

# The potential of African philosophy in interpreting socio-economic rights in the African Charter on Human and Peoples' Rights

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**ABSTRACT:** Socio-economic rights in the African Charter are ideal in transforming socio-economic conditions of Africa's people and preserving their historical collective way of living. For these rights to achieve goals envisaged by the Charter, an innovative interpretation that engages relevant interpretative tools is required. This article argues that African philosophy is a potential interpretative tool that can contribute immensely to upholding the Charter's object and purpose. Founded on the principles of collectiveness and togetherness of Africa's people, African philosophy has the potential to enrich the meaning, scope and content of socio-economic rights and enable individuals to commune with others in all spheres of socio-economic activities. The article argues that engaging African philosophy in the interpretative process will guarantee individual and collective enjoyment of socio-economic rights to Africa's people as understood in the African context. However, the supervisory organs of the African Charter have not effectively applied this significant interpretative tool in their socio-economic rights jurisprudence.

## TITRE ET RÉSUMÉ EN FRANCAIS:

### **Le pouvoir interprétatif de la philosophie africaine en matière de droits socio-économiques garantis par la Charte africaine des droits de l'homme et des peuples**

**RÉSUMÉ:** Les droits socio-économiques de la Charte africaine peuvent transformer les conditions socio-économiques des populations africaines et préserver leur mode de vie collectif historique. Cependant, ces droits ne peuvent atteindre les objectifs envisagés par la Charte que lorsque leurs interprètes recourent fréquemment aux techniques d'interprétation innovantes. Cet article avance que la philosophie africaine est un outil d'interprétation contextuel important qui peut contribuer de façon significative à faire respecter l'objet et le but de la Charte africaine. Fondée sur les principes de collectivité et d'unité du peuple africain, la philosophie africaine a le potentiel d'enrichir le sens, la portée et le contenu des droits socio-économiques et de permettre aux individus de communier avec les autres dans toutes les sphères

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d'activités socio-économiques. L'article soutient que le recours à la philosophie africaine dans le processus d'interprétation garantira la jouissance individuelle et collective des droits socio-économiques des peuples d'Afrique tels qu'ils sont compris dans le contexte africain. Cependant, les organes de surveillance de la Charte africaine n'ont pas appliqué efficacement cet important outil d'interprétation dans leur jurisprudence sur les droits socio-économiques.

**KEY WORDS:** African philosophy, interpreting socio-economic rights, African Charter

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**1 INTRODUCTION**

The African Charter on Human and Peoples' Rights (African Charter),<sup>1</sup> like other human rights instruments, formulates socio-economic rights broadly. This formulation is characterised by lack of an exhaustive elaboration of rights' meaning, scope and content. As such, the meaning, scope and content of socio-economic rights in the African Charter as envisaged by its drafters require a holistic interpretation that engages different interpretative tools. While the author paid substantial attention to relevant interpretative tools elsewhere, this article focuses on African philosophy. The article focuses on how the interpretation of socio-economic rights can benefit from African philosophy. Thusfar, little has been explored on the potential and implications of African philosophy for developing the meaning, scope and content of socio-economic rights.

The Preamble to the African Charter stipulates the member states' commitment to promoting the African philosophy. It declares states' consideration of the virtues of African historical tradition and values as sources and reflection of the African human rights concept.<sup>2</sup> The preamble acknowledges that the enjoyment of the rights in the African Charter requires the performance of duties by everyone.<sup>3</sup> Founded on

1 African Charter on Human and Peoples' Rights (1981) OAU CAB/LEG/67/3/rev 5, 21 ILM 58 (1982) African Charter) adopted on 27 June 1981 and entered into force on 21 October 1986.

2 Preamble to the African Charter paras 5-6.

these principles of collectiveness and togetherness of Africa's people, African philosophy has the potential to enrich the meaning, scope and content of socio-economic rights and enable individuals to commune with others in all spheres of socio-economic activities. However, the supervisory organs of the African Charter has not effectively applied this significant interpretive tool in its socio-economic rights jurisprudence. The article argues that engaging African philosophy in the interpretative process will guarantee everyone's enjoyment of socio-economic rights to Africa's people as understood in the African context.

The article has seven sections, of which this introduction is the first. The second section shows the legal basis for the application of African philosophy in the interpretative process. The third section discusses the meaning and debates surrounding the existence of African philosophy. The fourth section analyses the implications of African philosophy for interpretation of socio-economic rights. The analysis of the socio-economic rights jurisprudence of the African Commission and the African Court regarding their application of African philosophy in interpreting these rights is explored in section five. Section six suggests the way forward that can assist the supervisory organs of the Charter in engaging African philosophy to interpret socio-economic rights. Section seven concludes this article.

## **2 LEGAL BASIS FOR APPLICATION OF AFRICAN PHILOSOPHY IN INTERPRETING SOCIO-ECONOMIC RIGHTS IN THE AFRICAN CHARTER: TELEOLOGICAL APPROACH**

The teleological approach is one of the major approaches to treaty interpretation. The other two are the textual approach, and the 'intention of the parties' approach. The teleological approach emerged in international law in 1935 through article 19(a) of the Harvard Draft Convention on the Law of Treaties (Harvard Draft),<sup>4</sup> as formulated by the Harvard research in international law programme and elaborated in Fitzmaurice's 1951 classification on approaches to treaty interpretation and then codified in the Vienna Convention.

The teleological approach considers the object and purpose of a treaty as the main element in its interpretation. The object and purpose of a treaty is established through a range of other significant elements from within and outside the treaty in question. These elements include the treaty's historical background and preparatory work; the subsequent conduct of the parties in applying the provisions of the treaty; and conditions prevailing at the time the treaty is interpreted.<sup>5</sup>

3 Preamble to the African Charter para 7.

4 Art 19(a) of the Draft Convention on the Law of Treaties (1935) 29 *American Journal of International Law* Supp 971.

Other elements include the entire treaty, the relevant international, regional and national legal instruments and jurisprudence, and the principle of effectiveness.

In establishing the object and purpose of a treaty concerning provisions being interpreted, the teleological approach considers the treaty as a whole. Considering a treaty, as a whole requires interpretive organs to engage its preamble and other relevant provisions within a treaty to assign meaning to the provisions in question.<sup>5</sup> The preamble is composed of two characteristics, namely interpretive and binding characters. Regarding its interpretive character, a treaty's preamble enshrines and elaborates its object and purpose.<sup>6</sup> This inclusion renders a useful interpretative tool for meaning elaboration of treaty provisions, as well as clarifying the context in which such provisions are construed.<sup>8</sup> The preamble, when applied as an interpretive aid, becomes binding just like any other treaty provision.<sup>9</sup> It is for this reason that parties' statements contained in the preamble to the treaty must be treated as relevant when interpreting the treaty in question.<sup>10</sup>

In the context of the African Charter, this element enables the interpretive organs to consider a range of preambular statements including the notion of African philosophy as the relevant interpretive tools to elaborate the meaning, scope, and content of the socio-economic rights. Therefore, the interpretation of socio-economic rights in the African Charter should engage among other interpretive tools African philosophy. The focus on African philosophy in this article does not necessarily mean to underestimate other interpretive tools. This article mainly focuses on African philosophy because its interpretative potential has not been efficiently explored in the socio-economic rights jurisprudence of the supervisory organs compared to other interpretative tools.

### 3 AFRICAN PHILOSOPHY: MEANING AND DEBATES SURROUNDING ITS EXISTENCE

There is a scholarly debate concerning the existence of African philosophy. Hountondji rejects the existence of African philosophy on the ground that it is not in written literature. According to her, the African philosophy is a 'set of texts written by Africans and described as philosophical by their authors'.<sup>11</sup> She argues that lack of literature on an

5 As above.

6 See also art 31(2) of the Vienna Convention.

7 GG Fitzmaurice 'The law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1951) 28 *British Yearbook of International Law* 25

8 Fitzmaurice (n 7) 25.

9 G Fitzmaurice 'The law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1957) 33 *British Yearbook of International Law* 229.

