

EVALUATION OF THE ADJUDICATORY RELEVANCE OF THE AFRICAN CONVENTION ON HUMAN RIGHTS¹

Abstract

The African Convention on Human Rights is what gave birth to the “African Charter on Human and People’s Rights”. It is not in doubt that the major difference between the African Charter and other Charters, is that the African Charter obliges state parties to give effect to the provisions of the Charter. Thus, the Convention was intended to achieve a lot through its Charter by way of enforcement. However, despite the ratification of this Charter, human right abuses have continued unabated in Africa. Largely, apart from few states like Nigeria, the political conditions in these non-adhering states make it problematic to institute actions in national courts against state agents. This negates the spirit and purpose of the international instrument on human rights and the obligations of states to ensure its enforcement. The centrality of this paper lies in the observation that there exists a view that the perception and practice of African states on the scope and nature of human rights are not in tandem with those of the developed world. The paper thus finds that compensation is crucial to the adjudication process thus enhancing elimination of all forms of exploitations. State parties are thus required to protect rights of people by forestalling possibilities of deprivation of peace and security.

Key words: enforceable rights, communal responsibility, fundamental liberties, generational rights, compensations

1. Introduction

Human Societies are not static; and as they develop, notions of rights, duties, wrong, justice and fairness evolve in the society. In this regard, certain rights tend to become entrenched in the society, attached to the individual being, either alone or in association with others. Human Rights are rights regarded as inalienable and fundamental to man. Accordingly, Kayode Eso JSC, in *Saude v. Abdullahi* observed that, “Human Rights are not just mere Rights; they existed even before orderliness proscribed rules for the manner they are to be sought.² There is hardly any agreement as to the universal meaning of the concept but suffice it to say that, Human Rights as legal rights are those guaranteed by positive laws within a given legal system creating enforceable rights and obligations within the law.³

The African Convention on Human Rights (hereinafter called “The Convention”) was adopted in June 1981³ but it came into force on 21st October, 1986.⁴ It must be noted therefore that before the adoption of the Convention there were various conventions on Human Rights already in existence. Thus, there is the United Nations Convention adopted in 1966. In examining the African Convention, it is necessary to discuss the historical experience of the African people that has largely influenced the language of the Convention and its content.⁵

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² Kayode Esho J. S. C. (of blessed memory) Why Human Rights? An Article in Respect of Human Rights International Seminar on Human Rights Feb. 2-6 1992 pg 276.

³O. C. Eze, *African Concept of Human Rights*- A Paper delivered at the International Seminar on Human Right Feb. 26 1992

⁴U. O. Umozurike “The Present State of Human Rights in Africa, *Calabar Law Journal*, Vol. 1 (Enugu: Fourth Dimension Publishers 1980) pg 80

⁵B.O. Okere “The Protection of Human Rights in Africa and the African Charter on Human and Peoples Rights”. A Comparative Analysis with European and American Systems, *Human Rights Quarterly*, Vol 6 No 2 (1994) P. 67

The development of the general Human Rights regime in African should be viewed; firstly, from the pre-colonial period, secondly the colonial period when most African countries gained independence. It is after appreciating this historical past that a proper grasp of Human Rights as adopted in the Convention can be properly understood. It can be argued that Pre-colonial Africa had its own notion of Human Rights. The African people or society was neither culturally nor politically homogenous. Therefore, various communities had established norms of communal responsibilities, ethos and moral values, which developed over time, a violation of which is frowned upon; and norms were not guaranteed by positive law.

Further, as has been observed in many academic fora and legal arguments, colonial rule is an aberration and a violation of Human Rights and in particular the right to self-determination. The underlying principle of colonialism is the subjugation of the colonized people to the rule of the colonial overlords and this in itself is an erosion of Human Rights that is not only derogatory but also contemplative of pseudo-slavery existence of the colonized. Thus, the colonized people were denied Civil and Political Rights. Such rights as freedom of association, to propagate opinions, religion, were either curtailed greatly or non-existent. All these denials resulted to various armed struggles and diplomatic alignments against the colonizers.⁶

The post-Colonial African Societies witnessed the emergence of nation states under self-rule. This led to various national constitutions with the aim of legally guaranteeing the various rights and duties of the citizens and the establishment of the rule of law with the sole purpose of demolishing the colonial structures of human rights deprivations. With these structural developments in view, it has been observed that African nations have not fared better in guaranteeing the notion of Human Rights.

