

Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights

*Kenneth Asamoah Acheampong**

Barrister and Solicitor, Supreme Court of Ghana; Senior Lecturer, Faculty of Law, National University of Lesotho

1 Introduction

Regardless of the shortcomings of the African Charter on Human and Peoples' Rights (African Charter or Charter), the efforts made to provide Africa with a continental human rights instrument are of such a commendable nature that one could easily be forgiven if one glosses over the fact that these efforts commenced in 1979, the year in which three African governments, particularly known for their egregious violations of human rights, came to a very welcome end. These were the governments of Idi Amin of Uganda, Macias Nguema of Equatorial Guinea and Jean-Bedel Bokassa of the then Central African Empire, now the Central African Republic.¹ Surely, the Organisation of African Unity (OAU) needed a continental human rights instrument in addition to those of the International Bill of Human Rights and its offshoots, to reinforce the human dignity and worth of Africans, which these repressive governments (among others that included the infamous regime of apartheid South Africa) had disregarded with utter impunity.

The framers of the African Charter made a noble beginning in providing Africa with a mechanism for ensuring the continental promotion and protection of human rights in Africa. In providing for the

* LLB (Ghana), LLM (Saskatchewan), Diploma in Human Rights (Lund); ak.acheampong@nul.ls

¹ Amin was in office from 1971 to 1979, Nguema from 1968 to 1979 and Bokassa from 1965 to 1979.

Charter's amendment, they took cognisance of the fact that the Charter may have to be reformed in the future.² This paper analyses the possible reformation of the substance of the Charter in respect of civil and political rights and socio-economic rights.

2 The backdrop of the Charter's reformation

Any attempt to reform the substance of the African Charter, as with any other human rights instrument, should be posited upon or set against the backdrop of the principles of the concept of human rights. This may sound trite. However, it is worth keeping in mind when one seeks to undertake an exercise of reforming a document such as the African Charter. To start with, the Preamble of the OAU Charter reaffirms that the Charter of the United Nations (UN) and the Universal Declaration of Human Rights (Universal Declaration) provide a solid foundation for peaceful and positive co-operation among states. These two documents are referred to as worthy of due regard in the promotion of international co-operation in substantive article 2(e) of the OAU Charter. This co-operation aims at, amongst others, the promotion of respect for human rights. While the UN Charter makes copious references to the expression 'fundamental human rights',³ the landmark Universal Declaration gives flesh and viscera to the dry bones of this expression by detailing what constitutes fundamental human rights. Thus, the OAU Charter was a precursor of the protection and promotion of human rights in Africa.

Any possible reform of the African Charter needs to be seen in the context of a number of issues which will now be discussed.

2.1 Underpinning philosophy of the Charter

According to the OAU, the drafting of the African Charter was predicated upon the following vital principles:⁴

- the specificity of African problems with regard to human rights;
- the importance of economic, cultural and social rights to developing countries;
- the total liberation of Africa from foreign domination;
- the need to eradicate apartheid;
- the link between human and peoples' rights;
- the need for a new economic order, particularly the right to self-determination.

² Art 68.

³ For specific references to human rights, see the following provisions of the UN Charter: the Preamble and arts 1(3), 13(1)(b), 55(c), 62(2), 68 & 76(e).

⁴ Rapporteur's Report OAU Doc CM/1149(XXXVI) Annex 1 p 3 paras 10 & 11.

In expatiating these principles, the Preamble of the African Charter takes into consideration the OAU Charter's stipulation that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'. As discussed above, this stipulation undergirds the concept of human rights in general. These essential objectives are values, respect for which constitutes an essential precondition for the enjoyment of human rights everywhere. It is, thus, laudable for African peoples to strive to achieve their legitimate aspirations through respect for these values.

In other paragraphs, the Preamble of the African Charter highlights these principles by either recognising the imperatives of human rights in general or putting special emphasis on the problems of Africa with regard to human rights. In doing the latter, it reaffirms the solemn pledge made by African states in article 2 of the OAU Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

To this is tied the duty to achieve the total liberation of Africa and to secure the dignity and genuine independence of Africa through the elimination of colonialism, neo-colonialism, apartheid and Zionism. Dignity and genuine independence are also to be attained through the dismantling of all foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions.

Significantly, the Preamble of the African Charter takes into consideration the virtues of African peoples' historical tradition and the values of African civilisation, which should not only inspire but also characterise the African peoples' reflection on the concept of human and peoples' rights.⁵ This is to emphasise that an African imprint on the concept of human rights is no anathema and the Charter therefore had to reflect this. According to the last paragraph of the Charter's Preamble, this imprint is highlighted through a firm conviction of African states to protect and promote human and peoples' rights on account of the importance traditionally attached to these rights and freedoms in Africa.

