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The indigenous African concept of human right: A farce or a misjudge

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Abstract
The concept of human rights is eroneously believed to have its origin in the West and that it was 'imported' into Africa. The question is: Did the indigenous African communities possess or know anything about human rights? If the answer is No, how then is human rights a global concept if the continent of Africa truly had no idea of human rights? The negative picture painted by the West concerning the concept of human rights is that it is alien to the indegenous African political system. They postulate that the African concept of justice has little or no regard for human rights. The ideal concept of human rights was missing not only in non-western traditions but also in western societies. The pro-African writers believe that the concept of human rights is given better expression than the then neo-colonial States. The Westernview that the customs and traditions of the pre-colonial African communities knew nothing like human rights is jaundiced and considered as another Western attempt to discredit, subjugate and re-colonise Africa. This paper shall examine the degree of compliance of Africa with the universal human rights concept and suggest appropriate recommendations to make African concept of human rights to be more proactive where necessary.

Keywords: Indigenous African, human rights, western, Africa, universalism, relativism

Introduction

The concept of fairness, according to MacCarrick, is the correct exercise of human rights in any proceedings of the court particularly where the rights of a human person is involved. She further states that adherence to the tenets of human rights clarifies equality, morality, objectivity and impartiality [1]. The concept of Human rights is an ancient one and is synonymous with the creation of the human person. In Pre-colonial era of some parts of Africa, there were no written laws as we have today. The early pre-colonial societies were mainly illiterate. However, there were judicial structures, which performed the very functions of judicial organs of modern government. Western philosophers have argued that customary law did not guarantee human rights *stricto sensu* as the judicial system lacks established procedural rules.

The British perception of the African traditional society believed that Africa is a society of jungle justice because it had no law hence the Western philosophers conclude that the concept of human rights was alien to Africa [2]. However, there were a number of counter arguments by writers who have accepted customary law as that which protects the rights of human person. This counter arguments argued that the law does not necessarily have to be an instrument of force before it can protect human rights.

A critical look into the traditional African political system, reveals that though it may not conform on all fours with the human rights guaranteed by the Western judicial system, it has its own traditionally unique system that protected the right of human person. In view of the Western belief that human right has its root in the West, *vis-a-vis* the belief that though the African idea of human rights may not be exactly be as it is perceived by the West, African idea of human rights is premised on the unique customs and traditions of the peoples. The mechanism of resolving disputes amongst African communities before the advent of the colonialists was their traditional justice systems [3]. Though the rural African communities have their peculiarities that are completely different from that of the West, Nina and Schwikkard state that the conclusion of the West was merely to sow the belief that these systems are obstacles to the promotion of human rights not minding the fact that justice has meant different things in different societies at different historical times [4].

Houtondji states that the jaundiced Western perspective that the concept of human rights was invented or inspired by the West is hotly contested by the third world scholars [5]. Thus, a truly universal concept of human rights includes the African perspective that was premised on the customs and traditions of the people [6]. In the opinion of Luutu, the perception of the West as regards African concept of human rights is that the indigenous Africa was insensitive to human rights and as such, the concept is alien to Africa and that its root is in Western civilization. Luutu further states that the assertion that the concept of human rights did not exist in indigenous Africa should instead be seen as a Western strategy to re-colonise Africa. He states that no society has a patent right as its moral legacy with exclusive rights over their origination, perfection and interpretation. The underline reason for the subjugation of the African concept of human rights is to make Africans believe that their ways of social life were savage and therefore had to adopt the European 'human way' of life. After all, colonialism is all about making the African believe that the African customs and way of life is barbaric [7].

In view of the fact that human rights is a universal concept, it is erroneous to conclude that the indigenous Africans did not have any idea of human rights and fairness just because it does not comply with the Western concept. It is my view that instead of judging the African concept with the degree of compliance with the Western concept, the customs and traditions of the Africans should rather be used to determine whether African communities respect human rights or not.

The Indigenous African Concept of Human Rights

The African concept of human rights believes that human being depends both descriptively and normatively on the community. The idea of the lone individual in African thought suggesting that the existence of the individual human subject could not be rendered intelligible without first presupposing the collectivity. The individual does not and cannot exist alone except corporately. And the reason is that 'he owes his existence to other people… He is simply a part of the whole' so that the '…community must therefore make, create, or produce the individual'[8] The judicial system of a given State is one of the yardsticks with which the State can be measured to be human rights compliant. The State where human right is guaranteed to her people regardless of the status, tribe, religion, race, colour, political, social affiliation, etc. is indeed a human right compliant State.

