

The Domestic Application of the African Charter on Human and Peoples' Rights

by Dr Rose D'Sa*

1. Introduction

The African Charter on Human and Peoples' Rights¹ was adopted as a regional treaty by the Organisation of African Unity (OAU) in 1981. It entered into force, contrary to most expectations, only five years later on 21 October 1986. To date, it has been ratified or acceded to by a total number of 35 African countries,² representing approximately two-thirds of the entire membership of the OAU. This makes it the largest regional human rights system in existence.³

The adoption of the Charter represents an important landmark in the protection and promotion of human rights on the African continent for a number of reasons. Firstly, it should be noted that the majority of African States are not parties to the treaties which are regarded as the main international human rights instruments, namely the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its Optional Protocol⁴. Thus, the adoption of this regional instrument, which affirms in its Article 60, adherence to general international law on this subject, is therefore an important additional means by which generally accepted international norms on human rights may have application in the domestic law of African States. It is an instrument to which the African judiciary may undoubtedly refer in the context of decision-making in the courts, since there is a general presumption in domestic law that whenever possible domestic law is to be applied and interpreted so as not to conflict with a State's international obligations.⁵

Secondly, the adoption of the Charter is an important milestone in the history of the OAU itself, which as an inter-governmental organisation representing all independent African States, has attracted criticism in the past for an apparent indifference to the suppression of human rights in some African countries which have at various times been evident on a massive scale.⁶ The Charter envisages in Article 31, the establishment of an African Commission on Human and Peoples' Rights of 11 members chosen to serve in their personal capacity from among African personalities of the highest reputation, particular consideration being given to those with legal experience. Its functions include the promotion and protection of the rights enumerated in the Charter, as well as the additional function of interpreting the Charter. This Commission has now been established and it remains to be seen whether its influence and its jurisprudence will make any significant contribution to the cause of human rights in Africa. Despite some inherent limitations in its mandate, which will be discussed below, it remains significant for Africa that the OAU, which hitherto has had a very restrictive legal and political approach to the concept of non-interference in the domestic affairs of its member countries⁸, should have established such a body at all. Viewed against this background, the decision by the OAU to adopt a regional treaty on the subject of human rights is a welcome initiative.

Thirdly, the African Charter has a special significance for African judges and lawyers because it purports to reflect "the African conception of human rights" and is intended "to take as a pattern the African philosophy of law and meet the needs of Africa".⁹ There is now ample evidence in the context of the European Convention of the significant contribution which can be made to human rights through the application and enforcement of regionally accepted norms. The acceptance by the majority of African states of this regional Charter is an unprecedented opportunity for the African judiciary and the African Bar to apply in domestic law, concepts of human rights which reflect African legal perspectives and social needs. However, it is naive to suppose that the emergence of this document alone will dramatically alter the enforcement of human rights in Africa. Many African States face the prospect of both internal and external subversion caused for example, by the fact that many of them encompass a heterogeneous collection of tribes, artificially drawn together as a result of colonial and administrative or economic preference and convenience.¹¹ Furthermore, the severe under-development of many African nations (with the attendant problems of poverty, malnutrition and disease) creates considerable problems for African governments and poses a dramatic human rights dilemma. Nevertheless, the existence of the African Charter and its clear affirmation that all human beings are entitled to certain fundamental rights does reinforce the legal and moral framework laid down in many African constitutions. By virtue of Article 1 of the Charter, States parties to it have an obligation to "recognise the rights, duties and freedoms enshrined" in it and "undertake to adopt legislative and other measures to give effect to them". This suggests that the rights protected by the Charter are intended to be binding on States¹⁰. It is therefore an important tool in the context of domestic law for the development of jurisprudence and the advancement of human rights for all.

The African Commission established under the Charter may in the context of its functions to protect human rights, entertain a "communication" from a State party (Article 47) or from entities other than States (Article 55). Thus communications from individuals or groups may be considered providing that a simple majority of the Commission decides to do so (Article 55(2)) and the provisions of Article 56 are also satisfied. The latter includes a requirement in Article 56(5) that local remedies, if any, must first be exhausted unless it is obvious that this procedure is unduly prolonged. Therefore it is clear that, as in the case of other regional systems, a complaint about an alleged violation will normally first have to be pursued via the domestic court system before it can be considered by the Commission. It is therefore necessary for domestic courts to have regard to the effect of the Charter's provisions in the context of domestic litigation. However, most African States ascribe to the dualist legal system whereby an international treaty cannot be applied in the domestic courts until it has undergone some process of "transformation" or "incorporation" and thus become directly applicable in domestic law. It is therefore important that African States give early consideration to the question of incorporation of the Charter into domestic law either by way of constitutional amendments in respect of relevant Charter provisions or by the enactment of appropriate legislation.

The decision by the OAU not to establish an African Court of Human Rights to which the Commission can transmit cases for judicial determination, (as under the European and American Conventions), was taken apparently on the basis that African tradition emphasises conciliatory rather than judicial procedures for settlement. Certainly OAU organisational history favours this approach since one of the OAU's principal organs for the peaceful resolution of disputes was the Commission on Mediation, Conciliation and Arbitration. However it eventually became defunct from lack of use. The African Commission is similarly not a formally constituted judicial organ, but is a fact-finding and conciliatory body with a mutual responsibility to try to reach an amicable solution (Article 52). The fact that measures taken by the African Commission under the Charter remain confidential until the OAU Assembly of Heads of State and Government decides otherwise (Article 59(1)) and that the latter, which is primarily a political organ, also decides whether the Commission's report is to be published (Article 59(2)) may significantly reduce the impact of the Commission's findings. However, it does not affect the ability of the African judiciary to apply the relevant human rights norms in the context of their domestic law whenever applicable. In this context it is relevant to note that although the United Kingdom, for example, has neither a written constitution nor legislation incorporating the European Convention into domestic law, and subscribes to the dualist legal system, the Convention has nevertheless come to be treated by judges as relevant for the purpose of resolving uncertainties in statute law, and also as being relevant to public policy.¹² It is therefore necessary to analyse the specific nature and extent of the rights to be protected by the Charter so as to determine their relevance and application in domestic law.

