

# THE IMPACT OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS AND THE PROTOCOL ON THE RIGHTS OF WOMEN ON THE SOUTH AFRICAN JUDICIARY

**Dissertation submitted in partial fulfilment of the requirements of the degree LLM (Human Rights and Democratisation in Africa)**

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**31 October 2011**

## Declaration

I, Ayalew Getcahew, declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other people's works have been used, they have been duly acknowledged.

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## **Dedication**

Dedicated to my beautiful wife, **Saeda Yusuf**. Without her help, inspiration and amazingly non-stop love this would not have happened. Honey, you are the one that I love beyond my heart. Thank you so very much for all what you have done for me and thank you for choosing to live with me, I am so proud of the person you have been.



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## List of Abbreviation

AU	African Union
CALS	Centre for Applied Legal Studies
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CGMHS	Central and Gauteng Mental Health Society
CHR	Centre for Human Rights
CLC	Community Law Centre
CLRDC	Community Law and Rural Development Centre
CoRMSA	Consortium for Refugees and Migrants in South Africa
CSAs	Civil Society Actors
DOJCD	Department of Justice and Constitutional Development
DRC	Democratic Republic of Congo
GCRC	Gauteng Children's Rights Committee
HURISA	Human Rights Institute of South Africa
IAC	Inter-Africa Committee
IBA	Independent Broadcasting Authority
LHR	Lawyers for Human Rights
NGOs	Non-Governmental organisations
OAU	Organisation of African Unity
SERP	Socio-Economic Rights Project
UDHR	Universal Declaration of Human Rights
UN	United Nations
WLC	Women Legal Centre

## Table of Contents

Declaration.....	i
Dedication.....	ii
Acknowledgments.....	iii
List of Abbreviations.....	iv
Table of Contents .....	v

### Chapter One

#### Introduction

1.1 Background .....	1
1.2 Statement of the problem.....	2
1.3 Research questions.....	3
1.4 Literature review.....	3
1.5 Objectives.....	5
1.6 Significance.....	5
1.7 Methodology.....	6
1.8 Limitations and key assumptions.....	6
1.9 Synopsis of the dissertation.....	6

### Chapter Two

#### Background on the African Charter on Human and Peoples' Rights and the Women's Protocol

2.1 Introduction.....	7
2.2 The African Charter on Human and Peoples' Rights: Background discussions.....	7
2.2.1 The African Charter: peculiar features.....	9
<i>Indivisibility of rights</i> .....	9
<i>The concept of peoples' rights</i> .....	10
<i>Individual duties</i> .....	12
2.2.2 Imperfections as to the Charter.....	13

2.3 Background on the Protocol to the African Charter on the Rights of Women.....	14
2.3.1 Justifications for the adoption of the Protocol.....	15
2.3.2 Provisions peculiar to the Protocol.....	17
2.4 Conclusion.....	20

### Chapter Three

#### **The impact of the African Charter on Human and Peoples' Rights and the Women's Protocol on the South African judiciary**

3.1 Introduction.....	21
3.2 The process of ratification of international instruments in South Africa.....	21
3.3 Domestication of international treaties: theoretical background.....	23
3.3.1 Legislative reforms after ratification of the African Charter and the Women's Protocol.....	25
3.4 The application of the African Charter and its Protocol on women's rights on the decisions of South African courts.....	27
3.4.1 The application of the African Charter in <i>S v Williams's</i> case.....	28
3.4.2 The application of the African Charter in <i>Ferreira v Levin NO and Others</i> case.....	29
3.4.3 The application of the African Charter in <i>Samuel Kaunda and others v President of the Republic of South Africa and others</i> .....	29
3.4.4 The application of the African Charter in <i>Bhe v Magistrate Khayelitsha</i> case.....	31
3.4.5 The application of the African Charter in <i>Richard Gordon Volks NO v Ethel Robinson and others</i> case.....	31
3.4.6 The application of the African Charter in <i>Dawood and another v Minister of Home Affairs and others</i> case.....	32
3.4.7 The application of the African Charter in <i>Hoffman v South African Airways</i> case	
3.4.8 The application of the African Charter in <i>Islamic Unity Convention v Independent Broadcasting Authority and Others</i> case.....	32
3.5 The impact of the African Charter and the Women's' Protocol on the courts' decisions.....	33
3.6 Conclusion.....	34

**Chapter Four**  
**Factors that enhance or impede the impact of the African Charter and the Women’s  
Protocol in South Africa**

4.1 Introduction.....	35
4.2 Factors that enhance the impact of the African Charter and the Women’s Protocol.....	35
4.2.1 The existence of progressive constitutional norms.....	35
4.2.2 The existence of pro-human rights CSAs.....	37
4.3 Factors which impede the impact of the African Charter and the Women’s Protocol in South African judiciary.....	40
4.3.1 Non-incorporation of the African Charter and the Women’s Protocol into the South Africa’s national law.....	41
4.3.2 Low level of awareness by the majority of the South African CSAs about the instruments.....	41
4.3.3 Low level of awareness by South African lawyers about the instruments.....	43
4.3.4 The existence of strong domestic normative frameworks.....	44
4.4 Conclusion.....	44



**Chapter Five**  
**Conclusion and Recommendations**

5.1 Conclusion.....	45
5.2 Recommendations.....	46
5.2.1 The role of South African courts.....	46
5.2.2 The role of the government and the Parliament.....	46
5.2.3 The role of South African CSAs.....	47
5.2.4 The role of South African lawyers.....	47
5.2.5 The role of the African Commission.....	47
Bibliography.....	49
Annex.....	59



# Chapter One

## Introduction

### 1.1 Background

The African Charter on Human and Peoples' Rights (the Africa Charter), which is one of the constituents of the African human rights system, was adopted by the Assembly of Head of States and Governments of the OAU in 1981 and entered into force five years later in 1986.<sup>1</sup> The African Charter covers a wider range of rights when compared to the other regional human rights instruments, such as the European and the Inter-American Human Rights Systems.<sup>2</sup> As many writers indicated, the Africa Charter is designed to reflect the history, values, traditions, and development of Africa by joining collective rights and individual duties.<sup>3</sup> The African Commission on Humans and Peoples' Rights (the Commission)<sup>4</sup> is responsible for the enforcement of the African Charter. Currently, the African Charter has been ratified by 53 countries. South Africa has signed, ratified and deposited the Charter on 09 July 1996.<sup>5</sup>

Though the African Charter provides protection for various rights and freedoms, with regard to the protection it accorded to women, it was considered insufficient. Therefore, an additional measure of protection was required. Hence, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (the Women's Protocol) was enacted and entered into force on 25 November 2005. This Protocol supplements the African Charter.<sup>6</sup> The Women's Protocol, among other things, 'seeks to bridge the gender gap by promoting gender equality, especially by removing discrimination in a variety of fields, and constitutes the most obvious demonstration of the AU's promotion of gender perspective'.<sup>7</sup> As many agreed, the adoption of this instrument is a big step in the protection of women's rights in Africa.<sup>8</sup>

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<sup>1</sup> R Murray *The African Commission on Humans and Peoples' Rights and international law* (2000) 10.

<sup>2</sup> F Viljoen, *International human rights law in Africa* (2007) 237.

<sup>3</sup> GJ Naldi 'Future trends in human rights in Africa: the increased role of the OAU' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* (2002) 25.

<sup>4</sup> The Commission was established to promote, protect and interpret the provisions of the Charter; See arts 30 & 45 of the African Charter.

<sup>5</sup> The African Commission documents available at [http://www.achpr.org/english/ratifications/ratification\\_african%20charter.pdf](http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf) (accessed on 18 June 2011).

<sup>6</sup> Art 65 of the African Charter provides special protocols may be adopted to supplement its provisions.

<sup>7</sup> M Evans, & R Murray 'The state reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans & Murray (eds) (n 3 above) 49.

<sup>8</sup> Issues such as polygamy (art 6(c)), domestic violence (art 4(2)) harmful practices against women such as female genital mutilation (art 5) women in armed conflicts (art 11) medical abortion (art 14 (2)(C)) and HIV/AIDS (art 14 (1)(d)); See Viljoen (n 2 above) 271; See notes available at [http://www.equalitynow.org/english/campaigns/african-protocol/african\\_protocol\\_en.html](http://www.equalitynow.org/english/campaigns/african-protocol/african_protocol_en.html) (accessed on 20 June 2011).

The Women's Protocol has been signed by 43 and ratified by 21 countries. South Africa has signed the protocol on 16 March 2004 and ratified it on 17 December 2004.<sup>9</sup>

## 1.2 Statement of the problem

The African human rights system (the African system), as it is established mainly by the African Charter, has faced a number of challenges. These challenges, in most cases, emanate from its implementation process. The African Charter, to a large extent, makes enforcement dependent on the discretion of national authorities;<sup>10</sup> as a result its impact is very minimal. The problem becomes worse with respect to the implementation of the Women's Protocol. The Women's Protocol was established to strength normative and structural frameworks for women's rights protection in Africa. But practically, one may not get a positive answer with regard to the question how far African states revealed 'practical and genuine commitment to the question of women's rights in concrete terms'.<sup>11</sup>

There are some factors which affect the effective implementation of the African Charter and the Women's Protocol in African countries generally and in South Africa particularly. Problems related to domestication, follow-up mechanisms, lack of information, lack of political will, failure to report to the African Commission, lack of implementing laws and weak institutions are among the challenges that adversely affect the implementation of the African Charter and the Women's Protocol.

South Africa has addressed many of the challenges which other African countries are also facing in relation to the African Charter and the Women's Protocol. As it is indicated above, South Africa has ratified both instruments; it also seems that there is a general compliance to human rights in the country. The country has also developed a strong human rights jurisprudence, mainly through its Constitutional Court, and in some of the decisions limited references have been made to the provisions of the African Charter and the Women's Protocol. The existence of various ranges of progressive laws and institutions also explains the country's endeavor to comply with human rights principles in general and the provisions of the African Charter and the Women's Protocol in particular.

However, there are still a number of challenges with regard to the implementation of the Africa Charter and the Women's Protocol in South Africa. These instruments are not very visible in legal discussions and hence professional groups and the public at large are not sufficiently aware of the

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<sup>9</sup> n 5 above.

<sup>10</sup> Naldi (n 3 above) 26.

<sup>11</sup> D Olowu 'A critique of the rhetoric, ambivalence and promise in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2006) 8 *Human Rights Review* 78 79.

instruments.<sup>12</sup> Specifically with regard to the actions and decisions of the South African judiciary, the impact of the African Charter and the Women's Protocol is quite limited, which can be explained by various factors. For instance, the judicial jurisprudence by the South African courts, including the Constitutional Court, on the application of the African Charter and the Women's Protocol is noticeably weak. South African judges, while they make extensive references to international laws and decisions of international tribunals, other than the African Commission, usually do not prefer to make references both to the African Charter and the Women's Protocol. Moreover, many lawyers in South Africa are not using these instruments and the decisions of the African Commission sufficiently in their briefings. These facts are reinforced by the limited involvement of South African Civil Society Actors (CSAs) in the advocacy and promotion of the African Charter and the Women's Protocol.

### **1.3 Research questions**

The problem statement informs the two main research questions of this dissertation, namely the extent of impact of the African Charter and the Women's Protocol on the South African judiciary; and the factors which facilitated or impeded the impact of such instruments on South African courts.

### **1.4 Literature review**

Dating the past 30 years since its establishment, a number of studies have been conducted on the African human rights system in general and the various normative instruments in particular. The contributions made by Murray, Haynes, Viljoen, Ouguergouz, Evans, Mbelle, and Okafor are very significant in this regard. Particularly, as he has discussed the impact of the African Charter on some African countries (South Africa included), Okafor's contribution in this respect is very crucial.<sup>13</sup>

With regard to the impact of the African Charter on the judicial decision making process in South Africa, Okafor discussed the constitutional privilege that South African courts have to apply international instruments in their decisions, and to what extent they have exploited this opportunity using the African Charter. Although, the African Charter has not yet been enacted into South African domestic law by national legislation, and as such not formally binding on South African courts, South African courts can use them for interpretation purpose. However, Okafor noted that 'there has not as yet been a surfeit of reference to the African Charter in South African judicial decisions'.<sup>14</sup> He also included a discussion on

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<sup>12</sup> Concluding observations and recommendations on the first periodic report of South Africa, African Commission, 38th ordinary sessions, 2005, available at [www.achpr.org](http://www.achpr.org) (accessed on 20 June 2011).

<sup>13</sup> OC Okafor *The African human rights system, activist forces, and international institutions* (2007) 155-219.

<sup>14</sup> Okafor (n 13 above) 156 & 157.

the impact of the Women's Protocol, but he limited the discussion to its impact on the executive organ of South Africa only.<sup>15</sup>

Similarly, discussing the application of the African Charter in domestic courts, Viljoen has also indicated the extent to which the African Charter has been applied in South Africa.<sup>16</sup> He has considered the extent of references made to the African Charter by South African Courts. Particularly, he discussed how the South African Constitutional Court made use of the African Charter in the famous *S v Makwanyane* case<sup>17</sup> (the *Makwanyane* case). He also further noted the references made to the African Charter in cases like *Ferreira v Levin*<sup>18</sup> (the *Ferreira* case) and *Case and Another v Ministry of Safety and Security*<sup>19</sup> (the *Ministry of Safety and Security* case). Yet, Viljoen came to the conclusion that the relative impact of the African Charter on South African courts is very minimal.<sup>20</sup>

There are also other general studies which have been done on the application and impact of international instruments in South Africa. For instance, in 2002, Heyns and Viljoen have produced a very detailed analysis of the impact of the United Nations (UN) human rights treaties on the domestic level. Accordingly, one of the sections of this book was dedicated to the case of South Africa.<sup>21</sup> However, the study focuses only on UN human rights treaties.

