

LEGAL FRAMEWORKS IN SUPPORT OF CIVIL SOCIETY

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Introduction

As the capacity of the government in Africa to address development problems dwindle, the negative effects of globalization become more glaring. There is therefore need for increased emphasis on the role of civil society in African States to fill in the gaps.

With the fast approach of the 21st century, ways of enhancing the role of civil society should be the focus of developing African States. The specialized features of civil society to the development challenge in Africa, in the context of globalization, especially in addressing the social and economic problem make this third sector of the economy of great importance.

There is now an urgent need for African States to look for alternatives to manage their affairs and these States will of necessity look inward for answers.

Law in development perspective is an instrument of social change. The legal space is an indicator to measure the degree of involvement of civil society. It is therefore important to examine the legal framework which has been put into place for civil society as this strengthens rather than weakens national and local development, if obeyed by all.

The Legal Framework

Legislation is the most important instrument of legal development. It is a useful tool for the social, economic and technological development in the country.

The constitution of any country is the supreme law of the land. This serves as the starting point in this paper. The government, be it military or democratic, has exclusive control of the legal environment within which the people operate. Actors of civil society are therefore bound by the legislations within the environment in which they operate. The right to associate is inherent in the actors of civil society. Section 37 of the 1979 Constitution of the Federal Republic of Nigeria provides inter alia that "every person shall be entitled to assemble freely and associate with others, form or belong to any political party, trade union or any other association for the protection of his interest". The Constitution of some other countries, go further than the cosmetic appearance of the Nigerian Constitution. In South Africa, people have a right to organise more peaceful protest and present petition. The Constitution of the Republic of South Africa contains more explicit provisions. Section 16 of this Constitution provides that "Every person shall have the right to assemble and demonstrate with others peacefully and unarmed and to present petition. Section 27

states that"

1. "Every person shall have a right to fair labour practices.
2. Workers shall have the right to form and join trade union and employers shall have the right to form and join employer's organisation.
3. Workers and employers shall have the right to organise and bargain collectively.
4. Workers shall have the right to strike for the purpose of collective bargaining.
5. Employers' recourse to the lock out for the purpose of collective bargaining shall not be impaired, subject to Section 33".

The Angolan 1991 revised Constitution provides for the right of association and the right to form and join trade union and engage in union activities and strike. A legislation passed in 1991 provides the legal framework for, and strictly regulates the exercise of that right and requires that labour union be recognised by the government. The law also prohibits lock out and provides protection for non-striking workers. In Benin, the 1990 Constitution provides for the right of peaceful assembly and association and freedom to organise, join union, meet, and strike. To buttress the fact that this right is respected in that country, in enacting a national law, which is the Labour code (new revision), the discussion and agreement was by the tripartite group composed of unions, employers and the government.

Other countries where there are constitutional provisions on right to assemble include Cote d'ivoire, Ghana, Kenya, Niger, Senegal, Sierra-leone, Togo, Uganda, Zimbabwe and South Africa. In South Africa, this constitutional provision is given statutory effect by the recently approved Labour Relation Act.

In Germany, Article 9(3) of the German Basic Law states inter alia that "the right to form association in order to safeguard and improve working and economic conditions shall be guaranteed to every individual and all occupations and profession. Agreements intended to hamper the exercise of this right shall be null and void, measures to this end shall be illegal".

The constitutional provisions in support of the right to freely associate and assemble by actors of civil society are in many African States recognised only in theory, and not respected in practice. In Angola, Cameroon, and Nigeria for example, some components of civil society are denied these rights in practice. Failure to respect basic rights as defined in several key International Labour Organisation (ILO) convention is a growing problem in many African countries like the rest of the world. These core workers' rights include freedom of association, which is the foundation on which workers can form trade union and defend their interest, the right to organise and bargain collectively. In spite of broad international recognition of these principles, free trade union continues to be barred or suppressed in a number of countries. In many more, restriction on freedom of association ranges

from outright state control, to legislation aimed at frustrating workers' legitimate efforts to organise. For example in 1995, Nigeria was cited by the ILO for its failure to repeal Decrees dissolving unions and denying unions the right to elect their own leaders, two of whom in early 1996 remain jailed without charges. (Country Report 1995). Such interference makes it difficult for the labour congress to represent workers effectively. On the other hand, the Country Report shows that countries like Benin, Zimbabwe and South Africa generally respect this right in practice.

It is worthy of note, that though there are instances of violation of the right to Association in some countries, this is not to say that there is total lack of support for civil society in these countries. In some of these countries, provisions in the national legislations show that structures and institutions are in place and maintained which are indicators of support for civil society.

