



TOWARDS AN EFFECTIVE SAFEGUARD FOR THE ENFORCEMENT OF HUMAN RIGHTS IN AFRICA – THE NEED FOR AN AFRICAN COURT*

1.1 INTRODUCTION

The adoption of the African charter on Human and peoples Rights¹ by the Organization of Africa Unity (OAU), now Africa Union (AU) has opened up the bases for a concrete analysis of both the regime of the relevant norms as well as that of the enforcement machinery. The development of the general human rights regime in Africa should be appreciated at three distinct levels. Firstly at the level of pre-colonial stage in which Africans and their various regimented or segmented communities dealt with each others. Secondly the effect of the devastating episode of colonialism² and lastly the post colonial period with all the attendant influences both internal and external.

African countries like all other colonial countries have to contend with the existing realities as well as the historical past in order to derive any meaningful lessons therefrom. The past cannot be lost to the future nor must it be totally disregarded in the construction of an enduring and veritable future. It is this intricate balancing that has necessarily influenced the African charter and has formed the concrete basis for a proper understanding of the mechanics of the said charter.

Certainly pre-colonial Africa had its own notion of human rights. But it should be borne in mind that pre-colonial Africa was neither culturally nor politically homogenous³, on the contrary Africa was composed of various nationalities grouped into a number of communities. These various communities had established norms of communal responsibilities, with each member responding to the general needs of his community. Africa was therefore composed of societies with communalistic ethos with consequent evolution of the relevant norms and values.

Secondly Africa was made up of different nationalities. Up in the North was predominantly of the Arab stock, while South of the Sahara are peoples of the Negroid stock. Even with these groups, there are still both linguistic and cultural differentiations that it is most apt to speak of African nations and nationalities. But with the emergence of feudal aristocracy, empires and kingdoms emerged. The history of Africa therefore is replete with these.



empires and kingdoms', which were eventually subdued by colonial aggression and conquest. Given this social milieu, it is possible to make a number of deductions in respect of the norms of human rights. Human rights at the communalistic stage was obviously collectivised⁴. This is to the effect that the whole community was the focus of rights and privileges coupled with duties. While spouses were entitled to the privacy and peace of married life, family relations were generally a community affair. The community was interested in maintaining the sanctity of family life as well as ensuring its continued existence. In this regard, the community could be the basis for settling family feuds.

The individual was entitled to his life and any derogation from the right to life must be in accordance with the established norms of the society. Any abuse of the right was accordingly punished. Firstly it took the form of retribution, but with time other forms of punishment were developed. There emerged the phenomenon of ransom, where the guilty party had to appease both the victim and the community at large. Such offender also could be banished from the community. Under all these forms of punishment, the community perception was that whichever was employed was the appropriate punishment, regard being had to all the circumstances of the case. The individual is entitled to personal property, both movable and immovable. In addition such individual is also entitled to family property and to any other property held in common by the community to which he belongs.

In pre-colonial Africa, the individual was not only entitled to a bundle of rights and privileges, but also had duties imposed on him. Consequently the individual had the inherent duty of maintaining and sustaining the cooperative spirit of the community. The individuals particularly males had a duty towards his family in particular and to assist any member of the community generally; more so in times of need. Although the process of the emergence of feudal aristocracy meant the centralization of power and administration, it by no means eroded some of the basic norms of human rights. Even within the centralized power structure, there were still consultation by the feudal lords on a number of issues. In fact the limits of this power is aptly described in relation to land. The feudal lord could not alienate the communal land without the authorization of the relevant section of the community⁵. The land was held in trust and traditional trust did not permit unbridled meddling nor dealing with the trust property by the trustee. Certainly for society to roll on.



Smoothly, there has to be some order either imposed without prior consultation or evolved as a result of corporate consensus. In the former a crises is engendered thereby, waiting to explode at an appropriate moment. In the latter, it provides for an organic evolutionary process for a better society.