With respect to the Women's Protocol, many academicians, researchers and activists have produced detailed analysis of the Women's Protocol in terms of its historical relevance, justifications, scope and challenges. Others have also contributed on cross cutting issues. In this context one can refer to the contributions of Banda, Viljoen, Heyns, Murray, Karugonjo-Segawa, Gittleman, Davis, Rebouche, Van der Poll, Stefiszyn, Olowu and Mujuzi.

Most of these articles address questions related to how the Women's Protocol helps the protection of women's rights in Africa in different contexts. They also identify the challenges that the implementation of such an instrument is facing. However, most of these writings, if not all, focus only on the normative content of the protocol and its challenges of implementation in Africa in general.

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<sup>15</sup> Okafor (n 13 above) 178.

<sup>16</sup> F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 42 *Journal of African Law* 1 12.

<sup>17</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC).

<sup>18</sup> *Ferreira v Levin* 1996 1 SA 984 (CC).

<sup>19</sup> *Case and Another v Ministry of Safety and Security* 1996 3 SA 617.

<sup>20</sup> Viljoen (n 16 above) 12.

<sup>21</sup> C Heyns & F Viljoen *The impact of the United Nations Human Rights Treaties on the domestic level* (2002) 539.

It is clear from the above cursory review that most, if not all, of the literature on the African human rights system is limited to discussing either the normative aspect of its documents or its challenges in general. Almost none of them have focused only on the impact of the African human rights system, as it is articulated by the African Charter and the Women's Protocol, on the South African judiciary. It is true that some, like Okafor and Viljoen, have given considerable space to the impact of the Charter and the Protocol in South Africa. However, they draw their conclusions based on facts only from a limited number of sources. In addition, most of the research is dated, so they also failed to include some new aspects as it appears in the current South Africa.

This dissertation, therefore, addresses the shortcomings of the above literatures by widening the sources of information using different methodologies, including interviews. In addition, the dissertation gives a particular focus only to the impact of the African Charter and the Women's Protocol on the South African judiciary, which helps the research to be able to identify the extent of their impact more accurately.

### **1.5 Objectives**

The dissertation has the following objectives:

- 1 To identify whether the African Charter and the Women's Protocol have been domesticated into South African legislation and their application in South African courts;
- 2 To assess whether the African Charter and the Women's Protocol, or decisions of the African Commission, have been referred to in the decisions of South African courts; and
- 3 To identify the factors that enhance or impede the impact of the African Charter and the Women's Protocol in the decisions of South African courts.

### **1.6 Significance**

This research has paramount importance in that it seeks to identify the strengths and weaknesses of the implementation process of the African Charter and the Women's Protocol in South Africa. This helps both the South African government and the African Commission to identify areas in need of intervention for a better protection of human rights in the country. Particularly, the findings will help the South African judiciary in revising its appreciation of the African System in general and these instruments in particular.

## **1.7 Methodology**

The research employs both primary and secondary modes of data collection mechanisms. Accordingly, interviews have been conducted with lawyers, staff from CSAs and key academics.<sup>22</sup> As a secondary source, desk research has also been used. Accordingly, the researcher has reviewed various books, law reviews, proceedings, reports, speeches and judgments on the relevant points to the research.

## **1.8 Limitations and key assumptions**

Due to practical constraints, this dissertation has some limitations. First, as most of the interviews have been made through email exchanges and telephone calls, the information gathered is limited in scope. Moreover, due to space and time limitations, it was difficult to conduct interviews with all relevant persons in all the selected areas. Therefore, their opinions and positions have, in some instances, been retrieved from secondary sources. Secondly, due to a lack of availability of decisions of South African courts at the lower level, this dissertation bases its discussion mainly on the decisions of the Constitutional Court. Finally, due to the fact that the issue relates to the problem of implementation of the African Charter and the Women's Protocol, one can easily understand the existence of the problem without even making a detailed investigation of the subject. Therefore, the research makes an assumption as to the existence of the problem on the basis of the application of these instruments in all African countries, including South Africa.

## **1.9 Synopsis of the dissertation**

This dissertation has five parts. After giving the introductory remarks in this chapter, the second chapter addresses the general background on the African Charter and the Women's Protocol. Among other things, this chapter discusses the historical and legal justifications for the adoption of these two instruments. It also briefly explains some of the peculiar features of these instruments. The third chapter goes to the heart of one of the research questions: the impact of the African Charter and the Women's Protocol on the South African judiciary. The chapter mainly discusses the decisions of the South African Constitutional Court and tries to analyse the extent to which these instruments are referred to. Addressing the other research question, the fourth chapter, considers the factors that enhance and impede the impact of the African Charter and the Women's Protocol on the South African judiciary. Finally, the dissertation proposes some conclusions and recommendations in the fifth chapter.

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<sup>22</sup> To this effect, I have obtained an ethics clearance certificate from the University of Western Research Committee.

## **Chapter Two**

### **Background on the African Charter on Human and Peoples' Rights and the Women's Protocol**

#### **2.1 Introduction**

Systematic human rights protection in Africa has been neglected in many of the African states for long a time. Even the landmark legal and political document, the 1963 Charter of the Organisation of African Unity (OAU), did not give the necessary attention to the protection of human rights on the continent. It only made a subtle reference to the protection of human rights in its Preamble. When it comes to the protection of peoples' interests in the continent, the role of the OAU has been limited to only promoting unity and solidarity for a better life among the peoples of Africa, which eventually, managed to end colonialism on the continent. It was after the 1970s, particularly with the adoption of the African Charter, that the African system started to focus on the protection of human rights in addition to enhancing unity among member states. After this time, many regional human rights instruments have been adopted. Focusing only on the African Charter and its Protocol on Women's Rights, this chapter makes general remarks about these two instruments. Accordingly, the chapter has two main parts. The first part gives a general background on the drafting process, substantive contents and challenges of the African Charter. In its own part, the second section elaborates on the same issues in light of the Protocol on Women's Rights.

#### **2.2 The African Charter on Human and Peoples' Rights: Background discussions**

History shows that discussions leading to the formulation of the African Charter began as early as 1961 when the International Commission of Jurists convened the African Conference on the Rule of Law in Lagos, Nigeria. At the end of the Conference a resolution, commonly called the 'Law of Lagos', was adopted. This resolution, among other things, articulates the responsibility of the world legal order to devise a regime for the protection of individuals.<sup>23</sup> More importantly, the resolution invites African governments to study the possibility of adopting an African Convention of Human Rights which will be safeguarded by a creation of a court of appropriate jurisdiction.<sup>24</sup> Accordingly, in 1969, under the auspicious of the United Nations Division of Human Rights, a seminar has been organised in Cairo to study the possibility of the establishment of regional commissions on human rights with special reference

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<sup>23</sup> R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667 670.

<sup>24</sup> F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy* (1993) 20.

to Africa. After that, various seminars and conferences have been held which have discussed the possibility of establishing a regional human rights protection system in Africa.

These discussions culminated in the Monrovia Seminar on the establishment of Regional Commissions on Human Rights with Special reference to Africa organised in 1979 under the auspices of the United Nations.<sup>25</sup> This seminar's final result was the Monrovia Proposal for the Setting up of an African Commission on Human Rights (the Monrovia Proposal). As Gittleman states, the Monrovia Proposal was intended to serve as a model for an African Convention on Human Rights. Yet the Monrovia Proposal failed to embody a wide range of protections. Due to this, the experts meeting in Dakar in 1979 rejected the provisions of the Monrovia Proposal and attempted to create a uniquely African document more responsive to African needs.<sup>26</sup> This continuous effort hit its target in 1979 when the Heads of States of African countries, at its 16<sup>th</sup> Ordinary Session in Liberia, requested the Secretary General of the OAU to convene a meeting of government experts to prepare a preliminary draft of an African Charter on Human and Peoples' Rights.<sup>27</sup> Accordingly, the African Charter, which is one of the constituents of the African Human Rights System, was adopted by the Assembly of Heads of States and Governments of the OAU in June 1981 in Nairobi, Kenya and entered into force five years later in 1986.<sup>28</sup> Currently all Member States of the AU, but for the newly created Southern Sudan, have ratified the African Charter.

The Charter is designed to reflect the history, values, traditions, and development of Africa. Though the African Charter is the main constituent of the African regional human rights system, it is important to note the fact that there are also other significant treaties that establish the system. Such as the African Charter Governing Specific Aspects of the Refugee Problem in Africa of 1969 which entered into force in 1974; the African Charter on the Rights and Welfare of the Child of 1990 which entered into force in 1999; the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights of 1998 which entered into force in 2004; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, of 2003 which entered into force in 2005.<sup>29</sup>

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<sup>25</sup> Gittleman (n 23 above) 672.

<sup>26</sup> Gittleman (n 23 above) 673.

<sup>27</sup> Briefing to the Parliamentary portfolio committee on Justice and Constitutional Development: available at <http://www.pmg.org.za/docs/2004/appendices/040805briefing.htm> (accessed on 20 August 2011).

<sup>28</sup> R Murray, *The African Commission on Humans and Peoples' Rights and international law* (2000) 10.

<sup>29</sup> D Olowa 'The regional system of protection of human rights' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 14.



### **2.2.1 The African Charter: peculiar features**

The African Charter has three main parts. The two chapters of Part I deal with rights and duties to be protected under the Charter; while Part II composed of four chapters dealing with the measures to safeguard the rights articulated in Part I. Finally, Part III establishes general provisions concerning the commencement of the African Commission on Human and Peoples' Rights. In all these provisions, the African Charter prescribes various innovative and progressive normative standards which enhance the protection of human rights in Africa. Though most of the provisions may have their own addition to the regional human rights system, many writers, however, identify the following three concepts as the main peculiar nature of the instrument. These are the indivisibility of rights, the concept of people's rights, and individual duties.<sup>30</sup>

#### ***Indivisibility of rights***

With regard to the inclusion of socio-economic rights in the corpus of the African Charter, participants of the conferences from different sides came to the conclusion that as in the case of civil and political rights, socio-economic rights also need particular attention. Particularly, the group from the Butare Colloquium asserted the fact that despite the situation in Africa, considering socio-economic rights as inferior rights cannot be justified, as a result a wide range of socio economic rights, including third generation rights, have been included in the African Charter with an equal status to civil and political rights.<sup>31</sup>

The African Charter has avoided this categorization and included all the rights in one document. In addition to the wide range of protection it accorded to civil and political rights, the African Charter also includes socio economic rights and third generation rights. The fact that these rights have been included in one document has an obvious implication on their justiciability. As Viljoen puts it, 'one of the most far-reaching consequences of this development is that socio-economic rights are unequivocally justiciable as any of the other rights in the Charter'.<sup>32</sup>

Understanding the spirit of the African Charter in this regard, the African Commission has also established jurisprudence in entertaining all rights as justiciable rights. Going through the decisions of the Commission, one can understand the indivisibility of civil and political rights and socio economic rights.

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<sup>30</sup> Viljoen (n 2 above) 237.

<sup>31</sup> C Mbazira 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6 *African Journal of Human Rights* 333 337.

<sup>32</sup> Viljoen (n 2 above) 237.

It is true that the focus of most of the cases is on civil and political rights; however, there are also a considerable number of communications based on socio-economic rights.

For instance, in *Free Legal Assistance Group and others v Zaire*,<sup>33</sup> one of the allegations against the government of Zaire was that it had failed to provide basic services, including health care services and education, which are part of socio-economic rights. In its decision, the Commission based its remedies on articles 16 and 17 of the African Charter. Similarly, in the case of *Malawi African Association and Others v Mauritania*<sup>34</sup> the Commission has also considered violations of the provisions of the African Charter in relation to several socio economic rights, including the right to property, the right to work, the right to cultural life and the right to health. Moreover, issues related to the right to health were at the centre of the decision of the Commission in *Purohit and Another v The Gambia*.<sup>35</sup>

Similar observations can be made regarding cases like the *Social and Economic Rights Action Centre and Another v Nigeria*,<sup>36</sup> where the Commission found violations of the provisions of the African Charter in relation to the right to health and clean environment, and in *Centre for Minority Rights Development on behalf of the Endorois Community v Kenya*,<sup>37</sup> where the African Commission found the right to development had been violated.

All these communications and decisions on socio-economic and third generation rights clearly indicate that the African regional human rights system as it is mainly guaranteed through the provisions of the African Charter has avoided the historical classification of rights into different groups and entertains all rights as potentially justiciable.

### ***The concept of peoples' rights***

Unlike any other regional and international instrument, the African Charter has included the concept of peoples' rights. The word 'people' has never been defined during the drafting process of the document. Some writers indicate that the absence of a clear definition of the word is an intentional omission, which is done to avoid controversy.<sup>38</sup> The concept has been included as a response to the interest of some of the socialist oriented African countries. Quoting Peter Onu (the Secretary General of the OAU at the time of the drafting of the African Charter), Quashingah stated that the concept Peoples came about as a

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<sup>33</sup> *Free Legal Assistance Group and others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

<sup>34</sup> *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

<sup>35</sup> *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

<sup>36</sup> *Social and Economic Rights Action Centre and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>37</sup> Communication No. 276/2003, *Centre for Minority Rights Development on behalf of the Endorois Community v Kenya*.

<sup>38</sup> Viljoen (n 2 above) 243.

compromise between the capitalist oriented and socialist oriented governments of the time. According to Onu,<sup>39</sup>

[t]he Charter itself is a compromise of the differing views of African States on the concept of Human Rights. Given the different political systems in Africa, those states with socialist orientation who see a similarity in their system with the communalistic way of life of the African insisted on spelling out 'collective' rights in the Charter hence the addition of Peoples' Rights. They argued that since in Africa, man is part and parcel of the group, individual rights could be explained and justified only by the rights of the community.

