

Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains

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Summary

This article analyses the impact that recent and current developments on the African continent have had, and continue to have, on the promotion and protection of human rights. Such developments include the establishment of an African Court on Human and Peoples' Rights, the formation of the African Union to replace the Organization of African Unity, democratic change in Africa and the advent of a new constitutionalism that embraces the concept of a bill of rights. An understanding of recent and current trends in the promotion and protection of human rights in Africa has to take into account the historical and international context within which the African system operates. Several challenges still inhibit the promotion and protection of human rights in Africa, including various ongoing regional and internal conflicts, the prevalence of poverty, ignorance and diseases, the predominance of political and social disharmony and the continued existence of unacceptable cultural and customary practices. The article concludes that there are still lots of pains to endure before the African system of human rights protection can favourably compare with its more advanced counterparts.

1 Introduction

For many years, the United Nations (UN) has recognised and promoted regional arrangements for the protection of human rights. At its 92nd

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plenary meeting in December 1992, the UN General Assembly reaffirmed that 'regional arrangements for the promotion and protection of human rights may make a major contribution to the effective enjoyment of human rights and fundamental freedoms ...'¹ The following year (in June 1993), the World Conference on Human Rights (held in Vienna) also reaffirmed the fundamental role that regional and sub-regional arrangements can play in promoting and protecting human rights and stressed that such arrangements should reinforce universal human rights standards, as contained in international human rights instruments.² To date, there are three regional human rights systems, largely based on regional inter-governmental organisations that revolve around continental arrangements in Europe, the Americas and Africa.

Compared to other regional systems (Europe and America), the African system for the promotion and protection of human rights is the most recent, having its origins in the early 1980s. The system is based primarily on the African Charter on Human and Peoples' Rights, also known as the Banjul Charter (African Charter or Charter).³ It was designed to function within the institutional framework of the then Organization of African Unity (OAU), a regional inter-governmental organisation that had been formed in 1963 with the aim of promoting unity and solidarity among African states. The OAU has since been replaced by the African Union (AU), but it is important to note that the new AU recognises the African Charter. Article 3(h) of the Constitutive Act of the AU provides that the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments are objectives of the AU. In that regard, therefore, the African Charter remains the primary instrument for the protection and promotion of human rights in Africa.

For various reasons, the African system and the African Charter on which the system is based have both been found wanting, at least in comparison to the other regional systems and human rights instruments. Concerns have continuously been raised about certain features of the African Charter.⁴ These concerns include the equivocal way in

¹ Regional arrangements for the promotion and protection of human rights, UN General Assembly Resolution A/RES/47/125.

² See art 37 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993 <http://www.ohchr.org/english/law/vienna.htm> (accessed 1 March 2006).

³ OAU Doc CAB/LEG/67/3 rev 5 (1982) 21 *International Legal Materials* 58. The Charter was adopted by the 18th Assembly of the Heads of State and Government of the Organization of African Unity on 17 June 1981 and came into force on 21 October 1986, <http://www1.umn.edu/humanrts/instreet/z1afchar.htm> (accessed 1 March 2006).

⁴ See eg GJ Naldi 'Future trends in human rights in Africa' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 6.

which the substantive provisions of the Charter are phrased, the extensive use of 'claw-back' clauses,⁵ the imposition of obligations upon the individual towards the state and the community, and the inclusion of provisions which are generally seen as 'problematic and could adversely affect enjoyment of the rights set forth in the Charter'.⁶ Moreover, the African Commission on Human and Peoples' Rights (African Commission), which was the only institution initially mandated under the African Charter with the function of promoting and protecting the rights in the Charter, was given relatively weak powers of investigation and enforcement and has generally been seen as a failure. The lack of any formal or legal binding force of the African Commission's decisions has not helped to enhance its image. As a result of these and other shortcomings, the African human rights system has always been seen as the least developed and the least effective in comparison to its European and American counterparts.

Such unfavourable comparison might be deemed to be unfair, considering that the African Charter was drafted to take account of the unique African culture and legal philosophy and it was hence directed towards addressing particular African needs and concerns.⁷ In that regard, the African Charter contains certain positive attributes that should be acclaimed.⁸ One such attribute is the inclusion of second and third generation rights as legally enforceable rights. In that regard, not only does the Charter provide for the traditional individual civil and political rights, but it also seeks to promote economic, social and cultural rights and the so-called third generation rights. Accordingly, it is the first international human rights convention to guarantee all the categories of human rights in a single instrument.⁹ Another constructive attribute relates to the individual communication or complaint mechanism. Under the African Charter, the *locus standi* requirements before the African Commission are relatively broad since, besides the victim, individuals and organisations can also submit complaints.¹⁰ This procedure, as will be seen further below, has been adopted and incorporated in the Protocol to the African Charter on Human and Peoples'

⁵ It is important to note that the African Commission has rejected the interpretation usually attached to the use of 'claw-back' clauses, namely that they seem to make the enforcement of certain rights dependent on municipal law. In that regard, see *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 59 & 60.

⁶ EA Ankumah *The African Commission on Human and Peoples' Rights* (1996) 171. See also P Amoah 'The African Charter on Human and Peoples' Rights — An effective weapon for human rights?' (1992) 4 *African Journal of International and Comparative Law* 226.

