

AFRICA AND HUMAN RIGHTS: PAST, PRESENT AND FUTURE.

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The root of most Human Rights discussions in Africa stems from Western inputs and developments. This tracing of everything human rights in Africa to sources beyond Africa gives the impression that the idea of the better morality, better religion, better idea of rights as distinct from wrong and better idea of human rights was introduced by foreign forces into our "barbaric practice and tradition". The writer as a prelude to our discussion will be examining the concepts "Africa" and "human rights", going further to refute the erroneous assertion as evidenced supra that human rights is a relatively new concept to Africa, concluding the discussion with a subtle outlook of the African Charter.

1.0 INTRODUCTION

There is very little written by Africanists and Africans on the philosophical and conceptual foundations of human rights in Africa. One can hardly talk of the African philosophy of human rights¹, hence an attempt to discuss it in true African concept might prove a herculean task, since most people's idea of human right is coloured from the perspective of non-Africans.

To illumine, what is Africa? The late Afro-beat Maestro, Fela Anikulapo Kuti sang " I no be gentle man at all, I be African man original!", was he referring to a brutish, cannibalistic, crude, primitive, dark, savage, pagan, ignorant continent of 30.3 million square kilometres and almost 700 million inhabitants of 54 states as opined by some authors?² No. The obvious is that— from the Ubuntu advocacy to Pan-Africanism to Fela's music, the truth has often been offered for free, a truth many would rather dismiss than believe. What is Africa? It has been described thus, "You are not a country, Africa, you are a concept, fashioned in our minds, each to each, to hide our separate fears, to dream our separate dreams".³

2.0 AFRICA'S HISTORY OF HUMAN RIGHT

The conjecture of Abioseh Nicol is that the Africa we know today is the creation, result and outcome of European imagination and adventurism. The Africa we know generally was recreated by African potentates in their own image, so that the political systems that exist in most of Africa

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¹ Shivji(1989:16)

² See Furnace Troy, "The struggle towards human rights in Africa".

³ See Avoided Nicol, "The meaning of Africa"

today remain the outcome of those colonial usurpers. In other words, most of what we have accepted as African is either what was told by others to and about Africans, or deals with how Africans imitate “civilisations” to become accepted. The story of Africa losing its essence, either totally or partly, is in line with the words of the late BBC Journalist, Komla Dumor, “the narrative would always glorify the hunter until the Lion itself learns how to write”⁴. As the first step for the Lion, the writer will be “writing” the concept of human rights in Africa, as Musa Ballah Conteh posits, is best described in three phases.

He argues that human rights, though in a context quite unlike that of the West, were recognised in the first phase of traditional society. In Africa traditional society, the philosophy was much more different. It rests on the understanding that the individual's interest is together with the community's. In John Mbiti's words, ‘whatever happens to the individual happens to the whole group and whatever happens to the whole group happens to the individual’. The individual can only say. “I am, because we are; and since we are, therefore I am”⁵.

The traditional African system of human rights not only recognised the rights to life, rights to freedom of expression and association and religious liberty, it also recognised the obligations to provide for those without the means of sustenance. Rights were derived from duties in the African concept of human rights, based on communalism and collectivism. In traditional Africa, Rights exist because of the communality of humankind.

In similar manner, Yougindra Khushalani, a former human rights officer of the United Nations Center for Human Rights in Geneva argues that traditional Africa does have a coherent system of human rights, including the right to life, the right to receive justice, the right to participation, freedom of religion, freedom of association, and freedom of expression⁶. She asserts that in traditional African culture, the right to life stems from the respect which Africans have for their traditional religious beliefs, and it extends beyond the life of human beings to the life of animals, hence, man kills only when necessary, in self-defense, protection of life of others and possession, provision of food, to perform sacrifice. But respect for life is governed not only by negative rules, such as “do not kill”, but also by responsibilities and obligation to provide for those who do not possess the necessary means of subsistence to ensure their survival. She suggests that human rights, whether individual or collective, were protected by the custom rather than by written texts and also often involved well-defined procedures. The pre-colonial African took cognisance of God, with the realization that God's

⁴ <https://www.Newsghana.com.gh/Komla-dumor-telling-the-African-story-at-tedx-easton/>. Last accessed on May 3rd, 2020

⁵ <https://www.anglicannews.org/blogs/2015/06/i-am-because-we-are-and-since-we-are,-therefore-i-am.aspx>. Last accessed May 3rd, 2020

⁶ Faith in Human Rights: Support in Religious Traditions for a Global Struggle, Georgetown University Press, by Robert Traer

imprint is within the human being, who imperatively acknowledges God's existence and worships accordingly.

