A NEW WINDOW IN THE ENFORCEMENT OF FUNDAMENTAL HUMAN RIGHTS IN AFRICA: GENERAL SANI ABACHA & OTHERS VS CHIEF GANI FAWEHINMI CONSIDERED

BY

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INTRODUCTION

The idea of human rights is generally ascribed to Magna Carta of 1215 but this position was debunked by Ali noting that the idea predates the widely held period[1]. It is no doubt that the going concern of every state is to ensure that the idea of human right is given a place of pride in the scheme of things. At the global level, since the adoption of Universal Declaration of Human Rights of 1948, after the 1776 French Revolution and 1779 American Declaration of Independence, it has become more pronounced and consistently being on the front burner.

There is the need to know that human rights as an inalienable property of human being is part and parcel of human existence, and whether the rulers like it or not, it shall continue to be so.

Scholars have attempted to define rights and it has become an intense subject of jurisprudential debate[2]. However, the natural rights school which is linked with John Locke in the Seventeenth Century postulated that the existence of such rights as rights to life, liberty and property based on a social contract and marking the end of the difficult condition of the state of the nature[3].

An attempt was however made to define the idea by Louis Henkin when he said

> *"Those liberties immunities and benefits which by accepted contemporary values, all human beings should be able to claim as of right of the society in which they live"*[4]

Osita Eze sees the idea of human rights as:

> *"Demands or claims which individuals or group make on society some of which are protected by law and have become part of 'lex lata' while other remain aspirations to be attained in the future"*[5]

In his own view, Professor Umozurike posited that human rights denote:

> *"Claim which are invariably supported by ethics and which should be supported by law, made on society especially by its official managers, by individual or group on the basis of their humanity*[6]*.*

One thing that runs through these definitions is that the rights are claimed by human beings and the only condition for which the rights evolve is because of the humanity of the individuals. It then means that whether or not the idea is codified, it cannot and should not be denied human beings and that codification is only a formality.

It may be apposite to state at this juncture that the codification may after all not be a mere formality within the African context if one reflects on the brutality visited on human beings within the continent especially in the last two decades when the various heads of government seem to derive pleasure in inflicting undeserved punishment on the citizenry in the name of governance and extermination of perceived opposition. We have witnessed the brutality of Late Mobutu Sese Seko in Congo, the exploits of late Samuel Doe in Liberia; apartheid regime in South Africa and lately the escapades of late Gen. Sanni Abacha in Nigeria to mention just a few.

HUMAN RIGHTS AND WORLD COMMUNITY.

As a phenomenon, in December, 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights which provides copiously for the guarantee of human rights in the global setting. It stated in no unmistakable terms that to ensure peace in the world, human rights of every individual should be respected. At the different regional levels, human rights crusade formed a major plank in their operational mode. Presently we have in force Inter-American Convention on Human Rights' which established the Inter-American Commission in 1970 and Inter American Court in 1979 as monitors of the human right abuse in the region. Equally, there was established within Europe as a result of Helsink Act, 1975, the European Convention on Human Rights[8].

At the continental level, the African Heads of states gathered in Banjul, Gambia under the auspicies of Organization of African Unity and proclaimed the African Charteron Human and Peoples' Rights on 19 January, 1981. This document has been described as:

> *"A significant step in the right direction, human rights were at least regarded to be too important to be left to the whims, and caprices of individual African state"*[9]

This Charter signifies the unism with which the African continent intends to fight human rights abuse. The Charter set up what it called the African Commission on Human and Peoples' Rights[10] with the aim of enforcing the protection of human and people's rights under conditions laid down by the present Charter

The Nigerian government has consistently and persistently sought to guarantee the protection of human rights in its various constitutions since independence.

Specifically, Chapter IV of the 1979, 1989, 1995 and 1999 constitutions was devoted to the Fundamental Human Rights provisions which includes right to life, right to liberty of person and property, freedom of association and religion to mention just a few.[11] The African Charter on Human and Peoples Rights represents a significant part of our organic laws as it is a treaty that has been adopted into our local laws and it must be seen as part and parcel of our basic laws. [12]

TREATY POWERS OF A STATE

The expression treaty is used in the generic sense to cover a multitude of international agreements. Treaty has however been defined by the Vienna Convention as:

> *"An agreement whereby two or more states establish or seek to establish a relationship between themselves governed by international law whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*[13]

A state has a right to enter into treaties as held in case of **HIGGS and Anor V. MINISTER OF NATIONAL SECURITY AND ORS**[14] that:

> *"In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the crown Treaties formed no part of*

domestic law unless enacted by the legislature. Domestic courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizens' right and duties in common or statute law. They might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government in its acts affecting them, would observe the terms of the treaty,"

There may be need for digression here and note that some states have adopted international law which treaty is a source of as part and parcel of their organic laws and even given precedence in the scheme of things.

