

The African Union: Concepts and implementation mechanisms relating to human rights

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Introduction

This paper focuses on the evolution of human rights within the African Union (AU), starting from the founding of the Organisation of African Unity (OAU) in 1963.

The paper therefore takes as its basic premise the following:

- Since its establishment, the OAU has been preoccupied with human rights, as evidenced by the struggle for the decolonisation of Africa and the right to self-determination and independence. Embodied within this, no doubt, is the fact that those agitating and fighting for independence used human rights standards to justify their struggle, as colonialism had no regard for the human rights of colonised people.
- The AU, in contrast to the OAU, made human rights an explicit part of its mandate, as embodied in its Constitutive Act, and mainstreamed human rights in all its activities and programmes. However, it is clear that the current methodologies require strengthening with a view to developing a holistic, comprehensive and integrated approach to ensure that all human rights are respected.
- Because it is linked to the above points, the human rights discourse cannot be divorced from its historical context or the prevailing political, social, economic and cultural conditions on the continent – particularly when it is understood that the struggle for human rights and the establishment of a human rights system are products of a concrete social struggle.¹ In this regard, human rights are also as much about civil and political rights as they are about economic, social and cultural rights.
- Africa's common positions and collective voice have asserted tremendous influence in the evolution of the continent's human rights architecture and in shaping Africa's future.

¹ Heyns (2006:15) calls it a 'struggle approach' to human rights.

- The adoption of a human rights approach to development, including the effective implementation of the right to development and to social, economic and cultural rights would promote people's active participation, thereby giving them a voice and a platform from which to assert their rights. This is achieved through effective democratic processes and the full exercise of political and civil rights.

OAU to AU: A brief overview

The OAU

The Charter establishing the OAU, adopted in 1963, was based on the principles of state sovereignty and non-interference, and stipulated the fight for the decolonisation of Africa among its main objectives, as it was believed that Africa could not be considered free unless the last colony had gained its independence, achieved the right to self-determination, and won the fight against apartheid. Linked to this was an obligation on OAU member states to provide support to people involved in liberation struggles, as set out in Article 20(3) of the African Charter. Namibia was one such colony, and it benefited greatly from the support it received from the OAU and its Liberation Committee. It was through Africa's collective voice and adoption of common positions on colonisation and independence at international fora such as the United Nations (UN) that pressure was brought to bear on the South African Government to relinquish its hold on Namibia and, eventually, accede to majority rule in South Africa.

Furthermore, in their fight for independence, African peoples drew upon human rights standards to justify their struggle. On account of colonisation, African people suffered from years of oppression and gross human rights abuses. As such, they used their struggle to expose these abuses and fight for their liberation. Additionally, many independent countries who supported the liberation movements by, for example, providing shelter to refugees, suffered the brunt of South Africa's wrath when that country retaliated with bombings and destabilising incursions across its borders. The sacrifices made by such countries could only have been done as part of a wider pan-African agenda, as embodied in Africa's search for human rights, dignity and identity.

Thus, it is clear that the concept of human rights has strong roots in the struggle against colonialism and apartheid. Indeed, a Declaration adopted at the 1945

Pan-African Congress clearly illustrates this point.² Furthermore, there has been recognition of the legitimacy of the anti-colonial struggles in some human rights instruments as well as in resolutions adopted by the UN.

Article 20(2) of the African Charter on Human and Peoples' Rights (the African Charter), which was adopted in 1981 and came into force in 1986, states that –

... colonised or oppressed peoples shall have the right to free themselves from the bonds of oppression by resorting to any means recognised by the international community.

It also provided the first explicit official recognition of the right to development and elevated human rights as an issue deserving particular attention by the OAU as well. The values underpinning the Charter include notions of community, rights and responsibilities, solidarity, and the right to development, which are seen as values that inform and inspire grass-roots approaches to human rights.

During the OAU, various other human rights instruments were also adopted. These included the African Charter on the Rights and Welfare of the Child (ACRWC); the Convention Governing the Specific Aspects of Refugee Problems in Africa; the Protocol establishing the African Court of Human and Peoples' Rights (the African Court); and the 1999 Grand Bay (Mauritius) Declaration and Plan of Action.

However, it has been argued that, while the OAU played a significant role in the decolonisation and freedom of countries and peoples, it did not expressly uphold the values inherent in human rights norms and standards as they relate to individuals and groups. Furthermore, by adopting an unconditional position on non-interference, the OAU became ineffective in the promotion and protection of human rights in a decolonised and free Africa.³

The AU

Two important developments extended and deepened Africa's commitment to human rights, democracy, governance and development. The first was the adoption of the African Union's Constitutive Act, which reaffirms Africa's commitment to promote and protect human rights. The second was the New

² (ibid.). For a general discussion on human rights in Africa, see also Zeleza (2006:42–43).

³ Murray (2004); Ahmadou (2007).

Partnership for Africa's Development (NEPAD), which also places human rights at the centre of development. Both aim to reinforce social, economic and cultural rights, as well as the right to development.⁴

The establishment of the AU was hailed as a welcome opportunity to put human rights firmly on the African agenda. The AU's Constitutive Act, adopted in 2000, marks a major departure from the OAU Charter in the following respects:

- Moving from non-interference to non-indifference, including the right of the AU to intervene in any member state's affairs
- Explicit recognition of human rights
- Promotion of social, economic and cultural development
- An approach based on human-centred development, and
- Gender equality.

Given the dynamism of human rights, both the OAU and AU began to take on broad emerging human rights issues over the years, as evidenced by the increasing number of conferences, meetings, declarations and resolutions adopted pertaining to human rights, in addition to the express human rights instruments such as the African Charter on Human and People's Rights (ACHPR), the African Charter on the Rights and Welfare of the Child (ACRWC), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter *Women's Rights Protocol*), the Protocol on the Establishment of the African Court on Human and People's Rights,⁵ and the Charter on Democracy, Governance and Elections. To effectively enforce these instruments, various bodies were established with an express human rights mandate such as the African Commission on the Charter on Human and Peoples' Rights (the African Commission), the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), and the African Court.