2.2 The concept of human rights

The African Charter recognises in its Preamble that '. . . fundamental human rights stem from the attributes of human beings, which justifies their national and international protection . . .'. This is the context in which Jacques Maritain, the modern Roman Catholic exponent of the concept of human rights, forcefully contends that the expression 'the

⁵ Para 51 Preamble to the African Charter.

dignity of the human person' means nothing if it does not signify that the human person has the right to be respected for the very fact that he is a human being.⁶ Thus, discussions on the African Charter's reformation should be posited on the general definition of human rights as given by the UN, notwithstanding the ideological and philosophical expressions of disquiet to the contrary. This is the context in which we can put the following statement made by Boutros Boutros-Ghali, in his capacity as the UN Secretary-General, at the 1993 World Conference on Human Rights held in Vienna:⁷

The human rights that we proclaim and seek to safeguard can be brought about only if we transcend ourselves, only if we make a conscious effort to find our common essence beyond our apparent divisions, our temporary differences, our ideological and cultural barriers. In sum, what I mean to say, with all solemnity, is that the human rights we are about to discuss here at Vienna are not the lowest common denominator among all nations, but rather what I should like to describe as the 'irreducible human element', in other words, the quintessential values through which we affirm together that we are a single human community. As an absolute yardstick, human rights constitute the common language of humanity.

This 'common language of humanity' can take on board various ideological persuasions and still maintain its essence, which is to protect the human dignity and worth of the human person. The Universal Declaration was a product of such a meeting of ideological minds. Charles Malik, one of the principal drafters of that instrument has, thus, made the following comment in respect of the drafting of the Universal Declaration:⁸

The genesis of each article, and each part of each article, was a dynamic process in which many minds, interests, backgrounds, legal systems and ideological persuasions played their respective determining roles.

This document has gone beyond the protestations made at the time of its adoption by its authors that it does not purport to be a statement of law or of legal obligation. True, as a resolution of the UN, it was deemed as having only the force of recommendation. Yet, through the repeated practices of states, including its incorporation into national constitutions, generally the supreme law of nations,⁹ it is now generally perceived as

⁶ J. Maritain *The rights of man and natural law* (trans D. Anson) (1943) 65.

⁷ Address by the former UN Secretary-General Boutros Boutros-Ghali at the opening of the World Conference on Human Rights at Vienna, Austria, on 14 June 1993. See UN Doc A/CONF 157/22, 12 July 1993.

⁸ See J. Humphrey *No distant millennium – the international law of human rights* (1989) 150.

⁹ For example, see the Constitutions of Benin (1990), Burkina Faso (1991), Burundi (1992), Cameroon (1972), Central African Republic (1995), Chad (1993), Comoros (1992), Congo (1992), Cote D'Ivoire (1960), Equatorial Guinea (1991), Gabon (1991), Guinea (1990), Mali (1992), Mauritania (1991), Niger (1992), Rwanda (1991), Senegal (1992), Togo (1992), and Zaire (Democratic Republic of Congo, 1978), which expressly refer to the UDHR. See C. Heyns (ed) *Human rights law in Africa 1996* (1996).

having ossified into customary international law and, thus, attained the force of law.¹⁰ Thus, at the end of the day, the proffering of different ideological underpinnings of human rights does not need to be fatal to an attempt to reform the African Charter. What matters is that in the reformation process, a determined effort should be made to produce a synthesis of these ideological perceptions of the concept of human rights that upholds the essence of this concept. A UN publication has succinctly summed this up:¹¹

Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.

The issue as to what human rights are continues to bedevil the concept of human rights, though not with the same intensity as in the past.¹² The debilitating Cold War between the West and the East exacerbated the ideological and philosophical tensions that clouded a clear articulation of the concept of human rights. However, thanks largely to the fall of the Berlin Wall in 1989, these tensions have abated considerably. There exists now a more solid international effort to secure human dignity that, in spite of all these tensions, has always been considered to be the quintessence of the concept of human rights. As stated by Humphrey, one of the authors of the Universal Declaration, 'Human rights are those rights without which there can be no human dignity.'¹³ Among the interdependent values that have been noted as being relevant in providing the fulcrum of human dignity are the following: respect, power, enlightenment, well-being, health, skill, affection and rectitude.¹⁴ Any reformation of a human rights instrument such as the African Charter that takes no account of these values will not be worth the effort. This is because entailed in the expression 'human dignity' is respect for the person, honour, and moral worth of human beings. This is an important consideration in the task of the reformation of the African Charter.

¹⁰ See *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* (24 May 1980) ICJ Reports 3 42.

¹¹ See United Nations *Human rights: Questions and answers* (1987) 4.

¹² See eg M Cranston 'What are human rights?' in W Lacqueur & B Rubin (eds) *The human rights reader* (1979) 21; TW Wilson 'A bedrock consensus of human rights' in AH Henkin (ed) *Human dignity: The internationalisation of human rights* (1978) 61; JD van der Vyver 'The doctrine of human rights: Its historical and philosophical foundation' in D Brand *et al* (eds) *From human wrongs to human rights (Part IV)* (1995) 49; T van Boven 'Distinguishing criteria of human rights' in K Vasak (gen ed) *The international dimensions of human rights* (1982) 49; and HJ Steiner & P Alston *International human rights in context – Law, politics, morals* (1996) 160.

