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A COMPARATIVE ANALYSIS OF THE AFRICAN AND EUROPEAN SYSTEMS FOR THE PROTECTION OF HUMAN RIGHTS*

INTRODUCTION:

With the emergence of the United Nations Organisation (U.N.) in 1945 the question of the international protection of the rights of the individual took a new dimension. Article 1 of the Charter of the U.N. proclaims as one of the purposes of the U.N. the promotion and the encouragement of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. For the very first time a global organisation declared as its objective the international protection of the rights of the individual. This appears to be the final blow to the contention of some writers that individuals are not subjects of international law but are rather objects of the law of nations.

The United Nations General Assembly (U.N.G.A.) in 1948 proclaimed the Universal Declaration of Human Rights. The declaration inspired regional instruments on human rights. The preambles of both the European Convention on Human Rights and the African Charter on Human and Peoples' Rights clearly shows that these instruments drew their inspiration from the UNDHR. An attempt would be made in this article to examine the African and the European Systems for the protection of human and peoples' rights. It is important to attempt a comparative analysis of the two systems not only because of past historical links between the two regions, but more importantly because similar human rights issues arise in both regions and also for the purposes of comparing notes on the efficiency of both systems thereby providing a basis for future amendments. The article will cover such issues as the aims and the scope of the two systems, a comparative analysis of the organs for enforcement of the provisions of the systems, a comparative appraisal of both systems and suggestions and recommendations.

The aims, origin and scope of Human and Peoples' rights protected under the two system.

Aims and Origins: Without doubt, the nature and form of any human endeavour would be determined by the aims and objectives of its founders. The Congress of Europe which was held at the Hague in May 1948 adopted the following proclamation: "We desire a Charter of Human Rights, guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition, we desire a Court of Justice with adequate sanctions for the implementation of this charter ..." It is thus evident that the aims and objectives of the founding fathers of the Council of Europe was to establish an European System for the protection of civil and political rights. It is also no surprise that

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1. Oppenheim's views quoted by Louis B. and T. Buergenthal; *International Protection of Human Rights* (1973) p. 3.

the European System established an European Court of Human Rights as can be gleaned from the above declarations. The European System for protection of human rights is a product of the Council of Europe. The Council of Europe established two legal regimes for the protection of human rights', the European Convention for the protection of Human Rights and Fundamental Freedoms and the European Social Charter. The Convention was signed on November 4, 1950 and it entered into force on September 3, 1953. The Convention has been ratified by the 21 Member States of the Council of Europe. The European Social Charter was signed on October 18, 1961 and it entered into force on February 26, 1965. The aim of the Social Charter was to secure the *"enjoyment of social rights ... to make every effort in common to improve the standard of living and to promote the social well-being ..."*²

The Charter provides the legal regime for the promotion of social and economic rights on the European axis.

Unlike the European System there exists in Africa a sole legal regime for the protection of human rights. The African Charter on Human and People's Rights which was adopted by the O.A.U. in 1981 and entered into force on October 21, 1986 provides the legal framework for the promotion and protection of human and peoples' rights in Africa. The preamble to the Charter leaves no one in doubt that it is essentially going to be a unique African instrument when it declared that it would take into consideration the virtues of Africa's historical tradition. Consequently, the African Charter incorporated essentially the African philosophy of rights and established a protection mechanism based on an African preference of friendly amicable settlement over settlement vide judicial processes. It is therefore not unusual that the African Charter did not establish an African Court of Human Rights.

THE SCOPE OF HUMAN AND PEOPLES' RIGHTS PROTECTED UNDER THE TWO SYSTEMS:

The European Convention on Human Rights essentially protects civil and political rights³. At its inception, the Convention guaranteed the following rights: right to life, freedom from torture or to inhuman or degrading treatment and security of the person and due process rights, right to respect for private and family life, right to freedom of expression, right to freedom of assembly etc. Various other rights, guarantees have been added

2. Preamble: European Social Charter, Raoul Walleberg compilation of Human Rights Instruments, edited by Goran Melander and Gudmundur Alfredso, p. 129.

