

Safeguard Of People's Rights Under The African Court: Challenges And Resolve

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Abstract

The African Human Rights Court was established on January 25, 2004. The paper is aimed at examining the development of the Court both on normative and institutional approaches, because these has resultant impact on the African Court. Major among other impacts is the transformation of the Organization of African Unity (AU), which adopted and created the Court of Justice. The objective of the paper is the examination of the developments of the Court with particular focus of the determination of the place of the African Court within the context of the African Union and the auxiliary impact it created thereafter. Meanwhile, the Constitutive Act of the Union is silent on the welfare of the African Human Rights Commission, rather, it convertly established the African Court of Justice. At its creation, the composition of the Court was yet to be determined since its establishing Protocol which was to compliment the mandate of the commission was yet be agreed upon. Irrespective of the above infelicities, the Court has the potency of better protecting people's rights required. It promotes the resultant outcome on human rights issues from its inception as it makes recommendations and binding decisions. The establishment of the African Court of Justice gave birth to a novel epoch of liberation in handling cases of human rights which was opposed to the secrecy that beclouded the proceedings of the Commission, due to its restrictive preservative approach as a requirement to the prosecution of human rights cases. The composition of the Court stands out as one of its bane because its Justices are appointed, but the president who is appointed to serve on part-time basis. This methodology underscored the integrity bestowed on the Court. In conclusion, it was stated that the merger of both the Human Rights Commission and the Court on Human and Peoples' Rights could promote rights of African citizens and provide accommodate for the shortcomings of the criteria to the charter on which the Court is established. A call for the merger to be seen from the perspective of administrative convenience was recommended to facilitate distribution only, to avoid jeopardizing the effort and or energy that was invested in creating the Court.

Keywords: African, Court, Human Rights, Challenges, Resolves.

Introduction

In 1961, the idea of establishing an African Court on Human and Peoples' Rights was considered, which resulted in the Protocol of the African Charter on Human and Peoples' Rights. Its Protocol, which was adopted on June 10, 1998 by then Assembly of the defunct Organization of African Unity, entered into force five years later, on January 25, 2004. (Viljoen 2004: 3). The delay for its ratification was caused by member states' piecemeal approval of the Protocol at its 24th session in 1998.

Many normative and institutional developments were documented during the Protocol's adoption period, as well as when it entered into force. Notable among these developments is the transformation of the Organization of African Unity (OAU) to become African Union (AU) on July 9, 2002, in Durban, South Africa, with its implementation of the Constitutive Act, 2001. The Act established, among other organs, an African Court of Justice (Article 5(1), establishing yet another regional judicial machinery, the implications of which on member states cannot be overstated. As a result, the African Union considered merging the African Court of Human Rights and the African Court of Justice (African Union, 2005). The Court is based in Arusha, Tanzania, and its mission is to regulate the violation of human rights in Africa. It is composed up of eleven judges chosen by the Union from a pool of candidates nominated by member states.

The paper examined the developments that occurred and their corresponding effects. The paper determined the Court's problems and prospects within the confines of the AU, as well as the impact of these innovations on the union. The discourse was thematic, with the following topics covered: a description of the Court's attempt in the protection of people's right; an examination of the Court's impact factor; problems and prospects; and conclusion and making recommendations for further research.

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Safeguard of Human Rights

Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights ("Protocol") established the African Court on Human and Peoples' Rights ("ACHPR"). The Court's main goal is to protect human rights and advance the mandate of the African Charter on Human and Peoples' Rights (the "Charter") by strengthening the African human rights protection system.

The majority of member states have recognized the Court's jurisdiction to hear cases that involves non-governmental organizations and individuals on contentious and advisory jurisdiction, respectively. Article 3 of the Protocol of the Court, provides it with jurisdiction to entertain contentious issues and empowers it to assume jurisdiction in cases brought before to it for adjudication and application of the Charter, the Protocol, and any other relevant human rights machinery which is recognized by member states, as parties in cases. Article 4 of the Protocol, on the other hand, provides that the Court may, at the request of an African Union member state or any organization recognized by the African Union, provide an opinion on any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the African Commission on Human and Peoples' Rights.