¹³ n 8 above 20.

¹⁴ See MN Shaw *International law* (1986) 173.

2.3 Universality, interdependence and indivisibility of human rights

An equally important context in which the reformation of the African Charter should be posited is the general understanding that all human rights are universal, interdependent and indivisible. This is regardless of the fact that in translating the provisions of the Universal Declaration into treaty form in 1966, the UN ended up with two covenants, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). These Covenants do, in parallel words in their Preambles, acknowledge the necessary linkage of all human rights.¹⁵ In 1968, two years after the adoption of these Covenants, the international community again emphasised the indivisibility of civil and political rights and economic, social and cultural rights. It did so through the Proclamation of Teheran.¹⁶ Paragraph 13 of this Proclamation states in part:

Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.

In 1993, the international community reiterated this perception of all human rights at the Vienna World Conference on Human Rights. In paragraph 5 of the Vienna Declaration and Programme of Action, adopted unanimously by delegates to the Conference, the international community stated:¹⁷

All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

It follows from this that the reformation of the African Charter must take account of all human rights, that is civil and political rights, economic, social and cultural rights and solidarity rights in a holistic manner. The classic distinction between them is not always clearly made in theory and in practice.

The categorisation of human rights into different classes or generations, ascribed to the French jurist Karel Vasak,¹⁸ does not import any rigid differentiation or compartmentalisation of human rights. Generally, the individual's enjoyment of civil and political rights is held to oblige

¹⁵ In the third paragraph of the Preamble of both Covenants, the UN General Assembly recognises that in accordance with the Universal Declaration, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights.

¹⁶ Adopted by the International Conference on Human Rights of Teheran on 30 May 1968; reprinted in E Patel & C Watters (eds) *Human rights: Fundamental instruments and documents* (1994) 31.

¹⁷ UN Doc A/CONF 157/24, 25 June 1993.

¹⁸ n 12 above.

the state to do 'little more than to endure these entitlements'.¹⁹ This is why these rights are considered negative rights, that is, freedom from state or governmental authority. In contrast, socio-economic rights are seen as 'positive rights', as their enjoyment calls for positive state or governmental action. However, there are times when some of these rights call for both restraint and action on the part of the government. One human right that suffices in bearing out this apparent contradiction is the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.²⁰ As a civil right, it theoretically demands only governmental forbearance.

However, the state has to actively ensure the realisation of this right. It must provide the public forum for such hearings. Where necessary, it must employ interpreters for the trial to proceed. Furthermore, it must ensure the independence and impartiality of tribunals or courts by, amongst others, selecting for judicial office individuals of integrity and ability with appropriate training or qualifications, securing by law the terms of office of judges, their independence, security, adequate remuneration, conditions of service and giving judges, whether appointed or elected, guaranteed tenure.²¹ In short, as endorsed by the UN General Assembly:²² 'It is the duty of each Member State [of the UN] to provide adequate resources to enable the judiciary to properly perform such functions', and also to provide the environment in which these functions may be performed without fear or favour, ill-will or affection.

2.4 Link to development

A salient aspect of the Charter's philosophy is its conviction, stressed in its Preamble, that it is essential to pay particular attention to the right to development, which is tied to the assertion of the indivisibility and association of civil and political rights and economic, social and cultural rights. The importance of this provision cannot be discounted considering the fact that the UN Declaration on the Right to Development was adopted on 4 December 1986, almost five and a half years after the adoption of the African Charter in 1981.

¹⁹ S Marks 'Emerging human rights: A new generation for the 1980s' (1981) 33 *Rutgers Law Review* 435 438.

²⁰ Art 14 ICCPR.

²¹ Principles 10, 11 & 12 of the Basic Principles on the Independence of the Judiciary adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan, Italy, from 26 August to 6 September 1985 and endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

²² As above, Principle 7.

2.5 Democracy

The last context in which the reformation of the African Charter should be placed is the concept of democracy. As it is said, 'human rights are tied to democracy'²³ and 'it is difficult to bypass a discussion of democracy in relation to human rights in the contemporary world'.²⁴ However, it is trite that a general agreement as to what constitutes democracy is lacking. Although generally there is a more consensual international approach towards human rights issues now than during the bleak days of the Cold War, nagging differences over such issues still remain. However, one can take solace in the fact that reference can be made to an International Bill of Human Rights, which spells out the norms generally agreed to as constituting human rights and which forms the genesis of a host of human rights instruments. There is nothing of that nature in respect of the concept of democracy; no one talks of an International Bill of Democracy.

Nevertheless, the concept remains universally popular. As Dahl notes:²⁵ 'In our times, even dictators appear to believe that an indispensable ingredient for their legitimacy is a dash or two of the language of democracy.'

