



## STATUS AND SCOPE OF ENFORCEABILITY OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS IN NIGERIA

Prof. Obiaraeri, N. O.\*

### ABSTRACT

Nigeria is a “dualist” state where international laws and treaties do not apply automatically in her domestic jurisdiction. Under the Constitution of the Federal Republic of Nigeria, 1999 as amended, section 12, international obligations are not automatically treated as operable domestic law unless ratified and declared enforceable by legislative action. Against this backdrop, this paper investigated the status and scope of enforceability of the African Charter on Human and Peoples' Rights, 1981 in Nigeria. The paper established that the African Charter has been ratified as domestic law vide African Charter on Human and Peoples's Rights (Ratification and Enforcement) Act 1983 Through consideration of decided cases, it was also established that although the African Charter is part of Nigeria's domestic laws, it has limited application as its provisions are still subordinated to the supremacy of the Nigerian Courts. Thus, provisions of the African Charter that relate to economic, social and cultural rights remain non-justiciable because of the blanket ban on enforceability of these genre of rights under the Constitution of the Federal Republic of Nigeria, 1999 as amended, section 6(6)(c). It was thus recommended that this constitutional barrier should be abrogated and the economic, social and cultural rights of the African Charter declared justiciable and enforceable.

**Keywords** – charter, justiciability, ratification, rights, scope

### 1.0 INTRODUCTION

This paper interrogates both the status and enforceability of the African Charter on Human and Peoples' Rights, 1981 in Nigeria. The African Charter on Human and Peoples' Rights, 1981<sup>1</sup> is an international treaty between member States of the African Union formerly known as and called Organisation of African Unity. Nigeria is a member of the African Union. A treaty between two or more states derives its binding force and effect from international law and the African Charter is not any different. The basis of the binding force of a treaty as a contract is agreement and the recognition given to agreement between states in international law as a law creating fact. Generally speaking, an agreement ought to be obeyed-*pacta sunt servanda*. However, specific to Nigeria, treaties formed no part of domestic law unless ratified or enacted by the legislature. As an international treaty, the general principle is that enforceability of the African Charter in the domestic forum depends exclusively on whether or not the treaty is

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\* LL. B (Hons), B.L. (Hons), LL.M, Ph.D (Law), FHRI, FCAI, KJW; MBRIPAN, Professor of Law and Former Dean, Faculty of Law, Imo State University, Owerri, Nigeria; Nigerian Association of Law Teachers (NALT) Taslim Elias Awardee, 2017; Former Visiting Scholar and Fellow, Human Rights Institute, Columbia University, New York, NY, USA; E-mail: profnoobiaraeri@imsuonline.edu.ng; noobiaraeri@yahoo.com; Tel: +2348035524442

<sup>1</sup> Hereinafter abbreviated and referred to as “ACHPR”. It is also referred to simply as the African Charter.



incorporated into the domestic legal order. It is against this background that this paper will interrogate the question whether, with respect to Nigeria, the condition precedent, to bindingness of the African Charter has been satisfied and, if yes, whether all its provisions on civil, political, economic, social and cultural rights apply seamlessly or in a limited sense. For ease of understanding and orderly presentation, the paper is further divided into the following segments namely:

## 2.0 STATUS OF THE ACHPR IN NIGERIA

In Nigeria, treaties formed no part of domestic law unless ratified and enacted by legislature. As an international treaty, the general principle is that enforceability in the domestic forum depends exclusively on whether or not the treaty is incorporated into the domestic legal order. Nigeria can be considered as a ‘dualist’ state because international laws, like human rights treaties, do not apply automatically in Nigeria’s domestic jurisdiction. Thus, unlike ‘monists’ states, international obligations are not automatically treated as operable domestic law or, rather, only incorporated into domestic law through specific executive or legislative action. With respect to Nigeria, the conditions precedent, to bindingness of international treaty in Nigeria is fairly well settled in the national Constitution.<sup>2</sup> An international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly.<sup>3</sup> Before its enactment into law by the National Assembly, a treaty has no such force of law as to make its provision justiciable in Nigerian Courts. Being not incorporated into the municipal law, domestic courts would have no jurisdiction to construe or apply it. The treaty provisions cannot have any effect upon citizen's rights and duties. The implication of this is that only upon incorporation into the corpus of Nigerian domestic laws will a treaty be applied and enforced. The corollary is that ratification without incorporation will neither entail application nor enforcement. The above reasoning finds full constitutional support under the provisions of the of the CFRN, as amended, section 12(1) which provides, with respect to implementation of treaties, that ‘No treaty between the Federation and any other country shall have the force; of law except to the extent to which any such treaty has been enacted into law by the National Assembly.’ This constitutional position which received judicial approval in the decision of the Supreme Court in *Abacha v Fawehinmi*<sup>4</sup> makes it manifest that, no matter how

<sup>2</sup> NO Obiaraeri, *Denatured Human Rights in Nigeria- A new normal is Possible* (Owerri, IMSU Press, 2025).

