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THE AFRICAN HUMAN RIGHTS SYSTEM: AN OVERVIEW OF THE ADMISSIBILITY OF NGOS APPLICATIONS BEFORE THE AFRICAN COURT

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ABSTRACT

Rights are sacrosanct and one of the most cardinal functions/objectives of the African Union (AU), being a regional organization, is the protection of rights of citizens of member states. The African Court on Human and People's Rights is the channel through which the African Union entertains and determines complaints of human rights infringements/abuses within the region. Among other categories of applicants, relevant NGOs can invoke the jurisdiction of the Court upon satisfaction requisite pre-conditions. Adopting a doctrinal approach, this paper seeks to shed light on the extent of the admissibility of applications by NGOs before the Court. This paper however finds that a number of genuine cases of human rights abuses risk being shut out within the present context. This paper concludes that the preconditions NGO applications are subjected to, are restrictive/limited. This paper therefore recommends that such conditions be reconsidered to allow a wider NGO access to the Court.

INTRODUCTION

The African Charter on Human and People's Rights is an instrument of the African Union which guarantees the fundamental rights of the people of Africa just as the European Charter and the Universal Declaration of Human Rights. In order to actualize the important objectives of the instrument and the rights guaranteed therein, the African Court on Human and Peoples' Right was established to complement the work of the African Commission on Human and Peoples' Rights. The court admits applications from, among others, Non-Governmental Organizations. This work will assess the admissibility of applications and the contributions of NGOs.'

THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHT ("AFRICAN COURT")

Establishment

The establishment of the African Court was conceived by the African Union (AU); then known as the Organization of African Unity (OAU) in 1994 as a result of the pressure from the academics and NGO on the relative ineffectiveness of the African Commission on Human and Peoples' Right (**the Commission**) (FIDH, 2010).and the need for a meaningful institution that could effectively protect human rights in Africa, It has been noted that due to the uncoordinated nature of the decisions of the Commission and apparent lack of jurisprudential thread, the Commission's decisions have left most complainants short of satisfaction from apparent poor enforcement and implementation.

The Protocol establishing the African Court; Protocol to the African Charter, was officially launched in Tunis in 1994 via a resolution adopted to set the preparatory work for the establishment of the African Court in motion. The cause was championed by an NGO based in Geneva, Switzerland; the International Commission of Jurists. The Protocol was adopted in 1998 at a Conference of Heads of State and Government of the AU wherein thirty (30) members signed the text, and came into force in 2004, thirty (30) days after the deposit of the fifteenth instrument of ratification by Comoros.

Due to the economic spate of the African Union, the Heads of State and Government decided in 2004 to merge the African Court with the Court of Justice; the Judicial organ of the AU and avoid having to finance two courts. This merger is to create the *African Court of Justice and Human Rights*.

It is important to note that the events identified above only deal with the establishment of the Human Rights section of the Court, the section will serve its purpose pending when the AU decide to establish the other part and merge them, at which point, the *African Court of Justice and Human Rights* will replace the *African Court on Human and Peoples' Rights*.

The Judges of the African Court were elected and endorsed by the Assembly of Heads of State and Government meeting in Khartoum, Sudan in 2006 and consequently sworn-in in the Gambia the same year. It was also agreed that the African Court be seated in Arusha, Tanzania, with the interim Rules of the Court adopted in 2008. The African Court met with the Commission in 2009 in Dakar, Senegal for the purpose of harmonizing their Interim Rules of Procedure on various issues

relevant to their areas of connect and synergy. The Court is however meant to be interim in its operational existence as it is meant to serve as the Human Rights section of the intended African Court of Justice and Human Rights when it is finally established.

Composition

The court is composed by eleven (11) judges who are elected in their individual capacities but with special regard for region and gender for a maximum of two (2) terms of six (6) years each. Out of this number, quorum is constituted by seven (7) judges of the court.

