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Problems of the rights of peoples: their historical and practical significance

The concept of human rights and the rights of peoples has undergone many variations in time and space. In time, in the sense that the eighteenth century conception of human rights and the rights of peoples is not necessarily the same as that of the twentieth century. In space, inasmuch as the English, American or French conceptions are not the same; the difference would be even more noticeable if the concepts of this group were compared to those of the so-called totalitarian regimes, not to speak of the African concept of human rights.

Apart from these differences of temporal and spatial conception, there are also variations according to the different branches of the human sciences (in the broadest sense of the term). Thus the view of the lawyer may differ from that of the sociologist or the anthropologist or the political scientist, etc.

The concept of human rights in the former African colonies

It is not our intention to analyse the conceptions of all colonized countries. We shall confine our investigations to Africa as a whole. This means that the countries of Latin America, Asia and the Middle East do not come within the sphere of our study. On the other hand, the African continent will be considered as a whole, without analysing the particular situation of any one country.

Having established this, the main question facing us in this study is whether these countries have a special conception of human rights and the rights of peoples. We feel that this question can be answered adequately only by distinguishing three essential periods in their evolution.

Thus we shall analyse successively human rights in the pre-colonial period, human rights as reflected in the first texts immediately following independence and thirdly, the present-day conception of human rights.

After many others, we in turn shall attempt to investigate the case of the Guin societies¹ and to describe human rights in the traditions and customs of these peoples.

¹ Populations living on most of the coastal part of Togo and concentrated around Glidji and Aneho.

First, there is the concept of man. That is *Agbeto* (man, the father of life, *Agbe* = life and *To* = father).

Man is represented as a substance which is universal. Man is the father of all the aspects of life. That shows that the concept of man was raised to the level of a fundamental moral and social value, inseparable from the idea of responsibility, freedom and dignity. Traditionally, the kings of Glidji are always chosen from the Tugba lineage. On the death of the king, the Fiotowo and the Amegawo, dignitaries and high councillors of the royal family, meet to appoint the new king. The choice is made within the family. The notables of the other lineages, however powerful and influential they may be in political life, do not theoretically play any part in this election. At most, they may ratify or oppose the choice, when the newly elected king is officially enthroned.

The authority of this sovereign is tempered by the existence of the Fioha or the Royal Council: «Ame deka mu du na fio o» (One man alone is not king), to quote a Guin proverb which well illustrates the essence of this royalty. The sovereign must take council from his people and seek support from them in order to govern, through the notables, who are the people's delegates. This royalty seeks, moreover, to be democratic in nature: «The people are sovereign; it is they alone who delegate their power to one person whom they raise to the dignity of king... One man alone, however powerful he may be, does not make himself king. Only the people may appoint whom they wish to this position», asserts a high dignitary of the kingdom with force and conviction. And it is not any man, who is elected, but the best, the most virtuous. This is why the future king before being crowned undergoes many ordeals to test his physical and moral strength and goes through secret initiatory rites to give him might and protection. To quote the words of the song:

«Amevo ma Tcho djegba
Axolu amevo ma Tcho djegba»

«A bad man does not wear the Djegba
Axolu (king) a bad man does not wear the Djegba»²

The Tomehueyi, representatives of the people within the Fioha, are responsible for ensuring that the sovereign observes the strict application of the customs, and traditions of the Ancients. The Guin political system thus seems to have been a constitutional monarchy, the Constitution being represented by the Tradition, jealously guarded in its pristine original form by the Fioha, which must see that it is respected and observed in its smallest details. It is for the Fioha to judge whether the decisions of the king go against the spirit or the letter of the tradition and to reject it if it is anti-constitutional or approve it if it comes within the line traced out by the Ancients.

The legal structures follow the same pattern as the political structures. At the top, the chancellor is assisted by assessors, or Tchami, who are responsible both for investigating the cases and forming the jury. When the court has pronounced a sentence which is contested by both parties or one of the parties, an

² The Djegba is the emblem of royalty above all others. It is the crown, a headpiece made of several strips of white silk or cotton, intertwined and decorated with white pearls.

appeal is made to the Hungbono, the high priest of the local divinities who intervenes publicly and makes a final decision. His decision is irrevocable and is generally uncontested. Everyday affairs are judged according to their importance by the Ga or heads of the lineage.