Though the word has been left undefined during the drafting process, the Commission has attaching different meanings to it in different cases. For instance, in *DRC v Burundi, Rwanda and Uganda*,<sup>40</sup> the Commission used the phrase 'Congolese peoples' rights' and 'the rights of the people' of Congo interchangeably. In this sense the word is applied to mean 'everyone within a state'.<sup>41</sup> The word can also imply 'distinct minority groups, such as linguistic, ethnic, religious or other groups sharing common characteristics, constituting of individuals who are usually inhabitants of the same state'.<sup>42</sup>

Ouguergouz states that although there is no clear definition of the words 'peoples' in the African Charter, it can be defined either by making references to certain indicators in the Charter itself or by making inferences.<sup>43</sup> For instance, as it is used in Article 23(2)(b) of the African Charter, the word 'people' can be taken as to mean the sum of the national of a state. Furthermore, the way it is used in Article 20(2) of the African Charter may indicate that the Charter uses the word to denote entities under colonial or racial domination.<sup>44</sup>

As it is indicated by many writers and even the decisions of the Commission, the word 'people' can imply different groups depending on the different cases that it is trying to address. For instance, in relation to the right to self-determination it is more likely for the word 'people' to imply a small group of persons who possess the right to political self-determination, rather than to mean all persons within a state.

The rights which can be regarded as peoples' rights in the African Charter are; the rights of all peoples to be equal and not to be dominated by another group,<sup>45</sup> the right to self-determination, the right to

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<sup>39</sup> K Quashingah 'The peoples' rights in the African Charter on Human and Peoples' Rights: Assessment of their revolution and impact in human rights jurisprudence' a paper presented at the Centre for Human Rights (July 2011) 2.

<sup>40</sup> Communication 227/1999, *DRC v Burundi, Rwanda and Uganda* 20th annual activity Report, paras 87 & 95.

<sup>41</sup> Viljoen (n 2 above) 243.

<sup>42</sup> As above.

<sup>43</sup> Ouguergouz (n 24 above) 205.

<sup>44</sup> Ouguergouz (n 24 above) 207.

<sup>45</sup> Art 19 of the African Charter.

equal enjoyment of the common heritage of mankind,<sup>46</sup> the right to development<sup>47</sup> the right to freely dispose their natural resources, the right to international peace and security,<sup>48</sup> and the right to a generally satisfactory environment.<sup>49</sup>

### ***Individual duties***

International and regional human rights systems usually focus on state duties. Unlike this tradition, the African Charter further imposes duties on individuals. As stipulated in articles 27-29, the African Charter has included the duties of individuals towards other individuals, towards his or her families, towards the community, towards the state to which he or she a national to, and towards the African and international community. Incorporating the African cultural values, it is regarded that the African Charter's articulation of an individual's duties is further indication of its attempt to balance cultural relativism with universalism in human rights.

However, such an inclusion of individual duties is not far from criticism. Some argue that this imposition of duties on the individual may lead to a flawed interpretation to legitimization of state power to override individual rights. However, as Sloth-Nielsen and Mezmur indicate, these fears and concerns, while sometimes understandable, are often flawed and exaggerated. The violation of human rights in Africa has not been anchored in the notion of duties; rather, 'the most enduring causes of human rights abuse in Africa are social stratification and the consolidation of political power in the hands of a small ruling class'.<sup>50</sup>

The fact that the African Charter includes an innovative and unique form of protection for a wide range of rights, should not give the reader an impression that it is a perfect document. There are still some rights which are omitted and provisions which could be interpreted in a way that they can unreasonably restrict the application of the other rights. Therefore, this section should not end without reflecting on some of these substantive shortcomings of the Charter.

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<sup>46</sup> Art 22 of the African Charter.

<sup>47</sup> Art 22 of the African Charter.

<sup>48</sup> Art 23 of the African Charter.

<sup>49</sup> Art 24 of the African Charter.

<sup>50</sup> J Sloth-Nielsen & B Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 159 166.

## 2.2.2 Imperfections as to the Charter

With no doubt the African Charter, as a timely answer to address the plight of the African continent, it provides a wide range of protection for various rights. However, there are still omissions with regard to some of the rights. Particularly, in comparing the African Charter with its regional counterparts, like the European and American Conventions, the African Charter fails to incorporate some provisions. For instance, unlike Article 11(2) and (3) of the American Convention and Article 8 of the European Convention, the African Charter does not mention the right to respect for private life; moreover, different from Article 17(3) of the American Convention, it also fails to include the right to the free choice of spouse. Similarly, contrary to Article 12(1) and (2) of the American Convention and article 9 of the European Convention, the Charter fails to incorporate the rights to change religion; and unlike Article 4(2) and (6) of the American Convention, the African Charter does not contain any restriction on the imposition of the death penalty.<sup>51</sup>

Moreover, the fact that the African Charter lacks a general limitation clause has been indicated as the major flaw of the instrument.<sup>52</sup> It is a general knowledge that there are various justified circumstances for governments to suspend rights for the sake of a greater interest. But general limitation clauses usually set strict guidelines, including derogable and non-derogable rights, which must be adhered in cases of suspending rights. The African Charter does not have such clause. But as many agree, when the drafters of the African Charter omitted this clause, it is not practical to imagine that their intention was to prohibit limitation of rights in general.<sup>53</sup> To fill this gap some assigned this role to Article 27(2), which reads ‘the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest’. This may create an obstacle to the way in which the African Charter deals with restrictions on all rights. If there is no guideline as to how rights should be limited, that may expose the rights to an arbitrary mode of restrictions by government actors. As Heyns asserts, ‘a well-defined system of limitations is important...a society in which rights cannot be limited will be ungovernable, but it is essential that appropriate human rights norms be set for the limitations’.<sup>54</sup>

A further problem is that the African Charter does not contain any reference to derogation in times of emergency. This has been interpreted by the Commission to mean that the African Charter does not allow derogation under any circumstances, even during a properly declared, genuine state of emergency.<sup>55</sup> As the Commission stated: ‘The African Charter, unlike other human rights instruments, does not allow

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<sup>51</sup> Ouguergouz (n 24 above) 60.

<sup>52</sup> C Heyns ‘The African regional human rights system’ (2004) 108 *Pennsylvania State Law Review* 692 692.

<sup>53</sup> Ouguergouz (n 24 above) 62.

<sup>54</sup> Heyns (n 52 above) 688.

<sup>55</sup> Communication 70/92, *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, para 21.

for state parties to derogate from their treaty obligations during emergency situations, thus even a civil war in Chad cannot be used as an excuse by the State violating or permitting violation of rights in the African Charter.<sup>56</sup>

The omission of a derogation clause may have a positive contribution to the protection of human rights. However, as Viljoen noted, ‘it puts the Charter at odds with the domestic constitutional law of many sub-Saharan African countries, as well as with some of their international law obligations’.<sup>57</sup> Heyns also holds the view that the absence of derogation clause in the African Charter is really problematic. As of Heyns, in cases of real emergencies, the African Charter does not play any restraining influence on states in respect of the way in which the operation of the rights in question is suspended.<sup>58</sup>

Prior to concluding the discussion on the African Charter and proceed to the Women’s Protocol, it is necessary to indicate the other problematic area of the African Charter, namely the inclusion of what is called the ‘claw-back’ clauses.<sup>59</sup> Such clauses basically make implementation of the rights dependent on the national laws. Considering the danger of these claw-back clauses, Bondzie-Simpson states that ‘these clauses seriously emasculate the effectiveness of the African Charter as well as its uniform application of member states’.<sup>60</sup> In filling this gap, the African Commission has held that provisions in articles that allow rights to be limited ‘in accordance with law’ should be understood to require such limitations to be done in terms of domestic legal provisions, which comply with international human rights standards.<sup>61</sup>

### **2.3 Background on the Protocol to the African Charter on the Rights of Women**

The idea of establishing the Women’s Protocol was first introduced in a seminar organised by the African Commission, which was held in Lome, Togo in 1995. Taking the recommendations from the various CSAs in the seminar, the African Commission submitted a suggestion for the creation of a framework on a women’s protocol to the OAU Heads of State which then was approved at the 31<sup>st</sup> Ordinary Session, which took place in June 1995 in Addis Ababa.<sup>62</sup>

Immediately after the approval, the Commission has started drafting the Women’s Protocol. While the Commission was in the process of drafting the Women’s Protocol, the Inter-Africa Committee

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<sup>56</sup> n 55 above para 49; See Viljoen (n 2 above) 252.

<sup>57</sup> Viljoen (n 2 above) 251.

<sup>58</sup> C Heyns ‘The African human rights system: in need of reform?’ 6 (2002) *African Human Rights Law Journal* 155 161.

<sup>59</sup> E Bondzie-Simpson ‘A critique of the African Charter on Human and Peoples’ Rights’ (1988) 31 *Howard Law Journal* 643 660.

<sup>60</sup> As above.

<sup>61</sup> Communication 152/ 1996 *Media Rights Agenda & Others v Nigeria*, para 66.

<sup>62</sup> K Davis ‘The emperor is still naked: Why the Protocol on the Rights of Women in Africa leaves women exposed to more discrimination’ (2009) 42 *Vanderbilt Journal of Transitional Law* 949 659.

on Traditional Practices Affecting the Health of Women and Girls (IAC) also initiated a Draft Convention on traditional practices affecting the fundamental rights of women and girls. In order to avoid duplication, the then Secretary General of the OAU decided that the Draft Protocol and the Draft Convention should be merged into one document. A meeting of the Commission, IAC and the Women's Unit took place from 24 to 26 July 2000, in Addis Ababa. The outcome of this meeting is the merged document called 'the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa'.<sup>63</sup>

The Draft Protocol was first discussed at a Meeting of Experts, which was held from 12-16 November 2000 in Addis Ababa. It has been noted that the Meeting of Experts adopted almost 90 per cent of the provisions of the Draft Protocol. Only a few issues, notably those regarding polygamy and the monitoring and enforcement of the Protocol, remained contentious issues. The 2<sup>nd</sup> Ordinary Session of the Assembly that met from 10 – 12 July 2003, in Maputo, adopted the Draft Protocol as agreed by Member States in Addis Ababa and appeals to all Member States to sign and ratify this important instrument.<sup>64</sup>

### **2.3.1 Justifications for the adoption of the Protocol**

Different scholars view the rationale behind the establishment of this instrument from different angles. For instance, taking the variety of protection of women's rights provided both in international and regional instruments, some assert that the Women's Protocol is adopted just as response to the problem of enforcement of such rights. Taking this position, Viljoen states that 'the Protocol should not be viewed as correcting normative deficiencies in international human rights law dealing with women's rights, but rather as a response to the lack of implementation of these norms'.<sup>65</sup> This may give sense particularly in reference to what the document itself describes in its Preamble. Paragraph 11 of the Women's Protocol states that the Protocol was adopted to address the concern that 'despite the ratification of the African Charter and other international human rights instruments by the majority of the states...women in Africa still continue to be victims of discrimination and harmful practices'.

Others, like Karugonjo-Segawa, regard the document mainly as response to the inadequacy of the protection of women's rights provided in international and regional instruments.<sup>66</sup> In my opinion, taking a radical position on this issue may not help us to understand the whole range of justifications which lead to the adoption of this important instrument. It is true that African women have been suffering from different

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<sup>63</sup> As above.

<sup>64</sup> The status of the Protocol available at <http://www.pmg.org.za/docs/2004/appendices/040805notes.htm> (accessed 22 August 2011).

<sup>65</sup> F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11 17.

<sup>66</sup> R Karugonjo-Segawa *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women* (2005) 5.

kinds of human rights violations in spite of the fact that different international and regional instruments have been adopted and ratified by many African countries. As Maiga, Special Rapporteur on the Rights of Women in Africa stated, states despite the existence of a wide range of protection of women's rights, there are still disparities between girls and boys in relation to access to education and inequalities continue to be tolerated and maintained in the Family and in the work place.<sup>67</sup>

However, considering the various instruments, one can easily understand that enforcement was not the only challenge with regard to the protection of women's rights in Africa. For instance, it has been noted that in the African Charter, women's rights are barely mentioned in one paragraph. It is only Article 18 which expressly addresses the concern of women in light of family, tradition, morality, children and people with impairments. It is clear that the most important concern of Article 18 is the family. In addition, it has been noted that the African Charter should be inspired by the virtues of African tradition and the values of African civilization, which in most cases does not recognise the role of the woman in the traditional African family.<sup>68</sup> Here one might argue that as women are also human beings they can benefit from the other provisions of the African Charter. However, this argument is not in line with the concept of 'women's human rights' which refers to both the rights of women as human beings and to the rights of women as women.<sup>69</sup> The idea that 'women's rights are human rights' was articulated in the UN World Conference on Human Rights held in Vienna in 1993. The Vienna Declaration and Program of Action, which is the product of the conference, states that; 'the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights'.<sup>70</sup> This concept reflects the fact that men and women have very different experiences, and the fact that women and girls often face gender-based discrimination that puts them at increased risk of poverty, violence, ill health and a poor education, and therefore, the concept enables women to define and articulate the specificity of the experiences in their lives.<sup>71</sup>

Therefore, it is warranted to conclude that the adoption of the Women's Protocol is an attempt to address both the problem of enforcement of women's rights and the inadequacies of the African Charter.

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<sup>67</sup> Inter Session Report by Special Rapporteur on the Rights of Women in Africa 49th Session of the African Commission on Human and Peoples Rights available at <http://www.achpr.org/english/Commissioner%27s%20Activity/49th%20OS/Commissioner/MAIGA.pdf> (accessed on August 20 2011).

<sup>68</sup> The Protocol remedies this problem by clearly stating that the African values are to be based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy; See para 4 of the preamble of the Women's Protocol.

<sup>69</sup> E Friedman 'Women's rights: the emergence of a movement' in J Peters and A Wolper (eds) *Women's rights: International feminist perspective* (1995) 18.

<sup>70</sup> Sec 1(18) of the Vienna Declaration and Program of Action A/CONF.157/23, 1993.