The Nigerian Experience

The Trade Union Act (Cap 437, 1990) provides that all trade unions in Nigeria must be registered in accordance with the provisions of the Act to function. Violation of this provision is an offence. This is to ensure a stable trade union in the country. The procedure of registration is rigidly followed and this brings to light the monitoring role of government in ensuring the viability of trade unionism in the country. The procedure includes the registration of the rules of the union which must be a public document and the publication of notice of application of any intending trade union in a federal gazette leaving three months for any objection by any member of the public to such registration. Furthermore, the Act protects registered Trade Union against any action in Tort committed by or on behalf of Trade Union in contemplation of or in furtherance of a trade dispute in any court of law in Nigeria. This provision applies to both an action against a trade union in its registered name and an action against one or more persons as representative of a trade union. The Trade Union (Amendment) Decree No. 4 of 1996 further relaxed and simplified certain procedures of the trade union and in particular strengthened the financial base of trade unionism in Nigeria. The amendment now excludes the power of a worker to contract out of the check off system guaranteed by the Labour Act. See UDOH Vs ORTHOPAEDIC HOSPITAL MANAGEMENT BOARD (1990)

Cooperative societies, (hereinafter referred to as Cooperatives) as a component of civil society are primarily value driven rather than profit driven. Individuals control both the objectives of the cooperatives as well as the capital. In view of its simple modus operandi, the legal framework is not as complicated as others. In many countries including Nigeria, the support given to Cooperatives is in terms of supervision, advise, provision of structures and staff. The legal framework in support of Cooperatives is embodied in the Cooperative Development Act (Cap 67 1990) and other state legislations. The Act provides that the officials of the

Cooperative Development Division established by the Act are public servants whose duties are mainly to monitor, advise and supervise the activities of cooperative societies. The division is in charge of coordination of all activities of cooperative societies, disbursement of federal and foreign assistance to cooperative movement, cooperative education and training. In performing their duties, the cooperative officials ensure a solid based cooperative society, without interference in its activity. All cooperatives must be registered with the relevant body. In Nigeria, the establishment of federal and state cooperative colleges, where cooperative officials are trained, in different parts of the country as stipulated by law shows a support to this component of civil society.

Non-Governmental Organisations (NGOs) as a component of civil society are relatively new in Africa even though civil society has existed since time immemorial. Nonetheless, NGOs are growing rapidly, indicating the need for effective alternative for development. NGOs are effective agents of development because of their relative administrative simplicity, their proximity to the grassroot, their ability to identify the felt need of the people and their efficient and cost effective mode of operation. NGOs have enjoyed a cordial relationship with the government more than other components of civil society. The work of NGOs which is irreplaceable has an authenticity and legitimacy. No government, no matter how powerful or how well intentioned can perform the work being done at the grassroot by NGOs.

In many African countries, there is generally the requirement for the registration of the NGOs with a relevant body approved by the government. In Uganda, NGOs register with the Ministry of Internal Affairs, and all associations must register or be exempted from registration by the registrar of societies. Generally there has been less interference with the activities of NGOs, unlike other associations, but in exceptional situations, the courts have intervened on behalf of the NGOs when cases come before them.

In Nigeria, many NGOs are registered under part C of the Companies and Allied Matters Act (1990). The statute provides for the registration of associations for religious, educational, literacy, scientific, social, developmental, cultural, sporting or charitable purposes. The legal framework is similar to that of other components of civil society, and it shows the protective nature of the government. It ensures lawful and peaceful association by providing that the aims and objectives of such an association must be lawful before registration. The Act also provides for the publication in a daily newspaper the application for registration of such a body for public notice. To ameliorate the cost of registration which is usually at the Corporate Affairs Commission, the government has devised other cheaper and simpler means of registration of such associations.

NGOs in Nigeria, can now register with specified approved federal and state agencies, relevant to the aims and objectives of the association. In the particular case of Pan African Food Aid Programme, the registration of this organisation was with the Organisation of African Unity (OAU). The requirement for registration of NGOs and other components of civil society is not peculiar to Nigeria alone. In Uganda, NGOs register with the Internal Affairs office and in Cameroon, registration is with the Ministry of Labour.

