

# THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHT AS COMPATIBLE WITH DESPOTISM: THE NIGERIAN EXPERIENCE

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## **Introduction**

From ancient times to the middle ages, international law was non-existent. The history of international law can be traced to the year 1625 when the work of a Dutch lawyer, Hugo Grotius, on the Law of War and the Law of Peace became the foundation of a systematized body of rules of universal application.<sup>1</sup> However, as a result of the concept of sovereignty, nations and not individuals were considered the subject of international law. International law, therefore, did not recognise the rights of any individual against any sovereign state. A sovereign state will brook no interference in its internal affairs.

This position was strengthened in the 19<sup>th</sup> century when John Austin provided the legal rationale for the doctrine of state sovereignty. The Australian theory of sovereignty and laws was of much appeal to autocratic and despotic regimes since by that theory no external person can pry into their treatment of their nationals. The initial calls for the international protection of human rights were actuated by serious episodes of disregard for human value, such as the 19<sup>th</sup> century concern over the slave trade, which seems to have originated international human rights agreement. It was the outbreak and shattering effect of the Second World War that strengthened the conviction that the international recognition and protection of human rights was in accordance not only with the objects of international law but also with an essential requirement of international peace,<sup>2</sup> for regimes that deny these rights often go further to seek foreign domination and pursue belligerent foreign policies. Adolph Hitler perpetrated atrocities against hundreds of thousands of individuals including the extermination of over six million Jews based on the conceived inferiority of some human beings, hence their elimination by the supposedly superior race. Furthermore, the dropping of the atomic bomb in the cities of Hiroshima and Nagasaki revealed the prospects of the end of mankind. Shocked by these acts, the international community came to realise that human rights could no longer be left to domestic jurisdiction. Thus, the quest for a new world order based on universal respect for human rights was stimulated.

The Charter of the United Nations (UN) ushered in a new international law of human rights. This new law buried the old dogma that the individual is not a subject of international politics and law and that a government's behaviour towards its own nationals is a matter of domestic and not international concern.<sup>3</sup> Since 1945, therefore, the concept of human rights acquired a multi-lateral sanction and a legitimacy on the international plane. The principles of human rights now constitute a standard, which is external to the individual states, but by which state laws, practices and social values are evaluated.

The Charter of the UN was followed in 1948 by the Universal Declaration of Human Rights (UDHR). The UDHR was later supplemented by two international

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<sup>1</sup> Nariman, F.S. "International Human Rights Law and the Sovereignty of States: Role and Responsibility of Lawyers" (1997) 2 (No 2) *H.R.I. News*, newsletter of the IBA Human Rights Institute, p.22.

<sup>2</sup> Oppenheim, *International Law: A Treatise*, London: Associated Companies, 1955, p.737

<sup>3</sup> Oputa, C A, *Human Rights in the Political and Legal Culture of Nigeria*, 2<sup>nd</sup> Idigbe Memorial Lecture, Lagos: Nigerian Law Publication, 1988, p.136

covenants – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – which were adopted in 1976. They were followed by a myriad of other international instruments. The UDHR has become the basic condition for global diversity. It has been described as the great charter of liberties and a common standard of achievement for all people. It represents a common statement of goals and aspirations – a vision of the world, as the international community would want it to become.

The world community has acknowledged the universality and independence of human rights. The Vienna Declaration adopted by the World Conference on Human Rights (1993) states:

All human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various background must be borne in mind, it is the duty of states regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedom.

Human rights are indivisible because the violation of one right will often affect the respect of several other rights. All rights are equally important in order that all people can live a life of freedom and dignity. Universality of human rights means that all people have the right to claim agreed human rights. It also implies that all people have equal rights.<sup>4</sup>

The international recognition and protection of human rights was followed by regional efforts towards the promotion and protection of human rights. The movement towards the regionalisation of human rights was initially not popular with the UN. It was regarded as a break away movement which called the universality of human rights into question. It was also feared that regional arrangements are likely to diminish the value of the human rights work of the UN and perhaps even undermine its effectiveness.<sup>5</sup>

There were, however, compelling arguments in favour of regionalism. Most states are more readily disposed to regional system of enforcement than the universal system. A state is more likely to have more confidence in an international enforcement mechanism set up by a group of like-minded countries which are already partners in a regional organisation. Furthermore, a state is more likely to concede more power to a regional organ of restricted membership of which other members are its friends and neighbours than to a world-wide organ in which it plays a proportionally smaller role. More importantly, the logic of distance and proximity favours regionalism.<sup>6</sup> However, the regional efforts were intended to give full effect to UDHR and not to undermine the universality of human rights.

