

The Human Rights of Africans

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RÉSUMÉ. Les écrivains africains modernes ont utilisé le concept des droits de l'homme pour condamner le traitement des Africains par des non-Africains. Ces idées doivent être étudiées en tant que telles et non pas simplement considérées comme des versions secondaires des concepts "empruntés à l'Occident". Une recherche préliminaire sur les idées modernes Africaines montre que les Africains considèrent les droits d'abord en termes collectifs. Au lieu d'être pour l'essentiel une doctrine qui restreint le pouvoir d'un Etat, comme c'est le cas en Occident, en protégeant les vies, libertés et propriétés des individus, les droits de l'homme ont été dans le contexte africain une déclaration de guerre contre l'esclavage, le racisme, le colonialisme et le sous-développement. La conception africaine des droits de l'homme s'est voulue une réaction à ces injustices collectives et cherche à restreindre le pouvoir des non-Africains par rapport aux Africains. Que cette conception des droits de l'homme soit une bonne conception ou non pour traiter les problèmes de l'Afrique post-coloniale doit faire l'objet d'une recherche plus poussée. L'important est que les africains doivent avoir le droit à interpréter les droits universels de l'homme à leur manière et que l'accent sur les droits collectifs au lieu des droits individuels n'invalide pas leur point de vue. Les discussions autour des mérites relatifs des droits individuels par rapport aux droits collectifs restent ouvertes. Cependant l'accent mis sur les droits collectifs n'implique pas le rejet des libertés individuelles. Les contradictions entre les droits individuels et collectifs ne sont plus irréconciliables.

Introduction

Human rights are generally accepted nowadays as a universal moral standard. If this is the case, then we ought not to speak of the rights *of* Africans, but only of human rights *in* Africa. However, if we examine the idea of human rights, leaving aside the practice or non-practice for a moment, we can see that there exists a profusion of varying interpretations of the doctrine. The East and West wage a cold war over the fundamental meaning of human rights concepts¹. Third World scholars claim that their own version of human rights has more to do with collective human dignity than with individual rights. The West is accused of imposing Western values on non-western cultures when it attempts to insist that such deviations from the "true" meaning of human rights are perversions of the doctrine². How then do we deal with the myriad contradictions and general confusion about the meaning of "universal" human rights? If we distance ourselves from the ideological aspects of the debate and concentrate on what human rights have

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1 See Louis Henkin, "Economic-Social Rights as "Rights": A US Perspective", 2 *HRLJ* (1981), pp. 223-236 and F. Medvedev and G. Kulikov, *Human Rights and Freedom in the USSR* (Moscow: Progress Publishers, 1981).

2 See Adamantia Pollis and Peter Schwab, eds. *Human Rights; Cultural and Ideological Perspectives*, (NY: Praeger, 1979).

meant and not on what they should mean, we can see that the idea of human rights has varied throughout history, even in the West³. Modern day conceptions of human rights are broader than the original seventeenth century ideas of natural rights which are different again from earlier formulations of natural law. The concept of human rights has never been universal in the sense of an idea that is timeless and absolute. There is not one single, final true version of the doctrine. Therefore, to avoid charges of cultural imperialism, when one talks of "universal" human rights, the discussion must include the ideas of non-western peoples. Only a conglomeration of views from different segments of humanity add up to a truly universal perspective on human rights. African ideas of human rights are one neglected aspect of the total composite picture.

Modern African writers have used the concept of human rights to express their condemnation of the treatment of Africans by non-Africans. These ideas should be examined in their own right and not considered as mere second class versions of concepts "borrowed from the West". In fact, to suggest that an idea is borrowed means that it is merely on loan and must ultimately be returned. To imply that the West "owns" the concept of human rights is just as unacceptable as the claim that the concept of human rights is a "western inspired idea" or that it "originated in the West". Paulin J. Hountondji, echoing the sentiments of many contemporary African scholars, declares that, "Europe certainly did not invent human rights..."⁴. Ideas of human rights arise at particular historical time periods when the social and economic conditions are ripe enough for their articulation and dissemination. These ideas flourish everywhere and cannot be considered the private property of the West.

Once it is considered that all concepts of human rights are historical products of particular circumstances, or more specifically, the reactions to certain injustices experienced by a people, then it can be seen that African ideas of human rights are equivalent to similar statements made by Americans or Frenchmen. While equal merit may be posited, equal attention has not been given to African ideas. This article begins to redress this imbalance

3 For a brief overview of the history of the Western concept of rights see Richard P. Claude, "The Classical Model of Human Rights Development", in *Comparative Human Rights*, Richard P. Claude, ed. (Baltimore and London: John Hopkins U. Press, 1976). For a more detailed discussion on the idea of Natural Rights in the West, See David D. Ritchie, *Natural Rights. A Criticism of Some Political and Ethical Conceptions*, (London: George Allen and Unwin Ltd, 1894) and Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953).

4 Paulin Hountondji - "The Master's Voice - Remarks on the Problem of Human Rights in Africa", in Paul Ricœur, ed. *Philosophical Foundations of Human Rights*, (Paris: Unesco, 1986) pp. 319-332.

with a brief examination of some of the historical documents in which Africans have declared their human rights.

Adherents of the view that Africans have an idea of human rights which is different from the dominant western version have indicated that the source of this vision lies in Africa's pre-colonial communal past⁵.