10 Fitzmaurice (n 9) 229.

11 PJ Hountondji *African Philosophy: myth and reality* (1983) 33.

African philosophy 'prevents its integration into a collective theoretical tradition' and from 'taking its place in history as a reference point capable of orienting future discussion'.<sup>12</sup> Maurier denies the existence of African philosophy on the basis that it does not satisfactorily meet the three criteria required for the existence of genuine philosophy, namely, that it should be reflective, rational, and systematic.<sup>13</sup> Bodunrin rejects the existence of African philosophy on the basis that it is wrong to argue that African philosophy is centred on an individual's collective nature. According to him, since philosophy is studied through examining the thoughts of an individual, the African conception of philosophy based on the collective nature of individuals is based on an incorrect conception.<sup>14</sup> He argues that this view of an African philosophy merely portrays a specific system of thought of a particular African community.<sup>15</sup>

It is wrong to rely exclusively on the existence of philosophical literature and philosophers as the sole justification for the existence of African philosophy. The denial of the existence of African philosophers implies the denial of the existence of African people who can reflect and conceptualise their experiences.<sup>16</sup> Apart from published literature, philosophical information can be found through other undocumented sources, like stories. Although the subject of philosophy is established through a systematically identifiable body of literature, as developed by philosophers, this proof can be difficult as there is no work by individual African philosophers similar to 'Aristotle's *Metaphysics*, Hume's *Treatise of human nature*, or Kant's *Critique of pure reason*'.<sup>17</sup> It is genuine to assume that the existence of a particular philosophy largely depends on published literature.<sup>18</sup> However, it is wrong to assume that written literature is an exclusive means to substantiate the existence of philosophy.<sup>19</sup> African philosophy can be found through stories, oral tradition, and social institutions, as well as the writings of scholars.<sup>20</sup> For example, ubuntu, as an African philosophical concept, was expressed through songs and stories.<sup>21</sup> As such, African philosophy exists and that 'its tenets may legitimately be found in the types of literature mentioned earlier'.<sup>22</sup> African philosophy can be demonstrated through the cultures, experiences, and mentalities of Africans, which shape their societies.<sup>23</sup> If the scepticism concerning the

12 Hountondji (n 11) 106.

13 H Maurier 'Do we have an African philosophy?' in RA Wright (ed) *African philosophy: an introduction* 3 ed (1984) 26.

14 PO Bodunrin 'The question of African philosophy' in RA Wright (ed) *African philosophy: an introduction* 3 ed (1984) 11.

15 Bodunrin (n 14) 1.

16 K Appiagyei-Atua 'A rights-centred critique of African philosophy in the context of development' (2005) 2 *African Human Rights Law Journal* 346.

17 RA Wright 'Investigating African philosophy' in RA Wright (ed) *African Philosophy: an introduction* 3 ed (1984) 50.

18 Wright (n 17) 51.

19 Wright (n 17) 51.

20 Wright (n 17) 51.

21 A Shutte *Ubuntu: an ethic for a new South Africa* (2001) 9.

22 Wright (n 17) 51.

existence of African philosophy is based on historical reasons (namely, that there have been no renowned African philosophers) then such a doubt is wrong. The existence of African philosophy can be established through common social values in African communities, which lay the foundation for African philosophy.<sup>24</sup>

The foundation of African philosophy is the collective way of living in African societies. African philosophy is founded in the phrase 'I am, because we are, and since we are, therefore I am'.<sup>25</sup> This phrase demonstrates that African philosophy is built on the collective nature of humans, rather than on an individual. African philosophy is characterised by the relationship that an individual maintains with others in the community.<sup>26</sup> Similarly, President Senghor acknowledges that African philosophy considers individuals as part and parcel of the community in the sense that the individual and the community are inseparable.<sup>27</sup>

The African philosophy accordingly refers to an individual as a person who is responsible to the entire community for the realisation of his or her rights. 'The African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity'.<sup>28</sup> Therefore, African philosophy is guided by values of collectiveness, humanism, togetherness, corporation, responsibility, and interdependence. African philosophy refers to the 'fundamental and general principles governing the community of people called Africans'.<sup>29</sup>

Scholars challenge the community-oriented nature demonstrated by the African philosophy. Howard argues that the collective conception of individuals is not the exclusive system in Africa.<sup>30</sup> According to her, African societies are largely divided into classes and status, like age and sex, free-men and slaves, members and aliens.<sup>31</sup> She contends that individualism has increased in contemporary African society due to economic difficulties and unemployment.<sup>32</sup> According to

23 Appiagyei-Atua (n 16) 347.

24 MA Makinde *African philosophy, culture, and traditional medicine* (1988) 28-29.

25 JS Mbiti *African religions and philosophy* 2 ed (1990) 106 and 141.

26 H Maurier 'Do we have an African philosophy?' in RA Wright (ed) *African philosophy: an introduction* 3 ed (1984) 35.

27 Address delivered by Leopold Sedar Senghor, President of the of Senegal, OAU Doc CAB/LEG/67/5 27-29

28 BO Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American Systems' (1984) 6 *Human Rights Quarterly* 148.

29 KC Anyanwu 'The African world-view and theory of knowledge' in EAR Omi & KC Anyanwu (eds) *African philosophy: an introduction to the main philosophical trends in contemporary Africa* (1984) 81.

30 RE Howard 'Human rights in commonwealth Africa' 25, as quoted in IG Shivji *The concept of human rights in Africa* (1989) 12.

31 RE Howard 'Group versus individual identity in the African debate on human rights' in AA An-Na'im & FM Deng (eds) *Human rights in Africa: cross-cultural perspectives* (1990) 163-174.

32 Howard (n 31) 165.

her, insistence on the communal-oriented nature of the African philosophy is not feasible.<sup>33</sup>

The communal oriented nature of an individual in a society is characterised as African philosophy given that it was practiced by many pre-colonial African societies. This community-oriented practice enshrined in African philosophy is identified through different names. Scholars in contemporary African society identify the philosophy as 'African personality'; 'negritude'; and 'Ujamaa' (the Kiswahili term for African socialism).<sup>34</sup> Winks terms the African philosophy 'African humanism'.<sup>35</sup> African humanism was pre-dominant in pre-colonial societies and is similar to Kwame Nkrumah's modern reformulation of 'consciencism'; Kenneth Kaunda's 'humanism'; and Julius Nyerere's 'Ujamaa'.<sup>36</sup>

These formulations of African philosophy are practised and expressed in many African countries through various languages. For example, in South Africa, it is known as 'ubuntu'.<sup>37</sup> Ubuntu originates from the Zulu phrase 'Umuntu ngumuntu ngabantu', which means 'a person is a person through other persons'.<sup>38</sup> Langa J notes in *S v Makwanyane (Makwanyane)*:<sup>39</sup>

Ubuntu emphasises on collective and 'interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.<sup>40</sup>

Broodryk points out the existence and practice of ubuntu in other African languages.<sup>41</sup> Although the names for African philosophies are different, they all represent the 'respect for, and protection of, the individual and individuality within the family and the greater socio-political unit'.<sup>42</sup>

33 Howard (n 31) 163-174.

34 M Mutua 'The Banjul Charter and the African cultural fingerprint: an evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 352.

35 BE Winks 'A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) 11 *African Human Rights Law Journal* 456.

36 Winks (n 35) 456.

37 Winks (n 35) 456.

38 Winks (n 35) 456.

39 *S v Makwanyane* 1995 3 SA 391 CC.

40 *Makwanyane* (n 39) paras 224 and 308.

41 Broodryk *Ubuntu: African Life Coping Skills* (2006) 3-4, Paper delivered at the CCEAM conference in Lefkוסia (Nicosia), Cyprus, 12-17 October 2006. According to Broodryk, *Ubuntu* is also known as *Botho* in Sesotho; *Biakoye* in Akan; *Ajobi* in Yoruba; *Numunhu* in Shangaan; *Vhuthu* in Venda; *Bunhu* in Tsonga; *Umntu* in Xhosa; *Hunhu* in Shona; *Utu* or *Ujamaa* in Swahili; *Abantu* in Ugandan languages; and *Menslikgeit* in Cape Afrikaans.