⁷ See S Davidson *Human rights* (1993) 152.

⁸ Naldi (n 4 above) 8.

⁹ See JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2004) 26-27.

¹⁰ This is implied in art 55 of the African Charter. In any event, this procedure is now clearly established in the African Commission's practice.

Rights on the Establishment of an African Court on Human and Peoples' Rights.¹¹

The confines and parameters of this paper do not lend themselves to a detailed discussion of all the shortcomings and positive attributes of the African Charter. Suffice here to say that, quite apart from those, several recent and current developments on the African continent have had, and continue to have, significant positive and negative implications for the promotion and protection of human rights. On the positive side, such developments include the establishment of an African Court on Human and Peoples' Rights (African Court), the formation of the AU to replace the OAU, the winds of democratic change that seem to be blowing over Africa, a renewed emphasis towards the rights of certain groups of people and the advent of a new constitutionalism that embraces the concept of a bill of rights. It is to these 'gains' that we now turn our attention.

2 Positive developments

2.1 The African Court on Human and Peoples' Rights

As mentioned earlier, the only institutional implementation mechanism established by the African Charter was the African Commission. The absence of an African Court to settle inter-state disputes and individual human rights grievances provoked considerable comment and debate. Some argued that this was in keeping with African culture and traditions, which placed considerable emphasis on reconciliation and consensus rather than arbitration and confrontation.¹² Others felt that an African human rights court was indeed desirable, a view that is reflected in the fact that the idea was mooted as early as 1961 at the Law of Lagos Conference, long before the African Charter was even drafted.

Mention was made earlier that the lack of enforcement mechanisms was largely responsible for the popular view that the African Commission has served as a limited means of control over human rights abuses.¹³ Indeed, only very few of the considerable number of petitions submitted to the Commission have resulted in adverse findings, the majority having been declared inadmissible, withdrawn or concluded through a friendly settlement.¹⁴ It is against this background and the

¹¹ See arts 5(1)(e) & 5(3) of the Protocol.

¹² See eg K M'Baye 'Introduction to the African Charter on Human and Peoples' Rights' in K M'Baye (ed) *The African Charter on Human and Peoples' Rights: A legal analysis* (1985); UO Umzurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 908.

¹³ See JC Mubangizi & A O'Shea 'An African Court of Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 257.

¹⁴ As above.

acknowledgment that the African human rights system was incomplete, that a process was formally initiated in 1994, aimed at the creation of an African Court. The result of the process was the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol),¹⁵ which was adopted on 9 June 1998. In terms of the Preamble, the African Court was intended 'to complement and reinforce the functions of the African Commission on Human and Peoples' Rights'.¹⁶

According to the Protocol, the Court will consist of 11 judges,¹⁷ nominated by the states party to the Protocol.¹⁸ These judges will be 'elected in an individual capacity from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights'.¹⁹ They will be elected by secret ballot by the Heads of State and Government of the OAU (now AU) for a six-year term of office, renewable only once. Apart from the President of the Court, all judges are to perform their duties on a part-time basis.

In accordance with articles 3 and 4, the African Court will have both adjudicatory and advisory jurisdiction. In exercising its adjudicatory or contentions jurisdiction, the Court will decide 'disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned'.²⁰ In that regard, not only will the Court accept complaints lodged by the African Commission, state parties and African inter-governmental organisations, the Court will also be empowered to allow complaints lodged by non-governmental organisations (NGOs) with observer status before the Commission, individuals and groups of individuals.²¹ The Court will have a discretion to accept or refuse such access. It is also important to note that, by ratifying the Protocol, state parties undertake to comply with the judgments of the Court in any cases to which they are parties and to guarantee their execution. In exercising its advisory jurisdiction, the Court will be empowered to 'provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments'.²² The

¹⁵ OAU/LEG/MIN/AFCHPR/pROT.1 rev 2 <http://www1.umn.edu/humanrts/africa/court-protocol2004.html> (accessed 1 March 2006). For more detailed discussions on the Court, see Mubangizi & O'Shea (n 13 above). See also M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342.

¹⁶ See Preamble to the Protocol.

¹⁷ Art 11(1).

¹⁸ Art 12(1).

¹⁹ Art 11(1).

²⁰ Art 3(1).

²¹ Art 5(3).

²² Art 4(1).

power to request such opinions is not limited to state parties, but also extends to requests from recognised organs and organisations.

The African system for the protection of human rights will undoubtedly be strengthened by the establishment of the African Court. The Court will obviously become an invaluable addition to the African Commission's somewhat limited protective role. Nevertheless, the success and effectiveness of the Court will not only depend on the skill and clear-sightedness of the persons elected as judges, but also on the will of the states to adhere to the Protocol by respecting, honouring and executing the decisions of the Court when they are made.