For major criminal or political affairs, however, assizes were held periodically at Glidji in the famous Huntitogomé Square³. The plaintiff and the defendant were summoned there before the assembly of chiefs from the surrounding area, presided over by the king or his representative. The trial was held in public and the square was full of people, according to the accounts, because all the neighbouring families and chiefs felt it their duty to instruct their family and especially their children. We are under the palaver tree. What used to happen there? To quote Robert Cornevin: «The African palaver follows strict rules and often lasts a long time, because there is no restriction on speech by the public, who come from all walks of life. The length of the procedure is due to the fact that each person has almost too much freedom to state his views, even the slaves are not excluded from the process... Anyone can take the floor. The speakers generally express themselves very frankly. It is agreed that on these occasions the chiefs must accept the harshest criticism without turning a hair. Here as elsewhere there is always one party who supports authority and the other party who attacks it»: an intuitive and living democracy, and not one to which merely lipservice is given.

From all this can be deduced a number of jealously protected principles and rights:

the government is organized in such a way as to discourage any tendency to seize power or to impose a personality cult. The king is surrounded by a secret council whose role is to advise him, sometimes to judge him, if necessary to admonish him, and in extreme cases, should he show any lack of discipline with regard to the traditions which he must uphold, or should he misbehave, to appoint a viceroy known as Agbonugla, responsible for supervising him and keeping him under close supervision.

The assertion of the right to preserve their cultural identity by the other peoples making up the Guin kingdom is respected by the government. These people are composed of the Ga group, the largest element, the Ela, the Adangbe Nungo originally from the Acca region, certain Anlo lineages from Kéta, the Adja from Fanté, originally from Elmina, and the integrated groups or Portuguese and former slaves returning to the coast. All these ethnic groups preserve their cultural and religious characteristics and are often members of the Fiohawo, the council of government. It may even be said that the Vodun of each of these groups were respected by the Guin community as a whole. Does not the new king during his coronation move from convent to convent to receive a benediction or undergo initiatory rites?

A spirit of tolerance and open-mindedness prevailed in the Guin community.

The Guin proverb says: «Before slitting even a chicken's throat you give it water to drink». In such a society it is obvious that a certain number of rights must be absolutely and naturally guaranteed. These are:

³ Under the three kapok trees.

The right to life: No one has the right to threaten the life of another, even the king. In this sense the greatest evil is sorcery. That is why when a Bokono is approached and asked to kill someone, unless he himself is evil, he replies: «nye mu le dji la gble asio» (I do not want to dirty my hands). For his role is to save life and not destroy it. If he does so as a priest he loses all his powers.

The right to association and meeting: It is completely free and accessible to all, without prior authorization or limitation in time and space.

The right to freedom of expression: The palaver tree reflects this well. There was even the Halo, a tom-tom gathering during which two opposing parties settled their affair through singing. Each party was invited to the tom-tom session organized by the other and accepted impassively whatever might be said.

The right to freedom of choice: This was guaranteed within the limits set by established usage. Mention may also be made here of a visceral attachment to the idea of justice in all fields, economic, political, social, cultural etc., to a sense of human freedom and dignity, the rejection of all forms of excessive domination, of all totalitarianism and dictatorship from whatever source.

The right to property and to work: The principle is that each individual must earn his living through work. But as property, especially land, is collectively owned, the community must provide the individual with the necessary plot of land.

The right to education, to culture, to one's own culture: The family has, of course, an educational function. The child is given a community and individual education closely linked to the life of the community. The more or less codified initiation of the adolescent and introduction to the secrets of life and practical skills form the highlights of this education. Initiation is not only practical, political and religious in scope but also a school of philosophical and theoretical training, i.e. education leading to full manhood.

The right to solidarity and corresponding duties: This is so strong that the individual seems completely overwhelmed by the group. Solidarity is a primordial value which prevents the community spirit from breaking up. Of course the right to circulate, to come and go without authorization or visa, to accede to functions in keeping with one's status, must not be ignored.

We may now consider three groups of people who are expressly protected by special provisions⁴: old people, women and children.

Old people: as Amsatou Caab Sow stressed in his contribution to the Lomé meeting on «Human Rights in African Traditions», the old man, also among the Guin, is the venerated and respected guarantor of the traditional values of society and the stability of the group:

- a religious, spiritual and mystical leader;
- a politician, through his participation in the election and initiation of the future chief;
- he plays the role of judge and arbiter.

Women: they also play an important role. The woman is:

⁴ Cf. Communication by Amsatou Caab Sow, and *Fonction sociale de la famille et problèmes actuels* (Social function of the family and present problems) by Ram Christophe Sawadogo at the Regional Seminar on the Law and Demographic Problems, Lomé 10-14 March 1975.

