Discrimination and the African Charter on Human and Peoples' Rights

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Introduction

Up to the end of the second world war in 1945, the concept and scope of human rights suffered from definite conceptual and structural defects. They were not differentiated from civil rights and were regarded as individualistic and, at best parochial, in scope. Such palpable backdrops of popular upheavals as the Magna Carta in England (1215), the French Declaration of the Rights of Man (1789) and the American Bill of Rights (1791) were looked upon as the exclusive concerns of the countries concerned. Even the founding of the League of Nations after the first world war did not quite completely obliterate these limitations. It was only as a result of the enormity of human sufferings during the second world war and the creation of the United Nations as a forum for regular discussion of international problems hostile to international peace and harmony, the main objective of the UN Charter, that foundations for universality of human rights norms were laid. That spirit of universality found expression not only in the Universal Declaration of Human Rights which was passed by the General Assembly in 1948, followed by the two Covenants (1966) one on Economic, Social and Cultural Rights and the other on Political and Civil Rights. About the same period, similar developments were taking place in different Regions of the world, leading to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), European Social Charter (1961), the Inter-American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (1981).

It is important for purposes of this paper to bear in mind the fact that all these international instruments were somehow connected, being all from a common motivation, to wit: the promotion and protection of human rights. Also, to a large extent, they have identical contents, though with some minor difference in places.

International Human Rights Norms

One of the most significant achievements of the maiden colloquium and precursor of this, which was held in Bangalore, India, in 1988, was, in my opinion, a recognition of the fact that although international human rights norms are not usually directly enforceable in national courts exercising their respective domestic jurisdictions, yet those courts are expected to have due regard to such norms while deciding cases whenever their domestic law - constitutional, statutory, or common law - is uncertain or incomplete.

Another point which must be mentioned in this introduction is the principle of universality of human rights norms. Before 1945, these rights were regarded as the exclusive problem of affected individuals or localities. By the United Nations Charter, 1945, and the Universal Declaration, 1948, they ceased to be so regarded. These norms are usually stated in international or regional instruments, customary international law, principles of the common

law for those within the common law jurisdictions and now internationally developing human rights jurisprudence. Sometimes they are expressed in constitutions and other legislations of different countries. But as was noted from the preamble to the Universal Declaration of Human Rights, that change of attitude was initiated by a realization that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Hence it was proclaimed therein that the "Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction". Hence it proceeded to declare in Art 1 as follows:

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

So, although the Declaration was not intended to be a universal and enforceable code binding on all member states as such, it was designed to set a uniform standard for all member states. It was intended that the entire humanity should aspire to their attainment. The norms are, therefore, universal. To that intent, the underlying concept is that subject to express provisions to the contrary in the domestic laws of any particular state, they are the entitlement of all members of the human family as they are "the foundation of freedom, justice and peace in the world". So they deserve universal and effective recognition by all. One corollary of the universality of these norms is that, subject to express provisions in the domestic laws of a particular state, there cannot be in concept or essence any separate version of any of these norms in Britain or the United States and yet another for Russia, or India, or Nigeria, or South Africa. Indeed recognition and respect of these international norms of human rights make the difference between a civilized society and a barbaric one. They are rights which all civilized societies ought to aspire to. They are rights which are conceptually antecedent to the political society itself and are therefore regarded as "primary condition to a civilized existence."[1] It is from the above general and broad principles that I shall now examine more closely two of such norms, to wit: freedom from discrimination and freedom of expression and the press under the African Charter.

Discrimination

One of the cherished norms guaranteed under the African Charter is equality of all human beings before the law and equal protection of law to all persons: Article 3 of the Charter provides as follows:

Article 3

1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law.

This Article, which is a clear reflection of Art 1 of the Universal Declaration, provides for what is usually referred to as freedom from discrimination. It is important to observe that in this context the African Charter deals with two distinct situations, namely equality of all persons before the law and equal protection of all persons by the law. Although they have the same fundamental objective, to treat all persons alike, it would be wrong to ignore the essential difference between the two. The first which relates more to social organization and association entrenches fundamental equality of all individuals before the law. It proscribes preferential treatment of any person or class merely because of his class. The second which looks rather like the supportive weapon of the first, like the equal protection clause in the Fifth and Fourteenth Amendments to the United States Constitution, is designed to deal a death blow to racial discrimination, but is not limited to it. Both arms of the Article, taken together, deal with discrimination in a very wide context. Both take all the citizens of a state as a group of equals and proscribe any arbitrary classification of them and preferential treatment to any group therein merely because they belong to the group.