The colonial period was that of diminished or even extinguished human rights activity⁶. The basic underlying tendency and means of action of colonialism was the subjugation of the colonized peoples to the rule of the colonizers. The act of colonialism itself suggests the erosion of human rights. Thus the colonized peoples were denied civil and political rights. The basic components of civil and political rights were non-existence, such as freedom of association, and the right to vote and be voted for, save in certain exceptional circumstances. Worst still the right to self determination was also denied peoples under colonial subjugation. The denial of the right of self determination resulted in the resort to armed struggles by these colonized peoples. More so that self determination is understood to mean that "all peoples have the right to freely determine without external interference, their political status and to pursue their economic, social and cultural development"⁷. Firstly the fact of colonization is unequivocally an act of external interference. There are two facts in colonialism. The colonized peoples are indigenous to the colony, while the colonial powers have by the advantage of superior military and consequently political power captured and dominated the colonized peoples. The colonizing powers are obviously foreign to the colonized territories with only the farcade of some civilizing mission. Colonialism as the competitive stage of capitalist development with its consequent search for markets discovered colonies which provided markets under the sentry of colonial administration and one of its effects is the deculturalisation of the colonized peoples. The colonizers deliberately forced its so-called superior culture on the colonized peoples with the result that either these culture lost their vitality or were subjected to certain tests of validity, for example in Nigeria, norms of customary rules were subjected to a number of tests through legislation⁸. Firstly any norm of customary rule shall not be applied as law, if such norm is repugnant to natural justice, equity and good conscience. On the face of it, this looks like a liberal democratic ideal, but there are certain dangers in its application without the tests having precise ramifications. The Judges at that point in history being largely Europeans and if Africans, having



been trained within the points of English law will certainly view African norms with disdain. Given this general scenarios, it was the practice to find societal norms and values during the period branded us barbaric and therefore unacceptable based on notions and precepts very much alien to the society in question. This had a devastating effect to the psyche of the colonized peoples. Thus because of the fact of external interference, the people of the colonies under colonialism were not able to determine their political status, while citizens of England, Belgium, Germany, Italy and others had the benefit of at least civil and political rights. The very fact of colonialism was a negation and blatant and forceful erosion of these rights in the colonies. Given this background therefore the colonized peoples could not have freely pursue their economic, social and cultural development. The colonies were faced by the naked exploitation of their natural wealth and resources. They were also subjected to severe social and cultural dislocation by the deliberate imposition of the social and cultural values of the colonizer. Probably there might have been some advantages, but history is replete with evidence that only the people themselves can achieve progress and development and not colonialism.

Post colonial Africa is the history of the acute crises of perspectives⁹. Having been socially and culturally dislocated as well as being politically disoriented, African countries had to contend with both their own notions of human rights and well as those imposed on them by their erstwhile colonizers. In the attempt to balance these conflicting dispensations, there were sometimes severe crises that had substantially affected even the basis of the state. This confusion has contributed to the poor showing of African countries in the field of human rights as well as other areas. Besides it has been falsely assumed that Africa had no notions of human rights and must therefore be gauged according to Western standards. And the emergence of post colonial Africa meant that African countries became integrated into the organized world community to which there have developed certain basic notions of human rights. On this score, members of the organized world community are obligated to observe and enforce the observance of these rules. However post colonial countries at independence, accepted and declared their continued obligations towards these treaties except for such treaties that were patently offensive. It is therefore obvious that certain Africa countries, if not all have got stuck in the groove of their confusion and showing apparent incapacity to regenerate



themselves to the level of the general notions of human rights. Civil and political rights have become bastardised with the entrenchment of dictatorship and the flagrant erosion of certain fundamental liberties. Participatory democracy of pre-colonial Africa has been lost on these leaders let alone to benefit from the contemporary practices. Having realised the apparent deficiencies in the continental human rights regime a number of efforts were made to develop it. Beginning with the Lagos Conference of 1963, a number of other initiatives were also undertaken culminating in OAU decision 115 (XII) of 1979¹⁰. This bold step resulted in the drafting of a charter that addresses the human rights question from the African perspective.

