

**The Impact of the African Charter on Human and Peoples' Rights on Domestic Law: A Case study of Nigeria**

Eghosa Osa Ekhator PhD (Hull)

eghosaekhator@gmail.com

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Eghosa Osa Ekhator\*

## Abstract

The African Charter on Human and Peoples' Rights (African Charter) establishes a system or mechanism for the promotion and protection of human rights in Africa **within the framework of the African Union (formerly known as the Organisation of African Unity)**. The African Charter promotes a range of human rights such as civil and political, socio-economic and cultural, individual and collective rights. The African Charter is the first regional mechanism to incorporate the different classes of human rights in a single document. **There have been a plethora of academic postulations indicating that the African Charter has impacted Nigerian Law minimally.** This article contends that the African Charter has impacted positively on Nigerian law notwithstanding the academic postulations to the contrary.

## 1.1 Introduction

This article analyses the impact of the African Charter on Nigerian law. This article focuses on the impact or relevance of the African Charter on environmental justice (including other socio-economic rights), women's rights and civil and political rights in Nigeria. This article will be divided into seven sections. The first section will be the introductory section. This section will undertake an overview of the African Charter and highlight some of its inherent contradictions and strengths. The second section will focus on the status of the African Charter in Nigeria. The third section will dwell on the impact of the African Charter on environmental justice in Nigeria. The laws regulating the oil and gas industry and its impacts on the Niger Delta region will also be in focus. The fourth section will dwell on the impact of African Charter on women's rights in Nigeria. The fifth section will focus on the impact of the African Charter on civil and political rights in Nigeria. The sixth part of the article will focus on the future

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\* [eghosaekhator@gmail.com](mailto:eghosaekhator@gmail.com). An earlier version of this paper was presented at the Seventh Annual International Graduate Legal Research Conference (IGLRC), 8-9 April 2013 at King's College London, UK.

prospects of the African Charter in Nigeria. Here, the likely impacts of the African Charter on the recently enacted law prohibiting same sex marriages in Nigeria will be highlighted. The seventh section is the concluding part of the article.

## 1.2 Overview of the African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter)<sup>1</sup> establishes a system or framework for the promotion and protection of human rights in Africa within the framework of the Organization of African Unity (now AU). The African Charter came into force on 21 October 1986. The African Charter promotes a plethora of human rights such as civil and political, socio-economic and cultural, individual and collective rights.<sup>2</sup> The African Charter is the first regional mechanism to incorporate the different classes of human rights in a single document.<sup>3</sup>

The rights encapsulated in the African Charter include right to enjoyment of rights **without** distinction of any kind (article 2), right to life (article 4), right to dignity of the human person (article 5), equality of all peoples (article 19), right to existence and self-determination (article 20), right to free disposal of natural wealth and resources (article 21), right to satisfactory and clean environment (article 24) amongst other rights.<sup>4</sup>

The African Charter has been lauded by many academics for its innovative provisions. For example, Professor Okafor observes that the impact of the African Charter has been modest but significant.<sup>5</sup> Other scholars have also posited similar assertions on the African Charter. For example, the African Charter has been hailed for its unique African characteristics such as its anti-colonial slant and emphasis on morality amongst others.<sup>6</sup>

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<sup>1</sup> African Charter of Human and Peoples' Rights OAU CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 entered into force Oct. 21, 1986.

<sup>2</sup>Manisuli Ssenyonj (ed) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers 2012)

<sup>3</sup> *ibid*

<sup>4</sup> African Charter on Human and Peoples' Rights (n1). Generally see Nnamdi Ogbu 'The African Charter on Human and Peoples Right as Compatible with Despotism: The Nigerian Experience' (2005) 8(1) University of Benin Law Journal 113. Also available online at <http://www.nigerianlawguru.com/articles/human%20rights%20law/THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%20RIGHT%20AS%20COMPATIBLE%20WITH%20DESOTISM.THE%20NIGERIAN%20EXPERIENCE.pdf>

<sup>5</sup> Obiora Okafor *The African Human Rights System and International Institutions* (Cambridge University Press 2007)

<sup>6</sup> Frans Viljeon *International Human Rights in Africa* (2<sup>nd</sup> edn, Oxford University Press 2012). Makau Mutua 'The Banjul Charter and the African cultural fingerprint: An assessment of the language of

Due to the innovative bent of the African Charter, many scholars have heavily criticised it especially on the basis of its conceptual framework.<sup>7</sup> For example, it is said to promote despotism. Unlike the African Charter, rights provided under international bills of rights or treaties are well defined and the circumstances where they may be limited or derogated from are clear and unambiguous.<sup>8</sup> Thus, 'the provisions of the of the African Charter are brief, vague, and in some circumstances allow national laws to limit or derogate from these rights without setting any standard for such national law'.<sup>9</sup> Here, absence of derogation clauses and the use of the claw-back clauses<sup>10</sup> amongst other reasons are adduced.<sup>11</sup>

The African Charter came into effect at the height of military regimes in Africa. It was regarded as a mere 'declaration' by many African leaders without any legal authority which did nothing to contain the human right abuses that were rife in the absence of democratic rule.<sup>12</sup> Some leaders such as Mobutu Sese Seko of Zaire and Omar Bongo of Gabon are prime examples of post-colonial military rulers in Africa who flagrantly violated the human rights of their citizens undermining the provisions of the African Charter.

Furthermore, under the procedure of the African Court of Human and Peoples Rights, individuals do not have direct access to the court. Also, State parties are required to

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duties' (1995) 35 Virginia Journal of International Law 339. Dejo Olowu 'The African Charter on Human and Peoples' Rights, Its Regional System, and the Role of Civil Society in the First Three Decades: Calibrating the "Paper Tiger" (2013) 31 Obiter 29.

<sup>7</sup> Rachel Murray 'The African Charter on human and people's rights 1987-2000: An overview of its prospects and problems' (2001) 1 African Human Rights Law Journal 1

<sup>8</sup> Ogbu (n4). Generally see Abdi Ali 'Derogation from Constitutional Rights and its Implications under the African Charter on Human and Peoples' Rights' (2013) 17 Law, Democracy & Development 78.

<sup>9</sup> Ogbu *ibid.* For example see article 4 (right to life) of the African Charter which states that '[E]very human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of his life'. Ogbu contends the clause 'no one may be arbitrarily deprived of this right' in article 4 can be curtailed by national laws in Africa and there is no uniform standards in such instances. This is unlike similar provisions in the European Convention on Human Rights and Fundamental Freedoms and the American Convention which explicitly define the circumstances and wherein the right to life may be derogated or limited and the extent of such limitation or derogation.

<sup>10</sup> Claw back clauses are 'those provisions which allow a state to limit the guaranteed rights to the extent permitted by municipal law' See Olowu (n 6) 36. These provisions have been relied upon by many African states to undermine the efficacy of the rights in the African Charter. Olowu *ibid.* Joseph Isanga 'The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?' (2013) 11 Santa Clara J. Int'l L. 267-302, 277

<sup>11</sup> Ogbu (n 4), Okafor (n5).