42 Mutua (n 34) 352.

#### 4 IMPLICATIONS OF AFRICAN PHILOSOPHY FOR INTERPRETATION OF SOCIO-ECONOMIC RIGHTS

The concept of African philosophy has direct implications for the interpretation of individual and collective socio-economic rights in the African Charter. Based on the values of cooperation, collectiveness, obligations, and interdependence African philosophy is appropriate for developing socio-economic rights.<sup>43</sup> Commenting on the relationship between ubuntu and the socio-economic rights enshrined in the Constitution of South Africa, 1996 ('South African Constitution'),<sup>44</sup> Metz notes that the inclusion of socio-economic rights in the Constitution relates to the respect for communal nature enshrined in ubuntu in two ways. Firstly, it requires a state to foster a communal relationship between itself and its people, by improving the quality of an individual's socio-economic life through poverty reduction. Poverty reduction strengthens togetherness between people and their state. Secondly, it requires a state to foster community among the people themselves by reducing the level of an individual's impoverishment.

The state is required to protect an individual's socio-economic rights to enable that individual to commune and engage in joint projects with others. Disregarding socio-economic rights undermines the ability of an individual to commune with others and weakens solidarity among the people. An individual feels ashamed to commune with others if his or her basic socio-economic needs are not realised, while those of other members of the community are. As such, a state must provide individuals with the socio-economic resources that will help them commune with others in society.<sup>45</sup> In a similar vein, writing on the link between ubuntu and the socio-economic right to social security, Tshoose posits that ubuntu is relevant to the right to social security, as it advocates for the concepts of 'humanness', 'justice' and 'equality'. Humanness is the basis for the provision of social security.<sup>46</sup>

African philosophy is linked to the concept of human rights, as understood in the African context. Like an African philosophy that considers an individual as inseparable from his or her community, the African concept of human rights is communal in nature as it considers an individual's rights as being integrally related to the rights of the community. An individual's human dignity and rights in Africa are not derived from an individualistic framework but rather from a communal structure.<sup>47</sup> The conception of an individual who is endowed with rights

43 JAM Cobbah 'African values and the human rights debate: an African perspective' (1987) 9 *Human Rights Quarterly* 331.

44 Constitution of South Africa, 1996.

45 T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2005) 5 *African Human Rights Law Journal* 550-551.

46 CI Tshoose 'The emerging role of the constitutional value of Ubuntu for informal social security in South Africa' (2009) 3 *African Journal of Legal Studies* 14-15.

47 Cobbah (n 43) 331.



and bound by obligations towards the community is the essence of the African notion of human rights.<sup>48</sup> This communal nature of rights in Africa was deliberately adopted to ensure equality among groups and classes in matters of justice.<sup>49</sup> The recognition of an individual's rights is subject to his respect and recognition of the rights of others.<sup>50</sup>

In African societies, an individual depends on other community members (such as the extended family) to enforce his or her rights. This dependence guarantees a form of social security among individuals.<sup>51</sup> Hence, the conception of human rights in Africa recognises not only the rights of the individual but also his obligations towards others. This African philosophical context expresses rights and duties through certain principles, namely respect, restraint, responsibility, and reciprocity.<sup>52</sup>

Philosophers criticise the communal conception of human rights in Africa on three grounds. First, they argue that proponents of the communal nature of rights confuse it with human dignity. According to Howard, the African concept of human rights is a mere concept of human dignity, which expresses the moral nature of an individual and his relationship with society.<sup>53</sup> Second, the African communal nature of human rights is considered a mere mechanism used by African leaders to justify their undemocratic rule. Howard argues that the communal conception of human rights, which denies the existence of economic and political inequalities, is invoked to support African leaders holding power for a long time.<sup>54</sup> Third, the African communal nature of human rights is subject to objection on the ground that pre-colonial African societies did not know human rights due to their low level of development. Scholars like Eze, Howard and Donnelly believe that the existence of human rights in a society largely depends on the level of development of that society.

Three arguments can be raised in response to these objections. Firstly, while it is true that African philosophy is mainly founded on the value of human dignity, it is a mistake to contend that the philosophy is exclusively a human dignity notion, which is isolated from the recognition and respect for human rights. To the contrary, African philosophy based on human dignity is the foundation for human rights as understood in the African context. It is also worth noting that, human dignity per se is a human right. As such an African philosophy solely based on human dignity is not contrary to human rights. Therefore, the value of human dignity enshrined in the African philosophy broadly encompasses a recognition and respect for human

48 Mutua (n 34) 363.

49 R Cohen 'Endless teardrops: prolegomena to the study of human rights in Africa' in R Cohen, G Hyden & WP Nagan (eds) *Human rights and governance in Africa* (1993) 14.

50 Mbiti (n 25) 106.

51 EA Ankumah *The African Commission on Human and Peoples' Rights: practice and procedures* (1996) 160.

52 Cobbah (n 43) 321.

53 Howard (n 31) 165.

54 Howard (n 30) 12.

rights. Writing on the African philosophical concept of ubuntu, Metz argues that:

one is required to develop one's humanness by honoring friendly relationships (of identity and solidarity) with others who have dignity by virtue of their inherent capacity to engage in such relationships, and human rights violations are serious degradations of this capacity. This Ubuntu-inspired theory is sufficient to account to many arrays of human rights.<sup>55</sup>

The collective nature of African philosophy demarcates individuals' rights and obligations. It is thus not correct to claim that African philosophy does not reflect the notion of human rights. African philosophy is developed through a system of rights and obligations structured through political and social organisations, like gender and age.<sup>56</sup> Moreover, African pre-colonial societies recognised various human rights norms similar to those that are currently recognised as human rights in various human rights instruments. These include the rights to life, personal freedom, and property. Pre-colonial societies had respect for the right to life, which was subject to the right to justice. Accordingly, cases regarding the right to life were determined through a judicial process. Moreover, accused persons convicted of murder or manslaughter were allowed to appeal from a subordinate court to a higher court.<sup>57</sup>

Secondly, it is unjustifiable to contend that under-developed African societies were not aware of human rights norms. African societies recognised the rights to membership, freedom of thought, speech, belief, and association, as well as the right to property.<sup>58</sup> The right to freedom of association was closely linked to the right to family in that it incorporated the rights to marriage and children.<sup>59</sup> The right to property, for example, is a fundamental right of any African society. In pre-colonial African societies, the right to property was communal in nature<sup>60</sup> in the sense that it largely depended on family membership.<sup>61</sup> Hence, any disposition of the family property required the consent of the extended family.<sup>62</sup> This consent requirement was significant for land transactions, like leasing, mortgaging, as well as the determination of the boundaries.<sup>63</sup> The requirement for consent demonstrates that pre-colonial African societies recognised the limits attached to the enjoyment of the right to property.<sup>64</sup>

Thirdly, it is flawed to generally argue that African philosophy encourages undemocratic rule. The existence of undemocratic leaders

55 Metz (n 45) 547.

56 Mutua (n 34) 361.

57 T Fernyhough 'Human rights and precolonial Africa' in R Cohen, G Hyden & WP Nagan (eds) *Human rights and governance in Africa* (1993) 56.

58 L Marasinghe 'Traditional conceptions of human rights in Africa' in CE Welch Jr & RI Meltzer (eds) *Human rights and development in Africa* (1984) 33.

59 Marasinghe (n 58) 33-34.

60 Marasinghe (n 58) 41.

61 Marasinghe (n 58) 42.

62 Marasinghe (n 58) 41.

63 Marasinghe (n 58) 42.

64 Marasinghe (n 58) 41.

in Africa does not necessarily mean that the practice is attributed to African philosophy. It can be argued that African philosophy enshrines attributes that embrace democracy and respect for human rights. As demonstrated above, African philosophy is founded on the principles of humanness; dignity; togetherness; community; and respect for human rights.

The significance of an individual is also seen through his capacity to commune with others. African philosophy places an individual as the leader of the family or community who should support his family or community. African philosophy treats all human beings as equal. In doing so, it fosters the value of equality. Thus, African philosophy encourages leaders to practice humanness, respect for human rights, and human dignity. It also encourages individuals in leadership positions to be on good terms with the people they govern. In this regard, it embraces a mutual relationship between the leaders and the other members of the state.