2. Civil and political rights under the African Charter

The African Charter enumerates a number of civil and political rights attributable to the individual, many of which are formally recognised in African constitutions. These include the right to non-discrimination (Article 2) the right to equality and equal protection of the law (Article 3), the right to life (Article 4), the right to the respect of human dignity (Article 5), the right to liberty (Article 6), the right to have one's cause heard, i.e. minimum standards during legal proceedings (Article 7), the right to freedom of conscience and religion (Article 8), the right to expression and dissemination of opinion, the right to freedom of association (Article 10), and the right of assembly (Article 11), the right to freedom of movement (Article 12), the right to participation in government and access to public service and public property (Article 13), and the right to property (Article 14).

In respect of the content of these rights it is not surprising that the Charter shares much in common with other regional instruments such as the European Convention and the American Convention, since there are several international human rights documents from which the drafters of the African Charter could draw inspiration. It is clear that whilst striving to reflect an African conception of human rights, the drafters

recognised that it would be imprudent to deviate too much from international norms already established in other international human rights instruments.¹³ This is also to be expected in view of the fact that human rights are by their nature attributable to human beings wherever they happen to live and to that extent "transcend the boundaries of nation, race and belief."¹⁴ There are, however, a number of specific points of interest in respect of the civil and political rights enumerated in the Charter.

(a) Some lacunae in the Charter

In respect of the right to life (Article 4) and the right to liberty (Article 6) it is clear that no one may be arbitrarily deprived of these rights and Article 6 includes a prohibition against arbitrary arrest and detention. Article 7 provides some procedural safeguards in criminal trials which include the right to have one's cause heard, the right of appeal, the right to be presumed innocent until proved guilty by a competent court or tribunal, the right to defence including the right to a defence counsel of one's choice and the right to be tried within a reasonable time by an impartial court or tribunal. In addition there is a prohibition against retrospective penal legislation in Article 7(2). However, it has been pointed out that certain additional safeguards found in both the European and American Conventions are missing,¹⁵ and these broadly relate to the lack of a requirement that the accused be notified in advance of the charges against him,¹⁶ the right to request witnesses to attend the trial,¹⁷ the absence of legal representation paid for by the State if the accused cannot afford to hire a lawyer¹⁸ and the right of the accused to aid where there is a language problem.¹⁹

Unless one took the view that the right to defence implies a right to e.g. call witnesses, these omissions (if not covered by domestic legislation) would mean in effect that the accused person might not be able to defend himself to the fullest possible extent and hence might lead to a miscarriage of justice or infringement of his rights. Some, but not all of these omissions such as the absence of State-funded legal aid, are understandable if one bears in mind the deficiencies of the legal process in many African states owing to the lack of trained legal personnel and the paucity of financial resources to bring the legal system in line with standards common in Western, developed countries. The concept of State-funded legal aid for all criminal cases though clearly a goal to be aimed at, is totally unrealistic at the present time given the poor economic condition of most African States.²⁰ This is therefore an instance where the universal "right to a fair trial" may have to be modified to take into account regional differences and practical realities.

On the other hand, the improvements which are necessary to the administration of justice will not come about unassisted. They require support from the judiciary and lawyers generally as well as from the African public, through its elected representatives, so that they can legitimately and successfully press for improvements which will enhance the protection of human rights. It is therefore important that unlike the European Convention, the African Charter does place on all States

parties to it the duty, in Article 25, of promoting and ensuring through teaching, education and publication, understanding and respect for the principles of the Charter. By virtue of Article 26, States parties also have the duty to guarantee the independence of the courts and must allow the establishment and improvement of institutions entrusted with the promotion and protection of rights under the Charter. The Charter also entrusts in the African Commission the function in Article 45(1) of promoting human and peoples' rights through appropriate research and dissemination of information, as well as to act as a spur to African Governments in the resolution of legal problems associated with the proper implementation of these rights and fundamental freedoms. It is important that the legal profession in Africa actively associates itself with these worthy objectives.

(b) The use in the African Charter of "clawback" clauses and its effect on domestic law

In view of the relative political instability which has been witnessed in various parts of Africa over the past two decades, it would seem reasonable for the Charter to have addressed itself to the question of exceptions to or derogations from, the rights of individuals and the circumstances in which the suspension of rights may be permissible. Both the European and American Conventions contain derogation clauses, that is clauses which temporarily suspend the rights guaranteed under the Charter in certain circumstances.²¹ Derogation clauses can also list certain rights as being non-derogable²² even when circumstances permitting derogation exist. The effect of a derogation clause is therefore to provide some protection to the individual at periods of national or other emergency when his fundamental rights would be most at risk, by limiting the situations when these rights can be suspended.

By contrast, however, the African Charter does not contain any derogation clause. Instead it uses "clawback" clauses. This type of clause has been defined as a clause that "permits, in normal circumstance, breach of an obligation for a specified number of public reasons."²³ Such a clause therefore differs from a derogation clause in that it applies in everyday circumstances, while the latter allows suspensions only in circumstances of war or public emergency. The clawback clause may provide that the circumstances when rights may be suspended or breached are to be determined by domestic law.

For example, Article 6 (the right to liberty) provides that individuals may not be arbitrarily deprived of their freedom but that "reasons and conditions" (i.e. the "clawback" clause) must previously have been laid down by law. This therefore leaves a considerable margin of discretion to individual States to enact legislation to provide in what circumstances preventive detention or other suspensions of civil and political rights may be allowed, and may thus exclude judicial control over state behaviour other than to determine whether such suspensions have occurred in accordance with domestic law. The use of such clauses is encountered in the Charter in respect of many other rights apart from the right to life (Article 4) and the right to liberty (Article 6) and includes the right to freedom of conscience and religion (Article 8), freedom to receive information and disseminate opinion

(Article 9), freedom of association (Article 10), freedom of assembly (Article 11) and freedom of movement (Article 12). In each case, the State is permitted to justify limitations on individual rights and freedoms by reference to its own domestic law, which could be restrictive.

However, it must be borne in mind that the Commission (and thereby African judges by implication) is able to have regard to other international instruments in the field of human and peoples' rights by virtue of Article 60, as well as to legal precedents and doctrine in this area. This will therefore include not only other regional instruments but more importantly the UN's International Covenant on Civil and Political Rights which defines the scope and limitations of permissible state derogation in its Article 4.