<sup>12</sup> Generally see Kofi Kufuor *The African Human Rights System: Origin and Evolution* (Palgrave Macmillan 2010) for the historical and political context and factors inhibiting effective implementation of the African Charter. Michele Olivier 'The Emergence of a Right to Democracy – An African Perspective' in Panara C and Wilson G (ed) *The Arab Spring – New Patterns of Democracy and International Law* (Martinus Nijhoff Publishers 2013)

make declarations recognising the jurisdiction of the Court and thereby granting direct access to individuals in such countries.<sup>13</sup>

Further criticisms of the African Charter points to the fact that the gamut of protection encapsulated in it is significantly weaker in comparison to similar conventions in Western Europe and Latin America.<sup>14</sup> Criticisms of the African Charter include; 'window dressing' for the purpose of acceding to 'international civilisation'<sup>15</sup> and that the African Charter offers little protection to the individual.<sup>16</sup>

Notwithstanding, the aforementioned criticisms of the African Charter, it has had a modest yet significant influence on the human rights architecture in Africa and Nigeria is no exception.<sup>17</sup> The African Charter has been accepted widely in Africa. Only Morocco (which is not member of the African Union) and South Sudan have not signed up or ratified the African Charter<sup>18</sup>

## 2 Status of the African Charter in Nigeria

Nigeria has ratified and domesticated the African Charter on Human and Peoples Rights. Nigeria was the first country in Africa to incorporate the African Charter wholesale into its national laws.<sup>19</sup> Nigeria operates a dualist system wherein treaties are not applied domestically unless incorporated through domestic legislation.<sup>20</sup> This

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<sup>13</sup> Eghosa Ekhaton 'Improving Access to Environmental Justice under the African Charter: The Roles of NGOs in Nigeria' (2014) 22 (1) African Journal of International and Comparative Law 63.

<sup>14</sup> Claude Welch 'The African Commission and People's Rights: A Five year Report and Assessment' (2002) 14 Human Rights Quarterly 43, Okafor (n 5)

<sup>15</sup> Sindjoun, L. 'La civilisation internationale des murs: éléments pour une sociologie de l'ide'alisme structurel dans les relations internationales' (1996) 27 Etudes internationales 848. Cited in Jean Boukongou 'The Appeal of the African System for Protecting Human Rights' (2006) 6 African Human Rights Law Journal 268, 271

<sup>16</sup> See Victor Ayeni *Domestic Impact of the African Charter on Human and People's Rights and the Protocol on the Rights of Women in Nigeria*. (An LL.M thesis submitted to University of Pretoria, South Africa 2011). Michelo Hansungule 'Towards a more Effective African System of Human Rights' A paper presented at the First International Conference on: The Application of the Death Penalty in Commonwealth Africa organized by the British Institute of International and Comparative Law held on 10th to 11th May 2004 at Entebbe, Uganda, Murray (n 7)

<sup>17</sup> Okafor (n 5)

<sup>18</sup> For the comprehensive list of countries that have signed, ratified and acceded to the African Charter see African Commission on Human and Peoples' Rights website <http://www.achpr.org/instruments/achpr/ratification/>

<sup>19</sup> Viljoen (n 6), Victor Ayeni 'The impact of the African Charter and Women's Protocol in Nigeria' in Centre for Human Rights *The impact of the African Charter and Women's Protocol in selected African States* (Pretoria University Law Press 2012)

<sup>20</sup> Generally see Edwin Egede 'Bringing Human Rights Homes: An Examination of the Domestication of Human Rights Treaties in Nigeria (2007) 51(2) Journal of African Law 249, Amos Enabulele 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts', (2009) 17(2) African Journal of International and Comparative Law, 326.

is by virtue of section 12(1) of the Nigerian Constitution 1999 which states that 'No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. **The African Charter is the only comprehensive human rights treaty that has been domesticated in Nigeria,<sup>21</sup> thence the African Charter (Ratification) Act 1983 is the domesticating law.** However, there are other approaches available for the domestication of treaties in Nigeria.<sup>22</sup> **One approach relates to treaties entered into by the British colonial administration and extended to Nigeria by virtue of the colonial authority.<sup>23</sup> An example is the Warsaw Convention made applicable to Nigeria by virtue of the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953. Another approach for domesticating treaties into Nigeria is when provisions of treaties are used as templates for Nigerian statutes without the necessity of making obvious reference to the treaties.<sup>24</sup> Examples include the Carriage of Goods by Sea Act<sup>25</sup> and the Rights of the Child Act <sup>26</sup> enacted by some states in Nigeria. Yet, another approach for domesticating international conventions into Nigerian law is via the use of subsidiary legislation. For example, the recent Environmental Regulations fashioned by the Minister of Environment by virtue of section of 34(3) of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 is based on the various international environmental conventions which Nigeria is party to.<sup>27</sup>**

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<sup>21</sup> Chidi Odinkalu 'The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights' in Gauri, V and Brinks. D.M (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in Developing World* (Cambridge University Press 2008). African Charter (Ratification and Enforcement) Act Chapter A9 Laws of the Federation of Nigeria (LFN) 2004

<sup>22</sup> See Ekhaton (n 13). For example, treaties entered into by the British colonial administration and extended to Nigeria by virtue of the colonial authority. See Enabulele (n 20)

<sup>23</sup> Enabulele (n 20)

<sup>24</sup> *ibid*

<sup>25</sup> Act 1 No. 1 of 1926 now Cap.C2 Laws of the Federation 2004. The Carriage of Goods by Sea Act 1926 was based on International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924. Generally see the Carriage of Goods Sea Act 1926, available online at <http://www.placng.org/lawsfnigeria/node/33>

<sup>26</sup> Act No 26 of 2003. The Act is premised on the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). Nigeria has ratified both treaties. See Egede (n 20) 268

<sup>27</sup> Margaret Okorodudu-Fubara 'Country Report: Nigeria. Legal Developments, 2009-2011' (2012) 1, IUCN Academy of Environmental Law e-Journal Issue, 170. For an analysis of the implementation of International Environmental Law Conventions in Nigeria, see Olubayo Oluduro *Oil Exploitation and*

The domestic authority of the African Charter in Nigeria can be gleaned from the long title of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act of 1983. Its Long Title goes thus "[A]n Act to enable effect to be given in the Federal Republic of Nigeria to the African Charter on Human and People's Rights made in Banjul on the 19<sup>th</sup> day of January, 1981 and for the purposes connected forthwith". Section 1 of the Ratification and Enforcement Act corroborates the Long Title by stating thus;

As from the commencement of this Act, the provisions of the African Charter on Human Rights Peoples' Rights which are set out in the Schedule to this Act shall, subject as there under provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

The Nigerian Supreme Court confirmed in the case of *General Sani Abacha v. Chief Gani Fawehinmi*<sup>28</sup> that the Charter is part of Nigerian law and courts must enforce it.