The Igbo of Nigeria, for example, recognize that the mystery associated with what is called *amadu* (humankind), which includes humankind's inestimable abilities to produce, build, and to destroy accounts for human origins and sustenance in God (Chukwu). The *chi* in human persons is regarded as the inner presence of Chukwu (God), linking them spiritually with God. God created human beings good, complete and likeable. The *obi* (the heart) is the centre of volition and obedience⁷ and the *eke* on the other hand links people with their ancestors and the life-force of the clan. A child comes to the world with an incarnation of an ancestor's *eke*. This ancestor must be known in order to reveal to the parents the taboos and rituals to be observed in order to ensure the child's survival⁸. As seen above the Right to life was obviously one of the most important rights because they recognised as earlier noted that God's imprint is within the human being.

In a similar vein, there was enshrined in the Umuofia culture, the practice of respecting and honouring human life as depicted by the Late Professor Chinua Achebe in his book 'things fall apart'⁹ where during the funeral of one of the greatest men of the clan, Ezeudu Okonkwo's celebratory gunfire inadvertently killed one of the dead man's sons.¹⁰ The only course for Okonkwo was to flee from the clan. Achebe wrote; the crime was of two kinds, "male" and "female". Okonkwo had committed the female because it had been "inadvertent"¹¹. The distinction between "male" and "female" homicide in the Umuofia culture seems to be similar to the distinction in contemporary criminal law between the offence of murder and manslaughter.

In contrast to Western traditions, African procedures have the character of conciliation, arbitration and mediation rather than a formal judgment. This conciliatory approach reflects the importance of community cohesiveness in traditional societies as well as the likely existence of kinship ties between the litigants which would render a non-consensual decision even more disruptive to family and communal life. The traditional system often sought to discover truth directly rather than through the clash of an adversary process in which each side supports its own position before an impartial and disinterested judge.¹² Furthermore, Khushalani asserts that traditional African society recognized the freedom of movement, the right to work, and the right to education. These rights were derived from the responsibilities of various members of the community. Khushalani concludes

⁷ Nkem Emeghara, "The Dignity of the human person in African belief" *Theology Annual* vol. 14, 1992- 1993, P.126-137.

⁸ *Supra*

⁹ Achebe. C (1958), 'Things fall apart'. Every man's library, New York.

¹⁰ *Supra*

¹¹ *Ibid* footnote 9, Chapters 12-13

¹² Third world attitudes towards International Law: An Introduction, edited by Fredrick E. Snyder and Surakiart Sathirathai, Martinus Nijhoff Publishers, page 333

that the traditional African society, beyond its recognition of individual and group rights, provided, through consensual procedures, "an almost sacred protection" of fundamental human rights.

The denial of our aforementioned rights as outlined severally above, first by foreign slave traders and then by colonial powers was mentioned and famously quoted by the Late Professor Chinua Achebe, the great illustrious son of Africa, in his popular book, "Things Fall Apart". According to Achebe,

"The white man is very clever. He came peacefully and quietly with his religion. We were amused at his foolishness and allowed him to stay. Now he has won our brothers, and our clan can no longer act like one. He has put a knife on the things that held us together and we have fallen apart"¹³.

The coming of the white man led to the second phase of the development of human rights concept in Africa, beginning with the latter part of the 19th century. Human rights claims were advanced by African intellectuals on behalf of the black peoples of Africa, for example addressing the UNGA in 1961, Dr. Kwame Nkrumah recalling the days of imperialism, exploitation and degradation said "These days are gone forever - and now. I am speaking with the voice of freedom proclaiming to the world the dawn of a new era.". In this second phase, there was little concern for universal or collective rights, but rather the pursuit of freedom and dignity by the 'black man'.

The third phase in the evolution of the idea that human rights involves a synthesis of human and people's rights. Conteh argues that this began with the adoption of the Universal Declaration of Human Rights and was reinforced by effective decolonization¹⁴.

3.0 UNIQUE FEATURES, CHALLENGES AND POSITIVES OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS¹⁵

1. The first feature is that the African charter is predicated on the principle of cultural relativity of the human rights provision of the UDHR, the African charter unlike other regional instruments did not blindly follow the provisions of the UDHR however it provided for the rights of the African peoples bearing in mind the region's peculiarity and background. This is largely due to the fact that by the time it was made the frontiers of human rights have been expanded and drafters of the charter have learnt from the shortcomings of other regional instruments. According to the OAU report on the African charter "all that can be said about the document is that it strives to secure a certain flexibility, equilibrium and to emphasize certain principles and

¹³ *Ibid* footnote 9, Chapter 20

¹⁴ The colonization disrupted the existent system of Human rights, and after years of the fight against colonization, the earlier forcefully taken inalienable and universal human rights were 'given' back.