Under this Article the public emergency must threaten the life of the nation and be officially proclaimed and the measures taken in derogation must be non-discriminatory, strictly required by the exigencies of the situation, and not incompatible with other international legal obligations. Thus it is important to recognise that the provisions of the African Charter should be viewed in the context of internationally accepted standards under international law as evidenced in the jurisprudence of the UN and other regional institutions. In the interests of greater coherence and clarity in the law, it is important that African judges and lawyers generally have improved access to the relevant jurisprudence so as to be in an informed position to apply the appropriate internationally accepted norms.

Furthermore, it is arguable that the existence of a clawback clause does not invariably mean that the relevant domestic law should be given a narrow or restrictive interpretation which limits human rights. The courts still retain an inherent jurisdiction to decide if a law is reasonably justifiable. In other words, the courts may legitimately consider whether the relevant domestic provisions comply with general principles of law including those of fairness, proportionality and the absence of arbitrariness.

Not all the individual rights are subject to the wider type of clawback clause discussed above. For example, Article 11 of the African Charter guarantees the right of every individual to assemble freely with others. Although this is subject to a clawback provision, this clause specifies the circumstances when domestic law can restrict this right. These require restrictions to be "in the interests of national security, the safety, health, ethics and rights and freedoms of others". However, these restrictions are potentially capable of covering a very wide number of situations so that wide restrictions on the right of assembly may in fact be permitted. The two other regional Conventions, the European Convention (Article 11(2)) and the American Convention (Article 15) arguably adopt a narrower formulation by merely permitting only such restrictions on this right as are prescribed by law and necessary in a democratic society.

3. The legal effect of the economic, social and cultural rights in the Charter

The African Charter is unique among international human rights treaties in that it enumerates both civil and political rights as well as economic, social and cultural rights in one document. By doing so it confirms that both categories of rights are fundamentally important and interlinked. It also leaves the matter open for argument that there are no reasons in principle why both kinds of rights should not be justiciable.²⁴ This is further supported by the fact that alleged violations of both categories of rights may be brought before the African Commission. The economic, social and cultural rights guaranteed to individuals under the African Charter include the right to work and equal pay for equal work (Article 15), the right to health (Article 16) and the right to education (Article 17). There is no support in the Charter provisions for any proposition that civil and political rights take less precedence or may even be suspended in order to promote economic, social and cultural rights; or vice-versa.

In terms of the practical application in domestic law of economic rights, it is difficult to see how certain rights e.g. the right to health (Article 16) can be guaranteed where the necessary economic infrastructure is lacking. However, that is to miss an important point which is that while some of these rights may only be capable of full implementation by progressive State action over time, access to whatever public facilities may be currently available must apply to all individuals and groups without discrimination under Article 2 and Article 19 of the Charter. In practical terms, the exploitation of a State's economic resources are usually managed by the State through the government of the day and whether individuals or groups ultimately benefit will depend on the propensities of that government. However, the Charter does provide for the relevant minimum standards by which to judge its actions. Interestingly, it also includes a right to property ownership (Article 14) which is also included in the First Protocol to the European Convention but which was not included in either of the UN Covenants on Human Rights. It also applies a principle of non-discrimination to the allocation of economic resources. It is arguable that for instance, evidence of the misallocation of resources so as to deprive some sections of the community of services essential to development for reasons not justifiable by reference to economic viability or feasibility or general principles of proportionality may very well be unlawful. It is important to note that Article 13 of the Charter whilst guaranteeing the civil and political right of participation in government also incorporates the economic right, in Article 13(2), of equal access to the public service and extends to all individuals, (and not just citizens)²⁵ in Article 13(3) the right of access to public property and services in strict equality of all persons before the law.

The possible role of the judiciary in the enforcement of economic rights has been demonstrated in recent years through the evolving jurisprudence of the Indian Supreme Court although the inclusion in the Constitution of India of specific Directives in this area has clearly been of assistance in providing judges with a directly

applicable source of legal norms with which to develop the common law.²⁶ The African Charter may not as yet have come to enjoy such a status in domestic law but it remains relevant that the economic, social and cultural rights in the Charter are viewed as part of a movement towards development in a general sense. The Preamble to the African Charter makes it clear that the African perception of human rights requires "particular attention" to be paid to the "right to development". It also points out 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".

This phraseology seems to suggest an equal emphasis on both types of rights but at the same time the strong link between development and human rights is stressed. For example, Article 22(1) states that:

"all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity in the equal enjoyment of the common heritage of mankind".

Thus the "right to development" is not limited strictly to development in economic terms, the usual measure of which is in real per capita gross national product (GNP), but accords with the more "modern" definitions of development²⁷ which includes taking into account the standard of living and opportunities for advancement of the individual as a member of society.

The existence of a human right to development seems to have been acknowledged within the UN as being a right in international law but the precise content of the right has yet to be comprehensively analysed.²⁸ Article 22(2) of the African Charter places a duty on States to "individually or collectively" ensure "the exercise of the right to development". This affirmative action at national and international level will, however, require some change in the present international economic system in order to bring about effective realization of the economic, social and cultural rights in the Charter. So long as the claims for the establishment of a New International Economic Order remain unrecognised, it is doubtful whether the "right to development" is indeed a legal right in international law. This reasoning is also supported by the fact that the existence of such a legal right implies that there is an obligation on developed countries to render assistance to developing countries in the latter's efforts to promote this right, in particular through development assistance, but such an obligation has not yet been authoritatively established or accepted. However, this should not be allowed to obscure the point that the African States themselves also have a duty under the African Charter to ensure that they make best use of the resources which they already have available, to ensure²⁹ the most equitable distribution of wealth among their peoples.