All the key original objectives contained in the OAU Charter have been retained in the AU Constitutive Act. However, and more importantly, in order to reflect

⁴ In the case of NEPAD, however, it has been argued that it did little to embrace a human rights approach to development.

⁵ A decision was taken and a Protocol adopted for the merger of the African Court of Justice and the African Court on Human and Peoples' Rights at the AU Assembly in July 2008 in Sharm El Sheik, Egypt. However, the Protocol has not been ratified yet and only the African Court on Human and Peoples' Rights has become operational.

current realities and address contemporary challenges, the Act also enumerates other key objectives that were not captured in the OAU Charter, such as –

... the protection and promotion of human rights in accordance with the ACHPR and other relevant human rights instruments and in this regard, pay particular attention to the issues of gender equality, good governance, and democracy as well as promoting cooperation in all fields of human activity to raise the living standards of the African people.

The major point of departure on which the establishment of the AU is predicated is that it should represent a qualitatively higher form of unity and integration for the African continent. Thus, the fundamental objective is to put in place an efficient and effective AU to deliver a better Africa. An efficient AU should have the capacity and the commitment to meet the aspirations of the African people in their desire for participatory and efficient governance systems, human rights, peace and security, development, social justice, and integration.

Whereas the principle of non-intervention in member states' affairs was a principle upheld by the OAU, the AU has adopted a more interventionist approach to end genocide, war crimes and crimes against humanity, human rights violations, and unconstitutional changes of government, through the mechanism of employing sanctions. It has also continued to develop legal frameworks and establish relevant institutions.⁶ In so doing, it has paved the way towards creating a culture of non-indifference towards war crimes and crimes against humanity in Africa. Furthermore, these principles reflect the new thinking and approach among African states on how to coordinate common responses to present-day political and socio-economic challenges, and to be responsive to the contemporary demands and aspirations of ordinary people.

According to one analysis, the transformation of the OAU to the AU has brought about huge potential for human rights to play a greater part in the AU.⁷ Furthermore, as the AU continues to adopt human rights instruments and strengthen existing institutions or establish new ones for their implementation, it has enriched the African human rights protection system and provided an enabling environment within which to pursue human rights promotion and protection vigorously. Amongst these mechanisms are the Pan-African Parliament (PAP),

⁶ One such instrument is the OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government (AHG/Decl.5 (XXXVI) 1997).

⁷ Murray (ibid.:267).

the Economic, Social and Cultural Council (ECOSOCC), the Peace and Security Council (PSC), the African Peer Review Mechanism (APRM) and the African Court. Unlike the OAU, where human rights remained the preserve of the African Commission, the AU has expressly ensured that human rights are mainstreamed throughout its organs, activities and programmes.

Despite the above, there are legitimate concerns about the AU's ability to live up to the high expectations of making a real difference to human rights in Africa. Amongst these concerns are the following:

- A well-articulated gender framework on women's rights and gender was lacking in the African Charter. This has now been corrected with the adoption of the Women's Rights Protocol.
- Human rights mechanisms lack the necessary resources and political backing to make a difference by compelling respect for human rights
- Organisational and financial challenges face the AU
- The many institutions with human rights remit need to be consolidated so that they can function effectively
- Challenges are posed by endemic poverty, unemployment, corruption, disease and ongoing conflicts
- The varying levels of development and governance by African countries undoubtedly impact on the extent to which the AU will achieve the goals of the Constitutive Act, namely promotion and protection of human rights, increased development, the combating of poverty and corruption, and the securing of peace and security on the continent
- Implementation and enforcement mechanisms are toothless
- Approaches vary when it comes to the domestication of ratified international and continental instruments
- Countries fail to comply with the requirement to report on the domestic implementation of ratified instruments, and
- The political will is lacking, as evidenced by the failure to implement agreed policies, values and standards.

It is recognised that much more needs to be done at continental, regional and national level to promote a human rights culture and respect for human rights.

African leaders have also committed themselves to a respect for human rights by ratifying international and continental human rights instruments, and enacting laws and policies aimed at protecting the rights of people and ensuring good governance and accountability.

Key issues

The AU is faced with many challenges with political, economic and social dimensions. Meeting these challenges will require commitment at the highest levels of the organisation as well as resources. This section highlights some of the key issues relating to the protection and promotion of human rights.

Culture and African values

African cultures have rightfully being criticised for not respecting the rights of women, mostly because of harmful practices which negate gender equality. Many campaigns have been launched against these practices, which include female genital mutilation/cutting, and early marriage. National laws and policies have been passed to combat such practices and to end discrimination against women. At the continental level, the Women's Rights Protocol and the ACRWC both aim to combat such practices. Yet these practices still continue. Women's organisations themselves have accepted that traditional practices, which are deeply rooted in society, cannot simply be legislated away; but they also realise that combating such practices requires political will and commitment, dialogue within communities and with traditional leaders, and civic and human rights education.

It would be equally wrong, therefore, to argue that culture has no place in the human rights discourse. In this context, Africa's struggle for liberation was also a struggle for its identity and cultural heritage as well as respect for human rights because the goal of colonialism in Africa was to undermine African cultures and the rights of the African people. To ensure the protection of African cultures, the OAU adopted the African Cultural Charter in 1976. Today, Africa is once again faced with having to defend its cultural heritage against the impacts of globalisation and Western lifestyles on traditional modes of living and social mores. Paradoxically, for cultures to survive the test of time, they must both interact with other cultures and change, and yet maintain their own unique characteristics.

In 2006, the AU adopted the Charter for the Cultural Renaissance of Africa,⁸ recognising that the birth of the African Union brought in a new African

⁸ This Charter (awaiting ratification) complements the 1976 Cultural Charter.

consciousness encapsulated in the African Renaissance, which will inform, inspire and allow Africans to search for and discover their true African identity. The AU also adopted various instruments on culture such as the Nairobi and Algiers Declarations.⁹ The Algiers Declaration reiterated that *culture* represents a set of ways and means through which the peoples of Africa, individually and collectively, affirm their identity, and protect and transmit such identity from generation to generation. The Declaration reaffirmed the role of culture for sustainable development, continental integration and the realisation of the African Renaissance with a view to building a united, peaceful and prosperous Africa. Therefore, the AU aspires to use culture as a vehicle for social and economic development in order to meet the various challenges facing the continent such as the HIV and AIDS pandemic, malaria and tuberculosis; abject poverty; high rates of illiteracy; and conflicts and emerging challenges such as climate change, the food crisis, the financial crisis, and the economic meltdown.

