 - 12. On this see H Booysen Volkereg: 'n Inleiding (1980) 4 et seq.
 - 13. For a discussion of this see MS Rajan United Nations and Domestic Jurisdiction 2ed (1961) 228 et seq; R Higgins The Development of International Law through the Political Organs of the United Nations (1963) 58 et seq; CJR Dugard "The Legal Effect of United Nations Resolutions on Apartheid" 1966 SALJ 44 et seq.

states. Before one considers the validity of this defence, it is necessary to explain what is meant by interference.

There are basically two approaches to the interpretation of interference. These have been described as the static and dynamic theories of interpretation of intervention.¹⁴ According to the static approach intervention is regarded as any action relating to the domestic affairs of a state by any organ of the UN except necessary action by the Security Council in the application of enforcement measures in terms of chapter VII of the charter. In accordance with this interpretation the UN is prohibited from interfering with an issue relating to human rights.¹⁵ This interpretation impliedly limits the effectiveness of all the operative provisions of the charter including those concerned with international economic and social co-operation. Moreover, it would not be possible to fulfill the functions provided for in articles 55, 56 and 62 of the UN charter without intervening in matters of domestic jurisdiction. This interpretation is obviously unacceptable.¹⁶

14. Rajan 74.

15. LC Steyn "Die Seggenskap van die Verenigde Volke insake Menseregte" 1950 THRHR 29 et seq.

16. Rajan 69.

According to the technical meaning of the word "intervention," intervention means "dictatorial interference by a state in the affairs of another state, affecting the latter's political independence or territorial integrity." To accept this interpretation implies that article 2(7) does not rule out action of UN organs by way of discussion study inquiry and recommendation falling short of actual physical intervention. This approach is in line with the principle of treaty interpretation namely that a treaty must be interpreted in such a way that its different provisions are not conflicting in their aims and results because the parties could not have intended such a result. Consequently a proper interpretation is one which, while rendering article 2(7) meaningful, confers on the organs of the United Nations competence to carry out the major purposes of the UN and also implement the operative provisions of the charter. This is only possible if one attaches the legally technical meaning to the term. Moreover, it must be remembered that people who drew up the charter were not laymen who were not¹⁷ unaware of the technical meaning of the word but were lawyers.

It is quite clear that the provisions of article 2(7) are far from unambiguous and the concept of domestic jurisdiction is not

17. Rajan 70 et seq.

static but dynamic. Consequently what is regarded as domestic today will not necessarily be regarded as so in future. Although it was in the past assumed that the question of human rights which the state affords its citizens is a matter of domestic jurisdiction, "today this assumption is open to serious doubt."¹⁸

The view that was expressed earlier was that human rights have become part of international customary law and as such are binding on states. This means that South Africa cannot today rely on the defence of domestic jurisdiction when the policy of apartheid is criticized by the international community. As a matter of fact no one can have the audacity or the temerity to raise that defence today. If therefore South Africa can no longer raise domestic jurisdiction as a defence to the violation of human rights, it means a fortiori that none of the African states can legitimately raise the same defence.

6.4 The application of double standards

Many of the African states have consistently condemned the racist policies of South Africa or of the then Southern Rhodesia. But when it comes to the gross violation of human rights by fellow member states of the OAU, they have turned a blind eye to such

18. Higgins 61.

violations. Alternatively they have raised the defence of domestic jurisdiction. If there is no material difference between the defence raised by South Africa and that raised by African states, this means that African states have been guilty of using double standards when it comes to the question of the violation of human rights.¹⁹

The application of double standards is not unique to Africa, but Euro-American states have been guilty of it.²⁰ But this does not excuse this course of action, nor does it derogate from the fact that such behaviour is inconsistent and therefore unacceptable on ethical grounds.

6.4.1 Double standards defined

Applying double standards implies "applying different criteria to situations which are so similar that they merit equal treatment."²¹ This may manifest itself in a variety of ways. The most common form of double standards occurs when a government condemns another government for human rights violations in which

19. Wiseberg 4-6; CE Welch Jr "The OAU and Human Rights: Towards a New Definition" 1981 Journal of Modern African Studies 4023; Weinstein 6; Bretton 7-10.

20. Wiseberg 4, 7.

21. Wiseberg 6.

it itself is involved. A typical example would be the government of Uganda criticising the government of South Africa for the violation of human rights while it was itself seriously infringing the rights of its citizens. Many similar examples may be cited.

6.4.2 Strategies for using double standards

One of two strategies may be employed in the application of double standards. The first may be for the government either to deny or hide the violation of human rights in which the government is involved. The other strategy does not consist of a denial of the facts but merely disputes how they should be interpreted. This means "challenging the comparability of the situation at home with the situation condemned abroad." Thus the government of Zambia may refuse to acknowledge that it uses undemocratic means of detention without trial just like South Africa because this is used for a different purpose.²²

The second instance of the double standard involves the use of different criteria to similar situations abroad. Thus a government may condemn another government for the violation of human rights while accepting the same behaviour by another government. The typical example is that of the African

22. Wiseberg *ibid*; Weinstein 7.

governments which have expressed moral outrage against the racist white regimes of Southern Africa while turning a blind eye to²³ gross violations of human rights by black African governments.

The OAU and its members have remained silent when Ghana expelled West African aliens en masse. The massacre of the Tutsi by the ruling Hutu group in Rwanda and the denial of equal access by the Tutsi to the political system in Rwanda triggered no reaction from African governments. Similarly in 1972 and 1973 the Hutu were massacred by the minority ruling Tutsi ethnic group.

Another example is that of the mass expulsion of the Asians by Amin from Uganda and the reign of terror which set in during his²⁴ rule in Uganda. There was no reaction from the OAU. The climax was the 1974 OAU summit which took place in Uganda and which culminated in the election of Amin as chairman, as was the convention that the host be elected, despite his gross violation of human rights in that country. In that capacity he would be the African spokesman for 1975-1976. Only three members boycotted this summit, namely Tanzania, Botswana and Zambia. A fourth member state, the newly independent Mozambique, also disapproved although in a mild way by sending only a low-level

23. Wiseberg 6.

24. Weinstein 7-9.

delegation led by its deputy foreign minister. The Tanzania government voiced the strongest objection to this and pointed out the hypocrisy inherent in condemning and seeking to isolate South Africa while ignoring the atrocities committed elsewhere on the continent.²⁵

From this it is evident that the decision to condemn violations of human rights has not been based on any uniform ethical standard, but on Realpolitik, namely on political or economic considerations, according to what the government perceives to be in its "national interest."²⁶ This then weakens any moral outrage which is expressed selectively by members of the OAU. As Wiseberg puts it: "By and large, governments have proclaimed humanitarian standards, and have been prepared to act to uphold or further human rights, only where it has been in their political and/or economic interest to do so. They have not been prepared to speak out or to take action where political costs would be entailed - where they might embarrass an ally, where protest might harm their relations with another sovereign, or where economic investments might be jeopardized. Additionally, there is a tendency towards inertia and indifference if there is nothing to be gained by challenging a government transgressing

25. Welch Jr (1981) 405-6; Weisfelder 117; Wiseberg 3.

26. Wiseberg 6.

against human rights, even if there is nothing tangible to
²⁷
 lose."