Even General Pinochet described the political system in Chile during his notoriously repressive regime as being an 'authoritarian democracy'.²⁶ The nature of the language of democracy has been and continues to be a veritable source of ideological controversy for, as noted by Gitonga, '[m]ore often than not it (democracy) is used and defined in a self-interested, opportunistic and holier-than-thou fashion.'²⁷ Therefore, 'democracies' and 'democrats' come in all colours, shapes and sizes: Social democracy, Christian, liberal, popular, national popular democracy, African, Arab, progressive democrats, (simple) democrats, etc.²⁸

General Abdulsalami Abubakar, a former military president of Nigeria, has said that '[I]t is the end of the Cold War and that now we are only one camp and that camp is democracy'.²⁹

The parameters of this camp can be discerned from the reality that democracy and human rights have interlinked fates and may rightly be

²³ Steiner & Alston (n 12 above) 207.

²⁴ Steiner & Alston (n 12 above) 659.

²⁵ AR Dahl *Democracy and its critics* (1992) 2.

²⁶ AK Gitonga 'The meaning and foundations of democracy' in WO Oyugi *et al* (eds) *Democratic theory and practice in Africa* (1988) 6.

²⁷ As above.

²⁸ As above.

²⁹ BBC News Online, 11 April 1999. General Abubakar made this statement when he shared his thoughts on democracy and good governance with the international community in a British Broadcasting Corporation radio discussion programme on 11 April 1999. This was before he effected his pledge to hand over the reins of political power to a civilian government on 29 May 1999.

considered twins, though not identical.³⁰ Article 33(5) of the Constitution of Ghana of 1992 stresses this linkage in the following words:

The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding those not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

The contention that fundamental human rights be considered inherent in a democracy also posits democracy on human dignity, the quintessence of human rights. This is the context in which Gitonga asserts: 'The quest for democracy is the quest for freedom, justice, equality and human dignity.'³¹ These values, freedom, equality and justice are all necessarily entailed in the concept of human rights and, as indicated, find a common root in human dignity.

The Constitution of South Africa, 1996, notes this symbiotic relationship between the demands of democracy and human rights in section 7(1), the leading provision of chapter 2, titled 'Bill of Rights'. The section states:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

At the Vienna World Conference on Human Rights, Boutros Boutros-Ghali highlighted the linkage and interplay between the concepts of human rights and democracy. He did so while expatiating on what he called the imperative of democracy. In his words, which for their germane relationship to our discussions we hereby quote extensively:³²

The imperative of democratisation is the last — and surely the most important — rule of conduct which should guide our work. There is a growing awareness of this imperative within the international community. The process of democratisation cannot be separated, in my view, from the protection of human rights. More precisely, *democracy is the political framework in which human rights can best be safeguarded*. This is not merely a statement of principle, far less a concession to a fashion of the moment, but the realisation that *a democracy is the political system which best allows for the free exercise of individual rights*. It is not possible to separate the United Nations promotion of human rights from the establishment of democratic systems within the international community.

In establishing these democratic systems through a reformation of the African Charter, we must take cognisance of the fact that what constitutes equality, freedom and justice, in democratic terms, is a matter determined both in the context of universal norms of human rights and the realities of specific jurisdictions. Any attempt to reform the African

³⁰ African Centre for Democracy and Human Rights Studies 'Human rights and democracy' (1992) 2 *African Human Rights Newsletter* 5.

³¹ n 26 above 2.

³² n 7 above (my emphasis).

Charter must very well appraise itself of universal norms of human rights. This underpins the obligation imposed on the African Commission on Human and Peoples' Rights (African Commission or Commission) by article 60 of the African Charter, to draw inspiration from the provisions of various African instruments on human and peoples' rights as well as other such instruments of the international community, such as the UN Charter and the Universal Declaration, in deciding the principles applicable to the interpretation of the African Charter.

The realities of African jurisdictions should also be taken into account in providing the political systems that best allow the free exercise of human rights. This should not be construed as giving those who have little or no respect for human rights a *carte blanche* to fashion such rights according to their whims and caprices. This is not a call to destroy the essence of any human right under the convenient guise of local realities. It is rather a reminder that a sincere effort should be made at the local level to provide a congenial atmosphere or environment for the realisation of human rights.

3 Civil, political, social and economic rights under the African Charter — A critique

3.1 Civil and political rights

Comments regarding civil and political rights in the Charter may better be appreciated in the context of the fundamental principles of human rights.

a Equality

The principle of equality and non-discrimination in the enjoyment of human rights is not limited to civil and political rights but underpins all human rights. As stated by the UN Human Rights Committee:³³

Non-discrimination, together with equality before the law and equal protection of the law without discrimination, constitutes a basic and general principle relating to the protection of human rights.