Since the beginning of 2004, there have been significant developments with far-reaching implications for the future of the African Court. On 25 January 2004, the Protocol on the Establishment of an African Court on Human and Peoples' Rights came into force, 30 days after Comoros deposited the fifteenth instrument of ratification.²³ In July 2004, the Assembly of Heads of State and Government of the AU decided to merge the African Court with the African Court of Justice of the AU. At its 5th ordinary session in July 2005, the AU Assembly decided that the Court would be based in an East African country.²⁴ The judges were elected in January 2006 at the 6th ordinary session of the Assembly. The Registrar and the staff will be nominated by the Commission of the AU, which will also determine the budget allocated to the new body.²⁵

2.2 The African Union and human rights

Of all the recent developments on the African continent, the creation of the AU is probably the most significant. Established in 2001, the AU replaced the OAU as the regional institution for the economic and political coordination of the 53 African nations. The AU was conceptualised and formed to provide a new vision that would seek to enhance the good intentions of the heavily criticised OAU. As such, it represents change and progress in critical areas of democracy, governance, human rights, the rule of law and justice for all the people of Africa.²⁶

²³ As required by art 34(3) of the Protocol. At the time, the following countries had ratified the Protocol: Algeria, Burkina Faso, Burundi, Comoros, Côte d'Ivoire, The Gambia, Lesotho, Libya, Mali, Mauritius, Rwanda, Senegal, South Africa, Togo and Uganda.

²⁴ See Decision of the Assembly of the African Union Assembly/AU/Dec 83 (V). See also 'Final green light for establishment of African Human Rights Court' <http://www.interights.org/page.php?dir=News> (accessed 1 March 2006).

²⁵ As above.

²⁶ For a further and more detailed discussion on the African Union, see NJ Udombana 'The institutional structure of the African Union: A legal analysis' (2002) 33 *California Western International Law Journal* 69. See also E Baimu 'The African Union: Hope for better protection of human rights in Africa' (2001) 1 *African Human Rights Law Journal* 299.

Some have argued that the successful enforcement of human rights in Africa will depend, in part, on the success of the newly reconstituted AU.²⁷ Others, however, maintain that the AU cannot be said to be radically different from the OAU, although it has a more explicit human rights focus. The Preamble to the Constitutive Act, for example, states that African leaders are 'determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law'. The objectives and principles of the AU, as defined in the Act, emphasise the promotion of peace, security and stability on the continent, democratic principles and institutions, popular participation and good governance, and the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.²⁸ They also encourage international co-operation, taking due account of the Charter of the UN and the Universal Declaration of Human Rights (Universal Declaration).²⁹

It is also important to note that various other provisions of the AU are particularly important in fostering the ideals of constitutionalism and good governance, thereby promoting human rights. Under article 4(h), for example, one of the principles according to which the AU will function is the right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. Furthermore, under article 23(2), any member state that fails to comply with the decisions and policies of the AU may be subjected to sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly. Moreover, article 30 makes it clear that governments that come to power through unconstitutional means will not be allowed to participate in the activities of the AU.

In view of the above, it is fair to say that the Constitutive Act of the AU renews a commitment to the promotion of human rights. To that end, the AU adopted a programme of development, the New Partnership for Africa's Development (NEPAD). NEPAD is a vision and strategic framework for Africa's renewal.³⁰ It is an African innovation practically designed to support the vision and goals of the AU and although it is an economic development programme, in many ways it continues the African insistence that human rights, peace and development are

²⁷ See eg Mubangizi (n 9 above) 31.

²⁸ Arts 3(f), (g) & (h) & art 4(m).

²⁹ Art 3(e).

³⁰ See 'NEPAD in brief' <http://www.nepad.org/2005/files/inbrief.php> (accessed 1 March 2006).

interdependent matters.³¹ In particular, the acknowledgment of the relationship between the right to development, the right to peace and the right to human dignity is implicit. In so doing, it recognises the complex interdependence of peace, human rights and development and makes them pillars of the African Renaissance.³²

In July 2002, the Heads of State and Government of the member states of the AU agreed to the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance. In the particular context of human rights, paragraph 15 of the Declaration states as follows:

To promote and protect human rights. We have agreed to:

- facilitate the development of vibrant civil society organisations, including strengthening human rights institutions at the national, sub-regional and regional levels;
- support the Charter, African Commission and Court on Human and Peoples' Rights as important instruments for ensuring the promotion, protection and observance of human rights;
- strengthen co-operation with the UN High Commission for Human Rights; and
- ensure responsible free expression, inclusive of the freedom of the press.

For the NEPAD process to achieve any reasonable measure of success, there ought to be a mechanism of review and appraisal. In recognition of this important imperative, paragraph 28 of the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance acknowledges the establishment of the African Peer Review Mechanism (APRM) on the basis of voluntary accession. The APRM seeks to promote adherence to, and fulfilment of, the commitments contained in the Declaration. The mechanism spells out the institutions and processes that will guide future peer reviews, based on mutually agreed codes and standards of democracy, political, economic and corporate governance. To that end, peer review has been described as the systematic examination and assessment of the performance of a state by other states (peers), by designated institutions, or by a combination of states and institutions.³³

Both NEPAD and the APRM are important juridical developments, not only for democracy, governance and economic development, but also for the promotion and protection of human rights. It must be acknowledged, however, that these important developments are not without criticism. To date, for example, only 23 of the 53 AU members have committed themselves to the review mechanism. Moreover, peer review takes time. According to NEPAD's Secretariat, reviews of the

³¹ See W Nagan 'Implementing the African Renaissance: Making human rights comprehensive for the new millennium' http://www.cha.uga.edu/CHA-CITS/Nagan_paper.pdf (accessed 1 March 2006).