¹⁵ The unique features discussed herein may not be exhaustive

guidelines of our organization as well as the aspiration of the African people. It seeks not to isolate man from the society but as well that society must not swallow the individual...”¹⁶

2. The Charter recognises the indivisibility of all rights. All ‘generations’ of rights are recognised. It not only provides for first generation negative rights i.e. civil & political rights but it also provides for economic, social and cultural rights and makes them justiciable see *SERAC v Nigeria*¹⁷ where the court held that ‘Clearly, collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any diverse rights contained in the African Charter and it welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective’¹⁸.
3. No derogations are allowed in respect of the rights provided in the African Charter as it does not contain a derogation clause. This is evidenced in *Media Right Agenda v Nigeria*¹⁹ where the African commission held that “the rights under the African charter do not contain a derogation clause therefore the limitation on the rights and freedoms enshrined in the charter cannot be justified by emergencies and special circumstances the only legitimate reason for limitations to the rights and freedoms of the charter are found in Article 27(2)”.
4. The African charter recognizes some third-generation rights as belonging to all people. This recognition of peoples’ rights stands out as one of the radical and controversial innovations of the African charter as it was perhaps the first time the concept of peoples’ rights is included in a binding legal instrument or charter. This concept of peoples’ rights emphasizes collective or solidarity rights for larger groups or the society or community including state to which the individual is interlinked. It also reflects the African culture of mutual communalism as opposed to the western culture of nihilistic individualism and privacy²⁰. Corollary to this rights are the right to development, free disposal of natural resources, the rights of special groups, and the right of peoples to self-determination. In the *Endorois case*, it was held that “the African commission wishes to emphasise that the charter recognises the rights of peoples.” The rationale for including the right to development is the that realistically speaking, some African states are still underdeveloped or at best developing.
5. Imposition of duties on both states and individuals. It is significant and laudable to reference the

¹⁶ OAU Doc AHG/102/XVII, Nairobi, June 1981.

¹⁷ (2001) AHRLR 60(ACHPR) 2001 Para 68.

¹⁸ *Supra*

¹⁹ (2002) AHRLR 200 (ACHPR) 1998

²⁰ Rembe, N.S. The Systems of Protection of Human Rights Under The African Charter On Human And Peoples Rights: Problems and Prospects, Human And Peoples Rights Monograph Series No.6(Lesotho Institute Of South African Studies)

point that the African Charter is the first binding instrument to stipulate and to provide for some individual duties to the family, society, and the state for further enjoyment of the right it confers. This is in consonant with the aforementioned claim that the traditional African society is based on obligation as the organising principle of kinship and family relationship. Hence under the African charter, individual rights and freedoms are to be exercised with due regard to the rights and freedoms of others and the collective interests.²¹

6. The African charter stands as the only regional charter that strikes a definite balance between law and morality. There is copious reference to morality in the charter, thus showing the uniqueness of the charter and exemplifying the external importance that Africans attach to morality in their personal, national and international affairs.
7. Although the African charter like its American and early European counterpart provides for a human right commission i.e the African commission on human and peoples' rights. The African charter goes further as the commission has both promotional protective function and not restricting who may file a complaint with it. It provides that signatory states, individuals, groups of individuals and non-governmental organizations may file a complaint whether or not they are the victims of the alleged violation. In *African commission v Kenya*²², the court reiterated this when an attorney raised the issue of locus standi of the plaintiff to bring the action. This contrasts with the European and American procedures.

Despite these laudable unique features, the African charter is still froth with a some challenges which impede the development of Human Right in the continent, these challenges include;

1. The normative flaws of the African charter. Although it is evident that the charter is tailored specifically in line with the African peculiarity and the African context, it is still contentious as it emphasises and focuses on social, economic and cultural rights, resulting in an inadequate coverage of civil and political rights. An example of this is the lack of explicit recognition of the right to privacy and the right against forced or compulsory labour. The absence of right to privacy has been defended on the basis that per the African peculiarity, privacy is not considered to be of importance. Furthermore, Article 7 and 13 on the right to fair trial and the right to political participation are considered to be inadequate and incomparable to international standards.
2. The Charter is fraught with excess claw-back clauses which permit the state in its almost unbounded discretion to restrict its treaty obligation or the rights guaranteed under the African

²¹ The preamble of the ACHPR provides that the enjoyment of the rights and freedom also implies the performance of duties on the part of everyone.

²² (2001) AHRLR 60 (ACHPR) 2001 Para 68.

charter. Despite the charter containing a derogation clause allowing a country to temporarily abstain from their obligations under a treaty in situations of emergency, it still contains claw-back clauses which may be applied even in normal situations, so long as national law is passed to that effect, as national laws are superior, hence human rights protected under this charter are subject to and can be limited or violated by draconian domestic laws. For example, the right to liberty and security in Article 6 may be deprived for reasons and conditions previously laid down by the law, likewise, Article 9(2) provides that “every individual shall have the right to express and disseminate his opinions within the law”, Article 8 providing for the freedom of conscience, profession and religion is subject to law and order of the state party. They are also contained in its provisions for the right to life²³; on association²⁴; on assembly²⁵; on freedom of movement and residence²⁶; and on the right to participate in government²⁷. These Claw-back clauses are detrimental to the protection of human rights as they place the state’s duty of promoting, protecting and fulfilling these rights to be discretionary, since it is subject to national laws, which can be capricious, draconian and Orwellian. It gives the rights by the right hand, and take them back with the left hand.

