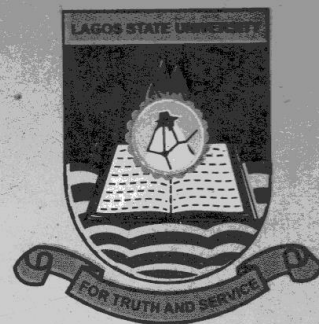


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ABACHA V. FAWEHINMI:¹ BETWEEN MONISM
AND POSITIVISM — An Exposition of The Application of
International Treaty in Nigeria

Anthony Gbadebo Olagunju*

INTRODUCTION

The law of treaties form an integral part of international law. It is a law that builds understanding between nations and reminds them that obligations freely entered into by them cannot be freely given or wished away.

Hence the Latin maxim '*pacta sunt servanda*.'² Treaties to nations are thus what contracts are in domestic laws to individuals.

Their categories vary but the law governing them are the same.³ While law making treaties,⁴ are in their basic nature comparable to statutes or legislation in municipal laws, treaty contracts have a character closely related to domestic contracts for usually they govern transaction of a particular purpose e.g. a treaty between Nigeria and the U.S for the construction of a dam or improved electrification.⁵ Once the project is completed, the treaty ends.⁶ This is not so in the case of the former which is more of a permanent nature since it establishes rules of international law. And according to Lord McNair:-

*"... is intended to be of perpetual duration and incapable of unilateral termination, unless, expressly or by implication, it contains a right of unilateral termination or some other provision, for its coming to an end."*⁷

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1. (2000) 6 NWLR. (pt. 660) p. 228

2. "Agreement must be obeyed"

3. All treaties are now governed by the Vienna Convention on the law of treaties concluded on May 22, 1969 (hereinafter referred to as 'the Vienna Convention') which was a codification of the customary rules of international law on the subject.

4. These are treaties that establish rules of international law and are of a general nature e.g. statute of ICJ. See also Art. 38 of the UN Charter.

5. This is sometimes referred to as Bilateral treaty.

6. Such treaty is said to be merged in the purpose for which it was created consequently it ceases to exist by operation of law.

7. The law of treaties (1938) p. 351.

It must be noted however that this seeming permanent nature does not make it (law making treaty) any more binding than a treaty contract. The purview of this review falls primarily into the former but for academic purpose(s) we may not be able to avoid reference to the latter.

The issue of Human Right, old as time, is universal, international, topical as well as controversial. From the Greeks to the social contract theories down to the universal declaration of Human Right by the UN in 1948, the issue is ever current on the list both locally and internationally. In 1981, the Organisation of African Unity (O.A.U) of which Nigeria is a member adopted the African charter on Human and Peoples' Rights. Then in 1983, the same charter or treaty was adopted by incorporation into the Nigerian domestic or municipal laws by an Act of the National Assembly.⁸

What is the implication of this treaty and its ratification/adoption by Nigeria? Is a treaty superior to the domestic law (e.g. say the constitution or an act of the National Assembly)? What is the effect of ratifying a treaty *simpliciter*, and/or ratifying and adopting/incorporating same into domestic law?

Today the hierarchy of laws in Nigeria still puts the Acts of the National Assembly at the lower rungs of the ladder following the decision of the Supreme Court since 1992 in the cases of *Labiya v. Anretiola*,⁹ affirmed in the present decision even though the circumstances have changed. Nigeria having shifted grounds from dictatorship to democracy, should a Decree (and Edict for that matter) continue to override an Act of the National Assembly? These and many more shall be our focus in this review.

Facts of the Case:

The Respondent, a legal practitioner and human rights activist was on 30th January, 1996 at about 5.15 am arrested by the men of the state security service (S.S.S.) and taken away to their Lagos office at Shangisha where he was detained for about a week before being later transferred to Bauchi prison for further detention.

8. See the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 as contained in cap. 10 Laws of the Federation of Nigeria, 1990.

9. (1992) 8 NWLR (pt. 258) 139.

