

THE AFRICAN COURT OF HUMAN AND PEOPLES RIGHT: RE-WORKING THE HUMAN RIGHTS REGIME OF NIGERIA

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Preamble

Nigeria often referred to as the giant of Africa and also the most populous black nation in the world have not been able to convince the international community that the above mentioned appellations are not mere conjectures, infact in retrospect, they are simply superflous.

What manner of a continental giant will continue to formulate rules and policies that are at variance with international norms and standards? What manner of a giant will consistently rig elections in favour of its oligachs?

It is this same giant that has not been able to effectively actualize the separation of power concept enshrined in its constitution. Its judiciary, remained by and large susceptible to the Executive and Legislative branch pressures. Massive corruption continue to flourish unabated. Its government in most cases continue to rely on the army rather than the police to quell many instances of communal violence. Inadequate infrastructure, endemic corruption and general economic mismanagement continue to hinder its growth and much of the country's wealth remained concentrated in the hands of a small elite.

The government human rights record remains poor. The police, military and security forces continue to commit extra judicial killings and use excessive force to apprehend criminals.

Domestic violence against women remained widespread.¹ All these wanton disregards for the human rights of the people continue to stimulate the debate about reworking the Nigeria human rights system, despite the fact that Nigeria in 1983 ratified that very important continental bill of rights called the African charter on human and peoples rights.

¹ Nigeria – nation-by-Nation <http://www.nationbynation.Com/Nigeria>
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Domestication of the African Charter on Human and Peoples Rights in Nigeria, What Challenges?

The African charter on Human and Peoples rights is a human rights instrument specifically designed to respond to African concerns, traditions and conditions. It contains 68 articles with an elaborate list of civil and political rights drawn from the universal declaration of human rights² developed by the UN. It also provides for economic social and cultural rights, groups rights, duties of the state and that of the individual. Article 1 of the African charter is most instructive as far as its adoption by Nigeria is concern. Its provides:-

"The member states of the OAU,³ parties to the present charter shall recognize the right duties and freedoms enshrined in this charter and shall undertake to adopt legislative or other measures to give effect to them".

Therefore this article becomes the basis of adoption of the charter by members state. S. 12(1) of the 1999 constitution of Nigeria adopted the principle enunciated in Article 1 of the African charter whole-heartedly. It proclaims that "no treaty between the Federation and any other country shall have the force of law, except to the extent to which any such treaty has been enacted into law by the National Assembly. The African charter was therefore domesticated by virtue of the above section following an enactment of the Nigerian National Assembly titled" The African Charter on Human and Peoples Rights (Ratification and Enforcement) Act"⁴ Cap 10 Laws of the Federation of Nigeria, 1990.

The process of domestication of the African Charter by Nigeria started when, it ratified the treaty in 1983⁵, the ratified treaty is required by S.12 to have been enacted into law, which Nigeria has also done and the effect of this is that the African Charter has been incorporated into the municipal laws of Nigeria.

Since the African Charter became part of our laws, the poser now is: how far has Nigeria been able to give effect to this charter since a treaty having been incorporated as part of Nigerian law as above becomes a subject matter by which aggrieved individuals or parties can seek for their enforcement in a competent domestic court or in future, the African court

² 1948

³ Now African Union (AU)

⁴ Now Cap 9 LFN 2004

⁵ Ratification is an executive function, whereby an instrument is deposited at the secretariat of the organization responsibly for collecting the instrument of ratification.

of human and peoples rights which is more or less a supra-national legislative?

Article 2 of the African Charter begins with the non-discriminatory clause asserting that all shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind, such as race, gender, ethnic group, colour, sex, language, religion etc. It is expected that a state shall strive to promote its citizens rights under this article and by so doing the state will be deemed to be performing its obligations under the Charter. Again the question is, has Nigerian been able to protect its citizens within the context of Article 2?