3. Structural weaknesses have also plagued the African human rights system since its inception²⁸. The African Commission consists of eleven members chosen from amongst African personalities of the highest reputation, with the primary function of the commission being “to promote human and peoples’ right and to ensure their protection in Africa²⁹,” however its capacity and effectiveness lack in potency as the commission’s recommendations are only advisory and not binding, hence resulting in a problem of lack of authority of the commission in carrying out its protective function. In times past, the commission’s recommendations has been ignored blatantly, one of which rushes to mind is the Ken Saro-Wiwa’s case where Ken Saro-Wiwa alongside a number of other activist were sentenced to death in Nigeria despite the commission’s request for them to be release, which was ignored.
4. Another defect is the hostile environment of the African state: The sincerity of African government to discharge their good faith and voluntary obligations under the Charter may be questionable as it is not cruelty to consider the political elite as lackadaisical about human right protection of the citizenry. They advertently place more emphasis on development and political

²³ Article 4 of the African Charter on Human and Peoples’ Rights

²⁴ *Supra* Article 10

²⁵ *Supra* Article 11

²⁶ *Supra* Article 12

²⁷ *Supra* Article 13

²⁸ Makua Muta, The African Human Rights Court- A Two Legged Stool?

²⁹ *Ibid* footnote 23, Article 45 (1)

stability at the expense of human rights, most of them relegate human rights and its violations to election period discussion, all to gain access to power.

5. A drawback in the implementation of the charter is linked with the practice of African state parties asserting their sovereignty by stating that the national laws supersede the charter and international instruments, resulting in the charter being dormant and unable to 'protect individuals from the governments who are, in reality, the greatest violators of the human rights and freedoms it recognises and enshrines.

Despite the various drawbacks of the charter, the charter has some irrefutable contributions and advantages which are important for the future of human rights protection.

1. The Charter provided a common avenue utilised by civil societies and activists for the fight against the violation of Human rights as well as a source of inspiration for African human rights defenders and civil society activists.
2. The Charter is affecting, even if slow, how human rights are respected and viewed in some countries, it has aided in asserting the universality of human rights, that human rights are not new to Africa.
3. The Charter is the strong foundation for Africa's human rights development. Since its adoption, series of treaties, protocols and declarations have been built atop it, such as the Protocol on the Rights of Women in Africa; the African Charter on the Rights and Welfare of the Child; the African Charter on Democracy, Elections and Governance; the African Union Convention on Preventing and Combating Corruption; Declaration of Principles on Freedom of Expression in Africa; Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa, the Protocol to the African Charter on Human and Peoples' Rights adopted in 1998 which established the African Court on Human and Peoples' Rights. y 2004. The Charter has and will continue to form the foundation and basis of the development of human rights in Africa.
4. Despite the problem of the commission which ranges from financial and political hindrances to bindingness of the recommendations of the commission, it has made the administration of matter brought before it and the Court easy, by harmonizing their rules of procedure to include issues such as transfer and referral of cases between the two institutions and making collaboration easy and possible where there is a request for interpretation of the Charter or request for advisory opinions.

4.0 CONCLUSION

The adoption of the Charter years ago was not initially considered to be a significant development. The Charter was even mocked by critics, one of whom even said, “We cannot and should not continue to delude ourselves that we have a human rights system. What we have is a façade, a yoke that African leaders have put around our [Africans’] necks”³⁰. The Charter has come a long way from its birth, and even though its movement has been slow, it has indeed moved, maybe not with the desired vigour and speed.

As the Society and its structures are continuous and dynamic, so is the construction and definition of human rights norms, and for a positive development of anything dynamic, a good foundation is as important as the development. In this case, the good and solid foundation, being the Charter is existent, but despite its applauses, advantages and uniqueness, there is still much progress to be made before the charter can be fully credited with shaping a human rights culture in Africa. The flaws discussed above can only be corrected through its reformation and a good human rights culture in the governing class. Despite the flaws of the charter, it is applauded for having provided a solid foundation upon which a human rights culture can be fostered, acting as an assurance on the future of Human Rights in Africa. The African Charter can be said to be an application of the UN Declaration of Human Rights to the African perspective, hereby laying a strong for the development of Human rights culture here. ‘It is a legal instrument ‘written by Africans for Africans’.

³⁰ <https://www.vanguardngr.com/2011/11/african-charter-on-human-and-peoples%E2%80%99-rights-from-last-to-next-30-years/amp/>