Before the establishment of the Court, the African Commission on Human and People's Rights was saddled with the responsibility to exercise oversight function on the rights, as enshrined in the African Charter. Harrington (2004), stated that the Protocol of the Charter for the establishment of African Court on Human and People's Right came into being (Harrington, 2002: 308). In the words of Viljoeu, the African Commission decisions are recommendatory and subject to the ratification of the Assembly of Heads of State and Government of the Organization of African Unity (OAU). This is because it had a quasi judicial status *ab ini tio* (Viljoeu, 2004:5). Mutua (1999), mentioned that, irrespective of the extensive powers of the commission, ranging from promotion, protection and interpretation of any assigned responsibility, the OAU under Article 45, states that, the Charter on Human and People's rights and the commission are faced with the challenge of their inherent status which led to a consensus between Non-Governmental Organization (NGOs), the academia and state actors on the need (Mutua, 1999:352), for the establishment of human rights court. He further stated that the Secretary General of the OAU was directed by the Assembly to convene a submit of professionals, in partnership with the Commission to x-ray the need for the establishment of the African Court on Human and People's Rights, "with the aim of ameliorating the shortcomings of the African Commission on Human and People's Rights" (Mutua, 1999:352). Several submits of professional and meetings of the OAU member states Attorneys General resulted to the Draft Protocol of the Court that was adopted by Council of Ministers of the OAU in June 1998, when it was ready for signatories by the participants (Viljeon, 2004:4; Harrington, 2002:309; Nmahielle, 2003:225).

Article 1 of the Protocol established the Court as a compliment to the Commission, and its establishment signified a watershed in the African human rights regime. This is discernible because the Court is empowered with the jurisdiction to interpret both the character and also any other instruments which are ratified by the parties (Id, article 3(1)). These developments came not without both prospects and difficulties to the citizen's rights in Africa. It is followed by examination of the impact of the developments on the status of the Court. Thereafter, focus shall be directed at the prospects and challenges of the Court.

Article 4(1) of the Protocol provided for two series of proceedings. Contested judgment and legal opinions. These could be at the behest of member states of the African Union, executive bodies of the African Union or any organization of African extraction that is recognized by the African Union. The Court has the jurisdiction on any case filed by any member state and every state is duly bound to acknowledge it. Article 5 (1) of the Protocol provides that the Court assumes jurisdiction whenever cases are filed by either of the African Human Rights Commission; the State Party against which the complaint has been lodged at the commission; the member state party to the suit which who has lodged a complaint to the commission; the member state whose citizen's right is violated; or an African intra governmental institutions. Article 5(3) conversely provides that the court resumes discretionary jurisdiction that requires an additional corresponding declaration of recognition.

Article 34 (5) provides that, a suit which is in the Court attracts optional jurisdiction only when the member state which is the accused has made an acceptance by declaration, recognizing the competence of the court. Zimmerman and Baumler 2010. mentioned that where there are serious and exceptional cases of human rights violations, the first two drafts Protocols provided further that, access as to be granted to the individual irrespective of the existence of any declaration by the home state of the victim. It was then stated that the right to file a suit should depend on submitting corresponding declarations of recognition competence (Zimmerman and Baumler, 2010: 43). This provision suffices in as much as a sufficient number of states submit corresponding declaration of recognition of competence. The reluctance of states to submit corresponding declaration allows the African Human Rights Commission to present proceedings. This gives room to leverage the Court to adjudicate on cases that involve considering that victims lodge a request for proceedings with the commission for onward transmission to the Court. It may also reduce pressure on the Court, but the commission have not been observed to meet with the mandate of this possibility.

By the combine provisions of Article 3 and Article 7, the Africa Court has jurisdiction to preside over matters where any of the parties are sued for breach of human rights. The cases entertained by the Court can both be on a breach of a charter or contravention of agreement on the protection of human and people's rights in which the state party has approved. The case of Africa as an example, also involves the convention which governing the specific areas of interests, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Women rights in Africa which was ratified in 2003. Furthermore, the level accommodates the international Convention on Economic, Social and Cultural Rights and that of the United Nations Convention against torture.

The Impact of Protecting Human Rights

The renaming of OAU to AU was received with divergent opinions by scholars, human rights advocates and policy makers due to the contradictory ideas about the development. In the Constitutive Act of the OAU agenda, 2001, human rights were prominently captured, while the African Union, and the protection of human rights remained mere speculation. Indeed, some academics viewed the establishment of a new judicial body for the Africa region as duplication of institutional framework for the protection of people's rights which has the potency of creating jurisprudential conflicts in the continent and may result to "forum shopping" syndrome; (Udombana, 2008:811). Some other scholars view the situation as sacrosanct, which would systematically strengthen the protection of people's right in the African continent, Doeber (2003), opined that, "the current system for the protection of human rights in Africa, which appears will continue under the auspices of the African, is headed in the right direction".

