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An Evaluation of the Relevance and Enforceability of African Charter on Human and Peoples Rights in Nigeria

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Abstract

Rights are generally meant to be protected and where this is not achieved, the whole essence of a law is defeated. It is in this spirit that the paper seeks to analyze the rights that are guaranteed under the 1999 constitution to wit- Civil and Political Rights, Economic, Social and Cultural Right which are not justifiable under Chapter II 1999 Constitution and which are protected and guaranteed under the African Charter on Human and Peoples Rights in Nigeria; The rationale and applicability of the Charter to Nigeria cases and solution on areas of inadequacies.

Introduction

Over the years, the need for protection and enforcement of human right have been on the increase especially in the dark days of military dictatorship and it continued through democratization and still being used as the basis or foundation for an enduring democracy as demonstrated in the dramas and shocking revelations at the Oputa Panel on Human Rights Violations.

This paper attempts an evaluation of the relevance of application of the African Charter especially in the quest for an enduring democracy.

Background to the African charter

The leaders of the African States, under the umbrella of the Organization of African Unity adopted the African Charter on Human and Peoples' Rights in Banjul on the 19th day of January 1981.

The background of the Charter could be seen from the wordings of its preamble, some of which are briefly referred.

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; Recognizing on the hand, that fundamental human rights stem from the attributes of human beings which justifies their international protection and on the other hand that the reality and respect of people's rights should necessarily guarantee human rights; Firmly convinced of their duty to promote and protect human and people's rights and freedom taking into account the importance traditionally attached to these rights and freedoms in Africa (Law of Federation of Nigeria 2004).

With the above background, it could be seen that the African Charter on Human and People's Right is in recognition of the African Leaders that human rights stem from the attributes of human beings, which justifies their international protection. Thus, according to Mr. R. Chongwe;

African charter on Human and Peoples' Rights itself is a combination of a number of attempts by the African

Leaders all members of the Organization of African Unity to create a regional charter to safeguard human and people's on Africa (R. Chongwe 2007)

The Rights under the African charter on human and people's rights 1981

a. Civil political rights

The Charter guarantees without qualification the rights to equality before the law, Human dignity and inviolability. It prohibits all forms of degrading treatment and exploitation especially slavery, torture and degrading Punishment. The right to fair hearing is guaranteed and the elements of this are enumerated in Article 7-the rights to be heard, to appeal, presumption of innocence, right to defence by counsel of one's choice and trial within a reasonable time by an legislation is prohibited and only the offender may be personally punished .

Other rights are qualified. Thus the right to life, liberty, freedom of conscience, freedom of derogated from by law. There is no express derogation rather the phraseology used is one of the following: "except for reasons and conditions previously laid down by law; "subject to necessary restrictions provided for by law" and "in accordance with law". It is not stated that such law must be "strictly required by the exigencies of the situation" as in the European convention,, or "reasonably justified in a democratic society" as in the Nigerian Constitution 1999. The right to form trade unions is not specifically mentioned as in the European and Inter-American Conventions but is incorporated in the right to free association in Article 10.

Everyone has the right to participate in government directly or through freely chosen representatives in accordance with the provisions of the law. This provision is regarded as prohibiting military coups in Africa, which had become endemic. There is no special provision for emergencies.

The independence of the judiciary is protected. Any person may leave a country, including his own and may seek asylum in other countries if persecuted. The Charter guarantees "equal access to the public service" and to "public property and services". The discrimination against permanent residents of a Federation on the basis of the origin of their ancestors is

certainly against the law and spirit of the Charter. The provision on equality relates to the individuals not the units of a state.

The mass expulsion of non-nationals is prohibited. Mass expulsion is defined under the Charter as that directed against nationals, racial, ethnic or religious groups. This does not imply the right of entry for non-nationals excess by the consent of the state or by special agreement, or perhaps on humanitarian grounds. A state reserves the right to determine the conditions of entry for non-nationals. Once an alien is within a territory, he becomes entitled to certain rights which include the right to be expelled after due process. Article 9 guarantees the right to receive information and also to express and disseminate one's opinion.

b. Economic, social and cultural rights

The Charter protects the right to property but provides that it may be "encroached upon in the interest of public need of the community and in accordance with the provisions of appropriate laws". There is no mention of the level of compensation where "prompt, effective and adequate". (US Department of State Bulletin 1939) In view of the controversy that usual surrounds expropriation, the UN standard of "appropriate or "reasonable" presumably applies.

