

LEGAL BASIS FOR ENTRENCHMENT OF HUMAN RIGHTS IN THE CONSTITUTIONS OF SELECTED AFRICAN COUNTRIES*

Abstract

The concept of human rights is not only universal dates back to antiquity. In the present world order, a single human right violation may spark international outrage. This underscores the sacredness of the fundamental rights of man. The practice of entrenching human rights of the citizenry in the constitution is now common among African countries. Presumably, this practice rein-enforces the rights, making them easier to enforce and enjoy. It is incontrovertible that Africa has made a tremendous progress in the global democratization process within the past decade. Paradoxically, however, human right abuses appear to be on the increase although these rights have been entrenched in the constitutions. This anomaly compels inquiry, hence this research. In this work, the doctrinal approach hinged on exposition and comparative analysis was adopted in order to establish whether there is a uniform trend in the entrenchment of human rights in the various constitutions of selected African countries, having regard to their human rights provisions. These constitutions are critically analysed to ascertain their human rights content in the context of their justiciability. Also, the case laws of these countries on human rights are appraised. This research reveals that the constitutions of most countries of Africa are replete with detailed provisions on human rights but that some also contain ouster clauses, which have made some of the rights non-justiciable. This work equally discovers that most international human rights instruments and treaties ratified by some African countries have either not been incorporated in the municipal laws of the countries or that the relevant enforcement mechanisms have been jettisoned, thus rendering the treaties or instruments worthless for the purpose of human right protection and enforcement among others. The paper recommends a number of measures which, if adopted and relentlessly pursued, would stem the ugly tide of human rights violation and generally improve the living condition of the people of Africa.

Keywords: Legal Basis, Entrenchment, Human Rights, Constitutions, African countries.

1. Introduction

In Nigeria, The fundamental rights provisions were introduced into the independence constitution of 1960, not necessarily in respect of the sanctity and humanity of persons but as a matter of course.¹ The Federal Election of December 12, 1959 had engendered wide spread apprehension by some political leaders who insisted that the guarantee of uninhibited campaign exercise in all parts of the country was critical for the survival of democracy. Beside this, the entrenchment of the basic human rights in the new constitution, it was argued, would eliminate the possibility of invasion of the rights and liberties of the ethnic minorities by the dominating tribes.²

One of the recommendations of the sir Henry Willink's Commission set up in June 1957 to inquire into the fears of the ethnic minorities which were received and adopted at the 1958 constitutional conference held in London, was the inclusion in the 1960 Independence Constitution of a detailed human rights provision, fashioned after the mode of the European Convention for the protection of Human Rights and Fundamental Freedoms.³ Following that recommendation, it was agreed at the conference that

* **ENYA, Matthew Nwocha** is a Professor of Law in Ebonyi State University Abakaliki.

** **EDENE, Thompson U.** is a Lecturer in Ebonyi State University Abakaliki.

¹ EA Udu. *Human Rights in Africa* (Lagos: Mbeyi & Associates (Nig) Ltd. 2011) P. 133.

² TO Elias, 'The British Common Wealth: The Development of its Laws and Constitutions in Nigeria' *London News* Vol. 14, pp. 14-17.

³ Ibid.

human rights should be entrenched in the constitution under these heads: right to life; freedom from inhuman and degrading treatment; freedom from slavery and forced labour; right to personal liberty; rights concerning civil and criminal law; the rights to private and family life; rights concerning religion; rights to freedom of expression; freedom of peaceful assembly and association, freedom of movement and residence; right to compensation for the compulsory acquisition of property; the enjoyment of political right without discriminatory legislation; and derogation from fundamental rights. There are also the provisions for the enforcement of fundamental rights.⁴ It is interesting to note that the successive governments in Nigeria, including military Junta, retained these fundamental rights in order to achieve semblance of legitimacy and to retain power.⁵

Ultimately, the effect of embodiment of a common law right as a fundamental right guaranteed by a written constitution is that the constitutional guarantee is a limitation on the otherwise unlimited power of the legislature which violates a fundamental right guaranteed by the constitution shall be void and of no effect.⁶ Under Section 4 of the Constitution of the Republic of South Africa, the constitution is declared the supreme law of the Republic and any law or act inconsistent with its provisions shall (unless otherwise provided in the constitution) be of no force and effect. Chapter 3, entitled Fundamental Rights, declares many of the traditional human rights. Section 8 provides that ‘every person has the right to equal protection of the laws.’⁷ The forbidden grounds of discrimination under this constitution include race, gender, sex, ethnic or social original, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. The constitution creates an independent and impartial judiciary. It creates a constitutional court which has jurisdiction over all matters relating to the interpretation and enforcement of provisions of the constitution, including any alleged violation or threatened violation of any fundamental right; and any inquiry into the constitutionality of any law, including an act of parliament, irrespective of whether such law was passed or made before or after the commencement of this constitution⁸.