4. The concept of "peoples" rights in the African Charter and its application in domestic law

(a) The importance of "group" rights in the African context

One of the unique features of the African Charter is its inclusion of rights attributable to "peoples". This addition, which is included in the title of the Charter itself, is clearly of central importance in the document and is a distinguishing feature from the European and American Conventions. Its inclusion was specifically intended to reflect its importance as part of the "African" conception of human rights. The importance of the community in traditional African culture is apparent, especially since collective agricultural and other efforts were often necessary to ensure the survival of the people. Thus it was within the group that individuals had identity in African customary law and expulsion from the group was one of the most serious punishments that could be inflicted on the individual.³⁰

However, it is important that the concept of "peoples rights" in the African Charter is correctly interpreted and understood. The term "peoples rights" was included at the instance of some socialist States, notably Ethiopia and Mozambique, who maintained that the individual had no greater rights than that attributable to the society as a whole.³¹ The emphasis on group rights in the Charter was intended not only to reflect a truly African conception of human rights but also voiced an implicit criticism of the existing human rights concepts, as formulated for example in the human rights Covenants of the UN, which has been accused of an inherent bias towards individual rights in preference to group rights.³² However the crucial issue is whether the Charter in fact creates any new "group" rights which have not been recognised by other international treaties and which thereby have special relevance for domestic law in African countries. It is submitted that no new legal rights have been created, and that therefore no substantially new rights will arise for determination in the context of domestic law, but that the Charter does serve to reaffirm the validity of the concept of group rights as part of internationally recognised human rights.

In order to examine this issue, it is necessary to look at the Charter as a whole. Firstly, the principle of non-discrimination in Article 2, which prohibits discrimination against the individual, is extended to peoples, who are declared in Article 19 to be equal and who are entitled to "enjoy the same respect and to have the same rights". Article 19 further states that "nothing shall justify the domination of a people by another". What constitutes "a people" has not been defined in the Charter and there is some suggestion that this was a deliberate decision of the drafters.³³ This term is also not clearly defined in international law, but one view is that both an objective as well as subjective element must be satisfied. Thus the people in question must be capable of showing some common link, usually of an ethnic or historical kind, and must itself be capable of identifying its members.³⁴ This could therefore include ethnic groups, tribes and racial groups.

(b) The concept of "group" rights in international human rights law

International human rights law, as exemplified in the UN Covenants of 1966, clearly envisages the individual as the primary subject of international human rights law. However, it also recognises both the existence of groups and the fact that such groups are capable of having rights and obligations. For example, the collective right of self-determination of peoples is given pride of place (in identical terms) in Article 1 of both of the human rights Covenants. Collective rights are also asserted through the recognition of the need for the special protection of minorities. For instance, under Article 27 of the International Covenant on Civil and Political Rights:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group to enjoy their own culture, to profess and practice their own religion, or to use their own language".

However, there has been some reluctance to accept that collective rights are also human rights. Classical theories of human rights suggest that "human rights" are by definition attributable only to individuals as human beings, and not to groups. Some of this reluctance stems from the fact that in the past violations of human rights have taken place on a massive scale (as in Nazi Germany) in the pursuit of a "collective" goal, on behalf of "the nation" or of "the State". However, the possibility of having to resolve conflicts between kinds of rights does not mean that groups may not claim or assert human rights. For instance some groups, notably minorities, colonised peoples, and to a lesser extent indigenous populations,³⁵ are recognised in international law as distinct groups capable of enjoying rights. The better view, and the one adopted by the Charter, is that collective rights are also human rights even though they have a different conceptual basis. This different but related conceptual basis for collective and individual rights is helpfully explained by Louis Sohn:

"One of the main characteristics of humanity is that human beings are social creatures. Consequently, most individuals belong to various units, groups and communities; they are simultaneously members of such units as a family, religious community, racial group, people, nation and state. It is not surprising therefore, that international law not only recognises inalienable rights of individuals, but also recognises certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. These rights are still human rights; the effective exercise of collective rights as a precondition to the exercise of those other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights."³⁶

This explanation as to why collective rights exist as a separate, distinct category of human rights is further developed by Richard Kiwanuka, by drawing an analogy between a group and a tennis club. In an inter-club tennis tournament, only clubs have the right to participate even if they are represented by individuals. Thus even world famous players like Boris Becker or Steffi Graff would not have the automatic right to play in such a tournament unless they were entered by their clubs in accordance with those clubs' rules. Thus:

"The individual's right to play can only be expressed in and through the club. This right is actualised first, by protecting the club's rights in the wider setting; and then by the individual's rights in the club. Individual and collective rights are no different".³⁷

However, the fact that collective rights may be legitimately asserted as a matter of international law, does not resolve the question of how they may be relevant to domestic law. In this context the African Charter offers little guidance to domestic lawyers and judges as to the domestic application of group rights. One possible example from the Indian context is provided in the constitutional law of India where the Supreme Court has a developed practice for hearing petitions brought by way of "public interest" litigation. Such cases are often sponsored by social action groups who wish to challenge or clarify the law in areas where it may affect the economic or social welfare of a section of the community. For example, in Mehta, M.C and Another v Union of India and Others,³⁸ the Supreme Court considered (in the light of the Bhopal tragedy) the relevance of the possible hazard to the health and well-being of workmen and people living in the vicinity, of allowing a caustic chlorine plant to restart after an earlier industrial accident at the plant which had caused death and injury to members of the community. Although, as in this case, the court in fact permitted the plant to re-start and the extent of the court's power of intervention was limited by the fact that the substantive issue was one of policy to be determined by the Government, it nevertheless illustrates the relevance of group interests and rights in the context of domestic litigation.

(c) The civil and political rights of "groups" or "peoples" under the African Charter

The concept of group or peoples rights therefore has a legitimate place in international human rights law. The question is whether the African Charter adds anything further to this understanding of group rights. Article 20 of the Charter gives to "all peoples" the unquestionable and inalienable right to self-determination. Analysis of Article 20(2) suggests that this clearly applies to "colonised or oppressed peoples" such as the people of Namibia and the Black population of South Africa who are further entitled, by virtue of Article 20(3) to assistance in their liberation struggle. This corresponds with the UN interpretation of the right to self-determination and does not imply any extension of its application to include a right of "internal" self-determination for peoples already within independent and sovereign states amounting to a right of

secession, except for people living under racist regimes.³⁹ This interpretation is also supported by OAU practice since that Organisation has since its inception expressly stated a policy of adherence to the state boundaries inherited at the time of independence of its Member States.⁴⁰ However, with regard to the right of peoples within independent African states to exercise other forms of internal self-determination,⁴¹ it is relevant to note that under Article 13(1):

"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".