2.2 THE AFRICAN CHARTER

The African charter represents an amalgam of both the traditional and contemporary formulation on human rights. The African charter therefore recognizes the theoretical trends in the development of the human rights regime. Basically human rights has been categorised into three stages or generations¹¹. The first generation of Human Rights relates to civil and political rights:

These rights are represented by both the Universal Declaration of human rights, 1948 and the International covenant on civil and political rights adopted on 16th December, 1966 and came into force on 3rd January 1976. These rights relate to the sanctity of the individuals as well as his rights within the socio political milieu in which he finds himself. As a result of these rights, the individual is entitled to participate in the political process of his country. The second generation of rights relates to the total realization of the individual within his environment. These relates to the economic social and cultural rights. The international covenant on Economic social and cultural right¹² is the most authoritative instrument in relation to these rights at the international level. Lastly the third generation rights are generally referred to as solidarity rights. These rights deal with the organic and corporate existence and workings of the society. These includes right to good environment, the right to development, just as the right to share in the common heritage of mankind. Recently the UN adopted the declaration on the right to Development¹³. This trend has also been recognized by The African Charter. The African Charter is therefore very representative of these various generations of rights in order to achieve an African perspective.



The Substantive provisions of the African charter may be categorized into three divisions. Firstly there are the rights of the individual. For our purpose rights shall also include duties. Individuals are granted the basic rights as categorized under the first and second generations.

The African charter makes an apt distinction between an individual and the citizen. It is meant that in a particular state, its citizens are entitled to certain rights just as they are also saddled with duties. But on general note, the African charter also grants certain rights to individuals without strict regards to nationality. However there are claw back clauses which subject the enjoyment of these right to appropriate national regimes and invariably this will in the final analysis also affect the extent of the enforcement of the provisions of the African charter¹². The second set of rights guaranteed by the African charter is people's rights¹³. This is a significant step in the regional formulation of the norms of human rights. And this also has its root in the African colonial experience. One of the fundamental tasks of the OAU (now AU) is the elimination of colonialism and discrimination in all its ramification. Tied to the question of self determination is the issue of permanent sovereignty over natural resources and wealth and the question arise as to what point in time can a people exercise their right of economic self determination? This arises from the fact that the notion of "people" suggests an aggregate of culturally and politically united group but which has not attained statehood. It is suggested that peoples should first enjoy the right to determine their political status and future, when this is resolved economic self-determination will necessarily follow. Lastly states also have rights and responsibilities. This is evidently so, since Africa is the least developed of all the world's regions, and coincidentally too, the most traumatized by the episode of colonialism. The urgent task of African countries is to shake off the yoke of external interference as well as grapple with the problematic of development. The African charter therefore addresses these twin problems within the general focus on human rights.

3.3. ENFORCEMENT MACHINERY

The basic machinery for the enforcement of human rights under the African charter is the African commission on Human and peoples Rights¹⁴. The commission is an organ of the Africa Union whose basic function is the promotion as well as the protection of human and peoples rights. It also interprets all the provision of the charter, when so requested by states or AU



institutions or by an African Organization recognized by the AU¹⁵. It performs other task that may be committed to it by the Assembly. The three dominant functions appear therefore to be promotion, protection and interpretation¹⁶. Articles 55 and 56 of the charter empowered the commission, subject to certain conditions to consider complaints otherwise (referred to as communications) from individuals. The OAU Heads of State were reluctant to grant the commission a significant role in protecting human rights. It was envisaged almost exclusively as a body to promote human rights. The commission has authority to entertain both interstate complaints and private petitions. In the case of private complaints, two conditions are necessary one is that these must be a request to that effect by the assembly of states of AU and the submission of reports. The commission must by a majority agree to examine such a complaint. Decisions of the commission on disputes referred to it take the form of reports. These reports are addressed to the Assembly of Heads of State and Government¹⁷.

The commission has made giant strides in the area of promotion of human rights. That is however where the glory ends. In the area of protection of human rights the commission looks helpless and abandoned.