Although Africa is a continent of great diversity, its people are the common thread that binds all Africa. *Culture* has been understood to be the foundation of society and development, integrating the values, customs and characteristics of a people, and promoting interaction and dialogue amongst people. Therefore, culture should serve the great cause of holding the African people together and strengthening their unity in diversity: whether within families, public life, communities or organisations. Culture should help Africa to make sense of itself in order to assert its roots, reflect on its troubled past, and forge a better, safer and prosperous way forward through a shared African Vision.

Cultural policies and programmes should provide the leaders and principal development actors with appropriate data and instruments to assist in the promotion of peace in a sustainable and humane manner; to ensure that African democracy does not become the hostage of tribalism or ethnic preferences; to promote pluralism, ethnic/cultural diversity, tolerance and respect for human rights; to ensure that the issues of development are couched in African rationality; to produce universal African texts which reflect the genius of the African people; and promote indigenous know-how as a basis for a truly “African Cultural Renaissance”.¹⁰

⁹ Both these Declarations were adopted at the AU Conferences of Ministers of Culture (Nairobi Declaration in 2005 and the Algiers Declaration in 2008) and endorsed by the AU Executive Council and the Assembly thereafter.

¹⁰ AUC programme on Culture.

The African Charter places emphasis on people's rights because African culture is firmly grounded in the age-old traditions of the supremacy of collectivism, sense of belonging to a community, humanism and *ubuntu*.¹¹ Africa's languages, history and traditions remain fundamental to the coexistence of its people.

In drafting the African Charter, it was vital to reflect respect for the universality of rights and also take into account the cultural context pertaining in Africa. Addressing the expert meeting convened in 1979 to develop the African Charter, the then President of Senegal, Leopold Senghor,¹² therefore noted the following:

As Africans we shall neither copy, nor strive for originality ... We could get inspirations from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civilization and the real needs of Africa.

In explaining the exclusion of people's rights, he further stated that —¹³

[w]e simply meant ... to show our attachment to economic, social and cultural rights, to collective rights in general, rights which have a particular importance in our situation of a developing country.

As will be elaborated on below, criticism has been levelled against the inclusion of cultural values in the African Charter, some of which have been found discriminatory towards women.¹⁴

Human rights and development

The establishment of the AU provides hope – and it is imperative that appropriate social and cultural policies accompany its construction. Such policies need to be harmonised so that they can mutually reinforce each other for the promotion of Africa's overall political, economic, cultural and social agenda. Furthermore, social development has to be based on approaches that guide human actions and interactions. A case in point is the human rights approach to development.

¹¹ Meaning that we exist as people only in relationships with others.

¹² Senghor (2006:51).

¹³ (ibid.:51).

¹⁴ Welsh (1993:555).

Right to development

The right to development¹⁵ finds clear recognition and expression in the ACHPR. The same meaning has also subsequently been advanced by the adoption of the UN Declaration on the Right to Development (DRD) (contained in the 1986 UN General Assembly Resolution 41/126). The right to development is not merely about economic or social development: it is both an independent right and one that is intrinsically linked to the full enjoyment of a range of human rights with social, cultural, political and economic dimensions.

The key elements of the right to development are as follows:¹⁶

- **Direct participation in development:** This implies meaningful connection to resources and opportunities as well as to institutions and systems of social organisation and governance. It is not enough for people to be passive beneficiaries of welfare and social benefits or to vote in elections. Such participation is achieved through the exercise of civil and political rights which create discussion and debate, and in turn make room to influence policies.¹⁷
- **Sustainable development:** This includes environmental rights and encompasses duties that mutually exist between the individual and his/her family, community and society.
- **The promotion of peace and security,** and
- **The right to self-determination:** This refers to a people's right to elect their government freely; to choose their own manner of pursuing social, economic and cultural development; and to have control over their resources and wealth.

The right to development seeks to protect all rights and, hence, do away with the artificial distinction made between so-called first-generation (civil and political) and second-generation (social, economic and cultural) rights. Therefore, it is argued¹⁸ that a violation of any of these rights is tantamount to a violation of the right to development in all its facets.

¹⁵ For a full discussion on the right to development, see Gutto (2004).

¹⁶ (ibid.:9); see also Patel (2005).

¹⁷ African Charter on Popular Participation in Development and Transformation, 1990.

¹⁸ Guevara (2005).

According to another analysis¹⁹ on the DRD, the development challenges faced by developing countries came about as a result of a history of exploitation and, therefore, need to be corrected by ensuring equitable economic development throughout the world. However, it is acknowledged that internal factors such as corruption, mismanagement and bad governance also have a role to play. In this sense, the argument is that the DRD creates an interconnectedness between nations; for this reason, the right to development affects the entire global community. In this regard, development assistance is viewed as a duty that developed countries have in ensuring the effective enjoyment of human rights in their developing counterparts.²⁰

Contrary to the assertion made by some²¹ that the right to development has legal force, Guevara²² claims that, as long as the Declaration on the Right to Development does not create a legal obligation by delineating duties, recipients and the means of claiming redress, no such right exists. Given his reasoning on the legal enforceability of the right to development, Guevara²³ argues that the most effective way to give meaning to this right is through the exercise of the social, economic and cultural rights that are found in most constitutions, although they do not always have the same legal force as civil and political rights.

Recognising the importance that the AU attaches to the enjoyment of all human rights, the AU Commission adopted a Strategic Plan which placed human rights at the core of its social development programmes and activities. One of the key roles of the AU's Department of Social Affairs is to provide the political leadership to harmonise and coordinate Africa's efforts in ensuring that noticeable improvements are made in the lives of all Africans. It does so within the context of the right to development, as embodied in the African Charter on Human and Peoples' Rights, the AU Constitutive Act, and the Vision and Mission of the AU Commission. The Department of Social Affairs' programmes encompass numerous issues, including health and endemic diseases, migration, population, reproductive health and rights, culture, sport, social protection of vulnerable

¹⁹ (ibid.).