Articles 2 and 3 of the African Charter provide, in a constitutive manner, for this principle. While article 2 specifies the prohibited grounds of discrimination in human rights enjoyment, article 3 provides for the principle of equality before the law and the equal protection of the law.

The ideological and philosophical controversies over the concept of equality are legion. In the extreme, the term 'equality' has even been

³³ General comments of the Human Rights Committee on the non-discrimination clauses of the ICCPR (adopted on 9 November 1989). See J Möller 'Article 7' in A Eide et al (eds) *The Universal Declaration of Human Rights: A commentary* (1992) 115 129.

derided as completely vacuous.³⁴ In the main, the concept is perceived from two angles, the formal and the relative. Formal equality, which is also known as mathematical, absolute or numerical equality, stands for the proposition that all persons should be treated the same way in all respects. In the relative or substantive sense, it stands for what Aristotle refers to as 'equality proportionate to desert',³⁵ that is, differentiation in treatment proportionate to concrete individual circumstances.³⁶ Those opposed to the use of the concept of equality to ameliorate the circumstances of persons or groups of persons disadvantaged by invidious societal practices or inaction tend to favour the formal sense of the concept of equality. While this is the sense in which equality should be understood in the absence of any relevant differences between persons, this conception of equality can occasion tremendous injustice arising from invidious discrimination against certain persons on the basis of the societal group(s) to which they belong. It is for this reason that Dworkin, in noting that sameness of treatment does not always ensure true equality, cautions as follows:³⁷ 'We must take care not to use the Equal Protection Clause [of the 14th Amendment of the American Constitution] to cheat ourselves of equality.'

It is to avoid the danger of the formal sense of the concept of equality being used to do societal injustice that chapter 2 of the South African Constitution, 1996, titled 'Bill of Rights', goes beyond the concept of formal equality. In section 9(2), the Constitution states:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Provision is consequently made for special measures or affirmative action in respect of a wide range of people. The African Charter, on the other hand, is too restrictive as regards societal groups deserving of special measures of protection or advancement. In its article 18, it limits such measures to women, children, the aged and the disabled. These groups deserve such special measures but they are not the only ones that do. Africa's history, both past and contemporary, indicates clearly that some

³⁴ See P Westen 'The empty idea of equality' (1982) 95 *Harvard Law Review* 537. The thesis that equality is an empty idea has not gone unchallenged. See A D'Amato 'Is equality a totally empty idea?' (1983) 81 *Michigan Law Review* 600; K Greenawalt 'How empty is the idea of equality?' (1983) 83 *Columbia Law Review* 1167; and KL Karst 'Why equality matters' (1983) 17 *Georgia Law Review* 245.

³⁵ *The politics of Aristotle* (Book V, i) (trans E Baker) (1946) 1301a.

³⁶ In the International Court of Justice case of *South West Africa Cases (Second Phase)* 1966, Judge Tanaka stated, in his dissenting judgment: 'The principle of equality does not mean absolute equality, but recognises relative equality, namely, different treatment proportionate to concrete individual circumstances.' See I Brownlie (ed) *Basic documents on human rights* (1992) 568 596.

³⁷ R Dworkin *Taking rights seriously* (1977) 239.

persons have been invidiously discriminated against and, thus, disadvantaged, on grounds such as race, national or ethnic origin and language.³⁸

To sidestep the unavoidable controversy as to which groups should be included in a list of this nature, the African Charter could adopt section 9(2) of the South African Constitution. Coupled with article 2 of the Charter this would ensure the true application of the concept of equality and non-discrimination by the Charter. This, we submit, will give substantive meaning to the following contention:³⁹

The universal equality of all constitutes the central institution of human rights. It is understandable that, by virtue of its importance among human rights, equality is regarded as a virtue to be protected before any other.

b Fair trial rights

The right to have one's cause heard is a basic principle of justice. The African Charter provides for this right in article 7. However, it does so in a way that unduly limits the democratic ramifications of the right.

In spelling out the demands of the right, the article states that the right of every individual to have his cause heard 'comprises' of (a) the right of appeal, (b) the presumption of innocence, (c) the right to defence and (d) the right to a trial within a reasonable time. The use of the word 'comprises' tends to give an air of finality in respect of the demands of this right as listed by the Charter. This list is definitely not exhaustive of the imperatives of the right, especially with respect to criminal cases when a person's liberty is at stake.⁴⁰ The word 'include' could have been used to indicate the non-exhaustive nature of the imperatives of the right to have one's cause heard.

The word 'include' does appear in article 7(c), though. It grants an individual 'the right to defence, including the right to be defended by counsel of his choice'. This is not enough to spell out the demands of the right as indicated. The obligation that the African Charter places upon the African Commission to draw inspiration from international human rights instruments is just not enough to give the important right of having one's cause heard the weight that it deserves. Article 7 of the

³⁸ See KA Acheampong 'The African Charter and the equalisation of human rights' (1994) 12 *Scandinavian Human Rights Journal* 168.