But, Rhoda Howard wonders how much of Africa's communal values still persist to warrant the claim of an African approach to human rights that is rooted in the pre-colonial period⁶. Osita Eze draws attention to the feudal character of many of the early African societies and advocates a more realistic and less romantic view of Africa's past when searching for evidence of human rights⁷. A more fundamental criticism, like that of Jack Donnelly, denies the existence of ideas of human rights in traditional or pre-modern societies both in the Third World generally and in the West as well⁸.

Given the difficulties of proving conclusively whether or not early African societies had concepts of human rights, this article restricts itself to modern African political thought where there is clear evidence of a particular interpretation of human rights. The article deals specifically with those writings of Africans which are in English and does not discuss the various strands of African political thought which are in French, Portuguese or stem from the Islamic tradition. African social and political thought, as it is used here, refers to the writings of Africans or those with African ancestry. Therefore, it includes important American and West Indian writers who have had a great influence on the subsequent writings of native born Africans. This article attempts to make an examination of African ideas by analyzing the concept of human rights as it appears in selected documents of modern African social and political thought, beginning with the reminiscences of ex-slaves written in the eighteenth century up to the OAU's 1981 "African Charter on Human and Peoples' Rights".

An overview of the development of the human rights of Africans can be seen as a battle which necessarily began as a legal struggle to free the

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- 5 Keba M'Baye - "Human Rights in Africa, *The International Dimension of Human Rights*. Karl Vasak, general editor (Paris: Unesco, 1982) pp. 583-602. Dunstan M. Wai, "Human Rights in Sub-Saharan Africa" in Pollis and Schwab op. cit. pp. 115-144. Asmaron Legesse, "Human Rights in African Political Culture" *The Moral Imperatives of Human Rights: A World Survey*. Kenneth Thompson, ed. (Washington, D.C.: University Press of America for the Council on Religion and International Affairs, 1980) pp. 123-138.
 - 6 Rhoda Howard - "Is There an African Concept of Human Rights?" Working Paper No A:8, Development Studies Programme, University of Toronto (November 1983).
 - 7 Osita C. Eze - *Human Rights in Africa: Some Selected Problems* (Lagos, Macmillan, 1984) p. 13.
 - 8 Jack Donnelly - "Human Rights and Human Dignity: an Analytic Critique of Non-Western Conceptions of Human Rights", *APSR* Vol 76, No 2, June 1982.

slaves. After emancipation, African demands for rights endured on a social or cultural level as the cry against racial discrimination, then moved to a political sphere in the fight against colonialism and foreign domination and continues in the economic realm with a call for a new International Economic Order.

From this preliminary investigation of modern ideas, it can be seen that Africans do view rights in collective terms. Rather than being fundamentally a doctrine which restricts the power of a state, as it does in the West by protecting the lives, liberties and property of individuals, human rights in the African context has been a declaration of war against slavery, racism, colonialism and underdevelopment. The African idea of human rights developed as a response to these collective injustices and seeks to restrict the power of non-African over Africans.

Whether or not this idea of human rights is adequate to deal with the problem of post-colonial Africa is a subject that needs to be more thoroughly investigated. In this article, however, it is argued that Africans do have a right to their own interpretation of universal human rights and that the emphasis on collective rights over individual rights⁹ does not invalidate their point of view. The examination of the African ideas is concluded with some general remarks regarding the still open debate on the relative merits of individual versus collective rights.

Early African Ideas of Human Rights

The first mention of human rights in modern African political thought is found in abolitionist literature. *Thoughts and Sentiments on the Evils of Slavery* by Ottobah Cugoano and the autobiographical *Life of Oualadaj Equiano or Gustavus Vassa, the African* are two texts written by Africans in the eighteenth century which provide us with an interpretation of human rights which means nothing less and at this stage nothing more, than the abolition of the inhuman traffic in slaves. The personal experiences of Vassa coupled with the learned biblical arguments of Cugoano make a convincing case against the continuation of the immoral institution of slavery, as a violation of man's most fundamental human rights.

The claim to "natural rights and common liberties of man", is made repeatedly in Cugoano's book¹⁰, to prove that no man should enslave another. All arguments made to justify slavery and the slave trade by excluding Africans from the category of holders of natural rights to life and liberty are refuted.

9 See Ekwueme Okoli - "Towards a Human Rights Framework in Nigeria", in Pollis and Schwab, eds. *Toward a Human Rights Framework* (N.Y.; Praeger, 1982) pp. 203-222.

10 Ottobah Cugoano - *Thoughts and Sentiments on the Evils of Slavery*, 1987 with an introduction by Paul Edwards, (London, Dawson of Pall Mail, 1969) Passim.

Cugoano states that, God "gave to all equally a natural right to liberty". Africans are "born as free" as Englishmen. Yet, we have been "robbed of our natural rights as men and treated as beasts". This was no exaggeration. Referring to the infamous Zong case of 1790, Cugoano tells us that, "slaves were to be considered the same as horses" and it was therefore legitimate to throw sick ones overboard in an attempt to recover their value from the insurers¹¹.