3. Civil and political rights have been defined as the entitlements of the individual and as rights and freedom pertinent to safeguarding the person and citizen's basic liberties vis-a-vis governmental authority. Francois Ventter, "The Western Concept of Rights and Liberties in the South African Constitution" (1986) 19 Cilsa 99, at 105.

over the years to the convention⁴.

Most of the civil and political rights protected by the European Convention also find expression in the African Charter in Articles 2 to 14. Unlike the European Social Charter which separately provides for social and economic rights, the African Charter incorporated these category of rights in Articles 15, 16, and 17. It lists amongst social and economic rights the rights to work under equitable and satisfactory conditions, the right to receive equal pay for equal work, the right to enjoy the best attainable state of physical and mental health, the right to education and the right of the individual to take part in the cultural life of his community. With regards to social and economic rights the provisions of the European Social Charter far outweighs the African Charter in terms of form, content and quality. The European Social Charter contains detailed provisions on the right to work, right to just conditions of work, right to safety and healthy working conditions, right to fair remuneration, right to bargain collectively, right of employed women to protection, right to vocational guidance, right to vocational training, right to protection of health, right to social security, right to social and medical assistance, right to benefit from social welfare services, right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement, etc.

However, inspite of the obvious paucity of provisions on economic and social rights, the African Charter uniquely makes detailed provisions concerning peoples' rights and the duties of the individual. The Charter, it has been correctly asserted, "incorporated some aspects of the African tradition such as group rights and obligations to the family and society in a manner not found in other international instruments on human rights".⁵ In Africa, it is believed that the individual is part and parcel of the larger society. The society or the group is conceived as having certain rights which imposes some obligations on the individual. In African traditional political thought "the individual usually exercises his rights in the context of the group and is therefore limited by the group".⁶ The African Charter in Article 20 proclaims the right of all people to existence, the right of colonised or oppressed people to freedom and right of assistance from states parties to ensure liberation of African States from political, economic or cultural domination. Articles 19, 21, 22, 23 and 24 also lists a variety of peoples' rights. The African Charter also uniquely provides for the concept of duties. Articles 27 to 28 list a variety of duties which include inter-alia the duties

4. See Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than, those already included in the Convention adopted on 20th March, 1954 which entered into force on 18th May, 1954; Protocol No. 4 adopted on 16th September, 1963 which entered into force on 2nd May, 1968; Protocol No. 6 concerning the abolition of the death penalty adopted on 28th April, 1983, which entered into force on 1 March, 1985; Protocol No. 7 of 22 November, 1984 which became effective on 1 November, 1988.

5. Osita C. Eze "African Concept of Human Right, "in *Perspectives on Human Rights*. Published by the Federal Ministry of Justice. 19.

6. CRM Dlamini, *Human Rights In Africa* - which way South Africa Butterworths pages 89-90.

of the individual towards his family and society, duties to preserve harmonious development of the family, not to compromise the security of the state, to respect parents at all times and to maintain them in times of need etc. Without doubt, the effort of the founding fathers of the Charter to reflect African values is appreciated. However, some of the provisions of the charter are not without some problems. For example, the term peoples' is not defined anywhere in the Charter. Some of the provisions are drafted in wide and vague terms that render enforcement problematic. However, as it has been rightly observed, "they may provide the basis for further development of positive law in the field of human rights as well as legitimate grounds for asserting such rights by social and political actions"⁷

IMPLEMENTATION AND PROTECTION OF PROTECTED RIGHTS

Under this heading we shall examine the obligations of state parties under the European Convention and the African Charter. The various organs established for the implementation of the instruments will also be examined.