The movement for regionalization of human rights bodies began in Europe and has spread to every continent in a varying degree with the exception of Asia. The European Convention on Human Rights and Fundamental Freedoms was adopted on 4 November 1950. The American Convention on Human Rights was adopted by the Organisation of American States in 1969.

The forerunner to the adoption of the African Charter was the African Conference on the Rule of Law held in Lagos in 1961 where African jurists there assembled declared, *inter alia*:

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<sup>4</sup> Realising Human Rights for the Poor – Strategies for Achieving the International Development Targets, publication of the Department for International Development, October p.10

<sup>5</sup> Robertson, *Human Rights in the World*, Manchester: Manchester Press, 1982, 158-160

<sup>6</sup> *Ibid*

That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states.

The 18<sup>th</sup> Assembly of Heads of State and Government of the Organisation of African Unity (O.A.U.) meeting in Nairobi, Kenya adopted the African Charter in 1981. The Charter came into effect on 21<sup>st</sup> October 1986, after its ratification by a majority of African States.

The African Charter is a digression from the international bills of rights in more ways than one. The footprints of African dictators are visible in the articles of the Charter to the extent that it can be said that Africa is still in want of a bill of rights. This is because a despotic regime can faithfully implement the provisions of the African Charter. In any case, various logics have been deployed to rationalize the provisions of the Charter and to disguise its conspicuous deficiencies.

### **Provisions of the African Charter**

The African Charter guarantees the following rights as well as imposes the following duties.

**Rights of Individuals:** Right to the enjoyment of rights without distinction of any kind (article 2); right to equality before the law and the equal protection of the law (article 3(1)(2)); right to life (article 4); right to the dignity of the human person (article 5); right to liberty and security (article 6); right to have cause heard (article 7); right to freedom of conscience, the profession and free practice of religion (article 8); right to receive information and to express and disseminate opinions (article 9); right to freedom of association (article 10); right to freedom of movement {article 12(1) (2)}; right to seek asylum and freedom from arbitrary expulsion from a state {article 12(3)(4)}; right to freedom from mass expulsion of non-nationals {article 12(5)}; rights to participate in government, and equal access to the public service and public property {article 13(1)(2)(3)}; right to work under equitable and satisfactory condition (article 15); right to physical and mental health (article 16); right to education and to participate in the cultural life of the community (article 17); right to property (article 14).

**People's Rights:** Equality of all peoples (article 19); right to existence and self-determination (article 20); right to free disposal of natural wealth and resources (article 21); right to economic, social and cultural development and the equal enjoyment of the common heritage of mankind (article 22); right to international peace and security (article 23); right to satisfactory environment (article 24).

**Duties of State Party to the Charter:** Duty to promote rights and freedoms contained in the Charter (article 25)' duty to guarantee the independence of the courts and to allow the establishment of human rights organizations (article 26).

**Duty of Individuals:** Duty to the family, society, the state and the international community (article 27); duty to respect and not to discriminate against fellow beings (article 28); duty to preserve the harmonious development of the family, to respect his parents and to maintain them in case of need {article 29(1)}; duty to preserve his national community {article 29(2)}; duty not to compromise the security of his state of origin or residence {article 29(3)}; duty to preserve and strengthen social and national solidarity {article 29(4)}; duty to preserve independence and territorial integrity of his

country {article 29(5)}; duty to pay taxes {article 29(6)}; duty to preserve African cultures {article 29(7)}; duty to the achievement and promotion of African unity {article 29(8)}.