<sup>71</sup> Women's human rights: An introduction available at <http://www.cwgl.rutgers.edu/globalcenter/whr.html> (accessed on 19 October 2011).



### 2.3.2 Provisions peculiar to the Protocol

A worldwide endeavor has been made to address the aged plight of women in many respects. Many basic instruments are created to govern a wide range of women's rights. These instruments range from the United Nations Charter's (the UN Charter) endorsement of the equal rights of men and women, to the Universal Declaration of Human Rights (UDHR) and subsequent international treaties and declarations on human rights. Making the promotion and protection of women's rights their central concern, many conferences have also been held and declarations and program of actions have been formulated. These include, the World Conference on Human Rights and Program of Action (the Vienna Declaration of 1993), the Cairo Conference on Population and Development (the Cairo Declaration of 1994), the Fourth World Conference on Women (the Beijing Declaration of 1995) are the main ones. In its promotional works, the UN has also assigned the United Nations Decade for Women, from 1976 – 1985.<sup>72</sup>

However, most of these international documents and conferences fail to adequately address the challenges in the daily reality of the lives of millions of women in Africa. The problems of African women cover a wide area of social, political and economic life. It ranges from access to land and commercial credit, to employment, labor and training, to health, reproductive and family life, to equal participation in governance and development processes.<sup>73</sup> Therefore, the Women's Protocol comes in to the arena of protection of women's in Africa with a desire to formulate a viable treaty framework that will meet these challenges of the socio-cultural peculiarities in Africa. Accordingly the Protocol addresses issues like gender based violence, harmful cultural practices, early marriage, widow rights, property inheritance and reproductive health rights.

For instance Article 5 provides for the elimination of harmful traditional practices, including female genital mutilation, against women.<sup>74</sup> Under this Article, states are obliged to prohibit and condemn all harmful practices that negatively affect the human rights of women and are contrary to recognized international standards. Moreover, the Women's Protocol also provides for women's rights regarding marriage in Articles 6 and 7. The minimum age of marriage for women is fixed at 18 years, to prevent the prevalent practice of early marriage in some African communities.<sup>75</sup> Furthermore, during marriage, a woman has the right to acquire her own property and to administer and manage it freely.<sup>76</sup> This, as Ebeku rightly points out, reverses the situation under most African customs where women, regarded as perpetual

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<sup>72</sup> At this point it also important to note the fact that the African Women's Decade, which spans from 2010- 2020, has also been launched in October 2010.

<sup>73</sup> D Oluwa 'A critique of the rhetoric, ambivalence, and promise in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' (2006) 8 *Human Rights Review* 78 80.

<sup>74</sup> Art 5(b) of the Women's Protocol.

<sup>75</sup> Art 6(b) of the Women's Protocol.

<sup>76</sup> Art 6(j) of the Women's Protocol.

minors and having no separate identity from their husbands, could not acquire or hold any property in their own name.<sup>77</sup>

Furthermore, according to most customary laws in Africa, a woman becomes part of the estate of her deceased husband upon his death to be inherited by his bothers. In other words, a widow has no choice but to marry another member of her deceased husband's family appointed to her by the family. Responding to the violation of the rights of women embodied in such practice, Article 20© provides that a widow shall have the right to remarry any person of her choice. Moreover, under Article 21(1) of the Women's Protocol, a widow has the right to an equitable share in the inheritance of her husband's property. It is also remarkable that the Women's Protocol revises the custom of several African communities that deny inheritance rights to female children, by providing that women and men have the right to inherit, in equitable shares, their parents' properties.<sup>78</sup>

The other innovative part of the Women's Protocol is the way it approaches the issue of the rights to health and reproductive rights of women.<sup>79</sup> Article 14 provides various rights in relation to health and reproductive rights of women in Africa. These rights include, the right to control their fertility,<sup>80</sup> to decide whether to have children (or the number and spacing of children),<sup>81</sup> to choose any method of contraception,<sup>82</sup> to self-protection and protection against sexually transmitted infection,<sup>83</sup> to be informed of their health status and of the health status of their partners,<sup>84</sup> and the right to family planning education.<sup>85</sup> Moreover, states should take all appropriate measures to protect the reproductive rights of women by authorizing abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the unborn child.<sup>86</sup>

Including these and other important provisions which are directly linked to address the real challenges of African women, the Women's Protocol is playing a significant role in enhancing women's rights in the continent. However, the envisaged realization of women's rights has not yet been achieved mainly due to the enforcement challenges that the Women's Protocol is facing.

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<sup>77</sup> KSA Ebeku 'Considering the Protocol on the Rights of Women in Africa' (2006) 36 *Africa Insight* 24 25.

<sup>78</sup> Art 21(2) of the Women's Protocol.

<sup>79</sup> F Randa 'Blazing a trail: the African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72 80.

<sup>80</sup> Art 14(1)(a) of the Women's Protocol.

<sup>81</sup> Art 14(1)(b) of the Women's Protocol.

<sup>82</sup> Art 14(1)(c) of the Women's Protocol.

<sup>83</sup> Art 14(1)(d) of the Women's Protocol.

<sup>84</sup> Art 14(1)(e) of the Women's Protocol.

<sup>85</sup> Art 14(1)(f) of the Women's Protocol.

<sup>86</sup> Article 14(2)(c) of the Women's Protocol.

A very important institution for the enforcement and implementation of the Women's Protocol is the African Court on Human and Peoples' Rights (the Protocol to the African Court).<sup>87</sup> Article 27 of the Women's Protocol gives jurisdiction to the African Human Rights Court in 'matters of interpretation arising from the application or implementation of the Protocol'. Accordingly, non-governmental organisation with an observer status before the African Commission and individuals may bring cases before this court based on violations of any of the provisions of the Women's Protocol.<sup>88</sup> However, this is subject to Article 34(6), which provides that at the time of ratification of the African Human Rights Court Protocol or at any time thereafter, the state shall accept the competence of the African Human Rights Court to receive cases. This Article clearly creates a challenge to the enforcement and implementation of the Women's Protocol as it might make implementation impotent.<sup>89</sup>

The other challenge surrounding the Women's Protocol is an issue of state reporting. It has been stated that the confusion and ambiguity with regard state reporting obligation under the Women's Protocol significantly undermines the Commission's effort to monitor the implementation of the instrument.<sup>90</sup> With regard to state reporting under the Charter, the Commission, shortly after the coming into force of the instrument, has adopted a Guideline on State Reporting.<sup>91</sup> However, despite the fact that Article 26 of the Protocol requires each state party to submit their reports to the Commission, the form which state reports under the Women's Protocol should take has never been clear and no consistent practice has been established for a long time.

It was only after the Gender Experts Meeting in Pretoria in 2009 that this issue has become clearer. The Centre for Human Rights at the University of Pretoria organised and hosted the Gender Experts Meeting on State Reporting on the Protocol on the Rights of Women in Africa, which was held from 6 to 7 August 2009, with the primary aim of drafting reporting guidelines for reports under the Women's Protocol.<sup>92</sup> Duly considering the importance of such document, the Commission has adopted the Guidelines in its 46<sup>th</sup> ordinary session in 2009. Now it is hoped that the obligation of state reporting will be taken more seriously by states parties, not only as an indication of commitment to implementing the Women's Protocol's provisions, but as a sincere attempt to promote and protect the rights of women.

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<sup>87</sup> Adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso, on 9 June 1998 OAU/LEG/MIN/AFCHPR/PROT (111), and came into force on 25 January 2004.

<sup>88</sup> Art 5(3) of the Protocol to the African Court.

<sup>89</sup> Ebeku (n 77 above) 32.

<sup>90</sup> J Biegon 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria Gender Expert Meeting, 6 - 7 August 2009' (2009) 9 *African Human Rights Law Journal* 615 616.

<sup>91</sup> General Guidelines Relating to the Form and Content of State Reporting, adopted at the 4th ordinary session of the Commission held in October 1988.

<sup>92</sup> Biegon (n 90 above).

## 5.2. Conclusion

As it can be inferred from the discussion in this chapter, both the African Charter and the Women's Protocol, with all their shortcomings, are playing a great role in the broader spectrum of Africa's regional human rights system. As the main focus of this dissertation is to evaluate their impact on the actions and decisions of the South African judiciary, the next chapter provides a detailed discussion in this regard.



## Chapter Three

# The impact of the African Charter on Human and Peoples' Rights and the Women's Protocol on the South African judiciary

### 3.1 Introduction

The actual impact of the African Charter and the Women's Protocol should be measured against the level of their influence on national institutions and their ability to result in practical changes in the lives of people in member states. It has been years now since South Africa acceded to the African Charter and ratified the Women's Protocol. Therefore, it is reasonable to expect a significant impact of this human rights system both on the governmental and non-governmental organs. Focusing on one of the main state organs, the judiciary, this chapter examines the extent of accuracy of this expectation in the light of the actions of the South African judiciary. The chapter answers the question to what the extent the South African courts have made reference to the provisions of the African Charter and the Women's Protocol, and whether these references have had any impact on the judgments. However, before directly proceeding to this discussion, the chapter briefly discusses the process of ratification of international treaties in the 1996 Constitution of the Republic of South Africa. As the application of international treaties through domestic courts is highly dependent on the position of international treaties in the country's legal system, issues related to domestication of the African Charter and the Women's Protocol in South Africa will also be explained.

Accordingly, this chapter has three parts. After giving a general background on the process of ratifications of international treaties with reference to the African Charter and the Women's Protocol in the first part, the second part the discusses domestication of the African Charter and the Women's Protocol into the corpus of the South African national laws. The third part, as the main concern of this chapter, presents a discussion the impact of the African Charter and the Women's protocol on the decisions of the judiciary in South Africa.

### 3.2 The process of ratification of international instruments in South Africa

Prior to 1994, in South Africa, it was the executive which enjoyed the exclusive treaty-making power.<sup>93</sup> As Michie states, 'the power to negotiate and conclude treaties, as well as the power to express the final

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<sup>93</sup> NJ Botha & M Wiechers *South African year book of international law* (2005) 17.

consent of the state to be bound, vested in the head of state, who exercised this authority through ministers and officials'.<sup>94</sup> However, the current Constitution has made significant changes in distributing the treaty-making power between the legislature and the executive. Section 231 of the 1996 Constitution of the Republic of South Africa (the 1996 Constitution) and Chapter 5 of the Practical Guide and Procedures for the Conclusion of Agreements by the Office of the Chief State Law Advisor (Guideline for Conclusion of Agreements) discuss this issue in detail.<sup>95</sup> According to the 1996 Constitution, while negotiating and signing of international agreements is the responsibility of the national executive,<sup>96</sup> the Parliament takes the responsibility of enacting these agreements into law by a national legislation so that they become law in the republic.<sup>97</sup>

Section 231 of the 1996 Constitution stipulates two frameworks for conclusion of agreements: first the framework that applies to international agreements that requires ratification or accession in order to be brought in to effect;<sup>98</sup> and second the framework that applies to international agreements that merely requires the signature of a duly authorized representative of a state party to come into effect.<sup>99</sup> Here, a question arises as to which agreements require parliamentary approval in terms of section 231(2) of the 1996 Constitution. The Guideline for Conclusion of Agreements lists such treaties which require parliamentary approval in terms of section 231(2) of the 1996 Constitution. These include: treaties that require ratification or accession (usually multilateral agreements); treaties that have financial implications that require an additional budgetary allocation from parliament; and treaties that have legislative or domestic implication.<sup>100</sup>

Both the African Charter and the Women's Protocol fall under the group of treaties that require ratification or accession. Accordingly, South Africa has acceded to the African Charter on 9 July 1996 through 'a letter of adherence' signed by the then Minister of Foreign Affairs, Alfred Nzo.<sup>101</sup> The Parliament has also ratified the document on the same date. Similarly, the Women's Protocol has also been ratified by the South African Parliament on 17 December 2004.

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<sup>94</sup> As above.

<sup>95</sup> Practical Guide and Procedure for the Binding of Agreements available at [http://www.dfa.gov.za/foreign/bilateral/conclusion\\_agreement1014.pdf](http://www.dfa.gov.za/foreign/bilateral/conclusion_agreement1014.pdf) (accessed 17 August 2011).

<sup>96</sup> Sec 231(1) of the 1996 Constitution.

<sup>97</sup> Sect 231(4) of the 1996 Constitution.

<sup>98</sup> Sec 231(2) of the 1996 Constitution.

<sup>99</sup> Sec 231(3) of the 1996 Constitution.

<sup>100</sup> n 95 above.

<sup>101</sup> The document is available with the researcher.

### 3.3 Domestication of international treaties: theoretical background

Before I directly proceed to addressing the application of the African Charter and the Women's Protocol in South African courts, it is crucial to discuss domestication of such instruments as that directly affects the use of international laws in judicial decisions. From the international law perspective, treaties will have a binding effect on states upon ratification by the government. Domestication, therefore, is required only for the purpose of application of international laws at the national level. Domestication, therefore, refers to the process of incorporating the provisions of the international treaties in a particular country's national law. Theoretically, the way international laws are domesticated depends on the legal system of the respective country. Accordingly, there are two schools of thought in this regard: the monist school and the dualist school.

The monist school, as articulated mainly by Kelsen, Verdross and Scelle, states that international law and municipal law must be regarded as manifestations of a single conception of law. According to this school of thought, 'international treaties are expected to become an integral part of national law upon ratification'.<sup>102</sup> This system started in France through the 1858 French Constitution.<sup>103</sup> Following this system, most of the civil law countries in Africa adopted the monist approach.<sup>104</sup> With regard to the application of international laws by domestic courts, monists assert that municipal courts are obliged to apply rules of international law directly without the need for any act of adoption by the law making organ.<sup>105</sup>

Contrary to monists, dualists appreciate international law and municipal law as completely different systems of laws. This school of thought requires an additional step of incorporation of international laws after they are ratified. Therefore, as Viljoen stated, this system gives the parliament an opportunity to check the decisions of the executive.<sup>106</sup> Dualism is mainly dominant in former British colonies in Africa and includes Nigeria, Malawi, Zimbabwe, Ghana, Kenya and South Africa.

