

CSVN SEMINAR

ON

ENGAGING WITH THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS FROM AN SA PERSPECTIVE

TUESDAY, MARCH 30, 2004

An examination of the freedom of expression provisions in the ACHPR

Part 1. Introduction

- Article 9 of the African Charter on Human and People's Rights is the provision that deals with the right to freedom of expression.

It states:

1. Every individual shall have the right to receive information.
 2. Every individual shall have the right to express and disseminate his/her opinions within the law.
- As its guiding principles (Article 60 and 61) the Charter states that the African Commission on Human and People's Rights established under Article 30 shall be guided by;
 - International law on human and people's rights, particularly the provisions of various African instruments on human and people's rights,
 - The UN Charter,
 - The Charter of the OAU,
 - The Universal Declaration of Human Rights
 - Other instruments adopted by the UN and by African countries in the field of human and people's rights.

Part 2. Implementation

- The ACHPR (Article 30) is the primary structure created in the Charter to oversee the implementation of the "Charter Rights" including the right to freedom of expression by Member States. Its central mandate is;

"To promote human and peoples' rights and to ensure their protection in Africa."

- Article 45 of the Charter "Mandate of the Commission" describes a number of activities that the commission can undertake to promote human rights in Africa which include:
 - Undertaking studies and research,

- Organising seminars and conferences,
- Formulating principles for solving legal problems relating to human and peoples' rights and,
- Cooperating with other African and international institutions concerned with the promotion and protection of human and people's rights.

Part 3. Protecting the right to freedom of expression in Africa

One can identify three main types of mechanisms through which the commission can take up and adjudicate violations to the right of freedom of expression:

1. Under Article 46- The commission can initiate investigations into matters of freedom of expression by use of any appropriate method (e.g. special rapporteurs and expert missions).
2. Under Articles 47 -49-inter-state complaints (the diplomatic language used is 'communications'),
 - Art 47.-one State can send a written communication to another (All 53 Members of the OAU have ratified the Charter) highlighting its concerns around the violation of the right to freedom of expression (easier said than done) and notify the GS of the OAU (AU) and chairperson of the Commission as well;
 - Art 49.- A state can send a communication (complaint) directly to the Commission, the AU and the State concerned
3. Finally under Articles 55 & 56 - The so called "Other communications" where entities other than States e.g. individuals, NGOs and other civil society structures can send complaints to the commission about the violation of the right to freedom of expression.

Part 4. Putting the Charter and commission to the test

There are two major weaknesses that one can identify in the Charter which make it very ineffective for protecting the right to freedom of expression. These are:

1. The wording of the freedom of expression clause, and
2. The charter's enforcement mechanism or lack thereof.

Article 9

- During the recent conference hosted by jointly Article 19 and the Commission on freedom of expression in Pretoria last month, Commissioner Andrew Chigovera lamented that the right to freedom of expression on the African continent is:

"Severely hampered as many governments continue to negate this right either through legislation [or by] other means¹"

What he forgot to mention is that this problem can in many ways be traced to the construction of Article 9 particularly clause 2.

A restatement of the clause is in order: -

2. Every individual shall have the right to express and disseminate his/her opinions within the law (emphasis supplied).
 - This overly broad, decidedly vague, and as it has now proven to be, dangerous phraseology, has succeeded in arming many States on the continent with the excuse to severely curtail the right to freedom of expression. In so doing they use a wide range of excuses all which they try to justify as being sanctioned by the clause, i.e. that these are "based within the law".
 - Under its protective shield, States have been able to use excuses such as national security, protection of national values, morals, good governance and the like to restrict the ability of individuals to express themselves.
 - Many governments on the continent still rely on old colonial laws- which were passed to frustrate the activities of 'natives' fighting for their liberation- to stop legitimate criticism of their mal-administration and violation of basic human rights. For instance sedition and insult laws are a major weapon of silencing dissent in countries such as Zimbabwe, Swaziland, Uganda, Zambia and many others.

Compared with other major international human rights instruments, this clause has obvious glaring shortcomings. All substantive human rights conventions and protocols make provision for limitation of the right to freedom of expression but do so in a manner which ensures that the state does not get carte blanche on unduly undermine this right.

Some of these instruments are: -

The Universal Declaration of Human Rights (1948)

Article 19 of the Declaration states that:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

[No limitation is placed under this article]

¹ Andrew Chigovera, Paper presented to the African Conference on Freedom of Expression, Pretoria 19-20 February 2004.

The International Covenant on Civil and Political Rights (1966)

Article 19 of the Covenant states that:

“Everyone shall have the right to hold opinions without interference; and,

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his (sic) choice.”

[Limitation]

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- 1. For respect of the rights or reputations of others;*
- 2. For the protection of national security or of public order (ordre public), or of public health or morals.*

The European Convention on Human Rights (1950)

Article 10 of the convention provides that:

Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information an ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

[Limitation]

*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary **in a democratic society**, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The American Convention on Human Rights

Article 13 of this Convention states that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

[Limitation]

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

1. respect for the rights or reputations of others; or

2. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Part 5. The enforcement mechanism

Given that decisions of the commission are not binding on Member States, this has in turn created a large enough loophole for non-compliance with the fundamentals and essentials of the Charter.

Furthermore, the inter-state complaints mechanism is at best naïve and at worst blind to the power-play and political horse-trading that usually undergirds governmental operations. Quite credibly, how many states on the continent have a record much better than that of Zimbabwe so that it can arm them with the moral high ground for pointing fingers to Robert Mugabe's government. In all probability, States would rather close ranks and turn a blind eye to things instead of looking beyond their borders to see whom

among them in the privileged club of the African ruling elite is violating this or that other right.

There are far too many skeletons in their individual closets for anyone of them to dare accuse a fellow culprit.

Declaration of Principles of Freedom of Expression in Africa

At its 32nd Ordinary Session in October 2002, the African Commission adopted the above principles, which are aimed at elaborating and expanding on Article 9. These principles deal with freedom of expression in its generic sense and also devote a fair amount of space to media freedom.

However some commentators² have pointed out that the Principles have significant gaps such as:

- They make no reference to freedom of the media as an institution and perceive freedom of expression in individual terms only;
- They provide a much weaker protective threshold for freedom of expression when compared to instruments such as the Inter-American Convention on Human Rights.
- Like other instruments, they allow States to interfere with the right to freedom of expression through the barn-door of the limitations clause as long as the limitations are:-

"Provided for by law and serve a legitimate interest..."

Conclusion

The Charter and Commission are important instruments for protecting the right to freedom of expression and create space for individuals and civil society to engage or lobby States on the continuing violation of free expression on the continent.

Nevertheless, the two are far too weak to have any significant effect on the regime of freedom of expression in Africa and perhaps we should be exploring alternatives to them or devise new ways of using other structures such as the African Court of Human and People's Rights as well as progressive national Constitutions of some countries like South Africa, Namibia and Botswana.

Civil society organisations should utilise the observer status, State reporting mechanisms and expert missions to engage with the commission on matters of freedom of expression

Thank you.

² Guy Berger, "Protection of journalistic sources: between you, me and the subpoena", paper presented to the African Conference on Freedom of Expression, Pretoria 19-20 February 2004

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