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The Banjul Charter and Universal Human Rights: A Comparative Analysis

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I. INTRODUCTION

Concepts of human dignity, of which human rights is a part, can be expressed in many terms including “ubuntu,” “social justice,” or “dharma.”¹ In the West, this concept has been expressed as human rights.² As an ideology, human rights constitute a “common language of humanity” that is deeply committed to the alleviation of human misery and social suffering.³ In the West, human rights emerged as the principle of liberation from oppression and domination of the downtrodden of society.⁴ It can be linked to a particular class of people, (rising bourgeoisie) who used human rights as a tool to resist tyrannical and oppressive rule.⁵ In other world cultures, notions of human rights have its roots stemming from different origins and they express such notions differently.

The adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations in 1948 resulted in the birth of contemporary international human rights.⁶ While there has been widespread recognition and adoption of human rights, there are still widespread violations of the same, including ethnic cleansing and genocide. Despite its inability to eradicate human sufferings, human rights standards and norms do empower people and provides a platform on which society can prosecute cruel acts that violate human dignity.⁷

The African Charter aims at institutionalizing a human rights protection regime within the African continent. The Charter attributes certain rights to and imposes certain duties on the individual to enable him live a meaningful life and to contribute in a useful manner to his society. The African Charter has proven to be a remarkable document because it represents a significant departure from international and regional human rights instruments it preceded because it is responsive to uniquely African circumstances. In formulating these rights and duties, the African Charter was inspired

¹ Virginia A. Leary, “Human Rights In Africa: Cross –Cultural Perspective,”(Brookings Institute, DC), 29.

² Id.

³ Upendra Baxi, “The Future of Human Rights,” (Oxford University Press, 2002), pg. 1

⁴ Costas Douzinas, “Critique and Comment: Ends of Human Rights,” *Melbourne University Law Review*, Vol 26, 2002, pg. 445.

⁵ Id.

⁶ Eva Berms, “Human Rights: Universality and Diversity” (Martinus Nijhoff Publishers: 2001) pg 20.

⁷ Upendra Baxi, “The Future of Human Rights,” (Oxford University Press, 2002), pg. 2

by the various existing international human rights instruments. In fact, the point of convergence between the Universal Declaration of Human Rights and the African Charter is greater than their differences.⁸ This should not come as a surprise because the preamble of the African Charter reaffirms the pledge of African states to promote international co-operation by “having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.”⁹ However, the Charter’s inspiration is not limited to these instruments but rather it was influenced by African conception of human rights and it incorporates patterns of African philosophy of law, a matter this paper discusses at length because it informs a proper understanding of the Charter. In many respects the African Charter has certain specific characteristics whose inspiration also stems primarily from Africa’s colonial history and Africa’s conception of man.

The African Charter is not without its critics. Criticism have been levied on the grounds that it departs from the norms of other regional and international instruments by recognizing the concept of people’s rights and imposing duties on the individual members of African societies. This argument is misguided because a proper understanding of human rights will lead to the appreciation of how the Charter has articulated various human rights concepts. This is not to say that the Charter does not have its shortcomings, as some universal rights identified in the Charter receive but a scintilla of protection.

This article examines the distinct features of the African Charter and how it differs from the Universal Human Rights and other human rights regimes. In so doing, it highlights areas where the Charter differs from European and American human rights protection regimes. The history and background of the aforementioned human rights instruments is beyond the scope of this article but this article highlights areas in which these instruments differ from the African Human Rights Charter. This article too has its shortcomings, as the analysis that follows regarding how the African notions of human rights varies or is similar to that of the West is not exhaustive. Moreover, this analysis, or any analysis for that matter, is unlikely to do justice to the fine nuances present in the conception of human rights across cultures.

⁸ A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa, page, 56.

⁹ Banjul Charter, Preamble, paragraph 4.

The article provides an introduction to the African legal philosophy on human rights; it broadly discusses Universal Human Rights; and it analyses the ways in which the African Charter is similar or differs from Universal Human Rights and to other regional instruments.

II. DISCUSSION

A. LITERATURE REVIEW: AN EXAMINATION OF AFRICAN LEGAL PHILOSOPHY ON HUMAN RIGHTS

1. The Communal School of Thought

One man, one vote is meaningless unless accompanied by the principle of “one man, one bread.”¹⁰

The communal school of thought can be divided into two broad groups (i) scholars who see Africa as an communal rather than an individualistic society and (ii) the scholars who view Africa as a society of duty rather than rights. These schools of thought are not mutually exclusive.

a. African Communitarian Ideal As “Rights”

Claude Ake is one of the recognized proponents of this school. In arguably one of the most influential theoretical works in sub-Saharan Africa, Ake argues that the values implicit in Western notions of human rights from which human rights ideologies emerge have limited appeal and applicability for Africans particularly given Africa’s “communal” culture which is distinct from western “individualistic” culture.¹¹ Asmarom Legesse, shares a similar view. According to him, a critical difference between African and Western traditions rests in the importance given to the human individual.¹² He argues that in the West, the ultimate repository of rights is the individual who holds a “virtual-sacralized” position in society that has an obsessive concern about such individuals’ dignity, worth, personal autonomy, and property.¹³ As such, individuals are celebrated when portrayed as fighting to preserve their dominion against oppressive forces of society. In Legesse’s view, the central role occupied by individuals in the West does not exist in Africa and an individual who fights private

¹⁰ Eva Berms, “Human Rights: Universality and Diversity” Martinus Nijhoff Publishers: 2001) pg 164

¹¹ Claude Ake, “The African Context of Human Rights,” “Africa Today, Vol. 34, No. ½, Human Rights: The African Context(1st Qtr.- 2nd Qtr., 1987), pg 5

¹² Asmarom Legesse, “Human Rights in African Political Culture,” The Moral Imperatives of Human Rights: A world Survey, pg 125.