Dualist countries can domesticate international laws in two ways: one through direct incorporation and second through reception (transformation).<sup>107</sup> Incorporation refers to 'the wholesale enactment of, as part of domestic legislation, an international agreement where an explicit reference is usually made to the

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<sup>102</sup> Viljoen (n 2 above) 530.

<sup>103</sup> Arts 53, 54 & 55 of the 1958 France Constitution; See Viljoen (n 2 above) 531.

<sup>104</sup> Examples include, Madagascar, Benin, Burkina Faso, Togo, Niger and others; See Viljoen (n 2 above) 531.

<sup>105</sup> J Dugard *International law: South African perspective* (2005) 47.

<sup>106</sup> Viljoen (n 2 above) 536.

<sup>107</sup> As above.

international law'.<sup>108</sup> While, reception occurs, when 'the provisions of an international agreement are reflected in parts of national legislation; or if pieces of national legislation are amended or repealed to confirm with international norms, usually without explicit reference to the sources of these norms'.<sup>109</sup>

South Africa is a dualist country. Therefore, both the African Charter and the Women's Protocol can be domesticated if an Act of Parliament or other form of national legislation is adopted to this effect. However, to date, October 2011, both the African Charter and the Women's Protocol are not incorporated in to the South African municipal law.<sup>110</sup> On this note, Okafor, stated that a Bill which incorporates the African Charter and makes it part of municipal law has been proposed by the Department of Justice and Constitutional Development (DOJCD) and it was in the consultation phase in 2007.<sup>111</sup> However, to the researcher's knowledge, there is no Bill enacted for such purpose up until this time.

This, however, should not lead to the conclusion that these instruments are not domesticated in any way. As I have noted above, domestication can be done through reception of international laws. Considering the various South African legislation which are enacted after the ratifications of the African Charter and the Women's Protocol proves that South Africa has domesticated most of the provisions of these instruments through reception (transformation). In submitting the periodic report to the African Commission, the Department of Justice and Constitutional Development states that 'South Africa has adopted numerous laws, case laws and other measures to give effect to the provisions of the Charter. Thus, the South African legal system is...ensuring the protection of human rights through [domestication] of the African Charter norms into the South African legal system.'<sup>112</sup> Moreover, according to Sloth-Nielsen, the provisions of the Women's Protocol have also been partly domesticated in the various laws on women's rights that South Africa has adopted after ratification of this instrument.<sup>113</sup>

As the following discussion explains, South Africa has made some legislative reforms to conform to the norms of the African Charter and the Women's Protocol.

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<sup>108</sup> As above.

<sup>109</sup> As above..

<sup>110</sup> In fact, the only dualist African country which has clearly incorporated the African Charter is Nigeria.

<sup>111</sup> Okafor (n 13 above) 180.

<sup>112</sup> First periodic report of South African government on the African Charter on Human and Peoples' Rights available at <http://www.justice.gov.za/policy/african%20charter/africancharter.htm> (accessed 15 August 2011).

<sup>113</sup> Interview with J Sloth-Nielsen 25 August 2011, University of Western Cape Tygerberg..



### 3.3.1 Legislative reforms after ratification of the African Charter and the Women's Protocol

Article 1 of the African Charter sets an obligation to member states to recognize and adopt legislative and other measures to give effect to the rights and freedoms in the Charter. Therefore, South Africa is under treaty obligation to make the necessary legislative reforms to give effect to the African Charter and its Protocol on Women's Rights. Complying with its duty, South Africa has adopted and amended various statutes after ratification of the African Charter and the Women's Protocol and some of these enactments and changes have been inspired (in most cases implicitly) by these instruments, particularly by the African Charter. The African Charter and the Women's Protocol influenced the adoption and amendments of legislations in South Africa in three different ways.

First, some of the legislative changes were inspired by court decisions in which the African Charter has been referred to.<sup>114</sup> For instance, the abolition of Corporal Punishment Act,<sup>115</sup> was partly influenced by the decision of the court in *S v Williams and others*<sup>116</sup> (*Williams case*), where the Constitutional Court challenged the constitutionality of Section 294 of the Criminal Procedure Act of 1977.<sup>117</sup> In invalidating this provision, the Court has relied on a number of international instruments including Article 5 of the African Charter.<sup>118</sup> Similarly, the repeal of the Black Administration Act of 1927<sup>119</sup> and Amendment of Customary Law of Succession Bill<sup>120</sup> were motivated by the decisions of the Constitutional Court in the *Bhe v Magistrate Khayelitsha* case<sup>121</sup> (*Bhe case*). As Okafor rightly noted 'it is in significant response to the decision of the court in the *Bhe* case that the South African Cabinet approved and introduced into Parliament a Bill to repeal the Black Administration Act of 1927'.<sup>122</sup> Invalidation of section 25(9)(b) of the Alien Control Act,<sup>123</sup> which eventually resulted in the adoption of the new Immigration Act,<sup>124</sup> has also been inspired by the decision of the court in *Dawood and another v Minister of Home Affairs and others* case,<sup>125</sup> (*Dawood case*) where article 18 of the African Charter has been invoked.

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<sup>114</sup> Okafor (n 13 above) 181.

<sup>115</sup> Corporal Punishment Act 33 of 1997.

<sup>116</sup> *S v Williams* 1995 3 SA 632 (CC).

<sup>117</sup> Criminal Procedure Act 51 of 1977.

<sup>118</sup> *Williams* (n 116 above) para 21.

<sup>119</sup> Black Administration Act 38 of 1927.

<sup>120</sup> Amendment of Customary Law of Succession Bill 108 of 1998.

<sup>121</sup> *Bhe v Magistrate Khayelitsha* 2005 1 SA BCLR 1 (CC).

<sup>122</sup> Okafor (n 13 above) 181.

<sup>123</sup> Alien Control Act 96 of 1991.

<sup>124</sup> Immigration Act 13 of 2002.

<sup>125</sup> *Dawood and another v Minister of Home Affairs and others* 2000 3 SA 936 (CC) para 29.

Secondly, according to DOJCD, the following legislative initiatives have also been taken by departments with a view to enhancing the application of the African Charter through removing discriminatory provisions and actively promoting equality.<sup>126</sup> Some of the Acts, like The Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>127</sup> were the result of the Equality Legislation Drafting Project, which was a joint project of the Ministry of Justice and the South African Human Rights Commission at the time. In the process of these reforms, according to the DOJCD, the Project took into account the provisions of international instruments ratified by South Africa including, the African Charter, the Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). The applicable legislation include: the Promotion of Equality and Prevention of Unfair Discrimination Act; the Recognition of Customary Marriages Bill;<sup>128</sup> and the Natural Fathers of Children Born out of Wedlock Act.<sup>129</sup>

Thirdly, the following laws on gender equality have been enacted and amendments have been made to give effect to the international and regional instruments to which South Africa is a party (which includes the African Charter and in some cases the Women's Protocol).<sup>130</sup> Among these laws, the following are the main ones: the Choice on Termination of Pregnancy Amendment Act;<sup>131</sup> the Sexual Offences and Related Matters Amendment Act;<sup>132</sup> the Reform of Customary Law of Succession and Regulation of Related Matters Bill;<sup>133</sup> and the Domestic Violence Act.<sup>134</sup>

Therefore, from the above discussion, one can conclude that although the African Charter and the Women's Protocol are not directly incorporated into the corpus of South African municipal law, the various legislative reforms entail that these documents have been domesticated through reception. So at this point, it is proper to discuss whether this non-incorporation of the African Charter and the Women's Protocol affects the application of these documents before courts in the country.

Section 233 of the 1996 Constitution states that, 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.<sup>135</sup> Moreover, the same Constitution in section 39 obliges courts, regardless of the fact that the international treaty is incorporated

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<sup>126</sup> n 112 above.

<sup>127</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>128</sup> Recognition of Customary Marriages Bill 110 of 1998.

<sup>129</sup> Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

<sup>130</sup> Parliament of the Republic of South Africa gender and women's issues (2004-2009) available at [www.pmg.org.za/files/docs/090812gender.doc](http://www.pmg.org.za/files/docs/090812gender.doc) (accessed 18 August 2011).

<sup>131</sup> Choice on Termination of Pregnancy Amendment Act 38 of 2004.

<sup>132</sup> Sexual Offences and Related Matters Amendment Act 32 of 2007.

<sup>133</sup> Reform of Customary Law of Succession and Regulation of Related Matters Bill 10 of 2008.

<sup>134</sup> The Domestic Violence Act 116 of 1998.

<sup>135</sup> Sec 233 of the 1996 Constitution.

or not, to consider both the binding and non-binding international treaties when interpreting the Bill of Rights. This requirement, according to Dugard, ‘shows the nation’s commitment to the rule of law and protection of human rights and sets the scene of renaissance of international law both in South Africa’s foreign policy and in the jurisprudence of its courts’.<sup>136</sup> Therefore, though both the African Charter and the Women’s Protocol are not directly incorporated, the 1996 Constitution guarantees their application in South African courts. Moreover, South African courts enjoy the power to judicial review of legislation.<sup>137</sup> Therefore, in addition to using international laws as a guide to statutory interpretation, they can also invoke them to challenge the validity of legislation.<sup>138</sup>

Based on this conclusion, the next section discusses to what extent that South African courts have applied the African Charter and the Women’s Protocol in their judgments.

### **3.4 The application of the African Charter and its Protocol on women’s rights on the decisions of South African courts**

In South Africa, the impact of the African system, mainly through the African Charter, is more visible relatively in the actions of the judiciary than the other organs. This is attributed, as I have indicated in the previous section, mainly to the 1996 Constitution which requires courts to consider international law when interpreting the Constitution and any other legislation.

Using this opportunity, South African courts comprehensively invoke the norms of UN treaties, decisions of the European Commission as well as European Court of Human Rights.<sup>139</sup> However, in most of the cases, they fail to give due consideration to the African System in general and the African Charter and its Protocol on Women’s Rights in particular. There are only a limited numbers of court judgments, while most of them are Constitutional Court decisions, where the African Charter and the Women’s Protocol (if at all it is cited) have been applied.

The word ‘application’ entails both ‘direct enforcement’ and reliance on the instruments for ‘interpretative guidance’.<sup>140</sup> A distinction must be made between judicial reliance on an international treaty as the basis of a remedy, allowing the international agreement to be ‘treated as part of domestic law for purposes of adjudication’ in a domestic court (direct enforcement), and the use of international agreements ‘as an aid to interpretation’ of domestic constitutions or ordinary laws (interpretative

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<sup>136</sup> Dugard (n 105 above) 26.

<sup>137</sup> Sec 172 of the 1996 Constitution.

<sup>138</sup> Dugard (n 105 above) 67.

<sup>139</sup> Dugard (n 105 above) 66.

<sup>140</sup> Viljoen (n 2 above) 540.

guidance).<sup>141</sup> Much more frequently courts look to international human rights law for interpretative guidance, thereby providing for a non-legislative measure to ‘give effect’ to the treaty. The basis of using international human rights law as a source of interpretative guidance is sometimes found in national law.<sup>142</sup> Exceptionally, reliance on international law to guide interpretation can be mandated by the Constitution;<sup>143</sup> it may also be stipulated in ordinary legislation;<sup>144</sup> or it may be a rule of statutory interpretation that enjoys acceptance within the particular legal system.

As it has been indicated in the previous discussion, the 1996 Constitution provides that in interpreting the Bill of Rights, courts must consider international law. Therefore, South African courts, even if the African Charter is not yet explicitly domesticated to the corpus of domestic law, must look to the Charter for interpretative guidance, thereby ‘give effect’ to the Charter as it is stipulated under article 1 of the African Charter. However, Viljoen indicates the fact that ‘[A]rticle 7(1) of the Africa Charter guarantees the right to appeal to competent national organs to redress the violations of rights recognized by conventions, laws, regulations and customs in force. This would suggest that state parties to the African Charter guarantee the rights of individuals to bring cases on the basis of the African Charter, even before local courts.’<sup>145</sup>

### 3.4.1 The application of the African Charter in *S v Williams’s case*<sup>146</sup>

On referral from the Cape of Good Hope Provincial Division, the Constitutional Court found that corporal punishment is inconsistent with Section 11(2) of the 1993 Constitution (the Interim Constitution),<sup>147</sup> which prohibited cruel, inhumane or degrading treatment or punishment.<sup>148</sup> The Constitutional Court, among other international laws, cited Article 5 of the African Charter to justify its interpretation of the provision of Section 11(2) of the Interim Constitution that prohibited torture, inhuman and degrading treatment or punishment.<sup>149</sup>

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<sup>141</sup> As above.

<sup>142</sup> Viljoen (n 2 above) 541.

<sup>143</sup> As it is the case in South Africa, Sec 39(1) of the 1996 Constitution.

<sup>144</sup> As it is the case in Botswana.

<sup>145</sup> Viljoen (n 16 above) 1.

<sup>146</sup> n 116 above.

<sup>147</sup> The Constitution of the Republic of South Africa Act 200 of 1993.

<sup>148</sup> Overview of the judgments of the Constitutional Courts of South Africa from 1994-2005 available at <http://41.208.61.234/uhtbin/cgiisirs/20090811063354/SIRSI/0/520/caselistC> (accessed 18 August 2011).

<sup>149</sup> *Williams* (n 116 above) para 21.

### 3.4.2 The application of the African Charter in *Ferreira v Levin NO and Others* case<sup>150</sup>

In this case, the Constitutional Court found that Section 417(2)(b) of the Companies Act<sup>151</sup> infringed the rule against self-incrimination and is not, therefore, consistent with Section 25(3) of the 1996 Constitution.<sup>152</sup> While giving meaning to the term ‘freedom and security of the person’, the court relied on the Africa Charter. Chaskalson P writes:<sup>153</sup>

It is also the primary sense in which the phrase, “freedom and security of the person” is used in public international law. The American Declaration of the Rights and Duties of Man, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and People’s Rights, all use the phrase “liberty and security of the person” in a context which shows that it relates to detention or other physical constraints.

