

African Human Rights System in Practice: Theoretical and Practical Challenges

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ABSTRACT:

The study examined the structural challenges encountered by the African Human Rights Commission in discharging its mandates of protecting and promoting charter guaranteed human rights in the continent. This study is based on document analysis and analytical review of secondary sources. The African Human Rights charter was entered into force in 1986 as the key normative instrument for the protection of human rights. The charter established the African Commission as a principal Continental Human Rights System under the OAU. Unlike the OAU, the AU provides stronger normative human rights framework for the African Commission. The study revealed that the Commission is encountering multifaceted structural and institutional challenges that continue to beleague its efforts at actualizing the provisions of the charter. The criticism of the Commission as being a simple appendage of African governments is basically linked to its limited mandate and autonomy. As study results indicate that competing sub-regionalism and state interest driven politics is not only hampering effective functioning of the Commission but also undermining efforts of making the charter as common standards of achievement and practice in Africa. The study suggest that Africa should continue to undertake the most robust measure to provide broader autonomy to the Commission and should also undertake reform process within the AU framework that is not so state-centric and compromise the breach of human rights by the member states in Africa.

Keywords:

AU, African Human Rights system, Charter, African Commission and Regional Economic Communities

1. INTRODUCTION

The former Organization of African Unity (OAU) adopted the African Charter on Human and People's Rights (African Human Rights charter) on 27 June 1981. The charter entered into force in 1986 and remains the primary normative instrument for the promotion and protection of human rights in the continent. Indeed, the adoption of the Charter gave recognition to the great need to give more serious attention to the promotion and protection of human rights in the African continent. Albeit with some differences, the provisions of the Charter adopted from international and regional human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and European Human

Convention. While including elaborative provisions for the protection of human rights in the continent in all areas, the charter divides the civil and political rights on the one hand and economic, social, and cultural rights on the other. This remains one of its unique features of the charter as compared to the other international human rights instruments. In addition, the charter's extension of human rights protection to what has been termed "group" or "collective" rights that ordinarily were not classified as falling either within civil and political rights, or economic, social, and cultural rights, is also an enduring legacy (Nmehielle, 2004; Murray, 2004).

The charter established the African Commission on Human and Peoples' Rights (African Commission or Commission) as principal Continental Human Rights System under the

OAU. The Commission was established after European and American human rights systems in the world (Murray, 2004). The Commission has charter mandate (as per art.30; art. 45/1-4) to promote human rights and to ensure their protection in Africa. It is also expected to provide some institutional oversight in the face of gross human rights violations that characterized post-colonial African governance. This study mainly focuses on the African Human Rights Commission as African Human Rights systems and other regional and national supervisory mechanisms to give effects to the charter and other human rights instruments, such as the Refugee Convention, Child Rights Charter, and Protocol on the Human Rights Court and the Womens' Rights Protocol, adopted by the African Union (AU).

Despite several challenges to its functioning, the African Commission has made some significant achievements, for instance, in terms of ensuring that human rights are a constitutive objective of the Constitutive Act of the AU and member States domestic laws, mainstreaming human rights in the AU organs, programmes and activities and adopting several binding and non-binding human rights instruments (Hansungule, 2009; Martorana, 2008; Isanga, 2012). The increase in the number of national human rights institutions in the continent is also another remarkable achievement of the Commission. In protecting human rights at national level, the African states have primary responsibility. This responsibility is however complemented by the African human rights Commission and UN Human rights system (Ebaborah, 2009:277). One of the methods devised by the Commission to complement this states' responsibility and to ensure the enforcement of human rights at national level is through the establishment of the national human rights institutions, which are flexible and more accessible to the local peoples than the commission since the Commission would not be able to cover the entire continent (Ebaborah, 2013; Peter, 2004). In addition, several binding and non-binding human rights instruments have been adopted in the continent to give effect to charter-guaranteed rights.

Despite progresses, the human rights situations remain bleak and violations of human

rights are still very critical problem in the continent. The Commission is facing multifaceted problems and challenges, which is the subject of this study, in effectively enforcing the charter and other human rights instruments. Aware of the challenges for effective enforcement mechanism under the Charter, the AU adopted the Protocol on the African Human Rights Court to complement and reinforce the functions of the Commission.

While this is a welcome development in the African human rights system, the critical challenge, as discussed later, regarding enforcement of the charter is the relationship between the Human Rights Court and the African Commission.

