

Negating the Promotion of Human Rights Through “Claw-Back” Clauses in the African Charter on Human and People’s Rights

Loveness Mapuva¹

Faculty of Law, Midlands State University, Department of Procedural Law, Gweru, Zimbabwe

Abstract

The phrase ‘claw-back’ clause has often been used to refer to those provisions of the African Charter that seek to minimize or limit some of the rights guaranteed under the Charter. Consequently, the African Charter on Human and Peoples’ Rights has often been criticized for having an abundance of “claw-back” clauses, thereby compromising the realization of some human rights. A critical analysis of the criticism leveled against the claw-back facility in the African Charter is warranted and is evidently clear that the implications of these claw-back clauses has a debilitating impact on the protection and promotion of human rights on the African continent. There has been the utilization of the work and efforts of the African Commission on Human and Peoples’ Rights to minimize the impact of the claw-back clause on the realization of human rights.

Introduction

The African Charter on Human and Peoples’ Rights (ACHPR)² is also known as the Banjul Charter and was adopted under the auspices of the Organisation for African Unity (OAU) now the African Union (AU), specifically to deal with human rights.³ The African Charter is intended to promote and protect human rights and basic freedoms within the African continent.⁴ Since 1986, the African Charter has been pivotal in influencing the development of regional standards on human rights on the continent.⁵ However, it has been noted that most human rights standards in the African Charter are couched in the form of “claw-back” clauses.⁶ The main objective of this essay is to critically analyse if criticism of the “claw-back” clauses is fair and whether or not the implications of these “claw-back” clauses has been negative on the protection of human rights on the African Continent. To achieve this objective this paper will therefore be divided into 4 sections. The first section will pinpoint the “claw-back” clauses in the African Charter. The second section will consider the criticisms of the “claw-back” clauses in the African Charter. The third section will look at the implications of the “claw-back” clauses. The last section will conclude the discussion.

The Claw-back regime

In its conventional sense, the claw-back concept relates to abandonment or a deliberate breach of an obligation for given reasons.

The claw-back discourse has been inundated with discussions on what it entails. What has been observed is that the ‘claw-back’ clause, is a distinctive feature of the African Charter, and permits, under normal circumstances, for a breach of an obligation for a specified number of reasons.⁷ The legal fraternity has concurred that the realization and exercise of most of rights in the ACHPR are limited *ab initio* by clause of type: ‘within the law’, ‘provided that individual abides by the law.’⁸ However, with regards to other systems, universal as well as regional,⁹ the concept of claw back include the derogation clauses. Derogation clauses are different from claw-back clauses in that they explicitly provide circumstances in which rights may be limited and define rights that are non-derogable and must be respected, even when derogation is permitted.¹⁰

“Claw-back” clauses under the Charter

The African Charter contains in its provisions many “claw-back” clauses.¹¹ The “claw-back” clauses in question run thus “except for reasons and conditions previously laid down by law”,¹² “subject to law and order”,¹³

¹ Loveness Mapuva is a Lecturer of Law at Midlands State and can be contacted at lmuyengwa@gmail.com

² African Charter on Human and Peoples’ Rights (Banjul Charter) adopted June 27, 1981 entered into force Oct. 21, 1986

³ Ewunetie N & Alemayehu A (2009:11)

⁴ African Charter on Human and Peoples’ Rights <http://www.achpr.org/instruments/achpr/>

⁵ Hansungule M (2004:1)

⁶ Thompson SS (2008)

⁷ Higgins R “Derogation under Human Rights Treaties” in 48 *British Yearbook of International Law* 281 (1978) p 281.

⁸ Ouguerzougout F (n 23 above) p 61. See for instance, articles 9, 10, 12, 13 (1) in the ACHPR.

⁹ Article 29 (2) of the UNDR, 4 of the ICC, Article 15 of the ECHR, Article 29 and 30 of the AmCHR.

¹⁰ Gittelman R (19820. *Virginia Journal of International Law* p 667.