<sup>3</sup>Section 12 of the of the CFRN, 1999 as amended refers.

<sup>4</sup>(2000) 6 NWLR (Pt. 660) 228 at 340. See also *Oshevire v British Caledonian Airways Ltd* (1990) 7 NWLR (Pt. 163) 507.



beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory may be, it remains unenforceable if it is not enacted into the law of the country by the National Assembly. The provisions of an unincorporated treaty might have indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government in its acts affecting them, would observe an unincorporated treaty. At best therefore, an unincorporated treaty is of a persuasive authority in the domestic legal order.

In view of the legal position that on unincorporated treaty has no domestic application, it may be asked, what is the position of the African Charter under Nigeria law? Put differently and more succinctly, is the African Charter part of Nigerian law? Direct answers to these questions are readily available. To satisfy the constitutional requirement which makes it expedient to make legislative provision for the enforcement in Nigeria of any treaty by way of an Act of the National Assembly, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983 was passed by the National Assembly. The receiving Act then sets out as a schedule the articles of African Charter on Human and Peoples' Rights and provides expressly that provisions of the Charter shall have force of law in Nigeria and be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive and judicial powers in Nigeria. What this means in practical terms is that the African Charter is now part of Nigerian domestic law and have become enforceable by the municipal courts. Specifically, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, section I, provides that as from the 17<sup>th</sup> day of March 1983, the provisions of the African Charter shall have full force of law in Nigeria. In fact, Uwaifo, JSC, in the case of *Abacha v Fawehinmi*<sup>5</sup> succinctly stated that as far as Nigeria is concerned, it is the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, 1983 which is the domestic law.

An opportunity to get a firm pronouncement of the Supreme Court of Nigeria on the exact status, scope and relationship of the African Charter in reference to other domestic laws presented itself clearly on the final appeal in the *Abacha's case* to the Supreme Court as the two main issues for determination were-

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<sup>5</sup>(2000) 6 NWLR (Pt. 660) 228 at 340.



(1) Whether it is permissible for Nigeria which is a party to and has adopted the African Charter on Human and Peoples' Rights to promulgate municipal legislations that are inconsistent with its obligations under that Charter while it remains in the statute book?

(2) Whether the African Charter on Human and Peoples' Rights as adopted by Nigeria is inferior or superior to municipal laws promulgated by the Government of Nigeria?

In direct answer to the above issues the Supreme Court held *inter alia* that-

1. The spirit of a convention or treaty demands that the interpretation and application of its provision should meet international and civilised legal concepts. Thus, the courts will not construe a statute as to bring it into conflict with international law. The case of *Oshevire v British Caledonian Airways*<sup>6</sup> and a host of others were cited in support.

2. Where an international treaty entered into by Nigeria is enacted into law by the National Assembly as was the case with the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act), it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts. The Supreme Court further held that the rights and obligations contained in the African Charter are not new to Nigeria as most of these rights and obligations are already enshrined in our constitution particularly Chapter IV of the 1979 Constitution under which it was decided (and indeed under Chapter IV of the present 1999 Constitutions).

3. The African Charter on Human and Peoples' Right is a statute with international flavour. Being so therefore, if there is a conflict between it and another statute its provisions will prevail over those of that other statute for the simple reason that it is presumed that the legislature does

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<sup>6</sup>(1990) 7 NWLR (Pt. 163) 489.



not intend to breach an international obligation. Thus, it possesses a greater vigour and strength than any other statute.

4. However, contrary to the view of the Court of Appeal, the Supreme Court held that the fact that the African Charter on Human and Peoples' Rights has an international flavour cannot prevent the National Assembly or the Federal Military Government from removing it from our body of municipal laws or by simply repealing it and the question whether such repeal is wise or just is not a judicial question. This is because a State is always at liberty, if it deems it desirable due to domestic circumstances or international considerations, to legislate a law inconsistent with its treaty obligation. This is without prejudice to any remedies available against the state in international law at the instance of the other States who ratified the treaty. Once the state decides to exercise such right through legislation, the courts in that country are bound to follow the promulgated domestic law.

5. The Supreme Court emphasised that the African Charter is not superior to and does not override the Constitution of the Federal Republic of Nigeria. The Constitution is the supreme law of the land. It is the *grundnorm*. Its supremacy has never been called to question in ordinary circumstances. Thus, any treaty enacted into law in Nigeria by virtue of the 1979 Constitution, section 12(1) (or indeed the CFRN, 1999 as amended) is circumscribed in its operational scope and extent as may be prescribed by the National Assembly. The decision of the Court of Appeal that the African Charter is protected by international law and as such the Federal Military Government is not legally permitted to legislate out of its obligations is wrong as it would elevate the African Charter above the Constitution. This will then be a violation of the provision of the supremacy of the constitution contained in *section 1* thereof.