Some apologists of authoritarian and repressive regimes in Africa have endeavoured to justify the violation of human rights by African governments on the grounds that "Africans believe that it is preferable to be oppressed or exploited by their own fellow
²⁸
 Africans than by white men." This is clearly not true. On the contrary it may be more painful to be oppressed by one's own people. Moreover, this view is an oversimplification of the condition of human rights in Africa. The infringement of human rights in Africa has gone beyond oppression or exploitation and
²⁹
 has comprised torture, and the taking of innocent lives. No one would sacrifice his life for nothing.

6.4.3 Difficulties

There are obviously difficulties in the observance of human rights. These relate to the interpretation of human rights as such. This arises from the apparent dichotomy between the approach of western countries and that of non-western ones to the

27. 7.

28. Zvobgo as cited by Bretton 7.

29. Bretton ibid.

issue of human rights. While African countries for instance incline towards social economic and cultural rights western countries stress civil and political rights. This prompts the question to what extent civil and political rights may be limited³⁰ in favour of other rights. But as was said above this dichotomy is more apparent than real. Civil and political rights are not in conflict with social, economic and cultural rights.

The above controversy has also led to the question whether the conduct of African states merits to be judged according to different criteria because of certain conditions peculiar to developing countries. These are, especially in the context of Africa, conditions which emanate from the colonial legacy of underdevelopment and racism. This would inevitably lead to African governments perceiving human rights violations differently from others.

The acceptance of the Universal Declaration of Human Rights by many African governments either expressly in their constitutions or implicitly, contradicts the perception that they have to be evaluated differently. Concededly African governments have faced daunting problems of nation-building development and economic self-sufficiency. But it is highly questionable whether these

30. Wiseberg 8-9.

noble ideals merit the restriction of fundamental rights. Even if certain circumstances might justify this, the length and extent of violation should be extremely limited. As pointed out above many of the truly basic rights and freedoms are not incompatible with these noble goals. The tendency may be that a small elite may use these goals to obfuscate "the consolidation of its own wealth and political power." Moreover, many of the gross violations of rights are totally unjustifiable. These include mass murder, or genocide, torture, apartheid or gross racial discrimination and serious infractions of the rule of law. This means that, "there are some rights that are so basic that violating them must always produce moral revulsion and there is a degree of proportionality in violations that can never be acceptable."³¹

6.4.4 Consequences of applying double standards

On the basis of the above arguments it is quite clear that despite certain limitations on African states, they have applied double standards in the field of human rights. This has certain implications.

The danger inherent in omitting to protest against the violations of human rights among black African states, "is that silence has

31. Wiseberg 9-11.

promoted increased audacity on the part of those who violate them." Uganda is the classic example. Moreover, the double standard which African leaders have adopted in the protection of human rights at the UN "promotes cynicism among western states whose delegates seize upon it as an excuse for their own delinquency vis-a-vis human rights violations in Southern Africa." Furthermore, the practice of being silent "in the name of African unity and the common struggle against racism in southern Africa, colonialism and neo-colonialism, is gaining an expressive value." For this reason it has become almost "immoral to mention human rights violations in a fellow African state."³²

6.5 Conclusion

There is no doubt that the OAU's role in the protection and promotion of human rights has been limited. This can be attributed to the vulnerable position of the OAU. The application of double standards by members of the OAU when it comes to the violation of human rights by fellow members has weakened their moral outrage at similar violations by some Southern Africa states. The OAU can, however, play a prominent role in the development of a human-rights regime in Africa.

33. Weinstein 11.

CHAPTER 7

TOWARDS A REGIONAL PROTECTION OF HUMAN RIGHTS IN AFRICA

7.1 Introduction

Although the OAU initially did not have the protection and promotion of human rights as one of its major preoccupations, it could not remain impervious to the violations of human rights in Africa. Moreover, it provided a suitable platform for the evolving of a regional human-rights system in Africa. Yet it would take a long time before the OAU could take a move in this direction.

7.2 Africa in search of a human rights institution

Despite the OAU's ineffectiveness in the protection and promotion of human rights, several attempts were made to create a regional human rights mechanism for Africa. Since its inception the UN has been directly involved in the promotion of human¹ rights on the international level.

At the 1961 Lagos Congress on the Primacy of Law, the meeting recommended a study to consider the possibility of both a Human

1. Kannyo 24 et seq; Eze 201 et seq.

Rights Convention for Africa and a regional Human Rights Tribunal, similar to the European or the American Commission on Human Rights. This proposal resurfaced at many subsequent seminars and in particular at the 1969 Cairo Seminar² where it was agreed that this move was desirable. Although the Secretary-General of the UN subsequently communicated that recommendation to the OAU and all the governments of the OAU member states, no³ action was taken.

Some have doubted the value of creating a regional commission as a result of the ineffectiveness in the past of many inter-governmental organizations to promote human rights. The reason for this is that states are the prime offenders against human rights, and inter-governmental organizations are generally pervaded by political, as opposed to ethical or moral, considerations. What has rather been advocated is the support of "non-governmental organizations and counter-elites" especially if they act in concert with each other to survey state behaviour⁴ denounce violations and mobilize pressure on governments.

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Be that as it may, efforts in this direction have been continued.

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2. A UN Seminar on the Creation of Regional Commissions on Human Rights with particular reference to Africa.
 3. Kannyo, 26; Wiseberg 13; Eze 201-202; Weinstein 10.
 4. Wiseberg 13-14.

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During the period of ten years since the Cairo Seminar, a number of seminars, meetings and conferences were held in various African countries under the auspices of the UN on different aspects of human rights. These meetings were held in Lusaka,⁵ Zambia in 1970, Addis Ababa, Ethiopia in 1971,⁶ Yaounde Cameroon⁷ in 1971, Libreville, Gabon in 1971,⁸ and Dar-es-Salaam, Tanzania⁹ in 1973. At many of these seminars, the desirability of creating an African human-rights commission or some other¹⁰ mechanism was expressed.

Since 1960, the International Commission of Jurists (ICJ) organized a number of conferences and seminars in various parts of Africa on the question of the rule of law. These meetings were held in Lagos, Nigeria (1961), Dakar, Senegal (1967), Dar-es-Salaam, Tanzania (1976) and Dakar Senegal (1978). In addition to re-affirming the belief and support for the principle of the rule

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5. "Seminar on the Realization of Economic and Social Rights with Particular Reference to the Developing Countries" Lusaka, Zambia, 23 June - 4 July 1970.
 6. "Conference of African Jurists on (the) African Legal Process and the Individual" Addis Ababa, Ethiopia, 19-23 April 1971.
 7. "Seminar on Measures to be Taken on the National level for the Implementation of the United Nations Instrument Aimed at Combating and Eliminating Racial Discrimination and for the Promotion of Harmonious Race Relations" Yaounde, Cameroon 16-29 June 1971.
 8. "Seminar on the Participation of Women in Economic Life, Libreville, Gabon, 27-29 August 1971.
 9. "Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Attention to the Problems and Needs of Africa" Dar-es-Salaam, Tanzania, 23 October - 5 November 1973.
 10. Kannyo 27; Eze 201-203.

of law, participants at these meetings often expressed the view that it was desirable to establish a human-rights mechanism at¹¹ the African regional level.

These seminars and conferences organized by the UN and the ICJ and other organizations have contributed considerably towards keeping alive the idea of establishing an African human-rights system and have also provided a forum where the general problems pertaining to human rights in Africa could be discussed. The most significant political step, however, was the decision of the OAU in 1979 "to initiate concrete steps in this direction within¹² the framework of the organization."