In consequence of the above, an application was brought on behalf of the respondent before the Federal High Court Lagos to enforce his fundamental rights and the following relief were sought:-

1. A declaration that the arrest of the applicant constitutes a violation of his fundamental rights guaranteed under sections 31, 32 and 38 of the 1979 constitution and Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria, 1990 and is therefore illegal and unconstitutional.
2. A declaration that the detention and continued detention of the applicant without charge constitutes a gross violation of the applicant's fundamental rights guaranteed under sections 31, 32 and 38 of the 1979 constitution and articles 5, 6 and 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of Nigeria, 1990 and is therefore illegal and unconstitutional.
3. A mandatory order compelling the respondents/their officers, agents, servants or privies to release the applicant forthwith.
4. An injunction restraining the respondents, their officers, agents, servants or privies from further arresting, detaining or in any other manner infringing on the fundamental rights of the applicant.
5. The sum of ₦10,000,000.00 (Ten Million Naira) as damages for unlawful and unconstitutional arrest and/or detention of the applicant.

Leave to enforce the right was granted and service of the appropriate processes were effected on the appellants. The appellants thereafter filed a preliminary objection to the action challenging the competence of the suit as follows:

"That the applicant/respondent cannot maintain this action against the respondents/applicants on the ground that this Honourable Court lacks the competence to entertain this action."

Grounds for the objection:

- (i) *By a subsidiary legislation made by the Inspector-General of Police in exercise of the powers conferred on him by State Security (Detention of Persons) Decree No. 2 of 1984 (as amended) and further by section 4 of the aforementioned Decree No. 2 of 1984 (as amended) the respondents/applicants are immune to any legal liabilities in respect of any action done pursuant to the Decree.*
- (ii) *The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 and the Constitution (Suspension and Modification) Decree No. 107 of 1993 oust the jurisdiction of this Honourable Court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree.*
- (iii) *This Honourable Court lacks the constitutional jurisdiction to entertain any action relating to the enforcement of any of the provisions of Chapter IV of the 1979 Constitution (as amended) and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1990."*

At the hearing of the objection, it was the appellants contention that the respondent was detained pursuant to a detention order signed by the Inspector-General of Police under the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 (as amended) and consequently the court has no jurisdiction to hear the action in that its jurisdiction was ousted by the Decree. The detention order even though produced by the appellant's counsel was not tendered in evidence. The order was made on and dated 3rd February 1996 and stated *inter alia*, the place of the respondent's detention as Bauchi prison. The respondent's counsel in his argument contended *inter alia* that the provisions of Decree No. 2 of 1984 are inferior to and cannot override the provisions of the African Charter on Human and Peoples' Rights under which the respondent was seeking the aforesaid reliefs and also that the said detention order did not cover the period between 30th January to 2nd February 1996 of the appellant's period of detention.

After hearing arguments on the objection, the trial court upheld it and struck out the suit of the respondent. The respondent then appealed to the Court of Appeal against the whole of the decision of the trial court.

The Court of Appeal unanimously allowed the appeal in part and remitted the "case back to the trial court to consider the issue of the consequences of the detention for the four days of the (detention of the) appellant which is apparently not covered by the order."¹⁰

Both parties were aggrieved by the decision and they appealed to the Supreme Court. The appellant complained against those parts of the judgment of the Court of Appeal that relate to findings on the status of the African Charter on Human and Peoples' Rights and the order remitting the case to the trial court. The respondent on the other hand cross-appealed against those parts of the decision of the Court of Appeal relating amongst others to - mode of enforcement of fundamental rights guaranteed under the African Charter on Human and Peoples' Rights.

Issues for Determination:

Some of the issues for determination as concerns us in this paper are: - Whether Nigeria as a party to, and which has adopted the African Charter on Human and People's Rights can make municipal laws that are inconsistent with its obligation under the Charter while it remains in the statute book; What is the status of the Charter as adopted by Nigeria? Is it inferior or superior to municipal laws made by the Government of Nigeria? Since the Charter did not lay down any procedure for its enforcement, what is the proper procedure to be adopted in enforcing the rights laid down in the articles of the Charter?

Under Customary International Law, treaties impose obligations or rather confer rights on the parties to them. In other words treaties are binding only on the parties to them. This expressed in the Latin maxim *Pacta tertiis nec nocent nec prosunt* and has been entrenched in Articles 34 - 38 of the Vienna Convention.

Thus, the obligation on Nigeria after the ratification of the African Charter is the enforcement of the provisions by respecting the rights of its people as contained therein. Where it fails to, an aggrieved person affected by those rights may seek the enforcement of that Charter, especially if it has been enacted into the domestic laws of the country. This brings us to the theories of applicability of international treaties.