This is due to the fact that these rights were perceived along the lines of colonial antiquities. Further, with regard to these ambivalent conditions of African perception of human rights, civil, political and economic rights have become bastardised with the entrenchment of dictatorship and military regimes, which has led to the erosion of certain fundamental liberties.⁷ Hence, even when democratic governments are in place, they maintain the similitude of military juntas in the area of human rights conditions.

2. Nature and Scope

Pursuant to the foregoing argument, the African Convention on Human Rights was brought to force to harmonize these divergent views and centralize the idea of global human rights regime. In this regard, the instrument recognizes the various trends in the development of the notion of human rights and this makes it unique in nature because it captures the essence of the African concept of human rights by recognizing peoples' rights, minorities' rights, and rights of dependent and independent states, which have been recognized by international laws. It is imperative to note that this Convention extended the scope of these rights from mere rights to legally enforceable rights.⁸

The view of this paper is that the African Convention represents a combination of both traditional and contemporary formulation of Human Rights. The Convention took into consideration the trends in the development of Human Rights in Africa generally.

⁶ S.C. Saha "Roles of Women in Traditional African Setting: African Quarterly, Vol. xxii No 1 (1982) pp 26-27

⁷ O.Gye-Wado-The Effectiveness of the Safeguard Machinery for the Enforcement of Human Rights in African, *Journal of Human Rights Law & Practice* Vol. 2 No. 3 Nov. 1992 by Civil Liberties Organization Pg. 151.

⁸ O.C. Eze, African concept of Human Rights A paper delivered in perspective on Human Rights on Human Rights - International Seminar on Human Rights Feb. 22-6 1002 pg. 2

Human Rights are generally looked at from three stages. There are the first generation rights. These are rights represented by both the Universal Declaration of Human Rights, 1948 and the International Convention on Civil and Political Rights, which came into force in 1976. These rights relate to the Socio Political environment of man in which he finds himself. As a result of these rights, the individual is entitled to participate in the Political process of his country under laid down international norms as ratified by the individual home state. The second generation rights relate to the rights of the individual within his environment; these are the economic, social and cultural rights. The third generation rights are the rights, which deal with the organic and corporate existence and the working of the society.

These include the right to good environment, the right to development and the right to share in the common heritage of mankind. In effect, the African Convention embraced all spheres of human rights-civil, political, social and economic by recognizing the African tradition in these fields. In examining the various rights provided under the African Convention, we shall take it that any discussion on rights will also include the corresponding duties imposed. Thus, civil and political rights are first generation rights and they are provided for in Articles 3-13. These rights also include the rights to property, freedom of association. Most of those rights are now guaranteed by various constitutions of independent African State.⁹

Pursuant to the foregoing, Article 3 for instance provides for equality before the law. It prohibits all forms of degrading treatment and exploitation especially slavery, torture and degrading punishment. There is also the right of fair hearing guaranteed by Article 7. This right will include the right to be heard, to appeal, presumption of innocence, right to counsel representation, trial within a reasonable time, before an impartial tribunal. Instructively, retroactive legislation is also prohibited as a means of safeguarding the rights of citizens.

The African Convention also provides for other rights, which are qualified. Thus, the right to life, liberty, freedom of conscience, expression, association, assembly and movement may be derogated from or limited by law. Article 13 for instance provides for the right to participate in government directly or indirectly through freely chosen representatives in accordance with the provisions of the law. The Convention also guarantees equal access to the public service and to public property and services.¹⁰

As a measure of general and individual right, mass expulsion of non-nationals is also prohibited.¹¹ Thus, mass expulsion is defined under the clause as that directed against national, racial, ethnic or religious groups. The second set of rights guaranteed by the African Convention contains peoples' rights. These are the socio-economic and cultural rights. They are usually referred to as the second generation rights because their development came much later, after the establishment of civil and political rights.¹²

In line with the findings above, Eze, with respect to civil and political rights opined that:

They represented the responses to increased improvement of the working class that resulted from capitalism. They also represented historical landmarks that decisively contributed to the evolution of

⁹ U.O Umozulike; *The significance of the African Charter on Human and Peoples' Rights. An article in Perspective on Human Rights* pg. 45.