The failures of the OAU in terms of the African Human Rights System are the challenges that the African Union has to confront and decisively deal with (Nmehielle, 2004). Within the Africa human rights system, criticism in relation to human rights violations is often voiced towards the Commission as being a simple appendage of African governments rather than discharging its mandate effectively to protect charter-guaranteed rights. However, putting all the blame on the African commission can mistake us to overlooks other crucial variables or barriers that hamper autonomous and effective functioning of the Commission. This should not be interpreted as the Commission should not bear part of the criticism for its poor performance.

In light of this, the study has three key objectives: firstly, the study examines structure problems that hamper the effectiveness of the African Commission in better protecting and promoting human rights; Secondly, the study analyzes the structural challenges related with the involvement of Regional Economic Communities (RECs) as sub-regional human rights system to establish continental human rights common standards of achievement and practice; and thirdly, the study investigates the measures taken by the AU to strengthen the Commission and its related challenges for the Commission. Methodologically, this study is based on the analytical review of documents and secondary sources to explore structural challenges that hamper the Commission and other human rights

instruments to fully ensure the realization of charter-guaranteed rights in the continent.

This study is organized into four parts beginning with describing the emerging of RECs as Human Rights Instruments and associated challenges for human rights protection in Africa. The second part deals with the key structural challenges that obstruct the Commission's independent and efficient protection of human rights in the continent. The third part presents the measures taken by the AU to strengthen the Commission and its related challenges. The last section is devoted to the conclusion and recommendation of the study.

1. DISCUSSION AND ANALYSIS

1.1. Challenges Faced by the African Commission

The establishment of the African human Commission is steps in the right direction for human rights protection in Africa. In this regard, the birth of the AU represents an era of paramount importance for the African Commission to better protect human rights than the OAU. The human rights that played no role during the 40 years of existence of the OAU are finally on the agenda as main objective of the AU (Hansungule, 2009: 269). However, the Commission has been facing some structural and other challenges that hamper its independent and effective functioning. Consequently, the Commission is often criticized as being a simple appendage of African governments due to its poor performance. Addressing the challenges that the Commission is currently facing therefore can expand the autonomy and mandate of the Commission so that it can better protect human rights in the continent.

Everyone agrees that the provision of human rights in the charter and other instruments do not implement themselves. Despite the seeming normative progress in terms of substantive human rights instruments made by the African human rights System, the Commission has no broader autonomy to enforce the charter and other instruments. While establishing the commission, the charter did not establish an enforcement mechanism for its provisions (Martorana, 2008).

The charter imposes mandate on the Commission to promote and ensure the protection of charter guaranteed rights in Africa (art.30; art. 45/1-4). However, the Commission does not have powers to give binding judgments to supervise the Charter (Ebaborah 2009:88). Discharging the mandate is limited to gathering information, establishing facts and making recommendations to the AU assembly (Odinkalu, 2002: 104-5). It is the assembly that decides what should be done with the findings and recommendations provided by the Commission. Furthermore, the Commission's mandate is to examine the compatibility of domestic law and practice with the Charter. It can only issue recommendations to the AU assembly. The Commission's jurisdiction does not extend to adjudicating on the legality or otherwise of national laws of states. Without authority to make binding orders, the Commission merely pleads with nations to come into compliance with the Charter (Martorana 2008:584). The Commission cannot publish and disseminate its findings until its report has received comment from and been adopted by the AU Assembly and further given permission to publish it (Isanga, 2012:132).

Furthermore, the Commission is not a judicial, but rather purely a supervisory body (Zimmermann, 2010:39). As a result, it cannot prosecute states for breaching human rights. Limited mandates and autonomy undermine the role of the Commission as protector of human rights in Africa. Martorana emphasized that the Commission wields no power to issue binding decisions or to grant remedies and its proceedings are conducted in secret (2008:584). In the same vein, Hansungule contends that the Commission cannot protect human rights without guaranteeing broader power (2009:250-2). Lack of broader mandate to the Commission has proven to be a major challenge to protect human rights in the continent (ibid). To actualize the realization of charter guaranteed rights as an independent human instrument, the Commission should be given a broader mandate and enforcement power. It is time to address these structural challenges to end the breach of human rights in Africa. This will enhance the Commission's institutional ability to actualize the objective and aspirations contained in the charter. Lack of broader jurisdiction is underlying cause for the weakness

of the Commission and criticism for its poor performance in protecting human rights.

