



The Human Rights Content of the African Youth Charter: A preliminary assessment

Busingye Kabumba*
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I. Introduction

The African Youth Charter ('the Charter') was born of a recognition of the importance of youth participation and involvement as a prerequisite for the sustainable development of the continent.¹ In light of this, and to ensure the full utilization of the potential of youth to drive the objectives of the African Union forward, the Charter guarantees a range of rights to youth and young persons.² This paper makes a preliminary assessment of the rights under the Charter as a starting point for further debate on its meaning for the empowerment of African youth.

II. Scope and depth of rights under the Charter

A survey of the Charter reveals it to be an internally conflicted document, alternately rights-enhancing and rights-limiting, with broad and generous language in parts and narrow and restrictive language in others.

The Charter as a rights-enhancing instrument

The rights-enhancing character of the Charter is evident in the broad and purposive language used, for instance, in Article 2(1) (general non-discrimination provision) and Article 25 (elimination of harmful or discriminatory cultural practices) which, in setting out prohibited bases of discrimination include the phrase 'or other status', thus allowing scope for reading in other grounds of discrimination such as sexual orientation and HIV status. This phraseology is included in the anti-discrimination provisions of a number of international treaties as a necessary guarantee to the full protection of the right to freedom from discrimination.³

The Charter also uses appropriately general declarations with regard to such rights and freedoms as thought, conscience and religion;⁴ privacy;⁵ social, economic and cultural

* LLB (1st Class Hons) (MU), Dip LP (LDC), BCL (Oxford), LLM (Harvard). Lecturer, International and Comparative Law, Makerere University. The author welcomes comment and can be contacted at bkabumba@law.mak.ac.ug.

¹ Preamble to the Charter. The Charter came into force on August 8th 2009, and is available at <http://www.africa-union.org/root/UA/Conferences/Mai/HRST/Charter%20english.pdf>

² The Charter makes the rather strained categorization of 'minors' on the one hand (defined as 'young people aged 15 to 17 years subject to each country's laws') and 'youth' or 'young people' in general (defined as persons between the ages of 15 and 35 years) on the other. This convoluted terminology might be telling of lack of clarity or agreement on who a 'youth' is especially in the African context where political, social, cultural and other circumstances might be force persons to take on 'adult' responsibilities at tender ages. For a more detailed discussion of conceptualizations of 'youth', see: Francis Chigunta, 'The Socio-Economic Situation of Youth in Africa: Problems, Prospects and Options' 12 July 2002, available at <http://www.yesweb.org/gkr/res/bg.africa.reg.doc>.

³ See for instance the International Covenant on Civil and Political Rights, 1966 ('ICCPR') (Article 2), the International Covenant on Economic, Social and Cultural Rights, 1966 ('ICESCR') (Article 2(2)), the Convention on the Rights of the Child, 1990 ('CRC') (Article 2), the African Charter on Human and Peoples' Rights, 1986 ('ACHPR') (Article 2) and the African Charter on the Rights and Welfare of the Child, 1999 ('ACRWC') (Article 3).

⁴ Article 6

⁵ Article 7



development;⁶ adequate standard of living;⁷ peace and security;⁸ humane treatment;⁹ clean and healthy environment;¹⁰ culture;¹¹ and rest and leisure.¹² There are also important and wide ranging provisions relative to the rights of mentally and physically challenged youth¹³ and other vulnerable and disadvantaged youth (such as displaced persons and minorities)¹⁴ as well as the rights of youth in the diaspora.¹⁵ In these and other cases, the Charter employs language that allows scope for as broad an interpretation of the right as needed to give full effect to it.

At other times, the Charter achieves expanded protection through specific and detailed provisions on the back of broad language. Thus Article 9 provides not only for a right to own property, but goes on to secure the right to inherit property and protection from the arbitrary deprivation of ‘property including inherited property’. This is a key provision as it recognizes and protects one of the most significant sources of property youth are likely to own. Similarly specific language appears in Article 13 which, in addition to an enunciation of the general right to education, provides that girls and young women who become pregnant or married before completing their education should be given the opportunity to continue their education.¹⁶ The trend is continued in Article 16 which, after declaring a general right to the highest attainable state of physical, mental and spiritual health, goes on to recognize, among other things, the special challenges posed by HIV/AIDS and to enumerate specific steps to be taken by states parties to deal with the pandemic such as expanding availability of voluntary counselling and confidential testing and providing timely access to treatment and prevention including prevention of mother to child transmission, post-rape prophylaxis and anti-retroviral therapy.¹⁷ More detail is provided in Article 23 (rights of girls and young women) which sets out the full length of states’ obligations from the elimination of all forms of discrimination against women to ensuring their full participation in national life and their effective access to all levels and forms of education. In this regard too, the Charter is in line with the approach taken by other international and regional treaties.¹⁸