Equiano's book¹² is more of a narrative than Cugoano's work and contains less on the abstract concept of natural or human rights. However, he does give references to rights, or violations of rights, from his personal experience. While still a slave, he despaired of ever attaining his rights among men and suspected that he needed, to wait till he got to heaven¹³. Although he had the good fortune to be able to purchase his freedom, he soon recognized that this was no guarantee of his rights. After witnessing the seizure by "these infernal invaders of human rights" of a free born young mulatto, Equiano exclaimed, "Hitherto, I had thought only slavery dreadful but the fate of a free negro appeared... in some respects even worse"¹⁴. To Equiano, a free negro was only "nominally free". Since his evidence was inadmissible in a West Indian court of law, he could be "universally insulted and plundered without the possibility of redress"¹⁵. Until not only the slave trade, but also the institution of slavery and the laws which supported the institution were all abolished, no single individual African could enjoy his human rights because his life and liberty were constantly threatened.

Cugoano shared this necessarily collective perspective on the issue of the human rights of Africans. He said, "The emancipation of a few, while ever that evil business of slavery is continued cannot make that horrible traffic one bit less criminal"¹⁶.

While non-African abolitionists shared the conviction that natural rights meant the elimination of the slave trade, not all who accepted the doctrine, at the time, saw this as the primary interpretation. The American revolutionaries of 1776 understood it in terms of the right to independence. They used the concept of natural rights to fight against tyrannical rule and to institute their own government.

There is no evidence to show that either Cugoano or Eguiano agreed with this interpretation. Just like the Americans and later the French, these two

11 Cugoano, *op. cit.* p. 111.

12 *Life of Olaudah Equiano or Gustave Vassa The African 1789*, 2 Vols. (London: Davidsons of Pall Mall, 1969).

13 Equiano, *op. cit.* Vol I, p. 178.

14 *Ibid.* Vol. 1, p. 249.

15 *Ibid.*

16 Cugoano, *op. cit.* p. 97.

African writers understood "universal" human rights in terms of the particular grievances of their own people. At the time Cugoano and Equiano wrote, Africans were still sovereign in Africa. The West had not yet started to scramble for African soil, only for the bodies of its fair sons and daughters. Once captured or purchased, Africans, unlike the white undentured servants, were declared slaves in perpetuity. Generations unborn were condemned to bondage. Natural rights, therefore, meant the claim to freedom for all those members of the Negro race who were unfortunate enough to be forcibly torn from their homeland and hence treated in a manner which was unnatural, cruel and inhuman.

For while both Cugoano and Equiano admit that their freedom was first violated by fellow Africans, (Equiano calls them those "sable invaders of human rights")¹⁷, they both appear lenient in their condemnation of these acts. Their true rancor is reserved for the Europeans who stripped the African of all semblance of human dignity and forced him to ask, "Am I not a man, and a brother?"¹⁸.

It was the peculiarly cruel nature of the trans-Atlantic slave trade that forced the conscience of the world to begin to question the time honoured institution of slavery. Edward Blyden, a prominent spokesman for his race in the late nineteenth and early twentieth centuries, asserts that, "the right to hold slaves was deeply rooted in the minds of men... until the Negro emancipation first established the principle that no circumstances justify the making or holding of slaves"¹⁹.

However, once emancipated, the former slaves were still not free to enjoy the natural rights and privileges of men. Blyden repeatedly warns Afro-Americans: "I am aware that some, against all experience, are hoping for the day when they shall enjoy social and political rights in this land"²⁰. He claimed that the effect of Abraham Lincoln's 1863 emancipation proclamation was only to set the body free, "but the soul remained in bondage, (and) the intellectual, social and religious freedom of the American ex-slave has yet to be achieved"²¹.

Blyden strongly believed that Africans would eventually attain this degree of freedom and hence enjoy their total human rights only if they returned to

17 Equiano, op. cit. p. 60.

18 This was the inscription on the seal of the British Abolitionist Society.

19 Edward Blyden, *Christianity, Islam and the Negro Race 1887*, (Edinburgh University Press, 1967) p. 355.

20 Edward Blyden - "The Call of Providence to the Descendants of Africa in America", in Lynch, ed., *Selected Published Writings of Edward Wilmot Blyden: Black Spokesman*. (London, Frank Cass & Co., Ltd, 1971) p. 25.

21 Blyden - "The Three Needs of Liberia" in Lynch, op. cit., p. 120.

their original homeland. He urged Afro-Americans to join him and build a modern African nation in Liberia.

Blyden stressed the importance of a separate racial identity and declared openly that Liberia should not be a replica of the US: "We do not want the same thing in Africa that we left in America"²². Instead, as perhaps the greatest of Africa's "cultural nationalists", Blyden was determined to assert the rights of the race to develop its own character, soul, personality, individuality and even nationality. He loudly proclaimed, "We have as much right as any other people to strive to rise to the very zenith of national glory"²³.

In the 1900's, other notable Pan-Africanists of the Diaspora also spoke of the Rights of Africans. The identity of the group demanding its rights continued to be based on a racial rather than a geographical limitation. This can be seen as an outgrowth not only of common ancestry but also the shared experience of racial degradation.

All rights listed in Marcus Garvey's, "Declaration of the Rights of the Negro Peoples of the World"²⁴, drafted and adopted at a Convention of the United Negro Improvement Association held in New York in 1920, were attacks against the dehumanizing segregation against people of colour. In the preamble to the declaration, the first point made is the complaint that "nowhere in the world, with few exceptions, are black men accorded equal treatment with white men"²⁵. The third right listed serves to sum up the meaning of every one of the rest of the rights, fifty-four(54) in all. It states: "That we believe the Negro, like any other race, should be governed by these rights and privileges common to other human beings"²⁶. According to the declaration, racial discrimination and the parcelling out of the continent of Africa among the European nations have caused the denial of all rights and freedoms which ought to be accorded to Negroes.