It is necessary to begin with, to get a clear idea of what is meant by discrimination. For lack of a clear idea as to its meaning and implication has often led to its being confused with freedom of association which is dealt with in Art 11, or of movement, dealt with in Art 12 and which are basically different.

It is important to note that the word "discrimination" suffers a good deal from imprecision. For not only are there *de jure* and *de facto* discriminations but also it must be admitted that not all legislations, if any at all, apply universally and deal with all persons equally. Discrimination is therefore used in the loose sense and in the strict sense. In the loose sense of the word, it can be said that a Children's and Young Persons Law discriminates against adults. A refugee law discriminates against non-refugees. A law on aliens necessarily discriminates against indigenes. Such examples can be multiplied indefinitely. But that is the loose sense of the word and, fortunately, not the sense in which it is used in the African Charter or any other international convention or instrument. Discrimination in the Charter or any other similar covenant always arises with reference to persons of the same class. Citizens of a state are supposed to be all of the same class. If a law or a policy seeks arbitrarily to classify them or give preferential treatment to a section therein on the basis of race, ethnic ancestry, gender, colour, circumstances of birth, that is discrimination. The opposite of it is the equal protection clause under the Fourteenth Amendment to the United States Constitution, the basis being unjustifiable classification.

Discrimination in the eye of the law, therefore, means the effect of a statute or established practice which confers particular privileges on a class (or a person) arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favoured reasonable distinction cannot be found. It implies "unfair treatment or denial of normal privileges to persons because of their race, age, nationality, or religion, and a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured".[2] Not less prominent are discriminations on grounds of sex, the so-called gender discrimination - and one on ground of colour - the notorious colour bar. Taking a clue from the position in the United States, in essence discrimination operates among persons of the same class or group. This is why the whole gamut of later decisions of courts in the United States go to show that discrimination against the negroes on no other ground but their race and colour is unconstitutional.[3] But let me emphasize that it does not bar all types of classification. It

certainly permits of such on reasonable grounds. The United States Supreme Court in my view put the principle right when it stated:

> as a general proposition (it) is undeniably true that it is not within the scope of the Fourteenth Amendment to withhold from the States the power of classification"[4] but it must appear that (a classification is) based upon some reasonable ground - some difference which bears a just and proper relation to the attempted classification.

The same court reiterated the *rationale* in the *Slaughter House Cases* and in *Williams v Fears*, 179 US 270, p 274 thus:

> The "evil" to be remedied (by the Fourteenth Amendment) was "the existence of laws in the States where the newly emancipated negroes resided, which discrimininated with gross injustice and hardship against them as a class."

It was subsequently held, in *Brown v Board of Education* 347 US 483 obviously over-ruling the doctrine of "separate but equal" approved in *Plessy v Ferguson* 163 US 537 that there would be no legal distinction among all those born or naturalized in the United States and so to separate negro children from others equally born or naturalized in the United States on no other ground but because of their race and colour was inherently unequal and, therefore, unlawful discrimination. It must be repeated that discrimination may be *de jure* when it is by express enactment or *de facto* when it is by established practice. Both of them are odious but it is, perhaps, more reprehensible when it is entrenched as a matter of law, ie *de jure*.

Worthy of consideration in this regard is discrimination in many countries against illegitimate children. It is true that illegitimacy derives from the act of such a child's parents, and not from any fault of the child himself. As the United States Supreme Court pointed out in the case of *Weber v Aetna Casualty & Surety Co* 406 US 164 "visiting condemnation upon the child in order to express society's disapproval of the parents' liaison is illogical and unjust." Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of law that legal burdens should bear some relationship to individual responsibility or wrongdoing. So, the law has usually disapproved of discrimination against children merely on grounds of illegitimacy.

Much more important for our consideration is discrimination based on gender. In many parts of the world laws are passed and policies formulated which clearly discriminate against women for no other reason but that they are females. Britain and some countries of Western Europe are virtually free of this - thanks to the effect of the suffragette movement of late 19th and early 20th centuries. In the United States the attitude of the courts was basically different for a start. In 1873, in the case of *Bradwell v Illinois* 83 US 130 the Supreme Court of the United States approved a law which discriminated against women in the practice of law. This attitude continued in many subsequent cases.[5] But the trend of approval of discriminatory legislation on no other ground but gender was later broken, as shown by the case of *Orr v Orr* 440 US 268 which disapproved of an Alabama legislation which provided for alimony for women and not for male spouses.