### 3.1 Laws Promoting Environmental Injustice in Nigeria

There are plethora of laws that accentuate environmental injustice in Nigeria especially in the Niger Delta area where the oil and gas (petroleum) industry is located. The laws in focus in this article will include the *Constitution of the Federal Republic of Nigeria 1999*, the *Land Use Act*<sup>29</sup>, the *Petroleum Act*<sup>30</sup>, and the *Associated Gas Re-injection Act*.<sup>31</sup> The first law in focus will be the Constitution of Nigeria 1999. Nigeria is a federal state with three tiers of government, the federal, state and local government. Section 44 (3) of the 1999 Constitution, vests the Federal Government with exclusive control and management of all minerals, mineral oils and natural gas. The section states thus:

Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the

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*Human Rights Violations in Nigeria's Oil Producing Communities* (Intersentia Publishing 2014) 408-411

<sup>28</sup> (2000) SC No. 45/1997

<sup>29</sup> Now Land Use Act Cap 202, Laws of the Federation of Nigeria (LFN) 2004

<sup>30</sup> CAP P10, LFN 2004

<sup>31</sup> CAP 20, LFN 2004

Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly<sup>32</sup>.

Furthermore, under the 1999 Constitution, the Federal government list or schedule of exclusive powers contains all matters relating to the regulation and management of the oil and gas industry.<sup>33</sup> The exclusive schedule contains matters pertaining to export duties, mines and minerals (including oil fields, oil mining, geographical surveys and natural gas), incorporation and regulation of corporate bodies and taxation of profits, capital gains and incomes.<sup>34</sup> These provisions of the Constitution have been used by the federal government to milk the Niger delta of its wealth. For example, the Federal government collects the bulk of the revenue generated from oil to the disadvantage of the communities where the oil resources are located.

Oil politics and policy in Nigeria has been beset by many institutional problems. The Niger Delta has been beset by environmental problems allegedly perpetuated by oil Multinational Corporations (MNCs) and it has become a theatre of violence and political agitation. These acts of violence can be traced to environmental degradation prevalent in the area and government cum MNCs ineffective response.<sup>35</sup> A major issue is the ownership of the oil resources in the Nigeria. Here, the law in focus will be the Land Use Act of 1978.<sup>36</sup> Section 1 of the Land Use Act vests the ownership of all land in the state. However, section 28 of the Act permits the compulsory acquisition of land for oil and mining exploration and this law nationalised all lands in Nigeria. This alienated people from their communal or traditional lands. Following this provision, it has been argued that the Land Use Act (which was originally a military enacted decree), due to its distinctive impacts on the Niger Delta people, was promulgated to deprive the people of active participation in the oil and gas sector of Nigeria.<sup>37</sup> Prior to

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<sup>32</sup> Constitution of the Federal Republic of Nigeria 1999. Available online at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> last accessed 20 April 2014.

<sup>33</sup> Wumi Iledare & Rotimi Suberu *Oil and Gas Resources in the Federal Republic of Nigeria*. Framework Paper prepared for delivery at the Conference on Oil and Gas in Federal Systems. March 3-4, 2010. Available online at [http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266445624608/Framework\\_Paper\\_Nigeria2.pdf](http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266445624608/Framework_Paper_Nigeria2.pdf) last accessed 21 April 2014.

<sup>34</sup> *ibid*

<sup>35</sup> Engobo Emeseh et al 'Corporations, CSR and Self Regulation: What lessons from the Global Financial Crisis?' (2010) 11 (2) German Law Journal 234

<sup>36</sup> Land Use Act Cap 202, Laws of the Federation of Nigeria (LFN) 2004

<sup>37</sup> Rhuks Ako 'Nigeria's Land Use Act: An Anti-thesis to Environmental Justice'. (2009) 53 (2) Journal of African Law 289

the enactment of this Act, families and communities were 'legally recognised as land owners and therefore were to be consulted before oil exploration could be initiated'.<sup>38</sup>

Also, the Act has affected compensatory rights available to the people deprived of their lands even when the lands are hosting economic activities that degrade their immediate environment and affect the livelihood of the local people.<sup>39</sup>

Another law in focus will be the Petroleum Act of 1969. In Nigeria, oil multinational corporations (oil MNCs) are said to apply lower operational standards or rules in contradistinction to their operations in developed countries. A ready example is the Petroleum Act which the oil MNCs disregard its provisions. The Petroleum Act which is the primary law regulating oil and gas industry in Nigeria and it posits that company operations must be conducted in accordance with 'good oil field practice'.<sup>40</sup> This term 'good oil field practice' is not defined in the Petroleum Act. However, section 7 of the *Nigerian Minerals Oil (Safety) Regulations*, which was created via the powers of the Petroleum Minister under section 9 of the Petroleum Act clarifies the term 'good oil field practices' by providing that:

Where no specific provision is made by these Regulations in respect thereof, all drilling, production and other operations necessary for production and subsequent handling of the crude oil and natural gas shall conform with good oil field practice, which for the purpose of these regulations shall be considered to be adequately covered by the appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute's Codes or the American Society of Mechanical Engineers Codes.<sup>41</sup>

Thus, the prevailing industry standards in the United Kingdom and the United States of America are deemed to be the standards that oil MNCs should adhere to in Nigeria. However, some other Nigerian statutes make provisions for lower standards to be operational in the oil industry. Such laws or regulations include the Federal Environmental Protection Agency (FEPA Act) which has been repealed<sup>42</sup>, the

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<sup>38</sup> Rhuks Ako & Patrick Okonmah 'Minority Rights Issues in Nigeria: A theoretical Analysis of Historical and Contemporary Conflicts in the Oil-Rich Niger Delta Region'. (2009) 16 International Journal on Minority and Group Rights 53, 58.

<sup>39</sup> Ako (n 37).

<sup>40</sup> Cited in Emeseh et al (n 35) 99.

<sup>41</sup> Section 7 of the Nigerian Minerals Oil (Safety) Regulations.

<sup>42</sup> FEPA has been replaced by the National Environmental Standards and Regulation Enforcement Agency (NESREA). For an analysis of the NESREA see Eghosa Ekhaton 'Environmental Protection in

Department of Petroleum Resources (DPR) Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (2001).<sup>43</sup> These regulations recommend standards that are lower than the oil industry standards envisaged by the Nigerian Minerals Oil (Safety) Regulations<sup>44</sup>. The oil MNCs adhere to the latter regulations rather than the statutory legal regime of the Petroleum Act. The major reason is that MNCs are trying to avoid the more rigorous standards inherent in Nigerian Mineral Oil (Safety) Regulations. Thus, this anomaly is a reflection of the parlous regulatory regime in Nigeria where the powerful MNCs choose the laws they adhere to.