The indigenous African societies had a unique way of settling dispute through their judicial systems. The hierarchy of court systems under the indigenous African justice systems particularly that of the Yoruba tribe of Nigeria [9], commenced with the family head, followed by the court of the chiefs, then the king's court which served as the apex court. The family head had the jurisdiction to settle matters between the family members and the jurisdiction of the family head was over civil matters between members of his extended family. The concern of the family head court was to reconcile the disputants in the spirit of oneness which existed among the family members and this is achieved through persuasion rather than strict legal principles [10]. The degree of the wrong doing determines the indigenous court that will determine the case.

In most traditional African societies, crimes went through a number of stages of dispute settlement. It could start with the disputants calling upon neighbours, family members, age-mates, or seniors and elderly people in the community to assist in resolving a dispute. If the matter remained unsettled, the disputants turned to a more public body that comprised of the chiefs and/or the King [11]. As a result of the social family cohesion and the cordial relationship that existed amongst family members, Bekker states that the family judicial process was always conscious of the obligation to maintain cordial relationship by being fair and neutral to ensure that the social cohesion of the family is protected [12]. In the traditional African justice system, the presiding judge opened the proceedings by narrating how he became seized of the matter after which the injured party or his representative (where the injured party cannot attend proceeding as a result of death or any incapacity), would be called upon to state his complaint in the full glare of the elders, judges and village members, followed by the defendants [13].

After each party had stated his case and they are questioned on their statement, then their witnesses will be called upon to give evidence. The duty of each witness is to give evidence in support of the party they have come to give evidence for. Where the party left out certaing facts that are crucial to his case, these facts can be recalled by the witness. The parties and the witnesses could be questioned on their statements by anybody from the crowd, and after a long debate, a decision would normally be taken right there in the full glare of the public. According to Udombana, Judges pointed out the rights and wrongs of each party based on their testimonies and the King or chief as the case may be pronounced the judgement.

One of the ways by which the African justice system complies with human rights standard is in the area of trial without undue delay and other rights related to access to justice which are not easily available under the formal courts. The right to be listened to by more than one judges, and decisions be delivered by them is to the advantages of traditional African justice systems. Though this is not the case in Nigeria under the formal courts particularly at the court of first instance except at the Court of Appeal and Supreme court.

In South Africa where traditional courts headed by the chiefs were in existence, the chiefs played crucial roles in dispensing justice in the indigenous communities and these courts had resemblance of the kind of dispute-resolution mechanisms desirable in a modern society [14]. The collective decisions of all the indigenous African courts reflected both the common need of the community to render justice, and the distrust of one authority because it was believed that plurality of members drawn from different kinship groups rendered fair and objective verdicts as opposed to one-man decision which the modern courts are known for. However, the Western critics see the indigenous African courts as conservative, barbaric and unable to render justice in the modern social, economic and political climate [15]. Also in Rwanda, according to Kayitare, the Gacaca court comprised of a panel of lay judges who co-ordinated a process in which genocide survivors and suspected perpetrators confront one another. In line with the evidence presented before the panel of judges by the parties and their witnesses, the panel decided cases of genocide after analysing the truth of what happened; who did what during the genocide [16].

To use the West as the mode, and yardstick for the measurement of human rights is unfair to fair judgement of the indigenous African justice system. Failure to appreciate the influence of indigenous African cultures on the African style of human rights, has made the West to wrongly conclude that human rights never existed prior colonialism in Africa. In Rwanda for instance, Nabudere states that upon realizing the fact that courts premised on western cultures were worsening post-genocide situation, the government of Rwanda re-established traditional courts to help deal with the crime of genocide and foster reconciliation in line with the cultures of the Rwandans as against the western courts which were introduced but making the situation to be worse [17].