The Charter guarantees to every person equality before the law, inviolability of human persons and respect for human life and dignity.⁶ It is trite that Nigerian government rather than give effect to this domesticated law continues to disrespect human rights. For example, the disbanded operation fire for fire of the police task force in Nigeria was among the most frequent human rights offender member of the task force committed extra judicial killings. On February 18, 2003, police in Obianiku in Delta State killed 15 youths. On June 10 2003, in Lagos, police shot and killed one Ikenna Asikaburu, an 18 year old student awaiting a vehicle, Akpata J.C.A affirmed in *Aliu Bello V. Attorney General, Oyo State*,⁷ that the deprivation of life by authorities of the state is a matter of utmost gravity and laws which specify the circumstances in which this is permissible must be strictly interpreted. Unfortunately no compensation was given to the family of the deceased, despite, a provision for compensation.

The domesticated African Charter also provides for economic, social and cultural rights. These are rights to health, employment, food and security. Also, these rights must be enjoyed alongside civil and political rights.

However, sections 16, 17 18 and 21 of the 1999 Constitution is the nearest in terms of articulation of the economic, social and cultural rights. But curious enough, they are couched in terms of duties of the state and are not enforceable in our courts (fundamental objectives and directives principles of state policy).

Internationally, human rights and ECOSOG have been defined to be universal, interrelated and the relationship between interdependent.⁸ The

⁶ Articles 3, 4, 5, 7 & 8

⁷ (1986) 5 NWLR pt 82 p 86

⁸ Vienna Programme of Action 1993

import of this is that the full realization of civil and political rights/liberties without the enjoyment of economic, social and cultural rights is impossible. That Nigeria has failed to upgrade the provisions of sections 16, 17, 18 and 21 of its 1999 constitution relating to ECOSOG is viewed in many quarters as evidence of its insensibility to the plights of the poor, homeless, sick, illiterate, hungry and marginalized citizens.

Nigerian courts have tried to solve the inherent conflict of the non-justiciability of the ECOSOG rights as provided for in Chapter IV of the constitution vis-à-vis, its operations in the African Charter. Therefore in the case of *Fawehinmi V. Abacha*⁹, the court of appeal held that, since the human rights provisions of the African Charter were protected by international law, the federal military government cannot legislate out of it, and military ouster clauses cannot affect the operation of the African Charter.

This no doubt is a landmark judgment. If military can oust the constitution or some of its provisions, it simply cannot oust the African Charter. The African Charter itself proclaim so, it permits no act of derogation.

Rather than improving on this, the Supreme Court went ahead on appeal to assert that, where there is a conflict between the African Charter and the Constitution of Nigeria the Constitution being the ground norm shall supercede.¹⁰

This judgment contrasted to that of the court of appeal which presumes that a constitution can be suspended, and government cannot legislate out of the African Charter. The Supreme Court judgment however further uplifts the constitution. It is now left to the Nigerian legislature to redress and resolve the problems by making the ECOSOG rights constitutionally enforceable.

Nigeria, however should follow the path of South Africa and Ghana in making sure ECOSOG rights are enforceable. The fourth Republic Constitution of Ghana 1992¹¹ relating to justiciable fundamental human rights and freedoms provides for enforceable economic, educational and cultural rights Article 34(2)¹² states that the president of Ghana is enjoined to report to parliament at least once a year steps taking to ensure

⁹ (1996) 9 NWLR 719

¹⁰ General Sani Abacha V. chief Gani Fawehinmi (2000) 6 NWLR p 600

¹¹ Chapter 5

¹² Articles 24, 25 and 26 of the Ghanaian Constitution 1992

realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.