¹³ Id.

wars against society is no hero. He further notes that most African cultures are egalitarian and hierarchical and have measures of distributive justice to ensure that individuals do not deviate from the norm in a manner that is disruptive to society.¹⁴

Similarly, Ake argues that Western human rights values are “alien” to Africa because: (i) as a communal society, Africans put less emphasis on the individual and more on the collective; (ii) African’s do not allow individual claims to override that of the society; and (iii) African’s are “more inclined to think of [their] obligations to other members of [their] society rather than [their] claims against them.”¹⁵ Ake’s observation that African societies are to a very limited extent individualistic and his perception that capitalist ideologies which tend to spore individualistic ideas and tendencies (such as individual rights) are lacking in the majority of African societies leads him to conclude that purely Western notions of human rights is unsuitable for Africans. In addition, Ake’s views are further informed by his observation that Africans still have a strong sense of belonging to an “organic whole” such as family, clan and ethnic group.¹⁶

Furthermore, Ake contends that Western notions of human rights emphasize rights that have limited appeal and are arguably of limited importance to Africans.¹⁷ This is because such notions of rights place emphasis on civil and political liberties rather than on socio-economic rights that are more strongly needed in an underdeveloped continent like Africa.¹⁸ He notes that Western emphasis on civil and political rights like free speech, fair trial, free press are pursuits more suitable for Westerners who are economically and socially better positioned to pursue such rights compared to Africans that are plagued with poverty, hunger, war and disease.¹⁹

Unlike some writers’ contentions,²⁰ Claude Ake, (like most proponents of this school of thought) does not reject the existence of human rights nor does he categorically reject the standard Western interpretation of such rights. Rather Ake

¹⁴ Asmarom Legesse, “Human Rights in African Political Culture,” *The Moral Imperatives of Human Rights: A world Survey*, pg 125.

¹⁵ *Id.*, 5

¹⁶ Claude Ake, 9

¹⁷ *Id.*, 9

¹⁸ *Id.*, 9

¹⁹ *Id.*, 9

²⁰ See Thaddeus Metz, “African Values, Human Rights and Group Rights: A philosophical Foundation for the Banjul Charter,” *African legal Theory and Contemporary Problems*” pg. 131

appears to argue that verbatim recital of Western notions of human rights which fail to take into consideration African traditional values and culture is unsuitable for Africans because it is likely to be unrealizable.²¹ In fact, Ake acknowledges that human rights ideology is permeating into Africa and that it is becoming relevant to the African experience.²² It is this recognition and awareness that human rights ideology is here to stay in Africa that prompts Ake to argue that this ideology should be Africanized. He states “western conception of human rights has evolved in ways which have made it more relevant to the African experience, although its relevance still remains ambiguous.”²³ Such assertion does not indicate a rejection of human rights nor is it a rejection of western standard interpretation of such rights. Rather, it is an acknowledgement that such rights are here to stay and as such, must be Africanized. Ake, like most proponents of this school of thought implore Africans to recreate Western notions of rights in light of African conditions and culture.²⁴

In addition, Ake argues that it is necessary to extend the idea of human rights to include collective human rights for social groups such as family, lineage and ethnic groups as Africans’ still largely think in terms of collective rights.²⁵ He asserts that, “for the idea of human rights to be meaningful in the African context, it has to incorporate them in a concept of communal human rights.” In sum, Ake calls for the redefinition and reinterpretation of western notions of human right in a manner that is relevant to African conditions and culture such that it is realizable by the people to whom such rights are to benefit.

b. Africa a society of duty rather than rights

The second variant of the communal school are scholars who believe that traditional African society is one of duties rather than rights. Duties existed in Africa in order to strengthen community ties and social cohesiveness.²⁶ Some of the ways in which the sense of duty has been captured in Africa is highlighted by popular

²¹ Id. 9

²² Id.6

²³ Claude Ake, 9

²⁴ Id., 9

²⁵ Id., 9

²⁶ Makau wa Mutua, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the language of Duties, Virginia Journal of International Law, Vol. 35, pg 362.

expressions such as: “it takes a village to raise a child” and that “the right of one kingship member is the duty of another and the duty of the other duty member is the right of another.”²⁷ Scholars belonging to this school argue that African society is built on the notion of duty rather than rights.

According to Kenneth Mwenda, in traditional African society, “a sense of duty and responsibilities, on individuals and their communities, was more paramount than the notion of rights.”²⁸ Other writers have argued the same. For example, Ahmed El-Obaid, argues that duty underlies the concept of rights in Africa as such, individuals exercise their rights in other to enable them perform their duties to their community.²⁹ Olusola Ojo further contends that, “Africans assume harmony, not divergence of interests ... and are more inclined to think off their obligations to other members of society rather than their claims against them.”³⁰ Similarly, M’baye asserts that “laws and duties are regarded as being two facets of the same reality: two inseparable realities.”

Put differently the philosophy relating to duties in the African context has been summed up by Mbiti in the phrase, “I am because we are, and because we are therefore I am.” As such, in traditional African societies, specific duties, social roles, hierarchies and a person’s relationship to the other define rights because the “African conception of man is not that of an isolated and abstract individual, but [man as] an integral member of a group animated by a spirit of solidarity.”³¹

For Mwenda, the concept of rights can necessarily be “egocentric,” “aggressive” and “assertive,” unlike that of duties which calls for “modesty and humility.” He argues that duties, unlike rights, realize the importance of co-existence of people and as such duty requires an individual to place the common good before individual satisfaction. Advocates of this school like Mwenda do not argue that African society should revert

²⁷ Makau wa Mutua, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the language of Duties, Virginia Journal of International Law, Vol. 35, pg 362.

²⁸ Kenneth Kaoma Mwenda, “Deconstructing the Concept of Human Rights in Africa,” *Alternative law Journal*, 293

²⁹ El-Obaid Ahmed El-Obaid and Kwadwo Appiagyeyi-Atua, “A New Perspective on linking the Past to the Present,” *McGill Law Journal*, Vol. 4 1995-1996, 830.