³² As above.

³³ See Economic Commission for Africa *The African Peer Review Mechanism — Some frequently asked questions* (2002) 2.

first four countries — Ghana, Kenya, Mauritius and Rwanda — are only expected to be completed by this year (2006).³⁴ At the time of writing, the African Peer Review Panel had finalised reviews for Ghana and Rwanda. The Country Review Reports for these two countries were presented to the Committee of Participating Heads of State and Government (APR Forum) at their last meeting held on 19 June 2005 in Abuja, Nigeria. These reports were scheduled for further discussion by the Heads of State and Government (Peer Review) at their next meeting. During that meeting, the two countries were expected to present in detail the steps they intended to take to address the shortcomings and gaps identified. While 19 more African countries are awaiting a review, the NEPAD Secretariat has yet to commence these.³⁵ Criticisms notwithstanding, there is no doubt that under the umbrella of the AU, through NEPAD and the APRM, African leaders have developed their own strategy for meeting the continent's pressing challenges, including extreme poverty, illiteracy, HIV/AIDS, war, environmental degradation and, most importantly, human rights abuses.

2.3 Fresh winds of democratic change

The interface between human rights and democracy is a hugely complex but very important issue. There is no doubt that human rights are a necessary component of any democratic society. The protection of human rights is therefore necessary for democracy. The traditional definition of democracy as a government of the people by the people and for the people seems to confirm this. According to Thomson, democracy literally means 'rule by the people'.³⁶ Simplistic as these definitions may seem, they reveal three important tenets of democracy. Firstly, democracy is a form of government in which all adult citizens have some share through their elected representatives. Secondly, democracy implies a society in which all citizens treat each other as equals without any discrimination. Most importantly, democracy brings about a form of government which encourages, allows, promotes and protects the rights of its citizens.³⁷ Accordingly, democracy is an ideal towards which all civilised nations are striving.

The history of post-colonial Africa is well documented. The main features of that history include military regimes, autocratic dictatorships, one-party political systems and apartheid repressions. From 1989, however, African states witnessed unprecedented demands for democracy. These demands came by way of popular political

³⁴ See 'Zambia "ready for NEPAD governance review"' <http://www.afrol.com/articles/14260> (accessed 1 March 2006).

³⁵ As above.

³⁶ See A Thomson *An introduction to African politics* (2000) 216.

³⁷ Mubangizi (n 9 above) 7-8.

challenges from within national borders and through external agents attaching special conditions to the distribution of aid and assistance.³⁸ As a result, the last decade of the twentieth century brought dramatic political changes to Africa. According to one commentator:³⁹

The whole continent was swept by a wave of democratisation. From Tunisia to Mozambique, from Mauritania to Madagascar, government after government was forced to compete in multi-party elections against new or revitalised opposition movements. To use South African President Thabo Mbeki's words, the continent was experiencing a political 'renaissance'.

Let us try to put these political and democratic changes into perspective. Undemocratic governments dominated Africa's political landscape by the end of the 1980s. By the end of 1994, however, 29 countries had held a total of 54 elections, with observers hailing more than half as 'free'. Further, these elections boasted high turnouts and clear victories. Voters removed 11 sitting presidents, and three more declined to run in the elections. Between 1995 and 1997, 16 countries held second round elections, so that by 1998 only four countries in all of sub-Saharan Africa had not staged some sort of competitive contest.⁴⁰

A 2000 Cornell University study on how leaders leave office shows that, since 1960, African leaders have mainly left office through *coups*, wars or invasions. According to the study, from 1960 to 1989, African leaders had left office 79 times due to *coups*, wars or invasions as compared to only once due to an election. The study shows, however, that while 22 leaders had left office through *coups*, wars or invasions between 1989 and 2000, another 14 had done so through elections.⁴¹

The above can be summarised in the following statistics: In 1988, there were only nine countries in Africa which had multi-party democracies, 29 countries had one-party systems, 10 were military oligarchies, two were monarchies and two were racial (apartheid) oligarchies. In 1999, on the other hand, there was only one one-party state (Eritrea), one 'no-party' government (Uganda), two monarchies, three military oligarchies and 45 multi-party states.⁴² These figures have to be treated with caution, as some of the multi-party governments may be only virtual democracies, as will be seen further below. In the main, however, a good number of African countries, most of which tend to be in

³⁸ S George 'Democracy, human rights and state reform in Africa' Policy brief 28 <http://www.cps.org.za/cps%20pdf/polbrief28.pdf> (accessed 1 March 2006).

³⁹ Thomson (n 36 above) 215.

⁴⁰ See M Bratton & N van de Walle *Democratic experiments in Africa: Regime transitions in comparative perspective* (1997) 21-22.

⁴¹ See AA Goldsmith 'Risk, rule and reason: Leadership in Africa' *Africa Notes*, Institute for Africa Development, Cornell University, May 2000, quoted in ER McMahon 'Assessing democratic development in Africa' Discussion paper prepared for the Development of State/NIC Conference 'Africa: What is to be done?' 11 December 2000 Washington DC 5.