It is of course arguable that in some instances broad language can lend itself to abuse and that, on the other hand, overly specific language may be rights-limiting inasmuch as rights not expressed may be presumed to be not provided for. With regard to the second danger, the approach adopted by the Charter on the rights to property, education and health as well as the rights of girls and young women seems to be the correct one, namely, only to provide

⁶ Article 10

⁷ Article 14

⁸ Article 17

⁹ Article 18

¹⁰ Article 19

¹¹ Article 20

¹² Article 22

¹³ Article 24

¹⁴ Article 2 (3); Article 16 (2) (b) and Article 17 (1) (e)

¹⁵ Article 21

¹⁶ Article 13 (4) (h)

¹⁷ See Article 16 (2) (a) to (n)

¹⁸ The CRC for instance provides for a general right of children to education before going on to require states parties to specifically provide for universal primary education as well as accessible vocational and higher education (Article 28 (1)). The Protocol to the African Charter on the Rights of Women in Africa, 2005 (‘Maputo Protocol’) similarly guarantees the right of women to health, including sexual and reproductive health, and further specifies the components of this right such as the right to control their fertility, to decide whether to have children as well as their number and spacing and the right to choose any method of contraception (Article 14).

specifics after a broad and general declaration of the right. However, the first danger may not be amenable to so easy an answer; indeed, certain aspects of the Charter provide evidence of its potency. One example is Article 8 (protection of the family) which enjoins states parties to protect families and support their establishment and development ‘noting that the structure and form of families varies in different social and cultural contexts’. While on the one hand, the phraseology may allow for state support of non-traditional family structures such as child-headed families (an important provision given the growing incidence of these as a result, especially, of the HIV/AIDS pandemic) and may similarly serve as a basis for equal treatment claims by cohabiting and same sex couples, on the other hand, it opens a window to unwholesome practices such as widow inheritance and child marriages since it may be argued that they are unique ‘structures and forms of families’ that have developed out of particular social and cultural contexts. Similarly the language in Article 16 (2) (i), which requires states to institute comprehensive programmes including legislative steps to prevent unsafe abortions, may be read as mandating states to allow for safe, legal abortions. However, states may interpret their obligation as only extending to providing information on contraceptives while maintaining laws against abortion. It would appear that the more detailed and specific the language employed (in addition to a general declaration of the right), the more effective the protection offered by the provision.

Rights-restrictive aspects of the Charter

The above progressive aspects of the Charter notwithstanding, the document in many ways falls short of providing full and adequate recognition of the rights of youth. As a starting point, we may point out the Charter is conspicuously silent on the most fundamental of human rights without which all other rights cannot be enjoyed; namely, the right to life. This is a most curious omission given the inclusion of a wide range of other rights and in such detail as highlighted above.¹⁹

That said, in a number of instances where the Charter does provide for rights, the language used tends to be rights-restricting, an effect achieved in three ways:- (i) use of closed-ended terminology; (ii) subjecting the rights to unqualified restrictions, and (iii) guaranteeing a portion of the right and remaining silent on another.

With regard to closed-ended terminology, we may have regard to Article 15 (right to employment) which, while mandating states to protect youth against work-related discrimination lists what appears to be an exhaustive list of prohibited grounds.²⁰ It is not clear in this regard why the ‘or other status’ phraseology employed in Articles 2 (1) and Article 25 could not be employed to similar effect in this case.

The second method of restriction of rights is evident in Articles 4 (freedom of expression) and 5 (freedom of association) which are subjected to ‘restrictions as prescribed by laws’ and to the exercise in ‘in conformity with the law’ respectively. In neither case is any attempt made to delimit the contours of possible restrictions so as to guard against their abuse. In essence, as presently framed, the Articles guarantee rights with one hand and negate them with the other.

¹⁹ The right to life has been guaranteed in other international and regional treaties dealing with vulnerable groups, such as the CRC (Article 6), the Maputo Protocol (Article 4) and the ACRWC (Article 5).

²⁰ Article 15 (4) (a). These are ethnicity, race, gender, disability, religion, as well as political, social, cultural and economic background.

