



An Assessment of the Strengths and Weaknesses of the African Human Rights System in dealing with massive human rights violations.

Emmanuel Ayoola

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Following the adoption of the AU Transitional Justice Policy (AUTJP) in 2019, the Fund was established to ensure that the Policy achieves its objectives of putting African communities and countries on the path to sustainable peace, justice, reconciliation, social cohesion, and healing after experiencing mass atrocities.

The ATJLF was established to support transformative and pioneering interventions in transitional justice processes in Africa. We support community-based, survivor-led transitional justice projects and processes in Cote D'Ivoire, The Gambia, Guinea, Liberia, Mali, North-eastern Nigeria, and Sierra Leone. Through the EU-AU supported Initiative for Transitional Justice in Africa, we will also be providing financial and technical support to organizations outside West Africa.



ABOUT THE AUTHOR

Emmanuel Ayoola

Emmanuel Ayoola is a Human Rights Lawyer and Transitional Justice Practitioner. He is a Grants and Programs Officer at the Africa Transitional Justice Legacy Fund). His portfolio covers The Gambia, Northeast Nigeria, Sierra Leone and the African Union. Emmanuel has worked across a broad spectrum of areas including; transitional justice, human rights campaigns, activism, project management, grants management, movement building, and community engagement. Before joining ATJLF, he worked with Amnesty International and Broken Chalk. During his tenure at Amnesty International, he played a pivotal role in developing the first-ever youth strategy for the organization in Nigeria. In addition to his roles within these organizations, he has contributed his expertise by providing support to the African Union on issues related to transitional justice. Emmanuel holds a Bachelor of Laws degree from the University of Lagos, Nigeria, and a Master of Laws degree from the University of East London, UK. He also has a diploma in 'Investigating and Prosecuting International Crimes' from Leiden University, Netherlands.



Introduction

In a bid to effectively discuss the strengths and weaknesses of the African Human Rights Systems, it is imperative to look into the past and consider the history of how the African human rights architecture came to be. This can be easily traced back to the establishment of the Organization of African States in 1963 which was borne out of a desire to promote regional cooperation and decolonization in Africa. While the OAU Charter recognized human rights, its focus was however more on states' sovereignty, territorial integrity, and non-interference in the affairs of states.¹ Human rights issues were kept under the exclusive purview of states (Mangu, 2005) They were not given priority in the agenda of OAU. It can be argued that under this dispensation, the rights of states outweighed the rights of people. (Isanga, 2013) . This inadequacy in addition to the reality of globalization encouraged the quest for the amendment of the OAU Charter.

Therefore, on 9 September 1999, at the 4th extraordinary session of the OAU Assembly in Libya, it was decided the AU would be formed to replace the OAU.² This development was a significant milestone in the history of human rights in Africa and it placed human rights directly on the agenda of the AU. (Heyns, 2004) .

The African human rights system has since developed to include treaties and principles. The system also includes special, independent organs of the African Union (AU) that are tasked with the responsibility of promoting and protecting human rights on the African continent. Under the auspices of the AU, three primary organs are, the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (African Court), and the African Committee of Experts on the Rights and Welfare of the Child (Child Rights Committee). Each body is charged with specific mandates. In addition to these, there are also other regional bodies protecting human rights. The first is the Economic Community of West African States (ECOWAS) Community Court of Justice. This court has jurisdiction to determine cases between member-states in addition to also determining cases involving human rights violations. Another of such regional bodies is The East African Court of Justice (EACJ), an organ that although lacks jurisdiction on individual complaints of human rights violations; but still lists in it establishing treaty, fundamental guiding principles that include the recognition, promotion, and protection of human rights.³ The Common Market for Eastern and Southern Africa (COMESA), is also another regional organ that recognizes the human and peoples' rights identified in the African Charter on Human and Peoples' Rights.⁴

This paper will in the next part, examine the arguments of scholars on the strengths of the African Human Rights System in dealing with cases of mass human rights violations.

Strengths of the African Human Rights System

The African Charter which is a fundamental instrument for the Human Rights System in Africa possesses some potential strengths for the promotion of human rights on the continent. The African Charter strongly enshrines a notion that rights are interdependent and indivisible (Moussa, 2009) by codifying them in a single instrument.

¹ OAU Charter, art III

² Constitutive Act of the AU, Preamble

³ East African Court of Justice, Jurisdiction, http://eacj.org/?page_id=27; Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000), 2144 UNTS 255, art. 6(d), available at http://eacj.org/?page_id=33.