The basis of entrenching all the human rights in the constitution is thus not merely a desire of political or economic liberalism but rather constitutionalism which is based on a conception of popular sovereignty whereby the constitution assures accountability to the people through a range of techniques and institutions, limiting and controlling the powers of government and ensuring respect for human rights entrenched in the constitution.⁹ It is generally expected that once constitutionalised, human rights become legally sacrosanct and inviolable to the extent provided in the constitution. In other words, since the constitution is a legal instrument, the inclusion of fundamental rights and freedoms therein means that they are enforceable in court of law and the court should so interpret them as to give to individuals the full measure of such rights.¹⁰

In Nigeria, the fundamental human rights provided under the Chapter Four of the Constitution of the Federal Republic of Nigeria (as amended) include: right to life; right to dignity of human person; right to person liberty; right to fair hearing; right to private family life; right to freedom of thought conscience

⁴ Ibid.

⁵ EA Udu (no. 1), p. 133.

⁶ DD Basu, *Human Rights in Constitutional Law* (New Delhi, Lexis Nexis Butterworths Wadhwa Nagpur. 2008). pp. 13-16.

⁷ Constitution of the Republic of South Africa, 1994, Section 8.

⁸ Ibid Constitution of the Republic of South Africa 1994, Section 96.

⁹ HJ Steiner & P Alston; *International Human Rights in Context*. (New York, Oxford University Press, 1996) pp. 710-713.

¹⁰ DD Basu: *Human Rights in Constitutional Law* (New Delhi. Butterworths Wadhwa Nagpur. 2008) PP. 132-133.

and religion; right to freedom of expression and the press; right to peaceful assembly and association; right to freedom of movement; right to freedom from discrimination; right to acquire and own immovable property anywhere in Nigeria and right to compensation upon compulsory acquisition of property.¹¹ These basic rights enshrined in the Nigerian Constitution will, for the purpose of this paper form the baseline for comparison of the provisions of some selected constitutional provisions relation to human rights in African countries. In this paper, attempt is made to critically examine the legal basis for enshrining human rights in the various constitutions of African countries using Nigeria, Ghana, Uganda, South Africa and Senegal merely as representative baskets. It goes without saying that the historical and political antecedents of these countries played a pivotal role in the resolutions that led to the constitutionalism of human rights in those states.

2. Legal Basis for Entrenching Human Rights in Constitutions of Nigeria, Ghana, Uganda, South Africa and Senegal

2.1 Right to Life

Under the Nigerian Constitution 1999, the right to life is not a non-derogable right as Section 33 (2) (a) – (c) provides for the derogation of this right in certain circumstances. Thus although Section 33 (1) expressly provides that every person has right to life and that no one shall be deprived intentionally of his life. There is however the proviso that this right can be deprived of a person in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.¹² This right can also be denied of a person in defence of any person from unlawful violence or in defence of property or in order to effect a lawful arrest or to prevent the escape of a person lawfully detained or for the purpose of suppressing a riot, insurrection or mutiny.

Similarly, the Ugandan¹³ and Kenyan constitutions in Sections 22 (1) and 71 (1) respectively, contain provision which are substantially similar to Section 33 (1) of the Nigerian Constitution and also allow for derogation of the right to life under the circumstances. There is however a striking difference with reference to the South African Constitution. Section II of the South African Constitution (Bill of Rights) simply provides that everyone has the right to life without saying more.¹⁴ The implication of this provision has ramifications of far-reaching significance. First, it seems to suggest that the death penalty has been abolished by that constitution. It has been argued by some authors that this posture of the South African Constitution regarding the right to life and dignity of human person has some relationship with the country's historical antecedent which was marked by apartheid. The same is true of the right to freedom from discrimination on the grounds of race, colour, ethnic or social origin, sex, religion or language. A close observation of the Constitutions of Nigeria, Ghana, Uganda and Kenya reveals contrary provisions as these rights are all held to be derogable in certain justifiable circumstance specified in the relevant sections.

The South African Constitution therefore remains the most advanced in terms of the level of human rights development. As stated earlier, this is partly attributable to the country's long history of apartheid and the need now to reunite the various ethnic groups under a truly democratic government as well as the need to secure the confidence and future of all citizens regardless of race, colour sex or ethnicity in

¹¹ Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 44 (1) a-b.

¹² Ibid, Section 33 (1).