At the 1979 ordinary summit meeting of the OAU it was decided to start work for establishing an African human-rights commission. Before the OAU summit conference, a symposium was organized by the secretariat of the OAU at the beginning of 1979. This symposium demonstrated the growing and widespread interest in the achievement of this objective.

The OAU symposium, met in Monrovia, Liberia, in February 12-16, 1979. It brought together forty African experts in various

11. Kannyo 29-30.

12. Kannyo 30.

fields to discuss the theme:" What Kind of Africa by the Year 2000?" One of the recommendations of the symposium was that a human-rights department be created within the OAU's general secretariat. The report of the Monrovia symposium was communicated to the OAU meeting of the Council of Ministers which met in July 6-20 and the meeting of the Heads of State and Government which met later in the month, both of which were held in Monrovia, Liberia. The OAU attached great importance to the Monrovia symposium. This is evidenced by the fact that both meetings passed resolutions which made specific reference to the report of the Monrovia colloquium.¹³

Among the decisions taken by African Heads of State during the summit meeting was the creation of an African human-rights defence mechanism. They "spoke out in unison and expressed concern over violations of human rights and stated that these have become a disturbing feature in the continent." Although diplomatic etiquette did not allow reference to the names of the states concerned, it was clear that they meant Equatorial Guinea under Marcias Nguema, Uganda, under Amin and the defunct Central African Empire under Jean Bokassa.¹⁴

13. Kannyo 30-31.

14. EO Esiemokhai "Towards Adequate Defence of Human Rights in Africa" 1980 Verfassung Und Recht in Ubersee 151.

A significant issue concerning human rights which was discussed by the OAU summit conference was the invasion of Uganda by Tanzanian troops and Ugandan exiles which led to the demise of the Amin regime in 1979. This question led to a heated debate centring around the principle of respect for territorial integrity and non-interference in the internal affairs of a state. There is, however, no doubt that this issue contributed significantly to the decisions of the OAU Heads of State and Government to commence work on the creation of an African human-¹⁵ rights system.

The Heads of State and Government requested the Secretary-General of the OAU to draw attention of the member states to certain international conventions the ratification of which would assist to strengthen Africa's struggle against certain maladies like apartheid and racial discrimination, trade imbalance and mercenarism, and to organize as soon as practicable in an African capital a restricted meeting of highly qualified experts to prepare a preliminary draft on an "African Charter on Human and People's Rights" which would, among other things, provide for the establishment of bodies to promote human and people's¹⁶ rights.

15. Kannyo 32.

16. Kannyo 33; Eze 203, 211.

In September 1979 the UN convened a seminar in Monrovia, Liberia, to discuss the possibility of establishing an African human-rights commission. This seminar was attended by participants from 30 African countries and representatives of inter-governmental and non-governmental organizations. At this seminar the participants resolved to take advantage of the momentum generated by the political developments and especially the resolution of the OAU summit conference to start working for creation of an African human-rights mechanism.

The seminar established a working group to draft concrete proposals for the creation of an African Commission on Human Rights. These recommendations were partly aimed at assisting the proposed OAU meeting of experts which was recommended by the ¹⁷ Monrovia OAU conference.

The seminar resolved that an African Commission on Human Rights be established as soon as possible. Consequently, it requested the Secretary-General of the UN to communicate the Monrovia proposal to the OAU as a possible model for an African Commission on Human Rights. The seminar further decided that its chairman, together with the representative of the UN Secretary-General, should inform the then Chairman of the OAU (the late President

17. Kannyo 28.

Tolbert of Liberia) about the outcome of the seminar and the proposal for an African Commission on Human Rights. It also suggested that the OAU should discuss with non-governmental organizations strategies for co-operation with the proposed African Commission on Human Rights in the promotion and¹⁸ protection of human rights.

The first working session of the OAU experts convened from November 29 to December 8, 1979 in Dakar, Senegal and produced a draft charter entitled: "African Charter on Human and People's Rights." The drafters were given a mandate to prepare a charter which "reflects the African conception of human rights," and for this purpose they were to "take as a pattern the African philosophy of law and meet the needs of Africa." This meant that this document had to differ from western conventions. Yet the charter reaffirmed its adherence to general international law on¹⁹ the question of human and people's rights.

A preliminary draft was adopted, with some modifications, by the OAU Council of Ministers in Banjul, Gambia in January 1981. This is why it is also called the Banjul Charter. It was then adopted

18. Kannyo 28-29.

19. RM D'Sa "Human and People's Rights: Distinctive Features of the African Charter" 1985 JAL 73; Eze 212; R Gittleman "The Banjul Charter on Human Rights and People's Rights: A Legal Analysis" in Welch & Meltzer (eds) op cit 152.

by the Assembly of Heads of State and Government of the OAU which²⁰
 met in Kenya, Nairobi on June 24-28 1981. It requires the
 ratification or adherence of a simple majority of the member²¹
 states of the OAU to become operative. It came into force in²²
 1986.

While one is cognizant of the problems peculiar to Africa,²³ it
 is essential to point out that there is danger inherent in
 emphasizing the "African" conception of human rights. It may be
 liable to abuse "in order to legitimize policy conducive to
 the interests of the ruling elite." It may for example lead to
 government's refusing to allow the formation of political
 opposition parties on the ground that the activities of such
 parties would be in conflict with the idea of consensual
 decision-making in traditional African society. It could also be
 used to justify holding political dissidents in preventive²⁴
 detention.

7.3 The African Charter

The decision of the OAU to adopt the African Charter has created

20. Eze *ibid*; E Kannyo "The Banjul Charter on Human and
 People's Rights: Genesis and Political Background" in
 Welch Jr et al (eds) *op cit* (1984) 128.

21. Article 63 (3).

22. Peter 242 and *ft* 27.

23. D'Sa 74; Eze 204-207.

24. D'Sa *ibid*.

conditons for a regional mechanism to promote and protect the²⁵ fundamental rights of over 400 million people in Africa. This decision indicates that African leaders for the first time recognized that human rights violations in African states are a matter of concern for the international community. Until then the principle of non-interference in the domestic affairs of member states had been consistently upheld.²⁶ The most significance consequence of the adoption of the African Charter is the implied recognition that the principle of non-interference can no longer provide a convincing defence for violators of human rights.²⁷ This development should inspire hope to the victims of²⁸ arbitrary power and to advocates of human rights in the region.

7.3.1 Distinctive features

The preamble to the African Charter differs from the preambles to the other regional conventions for the protection of human rights. It demonstrates that the charter drew its inspiration from the OAU Charter which stipulates that "freedom, equality, justice, and dignity are essential objectives for the achievement²⁹ of the legitimate aspirations of the African peoples."

While the Banjul Charter could be interpreted as a non-binding instrument, it could be contended that it was designed to be

25. Kannyo (1984) 128.

26. Kannyo idem ibid.

27. Kannyo idem 129 especially at 147-148.

28. Kannyo idem 148.

29. Gittleman 153.

binding. Member states of the OAU who are parties to the Banjul Charter have an obligation to "recognize the rights, duties and freedoms enshrined in the African Charter" and to "undertake to adopt legislative or other measures to give effect to them."³⁰

This language differs substantially from the American Convention and from earlier drafts of the present African Charter. Article 1 of the American Convention for instance provides that a state has an obligation "not to violate an individual's rights and may also have the obligation to adopt "affirmative measures necessary and reasonable under the circumstances to ensure the full enjoyment of the rights of the American Convention guarantees."