²⁰ Guevara (ibid.) sees the right to development as a form of recovery by less-developed countries from developed countries, despite developed countries not providing development assistance as a legal obligation.

²¹ See e.g. Gutto (2004); Nakuta (2008).

²² Guevara (ibid.).

²³ (ibid.).

groups, gender equality, education, and human resource development. Special attention is given to marginalised and disadvantaged groups and communities.

Examples of specific measures which have been taken by the AU Commission in addressing the social challenges at continental level include the following:

- The 2004 Ouagadougou Declaration and Plan of Action on Employment and Poverty Alleviation,²⁴ which expresses concern about the sustainable livelihoods of the African population in general, and those of vulnerable groups in particular. The Declaration calls for equal opportunities for all and commits its signatories to empowering the most vulnerable groups, including them in poverty alleviation programmes and policies, and ensuring their full participation in the implementation of these programmes.
- The 1999 Charter for Social Action incorporates the following principles, amongst others: respect for basic human rights, the basic needs and aspirations of the population, pursuit of the goals of social justice and equity, and accessibility of social services to all. Amongst its strategies, the Charter calls for the formulation of national social policy and the incorporation of the social dimension at all level of planning, programming and implementation.
- The 2008 AU Continental Social Policy Framework provides guidance to member states in the promotion of the rights and ensuring the welfare of marginalised and excluded groups, including orphans, other vulnerable children, the youth in general, people with disabilities, refugees and displaced people, families, the elderly, and people living with HIV and AIDS. The development of the Policy Framework was informed by Africa's need to combine economic dynamism (including "pro-poor" growth policies), social integration (societies that are inclusive, stable, just, and based on the promotion and protection of all human rights, non-discrimination, respect for diversity and participation of all peoples), and an active role for government in the provision of basic services at local and national level. In this context, it has been recognised that social policy should (a) promote equity and fairness amongst certain segments of society and certain regions within a country (otherwise it leads to social exclusion) by providing equitable access to rights and resources; (b) address the social tension between cultural identity and aspirations towards the freedoms

²⁴ Adopted at the Extraordinary Summit of Heads of State and Government in September 2004.

promised by modernity; (c) reflect the true realities of Africa that bring together economic and social policies, thus recognising the interdependency between the two; and (d) promote a human development approach that puts people at the centre of development, by investing in people.

Based on the above, it is clear that development is not just about economic growth: it encompasses social advancement and the betterment of livelihoods. In this sense, development is as much about increasing people's capabilities and choice as it is fundamentally also about values, systems, processes and institutions of social and political organisation.²⁵ This is particularly true because the condition of poverty is not merely about being relegated to a low-income status group, but also about being deprived of freedom of choice. The purpose of development is, therefore, to enhance the capability of individuals to overcome poverty and other social and economic challenges, human rights violations, neglect of women, and threats to the environment.²⁶

Moving beyond the discussions outlined above, all sides agree that the objective of the right to development needs to focus on poverty eradication and narrowing the inequality gap, because – as mentioned above – *poverty* is also understood to be the failure to improve the enjoyment of human rights. The poverty eradication approach should involve the active participation of vulnerable and marginalised groups in the design, execution and implementation of development policies and programmes.

Social, economic and cultural rights

Whenever reference is made to the promotion and protection of human rights, there is an inclination to speak about civil and political rights only. In this regard, the yardstick for measuring the enjoyment of such rights has been the full and active participation of people in democratic processes such as elections, freedom of expression, and the right to life. African countries have been hailed for increasing respect for human rights as more countries emerged through democratic transitions following elections through which people freely choose their governments. However, participation in elections should not be the only

²⁵ Gutto (ibid.).

²⁶ Sen (1999). Sen explains *development* as the expansion of freedom of choice for human beings – both in terms of processes that allow freedom of actions and decisions, and the actual opportunities that people have.

human rights indicator; rather, and more importantly, the indicator should be the full and equal enjoyment of social, economic and cultural rights, since these are intertwined with civil and political rights and are two sides of the same coin. In this respect, the OAU recognised that human rights should include all rights, and that corruption in Africa was an obstacle to the enjoyment of social, economic and cultural rights in particular, but also to socio-economic development in general.

Therefore, although it can be argued that the situation regarding the respect for civil and political rights has improved, the same cannot be said of economic, social and cultural rights because Africa continues to face grave challenges and threats. These include HIV and AIDS, diseases, poverty, exclusion, racism, xenophobia, inequality, corruption, conflicts, bad governance, and violence against women and children. As long as these challenges affect people's everyday lives, the problems of sustaining democracy and development and the protection and promotion of human rights will continue to haunt the continent. For example, poverty is recognised by Oxfam as –²⁷

... a symptom of deeply rooted inequities and unequal power relations, institutionalized through policies and practices at all levels of state, society, and household.

Therefore, poverty can be seen as a violation of human rights, and its reduction will contribute to the full and equal enjoyment of all human rights.

The issue which arises is how the AU can ensure the equal recognition and relevance,²⁸ including their enforceability and the unnecessary distinction between civil and political rights on the one hand, and social, economic and cultural rights on the other. Indeed, an all-encompassing human rights approach requires that the AU has to promote social, economic and cultural rights – which embrace the right to development as contained in the African Charter – in the same way as civil and political rights are promoted.

Most AU member states have adopted a bill of rights in their constitutions to guarantee fundamental human rights and freedoms, but these pertain mostly to civil and political rights, which are regarded as enforceable. However, Nakuta²⁹ argues that, given that social, economic and cultural rights play a greater role in

²⁷ Green (2008:27); Sen (ibid.).

²⁸ This was a recommendation by the APRM Panel to participating countries to accord economic, social and cultural rights the same recognition and relevance.