In addition, the Commission's lackluster performance and criticism as a simple appendage of African government has also attributed to lack of resources. In this regard, Hansungule has emphasized that 'all African institutions survive on shoestring budgets which will allow them to operate optimally' (2009:250). He further points out that budget constraint is far worse at the AU (ibid). In the activity reports at the 25th anniversary of the Commission, Commissioner pointed to insufficient staffing and a lack of resources to undertake such a herculean task of performing charter mandate of protecting human rights in the continent. Indeed, the Commission is mainly dependent on the donations from abroad (Martorana, 2008: Nmehielle, 2004). It is apparent that human rights realization by the Commission in Africa is dependent on the resources made available to it. Therefore, adequate budgetary resources and the ability to draw funding from multiple sources are vital to the Commission's viability.

1.2. Challenges of RECs Emerging as Regional Human Rights System

The RECs were originally set up as a vehicle for the pursuit of regional economic integration in Africa. The founding instruments of RECs had initially little or no reference to promotion and protection of human rights (Ruppel, 2009:277). However, human rights have progressively seeped into the agenda of some RECs for various reasons. Eboborha emphasized that 'the inclusion of human rights into the agenda of economic integration of RECs was arguably the result of frustration (and in some cases failures) of regional integration initiatives' (2009: 80). Previously, the national human rights system is generally complemented by the continental Human rights system. Nowadays, the RECs appears' poised to position itself as a layer of protection between the national and continental human rights system. However, there is currently no specific definition of relationship (let alone hierarchical) between the African Commission and the mechanisms of RECs (ibid: 88). The challenges associated with

increasing involvement of RECs in human Rights Protection is summarized as follows:

Firstly, seen from comparative perspective, there are differing degrees of involvement in the field of human rights among RECs as organizational mandates. Some RECs have relatively deeper levels of involvement in the protection of human rights while the degree of involvements by some others RECs is very scanty. In terms of norm creations and human rights standard setting at sub-regional level to protect human rights, the Southern African Development Community (SADC), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA) and the Economic Community of West African States (ECOWAS) exhibit deeper degree of involvement and their mechanisms are becoming stronger and more pervasive (Eboborah, 2013:179). They have gone further to create judicial bodies though they have overlapping and conflicting jurisdiction with African court on human and peoples' rights.

On the other hands, the Intergovernmental Authority on Development (IGAD), the Arab Maghreb Union (AMU), the Economic Community of Central African States (ECCAS), and the Community of Sahel-Saharan States (CEN-SAD) have less developed organization specific and functional human rights instruments to protect human rights (Ruppel, 2009:314). Their organizational treaties do not explicitly refer to human rights protection as a result they have involved in the field of human rights only to a very limited extent. The mechanism of human rights protection of the SADC, the EAC and the ECOWAS become more entrenched in Africa in contrast to others. Adding to economic integration, the SADC and the EAC adopted Human rights realization as main organizational objective (Eboborah, 2009:282). However, the ECOWAS and the COMESA do not clearly express human rights realization as main organizational objective (ibid). While they are considered as decisive layer of human Rights instruments in the continent, the RECs differing degree of involvement and fragmentation in the organizational and institutional competence in the field of human rights protections remain serious challenge for better protection of human rights in Africa.

Secondly, lack of direct references to African human rights charter as ‘a common standard of achievement’ while establishing sub-regional human rights standard by most RECs is another critical challenges to bring uniformity in human rights standards and practices throughout the continent. Being a treaty between states, no African RECs is a party to the African human rights Charter. Notwithstanding their involvement in the field of human rights, the RECs have no direct relationship with the African Human Rights Commission (Ruppel, 2009; Hansungule, 2009). They operate independently and not part of the continental human right systems. The SADC and to limited extent the EAC adopted expansive organizational specific human rights standards without direct reference to the charter as ‘a common standard’ (Ebaborah, 2009: 283). This contradicts sharply with the ECOWAS practice where the charter has acquired a central position. The SADC has quite unique experience among RECs in Africa. The SADC has created specific human rights standard by adopting SADC human Rights charter without adoption from the African Human Rights Charter. Neither the African Charter nor any other international human rights instrument holds a central place in the SADC Charter (ibid: 302).

Despite the fact that the SADC Charter restricts itself to the rights of workers, the value of adopting the African Charter as a ‘common standard’ and the persuasive ECOWAS model of the Charter’s use would thus be valuable here for avoiding conflicts with and risks of disrupting the African human Rights systems. All RECs must engage in direct standard-setting by taking the Charter as ‘a common standard’ if the promise of human rights realization has to be fulfilled in Africa. The specific human rights catalogue by RECs must not be created in the continent. Such competing sub-regionalism together with state interest driven politics over common regional interests is challenging effective regional integration and building common human rights frameworks in Africa.