## **The Implementation Mechanism**

### ***The African Commission on Human and Peoples' Rights***

This Commission is an organ of the OAU created for the purpose of promotion and protection of human and peoples' rights. The Commission consists of eleven members chosen from amongst African personalities of the highest reputation, and of acknowledged high moral integrity, impartiality and competence in matters of human and peoples' rights. Legal experience is not mandatory, though consideration will be given to persons having legal experience. The members of the Commission are elected by Heads of State and Government from a list of persons nominated by the State Parties to the Charter. Each state may nominate two candidates, who must be nationals of one of the State Parties to the Charter, but the Commission shall not include more than one national of the same state. The members serve in their personal capacity.

The members of the Commission hold office for a term of six years and can be reelected. However, at the first election, the term of office of four members shall be two years, while three others shall serve for four years. Members who should retire before six years are to be determined by lot.

The membership of the Commission should be such as to ensure the representation of African political divisions and legal systems (French, English and Arabic) as well as geographical regions (West Africa, North Africa, Central and Southern African).<sup>7</sup> The Secretary-General of the O.A.U. appoints the Secretary of the Commission, and also provides staff and other facilities for the Commission.<sup>8</sup>

The Commission elects its Chairman and Vice-Chairman for a two-year tenure, though they are eligible for re-election. The Commission is mandated to formulate its own rules of procedure.

Neither the African Charter nor the OAU Charter stipulates the location of the seat of the Commission. However, at its 3<sup>rd</sup> session held in Libreville, Gabon in April 1988, the African Commission recommended to the African Heads of Government that the seat of the African Commission be located in a State Party to the African Charter with substantial facilities for its work and research. Banjul, The Gambia, was subsequently approved by African Heads of Government.<sup>9</sup> In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities of the OAU<sup>10</sup>

***Mandate of the African Commission:*** Article 45 of the African Charter spells out three broad functions of the Commission as follows.

1. To promote Human and Peoples' Rights and in particular:
  - (a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise give more views or make recommendations to Governments;
  - (b) To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;

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<sup>7</sup> Reme *op.cit* p.22

<sup>8</sup> Article 41 of the Charter

<sup>9</sup> See Doc. AFR/COM/HPR/ACTY/RPP(III)p.3

<sup>10</sup> Article 43 of the Charter

- (c) Cooperate with other African and International Institutions concerned with promotion and protection of human and peoples' rights under conditions laid down by the Charter.
2. Ensure the protection of human and peoples' rights under conditions laid down by the Charter;
3. Interpret all the provisions of the present Charter at the request of a State Party, and institution of the OAU or an African organization recognized by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

Thus the first mandate of the Commission involves promotional activities and standard settings, while the second and third mandates are quasi-judicial functions which involve receiving and considering inter-state and other communications including interpretation of the African Charter.<sup>11</sup>

***Petitioning Procedure of the Commission:*** There are two methods by which the Commission may be seized of a case: inter-state communications and other communications.

***Inter-State Communications:*** Articles 47 to 54 deal with interstate communications. If a State Party to the Charter has good reasons to believe that another State Party to the Charter has violated the provisions of the Charter, whether in relation to her nationals or not, it may by a written communication draw the attention of the state to the matter. This communication should also be addressed to the Secretary-General of the OAU and the Chairman of the Commission. The state to which the communication is addressed shall, within three months of the receipt of the communication, give the enquiring state, written explanation or statement elucidating the matter.<sup>12</sup> If within three months from the date on which the original communication is received by the state to which it is addressed, the issue is not settled to the satisfaction of the two states involved through bilateral negotiation or by any other procedure, either state shall have the right to submit the matter to the Commission through the Chairman and shall notify the other state involved.<sup>13</sup>

In any case, a State Party to the Charter may refer the matter directly to the Commission without having first communicating the state concerned as stated above. The matter will be referred to the Commission by addressing a communication to the Chairman of the Commission, the Secretary-General of the OAU and the state concerned.<sup>14</sup> The Commission can only deal with a matter submitted to it after making sure that local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged. When the Commission is considering the matter, the state concerned may be represented before it and submit written or oral representations.