The Charter guarantees the right to work under equitable and satisfactory conditions and the equal pay for work. Under article 16, individuals are entitled to enjoy "the best state of physical and mental health". A state is obliged not only to protect the health of the people but also "to ensure that they receive medical attention when they are sick". The right to education is also guaranteed and is not even limited to any level. It presumably includes primary, secondary, tertiary, vocational and adult education.

c. Group rights

The Charter asserts the oft-repeated right to self-determination of people enabling them to freely determine their political, economic and social development. Some doubt is expressed as to the content of self-determination and who is entitled to exercise it. In particular, it is feared that the principle will encourage secession and the break-up of sovereignty. The principle actually recognizes the right of any people to shape their future.

It may assume the form of unitarism, federalism and confederalism or any other relations acceptable to the people. The unit that exercise it must have an identifiable interest, the more substantial the number, the easier it is to recognize their right. The exercise must have regard for other principles of law such as sovereignty, territorial integrity and non-interference in internal affairs. It may however, be affected by political and military realities. Whereas some claims have succeeded; others have failed even dismally. The hope of the international lawyer is the success of legitimate claims of self determination. In the final analysis, it urges the enthronement of good governance and democracy in order to ensure a compatible manifestation of the right. (U. O. Umozuike 1972) Colonized people are entitled to gain independence even with the use of force and with external support. The Charter declares the equality of peoples; “nothing shall justify the domination of a people by another”,⁵ This is specially directed to states with heterogeneous societies. Experience has shown that independence does not automatically in government or even be left alone to carry on as best as they can. This confirms our view that long after the demise of colonialism, self-determination will still be relevant to people in metropolitan territories. It must not be thought of only in the colonial context.

People are entitled to dispose of their natural wealth and resources and to lawful recovery or compensation in the event of spoliation or dispossession. States are called upon to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies. The Charter guarantees the right to national and international peace and security. All people have the right to equal enjoyment of the common heritage of all mankind. (African Charter Art. 21(5))

Four disadvantaged groups are marked for special protection-women, children, the aged and the disabled. States are obliged to ensure the exercise of the right to development and create a favourable atmosphere for it (K. Vasak 1977).

The three categories of rights are often referred to as the first, second and third generations of rights respectively. They are so called not because one group of rights develops and then dies for the subsequent one but reflects recognition in international law. The first generation has been so recognized since the American and French revolutions in the 18th Century. The second gained prominence in the Russian

Revolutions in the 18th Century. The second gained prominence in the Russian revolution in 1918 and in the Constitution of the Weimar (German) republic 1919, the Irish Republic 1921 and in the Constitution of the USSR 1937.

d. **The duties**

The Charter breaks new grounds by including duties in an international human rights instrument. Hitherto, rights were enumerated while duties were implied. The Charter recognizes the duties of an individual to the Family-preserve its harmonious development and cohesion, respect parents and maintain them in case of need. The Nation-serve the nation, preserve its independence, integrity, security and solitary and pay taxes, The international community; Other legally recognized bodies.

There is also a duty to preserve positive African cultural values and to achieve African Unity. The process for enforcing duties is not stated. (Universal Declaration of Human Rights 1948)

Rationale for adoption of the charter

Traditionally, how a state treated its subject was a matter for its exclusive domestic jurisdiction and other states were thus precluded from interfering in what was considered to be its internal affairs.

The recent development in our courts have shown that enforcement and protection of human rights is not limited to the provisions of the constitution and the Enforcement Procedure Rules. As Hon. Justice P. Nnaemeka Agu puts it-

Statement of Human Rights in international instrument or national constitution may come to naught unless the judiciary of the particular country breathe life and meaning and purpose into them. (P. Agu 1993)

The Renowned jurist, Hon. Justice Kayode Eso posited thus in *ransomed Kuti v. AG Federation*.

But what is a fundamental right? It is a right, which stand above the ordinary laws of the land and which is fact is antecedent to the political society itself. It is a primary

condition to a civilized existence” (Kuti v. AG Federation 1985).

The rationale for the application of the chapter (Kuti V. A.G Federation 1985) is traceable to the principle of international law- “Pacta Sunt Servanda”-meaning that an international treaty or instrument is binding on the country that has ratified it (by way of re-enactment, adoption or otherwise).

Thus, Section 12(1) of the 1999 Constitution (Constitution of Nigeria 1999) provides 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.

In the light of the above provision, African Charter on human and peoples’ Right (ratification and Enforcement) Act 7 was made. The preamble to the Act captures the intent of the Act-

WHEREAS a Charter is entitled the “African Charter on Human and peoples’ Right” has been duly adopted by diverse states in Africa and Nigeria is desirous of adhering to the said Charter” AND WHEREAS it is necessary and expedient to make legislative provision for the enforcement in Nigeria of the said Charter by way of an Act of the national Assembly.

