SOUTH AFRICA AND A HUMAN RIGHTS COURT FOR AFRICA

Paper 6
by Christof Heyns
Centre for Human Rights
University of Pretoria
August 1995

Much has been said in recent times about the powers of the South African Constitutional Court. Some defend these powers in the name of constitutionalism -the idea that, as the Germans would say, above the Constitutional Court there is only blue sky. Others wish to place checks on the Court, most notably that of Parliament or referenda, in the name of popular democracy. After a bruising battle, inter alia in Parliament, the former opinion won the day, and most of the bruises are on the other side.

However, there is a new and perhaps more persistent speck appearing in the skies above the Constitutional Court. The Organisation of African Unity decided in 1994 that a governmental legal experts' meeting would be convened to investigate the establishment of an African Court of Human Rights. This meeting will take place in September in Cape Town. In a letter of salutation to the participants in the first All-African Human Rights Moot Court Competition that was held at the University of Pretoria recently, the Secretary General of the OAU, Dr Salim Ahmed Salim, unequivocally stated that '[i]n the months and years ahead, such a court will become a reality'.

This contribution will take a brief look at the following four questions:
(1) Where do regional human rights systems, and particularly human rights courts, fit into the larger picture of the protection of human rights?
(2) Should Africa have a court for human rights?
(3) What are the interests of South Africa in this regard?
(4) What should be the long term goals for the regional protection of human rights in Africa?

REGIONAL SYSTEMS FOR THE PROTECTION OF HUMAN RIGHTS

There could be little doubt that the most important level on which human rights should be protected is the national one: If a strong government refuses to protect human rights in a particular country, there are limits to what could be done by the world community. However, some kind of safety net mechanism has been brought into place after the devastation of the Second World War demonstrated that human rights know no boundaries. The United Nations gradually developed human rights standards and started developing implementation mechanisms on the universal plane. A state's human rights practices are no longer regarded as domestic affairs -largely as a result of the precedent that was set in respect of apartheid South Africa.

In three parts of the world, regional human rights systems were also brought to life. In Europe the European Convention on Human Rights of 1950 created a Commission of Human Rights, which investigates allegations of human rights violations by State Parties and issue reports, as well as a Court which takes decisions which are legally binding on those states.In the Americas a similar structure was brought into place, inter alia by the American Convention on Human Rights of 1969. In both these systems the Court has power to overrule the

decisions of the highest courts in the participating countries, and in Europe the Convention is directly applicable in the courts of a large number of states.

In Africa the African Charter on Human and Peoples' Rights of 1981 created only a Commission, and no court. This was partly the result of the view that the African tradition is that of compromise and consultation, which can be achieved by the Commission, and not confrontation, which is inherent in court procedures. All African states which are members of the OAU, with the exception of Ethiopia, Eritrea, Swaziland and South Africa, have ratified the African Charter, the founding document of the system. The African Commission on Human and Peoples' Rights started functioning in 1986.

The European Human Rights Court, together with the European Commission on Human Rights, has played an enormous role in establishing the wide consensus on basic human rights matters which exists at the moment on that continent. In the process it has succeeded in the objectives of its founders after the Second World War, namely to prevent a resurgence of fascism and to curtail the spirit of Stalinism. Almost all the former Communist countries, including Russia, are now knocking on the door to join the system, and are bringing their legal systems in line with the norms of the European Convention on Human Rights.

In the Americas the Commission for Human Rights, backed up by the Court, has exercised considerable influence in the transformation of many Latin American countries in the 1980's from military dictatorships to democratic governance.

In essence a regional system for the protection of human rights amounts to a number of countries tying themselves to each other, much as mountain climbers do when they scale a high cliff, with the idea that if one should slip or fall, the others will try to save him. Of course, in the concrete sense of the word, these ties are often very weak, and if control over a particular country falls into the hands of thugs who do not want it to be 'rescued', they can cut their country loose and seek their own path. But the moral indignation which inevitably follows when this happens - which often translates into the force of economic, cultural and diplomatic sanctions - can be considerable, and plunge a recalcitrant state into a free fall until its leaders come to their senses.