– not only the mother but also the element of solidarity in the group; she is «not only the wife of her husband, the mother of her child, she is also the wife of the brothers, cousins and friends of the husband, the mother of all the nephews and of all the children of her husband's friend»;

– an important cultural figure having ritual and mystical functions. She ensures the role of education and transmission of traditional values and various artistic and healing roles,

– invested with judicial and moral functions;

– invested with important economic functions;

– invested with a political role which, although indirect, is none the less effective.

The child: It is in an extended family that the child finds protection. This protection is strengthened by the solidarity which exists between the members of the family which plays this role in relation to the functions entrusted to it.

The family gives the child a group to belong to and an identity of which the limits are those of the group. In fact kinship is a very wide reality which goes beyond mere biological aspects and takes on social characteristics. The child is not only the child of his father and mother but also of his uncles, aunts and even his parents' friends. That is why the death of the father does not mean that the child is left on his own. *The child is placed under guardianship*, so as to give him as much security as possible. He is put in the charge of a relative who constitutes a guarantee that good care will be taken of him. Often it is the widow, who is married by a brother of the deceased husband (Ahoka soso) who thus becomes the "father" of his orphan nephews and nieces. In practice, there are no illegitimate or legitimate children or children born of adultery or incest etc. even though the distinction exists to the detriment of those responsible.

At this level, the principle which applies is not «to each according to this work», but «to each according to his needs». It is a question of ensuring that all members of the family and more particularly the child always has sufficient food in quantity and quality. A parent will often be heard to say «my child will not go hungry as long as I live». Each member of the group, even if he is no longer productive (old people) or if he is not yet productive (children) must receive his portion to satisfy his needs. Family links are more strongly experienced than cold, impersonal economic relationships. In this context, the concepts of the working population and productivity have practically no significance; on the other hand, there is a form of social security within the group from which the children, more than any others, benefit.

The child is part of a whole, a coherent whole which will influence his behaviour. The relationship between the child and his mother does not remain in isolation but extends to his step-mothers, his half-brothers and sisters, his male and female cousins, and even, more impersonally, to all other members of the community. Although his mother plays a privileged role, it is not exclusive. In fact the child is picked up also by his aunts, sisters and neighbours: his body "melts" so to speak, into a dynamic community which is ever present and all-pervasive.

Education therefore takes on a popular and individual character which remains closely linked to the life of the community. All the adults help to give the child a sense of honour, sociability, respect for others and especially for strangers, uprightness, honesty, courage, solidarity and hospitality, which are the main moral

qualities. As we have already said, learning among children in the form of instructive games, the more or less codified initiation of the adolescent, the introduction to the secrets of life and practical skills constitute the most important stages of this education. The child here has not only a right to education but also a duty which he must fulfil.

The Guin family and society are religious institutions: the feeling of peace, fraternity and union which predominates is not solely based on consanguinity but above all on the fact that in addition to this objective factor the members of the group feel linked to a transcendental force of which the rest of the world is deprived. In this spirit, the head of the family is at the same time the priest who presides over the cult of a supreme force or being (Mamu = the infinite), through the mediation of the Ancients who upheld the integrity and life of the community, in accordance with the following principles:

- unity, community, hierarchy of the orders and beings of the world;
- strong links between the ancestors and their descendants;
- reincarnation of outstanding ancestors;
- the indissoluble link between the visible and the invisible and more specifically the dead, the spirits and the living;
- the primordial importance of "being alive".

Experience here concerns mainly the following values: honour, courage, devotion, selflessness, the spirit of sacrifice, love of life and therefore of others. And these values are established in such a way that the individual is not allowed to avoid them. This is the true sense of the taboo: every gesture, every attitude which could be harmful to the life of the community and therefore to man, to Agbeto, is strictly forbidden. This sacred seal which rules out certain acts is an effective and useful way of establishing the *ethos* which forms a stronger rampart than individual moral efforts.

The concept of human rights and the rights of peoples after African countries gained independence

At the basis of colonization, there lies the conscious or subconscious idea of the superiority of the colonizer over the colonized. The latter is, as it were, a second-rate citizen or may purely and simply be a subject even in his own territory. Thus the colonized countries struggled for their independence in name of human rights and the rights of peoples. After independence, therefore, these countries felt it their duty to proceed to proclaim those rights in the name of which they had gained their independence.

Thus, in all the constitutions of former colonized States, human rights are proclaimed. The way in which they are presented varies, of course, from country to country. In some countries the preambular formula has been adopted. More frequently the constitutions refer to the Declaration of the Rights of Man and of the Citizen, of 1789, or to the Universal Declaration of Human Rights, of 1948. This is the case especially in the former French colonies; in the English-speaking

countries, there is no reference to the principles of 1789. The fact that those who were colonized felt that their identity had been diminished makes them proclaim human dignity all the more strongly. The emphasis has thus been placed on a certain number of rights, as for example, the condemnation of all racial discrimination and racial propaganda, or the condemnation of all regionalist propaganda, with a view to reinforcing national unity. Emphasis has also been placed on the rights of the family and on marriage rights. We may also mention economic and social rights, the right to work, the right to strike, religious freedom and political freedom. This last right, however, is almost everywhere subject to restrictive texts, as most of these countries have opted for single party government.