In this document, the Negro race demands a right to their history, a right to dignity, a right to respect. They want only what is denied them because of their colour, i.e. unhindered access to public places, to employment and to equal education, as well as equal protection under the law. They condemn the uncivilized and barbaric behaviour of whites toward the Negro peoples. The declaration makes it clear that violence is justified in the attempt to eliminate the infringement of the rights of Negro peoples. Africa belongs to Africans and the "Solemn determination to reclaim the treasures and posses-

22 Ibid, p. 123.

23 Blyden - "A Vindication of the African Race", in Lynch, op. cit., p. 133.

24 Reproduced in V.B. Thompson - *Africa and Unity: The Evolution of Pan-Africanism* (London: Longman, 1969), pp. 324-330.

25 Ibid.

26 Ibid.

sions of the vast continent of our forefathers²⁷ is recorded in the document.

Fundamentally, the declaration protests against the idea that human rights are reserved for the white man. Negroes must be recognized as fellow members of the *human race*.

W.E.B. Dubois also fought for the rights of Africans as a racial group. He claimed that the drawing of lines on the basis of colour and race was not his own idea but could be attributed to the behaviour of whites throughout the world who displayed a "disposition not to treat civilized Negroes as civilized, (and) to consider that the Negro races existed in the world chiefly for the benefit of white races"²⁸. But he sometimes identified similarities with other groups and advocated, in 1915, an alliance between white and black labour²⁹. At the Pan African Congress held in Paris in 1919, the first resolution arrived at was that the "Allied and Associated Powers establish a code of law for the international protection of the natives of Africa similar to the proposed international code for labour"³⁰.

The rights of Africans at the 1919 Congress were identified primarily in social and economic terms. Freedoms and political control took a back seat to demands for capital to be regulated and profits to be taxed for the social and material benefits of the natives. These benefits were clearly stated: education and medical services should be provided by the state³¹. Labour was also to be strictly regulated so that abuses were curtailed.

The Land was to be held in trust for the natives. It seems that the state was also to be "held in trust", for "the right to participation is limited by the development of the natives" with the view toward a future where "Africa is ruled by Africans"³².

Right to Independence

However, in the near future, (1945 at the Pan African Congress in Manchester) rule by consent was no longer the ultimate goal. Constitutional reforms which allowed for greater participation were considered as "spurious attempts to continue the political enslavement of the peoples"³³. Indirect rule was seen as an "encroachment on the right of the... African natural rulers". Africans and all colonial peoples had a "right to control their own destinies"

27 Ibid.

28 Ibid.

29 Ayedele Langley - *Pan-Africanism and Nationalism in West Africa 1900-1945*. (Oxford: Oxford University Press, 1975) p. 60.

30 Colin Legum - *Pan-Africanism: A Short Political Guide* (N.Y.: Praeger, 1965) pp. 151-152.

31 Langley, op. cit. p. 66 Langley points out that neither Padmore nor Legum include the section on health in the resolutions of the Pan Africa Congress of 1919.

32 Legum, op. cit., pp. 151-152.

33 Ibid, pp. 153-155.

and this meant a "right to govern themselves". Self-government was the only way to defeat the exploitative intentions of the imperialist powers. Colonial workers and farmers were called to join the struggle for emancipation. Intellectuals and professional classes were told that the winning of their own liberties depended upon fighting for "trade union rights, the right to form co-operatives, freedom of the press, assembly, demonstration and strike, freedom to print and read the literature which is necessary for the education of the masses..."³⁴. These rights were needed to organize the masses as the only road to effective action. These rights were *instrumental* in the gaining of the single most important right; the right to *freedom*, not for individuals, but for a national group.

Besides being primarily moral and legal limitations on existing governments, the Western doctrine of the rights of man contains revolutionary elements. The doctrine sees rights as natural and prior to government. Government was instituted among men to protect these rights. If any government failed to carry out the purposes for which it was created by the people, these same people had a right to abolish it. It was this aspect of the doctrine which appealed most to Africans at this stage in history.

Human rights became the platform on which the struggle for independence was fought. The doctrine was used not to restrict the power of the state over individuals but to overthrow existing foreign control over peoples of a different race and eliminate discrimination on the basis of colour. Africans argued that they had a right to overturn colonial government because its politics of racial discrimination and economic exploitation denied Africans their rights. The logical conclusion was that a new government must be formed which would protect and ensure these rights. However, the emphasis was placed on the right to self-determination as a right in itself and not as a means to the realization of other rights.

If a government is not only based on the consent of a people but also created by the people themselves, then Europe was to be reminded that the Africans did not create the colonial governments. Racism, created by the whites, clearly separated the two groups: Africans and Europeans. The rule of one over the other is alien rule and must come to an end. Africans can never be Europeans because of the colour of their skins, therefore Africa can never be part of Europe. A distinct people must rule themselves. They must be able to determine their own destiny as well as to define their own identity. This is the only way to end the discrimination and exploitation which denied Africans not only their rights but even their humanity.