The Act (African Charter on Human and Peoples Right 1967). Itself provides clearly in Section 1 that:

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples’ Rights which are set out in the schedule of this Act shall, subject as there under provided, have the force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

As rightly pointed out by Wali J.S. C in (Ibidapo v. Lufthansa Airlines 1997) “Nigerian, like any other Commonwealth country inherited the English

Common Law rules regarding municipal application of international law. Nigeria as part of international community for the sake of political and economic stability cannot afford to live in isolation” (Nigerian Weekly Law Report 1997; *Ibidapo v. Lufthansa Airlines*).

The issue of applicability of the Charter was decided by the Court of Appeal in *Gani v Abacha* (*Gani v Abacha* 1996) before being recently laid to rest by the apex Court (Nigerian Weekly Law Report 2000; *Gani v Abacha*).

The appellant brought his claim on the combined strength of the Charter () and Chapter IV of the Constitution (Constitution of Federal Republic of Nigeria 1999). The Court of Appeal pronounced on the status, enforcement, and mode of enforcement of the Charter, amongst others thus:

African Charter are in a class of their own and do not full within the classification of the hierarchy of local legislation in Nigeria in order to superiority (Constitution of Federal Republic of Nigeria 1999).

The court posited further that member nations- parties to the protocol recognized that fundamental human rights stem from the attributes of human beings which justify their international protection and accordingly by promulgating Cap 10, the Nigerian state attempted to fulfill its international obligation to which the nation voluntarily entered and agreed to be bound.

The Court further added, per Pat-cholonu J.C.A. Constitution of Federal Republic of Nigeria 1999 that,

By not merely adopting the African Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength and as Bello C. J.N (as he then was) said in *Ogugu v, State*, (*Ogugu v. State* 1994) its violability becomes actionable.

It goes without saying that the rationale and intention of Cap 10 is that it should be accorded the full force of law which Nigerian is seen as country that not only signs, respects and adopts the full contents and import of the Charter but has also gone an extra mile by incorporating it

into our municipal law²⁴ pursuant to the constitution of the Federal Republic of Nigeria (Constitution of Federal Republic of Nigeria 1999).

Judicial application of the charter as a saving-grace in the enforcement of human rights

The Courts have had to resort to the African Charter to secure and ensure the enforcement of the fundamental rights of Nigerian citizens during military regimes when chapter IV of the Constitution dealing with human rights have either been out rightly suspended or modified to make it ineffectively²⁶.

To justify the above, some of the notable cases will be examined.

In *Chima Ubani v. Director of S.S.S* (Chima Ubani v. Director of State Security Services 1999), the appellant was arrested in his home by some plain clothed operatives of the State Security Services (SSS) prior to which time his apartment was thoroughly searched and some valuables carted away including books, documents and his international passport, around July 1995. He was detained pursuant to State Security (Detention of Persons) *Decree No 2 of 1984*, which ousts the jurisdiction of the court. He brought an action in the Federal High Court seeking reliefs against his arrest and detention by the respondent relying amongst others, on the Charter. The trial court upheld the preliminary objection of the respondent and dismissed the application.

The Court of Appeal, while justifying its unanimous decision in allowing the appeal said that:

The High Court when called upon to consider issues bothering on the infraction of the fundamental rights as protected under the African Charter on Human and Peoples' Right ought not to throw up his hands in a state of surrender and helplessness in the face of the ouster provisions in the Decree of the Military Government. In question or issues concerning the fundamental rights protected under the African Charter, the provisions of the African Charter are superior to the Decrees of the Federal Military Government (Abacha v. Fawehinmi 2000)

The Court asserted that the African Charter being a fundamentally superior law of our land, there is need to remind all organs of government of the sacred duty to respect the provisions (Osherire v. British Caledonian Airways Limited 1990).

Also in *Comptroller of Nigerian Prisons v. Adekanye* (Attorney General of Botswana v. Unity Dow 1998) the Court of Appeal opined that a court should not shrink from its responsibility to consider issues bothering on infraction of fundamental rights as protected under the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act, cap 10, laws of the Federation of Nigeria, 1990 under a thin disguise that there is an ouster provision in a Decree promulgated by a Military Administration. A court, according to the Court of Appeal ought not to throw up its hands in a state of surrender and helplessness in the face of the ouster provisions in the Decree of a military Government. The court declared, suing the Charter as a saving –grace, that the ouster of the supervisory jurisdiction of the High Court cannot include to acts done a law so patently in conflict with the African Charter on Human and Peoples' Rights.

The Supreme Court of Nigeria is not also leaving any stone unturned at ensuring protection and enforcement of human rights of Nigerian citizens also by using the Charter. Thus, in *Ogugu v. State*, the court expressly declared that:

By the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federal of Nigeria 1990, Nigeria adopted the African Charter on Human and Peoples' Rights as apart of her municipal law. The provisions of that Charter are enforceable in the same manner as those of Chapter IV of the 1999 by application made under Section 42 of the Constitution.