³⁰ Olusola Ojo, “Understanding Human Rights in Africa,” paper presented at the Preparatory Conference on Human Rights: Individual Rights or collective rights, as cited in *Human Rights in Africa: Cross Cultural Perspective*, pg 162

³¹ B. Obinna Okere, “The Protection of Human Rights in African and the African Charter on Human Rights and Peoples’ Rights: A comparative analysis with the European and American Systems,” 6 *Human Rights Quarter*. 141, 148 (1984).

back to traditional norms and practices, but rather they challenge Africans to deconstruct Western-centric notions of human rights and instead rediscover an African ideal version.

In Mwenda's view, Africans should begin to consider the notion of responsibility as the new basis of social order. He contends that the notion of responsibility is more ideal than the notion of duty in contemporary Africa because it is wider in scope and it is more suitable for the communitarian tendencies that African societies possess. Mwenda does to rule out taking elements that are attractive in Western values and incorporating them into the African polity.

2. **Human rights in Africa is based on notion of human dignity**

Human rights as based on the notion of human dignity emerged in reaction to the externalist school. According to the externalist school, human right notions were "extraneous" to pre-colonial Africa.³² As such, human rights notions are a "gift of the West to the rest."³³ Proponents of this school argue that traditional African concepts of human rights are nothing more than notions of human dignity and worth that existed in all pre-industrial societies."³⁴ Non-western societies are considered to be bereft of notions of human rights because they neither experienced the rise of capitalism with which the origins of modern human rights is thought to be linked.³⁵ The externalist school argues that Africa, like most pre-industrialized societies, went through a stage where because of low level of productivity and collective ownership of means of production, a communal lifestyle was necessary for subsistence.³⁶ Therefore, this led to the emergence of communal social structure/life style, which led to the development of humanistic ideas, that do not necessarily embody the same ideas of human rights as seen in the West.³⁷

Similarly, other proponents of this school have argued that African societies could not have had notions of human rights because it did not "recognize the concept of

³² Bonny Ibhawoh, "Imperialism and the Human Rights Discourse In Africa: Colonial Discourses of Rights and Liberties in African History," pg. 21

³³ Upendra Baxi, "The Future of Human Rights," (Oxford University Press, 2002), pg. 24.

³⁴ Bonny Ibhawoh, "Imperialism and the Human Rights Discourse In Africa: Colonial Discourses of Rights and Liberties in African History," pg. 21

³⁵ Upendra Baxi, "The Future of Human Rights," pg. 24.

³⁶ Bonny Ibhawoh, "Imperialism and the Human Rights Discourse In Africa: Colonial Discourses of Rights and Liberties in African History," pg. 21

³⁷ Id.

a human being as a descriptive category.”³⁸ In other words, African societies did not recognize rights one held simply by virtue of being a human being because in African culture, people were defined by their status and group memberships.³⁹ As such, a social relationship, which exists between the individual and the state (a relationship that forms the basis of Western notion of human rights), did not exist in traditional African societies. According to this view, notions of human rights in Africa began after the arrival of Westerners whose incursions dislocated African community thus denying individuals in such community access to prior ways of protecting their lives and human dignity. Proponents of this view argue that:

“the consciousness of human rights that occurred in non-Western societies is said to be purely due to the patterns of imposition and diffusion of the Enlightenment ideas and ideals among them. It was this mimetic adaptation of these ideas that enabled, even empowered, the non-West communities with the knowledge and power to interrogate their traditions *devoid of notions of human rights...*”⁴⁰

This view however has been criticized. Critics of this view note that African societies were mythical and hierarchical, as such; human rights in traditional African society should be examined within this context because notions of human rights in African were adapted to the existing social and political environment in which Africans lived. The fact that Africans have a communal life style does not mean that notions of human rights never existed there. A. J. M. Milne argues that human rights can exist even in a community based culture or environment.⁴¹ He notes that:

“A community consists of its members in the sense that, unless there are members, there cannot be a community. Since to be a member is *inter alia* to have rights, without rights there can be no community... A community in which all the members had obligations and none any rights are logically impossible and therefore inconceivable. To be a member is necessarily to have rights as well as obligations...”⁴²

³⁸ Bonny Ibhawoh, “Imperialism and the Human Rights Discourse In Africa: Colonial Discourses of Rights and Liberties in African History,” pg. 21

³⁹ *Id.*, 22

⁴⁰ S.K. B. Asante, “Nation building and Human Rights In Emergent African Nations,” *Cornell Int’l L.J.*, 1969, pg 73

⁴¹ A.J.M. Milne, “Human Rights an Human Diversity,” “An Essay in the philosophy of Human Rights” 115-116.

⁴² *Id.*

Other scholars have argued that pre-colonial African society had legal structures that respected human rights. The presence of these structures, coupled with the existence of the respect for human dignity, a value that was fundamental in traditional African culture, evinces the presence of human rights in pre-colonial times. Asante, for example, asserts that the “concept of human rights is by no means alien to indigenous African legal process. He argues that because human rights are concerned with asserting and protecting human dignity, the presence of concepts of humanism or “Ubuntu” in Africa, that unequivocally asserted the dignity and worth of man, indicates that the concepts of human rights were present in Africa.⁴³ He further notes that:

“...African legal systems have had an articulate concept of natural justice and legality. The motion of due process of law permeated indigenous law; deprivation of personal liberty or property was rare; security of the person was assured, and customary legal process was characterized not by un-predictable and harsh encroachments upon the individual by the sovereign but by meticulous, if cumbersome, procedures for decision-making. African conception of human rights was an essential aspect African humanism sustained by religious doctrine and the principle of accountability to the ancestral spirits...”⁴⁴

According to Asante, African conception of human rights was an essential aspect of African humanism sustained by religious doctrine and the principle of accountability to the ancestral spirits. This view is recognized by others who argue that the traditional African approach to human rights is derived from ancestral concept of life, which considered rights as a gift from God.⁴⁵ Within this framework, individuals and communities were required to do all that was necessary to improving their life and avoid acts that eliminate it. This concept of right spreads across various aspects of societal existence including through ethnic groups, issues like childbirth, death, dispute settlement and popular participation. Within this context, human and community rights and duties are viewed as an integral part of African society.

⁴³ S.K. B. Asante, “Nation Building and Human Rights In Emergent African Nations,” *Cornell Int’l L.J.*, 1969, pg102

⁴⁴ Id.