No one would argue that a regional Human Rights Court could intervene in the type of madness that beset Rwanda recently once it has broken out, but it could play an important role in preventing such a society from losing its balance in the first place.

A HUMAN RIGHTS COURT FOR AFRICA?

Judging by the experience of the other systems Africa could benefit greatly from an efficient and independent court. A court has the potential to place the issue of human rights more firmly on the African agenda, and to add teeth to the idea that human rights should be protected on the continent. Perhaps only a few states would submit to such a system in the beginning, but if they are the most progressive states and they are also the ones which show economic growth, that would set an important example on the continent of the link between respect for human rights and progress. The African Charter, because of its wide acceptance, provides an ideal platform for further growth.

The fact that Africa traditionally prefers to resolve its disputes through discussion and not through confrontation in courts, does not serve as an argument against the establishment of a

Human Rights Court. Such a court would not be an alternative to discussion and compromise - the African Charter in fact provides, as in the case with the other regional systems, that the Commission could play a facilitating role in this regard. However, if discussion fails and a friendly settlement cannot be reached, the question is what are the alternatives. If there is no court, the only alternative is that the strongest party should prevail - a solution which often leads to war.

The fact that there are problems in this regard, however, also need to be recognised and they must be addressed. The African Commission on Human and Peoples' Rights, which has been in existence since 1986, has not yet made a significant practical impact on the protection of human rights in Africa. The Commission is short of money, which raises the question where funding for the Court will come from. The allegation is often made that African states are unwilling to appoint too many independent thinkers as judges in their own countries; why would they then accept the appointment of truly independent people to a supra-national court and submit themselves to its 'foreign judgments'?

In addition to the above, it is widely recognised that the African Charter, which such a court will presumably be called upon to interpret, has serious weaknesses, at least if it is to be used as a basis for court decisions. It contains several 'clawback clauses' with the effect that important rights, such as security of the person, is protected only in so far as the law does not provide otherwise. It also prescribes certain duties which would be hard to enforce in a court of law, such as the duty to 'strengthen positive African values'. These duties could in fact serve as severe limitations on the rights granted. How would a supra-national court enforce socio-economic rights such as the right to work and the right to health, and would states accept the possibility of such foreign interference with its budget? How would the Court interpret the term 'people', so central to the Charter?

As much substance as there may be to the problems mentioned, they need to be seen in context. The time might not yet be right for an African Court of Human Rights to play a vigorous role in the protection of human rights in Africa, but that does not mean that the process of establishing such a court should not be set into motion. It took fourteen years for the African Commission to reach the point where they are now, and it is precisely because so much time has elapsed that one can now rightfully demand that it start showing more results.

As far as the flaws of the Charter are concerned, some of the problems can perhaps be circumvented. Instead of making the whole caboodle of rights and duties of individuals and peoples enforceable, only a limited number of the rights contained in the Charter may first be selected for enforcement. This was done in the Inter-American system, where the Commission for some time acted only on individual complaints about violations of a selected list of 'preferred freedoms', when such an approach was necessary in the course of the development of the system. The idea of starting out with a number of core rights and subsequently adding to them is also not foreign to the European system, where later rights were added by means of Additional Protocols to the original Convention.

Another option would be to make most of the rights susceptible to reservations, except perhaps a core group of rights such as political participation, freedom from torture, detention without trial, etc. In addition to the abovementioned, a general limitation clause could be inserted into the convention that sets up the Court, to limit the corrosive effects of the clawback clauses.

The advantage of making only a limited set of rights enforceable would be that states might feel their national sovereignty is less threatened by joining the system, and more states would then presumably be willing to do so. The disadvantage is that, depending on whether the Charter as a whole would be used to interpret the preferred rights or not, the Court and the Commission could develop a divergent and even conflicting jurisprudence.

The alternative would be to make the entire Charter, as far as rights and duties are concerned, enforceable. Even if only a few countries join in the beginning, an indigenous and comprehensive African jurisprudence could be developed which will exercise a gravitational pull in respect of other countries. The disadvantage is that this route provides no opportunity to mitigate the problems posed by the duties, the clawback clauses, etc in the Charter. Even a very high level of creativity in interpreting the Charter may not achieve this.