In most parts of Africa, the story is not rosey: women are still regarded as underdogs.

In Nigeria, as far back as 1935, the Chief Secretary to Government, in a reply to Lady Abayomi's representation that "both sexes must be equally and fairly educated" and equally paid said:

> Women don't make good saleswomen and since women don't have the financial responsibilities as men, they should not receive equal salaries.[6]

This is clearly a classic example of discrimination. Discrimination against women on grounds of their sex runs through the classical era during which a woman's domestic position was completely subordinated to that of the man, *(patria potestas)* whether he was the father, brother or husband. Women had rather little, if any at all, legal personality. The Hebrews demonstrated their discrimination against women by their usual morning prayer to God by Jewish men:

> Blessed art thou who has not made me a Gentile, a slave or a woman.[7]

Most tribal groups in Nigeria, and in fact most of Africa, regard women as inferior to men. The truth is that this deep rooted prejudice against women was such that in 1957 the United Nations thought it fit to adopt a "Convention on the Elimination of All Forms of Discrimination Against Women." This was one of the ideological backgrounds which informed the insertion of Art 3 already set out above in the African Charter.

Were the African Heads of Government merely content to just enunciate the abstract norm? No. They went further to prescribe their duty in that respect. Hence in Chapter 2 - Duties, they provided in para 3 of Art 18 as follows:

> 3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions.

In most African communities there are many instances of discrimination against women in their substantive laws, in spite of this and the express provision in Art 16(1) of the Universal Declaration of Human Rights for equal rights of men and women. These discriminatory enactments relate to marriage, rights during coverture, and rights over their pre-nuptually and post-nuptually acquired properties. Even parental rights over their children bear out this discrimination. In fact in the traditional concept of most African communities, a wife is part of her husband's properties and in real terms she is only a shade higher than a chattel. In short quite apart from positive enactments, the position of women is made worse by custom and customary concepts.

This brings me to the case of discrimination against children. By many international declarations, covenants and instruments, the need for special case for children has been recognized. Mention may be made of the Geneva Declaration on the Rights of the Child 1924, the UN Declaration of the Rights of the Child 1959; Art 24 of the International Covenant on Civil and Political Rights (1960), Art 10 of the International Covenant on Economic, Social and Cultural Rights (1966), the United Nations Convention on the Rights of the Child and several other international declarations on Social and Legal Principles relating to the Protection and Welfare of children. All of them recognize the fact that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding"[8] and completely free

from discrimination. So, because of his or her special circumstance, the child deserves special care and assistance. Yet, in many countries, particularly in the African Region, the child is discriminated against in laws on many theatres of life. All the rights of the child set out in 45 out of the 54 Articles in the UN Convention on the Rights of the Child are trampled upon at will. Even their right to education in any part of their country is sometimes restricted or denied some children of the same country.

In Nigeria, right to freedom from discrimination is an entrenched right under s. 39 of the 1979 Constitution and s. 41 of the 1981 Constitution. Hence in *Adewole v Jakande*[9], a circular which sought to restrict certain children to only public schools was held to be unconstitutional. Similar provisions exist in many African Countries.

The last type of discrimination that I wish to touch upon is that with respect to voting. Experts on the United States Constitution regard the right to vote as an aspect of human rights[10] As it is so, several legislation that tended to dilute the right to vote by every citizen of the State or to weight the value of a vote higher or lower than others, or deprive a section of the populace of their right to franchise, or restrict the free exercise of the right to vote by any section of the people are denials of human rights and therefore unconstitutional.

Back to The African Charter

One might have been wondering why I have gone so far afield in my discussion of general principles and, particularly in the consideration of decided cases and examples - far away from the African Region to which the African Charter more directly relates. This is deliberate, for the following reasons:

(i) As I tried to show in the introduction, the Universal Declaration and the different Regional Covenants on Human Rights are connected not merely in their historical setting but more relevantly in their motivation and concept. Also, the norms are universal. The result is that decisions on any of them in one country or region will have a persuasive effect on a court in the African Region faced with the same problem in similar circumstances.