Political participation by the population is clearly fundamental to any discussion of human rights. It is relevant to note in the context of the Charter that the right to participate in the benefits and decision-making powers⁴² of the community is a traditional right in African customary law. Thus although the African Charter does not link "peoples rights" with a right of secession, it does clearly recognise individual rights of participation in government. Since tribal or separatist groups are often in reality groups protesting against the denial of effective participation in the decision-making process of the State, or constitute a reaction to oppression by the authorities, the Charter does thereby address a fundamentally important issue. It is therefore in this context for example, that the issue of collective rights may arise in domestic litigation.

d) The economic, social and individual rights of "peoples" under the Charter

The remaining "peoples" rights in the Charter fall broadly in the category of economic, social and cultural rights, but these essentially equate peoples rights with the rights of the State. For example, Article 21 proclaims that "all peoples shall freely dispose of their wealth and natural resources". This right is also given to African States themselves in Article 21(4). It therefore reflects the aspiration of African States which have achieved political independence, to gain effective control over the resources of their nations so as to achieve economic independence as well. State parties have a further duty to enable their peoples to fully benefit from the advantages derived from their natural resources in Article 21(5), by having the duty to eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies. It has been argued that the forceful language of Article 21(5) is tempered somewhat by the obligation in Article 21(3) to "promote international economic co-operation based on mutual respect, equitable exchange and the principles of international law"⁴³. This would imply that nationalisation of foreign property and business assets would only be lawful if the appropriate international legal standards were compiled with, and this would include the payment of compensation. However, the African Charter gives no specific direction as to the level of compensation payable, except with regard to the "spoliation" of people, who are given in Article 21(2), the right both to the lawful recovery of

their property as well as to adequate compensation. The compulsory acquisition generally, of property by the State is made subject in Article 14, to a requirement for the existence of "public need" or that it is "in the general interest of the community and in accordance with the provisions of appropriate laws". There is some evidence for suggesting, however, that this requirement goes beyond that now required in international law since the public utility principle is no longer regarded as a necessary requisite for the legality of a nationalisation.⁴⁴ Thus the State is free to judge for itself when to nationalise, so long as its motivation does not take on a discriminatory character. The right to freely dispose of wealth and natural resources in the African Charter is of course part of a wider, international campaign, particularly within the UN to gain international recognition for the concept of permanent sovereignty over natural resources.⁴⁵ As such it is not a matter which broadly speaking, is justiciable in the domestic law context.

e) Third generation "peoples" rights

The debate about human rights has been in continuous evolution ever since the adoption of the International Covenants in 1966. The category of civil and political rights and that of economic, social and cultural rights have sometimes been referred to as "first" and "second" generation rights respectively. There are also various rights which are sometimes described as newly "emerging" human rights or the "third generation of human rights".⁴⁶ The African Charter includes a reference to three such rights, namely the right to development (Article 22), the right to peace (Article 23), and the right to a satisfactory environment (Article 24). These rights are also viewed as "peoples" rights under the Charter.

Their inclusion in the Charter is of interest because it is the first human rights treaty to include a detailed reference to these "rights" and to that extent it encourages the development of new perspectives for Africa. However, the effect of their inclusion in terms of the domestic law in African States is limited. This is inevitable because the specific legal content of such rights has yet to be fully conceptualised as a matter of international law. Furthermore, although such "rights" may be embodied in the Charter, it is doubtful whether the necessary opino juris i.e. the actual expectations of States, as evidenced by state practice, is present such that the "right" can be regarded as being accepted in international customary law.⁴⁷ Even it were, it is difficult to ascertain how and in what context these rights may become justiciable in domestic law and this is a matter on which the African Commission may wish to undertake further research.

(f) Positive or affirmative action in the context of "peoples" rights

One further aspect of peoples' rights which merits attention, is the extent to which the recognition of group rights as such implies any duty upon the State to take any positive action to secure these rights. It will be recalled that Article 27 of the International Covenant on Civil and Political Rights in dealing with the protection of minorities,

formulates a 'static' guarantee namely that such persons "shall not be denied the right" to enjoy their culture, and so forth. The question arises as to whether the African Charter places any obligation on States to take positive steps for example, to ensure not merely a right to education but to education or teaching in conformity with the religious convictions of the parents or group in which the individual belongs, or in the particular language of a community.⁴⁸

It is of interest that a number of newer African constitutions have not only recognised that the best guarantee of unity and harmony is a serious commitment to minority rights but also that this may require mention of specific, affirmative action for disadvantaged groups.⁴⁹ However, the African Charter is silent on this question of positive or affirmative action with respect to group rights, with one exception - the reference to the family, in Article 18. This Article states that the family "shall be the natural unit and basis of society". It places on the State the duty of taking care of the physical, health and moral welfare of the family (Article 18(1)), the duty to assist the family, which is the custodian of morals and traditional values recognised by the community (Article 18(2)), the duty to eliminate discrimination against women and the protection of internationally recognised women's and children's rights (Article 18(4)). In respect of women's rights, the acceptance of the principle of non-discrimination in domestic law is in practice only the first step towards the elimination of discrimination against women in Africa.⁵⁰

In general Article 18 places a great deal of emphasis on family life as such, and adopts a different approach to that in the European and American Convention which in Article 8 and 5 respectively, merely provide for the absence of interference in family life, rather than for a positive commitment towards the protection of the family, such as that contained in the African Charter. The emphasis on the family is to be regarded as being in keeping with traditional African values and tradition, which it is part of the Charter's function to respect and promote. The concept of the "family" has a much wider connotation in traditional African society than it does in the European context; it involves an extended family which is a most important unit of social life, functioning for many purposes as an economic unit under the direction of its head.⁵¹ However, the application of this principle of affirmative support for family life in domestic law remains unclear. It is perhaps to be viewed as a guiding principle to African States in the enactment of social legislation and the formulation of social policies, rather than a principle which gives to individuals or groups some specific right which is capable of being enforced in domestic law.

5. The concept of "duty" of the individual

The African Charter is unique among regional human rights instruments in that it contains in Article 27(1) a requirement that "every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community". This differs from both the European and American Conventions, neither of which mention obligations by the individual to the State, although Article 32 of the American Convention recognises the

obligation of the individual to his family, community and mankind. However, unlike the African Charter, it does not enumerate these duties.