⁴² Thomson (n 36 above) 216.

Southern Africa, have attained a generally acceptable level of democracy. Many of these countries have an active and unfettered press, vibrant civil societies and institutions that function at least relatively effectively.⁴³ In that regard, it can be said that the winds of democratic change that have been blowing over Africa during the last 15 years have ushered in a renewed commitment to the promotion and protection of human rights on the continent.

2.4 A new constitutionalism

One of the inevitable outcomes of democratic change in Africa is a new understanding of the notion of constitutionalism. Constitutionalism can be defined as an adherence to the letter and spirit of a constitution. As such, not only does it represent a concern with the instrumentalities of governance, but it upholds the supremacy of the constitution and requires government officials and citizens to obey and operate within the framework of the law. In that context, a constitution is usually seen as 'a document which sets out the distribution of powers between, and the principal functions of, a state's organs of government'.⁴⁴ It is therefore important that a country should not only have a good constitution, but that the principles of constitutionalism are adhered to. It is in this context that a new constitutionalism appears to be taking root in Africa. This new constitutionalism is characterised by a widespread struggle for the reform of constitutions in all parts of the continent. As such, it has become an integral part of the African political reform process.

In the context of the promotion and protection of human rights, the advent of a new constitutionalism in Africa has to be hailed. This is because constitutions and constitutionalism go hand-in-hand with human rights in the sense that most constitutions contain a list of rights, usually known as a bill of rights. The significance of the presence of a bill of rights in a constitution cannot be over-emphasised. It not only instructs and informs the state on how to use its power without violating the fundamental rights of the people, but it also imposes duties both on the state and on natural and juristic persons.⁴⁵

It is no coincidence that the advent of a new constitutionalism in Africa coincided with a new democratic order in the early 1990s. Indeed, the 1991 Conference on Security, Stability, Development and Co-operation in Africa, held in Kampala,⁴⁶ resolved, *inter alia*, that:

⁴³ McMahon (n 41 above) 5.

⁴⁴ See P Cumper *Constitutional and administrative law* (1996) 3.

⁴⁵ See I Currie & J de Waal *The new constitutional and administrative law* (2001) 318.

⁴⁶ The conference was proposed by Yoweri Museveni, then Chairperson of the OAU, and it was convened at the initiative of the Africa Leadership Forum, an NGO involving former heads of state and prominent Africans from many countries; <http://www.africaaction.org/african-initi3at4ives.htm> (accessed 1 March 2006).

[e]very state should have a constitution that is promulgated after thorough national debate and adopted by an assembly of freely elected representatives of the people. Such a constitution should contain a Bill of Rights.

Several African states seem to have heeded the call. Since 1991, many African countries have adopted new constitutions with bills of rights. Examples of such countries include Angola, Ghana, Malawi, Namibia, Nigeria, South Africa and Uganda. In all these countries, the courts have a pivotal role in enforcing the rights enshrined. Some countries, such as South Africa, have taken the lead in the judicial enforcement of human rights. Although the actual enjoyment or realisation of the rights in the constitutions is another story, the fact that they are included in the various constitutions ought to be applauded as a victory for the protection of human rights.

2.5 Rights of specific groups

Apart from the African Charter and the Protocol Establishing the African Court on Human and Peoples' Rights, the only three other human rights treaties of the AU deal with specific groups of people. These treaties are:

- the Convention on Specific Aspects of the Refugee Problem in Africa (1969);
- the African Charter on the Rights and Welfare of the Child (1990); and
- the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) (Women's Protocol).

In the particular context of women's rights, the Women's Protocol goes further than the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).⁴⁷ For example, it contains provisions on marriage, the right to participate in political and decision-making processes, the protection of women in armed conflicts, and rights to education, health, employment, food security and housing. It is also important to note that the Women's Protocol prohibits all forms of female genital mutilation, an issue that will be discussed further below. On 25 November 2005, the Protocol came into force, 30 days after Togo deposited the fifteenth instrument of ratification.

In the context of children's rights, the African Charter on the Rights and Welfare of the Child (African Children's Charter)⁴⁸ is an important instrument which was adopted by the then OAU as far back as 1990. A detailed discussion of the Children's Charter falls outside the scope of

⁴⁷ GA Res 34/180 UN Doc A/34/46 <http://www1.umn.edu/humanrts/instree/e1cedaw.htm> (accessed 1 March 2006).

⁴⁸ OAU Doc CAB/LEG/24.9/49 (1990) <http://www1.umn.edu/humanrts/africa/af-child.htm> (accessed 1 March 2006).

this paper. Suffice to mention, however, that in some important respects, the Children's Charter builds upon international standards. In that regard, the Children's Charter actually provides greater protection of some rights than does the UN Convention on the Rights of the Child.⁴⁹ An important development was the establishment of the African Committee of Experts on the Rights and Welfare of the Child. Established in July 2001, the Committee had its inaugural meeting in May 2002. It is expected to play an important role as it is empowered to receive state reports as well as communications from individuals, groups or recognised NGOs.