To further elucidate and affirm the originality of the African concept of human rights, Kayitare asks an important question that assuming but not conceeding that the indigenous African concept of human rights did not conform with the Western standards, the consequent of which it was declared as non-existing, why did the Western concept introduced in Rwanda after the genocide fail to provide solution to the Rwanda genocide problem which consequently made the Rwanda government to revert to their indigenous justice system? Can the Western concept of human rights that is geared towards re-colonising Africa by making the Africans believe that their judicial system is savage be considered as the global measuring tape? The answers to these questions make one to share the opinion of Udombana that the yardstick for the measurement of the African concept of human rights is not the Western concept

but the Africans themselves because they are the one who appreciate African concept of human rights [18]. Human rights are trampled upon in the East as in the West, in the North as in the South of the planet. So it is incomprehensible for a part of the planet to lay claim to the origin of human rights.

The Universality and the Relativity of the Concept of Human Rights

Human rights according to the universalist school, have global validity hence human rights apply to all regardless of race, cultures, religion, time, level of socio-economic development and political systems. Human rights apply to all people, State and continents equally without any colour discrimination. Since they are accepted by all states and peoples, they apply equally and indiscriminately to every person and are the same for everyone everywhere. Kant argues that individual person has a right to external freedom "by virtue of his humanity." [19] Kant's reasoning here is quite simple. Since each individual has a right to freedom whose extension is limited only by the condition that such freedom be compatible with that of all others, it follows that these spheres must be all equal. A Universalist believes that human rights are universal and inure to the human being simply by virtue of his being human of which he believes that no further qualification is required for having a human right as universality of human rights believes that human nature is universal [20].

Universality means that human beings are endowed with equal human rights simply by virtue of being human, wherever they live and whoever they are, regardless of their status or any particular characteristics. Universality must be understood as closely related to other core human rights principles of interdependence, indivisibility, equality and dignity. It is common to find among many human rights moral philosophers, theorists, and legislators, that human rights are basic entitlements owed to human beings simply because they are human beings [21]. The Universalist focus on that which all human beings have in common qua persons, turning attention directly away from whatever else distinguishes them, in particular the contingencies of human nature [22].

According to Donnelly, the principle of universality of human rights is the cornerstone of international human rights law [23]. This means that we are all equally entitled to our human rights. This principle, was first emphasized in the Universal Declaration of Human Rights [24], and repeated in many international human rights conventions, declarations, and resolutions such as the International Covenant on Civil and Political Rights [25], and the International Covenant on Economic, Social, and Cultural Rights [26].

Cultural Relativism is of the view that human rights vary from culture to culture and each is equally valid and no one concept is really "better" than any other. This is based on the idea that there is no ultimate standard of good or evil, so every judgment about right and wrong is a product of society [27].

While universalists argue that human rights embodies universal ideals and rights that are universally relevant and applicable to all people. However, the relativists have argued that this idea, stating that ethical systems develop in the context of local cultures and that universal applicability should not be assumed. The universality of human rights is founded on the notion that all human rights apply uniformly and with equal force throughout the world. Thus, it opposes the doctrine of the so-called relativity of human rights, which maintains that in the application of human rights in concrete situations, allowance should be made for particularities that attend cultural, ethnic or religious varieties.

Human Rights under the African Charter and the European Convention Distinguished.

In 1981, the then Organisation of African Union (now African Union) adopted the African Charter on Human and Peoples' Rights (the 'Charter'), also known as the 'Banjul Charter' as the primary human rights instrument for the African continent. The Charter is an international treaty that is legally binding on those States that have ratified it and is intended to set international standards that African States are required to observe. Upon receiving the required number of ratifications by OAU member States, the Charter came into force on 21 October 1986. On 4th November, 1950, the European States under the aegis of the European Union opened for signature in Rome the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights and it came into force on 3rd September 1953.

The Charter has the African Commission as its judicial organ which try the petitions on the abuse of human rights of the individual within the member States. The right to fair trial is the most invoked of all the human rights by petitioners seeking redress through either the African Charter or the European Convention. According to Jacot-Guillarmod, Article 6 of the European Convention on Human Rights plays a central role within the system of protection established by that instrument and it is the most frequently invoked provision of the Convention [28]. This was confirmed by Janis *et al* that the provisions of the Article 5 and Article 6 have been the most commonly invoked before the European Court of Human Rights [29].