⁴⁵ Mutoy Mubiala, “The Contribution of African Human Rights Traditions and Norms To United Nations Human Rights Law, *Hum. Rts. & Int’l Legal Discourse*, 2010, pg. 213

3. Before a Rights-based approach, a concept of citizenship

This school is an “emerging new” one and it argues that human rights rhetoric is ineffective in cultivating those core moral values that are essential to societal connectedness, collective flourishing, a sense of belonging and societal integration, factors which are all important in achieving peaceful co-existence especially in multi-ethnic societies plagued with internal conflicts.⁴⁶ This is because, how people should relate to each other often gets lost in the rights and responsibility rhetoric.⁴⁷ This issue, it argues can be resolved through the adoption of the concept of citizenship that is grounded on the concept of African jurisprudence because African jurisprudence emphasizes human interdependence and interpersonal relationships, thus providing a better way of fostering the development of essential moral values fundamental to societal co-existence.⁴⁸

According to this school, the Universal Declaration of rights does not conclusively guarantee the kind of connectedness required to build societal cohesion nor does it provide a harmonious or moral language of interaction among diverse groups especially in a continent like African, which holds various ethnic groups.⁴⁹ This is because, although in theory, human rights should apply to everyone irrespective of citizenship, in practice, this is not necessarily the case, as rights depend on concrete domestic political settings and applies to concrete people by membership to a political community through citizenship. Such memberships are essential in determining access to rights. Even though this may not always be the case, access to human rights depends on one’s status as a citizen.

Proponents of this school of thought recognize the advantages of having a rights-based model especially for communities divided along ethnic religious, racial or other lines. In their view, a rights-based approach can help such groups achieve several goals, including resource distribution, the resolution of disputes by providing a neutral

⁴⁶ Oche Onazi, *Before Rights and Responsibilities, An African Ethos of Citizenship*, African Legal Theory and Contemporary Problems, (Springer, 2014) pg. 153

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

framework for negotiation, settlement and agreement.⁵⁰ However, they argue that this advantage turns into a weakness because this approach arguably does not sustainably guarantee the peaceful coexistence of diverse peoples. In other words, a rights-based approach is not integrative because it does not mediate between differences or contribute to a sense of belonging among those who share common boundaries.⁵¹ This is because rights-based claims do no more than to protect the individual against others rather than encouraging reconciliation or relationships between different individuals.⁵² It is argued that a rights bearer is not obliged to act ethically or responsibly towards others as such, right-based claims can become a source of discord in fragmented societies. Paradoxically, rights may become a source of division.

Similarly, but speaking in a different context, Simone Weil argues that rights claims are inherently hostile and only effectively backed through force or by the threat of force.⁵³ As such, in her view, rights have the potential of making conflicts among people more acute. This is because rights are about “liberation or radical autonomy “not community, integration or reconciliation.” As such, it has been argued that a community that places emphasis on rights creates individuals that are hostile and aggressive. For one, “rights militate against harmonious empathic and affectionate dialogues and interaction between people...[this] is because by formulating grievances in terms of rights denies the possibility of other more harmonious ways of relating to people.⁵⁴ Although more less divisive or individualistic ways of conceiving rights can be formulated, to promote social cohesion and harmony among different people, the problem of rights as described does not disappear once they are described more collectively.⁵⁵

In light thereof, this school contends that, “something else is required apart from rights, to encourage the basic values, especially the empathy involved in the process of societal existence.”⁵⁶ This school does not dismiss rights-based system per se, it simply

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Weil Simone, “Human personality. In: Miles S (ed) Simone Weil: anthology. Penguin books, London, pg 69-98.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

argues that it does not create the type of atmosphere for mutual respect, tolerance, reciprocity, care, empathy or other values, which remain essential to any process of belonging—the kind of values necessary for societal existence. For these reasons, it is argued that we should look to other ways of promoting societal coexistence.

In conclusion, in recent times, there appears to be a general consensus among African scholars that African society is neither purely communal nor entirely individualistic.⁵⁷ In addition, the “new” school of thought raise interesting concerns regarding the shortcomings of a purely rights-based approach to human rights. It will be interesting to see the extent which this school can attract a broader audience. Although this school did not in any way influence the outcome of the Charter, yet this essay recognizes it because an examination of the literature on African human rights philosophy will be incomplete without reference to this school.

African communalism is more than a mere lifestyle but rather it is a worldview of group solidarity and collective responsibility that places the individual within his community and also within the continuum of the dead and the living.⁵⁸ The African Charter attempts to embody various aspects of the African legal philosophy on human rights in an attempt to make it resonate with African cultural values and norms while making it fit nicely within existing international human rights regime.

B. ANALYSIS OF THE CHARTER

1. Background

The Banjul Charter was born out of a desire to create a human rights instrument inspired by African notions of human right. To a large extent, the Charter takes into account the concerns that have been raised in the literature regarding the need to Africanize notions of human right. The Organization for African Unity (OAU), and the African Commission on Human and Peoples’ Rights backed the creation of the African Charter on Human and Peoples’ Rights (ACHPR).⁵⁹

⁵⁷ see El-Obaid Ahmed El-Obaid and Kwadwo Appiagyei-Atua, “A New Perspective on linking the Past to the Present;” also see Thaddeus African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter.

⁵⁸ Josiah A.M Cobbah, “African Values and Human Rights Debate: An African Perspective” Human Rights Quarterly 9 (1987) pg. 323.

⁵⁹ Eva Berms, “Human Rights: Universality and Diversity” Martinus Nijhoff Publishers: 2001) pg 92

The Banjul Charter can be regarded as containing both universal yet African specific notions of human rights. In Leopold Sedar Sengor’s speech given to the drafters of the Charter in Dakar Senegal, he called on the expert’s to “borrow from modernism only, that which does not misrepresent our [African] civilization and deep nature” and avoid creating a charter of right of the “African Man.”⁶⁰ His statement indicates that the African Charter favors universal human rights to the extent that it is compatible with African culture and values. It also indicates that the Charter was not intended to have limited applicability and appeal to the African man. Conversely, the Charter is in favor of African rights to the extent that they are not incompatible with universal rights.