Similarly the South African constitution has provided for justiciable rights to employment, housing and shelter, health, water, light, social security and food. Though, it is being argued that enjoyment of the ECOSOG rights can only be contingent on a good and prosperous economy, if the Nigerian economy is properly managed, it is quite feasible for us to enjoy these rights, Justice P.N. Bhagwati of the Indian supreme Court rightly observed

"It is indeed questionable how human freedom and dignity can be promoted and protected at all without realization that in view of the chronic widespread poverty and disparities in the third world social and economic rights should be thought of as being priority"¹³

Nigerian Courts And the African Charter

Nnaemeka P. Agu JSC¹⁴ observed that an aggrieved person can come to court by any of the usual methods of initiating proceedings and not necessary by way of prerogative writs. These rights are called fundamental human rights in Nigeria. They are not privileges in the sense that they can be withdrawn at the whims and caprices of the government. They are rights which the executive, the legislature and the judiciary are all enjoined to protect. Any violation by the government is liable to be called to order and courts are duly bound to make orders of reparation or compensation in monetary terms where necessary.

The issue is does the Nigerian bench adopt the afore-mentioned principles? No doubt the judiciary is constituted as the ultimate interpreter of the constitution and other laws. It thus has been vested with the powers of judicial review of the branches of government in accordance with the rule of law.¹⁵

The rule of law is, therefore, a dynamic concept which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic

¹³ First World Conference on Human Rights in Tehran Iran, quoted in Development Human Rights Jurisprudence. Common Wealth sect. 1988 p. 62?

¹⁴ Nigerian Courts and domestic application of international human rights declaration 1992, Journal? Judgement? Etc.

¹⁵ Per Bhagwati CJ in the state V. NTN Ltd and NBN Ltd (1988) GB 43?

educational and cultural conditions under which the legitimate aspirations and dignity of individual citizens of the country may be realized.

For the judiciary to perform this role, it must be independent and impartial. This is because judicial attitude to the interpretation of the African Charter has serious implication for human rights enjoyment. Nigerian Courts have been oscillating between the ideology of judicial restraint and judicial activism in interpreting cases of human rights. Judicial restraint implies deciding cases based on a process of interpreting and applying rules which others have laid down for the regulation of society. Courts therefore should confine themselves to applying the law as it exists and leave its development, modification and alteration to the political process where it properly belongs.¹⁶ The ideology of judicial activism takes a diametrically opposite position. It prides itself as using and developing the rules to achieve results. What the courts decides is more important than how it decides it. Lord Denning the famous English judge as outstandingly the champion of judicial activism. He argued:

"My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law that impairs the doing of justice, then it is the province of the judge to do, all he can legitimately do to avoid that rule or to change it".¹⁷

The Nigerian bench has fared average in terms of bold and progressive judgments. For example, in the case of *Nafiu Rabi'u V. State, Udoma JSC*¹⁸ affirmed a liberal interpretation of the 1979 Constitution. He said,

"The function of a constitution is to establish a framework and principles of government, broad and in general terms, intended to apply to the varying conditions which the development of our several communities must involve. Ours being a plural, dynamic society and therefore mere technical rules of interpretation of statutes as to some extent inadmissible in a way so as to defeat the principle of government enshrined in the constitution. My Lords, it is my view that the approach of this court to the construction of the constitution should be and so it has been one of liberalism"

¹⁶ Okere B.O judicial activism and pessimism in interpreting Nigerian constitution 1. col. Q.V. 36 p 1

¹⁷ Lord Denning. *The Family Story* (London Butterworths 1981), p.174.

¹⁸ (1981) 2 NCLR 293 p 326

Nigerian Courts must follow liberal interpretation of human rights instruments. In the case of *Shugaba Darman V. Minister of Internal Affairs*,¹⁹ the court lashed the government for violation of the rights of a Nigeria it said what? The courts equally asserted boldness in the case of *Labiya V. Anretiola*.²⁰ The supreme Court held that since the African Charter has been domesticated, it becomes binding and our courts must give full effect to it like all other laws falling within the judicial powers of the courts.

However, it does not mean that the Nigerian Courts have scored themselves high or as far as playing an active interventionist policy of liberal interpretation of the African charter in terms of protection of the rights of Nigerians.