### 3.4.3 The application of the African Charter in *Samuel Kaunda and others v President of the Republic of South Africa and others*<sup>154</sup>

In this case, the applicants, South African citizens held in Zimbabwe on various charges, sought an order compelling the government to take urgent steps, including diplomatic representations on their behalf to the Zimbabwean and Equatorial Guinean governments. Though the court noted the fact that South African citizens are entitled to request the government for protection under international law against wrongful acts of a foreign state, in this case, it found that the government’s approach was consistent with international law and the Constitution.<sup>155</sup>

Dismissing the appeal, Chaskalson CJ, wrote the majority opinion and invoked the African Charter to support his arguments. He writes,<sup>156</sup>

a human right to diplomatic protection is not contained in either the African Charter or the Universal Declaration of Human Rights, the Constitution could not be read to require the government in every case to seek diplomatic protection for its citizens and that the courts must allow large measure of discretion to the executive in this connection.

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<sup>150</sup> *Ferreira v Levin NO and Others* 1996 1 SA 984 (CC).

<sup>151</sup> The Companies Act 61 of 1973.

<sup>152</sup> n 148 above.

<sup>153</sup> *Ferreira* (n 155 above) para 170.

<sup>154</sup> *Samuel Kaunda and others v President of the Republic of South Africa and others* 2005 4 SA 235 (CC).

<sup>155</sup> n 148 above.

<sup>156</sup> *Kaunda* (n 154 above) para 34.

In her separate decision, O'Regan J broadly used Articles 5 and 7 of the African Charter to assert the state's obligation in taking steps to protect the applicants against conduct of other states that might amount to a fundamental breach of the human rights of the applicants as recognized in customary international law and the African Charter.<sup>157</sup> In articulating her arguments, she took an innovative step and used the provisions of the African Charter against the government's obligation.<sup>158</sup>

### 3.4.4 The application of the African Charter in *Bhe v Magistrate Khayelitsha* case<sup>159</sup>

The applicants challenged the constitutionality of Section 23 of the Black Administration Act, and regulations promulgated in terms of this section and Section 1(4)(b) of the Intestate Succession Act.<sup>160</sup>

Both Langa DCJ and Ngcobo J used the African Charter in supporting their arguments. Particularly, unusual to most of the decisions where the African system has been referred to, Langa DCJ has made reference to the Women's Protocol to highlight the need to protect the rights of women, and to abolish all laws that discriminate against them.<sup>161</sup> In writing his partial dissent opinion, Ngcobo J has relied on the African Charter. He states that:<sup>162</sup>

The obligation to care for family members is a vital and fundamental value in African social system. This value is now entrenched in the African (Banjul) Charter on Human and Peoples' Rights. The Preamble to the Charter urges member states to take "into consideration the virtues of their historical traditions and values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights". Article 27(1) provides that "every individual shall have duties towards his family and society". Article 29(1) provides that an individual shall . . . have 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".

Moreover, he also used Article 18 of the African Charter to support his argument on member states obligation to put an end to gender inequality within their countries.<sup>163</sup>

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<sup>157</sup> *Kaunda* (n 154 above) para 212.

<sup>158</sup> *Okafor* (n 13 above) 159.

<sup>159</sup> *Bhe* (n 121 above).

<sup>160</sup> Intestate Succession Act, 81 of 1987.

<sup>161</sup> *Bhe* case(n 121 above) para 51.

<sup>162</sup> *Bhe* case (n 121 above) para 166.

<sup>163</sup> *Bhe* case (n 121 above) para 209.

### **3.4.5 The application of the African Charter in *Richard Gordon Volks NO v Ethel Robinson and others case***<sup>164</sup>

Mrs Robinson, who was in a permanent life partnership with Mr Shandling from 1985 until his death in 2001, submitted a maintenance claim against the estate in terms of the Maintenance of Surviving Spouses.<sup>165</sup> She challenged the definition of the term ‘survivor’ in the Act. Rendering the judgment, the majority opinion did not invoke the African Charter. However, Ngcobo J, in his separate judgment, relied on Article 18 of the African Charter in order to justify his constitutional arguments. He states that:<sup>166</sup>

The constitutional recognition of the right to marry and the institution of marriage is consistent with the obligations imposed on our country by international and regional human rights instruments which impose obligations upon states to respect and protect marriage. The African Charter on Human and Peoples’ Rights recognizes the importance of marriage and the family.

### **3.4.6 The application of the African Charter in *Dawood and another v Minister of Home Affairs and others case***<sup>167</sup>

This case examined the constitutional right of spouses to cohabit and invalidated section 25(9) of the Aliens Control Act,<sup>168</sup> which requires applicants for immigration permits to be outside South Africa when their permits are granted. The spouse of the applicant in this case was neither citizen nor permanent resident of South Africa.<sup>169</sup>

In the judgment, O’Regan J stated how the right to family life, though not expressly mentioned in the Bill of Rights, can be entrenched in section 10 of the Bill of Rights of the 1996 Constitution. Invoking Article 18 of the African Charter, which recognizes the vital importance of marriage and imposes a state obligation to protect a family, she reached the conclusion that ‘the protection of the right of married couples to cohabit was so important constitutional norm that it was unconstitutional for the relevant provisions to result in the coerced departure from South Africa of a non-citizen spouse of a South African citizen.’<sup>170</sup>

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<sup>164</sup> *Richard Gordon Volks No v Ethel Robinson and others* 2005 5 BCLR 446 (CC).

<sup>165</sup> Maintenance of Surviving Spouses Act 27 of 1990

<sup>166</sup> *Volks* (n 164 above) para 82.

<sup>167</sup> *Dawood* ( n 125 above).

<sup>168</sup> The Aliens Control Act 95 of 1991.

<sup>169</sup> *Dawood* (n 125 above) Para 1.

<sup>170</sup> Okafor (n 13 above) 167.

### 3.4.7 The application of the African Charter in *Hoffman v South African Airways* case<sup>171</sup>

The case was brought to challenge the constitutionality of the South African Airways practice of not employing people living with HIV as cabin attendants. The Court held that this decision infringed the applicant's right to equality under section 9 of the Constitution.<sup>172</sup> To justify his interpretation of the requirements of the non-discrimination provisions of South African Constitution, Ngcobo J has referred to the African Charter. In his words:<sup>173</sup>

The need to eliminate unfair discrimination does not arise only from chapter 2 of our Constitution. It also arises out of international obligation. South Africa has ratified the African Charter. In the preamble to the African Charter, member states undertake, among other things, to disseminate all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of article 1, member states have an obligation to give effect to the rights and freedoms enshrined in the Charter.

### 3.4.8 The application of the African Charter in *Islamic Unity Convention v Independent Broadcasting Authority and Others* case<sup>174</sup>

This case concerned the constitutional validity of a provision in the Code of Conduct of the Independent Broadcasting Authority (IBA). In considering whether the prohibition against the broadcasting of material that is 'likely to prejudice relations between sections of the population',<sup>175</sup> is consistent with the Constitution, the Constitutional Court referred to Article 9 of the African Charter 'in order to justify the argument that the right to freedom of expression is one of the essential foundations of a democratic society'.<sup>176</sup>

In a limited number of cases, courts other than the Constitutional Court have also made references to the African Charter. For instance, in *State v Viljoen* the High Court of Transvaal in South Africa relied on Article 7 of the African Charter to rule upon the case of the accused constitutional rights to have counsel during the investigation of the crime as well as to keep silent at the plea proceedings.<sup>177</sup>

As it can be observed from the above discussion, the African Charter has been invoked in a number of judgments, but mostly it has been referred to as 'a mere confirmation of existing constitutional

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<sup>171</sup> *Hoffmann v South African Airways* CCT17/00 (2000) CC.

<sup>172</sup> n 148 above.

<sup>173</sup> *Hoffmann* (n 171 above) para 51.

<sup>174</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others* CCT36/01 (2002) CC.

<sup>175</sup> n 148 above.

<sup>176</sup> Okafor (n 13 above) 172.

<sup>177</sup> Okafor (n 13 above) 169.



provision'.<sup>178</sup> Therefore, it can be concluded that South African courts have made references to the African Charter only as interpretative tool; in any of the cases no single provision has been invoked as a base for legal remedy.

### 3.5 The impact of the African Charter and the Women's Protocol on the courts' decisions

Even if South African courts have a constitutional privilege to use both the African Charter and the Women's Protocol in their decisions, they seem reluctant to make use of this opportunity. Particularly, the application of the Women's Protocol is non-existent. The courts usually resort to the UN treaties or other regional laws, like the European system. Though the African Commission has established strong jurisprudence in a number of cases, South African courts tend to refer to the decisions of the European Court of Human Rights, the European Commission for Human Rights and the Inter-American Court.

Even in those decisions where the African Charter and the Women's Protocol have been referred, it has been done in a very subtle manner. In most of the cases, these instruments did not influence the decisions of the courts. For instance, in the *Williams* case, the Court has made reference to article 5 of the African Charter. However, the impact of such reference to the African Charter does not put any significant contribution to the outcome. The judge failed to make use of the provision of the African Charter extensively. Rather he chose to rely mainly on the jurisprudence of the European Court decisions and some domestic court decisions in the US and Canada.<sup>179</sup> Similarly, in the *Bhe* case though the judges played a considerable role in joining the norms of the African Charter into the legal reasoning of South African judiciary, its significance to the outcome was not visible.<sup>180</sup>

Relatively, it was in *Samuel Kaunda and others v President of the Republic of South Africa and others* that the African system, through the application of the African Charter, has played a significant role in influencing the outcome of the case. This has happened mainly due to the role played by the activist judge, Ngcobo J. Asserting this fact, Okafor stated that 'the creative invocation of the Charter by Ngcobo J clearly played an important role in the legal logic that underpinned the decision of the court in this case'.<sup>181</sup>

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<sup>178</sup> Viljoen (n 2 above) 556.

<sup>179</sup> *Williams*(n 116 above) para 21-31.

<sup>180</sup> Okafor (n 13 above) 176 .

<sup>181</sup> Okafor (n 13 above) 159.

### **3.6 Conclusion**

The discussion in this chapter shows that the application of the African Charter and the Women's Protocol in South African courts is very limited. Particularly, the application of the Women's Protocol is non-existent. Considering this limited application of the African Charter and the Women's Protocol, the next chapter explores the factors that enhance or impede the application of these instruments in South African courts.



## Chapter Four

# Factors that enhance or impede the impact of the African Charter and the Women's Protocol in South Africa

### 4.1 Introduction

In chapter three I have discussed the extent to which South African courts have used the African Charter and the Women's Protocol. Considering the constitutional privilege that South African courts have in applying international instruments in their decisions, their record in using the African Charter and the Women's Protocol is really disappointing. The number of cases in which courts referred to these instruments is quite low. This low level of application of the African Charter and the Women's Protocol happens due to various factors. Therefore, this chapter identifies and discusses both the positive factors which enhance their application and the negative factors which impede the application of these instruments before courts of law. Accordingly, the chapter has two broad parts. While discussing the positive factors, the first part includes the existence of strong constitutional norms and pro-human rights CSAs in South Africa as the main point. The second part identifies four main elements as impeding factors. These are non-incorporation of the instruments, low level of awareness among the majority of CSAs and lawyers in South Africa and the existence of a strong domestic legislative framework.

### 4.2 Factors that enhance the impact of the African Charter and the Women's Protocol

#### 4.2.1 The existence of progressive constitutional norms

One of the most important factors that places South Africa in a better position relative to other African countries is the fact that it has a strong constitutional framework which embraces a progressive Bill of Rights. Different features explain the progressive nature of the Bill of Rights. Such as the fact that it comprehends both civil and political rights with socio-economic rights inseparably, the fact that it imposes affirmative state duties besides the negative restraints, the fact that it introduces the concept of horizontality through which it sets duties in private spheres, and the fact that it seeks to transform the *status quo ante* to a new order.<sup>182</sup>

The existence of such a progressive normative framework is an opportunity for the African human rights system to flourish in the South African courts. If the Constitution did not encompass Bill of Rights

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<sup>182</sup> KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South Africa Journal of Human Rights* 146 154.

or if the provisions contradicted with the African Charter or the Women's Protocol, it would have been impossible to apply the norms of these African instruments by the municipal courts. Fortunately now, the provisions of both the African Charter and the Women's Protocol are in line with the Bill of Rights in the 1996 Constitution, hence no conflict would arise in application of these instruments in courts of law.<sup>183</sup> For instance, Articles 2 and 3 of the African Charter provide for the principles of equality and non-discrimination corresponds to Sections 7 and 9 of the 1996 Constitution; and Article 4 of the African Charter which provides for the right to life clearly is in agreement with section 11 of the 1996 Constitution. Similarly, one can also look at Article 5 of the African Charter which guarantees individuals rights to dignity including the right to be free from all forms of exploitation and degrading treatment, which is also protected in Sections 10, 12, 13 and 28 of South African Bill of Rights. Moreover, Article 6 of the African Charter which guarantees the right to liberty and security of the person is also enshrined in Section 12 of South African Bill of Rights. Generally, going through the provisions of these instruments, one can easily understand how the Provisions of the African Charter correspond to the provisions of the 1996 Constitution.<sup>184</sup>

Though there may not appear to be specific similarities between the Women's Protocol and the Bill of Rights, the general principles that motivates the provisions in both instruments indeed correspond. The Women's Protocol imposes obligations on the ratifying states to ensure maximum protection of women's rights, prevent discrimination and undertake measures to ensure women are given appropriate space for development, equal opportunities and full protection of social, economic and civil rights. The 1996 Constitution, in addition to the full range rights protected under the Bill of Rights, includes sections that are designed specifically to protect the rights of women. In fact, it is agreed that it is through the introduction of the Bill of Rights that all women in this country received formal recognition as equal citizens.<sup>185</sup> Specifically, Section 9(3) of the 1996 Constitution corresponds to Article 2 of the Women's Protocol.