For instances in the then Western Germany, their constitution stipulates:

"The general rule of international law shall form a part of the Federal law, they shall take precedence over federal law and create rights and duties directly for inhabitants of Federal Republic of Germany"[15]

Equally, the United States constitution as interpreted in the case of THE CHARMING BETSY[16] as declared by Marshall C.J. that:

"An Act of Congress ought never to be construe to violate law of nations if any other possible construction remains."

This position was complemented in the case of PAQUETTE HABANA' as held by Gray J that:

"International law is part of our law and must be ascertained by the courts of Justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.[18]*"*

All the above show clearly the position of international law in the scheme of things and the revered position that states have put international law.

States transact a lot of business by using the device of treaty, for instance war will be terminated, disputes settled, territory acquired, special interests determined. alliances established, and

international organizations created all by treaties[19]. Recently, the governments of Nigeria, Gabon and other states signed the Gulf of Guinea Treaty to protect their economic rights.

It may be appropriate at this juncture to reflect that the term treaty is mostly used in international agreements and it is called various names but generally used to express the same concept and it includes protocol, act, charter, covenant, pact, concord, to mention a few. However where the agreement is not intended to create a legal relationship but retains its political effect, it will not be a treaty[20].

A state may be bound by a treaty which she entered into voluntarily by consent through the signing of same by authorized officer of government, exchange of instruments, ratification, accession.[21] At this level, a state cannot get out of the implication of the treaty. Threaties are generally binding on the parties to such agreements in accordance with general rules of international law but with the exception of treaties which have assumed the garb of customary international law.[22]

Within the Nigerian context, a treaty is entered into in accordance with the provisions of our constitution in 1979 5.12 provides, that Nigeria may enter into a

treaty to the extent to which the National Assembly so authorised. This is in pari- material with the provisions of 5.12 of the 1999 constitution.

The effect of this provision is to show that Nigeria is not an island unto herself and it recognises the fact that in dealings with other nations, it must join others at bi lateral and multi-lateral levels, come to agreement on issues which affect the life's of the citizenry and the international community in general. The state of affairs in Nigeria was given judicial stamp in the celebrated case of GENERAL SANI ABACHA & OTHERS VS. CHIEF GANI FAWEHINMI[23] where his lordship Hon. Justice M.E Ogundare J.S.C. delivering the lead judgment said:

> *"Where however the treaty is enacted into law by the National Assembly as was the case with the African Charter which is incorporated into our municipal (ie domestic) law by the African Charter on Human and Peoples Right (Ratification and Enforcement) Act Cap. 10 Law of the Federation1990, herein after is referred to simply as Cap. 10) it becomes*

binding and our courts must give effect to it like all other laws failing within the judicial powers of the courts[24]. (emphasis mine).

It is humbly submitted with respect that the ratification by enactment in the domestic laws is not what gives a treaty the binding force it deserves but rather the mere agreement to be a party to a treaty creates a binding effect of such treaty on the contracting state. This is the rule known as PACTA SUNT SERVANDA which is arguably the oldest principle of international law and re-affirmed by the 1969 convention.[25]

THE CASE OF ABACHA VS FAWEHINMI-NEW WINDOWS.

Chief Gani Fawehinmi, a legal practitioner, ad human rights activist was on 30"h January, 1996 at about 6p.m. arrested in his residence in Lagos by operatives of the state security service and policemen and later detained at the security service office The operatives of the security service who effected the arrest did not inform him o his offence and was later taken to and detained at the Bauchi prison. In accordance with the provisions of the law of the land, he applied for the enforcement of his fundamental rights before the Federal High Court in Lagos by filing ex-parte application claiming that the arrest is a breach of his fundamental rights, as guaranteed by the constitution of Nigeria; that the detention constitutes a gross violation of his rights; an order compelling his release, an order compelling his arraignment before a properly constituted court or tribunal, an injunction restraining his further arrest and/or detention and ten million naira (#10,000,000.00) as damages for the unlawful arrest and/or detention. The court granted the ex-parte application and consequently a motion on notice was filed and served on the then head of state, late General Sani Abacha and others; a preliminary objection was filed on the grounds that the court lacked jurisdiction to entertain the matter for the following reasons:

1. By a subsidiary legislation made by the Inspector-General of Police, the respondents are immuned to any legal liabilities in respect of any action done pursuant to State Security (Detention of Persons) Decree No.2 of 1984 (as amended).