Also, The Supreme Court, Recently in *Director of SSS v. Agbakoba* while justifying the right to hold a Nigerian Passport said that:

....Nigerian's right to hold a Nigerian passport became an inevitable corollary to his right to foreign travel guaranteed under Section 12 (2) of the African Charter... which provides that Everyone has the rights to

leave any country including his own, and to return to his country.

The list is endless. It can be rightly be submitted that due to the effect of military rule and decrees which had rob the court of its jurisdiction to protect the citizenry , our courts have fund solace in the provisions of the Charter and have assumed jurisdiction (in most cases) of the fullest on the strength of the African Charter (Abacha v. Fawehinmi 1999):

A brief examination of the locus-classicus- Gani v. Abacha (Gani v. Abacha 2000).

It is no longer news that there was an appeal against the decision of the Court of Appeal in Gani v. Abacha. (Gani v. Abacha 2000) The Supreme Court finally laid the issue to rest in its landmark decision of Friday 28th April, 2000 with Ogundare J.S.C reading the leading judgment. (Concord Press Nigeria Limited v. A. G. Federal and others 1999) Some of the issues finally settled are briefly examined below.

The position the spirit of a convention or treaty (like the Charter) demands that the interpretation and application of its provision should meet international and civilized legal concepts i.e those concepts which are widely acceptable and at the same time of clear certainty in application and that the court will not construe a statute so as to bring it into conflict with international law, was fully subscribed by the Supreme Court (Abacha v. Fawehinmi 1999):

The court established that the concepts on which the Charter stands are:

- a. The African Charter is a special genus of law in the Nigerian legal and political system;
- b. The Charter has some international flavour and in that sense it cannot be amended or watered down or sidetracked by any Nigerian law;
- c. The effect of the Charter in Nigeria may be completely obliterated by an express repeal of the Charter (Osherire v British Caledonian Airways Limited 1990)

The court asserts that paying attention to the Charter will not be in conflict with the decision of the court. Being a law that falls into the category of

laws made by National Assembly and cannot be subjected to the sheer vagaries of any other municipal or domestic law (Attorney-General of Botswana v. Unity Dow 1998).

Ogundare J.S.C had this to say on the status and applicability of the Charter

The Charter gives to citizens of members states of the organization of African Unity, rights and obligations, which rights and obligations are to be enforce by our courts, if they must have any meaning.

The Charter, according to the Supreme Court is a statute of international flavour and so, if there is a conflict between it and another statutes, its provisions will prevail over those of other statute due to the presumption that the legislature does not intend to breach an international obligation.

The attitude of the Supreme Court to the Charter is tailored along the civilized societies of the world. According to the court, where we have a treaty of this nature (African Charter) we must be prepared to stand on the side of civilized societies of the world over and apply them, particularly when we have adopted them as part of our laws (F. Okeh 2008) and our judiciaries must not be seen as assisting those who step on liberty and justice to effectively press them down Uwaifo J.S.C The learned J.S. C. fully subscribed to the attitude that:

We cannot afford to be immuned from the progressive movements manifesting themselves in international agreements, treaties resolutions protocol and other similar understanding as well as in the respectable and respected voices of our learned brethren in the performance of their adjudicating roles in other jurisdiction.

To ensure that enforcement of the rights is not impeded by technicians, the court held that where no provisions is made as to the procedure to be followed in enforcing the rights under the charter, the plaintiff is entitled to bring the case in the usual form of an action and have it heard. Thus an aggrieved person can enforce his rights under the African Charter by way of an action commenced by a writ nor by any other permissible procedure such as the fundamental Rights (Enforcement Procedure) Rules, 1979 and either his procedure, or judicial review or common law or

statutory procedure for obtaining declarations or injunction or damage may be used where appropriate.

The decision cannot be fully x-rayed in this article. However, from the expositions above, the attitude of the Supreme court one of sincere readiness to enforce and protect the rights of citizens of this country at the slightest opportunity especially on the strength of the protection afforded by the Charter (Abacha v. Fawehinmi 1999).

Conclusion

From the above, it has been shown that recourse to African Charter is not an effort in futility. It is an effort in the right directions. African Charter is and remains a special statutes of international flavour and regardless of the attitude of the government of the day, our courts are fully ready to apply its provisions as part of our law (so long as it remains an existing law in the country).

The attitude of our courts is highly commendable as it goes a long way in giving hope to a common Nigerian man assured enforcement and protection of his rights, since according to Nnaemeka -Agu J.S.C., statements of human right in international instrument or national constitutions may come to naught unless the judiciary of the particular country breathes life and meaning and purpose into them (Abacha v. Fawehinmi 1999).

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