Other laws that impacts on oil and gas regulation in Nigeria include the various gas flaring laws<sup>45</sup> which permits gas flaring by oil MNCs in the oil and gas industry, Environmental Impact Assessment Act (EIA) 1992 which is *sine qua non* before the commencement of any oil related project in Nigeria (which is routinely ignored by oil MNCs in Nigeria), the Harmful Waste (Special Criminal Provisions) Act 1988 which prohibits the illegal dumping, depositing and transporting of harmful wastes on land and territorial waters of Nigeria and the Oil in Navigable Waters Act 1968 which expressly prohibits the discharge of oil into Nigerian waters. Other Laws include the Hydro Carbon Refineries Act, Oil and Gas Export Free Zone Act, Oil Pipelines Act and Petroleum (Drilling and Production) Regulations amongst others.

### 3.2 African Charter and Environmental Justice in Nigeria<sup>46</sup>

The African Charter has been relied upon by the courts in Nigeria to invalidate some of the obnoxious laws accentuating the inadequate protection or promotion of environmental justice in Nigeria especially in the Niger Delta region. For example, in

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the oil and gas industry in Nigeria: the roles of governmental agencies' (2013) 5 International Energy Law Review 196

<sup>43</sup> Cited in Emeseh et al (n 35) 99

<sup>44</sup> *ibid.*

<sup>45</sup> See Amy Sinden 'An Emerging Human Right to Security from Climate: The Case Against Oil Flaring in Nigeria' in William Burns et al (eds) *Adjudicating Climate Change: Sub-National, National and Supranational Approaches* (2008), Available from the SSRN website at <http://ssrn.com/abstract=1280934>

<sup>46</sup> This section draws heavily from Ekhator (n 13)

*Gbemre v. Shell*<sup>47</sup>, the plaintiff filed a suit against Shell, the Attorney General and the Nigerian National Petroleum Corporation (NNPC) to end the practice of gas flaring. The court held that the extant gas flaring laws 'was inconsistent with the Applicant's right to life and/or dignity of human person' as enshrined in the Nigerian Constitution and the African Charter.<sup>48</sup> The next part of the article will highlight the impact of the African Charter on socio-economic rights in Nigeria.

#### A Impact of the African Charter on Socio-economic rights in Nigeria

In Nigeria, socio-economic rights are not justiciable. Therefore, promotion and protection of the environment under section 20 of chapter II of the Constitution of Nigeria entitled 'Fundamental Objectives and Directive Principles of State Policy' is neither justiciable nor enforceable.<sup>49</sup> However, the African Charter has been relied upon by Nigerian courts to promote socio-economic rights. For example, in the case of *Odafe and Others v. Attorney General of the Federation*<sup>50</sup>, the right of prisoners to medical care was held to be enforceable by the Federal High Court in Nigeria. Justice Nwodo held thus:

The [African] Charter entrenched the socio-economic rights of person[s]. The Court is enjoined to ensure the observation of these. A dispute concerning socio-economic rights such as the right to medical attention requires the Court to evaluate State policies and give judgement consistent with the Constitution.<sup>51</sup>

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<sup>47</sup> Suit No. FHC/B/CS/153/05. Also available online at the African Human Rights Law Database at <http://www.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html>

<sup>48</sup> Ekhaton (n 13).

<sup>49</sup> *ibid* 70-71 for an analysis of the conundrum of enforcing socio-economic rights in Nigeria. Chapter II is not justiciable by virtue of section 6(6)(c) of the Constitution of Nigeria. However, it has been argued that one way wherein the Nigerian Supreme court can by-pass this conundrum is by 'simply recognizing that the programmatic aspirations set out in Chapter II were rendered justiciable the moment the legislature took the socio-economic inchoate rights in the African Charter and made them law in Nigeria when the Charter was domesticated' See Tunde Ogowewo *Wealth (Dis)creation through Corporate (Mis)governance and Banking(Mis)supervision: The Outlines of a Reform Agenda*, being a paper presented in Honour of Hon. Justice E.O. Ayoola on 25 November 2009 at the Nigerian Institute of International Affairs 3 cited in Oluduro (n 27) 407

<sup>50</sup> (2004) AHRLR 205 at 211; (2005) CHR 309 at 323-324. Cited in Ekhaton (n 13)

<sup>51</sup> *Ibid*

Also, in the recent case of *Mrs Georgina Ahamefule v Imperial Medical Centre and Dr Alex Molokwu*<sup>52</sup>, a Lagos State High Court held that the termination of employment of a nurse on the basis of her positive HIV status to be unlawful. The court further held that the denial of medical care to the plaintiff is a violation of article 16 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act and article 12 of the International Covenant on Economic, Social and Cultural Rights which has been ratified by Nigeria.<sup>53</sup> This judgement was given notwithstanding that the right to health under section 17(3) of the Constitution is localised in chapter II which is not justiciable.

## B Impact of African Charter on the Locus Standi doctrine in Nigeria

Furthermore, the African Charter has extended the frontiers of the *locus standi* in Nigeria. Here, the new fundamental rights enforcement rules (FREP) of 2009 will be in focus. Preamble 3(e) of the FREP rules 2009 abolishes the locus standi rule in Nigeria<sup>54</sup> and this preamble will be quoted in extensor:

- (e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:
- (i) Anyone acting in his own interest;
  - (ii) Anyone acting on behalf of another person;

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<sup>52</sup> Unreported Suit No.1D/1627/2000. The judgement was delivered on 27/09/2012. Available online at <http://www.escr-net.org/node/364987>

<sup>53</sup> *ibid* 23. For an extensive analysis of the case, see Ebenezer Durojaye 'So Sweet, So Sour: A Commentary on the Nigerian High Court's decision in Georgina Ahamefule v Imperial Hospital & another relating to the Rights of Persons Living with HIV' (2013) 13 African Human Rights Law Journal, 464. Also see Emeka Amechi 'Environmental Pollution and Human Rights in Nigeria: Some Reflections on the Linkages and the Need for Effective Enforcement of Environmental Regulations' (2012/1) 18(1) The Nigerian Journal of Cotemporary Law 93. For an analysis of right to health under the African Human Rights system see Ebenezer Durojaye 'The Approaches of the African Commission to the Right to Health under the African Charter' (2013) 17 (Special Issue) Law, Democracy & Development 393

<sup>54</sup> Femi Falana *Fundamental Rights Enforcement in Nigeria* (2<sup>nd</sup> edn, Legal text Publishing Company Limited 2010). According to Ayeni (n 19) 128, the court also relaxed the rules of locus standi on the basis of article 13(2) of the African Charter in the case of *Nwankwo v Onomeze-Madu* (2009) 1 NWLR c(part 1123) 671, 715-716.