The right to fair trial is governed by Articles 6 and 7 of the European system for the protection of human rights and Fundamental Freedoms. Article 6 of this Convention provides that:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
   Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him:
b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 of the same Convention provides that:
1. No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act oromission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

On the other hand, Article 7 of the African Charter on Human and Peoples Rights provides that:
1. 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 recognised and guaranteed by conventions, laws, regulations and customs in force;
b. the right to be presumed innocent until proved guilty by a competent court or tribunal;
c. the right to defence, including the right to be defended by counsel of his choice;
d. the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can only be imposed on the offender.

A critical examination of the provision of Article 7 of the European Convention will reveal that it neglects vital areas of human rights. For instance, the right to an interpreter for a party who does not understand the language of the court is not provided for. It does not include the guarantee of public trial. It does not have provision for the right to examine and cross examine witnesses among others [30].
There is a huge gulf between the African Charter and the European Convention in terms of the depth and rigour of the guarantees of human rights, which their respective norms enshrine. What accounts for this wide-ranging disparity are the contextual realities of the two systems and the regions that they cover that exert considerable impact on the shape of human rights protection available through them. When the two instruments are juxtaposed, one would discover that while the European Convention does not make provision for the right to court and prohibition on self-incrimination, the African Charter provides for the two rights. Also while the European Convention has sufficient provisions in the area of essential safeguards for an accused in a criminal process, the African Charter is deficient in that area. In addition, where the European Convention separated the right to legal representation and assistance from the requirement of adequate time and facilities, the African Charter grouped them together as the right to defence and counsel while also completely ignoring the issue of legal aid [31].
In view of the differences that exist between the two instruments, it is pertinent to examine critically their provisions so as to bring out the area of similarities and differences and abstenance.

1. Trial or Hearing within a Reasonable Time
The European Court held in many of its decisions that when justice is unduly delayed, its effectiveness and credibility may be jeopardised [32]. Therefore what constitute within a reasonable time depends on the circumstances of each complaint. For instance, a case that eventually took 15 years to conclude is considered to be too long and unreasonable. According to Udombana, the only point of departure in the African system is that while the European court treats delays in both criminal and civil proceedings, the African Commission restricts its jurisdiction in this area to criminal cases. Its expansion of this right, for instance, in its Resolution on the Right to Recourse to Fair Trial states [33].

2. Rule against Double Jeopardy
This rule bothers on the fact that once a person is acquitted he could never be tried for the same crime a second time. This is one of the initial missing gaps in the European Convention [34]. The European Convention originally did not prohibit the rule against double jeopardy and the European Commission on Human Rights drew the attention of the Committee of Ministers to this missing gap. The Committee in turn referred the issue to the European Committee on Crime Problems, which in its opinion made exceptions to the application of the rule at the international stage [35]. They advised that the principle should be restricted to "acquittals and to those convictions where the penalty has been served or where the fact that the penalty has not been served is due to a decision to that effect by the country imposing the sentence, or where no sanction has been imposed. In the alternative the Committee was of the view that the rule would better be placed in the Treaty on the International Validity of Criminal Judgments rather than drafting for it a different protocol. This opinion was apparently based on the understanding that prohibition of double jeopardy was widespread within the state parties to the European Convention and was in any case more a principle of domestic law than international law.

3. Right to Court
The African charter recognizes the right to court, which it refers to in Article 7(1) (a) as the right "to an appeal to competent national organs" to redress violations of the charter. Article 6(1) of the European Convention does not expressly state the right of access to the courts or tribunals, The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings. The African situation presents a contrasting picture.
The African Commission has made several decisions regarding what would constitute a violation of the right to

court. For instance, where pending litigation in domestic courts are forecloseable by executive decree, when instead of the right to appeal, judgments are rather confirmed by the executive [36], Also where the king retains power to reverse all court decisions [37] or where the courts are deprived of personnel qualified to ensure that they operate impartially [38].

The Commission takes seriously the word "competent" appearing in the Article and links it to the expertise of the judges and the procedures that they operate. Consequently, military tribunals are not *per se* objectionable so long as their procedures are neither unfair nor unjust. Though they may be presided over by military personnel, the commission decided thatthey are, however, subject to the same rules of transparency, independence and objectivity as the ordinary courts [39]. This notwithstanding, the Commission advised against the establishment of such tribunals irrespective of whatever domestic circumstances that may make their establishment tempting as setting them up not only undermines the court system but creates the likelihood of unequal application of the law.