Thirdly, African states overlapping memberships to various RECs and existence of concurrent jurisdiction is another structural challenge for better human rights protections in the continent (Ruppel, 2009:277). It is known that

the OAU as well as AU has long based its policies on the principles of state sovereignty and non-interference. This principle of state sovereignty is still hampering the effectiveness of the AU and the human rights Commission. The barrier of state sovereignty is still critical challenge for the success of sub-regional economic and continental integration. The states as a sovereign entity enjoy supreme authority in Africa. The states compliance with human rights decisions of judicial organs within RECs and AU is not total (Isanga, 2012). This fact is demonstrated by the difficulties being experienced by the ECOWAS with respect to the Gambia’s refusal to implement the decision of Community Court of Justice in the Manneh case and SADC, with respect to Zimbabwe’s refusal to comply with the SADC Tribunal’s decision in the Campbell case (Ebaborah, 2009: 333-4). This can be regarded as a hurdle for effective human rights standards and practice in the continent. This is also evidence for lack of sufficient political will among African states to act in accordance with sub-regional and continental human rights laws, weak RECs competence over member states and a functional regional system to protect breach of human rights. Thus, addressing the challenges emanating from the state sovereignty and undertaking a reform process that is not so state-centric in Africa is mandatory for better protection of human rights in Africa.

1.3.The AU Measures to Strengthen the African Commission and Related Challenges

Cognizant of Commission’s weakens due to lack of autonomy to make binding decisions and power to enforce its determinations under the Charter, the OAU adopted the Protocol to the African Charter establishing an African Court on Human and Peoples’ Rights on 9 June 1998. The Protocol created the Court as an independent judicial body with the authority to bind parties under the Charter. Further, the Protocol intended to address the major failures of the charter in establishing strong enforcement mechanism by arming the Court with the power to issue binding orders and remedies (Martorana, 2008: 599). To give the political backing to the implementation of

the Court decisions, provision is made for the Council of Ministers to monitor the execution of court judgment. The Protocol's provision for binding orders shows the greatest promise for the implementation of human rights.

The transition from the OAU to AU was indeed a milestone for the African Commission as the latter provides the Commission a stronger normative human rights framework. Nmehielle has also mentioned that 'the Constitutive Act of the AU appears to be more positively oriented towards human rights promotion and protection in the continent and thus would have a larger normative impact on the future development of the African System'(2004:6). As embodied in the Constitutive Act, promotion and protection of human and peoples' rights in Africa is one of the main objectives of the AU (art.3). Consequently, the transformation of the OAU to the AU has brought about huge potential for human rights to play a greater part in the AU (Murray, 2004:267).

Moreover, the Constitutive Act reaffirms and deepens Africa's commitment to promote and protect human rights, democracy, governance and development (Gawanas, 2009: 137). Though the AU is criticized for not formally recognizing the African Commission as one of its main organs in the Constitutive Act (art. 5), it continues to adopt more human rights instruments, strengthen existing institutions for realization of human rights and mainstreamed human rights in all its activities and programmes. The AU has thus enriched the African human rights system and provided an enabling environment within which to pursue human rights promotion and protection vigorously in the continent (Gawanas, 2009:139).

While the protection of human rights is laudable under the Constitutive Act, the human rights institutions have the challenge of limited capacity and inadequate coordination and collaboration to better protect human rights (ibid). As a result, a holistic, comprehensive and integrated approach is required to consolidate and coordinate the activities of those institutions involved in the human rights realization at the continental level. Notwithstanding the continuation of principles of state sovereignty and non-interference in the internal affairs of member state, the Constitutive Act marks a major

departure from the OAU Charter by recognizing the right of the AU to intervene in a member states during war crimes, genocide and crimes against humanity (art.4). The AU recognized that the policy of non-interference hampered effective protection of human rights in the continent. Despite different positive aspects, the effective enforcement of charter guaranteed rights remains a headache in the continent. Africa continues to grapple with the breach of human rights and building mechanisms to end human rights violation.

In nutshell, the challenges to the Commission are many. They need to be considered and addressed for better protection of human rights. Particularly, its lack of broader autonomy and possible failure of the AU to enforce decisions regarding Charter violations by the member states on the basis of the Commission reports and recommendation coupled with the secrecy of the Commission's proceedings and lack of resources to undertake charter mandate, led to the criticism that the Commission is an insufficient and political institution to the myriad of human rights abuses in Africa. These challenges that continue to beleague the Commission's efforts at actualizing the objective of the charter should be addressed with the aim of creating broader mandate and autonomy for the Commission.