¹³ Constitution of Uganda expressly outlaws abortion. Section 22 (2) provides that "No person has the right to terminate the life of an unborn child except as may be authorized by law. There is no similar provision in the Constitutions of Nigeria, Ghana, Kenya or even South African. To that extent, Uganda can be said to have taken the right to life to another level.

¹⁴ Constitution of the Republic of South Africa No. 108 of 1996, Section 11.

that country. South African Constitution includes corporate bodies as juristic persons that are entitled to rights.¹⁵

2.2 Right to Dignity of Human Person

This right is protected by the Constitution of the Federal Republic of Nigeria 1999 (as amended) in Section 34 (1) (a)-(c). The above section provides that every individual is entitled to respect for the dignity of his person and accordingly: (a) No person shall be subjected to torture or to inhuman or degrading treatment; (b) No person shall be held in slavery or servitude; and (c) No person shall be required to perform forced or compulsory labour.¹⁶ This section equally provides a number of exceptions to the rule against “forced or compulsory labour.” Under the Ugandan Constitution, Section 24 contains equivalent provisions with regard to the right to human dignity. The Constitutions of Ghana, Kenya each contains equivalent provisions in regard to the right to respect for human dignity.¹⁷ South African Constitution not only provides for this right but makes it non-derogable or absolute. Section 10 of that Constitution simply provides that ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’

It is submitted that the provision of South African Constitution is rather too wide as it does not outline the various facets of this right as in the other constitution referred to above. It therefore follows that there is no limit to this right and that anything that gives semblance of “forced or compulsory labour” even if it is reasonably justifiable is illegal in South Africa. What is more, this right to respect for the dignity of human person is included in the table or list of non-derogable rights in that constitution.

2.3 Right to Personal Liberty

Section 35 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides for the protection of the right to personal liberty. However, paragraphs (a) – (f) of that subsection establishes circumstances where a person may be deprived of his right to liberty. These include the following:- (a) In the execution of the sentence or order of a court in respect of a criminal offence of which a person has been found guilty; (b) By reason of his failure to comply with the order of a court or in order to secure the fulfillment of any obligation imposed upon him by law; (c) For the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence; (d) In the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare; (e) In the case of persons suffering from infections or contagious disease, persons of unsound mind persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or (f) For the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto.

The above section of the Nigerian Constitution has been quoted in extensor just to analyse the extent of derogation of the right to personal liberty allowed by that constitution in comparison with the other African constitutions. The right to personal liberty is guaranteed subject to the underlisted conditions:-

1. Any person who is charged with an offence and detained, awaiting trial, must not be detained for a period longer than the maximum period of imprisonment prescribed for the offence.

¹⁵ South African Constitution, Section 7 (4).

¹⁶ Constitution of the Federal Republic of Nigeria, Section 34 (1)(c).

¹⁷ Constitution of the Federal Republic of Ghana, Section 15 (1) – (3).

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2. Any person who is arrested or detained has the right not to answer any questions or make a statement until after consultation with a legal practitioner or any other person of his own choice.
3. Any person who is arrested or detained must be informed in writing within 24 hours, the facts and grounds of his arrest or detention.
4. Any person who is arrested or detained on a court order or on suspicion of having committed a criminal offence must be brought before a court of law within a reasonable time.
5. Any person who is in custody or is entitled to bail must be tried within 2 months; while a person who has been released on bail must be released. This right does not extend to a person arrested or detained for committing an offence for which the punishment is death.
6. Any person who is unlawfully arrested or detained is entitled to compensation and public apology, from the appropriate authority or person.

The stipulated time limit for bringing a suspect to trial does not apply to a person who is suspected of having committed an offence for which the punishment is death. Also, any law that authorizes the detention of a member of the armed forces, the Nigerian Police Force or other government security services for up to a period of three months is not invalidated by the provisions of this section.¹⁸ Juveniles accused or convicted of offences must be kept in remand homes or reformatories. Their welfare must always be the underlying principle or aim of their custody.

Right to personal liberty is for every individual legally resident in Nigeria whether he or she is a citizen or an alien. Thus some recent violations of right to personal liberties in Nigeria have been vehemently attacked by human rights activists and lawyers. An example of such violation of the right to personal liberty of alien contrary to Section 35 of the 1999 Constitution is the case of Vaswani Brothers: Deportation case 2003.¹⁹ This is a case where some Indian nationals doing business in Nigeria as importers of diverse brands of goods were forcibly deported to Britain for prosecution on accusation of involvement in money laundering scam and customs duty evasion.

The brute force employed by the Nigerian security agent to effect the expulsion of the Vaswani Brothers is condemnable as it is contrary to Section 35 of the 1999 Constitution and violates Article 13 of the International Covenant on Civil and Political Rights to which Nigeria is a signatory which provides thus:-

An alien lawfully in the territory of a state party to the present covenant may be expelled therefore only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before the competent authority or a person or persons especially designed by the competent authority.