Infact, one area that is most disturbing is the area of capacity to sue, that is *locus standi*. In Nigerian jurisprudence, the concept of locus stand is still very restrictive. Under the African Commission on Human and Peoples Rights, there is no restriction as to who can bring a complaint/communication to the commission. This commission is charged with the mandate of promoting and protecting Human Rights under the African Charter. Under its protective mandates, states, NGOs and private persons can lodge complaints against any states on human rights violation. Most often, victims of human rights violations do not have the where withal to seek for redress, that in itself, became the basis of enlarging the scope of who can sue at the level of the commission.

In Nigeria, the doctrine is still very restrictive, to the extend that a general interest common to all members or some section of the community is not a litigable interest. This was established in the case of *Adesanya V. The President*.²¹ This is in sharp contrast to the more dynamic position in jurisdictions like India, Canada and the US. In India, the Supreme Court has democratized access to court by watering down the rigours of locus standi through the medium of the public interest litigation. Therefore Nigerian Courts must relax this rule as far as civil litigations are concerned. Despite the fact that, Nigeria ratified the African Charter and has domesticated it, it is yet to be. There is still scant regards for the effective promotion and protection of the rights in the charter. Most Nigerian are still very oblivious of the Charter let alone strive for its enforcement.

¹⁹ (1981) 2 NCLR 459

²⁰ (1992) 8 NWLR pt 258 p. 139 at page?

²¹ (1981) 1 ALL NLR pt 1. p 2

Nigeria has failed woefully to implement the solidarity or collective rights of the African Charter. These are right to development, right to environmental protection and right to self-determination.

Within the ambit of right to self-determination, which provides that no group should dominate another, the three major ethnic groups, Hausa, Yoruba and Igbo continue to behave as if there are no other groups. There are great deals of lethal inter ethnic, intra-ethnic and inter religious violence. Uptill now prison and detention conditions remained harsh and life threatening. Most prisons built 70 to 80 years ago lacked functional basic facilities, lack of potable water, inadequate sewage facilities and over crowding resulting in unhealthy and dangerous sanitary conditions. In some cases, women and juveniles are held with male prisoners.

Trials are unduly long in Nigerian Courts. Many Courts are under staffed, judges and lawyers frequently failed to appear for trails, because they are pursuing other means of income.

Government in terms of the group rights have for long disappointed a lot of Nigerians. As mentioned earlier, these rights includes, right to development, right to self determination etc. These rights grew out of response to the progressive phenomenon of global interpedence by African and it gives vent to the emergence of third world nationalism and its demand for global redistribution of power, wealth and other important values. Again, we have in that category apart from the above mentioned, right to clean and healthy environment and the right to international peace and security. The idea is that, the economic development of underdeveloped countries is necessary for their social well being and political stability, without which they cannot ensure effectively civil, political, economic, social and cultural rights.

The general concern felt in many countries about the need to protect the environment, particularly against pollution generated by modern industrial societies has led to the contention that there is a human right to a clean and healthy environment. Again it is contended that freedom from war is a human right. Nigeria, it must be said have done nothing to put in place mechanisms for the enjoyment of all these rights.

The most striking of the group rights is the right of all people to self existence and self determination. This implies the freedom of people to

determine their political status and to ensure their economic and social development according to the policy they have freely chosen.

Under this rights can any ethnic group, that is oppressed or colonized the rights to free itself by resorting to any means recognized by the international community? The Ogoni people, the Ijaw and other minority nationalities, if they feel oppressed can they chose to withdraw from the union called Nigeria? Since the charter provides for equality of peoples. Nothing, therefore, shall justify the domination of a people by another.²² Therefore can a group of people or ethnic group secede under the aforementioned law? Can there be a constitutional re-arrangement/or reworking? The answers are yes. A forced union can only spell doom for any country, if people feel they do not want to be part of any union, it should be their right to withdraw from any such union.