The African Court of Justice was created at the transformation from the OAU to the AU. After the ratification of the Protocol during the Maputo submit in July, 2003, the African Union has operated with two judicial institutions, hence the need for proper clarification on the provisions of Article 19 of the Protocol on the African Court of Justice. The Court was saddled with the responsibility of adjudicating on disputes which are related to the application and interpretation of the Act of the African Union and Pacts which ended with the abolition of the OAU. Also, disputes concerning international law are within the purview of the Court of Justice. Whereas, the African Court of Justice possess the foremost mandate to adjudicate on conflicts between states in matters concerning the interpretation of treaties and conventions under the watch of the Union, there exist the potency of overlapping in authority between them. This situation has often resulted to uncertain judicial outcomes with the members of the Union (Pityana, 2004).

According to Zimmerman and Baumler (2010), the essence of amalgamation of the two Courts was predicated on the fact, to alleviate the stress on the huge financial resources that may be required in the maintenance of these Courts. The amalgamation was concluded in the process that was prosecuted and completed when the Protocol of the African Court of Justice and Human Rights was agreed upon on July 1, 2008 at the 11th General Assembly of the AU submit in Sham El-Sheikh. The Court has two section including, a general section and that on human rights. Although the two Courts are operating at parallel, but the Protocol of the African Court on Peoples' Rights still remains the decisive on the Court pending when a new Protocol would be established to replace it.

In terms of cooperation and competitiveness, the African Human Rights Commission is saddled with the responsibility to protect the rights and to interpret the Banjul Charter. Its weakness lies in the fact that it is not a genuine judicial authority rather, it plays a supervisory role since it can only make recommendations. It lacks the effect of enforcing an order of reparation or compensation from defaulting parties to any dispute and its final reports are not disclosed to the public but only presented to the Assembly of Heads of States and Government (Krisch, 1998). With different methodological approaches, both Courts have operational overlap in their *modus operandi*. Article 2 of the Protocol provides that, the African Court on is contemplated to play a complimentary role and support the AHRC. Notably, it is clear because the ACHPR is bound by the resolutions of the commission but rather it reaches its own decision in the same matters before it. This suggests that the hierarchical pendulum is skewed in favour of the commission.

The conflicting views appear to be natural especially when the overlapping jurisdictions of both institutions cannot be over-emphasized. The provisions of Article 3 of the Protocol to the Charter empowers the Court with the powers of interpretation of the African Charter and other relevant human right reports, provided they are ratified by state parties to the issues. Article 26 of the Constitutive Act of the African Union provides the African Court of Justice with the power of interpretation. Meanwhile, financial implications involved in the dualization of the functions of the two bodies is humongous. Therefore, it was argued by Udombada (2003:3), that, "it is better to have an African Court which is normatively and structurally strong instead, than having two weak Courts whose existence may only be strong on pages of documents". In consideration of the above perhaps, it is suggestive that the challenges influence the decision of the Assembly of Heads of State and government of the African Union at the emergence of the Human Rights Court with the African Court of Justice. This did impacted on the Human Rights Court with certain impediment at its creation (Vide Doc, 2005).

Another area of worry is on the composition of the Court after the transformation of the OAU into the AU. Article 11(1) of the Protocol provides that there shall be eleven judges to constitute the Court. Article 18(2) of Constitutive Act established the African Court of Justice with no clear-cut composition, even when Article 60(1) of the Draft Protocol of the AU

suggests that there shall be seventeen judges for the Court to operate a special chambers system, whereas the African Human Rights Court would be established to serve as a chamber in the plan. Its implication is that it may culminate into compromising the standard of the required judges contemplated by the Protocol. It is worthy of note that the draft has been jettisoned and or abandoned.