- (iii) Anyone acting as a member of, or in the interest of a group or class of persons;
- (iv) Anyone acting in the public interest, and
- (v) Association acting in the interest of its members or other individuals or groups

Furthermore, preamble 3(b) of the FREP rules posits that the courts should respect municipal, regional and international treaties or bills of rights which the court is aware of.<sup>55</sup> Some of these treaties include the African Charter, African regional human rights jurisprudence and the Universal Declaration of Human Rights and other instruments in the United Nations human rights systems.<sup>56</sup> Thus, the African Charter has impacted positively on the provisions of the FREP. Furthermore, 'the [FREP] Rules laid to rest any lingering doubt regarding the justiciability of the socio-economic provisions of the Act including the right to a healthy environment, by expressly defining fundamental rights as including 'any of the rights stipulated in the African Charter on Human and People's Rights (Ratification and Enforcement) Act'.<sup>57</sup>

#### 4.1 Women's Rights in Nigeria

The Nigerian society is inherently patriarchal. This is due to the influence of the various religions and customs in many parts of Nigeria. Women are seen as the 'weaker sex' and discriminatory practices by the state and society (especially by men) are condoned. It has been contended that:

the traditions and culture of every society determine the values and behavioural patterns of the people and society...a culture that attributes superiority to one sex over the other exposes the sex that is considered to be inferior to various forms of discrimination.<sup>58</sup>

Discrimination against women was also prevalent in ancient societies such as Rome, Athens and Africa amongst others and remains endemic in certain areas of the world

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<sup>55</sup> Ekhaton (n 13).

<sup>56</sup> *ibid*

<sup>57</sup> Emeka Amechi 'Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation' (2010) 6(3) Law, Environment and Development Journal 320, 329

<sup>58</sup> Joy Ngwankwe 'Realising Women's Economic and Cultural Rights: Challenges and Strategies in Nigeria' (2002) 14 CJWL/RFD 143. Also see Emily Alemika 'Family Practices and Violations of the Rights of Women' (2010) 8 University of Maiduguri Law Journal 25

today.<sup>59</sup> Unfortunately, in some areas of Nigeria (even till this present times), and in some cultures, women and children are regarded and treated as chattel or property.<sup>60</sup> Thus, women are said to be among the vulnerable groups subjected to discrimination in Nigeria.<sup>61</sup> Generally, many laws discriminate against women in Nigeria. Some of these laws include some aspects of customary law practices, Sharia and some constitutional provisions amongst others.<sup>62</sup>

A few specific examples of such laws will suffice at this juncture. By virtue of section 127 of the Police Act, married women are prevented from seeking enlistment in the Nigerian Police Force. Under section 127, when an unmarried police woman is pregnant, she would be discharged from the police force. She can only be re-instated on the approval of the Inspector General of Police. Furthermore, by virtue of Regulation 124 of the Police Act, a woman police officer who is interested in getting married must initially apply in writing to the commissioner of police for approval

Also, by virtue of section 55(1) of the Labour Act, where a woman cannot be employed on night work in a public or any agricultural undertaking (with the exception of women nurses and women in management positions who are not engaged in manual labour) The Nigerian Drug Law Enforcement Agency (NDLEA) Act also accentuates the discrimination of women in some of its regulations. Some examples will suffice. Under article 5 (1) of the NDLEA Order, 2002 - "All female applicants shall be unmarried at the point of entry, and shall upon enlistment remain unmarried for a period not less than two years".

Furthermore Article 5 (2) provides, 'All unmarried female members of staff that wish to marry shall apply in writing to the Chairman/Chief Executive, asking for permission, stating details of the intended husband'.

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<sup>59</sup> Chukwudifu Oputa (1989) A paper presented at the Owerri Seminar on "Women and Children: A Disempowered Group under the Law" cited in Alemika (n 58) 28.

<sup>60</sup> Jadesola Akande 'Women and the Law' in Akintunde Obilade(ed) *Women in Law* (Southern University Law Centre and Faculty of Law University of Lagos 1993).

<sup>61</sup> Joseph Olubor 'The Legal Rights of the Vulnerable Groups vis-a-vis Customary Practices'. A paper delivered by Justice Olubor, President Customary Court of Appeal, Edo State at the Refresher Course for Judges and Kadis from 23-27 March, 2009. Retrieved 4 June 2013 from <http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/THE%20LEGAL%20RIGHTS%20OF%20THE%20VULNERABLE%20GROUPS%20VIS%20-%20A-VIS%20CUSTOMARY%20PRACTICES.pdf>

<sup>62</sup> Eghosa Ekhatior *Sexual Violence Laws and Women in Nigeria*. A paper presented at the Gender and Power: Interdisciplinary Dialogues, WISE Institute University of Hull. Forthcoming in the (2014) 3 Hull Student Law Journal 7-11.

There are plethora of laws and practices that accentuate or entrench discrimination of women in Nigeria. Fortunately, the African Charter has been relied upon to challenge some of the aforementioned discriminatory laws. Article 3 of the African Charter enjoins countries to combat discrimination against women via legislative, institutional and other means. The Protocol on Women's Rights in Africa has also been signed and ratified in Nigeria. However, the Protocol has not been domesticated in Nigeria and this hinders its domestic applicability.

#### 4.2 Impacts of the African Charter on Women's Rights in Nigeria

Due to the advent and deepening of democracy in Nigeria (after many years of military rule), courts are becoming increasingly activist by pronouncing on the legality of some discriminatory laws against women. For example, recently, a Federal High Court in *WELA v Attorney-General of the Federation*<sup>63</sup> held that Regulation 124 of the Police Act to be illegal and unconstitutional. The regulation which states that:

A woman police officer who is desirous of marrying must first apply in writing to the commissioner of police for the state command in which she is serving, requesting permission to marry and giving name, address and occupation of the person she intends to marry. Permission will be granted for the marriage if the intended husband is of good character and the woman police officer has served in the force for a period of not less than three years.

The court relied on the provisions of the African Charter and the Nigerian Constitution to nullify this offending provision. A similar decision was reached in *Priye Iyalla-Amadi v. Nigerian Immigration Service (NIS)*.<sup>64</sup>

In the case of *Mojekwu v Ejikeme*,<sup>65</sup> the Nigerian Court of Appeal relied on the provisions of the African Charter to nullify a customary practice (law) that prevented daughters of a deceased man from inheriting his property. Here, Justice Niki Tobi stated thus:

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<sup>63</sup> Unreported Suit No: FHC/IKJ/CS/M128/2010 cited in Funke Falana 'Women's Day and the Gender Agenda' Thisday Newspaper (Nigeria) Online Edition 11 March 2013. <http://www.thisdaylive.com/articles/women-s-day-and-the-gender-agenda/141787/> .Accessed 21 April 2014

<sup>64</sup> Uju Okeke 'A Case for the Enforcement of Women's Rights as Human Rights in Nigeria'. (2010). Available online at [http://www.wunrn.com/news/2010/04\\_10/04\\_05\\_10/040510\\_nigeria.htm](http://www.wunrn.com/news/2010/04_10/04_05_10/040510_nigeria.htm)

<sup>65</sup> (2000) 5NWLR 402, 409. This judgement was affirmed when it got to the Supreme Court on appeal. See *Muojekwu v. Iwuchukwu* (2004) 11 NWLR (Pt. 883) 196.