(ii) There is no supranational court on human rights in the African Region and, most of the national constitutions in the Region are nascent, in fact post-colonial, resulting in a dearth of precedents. The Magna Carta which laid the palladium for the so much hallowed British liberty, for an example, was forced on the Crown in 1215. American courts have been interpreting human rights norms for over 200 years. While it is conceded that these norms are universal, courts in the African Region ought, in my view, to be freely guided by reference to experiences in similar situations in England, America and elsewhere. In fact, there can be no better guide on any issue of discrimination in the African Charter than decisions of, and precedents by, courts in the United States, for historical reasons.

(iii) It is clear from the text of the African Charter itself that it never intended an isolationist interpretation. It is clear from the preamble that it set out, like other international and regional instruments "to promote and protect human and peoples' rights on the basis of freedom, equality and justice". Like those other international and regional conventions and instruments it was designed "to promote international

co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights". It also reiterates the need for international protection of human rights and for "adherence to the principles of human and peoples' rights and freedoms, contained in the declarations, conventions and other instruments adopted by (*inter alia*) . . . the United Nations." After statements of principles which are in language and essence identical with those of other international and regional instruments, it ennunciates the corresponding duties of member states and individuals. Then it creates the Commission as the enforcement organ and specifically charges it to draw inspiration from the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of various instruments adopted within the specialized agencies of the United Nations of which the state parties to the Charter are members. Thus there is a clear intention in the Charter itself that in its interpretation and application of the African Charter these other human rights instruments could be regarded.

A close look at Art 10 of the Charter set out above shows that discrimination, whether *de jure* or *de facto*, in all its ramifications is contrary to the letters and spirit of the Charter. In other words, to discriminate against any person or group by legislation or practice and policy because of his or their gender, race or ethnic origin, age, circumstances of his or her birth[11], colour, nationality or religion as such, as well as failure to treat all persons equally where no reasonable distinction can be found between persons favoured and those not favoured are all discrimination which runs contrary to the provisions of the Charter. So is the provision of public facilities in such a way as to favour some members of the community and put others at a disadvantage. So also is a legislation which is such as to bar from or diminish the right of any section or group in the community of exercising their full right to vote with equal opportunity. But I must also point out that, like in cases decided on equal protection clause under the United States Constitution[12] it may not be possible to avoid some classification altogether. But where there must exist one it must be based upon some reasonable ground and not a mere arbitrary classification based on the fact that the affected group belongs to a particular class or group that must be singled out.

As I have stated, there is no separate supra-national court of human rights charged with responsibility for enforcing these rights. But this does not mean that there is an absence of appropriate forum for their enforcement. True, the whole s. 4, (Arts 38-56) of the European Convention is devoted to the establishment, organization and powers of the European Court of Human Rights. So does s. 11 (Arts 81-82) of Chapter XI of the Inter-American Convention make provision for a similar Court for the Inter-American regional human rights system. There are no such provisions in the African Charter. But Art 7 of the Charter provides as follows:

Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

So, even though the African Charter differs from both the European and Inter-American Conventions each of which has provided for a Court of Human Rights, power has been given to the Courts in the region, in exercise of their respective domestic jurisdictions, to enforce human rights. Furthermore, the written constitutions of all of them expressly give judicial

power to the judicature. An example is in s. 6 of the Constitution of Nigeria 1978 and 1979. This is a great power. Read together with Art 7 of the African Charter it is clear that the responsibility and power of interpreting and enforcing the provisions on freedom from discrimination both in the Charter and in their domestic jurisdictions, are those of the judges in the region.

Other Specific Provisions

It is from the above general principles that the Courts in the African region, in exercise of their respective domestic jurisdictions, and in the spirit of Art 7 of the Charter, are now expected to interpret and enforce the other specific provisions of the Charter. The following are particularly relevant:

1. *Discrimination against non-nationals of member states:* Paragraphs 4 and 5 of Art 12 provide against discrimination against non-nationals of states parties to the Charter. Mass expulsion of non-nationals on grounds of nationality, racial, ethnic or religious considerations is expressly prohibited. [Art 12(5)].

2. *Non-discrimination with respect to access to the public service of the country:* Every individual is guaranteed equal access to the public service of his or her country. The Constitution of Nigeria, 1979, provides for Federal Character in appointments to the public service. This is a form of affirmative action which should be enforced by the courts. But it is, regrettably, declared by the Constitution to be an element of the Fundamental Objectives and Directive Principles of State Policy which is non-justiciable.