With regard to refugees, the African human rights system boasts the most progressive protection in the world, at least on paper. The OAU Convention Governing Specific Aspects of Refugee Problems in Africa⁵⁰ was adopted as far back as 1969, long before the African Charter was drafted. Since then there have been a number of international conferences, the most notable the 1994 OAU/UNHCR Symposium, which resulted in the Addis Ababa Document on Refugees and Forced Population Displacements in Africa.⁵¹ The Kigali Declaration of 2003⁵² is also worth mentioning. Although there has been criticism regarding the lack of clear mechanisms to deal with the issue of refugees as a whole, it is clear that the African system has paid reasonable attention to the rights of refugees.

Based on the foregoing discussion, this paper argues that the African human rights system places significant emphasis on the rights of specific groups of people; mainly, women, children and refugees.

3 Problems and challenges

In spite of the gains that have been made over the last 15 years, contemporary Africa still remains home to gross violations of human rights. As such, the promotion and protection of human rights on the continent still face many challenges. Although many of the causes of human rights abuses have their genesis in the colonial era, it is no longer acceptable to blame all African human rights problems on colonialism and apartheid. It is in this context that we proceed to highlight the problems and challenges facing human rights protection in Africa.

⁴⁹ Eg, protection of the right to life and rights during times of armed conflict.

⁵⁰ 1001 UNTS 45 <http://www1.umn.edu/humanrts/instree/z2arcon.htm> (accessed 1 March 2006).

⁵¹ Adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa 8-10 September 1994 <http://www1.umn.edu/humanrts/africa/REFUGEE2.htm> (accessed 1 March 2006).

⁵² MIN/CONF/HRA/Decl 1(I) http://www.unhcr.ch/html/menu6/declaration_en.doc (accessed 1 March 2006).

3.1 Regional and internal conflicts

In Africa, as anywhere else in the world, the relationship between conflicts and human rights violations is the proverbial chicken and egg. While conflicts inevitably result in human rights violations, it has to be recognised that human rights violations are one of the main causes of conflicts in Africa. In the words of the Secretary-General of the UN, 'conflict in Africa poses a major challenge to United Nations efforts designed to ensure global peace, prosperity and human rights for all'.⁵³ The Report of the Secretary-General on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa further makes it clear that 'respect for human rights and the rule of law are necessary components of any effort to make peace durable'.⁵⁴ It is not surprising, then, that human rights abuses are often at the centre of wars in Africa. According to the 2005 Amnesty International Report, for example:⁵⁵

Armed conflicts continued to bring widespread destruction to several parts of Africa in 2004, many of them fuelled by human rights violations. Refugees and internally displaced people faced appalling conditions.

Hundreds of thousands of people have been killed in Africa in recent times from a number of conflicts and civil wars.⁵⁶ The following are but a few examples of recent or on-going conflicts in Africa:

- The recent conflict in the Democratic Republic of Congo (DRC) involves seven nations. This conflict was fuelled and supported by various national and international corporations and other regimes which had an interest in the outcome of the conflict.⁵⁷
- Sierra Leone has seen serious and grotesque human rights violations since 1991 when the civil war erupted in that country. According to Human Rights Watch, over 50 000 people had been killed by July 1999, with over one million people having been displaced.⁵⁸
- The conflict between Ethiopia and Eritrea has been going on for decades, sparked off by one reason or another, most recently in May 1998 over what seemed to be a minor border dispute.

⁵³ See Report of the Secretary-General on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa <http://www.un.org/ecosocdev/geninfo/afrec/sgreport/report.htm> (accessed 1 March 2006).

⁵⁴ As above.

⁵⁵ See 'Amnesty International Report 2005' <http://web.amnesty.org/report2005/2af-index-eng> (accessed 1 March 2006).

⁵⁶ See 'Conflicts in Africa' <http://www.globalissues.org/Geopolitics/Africa.asp> (accessed 1 March 2006).

⁵⁷ See the judgment of the International Court of Justice in *Democratic Republic of the Congo v Uganda* Case Concerning Armed Activities on the Territory of the Congo, judgment of 19 December 2003 <http://www.icj-cij.org> (accessed 1 March 2006).

⁵⁸ See Human Rights Watch 'Sierra Leone — Getting away with murder, mutilation, rape: New testimony from Sierra Leone' <http://www.hrw.org/reports/1999/sierra/> (accessed 1 March 2006).

- The 1994 genocide in Rwanda will go down in African history as one of the most brutal consequences of a conflict that many people have simplistically explained in terms of ancient tribal hatred.

Other conflicts of no less significance include the recent mayhem in Darfur, Western Sudan and the never-ending war in Northern Uganda. It is too soon to say whether peace has finally returned to Burundi after years of internal conflict. The same may be said about Somalia, which recently finalised a reconciliation process to end over a decade of state collapse and factional violence by forming a new government that included the former faction leaders.

From the above discussion, it is clear that Africa is beleaguered with strife and conflicts and that the struggle for human rights remains tied up with the problems of such conflicts. Moreover, the patterns of conflict in Africa will continue to be an important impediment to the effectiveness of the AU, NEPAD and other continental and regional institutions that are meant to promote and protect human rights.