Control

Being a creation of the African Union, the African Court finances the court, elects judges and takes care of their allowances, expenses and oversees the implementation of the court's decisions and has the power to amend the Protocol to the African Charter on a State's request subject to the approval of an absolute majority of the Conference of Heads of State and Government. The African Court is a super-national judicial body with enough powers to ensure and/or compel respect for the rights guaranteed under the African Charter. The African Court's independence is guaranteed through special immunities and privileges of the judges under the Protocol in a manner similar to that of the European and inter-American Courts.

Jurisdiction

The core of the functions of the Court is to give advisory opinion on any legal matter concerning the African Charter or any other relevant instrument on human rights on the request of an AU member state, any organ of the AU or an AU-recognized organization as long as such opinion does not relate to a request pending before the Commission. The Court can be called upon to deal with cases relating to violations of the African Charter on Human and Peoples' Rights, 1981. The court also interprets its own judgments for the purpose of execution on the request of any party in the case within twelve (12) months following the date of the court's decision, or even review its decision where fresh evidence outside the initial contemplation of a party is later discovered. This must however be done within six (6) months from the time the party became aware. Like any other court, the request for interpretation or revision of the decision of the court by a party does not ordinarily affect the execution or implementation of such decision unless the court otherwise rules. The court may also first attempt to arbitrate or take steps towards amicably settling the case submitted before it.

Locus standi

To invoke the jurisdiction of the African Court, an applicant; the Commission, the State party which has lodged a complaint to the Commission, the State party whose citizen is a victim of the violation, an African Intergovernmental Organization, Individuals or relevant NGOs with observer status before the Commission, must be sure of a proper standing; *locus standi* before the court. It must be made sure that the right of the person whose violation is alleged is covered by the African Charter or any other relevant instrument ratified by the state concerned, that the state or the violator of the human rights has ratified the instrument, that the perpetrator is an agent of the state or the state had the obligation to protect the right violated and that the violation was committed after the ratification of the instrument under which the Court's jurisdiction is invoked.

Enforcement of decisions

Based on the doctrine of political sovereignty of states, it is trite that judgments of a transnational organ do not have serious legal binding or overriding effect on the domestic legal order of the state it affects and domestic laws. The African court is not an exception; it is not a court of appeal for domestic courts and as such lacks the authority to override the decisions of domestic courts, only states can decide to abide by the decisions of the court based on *pacta sunt servanda*.

The mechanism of enforcement adopted for the court by the Protocol is to make the state parties bind themselves to comply with the judgments of the court, as well as to execute them. By the African Charter itself, state parties recognize the rights sought to be protected and undertake to adopt legislative or other measures to give effect to them. In other words, state parties undertake to abide by the decisions of the court and make them enforceable within their jurisdictions. In order to give effect to this, States may have to jettison their sovereignty and amend their Constitutions or other legislations to subject the decisions of their apex courts in human rights matters to that of the African Court or make that of the African court have overriding binding effect within their jurisdictions. This will mean that, in Nigeria for instance, the CFRN 1999 as amended and the Supreme Court Act will be amended to allow decisions of the Supreme Court in Human Rights cases be overridden by the decision of the African Court if any of the parties makes the move.

In addition, the National Human Rights Commission Act would have to be amended to create a special Tribunal/court where the commission will forward its report for possible prosecution in place of forwarding same to the President as we presently have it. The CFRN 1999 as amended and the Fundamental Rights Enforcement Procedure Rules would also have to be amended to confer exclusive jurisdiction in all Human Rights matters on the National Human Rights Tribunal/Court. By this, matters bordering on Human Rights violations and abuse will start from the Tribunal and may end at the African Court. Upon failure to do so however, there are no concrete provisional measures besides that which allow the court to annually submit a report listing defaulters to the Assembly of Heads of State and Government of the AU, who in turn will issue a report publicly naming and shaming defaulters.

NON GOVERNMENTAL ORGANISATIONS (NGOs)

To submit an application before the African Court, the applicant can either be the Commission, the State party which has lodged a complaint to the Commission, the State party whose citizen is a victim of the violation, an African Intergovernmental Organization, Individuals and relevant NGOs with observer status before the Commission.