Nigeria is an egalitarian society where the civilised society does not discriminate against women. However, there are customs, all over which discriminate against the womenfolk, which regard them as inferior to the men folk. That should not be so as all human beings, male and female are born into a free world and are expected to participate freely without any inhibition on grounds of sex. Thus, any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy. The Oli-ekpe custom, which permits the son of the brother of a deceased person to inherit his property to the exclusion of his female child, is discriminatory and therefore inconsistent with the doctrine of equity.... Article 18 of the African Charter on Human and Peoples' Rights specifically provides for the elimination of discrimination against women.<sup>66</sup>

Furthermore, there has been an upsurge in cases on discrimination of women in Nigeria. Nigerian courts have been creative in their reliance on international conventions and the African Charter (in addition to Section 42 of the Nigerian Constitution) in abrogating some of these discriminatory practices.

Section 42 of the Nigerian Constitution states:

(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege

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<sup>66</sup> Ibid. Also see Christopher Ukhun & Nathaniel Inegbedion 'Cultural Authoritarianism, Women and Human Rights Issues among Esan people of Nigeria (2005) 5 African Human Rights Law Journal 129 for an extensive analysis of the case. Recently in April 2014, the Nigerian Supreme Court upheld the right of female children to inherit properties in the Igbo-speaking (South Eastern) parts of Nigeria. Here, the court voided that the Igbo custom which forbade a female child from inheriting her late father's estate on the grounds that such custom was discriminatory and contravenes Section 41(1) (2) of the Nigerian Constitution. For details of the case see Tobi Soniyi 'Nigeria: Supreme Court Upholds Right of Female Child to Inherit Properties in Igboland' Thisday Newspaper (Nigeria) Online 15 April, 2014. <http://allafrica.com/stories/201404150610.html> Accessed 21 April 2014.

or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria.

It can be contended that Section 42(3) of the Nigerian Constitution indirectly promotes the discrimination of women under the Constitution.<sup>67</sup> This sub-section of the Constitution is said to 'preclude one from challenging laws which are discriminatory with respect to any office under the State, in the armed forces, the Nigerian Force or a body corporate established directly by any law in force in Nigeria'.<sup>68</sup> With due respect, the above view that the Nigerian Constitution promotes discrimination of women is erroneous and represents the traditional and outdated view held by academics and lawyers in Nigeria. The African Charter, other sections of the Constitution such as section 17(1) (2), section 42 (1)(2) and other international treaties or conventions which Nigeria have signed and ratified can serve as bastions in invalidating some of these state sanctioned discriminatory practices in Nigeria. For example 17 (1) of the Nigerian Constitution states that 'the State social order is founded on the ideals of Freedom, Equality and Justice'. Section 17(2) (a) provides that 'every citizen shall have equality of rights, obligations and opportunities before the law'. Furthermore, section 15(2) of the Nigerian Constitution prohibits 'discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties'. Thus, the Nigerian Constitution can be said to be contradictory and insensitive especially section 42(3).<sup>69</sup> However, the view of this paper is that section 42(3) of the Constitution (which promotes indirect discrimination of women) should not serve as a plank for condoning the discrimination of women in Nigeria because other sections of the constitution

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<sup>67</sup> M.O.A Ashiru 'A Consideration of Nigeria Laws which are Gender Insensitive: The Female Gender in Focus' (2010) 1 (1) University of Benin Journal of Private and Property Law. 90-110

<sup>68</sup> Ashiru *ibid* 94

<sup>69</sup> *ibid*

promote women's rights explicitly. Section 42(3) of the Constitution should be repealed or amended.

Furthermore, Nigeria has signed and ratified a plethora of treaties promoting women's rights and prohibiting the discrimination of women in Nigeria. For example, Nigeria has ratified the Convention for the Elimination of all forms of Discrimination against women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR) and the Protocol to the African Charter on the Rights of Women (African Women's Protocol) amongst others. Notwithstanding that the Constitution of Nigeria is the supreme law of the land, it has been contended that Nigeria is expected to respect its international obligations under the aforementioned treaties or conventions.<sup>70</sup> By virtue of section 19(d) of the Constitution, Nigeria's foreign policy entails 'respect for international law and treaty obligations'. Nigeria signed and ratified the CEDAW in 1985. The optional protocol to the CEDAW was ratified by Nigeria in 2004. The CEDAW urges countries to denounce discrimination against women in totality and set in motion (without delay) policy of eliminating discrimination against women by localising the equality of sexes in their various constitutions.<sup>71</sup>

To redress the gender inequality and discrimination in Nigeria, the Nigerian government has espoused a number of measures.<sup>72</sup> For example, in 2007, the Nigerian government adopted the National Gender Policy and this measure aims at

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<sup>70</sup> Wachira Maina 'Using International Human Rights to Confront Discrimination: The Case of Nigeria, Tanzania, Kenya and South Africa' Human Rights and Litigation and The Domestication of Human Rights Standards in Sub Saharan Africa (2007) (AHRAJ Casebook Series 1) International Commission of Jurists- ICJ Kenyan Section 26 'There is a presumption that a state will "not legislate contrary" to its international obligations. And the proper principle of interpretation is that where an act and a treaty deal with the same subject, the court will seek to construe them so as to give effect to both without acting contrary to the wording of either'. Also see Kenneth Ajibo 'Facing the truth: Appraising the Potential Contributions, Paradoxes and Challenges of implementing the United Nations Conventions on Contracts for the International Sale of Goods (CISG) in Nigeria' (2013) 2(1) Journal of Sustainable Development Law and Policy (Afe Babalola University, Nigeria) 175, 186. For an overview of the impact of international human rights law on domestic law in Africa, see Magnus Killander 'How International Human Rights Law Influences Domestic Law in Africa' (2013) 17 Law, Democracy & Development (Special Issue) 378, 387.

<sup>71</sup> Itoro Eze-Anaba' Domestic Violence and Legal Reforms in Nigeria: Prospects and Challenges' (2007) 12 Cardozo Journal of Law and Gender 21

<sup>72</sup> Ebenezer Durojaye & Bridget Okeke 'How Effective is Gender Mainstreaming at the National Level? A Comparative Study of Nigeria and South Africa' (2012) 13 (1) Economic and Social Rights Review 3, Ayeni (n 19) 126-127

supplementing section 42 of the Constitution which prohibits the discrimination of women in Nigeria.<sup>73</sup> One major objective of the policy is to:

build a just society devoid of discrimination, harness the full potentials of all social groups regardless of sex or circumstance, promote the enjoyment of fundamental rights and protect the health, social, economic and political wellbeing of all citizens in order to achieve equitable rapid economic growth.<sup>74</sup>

In the case of *Timothy v Oforka*,<sup>75</sup> the Nigerian Court of Appeal held that that no law or custom that stands in the way of the constitution should be allowed to stand tall no matter the circumstances. In *Yetunde Tolani v Kwara State Judicial Service Commission & Or*<sup>76</sup>, the Court of Appeal held that the appointment of a female magistrate that was terminated on the basis of her 'single' status was illegal and void and ordered her immediate re-instatement.