It can be seen from all the aforementioned that despite the fact that the African charter is like a bill of rights for Africa, most African states still pay lip service to it enforcement. Domestic courts of Nigeria have not done enough to bring about a new regime or a better regime of human rights protection. The African Commission too has not fired better. It is within this backdrop that led to series of agitations for an African Court that will be supra-national in nature and would re-work the human rights system of Nigeria and other African countries.

4. The African Court of Human and People Rights:- Hopes and Challenges

The African Charter did not provide for a court of justice, unlike the European convention on Human and Fundamental Freedoms²³ and the Inter American Convention on Human Rights.²⁴ Instead, it provides for an African Commission on Human and Peoples Rights with no binding authority.

The African Commission has not been perceived as an effective institution for the protection of human rights in Africa; because states parties to the African Charter, nay Nigeria have not taken the Charter serious, they refuse to respect the views and recommendations of the commission.²⁵

The African Court on Human and People Rights is the most recent of three regional human rights judicial bodies. It was established in 1998 by

²² Article 20(1) African Charter on human and peoples rights

²³ 1959

²⁴ 1961

²⁵ Human Development report 2000 (Background paper by UNDP)

a protocol, 12 years after the entry into force of the Charter. The European Courts of Human Rights was part of the European human rights system abinitio while the Inter-American Courts of Human Rights also was part of the Americans. Unfortunately, Asian countries are just trying to put up a supra national structure to take care of the problems of human rights enforcement in that region.

The advancement of democracy in Nigeria after a long period of military rule and even in some other countries of Africa heightened the need for stronger domestic regional guarantees for the protection and enforcement of human rights, thus making the establishment of the African Court possible.

Domestic Courts of most African countries could not effectively protect the human rights in the African Charter, especially in the area of enforcement of court orders against their respective governments.

This was therefore one of the reasons for the creation of a supra-national human rights courts (styled the African Court on Human and People Rights).

The court is empowered to uphold rights essentially provided for by the African Charter. The Protocol on the African Courts on human and people rights entered into force on 25th January 2005. The protocol received the required 15 instruments of ratification when the Union of Comoros deposited its instrument of ratification on 26th December 2003.

5. Composition

The African Court under Article 11 of the protocol establishing it sap it shall consist of 11 judges who shall be nationals of member states. Under the European system, the court consists of a number of judges equal to the contracting parties, while in the Inter-American system, the judges of the court are 7. The African judges will be elected in an individual capacity, from amongst jurists of high moral character recognized, practitioners, judicial or academic competence and experience in the field of human and peoples rights for a term of six years.²⁶

Articles 12(2) and 14(3) provides for adequate gender representation and this should align itself with the gender balance practice by the African Charter. Article 21(2) provides that, the

²⁶ <http://www.pict-peti.org/courts/ACHPR.htm/>
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president of the court shall be on a full time basis, while other judges will sit part time. This is a big drawback. Human rights issue that will emerge from the entire continent and lay back to the court will be so huge and vast that will need judges who are full time to be able to grapple with them.

The protocol should also draw inspiration from the European court that have permanent judges Article 17 guarantees the independence of the judges and by necessary interpretation accords them immunities and privileges. This it is expected will allow the judges to be bold and assertive and rise above popular passion or politics of the moment.

Jurisdiction

The court has both contentious jurisdiction and advisory one. Decisions made in contentions matter are binding on the states, while advisory ones are not binding.²⁷ When states ratified the protocol, they accept the general jurisdiction of the courts, and thus surrender themselves to the court. States that have not ratified the treaty cannot be compelled to do so. On the other hand, despite the non-binding nature of advisory opinions, it is expected that, they can in the foreseeable future contribute enormously to the development of a very resourceful and coherent body of African law jurisprudence. Nigeria for example could request an opinion from the court on the compatibility of its own domestic law or even constitution, especially the non-justiciable chapter, with the regional law. Should the African court find out by way of illustration, that the said chapter 11 of Nigeria's 1999 constitution fall short of the international standard of human rights, promoted by the regional system, then the court could recommend that, the state enact the necessary legislative amendments, as to make its constitution or other laws compliant.