After having tried all appropriate means to reach an amicable solution based on respect of human and peoples' rights, the Commission shall, within a reasonable time from the date of the notification, prepare a report stating the facts and its findings. This report shall be sent to the states concerned and communicated to the Assembly of

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<sup>11</sup> Rembe *op.cit* p.26

<sup>12</sup> Article 47

<sup>13</sup> Article 48

<sup>14</sup> Article 49

Heads of State and Government.<sup>15</sup> The Commission may make such communications, as it deems useful.

**Other Communications:** Articles 55 to 59 relate to the manner of dealing with other communications. Before each session the Secretary of the Commission shall make a list of the communications other than inter-state communications and transmit them to the members of the Commission. The Commission shall by a simple majority vote of its members decide on the communication it shall consider.<sup>16</sup>

For such communications to be considered, seven requirements must be satisfied, viz, (1) it must be anonymous; (2) it must be compatible with the Charter of the OAU or the African Charter on Human and Peoples' Rights; (3) it must not be written in disparaging or insulting language; (4) it must not be based exclusively on news disseminated through the media; (5) all local remedies, if any, must have been exhausted, unless it is obvious that this procedure is unduly prolonged; (6) it must be submitted within a reasonable time from the time local remedies are exhausted or from the date the Commission is seised of the matter; and (7) it must not deal with cases which have been settled by the States involved in accordance with the principles of the Charter of the UN, or the Charter of OAU or the provisions of the African Charter.<sup>17</sup>

All communications must be brought to the knowledge of the state concerned before being considered.<sup>18</sup>

When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations. A case of emergency duly noticed by the Commission shall be submitted by the Commission to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

By article 59 of the Charter, measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of the Heads of State and Government shall otherwise decide.

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<sup>15</sup> Article 52

<sup>16</sup> Article 55

<sup>17</sup> Article 56

<sup>18</sup> Article 57

## Compatibility of the African Charter with Despotism

By despotism we mean a political system in which a person or group of persons hold unlimited power over their fellow men. The African Charter is supposed to be a bill of rights for the African continent. As observed by Justice Jackson of the US Supreme Court in *West Virginia State Board of Education v Barnette*,<sup>19</sup>

The very purpose of a bill of rights is to withdraw certain subjects from the vicissitudes of political controversy; to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts.

The concept of human rights implies the demarcation of the boundary between the public sphere of authority and the area of individual autonomy. To have a bill of rights for the African continent means that there are some basic rights guaranteed to all individuals in the continent without regard to the legal system of a particular state. In such a situation, a state that ratifies the African Charter will be under obligation to amend its domestic laws for the purpose of meeting the terms of the Charter. If a state is not carrying out the terms of the Charter that will be obvious. Unfortunately the African Charter has failed woefully in this regard. The rights guaranteed by international bills of rights and other regional instruments are well defined and the circumstances and the extent to which they can be limited or derogated from are very clearly and unambiguously stated. In the circumstance, it becomes easy to say when the rights are violated. It also becomes possible to ascertain whether a state's actions or omissions are in consonant with the international bills of rights or not.

On the other hand, the provisions of the African Charter are brief, vague and in some circumstances allow national laws to limit or derogate from these rights without setting any standard for such national law. For instance, article 4 on the right to life provides: "Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his life." The import of the provision that 'no one may be arbitrarily deprived of this right' is that the right could be deprived in circumstances prescribed by national law and there is no standard set for such national laws. The corresponding articles of the European Convention on Human Rights and Fundamental Freedoms and the American Convention<sup>20</sup> define clearly the circumstances in which the right to life could be limited or derogated from and the extent of the permissible limitation or derogation. In Africa, many regimes are revolutionary. Both customary international law and legal theory recognize successful revolutions as a proper and effective means of changing a legitimate government, provided that the following basic requirements are fulfilled:

- (a) There must have been an abrupt political change i.e. *coup d'etat* or a revolution. It does not matter whether the change has been effected directly by a military junta or a civilian or group of civilians subverting the existing legal order with or without the aid of the military. There can be a coup without the use of armed forces;
- (b) The change must not have been within the contemplation of an existing constitution. If it were, then the change would be evolutionary i.e. constitutional; it would not be revolutionary;
- (c) The change must destroy the entire legal order except what is preserved. In order for the *coup d'etat* to be complete, the new regime need not have abrogated the entire existing constitution. It is sufficient that what remains of it has been permitted by the revolutionary regime;

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<sup>19</sup> 319 U.A. 624

<sup>20</sup> Articles 2 and 4 respectively.