- (i) States obligations under the European Convention and the African Charter; By virtue of the provisions of Article 1 of the European Convention the High Contracting Parties placed themselves under an obligation to secure within their jurisdiction the rights and freedoms guaranteed by the Convention. By implication it is the responsibility of State parties to put machineries in motion within their municipal systems to fulfil and incorporate their obligations under the Convention. Similar obligations are assumed by State parties to the African Charter. Article 1 of the African Charter provides in similar veins that State parties shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to the provision. Under both the European Convention and the African Charter it does not lie in the mouth of a state accused of violations of these instruments to plead incapacity under its municipal law. The principle involved in such issues was clearly stated in the Nigeria case of *Oshevire V. British Caledonian Airways Ltd.*⁸ Where it was held that where any domestic law is in conflict with an obligation agreed to under international law, the domestic legislation would be void to the extent of its inconsistency. The Nigerian Courts have courageously employed the above state principle in cases of conflict between the provisions of the African Charter⁹. In addition, under the European Convention, where a decision of the European Commission of Human Rights has been

7. Eze, Op. Cit. page 19

8. (1990) 7 NW.L.R. (Pt 163) 507

9. See C.R.P.V. President of Republic of Nigeria: *Richard Akinola V. Gen. Ibrahim Babangida* reported in *Journal of Human Rights and Practice*, pages 218 and 250; *Fawehinmi V. Abacha* (1996) 9 HW2R (Pt. 475) 710

transmitted to the Committee of Ministers and the decision is not referred to the European Court of Human Rights within three months, the contracting parties undertake to regard the Committee of Ministers' pronouncement on the matter as binding on them (Art. 32(4)). The contracting parties also undertake to abide by the decision of the court in any case to which they are parties (Art. 53). The obligations of state parties to abide by the provisions of the Committee of Ministers' decision and that of the European Court is in sharp contrast to the position under the African Charter. The African Charter makes no provision making the decision of the Organisation of African Unity Assembly of Heads of State and Government on reports and recommendations of the African Commission binding on state parties. This obviously is a weakness in the African systems.

(ii) **Implementation and protection of protected rights:** Various organs have been established under the European Systems for the protection of human rights. There is an overlap of some of the organs involved in the implementation and protection of rights under the two systems. Even where the terminology differs some of the organs perform similar functions. The only exception appears to be the European Court of Human Rights which has no parallel organ under the African system. These organs are as follows:

(a) **The African Commission on Human and Peoples' Rights and the European Commission of Human rights:** A comparative analysis of these two Commissions shall be done under the following sub-divisions:

(i) **The role of the Commissions:** Both Commission are a direct creation of relevant instruments. Article 19 (a) of the European Convention provides for the setting up of a European Commission of Human Rights while Article 30 of the African Charter establishes an African Commission on Human and Peoples' rights. The functions of the European Commission appears to be a limited scope compared with the African Commission. The three major functions of the European Commission are:

- (a) to examine and consider petitions alleging violations of the Conventions under Article 24;
- (b) to process the petition, investigate the allegation and make a report to be transmitted to the Committee of Ministers and

(c) the Commission may refer the matter after conclu-

sion of its report to the European Court of Human Rights.

The functions of the African Commission are copiously set out in Article 45 of the African Charter. In addition to the function of examining and investigating alleging allegations of violations of the Charter the African Commission is also empowered to promote human and peoples' right by collecting documents, undertaking studies and research etc. The Commission also has the function of formulating and laying down principles and rules aimed at solving legal problems relating to human rights. The Commission is also empowered to perform other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

- (ii) Inter State complaints procedure: Both the African and European Commission can entertain inter-state complaints alleging violation of the relevant instruments by State Parties¹⁰. The African Charter provides for two methods of inter-state complaint procedure. The 1st procedure which involves only the two states parties is aimed at allowing for amicable settlement of alleged violations between the state parties. The procedure allows for copies of the complaint to be sent to the Secretary General of the OAU and the Chairman of the Commission. If the matter is not amicably resolved within 3 months from the date of the receipt of the original Communication the matter may be referred to the African Commission on Human rights. The second procedure which is an alternative to the first allows either of the state parties to refer the alleged violations directly to the Commission, the secretary General of the OAU and the state concerned. Once the complaints is admissible. Under the African and European systems the conditions for admissibility of complaints are similar. The usual conditions is that the complainant must have exhausted all local remedies, if they exist, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged¹¹.

Under both systems the Commissions will investigate the allegations and listen to representations and information sup-

10. Article 24 European Convention on Human Right: Art. 47, 48 and 49 of the African Charter on Human and Peoples' Rights.

11. Art. 50 African Charter; see also similar provisions in Art. 26 of the European Convention.

plied by both parties¹².