The commission can bark; this is not in doubt, what is in doubt is its ability to bite. After all it was not created to bite. It lacks a mechanism to ensure compliance with human rights norms¹⁸. The commission cannot

for example award, damages, restitution or reparations. It is not empowered to condemn an offending state. It can only make recommendations to the parties. This was greatly amplified in the following cases decided by the commission. Constitutional rights project V. Nigeria and Center For free Speech v Nigeria¹⁹, where the commission indicted Nigeria for violating the human rights of the complainants in the above cases. The commission could only appeal to the Government of Nigeria to desist from violating the right of the victims. This fact and the fact that, the commission's proceedings are heavily dependent on the Heads of state render the commission impotent²⁰. Thus this commission is not capable of guaranteeing and protecting human rights because of its weak nature. It has taken very few forceful or persuasive actions to attempt to curb serious human rights violations. The demand for the establishment of a judicial body for the effective protection and enforcement of the provisions of the charter was not satisfied by the establishment of the commission. Therefore something else was needed to give the charter teeth.



There had been some earlier speculations that the commission, because of its ineffectiveness should be abolished and replaced by a court. The prevailing consensus was that the Court should reinforce the commission²¹.

4.4 THE NEED FOR AN AFRICAN COURT

The African charter on Human and People Rights did not establish a court for the enforcement of human rights unlike other regional human right regimes of Western Europe and the Americas, which have functional and effective courts for the enforcement of human rights.

The European convention for the enforcement of Human rights and fundamental freedoms, for example opened up for signature on Nov. 4, 1950 and entered into force on September 3, 1953. Three organs originally implemented the human rights protected by the treaty: The European Commission of Human Rights; The European Court of Human Rights and the Committee of Ministers of the Council of Europe. This institutional structure operated from 1953 untills 1998, when it was replaced by a new system in accordance with the provisions of protocol No.11. Under the new system the European court of human right²² deals with individual and inter state cases and the commission has been abolished.

In the African system, the Banjul charter established the African commission on Human and peoples rights, making it the major instrument for ensuring the observance of the rights. Non provision for a court of human rights appear to have been deliberate²³. The experts who drafted the charter contended that they favoured negotiation, diplomatic and bilateral settlement of disputes in an amicable manner instead of adjudication. They argued that African culture frowned against litigation and the adversarial and adjudicative procedures common to Western legal systems. Africans therefore have always shied away from using a "court" as a mechanism for solving African problems. They favour consensus and an amicable settlement of disputes, thus our system therefore is one of forgiveness, conciliation and Arbitration. Conciliation and open truth, not legal friction or technicality.²⁴ This philosophy was also reflected in the charter of the OAU (now AU). The charter creates a body called the commission of mediation.

Article 19 of the charter contain a specific undertaking about peaceful settlement of disputes. It provides for the creation of the above commission by a separate protocol. This contending issue created two divergent



perspectives. Those opposed to the establishment of a court of human rights and those in support.

5.5 ARGUMENTS IN FAVOUR OF AN AFRICAN COURT

5.5.1. Binding, Authoritative And Conclusive Decisions

The African commission being a non-judicial body does not give judgements. It was intended mainly as a promotional body. Its protective functions are limited to investigation and making of recommendations. These recommendations may be persuasive but it is not mandatory for implicated states to give effect thereto. One of the draw backs of the commission is the lack of mandate to make final binding decisions²⁵. This makes enforcement dependent on the very institution (governments) against which protection is sought. It has therefore been recommended that “a court with final decision making power be setup²⁶. Its decisions will not depend on the consent of another body, but will derive their authority from itself. No further appeal will be possible and the decision need not be evaluated or confirmed by a political body. Such decisions will be enforceable, will be followed up and will be implemented. The protocol provides for a court that gives final and binding judgements.²⁷ Once operational the court will greatly enhance the effectiveness of the charter by providing the best available guarantee that human rights violations will be redressed.

5.5.2. Implementation of Effective Remedies

Complainants who approach the African commission are required to have exhausted local or domestic remedies to have their complaint considered. The lack of remedies at the national level is the most important reason for the existence and necessity of supra-national recourse, therefore where a state fails to provide effective remedies, the commission will step in; Although it has taken encouraging and innovative steps, the commission has not been able to provide effective remedies, or to oversee their implementation. On the other hand findings of a court being binding can be implemented effectively. This will lead to real sanctions and remedies. The court will through its efforts and pronouncements indirectly strengthen democratic values and help consolidate African democracies.