3.2 Poverty

Of all the social phenomena that have a significant impact on human rights, poverty probably ranks highest. Poverty is in itself not only a denial of human rights, but also erodes or nullifies the realisation of both socio-economic and civil and political rights.⁵⁹ There is no doubt that Africa is the globe's poorest continent. Of the estimated 700 million people who live in sub-Saharan Africa, about 315 million (one in two people) survive on less than one dollar per day.⁶⁰ According to the United Nations Development Programme, the following facts on poverty are also worth noting:

- 184 million people (33% of the African population) suffer from malnutrition.
- During the 1990s, the average income *per capita* decreased in 20 African countries.
- Less than 50% of Africa's population has access to hospitals or doctors.
- In 2000, 300 million Africans did not have access to safe water.
- The average life expectancy in Africa is 41 years.
- Only 57% of African children are enrolled in primary education, and one in three children does not complete school.

⁵⁹ See JC Mubangizi 'Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa' (2005) 21 *South African Journal on Human Rights* 32.

⁶⁰ See UNDP 'Facts on poverty in Africa' <http://www.africa2015.org/factspoverty.pdf> (accessed 1 March 2006).

- One in six children dies before the age of five.

Many people see poverty in Africa as a human creation, the outcome of an uncaring international community. They argue that⁶¹

the interests of the powerful have dominated discourse in a rapidly changing, globalised world, and the shift of power from the people to the market and from state to the corporation under the rubric of globalisation has resulted in unbalanced structures of international trade and investment, uneven distribution of new technologies and an unjust allocation of resources as well as employment practices that work against the interest of the poor.

Hence, it could be argued that globalisation, through its much-hyped essentials of efficiency, creativity, ability and capacity, has done nothing to preserve, protect and promote the fundamental human rights and dignity of the Africa's poor.

The problem of poverty in Africa is compounded by other factors. These include low levels of education, widespread unemployment, poor political and economic policies, natural disasters, armed conflicts and, quite significantly, pandemics such as HIV/AIDS. In the particular context of human rights, the link between poverty and HIV/AIDS cannot be overemphasised. Indeed, this paper would be incomplete without highlighting HIV/AIDS as one of the main challenges to the protection of human rights in Africa. It is to that aspect that we now turn our attention.

3.3 HIV/AIDS

HIV/AIDS has reached pandemic proportions, not only in sub-Saharan Africa but also in many parts of the world. According to the UNAIDS/WHO AIDS Epidemic Update of December 2005, sub-Saharan Africa has just over 10% of the world's population, but is home to more than 60% of all people living with HIV (25,8 million).⁶² In 2005, an estimated 3,2 million people in the region became infected with HIV, while 2,4 million adults and children died of AIDS.⁶³ It is clear from these statistics that sub-Saharan Africa is the most affected region worldwide as the continent is home to approximately two-thirds of all the people currently living with HIV/AIDS.

HIV/AIDS has an impact not only in terms of the human toll and suffering, but also in terms of human rights and health care. Issues of human rights in general, and the right to health care specifically, have become paramount not only in trying to stem the spread of HIV/AIDS,

⁶¹ See L Das 'The spectre of poverty in the Commonwealth: A serious violation of human rights?' <http://www.jha.ac/books/br025.htm> (accessed 1 March 2006).

⁶² See UNAIDS/WHO *AIDS epidemic update 2005* <http://www.unaids.org/epi/2005> (accessed 1 March 2006).

⁶³ As above.

but also in dealing with those who are infected or affected. Several human rights norms are relevant both in the fight against HIV/AIDS and also in the protection of the rights of people infected with the disease. Although the right to health care is the most relevant, there are other important rights such as the right to privacy, the right to human dignity, the right to life and the right not to be discriminated against.

The Secretary-General of the UN has stressed that the protection of human rights is essential to safeguard human dignity in the context of HIV/AIDS, and to ensure an effective, rights-based response to HIV/AIDS.⁶⁴ An effective response requires the implementation of all human rights, civil and political, economic, social and cultural, and fundamental freedoms of all people, in accordance with existing international human rights standards.⁶⁵ It has also been recognised that when human rights are protected, less people become infected and those living with HIV/AIDS and their families can better cope with the disease. In the African context, therefore, the challenge of HIV/AIDS to human rights protection is compounded by the sheer numbers of those infected and, conversely, the high levels of infection on the continent are aggravated by the rampant abuses of human rights caused by other factors. Moreover, in Africa, the fight against HIV/AIDS is seriously inhibited by certain unique cultural practices that are in themselves a major challenge to the promotion and protection of human rights, as the following discussion illustrates.

3.4 Cultural challenges

'Culture' has been defined as 'the whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or social group'.⁶⁶ As such, there is a potential conflict between certain cultural practices and the enjoyment of cultural rights ordinarily recognised by most international human rights instruments. In Africa, there are certain cultural practices that are clearly incompatible with international human rights norms. One such practice is the custom of female circumcision, otherwise referred to as female genital mutilation (FGM). Although FGM can be found in various parts of the world, it is practised predominantly in Africa, where the practice originated. FGM is an integral part of certain communities' cultures, and 28 out of 53 countries in Africa practise it in one form or another.⁶⁷

⁶⁴ See Second International Consultation on HIV/AIDS and Human Rights (Geneva, 23-25 September 1996), Report of the Secretary-General E/CN.4/1997/37 para 10(a) <http://www1.umn.edu/humanrts/instreetree/hivreport-1996.html> (accessed 31 March 2006).