The Court and the Protection of Human and Peoples' Rights

There are both institutional and challenges that faces the Court. At the institutional level, the composition in terms of the number of Judges of the Court is paramount. Although, the number of the judges are 11 and protected by diplomatic practice by the provisions of Article 11(1) of the Protocol to the Charter, it remains worrisome that while the Judges are appointed to represent the various African regions and legal systems, it has been observed that some judges are not experts in human rights law. Furthermore, that two women judges only were nominated to serve in the Court, makes it gender insensitive (Viljeon, 2007). The integrity of the Court is undermined for the reason that it is only the President who serves a tenure because other judges serve on part time. Another challenge of the Court is that both individuals and non-governmental organizations lack the locus standi to bring cases to it, as only member-states have the access to the court. Another challenge is that of a state party to a dispute to ratify the Protocol of acceptance through the declaration of the Court's jurisdiction. An individual complaint could not be entertained (Article 5(1) (2) (3), a situation which massages the ego and integrity of the Court (Mutua, 1999:355), whereas it is supposed to guarantee the protection of human and people's rights against the state and other agencies. Nonetheless, a couple of states have ratified the Protocol. The Court also faced the challenges of venue because at the time of nominating the judges, the venue of the Court was yet to be decided. It was only August 2007 where the states were able to resolve on Arusha, Tanzania where they concluded on an agreement between the AU and Tanzania in consideration that the Court should relocate to the International Conference Centre, where the United Nations International Criminal Tribunal for Rwanda had done some work to the period of the treaty.

The reluctance of the states that constitutes the Union to submit declaration of the competence of jurisdiction of the Court has made the option of the African Human rights Commission in initiating proceedings on disputes between member states to become necessary. The decisions of the Court are not appealable nor contested because their execution is monitored by the executive committee in the interest of the Africa union Assembly. This is provided by Article 29(2) of the Protocol. And it is the same provisions governing the Council of Ministers as provided in Articles 10-13 of the OAU Charter. There have only been a case or few that the Court has delivered judgment, making it to be observed as having an ineffective approach to delivery, (Article 7(2) of the Banjul Charter and *Belgium V. Senegal*).

From the Normative criteria, the observation of Mutua is apt, thus:

The African Charter, the Court's basic instrument, has deep normative flaws that must be addressed to give the Court a firm legal basis to protect human rights. In particular, drawback clauses permeate the African Charter and permit African States to restrict basic human rights to the maximum extent allowed by domestic law (ID, 359).

The derogatory provisions of the African Charter could be considered a normative flaw. This deliberately allowed states to certain privileges which one enshrined in the Charter through legislation of domestic laws of member states 9Anthony, 1997:518). Again, women rights are oppressed (Mutua, 1999:359). The diversity of the African continent posts as a challenge considered to be greatest.

Expectations of Safeguards of Peoples' Rights

Irrespective of the challenges of the Court, there is a reprieve, because it has the jurisdiction which portends a better future for safeguarding human and people's rights in the Africa. Firstly, Article 30 of the Protocol provides that the Court's decisions are binding on the parties. The power to make orders which are intended to ameliorate the violation of people's rights negates the provision of Article 27(1) on human rights as enshrined in the charter. This may introduce clarity of purpose and certainly in the awards of remedies in the cases before it, as it is in contradistinction to the uncertainty surrounding the decisions of the commission that led to the anomalies guiding the treatment of these violations.

The requirements of the Court have exposed the trial of human and people's rights cases which were, before now shrouded in secrecy (Article 28(5); Viljeon, 2004:6), but closed proceedings of the Court could be conducted in exceptional cases like the protection of witnesses and complaints when there exist eminent threat and danger (Article 10 of the Protocol).

The time frame in which the Court has to dispose off cases is another prospects of note. The Court has ninety (90) working days to conclude oral hearing of a case with at least seven judges sitting and on the approval of the majority (Article 28 of the Protocol). The Court can make orders for payment of damages, compensations or reparation (Article 27 of the Protocol). According to Viljeon (2004:5-7), the above provisions could remedy the plague which faced the commission. The Court would throw up publicity and media for cases of human and peoples' rights in Africa.

Conclusion

From the foregoing, it could be concluded that the safeguard of people's rights under the Court can be somewhat established only when the indices of operation of both the Court and the Commission are clearly spelt out. This could be achievable on when there exist the overlapping in operation between them that should not give neither the Court nor the Commission advantages over the other as intended by the draftsmen. Their functions should be clearly spelt out to boost further and better protection of human and peoples' right within the confines of the African continent and as well make up for the flaws inherent in the Protocol to the Charter which established the Court.

Recommendations

It is recommended as follows that:

1. The merger of the Court and the Commission should basically be for administrative convenience, to curb the waste of effort of African leaders to provide a Court which is intended to protect rights.
2. A machinery should be put in place to sustain the Protocol on gender sensitivity, as adopted in July, 2003.
3. Africa should strengthen its institutions rather than their leaders to enable for the effective management of her resources.

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