It is not clear that the African Charter requires an equally strong obligation from member states. The earlier Dakar draft required that states "shall recognize and shall guarantee the rights and freedoms stated in the present Convention and shall undertake to adopt, in accordance with the constitutional provisions, legislative and other measures to ensure their respect." The elimination of the words "guarantee" and "ensure" from the final draft deprives the charter of much of its force. The language was altered apparently to make the charter more acceptable to the governments concerned about the effect of human rights covenant upon national sovereignty.³¹

30. Article 1.

31. Gittleman 155-156.

To recognize rights without a guarantee to implement them could lead to the interpretation that the charter is merely a set of rights to be promoted rather than protected. This contention is, however, contradicted by the provisions of article 1 which enjoin member states to "undertake to adopt legislative or other measures to give effect" to the charter. The deletion of the express guarantee and obligation to ensure protection of rights may, however, be regarded as supportive of the proposition that³² the charter is non-binding and non-protective.

When a state ratifies a human-rights instrument, it recognizes the existence of these rights and agrees to incorporate them into its own domestic legal system. It may then no longer refuse to allow the international community to discuss alleged breaches of the instrument on the basis that such a discussion violates its sovereignty. According to the principle *pacta sunt servanda*, a³³ state must honour its treaty obligations.

7.3.2 Types of human rights

The African Charter contains three generations of rights, namely civil and political rights, economic, social and cultural rights³⁴ and rights to development. The interdependence of the generations is mentioned in the preamble: "(I)t is henceforth

32. Gittleman 56.

33. Gittleman 157.

34. Shepherd Jr 44-45.

essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, cultural, and social rights in their conception as well as universality, and that the satisfaction of economic, social, and cultural rights is a guarantee for the enjoyment of civil and political rights."

It will not be possible to discuss in detail all the rights contained in the charter. A broad generalization will be made to point out the salient features thereof. The civil and political rights of the individual provided for in the charter have much in common with other regional instruments.

7.3.3 Civil and political rights

No doubt the most fundamental human rights are the rights to ³⁵life, and the right to liberty. ³⁶The charter provides that no one may be deprived of his freedom except for reasons and conditions previously laid down by law. It prohibits the arbitrary arrest and detention of the individual. The African Charter does not contain any derogation clause which entitles a state temporarily to suspend a right guaranteed in the charter. Many of the provisions, however, contain clawback clauses which entitle a state to restrict the granted rights to the extent permitted by the domestic law.

35. Article 4.

36. Article 6.

Clawback clauses differ from derogation clauses and do not afford the individual the same degree of protection provided by derogation clauses contained in other covenants and conventions. Derogation clauses limit a state's conduct in two important ways: it restricts the circumstances where derogation may take place. The usual practice is to provide for derogation in time of war or other public emergency threatening the life of the nation. Derogation clauses also define rights that cannot be derogated from and must be respected, even when derogation is permitted. "The effect of derogation clauses, therefore, is to carefully define the limits of state behaviour towards its nationals during times of national emergency - a time when states are most apt to violate human rights."³⁷

Whereas derogation clauses permit the suspension of rights previously granted, clawback clauses restrict rights from the start. As a result, clawback clauses tend to be more imprecise than derogation clauses because the limitations they allow are "almost totally discretionary." The right granted may be restricted by the local law or the existence of a national emergency, both "very vague and limitlessly broad standards."³⁸

37. Gittleman 157.

38. Gittleman 158; D'Sa 75.

The African Charter for instance stipulates in article 6 that individuals may not be arbitrarily deprived of their freedom but that "reasons and conditions" must previously have been laid down by law. This clawback clause "leaves open the possibility for domestic legislation to provide in what circumstances preventive detention may be allowed."³⁹ While article 7 provides for some protection for the individual in the form of procedural safeguards to enable him to have his cause heard, the right of appeal to a competent national organ, the presumption of innocence, the right to defence and trial within a reasonable period, this is, however, limited to these procedures being carried out by "competent national organs" or a "competent court or tribunal."⁴⁰

It is, however, not clear whether cases concerned with preventive detention for instance should be heard in the ordinary course of criminal procedure. This means that detention without trial may still be possible and lawful and such cases may be heard by special courts or by an impartial panel. Consequently the state has the discretion of suspending the normal judicial process in the interests of state security.⁴¹

39. D'Sa *ibid.*

40. Article 7(1) (b) and (d).

41. D'Sa 75.

The use of clawback clauses is found in the charter in relation to many other rights apart from the right to life⁴² and the right to liberty⁴³ and includes the right to freedom of conscience and religion,⁴⁴ freedom to receive information and disseminate opinion,⁴⁵ freedom of association,⁴⁶ freedom of assembly,⁴⁷ and freedom of movement.⁴⁸ In each instance the state is entitled to justify limitations on individual rights and freedoms by virtue of its own law which could be restrictive. Some articles do, however, provide guidelines by enumerating circumstances when the restrictions will be justified. The exercise of the right of assembly for instance may only be curtailed in the interest of either national security or the safety, health, ethics and rights and freedoms of others. The weakness of this, however, is that it allows suspension of this right in too wide a range of circumstances which are left undefined.⁴⁹

Article 13(1) guarantees the right of participating in government either directly or through freely chosen representatives. This provision is quite significant in the light of the general

42. Article 4.

43. Article 5.

44. Article 8.

45. Article 9.

46. Article 10.

47. Article 11.

48. Article 12.

49. D'Sa 76.

position in Africa. Yet this provision is also subject to a clawback clause, "in accordance with the provisions of the law." The implication of this is that if the national law provides for a one-party state, as is usually the case, this right is not violated. Moreover, many African states are ruled by military regimes. This is also apparently accommodated. The clawback clause, however, permits a wide discretion to African governments "to order their political system as they think fit, which⁵⁰ includes the institution of a one-party-state."

7.3.4 Duties

The African Charter appears unique among the regional instruments of its kind in that it imposes duties on the individual towards "his family and society, the State and other legally recognized communities and international community," as well as rights⁵¹ against the state. The duties enumerated in article 29 comprise respect for the family and care of parents, the preservation of social and natural solidarity as well as contributing to the achievement of African unity, defence of the state, the payment of taxes and the strengthening of African cultural values. Although some of these duties are general, they⁵² are not necessarily unenforceable. These are for example the

50. D'Sa *ibid.*

51. Article 27 (1)

52. D'Sa 77.

duty to support one's parents in case of need,⁵³ or to pay taxes.⁵⁴ Other duties, however, such as the duty to serve one's national community by placing one's physical and intellectual abilities at its service⁵⁵ merely place a moral rather than a legal duty on individuals. "It appears that the section on 'duties' generally, whilst reflecting African cultural values, is probably not to be strictly regarded as capable of effective implementation but as a code of good conduct for all citizens of African countries."⁵⁶ The drafters of the African Charter considered this an innovation. According to them "until now, international instruments referring to the duties of individuals do so in a few words and this often betrays the authors' lack of conviction. It is necessary to point out here that if individuals have rights to claim, they also have duties to perform. In traditional African societies, there is no opposition between rights and duties or between the individual and the community - they blend harmoniously."⁵⁷

7.3.5 People's rights

The African Charter also provides for the protection of peoples' rights. The inclusion of these in the African Charter

53. Article 29 (1).

54. Article 29 (6)

55. Article 29 (2).

56. D'Sa 77.

57. Cited by Eze 214.

reflects its importance as a part of the "African" conception of human rights.⁵⁸ According to customary law the individual usually exercises his rights in the context of the group and is therefore limited by the group. For instance the principle of non-discrimination against individuals in article 2, is extended by article 19 to "all peoples" who are also supposed to enjoy the same rights and should not be dominated by any other people. Article 20 reinforces this. It confers on "all the peoples the right to existence" as well as "the unquestionable and unalienable right to self-determination." This involves the free determination of their political status and the pursuit of "their economic and social development according to the policy they have freely chosen."