As such, the Banjul Charter can be viewed as a document that recognizes and embodies universal notions of human rights but creates an instrument that expresses African views of human rights in the belief that such expressions would be more adequate in dealing with the realities in Africa. The Charter is arguable a balance between tradition and modernity, i.e., the balance between both (i) African tradition and the modernity of international law; and (ii) a balance between African modernity and the tradition of international law.⁶¹ As would be seen throughout this article, the Banjul Charter seeks to affirm Africans identity while expressing Africa’s integration to universalism.

2. Structure of the Banjul Charter

The African Charter is divided into three parts. Part I has two chapters—Chapter I which sets out the human and peoples’ rights to be protected and Chapter II which sets out the duties. Part II of the Charter is composed of four chapters which highlights the measures for safeguarding the rights and duties articulated in Part I. Chapter I seek to establish the African commission on Human and people’s Rights and highlights its structure. Chapter II relates to the functions of the Commission and Chapter III relates to the procedure of the Commission and part IV makes provisions regarding the commencement of the African Commission on Human and Peoples’ Rights.

⁶⁰ Id.

⁶¹ Id.

3. A Comparison of the Universality and Specificity of the Banjul Charter

a. Preamble

The preamble of the African Charter differs from the preamble of the Universal Declaration of Human Rights (“UDHR”) or the American and European human rights instruments. Unlike these instruments, the African Charter asserts in its preamble, the source of its inspiration—the Charter of the OAU. Unlike other instruments its inspiration stems from a desire to promote “freedom, equality, justice and dignity” which it believes are essential objectives for the achievement of the aspirations of African peoples. The Charter unlike other legal instruments was inspired by African legal philosophy and it aims at responding to African needs while relying upon “historical tradition and values of African civilization.” It is for these reasons that the African Charter differs from other human rights instruments because in its selection and presentation of human rights views, the Charter relies on principles primarily African in nature.

b. Banjul Charter as an instrument of both Human and Peoples’ Rights

The African Charter is the first human rights instrument to include several provisions that deals with peoples’ rights in a binding convention.⁶² Although the Charter is not the first document of its kind to recognize people’s rights together with individual human rights (see e.g. Article 1 of the International Covenant on civil and Political Rights (ICCPR)) none have done so in a broad and expansive manner as the Charter.⁶³

Five provisions in the Banjul Charter, which are aspirational in nature, refer to the “peoples” rather than the individual as beneficiaries of the rights.⁶⁴ Although the concept of “peoples” is increasingly being recognized and appreciated, the dynamic use made by the Charter of this term has thrust the term into greater pre-eminence within international human rights law.⁶⁵ A number of international human rights instruments

⁶² Id.

⁶³ Id.

⁶⁴ “The Emergence of New Rights in the African Charter,” N.Y.L Sch.J.Int’L & Comp. L., 308

⁶⁵ “The Emergence of New Rights in the African Charter,” N.Y.L Sch.J.Int’L & Comp. L., 308

including the General Assembly Resolution have referred to the rights of people especially when dealing with issues such as self-determination and sovereignty over natural resources.⁶⁶ Because the framers of the Charter believed that peoples' rights was an important issue and critical to the Charter's objectives, the term was incorporated in the title of the treaty to emphasize this point.

References made to "peoples' rights" in the Banjul Charter appear to be recognition of the collective nature of human rights. According to the Charter, "fundamental human rights stems from the attributes of being human ... [hence] the respect of peoples' rights should necessarily guarantee human rights."⁶⁷ The Charter is arguably suggestive that the realization of collective rights is a condition for the realization of individual rights. While the Charter can be construed as placing community rights above individual rights, commentators have dismissed this argument. They instead argue that the Charter recognizes collective rights in order to promote human rights.⁶⁸ Similarly, others have suggested that both concepts—individual and peoples' rights are not in conflict or in competition with each other but rather they are complimentary concepts.

Several reasons have been identified to explain why peoples' rights were included in the African Charter. These reasons are embedded in the historical, cultural, political and socioeconomic context in which the Charter was created. According to the drafters of the Charter peoples' rights were included along side human rights because "the conception of an individual who is utterly free and utterly irresponsible and opposed to society is not consonant with African philosophy." Others support this view and assert that one can correctly assume that the major principle that guided the framers of the Charter resides in the fact that "in Africa, man is part and parcel of the group" and "that the individual rights could be explained and justified only by rights of the Community."⁶⁹

⁶⁶ Foot note 6, as cited in "The Emergence of New Rights in the African Charter," N.Y.L Sch.J.Int'L & Comp. L., 308

⁶⁷ Banjul Charter, pp 6.

⁶⁸ Human Rights: Universality and Diversity, 101

⁶⁹ Emmanuel Bello, *The African Charter on Human and Peoples' Rights. A legal Analysis, Collected Courses of the Hague Academy of International Law*. The Hague Academy of International Law. Brill Online, 2015. [Reference](#). Columbia University. 05 December 2015

In finding justification for the inclusion of people's rights in the Charter, scholars have looked to the social, political and economic conditions prevalent when the Charter was drafted. For one, when the Charter was created, not all African countries were free from colonization. Southern African countries like Namibia, Zimbabwe and South Africa were still subjected to colonialism and racial segregation.⁷⁰ As such, it has been argued that "peoples' rights" can be interpreted as claims for independence by African states against colonization. Article 19-11 and the preamble of the Charter is illustrative of this point. According to the preamble, the Banjul Charter serves to;

"eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights"⁷¹

One author notes that the "peoples' rights" asserted in the African Charter is "none other than those for which the third world States fight in the context of a new international order" including, "the sovereign equality of all peoples, their inalienable right to self-determination, their right to freely dispose of their natural resources and to enjoy in all equality, the common heritage of mankind."⁷² The reference to peoples' rights appears to stem from Africa's colonial experience characterized by slavery and exploitation where their rights were grossly violated. Its inclusion serves as a reminder of this experience that they collectively suffered as a people. Furthermore, some have noted that the term was included as a compromise between socialist and capitalist states then in existence in Africa, with capitalist interest represented by individual human rights and socialist interest in peoples rights.⁷³

Although the Charter is not clear on who the beneficiaries of "peoples' rights" are, these beneficiaries could be the state, a group within a state (e.g. minority group) or the citizens of a state. Scholars have critiqued the embodiment of people's rights in the African Charter. Bondzie-Simpson, for example, argues that the "people's rights" are

<http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/the-normative-character-of-the-charter-194-ej.9789024736362.009_268.6>

First appeared online: 1985

⁷⁰ Edem, 273

⁷¹ Banjul Charter, preamble: paragraph 7.