Article 28 of the African Charter provides for a general duty by an individual to respect and consider his fellow human beings without discrimination, but also includes in Article 29 specific duties. These include respect for the family, the maintenance of parents in case of need, and the preservation of the family's harmonious development. Wider social duties are also included, such as the duty to place one's intellectual and physical abilities at the service of the community, to work to the best of one's ability and competence, and to preserve positive African cultural values in one's relations with other members of the society, in a spirit of tolerance. The individual also has further duties towards the State to preserve national unity and the territorial integrity of his country and to contribute to the defence of his country, in accordance with the law. Some of these duties do not appear to be capable of effective implementation in law, such as the duty in Article 29(8) to promote African unity, but others such as the duty to maintain parents in need or to pay taxes, may properly be regarded as legal rather than merely moral obligations.

The section on duties as a whole certainly provides a code of good conduct for all African citizens.⁵² However it may also involve some difficulties for implementation in domestic law. For example, Article 28 appears to extend the general principle of non-discrimination, to relations between individuals. It is unclear whether it would thereby have application within the sphere of private as opposed to public law, such as in the context of contractual rights between private individuals. In the context of international law, the principle of non-discrimination tends to be applied only in the context of the provision by public authorities of public facilities such as housing, or public services such as transport. The principle of freedom of contract however tends to prevail in other contexts. For example, Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) refers to racial discrimination in the "political, social, cultural or any other field of public life" (emphasis added). Discrimination in a private or social context is therefore not covered.

Furthermore, it is not clear from the African Charter whether the "duties" imposed on individuals thereby exonerate or exclude State obligations. For instance does Article 29(1) which places an obligation on the individual to maintain his parents "in case of need" mean that the State does not have any or only a secondary responsibility to look after the welfare of elderly parents? Furthermore, the concept of "duty" may arguably be interpreted as limiting the application of certain rights. For example, the right to freedom of expression in Article 9 could, in some circumstances, conflict with the duty of the individual to promote African unity in accordance with Article 29(8). These are the kinds of issues on which the African Commission can usefully provide guidelines for member States so that the implications for domestic law can be more fully considered. It is of interest in this context that among the promotional functions of the Commission in Article 45(1)(b) is a mandate "to formulate and lay down, principles and rules arrived at solving legal problems relating to human and peoples'

rights and fundamental freedoms on which African governments may base their legislation".

6. Conclusions

The African Charter on Human and Peoples' Rights is a considerable political achievement for African States and the OAU. It also presents an unique challenge for African lawyers and the African judiciary in the context of the domestic implementation of these new regional norms and in giving substance and day-to-day relevance to the Charter in the lives of African citizens. The Charter incorporates a number of distinctive features which reflect African cultural values. It also reinforces the applicability of international legal norms in this area. It confirms the applicability of both civil and political rights as well as economic, social and cultural rights to the people of Africa. It also affirms groups or "peoples" as the legitimate subject of human rights and obligations although the manner in which these will apply in the domestic context is left undetermined. It is a forward-looking document in that it includes references to a possible new category of "third generation" human rights the legal content of which remain unclear but which will no doubt continue to be the subject of international and regional debate.

In the context of domestic law the Charter allows a considerable degree of autonomy to African Governments in respect of civil and political rights by the extensive use of "clawback" clauses, although this need not necessarily impose a fetter on purposive interpretation of human rights norms by the judiciary. Some emphasis is placed on the concept of "peoples" rights but it is most unlikely that the intention is to expand or alter in any way contemporary African political thought on such issues as secession. The enumeration of economic, social and cultural rights and the articulation of the right to development of African peoples is to some extent a goal limited by external factors relating to the international economic system.

The Charter envisages procedures for the protection and promotion of human and peoples' rights through the institution of the African Commission on human rights, but strictly legal methods of dispute resolution are not envisaged and an African Court on Human Rights is not included. This increases the scope for and the responsibility of the African judiciary, to interpret and apply, where appropriate, the relevant principles in domestic law so as to comply with the commitments of African governments in ratifying the Charter. Regular discussions between the senior judiciary in African countries about common difficulties faced in respect of legal implementation of certain rights will be of assistance. The availability of international and regional jurisprudence to African judges will be an important factor in assisting them to meet this challenge, which is ultimately expected of them by Article 26, which places on all States Parties the duty to guarantee the independence of the courts and to allow the establishment and development of appropriate national institutions to promote and protect the rights and freedoms guaranteed by the Charter.

FOOTNOTES

- * LL.B, Ph.D (Birmingham), Barrister; Consultant to the Human Rights Unit of the Commonwealth Secretariat. The writer wishes to acknowledge with thanks, the helpful comments of Dr Frank Wooldridge, formerly Senior Lecturer in Law, University of Birmingham and Mr Adrian Jones, LL.M (University of Essex) on an earlier draft of this paper.
1. The African Charter on Human and Peoples' Rights is also known as the "Banjul Charter" after the city of Banjul, The Gambia, in which it was drafted. It is referred to in this paper as the "African Charter" or as "the Charter". (For the text, see Annex).
 2. The following OAU Member States are parties to the African Charter: Algeria, Benin, Botswana, Burkina Faso, Cape Verde, Central African Republic, Chad, Comoros, Congo, Egypt, Equatorial Guinea, Gabon, Gambia, Guinea, Guinea-Bissau, Liberia, Libya, Mali, Mauritania, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome & Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia, Uganda, Tanzania, Zaire, Zambia and Zimbabwe.
 3. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1951 ("the European Convention") has 21 parties and the Inter-American Convention on Human Rights ("the American Convention") has 19 parties.
 4. As at 14 July 1988 there were 87 State Parties to the International Covenant on Civil and Political Rights, of which 24 were from Africa. As at 5 July 1989, 45 State Parties have accepted the competence of the U.N Human Rights Committee under the Optional Protocol of which 12 were from Africa. As at 18 November 1988, 92 States were Parties to the International Covenant on Economic, Social and Cultural Rights of which 24 were from Africa.
 5. See further I. Brownlie, Principles of Public International Law, (3rd Ed.), 1979 at p. 51.
 6. See further U.O. Umozurike, "The Domestic Jurisdiction Clause in the OAU Charter" (1979) African Affairs, 197 at 199.
 7. The inaugural session of the Commission was held in Addis Ababa, Ethiopia in November 1987.