3. *Non-discrimination with respect to access to public property:* Every individual is guaranteed the right to equal access to public property and facilities in the state under Art 13(3). This means that there is no room for separate facilities on grounds of race or ethnic origin even if the facilities were equal. It is gratifying to note that Apartheid laws in South Africa are being repealed.

4. *Equal right to assemble with all citizens:* Similarly, under Art 11, every individual is guaranteed the right to assemble freely with others. This right, however, is not absolute as it could be restricted or derogated from by law enacted in the interests of national security or the safety, health, ethics and rights and freedoms of others.

5. *Non-discrimination with respect to conditions of similar employment:* Every individual is guaranteed equal conditions of employment for similar jobs. S/He shall, under Art 15, receive equal pay for equal work.

6. *Non-discrimination on grounds of sex:* Article 18 guarantees the elimination of all discrimination against women on grounds of their sex and assures every woman of all her rights as guaranteed by international declarations and conventions.

7. *Provision for special care for the Child:* similarly, the child is guaranteed all the protection provided for him/her in all international conventions [Art 18(3)].

Conclusion

The only question is whether judges in Africa can rise to the occasion. In trying to drive home this challenge, I would like to cite a line of cases decided by the United States Supreme Court on racial discrimination. Please pardon my constant reference to the United States. After all, though Great Britain was the father and maker of all constitutions in Commonwealth Africa, the United States was their precursor and remains, somehow, a model for the interpretation and application of written constitutions. Now to the cases:

In *Scott v Sanford* 60 US (19 How), 393 (1857), the United States Supreme Court, in exercise of its interpretative jurisdiction, refused to free Dred Scott, a slave, describing him as property, the subject of a right not capable of having rights. This contributed to the Civil War and was one of the causes of the Fourteenth Amendment. By the exercise of the same jurisdiction even after the Fourteenth Amendment, the same Court approved the doctrine of "separate but equal" in schools and public facilities which became the constitutional mainstay of segregation in *Plessy v Fergusson* 163 US 537 (1896).

Then in the historic case of *Brown v Board of Education* 347 US 438 (1954), the same court, taking into account social and economic factors, decided that segregation in schools was a breach of the constitution because the principle of separation per se, even if the facilities were equal, was inherently unequal. *Brown's* sister case, *Bolling v Sharpe* 347 US 497 (1954), held that segregation in public schools in the District of Colombia, was a breach of Due Process. Thus the court dealt a death knell on segregation, that is, discrimination on grounds of racial origin or colour in schools.

After considering these and other cases, who can doubt that judges and their co-ordinates, lawyers, do change society? It is therefore left to judges and lawyers in the African region to decide whether to follow suit. It is my belief that if they apply the principle of purposeful interpretation with wisdom, knowledge and courage, balancing sociological factors with the purposes of these human rights norms, they will not only make the mark but also save their respective societies from turmoil. Only thus can our societies reap the full benefit of judicial review.

Endnotes

1. Per Eso, JSC, in Ransome-Kuti v A-G of the Federation (1985) 2 NWLR 211.

2. See Baker v California Land Title Co DC Cal, 349 F Sup 235, 239, also Black's Law Dictionary (5th Edn).

3. See Hernandez v Texas, 347 US 475.

4. See Gulf, C & S F Ry v Ellis, 165 US 150.

5. See eg Reed v Reed 404 US 71.

6. See Mba: Nigerian Women Mobilized: Woman's Political Activity in Southern Nigeria 1900-1965 Institute of International Studies, University of California.

7. See Ayo Ayojobi: Journal of Human Rights Law & Practice Volume 1, May 1991 at pp 77-78.

8. See: Preamble to the UN Convention On The Rights of The Child.

9. See Adewole v Jakande (1981) NCLR 262.

10. See Lockhart, Kamisar & Choper: Constitutional Law Cases, etc. (5th Edn) p 1414 et seq.

11. See Dabiri v Gbajumo (1961) All NLR 225; Ebiriukwu v Ohanyerenwa (1955) 4 FSC 212.
Also: Developing Human Rights Jurisprudence, Volume 4 pp 65-79 per Karibi Whyte, JSC.

12. Eg Gulf, C & S F Ry v Ellis, 165 US.