⁷² Edem, 277

⁷³ Human Rights: Universality and Diversity, 98

“clearly lofty ideals and laudable aspirations rather than enforceable rights.”⁷⁴ This criticism notwithstanding, the Charter gives African’s something to aspire to.

c. Banjul Charter An Instrument of Individual Duties:

The individual duties recognized by the African Charter forms one of its distinctive features. These duties are the subject of a separate chapter in the Charter. The Charter’s preamble states that, “the enjoyment of rights and freedoms also implies the performance of duties.”⁷⁵ The duties imposed on individuals are contained in Articles 27, 28 and 29. The African Charter provides that every person has duties towards “his family and society, the State and other legally recognized communities and the international community.”

The concept of individual duties is recognized in some international instruments. For example, Article 29 of the Universal Declaration of Human Rights states that: “Everyone has duties to the community in which alone the free and full development of his personality is possible.”⁷⁶ Duties is also mentioned a total of 6 times in The American Declaration of the Rights and Duties of Man.

The duties section of the African Charter is innovative in several ways. Its been argued that up until the creation of the Charter:

“...international instruments referring to the duties of individuals do so in few words and this often betrays the authors’ lack of conviction. It is necessary to point out here that if individuals have rights to claim, they also have duties to perform. In traditional African societies, there is no opposition between rights and duties or between the individual and the community. They blend harmoniously.”⁷⁷

In addition, the duties recognized in the American Convention and the Universal Declaration are merely implicit duties i.e. duties which ought to be respected in the exercise of rights.⁷⁸ Although, the wording of these recognized duties does not exclude autonomous duties (i.e., duties which are owed independently of right.), the fact that such duties were not spelt out distinguishes it from the duties recognized in the African

⁷⁴ Bondzie-simpson, 657.

⁷⁵ Banjul Charter, Preamble, paragraph 3

⁷⁶ Universal Declaration of Human Rights

http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf Accessed December 1, 2015.

⁷⁷ Eze, Human rights in Africa, 214.

⁷⁸ Human Rights: Universality and Diversity, 110

Charter where autonomous duties play a central role. Another fact that further distinguishes the African Charter from other instruments is its enunciation of a list of specific autonomous duties (some of which have roots in African cultural values and tradition) in a binding convention.

Furthermore, the African Charter differs from other human rights instruments that recognize duty, because the concept of duty in those instruments applies to the duty a State owes towards aliens and its citizens.⁷⁹ The Charter imposes a duty on persons to exercise their rights and freedoms with due respect to the rights of others on moral grounds. For example, it states that every person has the duty to:

- (1) “Preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect his parents at all times, to feed and help them in case of need;
- (2) To preserve and strengthen positive African cultural values, in his relations with his fellow beings and in his relations with society, in the spirit of tolerance, dialogue and consultation and in general to contribute to the promotion of the moral well-being of society.”

Some of the “duty” provisions identified in the Charter highlights issues of basic concern in Africa—i.e. an underdeveloped country that lacks social security safety nets for the elderly an issue addressed by parents relying on their children to care for them at old age. In sum, the duty provision aims not so much at creating concrete legally enforceable duties per se but rather to create a source of positive law.

The inclusion of duties in the African Charter is influenced by African tradition and cultural values that is communal in nature where rights are allegedly inseparable from the idea of duty, a concern that was raised by African legal rights scholars. To this end, Maurice Glele Ahanhango argues that the inclusion of duties by the framers of the charter was done in an attempt to avoid the adverse effect of a far-reaching individualism, which can lead to irresponsibility and egoism.⁸⁰

In addition, the inclusion of individual duties in the African Charter has been viewed as a non-binding ethical obligations and a “code of good conduct” not capable of being legally and effectively implemented. Article 29 § 1 for example highlights this

⁷⁹ Rosa M. D’SA, “Human and Peoples’ Rights: Distinctive Features of The African Charter, *Journal of African Law*, 76.

⁸⁰ Human Rights: Universality and Diversity, 110

point. It states that the individual has the duty “to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times to maintain them in case of need.”⁸¹ The provision can be said to be a code of good moral conduct or behavior that exists in the African where children are taught at an early age to be respectful to their parents and elders.

The reason for its lack of enforceability is the imprecision in the wording of the provisions on duty. For one, it has been argued that when a state is accused of violating individual rights, a state may raise the defense that the individual has not lived up to its duty as described in the Charter. In other words, treating the Charter as an ethical obligation reduces the risk of the Charter’s misuse by states.

d. Banjul Charter as containing the Right to Development

The African Charter recognizes the right to development in a manner that distinguishes the Charter from other instruments.⁸² It is only in Africa that this right has been provided for with binding legal force whereas the UN instrument is merely a Declaration of this right. The right to development is yet to be included in the Universal Declaration of Human Rights or in any human rights treaties at the international level although the UN General Assembly adopted this right in 1986.⁸³ The importance of this provision in the African Charter can never be overstated considering the fact that The UN Declaration of the right to development was adopted close to five and a half years after the adoption of the African Charter in 1981.⁸⁴

The concept of right to development is of African origin and it appears to have been first uttered in at the Economic Conference of the Group of 77 in October 1967.⁸⁵ This right is considered to be a “specifically” African contribution to the international human rights discourse. Keba M’baye, a Senegalese jurist, is credited to being the first to posit this right in 1972 and in getting this right to be formally recognized in resolution

⁸¹ African Charter, Article 29 §1

⁸² A Comprehensive Agenda pg. 57

⁸³ Human Rights: Universality and Diversity, 450

⁸⁴ Kenneth Asamoah Acheampong, Reforming the Substance of the African Charter on Human and Peoples’ Rights: Civil and Political rights and socio-economic rights, *African Human Rights Law Journal*, Vol. 1 No. 2. 185-205

⁸⁵ A Comprehensive Agenda pg., 298.