Writing on ubuntu as an African leadership philosophy, Ncube argues that ubuntu centres on relationships with others.<sup>65</sup> It also embraces the significance of mutual relationships between leaders and their followers. According to her, this value of togetherness fosters the sanctity of human life to treat all humans equally. Ncube argues further that ubuntu provides a viable leadership philosophy that helps leaders to balance the past and present by examining immediate and pressing concerns in society, as well as the vision for the future.<sup>66</sup> Writing on the African philosophy from the Akan context, Appiagye-Atua argues that African philosophy does not exclusively confine itself to thoughts of the past. While considering the past, African philosophy identifies and leaves norms that are irrelevant to present circumstances. Through its various values, African philosophy can consider norms that are relevant for present living conditions'.<sup>67</sup>

As demonstrated above, there is a close link between African philosophy and the values of freedom, equality, justice, and dignity. African philosophy is founded on the value of dignity, which considers freedom, equality, and justice as part of human dignity. In elaborating on the concept of ubuntu as an African philosophical approach in *Makwanyane*, Langa J<sup>68</sup> and Mokgoro J<sup>69</sup> stated that ubuntu relates to the values of human dignity, freedom, and equality that need to be upheld in society. Ubuntu is directly linked to the values of human dignity, equality, and the advancement of human rights and freedoms, accountability, responsiveness, and openness.<sup>70</sup>

65 LB Ncube 'Ubuntu: A transformative leadership philosophy' (2010) 4 *Journal of Leadership Studies* 78.

66 Ncube (n 65) 78.

67 Appiagyei-Atua (n 16) 347-348.

68 *Makwanyane* (n 39) para 224.

69 *Makwanyane* (n 39) para 308.

70 H Keep & R Midgley 'The emerging role of *ubuntu-botho* in developing a consensual South African legal culture' in F Bruinsma & D Nelken (eds) *Explorations in legal cultures* (2007) 35.

Therefore, the interpretation of the socio-economic rights in the African Charter should be able to depict the adherence to and promotion of African philosophy and its identified values. The significance of promoting these elements is that they can ensure that socio-economic rights are interpreted in a manner that achieves the collective nature of human rights and obligations, values of equality, dignity, justice, and freedom in the enjoyment of these rights. It is imperative for the African Charter's supervisory organs to engage the values of freedom, equality, justice, and dignity in developing the scope and content of socio-economic rights. As Tshoose notes, interpreting fundamental human rights requires considering the values accepted in an open and democratic society.<sup>71</sup>

## **5 APPLICATION OF THE AFRICAN PHILOSOPHY BY THE SUPERVISORY ORGANS OF THE AFRICAN CHARTER: MISSED OPPORTUNITIES**

The supervisory organs, particularly the African Commission, have had various opportunities to interpret socio-economic rights and have developed significant socio-economic rights jurisprudence. While the African Commission's jurisprudence is substantial the Court's socio-economic rights jurisprudence is in its infancy. However, it is very relevant and worth a discussion in this article. In their jurisprudence, the supervisory organs have been applying various aspects of the teleological approach. Although the supervisory organs have applied aspects of the teleological approach to interpreting the socio-economic rights in question, the potential of African philosophy has not been fully explored. The discussion in this section highlights the jurisprudence where the supervisory organs had an opportunity to engage African philosophy but missed those opportunities. The section pinpoints the implications of the non-engagement of African philosophy.

### **5.1 African Commission's socio-economic rights jurisprudence**

#### **5.1.1 *Social and Economic Rights Action Centre (SERAC) v Nigeria***

The complainants in *SERAC* brought the communication on behalf of the Ogoni Community. They alleged that the military government of the respondent state had been directly engaged in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC), which was the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC). According to the

71 Tshoose (n 46) 18-19.

complainants, the oil production activities had been contaminating the environment, and causing health problems to the Ogoni people. It was further alleged that the victims were not engaged in the decision-making process concerning the development projects affecting their land. The complainants alleged that the respondent state, through its security forces attacked, burned and destroyed several villages and homes in Ogoniland. Allegedly, the respondent state destroyed and threatened food sources in Ogoniland through pollution of soil and water on which the Ogoni people relied for farming and fishing activities. During the raids on villages, the armed forces destroyed crops and killed animals. All these activities resulted in malnutrition and starvation among the Ogoni people. They alleged that these actions and omissions of the respondent state amounted to the violations of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.<sup>72</sup>

The African Commission commenced its decision by describing the states' obligations as set out in the African Charter. According to the African Commission, both civil and political rights, as well as socio-economic rights impose upon states a quartet of obligations, namely: duties to respect, protect, promote and fulfil the rights.<sup>73</sup> Drawing inspiration from the provisions of article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>74</sup> the African Commission stated that states are required to implement all these categories of obligations.<sup>75</sup>

The African Commission went on to determine the allegations regarding the violations of the rights to health and healthy environment in articles 16 and 24 of the African Charter respectively.<sup>76</sup> It stated that the joint reading of the provisions of articles 16 and 24 guarantees the right to a healthy environment.<sup>77</sup> It explained that the right to a healthy environment relates to socio-economic rights.<sup>78</sup> It noted that polluted environment does not meet the standards of healthy living conditions and is dangerous to the individual's physical and mental health.<sup>79</sup> According to the African Commission, article 24 imposes upon states 'an obligation to take reasonable legislative and other measures' to avoid air and environmental pollution as well as promoting progressive environmental conservation and 'ecologically sustainable development and use of natural resources'.<sup>80</sup> It drew inspiration from the provisions of article 12 of the ICESCR to reach to these findings. It found the respondent state to be in violation of articles 16 and 24 of the African Charter.

72 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) 1-9.

73 *SERAC* (n 72) para 44.

74 International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI) 16 December 1966, 993 UNTS 3.

75 *SERAC* (n 72) para 48.

76 *SERAC* (n 72) para 50.

77 *SERAC* (n 72) para 51.

78 As above.

79 As above.

80 *SERAC* (n 72) para 52.

Moreover, the African Commission determined the alleged violation of article 21 concerning the right of peoples to dispose freely of their natural wealth and resources. The African Commission elaborated upon the nature and scope of states' obligations imposed by this right.<sup>81</sup> According to the African Commission, the state has an obligation to protect its citizens through legislation and effective enforcement, and protecting them from damaging acts perpetrated by third parties.<sup>82</sup> Drawing inspiration from *Velasquez Rodriguez v Honduras (Velasquez)*<sup>83</sup> the African Commission held that a state violates its obligation to protect when it permits third parties to act in a manner that violates peoples' rights.<sup>84</sup> The African Commission then held that the respondent state failed to protect the victims from interferences in the enjoyment of their rights.<sup>85</sup> Instead, it facilitated the destruction of Ogoniland.

The African Commission then determined the right to housing implicitly recognised in articles 14, 16 and 18(1) of the African Charter.<sup>86</sup> It held that, while the African Charter does not expressly recognise the right to housing, it is implicitly protected through the provisions protecting the rights to health, property and family.<sup>87</sup> According to the African Commission, when housing is destroyed, property, health and family are negatively affected.<sup>88</sup> It stated that at the minimum, the right to shelter imposes upon the respondent state an obligation to refrain from destroying the housing of its citizens and to desist from preventing their efforts to reconstruct the destroyed homes.<sup>89</sup> It stated further that this obligation requires states to refrain from conducting, supporting or tolerating conduct that violates the right to housing.<sup>90</sup> The obligation to protect housing requires the respondent state to prevent third parties from violating the same.<sup>91</sup> According to the African Commission, the right to housing includes not only 'a roof over one's head' but also individuals' 'right to be left alone and to live in peace'.<sup>92</sup> Moreover, the African Commission held that the implicit right to adequate housing incorporates the right to protection against forced evictions.<sup>93</sup> Drawing on the Committee on Economic, Social and Cultural Rights' (CESCR) definition, the African Commission defined forced evictions as the permanent removal, against their will, of individuals, families and communities from their

81 *SERAC* (n 72) para 57.

82 As above.

83 *Velasquez Rodriguez* (Judgment) Inter-American Court of Human Rights series C 4 (29 July 1988).