²⁹ Nakuta (2008:95); see also Agbakwa (2006:70–75).

improving people's lives and standard of living, they should be justiciable. This argument is supported by the fact that, in the 21st century, the challenge lies in making rights a reality for the majority of the people by addressing poverty and inequality.

Since the enforcement of social, economic and cultural rights largely depend on the availability of resources, the AU will have to step up its advocacy for increased resources both internationally and domestically not only to fulfil these rights, but also to effectively monitor compliance by member states, which should use the same approach as they do to advance civil and political rights – albeit with added methods and competencies.

Vulnerable groups

It is generally believed that the groups made vulnerable by social exclusion and inequality are best protected through the effective implementation of social, economic and cultural rights and the right to development in addition to civil and political rights. Poverty and exclusion from mainstream development policies and programmes result in vulnerability. The delivery of affordable basic services remains a big problem, and this can be addressed through promoting access by vulnerable groups to health, education, water, sanitation and shelter, amongst other things. Vulnerable groups include children, the elderly, persons with disabilities, the youth, orphans and other vulnerable children, persons living with HIV and AIDS, poor families, and refugees and displaced persons. All of these vulnerable groups have been targeted by AU Commission programmes.

As mentioned previously, the OAU/AU developed key legal and policy frameworks that embody commitments made by African leaders to promote and protect the rights and welfare of vulnerable groups, and thereby address their vulnerability and social exclusion. In addition to the legal instruments already referred to, policy instruments adopted to augment the legal protection framework include the following:

- The Declaration and Plan of Action on Africa Fit for Children (2001)
- The Call for Accelerated Action on the Implementation of the Plan of Action on Africa Fit for Children (2007)
- The Policy Framework and Plan of Action on Ageing (2003). In collaboration with the African Commission, the AU Commission is elaborating a Protocol on the Rights of the Elderly. A Steering Committee has been set up to prepare for the establishment of the Advisory Council for the Elderly within two years

- The Declaration and Plan of Action on the African Decade of Disabled Persons (1999–2009)
- The Plan of Action on the Education Decade (2008)
- The Continental Policy Framework on Human Rights and Persons Living with HIV/AIDS (2006), in addition to the declarations and plans of action adopted at two Special Summits of Heads of State and Government such as the Abuja Declaration and Framework Plan of Action on HIV/AIDS, Tuberculosis, and Other Related Infectious Diseases (2001)
- The Africa Health Strategy (2007) and the Africa Regional Nutrition Strategy (2005-2015)
- The Plan of Action on the Family (2005)
- The EU-Africa Plan of Action to Combat Trafficking in Human Beings, especially Women and Children (2007)
- The Policy Framework on the Sustainable Development of Sport in Africa (2008)
- The Social Policy Framework (2008), and
- The Study on Social Protection Systems in Africa (conducted in 2008).

Human rights, democracy and governance

It is undeniable that the conducting of democratic elections has increased across Africa. However, democracy – if measured only by the outcome of elections – has produced mixed results: at times it has generated prosperity, and at others factionalism and discord.³⁰ The AU has effectively deployed sanctions against any country that comes to power through unconstitutional means, so military coups as well as any takeover of power from an elected government are becoming something of the past. Regrettably, recent events in Africa have shown that democracy still remains fragile³¹ Equally, good governance, including the fight against corruption and its impact on social and economic rights, has become a measure of democracy. To this end, the AU adopted the Charter on Democracy, Governance and Elections³² and the Convention on Combating Corruption.³³

³⁰ Vadi (2008).

³¹ For example in Guinea Bissau, Mauritania and Madagascar.

³² See also the OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government (ibid.), and the Declaration on the Principles Governing Democratic Elections in Africa (AHG/Decl.1(XXXVIII) 2002), which reflects a wider perspective on democracy than simply being a focus on electoral processes.

³³ Members of an Advisory Board serving to implement the Convention were appointed in 2008.

The AU Commission's Department of Political Affairs is mandated to deal with human rights, democracy, elections and humanitarian affairs, amongst other things. It has established an electoral fund to facilitate election observance in member states, and has conducted workshops on human rights and corruption with national human rights and anti-corruption institutions, respectively. The establishment of PAP, with the important role of promoting democracy, aims at galvanising people to participate and building the visibility of the AU to increase its relevance and credibility to the people of Africa.

A notable development in the area of democracy, human rights and governance is the establishment of the African Court and the appointment of judges in 2007. Another is the APRM which followed the adoption by the Durban Summit in July 2002 of the Declaration on Democracy, [and] Political, Economic and Corporate Governance as a supplement to NEPAD. According to the 2002 Declaration, states participating in NEPAD "believe in just, honest, transparent, accountable and participatory government and probity in public life". Accordingly, they "undertake to work with renewed determination to enforce", among other things, the rule of law; the equality of all citizens before the law; individual and collective freedoms; the right to participate in free, credible and democratic political processes; and adherence to the separation of powers, including protection for the independence of the judiciary and the effectiveness of parliaments.

The 2002 Declaration also committed participating states to establishing an APRM to promote adherence to and fulfilment of its commitments. On 9 March 2003, the NEPAD Heads of State and Government Implementation Committee, meeting in Abuja, Nigeria, adopted a Memorandum of Understanding (MOU) on the APRM. This MOU effectively operates as a treaty. It came into effect immediately, with six countries agreeing to be subject to its terms. Those countries that do not accede to the MOU are not subject to review. The March 2003 meeting also adopted a set of objectives, standards, criteria and indicators for the APRM. The meeting agreed to the establishment of an APRM Secretariat and the appointment of a seven-member panel of eminent persons to oversee the conduct of the APRM process and ensure its integrity. The APRM is a voluntary mechanism open to any AU country. A country formally joins the APRM upon depositing the signed MOU at the NEPAD Secretariat.

The APRM process is based on a self-assessment questionnaire,³⁴ which is divided into four sections: democracy and political governance, economic governance

³⁴ The questionnaire was formally adopted in February 2004, in Kigali, Rwanda, by the first meeting of the African Peer Review Forum, made up of representatives of the Heads of State or Government of all states participating in the APRM.

and management, corporate governance, and socio-economic development. Its questions are designed to assess states' compliance with a wide range of African and international human rights treaties and standards.