With regard to guarantees, former British colonies have recognized the exclusive authority of the legislator to establish regulations governing freedoms. On the other hand many French-speaking African States have created procedures for controlling the constitutionality of the laws. Hence the creation of supreme courts composed of a constitutional chamber and an administrative chamber which have control over abuse of power. The Arab States and the English-speaking States reject the constitutional force of laws, but widely admit control over abuse of power.

We can see that African States on gaining independence lost no time in proclaiming human rights and the rights of peoples. But the problem is to know whether these proclamations are based on a specific conception of these rights. It cannot be said that the African countries have made a particular effort to get out of the rut of liberalism or Marxism. Their conception of rights can only be defined negatively. First, there is no specifically African ideological basis. This is visible in the Malagasy Constitution which contained two contradictory assertions, advocating the free flow of capital and condemning the exploitation of man by man. One wonders whether Mamadou Dia is not right in denouncing the lethargy which prevents Africans from creating their own ideology instead of simply importing ideas from abroad.

A certain lack of realism may be noted in these declarations. In fact there is almost no link between the rights which are proclaimed and political, economic and social reality. The result is that democracy remains theoretical and that there is a gap between theory and practice.

In view of that, we can hardly conclude that a specifically African conception of human rights and the rights of peoples existed during this period. The impression is that these rights were proclaimed because they did not exist during the colonial period.

The concept of human rights in the African Charter on Human and Peoples' Rights

Although Africa in its traditions seemed to have a somewhat original view of human rights, we have noted that in the various proclamations of these rights immediately following the independence of the different States of which the continent is composed, the African conception lost all its originality. This was perhaps the result of acculturation. With time there has been an increasing awareness of this situation in the African States. Thus the OAU decided to have an *African*

Charter on Human and Peoples' Rights drawn up and adopted. Our problem here is whether from this Charter, which was now entered into force, there emerges a specifically African conception of human rights. The authors of the document, as was pointed out by Mr. Moïse Malonga in his statement at the A.J.J.A.F. Seminar in Lomé on Human Rights in the African Traditions «consider that there is no human right specific to Africa for freedom cannot be divided»⁵. But these authors recognize nevertheless that there is «a certain sensitivity, a specifically African view of human rights». It is this "sensitivity", this "specific view" which we wish to identify in the Charter.

Let us agree that, at first glance, the Charter does not seem to differ, as regards the substance of the rights from the *Universal Declaration of Human Rights*. Thus it contains almost verbatim most of the principles set out in the Universal Declaration of 1948. But we do not think that it is simply a copy of that declaration. First, new rights are proclaimed. Thus the Charter lays specific emphasis on economic, social and cultural rights, on the right of the family, emphasizing the duty of young people to respect their parents, and to maintain them in case of need (Article 29 - 1). Article 28 proclaims the duty to "maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance». We can see already that even in the substance of these rights, there are differences. Moreover, one may proclaim the same rights while not having the same conception of them.

In view of all these considerations, we feel that it is not out of place to raise the question of whether Africa has a special conception of human rights. In order to answer that question we must seek the main sources of inspiration of human rights in the Charter and identify the Charter's guiding principles.

Sources of inspiration

On this point the Charter is clear. The preamble contains the following passage: «*Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights*»⁶. The sources are therefore clearly indicated. These are neither liberal concepts nor totalitarian concepts but African traditions and the values of African civilization. If the authors are consistent with themselves there cannot fail to be something original in the African concept of human rights. As we have pointed out above, human rights in the pre-colonial period, i.e. in the traditions, do not seem to be exactly the same, especially in their concept, as human rights in the liberal way of thinking or in Marxist thinking, for example. Thus if these traditions are truly the sources of inspiration of the present African Charter, there cannot be any doubt that the concept of the rights embodied in that Charter has some originality. In our view this is so. On many points our traditions have inspired the authors of the Charter. For example the

⁵ Cf. Moïse Malonga: «Pour un concept africain des droit de l'homme et des peuples» (Towards an African concept of human and peoples' right). Communication at the Lomé symposium on human rights in the African traditions.