⁴ Common Market for Eastern and Southern Africa, About COMESA, <http://about.comesa.int/>; Treaty Establishing the Common Market for Eastern and Southern Africa (adopted 5 November 1993, entered into force 8 December 1994), 2314 UNTS 265, art. 6(e), available at http://www.comesa.int/index.php?option=com_content&view=article&id=1337&Itemid=100



Furthermore, the Charter includes third generation rights such as the right to national and international peace and security (Art 23(1)),⁵ the right to a general satisfactory environment (Art 24)⁶ and the right to economic, social and cultural development (Art 22)⁷ thereby giving due attention to these rights and granting them the important status they deserve in Africa. The importance of these rights was alluded to in *SERAC & Another v Nigeria*⁸ where the court held that ‘...collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa’.⁹

Also, the Charter has arguably developed an approach that is contextual for Africa.¹⁰ It recognizes the position that human rights norms may vary ‘...with time and according to regional cultural variations’.¹¹ Thus, the African Charter responds to the historical context¹² of Africa by enshrining values that Africa needs for the full protection of human rights.¹³

Another strength of the Africa human right system is the wide jurisdiction conferred on the African Court on Human and People’s Rights in Article 3(1) of the Protocol to the African Court on Human and People’s Rights. This allows the court, by extension to also rely on any human rights instruments ratified by the States concerned.

Despite these potential strengths, the African human rights system is however still plagued by the issues of institutional weaknesses and ineffectiveness; cultural challenges and lack of political will to adequately protect human rights by states. There exists a gulf between the theory of human rights in Africa and its practice. This paper in the next section will examine some of these weaknesses.

Weaknesses of the African Human Rights System

i. Contextual relevance of the African Charter

The argument that the African Charter is specifically developed to align with the contexts of Africa seems like an argument that cannot be controverted. While this may be generally true, it can also be argued that the argument may not be entirely true. There are portions of the Charter that do not adequately reflect Africa’s context. For instance, the African Charter places a strong emphasis on social, economic and cultural rights, with a rather inadequate coverage of civil and political rights. Also, the Charter does not explicitly recognize the right to privacy and the right against forced or compulsory labour. Furthermore, Article 7 and Article 13 concerning the right to a fair trial¹⁴ and the right to political participation¹⁵ have limitations placed on them by the operation of claw-back clauses. These clauses ‘permit a state, in an almost unfettered liberty, to restrict its obligations to the human rights provided and protected by the African Charter’. In most African countries, national laws are accorded primacy over the Charter. This therefore means that human rights in states can be violated despite being protected by the Charter.

The implementation of the Charter is hindered by African states asserting their sovereignty by permitting national laws to supersede the Charter and international instruments. As a result, the Charter is unable to ‘protect individuals from their governments who are the greatest violators of the human rights freedoms it recognizes and enshrines’.¹⁶ Subsequently, the African Charter does not have universal applicability. This is also

⁵ African Charter on Human and Peoples’ Rights 1981, Art 23(1)

⁶ African Charter on Human and Peoples’ Rights 1981, Art 24⁷ African Charter on Human and Peoples’ Rights 1981, Art 22⁸ *SERAC and Another v Nigeria* [2001] AHRLR 60

⁹ *SERAC and Another v Nigeria* [2001] AHRLR 60, [68]

¹⁰ Julia Swanson, ‘The Emergence of New Rights in the African Charter’ [1991] 12 NYL Sch J Int’l & Comp L 307, 322¹¹ Julia Swanson, ‘The Emergence of New Rights in the African Charter’ [1991] 12 NYL Sch J Int’l & Comp L 307, 308¹² Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2011) 71

¹³ Makau Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ [1994-1995] 35 Va J Int’l L 339, 380

¹⁴ African Charter on Human and Peoples’ Rights 1981, Art 7

¹⁵ African Charter on Human and Peoples’ Rights 1981, Art 13

¹⁶ Ebou Bondzie-Simpson, ‘A Critique of the African Charter on Human and People’s Rights’ [1988] 31 Howard LJ 643, 661



the case with regards to Article 68¹⁷ of the Charter whereby an amendment will take effect and come into effect in States only if such variations have been accepted and recognized by the local constitution or laws. An example of a state that places precedence on domestic laws is Kenya. By virtue of Article 2 of its new Constitution.¹⁸ It was ruled with reference to the provisions of the African Charter in the case of *Pattni & another v Republic*¹⁹ that ‘the constitution as law is paramount’.²⁰ The Court in its words argued for the precedence of the Kenyan constitution over the African Charter.

‘...although more African countries are incorporating a Bill of Rights into their constitutions, we cannot and should not continue to delude ourselves that [Africa has] a human rights system. What we have is a façade, a yoke that African leaders have put around our necks’.²¹

These Claw-back clauses are harmful to the protection of human rights and further place restrictions on civil and political rights which are already suffering from an inadequate coverage under the Charter. This in turn poses a major threat to the promotion and protection of human rights in Africa.

ii. Faulty Oversight System

Heads of states under the African Charter are charged with exercising authority over the commission. The fact that these Heads of States are in most cases, usually the violators of human rights create a faulty oversight system and this ‘undermines the legality of the system’²². This has been one of the major set-backs for the protection of human rights on the continent. This conflict of interest creates a lack of political will to drive processes that will implement the protection of human rights. The substantive content of the charter needs to be altered in order to address this issue.