- (d) The new constitution and government must be effective. There must not be a concurrent rival regime or authority functioning within or in respect of the same territory.<sup>21</sup>

The government brought to power through a revolution or *coup d'etat* is, according to international law and legal theory, the legitimate government of the state, whose identity is not affected by these events. The laws of such a government becomes binding without regard to the morality or rationality of their content.

The Supreme Court of Nigeria recently reaffirmed the position. The Court of Appeal had held in *Guardian Newspapers Ltd v AG Federation*<sup>22</sup> that a statute is inherently irrational and an assault to the psyche of the citizens when it is extra-ordinarily in conflict with reason, is offensive and utterly hostile to rationality and so emptied of substance that it should be rejected by the people to whom it is directed (or made for) and the people of other nations who condemn it for the inhumanness.<sup>23</sup>

When the matter got to the Supreme Court,<sup>24</sup> the Court held that the validity of law is not determined today by reference to morality, reason, rationality or natural law. Decree No.12 of 1994 provides thus:

No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if such proceedings are instituted before, on or after the commencement of this Decree, the proceedings shall abate, be discarded and made void.

The Supreme Court held that these were valid laws the validity of which could not be questioned in court in strict fidelity to Decree 107 of 1993 which barred any action that questions the validity of a decree or an edict.

Article 6 of the African Charter guarantees the right to liberty. The Charter lays down a single condition for the legitimate deprivation of individual liberty – it must not be deprived unless “for reasons and conditions previously laid down by law”. Under the last military regime in Nigeria, Decree No.2 of 1984 (as amended) provides:

If the Chief of General Staff is satisfied that any person is or recently has been concerned in acts prejudicial to State Security or has contributed to the economic adversity of the nation, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may by order in writing direct that that person be detained in a civil prison or police station or such other place specified by him, and it shall be the duty of the person or persons in charge of such place or places ... to keep that person in custody until the order is revoked.

This preventive and speculative detention Decree cannot be acceptable in any civilized society that observes human rights. Nevertheless, any person detained under its provision cannot take refuge under the African Charter as the deprivation of liberty is ordained by law, thus satisfying the requirement of the Charter. Seven other articles of

<sup>21</sup> Elias, T O, *Africa and the Development of International Law* 2<sup>nd</sup> ed by Richard Akinjide, London: Martomis Nijhoff Publishers, 1988, pp.107-8. See also Han Kesen, *The General Theory of Law and State* (1961 edn) pp.117, 220; *Uganda v. Commissioner for Prisons*, Ex parte Matovu (1966) E.A. 514.

<sup>22</sup> [1995] 5 NWLR (Pt.398) 703 at 735-736

<sup>23</sup> The statutes in issue are *Guardian Newspapers and African Weekly Magazine (Proscription and Prohibition from Circulation) Decree* (No 8 of 1994) and *Federal Military Government (Supremacy and Enforcement of Powers) Decree* (No 12 of 1994) Sections 1 and 2 of Decree No.8 read thus:

1. Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979 as amended, or any other enactment of law, the newspapers and weekly magazines listed in the Schedule of this Decree, published by Guardian Newspapers Limited, both with corporate Headquarters at Rutam House, Isolo Expressway, Oshodi, are hereby proscribed and (sic) from being published and prohibited from circulation in Nigeria or any part thereof.
2. The premises where the Newspapers and the Magazines referred to in section 1 of this Decree are printed and published shall be sealed up by the Inspector-General of Police or any other officer of the Nigerian Police authorized in that behalf during the duration of this Decree

<sup>24</sup> *A.G. Federation v. Guardian Newspapers Ltd.* (2001) FWLR (Pt.32) 87

the Charter also provide that the rights guaranteed can be limited by law.<sup>25</sup> The Charter in article 7 guarantees the right of a person to have his cause heard. The Charter does not require that the hearing must be fair, except in the case of criminal trial. There is also no requirement that the trial should be in public.