³⁹ I Szabo 'Historical foundations of human rights and subsequent developments' in Vasak (n 12 above) 38.

⁴⁰ Other imperatives not itemised by the Charter and which relate to criminal cases include the following: the right to be informed promptly in a language that one understands of the nature and cause of the charge against him; the right of one to be given adequate time and facilities for the preparation of his defence; the right to be tried in a language that one understands or, if that is not practicable, to have the proceedings interpreted in that language; and the right to have legal counsel assigned to one by the state and at state expense if substantial justice would otherwise result, and to be informed promptly of this right.

Charter must, therefore, be amended with the insertion of the word 'include' to indicate that the imperatives of the right as given are only illustrative or a more detailed list of these imperatives must be given as appears in article 14 of the ICCPR and article 35 of the South African Constitution. Its current brevity subjects the substance of the right to ridicule.

The same can be said of the right to liberty and the security of one's person provided for by article 6 of the African Charter. It is not unknown in Africa for people to be incarcerated for political reasons conveniently dressed in the stifling garb of national security. This is especially so in the case of political opponents of governments who tend to be perceived and portrayed as criminal elements when all that they are doing is asserting their democratic right to differ with the policies of these governments. The risk is that one whose liberty is curtailed on such grounds could easily lose his most basic human right, the right to life. For that reason, it is submitted that article 6 should be amended in a way that expatiates its provision that 'in particular, no one may be arbitrarily arrested or detained'. Such expatiation should include the following:⁴¹

- Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- Anyone deprived of his liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- Anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.
- Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

c *Right to vote*

According to article 21(3) of the Universal Declaration,

[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections and shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The international community has reiterated this democratic basis as to governmental authority in article 25(b) of the ICCPR, which states that

⁴¹ Arts 9 & 10 ICCPR.

every citizen shall have the right and the opportunity, without unreasonable restrictions and in the absence of any of the prohibited grounds of discrimination in respect of human rights,

[t]o vote and be to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

The African Charter provides for this right in its article 13(1) as follows:

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.

It needs not be gainsaid that in comparison with both the Universal Declaration and the ICCPR this right is vague in respect of the franchise. As article 13(1) stands, it panders to the desires of those who want to remain in political power permanently. It does not provide for periodic or genuine elections, which contribute to ensuring the accountability of governors to the governed, the ultimate political sovereign. The article's reference to 'freely chosen representatives' is no guarantee of the democratic exercise of the franchise. This is made even worse by the following rider to this expression: 'in accordance with the provisions of the law'. What law and whose law, one might ask? African governments, experience tells us, often do not appreciate electoral defeat and desperately hang on to power through all kinds of political gymnastics when all the democratic odds are heavily stacked against them. The article under consideration must be amended to take account of the provisions of the Universal Declaration and ICCPR referred to herein. This is the only way the OAU can provide the requisite leadership respecting this very troubled aspect of governance in Africa.

d Freedom of expression

Closely tied to the franchise is the right to freedom of expression. The basic functions that this right serves in a democratic society underlie the intimate relationship between the concepts of human rights and democracy. Thomas Emerson has cogently outlined these functions.⁴²

First, it is a means of assuring the individual a degree of personal self-fulfilment, enabling a person to realise his or her potentialities as a human being. Second, it is an essential process for the advancement of knowledge and the discovery of truth, providing an opportunity to hear all sides of a question and to test one's judgment by exposing it to conflicting views. Third, it is necessary in order to allow all members of the society to participate in public decision-making, furnishing them with the information and ideas vital in reaching a common judgment. And fourth, it is a method of achieving social change without resort to violence, thereby enhancing the prospects of a more adaptable and at the same time more stable society.

⁴² TI Emerson 'Freedom for political speech' in B Marshall (ed) *The Supreme Court and human rights* (1982) 67.

Article 9 of the African Charter, which provides for the right to freedom of expression, does not, unfortunately, import this milieu. This article provides for the right to receive information and to express and disseminate opinions within the law. We need not repeat the arguments made in respect of the debilitating effect of the clause 'within the law'. Once again, it might be argued that the applicable principles and guidelines spelt out in articles 60 and 61 of the African Charter will democratically condition any limitation of the right. We, however, hasten to point out, though in a melancholic manner, that the African experience with this right strongly suggests that domestic law is more often than not used to stifle democratically legitimate expression of opinion, especially when such opinion is political and is deemed, by the powers-that-be, to have the potential effect of changing the occupants of State House. Such abuse is rampant around election time when opposition parties struggle to have their voices heard by the electorate. We therefore suggest the express amendment of article 9 of the Charter. Such an amendment could be along the lines of article 13(3) of the American Convention on Human Rights, 1969, which states:

The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

As it is said in popular parlance, 'it is better to jaw-jaw than to war-war'. The OAU should, thus, give proper democratic grounding to the right to freedom of expression and in this way help to stem the resort to rebellion and even violence that tends to follow the trail of the suppression of this right. As the third paragraph of the Universal Declaration warns:

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

e Right to property

The right to property, as provided for by article 14 of the African Charter, also needs to be revisited. Though the article guarantees the right, it further provides that the right 'may only be encroached upon in the interest of the community and in accordance with the provisions of appropriate laws'. As discussed earlier, this wide limitation clause subjects this right to arbitrariness on the part of the state. Furthermore, nothing is stated about the payment, let alone just and equitable payment, of compensation for property expropriated in the interest of the community. To make such a provision meaningful, consideration should be given to section 25(3) of the Constitution of South Africa. It states:

The amount of the compensation and the amount and manner of payment must be just and equitable, reflecting an equitable balance between the

public interest and the interests of those affected, having regard to all relevant circumstances, including —

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

Furthermore, communal ownership of property should be specified alongside the general provision of the right to property. This is to reflect one of the core African traditions that the African Charter seeks to uphold. The specific protection extended to 'a person or community dispossessed of property' by section 25 of the South African Constitution seeks to underlie this tradition, which should not be made to play second fiddle to traditionally Western concepts of private ownership of property.

f Right to life

The right to life, the fulcrum of all rights, should be expatiated upon to take account of internationally agreed protections in respect of this right. Article 4 of the African Charter provides as follows:

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

This provision is as brief as that of the Universal Declaration, whose article 3 states: 'Everyone has the right to life, liberty and security of person.' That is no saving grace though. In spite of the coming into force in 1989 of the Second Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty, the death penalty still remains on the statute books of some African states. Like abortion and euthanasia, international law appears to regard the death penalty as a matter of legitimate diversity, an issue on which international consensus cannot easily be expected and in respect of which different societies are bound to disagree. However, it should be noted that the death penalty has at times been imposed on people innocent of crimes for which they are required by law to pay the supreme penalty. It has also been used at times in a callous and immoral way by unscrupulous governments to despatch their political opponents to their untimely death. Such is the lingering suspicion surrounding the Sani Abacha military regime's hanging of the former Nigerian playwright Ken Saro Wiwa, who was well known to be a champion of the human rights of the minority Ogoni tribe of Nigeria. The current President of Nigeria, Olusegun Obasanjo, could have met a similar fate on charges that have turned out, through the confession of those who made them, to have been totally trumped up.

The finality of the death penalty should convince the OAU to consider setting out limitations upon the imposition of that sentence. Such limitations could take after those of articles 4 and 6 of the ICCPR that,

we submit, countries that have not abolished the death penalty can live with. For example, article 6(2) of the ICCPR permits countries that have not abolished the death penalty to impose it only in respect of the most serious crimes. By virtue of article 4(2) of the ICCPR, the right to life cannot be derogated from in times of public emergency. These limitations would go a long way to uphold the right to life even in the face of deep-seated disagreements over its imposition. Notwithstanding these disagreements, we urge the OAU to strongly consider adopting an additional protocol to the African Charter aiming at the abolition of the death penalty. The ratification of the Second Optional Protocol to the ICCPR by African countries could serve the same end, though.

g Other rights

The right to privacy, the right to marry and find a family, the right to nationality and the right to compensation in the event of the miscarriage of justice are civil and political rights that are also worthy of consideration by the OAU for inclusion in the African Charter.

3.2 Economic and social rights

In respect of the rationale for the provision of socio-economic rights, it has been asserted:⁴³

The main purpose of socio-economic rights is to place the state under a legal obligation to utilise its available resources maximally to correct social and economic inequalities and imbalances. It has been stressed in the literature and confirmed by practical experience that democratisation and the protection of rights can be attained only if the social and economic conditions of individuals improved. Modernisation theorists argue that economic development is critical for successful democratisation, and accordingly for the protection of rights. They hold that 'without modernisation and a minimum threshold of economic development, democracy in divided societies is hopeless'.

In other words, there is an awareness that one cannot meaningfully talk about the realisation and strengthening of democracy and human rights in the midst of social and economic deprivations arising out of a lack of economic development. This is what provides a prop for the concept of the indivisibility, interdependence and interrelatedness of all human rights that we have stressed earlier. Socio-economic rights cannot, therefore, be made to play second fiddle to civil and political rights as the reality of their practical implementation makes the traditional distinction drawn between these set of rights of little significance. This is true of all countries, more so developing ones.

The socio-economic circumstances of the overwhelming majority of Africa's peoples are such that no amount of talk about the need for

⁴³ B de Villiers 'The protection of social and economic rights — International perspectives' Occasional Paper 9, Centre for Human Rights (1996) 2.

governments to allow the so-called market forces, that is supply and demand, to dictate the level of socio-economic activities, can lead to a situation in which African governments can completely wash their hands of socio-economic issues. As Van Boven asserted:⁴⁴ 'These rights are to be realized through or by means of the State. In this case, the State acts as the promoter and protector of economic and social well-being.'