The charter, however, does not define what the term "peoples" means.⁵⁹ It would appear that this involves people with a common link, "usually of an ethnic or historical kind, and must itself be capable of identifying its members."⁶⁰ A possible inference is that it includes "colonized oppressed peoples,"⁶¹ as well as those engaged in a "liberation struggle against foreign domination, be it political, economic and cultural."⁶²

58. D'Sa *ibid*; Eze 212.

59. D'Sa 77; Eze 215.

60. D'Sa *ibid*.

61. Article 20(2).

62. Article 20(3).

It is, however, not clear whether the term "peoples" includes groups within independent African states which wish to secede. But when one considers that the OAU has always insisted on "territorial integrity" and adherence to territorial boundaries as they existed at the time of attaining independence, even if these boundaries had cut across traditional boundaries, ethnic societies and divided families, it is unlikely that the OAU would support such secessionist groups.⁶³

7.3.6 Social economic and cultural rights

The African Charter provides for the protection of social economic and cultural rights. Article 21 stipulates that "all peoples shall freely dispose of their wealth and natural resources." African states themselves also possess this right.⁶⁴

It is no doubt a reflection of the desire to achieve economic independence by exercising control over the resources of their land. States which are parties to the charter are enjoined to enable their peoples to benefit fully from the advantages derived from their natural resources by eliminating all forms of foreign economic exploitation, especially that practised by international monopolies.⁶⁵ The peoples must do

63. D'Sa 78.

64. Article 21(4).

65. Article 21(5).

this "without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law."⁶⁶

This implies that nationalization of foreign property and business assets will only be lawful if there was compliance with the appropriate international legal standards which include the payment of compensation.⁶⁷ Although the charter does not provide for the level of compensation to foreign nationals, it does stipulate that in the event of spoliation of people adequate compensation shall be payable and the dispossessed people have the right to recover their property.⁶⁸ The compulsory acquisition of property by the state is made generally subject to the existence of "public need" or "the general interest of the community and in accordance with the provisions of appropriate laws."⁶⁹

The economic social and cultural rights provided for in the charter are all geared towards development,⁷⁰ not in simple economic terms but include taking into account "the standard of living and opportunities for advancement of the individual as a

66. Article 21(3).

67. D'Sa 78.

68. Article 21(2).

69. Article 14.

70. Article 22(1).

member of society."⁷¹ In terms of article 22(2) the states have a duty to "individually or collectively ensure" the exercise of this right. For this reason each state party is required to submit, every two years from the date the charter entered into force, a report on the legislative or other measures taken in order to give effect to the rights and freedoms recognized by the charter.⁷²

7.3.7 The African Commission on Human and Peoples' Rights

The African Charter provides for the establishment of an African Commission of eleven members, chosen to serve in their personal capacity from among African personalities with the highest consideration for their high morality, integrity, impartiality and competence in matters of human and peoples' rights. Particular consideration should be given to people with legal experience.⁷³ The members of the commission must be elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the state parties to the charter.⁷⁴

71. D'Sa 79.

72. Article 62.

73. Article 31.

74. Article 33.

Members of the commission are expected to make a solemn declaration to discharge their duties impartially and faithfully. The Secretary-General of the OAU appoints the Secretary of the Commission and provides the staff and services necessary for the effective discharge of the duties of the Commission.⁷⁵

Membership of the commission terminates on death or resignation of a member. It may also terminate if, in the unanimous opinion of other members of the commission, a member stops discharging his duties for any reason other than a temporary absence or because he is unable to discharge them.⁷⁶ In the discharge of their duties members of the commission must enjoy diplomatic privileges and immunities provided for in international law.⁷⁷ Provision is to be made for the emoluments and allowances of the members of the commission in the regular budget of the OAU.⁷⁸

The functions of the commission are mainly promotional. Although the commission may resort to "any appropriate method of investigation,"⁷⁹ it appears that it is not sitting in judgment on the matter like a formally constituted judicial organ, and its

75. Article 41. Article 41 provides for the constitution and procedure of the commission.

76. Article 39.

77. Article 43.

78. Article 44.

79. Article 46.

first function is to try and reach an amicable solution. It gathers information, establishes facts, concludes and makes recommendations to the Heads of State. The recommendations are, however, not binding. In addition the commission has the function of interpreting the provisions of the charter at the request of the state party, an institution of the OAU or an organisation recognized by the OAU. It is also expected to perform other functions which may be entrusted to it by the Assembly of Heads
80
of State and Government.

A state party to the charter which has good reason to believe that another state party has violated the provisions of the charter may by written communication draw attention of the state to the charter. Within three months of receiving the communication, the state to which the communication is addressed is supposed to give the enquiring state written explanations or statements elucidating the matter. These should include all possible information indicating the laws and rules of procedure applied and applicable and the redress already given or
81
pending. If the issue is not settled by bilateral negotiation or other peaceful procedure, either state has the right to submit the matter to the commission through its chairman and should
82
notify the other state involved. This notwithstanding, where

80. Article 45; D'Sa 80; Eze 218-219.

81. Article 47.

82. Article 48.

a state party has violated the provisions of the charter it may refer the matter directly to the commission by addressing a communication to its chairman and to the Secretary-General of the OAU and the state concerned.⁸³

Before the commission can deal with the matter submitted to it, it must ensure that local remedies, where they exist, have been exhausted, unless it is obvious that these will be ineffective or that the procedure is unduly prolonged.⁸⁴ The commission is empowered to ask the states parties concerned to provide it with all relevant information. States parties concerned may be presented before the commission and submit written or oral representations.⁸⁵

If the commission has obtained from the states concerned and from other sources all the information it deems necessary and after trying all appropriate means to reach an amicable solution, it must prepare within a reasonable period a report stating the facts and its findings. The report must be sent to Heads of State and Government of the OAU. The report may include such recommendations as the commission deems useful.⁸⁶

83. Article 48.

84. Article 49.

85. Article 50.

86. Article 51.

Communications other than those from states, such as those from individuals or groups received by the commission are only to be considered if certain conditions are satisfied. These are that they must disclose the authors even if the latter request anonymity; compatibility with the charter of the OAU and the African Charter; that there is prior exhaustion of the local remedies; that they do not deal with cases which have been settled in accordance with the principles of the charter of the OAU and the provisions of the African Charter; that they must also be based on fact other than information obtained from the news media; and that the communication is not insulting or disparaging.⁸⁷

It is provided that when it appears after deliberations of the commission that one or more exceptional situations apparently reveal the existence of a series of serious or massive violations of human and peoples' rights, the commission should draw the attention of the Assembly of Heads of State and Government to them. The latter may then request the commission to undertake an in-depth study of these situations and make a factual report accompanied by its findings and recommendations. The commission can act on its own initiative if it has duly noticed a state of emergency. The state of emergency must be reported to the chairman of the Assembly of Heads of State and Government, who⁸⁸ may request an in-depth study.

87. Article 56.

88. Article 58.

The measures taken within the provisions of the African Charter are supposed to remain confidential until such time as the Assembly of Heads of State and Government decide otherwise. The chairman of the commission may, however, publish the report if the⁸⁹ Assembly of Heads of State and Government so decide.