7. The Supreme Court sharply deprecated the decision of the Court of Appeal that the provisions of the African Charter is in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria or in order of superiority as enunciated in *Labiya v Anretiola*.<sup>7</sup>

### **3.0 SCOPE OF ENFORCEABILITY OF THE AFRICAN CHARTER IN NIGERIA**

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<sup>7</sup>(1992) 8 NWLR (Pt. 258) 139.



Against the foregoing, it remains to determine in this segment of the paper whether as an applicable law in Nigeria, it can be safely surmised that all the civil, political social, economic and cultural rights guaranteed under the African Charter are applicable in Nigeria being that the African Charter does not classify the rights it guaranteed in terms of judicial enforceability which the Nigerian Constitution does. Put differently, are all the rights guaranteed under the African Charter justiciable when the Nigerian Constitution provides that only the civil and political rights found in Chapter IV are justiciable while the social, economic (excluding right to own property and right to prompt and adequate compensation upon compulsory acquisition of property) and cultural rights provided in Chapter II are non-justiciable.

Firstly, it bears repeating that on the authority of the Supreme Court's decision in *Abacha v Fawehinmi*<sup>8</sup> and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983, it is safe to surmise that the African Charter is an integral part of Nigerian law to be enforced by legislative, executive or judicial authorities in Nigeria. This was also the position taken by the Court in *Danbaba v State*<sup>9</sup> and *Ogugu v State*.<sup>10</sup> However, the fact that African Charter is part and parcel of Nigeria's domestic law does not obviate the constitutional dichotomy erected and recognised between the first generation, second and third generation group of rights as the African Charter provisions (received vide of the Constitution of the Federal Republic of Nigeria, 1999 as amended) are not superior to and do not override the provision of *section 6(6)(c)* of the same Constitution declaring the fundamental objectives and directive principles of state policy as non-justiciable rights. Thus, economic, social and cultural rights contained in the African Charter remain programmatic rights subject to the political will of the government and further dependent on available resources because of the *caveat* etched in the Constitution of the Federal Republic of Nigeria, 1999 as amended, *section 6(6)(c)*. The economic, social and cultural rights remain mere pious wishes akin to looking at a glass ceiling without being able to touch it.

Pointedly, for the broad spectrum of economic, social and cultural rights in the African Charter there is need for a further express constitutional amendment or alteration succinctly dismantling the barrier found in the CFRN, 1999 as amended, *section 6(6)(c)* coupled with creative lawyering which will help to change judicial inhibitions in this regard. In the ground

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<sup>8</sup>(2000) 6 NWLR (Pt. 660) 228 at 340.

<sup>9</sup>(2000) 14 NWLR (Pt. 687) 396.

<sup>10</sup>*Ogugu v The State* (1994) 9 NWLR (Pt. 366) 1.



breaking adjudication by the African Commission on Human and People’s Rights in the famous case of *The Social and Economic Rights Action Center and The Center for Economic and Social Rights v Nigeria*,<sup>11</sup> otherwise known as the “*Ogoni Case*”, the African Commission found the Nigerian government to be in breach of articles of the African Charter guaranteeing socio-economic rights yet the decision is of no binding force as it remains unenforced or disobeyed till date. Nigeria is under an obligation to modify her domestic law to give effect to treaty obligations and this chance has been offered by the current constitution review process. It is against the principles of *pacta sunt servanda* to approbate and reprobate at the same time on mutually agreed treaties- ratify treaties, domesticate some and make domestic laws that negate them.<sup>12</sup>

#### 4.0 CONCLUSION AND RECOMMENDATION

This paper established that the African Charter on Human and Peoples’ Rights is part of Nigerian laws to be obeyed by all the three arms of government. However, the ACHPR is not superior to and does not override the Constitution of the Federal Republic of Nigeria. The hegemony or supremacy of the Constitution has never been called to question in ordinary circumstances. Thus, while all the civil and political rights found in all the ACHPR are justiciable, the social, economic (excluding right to own property and right to prompt and adequate compensation upon compulsory acquisition of property) and cultural rights therein remain non-justiciable because of the prohibition in the CFRN, 1999 as amended, section 6(6)(c). It is therefore recommended that the constitutional dichotomy between the justiciable and non-justiciable provisions of the ACHPR as a result of the barrier found in the CFRN, 1999 as amended, section 6(6)(c), should be abrogated and these rights declared justiciable and enforceable.

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<sup>11</sup>Communication 155/96.

<sup>12</sup> E Onyekpere, “Justiciable Constitutionalisation of Economic, Social and Cultural Rights – A Framework for Action”, in EC Ngwakwe, CO Ajah and I Okoronye, (*Human Rights, Democracy and Development Revisited: Essays in Honour of Professor Osita C. Eze*, Aba, KDV E-Publishers, 2012) 119.