Article 27(1) of the protocol provides that the court may follow a finding of violation with an appropriate order to remedy that violation. The court may also take interim measures if required.



of intercontinental cooperation and may prove instrumental in forging legal unity in Africa. By installing a common framework of the rule of law, democratic government and respect for fundamental human rights in African states, the court will provide viable building blocks for unitary institutions in Africa. As Africa moves in the direction of close cooperation and unity in terms of the treaty establishing the Africa Economic Community; It becomes imperative that cross-continental projects becomes visible. This will help create much needed monuments towards closer links at different levels. In movements towards regionalism, the institution of the court may provide a leadership role in counteracting the centrifugal forces of regionalism.

5.5.6. An Impartial Court Can Depoliticise Conflicts

Human rights disputes are often very politically charged. Political or politicized disputes may be addressed at different levels. i.e. by a political body; through mediation or settlement or by resolution of a judicial body.

It is suggested that overtly politicized issues will often not be efficiently addressed by diplomacy, mediation or friendly settlement. Judicial and political decisions differ in nature. Courts including international or regional court, use judicial concepts. Their criteria are standards of legality and their methods are enquiry into legal proof. The resolution of some of these conflicts by a court maybe preferable to resolution through pressure and coercion²⁹.

Thus a judicial decision would give a sense of security since courts will decide cases on the basis of the relevant evidence and not on the basis of extraneous political factors.

6.6 THE AFRICAN HUMAN RIGHTS COURT UNDER THE PROTOCOL OF JUNE 1998

Having proffered arguments in support of an African Court, it becomes necessary to X-ray some of the Highlights of the protocol of the Court so as to have an insight as to how the proposed Court will operate.

Firmly convinced that the attainment of the objective of the African Charter on Human and Peoples Rights requires the establishment of an African Court on Human and peoples right to complement and reinforce the functions of the African Commission on Human and peoples rights. The member states of the OAU, states parties to the African charter on human and peoples rights have agreed under Article 1 of the protocol to the African charter on human and peoples rights, for the establishment of an African court on Human and



5.5.3. Development of an African Human Rights Jurisprudence

The commission has not been very successful in realizing the aim of developing a uniform system of law for the promotion, interpretation and enforcement of human and peoples rights in Africa. One of the reasons for this failure was highlighted during the African commission's first decision about the possible establishment of a court. Commissioner Umozurike noted that the commission "is not really in a position to develop the jurisprudence of human rights in Africa as no lawyer had as yet appeared before it"²⁸.

As the commission is not regarded as a judicial tribunal no provision is made for legal representation to appear before it. Being overburdened by numerous cases, with limited time at their disposal and backed by restricted technical assistance, the commission is not able to analyze issues before it in any depth. In this regard the proposed African court will give reasons for both its advisory and contentious decisions. The protocol also allow dissenting and separate opinions. This provides the system with those pre-requisites for the development of a human rights case law, which have been lacking so far. The development of an African-based jurisprudence is not only indispensable for the protection of human rights on the continent but also to develop an indigenous legal frame work. Africans including lawyers, must have trust in home-grown institutions and approaches rather than instinctively relying on precedents and approaches adopted in other parts of the world.

5.5.4 Strengthening Local Courts

Applying human rights provisions in states without a human rights tradition is sometimes risky and requires a courageous judiciary. The decisions provided by an African Court may provide domestic courts with precedents which can be applied locally. In this sense, the hands of domestic judges will be strengthened. They may justify decisions that could embarrass states with reference to cases already decided by the African court. Especially the jurisprudence on claw back clauses, if interpreted narrowly will set precedents for domestic courts on which to base a broad interpretation of the world "law". Again the use of non-African case law could easily be countered by arguments against the importation of ideologically unsound tenets into African legal systems.

5.5.5 Encouraging, Further Inter-African Co-Operation

The proposed court will function continuously at the supra-national level as a high profile institution. Again this court will symbolize the possibility



peoples rights (hereinafter referred to as court). The organization, jurisdiction and functioning of which shall be governed by the present protocol³⁰.