The point is, however, that different option are available. It is submitted that, if appropriate steps are taken to address this problem, a Court of Human Rights can make a substantial contribution towards the protection of human rights in Africa.

The one outstanding problem is that of funding. It is no secret that one of the main reasons why the African Commission is not functioning as it should, is its lack of funds. Whereas the European Commission on Human Rights, for example, has a whole building full of lawyers who specialise in the various legal systems of the countries the Commission deals with, the African Commission now has only one trained lawyer on its support staff. The commissioners have limited funds to travel and to conduct fact finding missions.

A court would be expensive: It needs a proper library, the judges would have to be given financial security to ensure their independence, they would need to travel. It would be an untenable situation if the Court is going to drain the finances of the Commission further, and it would be equally unacceptable for the Court not to have the funds it will need to be a respected and proud institution. Until this obstacle is overcome, no court should be established.

SOUTH AFRICA AND AN AFRICAN HUMAN RIGHTS COURT

What are the interests of South Africa in this matter? Do they coincide with those of rest of Africa, or are they different? No doubt, in spite of some apparent misgivings on the side of the politicians, South Africa will soon sign and ratify the African Charter. It is the only show in town, which can only be strengthened from the inside and not challenged from the outside. For South Africa not to become part of the African regional system will be a serious diplomatic and strategic blunder, with grave consequences for human rights in Africa.

But what about submitting to the jurisdiction of the African Human Rights Court, and assisting in getting such a Court established?

South Africa certainly has a general interest in promoting the cause of human rights in Africa. Human rights is the basic ideology of our state, and this ideology is more likely to survive if it also takes firm root in our neighbouring countries.
Moreover, human rights, as we know today, know no boundaries. Violations of human rights in one country inevitably spill over into another, either in the form of refugees or simply because it sets a bad example. A negative perception of human rights in Africa as a continent

impedes trade and other links with all African countries and in general devalues the marketability of the entire region. If an African Human Rights Court could help to advance this cause, South Africa should support it. Moreover, whereas things might be going remarkably well in South Africa at the moment, one can never exclude the possibility of bad weather in the future, when South Africans might also need the protection offered by a supra-national court.

Many would argue, however, that we should also be careful to subject our Constitutional Court, which is supposed to be the ultimate protector of those liberties that were won through generations of struggle, to determination from the outside, by a court whose approach and commitment to these values and independence has not been demonstrated and proven. If the regional court will have the power to overrule the domestic one, much of what has been achieved in the country could be destroyed from the outside, if we relinquish our sovereignty in this regard.

The basic orientation of the Court could for example be different from the national approach or, some would argue, especially in the early years the human rights norms it poses could be at too low a level.

To argue that a regional human rights court merely poses minimum standards, and if the standards posed by a particular national court are higher than the regional areas no harm is done, does not solve this last-mentioned problem. The determination of appropriate human rights standards almost always involves the balancing of conflicting rights - eg in the case of hate speech, where freedom of expression and human dignity is balanced. The one defines the limits of the other, and a too weak emphasis on the one gives excessive scope to the other. A regional human rights court could thus easily upset a delicate balance which has been struck in a national court as a response to the particular needs of that society.

These are serious issues which deserve serious attention, but also in this matter a clear view of the larger picture is necessary. South Africa has to weigh its interests in promoting human rights in Africa as a whole against the possible disadvantages outlined above. If these disadvantages could effectively be minimised, the scale could be tipped in favour of participation.

The only way for South Africa to make sure the risks outlined above are minimised is to be actively involved in the process of investigating the feasibility of setting up the Court - to put its full weight behind an effort to make this initiative the starting point for a truly independent, wise, strong and courageous court. An attempt was made to point out some of the areas of concern, and there could be many more. If South Africa eventually feels the risks have been sufficiently minimised, it should join the system. In order to reduce these risks, and to be in a position to play a role in the system when it is established, South Africa needs to become part of the debate.