¹¹ Dinjens E & Fleurke F (2002:6)

¹² Article 6 (liberty and security of the person and freedom from arbitrary arrest)

¹³ Article 8 (freedom of conscience and religion)

“within the law”,¹ “provided that he abides by the law”,² “subject only to necessary restrictions provided for by law in particular those enacted in the interests of national security, the safety, health, ethnics and rights and freedoms of others”,³ “provided that he abides by the law”,⁴ “provided that he abides by the law”,⁵ “in accordance with the provisions of the law”,⁶ and “in accordance with the provisions of appropriate laws”⁷

Criticisms of the “claw-back” clauses in the Charter

A critical analysis of The African Charter on Human and Peoples' Rights has been roundly blamed for its content that is fraught with claw-backs. The Charter has been criticised for its extensive deployment of claw back clauses - phrases which could effectively remove (or at a minimum severely curtail) the rights ostensibly guaranteed.⁸ Phrases such as: “... except for reasons and conditions previously laid down by law...” (Article 6), “...subject to law and order...” (Article 8) and “... provided he abides by the law...” (Article 10) abound.⁹

Human rights groups argue this is a particular problem in Africa as many states still have laws and regulations that directly violate human rights. For example, some states prohibit the formation of certain types of associations merely at the whim of the registering officer. The clauses seriously weaken the effectiveness of the Charter affecting its uniform application by Member States because instead of the Charter having primacy, the various national laws of Member States actually assume the primary place.¹⁰ Previously granted rights in the African Charter are rendered meaningless as states the clauses “to justify limitations on individual rights and freedoms by reference to domestic laws, which may be restrictive”.¹¹

The claw-back clauses in the Charter go further than derogation clauses in that they permit a state, unilateral discretion, to restrict treaty obligation or the rights guaranteed by the Charter thereby manipulating the law.¹² Thus States are permitted greater latitude and extraordinary flexibility to identify the extent of their obligations as Member States. Unlike derogation clauses which permit suspension of treaty obligations on a temporal basis, “claw-back” clauses’ suspension may be permanent.¹³ Such domestic laws could be laws that are made to validate acts of violation deliberately embarked upon by Member States. Various African governments are known for the use of retroactive legislation to achieve their dictatorial tendencies, and will thus find the claw-back clauses a veritable source of inspiration.

I think the criticisms are fair because the effect of the “claw-back invalidated the rights granted by the Charter thereby nullifying them because the rights are given by one hand and taken by the other hand. Looking at the African continent one may notice that the continent is full of dictatorship hence human rights are being violated every day. For example, in Zimbabwe during the land reform programme, the Constitution and the legislation providing for land where amended to legitimize illegal land grabs. The “claw-back” clauses give African leaders’ power to create and change laws by inserting clauses that permit rights to be limited by the law.

The African Commission on Human and People’s rights

The African Commission on Human and Peoples' Rights (ACHPR) considers individual complaints of violations of the Charter.¹⁴ For instance, the Commission has clarified that states that refer to domestic law to justify invoking the internal limits of the African Charter’s “claw-back” clauses must act in accordance with international human rights law.¹⁵ This has prevented states from using “claw-back” provisions to stop the Commission from accepting petitions from wronged parties, allowing both NGOs and individuals to participate more fully in the Commission’s activities than they otherwise might.

In *Media right agenda, Constitutional Rights Project, Media Rights Agenda, Constitutional Rights Project v Nigeria* the Commission found that as a rule “claw-back” clauses render local remedies non-existent, ineffective or illusory creating a legal situation in which the judiciary cannot provide checks on the executive

¹ Article 9.2 (freedom of expression and the right to disseminate one’s opinion)

² Article 10.1 (freedom of association)

³ Article 11(freedom of assembly)

⁴ Article 12.1(freedom of movement and residence within one’s state)

⁵ Article 12.2 (the right to leave any country and to return to one’s own country),

⁶ Article 13 (freedom to participate in the government of one’s own country)

⁷ Article 14 (The right to property).

⁸BBC-World Service (2008). Human Rights Agreements in Africa, Europe and the Americas, and Regional Courts. Available at http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/treaties_regional.shtml

⁹BBC-World Service (2008).

¹⁰Nmehielle VOO (2001:165)

¹¹Nmehielle VOO (2004)

¹²Ewunetie N & Alemayehu A (2009:91)

¹³Ewunetie N & Alemayehu A (2009:93)

¹⁴Nmehielle VOO (2001:165)

¹⁵ Thompson SS (2008)

branch of the government.¹ Claw-back clauses purport to subject human right provisions to the laws enacted by parliament.² The African Commission has, in fact, variously rejected that interpretation, and reinforced the overarching reach of international human rights law, which does not succumb to flimsy domestic laws or regulations that tend to limit the enjoyment of human rights protection without cause, or in a very irregular situation.³