In addition to the clear correspondence between these regional instruments and the Bill of Rights, the fact that the 1996 Constitution obliges courts to apply both binding and non-binding international laws while interpreting the Constitution and other legislation provides for another opportunity to enhance the

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<sup>183</sup> In making this comparison the researcher has used the 2005 report of the South African Government to the African Commission.

<sup>184</sup> Art 7 of the African Charter with sec 35 of the 1996 Constitution, art 8 of the African Charter with sec 15 of the 1996 Constitution, art 9 of the African Charter with secs 16 and 32 of the 1996 Constitution, arts 10 and 11 of the African Charter with secs 17, 18 and 23 of the 1996 Constitution, art 12 of the African Charter with sec 21 of the 1996 Constitution, art 13 of the African Charter with sec 19 of the 1996 Constitution, article 14 of the African Charter with sec 25 of the 1996 Constitution, art 16 of the African Charter with sec 27 of the 1996 Constitution, art 17 of the African Charter with sec 29 of the 1996 Constitution, art 19 of the African Charter secs 181(1)(c) and 185 of the 1996 Constitution, art 20 of the African Charter with sec 235 of the 1996 Constitution, and art 24 of the African Charter with sec 24 of the 1996 Constitution.

<sup>185</sup> Note on women's rights available at <http://www.constitutionalcourt.org.za/text/rights/know/women.html> (accessed on 20 August 2011).

application of the African Charter and the Women's Protocol in the South African judiciary. As this point has been given due coverage in the previous chapter, it is not necessary to discuss it again. Suffice it to say that South African courts have a constitutional duty to apply relevant international norms as interpretative tools in reaching their decisions. This duty has been duly complied to by South Africa courts, especially by the Constitutional Court, in making references to various international norms their decisions. Of course, as I indicated in chapter three, the references to the African Charter and the Women's Protocol are considerably far less meaningful references than to the UN and European system instruments, but still these limited numbers of references would not have happened if the Constitution did not impose this duty on courts.

However, at this point it is important to note the fact that the strong normative and judicial framework which is established by the 1996 Constitution is an effective tool because it has been complimented by the existence of the activist judges such as Ngcobo J, Chaskalson J and O'Regan J. Had it not been due to these pro-human rights judges, the fact that the Constitution obliges the courts to refer to international law might not be a sufficient guarantee. As Okafor rightly noted, Ngcobo J played as an 'intelligent transmission-lines that helps to creatively relay the normative energy of the African system into key domestic institutions in South Africa'.<sup>186</sup>

#### **4.2.2 The existence of pro-human rights CSAs**

The other most important factor which enhances the impact of the African Charter and the Women's Protocol in South the African judiciary is the existence of human rights activist CSAs. CSAs play a great role in the protection and promotion of human rights. They can, through advocacy works, litigations and promotional tools, influence the decisions of governments and courts. It was in considering their contribution that the African Charter suggests the participation of CSAs in the various levels of the activities of the Africa Commission.<sup>187</sup>

CSAs engage in helping the activities of the Commission in different ways. As Ankumah indicated, CSAs contributed to the jurisprudence of the Commission through complimenting the Commission's promotional and protective activities.<sup>188</sup> In this regard some of the contribution of South African CSAs deserves mentioning.

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<sup>186</sup> Okafor (n 13 above) 208.

<sup>187</sup> Arts 45 (1)(a) & (c) of the African Charter.

<sup>188</sup> EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 47.

The Community Law Centre (CLC), starting from the year 2005,<sup>189</sup> has been participating at various ordinary sessions of the African Commission and has presented statements on the situation on human rights in Africa in general and South Africa in particular. To this end Muntingh, explains that CLC has made statements on the human rights situation of South Africa and on some cross cutting human rights issues in Africa to the African Commission. For instance, the CLC has made statements on food security (at the 41<sup>st</sup> ordinary session of the African Commission), on election (at 44<sup>th</sup> ordinary session of the African Commission), on prison reform in Africa (at 45<sup>th</sup> ordinary session of the African Commission), on pre-trial detention in Africa (at 47<sup>th</sup> ordinary session of the African Commission), on children in prison and deprivation of liberty in South Africa (at 48<sup>th</sup> ordinary session of the African Commission) and on governance, democracy and human rights (at 49<sup>th</sup> ordinary session of the Africa Commission).<sup>190</sup>

Lawyers for Human Rights (LHR) is among the non-governmental organisations in South Africa with considerable contribution in promoting the African system. Most notably, the LHR's recent submissions to the African Commission deserve mentioning. LHR has taken two submissions against the governments of South Africa and Namibia to the 48<sup>th</sup> ordinary session of the African Commission in November 2010.<sup>191</sup>

Moreover, CSAs can also contribute to the state reporting process by providing alternative information to the Commission. In explaining the use of alternative information during state reporting, Viljoen states that:<sup>192</sup>

Because of many states' lack of honest self-reflection or introspection, civil society becomes an important source of supplementary information about the status of human rights in that state. Information and reports by non-governmental organisations are the most obvious potential source of information against which a state report can be evaluated.

It was based on this mandate that the Centre for Human Rights (CHR), Socio-Economic Rights Project (SERP), the Human Rights Institute of South Africa (HURISA), Central and Gauteng Mental Health Society (CGMHS), Gauteng Children's Rights Committee (GCRC), Community Law and Rural Development Centre (CLRDC), CLC, and LHR prepared a shadow report and submitted it to the

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<sup>189</sup> The memorandum of understanding between the CLC and the African Commission, available at [http://www.communitylawcentre.org.za/achpr/files-for-achpr/Memorandum\\_of\\_Understanding.pdf](http://www.communitylawcentre.org.za/achpr/files-for-achpr/Memorandum_of_Understanding.pdf) (accessed on 19 August 2011).

<sup>190</sup> Interview with L Muntingh 18 August 2011 University of Western Cape Tygerberg.

<sup>191</sup> The document is available at <http://www.lhr.org.za/policy/lhrs-submission-african-commission-november-2010> (accessed on 19 August 2011).

<sup>192</sup> Viljoen (n 2 above) 381.

Commission when South Africa submitted the consolidated second, third and fourth periodic reports in 2005 to the Commission.<sup>193</sup>

Using the procedures established for the examination of individuals and NGOs communications in Articles 55 through 61 of the African Charter, CSAs can also play a great role in the protection of human rights under the African system.<sup>194</sup>

In South Africa, there are considerable numbers of CSAs which are engaged in various human rights related activities. Yet as it will be discussed in this chapter, many of them do not have the awareness of the African Charter and the Women's Protocol and they do not use these instruments in their activities. However, there are limited numbers of CSAs which involve these instruments in their work. Particularly, South African CSAs with an observer status in the Commission are relatively in a better position to enhance the impact of the African Charter and the Women's Protocol through litigation and advocacy. The fact that they have chosen to apply for observer status, which, among other things, requires them to devote their material and human resource in attending the bi-annual ordinary sessions of the Commission,<sup>195</sup> implies a certain degree of readiness to enhance the African system in South Africa. As it is clearly indicated in the table,<sup>196</sup> to date there are 17 South African CSAs with an observer status in the Commission.

Some of these CSAs use the African Charter and sometimes the Women's Protocol in domestic court litigations. In this regard, some are more active than the others. In the past years, CSAs like HURISA, CHR, LRC, LHR and Women Legal Centre (WLC) have been playing the main role in applying the African Charter and the Women's Protocol in South African courts.

For instance, the WLC has played a significant role in using the African system, particularly the Women's Protocol in its activities, including litigations. Williams states that:<sup>197</sup>

We do use the Women's Protocol in all our submissions to parliament, most of our legal opinions and all our submissions to court. Our Constitution provides that international instruments are binding on our courts and so we will usually first set out our international and regional obligations (which will include the

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<sup>193</sup> Shadow report to South Africa's first periodic state report Available at [http://www.chr.up.ac.za/images/files/documents/ahrdd/southafrica/southafrica\\_ngo\\_shadow\\_report\\_2005.pdf](http://www.chr.up.ac.za/images/files/documents/ahrdd/southafrica/southafrica_ngo_shadow_report_2005.pdf) (accessed 01 September 2011).

<sup>194</sup> Murray (n 28 above) 88.

<sup>195</sup> Okafor (n 13 above) 192.

<sup>196</sup> See annex 1, in developing this table I relied on a document from the African Commission which lists all the 418 organisations granted observer status in the African Commission, updated on May 2011, document is available from the researcher on request.

<sup>197</sup> E-mail from J Williams on 31 August 2011.

Women's Protocol if it has relevant clauses). Thus, we quote the Women's Protocol in relation to violence against women, rights of women to property, in relation to customary marriages and the obligations on the state in terms of gender equality. We aim for about 3 judgments a year and do many submissions, about ten.

Similarly, the LRC has also been using the African Charter and the Women's Protocol in court litigations. According to Wicomb, LRC has made references to the provision of the African Charter in a number of cases.<sup>198</sup> Article 8 of the African Charter has been invoked by the council in the *Prince* case, where the Legal Resources Centre was among the parties from the applicant side.

In the *Kaunda* case the Society for the Abolition of the Death Penalty in South Africa has invoked the African Charter in strengthening its argument.<sup>199</sup> Moreover, in the *Islamic Unity Convention* case, the Islamic Unity Convention and the South African Jewish Board relied on the African Charter in their briefs.

The above discussion clearly illustrates that the existence of these activist CSAs is an opportunity for the African Charter and the Women's Protocol to have an impact in the actions of South African judiciary. Though they are limited in number, their contribution as activist forces is really significant in enhancing the application of the African system in South African courts.

### **4.3 Factors which impede the impact of the African Charter and the Women's Protocol in South African judiciary**

As indicated in chapter three, the impact of the African Charter and the Women's Protocol in the decisions of the South African judiciary is below the expected level. Despite the above enhancing factors, courts in South Africa are still not referring to these important regional instruments in their judgments. As it has been echoed repeatedly in this dissertation, South African courts regularly relied on the general Comments of UN treaties, and on the jurisprudence of UN and other regional human rights bodies,<sup>200</sup> including UN treaties. They repeatedly failed in making the expected use of the African system, particularly the African Charter and the Women's Protocol. This minimal impact of the African Charter and the Women's Protocol is the result of several impeding factors, which directly or indirectly affect the utilization of these regional instruments utilization in courts of law.

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<sup>198</sup> Interview with W Wicomb on 27 July 2011 Cape Town.

<sup>199</sup> Okafor (n 13 above)193.

<sup>200</sup> The South Africans Constitutional Court, in number of instances, could have used the decisions of the Commissions. For instance, as Viljoen stated, the judgment in *City of Johannesburg v Rand Properties and Others* provides an example of a missed opportunity to do so. According to Viljoen, in the judgment Jajbhay J noted that the Charter does not include a right to housing, but argued that the right to life and to health provide a basis for the assertion of such a right. The judge could have used the Commission's reasoning in the *Ogoniland* case; See Viljoen (n 2 above) 560.



### **4.3.1 Non-incorporation of the African Charter and the Women's Protocol into the South Africa's national law**

The domestication of international instruments is crucial because it defines the judicial application of an international treaty which is dependent on the status that the international human rights norms enjoy in a local legal system. As was shown in chapter three, both the African Charter and the Women's Protocol are not yet formally domesticated (incorporated) into South African municipal law, which means that they are not binding on the South African courts. This has a substantial adverse impact on the utilizations of these instruments in the judiciary. As Viljoen stated, 'it is unlikely that judicial institutions will base findings on provisions of the African Charter if the Charter is not regarded as part of domestic law, either it is because its provisions are not self-executing or they because they have not being domesticated explicitly'.<sup>201</sup>

Though the 1996 Constitution obliges courts to make reference to international law while interpreting legislation, this may not create a legal obligation on courts to base their findings on these instruments. One may argue that South Africa has in effect domesticated both the African Charter and the Women's Protocol through 'reception'; therefore, domestic courts can directly invoke and base their remedies on these instruments. However, taking the other factors into consideration, such as the general invisibility of the African system on the continent, it would prove to be very difficult, if not impossible, at this stage to convince domestic judges to do so.

Besides, the non-incorporation of these instruments has also reduced their visibility with in the South African socio-legal order. This resulted in a considerable level of ignorance among lawyers, law societies, CSAs and the public at large, as to the existence of the African system in general and the African Charter and the Women's Protocol in particular. This brings to light the other two factors that have impeded the application of the African Charter and the Women's Protocol in the South African Judiciary: the lack of awareness by the majority of South African CSAs and South African lawyers about the instruments.

### **4.3.2 Low level of awareness by the majority of the South African CSAs about the instruments**

Despite the existence of numerous human rights activist CSAs in South Africa, researches confirm that their level of awareness and knowledge about the status of these instruments is really low.<sup>202</sup> It is obvious

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<sup>201</sup> Viljoen (n 2 above) 540.