A LONG-TERM VISION FOR THE REGIONAL PROTECTION OF HUMAN RIGHTS IN AFRICA

In conclusion, it is submitted that a vision of where we are ultimately going with the regional protection of human rights in Africa is necessary to inform and guide steps taken along the way.

As was recognised by the authors of the African Charter, the African situation requires peculiarly African answers, and the initiatives regarding the Court illustrate that the system is still developing. The idea of one commission and one court for the region might not in the final analysis be the best solution for Africa - in fact the changed circumstances in Europe are now prompting them to abandon the idea of a commission and only to retain the court.

What role should a commission or commissions play in the specific circumstances in Africa? In situations of massive violations of human rights, as have occurred in Africa and in the Americas in recent times, a commission which can assess and address the total situation in a particular country is often more effective than a court which only considers individual cases, and even such isolated cases face the risk of humiliation if its orders are not complied with. This consideration points towards a system for Africa in which a central role is played on the commission level. But how can the speed and efficiency of the Commission be increased?

One possible solution might be the introduction of different commissions for the different parts of Africa. The Inter-American system owes much of its success to the ability of the Commission to travel quickly to trouble spots. In Africa those who wish to travel from north to south or east to west often have to go through Europe. At most one can travel quickly to other countries in one's own subregion. This consideration militates against the idea of one commission for Africa. If there is a crisis, it is in the first place difficult to get all the commissioners together, and then it might also be a problem to get them to the trouble spots. A sub-regional commission will be much more mobile.

Another condition for swift action by a regional human rights commission is readily available knowledge of the legal system of the country in question. In Africa this is often difficult to obtain, and a commissioner who comes from one part of the continent might have extreme difficulty in understanding the technicalities of what is happening in a country on the opposite side of the continent, which might have a different legal background and governmental institutions, different languages, cultural practices, religious norms and customs. Also in this respect sub-regional commissions might be more ideal.

Moreover, the moral ties that bind countries which form part of the same regional human rights system invariably depend for their efficiency on economic, cultural and diplomatic links between the countries involved because such ties are ultimately the only enforcement mechanisms. The stronger these ties, are, the higher the chances of successful enforcement of Commission or Court decisions are. Such ties bind large parts of the European continent, but in Africa many countries share them primarily with their immediate neighbours, as is evidenced by the sub-regional trade agreements. The area in which a commission operates will consequently have to be determined with reference to the question where these ties are the strongest.

The above considerations prompt one to think that ultimately the appropriate mechanism for Africa might be sub-regional human rights commissions for North, East, Central, West and Southern Africa. Various sub-regional, rather than one regional commission, will be able to travel fast, build up a working knowledge of the legal and political systems in the other countries concerned, and implement whatever trade and other links these countries might have to ensure compliance with human rights norms.

Another possibility would be to have sub-regional chambers of the present Commission

established. Whichever route is followed, the different sub-regional commissions or chambers of the Commission should then be placed under the umbrella of one Court of Human Rights for the continent as a whole, to symbolise and emphasise the essential unity of Africa as a continent. Even if it takes a long time for the Court to start functioning, at least the structure will be in place and the process underway.

If the regional protection of human rights in Africa should indeed be brought to move in this direction, it will be useful to keep this goal in mind in setting up the court, for example by providing in the founding protocol or other convention, that as soon as a certain number of countries in a subregion have ratified this procedure, the role of the present African Commission in respect of those countries will be replaced by that of a sub-regional commission or that sub-regional chambers of the commission will be formed.

It is submitted that the ideal of the protection of human rights in Africa, as well as the interests of South Africa, points towards South Africa giving all possible assistance to make such a system a reality. From the South African perspective the long walk to freedom should not stop at the Zambezi.

The author of this paper is a Professor of Law at the University of Pretoria and the Acting Director of the Centre for Human Rights. He has been a Human Rights Fellow at the United Nations Centre for Human Rights, and served internships at the Inter-American and European Commissions of Human Rights.
He is the editor of the book Human Rights Law in Africa: A Review of National Instruments. He holds the degrees MA (Philosophy) LLB (Pret) LLM (Yale) PhD (Wits).