A similar feature of the role of the Commissions under both systems is the obligation to attempt to effect friendly settlement between the parties¹³.

(iii) **Individual Petitions:** The right of an individual to file a complaint before the African Commission is provided for in Article 55 which allows the Secretariat of the Commission to compile a list of communications other than those of states parties and transmit them to the members of the Commission. The African Charter confers an individual right of petition generally against state parties. Under the European system is radically different. Under the European convention the individual has no general right of petition before the Commission is conditioned on that state's prior recognition of the right of petition. Such recognition is usually through a declaration accepting the jurisdiction of the European Commission¹⁴.

Another distinctive feature of the individual petition system under the African Charter is that it does not allow isolated violations of the charter. According to Article 58(1) it only relates to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights. Individual petitions before the commissions under both systems are subjected to similar conditions of admissibility¹⁵.

The conditions under both systems are aimed at discouraging frivolous and ill motivated petitions and also to ensure that all local remedies have been exhausted before the Commissions are approached for redress.

(iv) **Decisions and findings of the Commissions:** The nature and the status of the decisions and findings of the Commissions under both systems are similar. Under the European system the Commission shall draw up a report on the facts and state its opinion as to whether the facts found disclose a breach by the state concerned of its obligations under the European Convention¹⁶.

12. Art. 28 European Convention; Art. 51 of the African Charter

13. Art. 28(2) European Convention. Art. 52 African Charter.

14. Art. 25 European Convention

15. Art. 26 and 27 European Convention; Art. 56 of the African Charter.

16. Art. 31 European Convention.

The Commission is expected to transmit the report to the Committee of Ministers and the states concerned. The Commission may then decide subsequently to refer the matter to the European Court of Human Rights. Similarly under the African system the Commission is expected to draw up a report stating the facts and its findings. The report is then sent to the states concerned and communicated to the Assembly of Heads of State and Government.

The report of both Commission under both systems is not final and conclusive. Under the African System the final consideration and implementation of the Commission's report is left with the Assembly of Heads of State and Government. While under the European System the Commission's report may still be subjected to further proceedings if the matter is referred to the European Court or the Committee of Ministers.

A further similarity under both system is that the reports of both commissions remains confidential until it has been pronounced upon by the other aforementioned organs. The reports may then be published.

- (b) The Committee of Ministers/The Assembly of Heads of State and Government: The Committee of Ministers under the European System and the Assembly of Heads of State and Government under the African System performs important and similar functions. The Committee of Ministers comprises of the Foreign Ministers of States members of the Council of Europe. The Committee of Ministers is an important political body and it serves principally as the governing board of the Council of Europe.

It has two functions assigned to it under the European Convention. Under Art. 32 where the report of the European Commission transmitted to it has not been referred to the European Court, the Committee of Ministers has a duty to decide by a majority of two-thirds of its members whether there has been a violation of the convention. The Conferment of quasi judicial functions on a political body is a clear drawback in the European System. However, it has been observed that "On the whole, the Committee of Ministers has not seriously politicized the application of article 32:"¹⁷

The Committee has generally approved the findings of the European Commission, but it has occasionally failed to adopt the finding¹⁸. The decision adopted by the Committee binds states parties to the convention¹⁹. The second function assigned to the Committee is the duty to supervise the execution of the judgement of the European Court.

In performing this task the Committee "uses its diplomatic and political influence to promote the protection of human rights and to secure an amendment of the national legislations concerned"²⁰. When the judgement to be supervised is a monetary sum, it is quite easy for the State concerned to comply and notify the Committee. Problems may arise where a state party refuses to comply with the judgement and to effect an amendment of its national laws. The European System has worked effectively because "it is assumed that no state, at least so long as it remains a member of the Council of Europe and a party to the Convention will default on its obligation"²¹. Where a State however, defaults after efforts to ensure compliance by the Ministers have failed, the Committee of Ministers may invoke its powers under Art.8 of the Statute of the Council of Europe which empowers the Ministers to expel state parties violating human rights from the Council of Europe. It has been rightly observed that these provisions having no parallel" in any other international organisation were invoked against Greece while proceedings were pending before the Commission in the Greek case"²².