34 Ibid.

Universal Declaration of Human Rights

Once the Universal Declaration of Human Rights was adopted by the Security Council of the UNO in December 1948, Africans constantly referred to this document in their struggle for independent status. The Final Communiqué of the Conference of Independent States held at Accra in April 1958 proclaims and reaffirms unswerving loyalty to the Universal Declaration of Human Rights and reiterates the deeply held conviction that "racialism is a negation of the basic principles of human rights"³⁵. However, when the Conference recognizes "the right of African peoples to independence and self-determination"³⁶, it is not referring to the Universal Declaration of Human Rights.

The United Nation's document does not include a right to self-determination. It is a declaration of "individual" rights. Individuals are considered to be "born free and equal in dignity and rights", but the acceptance of "limitations of sovereignty" found in the Declaration means the acceptance of the unequal status of certain territories. Of course, this need not or even must not excuse denials of rights to *individuals* in dependent areas. Discrimination against individuals on any basis, including the "political, jurisdictional or international status of the country to which a person belongs"³⁷ is condemned by the declaration.

However, Africans refused to accept the claim that individual rights could be observed under conditions of servitude of a people. The colonial powers did not treat Africans as individuals but as a single racial category to be dominated and exploited indiscriminately. Oppression and subjection of one race by another is clearly a denial of all human rights.

At the All African People's Conference in Accra in December 1958, the resolutions on Imperialism and Colonialism, and on Racialism are rife with references to human rights. The emphasis, in this document, is on political rights as distinct from fundamental human rights in general. Alongside a right to self-determination and independence is a right to participate in the government of your country. This last right *is* included in the Universal Declaration of Human Rights and is clearly violated by the colonial policy of denying universal suffrage to Africans. This denial of fundamental *political* rights to Africans gives the imperialists a free rein to continue their nefarious activities which deprive Africans of "fundamental human rights, freedom of speech, freedom of association, freedom of movement, freedom of

35 Legum, *op. cit.*, pp. 157-166.

36 *Ibid.*

37 *Ibid.*

worship, freedom to live a full and abundant life"³⁸.

Under such circumstances, there can be no other choice but to condemn colonialism and imperialism and to insist upon the right to self-determination for the entire continent and all colonial peoples.

On the 14th of December, 1960, the omission of a right to self-determination in the Universal Declaration of Human Rights was corrected by the Declaration of the Granting of Independence to Colonial Countries and Peoples. This declaration stated as its first principle: "The subjection of people to alien subjugation, domination and exploitation constitutes a denial of fundamental Human Rights"³⁹. Article two of this declaration later becomes the first article in the two International Covenants formulated in 1966 to give effect to the Universal Declaration of Human Rights. Both the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights begin with the words: "All peoples have a right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"⁴⁰.

African Constitutional Rights

African and colonial peoples won their battle for the acceptance of the right to self-determination as a universal right and in the years that followed many African states gained independence as well. The stage was set for the realization of the rights of Africans free from foreign domination and the pernicious effects of racism. Most of Africa was now in control of the governmental apparatus which could deny a people civil and political freedoms.

Nearly all the constitutions of the newly independent states declared allegiance to the principles of human rights. Often these declarations of rights were found in the preamble (i.e. Tanganyika) or in some other non-enforceable form as in the President's oath of office in Ghana's republican Constitution of 1960. Nigeria, however, was the first African nation to include a bill of rights as a substantive provision in its constitution. Rather than the absolute declarations of rights found in many of the former French colonies' independence constitutions, Nigeria had a more modern "bill of exceptions", where numerous limitations on the rights guaranteed by the constitution were spelled out in detail⁴¹.

38 Ian Brownlie, ed., *Basic Documents on Human Rights*, (Oxford: Clarendon Press, 1971), p. 108.

39 Legum, op. cit., pp. 241-254.

40 Brownlie, op. cit., p. 115.

41 See B.O. Nwabueze - *Constitutionalism in the Emergent States*, (N.J.: Associated University Presses, Inc., 1973) and "Redrafting Human Rights" in *Nigeria 1965 Crisis and Criticism: Selections from Nigerian Opinion* (Ibadan University Press, 1966), pp. 52-53.

While Tafewa Balewa remarked, at the Lagos Conference on the rule of Law in 1961, that, "We felt that (human rights) was a subject of such tremendous importance that (they) should not be left hidden here and there in a legal maze and we insisted on having a special chapter of our constitution devoted to the exposition of those fundamental human rights"⁴² most sources cite the origin of Nigeria's bill of rights as the Willink Commission (commonly referred to as the Minorities Commission).

On the verge of independence based on majority rule, fears for the rights of minorities surfaced. Nigeria's bill of rights was included in its constitution and came into force prior to independence in order to be used for the elections in 1959. Africans were quick to realize that a people can be denied rights by members of their own race and not only through subjection to alien rule. The struggle for rights was still conceived of in terms of groups rather than individuals but with the imminent departure of the colonialists, the boundaries of the group to which one belonged had to be redrawn. In Nigeria, this redefinition of boundaries took the form of a request for new states within the federal structure.

In 1958, a commission of inquiry headed by Henry Willink was set up to investigate the fears of minorities and to suggest ways of allaying such fears. Representations were made to the commission requesting the formation of additional states to safeguard the liberties of minorities who feared discrimination after independence once the indigenous majorities gained control over each of the regional governments. The commission concluded that the balance between regional and federal institutions should be adequate to deal with this problem. National leaders would be forced to represent the interests of minorities in order to gain enough votes for election to federal institutions. The police would also be an arm of the federal government and this would help minimize possible infringement of minorities' rights. The commission refused to recommend the creation of new states.