The right to free practice of religion is guaranteed by article 8 of the African Charter. The section goes further to qualify the right by providing that “no one may, subject to law and order, be subjected to measures restricting the exercise of those freedoms”. The right to religious freedom is a very important right which ought not to be vaguely defined. In Nigeria, twelve states have recently adopted the Islamic legal system which fatally curtails the rights of non-Muslims in those states to practice their religion. Under the Sharia system, *ridda* (change of religion) is a capital offence. Where the offence of *ridda* is provided by law, then a person prosecuted for violating the offence cannot have recourse to the African Charter. Another implication of the vague provision of the Charter is that if some people resent the practice of a particular religion and react violently against its practice, the practice of the religion can be restricted by law in interest of order.

Article 9 of the African Charter provides that every individual shall have the right to express and disseminate his opinion within law. In Nigeria, the Burhari/Idiagbon regime enacted Decree 4 of 1984.<sup>26</sup> The effect of this Decree was succinctly stated by Adefarasin, CJ in *Guardian Newspapers v AG Federation*.<sup>27</sup>

By the foregoing provision it is unlawful for a person to publish a report or statement which brings or is calculated to bring the Federal Military Government or a State Government or a Public Officer to ridicule or disrepute even if the publication is true.

This Decree constitutes an infringement of the right to freedom of expression; nonetheless it was a law of the land. Being part of the laws of the land, it can legitimately limit the right to freedom of expression guaranteed by the African Charter. Another law that seriously limits the right to freedom of expression in Nigeria is the sedition law. Section 51 of the Criminal Code provides:

- (1) Any person –
  - (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;
  - (b) utters any seditious words;
  - (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;
  - (d) imports any seditious publication, unless he has the reason to believe that it is seditious;

shall be guilty of an offence and liable on conviction for a first offence to imprisonment for two years or to a fine of one hundred pounds or to both such imprisonment and fine and for a subsequent offence to imprisonment or three years; and any seditious publication shall be forfeited to Her Majesty.

- (2) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and liable on conviction, for a first offence to imprisonment for one year or to a fine, and for subsequent offence to imprisonment for two years and such publication shall be forfeited to Her Majesty.

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<sup>25</sup> Articles 8, 9, 10(1), 11, 12, 13 and 14.

<sup>26</sup> Public Officers (Protection Against False Accusation) Decree

<sup>27</sup> Suit No. M/139/84

There is no doubt that this is a law which can limit the right to freedom of expression guaranteed by the African Charter notwithstanding that incitements to violence is not an ingredient of the offence.<sup>28</sup> Some other laws that had curtailed the right to freedom of expression include the Treason and Treasonable Offences Decree No. 29 of 1993, under which any person who “utters any word, displays anything or publishes any material” that the government judges capable of “breaking up Nigeria” becomes guilty of treason and liable on conviction to be sentenced to death. There was also the Offensive Publication (Proscription) Decree No. 5 of 1993 which gave the Head of State unfettered discretion to order the proscription, seizure and confiscation of any publication.

Article 10 of the African Charter provides that every individual shall have the right to free association provided that he abides by law. An important aspect of freedom of association is the right to form or belong to a political party and a trade union. The international bills of right and other two regional instruments specifically mentioned the right to form or belong to a political party or trade union as part of the concomitant of the right to freedom of association. The African Charter is silent on them. There had been several military decrees which limited the right to freedom of association in Nigeria. By Decree 22 of 1988 the Nigerian Labour Congress was dissolved. Decree No 25 of 1989 deleted the Customs & Excise and Immigration Staff Union as well as the Academic Staff Union of Nigerian Universities from the list of registered trade unions. Decree No 26 of 1996 withdrew the right of workers to strike. Decree No 29 of 1996 barred trade unions from affiliating with international labour organizations or trade secretariats, except the African Trade Union Unity and the Economic Community of West African States trade unions. It is lamentable that the African Charter has no answer to this kind of situation.