<sup>202</sup> Okafor (n 13 above) 214.

that CASs with an observer status in the Commission do have the awareness of the African Charter and the Women's Protocol. However, even if they are aware of these instruments, most of them do not have any specific focus both on the African Charter and the Women's Protocol. Stating this fact, Viljoen observes that, 'it is only recently, with in the past three years, that some NGOs started working on the Charter. Even those with observer status, they usually do not have specific focus on the Charter at the grassroots level.'<sup>203</sup>

Garderen also shares this opinion. He said, 'I doubt that South African civil society organisations are well informed about the various African human rights instruments, in particular the Women's Protocol.'<sup>204</sup> Endorsing this opinion, Muntingh also states that South African NGOs lacks awareness not only on the African Charter and the Women's Protocol, but also generally on the African human rights system and on the activities of the African Commission.<sup>205</sup>

Agreeing with the above assessments, Killander states that the African system is not really known among the broader NGOs. He says 'my impression is that it is relatively good among some human rights NGOs, but virtually non-existent among broader civil societies.'<sup>206</sup> Acknowledging the recent improvement as to the awareness of these African instruments among South African NGOs, Dadoo, regional advocacy officer at Consortium for Refugees and Migrants in South Africa (CoRMSA), also states that:<sup>207</sup>

I don't think there is great awareness amongst civil society of the Charter or the Protocol or in general of regional mechanisms. However, there have, more recently, been a number of projects to hold training sessions and workshops on the Charter so maybe that will start to change, particularly amongst larger, active, urban NGOs.

Similarly, Hansungul also asserts the fact that most South African civil society organisations are generally unaware of the African Charter and Protocol.<sup>208</sup>

This shows that many of the South African CSAs lack awareness as to the establishment of the instruments and their status under the South African national laws. And those, at least most of them, with an observer status in the Commission, are not using the African Charter and the Women's Protocol in their litigations. For instance, in the *Bhe* case, despite the ample opportunity to make use of both the provisions

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<sup>203</sup> Telephone communication with F Viljoen on 19 August 2011.

<sup>204</sup> E-mail from J Garderen on 29 August 2011.

<sup>205</sup> n 190 above.

<sup>206</sup> E-mail from M Killander on 16 August 2011.

<sup>207</sup> E-mail from R Dadoo on 19 August 2011.

<sup>208</sup> E-mail from M Hansungule 21 August 2011.

of the African Charter and the Women's Protocol, both the WLC and the Centre for Applied Legal Studies (CALS) did not make any reference to this effect. Similarly, in the *Volks NO* case, when an unmarried surviving female partner of a deceased adult male challenged the constitutionality drawn under South African law between married and non-married surviving partners in relation to claiming maintenance, the WLC again missed an opportunity of using the African Charter and the Women's Protocol while assisting the applicant.<sup>209</sup>

#### 4.3.3 Low level of awareness by South African lawyers about the instruments

As many agree, and as can be inferred from lawyers briefs, lawyers in South Africa do not seem well aware of the African system in general and the African Charter and the Women's Protocol in particular. Cowen, a South African lawyer, confirmed that lawyers in South Africa are hardly familiar with the African regional human rights system. She states:<sup>210</sup>

In general terms I don't think that lawyers generally are familiar with the African Charter or the Women's Protocol. It is the NGOs and public interest law centre that are familiar with its contents and who, often through amicus interventions, bring it to the court's attention. Obviously there are some lawyers who are more familiar with them than others. But on the whole I would say lawyers don't generally know them or use them and where they do it is often in circumstances where public interest law centres are clients or attorneys.

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Endorsing Susannah's comments, Wicomb also states that lawyers in South Africa usually do not refer both to the African Charter and the Women's Protocol in their briefs, which clearly show their low level of their awareness towards these instruments.<sup>211</sup>

Though there were ample opportunities for the lawyers and law societies to refer to the African Charter and the Women's Protocol, it has never happened almost in all the cases. It is the court, through the judgments, that usually makes references to these regional instruments. For instance in the *Dawood* case, none of the briefs filed referred to the African Charter or the Women's Protocol, while there was an ample opportunity for the counsel to make use of these instruments.<sup>212</sup> Similarly in the *Volks No* case, none of the parties have made reference to the provisions of the African Charter.

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<sup>209</sup> Okafor (n 13 above) 164.

<sup>210</sup> E-mail from S Owen on 22 August 2011.

<sup>211</sup> n 198 above.

<sup>212</sup> Okafor (n 13 above)167.

#### **4.3.4 The existence of strong domestic normative frameworks**

The fact that South Africa has a strong legal and institutional (judicial) safeguard of human rights sometimes causes lawyers and judges to confine themselves to using only these national laws. So in most cases they may tend to apply the provisions of the Bill of Rights and other applicable legislation. Particularly, with regard to the Women's Protocol, perhaps the most important factor which contributed for its low level of judicial application is the fact there are quite a number of domestic laws on the general promotion of women's rights in South Africa.<sup>213</sup>

It is true that the new constitutional order after the 1996 Constitution has resulted in a number of advancements in relation to legal safeguards in South Africa. However, as the Constitution is a political document, it is always susceptible to political change, and hence relying only on domestic laws cannot guarantee a sustainable protection of human rights. Therefore, it is crucial for South African lawyers and judges should to make use of the norms of international and regional laws more visibly in the judiciary.

While the above points are the main factors which impede the impact of the African Charter and the Women's Protocol in South African courts, there are also other facts which play their own role in reducing the visibility of these instruments in the South African Judiciary. These include, the Commission's reluctance to publicise itself in member states including South Africa, which can be explained mainly due to lack of resources, and the fact that South Africa's accession to the Charter did not enjoy extensive media coverage and was not preceded by discussions in the legal circles.

#### **4.4 Conclusion**

This chapter shows that despite the positive factors, which enhance the application of the African Charter and the Women's Protocol on the South African judiciary, the impact of these instruments could not be as visible as it is supposed to be due to a number of impeding factors. As it has been discussed, these impeding factors emanate from various sectors. Therefore, as it is indicated in the conclusion and recommendations, in the coming chapter, a joint effort should be employed to address these challenges and enhance the impact of these important regional instruments in the South African judiciary.

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<sup>213</sup> See the discussion above in section 3.3.1.

## Chapter Five

### Conclusion and Recommendations

#### 5.1 Conclusion

Serving as the main constituent normative standard in the African regional human rights system, the African Charter reveals itself as a response to the multifaceted human rights violations in the continent. The African Charter consists of various provisions which reflect an African fingerprint in many respects. Such provisions include the concept of peoples' rights and individual duties, which also form the peculiarities of the document.<sup>214</sup> Though the African Charter addresses numbers of rights, it was also a subject of strong criticism for its failure to give sufficient attention to the rights of women in Africa.<sup>215</sup> In response to such criticism, the Women's Protocol was established in 2003. Incorporating both the concern of African women and other international standards, the Protocol is considered to be an answer for the aged universalist-relativist debate.<sup>216</sup>

Ratifying the African Charter in 1996 and the Women's Protocol in 2004, South Africa has declared its commitment in taking part of the Africa regional human rights system.<sup>217</sup> However, as a dualist country, ratification of such instrument does not result in their incorporation into the corpus of South African domestic laws. This should not, however, lead to the conclusion that these instruments cannot be applied by the South African judiciary. Reading section 233 and 39 of the 1996 Constitution gives a clear meaning that South African courts are obliged to refer to international instruments, binding and non-binding, while interpreting the Bill of Rights and other legislation.<sup>218</sup>

However, the review of the different decisions, mainly by the Constitutional Court, entails that the African Charter and the Women's Protocol, unlike the other UN human rights treaties, are not sufficiently used by South African Courts. Similarly, while most of the decisions make references to the decisions of international tribunals and foreign court judgments, South African courts failed to make a proper use of the jurisprudence created by the African Commission. Though the African Charter has been referred in a limited number of decisions by the Constitutional Court, it was done in a very subtle manner that did not play a significant role in impacting the outcome of the judgment.<sup>219</sup>

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<sup>214</sup> See the above discussion in section 2.2.1.

<sup>215</sup> See the above discussion in section 2.2.2.

<sup>216</sup> See the above discussion in section 2.3.

<sup>217</sup> See the above discussion in section 3.2.

<sup>218</sup> See the above discussion in section 3.3.

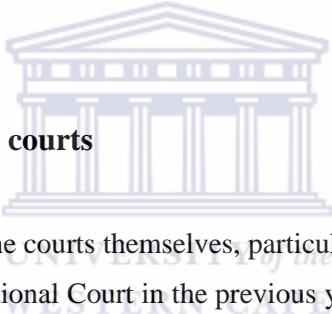
<sup>219</sup> See the above discussion in section 3.4.

Despite the existence of enhancing factors, such as the progressive constitutional norms and pro-human rights CSAs, the application of these instruments in South African judiciary is very poor.<sup>220</sup> This poor application and limited impact has been attributed to by a number of factors. Such factors include the non-incorporation of the African Charter and the Women's Protocol into the corpus of the South Africa's national law; low level of awareness by the majority of the South African CSAs about the instruments; low level of awareness by South African lawyers about the instruments; and South Africa's attitude of self-sufficiency, which resulted from the existence of strong domestic normative and institutional frameworks in the country.<sup>221</sup>

Therefore, due to these and other factors, the impact of the African Charter and the Women's Protocol in the actions and decisions of South African judiciary is really minimal. This shows that a joint effort should be employed to address this problem and to strengthen the impact of such instruments on the South African judiciary.

## **5.2 Recommendations**

### **5.2.1 The role of South African courts**



The main actors in this regard are the courts themselves, particularly the Constitutional Court. Though it is limited, the South African Constitutional Court in the previous years has tried to make a reference to these instruments, mainly to the African Charter, in addressing various human rights issues in the country. This experience should be developed to the extent of being the Court's 'policy'. While keeping the trend in making references to UN treaties, the Constitutional Court, however, should prioritize the use of the African Charter and the Women's Protocol. This, with no doubt, will create a strong jurisprudence in the other lower courts in South Africa. Moreover, giving due regard to the bigger vision of strengthening the African regional human rights system, the Court should also make references to the decisions and jurisprudence of the African Commission based on its appropriateness.

### **5.2.2 The role of the government and the Parliament**

As lack of incorporation is among the main factors which weaken the expected impact of these instruments, the responsible governmental organ, the Department of Justice and Constitutional

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<sup>220</sup> See the above discussion in section 4.2.

<sup>221</sup> See the above discussion in section 4.3.

Development, should initiate the process of incorporation. The South African Parliament should also issue an ‘Act of Parliament’ which legitimize the incorporation of these instruments into the municipal law.

### **5.2.3 The role of South African CSAs**

As CSAs are the main players in the promotion and protection of human rights, they should employ their effort in using the African Charter and the Women’s Protocol in their promotional and advocacy works. Particularly, those with an observer status before the Commission must take such activity as one of their priority engagements. In filing human rights cases before South African courts, they should consider basing their arguments on the provisions of these instruments. In their promotional works, they should also include awareness-raising programs on these instruments so that there can be an increased visibility of such instruments in the South African legal context.

### **5.2.4 The role of South African lawyers**

South African lawyers and law societies are also among the main actors to enhance the impact of these instruments in South African courts. If lawyers use the African Charter and the Women’s Protocol in their briefings and applications, that would remind the judges that they should refer to these instruments in their decisions. Therefore, as in the case in CSAs, South African lawyers should also use the provisions of the Charter and the Protocol in their litigations.

### **5.2.4 The role of the African Commission**

It is also crucial to note the role that the African Commission could play in this regard. As the main monitoring body of these instruments at the regional level, the Commission has to play a key role in making the African system in general and these normative standards in particular visible in all sectors across the continent, including the South African judiciary.

Moreover, the Commission, while issuing a concluding observation to South Africa, can also evaluate the judicial applications of these instruments at the national level, which in turn impose a duty to the government to incorporate these instruments into the national law.

Finally, as it is stated in the Resolution for the Granting and Enjoying Observer Status to NGOs Working in the Field of Human Rights with the African Commission,<sup>222</sup> CSAs with an observer status in the Commission shall present their activity reports to the Commission in every two years. In reviewing such reports, the Commission can evaluate the extent to which these CSAs have used the Charter and the Protocol in their works, including litigations. Through such mechanism, besides increasing the low level of awareness of these instruments, the Commission can influence the actions and decisions of the South African judiciary with regard to application of the African Charter and the Women's Protocol.



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<sup>222</sup> Established by the African Commission on Human and Peoples' Rights, meeting in its 25th ordinary session, in Bujumbura, Burundi, from 26 April - 5 May 1999.



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**Annex 1 - Table 4.1 List of South African CSAs with an observer status in the African Commission**

<b>No.</b>	<b>Names of CSAs</b>	<b>Sessions of the Commission</b>	<b>Date of the sessions</b>	<b>Host country</b>
1.	Lawyers for Human Rights:	11th ordinary session	9 March 1992	Tunisia
2.	The Centre for Human Rights	14th ordinary session	2 December 1993	Ethiopia
3.	Centre for Applied Legal Studies	16th ordinary session	25 October 1994	The Gambia
4.	Human Rights Committee of South Africa	20th ordinary session	21 October 1996	Mauritius
5.	National Institute for Public Interest Law and Research	20th ordinary session	21 October 1996	Mauritius
6.	Human Rights Institute of South Africa	29th ordinary session	23 April - 07 May 2001	Libya
7.	Community Law and Rural Development Centre	32nd ordinary session	17 - 23 October 2002	The Gambia
8.	Institute for Democracy in South Africa	32nd ordinary sessions	17 - 23 October 2002	The Gambia
9.	Indigenous Peoples of Africa Coordinating Committee Trust	33rd ordinary sessions	15 - 29 May 2003	Niger
10	Centre for the Study of Violence and Reconciliation	34th ordinary sessions	6 - 20 November 2003	The Gambia
11	Community Law Centre	41st ordinary session	21 November – 5 December 2005	The Gambia
12	Zimbabwe Exiles' Forum	41st ordinary session	16 - 30 May 2007	Ghana
13	People Opposing Women Abuse	42nd ordinary session	15 - 28 November 2007	Brazzaville, Congo
14	Legal Resources Centre	43rd ordinary session	17 - 22 May 2008	Swaziland
15	Coalition for an Effective African Court on Human and Peoples' Rights	44th ordinary session	10 - 24 November 2008	Nigeria

16	Human Rights Development Initiative	44th ordinary session	10 - 24 November 2008	Nigeria
17	Consortium for Refugees and Migrants in South Africa	Information not provided	Information not provided	Information not provided

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