Admissibility/Locus Standi

Under this heading, the question shall be asked, who has the standing to bring a complaint before the African court and how should a dispute get to the court? The functions of the court will be to complement the protective mandate of the African commission. The commission has been criticised as a non-performer, and that, the commission should not be scrapped, but rather have the court to support it. Since its decisions are non-binding, the court will act as a referral court from the African commission, that is a dispute get to the court by way of a referral from the commission States can also refer matters to the court, but first must be a party to the protocol, if the court must have jurisdiction. Individuals too

²⁷ [http://www.derebus.org.za/achieves/2004 Apr/articles/African court](http://www.derebus.org.za/achieves/2004%20Apr/articles/African%20court)
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can take their complaints to the court and these will accommodate both Natural and juristic personalities.

It must be noted that the court will not entertain any complaint unless the complainant has first exhausted all the legal remedies that may be available in the defendant state. This is because a state cannot be said to have violated a rule of international law, until it is clear that it offers no recourse to the victims of a human rights violation.

This rule will assist countries like Nigeria to ensure that it gets its domestic legal order compliant with regional law specifically and international human rights law generally. By this Nigeria will have domestic laws that adequately forms an integral part of the African regional system by effectively promoting and protecting human rights, and if other member states follows suit, then there will be very little work for a supra-national court like the African charter do to. And, Nigeria is yet to have a domestic regime that is human rights friendly. It is therefore believed that, the African court will be there to ensure that countries like Nigeria with an unhappy human rights records, gets their domestic house in order, because our own domestic laws cannot escape security by the African court.

Conclusion

It is necessary that the African court draw some lessons from the principle of subsidiary as regards distribution of judicial powers between, the European and various other domestic courts. Under this arrangement, the initial responsibility of enforcing human rights falls upon domestic courts of members states before the responsibility is shifted to the European court. In other words the European court has a subsidiary role, a kind of review powers over the domestic courts.

Therefore the African court too should clearly act like the European court under this context. We might however be forced to ask, what guarantee does Nigerian have that the African court in the review process will not do more damage than good by applying a different level of security, given the social context in which we find our selves?

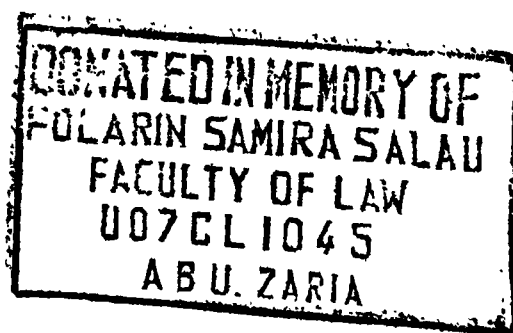
I will argue that, the African court should ensure that states like Nigeria govern their territories with adherence to a basic minimum standard acceptable to the African regional system and as such, the African court should be effective. Its effectiveness and efficacy will no doubt depend on the appointment of highly qualified judges with a strong commitment to

human rights. They will be the most visible representatives of the courts and they must be judges of the highest calibre, with a fair representation of men and women from the main regions and legal systems.

The good news is that the protocol is now in force after receiving 15 ratifications and the protocol also provides that the chair person of the AU upon entry into force of the protocol request each state party to present within 90 days (end of April 2004) its nominees for the office of the judge of the court.²⁸

Nigeria should take this advantage and send credible nominees, those that will do Nigeria proud. This write up calls for an open procedure for nomination of judges and also to involve the broadest possible consultation, including the Supreme Court, Law faculties of Nigerian Universities, Bar Associations and the civil society. This will assist in attracting the best possible candidates, including women.

The African Court therefore in reworking the human rights regime of Nigeria and other member states can only contribute fully to the promotion and protection of human rights if the nomination and election of judges comply fully with the requirements stipulated under the protocol and the court receives full political support from AU members.



²⁸ Amnesty International Human Rights News Actions p.1 Newsletter 2005
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