84 *SERAC* (n 72) para 57.

85 *SERAC* (n 72) para 58.

86 *SERAC* (n 72) para 60.

87 As above.

88 As above.

89 *SERAC* (n 72) para 61.

90 As above.

91 As above.

92 As above.

93 *SERAC* (n 72) para 63.

homes which they occupy without the provision of, and access to, appropriate forms of legal or other protection.<sup>94</sup> According to the African Commission, forced evictions cause physical, psychological and emotional distress, loss of means of economic sustenance and increased impoverishment.<sup>95</sup> They cause sporadic deaths, break up of families and homelessness.<sup>96</sup> The African Commission drew inspiration from the CESCRC General Comment 4 on the right to adequate housing (General Comment 4)<sup>97</sup> that recognises the right of everyone to possess security of tenure that ensures legal protection against forced eviction, harassment, and other threats against his or her property.<sup>98</sup> The respondent state's actions demonstrated a violation of this right enjoyed by the Ogoni as a collective right.<sup>99</sup>

The African Commission dealt with the right to food alleged by the applicants to be impliedly incorporated in articles 4, 16 and 22 of the African Charter. The African Commission noted that the right to food is directly linked to the dignity of human beings and relevant for the enjoyment and fulfilment of other rights including: health, education, work and political participation.<sup>100</sup> The respondent state is bound by the African Charter and international law to protect and improve existing food sources, and ensures access to adequate food for its citizens.<sup>101</sup> The minimum core of the right to food requires the respondent state to desist from destroying or contaminating food sources and prevent peoples' efforts to feed themselves.<sup>102</sup> The respondent state violated the minimum core of the right to food, namely the destruction of food sources through armed forces and state oil companies, permitting private companies to destroy food sources.<sup>103</sup> Through terror, it also prevented the Ogoni people from feeding themselves.<sup>104</sup>

Regarding the violation of the right to life, the African Commission held that the violations of the rights to housing, food, property, health, and protection of the family amounted to the violation of the right to life.<sup>105</sup> This was done through the killings of Ogonis, environmental pollution and degradation, and the destruction of farms.<sup>106</sup>

I argue in this article that in addition to the provisions of the ICESCR the African Commission could broadly engage the principles of

94 *SERAC* para 63.

95 As above.

96 As above.

97 Committee on Economic, Social and Cultural Rights General Comment 4 The right to adequate housing (1991) UN Doc E/1992/3.

98 *SERAC* (n 72) para 63.

99 As above.

100 *SERAC* (n 72) para 65.

101 As above.

102 As above.

103 *SERAC* (n 72) para 66.

104 As above.

105 *SERAC* (n 72) para 67.

106 As above.

obligations, responsibility and accountability embedded in African philosophy to elaborate state's duties. This way the Commission could have demonstrated the notion of state's duties as understood by African societies and its acceptance. It could show that the state's duties are not an alien in Africa. The Commission did not engage the African philosophy's values of dignity, responsibility, leadership, obligations, and right to life to elaborate the link between the rights to health and healthy environment and their obligations. The Commission didn't invoke the African philosophy's principle of freedom and the pre-colonial African societies' communal understanding of the right to property to interpret article 21 of the Charter. Holistic interpretation of the right to property as understood in Africa's pre-colonial societies requires any disposition of property and other natural resources to include the consent of all members of the community. This consent requirement is significant for land transactions, like leasing, mortgaging, and the determination of the boundaries. The requirement for consent thus demonstrates that African societies recognise the limits attached to the enjoyment of the right to property and other resources. Again, the Commission missed an opportunity to apply the principles of obligations and the rights to property and family embedded in the African philosophy to elaborate the right to housing and other relevant rights. The Commission did not engage the principle of human dignity and the right to life as understood in the African philosophy to elaborate the rights to food, health, education, work, life and political participation.

### 5.1.2 *Purohit and Moore v The Gambia*

In *Purohit and Moore v The Gambia (Purohit)*<sup>107</sup> the complainants called upon the African Commission to decide on the alleged violations of the rights to non-discrimination, equality, dignity, and health. The complainants brought the communication on behalf of the patients who were detained in a psychiatric unit of the Royal Victoria Hospital at Campama, and on behalf of both the current and future mental health patients who will be detained under the Mental Health Acts of the respondent state.<sup>108</sup> The complainants alleged that the law governing mental health in the respondent state was out-dated.<sup>109</sup> They referred to the failure of the Lunatic Detention Act (LDA) to define the term 'lunatic', and to the lack of provisions and significant requirements to protect the mental health of patients during diagnosis, certification and detention processes.<sup>110</sup> They further claimed that the psychiatric unit was overcrowded and that there was a lack of requirement of consent to treatment or continuation of treatment.<sup>111</sup> They further alleged that the LDA does not provide for legal aid scheme and compensatory

107 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit* case).

108 *Purohit* (n 107) para 1.

109 *Purohit* (n 107) para 3.

110 *Purohit* (n 107) para 4.

111 *Purohit* (n 107) para 5.



mechanisms for the violations of the patients' rights.<sup>112</sup> As such, the complainants alleged the violation of articles 16 and 18(4) of the African Charter that provide for the right to health.<sup>113</sup> Moreover, the complainants alleged that the treatment of mental patients to indefinite institutionalisation and the conditions in which they are held under the LDA violate the rights to non-discrimination, equality and dignity provided in articles 2, 3 and 5 of the African Charter.<sup>114</sup>

The African Commission determined whether the respondent state violated the right to dignity in article 5.<sup>115</sup> On this issue, it responded in the affirmative. It referred to the provisions of article 5 and stated that this right also imposes on every human being the obligation to respect this right.<sup>116</sup> It further stated that all state parties to the African Charter should respect this right.<sup>117</sup> With reference to *Media Rights Agenda and Others v Nigeria (Media Rights Agenda)*<sup>118</sup> and *John K Modise v Botswana (Modise)*<sup>119</sup> the African Commission stated that the LDA's description of persons with a mental illness as 'lunatics', and 'idiots' violates the right to dignity in article 5 as these terms dehumanise and deny such persons any form of dignity.<sup>120</sup> It further drew inspiration from UN Principles for the Protection of Persons with Mental Illness and stated that the dignity of persons with a mental disability should be respected.<sup>121</sup> Moreover, the right to dignity requires persons with a disability to be treated with humanity.<sup>122</sup> It then stated that persons with a mental disability have the right to enjoy the right to dignity and that the right should be protected by all state parties to the African Charter.<sup>123</sup>

In this case, the African Commission could also engage the African philosophy's element of individual duties, values of dignity, equality, and humanness to elaborate the rights to dignity, equality, non-discrimination, and health. For example, the African Commission could enhance its decision by applying the value of human dignity as holistically understood in the African philosophy to elaborate the right to dignity in the African Charter. The holistic application of the value of dignity in the African philosophy could assist the African Commission to enrich the meaning, scope, and content of the right to dignity in article 5 of the African Charter.

112 *Purohit* (n 107) para 8.

113 *Purohit* (n 107) para 9.

114 As above.

115 *Purohit* (n 107) para 55.

116 *Purohit* (n 107) paras 56-57.

117 *Purohit* (n 107) para 61.

118 *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

119 *John K Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).

120 *Purohit* (n 107) paras 56-61.

121 *Purohit* (n 107) para 60.

122 As above.

123 *Purohit* (n 107) para 61.