2. By the provision of The Federal Military (Supremacy and Enforcement) of Powers Decree No.12 of 1994 and constitution (Supervision and Modification) Decree No. 107 of 1993 the jurisdiction

of the court is ousted to entertain any civil proceedings that arise from anything done pursuant to the provision of any Decree.

3. Court cannot exercise jurisdiction on the provisions of Chapter IV of the 1'979 constitution and African Charter on Human and Peoples Rights (Ratification and Enforcement) Act

The trial court granted the preliminary objection and among others held that the provisions of the African Charter is void to the extent of its inconsistency with Decree No. 107 of 1993 which his lordship regarded as the grundnorm within the legal framework in Nigeria His lordship equally upheld the position that the Charter has no legs of its own under the Nigerian law and thus subject to the domestic laws and consequently the ouster Decrees.

Chief Fawehinmi was not satisfied with this decision and challenged same on appeal, which court on 12th December, 1996 allowed the appeal in part and remitted it back for retrial on the issue of consequences of the detention for four days.

Specifically the Court of Appeal assessed the pedestal of the Charter in the following words.

> *"That notwithstanding the fact that Cap. 10 was promulgated by the National Assembly in 1983, it is a legislation with international favour's and the ouster clauses contained in Decree No. 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria. That the provisions of Cap. 10(The African Charter on Human and Peoples' Right Act) of the Laws of the Federation 1990 are provisions, in a class of their own. They are protected by the international law and the Federal Military Government is not legally permitted to legislate out its obligation"*[26]

This decision naturally generated a lot of furore and ordinarily the then military regime would have ignored it as it has done to so many other court decisions claiming the super human nature and/or posture that was all pervading in our society. However, this case was appealed against to the Supreme Court by both parties. The Appellant's grouse with the judgment was the findings on the status of the African Charter on Human and Peoples Rights and the order which remitted the case for retrial with regard to the four day detention.

The cross-appeal on the other hand, challenged the power of the Inspector General of Police to sign and issue a detention order, enforcement procedure as guaranteed under the Charter; procedure for tendering detention order and the immunity of heads of state which was as a result of obiter made by Hon. Justice Pats Acholonu with regard to the propriety of joining General Sani Abacha as a party who in his lordship's view was immuned by the provisions of S. 267 of the Constitution.

The Supreme Court by a majority 4 to 3 dismissed the appeal The lead judgment was delivered by Hon. Justice Ogundare with Justices Iguh, Uwaifo and Ejiwumi Concurring. Hon, Justice Okay Achike, 5.M.A. Belgore and Mohammed dissented In deciding the appeal, the Supreme Court in the lead judgement delivered by Hon. Justice Ogundare considered the Status of the African Charter and held that by virtue of its incorporation into our domestic laws via Cap. 10, it becomes binding and effect must be given to its provisions like all other laws falling within the judicial powers of the courts.

The accommodation of the Charter within our legal system however is not without its limitations as it is still subject to the provisions of the constitution and this was couched admirably by his lordship in the following words

> *"To this extent, I agree with their lordship of the court below that the Charter possesses a greater vigour and strength" than any other domestic statute. But that is not to say that the Charter is superior to the constitution as erroneously, with respect was submitted by Mr. Adegboruwa, learned counsel for the respondent. Nor can its international flavour prevent the National Assembly, or the Federal Military Government before it, from removing it from our body of municipal laws by simply repealing Cap 10.Nor also is the validity of another statute to be necessarily affected by the mere fact that it violated the African Charter or any other treaty for that matter".*[27]

This position is in accord with judicial approach adopted in other jurisdictions as could be gathered from the immortal comments of the erudite late Lord Denning in the case of **AHMAD V. INNER LONDON EDUCATION AUTHORITY**[28] when his Lordship in considering the applicability of Article 9 of the European Convention on Human Rights said:

"The convention is not part of our English law, but as I have often said, we will always have regard to it."[29]