Some shortcomings in the questionnaire have been pointed out, such as its complicated nature, overlapping areas of reporting, the participation of civil society organisations. The question has also been asked whether there is political will to make the APRM process a success story.³⁵ However, it should be acknowledged that, by participating in the APRM, African governments have voluntarily subjected themselves to public scrutiny and accountability as shown by the various missions and reports issued by the APRM panel. By March 2009, 29 countries had formally joined the APRM by signing the 2003 MOU.³⁶

It should also be clear from the discussion in this paper that democracy is not just about elections, but about respect for human rights and the meaningful participation of people at all levels of society, both during and after elections – hence the generally held view that sustainable development requires a viable democracy and respect for all human rights. Social development and democracy go hand in hand, as both require the full and active participation of people in decisions affecting their lives. This will require that the AU be seen as a people-driven organisation, and that ECOSOCC should become more active in facilitating the participation of civil society organisations in the AU's work. This should be complemented by efforts at national level to encourage a closer relationship between governments and civil society organisations.

Gender equality

An earlier critique of the African Charter was the omission of women's rights in its provisions, as it gave little or no direct attention to women as a group. This is despite the fact that women brought issues on gender inequalities to the

³⁵ Killander (2008); see also Adisa (2002).

³⁶ Algeria, Burkina Faso, Republic of Congo, Ethiopia, Ghana and Kenya signed the MOU in March 2003; Cameroon, Gabon and Mali in April and May 2003; Benin, Egypt, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa, and Uganda in March 2004; Angola, Lesotho, Malawi, Sierra Leone and Tanzania in July 2004; Sudan and Zambia in January 2006; São Tomé and Príncipe in January 2007; Djibouti in July 2007; Mauritania in January 2008; and Togo in July 2008. This is more than half of the AU's 53 countries. However, Mauritania was suspended in October 2008 AU due to a coup earlier in the year.

African agenda through their participation in liberation struggles – albeit within the limits of power relations – and, thus, directed OAU and AU attention to the position of women in society. As was stated earlier, the adoption and ratification of the Women’s Rights Protocol sought to address these omissions.

Another criticism levelled against the Charter is the emphasis given to cultural values. This emphasis conveys an ambiguous message and, according to Khadija Elmadmad,³⁷ –

[t]he African Charter [i]s characterized by a dualism of norms regarding women’s rights, a contradiction between modernism and traditionalism as well as between universalism and regionalism ... The African Charter has placed the rights of women in a ‘legal coma’.

This view is based on the fact that, in general, African cultures militate against women by according them low status and through harmful traditional practices such as female genital mutilation/cutting, despite many African constitutions providing for gender equality and non-discrimination.

In addition to the Women’s Rights Protocol, the AU Commission has prioritised activities to promote gender equality that include the adoption of commitments such as the Solemn Declaration on Gender Equality in Africa, the Policy Framework and Plan of Action on Sexual and Reproductive Health and Rights, and an AU Gender Policy. The Heads of State and Government, through their adoption of the 2004 Ouagadougou Declaration on Employment and Poverty Alleviation, expressed concern about the major challenges and obstacles to gender equality as well as the low levels of women’s representation in social, economic, and political decision-making structures which still persist; the increasing feminisation of poverty, aggravated by discrimination and unequal opportunities and treatment; and the underutilisation of the entrepreneurial creativity and job creation potential of African women.

It should also be noted that most instruments adopted since 2003 make provision for gender equality and women’s participation. Some even provide expressly for the inclusion of women in the AU’s decision-making bodies. For example, the AU has achieved a 50:50 gender balance with the appointment of five women and

³⁷ As quoted in Welsh (ibid.:555).

five men to its Commission.³⁸ The first President of the Pan-African Parliament is a woman, whilst the first Interim President of ECOSOCC was also a woman.

The AU Commission also established a Women, Gender and Development Directorate in the Office of the Chairperson to coordinate all its activities and programmes relating to gender, as well as to ensure that gender is mainstreamed into all AU programmes and policies in accordance with the Decision on Mainstreaming Gender and Women's Issues within the African Union. There is also the AU Women's Committee, an advisory body to the AU Commission Chairperson. Among its roles, the Committee works with governments and civil society to monitor the implementation of the Women's Rights Protocol and the Solemn Declaration on Gender Equality in Africa.

Despite commitments to gender equality, discrimination against women and the lack of effective participation by women in decision-making continues. Among the examples are that women are accorded low status in society; they suffer violence and abuse; the rate of maternal mortality remains high; and poverty is increasingly feminised. This is attributed to various factors, such as the deep-seated discrimination in African societies, patriarchal attitudes and stereotypes about women's role in society, and a limited number of women's organisations that make human rights an express part of their mandate – despite a human development approach enjoining us all to link human rights and development.

Therefore, legal and policy commitments always need to be accompanied by measures to combat societal discrimination to address gender inequalities and women's unequal access to education, health and other social services. These measures would include combating harmful traditional practices through increased awareness-raising activities and the active involvement of traditional and community leaders; the economic empowerment of women; concrete actions and strategies to end violence and abuse against women and girls; increased access to basic social services such as education of the girl child; and increased access to sexual and reproductive health services and rights. Much, therefore, needs to be done to accelerate action in order to achieve the Millennium Development Goals, as they all directly and indirectly impact on women's lives.

³⁸ Statutes of the AU Commission.

Strategies for enhancing human rights protection and promotion

An inclusive approach to human rights

Notwithstanding some rights being regarded as enforceable and others not, the AU should avoid their polarisation and ensure that all rights – including social, economic and cultural rights – are protected and promoted. To avoid the usual polarisation between the latter rights and political and civil rights, it is suggested that a human-rights-based approach to development be adopted. Such an approach combines social, economic and cultural rights with civil and political rights, and the building of a just, equitable social contract between State and citizen.³⁹

A human-rights-based approach will also assist in linking the human rights agenda to the broader development agenda. The current discourse on human security and human rights is very relevant to the AU agenda. A human rights approach would also require governments to develop clear plans of action with targets, objectives and measures for achieving them, and to allocate substantial resources to their achievement.