¹⁰Article 11

¹¹Article 12 (5)

¹²Ibid at 58

socio-economic rights that later became known as second generation rights as opposed to civil and political rights that are categorized as first generation rights.¹³

The provision of these rights in the Africa Convention is a significant step in the formulation of the norms of Human Rights in Africa. This may be traced to the colonial experience of African Countries and the resolve to uproot all traces of colonialism and discrimination. The African Convention protects the right to property but this may be derogated upon in the interest of public needs or the general interest of the community and in accordance with the provisions of international and domestic laws.¹⁴

There is the right to work under equitable and satisfactory conditions and to equal pay for equal work.¹⁵ It must be noted however that in view of the present socio-economic conditions in Africa, African states cannot guarantee the right to work. It is submitted therefore that the convention does not guarantee the right to work *simpliciter*. It only guarantees the conditions under which work is to be carried out. There is also guaranteed the right to the best state of physical and mental health.¹⁶ However, this guaranteed right does not prescribe the standard or to what extent it can be exercised. Thus, it would appear that the drafters of the Convention have taken into consideration the means available to the African Countries in providing such services and the limitations and challenges inherent therein. Consequently, the convention also guarantees to the individual the right to education as well as to freely take part in the cultural life of his community.¹⁷ The crucial implication of this condition is that the provision of these rights in the convention is unique in the sense that it has attempted to elevate them to the level of enforceable rights. The paper also finds that another group of rights provided for in the African Convention is *peoples' rights*; which are tied to the question of self-determination. This right is sometimes referred to as group rights or third generation rights.

It enables a group to freely determine their political, economic, and social development. However, in examining this particular right, the first question to be addressed is– who are “People”? It is often difficult to define a concept but it will be in order here to describe aspirations and to some extent a degree of economic integration. However, in a wider context, people may also refer to a particular class e.g. children, women, disabled etc., people in this context will therefore include both minorities and majorities.

According to Umezurike, this right is the right of a people to determine their future. This right is exercisable by a people with identifiable interests.¹⁸ The Convention declares the equality of peoples.¹⁹ This is specially declared in view of the heterogeneous nature of African societies. People under the convention are entitled to dispose of their wealth and resources and to lawful recovery or compensation in the event of damages or dispossession. States are enjoined to eliminate all forms of economic exploitations;²⁰ particularly that practiced by international monopolies.

¹³Article 14

¹⁴Article 12

¹⁵Article 16

¹⁶Article 17

¹⁷Ibid Perspective on Human Rights pg. 48

¹⁸Article 19

¹⁹Article 21(5)

²⁰Ibid Perspective on Human Rights 49

The Convention guarantees the right of people to national and international peace and security. It is therefore incumbent on states to ensure peace and security, without which the rights guaranteed are difficult to secure. The Convention provides for the right to the equal enjoyment of the common heritage of mankind.²¹ This will include the resources of the deep-sea bed, the air space and celestial bodies. The Convention provides protection to four groups, namely women, children, the aged and the disabled.²²

Another important right protected under the Convention is the right to socio-economic and cultural development. This is tied to the right to self-determination, which can be manifested in the rights of people to freely dispose of their wealth and natural resources. According to Eze, this right to development, which the Convention has provided and given a legal status, makes the Convention a unique one. Accordingly, African peoples have the right to development and therefore African States are enjoined to ensure the exercise of the right.²³

3. Duties Incumbent on Nation States

The African Convention in uniqueness had included individual duties in its provisions.²⁴ The Convention therefore recognizes the duties of the individual to the family, to preserve and harmonize its cultural heritage, development and cohesion in addition to traditional norms of respect for parents and hierarchy of seniority and to maintain them in time of needs. Further duties to the nation includes to serve and preserve its independence, integrity, security and solidarity and to pay taxes. Other duties imposed by the Convention includes those duties to the international community and to preserve positive African cultural values and the promotion of African Unity.

4. Human Rights Enforcement Machinery

The basic machinery for the enforcement of human rights under the African Convention is the African Commission on Human and Peoples Right²⁵ (hereinafter called “The Commission”). The Commission is an organ of the Organization of African Unity whose function is the promotion and protection of Human and People’s Rights.

In furtherance of rights protection, Articles 31 of the Convention provides for the membership of this Commission. There shall be eleven members chosen from African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and people’s rights, with particular consideration being given to persons having legal background and experiences.²⁶ The members are to serve in their duties on personal capacities and are to be elected by secret ballot by O.A.U. Assembly of Heads of State and Government from a list of persons nominated by the State parties to the Convention. Members of the Commission are expected to make a solemn declaration to discharge their duties impartially and faithfully. The Commission shall lay down its rule of procedures and elects its Chairman and Vice Chairman for a 2-year period. The elected officers are eligible for re-election. The OAU Secretary General appoints the Secretary to the Commission and other supporting staff. A member’s seat becomes vacant on his death or resignation or if in the

²¹OC Eze (n.3) pg 48

²²OC Eze (n.3) pg. 49

²³Ibid Perspective Human Rights pg. 50

²⁴Article 30

²⁵Article 30(1)

²⁶Article 50

unanimous opinion of other members, he has stopped discharging his duties for any reason other than temporary absence.²⁷

Article 45 of the Convention makes provision for the functions of the Commission. The first basic function of the Commission is the promotion of human and people's rights. In this regard, the Commission is expected to collect documents that are relevant to human and people's rights. The Commission is also expected to carry out studies and researches on African problems relating to human and people's rights. These may involve seminar, symposia and conferences or any other means in which information shall be made available for the appreciation of human and people's rights. The Commission may give its views or make recommendations to government.