On the relationship between the court and the commission, the protocol provides that the court shall complement the protective mandate of the African commission conferred upon it by the African charter³¹.

The jurisdiction of the court extends to all cases and disputes submitted to it concerning the interpretation and the application of the African charter, the protocol under consideration and any other applicable African Human Rights

Instrument³². In the event of a dispute as to whether the Court has Jurisdiction, the matter shall be settled by the decision of the Court, At the request of a member state of the OAU any of its organs or any African Organisation recognised by OAU. The court may provide an opinion on any legal matter relating to the charter or other applicable African human rights instruments. The court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting opinion.

The following are entitled to submit cases to the court³³. (a) The commission (b) The state party which has lodged a complaint to the commission and (c) The state party against which the complaint has been lodged at the commission. When a state party has a legal interest in a case it may submit a request to the court to be permitted to join.

It must be noted that at any time after the ratification of this protocol, the state must make a declaration accepting the competence of the court to receive petitions and the court shall not receive any petition involving a state party which has not made such a declaration. However, under Article 9 of the protocol. The court may try to reach an amicable settlement in a case pending before it, in accordance with the provision of the charter. By virtue of Article 10 of the protocols, the court shall conducts it proceedings in public, the court, if the circumstances so permit may however conducts its proceedings in camera. A party to a case shall be entitled to be represented by a legal practitioner of the party's choice

Free legal representation may be provided where the interest of justice so require. Any person, witness or representative of the parties, who appear before the court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the court.



The composition of the court under Article 11 of the protocol shall consist of 11 judges, nationals of the member states of the AU elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples right. No two judges shall be nationals of the same state.

The protocol provides that judges of the court shall be elected by a secret ballot by the AU Assembly of Heads of State. Furthermore, the judges of the court shall be elected for a period of six years and may be re-elected only once.

The independence of these judge shall be fully ensured in accordance with international law. No judge by virtue of Article 17 may hear any case in which the same judge has previously taken part as agent, counselor advocate for one of the parties or as a member of a national or international court or a commission of enquiring or in any other capacity. At no time shall the judges of the court be held liable for any decision or opinion issued in the exercise of their functions³⁴.

The court will examine case brought before it by at least seven judges and the court may convene in the territory of any member state of the AU.

If the court finds that there has been a violation of a human or peoples right. It shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. The court shall render its judgement within three months of having completed its deliberations. The judgement of the court taken by the majority shall be final and not subject to appeal and the judgement of the court shall be read in open court and reasons shall be given for the judgement of the court.

Article 28 of the protocol provides that state parties to the protocol shall undertake to comply with the judgement in any case to which they are parties and to guarantee its execution. Finally the expenses of the court, emoluments and allowances for judges and the budget of its registry shall be determined and borne by the AU.

It is evident from the above that the concerns and fear of the opponents to the establishment of the court have fairly been taken care of especially in the areas of integrity, impartiality and independence and it is hoped that, if the protocol is ratified, the court would complement the role of the commission, through the finality and binding nature of the courts decisions.



7.7 CONCLUSION

Those opposed to the establishment of an African court have brought forth arguments that cannot be sustained. For example they argue that there was yet no sufficient political will among governments in Africa to support the court and to set up an ineffective Court will discredit the African human rights regime. This argument have been countered on the premise of all the above arguments and the fact that times have changed, contemporary Africa has moved a long way. Courts are now an indispensable organ of government and part of the political order, even in traditional African societies court did exists. It is also not true that courts brings acrimony as the opponents of an zAfrican court would want as to believe. Acrimonious differences do not arise because of the existence of courts. That would be to place the cart before the horse. In fact Courts favour and encourage amicable settlement. It needs be emphasized that cases that comes to court are usually those that have defied settlement and where else would one go for redress if not the courts? Courts perform that function, they settle differences, they do not produce them.

Therefore, a court of human rights in Africa is a necessity. It will champion the development of African human rights jurisprudence and will also implement in concrete terms, the protective mandate of the commission. Without this court, the system of human rights protection in Africa will be deemed toothless. Thus the court is a prerequisites for the further development and sustained legitimacy of the system.



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