Institutional and constitutional arrangements

The Constitutive Act of the AU provides Africa with a continental legal framework for the protection and promotion of human rights. In the spirit of the Constitutive Act, the AU has adopted an institutional focus on human rights, and explicitly recognises the mainstreaming of human rights in all AU activities and programmes. However, it needs to ensure that of human rights norms, standards and principles are effectively integrated into a range of activities and practices, including the AU's peacekeeping operations, election observation, and conflict management. For example, in carrying out their mandates, all portfolio Departments in the AU Commission are required to mainstream human rights into their programmes; therefore, the issue of human rights is no longer limited to the African Commission on Human and Peoples' Rights. The Peace and Security Council also sees the protection of human rights as part of its mandate. In addition, social, economic and cultural rights should be part of the peace and security agenda because conflicts exacerbate social issues such as a lack of

³⁹ Green (2008:27).

access to food, water, health care, sanitation and education, and these require special attention during and after conflicts.

It is equally important that the AU should also promote the mainstreaming of respect for values inherent in human rights, both in members states' laws and their policymaking. Strengthening the capacity of institutions with a human rights remit and providing them with adequate resources at the continental, regional and national level to effectively fulfil the mandate of promoting and protecting human rights remains critical.

Better coordination of mechanisms with a human rights remit

Along with the adoption of legal instruments targeting human rights came mechanisms for their implementation, such as the African Commission, The African Court, the ACERWC, the APRM, the PAP, national human rights institutions, and NGOs. Given the scarcity of resources and to avoid duplication of effort, the question always remains whether there will be adequate funding to ensure the effectiveness of all these mechanisms. There might also be a need to avoid a proliferation of institutions with a human rights remit. For example, a common question is whether it was necessary to establish a separate body for the protection of children. Whatever the answer may be, it is important that there is proper coordination between all these human rights mechanisms, such as the ACERWC and the African Commission, as well as with other institutions. Equally, the APRM process should complement the efforts of existing human rights institutions.

It may be advisable for these mechanisms to develop a programme of activities that build on each other's initiatives to create coherence and synergy between their approaches and activities. There might also be a need to rationalise existing African institutions.

Coherent and comprehensive approach to the elaboration of standards and their implementation

As noted above, many legal instruments, policy instruments and policymaker statements with a human rights focus have been adopted by the OAU/AU over the years. However, it is imperative that all these are consolidated and build

upon as part of Africa's institutional history. This will also serve as the AU's contribution to the creation of a continent-wide human rights protection system, and the development of a coherent and comprehensive approach to the elaboration of standards.

According to Murray,⁴⁰ a development of standards should include the following:

- A review of existing instruments and bodies with a human rights agenda
- A streamlining of the operations of such institutions, and
- The development of a coherent and consolidated institutional approach to human rights.

In addition to the above, it might also be necessary to promote –

- dialogue on critical human rights issues and challenges in Africa, and
- research to inform policy development and lawmaking.

Implementation or enforcement mechanisms and processes

As noted above, the OAU/AU and regional organisations have adopted various legal and policy instruments to promote and protect human rights. There has also been an increased realisation of rights on the domestic level through the adoption of constitutions, laws and policies, and the establishment of institutions such as parliaments, courts, human rights institutions, ombudspersons, and certain civil society and non-governmental organisations.

Although all these instruments and mechanisms exist to promote and protect human rights, many lack resources and political backing. In the absence of the political will and financial and logistical support to operationalise the institutions with a human rights remit, they will be ineffective in their tasks. Thus, the enforcement and implementation of obligations and commitments remain a challenge, as explained below.

By signing and ratifying continental or international legal or human rights instruments, member states incur legal obligations to implement the values and standards embodied in them at domestic level. However, what is more important than the ratification process is making the rights enshrined in those instruments a

⁴⁰ Murray (ibid.).

practical reality through their domestication and implementation.⁴¹ The systems of incorporating such standards into domestic laws differ across member states.⁴² Even if countries like Namibia do not need parliamentary involvement to incorporate such instruments once ratified, it is preferable to give meaning to them by enacting laws and adopting policies and plans of action. These need to be aligned with human rights standards as well as with sustained financial backing so as to ensure their effective implementation.

The enforceability of rights also depends on access to courts. Courts are often inaccessible to ordinary people, who are also not necessarily familiar with the court system. The AU should, therefore, also promote the establishment of alternative mechanisms such as national human rights commissions and ombudspersons, who employ both formal and informal complaints processes and are easily accessible to people. However, to be effective, these mechanisms have to be independent, well resourced, and complemented by an independent judiciary and an active legislature.

These numerous resolutions and decisions by AU bodies which have a huge potential to contribute to the human rights protection system are not always well known across the continent, and neither are the mechanisms for their enforcement/implementation. Therefore, there is a need for mass education and dissemination of information on the Constitutive Act, national constitutions and laws, other human rights instruments, and their implementation mechanisms. Indeed, the African Charter obligates states to create awareness of the rights enshrined in it. People can only exercise their rights if they are aware of them and how to enforce them.

The current mechanisms for enforcement and implementation include reporting, fact-finding missions, and advice and recommendations of implementation mechanisms. One of the AU's roles is to ensure effective follow-up and monitoring, but it does not have a presence in member states. Consequently, member states have to – although they are not always legally obliged to – submit reports to the AU. Nonetheless, this is not always complied with, the reports are delayed, or they are not submitted frequently enough.

⁴¹ The APRM recognised the importance of domestication, given the differences that exist between countries as regards ratification and domestication.

⁴² Some countries require parliamentary involvement, while others make it automatically applicable, backed up by laws and policies.

In addition, member states which have ratified international and African human rights instruments also have reporting obligations to separate bodies such as the UN and the AU, thus placing additional burdens on governments. It was found that countries usually provided better and more frequent reporting to international organisations such as the UN in comparison with continental organisations such as the AU. Linkages and partnerships between continental and national mechanisms would, therefore, facilitate accurate and effective reporting as well as harmonise such reporting.