2. CONCLUSIONS

In conclusion, let me try to reiterate some brief answers to the objectives we set at the beginning of this study. The main weakness of the African Commission in protecting human rights and subsequent criticism of the Commission as being a simple appendage of African governments is basically linked to its limited mandate and autonomy. The competing regionalism and state interest driven politics in Africa is undermining the movement towards African unity, human rights legal integration, realizing the charter and other human rights instruments as common standards of achievement and practice. Uneven and weak structural competences among RECs in the field of human rights seem to dismantle common standards of human rights system as per the charter and practice to better protect and promote human right. It is time to rethink and

restructure human rights system in Africa. The study suggest that Africa should continue to undertake the most robust measure to create unshakeable foundation for the Commission with broader mandate and autonomy to better protect human rights in the continent. Essential to achieving this is a reform process within the AU framework that is not so state-centric and compromise the breach of human rights by the member states in Africa.

REFERENCES

Caporaso, J. A. (1972). *Functionalism and regionalism integration: A logical and Empirical assessment*. Beverley Hills: Sage Publications.

OAU. (1981). African Charter on Human and Peoples Rights. Adopted in Nairobi.

Ebobrah, S. & Tanoh, A. (Eds.). (2010). *Compendium of African Sub-Regional Human Rights Documents*. Pretoria: Pretoria University Law Press

Ebobrah, S. T. (2013). Human Rights Developments in African Sub-Regional Economic Communities during 2012. *African Human Rights Law Journal*, vol. 13, 178-213.

Ebobrah, S. T. (2009). *Legitimacy and Feasibility of Human Rights Realization through Regional Economic Communities in Africa: The Case of the Economic Community of West African States*. Unpublished PhD Dissertation, University of Pretoria, South Africa.

Gawanas, B. (2009). The African Union: Concepts and implementation Mechanisms Relating

to human rights. In A. Bösl & J. Diescho (Eds.), *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (pp.132-162). Konrad-Adenauer-Stiftung and the Authors

Hansungule, M. (2009). African Courts and the African Commission on Human and Peoples' Rights. In A. Bösl & J. Diescho (Eds.), *Human Rights in Africa :Legal Perspectives on*

their Protection and Promotion (pp.232-317). Konrad-Adenauer-Stiftung and the Authors

Isanga, M. J. (2012). Foundations of Human Rights and Development: a Critique of African

Human Rights Instruments. *Ave Maria Law Review*, Vol. 11:1. Pp.123-147. USA

Keetharuth, S. R. (2009). Major African Legal Instruments. In A. Bösl & J. Diescho (Eds.),

Human Rights in Africa: Legal Perspectives on their Protection and Promotion (pp.163-321).

Konrad-Adenauer-Stiftung and the Authors.

Murray, R. (2004). *Human rights in Africa. From the OAU to the African Union*. Cambridge: Cambridge University Press.

Martorana, C. S. (2008). *The new African Union: Will it Promote Enforcement of the Decisions of the African Court of Human and Peoples' Rights?* The George Washington University.

Nmehielle, V. O. (2004). Development of the African Human Rights System in the Last Decade.

Human Rights Brief, 11(3), 6-11.

Nwauche, E.S. (2009). Regional economic communities and human rights in West Africa and

the African Arabic countries. In A. Bösl & J. Diescho (Eds.), *Human Rights in Africa: Legal*

Perspectives on their Protection and Promotion (pp.318-374). Konrad-Adenauer-Stiftung

and the Authors

Odinkalu, C. A. (2002). Implementing economic, social and cultural rights". In M. Evans & R.

Murray (Eds), *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000*. Cambridge: Cambridge University Press.

Peter, C. M. (2009). Human Rights Commissions in Africa – Lessons and challenges. In A.

Bösl & J. Diescho (Eds.), *Human Rights in Africa: Legal Perspectives on their Protection*

and Promotion(pp.348-374). Konrad-Adenauer-Stiftung and the Authors

Ruppel, O. C. (2009). Regional economic communities and human rights in East and southern

Africa. In A. Bösl & J. Diescho (Eds.), *Human Rights in Africa :Legal Perspectives on their*

Protection and Promotion (pp.272-317). Konrad-Adenauer-Stiftung and the Authors.

Zimmermann, A. (2010). Current Challenges facing the African Court on Human and Peoples' Rights. *Kas International Reports* 7, 38-53.