Some articles of the African Charter provide that the rights guaranteed can be limited in the interest of national security,<sup>29</sup> or in the interest of safety, health, ethics, public need or general interest.<sup>30</sup> There is no provision that particular limitations imposed by a state must be necessary for the purpose for which the rights are limited. In some cases, there is no requirement that these limitations shall be by law, in which case the rights could be limited by executive or administrative acts.

The African Charter also has laconic and ambivalent provisions dealing with democratic institutions. The American Convention in article 32(1)(b) provides that the right to vote and to be elected shall be practised in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of voters. Similarly, article 3 of the 1<sup>st</sup> Protocol to the European Convention provides unambiguously that “the high contracting parties undertake to hold free and fair elections at reasonable intervals by secret ballot.” The African Charter merely provides in article 13 that every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with provisions of the law. If the law decrees a one-party state, the Charter provision is satisfied. Africa has the legacy of “sit tight syndrome” where political office holders, whether elected or unelected, seek to perpetuate themselves in power by all means and at all cost.

Another characteristic of African political system is election rigging and other forms of electoral malpractices which tend to erode the sovereignty of the people and to

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<sup>28</sup> Sections 50 and 51 of the Criminal Code were held unconstitutional in the case of *Arthur Nwankwo v The State* (1985) 6 NCLR 228. This is because by section 41 of the 1979 Constitution of Nigeria, any law that limits the right to freedom of expression must be reasonably justified in a democratic society and must additionally be in the interest of defence, public safety, public morality or for the purpose of protection of the rights of other persons. There is no such requirement under the African Charter.

<sup>29</sup> Articles 11 and 12

<sup>30</sup> Articles 11, 12 and 14

enslave them. It goes without saying that human rights can only be realized in a democratic society. Perhaps, for this reason, democratic rule is one of the human rights guaranteed by the UDHR (article 21). The preamble of the Charter states in the drafting of the African Charter, African history, culture, aspirations and realities were taken into consideration. Yet the Charter did not address the above critical issues.

The African Charter has no derogation clause – a clause dealing with temporary suspension of rights in times of war or state of emergency, and non-derogation from certain rights on such occasions. A state of emergency normally provides a fertile ground for clamp down on human rights. Other regional instruments and the international bills of right stipulate that measures taken in times of emergency or war which have the effect of derogating from human rights must be to the extent and time strictly required by the exigencies of the situation and be non-discriminatory in nature.

The African Charter is also grossly deficient in the enforcement mechanism it had provided. There is a conspicuous absence of a human rights court. The African Commission does not and cannot qualify as one. The Commission is not conceived of as a court with powers of impartial adjudication over alleged breaches of human rights. It has rightly been observed that by its mandate the Commission is more of a research center.<sup>31</sup>

The absence of a human rights court in the African Charter has been surreptitiously justified on the ground that African customs and traditions emphasize mediation, conciliation, and consensus rather than the adversarial and adjudicative procedures, which normally produce a victor and vanquished. However, the traditions referred to here are those in pre-colonial society, which worked very well in the communal ways of life. African societies have undergone fundamental transformations since the post-colonial era. In the traditional African society, urban areas were not common. Most people lived in their own communities which made conciliatory and amicable settlement possible. Modern African societies are inhabited by heterogeneous peoples with different cultural and socio-political backgrounds.<sup>32</sup> In addition, the rights guaranteed by the African Charter are not restricted to Africans alone; other nationals who live in Africa are protected by these rights. In the circumstance, amicable and conciliatory settlement may not be possible. Moreover, if we have national courts for adversarial and adjudicative resolution of disputes, it will be hypocritical to contend that a court of human rights is not appropriate in the African context.