Although the Assembly of Heads of State and Government is entitled to decide on the appropriate action to be taken on the recommendations of the commission, it is not clear what that competence involves. This vagueness may have been intended to allow the assembly a measure of flexibility in dealing with specific issues. The absence of a judicial organ seems to be unfortunate. It makes the role of the charter ineffective. Yet considering the length and breadth of the scope of the rights⁹⁰ protected, it might have been a pragmatic step.

Despite the limitations of the competence of the commission, it will nonetheless draw inspiration from international law on human rights, especially from the provisions of various African instruments on human rights, from the provisions of the charter of the United Nations, from the Charter of the OAU, from the Universal Declaration of Human Rights, from the provisions of

89. Article 59.

90. Eze 220.

other instruments adopted by the United Nations and by African countries in the field of human rights as well as from the provisions of various instruments adopted within the specialized agencies of the UN of which the state parties to the present charter are members.⁹¹

7.4 Conclusion

Despite its many limitations, the adoption of the African Charter is a commendable step in the direction of greater involvement and commitment by the OAU in the field of human rights.⁹² The present African Charter is innovative in many ways. The impact of its provisions, however, is limited by the widespread use of clawback clauses. This tends to give the states too much autonomy which may allow them to violate human rights with impunity. This may have been made with the intention of attracting many African states to ratify the African Charter. The African Commission which is envisaged by the charter will be rather a conciliatory than an adjudicatory body. The success of this venture is still not yet certain. The very fact, however, that African states have adopted this strategy is indicative that African states are not unconcerned with the violation of human rights. One has still to wait and see the impact of this step.

91. Article 60; Eze 221.

92. D'Sa 81.

CHAPTER 8

CONCLUSION

8.1 Introduction

The aim of this investigation was not to condemn African states for their violation of human rights, nor to praise them. It was merely to make a dispassionate evaluation of the condition of human rights in Africa and to seek reasons for that. Moreover, the purpose was to ascertain what lesson can be learnt from the African experience. This was done by looking at the past and present position in Africa.

8.2 Findings

Perhaps the most significant finding on the issue of human rights in Africa is the unity of human nature. Even the best of people when left to themselves without any pre-existing tradition or structure limiting power can abuse power. This is buttressed by the fact that most of the colonial powers at the time of colonising Africa were already mature democracies. But when they established their rule in Africa, where they were not shackled by any pre-existing tradition, they were extremely authoritarian. In this way the colonial powers applied double standards when it came to the protection of the rights of Africans.

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Many of the undemocratic practices for which many African states are notorious today were first introduced by the colonial rulers. These include detention without trial, suppression or elimination of opposition parties and laws which violate the rule of law. These were all inherited from the colonial rulers. Similarly, the use of violence to maintain the party in power was prevalent during colonial rule. Many of the national leaders who led the independence struggle had had the experience of being detained without trial or some other draconian law.

Whereas independence was eagerly awaited as ushering in a new epoch of liberty and prosperity, this did not happen. High hopes were dashed and replicas of authoritarian regimes emerged. Opposition parties were suppressed and opposition leaders were either eliminated or exiled. Detention without trial became the order of the day. Single parties were often foisted on the people in the name of the eradication of divisions factions and tribalism, nation-building and development. The democratic character of one-party states was often eulogized without any convincing evidence. In short human rights did not flourish but in many cases were grossly violated. Violation at times were far beyond simply being undemocratic and involved the taking of life itself.

For some this may sound surprising as one would have expected that when African leaders were in control over Africans they

would treat them humanely and foster their interests. On the contrary those who were first to obtain power have tended to entrench their position thus creating a caste of perpetual rulers and a group of underdogs who have no access to power.

Although the one-party state has been described as broadly democratic, it has serious deficiencies. It restricts the individual's freedom of association, leads to one-man rule, where even the legislature is a mere rubber stamp for the party and is therefore undemocratic. Moreover, it leads to difficulty in changing government in a constitutional way and is therefore not conducive to democratic stability.

Although the African leaders have also attempted to rationalise a one-party on the basis of tradition, this argument similarly does not hold water. What is, however, intriguing is that a one-party is nothing new in Africa. It was introduced by the whites during colonial rule. Blacks were excluded from political participation on account of their race and colour. As a result only one party was permissible, namely the white party. Although a semblance of democracy was retained in the white community by allowing whites to form various parties, it essentially remained a one party or a party representing the interests of whites. By excluding the majority of blacks it was therefore undemocratic.

When African leaders took over, they followed this example by limiting political participation to the single party. This ensured that they would be in power indefinitely. One of the reasons for this is that in Africa politics have provided a source of wealth and prosperity. Many of the African politicians who have assumed positions of power have had no alternative source of income. Unlike political leaders in Britain or the United States of America they have nothing to fall back on if they are removed from power. For this reason they tend to cling to power for dear life not only because it provides scope for influencing political events in the country but because it is the only means of livelihood.

Although many African leaders admire democracy as an ideology of government, the lure of power and all the economic benefits that go with it becomes too strong. As a result democracy becomes a high-falutin ideal to be talked about in lofty speeches, but when it comes to practice all this must be sacrificed on the altar of political expediency.

This means that the colonial legacy coupled with the human factor has largely bedevilled the position of human rights in Africa.

A significant development on the eve of independence of African states, was the provision of constitutions which contained guarantees for the protection of human rights. As a result most

of the independent African states possess bills of rights. Only a few remain without one. There are political reasons behind this phenomenon.

Violations of human rights have taken place even in those countries with bills of rights. Yet surprisingly these bills of rights have survived even when there have been military take-overs, when these states have adopted single parties and when there have been changes in the constitution.

The tenacity of these bills of rights demonstrates that they are not altogether useless. They do have some significance. They may still be taken by the states concerned as the ideals to which they should strive. Moreover, they may serve a political purpose, namely of demonstrating to the international community that the state concerned still adheres to a bill of rights and is therefore democratic. No state wants to be regarded as undemocratic.

Although some have contended that the reason for the failure of bills of rights in Africa is that they entrench the wrong type of rights, namely civil and political rights and exclude social, economic and cultural rights, this view is not supported. While economic social and cultural rights are important, in that they concern the satisfying of basic needs, they do not override civil

and political rights. No doubt failure to satisfy basic needs is a violation of human rights. But civil and political rights are crucial because they deal with the question of power. Power is indispensable for the determination of the distribution of resources. The history of western countries attests to this fundamental fact.

Although there have been widespread violations of human rights in Africa, this does not mean that it will always be so.¹ Although the African states adopted constitutions with bills of rights on independence, these bills of rights were imposed on these emergent states by the departing colonial rulers for political reasons and they consequently lacked legitimacy. They were not rooted in a democratic culture. There were no programmes to implement them and to ensure that the people effectively exercised their rights. Moreover, the time within which these states have had to evolve a viable democracy, in the light of the authoritarian colonial rule, has been too short.

It took Britain centuries to become a mature democracy. The struggle for liberation from autocratic rule in Britain was punctuated by a number of important documents which secured the rights of the individual over a long period of time. These

1. Nwabueze Constitutionalism 299 et seq.

include the Magna Carta of 1215, the Petition of Right of 1628,² the Bill of Rights of 1689 and the Act of Settlement of 1701.