The legitimate expectations that Africans have of their governments include the creation of a favourable environment for the realisation of socio-economic rights. It is, therefore, disheartening to realise that in spite of its insistence that 'the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights',⁴⁵ the African Charter provides for only few socio-economic rights. These are as follows: the right to work under equitable and satisfactory conditions (article 15); the right to receive equal pay for equal work (article 15); the right to enjoy the best attainable state of physical and mental health including medical care for the sick (article 16); the right to education (article 17); the right to freely take part in the cultural life of one's community (article 17); and the right of women, children, the aged and the disabled to special measures of protection in keeping with their physical or moral needs (article 18).

Some socio-economic rights not provided for by the African Charter include the following: the right to social security including social insurance; the right to rest and leisure; the right to food or to be free from hunger; the right to housing; the right to form a trade union and to join a trade union of one's choice; and the right to freely participate in the cultural life of one's community. That these rights are deemed to be of progressive realisation based upon available resources should not deter the OAU from including them in the African Charter. In any case, some socio-economic rights that demand progressive realisation are already catered for in the Charter. Furthermore, as noted earlier, not all socio-economic rights are positive rights in the sense that they are realisable only when the state acts. For example, state action is not necessary for the exercise of the right to form and to join trade unions and the right to free choice of employment. The latter right, the right to free choice of employment, should be made an adjunct of the right to work that article 15 of the African Charter provides for as one's human dignity is not upheld by being compelled to take up a job.

As discussed earlier, not all civil and political rights can be described as negative rights in the sense that they require no governmental action for their realisation. For example, the right to a fair trial and the right to vote do require state action for their realisation. Even the right to life is no longer perceived as a civil right in strict terms. It is now seen both in

⁴⁴ Van Boven (n 12 above) 49.

⁴⁵ Para 8 Preamble to the African Charter.

a negative sense, thus imploring a hands-off policy on the part of the state, and a positive sense, which warrants state intervention or action. Respectively, these perceptions are known as opposition to negation of life and affirmation of life. The opposition to the negation of life looks at life as a civil and political right while the affirmation of life does so from the point of view of socio-economic rights. In this regard, a UN publication has stated:⁴⁶ 'The worth of life . . . is the fountain-head for all other ideals and values . . . This implies not only opposing the negation of life, but also positive and affirming aspects.'

The positive and affirming aspects of life look at issues such as environmental deterioration, the water crisis, health, housing, and employment. Without them, the civil and political aspects of life have little or no meaning at all.

4 Conclusion

I do not suggest that the analysis we have made respecting civil, political, social and economic rights in the African Charter precludes any further discussions of the Charter in this regard. I have merely presented an opinion as to how the substance of the African Charter can be reformed in respect of these rights so that the Charter may be responsive to the imperatives of the concept of human rights.

The adoption of the Charter was a noble undertaking, showing a sincere effort on the part of the OAU to put continental Africa firmly on the human rights map. The Charter should, however, seek to become a living instrument that accommodates the realities and imperatives of human rights. This is the only way by which the Charter will attain the legitimacy of law and become a beacon of human rights for the people of Africa who, in so many ways and for quite some time in history, have had their human dignity shredded at the international, regional and national levels. This is the context in which any discussion or analysis of the African Charter should be seen.

In the infamous American case *Dred Scott v Sanford*,⁴⁷ the American Supreme Court determined that American Negroes were 'beings of an inferior order and so far inferior that they had no rights which the white man was bound to respect'.⁴⁸ To the Court, 'this opinion was fixed and universal' and 'was regarded as an axiom in morals as well as politics, which no one thought of disputing, or supposed to be open to

⁴⁶ United Nations *Human rights and social work* (1994) 8.

⁴⁷ 60 US 393 (1857).

⁴⁸ n 47 above 407.

dispute'.⁴⁹ In emphasising this opinion, the Court stated: 'This stigma of the deepest degradation was fixed upon the whole race.'⁵⁰ Today, the American Constitution and all its laws apply to American Negroes, though traces of invidious discrimination still remain at the informal level of social relations.

Apartheid perfected the nauseating art of desecrating the human rights of people on the basis of race. Dictatorial and oppressive African governments, like those of Idi Amin, Macias Nguema and Jean-Bedel Bokassa, have disregarded the principle that the human person has an inherent worth and dignity that must be protected and upheld through unflinching respect for human rights. These incidences highlight the urgency with which the African Charter should be reformed so as to meaningfully protect the individual from governmental excess and demeaning societal practices still prevalent in Africa. If left unchecked, these abuses could well lead Africa to the state of nature where, as Thomas Hobbes asserts, 'the life of man' (read Africans) will become 'solitary, poor, nasty, brutish and short'.⁵¹

⁴⁹ As above.

⁵⁰ n 47 above 409.

⁵¹ T Hobbes *Leviathan* (1947 — reprinted from the edition of 1651) 97.