The Commission may also formulate and lay down principles and rules aimed at solving legal problems relating to human and people's rights. The performance of those duties by the Commission will involve the co-operation between it and other institutions whose responsibilities include the promotion and protection of human and people's rights. The Commission will also perform other tasks, which may be entrusted to it by the Assembly of Heads of State and Government. Having discussed the functions of the Commission, it is necessary to examine the procedure adopted by the Commission in dealing with communications addressed to it.²⁸

If a state believes that a breach of the convention has occurred, it sends a communication to the state concerned and addresses same to the Secretary General of the OAU and the Chairman of the Commission. After this, the state to which the communication has been addressed shall within three months give the inquiring state a written explanation, which shall include all possible information on the laws and rules of procedure applicable to the breach. The Convention's procedure requires that if within three months from the date of the original communication, there has been no peaceful resolution, either of the states may submit the matter to the Commission directly. However, Article 49 permits states to address a communication directly to the Commission about any alleged violation of the provisions of the African Convention by the State concerned and send copies to such state and to the Secretary General of the OAU. The Commission then obtains all relevant information from the parties and tries to settle the matter amicably. It then submits within a reasonable time, a report of the facts and its findings to the parties and to the Assembly of Heads of State and Government.

The Commission may also receive communications from non-states parties. This is one of the fine points in the African Convention, which grant individuals and not only nationals certain rights.²⁹ In furtherance of the foregoing, there are some conditions which have to be fulfilled before such communications can be considered by the Commission. For instance, the communications must indicate its author; it must be compatible with the African Convention or OAU Charter; the language of the communication should not be irrelevant and insulting in nature or suggestive of disregard to acceptable norms and values.

The foregoing implies that the communication should not be based exclusively on media reports; it should be sent within reasonable time and should not relate to matters already settled by some other procedure; and all local dispute settlement remedies must have been exhausted. The Convention does not specify the remedies available to an aggrieved party. One may

²⁷Ibid. Perspective of Human Right pg. 51

²⁸Articles 55, 56

²⁹O.C. Eze (n.3) pg. 96

therefore assume that since it is the function of the Commission to make recommendations, it will be justified to determine whether the conduct of state party is or is not in breach of the provisions of the Convention.³⁰

The Commission may also adopt interim measures under Rule 109 to stop acts or policies that are in violation of the Convention. Since the Convention is an international instrument, resort may also be found in the established rules of public international law to the effect that a breach of international obligation imports an obligation to make reparation as stated by the PCIJ in *Chorzow Factory case* (indemnity Merits).³¹ Judicial and arbitral decisions and opinions have also established various forms of reparation under international law.

The foregoing includes monetary compensation for the injury suffered, apologies, and restitution in kind. An instance of this practice in international law is the apology offered by Germany to Israel over the treatment of Jews during the Second World War and the payment of compensations. In this vein, Eze observed that even though not expressly stated in the Convention, it would appear that the Commission has the competence to grant these remedies in the absence of any specific limitation.

5. Conclusion and Recommendations

Although the Africa Convention has been described as unique in its provisions, some limitations can be identified in its enforcement. For instance, while the convention may grant a particular right, it proceeds to further subject such right to the application of national law. The effect is that the national legislation may therefore limit the application of such right. This may serve as a ready tool for dictators to flagrantly violate the rights so guaranteed under flimsy excuses. Another observation on the African Convention is that most of the human and peoples' rights provided for require some level of economic buoyancy on the part of the state for it to be meaningful. Having regard to the present state of some African countries' economies, it is doubtful if such rights can be realized in the present context. The success or failure of this international instrument depends largely on the commitment of states who are parties to it. One thing is however clear. The African Convention on Human and Peoples Right has provided a platform from which Africa should always be looked at in relation to human rights. It has taken into account African's historical experiences and formulated its provisions and procedures within the context of traditional African cultures and values. It is also suggested that an African Court on Human and Peoples Rights be established and given powers to award specific remedies in the determination of matters brought before it.

³⁰(*Germany v Poland*) PCIJ Reports Series A. No. 17 pg. 46-48

³¹*Ibid* at 77