4(XXXIII) of the UN Commission on Human Rights in 1977.⁸⁶ He is regarded as the father of the “right to development.”⁸⁷

M’baye’s view’s the right to development as a comprehensive integrated process that includes, but is not limited to, economic development.⁸⁸ He identifies “states” and the “international community” as having the obligation to promote this right.⁸⁹ M’baye finds justification for the right to development on a number of reasons based on political and economic considerations but founded on moral grounds.

First, due to the colonial exploitation of the underdeveloped South by the developed North and the continued inequalities that exists between the North and the South, M’baye views these economic realities as necessitating the need and obligation of the North to recognize and promote the right of development of the South.⁹⁰ Second, M’baye argues that international peace cannot be guaranteed in a world where there is a large divide between the rich and the poor and as such, the development of the poor is necessary and is an obligation of the North.⁹¹ Third, since the North control and define international order and events they have the responsibility of contributing to the development of the South, hence the need for the right of development.⁹² Fourthly, there is moral justification to the right to development because the world is moving towards relations based on international solidarity.⁹³

In addition, the objects and subjects of the rights to development are different in the African Charter compared to that of the Universal Human Rights Declaration.⁹⁴ The right to development appears to be viewed as a multi-dimensional right by the UN. The issue of whether the right of development was to be viewed as an individual or a collective right was considered unnecessary to settle because these rights are not mutually exclusive.⁹⁵ However, based on the General Assembly resolutions passed by the UN, it is believed that the individual aspect of the right is much preferred in the

⁸⁶ Issa G. Shivji, “The Concept of Human Rights in Africa,” 29

⁸⁷ Id.

⁸⁸ A Comprehensive Agenda pg., 298.

⁸⁹ A Comprehensive Agenda pg., 298.

⁹⁰ Id.

⁹¹ Id.

⁹² Id.

⁹³ Id.

⁹⁴ A Comprehensive Agenda pg. 57

⁹⁵ Id.

international sphere. For example, on a number of occasions the UN resolutions have stated that “the right to development is a human right that equality of opportunity for development is a human right and that equality of opportunity for development is as much a prerogative of nations as of the individuals within nations.”⁹⁶ Other resolutions have also further emphasized the individual aspect of the right to development. According to Article 1 and 2 of Resolution 41/128 (“Declaration on the right to development”):

Article 1: “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

Article 2: “the human person is the central subject of development and should be the active participant and beneficiary of the right to development.”⁹⁷

Article 1 has been interpreted to mean that “the right to development implies the full realization of the right of individuals to self-determination.” In other words, human development can be achieved on an individual level. Article 2, on the other hand, explicitly states human development begins at the individual level. In sum, according to Articles 1 and 2, the right to development can be interpreted as an individual right which, at best, can be exercised collectively. Under the African Charter, the right to development inevitably has an individual dimension, however, this individual dimension stems from the purpose of the right rather than the way it is exercised.

Under the African Charter, the right to development is viewed as a collective right and the Charter designates the “people” as the sole holders of the right to development. Article 22 of the Charter unequivocally states that:

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

⁹⁶ Kenneth Asamoah Acheampong, “A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa,” *African Human Rights Journal*, page, 300.

⁹⁷ UN Declaration of Right to Development, <http://www.un.org/documents/ga/res/41/a41r128.htm>, Accessed December 12, 2015.

Another distinguishing feature between the African Charter and the UN Declaration is that, unlike the UN Declaration the African Charter does not provide for the political right to development but only provides for the economic, social and cultural right to development. As such, the standard set by the Charter is considered to be relatively weaker compared to that of the UN. It has been argued that the right to political development has not been asserted in the African context because of the fear by African states of rights claims on this ground.⁹⁸

e. **Banjul Charter an instrument on civil and political rights**

The civil and political rights identified in the African Charter are similar to other international and regional human rights instruments. These rights have received the most attention of the African Commission.⁹⁹ The Charter recognizes civil and political rights including the right to freedom from discrimination, equality before the law, the right to life, the right to a fair trial; freedom of association, freedom of movement; political participation and right to property.

There are some fundamental differences between the ways these rights are protected under the African Charter in comparison to the UDHR. For one, the African Charter's standard is by far weaker in comparison to the UN standard.¹⁰⁰ For example, although Article 13 of the Charter guarantees the right to participate in government, it does not do so forcefully because most of the essential features of this right is not provided for in the Charter. In other words, unlike the UDHR, it does not guarantee the right to vote or the right to a democratic government. Although the Charter reiterates Article 21(1) of the Universal Declaration, it omits paragraph 3, an important part of this right. Paragraph 3 of the UDHR states:

“the will of the people shall be the basis of authority of government. This shall be expressed in periodic and genuine elections which shall be expressed in periodic and genuine elections which shall be by universal

⁹⁸ Michelo Hansungule, “The African Charter on Human and Peoples Rights: A Critical Review, Afr. Y.B. Int'l L. 2000, pg292

⁹⁹ Christof Heyns, “The African Regional Human Rights System: The African Charter,” Penn State law Review, 686

¹⁰⁰ Michelo Hansungule, “The African Charter on Human and Peoples Rights: A Critical Review, Afr. Y.B. Int'l L. 2000, pg 285

and equal suffrage and shall be held by secret vote or by equivalent free voting procedure.”¹⁰¹

It has been argued that African politicians could not commit to this article during the creation of the Charter because, in part, they did not believe in democracy. Furthermore, in comparison to other international instruments, the African Charter gives scant protection to the right to a fair trial and political participation.¹⁰² In addition, there is no explicit reference in the Charter to a right to privacy.¹⁰³

f. Banjul Charter As Containing Three Generational Rights

Another unique feature of the African Charter is its inclusion of three generations of rights—socio-economic rights, civil and political rights in a binding treaty.¹⁰⁴ The placement of these rights side by side is significant in that it emphasizes the indivisibility and interdependence of these rights. The African Charter includes all three rights in one binding instrument unlike UN human rights instruments which, in translating the provisions of the Universal Declaration into treaty form in 1966, ended up with two instruments, the International Covenant of Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Although these instruments in both their Preambles and in parallel words acknowledge the necessary linkage of all human rights, these instruments do not appear to have a forceful effect in comparison to the African Charter where these rights are placed side by side in a single instrument.