8. See the writer's unpublished Ph.D thesis, "The Relationship Between the UN and the OAU in the Fields of International Peace and Security and of Economic and Social Development", Faculty of Law, University of Birmingham, UK., Vol.I pp 147-151. See also Umozurike, *op cit*; Akinyemi "The OAU and the Concept of Non-Interference in the Internal Affairs of Member States" (1972/73) 4 BYBIL, 393; Okungwu, "The OAU Charter and the Principle of Domestic Jurisdiction in Intra-Africa Affairs" (Oct/Dec 1973) 13 Ind. J.IL 589. See also the Nationality Decrees issued in Tunis and Morocco Case, P.C.I.J. Rep., Series B, No. 4 (1923) p.24: the presence of a treaty obligation may remove an item from domestic jurisdiction.
9. See OAU Doc CAB/LEG/67/3/ rev. 1 (1979) Dakar Draft at 1.
10. This formulation is arguably weaker than the equivalent Articles 1 and 13 of the European Convention, and Article 1 of the American Convention. Nevertheless, it is submitted that the intention was to make the Charter a binding instrument on State Parties as evidenced by Article 45(2) which confers a duty on the African Commission to ensure the protection (and not merely the promotion) of the rights in the Charter.
11. Mojekwu, "International Human Rights: The African Perspective" in Nelson and Green (Eds), International Human Rights, Contemporary Issues, (1980) 15 at 91.
12. See e.g. Waddington v. Miah [1974] 1WLR 683 (HL) at pp. 693H-94E., Attorney-General v Guardian and Times Newspapers [1987] 1 WLR 1248 at pp. 1296E and comments thereon by A Lester, Q.C., in his paper on "Freedom of Expression: Relevant International Principles" published in the Report of the Judicial Colloquium in Bangalore, 24-26 February 1988, Commonwealth Secretariat, at p. 25 et seq.
13. OAU Doc. CAB/LEG/67/3 rev. 1 (1979) at p.2.
14. See the reasoning of Judge Tanaka in the South West Africa Case, 2nd Phase, ICJ Rep 1966 p 6 at 296 et seq. (dissenting opinion).
15. Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis" (1982) 22 Virginia Journal of International Law, 669 at 685.
16. European Convention Article 6(3)(a); American Convention Article 8(2)(b). In addition, these two Conventions extend the right to a hearing to civil proceedings, whereas the African Charter appears to restrict it to criminal trials.
17. European Convention Article 6(3)(d); American Convention Article 8(2)(f).

18. European Convention Article 6(3)(c); American Convention Article 8(2)(e); International Covenant on Civil and Political Rights Article 14(3)(d).
19. European Convention Article 6(3)(e); American Convention Article 8(2)(a).
20. However, other possible methods for improving access to justice have been proposed. See Reyntjes, "Africa - South of the Sahara" in Zemans (ed), Perspectives on Legal Aid: An International Survey, (1979) 12.
21. See generally Higgins "Derogations Under Human Rights Treaties", (1978) 48 BYBIL 281.
22. The non-derogable rights in the European Convention (Article 15) include the right to life, freedom from torture, freedom from slavery and freedom from ex post facto laws. The non-derogable rights in the American Convention (Article 27(2)) are the right to life, freedom from torture, freedom from slavery, freedom from ex post facto laws, freedom from imprisonment for failure to fulfil a contractual obligation, right to recognition as a person before the law, rights of the family, right to a name, rights of a child, right to nationality and right to participate in government. The guarantees essential for the protection of such rights are also non-derogable.
23. Higgins, op cit 281.
24. For example, some economic rights can be claimed before international bodies such as the I.L.O and the E.E.C Court. See further M. Addo, "The Justiciability of Economic, Social and Cultural Rights", Vol. 14, Issue 4, Commonwealth Law Bulletin, October 1988 pp. 1425-1432.
25. The African Charter is more liberal than either the American Convention (Article 23(1)(c)) or the International Covenant on Civil and Political Rights (Article 25(c) in that they only apply this right to citizens.
26. See further the Colloquium paper prepared by Justice P N Bhagwati, "Fundamental Rights in their Economic, Social and Cultural Context", Report of the Judicial Colloquium in Bangalore, 24-26 February 1988, Commonwealth Secretariat.
27. See further Moskowitz, International Concern with Human Rights, (1974) 155 and Study of the UN Secretary-General on the "International Dimension of the Right to Development as a Human Right in Relation with other Human Rights Based on International Co-operation, including the Right to Peace, Taking into Account the Requirements of the NIEO and

Fundamental Human Needs", UN Doc. E/CN 4/1334(1979) paras 14-17 (hereinafter cited as Right to Development Study) and the Report of the Working Group of Fifteen Governmental Experts, UN Doc E/CN 4/1983/11 (1983).

28. See The Right to Development Study, op cit at 157. It states that "The analysis of legal norms ... indicates that there is a substantial body of principles based on the Charter of the UN and the International Bill of Human Rights reinforced by a range of Conventions, Declarations and resolutions which demonstrate the existence of a human right to development in international law". See also confirmation of this in U.N General Assembly Resolution 34/46 November 23, 1979 and the 1986 "Declaration on the Right to Development" U.N General Assembly Resolution 41/128 of 4 December 1986. However the right to development in the African Charter only appears as a "peoples" right whereas the Right to Development Study, op cit suggests that it has both an individual and collective dimensions.
29. Recent efforts by the OAU Member States in this connection include the adoption of the 1980 Lagos Plan of Action which aims at a successful regional strategy for African development, culminating by the year 2000 with the creation of an African Common Market: See Lagos Plan of Action for the Economic Development of Africa, 1980-2000, OAU 1981, published by the International Institute of Labour Studies, Geneva. See further R M D'Sa, "The Lagos Plan of Action - Legal Mechanisms for Co-operation between the Organisation of African Unity and the United Nations' Economic Commission for Africa", (1980) No. 1, 27 Journal of African Law 4-21. It has been further argued that under the provisions of Article 22 of the African Charter, African states have a duty to co-operate in these groupings to ensure the right to development: see Benedek, "Human Rights in a Multi-Cultural Perspective: The African Charter and the Human Right to Development" in Ginther and Benedek, New Perspectives and Conceptions of International Law: An Afro-European Dialogue (1983) at 157.
30. See Hannum, "The Butare Colloquium on Human Rights and Economic Development in Francophone Africa", (Butare, Rwanda, 1979), Universal Human Rights 63. Other important discussions include the Seminar on Human Rights in a One-Party State (Dar-es-Salaam), International Commission of Jurists, 1978, at p 65.
31. See Gittleman, "The African Charter on Human and Peoples' Rights; A Legal Analysis" (1982) 22 Virginia Journal of International Law, 669 at 673.