⁶ Our underlining.

special emphasis on the family which is described as the «natural unit and basis of society» can only be inspired by our traditions. We know in fact that in most traditions other than Africa, the family is not considered as the basic cell of society; it is the individual as such. This is why in the rights derived from these traditions it is the individual who is essentially concerned. In the African traditions, however, the individual as such is not taken into consideration; it is the community, and more specifically the family, that is the basic unit of society. Hence, in our customs, it is not the individual as such who is the object of the right but the community, the family, which explains the collective nature of most of the rights in our customs. Another example is the special emphasis laid on solidarity and mutual assistance, reflecting our traditions in which solidarity is raised to the level of a principle. We can find many other examples in the Charter. We may say therefore that the traditions are the main sources of inspiration of this concept of human rights. We do not totally exclude other influences – that would be an unscientific approach – but we may say that there has been an appreciable effort to adapt the concept of these rights to African traditions. This will emerge even more clearly if we try to analyse a number of the guiding principles of the Charter.

Guiding principles

We wish to emphasize four essential principles embodied in the text:

(a) Man is at the centre of the whole discussion on human rights because «human beings are inviolable» (Article 4). It is this concept of man, Agbeto, which we analysed above, that underlies the need for respect for the life and physical and moral integrity of every human being. Everything in this world is conceived with a view to man's total development.

(b) But man is not considered in his individuality. He is considered as part of a whole which is society. Under these circumstances, the individual must not be protected at the expense of society. Similarly the protection of the rights of society must not be conceived in such a way as to prejudice the guarantee of the rights of the individual. Two different sorts of interests must be taken into account and an attempt must be made to harmonize them. Hence the assertion in the preamble: «Fundamental human rights stem from the attributes of human beings, which justifies their regional and international protection» and «the reality and respect of peoples» rights should necessarily guarantee human rights'. It is the essential relationship between human rights and the rights of peoples, to which we referred briefly in our introduction, that is asserted here in the preamble to the African Charter on Human and Peoples' Rights, and the need for these two categories of rights to remain inseparable.

(c) The enjoyment of rights and freedoms implies that each individual carries out his duties; this principle is of course not new, it was already embodied in the liberal declarations of the twentieth century. We are well aware of this, but here the Charter seems to make the accomplishment of duties, the condition for the enjoyment of rights.

(d) Civil and political rights are indissociable from economic, social and cultural rights, both in their conception and in their universality, and the satisfac-

tion of economic, social and cultural rights guarantees the enjoyment of civil and political rights.

The African Charter on Human and Peoples' Rights has indeed laid special emphasis on the economic, social and cultural rights. Here again we cannot say that this is an innovation, but the way in which these rights are expressed in the Charter introduces a new note, reflecting the fact that the countries concerned are former colonies, which do not derive the full benefit, even after independence, of their own natural wealth and resources. It also reflects the economic concerns of the world today which are expressed in the need for a new international economic order.

Conclusion

In conclusion we may say that in view of these considerations, we can agree that the African Charter on Human and Peoples' Rights does introduce a certain originality in the African concept of human rights. These are more humanized rights based on a keen sense of justice. They are rights which concern the community more than the individual. Although the specific rights of the individual are recognized, this is to safeguard and protect the rights of man living in close relationship with nature and with other men, with the community. The specific rights of the individual are recognized because the individual is not regarded in the same way as in the liberal concept or even the Marxist concept, but it is through the individual that we see our Agbeto, the father of life, this global entity which contains life but is fragile and therefore needs care and protection. It is our hope that these rights will not remain on the purely theoretical level but will truly find application in the African States.

It will be objected that this is an idealization. It would have to be recognized in that case that it is the magistrature which makes ideal justice, that legislation is the source of moral law and that ethics have no other origin than society itself. This seems to have already been rejected by the liberal theories. But if ethics are the expression of the human ideal and deep spiritual impulses, the contrary is true. This was rightly pointed out by Montesquieu when he recognized that relations of equity pre-existed the positive laws which embody them in codes. «Before laws were made, there were possible relations of justice. To assert that there is nothing just or unjust other than what the positive laws order or forbid amounts to saying that before the circle was traced all radii were not equal». The difference between the rights of individuals and of peoples and the rights of the human being is the difference between the empirical and the rational, the sensitive to the intelligible, the temporal and the eternal, the relative and the absolute. Human rights as peoples' rights are only established in terms of the fundamental laws of human nature, i.e. the whole series of specific characteristics linked to what is essentially human and which differentiates it radically from the rest of the world, features which are indelibly ingrained within us. To establish the right is in fact to determine «what is just and reasonable for man considered in his very essence on the basis of the deepest and most powerful feelings of the human heart».

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