The same can be said of the USA. Although the USA adopted a bill of rights in 1791, this did not lead to the immediate enjoyment of those rights by the American blacks. This took a long time. Racial discrimination for instance continued to exist in the USA until relatively recently. It was in the case of Brown v Board of Education of Topeka³ that the American supreme court abolished racial discrimination by declaring separate schools unconstitutional and by holding that the doctrine of "separate but equal" was untenable.

This demonstrates that any deep-rooted practice takes time to eradicate. It may persist even in the presence of legislative provisions outlawing it. Yet the presence of the bill of rights does make a difference. The bill of rights in America contributed considerably towards the elimination of many injustices. The civil rights movement largely succeeded in the USA as a result of the presence of a bill of rights.⁴

2. For a discussion of this see G Carpenter Introduction to South African Constitutional Law (1987) 29 et seq.

3. 347 US 483 (1954).

4. On this see Fredrickson 135 et seq.

In the words of Cowen:

Indeed, from this point of view, it would be difficult to overestimate the importance of the role of which the United States Constitution has played in establishing the fact of American nationhood. No one who has studied American society, even for a comparatively short period, can fail to be impressed by the central position of the constitution in the affection, the thought, and the imagination of Americans. No enumeration of the characteristics and qualities which go to make up a 'good American' would be complete without reference to the United States Constitution and its Bill of Rights.⁵

It becomes clear therefore that democracy does not simply grow like weeds. It is a fragile plant that needs judicious cultivation and hot-house care. To destroy it may be easy, but once established it endures.

The adoption and ratification of the African Charter on Human and Peoples' Rights is therefore a hopeful sign. It provides a regional mechanism for the protection and promotion of human rights in Africa. Despite its many limitations and shortcomings, it can create a favourable climate for discouraging the gross violation of human rights. Lack of criticism of this in the past led to its flourishing. Moreover, it implies that the principle

5. Cowen 81.

of non-interference in the domestic affairs of a state is no longer a bar.

8.3 Conclusion and evaluation

In conclusion the pertinent question is: What is the relevance of the African experience to us in South Africa? The simple answer is that there is a number of lessons to be learnt from the African experience.

There is no doubt that the present constitutional and political dispensation in South Africa is having a crisis of legitimacy. Efforts have been made to map out a just and egalitarian constitutional dispensation for the country. Many believe that a cure for South Africa's political problems starts with a bill of rights. The issue of a bill of rights has been considerably
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debated in South Africa.

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6. See inter alia Cowen 113 et seq; Beinart 137 et seq; DB Molteni "The Rules Behind the Rule of Law" 1965-6 Acta Juridica 147-148 and "Change and Methods of Change" in P Randall (ed) Law, Justice and Society (1972) 96-97; Dugard (1978) 401-402; Van der Vyver (1975) 184-185; Van der Vyver (1976) 76-77; Van der Vyver (1982) 582-583; Van der Vyver (1985) 1 et seq; MM Cobbert "Human Rights: The Road Ahead" in CF Forsyth & JE Schiller (eds) op cit 1 et seq; AJ Milne Address to the Institute of Chartered Secretaries and Administrators 11 September 1985 Natal Mercury 10; RN Leon "A Bill of Rights for South Africa" Address delivered at the Annual General Meeting of Lawyers for Human Rights 1986 SAJHR 60; IM Rautenbach "Die Juridiese Werking van Menseregteaktes en die Nuwe Grondwetlike Bedeling" in SC Jacobs (ed) in Nuwe Grondwetlike Bedeling vir Suid-Afrika: Enkele Regsaspekte (1981) 151 et seq; JD van der Vyver "Mensregte in Perspektief" 1984 Woord en Daad Vol 24 No. 259 13; LJ Boule "The Rights and Wrongs of a Bill of Rights" 13 July 1986 Sunday Times 23.

A significant lesson to be learnt from the African experience is that to provide for a bill of rights is one thing; to make it work is another. To provide for a bill of rights is just the beginning. Then follows the effective education of society on a bill of rights and how to exercise the rights provided therein. The other problem is that people may not have the means to take a matter to court because of limited means. Thus the need to provide effective legal aid is obvious.⁷

Another problem is that the courts, as has been the experience in Africa, will not always be activist in the interpretation and application of a bill of rights. This is because it is often unpleasant for the courts to clash with the legislature or the executive. As a result they may tend to be literalist in their interpretation of a bill of rights or interpret it in the light of the common law. A literal interpretation may frustrate the right of the individual. Courts, unlike the legislature and executive, do not have armies at their disposal to enforce their decisions. They depend on the executive. For a bill of rights to operate, there is a need for the government to respect the independence of the judiciary. There is also a need to educate the judiciary on a bill of rights.

7. On these issues see RN Kiwanuka "Some Reflections on the Problems of Human Rights Education in Africa" 1987 Verfassung Und Recht in Ubersee 81 et seq; DJ McQuoid-Mason An Outline of Legal Aid in South Africa (1982).

An important consideration is that blacks will not respect a bill of rights which will be provided on the eve of majority rule. For a bill of rights to be respected by the black majority it is essential that they should have had the experience on the effect of a bill of rights. If a bill of rights is provided on the eve of majority rule, they will tend to be suspicious of it as being an artificial barrier to be used by whites against them in the exercise of their democratic rights or it will be perceived as a means of protecting white privilege.

Consequently if a bill of rights is to have any chance of success, it is necessary to introduce it before the transfer of power.⁸ This is essential to create a democratic tradition for the future. To wait until power has been transferred before a bill of rights is adopted is sure to make it fail.⁹ It will be too late.

Failure to protect human rights is a sure way of courting a coup. This has been a general feature of the African states. Obviously this depends on the ability of the people to resist successfully. Because of the absence of a democratic method of changing government, members of the military force have seized power with the purpose of coming to the rescue of the people. Unfortunately they themselves became entangled in the struggle for power and a

8. DM Davis "Legality and Struggle: Towards a View of a Bill of Rights for South Africa" in Van der Westhuizen.

9. Davies 177.

vicious cycle was created. One hopes South Africa will take steps to avoid this.

A bill of rights, however, has a significance which goes beyond the disregard of its provisions for the moment. It may inculcate a democratic culture into the politicians and judicial officers. Even if violated for a moment, it may later be revived and used effectively.

On the future of human rights in Africa, let others speculate. For the present purposes it may be apposite to say like Alan Paton:¹⁰

God bless Africa,
Guard her children
Guide her rulers
And Give her peace
Amen.

10. Journey Continued cited in Sunday Tribune 17 April 1988 25.

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APPENDIX I

UNIVERSAL DECLARATION OF HUMAN RIGHTS

WHEREAS recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

WHEREAS disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

WHEREAS, it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

WHEREAS it is essential to promote the development of friendly relations between nations,

WHEREAS the peoples of the United Nations have in their Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

WHEREAS Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

WHEREAS a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

NOW, THEREFORE, THE GENERAL ASSEMBLY PROCLAIMS this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3. Everyone has the right to life, liberty and security of person.

Article 4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in

all their forms.

- Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- Article 6. Everyone has the right to recognition everywhere as a person before the law.
- Article 7. All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
- Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
- Article 9. No one shall be subjected to arbitrary arrest, detention or exile.
- Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
- Article 11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

- (2) No one shall be held guilty of any penal offence on account of any act of omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13. (1) Everyone has the right to freedom of movement and residence within the borders of each state.

- (2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14. (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

- (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15. (1) Everyone has the right to a nationality.

- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16. (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.

- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17. (1) Everyone has the right to own property alone as well as in association with others.

- (2) No one shall be arbitrarily deprived of his property.

Article 18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive

and impart information and ideas through any media and regardless of frontiers.

Article 20. (1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21. (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22. Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23. (1) Everyone has the right to work, free choice of employment, to just and favourable conditions of work and to protection against unemployment.

- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25. (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26. (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and

professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

- (3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27. (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28. Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29. (1) Everyone has duties to the community in which alone the free and full development of his

personality is possible.

- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

APPENDIX II

AFRICAN CHARTER ON HUMAN RIGHTS AND PEOPLES' RIGHTS

PREAMBLE

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and People's Rights."

Recalling Decisions 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July, 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and people's rights."

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspiration of the African peoples."

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their co-operation and efforts to achieve a better life for the people of Africa and to promote

international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights.

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights.

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.

Convinced that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Conscious of their duty to achieve the total liberation of Africa, the peoples which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neocolonialism, apartheid and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion.

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations.

Firmly convinced of the duty to promote and protect human and peoples' rights and freedoms in Africa.

HAVE AGREED AS FOLLOWS:

PART I: RIGHTS AND DUTIES

CHAPTER 1

HUMAN AND PEOPLES' RIGHTS

ARTICLE 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the right, duties and freedom

enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

ARTICLE 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political, or any other opinion, national and social origin, fortune, birth or other status.

ARTICLE 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

ARTICLE 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

ARTICLE 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his

legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

ARTICLE 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

ARTICLE 7

1. Every individual shall have the right to have his cause heard. This comprises:

(a) 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;

(b) the right to be presumed innocent until proved guilty by a competent Court or Tribunal;

(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within a reasonable time by an impartial Court or Tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

ARTICLE 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

ARTICLE 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

ARTICLE 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

ARTICLE 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall 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 freedom of others.

ARTICLE 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

ARTICLE 13

1. Every citizen shall have the right to freely participate in the government of this country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right to access to public property and services in strict equality of all persons before the law.

ARTICLE 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

ARTICLE 15

Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.

ARTICLE 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

ARTICLE 17

1. Every individual shall have the rights to education.

2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

ARTICLE 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

ARTICLE 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

ARTICLE 20

1. All people shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

ARTICLE 21

1. All peoples shall freely dispose of their wealth and
- .

natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.
4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their people to fully benefit from the advantages derived from their national resources.

ARTICLE 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedoms and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

ARTICLE 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, State parties to the present Charter shall ensure that:
 - (a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of

origin or any other State party to the present Charter,

- (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

ARTICLE 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

ARTICLE 25

State parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

ARTICLE 26

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.

CHAPTER II

DUTIES

ARTICLE 27

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

ARTICLE 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

ARTICLE 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect his parents at all times, to maintain them in case of need.
2. To serve his national community by placing his physical and intellectual abilities at its service.
3. Not to compromise the security of the State whose national or resident he is.
4. To preserve and strengthen the social and national solidarity, particularly when the latter is threatened.
5. To preserve and strengthen the social and national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law.
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society.
7. To preserve and strengthen positive African cultural values in his relations with other members of the Society, in the spirit of tolerance, dialogue and consultation and,

in general, to contribute to the promotion of the moral well being of society.

8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

PART II: MEASURES OF SAFEGUARD

CHAPTER 1

ESTABLISHMENT AND ORGANISATION OF THE AFRICAN COMMISSION AND PEOPLES' RIGHTS

ARTICLE 30

An African Commission on Human and Peoples' Rights, hereinafter called "the commission," shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

ARTICLE 31

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and

competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.

2. The members of the Commission shall serve in their personal capacity.

ARTICLE 32

The commission shall not include more than one national of the same State.

ARTICLE 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

ARTICLE 34

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States parties to the present Charter. When two candidates are nominated by a State, one of them may not be a national of the State.

ARTICLE 35

1. The Secretary General of the Organization of African Unity shall invite State parties to the present Charter at least four months before the elections to nominate candidates.
2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

ARTICLE 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

ARTICLE 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

ARTICLE 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

ARTICLE 39

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

ARTICLE 40

Every member of the Commission shall be in office until the date his successor assumes office.

ARTICLE 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the cost of the staff and services.

ARTICLE 42

1. The Commission shall elect its Chairman and Vice Chairman for a two-year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form the quorum.
4. In case of an equality of votes, the Chairman shall give a casting vote.

5. The Secretary General may attend the meeting of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the commission may, however, invite him to speak.

ARTICLE 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

ARTICLE 44

Provisions shall be made for emoluments and allowances of the members of the commission in the Regular Budget of the Organization of African Unity.

CHAPTER II

MANDATE OF THE COMMISSION

ARTICLE 45

The functions of the Commission shall be:

1. To promote Human and Peoples' Rights and in particular:
 - (a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' 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 legislation.
 - (c) Co-operation 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. Preform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

CHAPTER III

PROCEDURE OF THE COMMISSION

ARTICLE 46

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

COMMUNICATION OF STATES

ARTICLE 47

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of the State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, a

written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

ARTICLE 48

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the commission through the Chairman and shall notify the other State involved.

ARTICLE 49

Notwithstanding the provisions of Article 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the chairman, to the Secretary General of the Organization of African Unity and the State concerned.

ARTICLE 50

The Commission can only deal with a matter submitted to it after

making sure that local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

ARTICLE 51

1. The Commission may ask the State concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be presented before it and submit written or oral representations.

ARTICLE 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings. This report shall be sent to the state concerned and communicated to the Assembly of Heads of State and Government.

ARTICLE 53

While transmitting its report, the Commission may make to the

Assembly of Heads of State and Government such recommendations as it deems useful.

ARTICLE 54

The Commission shall submit to each Ordinary Session of the Assembly of Heads of State and Government a report on its activities.

OTHER COMMUNICATIONS

ARTICLE 55

1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of State parties to the present Charter and transmit them to the Members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

ARTICLE 56

Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

1. indicate their authors even if the latter requests anonymity;
2. are compatible with the Charter of the Organization of African Unity or with the present Charter;
3. are not written in disparaging or insulting language direct against the State concerned and its institutions or to the Organization of African Unity;
4. are not based exclusively on news disseminated through the mass media;
5. are sent after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
6. are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

ARTICLE 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

ARTICLE 58

1. When it appears after deliberations of the Commission that one or more communications apparently reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to them.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these situations and make a factual report, accompanied by its finding and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

ARTICLE 59

1. All measures taken within the provisions of the present

Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.

2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

CHAPTER IV

APPLICABLE PRINCIPLES

ARTICLE 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the

Specialised Agencies of the United Nations of which the parties to the present Charter are members.

ARTICLE 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law other general or special international conventions, laying down rules expressly recognised by member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

ARTICLE 62

Each State party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

ARTICLE 63

1. The present Charter shall be open to signature, ratification or adherence of the member states of the Organization of African Unity.

2. The instrument of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence by a simple majority of member states of the Organization of African Unity.

PART III: GENERAL PROVISIONS

ARTICLE 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the headquarters of the Organisation within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

ARTICLE 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by the State of its instrument of ratification or adherence.

ARTICLE 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

ARTICLE 67

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

ARTICLE 68

The present Charter may be amended or revised if a State party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the

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sponsoring State. The amendment shall be approved by a simple majority of the States parties and it shall come into force for each State which has accepted it in accordance with its constitution procedure three months after the Secretary General has received notice of the acceptance.