Inspite of the position of his lordship in that case, one is of the very strong view that there is a denial of the right of the appellant in that particular case.[30] The decision of the Supreme Court cannot be faulted to the extent that rights are better guaranteed by municipal laws and not international treaty which have their own limitations within the context of legal regime in any particular community. It must however be said that a lot of misrepresentations have gone with regards to the interpretation of the position of the Supreme Court in this particular case to the extent that the Chief Registrar of the court had to come out in clarification of the actual stand of the court It is humbly submitted with respect that there is no need for this clarification in view of the fact that the judgment of the court is a public document and the report will naturally be well circulated, if anybody thus misleads himself or herself as to the clear words of the Supreme Court he or she will have to take the blame. It is even more preposterous if we access it from the angle of the fact that newspaper reports or comments are not law reports and it behave any legal practitioner worth its salt to go the extra mile if it could be so regarded and read between the lines the position of a court in any particular matter and need not rely on the newspaper reports. This venture by the Chief Registrar may however be excused if we consider the interest of the public in this particular matter. Moreso, if it is viewed from the angle of the ordinary man who sees the decision as a vindication of their position on the deceased head of state with regard to what most people see as high handedness and draconian disposition of Late General Sanni Abacha.

The Supreme Court gave unequivocal effect to the provisions of the Charter in unmistakable terms thus:

"By these provision, Cap. 10 remained in full force and effect as it was never at any time altered by the Provisional Ruling Council nor was there any need for its modification to bring it into conformity with the 1979 Constitution (as amended, suspended and modified) or any Decree made after the commencement of Decree No. 107 of 1993, that is, after 17 November, 1993, Cap. 10 was not inconsistent with any provision of the 1979 Constitution or any such Decree".[31]

This position was fortified by the fact that before ouster clause could be said to be effective it must be clear, unambiguous and unequivocal as courts have a duty to protect its jurisdiction and guard same jealously.[32]

The position of the dissenting judgment as expoused by Hon. Justice Okay Achike was to the effect that the Charter is not on a higher pedestal but at par with other municipal laws in the following words:

"More importantly, the African Charter having been incorporated into the body of the Nigerian municipal laws cannot be preferentially treated but should rank at par with ather municipal legislations and be subordinated to the Constitution.[33]

and unsuspended This position was complemented with the view that our hierarchy of laws in Nigeria has been decided in the case of LABIYI V ANRETIOLA[34] which indicated that the Charter as an enactment of the National Assembly will come fourth behind the constitution (suspension and modification) Decrees, Constitutional provisions. His lordship was of the view that the doctrine of stare decisis mandates the lower courts to adopt the decision of a higher court, the Court of Appeal ought to have taken the position that the said Charter will have to conform with the provisions of the Decree.

It is humbly submitted that his lordship overlooked one fundamental aspect of the lead judgment with respect to ouster clauses and it is that for an ouster clause to be operative, it must be clear and clearly state that a certain aspect of the jurisdiction of the court is ousted. This is moreso when the enactment meant to be suspended, modified or out rightly outlawed were spelt out It is a fundamental principle of interpretation that what is clearly mentioned exclude others "expressio unis exclucio ulterous". It is not wise to read into the provision of Decree No. 107 of 1993 and Decree No. 12 of 1994 what it did not specifically mention and it is not enough to hide under the general expression of S. 1(2) (b)(i) of Decree No. 12 of 1994 on "any Decree or Edict "postulation. It then means the executive can wake up one day and order all Nigerians killed as long as it is done under the authorities of the "Kabiyesi" provision of "any Decree or Edict".

The judiciary as the bastion of the hope of the common man should continue to expand its frontiers and give an elasticity disposition especially where the rights of the individuals are

involved in order to put the executive in check to totally obliterate abuse of power and what Hon. Justice Kayode Eso called Executive lawlessness.[35]

Prognosis

It is humbly submitted that the attitude of the Supreme Court as represented by the majority decision is the correct approach as it will encourage a stable polity, discourage dictatorship, eliminate recklessness and lawlessness at the level of government, elevate the independence of the judiciary and put the ordinary man on a higher pedestal especially where their fundamental human rights are called to question.

There is a gulf of omission with regard to all the Decrees put together as experienced during the military regimes between 1984 and 1999 to the effect that Cap. 10 was conspicuously missed out in the scheme of things in the bid of the military governments to trample on the rights of the citizens.

It is not a deliberate act but rather a show of the intellectual emptiness of the military rule. All past military regimes do not show any new idea in their operational approach but rather re-enact, re-write and replay what others before them have done since the unfortunate incident of January 15, 1966. It may be said that the omission of Cap. 10 was a result of the fact that Cap.10 was not in place when the first military coup took place and thus the subsequent regimes could not get anything to copy there from with regard to Cap. 10.

May the day never come again, in Nigeria when military terror will be enlished on us whether by design or accident and Cap. 10 will now feature in their list of ousted laws.