### 5.1.3 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*

In *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan (COHRE)*,<sup>124</sup> the second complainant (complainant) alleged the violation of human rights by the respondent state against the indigenous black African tribes in the Darfur region found in the western part of the respondent state.<sup>125</sup> The complainant alleged that through the Janjaweed the respondent state attacked the civilian population, raided and bombed their villages, markets and water wells by helicopter gunships and airplanes (aeroplanes).<sup>126</sup> They further claimed that the respondent state forcibly evicted a large number of people from their homes that were also totally or partially burned and destroyed. The complainant alleged that the respondent state deliberately and indiscriminately killed people and many other people were displaced.<sup>127</sup> Based on this background the complainant alleged the respondent state's violation of, amongst others, articles 4, 5, 14, 16, 18(1) and 22 of the African Charter.<sup>128</sup>

The African Commission found the respondent state in violation of articles 4 and 5 of the African Charter.<sup>129</sup> With regard to article 4, the African Commission noted that the right to life should be interpreted broadly to include the right to dignity and livelihood.<sup>130</sup> It is a supreme right without which other rights become meaningless.<sup>131</sup> This right to life imposes upon states the duty to protect people from arbitrary actions committed by public authorities and private persons.<sup>132</sup> This duty is broad as it includes strict control and limits circumstances under which a person may be deprived of his or her life by state authorities.<sup>133</sup> The right also imposes a duty upon the state to respect the right to life by desisting from violating it by protecting it from violation by non-state actors within its jurisdiction.<sup>134</sup> Referring to *Zimbabwe Human Rights NGO Forum v Zimbabwe (Zimbabwe Human Rights NGO Forum)*,<sup>135</sup> the African Commission held that lack of due diligence on the part of the state to prevent the violation or for not taking steps to provide the victims with reparation, amounts to a violation of the right.<sup>136</sup>

124 *Sudan Human Rights Organisation & Centre on Human Rights and Evictions v Sudan* (2009) AHRLR 153 (ACHPR 2009) (COHRE case).

125 COHRE (n 124) para 2.

126 COHRE (n 124) para 13.

127 COHRE (n 124) para 14.

128 COHRE (n 124) paras 15-16.

129 COHRE (n 124) paras 153 and 168.

130 COHRE (n 124) para 146.

131 As above.

132 COHRE (n 124) para 147.

133 As above.

134 COHRE (n 124) para 148.

135 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006).

136 COHRE (n 124) para 148.

Regarding the right to dignity the African Commission through reference to *Media Rights Agenda, Modise* and the decision of the United Nations Committee Against Torture in *Hajrizi Dzemajl et al v Yugoslavia (Hajrizi)*,<sup>137</sup> held that 'cruel, inhuman and degrading punishment or treatment' in article 5 should be broadly interpreted to protect people from physical or mental abuse.<sup>138</sup> It noted that forced evictions and destruction of housing amount to cruel, inhuman and degrading treatment or punishment. The forced eviction of Darfurians from their villages and homes, executed by the respondent state through the Janjaweed militia and its agents, amounted to cruel and inhuman treatment and threatened their right to human dignity. Then, the respondent state violated both articles 4 and 5 of the African Charter.<sup>139</sup>

Furthermore, the African Commission found Sudan in violation of article 14 of the African Charter on the right to property.<sup>140</sup> It started by stating the significance of the right to property and the nature and scope of states' obligations imposed by this right.<sup>141</sup> According to the African Commission, the right to property is a fundamental right in democratic states and imposes upon states obligations to respect and protect it from encroachment by the states and non-state actors.<sup>142</sup> States are required to ensure that this right is accessible to everyone while taking the public interest into account.<sup>143</sup>

The African Commission explained further that the right to property incorporates two principles: ownership and peaceful enjoyment of property, as well as conditions for deprivation of the right such as public or general interest and 'in accordance with the law'.<sup>144</sup> According to the African Commission, the respondent state's action through the Janjaweed militia to destroy the victims' villages and homes amounted to the deprivation of the right to property.<sup>145</sup> The respondent state failed to refrain from forcible evictions of the victims or demolition of their houses and other properties.<sup>146</sup> The African Commission further found that the respondent state failed to take measures to protect the victims from attacks and bombings.<sup>147</sup> It held that the fact that the victims could no longer use their possessions to earn their living indicated that they were deprived the right to use their property in circumstances allowed by article 14 of the African Charter.<sup>148</sup>

137 *Hajrizi Dzemajl et al v Yugoslavia* Communication no. 161/2000 UN Doc No CAT/C/29/D/161/2000 (2 December 2002).

138 *COHRE* (n 124) paras 158-159.

139 *COHRE* (n 124) paras 158-168.

140 *COHRE* (n 124) para 205.

141 *COHRE* (n 124) para 192.

142 As above.

143 As above.

144 *COHRE* (n 124) para 193.

145 *COHRE* (n 124) para 194.

146 *COHRE* (n 124) para 205.

147 As above.

148 As above.

The African Commission also considered the allegations regarding the right to health.<sup>149</sup> It found Sudan in violation of the right to health contained in article 16 of the African Charter.<sup>150</sup> Significantly, the African Commission defined the content of the broadly formulated right to health to include both health care and health conditions.<sup>151</sup> It then stated that the respondent state's destruction of homes, livestock, farms, and the poisoning of water sources like wells, exposed the victims to serious health risks. Referring to CESCR General Comment 14 on the right to the highest attainable standard of health (General Comment 14) the African Commission held that, in addition to timely and appropriate health care, the right to health encompasses other underlying determinants such as access to safe and potable water, an adequate supply of food, nutrition and housing.<sup>152</sup> The right should be available, accessible, and acceptable, and of good quality.<sup>153</sup> The right to health imposes obligations to respect, fulfil and protect.<sup>154</sup> States should thus not infringe on the enjoyment of this right.<sup>155</sup> Through this obligation, states should refrain from polluting air, water and soil.<sup>156</sup> The right to health also imposes upon states an obligation to ensure that non-state actors do not restrict individuals or groups' accessibility to any information and services related to this right.<sup>157</sup> The African Commission went on to state that the state's failure to adopt and enforce legislation that prevents water pollution equally amounts to the violation of the right to health.<sup>158</sup> Referring to *free legal assistance* the African Commission held that failure to provide safe drinking water and electricity amounts to a violation of the right to health.<sup>159</sup> The African Commission found the respondent state in violation of the right to health enshrined in article 16 of the African Charter.<sup>160</sup>

The African Commission also found the respondent state in violation of the right to the protection of the family contained in article 18(1) of the African Charter. It stated that article 18 imposes upon states a positive obligation to protect the physical and moral well-being of a family.<sup>161</sup> The provisions of article 18 also prohibit states' and non-state actors' arbitrary or unlawful interference with the family.<sup>162</sup> Drawing inspiration from the CESCR General Comment 19 on the right to social security (General Comment 19) the African Commission stated that the right to family protection imposes on states obligations to adopt

149 *COHRE* (n 124) para 206.

150 *COHRE* (n 124) para 212.

151 *COHRE* (n 124) para 208.

152 *COHRE* (n 124) para 209.

153 As above.

154 As above.

155 As above.

156 As above.

157 *COHRE* (n 124) para 210.

158 As above.

159 *COHRE* (n 124) para 211.

160 *COHRE* (n 124) para 212.

161 *COHRE* (n 124) para 213.

162 As above.

legislative, administrative, or other measures to give effect to this right.<sup>163</sup> It also obliges states to desist from conducts that may endanger the family unit such as arbitrary separation of family members and displacement of families involuntarily.<sup>164</sup> Drawing inspiration from the judgment of the European Court of Human Rights (European Court) in *Dogan v Turkey (Dogan)*<sup>165</sup> the African Commission stated that the respondent state's refusal to allow the victims to access their homes and livelihood amounts to an interference with the family.<sup>166</sup> Significantly, the African Commission connected the mass expulsions of the applicants with their right to the protection of the family.<sup>167</sup> Referring to *Union Interafricaine des Droits de l'Homme v Angola*<sup>168</sup> it held that massive forced expulsions of people adversely affects the right to the protection of the family.<sup>169</sup> The respondent state's forcible eviction of the victims from their homes, the killing of some family members and the displacement of others threatened the foundation of family and made the enjoyment of the right to family difficult. Therefore, the respondent state was found to have violated the right to family.<sup>170</sup>

Then the African Commission determined allegations regarding the violation of the right to development in article 22 of the African Charter.<sup>171</sup> It found the respondent state to be in violation of the right to development.<sup>172</sup> According to the African Commission, article 22 is collective in nature in that it is endowed on a people.<sup>173</sup> The African Commission reasoned that to establish the violation of article 22 the question whether victims constitute 'people' in the context of the African Charter is vital.<sup>174</sup> Therefore, it had to determine whether Darfurians constitute a 'people' thus entitling them to the right to development.<sup>175</sup> According to the African Commission, various characteristics can be used to identify persons referring to themselves as 'a people'.<sup>176</sup> These characteristics include language, religion, culture, the territory they occupy in a state and a common history.<sup>177</sup> The African Commission stated further that race also characterises 'people' in communities with a population of different racial

163 COHRE (n 124) para 214.

164 As above.

165 *Dogan v Turkey* App 8803-8811/02, 8813/02 and 8815-8819/02 (ECtHR, 29 June 2004).