4. The Right to a Public Trial

This is a right to the effect that the parties are entitled to a public trial of their cases. Right to a public trial includes the presence of the parties at all stages of the proceeding, public hearing and judgments must be delivered publicly.

Article 6 of the European Convention makes provision for fair trial which includes but not limited to public hearing and also mandates that judgments be pronounced publicly. According to the European Convention, the press and public may be excluded from particular proceedings if such exclusion serves the interests of morals, public order or national security in a democratic society. However the requirement of publicity of hearings and judgments is not absolute. Such is also the case where the interests of juveniles or the protection of private life of the parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

In criminal cases, the presence of the accused is mandated except in cases where the accused waives the right to be present or in some narrowly defined situations where trials in absentia are allowed [40]. Waiver of the right to physical presence must be unequivocally established accompanied by minimum safeguards commensurate to its importance. For trial in absentia, the national authorities must show that they used due diligence in efforts to locate the accused person and pass to him information about the criminal charges and other important details of the trial, provided the accused may subsequently obtain from the court which tried him in absentia a fresh determination of the merits of the charge.

Mere presence in court is however of little moment if the litigant in a civil proceedings or the accused in a criminal case is for any reason unable to effectively participate in the proceedings. Where a slightly deaf applicant who was unable to hear some of the evidence given at the trial claimed that a violation occurred in a case involving a slightly deaf applicant, the European Court refused to so believe [41] the court's decision rested on the fact that the defence attorney who could hear all the evidence chose not to request that his client be seated closer the witnesses. However, in the trial of a boy aged 11 for the murder of a toddler, the court was against the background of massive publicity generated by the crime and accordingly held that it was highly unlikely that the applicants would have felt sufficiently free in the charged courtroom and under such intense public scrutiny to have the benefit of effective legal consultation during the trial [42].

Indigenous Courts in Africa

The reality of the existence of traditional forms of adjudication in different parts of Africa can no more be debated. The question, however, is whether such institutions are to be left on their own without check or be made to bow to the dictates of international principles for the delivery of justice? In the midst of arguments for or against making human rights guarantees relative to local conditions, the question may be asked if there are particular human rights principles that could be considered alien to traditional systems of justice in Africa. To Otteh, it seems dangerous to put these institutions outside the purview of the international regime for acceptable trial procedures especially as they are known to be responsible often for massive violations of basic tenets of due process [43].

In line with the resolution, the indigenous or traditional courts are required to respect the equality of persons without discrimination, respect the inherent dignity of human persons and respect human liberty and security in addition to several other guarantees [44]. But with particular reference to fair trial demands, traditional courts by the provisions of the resolution must allow parties before them equal opportunity to prepare a case, present arguments and evidence as well as respond to opposing evidence or arguments.

Notwithstanding the significance of this aspect of the 1999 resolution of the Commission, they are yet to be tested in real terms as no previous case for consideration before the Commission has ever been concerned with a violation arising from the proceedings of a traditional African court [45]. Nevertheless these courts continue sitting all over Africa. States in Africa under the resolution are required to guarantee the independence of traditional courts by their respective laws and also ensure their impartiality. According to the resolution the impartiality of a traditional court would be undermined when one of its members has expressed an opinion which would influence the decision making or has some connection or involvement with the case or a party to the case or has a pecuniary or other interest linked to the outcome of the case.

Conclusion

Granted that the European system with which the African system is compared in this regard has set good standards both in terms of litigation generated and the jurisprudence produced. It has been shown overtime that the greatest impediment to the advancement of human rights in Africa is the unaccountable nature of most governments on the continent I strongly believe that if the African States are not conscious of human rights, the continent cannot be expected to fare better. It follows, therefore, in the word of Udombana, that if the continent's component states are intolerant to best human rights practices, they cannot be expected to have the political will needed to deliver a satisfactory region-wide human rights regime [46].

Though a good number of the specific elements of human rights remain untested within the African system, an enhanced use of the African system as well as education

about its activities is apposite in this regard. Though the African system cannot be equated with the European system, nevertheless, it is not far behind. It is indeed a credit to the African system that it has shown willingness to borrow from other international and regional systems, including the European system, so as to strengthen its own jurisprudence. What is left is to provide solutions to address the noticeable shortcomings and to make its own procedures more open and accessible. These are achievable if the political authorities of the African States are ready and willing to give further room to the African human rights institutions.

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