iii. Institutional Weaknesses

The African human rights system has suffered institutional and structural weaknesses since its inception.²³ Institutions like the African Commission and the African Court of Justice are charged with the responsibility of implementing the African Charter. However, their effectiveness in implementing the Charter has come under question. Scholars have argued that the African commission in practice, lacks the ability to provide any effective remedy. It has been further argued that the recommendations of the commission are seen more as advisory than they are seen as binding. This was clearly seen in the Ken Saro-Wiwa case where Saro-Wiwa was sentenced to death alongside other activists. The Commission made a request to the Nigerian government to release them. This request was ignored.²⁴ This shows an absence of authority of the Commission in executing its functions. This set-back also extends to the implementation of article 62²⁵ which requires states to ‘submit every two years...a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter’.²⁶ Despite the fact that this requirement is an obligation, the Commission remains incapable of compelling states to submit this report. It is clear that there needs to be a distinct separation of powers and independence of implementing institutions from the political institutions of states.

¹⁷ African Charter on Human and Peoples’ Rights 1981, Art 68

¹⁸ The Constitution of Kenya 2010, Art 2

¹⁹ *Pattni & Another v Republic* [2001] KLR 262

²⁰ *Pattni & Another v Republic* [2001] KLR 262

²¹ Vincent Obisienunwo Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff Publishers 2001) 325

²² Christof Heyns, ‘The African Regional Human Rights System: The African Charter’ [2003-2004] 108 Penn St L Rev 679, 695

²³ Makau Mutua, ‘The African Human Rights Court: A Two-Legged Stool?’ [1999] 21 Hum Rts Q 342, 343

²⁴ <www.news.bbc.co.uk/onthisday/hi/dates/stories/november/10/newsid_2539000/2539561.stm> accessed 17 October 2021

²⁵ African Charter on Human and Peoples’ Rights 1981, Art 62

²⁶ African Charter on Human and Peoples’ Rights



iv. Vagueness and lack of clear definition

The vagueness and lack of clear definition in some portions of the Charter is a weakness the African human rights system has faced. This has enabled State parties to neglect their obligations under the Charter. A clear example is the definition of the right to life under the Charter. While the Charter recognizes this right, it is, however, vague with the definition of the concept of ‘human being’. This vagueness has created a lacuna which in turn has left the definition of the concept to the subjective choice of States or individuals.

Conclusion

Conclusively, the African human rights system though well-structured in terms of formation remains ineffective due to weak enforcement mechanisms and a myriad of other challenges earlier discussed. The African Charter certainly provides a potential for an improved human rights regime in Africa. With effective enforcement and necessary amendments to the African Charter, the African human rights situation is bound to develop positively.

Furthermore, there is an imminent need for an unambiguous distribution of roles and responsibilities among institutions involved in the implementation of the Charter. This clarity will contribute positively to increasing the cooperation and efficiency between these institutions. For an improved human rights situation in Africa, the following recommendations are suggested:

- i. **Adoption of an all-inclusive approach to human rights:** Despite the fact that some rights are referred to as second-tier rights, and regarded as unenforceable, the AU should avoid the polarization of rights and ensure that all rights regardless of their nature are protected. An approach that combines economic, social, and cultural rights with civil and political rights will foster the development of a just and equitable social contract between the State and the citizen.
- ii. **Institutional Integration:** The integration of human rights standards and norms in the AU programs and activities, including in election observation, peacekeeping missions, and conflict management can be a major booster for the promotion of human rights on the continent.
- iii. **Amending flawed provisions:** It is important to acknowledge that the African Charter contains some normative flaws that ought to be addressed urgently. For example, the right to life as provided under the Charter should be pronounced an absolute right, not capable of being subjected to restrictions.
- iv. **Review of Claw Back Clauses:** The, ‘claw back’ clauses give the liberty to member-states to place restrictions on the enjoyment of human rights and must be reviewed and amended. The presence of this provision makes the abuse of such powers inevitable.
- v. **Make rights non-derogable:** There is a need to insert a provision on non-derogable rights. Also, provisions specifying the categories of derogable rights ought to be specified. A clear provision in both cases will curtail the propensity of abuse by State members.

In addition to the above recommendations, it is trite that the promotion of transitional justice in Africa will help both national and regional institutions better deal with massive human rights violations on the continent. Transitional justice which refers to processes aimed at addressing legacies of conflicts, atrocities and gross human rights violations is well suited for Africa – a continent that has been ravaged by civil wars, armed conflicts, and autocratic seizures of powers. The absence or non-implementation of transitional justice policies and frameworks has often made it difficult for Africa to address these legacies of atrocities. The domestication of the African Union Transitional Justice Policy (AUTJP)¹ across Africa can potentially make African human rights systems better positioned to tackle the scourge of massive human rights violations. While the recommendations above are by no means an exhaustive list of the solutions to the challenges plaguing human rights protection in Africa, they are certainly some of the prominent steps that could be taken on the road to ensuring the full protection and promotion of human rights in Africa.

²⁷ https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf



📍 Accra, Ghana Adjiringanor - East Legon

☎ +233 302 526 466

✉ info@atjlf.org