166 COHRE (n 124) para 214.

167 COHRE (n 124) para 215.

168 *Union Interafricaine des Droits de l'Homme v Angola* (2000) AHRLR 18 (ACHPR 1997).

169 COHRE (n 124) para 215.

170 COHRE (n 124) para 216.

171 COHRE (n 124) para 217.

172 COHRE (n 124) paras 224 and 228.

173 COHRE (n 124) para 218.

174 As above.

175 As above.

176 COHRE (n 124) para 220.

177 As above.

composition.<sup>178</sup> It stated that in Africa racial and ethnic diversity contribute to the cultural diversity that should be embraced.<sup>179</sup> Significantly, the African Commission elaborated on the object and purpose of the African Charter regarding peoples' rights. It stated that the object and purpose of the African Charter is to protect peoples against external and internal rights' violations.<sup>180</sup> Based on this reasoning the African Commission pointed out that the African Charter protects individuals and groups of different racial, ethnic, religious and other social backgrounds.<sup>181</sup> The African Commission applied article 19 of the African Charter to emphasise that Darfurians in their collective are 'a people'.<sup>182</sup> The article recognises peoples' right to equality and enjoyment of the same human rights without distinction.<sup>183</sup> Thus, the respondent state's action to target Darfur's civilians instead of combatants amounted to collective punishment.<sup>184</sup> According to the African Commission;

the attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities. The displacement interfered with the right to education for their children and the pursuit of other activities'. In this respect, the African Commission found the respondent state to have violated article 22 of the African Charter.<sup>185</sup>

While the Commission's findings in *COHRE* is commendable, the Commission could have strengthened its jurisprudence and give it the African context by broadly engaging the African philosophy's principle of duties to elaborate the states' obligation towards its people. It missed an opportunity to elaborate the African philosophy's principle of dignity, humanness, equality and the rights to life, Africa's concept of family, and property to elaborate the rights to dignity, life health, food, water, family, development and property in *COHRE*. This was an opportunity for the Commission to elaborate the significance of the right to property in the African context. This was an opportunity that the Commission could apply the general understanding of African philosophy that is based on the collective nature of Africa's people to define the Darfurians as 'a people'. The Commission missed an opportunity to cement on African philosophy's emphasis on states to respect human rights including socio-economic rights in a manner that would enable people to commune with others and engage in various individual and collective socio-economic rights.

The African Commission applied similar approach, by exclusively relying on the relevant jurisprudence of the Inter American Court while completely leaving out African philosophy, in its subsequent communication, *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois*

178 *COHRE* (n 124) para 220.

179 *COHRE* (n 124) para 221.

180 *COHRE* (n 124) para 222.

181 *COHRE* (n 124) para 223.

182 As above.

183 *COHRE* (n 124) para 221.

184 *COHRE* (n 124) para 223.

185 *COHRE* (n 124) para 224.

*Welfare Council v Kenya (Endorois)*.<sup>186</sup> The complainants in *Endorois* alleged that the respondent state violated in particular, the rights to property, cultural life, natural resources, and the right to development contained in articles 14, 17, 21 and 22 of the African Charter.<sup>187</sup>

The *Endorois* was an opportune moment for the African Commission to enrich its jurisprudence by applying various aspects of African philosophy. It could apply the notion of African philosophy first to develop the scope and content of the property rights of the indigenous peoples and then apply the relevant jurisprudence to establish the external coherence. The Commission could also apply the general understanding of African philosophy founded on the collective way of life to enrich its definition of peoples. It could also invoke the African philosophy's understanding of the right to property and other natural resources to broadly interpret the rights to property and free disposal of wealth in article 21. These two rights in African context include the right to free consent, freedom of enjoyment, and obligation to respect. As such the rights broadly encompass the obligation to consult.

## 5.2 African Court's socio-economic rights jurisprudence

### 5.2.1 African Commission on Human and Peoples' Rights v Kenya (*Ogiek case*)<sup>188</sup>

The applicant in the *Ogiek* alleged that the Ogiek Community (the Ogieks)<sup>189</sup> in the respondent state are an indigenous minority ethnic group residing in the greater Mau forest complex.<sup>190</sup> The applicant submitted that the state, through its agency the Kenya Forestry Service, issued the Ogieks and other settlers with a 30-day notice to vacate the Mau forest on the grounds that it is a reserved water catchment zone and 'government land', as stipulated in section 4 of the Government Land Act.<sup>191</sup> The applicant further argued that the eviction notice failed to consider the importance of the Mau forest for the Ogieks' survival.<sup>192</sup> The applicant, therefore, alleged a violation of articles 1, 2, 4, 14, 17(2)-(3), 21, and 22 of the African Charter.

The African Court subsequently had to consider whether the Ogieks constitute indigenous peoples.<sup>193</sup> It noted the African Charter's

186 *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHLRLR 75 (ACHPR 2009).

187 *Endorois* (n 186) paras 1-6 and 14-21.

188 *African Commission on Human and Peoples' Rights v Kenya* Application 6/2012.

189 *Ogiek* (n 236) para 6.

190 *Ogiek* (n 236) para 6.

191 *Ogiek* (n 236) paras 7-8.

192 *Ogiek* (n 236) para 8.

193 *Ogiek* (n 236) para 102.

omission regarding the meaning of indigenous peoples.<sup>194</sup> Through articles 60 and 61 of the African Charter, the Court drew inspiration from the African Commission's Working Group on Indigenous Populations/Communities, as well as the work of the United Nations Special Rapporteur on Minorities, which establish criteria to identify indigenous populations.<sup>195</sup> It found that the survival of indigenous populations hinges on 'unhindered access to and use of their traditional land and the natural resources thereon'. Satisfied that the Ogieks possess all these requirements, the Court held that they are indigenous people.<sup>196</sup>

Regarding the right to property in article 14 of the African Charter, the African Court found that this right is both individual and collective in nature.<sup>197</sup> The right includes three elements namely the 'right to use the property (*usus*)'; the 'right to enjoy the property (*fructus*)'; and the 'right to dispose the property or transfer it (*abusus*)'.<sup>198</sup> Drawing inspiration from the United Nations General Assembly Declaration 61/295 on the Rights of Indigenous Peoples, the Court held that the Ogieks have the right to occupy, use, and enjoy their traditional lands.<sup>199</sup>

Regarding the right to non-discrimination in article 2, the African Court held that it guarantees the enjoyment of all the rights in the African Charter and that it is directly related to the right to equality in article 3.<sup>200</sup> The scope of the right to non-discrimination extends, however, beyond the right to equality in that it practically enables individuals' enjoyment of their rights without distinction.<sup>201</sup> According to the Court, the phrase 'any other status' in article 2 includes any form of distinction that was not foreseen during the Charter's adoption.<sup>202</sup> The Court explained that it considers the African Charter's object and purpose when establishing the forms of distinction covered in the phrase 'any other status'. It noted that not all forms of distinction are discriminatory. A distinction is discriminatory when it is not objective, reasonably justifiable, necessary, or proportional.<sup>203</sup> The African Court held that denying the Ogieks their rights (which are recognised as similar to indigenous peoples in that their survival depends on their traditional lands) amounts to a distinction based on ethnicity or another status provided in article 2.<sup>204</sup>

On the right to life in article 4, the African Court stated that this right guarantees the realisation of all rights in the African Charter.<sup>205</sup> It

194 *Ogiek* (n 236) para 105.

195 *Ogiek* (n 236) paras 105-106 & 108.

196 *Ogiek* (n 236) paras 110-112.

197 *Ogiek* (n 236) para 123.

198 *Ogiek* (n 236) para 124.