Implications of the “claw-back” clauses on the African continent

They "permit the routine breach of the Charter obligations for reasons of public utility or national security and confine many of the Charter's protections to rights as they are defined and limited by domestic legislation."⁴ The proliferation of claw-back clauses allow a state to restrict or infringe the rights granted to the extent permitted by domestic law.⁵ Moreover, the protection afforded to right to life under the African Charter has been watered down by the so-called “claw-back” clauses.⁶ Owing to claw back

Some commentators have dismissed the entire Charter as irrelevant to Africa’s political life, while others have looked to Article 60 which implies that the Banjul Charter cannot be invoked to avoid state obligations that are enumerated in other international covenants.⁷ In *Legal Resources Foundation v. Zambia*, the Commission emphasized that no state party to the Charter should avoid its responsibilities by recourse to the limitations and ‘claw back’ clauses in the Charter,” and added that the Charter cannot be used to justify violations of sections of it.⁸ The "claw-back" clauses are quite visible in the charter, to the effect that they subject provisions of the African Charter to domestic law, thereby limiting the potency of such provisions.⁹

Since African states are traditionally the most frequent violators of human rights. This negatively impacts on the Charter by making human rights vulnerable to the very institutions which attack them most often.¹⁰ The “claw-back’ clauses in the Charter aggravate the enjoyment of some of the rights guaranteed in the Charter thereby undermining the whole idea of international supervision of domestic law and practices rendering the African Charter meaningless in respect of protecting human rights.¹¹ The Charter itself permits the perpetration of violations of rights enshrined in it leading to human rights abuses.¹²

In other words, the Charter gives rights, but permits them to be taken away, thus not protecting the individuals it is meant to protect.¹³ Claw-back clauses constitute a form of a permit for the already unwilling State to engage in wanton and routine breach of the Charter obligations using the reasons of public utility or national security.¹⁴ There is little or no room for arbitrariness under such well-defined standards, whereas opportunities for discretionary abuse under the Charter’s ‘claw-back clauses’ are broad and well-used. This effectively allows governments to determine the scope of human rights protections themselves.¹⁵ Therefore the implications of the “claw-backs have been negative on the African continent.

ATTEMPTS AT REFORMING THE AFRICAN CHARTER

(see The African regional human rights system: In need of reform?-Christ of Heyns [<http://www.ahrlj.up.ac.za/heyns-c>]

Conclusion

From the discussions it can be argued that the “claw-back” clauses in the Charter have had an enduring effect on

¹Ouguergouz O (2003:606)

²Chirwa DM (2011: 46)

³Nmeielle VO (2004)

⁴ Keetharuth SB Major African legal instruments, available at <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/7_Keetharuth.pdf>[accessed 26 May 2012]

⁵Kabange N C (2008) Protection of Human Rights in Africa: African Human Rights in a Comparative Perspective, available at <<http://www.leganet.cd/Doctrine.textes/DroitPublic/DH/ProtectionofHR.Kabange.htm>> [accessed 27May 2012]

⁶Tlakula FP (2007) Activities as Special Rapporteur on Freedom of Expression and Access to Information Activity Report of the Special Rapporteur on Freedom of Expression in Africa 41st Ordinary Session, Accra - Ghana 16 – 30 June, 2007.

⁷Ndagire J (2011:59) The Ghost Of The Organization For African Unity (OAU) Haunts Africa

⁸Communication No. 211/98 (2001), para. 70.

⁹Udombana NJ (2000:62)

¹⁰Nmeielle VOO (2001:165)

¹¹HeynsC (2004:688) African Regional Human Rights System: The African Charter 18(3) *Penn State Law Review* 679.

¹²Welch CE (1992: 46) The African Commission on Human and Peoples' Rights: A Five-Year Report and AssessmentVol. 14(1) Human Rights Quarterly 43.

¹³Udombana NJ (2000:63)

¹⁴Hansungule M (2004:3)

¹⁵Udombana NJ (2000:62)

the [disbursement and-] realisation of human rights. As such, it is recommended that most of these must be removed, especially given that their existence in the Charter is being manipulated by despotic African leaders to trample on human rights with a measure of immunity. Most human rights violations by African leaders have gone unpunished due to the existence of claw-back clauses in the Charter. Additionally, domestication of laws deriving from the Charter has seen some African leaders drawing from such flawed sections of the Charter to enact an equally flawed regime of laws for their countries. Therefore, drawing from international and regional legislative instruments has not always yielded laws that promote and protect human rights.

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- Article 11 (freedom of assembly)
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- Article 12.2 (the right to leave any country and to return to one's own country),
- Article 13 (freedom to participate in the government of one's own country)
- Article 14 (The right to property).