The European System effectively creates a device by which decisions are enforced against state parties.

However, the position under the African Charter is unfortunately ambiguous and does not provide for an effective enforcement system. The Charter merely provides that the report of the African Commission must be submitted to the Assembly of Heads of State. It did not clearly state the steps or the decision to be taken in respect thereof. One can safely assume that the Assembly is expected to adopt a per-

18. Ibid pages. 102-103.

19. Art. 32(4) European Convention

20. Ms Agnes Debricon "The European Convention on Human Rights" in from Human Wrongs to Human Rights IV page 78.

21. F. G. Jacobs; *The European Conventions on Human Rights*. Clarendon Press page 269.

22. Ibid. page 269

suasive approach in dealing with violations by state parties rather than ensuring compliance by compulsion. The lack of effective and binding provisions compelling compliance with the African Charter is a great drawback in the African system.

- (c) **The European Court of Human Rights:** The European Court of Human Rights is an important organ involved in the protection of human rights with no parallel in the African System. The European Court sits in Strasbourg, France. The court has both contentious and non contentious jurisdiction. Its contentious jurisdiction extends to matters referred to it by the European Commission and by the States parties. Private individuals have no standing before the court. Before a state party is subjected to the contentious jurisdiction of the court it must have ratified the convention and it must have declared its acceptance of the jurisdiction of the court. The court also has the duty to offer advisory opinions by virtue of the provisions of Protocol No. 2 to the Convention. The juridical powers of the Court is backed up with the power to award just satisfaction to the injured party.²³

However, it has been observed that the court cannot "set aside the measure complained of, nor order the state to take specific remedial measures. The only solution is therefore to award Financial Compensation"²⁴.

This has probably contributed to the success of the court system under the European Convention. By not empowering the court to compel and order specific remedial measures, states parties are saved from the public embarrassment that would follow such orders. States would be more willing to pay Financial Compensation, rather than being compelled to take specific remedial measures which may involve legal amendments and political processes under its municipal system. The European System contemplates that with the finding of violations by the Court the states concerned will take the appropriate remedial steps. Without obviously go a long way in compensation to the victim would obviously go a long way in compensating the victim and giving him a sense of justice. Without any fear of contradiction, it is not an over-statement to say that "the human rights system established by the convention is not only the oldest but also the most advanced and effective of those currently in existence". Africa is no

23.

Art. 50 European Convention

24.

Ms Agnes Debricon op. cit page. 77.

doubt in dire need of such a Human Rights Court system with adequate sanctions against state parties in cases of violation of protected rights.

RECOMMENDATIONS AND CONCLUSION:

The foregoing analysis of the European and the African systems for the protection of human rights has enabled us to understand the working of both systems. I shall make the following recommendations aimed at ensuring a more effective human rights protection mechanism in Africa. The alarming level of poverty, low per capital income, unemployment et cetera in Africa makes it expedient that African leaders need to be more committed to the promotion and protection of social and economic rights. Even though the economic resources of African States may not be able to guarantee all the rights contained in the European Social Charter, an instrument guaranteeing some of these rights is desirable. Africa should evolve an instrument setting out social and economic rights. However, such an instrument must allow for gradual incorporation and entrenchment of these rights as the economic situation of state parties improves. The role of the Committee of Ministers under the European System outlined above is commendable. Additional provisional provisions should be included in the African Charter conferring on the Assembly of Heads of States functions similar to those performed by the European Committee of Ministers. The present position where the African Charter confers no specific mandate on the Assembly of Heads of States is not desirable.

The writer is also of the opinion that a system of financial compensation for violations of human rights fashioned after the European model is desirable for the African Continent. This would introduce a sanctions regime, the absence of which has largely made the African Charter a toothless bulldog.

In addition to the above, there is the need for African Countries to enlist in the global trend of democratization. Human rights thrive better in democracies with institutionalised checks and balances on arbitrary power. Greater Commitments by African leaders to human rights is also another important pre-requisite to the full enjoyment and protection of human rights.

African leaders should no longer see human rights as another instrument of colonialism but rather as a vehicle to create a just, better and more humane society for all without distinction as to race, sex, colour or religion.