The fact that there are no sanctions attached to failing to comply with reporting obligations is seen as a major weakness in the enforcement and implementation system. To ensure compliance, it has been suggested that there is a need to move beyond reporting obligations and fact-finding missions, and instead impose sanctions for human rights violations and redress for victims of such violations,⁴³ in addition to institutional support and enforcement mechanisms. The AU will also have to build a closer partnership with the regional economic communities, which are regarded as the pillars of the AU, and with civil society organisations.

Focus on vulnerability and exclusion

It has been pointed out that vulnerability is caused by the exclusion and marginalisation of certain groups. Thus, strategies for addressing vulnerability and exclusion should include integrated, multisectoral and multidisciplinary approaches, and should have the following elements:

- **Be rights-based:** This approach promotes, protects and defends the rights – particularly the social, economic and cultural rights – of the most vulnerable and marginalised as being integral to sustainable development.
- **Focus on poor people’s realities:** This will require their active involvement and participation.
- **Invest in organisational capacities:** Community-driven approaches led by community-based organisations and informal networks have been always been critical for the survival of communities. Communities need to have control over funds, resource allocation, and decision-making, as this relies on people’s strengths and knowledge. Such empowerment also helps

⁴³ Gutto (ibid.).

people to address inequalities inherent in the way society is structured and organised.

- **Promote social protection policies:** This is based on a scaled-up community-driven model aimed at strengthening community capacity to provide support during times of need, coupled with an effective monitoring and evaluation system to assess the social and economic impact of the programmes that target poverty reduction and inequality.
- **Change social norms:** This can be done through effective awareness-raising campaigns, civic and human rights education, and the involvement of traditional and community leaders, in order to address harmful traditional practices and gender inequalities.
- **Recognise the importance of social policy:** Social policy should be viewed as a web of policies that act in a complementary, multidimensional, multisectoral and multidisciplinary manner, and
- **Implement poverty reduction strategies:** These strategies should not only take into account income and consumption, but – more importantly – the factors that place people at risk of poverty or that worsen their poverty, including enhancing their capabilities to overcome poverty and other social and economic challenges.

Conclusion

It has been maintained throughout this paper that the AU needs to adopt an inclusive and holistic approach to human rights, and effectively advance social, economic and cultural rights as well as the right to development in its promotion of an African human rights protection system. This will include the effective implementation of instruments at the national level to have real impact on socio-economic development and the lives of the people, and to put in place proper monitoring and evaluation mechanisms. The hallmarks of any democracy would be measured by the extent to which not only governments but also all other stakeholders ensure that human rights and laws are respected and upheld.

The AU should focus on the protection of the rights of vulnerable groups by advocating for the implementation of various commitments made by governments through the adoption of national laws and policies, and by increasing the allocation of resources to the social sector to enhance access and build capacity in institutions, particularly those that strengthen human rights protection mechanisms.

Although African leaders have undertaken to promote the principles of the AU and NEPAD, including respect for human rights in all member states, the implementation of these principles remains a challenge. Therefore, the AU Commission should step up its advocacy, follow-up and monitoring role, and conduct proper assessments and evaluations of the impact of human rights instruments.

The debate on the effectiveness of the AU relating to the role and functions of its organs, the budget, and the extent to which the various bodies can work together to achieve the African human rights protection system is still ongoing, five years after the AU's establishment. This is because the AU continues to create more instruments and mechanisms with limited resources and overlapping jurisdictions, thus limiting their role in providing effective oversight and enforcement. Time will tell whether the AU has lived up to the expectations of making respect for human rights a reality.

In remarks on the AU that relate to this debate, the then UN Secretary General, Kofi Annan,⁴⁴ expressed himself as follows in his address to the AU Summit in 2006:

The African Union itself is in many ways the most eloquent testimony of progress, in development, in security, in human rights -- the three interlinked pillars on which the human family must build its future. An institution, which was created only six years ago, has established itself as a defining voice in each one of those areas.

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⁴⁴ Annan (2006).

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Major African legal instruments

Sheila B Keetharuth

Introduction

The African Charter on Human and Peoples' Rights (hereinafter *the African Charter* or *Charter*), at the very core of the African human rights system, has reached full ratification status. With the deposit of Eritrea's instrument of ratification on 14 January 1999, all member states of the African Union (AU) have signified their willingness to be bound by the obligations created by the Charter. Yet given the state of human rights enjoyment from Asmara to Abidjan, from Cape Town to Cairo and everywhere in between, one would be tempted to question the commitment of states to translate the rights contained in the African Charter into tangibles. Ten years after the adoption of the Grand Bay (Mauritius) Declaration and Plan of Action in April 1999, little has changed in the list of 19 identified causes of human rights violations in Africa.¹ Economic, social and cultural rights still receive less attention than civil and political rights, while violations of civil and political rights continue on a massive scale. The concept of group rights is still in an embryonic stage.

The African Commission on Human and Peoples' Rights (hereinafter *the African Commission*), established under Article 30, is the treaty body monitoring

¹ First Organisation of African Unity Ministerial Conference on Human Rights in Africa, (12–16 April 1999), Grand Bay, Mauritius, Grand Bay Declaration and Plan of Action, paragraph 8 identifies the following as the causes of violations of human rights in Africa: (a) contemporary forms of slavery; (b) neo-colonialism, racism and religious intolerance; (c) poverty, disease, ignorance and illiteracy; (d) conflicts leading to refugee outflows and internal population displacement; (e) social dislocations which may arise from the implementation of certain aspects of structural adjustment programmes; (f) the debt problem; (g) mismanagement, bad governance, and corruption; (h) lack of accountability in the management of public affairs; (i) monopoly in the exercise of power; (j) harmful traditional practices; (k) lack of independence of the judiciary; (l) lack of independent human rights institutions; (m) lack of freedom of the press and association; (n) environmental degradation; (o) non-compliance with the provisions of the OAU Charter on territorial integrity and inviolability of colonial borders and the right to self-determination; (p) unconstitutional changes of governments; (q) terrorism; (r) nepotism; and (s) exploitation of ethnicity.