## 5 Impact of the African Charter on Civil and Political Rights in Nigeria

The Nigerian Constitution promotes civil and political rights which are justiciable in Nigerian courts. Civil and political rights are found in Chapter IV of the Nigerian Constitution and are termed 'fundamental rights'. The civil and political rights in Nigeria as exemplified in the Constitution include the right to life (section 33), the right to dignity of human persons (section 34), the right to personal liberty (section 35), the right to fair hearing (section 36), the right to private and family life (section 37), the right to freedom of thought, conscience and religion (section 38), the right to freedom of expression and the press (section 39), the right to peaceful assembly and association (section 40) and the right to freedom from discrimination (section 42) amongst others. The African Charter also promotes civil and political rights. However, during the era of military regimes in Nigeria, some of these constitutional rights and other statutes were suspended by the different military junta by way of clauses ousting the jurisdiction of

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<sup>73</sup> Durojaye & Okeke *ibid*

<sup>74</sup> *ibid* 3

<sup>75</sup> (2008)9 NWLR (pt. 1091) CA

<sup>76</sup> (2009) LPELR- CA/IL/2/2008

courts (ouster clauses).<sup>77</sup> However, the provisions of the African Charter were never suspended in Nigeria by the military regimes.<sup>78</sup>

The African Charter was a valued strategy utilised by litigants in Nigeria to get access to justice in the military era. Here, courts relied on the African Charter as an alternative to the human rights provisions that were suspended by the various military juntas.<sup>79</sup>

The fact that the application or operation of the African Charter was never suspended by the various military governments enhanced its judicial application in Nigeria.<sup>80</sup> This is obvious from decisions of Nigerian courts as it is acknowledged in scholarly works. As indeed posited by Viljoen, the clearest illumination of impact of the African Charter on domestic law is found in Nigeria during the oppressive era of the military regimes. There are other examples to be relied upon below in support of this assertion.

It is not in doubt that some Nigerian judges were very creative in using the provisions of the African Charter to promote civil and political rights and to invalidate some obnoxious laws and policies in the military era in Nigeria. Hence, the courts consistently held that, with the exception of the unsuspended sections of the Constitution, the African Charter was superior to all other domestic laws including military decrees during the military era in Nigeria.<sup>81</sup>

In the case of *Garuba and Nine Others v Lagos State Attorney General*<sup>82</sup>, the applicants who were sentenced to death by an armed robbery tribunal filed a suit at Lagos High Court to enforce their fundamental human rights. Whilst the jurisdiction of the high court was expressly ousted by section 10(3) of the Robbery and Firearms (Special Provisions) Decree 5 of 1984, the court relying in the provisions of the African Charter held that the provisions of the African Charter cannot be unilaterally

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<sup>77</sup> For an extensive analysis of ouster clauses in Nigeria see Abdulmumini Oba 'The African Charter on Human and Peoples' Rights and the Ouster Clauses under the Military Regimes in Nigeria: Before and after September 11' (2004) 2 African Human Rights Law Journal 275. During the military era in Nigeria, "[T]he use of ouster clauses prevented persons aggrieved by the actions of a military government from seeking redress in courts. By barring access to courts, the military became a totalitarian government" Oba, 278-279

<sup>78</sup> Viljoen (n 6)

<sup>79</sup> Amos Enabule & Anthony Ewere 'Can the Economic Community of West African States Community Court of Justice Enforce the African Charter Replicas of the Non-Justiciable Chapter II Human Rights Provisions of the Nigerian Constitution against Nigeria?' (2012) 1 International Human Rights Law Review 312.

<sup>80</sup> Chima Nweze 'Human Rights and Sustainable Development in the African Charter: A Judicial Prolegomenon to an Integrative Approach to Charter Rights' (1997) 1 Abia State ULJ 1, 11-12 cited in Viljoen (n 6) 534.

<sup>81</sup> Ayeni (n 16), Ekhaton (n 13).

<sup>82</sup> *Garba v Lagos State Attorney General*, Suit ID/599M/91 (31 October 1991). Cited in Viljoen (n 6) 534

suspended by the military government.<sup>83</sup>The court also reached a similar decision in *Akinnola v Babangida*.<sup>84</sup>

However, not all judges in Nigeria were advocates of the supremacy of African Charter over all other domestic laws in Nigeria in the military era. For example, in the case of *Wahab Akanmu v Attorney General of Lagos State*<sup>85</sup>, the court held that the African Charter cannot over ride domestic laws in Nigeria. It is however essential to mention that the judges who hold this view are at the high courts and thus have no precedential value in comparison with the prevailing view at the Court of Appeal and the Supreme Court, that the Act implementing the Charter is superior to Nigerian Legislature.

## 6 Future of African Charter in Nigeria

In the area of regulating multinational corporations, the African Charter will be very relevant in the future especially in litigation. For example, two NGOs (SERAC and the Centre for Economic and Social Rights (CESR) /Nigeria) petitioned the African Commission on Human and People's Rights in the case of the Ogoni people of the Niger-delta who were alleged to be victimised by the Nigerian government and oil multinational companies operating in the Niger-delta.<sup>86</sup> The African Commission held that the Nigeria Government (and its agencies) and not the multinational corporations were in violation of the African Charter on Human and Peoples' Rights. However, recommendations by the African commission are non-binding on States.

Another area will be the impacts of the African Charter on sub-regional economic groupings or judiciaries in Africa.<sup>87</sup> The ECOWAS (Economic Communities of West African States) Court of Justice (ECCJ) is an example of a sub-regional grouping that relies on African Charter for the illumination of its human rights mandate. Here, Article 56(2) of the Revised ECOWAS Treaty of 1993 enjoins Member States to cooperate for the realization of the mandates or aims of the African Charter.<sup>88</sup>

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<sup>83</sup> Viljoen (n 6), Okafor (n 5), Ayeni (n 16).

<sup>84</sup> *Akinnola v General Babangida* judgment reprinted in (1994) 4 J of Human Rights L and Practice 250. Cited in Viljoen (n 6).

<sup>85</sup> *Wahab Akanmu v A-G of Lagos State* Suit M/568/91 cited in Viljoen (n 6).

<sup>86</sup> See Ekhaton (n 13) for an analysis of the case.

<sup>87</sup> Solomon Ebobrah 'Application of the African Charter by African Sub-regional organisations: Gains, Pains and the Future'. (2012) 16 Law, Democracy and Development 49.

<sup>88</sup> Ekhaton (n 13), Ebobrah *ibid*.

For example, in *SERAP v Federal Republic of Nigeria and Universal Basic Education Commission*<sup>89</sup>, the ECCJ relying on the African Charter held that the right to education is justiciable and enforceable in Nigeria. This decision was reached notwithstanding the fact that the right to education is non-justiciable under the Nigerian Constitution.<sup>90</sup> In the future, the African Charter will be a bastion for the promotion of gay rights especially in countries with anti-gay laws. For example, Nigeria recently enacted a law proscribing same sex marriages. My contention is that in the future, litigants might use the provisions of African Charter to attempt to invalidate this law.