⁶⁵ As above.

⁶⁶ World Conference on Cultural Policies (1982).

⁶⁷ See 'Razor's edge — The controversy of female genital mutilation' <http://www.irinnews.org/webspecials/FGM/46008.asp> (accessed 1 March 2006).

Although the details of the practice of FGM are beyond the scope of this paper, it can be said that FGM is rooted in a culture of discrimination against women. It is a human rights abuse that functions as an instrument for socialising girls into prescribed gender roles within the family and community. It is therefore closely linked to the unequal position of women in the political, social and economic structures of societies where it is practised.⁶⁸

The main reason why FGM is a big challenge to the protection of human rights in Africa is that deep cultural importance is attached to it. As a result, not only is there a reluctance in many countries to legislate against it, but attempts at implementing such legislation are often met with firm resistance. Moreover, although the practice has been in existence for thousands of years in various parts of the world, it has only attracted the attention of the international community during the last 25 years.

Another repugnant cultural practice incompatible with international human rights norms is virginity testing. Although this practice is not as widespread in Africa as is FGM, it is nevertheless deeply imbedded in the cultures of certain African communities. For example, nearly one million South African girls in the KwaZulu-Natal province underwent virginity tests from 1993 to 2001 alone.⁶⁹ Swaziland is another country in which virginity testing is practised. Many human rights groups have condemned virginity testing as a violation of the rights of women and children, but just like FGM, it is a practice that is not likely to die soon. Other cultural practices that pose a serious challenge to the protection of human rights in Africa include polygamy and the requirement of high bride prices in many African communities.

3.5 Political challenges

It was mentioned earlier that the protection of human rights is necessary for democracy, and *vice versa*. That is, proper and effective human rights protection requires the existence of real democracy. While it was argued earlier that democratic change is sweeping over the African continent, it is also true to say that a number of African countries are not yet on a clear path towards consolidating democratic institutions. According to one commentator, 'in these countries authoritarian governments have attempted to carefully manage the democratisation process and the legitimacy of electoral processes has fallen short of

⁶⁸ See Amnesty International USA 'Female genital mutilation: A fact sheet' http://www.amnestyusa.org/women/violence/female_genital_mutilation.html (accessed 1 March 2006).

⁶⁹ See B Illingworth 'The dangers of virginity tests' <http://www.plannedparenthood.org> (accessed 1 March 2006).

expectations'.⁷⁰ In such countries, the democratic experiment is clearly failing, resulting in what could be referred to as 'virtual democracies'.

Take Uganda, for example. Although many positive changes have taken place in that country since 1986, the National Resistance Movement government of Yoweri Museveni has stubbornly clung to power. Over the years, the main political characteristic of this government has been the 'movement' or 'no-party' system which has essentially prohibited political activity other than under the movement itself. There have been many arguments for and against this rather strange political philosophy, but it is generally agreed that any political system that restricts or prohibits political parties can only be undemocratic. Recent attempts to introduce multi-party politics have been compromised by the arrest, harassment and intimidation of opposition leaders. This has been aggravated by a flagrant violation of the Constitution. The Constitution was amended to allow Museveni a third term in the office that technically he has now occupied for 20 years. On 23 February 2006, 'multi-party' elections were held and, as expected, Museveni was voted in for his third term. The main opposition party rejected the results and it remains to be seen how the courts will deal with the inevitable challenge that will be brought by the opposition.

Zimbabwe is another example. It is undemocratic and a human rights disaster. Robert Mugabe, who has been in power since 1980, is regarded as one of the world's worst ten dictators.⁷¹ Although elections are held regularly, they are never free and fair and the ruling ZANU/PF party is invariably returned to power.⁷² Its human rights record is an embarrassment to the AU and the continent. Other 'virtual' democracies in Africa which epitomise political challenges to human rights protection include Cameroon, Gabon, Kenya and Togo. The political systems of countries such as Swaziland and Morocco are also a source of concern.

4 Conclusion

It is obviously not possible to discuss all the recent and current positive developments in the protection of human rights in Africa. It is even more difficult to analyse all the problems and challenges to be contended with. What has been attempted in this paper is a discussion of the more prominent developments and challenges. From the discussion it can be concluded that the future of human rights in Africa is

⁷⁰ McMahon (n 41 above) 7.

⁷¹ See D Wallechinsky 'The world's ten worst dictators' http://archive.parade.com/2005/0213/0213_dictator.html (accessed 1 March 2006).

⁷² See 'Zimbabwe: Is a fair vote possible?' http://news.bbc.co.uk/2/hi/talking_point/debates/african_debates/798820.stm (accessed 1 March 2006).

more completely in the hands of Africans than it has ever been before. The developments that are taking place are a result of African initiatives. The problems and challenges are also mainly of an African creation. Although the global community can and should play some role in addressing these problems, it is up to the people of Africa to construct their own destiny. The gains that have been made over the last few decades are a clear indication that Africa can succeed. In spite of these recent gains, however, there are still lots of pains to endure before the African system of human rights protection can compare favourably to its more advanced counterparts.