32. Howard, "Evaluating Human Rights in Africa"; Some Problems of Implicit Comparisons" (1984) No. 2, 6, Human Rights Quarterly, 160 at 163.
33. See Report of the Secretary-General on the Draft African Charter on Human and Peoples' Rights, June 1981, CAB/LEG Draft Rapt. Rpt (II) Rev. 4, p.4.
34. Mumba, "Prospects for Regional Protection for Human Rights in Africa" (1982) Holdsworth Law Review, 101 at 106. See further Dinstein, "Collective Human Rights of Peoples and Minorities" (1976) 25 ICLQ 102.
35. See for example ILO Convention No. 107 (1957) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, ILO, International Labour Conventions and Recommendations, 1919-1981, at 858 (1982). (This Convention is currently under review by the ILO). See further R.L. Barsch, "Indigenous Peoples: An Emerging Object of International Law", (1986) 80 A.J.I.L., pp. 369-385; G. Nettheim, "'Peoples' and 'Populations': Indigenous Peoples and the Rights of Peoples" in J Crawford (Ed) The Rights of Peoples, Clarendon Press, Oxford, 1988 pp. 107-126.
36. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than State, 32 Am. U.L. Rev. 1, (48) (1982).
37. Kiwanuka, "The Meaning of "People" in the African Charter on Human and Peoples' Rights" (1988) 32 A.J.I.L. pp. 8-101 at p.85.
38. Supreme Court of India, 17 February 1986 (Writ Petition (Civil) No. 127 39 of 1985).
39. See in particular the 1970 UN General Assembly "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations", GA Res 2625, 1970 adopted by consensus, which supports the right of self-determination but does not authorise the impairment of the "territorial integrity or political unity of sovereign and independent States". The African Charter appears to support this UN interpretation in its Article 23. See further, Gittleman op cit. 679. This position may be contrasted, for example, with the Helsinki Act, which though not a legally binding instrument, appears to embody a broader concept of self-determination than than found in the African Charter and in UN practice: see the Conference on Security and Co-operation in Europe, Final Act August 1, 1975 which was signed by 35 European States and commentary thereon by Cassese, "The Helsinki Declaration and Self-Determination" in

- Buergenthal (ed) Human Rights, International Law and the Helsinki Accord, (1977) 83 at 85. For a broader interpretation of African Charter Article 20 see Kunig "The Role of "Peoples" Rights in the African Charter" in Ginther and Benedek, op cit. 162 at 168.
40. See for example OAU Res. AHG/16(I) July 1964 on African Boundaries.
 41. Total independence is not the exclusive form in which the right of self-determination is realisable. See further Brownlie, "The Rights of Peoples in Modern International Law" 9 Bulletin of the Australian Society for Legal Philosophy, 104 at p. 108, also reprinted in Crawford, op cit.
 42. Hannum, op cit at 66, 67. See also Hersche (ed) Le Droit d'etre un Homme, (1968) para 606 and Gluckman., The ideas in Barotse Jurisprudence (1965) (later edn. 1972) 27-71. For an emphasis on the absolute power of the traditional Chief see Seydon Badian, Les dirigeants africains face a leur peuple (1964).
 43. Gittleman, op cit 682.
 44. See Award in Dispute between Libyan American Oil Co (LIAMCO) and the Government of the Libyan Arab Republic relating to Petroleum Concessions, April 12, 1977 (1981)XX ILM, Sole Arbitrator Dr S. Mahmassani at 114 et seq.
 45. See further Gittleman, op cit 680.
 46. See further P Alston, "A Third Generation of solidarity rights: progressive development or obfuscation of international human rights law?" (1982) 29 Neth. Int. L. Rev. 307; "Conjuring up new human rights: prospects for quality control" (1984) 78 A.J.I.L. 607; S Marks, "Emerging human rights: a new generation for the 1980s" (1981) 33 Rutgers L. Rev., 435.
 47. See Brownlie op cit at p. 115.
 48. See for instance, in the context of the European Convention, the Belgian Linguistics case, European Court of Human Rights, Ser A No. 6 (1968).
 49. See for example, Article 3 of the 1979 Constitution of Benin (Formerly Dahomey):

"The Popular Republic of Benin is a unified multi-national state. All nationalities are equal in rights and duties. Consolidating and developing their union is a sacred duty of the State, which shall assure to each one a full development in unity through a just policy toward nationalities and an inter-regional balance.

All acts of regionalism shall be rigorously prohibited.

All nationalities shall be free to use their spoken and written language and to develop their own culture.

The State shall actively aid those nationalities living in under-developed areas to attain the economic and cultural level of the country as a whole".

See also Article 9 Djibouti Constitutional Law No. 2 (LR)77-002, 1977).

50. See further R M D'Sa, "Women's Rights in Relation to Human Rights: A Lawyer's Perspective", Vol. 13 No. 2, Commonwealth Law Bulletin, April 1987, pp. 666-676 at p. 675 *et seq*; Mintah, "The Law and Women in Contemporary African Legal Systems", in Takirambudde, (ed) The Individual Under African Law, Proceedings of the first All-Africa Law Conference, October 11-16, 1981, Swaziland, 30 at 30, 31. See further the Nairobi Forward-Looking Strategies for the Advancement of Women adopted by consensus by the World Conference to Review and Appraise the Achievements of the UN Decade for Women in Nairobi in July 1985.
51. See Nwabueze, "Family Law in Nigeria", in M'baye (ed) Le Droit de la Famille en Afrique Noire et a Madagascar, (1968) 117 at pp. 117,118. See also Marasinghe, "Traditional Conceptions of Human Rights in Africa" in Welch and Meltzer (Eds) Human Rights and Development in Africa (1984) 32-45 at pp 33-38.
52. Mumba, op cit at 114.