Religious delegations were also given a hearing. It was these groups only that suggested the inclusion of a bill of rights to safeguard their rights to worship and to proselytize. The commission seized this opportunity to recommend the bill of rights and suggested a textual borrowing from the European Convention on Human Rights⁴³.

The example of the origin of Nigeria's Fundamental Human Rights provision in its constitution confirms the idea that Africans were still fighting for collective group rights even on the advent of colonial withdrawal. The minorities were demanding their right to self-determination, albeit on a lesser

42 Kéba Mbaye, "Human Rights in Africa" in Karel Vasak, ed., *The International Dimensions of Human Rights*. (Paris: UNESCO, 1982), p. 583.

43 Cmnd. 505 (1958).

scale than independent status at the international level. The fact is that their fears of discrimination took the expression of a request for autonomy of the group and not the protection of individual rights. Even the religious delegations were more interested in the right to establish religious institutions than in personal religious freedom.

Minority Rights

Minority rights are collective rights. They are the right to full equality with the majority and the preservation of the separate identity of the minority. They give rise to the right to establish, manage, and control charitable, religious and social institutions, schools and other establishments using the language of the minority and freely exercising religious precepts of the group⁴⁴.

The right of an individual to be free from discrimination or to be treated equally is not the same as the right of a group to equal status with the dominant group. The idea of equality of the *individual* whitewashes differences. It is an equality which requires everyone to become like the dominant group by disassociating himself from the inferior minority. The individual is expected to melt into the larger whole. During the colonial period this could only be attempted but not accomplished, by the schizophrenic act described by Frantz Fanon as the wearing of white masks over black faces. This experience taught Africans to be wary of an individual freedom and equality which can only be purchased at the price of repudiation of one's past and one's culture.

To consider rights in collective terms means to fight for the continued existence of the group. The group asserts its right to remain a distinct and separate entity and to preserve its identity as such.

But the Willink Commission was convinced that to allow states to be created on the basis of ethnicity would be to perpetuate differences destined to wither away⁴⁵. This is an odd comment from a people who believe that democracy means tolerance of diversity and competition in a pluralistic society. It is also a turn about on earlier colonial policy which encouraged the development of ethnic differences and tribal institutions because they were the "natural expressions of a people's innate genius"⁴⁶. Nevertheless, the British gave Nigeria its substantive bill of rights on *an individual basis* by copying it from the European Convention on Human Rights with minute changes of wording.

Hindsight helps to deepen the impression that the Willink Commission was

44 Yoram Dinstein - "Collective Human Rights of Peoples and Minorities" - *ICLQ* Vol. 26 (1976).

45 Cmnd. 505 (1958), p. 88.

46 Sir Hugh Clifford, quoted by V.B. Thompson, *op. cit.*, p. 47.

exceedingly unresponsive to the desires of the Africans who testified before them in 1958. The difference between collective group rights and individual rights is more fundamental than any possible legal distinction between the phrases "justifiable" and "necessarily justifiable" in a democratic society⁴⁷.

Collective Rights

While the Universal Declaration of Human Rights lists nearly 30 individual rights, modern law vouchsafes *three* collective human rights to peoples. These are: the right to physical existence, to self-determination and to utilize natural resource⁴⁸.

The fight for the rights of Africans can be seen as a struggle for these three collective rights. The right to physical existence, besides being a prohibition against genocide, entails the right to a separate identity. This expresses the social and cultural aspects of the fight against racism. Racism denies black men respect and dignity by denying them a positive identity of their own making. Once slavery was abolished Africans demanded a right to practice their culture, to learn their history, a right to be black and still be considered as equal members of the human race. Then the struggle progressed to the political stage where Africans demanded not only the right to define themselves but to rule themselves as well. Eventually the colonialists were forced to concede the right to self-determination to nearly all of the African peoples. The third right (to utilize your natural resources) appears to originate from the demands of colonial peoples⁴⁹. It is an expression of the collective social and economic rights of a people which are being fought for today under the banner of the New International Economic Order.

Right to Development

When Africans demanded the right to political control over their nations, they expected to gain economic control as well. Independence had been sought as a road to the end of foreign exploitation and the beginning of national development. However, after the initial euphoria created by the winning of independence died down, it soon became apparent that civil, and political freedoms were not sufficient to bring about the desired transformation of the continent and its peoples. Economic ties still constituted a bondage to the interest of the ex-colonial powers. A right to development for the African people was seen as being sabotaged by continued economic dependence upon the international economic order which maintained low prices for raw materials and high prices for manufactured goods. Unequal exchange resulted in unequal development and the social and economic rights of Africans were still being denied even after political independence had been

47 De Smith - "Fundamental Rights in the Commonwealth" *ICLO*, 10 (1961).

48 Dinstein, *op. cit.*.

49 *Ibid.*

granted. What is needed now is a New International Economic Order to redress the imbalance caused by years of exploitation and drain on the economies of the Third World.