The third avenue is apparent in Article 3 (freedom of movement) which provides for the right to leave any country, including one's own, and to return to one's country. It is evident that what is granted here is a right to leave and enter countries and not to actually move within them. Similarly, while Article 8 provides for protection of the family, it does not expressly provide for the right to marry and found a family.²¹

III. Provisions for enforcement and implementation

States parties are mandated to recognize the rights, freedoms and duties enshrined in the Charter²², to take 'necessary steps' to give effect to the Charter's provisions²³ and to promote and ensure the respect of the rights and freedoms therein through teaching, education and publication.²⁴ For its part, the African Union Commission is tasked with the duty to ensure that states parties respect their commitments and fulfil their duties under the Charter;²⁵ but this role seems to be couched more in terms of facilitating states without any apparent provisions for sanctions. There appears to be no avenue for enforcement of the rights and freedoms under the Charter although, conceivably the Charter can be interpreted and applied by the African Court on Human and Peoples' Rights under Article 3 (1) of its statute.²⁶

One important obligation upon states parties under the Charter is the Article 12 requirement to develop comprehensive and coherent national youth policies that are cross-sectoral in nature, informed by extensive consultation with young people and by baseline evaluations of the priority issues for youth development, accompanied by a national youth coordinating mechanism to link youth organizations and supported by a national programme of action that is coupled with adequate and sustained budgetary allocation. It is especially noteworthy that part of the obligation is to ensure that the policies developed are adopted by the national parliaments and enacted into law.²⁷ This is interesting as it appears the framers of the Charter were alive to the important distinction between law and policy. This distinction was highlighted in the case of *Rapula Jimson v. Botswana Building Society*²⁸ wherein the Botswana Industrial Court noted that policy and law operate at different levels and that courts

²¹ While it can be argued that Article 8 (2) envisages the right to marry and found a family insofar as it provides that 'young men and women of full age who enter into marriage...', this does not negate the point that an express articulation of this right would be preferable, as was done in the Universal Declaration of Human Rights, 1948 ('UDHR') (Article 16 (1)) and the ICCPR (Article 23(2)).

²² Article 1 (1)

²³ Article 1 (2)

²⁴ Article 27

²⁵ Article 28

²⁶ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('the 1998 Protocol'), available at http://www.achpr.org/english/info/court_en.html. Regard should also be had to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted in 2008 ('the 2008 Protocol') (available at http://www.hurisa.org.za/Advocacy/AfricanCourt/Single_Legal_Instrument.pdf) which replaces the 1998 Protocol and the Protocol of the Court of Justice of the African Union ('the 2003 Protocol') (available at <http://www.lrcr.or.tz/documents/justice.pdf>). The 2008 Protocol merges the African Court of Human Rights (ACtHR) established under the ACHPR with the African Court of Justice (ACJ) established under the African Union into a single court, the African Court of Justice and Human Rights (ACJHR). When it comes into operation, ACJHR will have jurisdiction over cases dealing with the interpretation and application of the Charter under Article 28 of its Statute.

²⁷ Article 12 (h)

²⁸ (2005) AHRLR 3 (BwIC 2003); available at http://www.chr.up.ac.za/undp/domestic/docs/caselaw_30.pdf.



can only enforce the law²⁹ since policy is in the nature of moral, not legal, persuasion.³⁰ At the same time, if the framers appreciated this distinction, and desired that the concerns of the youth be effectively implemented by states parties, it seems that the emphasis should have been on enacting laws to this effect as opposed to the instance in Article 12 where enactment into law was seemingly inserted as an afterthought. This is especially striking given that in other parts of the Charter, specifically Articles 16 (right to health) and 23 (rights of women and children), states are required to take legislative measures without the requirement to go through the law-after-policy process. Indeed, Article 23 contains a reference not merely to legislation but to ‘special legislation’,³¹ which perhaps should have been the term employed in Article 12.

Another potential obstacle to enforcement of the Charter may be the provisions of Article 1 (2) under which states parties are required to effect the Charter, among other things, ‘in accordance with their Constitutional processes’, as well as under Article 14 (right to an adequate standard of living) which requires implementation thereof to be in accordance with the national laws of state parties. As drafted, these provisions leave it open to states parties to raise their constitutional or legal orders as defences to non-implementation of the Charter.

IV. Conclusion

On the whole the Charter contains a number of important human rights provisions. It is timely and foresighted in many respects and should serve as an important framework for advancing the rights of youth on the continent. Any failings in the Charter are remedied in the interim by Article 29 which provides that nothing in the Charter shall be taken as minimizing higher standards and values contained in other relevant human rights instruments ratified by states concerned or national law or policies. This is an important ‘do-no-wrong’ clause that ensures that more progressive nations do not have their laws and policies watered down by any loopholes in the Charter. However, as pointed out above, the Charter contains certain rights-restrictive provisions and impediments to implementation that should be amended to give full effect to the spirit of the Charter.

²⁹ Supra, at para. 46 of the judgment

³⁰ Supra, at para. 66

³¹ Art. 23 (k)