199 *Ogiek* (n 236) para 125-128.

200 *Ogiek* (n 236) para 137.

201 *Ogiek* (n 236) para 138.

202 As above.

203 *Ogiek* (n 236) para 139.

204 *Ogiek* (n 236) paras 142 and 146.

205 *Ogiek* (n 236) para 152.



held that the right to life prohibits the arbitrary deprivation of life and establishes a link between the right to life and the inviolable nature and integrity of human beings.<sup>206</sup> The Court further found that violating socio-economic rights through evictions does not necessarily violate the right to life, but rather engenders conditions unfavourable to a decent life.<sup>207</sup> According to the Court, the right to life in article 4 refers to a physical right to life, rather than an existential understanding of the right.<sup>208</sup> It held further that the Ogieks' eviction negatively affected their decent existence of a group.<sup>209</sup> The African Court, however, held that the applicant failed to prove the direct link between the evictions of the Ogieks and the death of some members of their community.<sup>210</sup> It, therefore, held that the respondent state did not violate article 4.<sup>211</sup>

Regarding the right to freely dispose of wealth, the African Court started by defining the notion of 'peoples'. It noted the African Charter's omission regarding the meaning of this term. According to the Court, the omission was deliberate to allow supervisory organs the necessary flexibility to define it.<sup>212</sup> The African Court explained that, during anti-colonial struggles, the term 'peoples' meant populations in countries struggling for their independence and national sovereignty.<sup>213</sup> In the independent states, the Court had to decide whether the term extends to ethnic groups or communities within a state.<sup>214</sup> It held that, provided that such groups do not challenge the sovereignty and territorial integrity of a state, they should be recognised as peoples.<sup>215</sup> The Court then held that the violation of the Ogieks' right to property also amounts to a violation of their right to freely dispose of their wealth in article 21 of the African Charter.<sup>216</sup>

Concerning the right to development, the African Court held that peoples are entitled to the socio-economic right to development in article 22 of the African Charter.<sup>217</sup> According to the Court, the respondent state's eviction of the Ogieks without consultation violated their socio-economic right to development, as well as their rights to health, housing, and other socio-economic programmes related to the right to development.<sup>218</sup>

206 *Ogiek* (n 236) para 152.

207 *Ogiek* (n 236) para 153.

208 *Ogiek* (n 236) para 154.

209 *Ogiek* (n 236) para 155.

210 As above.

211 *Ogiek* (n 236) para 156. For a detailed discussion regarding the manner in which this decision fails to resonate with the teleological approach to interpretation see A Amin 'Teleological interpretation in the emerging socio-economic rights jurisprudence of the African Court: *African Commission on Human and Peoples' Rights v Kenya*' (2021) *African Journal of Legal Studies* 13-14.

212 *Ogiek* (n 236) para 196.

213 *Ogiek* (n 236) para 197.

214 *Ogiek* (n 236) para 198.

215 *Ogiek* (n 236) para 199.

216 *Ogiek* (n 236) para 201.

217 *Ogiek* (n 236) para 208.

218 *Ogiek* (n 236) paras 210-211.

The *Ogiek* was an opportune moment for the African Court to enrich its jurisprudence by applying various aspects of African philosophy. The Court could apply the general understanding of African philosophy founded on the collective way of life to enrich its definition of peoples. The Court missed an opportunity to engage the African philosophy's aspects of dignity, family, property, equality and life to elaborate the rights to life, non-discrimination, property, and development involved in this case.

For example, the Court's decision on the right to property is significant as it recognises indigenous peoples' rights to their traditional land. Upholding indigenous peoples' property rights embrace the African Charter's approach, which draws on African realities and philosophical perspectives regarding peoples' rights including peoples' socio-economic rights. The recognition of collective socio-economic rights is justified by the notion of African philosophy entrenched in the African Charter's preamble and elaborated on in its provisions. The African Court did not, however, invoke the notion of African philosophy to develop the unique and important scope and content of indigenous peoples' rights to property.

## **6 TOWARDS A COHERENT APPLICATION OF AFRICAN PHILOSOPHY IN INTERPRETING SOCIO-ECONOMIC RIGHTS IN THE AFRICAN CHARTER**

### **6.1 Applying the teleological approach to interpretation**

African philosophy is not an interpretive approach but rather an interpretative tool. As such, its application in interpreting socio-economic rights in the Charter will only be feasible if justified by an appropriate approach to interpretation. The effective application of African philosophy will require an interpretative approach that engages the object and purpose of the African Charter. In this regard, the teleological approach to interpretation becomes an appropriate interpretive approach. The engagement of the object and purpose of the African Charter in the interpretative process creates space for the supervisory organs to apply a wide range of interpretive tools including African philosophy in developing the meaning, scope and content of socio-economic rights in the African Charter. The supervisory organs can use principles embedded in the African philosophy to elaborate on both individual and collective socio-economic rights. Resultantly, there is a close link between the application of the African philosophy and the teleological approach to developing the meaning, scope and content of socio-economic rights in the African Charter.

## **6.2 Engaging African philosophy, its foundational principles, values and human rights**

African philosophy is a vital interpretive tool in the African Charter with enormous potential in elaborating Charter's socio-economic rights. Based on its phrase 'I am, because we are; and since we are, therefore I am' that represents a collective living of African societies, this interpretive tool engages a wide range of principles and values relevant for the development of socio-economic rights in the African Charter. Reference to the African philosophy will enable the supervisory organs to engage its foundational principles including collectiveness, humanness, responsibility, and respect. Other principles include the values of human dignity, respect for the right to life, freedom, justice, democracy, democratic and good governance, freedom to use and enjoyment of natural resources equally and collectively, and individual obligations. African philosophy creates an avenue for the supervisory organs to engage human rights to life, property, family, and equality to interpret both individual and collective socio-economic rights. Application of these principles, values and rights will enable the supervisory organs to elaborate socio-economic rights in a manner that portrays African identity and understanding of these rights. These interpretive aspects help to strengthen an argument that human rights are not alien in Africa.

## **6.3 Engaging other interpretive tools justified by the teleological approach**

The effective interpretation of socio-economic rights in the African Charter requires an engagement of a wide range of interpretive tools alongside African philosophy. As shown in the discussion above these interpretive tools include object and purpose of the African Charter, the Preamble to the Charter that engages the values of human dignity, equality, justice, and freedom. They also include interdependence of rights, and African philosophy. Other interpretive tools include the African Charter as a whole engaging the relevant rights provisions, duties provisions, drawing inspiration clauses. Others include relevant national, regional and international instruments and jurisprudence and the principle of effectiveness. As such, an effective interpretation of socio-economic rights does not require African philosophy to be applied in isolation from other interpretative tools. Other interpretative tools should be engaged to enrich the meaning, scope and content of socio-economic rights in a manner that allows international legitimacy that is, acceptance in the international sphere to create international coherence.

## **7 CONCLUSION**

At the heart of effective protection of socio-economic rights in the African Charter lies the potential of these rights to transform socio-

economic conditions of the Africa's people and enable them to preserve their historical collective nature of living. To be attainable, this treasure hidden in socio-economic rights requires the supervisory organs to engage relevant interpretative tools in their interpretative processes. I have argued that African philosophy founded on the principles of collectiveness and togetherness of Africa's people, is a potential interpretative tool to enrich the meaning, scope and content of socio-economic rights and enable individuals to commune with others in all spheres of socio-economic activities. I have shown that despite its potential, the supervisory organs have not explored this interpretative tool fully.

To assist the supervisory organs to advance the African Charter's object and purpose embraced in socio-economic rights, that is, transforming peoples' socio-economic-conditions and enhancing their historical communal way of living, I have developed a coherent application of African philosophy in interpreting these rights. I have shown that the legal basis for the coherent application of African philosophy is centred in the teleological approach to interpretation. I have shown that while the supervisory organs have been applying the teleological approach in their socio-economic rights jurisprudence, they have not engaged African philosophy in interpreting these rights. Engaging African philosophy consistently could enable the socio-economic rights in the African Charter to be a transformative tool of the Africa's people socio-economic conditions in a manner that facilitate them to commune in all spheres of socio-economic activities effectively.