Through their involvement in the Non-aligned Movement, Africans took part in the formulation of the demand for a New International Economic Order. Protests against the stark inequalities that exist between rich and poor nations began at Bandung and crystallized at the 1973 Algiers summit of the Non-aligned Heads of State and Governments where a specific call was voiced for a New International Economic Order with concrete suggestions regarding implementation.

Africans recognized the connection between the need for a change in the world economic system and the possibility of the realization of fundamental human rights for people of the Third World. At the Butare Colloquium on Human Rights and Economic Development in Francophone Africa held in Rwanda in July 1978, Africans made an explicit call for a New International Economic Order, which would mean a more equitable distribution of the world's economic power, as an essential precondition for economic development and the guarantee of human rights. The Colloquium asserted that fundamental human rights include social and economic rights and these cannot be realized without a prior right to development for people in the Third World. Therefore, a right to development must be held to be a fundamental human right in itself⁵⁰.

Given the conditions in the Third World, to deny a collective right to development of a nation based on the unhampered utilization of its natural resources would be to deny individuals' social and economic rights. The realization of social and economic rights of Africans necessitates not only the recognition of a right to development but the realization of the fact of development and this cannot be accomplished without the emergence of a New International Economic Order.

African Charter on Human and Peoples Rights

The battle for the rights of Africans is still being fought. Elements of the early stages of the struggle are still apparent in more recent documents. The African Charters on Human and Peoples' Rights adopted by the OAU Council of Ministers and Assembly of Heads of States and Governments in Nairobi in June 1981 contains elements from the stages of the struggle for the collective rights of Africans. The title alone demonstrates the emphasis not on individuals but groups or peoples. The desire to maintain a separate cultural identity and to fight against racist ideas of the inferiority of the

50 Mbaye, *op. cit.*

African are to be found in statements made in the preamble referring to the need for Africans to "inspire and characterize their reflections on the concept of human and peoples' rights" by "taking into consideration the virtues of their historical tradition and the values of African civilization"⁵¹.

Article 1 of the Charter merely calls members to recognize and undertake to adopt legislation which will guarantee the following list of rights. Articles 2 and 3, which we can assume are of primary interest since they are the first rights listed, are the right to freedom from discrimination in terms of rights and before the law. The emphasis is still on the elimination of racial inferiority as a precondition to the realization of rights. This point appears to be so important that it necessitates repetition in the Charter. Article 19 states "all peoples shall be equal".

Article 20 is "the right to freedom from colonial domination"⁵². While this article also repeats the formula used in the two UNO Covenants of 1966 for the right to self-determination, two adjectives, "unquestionable" and "inalienable", have been added as a means to give additional emphasis to this declaration of freedom from alien rule.

Earlier OAU documents give an even clearer indication of the supreme importance of this right to the Organization and to the African peoples. Birame Ndiaye argues that in the founding Charter of the OAU there is a dichotomy between the right of peoples to self-determination and all other human rights⁵³. The right to self-determination is not primarily an instrumental right, a prerequisite for the protection of human rights. Rather, it is the only right that is assigned importance by the founding charter. Human rights in this document are merely listed under the heading of purposes and member states are under no obligation to implement them. However, member states are obliged to respect the right of a people to self-determination, by recognizing sovereignty and independence of all member states.

The omission of a commission on human rights from the list of five specialized commissions set up by the original charter is rectified by the 1981 Charter on Human and Peoples' Rights but this does not upset the balance in favour of collective political freedom or self-determination over all other human rights.

The 1981 Charter lists social and economic rights alongside civil and political liberties as is found in the United Nations' Declaration of Human Rights but is seldom found in constitutional declarations of rights, including

51 *African Charter on Human and Peoples' Rights*, ICJ *The Review*, Dec. 1981.

52 *Ibid.*

53 Birame Ndiaye - "The Place of Human Rights in the Charter of the OAU", *Vasak*, op. cit., p. 602.

those in African constitutions. The preamble to the 1981 Charter asserts that economic, social and cultural rights cannot be disassociated from and are a guarantee for the enjoyment of civil and political rights. This emphasis on economic and social foundations leads to a conviction that it is "essential to pay particular attention to the collective rights of development"⁵⁴. Article 21 states that peoples freely dispose of their wealth and natural resources and asserts that states must endeavour to eliminate all forms of foreign economic exploitation. Article 22 specifically and unequivocally claims a right to development.

Collective Rights versus Individual Rights

While individual rights and collective rights are found side by side in the 1981 Charter of the OAU, this fact does not detract from the importance of collective rights in African political thought. Proponents of collective rights often include individual rights in their understanding of freedoms. Usually, it is the western advocates of individual rights who exclude collective rights and often social and economic rights as well, from their conception of rights. They claim that rights can only be individual in nature. What is important is that Africans do not accept this exclusive view of rights as pertaining to individuals alone. Instead, they predominantly see rights in terms of the rights of collectivities.

This is actually a more realistic appraisal of the idea of rights. Individuals exist not in abstract but as members of particular groups. One cannot meaningfully discuss an individual outside the context of the group to which he or she belongs. Individual rights are always accorded to individuals belonging to particular groups. The origin of western individual rights can be traced to the theory of natural rights which spoke of rights which were supposedly innate and universal but were applicable only to men of property⁵⁵; Constitutional rights in the US were originally the "rights of gentlemen"⁵⁶ and not of all Americans or mankind generally. The European Convention on Human Rights was called "a declaration of the rights of the European man" by Leopold Senghor because it specifically excluded the non-metropolitan territories from its field of operation⁵⁷. Struggles had to be waged throughout history to expand the boundaries of those considered eligible to demand rights.