Although the action of the then President Olusagun Obasanjo was justifiable having regard to the activities of the Vaswani Brothers and the need to preserve and protect our economy, sovereignty and national security, the way and manner this was done is what was condemned by proponents of Human Rights Activists.

¹⁸ OP Ikogho, *Nigerian Constitution Simplified* (Lagos: Law Angle Consult 1993) pp. 43-44.

¹⁹<http://www.vanguardngr.com/2009/11/court-declares-deportation-of-vaswani-brothers-illegal/> accessed on 15/6/2016.

A classical Nigerian case of violation of the right to personal liberty involving a Nigeria citizen is celebrated case of Alhaji Darman Shugaba²⁰ which is already known to popular consciousness and need not be explained further here. But suffice is to say that instances of violation of the right to personal liberty abound in Nigeria during the eras of military and democratic rules. The case of the expulsion of Dr. Patrick Wilmot from Nigeria in an agonizing fashion and a host of other cases of Police brutality against even innocent and law-abiding citizen on mere allegation of crime need no specific mention.

In Uganda, the right to personal liberty is provided under Section 23 (1) (a-d) of the Constitution of Uganda. This section is quite similar to Section 35 of the Nigerian Constitution. There are however a few variations with regard to some of the conditions for the derogation of this right to personal liberty when compared with Nigeria Section 23 (3) of the Ugandan Constitution. The said section of the Ugandan Constitution provides that “a person arrested, restricted or detained shall be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention and of his other right to a lawyer of his or her choice.”²¹ This appears to be a similar provision in Section 35 (3) of the Nigerian Constitution that “any person who is arrested or detained must be informed in writing within 24 hours of the facts and grounds for his arrest or detention. However, the term “immediately” as used with respect to information to a detainee of the reason or ground for his arrest or detention points incontrovertibly to uncertainty of time or duration in the Ugandan Constitution.

Under the Kenyan Constitution, Section 72 (2) provides that a person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention. In this case, the expression “as soon as reasonably practicable” is used to indicate the time limit while the section remains silent on the mode of conveying the information.

The South African Constitution provides at Section 35 (2) that everyone who is detained including every sentenced prisoner, has the right to be informed promptly of the reason for being detained.²² Again this does not state the time limit or the mode which a detained person should be informed of the reason for his arrest or detention. However, the section prescribes a maximum period of 48 hours within which a person being detained must be brought before a court. In Ghanaian, the Ghanaian Constitution is substantially similar to those of Nigeria, Uganda and Kenya in so far as the right to personal liberty is concerned. The only difference is that the Nigerian Constitution appears to take this right more seriously than her counterparts, especially having regard to the mode of informing an arrested person, the reason for his arrest and/or detention as well as the time limit within which he must be brought to trial.

2.4 Right to Fair Hearing

The right to fair hearing is provided in Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The section provides that ‘In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to fair hearing within a reasonable time by a court or tribunal established by law and constituted in such a manner as to secure its independence and impartiality.’²³ The Ugandan Constitution in this regards empowers the court or tribunal to exclude the press or the public from all or any proceeding before it for reasons of morality, public order or national security.

²⁰ *Alhaji Darman Shugaba v. Fed. Ministry of Internal Affairs* (1981), NCLR 90.

²¹ Constitution of the Republic of Uganda, Section 23 (3).

²² Constitution of the Republic of South Africa, 1996.

²³ TConstitution of the Federal Republic of Nigeria 1999, Section 36(1). Ugandan Constitution 1995, Section 28(1).

3. Conclusion and Recommendations

The paper has been able to establish that human rights are universal concept but documented in different form by countries especially in Africa. As noted in the paper, the practice of entrenching human rights of the citizen in the constitution is now common among African countries. However, despite the tremendous progress recorded in human right posture in Africa, there are barriers to full realisation of human rights in Africa. Such barriers include non-justiceable provisions against social, economic and cultural rights in certain constitutions of African countries like Nigeria, locus standi, ouster clauses, political instability, cost of litigation. Religion factor, cultural inhibition, among others. It was the discovery of the paper that most international human rights instruments and treaties ratified by some African countries have either not been incorporated in the municipal laws of the countries or that the relevant enforcement mechanisms have been jettisoned, thus rendering the treaties or instruments worthless for the purpose of human right protection and enforcement.

It is therefore recommended that stronger approach for the respect of human rights in Africa as the basis of achieving peace, development and cooperation within the region. This will relentlessly pursued, and stem the ugly tide of human rights violation and generally improve the living condition of the people of Africa.