Conclusion

The Supreme Court having opened a new window in the treatment of fundamental rights enforcement issues by taking a bold step and refusing to consider the Charter ousted without any express provision to that effect must be

ready to go a step further by protecting and jealously guiding the state of affairs to be drawn back by any government purporting to legislate out, modify or even repeal this all important law.

The position in Ghana[36] and Botswana[37] who though have not legislated or incorporated the Charter into their municipal laws but regard the Charter as being above their municipal laws inspite of its short comings seem to one as the ideal for the African Society where the leadership must be literally forced to obey, respect, and abide by the rudimentary and elementary rule of governance which espouses respect for the dignity of human person.

The irreducible minimum requirement of the citizens in the third world countries is that the government in place at any point in time must give due regard to their fundamental rights to life, liberty and ownership of property. Afterall, that is the basis of government being in place in the first instance. The common man constitutes the majority in any community, their rights should not be trampled upon.

The need to stay with the common man was put across lucidly in the following lines by Imam Ali that:

> *"Maintain justice in administration and impose it on your own self and seek the counsel of the people, for the discontent of the masses sterilizes the contentment of the privileged few, and the discontent of the few resolves itself into the contentment of the many. Remember the privileged few will not rally round you in moments of difficulty. They will try to side track justice. They will ask for more than what they deserve and will show no gratitude for favours done to them. They will feel restive in the face of trials and tribulations, and will offer no regret for their short coming. It is the common man who fights the enemy. So live in close contact with the masses and be mindful of their welfare".* [38]

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1 . Ali, Y O Islam as the flashlight of Universal human rights Formulation-paper presented to Federation of Muslim Law Students Society, Ilorin on 13 December, 1997

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3. Shaw, Malcolm N. International Law Cambridge University Press p. 197

4. Henkin L.- "Human Rights" Encyclopedia of International Law 1985 Vol. 8 p. 268

5. Ese, O. Human Rights in Africa 1984 p. 5

6. Umozurike, U. O. -the African Charter in Human and Peoples' Rights 1997 p. 5.

7. Inter-American Convention on Human Rights 1969

8. The Council of Europe was concerned with Human Rights abuse and through the Congress of Europe, 1948 convened the Committee for the movement of Europe Unity and eventually a promulgation of a Social Charter in 1961.

9. Umozurike U. O -African Human Rights Issue in the 21" Century- Paper Delivered at the 30th anniversary of Nigeria Society of International Law June 4-6, 1998, Lagos.

10. See Article 30 of African Charter on Human and Peoples' Rights Cap 30 1990 Laws of the Federation of Nigeria

11. See Sections 3346 of the 1999 constitution for detailed provisions on the current regime of Fundamental Human Rights in Nigeria.

12. African Charter on Human and Peoples' Right was adopted and is now Cap. 10 of the 1990 Laws of the Federation of Nigeria.

13. Article 2 Vinna Convention concluded on 22 May, 1999.

14. Privy Council Decision reported in Times Oof 23 December, 1990.

15. Article 24, West Germany Constitution, 1949.

16. (1804) 2 Cranch 64 at 118

17. (1900) 175 U.S.677.

18. Ibid at 700

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21. Article 24 Vienna Convention; Thirlway, 1992 Law and Procedure p.32.

22. Article 38, Vienna Convention; North Sea Continental Shelf Cases 1CJ Reports 1969 p.3,41 ILR p.29.

23. 2000 4 SCNJ 400

24. Ibid at p.422.

25. Article 26. This position indicates the performance of such terms of the treaty in good faith; which is emphasised by Articles 31, 46 and 69 of the Convention.

26. Abacha V. Fawehinmin. Ibid P.420.

27. Ibid at P.423.

28. 1978 IQ.B.36.

29. Ibid at p.41.30.A.A. Oba bas admirably commented on this case in his "International Conventions on the Right of Worship and the practice in England, America and Nigeria", Journal of Law and Social Sciences, Vol.1 No. 1 pp. 112-113.

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32. Kotoye V. Saraki (1994) 7NWLR (pt357)414.

33. Ibid of P.484.

34. (1992) 8NWLR (pt 258) 139.35.Governor of Lagos State V. Ojukwu (1986) 1NWLR (pt18)621 at 633-634.

36. New Patriotic Party V. The Inspector-General of Police, Ghana $Ors No. 4/93 delivered on 30th November, 1993 referred to in Abacha V. Fawehinmi (Supra).

37. Attorney-General of Botswana V. Unity Dow (1998) 1HRLRAI 38. This was the position expressed by Imam Ali in a letter to one of the governors during his reign.