For example, it can be argued (to some extent) that article 2 of the African Charter grants equal protection to everyone. The article states - 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'. However, 'that these rights [in Article 2] may be 'limited' by other provisions in the charter or by factors listed in article 27(2), which requires 'due regard to the rights of others, collective security, morality and common interest'.<sup>91</sup>

Furthermore, article 29 (7) of the African Charter requires individuals 'to preserve and strengthen positive African values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and in general, to contribute to the promotion of the moral wellbeing of society' can be used to curtail gay rights in Africa.<sup>92</sup> Also, there is widespread cultural belief that homosexuality is alien to Africa.<sup>93</sup>

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<sup>89</sup> Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission, No. ECW/CCJ/APP/0808. Available online at <http://www.escri-net.org/docs/i/1143047>

<sup>90</sup> Ekhaton (n 13).

<sup>91</sup> Pambazuka News Editorial 'Sexual orientation under the African Charter on Human and Peoples Rights' (2010) Available online at <http://pambazuka.org/en/category/features/68953> . Viljoen (n 6) 256. Similar arguments were adduced in Europe for the initial restriction or rejection of gay rights under the European Convention on Human Rights (ECHR) see Paul Johnson 'Homosexuality and the African Charter on Human and Peoples' Rights: What Can Be Learned from the History of the European Convention on Human Rights?' (2013) 40 (2) Journal of Law and Society 249.

<sup>92</sup> Johnson (n 92) 262. Also claw back clauses can be used to curtail the rights of sexual minorities in Africa.

<sup>93</sup> Johnson *ibid*. Solomon Ebobrah 'Africanising Human Rights in the 21st Century: Gay Rights, African Values and the Dilemma of the African legislator' (2012) 1 International Human Rights Law Review 110. Also to further accentuate the fact that African cultural belief was the cornerstone of the law prohibiting same sex marriages in Nigeria, Senator Obende the sponsor of the bill posits: 'What I do is that first and foremost, I see myself as an African that has a culture. Secondly, I try to uphold the value that is attached to that culture. Now the anti-gay bill is to protect the menace of importation of morals into Africa' Vanguard (Nigeria) Newspaper online at <http://www.vanguardngr.com/2014/03/sponsored-sex-prohibition-bill-senator-obende/>

Notwithstanding the above assertion that suppression of gay rights in Africa can be justified on certain grounds such as public policy or morality, the African Union (AU) has posited that the various anti-gay laws enacted in different countries in Africa go against the tenor of the African Charter. For example, in respect of the Same Sex Marriage [Prohibition] Act 2013 in Nigeria, the Special Rapporteur on Human Rights in Africa, has stated that some provisions of the law undermine the activities of human rights advocates in Nigeria.<sup>94</sup> Furthermore, the Special Rapporteur counselled the Nigerian government to be mindful of its obligations under the African Charter and the UN Declaration on Human Rights Defenders.<sup>95</sup> Also, the Special Rapporteur has posited that some provisions of the recently enacted Anti-Homosexuality Act 2014 in Uganda violates the African Charter and such provisions in the law should be abrogated.<sup>96</sup>

Equally important is the promotion of indigenous peoples right to “...freely dispose of their wealth and natural resources” by virtue of Article 21(1) of the African Charter. This is very relevant in the Nigerian oil and gas industry especially with the myriad of laws appropriating ownership and control of oil and mineral resources to the central government. In the Social and Economic Rights case, wherein Nigerian government was held liable for the environmental degradation of Ogoni land in the Niger Delta. The Nigerian government admitted its failings and averred that it had put in place remedial actions to remedy the situation.<sup>97</sup>

## 7 Conclusion

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<sup>94</sup> African Commission on Human and Peoples' Rights: Press Release on the Implication of the Same Sex Marriage [Prohibition] Act 2012 on Human Rights Defenders in Nigeria, 05 February 2014. Available online at the African Commission website at <http://www.achpr.org/press/2014/02/d190/> However for rulings by the African Commission on Human and Peoples' Rights on sexual minorities rights see Rachel Murray & Frans Viljoen 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 (1) Human Rights Quarterly 86. Frans Viljoen 'From a Cat into a Lion? An overview of the Progress and Challenges of the African human Rights system at the African Commission's 25 year mark' (2013) Law, Democracy & Development: Special Issue 1 (17) 298, 309-310

<sup>95</sup> African Commission Press Release *ibid*

<sup>96</sup> African Commission on Human and Peoples' Rights: Press Release on the implications of the Anti-Homosexuality Act on the Work of Human Rights Defenders in the Republic of Uganda' 11 March 2014. Available at the African Commission website at <http://www.achpr.org/press/2014/03/d196/>

<sup>97</sup> Nlerum Okogbule *An Appraisal of the mutual impact between globalization and human rights in Africa*. (2012) A PhD Thesis submitted to the University of Glasgow.

The African Charter has had some distinctly positive impacts on Nigerian law. NGOs should use the machinery of justice in the African Charter to improve the plight of women in Nigeria. Here women activists should take a cue from NGOs in the oil and gas industry in Nigeria that have improved access to environmental justice to victims of the activities inherent in the oil and gas industry in Nigeria.<sup>98</sup> For example, by filing suits at the ECOWAS court of justice. Recently, some women's groups and litigants have utilised the machinery of the ECOWAS Court of Justice in instances of discrimination against women under domestic law in Nigeria. For example, in 2012 in case between *Legal Defence and Assistance Project Ltd v the Federal Government of Nigeria*, the applicants filed a suit at the ECOWAS court of Justice seeking redress on alleged human violations including the right to freedom from discrimination.<sup>99</sup> Presently, the suit has been adjourned to a subsequent date for further hearing. Notwithstanding, the non-domestication of the Protocol to Women Rights and the CEDAW in Nigeria, it can be argued that the Protocol and CEDAW are applicable in Nigeria.<sup>100</sup> The reason is that the African Charter is domesticated and *ipso facto* part of the laws of the land. Article 18(3) of the African Charter states that the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'. Thus, Nigerian courts in construing the applicability of the CEDAW and the Protocol on women rights can make allusions to the provisions of African Charter by holding that there are applicable by virtue of article 18. Finally, the Nigerian citizenry should be educated on the merits of the African Charter. There should be massive enlightenment by the various NGOs and groups on the relevance and merits of the African Charter to the Nigerian citizenry.

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<sup>98</sup> For an extensive analysis of the roles of NGOs in the environmental justice paradigm in Nigeria see Ekhaton (n 13).

<sup>99</sup> ECOWAS Court of Justice Website (2013) 'Alleged Human Right Violations Against the Republic of Nigeria Adjourned' Available online at [http://www.courtecowas.org/site2012/index.php?option=com\\_content&view=article&id=209:allegedhumanrightviolationssuitsfiledagainstthefederalrepublicofnigeriaadjourned&catid=14:pressrelease&Itemid=36](http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=209:allegedhumanrightviolationssuitsfiledagainstthefederalrepublicofnigeriaadjourned&catid=14:pressrelease&Itemid=36)

<sup>100</sup> Ekhaton (n 62), Viljoen (6), Ayeni (n 16).