For one, the placement of socio-economic rights along side civil and political rights is suggestive that the African Charter regards these rights as equally important rather than prioritizing each against the other. In addition, the placement of these rights side-by-side is also reflective of African philosophy of law and human rights. This is because the socio-economic rights advanced for in the Charter can be viewed as part of a movement towards development. The Preamble of the African Charter asserts that the African perception of human rights requires that “particular attention” be paid to “the right to development” as “civil and political rights cannot be dissociated from economic,

¹⁰¹ Universal Declaration of Human Rights Article 21(1) paragraph 3

¹⁰² Christof Heyns, “The African Regional Human Rights System: The African Charter,” Penn State Law Review, 686

¹⁰³ Id., 686

¹⁰⁴ Id., 690

social and cultural rights.” Therefore, by placing these three rights side-by-side, the African Charter suggests that all three rights are equally imperative.

g. On the Enforcement of the Banjul Charter

A prior distinctive feature of the African Charter is the initial absence of a court system that adjudicates disputes arising under the Charter.¹⁰⁵ Unlike the American and European Convention, the African Charter then did not provide for findings of the commission to be reviewed by a judicial body.¹⁰⁶ The framers of the Charter preferred negotiation and the diplomatic/bilateral settlement of disputes that arise under the Charter rather than by adjudicating these issues.¹⁰⁷ They argued that the amicable settlement of disputes rather than their litigation is inline with the African culture.¹⁰⁸ However, this has all changed.

Unlike the European and Inter-American systems for the protection of human rights, where the ECHR and the IACHPR court systems are integral parts of the convention at the outset, the establishment of such similar body under the Charter was an afterthought.¹⁰⁹ Prior to the adoption of the ACHPR Protocol, the protection of rights guaranteed in the African Charter rested solely with the African Commission on Human and Peoples' Rights, a quasi-judicial body, modeled on the UN Human Rights Committee.¹¹⁰ This commission had no binding powers and its duties were limited to “examining state reports, considering communications alleging violations, and interpreting the Charter at the request of a State party, the OAU, or any organization recognized by the OAU.” This is hardly surprising because at the time of its enforcement, most African states were not democratic.

Another distinct feature of the ACHPR is that it could become the judicial arm of a plethora of human rights agreements concluded under the auspices of the United

¹⁰⁵ Ebow Bondzie-Simpson, A Critique of the African Charter on Human and People’s Rights,” *Howard Law Journal*, 662

¹⁰⁶ E.N.A. Kotey, “The African Charter On Human and Peoples’ Rights: An Exposition and, Analysis and Critique,” *University of Ghana Law Journal*, 662.

¹⁰⁷ Ebow Bondzie-Simpson, A Critique of the African Charter on Human and People’s Rights,” *Howard Law Journal*, 662

¹⁰⁸ Ebow Bondzie-Simpson, A Critique of the African Charter on Human and People’s Rights,” *Howard Law Journal*, 662

¹⁰⁹ The African Court of People’s and Human Rights < <http://www.pict-pecti.org/courts/ACHPR.html>> Accessed December 5, 2015.

¹¹⁰ *Id.*

Nations or of any other human rights instruments as a result of the broad jurisdictional authority the Protocol grants it.¹¹¹ In other words, actions may be brought before the Court on the basis of any instrument, including international human rights treaties, which have been ratified by the State party in question (Article 3.1). Furthermore, the Court can apply any relevant human rights instrument ratified by the State in question, in addition to the African Charter, as sources of law (Article 7).

Another peculiar feature of the ACHPR is the standing it gives individuals and NGOs to bring cases or issues before it. Like other judicial human rights systems, the Protocol allows for member states and AU organization have standing. However, unlike any other judicial body, NGOs, specifically, African NGO's can ask the ACHPR for advisory opinions, thus, expanding the scope of those who have standing before the court. With regards to issues relating to contentious jurisdiction, individuals can also bring cases before the court. This is a step forward from the Inter-American Court, where individuals have no standing at all, but it is still far from the progressive attitude of the new European Court of Human Rights.

CONCLUSION

The African Charter has several characteristics that are worthy of mention. The Charter, gives great importance to African cultural values and traditions and norms, thereby making it more broadly applicable to Africans. In addition the Charter places economic, social and cultural rights side by side in a binding instrument thus, highlighting the independence of these rights while emphasizing the right to development. The Charter is distinct because it is the first human rights instrument to include several provisions that deal with peoples' rights in a binding convention. It is also unique in that it recognizes the importance of individual duties and places it side by side with human rights.

The African Charter may be viewed as an acknowledgement that the social changes occurring in Africa requires a change in the way human rights issues are viewed. As such the Charter can be viewed as a response to those who have argued that traditional African society does not exist today in an unaltered form in comparison to pre-colonial times and as such human rights notions should apply in full force to the

¹¹¹ Id.

continent. Despite its limitations, the African Charter is an important and innovative African initiative. It is an important instrument because it was created by Africans to address the issues confronting them. As stated by one author the African Charter, “is not a case of African’s trying to show the West or North American’s how civilized they were but of African lawyers and social and political leaders grappling with the problems of achieving in Africa the quality of life that we all want”¹¹²

¹¹² CRM Dlamini, “Towards a regional Protection of human rights in Africa: The African Charter on Human and Peoples’ Rights, *Comparative International Law Journal South Africa*, 202.