A veritable means of shielding African dictators from the embarrassment that will follow any publicity given to their human rights violations is the provision of article 59 of the Charter which requires that all measures taken within the provisions of the Charter for the promotion and protection of human rights shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide. Save for Nelson Mandela, former President of South Africa, African leaders have a tradition of reciprocal silence in respect of the human rights violations of one another. Publicity normally has a serious deterrent effect.

The African Charter is also the first, if not the only binding human rights instrument that stipulates individual duties. The duties stipulated by the Charter are compendious and span five articles of the Charter.<sup>33</sup> The danger here is that a dictatorial regime may emphasize the duties instead of the rights. Furthermore, measures taken in pursuance of the duties may be in conflict with the individual's rights.

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<sup>31</sup> Eso, Kayode "Why Human Rights"? in Akpamgbo (ed) *Perspectives on Human Rights*, Lagos: Federal Ministry of Justice, 1992, p.275.

<sup>32</sup> Peter, C.M. *Human Rights in Africa – A Comparative Study of the African Human and Peoples' Rights Charter and the New Tanzanian Bill of Rights*, New York: Greenwood Press, 1990, p.53.

<sup>33</sup> Articles 25 - 29

## Conclusion

The goal of international human rights law is to set at the supra-national level a minimum standard for the treatment of human beings irrespective of the domestic laws and practices of a particular state. Human rights treaties are statements of internationally accepted principles. The advent of international human rights law symbolizes a crack on the doctrine of sovereignty, as international human rights regime is a qualification to that doctrine. Unfortunately, when the African Charter guarantees rights subject to limitation by state law, the sovereignty of the state is left intact. The danger lies in the fact that a law may have no moral content. Professor Ivor Jennings pertinently observed that even the most despotic states rule by law. He said that the powers of Louis XIV, Napoleon I, and Mussolini were derived from law.<sup>34</sup>

It must be noted that even if a regime is a democracy, this does not mean that it cannot be tyrannical. Charles Evans Hughes aptly observed that democracy has its own capacity for tyranny. Some of the menacing encroachments upon liberty invoke the democratic principle and assert the right of the majority to rule.<sup>35</sup> Thus the liberty of the minority can only be protected when they are placed outside the reach of the majority. It is also a dangerous situation to permit the limitation of rights by executive or administrative acts – not by law.

Wars and emergencies present opportunities for muzzling freedom. The Charter ought to state clearly the extent to which certain rights can be derogated from in a period of war or emergency. Those rights that cannot be derogated from at any time should be equally stated.

For the enforcement of the Charter, an African Court of Human Rights is a desideratum. Though efforts are in top gear to establish a Court of Human Rights for Africa, it is submitted that the establishment of such a court cannot cure some of the defects in the Charter. Where the Charter is domesticated, as in the case of Nigeria, the Charter will be enforced by domestic courts. In the circumstance, the claw-back clauses and the vague and laconic provisions of the Charter will still impede the efficacy of the Charter as a statement of principles accepted by the African states. Where the judiciary is not independent or impartial or lacks courage, it can take shield in the vague and laconic provisions of the Charter to allow human rights violations.

Publicity is a deterrent to human rights violations. Any findings or report of the Human Rights Commission should be open for public consumption.

There is a correlation between democracy and human rights. Democratic rule is a human right and human rights can only be realised in a democracy. In view of the chequered history of democracy in Africa, the African Charter ought to and should make elaborate and unambiguous provisions on the right to democratic rule. The right to fair hearing is such an important right that requires clear and detailed provision.

The Charter made provisions for socio-economic rights but the rights are not well defined. More definitive statements pertaining to these rights are required.

While it is acknowledged that the content and scope of human rights in Africa should respond to African experience, environmental, and socio-economic and political realities, the African Charter should not undermine the universality of human rights achieved after centuries of struggles.

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<sup>34</sup> Sir Ivor Jennings, *The Law and the Constitution* 5<sup>th</sup> ed (London: University of London Press, 1959) pp.47-48

<sup>35</sup> "Liberty and the Law" in Gerhart, E.C. ed *The Lawyer's Treasury* USA: Bobbs-Merrill Co Inc, 1963, pp 21-37.