Rights are more of an honour to be earned or a status to be achieved than an innate characteristic present at birth. The prize is admittance into the

54 1981 Charter, op. cit.

55 J.M. Hendrickson, "Human Rights: Fundamentally for Whom? *Nigerian Journal of Political Science* Vol. IV Nos 1&2, pp. 134-147.

56 Henkin, op. cit., p. 227.

57 Mbaye, op. cit.

group of rights-holders and the conferring of the title of individual to those who merit it. But to speak of a universal individual is to expand the boundaries of the once exclusive group to include all of mankind. If this is done without redefining the perimeters of the group, so that others are actually included, it is merely an exercise in intellectual arrogance or cultural imperialism.

The Universal Declaration of Human Rights claims to be the highest aspiration of mankind. However, if mankind is understood as male, white, western and of a certain class, the inclusion of individuals who fall outside this category is problematic. Unless a redefinition takes place, a woman, a colored person or a poor person can only gain entrance to the exclusive club of mankind by ceasing to be what he or she is. While it is possible to change one's religion, political beliefs or nationality, the issues of race and sex are immutable.

The problem is not the failure of those who already enjoy rights to live up to the ideal of treating everyone as an individual disregarding the alien shell and concentrating on the inner similarities. This type of criticism can easily be dismissed by arguing that ideals are unattainable aspirations and rights holders are only human. The end result of this line of attack is the continuation of the *status quo*. The real problem is that particular groups are not accepted for what they are or recognized as containing individuals within the separate and distinct group. Therefore, the only way to effectively fight for inclusion in the category of rights-holders is to fight for the rights of a group. Peace and harmony both within and between nations depend not on equal individual rights but on equal collective rights. If Africans were ever to have right, in any meaningful sense of the term, it was and is imperative to fight first against slavery and racism, to fight for self-determination and for a New International Economic Order.

Rights of Africans

The fight against racism and particularly the apartheid regime in South Africa continues to be part of the struggle for the recognition of the human rights of Africans. One wonders how the extension of rights to people of colour can be questioned by societies which are now considering the possibility of extending rights to animals and fetuses.

It is also surprising to read Louis Henkin's argument that Americans did not use and abuse human rights to justify a prior right to self-determination as Africans did. Rather, framers of the US Constitution were expressing what was real or "in the air" at the time of the American Revolution when they set out a bill of rights⁵⁸. This argument uses the erroneous idea that

58 Henkin, *op. cit.*

individual rights are morally superior to collective rights in order to promote the position that "Universal" rights are only found in the air one breathes in America, and not in Africa.

The tendency to look skyward and the failure to look at the ground could also explain why Americans generally fail to see social and economic rights. Individual rights exist as castles in the air and the social and economic foundation necessary for the full enjoyment of such rights for all is neglected. Certain social and economic changes must take place before individual human rights can be applied to everyone and will cease to be a category which always excludes some groups, i.e. blacks, women and the poor. Africans are more aware of the conditions necessary for the realization of rights and know from experience that poverty as well as racism is a negation of all human rights. According to Julius Nyerere, poverty must be abolished before the peasants' *right* to dignity becomes a *fact* of human dignity⁵⁹.

But even those theorists in the West who recognize social and economic rights are reluctant to apply the idea on an international scale. D.D. Raphael argues that social and economic rights, while worthy of the label rights, can be distinguished from earlier ideas of liberties because they can only be demanded from your own nation. They are the rights of a citizen rather than the rights of man⁶⁰. Apparently to see social and economic rights in collective terms as a demand for redistribution of wealth through a New International Economic Order, one needs to be a member of a nation which cannot, at present, satisfy the social and economic needs of all of its peoples, whether it is their right or not.

Conclusion

The idea of rights found in the declarations and writings of African peoples is fundamentally expressed in collective terms. However, the difficulties experienced by Africans in realizing individual rights within the framework of the independent nation states of Africa should not be attributed to the theoretical predominance of collective rights over individual rights. To assume that the emphasis on collective rights causes the denial of individual freedoms is to accept an irreconcilable contradiction between collective rights and individual rights. This approach is consistent with the Western idea of individual rights which sets the individual above the society and against the state in an adversary relationship. Africans are less likely to view an individual in such an isolated manner. The OAU Charter on Human and Peoples Rights contains a separate listing of duties which are more than the observance of the rights of others. Africans have an obligation to the group, the community and the nation which is different from an obligation to other

59 Quoted in ICJ *Human Rights in a One Party State*, (London Search Press, 1978), p. 23.
60 D.D. Raphael, *op. cit.* p. 6.

individuals within the nation. Westerners would do well to aspire to an idea of rights which eliminates the stark dichotomy or at least minimizes the antagonism between the individual and the larger group.

Surely, violations of individual rights to freedom in Africa cannot be explained by the so-called alien nature of the idea of rights of the individual, because an idea or lack of it cannot be the *cause* of a phenomenon. Ideas are reflections of experience and the emphasis on collective rights can be understood as a reaction to slavery, racism, colonialism and underdevelopment. Rather, gross violations of individual rights must be blamed on the unjust structures existing both within a society and at the international level and not on the legitimate values and aspirations of the peoples of Africa and the Third World.