The Court however devotes an important part relating to right of access to NGOs where states have explicitly accepted such right. The Protocol authorizes the African Court to issue advisory opinions upon demand by an African organization recognized by the AU, this is broadly interpreted by the Court to allow advisory opinions to be requested by NGOs, provided they are African.

Indirect access by NGOs

NGOs with observer status before the African Commission are allowed to submit a case before the court where it concerns human rights violations through the Commission for onward submission before the Court, and this cannot be opposed by a state party as long as the state is a party to the Protocol. Where this is done, the NGO becomes a party to the resulting case before the Court.

This is a serious limitation on the right of access of NGOs as it implies that referrals depend on the prior agreement of the state, and the willingness of the Commission to present such cases before the court.

Direct access

NGOs are also entitled to institute actions directly before the court. Subject to the prior acceptance of the state accused of the human rights violations, an NGO with observer status before the AU may refer human rights violations of a state to the Court. In doing this, those submitting the case may not necessarily have to be the victims of the violations complained of, or members of their family or group, but this can be a class action against a state.

Observer status

It is obvious that, be it the direct or indirect modes of submission of cases before the Court by NGOs, the issue of observer status is cardinal. In order to obtain observer status however, an NGO working in the area of human rights, and in accordance with the fundamental objectives of the AU and the African Charter, must submit an application to the Commission's Secretariat. This, together with other supporting documents is what the AU considers in granting such status.

ADMISSIBILITY OF APPLICATIONS OF NGOs

Admissibility is a critical part of the African Charter, and of the African Court, just like the test of *arbitrability in Arbitral Proceedings* and *Jurisdiction in suits before a national court*, it enables the African court filter the substantive violations that could fall within the prescribed guidelines. For an application intended for submission before the court to be valid, the court may follow relevant decisions of the African Commission; which practically applies the same conditions, with the need for a state against which the application is directed to make a declaration approving same being the basic difference.

Conditions

The general conditions of admissibility of communications before the African Court is the need for the application to be directed against a state party which has made a declaration authorizing direct access of the NGO with observer status submitting the application before the Court or their representatives. The application can also be submitted by the NGO to the Commission. In addition, the application must also involve circumstances which fall within the jurisdiction of the Accused state and must have occurred after the ratification of the Protocol by the state.

The violation, subject matter of the application must relate to a right protected by the African Charter or any other regional or international human rights document ratified by the perpetrating state. In addition to the general conditions of admissibility, applications are also subjected to the following specific conditions, to wit:

1. The court may request the opinion of the Commission in deciding the admissibility or otherwise of applications from NGOs,
2. The NGO must have exhausted every available local remedy as regards the application sought to be submitted before the Court,
3. The application must invoke the provisions of the African Charter violated against,
4. Disparaging and abusive words must not be used in the application,

The application must not be based exclusively on information disseminated through the mass media without properly verifying the veracity.

CONCLUSION

The African Court as an institution that compliments the work of the African Commission on the enforcement of the African Charter on Human and Peoples' Rights is a viable tool for the actualization of some of the core objectives of the AU in guaranteeing a better protection of Human Rights for the people of Africa. In this quest, NGOs have played important role in this quest, albeit with an imitating factor which renders their access and admissibility of applications therefrom hard to achieve.

One of the main weaknesses of the African Court is the fact that NGOs and individuals alike cannot access the court without first obtaining observer status with the AU and having the approval of the perpetrating member state. Based on this fact alone, the court risks shutting out the most ordinary and uninformed African from access to the court, and in consequence, treating only a few cases.

NGOs particularly should have unfettered access to the African Court without having to first secure observer status and should be allowed to submit cases directly to the Court without all the limitations.

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FURTHER READINGS

- See Articles of the African Charter
- See Articles of the Protocol
- See discussions on African Court of Justice and Human Rights infra