An International Legislative Focus

The legal framework of civil society is not restricted to provisions in national legislations. Across the boundaries of many individual African States lie international laws in support of a viable civil society. The African Charter on Human and Peoples Rights is an international instrument that binds many African States together. It is a guiding law, which should be observed and obeyed by countries that are signatories to the agreement. There are about fifty-two African countries that have signed and ratified the charter. One of the rights contained in the Charter is the right to free association and right to assemble freely with others (Articles 10 and 11). This is a right to be a member of any organisation, union or political party. The unique thing about the provision in the Charter compared to the Constitutional provision on the right of association, is that a constitutional provision may be suspended as it has been done in some African countries, but the African Charter enjoys the support of a higher status than the constitution. In Nigeria, the Constitution (suspension and modifications' Decree 1984) as amended by Decree No. 9 of 1990 is an illustration which shows the supremacy of charter over a constitution. In its provision, this Decree subjects the Constitution to all subsequent Decrees. One of such subsequent draconic Decrees is the popular Decree No. 2 - the State Security (Detention of Person) Decree No. 2 of 1984. Another one is the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 13 of 1984 (as amended). Decree 13 oust the jurisdiction of courts on anything done under any Decree. A notable departure from the past is the application of the African Charter on Human and Peoples Rights of which many African States are signatories. The African Charter preserves the jurisdiction of the courts while some national legislations, oust the jurisdiction of courts from adjudicating on any aspect of Human Rights infraction. In recent times, the Nigerian courts have held tenaciously to the application of the African Charter particularly ruling on objection raised by the State in respect of jurisdiction of courts. See the Nigerian case of RICHARD AKINNOLA Vs GENERAL IBRAHIM BABANGIDA AND 3 OTHERS (1994) Unlike other provisions under national legislations, the right to associate, like any other right guaranteed by the African charter is intact. In THE REGISTERED TRUSTEES OF THE CONSTITUTIONAL RIGHT PROJECT Vs THE PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA AND OTHERS (1993), the application of the African Charter on Human and Peoples Right of which Nigeria is

a signatory came into focus. The court held that the African Charter which preserves the jurisdiction of the court, overrides the ouster of jurisdiction clause in a Decree. The Nigerian court further held that this case is important because it touches the interpretation of The African Charter. The importance of this case, is not only to be seen in the Nigerian context, but it has shed a new light and horizon on the African Charter in African jurisprudence. (Onalaja 1993).

Going back to the history of the African Charter, the 1981 agreement by the Heads of State and government, was that the provision of the Charter which had been agreed to, should be included as part of the National laws of countries that have agreed to the Charter. Pursuant to this, in Nigeria, the African Charter was made into a municipal law by virtue of the African Charter on Human and Peoples Right, (Ratification and Enforcement Decree (cap 10, 1990)). In spite of the fact that the African Charter is made into a municipal law, it is still a treaty, ratified by the Nigerian government and since Nigeria retains its membership of the Organisation of African Unity, Cap 10 is binding on the Federal military government. This was the decision in the following cases: AFRICAN REINSURANCE CORPORATION VS FANTAYE (1986); CHIEF J.E. OSHEVIRE VS BRITISH CALEDONIA (1990); AEROFLOT VS AIR CARGO EGYPT (1987).

In RICHARD AKINNOLA VS GENERAL BABANGIDA 1994), the court had occasion to consider and resolve such conflict between municipal law and International obligation. Relying on the Court of Appeal of Paris case of AEROFLOT VS AIR CARGO EGYPT (1987); the court held that any domestic legislation in conflict with the convention is void. The observation of Muhammed Heleen, the Chief Judge of Pakistan at the Judicial Colloquium in Banglore, Pakistan in his paper (1988) is very relevant to this issue. He said:

"A state has an obligation to its municipal law, conform to its undertaking under treaties to which it is a party. With regards to interpretation however, it is a principle generally recognised in national legal systems that in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations. The domestic applications of human rights norms is now regarded as the basis for implementing constitutional values beyond the minimum requirement of the constitution ..."

Support of Civil Society - A myth or reality

There is no doubt that there is the existence of a theoretical legal framework in support of civil society in many African States with the various legislation and

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Support of Civil Society - A myth or reality

There is no doubt that there is the existence of a theoretical legal framework in support of civil society in many African States with the various legislation and

structure analysed above. However, in reality, the experiences in these countries, show the extent of support actually given to civil society. It is revealed that the theoretical support is greater than the practical support, subject to a few exceptions in some countries. It is also observed that the level and type of support given to civil society in financial, supervisory, monitoring, advisory and provisional supports. In African States, there is no uniformity in the support given to the third sector. It continues to be a myth in some countries while a reality in others. The time is now for African States to adopt the partnership approach which brings together the State, the private sector and civil society. A theoretical legal framework no matter how solid, without adherence, cannot establish the independent and vibrant civil society much needed to strengthen development. When the state provides the various forms and organisation to carry public function, it is civil society which creates the values and normative framework for governance and normative. It creates the accepted social conscience with which the other two sectors operate.

Without a solid, well-rooted and operative legal framework for civil society, good governance and private enterprise cannot flourish.

In conclusion, law is an instrument of social change. The law and lawyers are social engineers. A solid theoretical legal framework, in support of civil society, respected by all, ensured by the courts will bring about a positive change in the process of development in African States.

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