10. See *Fawehinmi v. Abacha* (1996) 9 NWLR (pt. 475) 710.

Monism Versus Positivism:

According to the Monist Theory, international law and municipal law should be regarded as one aspect of the same coin binding on both the state and the citizens. In other words, once an international treaty is entered into by the state, it is automatically incorporated into the domestic laws without more, and thus binding on the state and its citizens.¹¹ The positivist does not however see it this way. According to this theory, international law has to be transformed or adopted by the municipal legal system. In effect a rule of international law - whether customary or by treaty must be legislated into municipal law. Thus, such rule or treaty can only be binding on the state and not the individual until the legislation has taken place. Examples are Britain and Nigeria.

Unlike in the U.S, the consent of the Senate is not required before the Nigerian Government enters into any treaty on behalf of its citizens, hence the justifiable application of the transformation (positivist) theory. This was given statutory/constitutional backing by the provision of section 12(1) of both the 1979 and the 1999 constitutions which state:-

"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."

This point was emphasised by the court when it talked about the status of the African Charter vis-à-vis Nigerian municipal laws including the constitution. Ogundare J.S.C, in his leading judgement was quick to point out as follows:-

*"Suffice it to say that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly."*¹²

He immediately went on to cite the above provision of the constitution in support of this position and then went further:-

11. To some extent this is the case in the US. This is understandably so since at least 2/3 majority of the members of the Senate must give their consent before a treaty in which the U.S is a party can be ratified or entered into. In effect the people (as represented by their elected representatives) can be said to participate in the negotiation of the treaty.
12. Ibid., at p. 288.

"Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justifiable in our courts."¹³

By comparative analysis, as said earlier in this paper, this is also the position in England and some other countries which apply the adoption/transformation theory. Thus in the very recent case of *Higgs & Anor. v. Minister of National Security* (cited by the court)¹⁴ the privy council held that:-

"In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the crown."¹⁵

and that:-

"Treaties formed no part of domestic law unless enacted by the legislature."¹⁶

Thus in the court's opinion domestic courts have no jurisdiction to construe or apply such an unincorporated treaty. Nor could such change the law of the country, or have any effect upon the citizens rights and duties both at common law or under statute.

Effect of Adoption

Where a treaty has been adopted into the municipal laws, such a treaty like other municipal laws become the law of the country and becomes not only justifiable by the courts. This was the purport of the reasoning of his Lordship in the leading judgement when he declared:-

"Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990 ... it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts.

13. Ibid., also at p. 288.

14. The Times, December 23, 1999.

15. Ibid., see p. 288 of the present report.

16. Ibid., see also p. 288.

By cap. 10 the African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it."¹⁷

His Lordship did not stop there, he went further to juxtapose the charter/treaty with other municipal laws on the one hand and the constitution on the other after it has passed the test of transformation/adoption. In the court's opinion while the charter may be superior to or take precedence over other municipal laws while it still remains in our statute books, the same cannot be said when it is placed side by side the constitution. Thus his Lordship posited:-

*"No doubt cap. 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and other statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the court below that the charter possesses 'a greater vigour and strength' than any other domestic statute. But that is not to say that the charter is superior to the constitution ..."*¹⁸

It is apparent from the above therefore, that the constitution is superior to the charter or any other treaty which has been adopted for that matter. This was in fact supported by the dissenting judgement of Achike J.S.C., When he said after considering the provisions of sections 1(1), 1(3) and 12(1) of the 1979 Constitution (which is *pari materia* with Section 1(1), 1(3) and 12(1) of the 1999 Constitution) that:-

*"The combined effect of subsections (1) and (3) of section 1 and section 12(1) of the 1979 constitution leaves one in no doubt not, only about the pride of place of the constitution but brings to the glare that a treaty enacted into law in Nigeria is circumscribed in its operational scope and extent as may be prescribed by the legislature."*¹⁹

At this juncture, we must hasten to underscore the fact that even though the court may give precedence to an adopted treaty where there is conflict between that treaty and other municipal laws, it does not render such other statute(s) invalid, even if such statute violates the treaty.²⁰ Put in proper perspective, the implication of the above, is

17. Ibid., at p. 289.

18. Ibid., also at p. 289.

19. Ibid., at p. 316

20. Cf. page 289 of the report, particularly paragraphs F - G.

that where any other municipal statute is inconsistent with any adopted treaty such as the charter, the provisions of the treaty will prevail over that statute but without rendering such statute void or invalid. Also, since the treaty/charter was adopted into the municipal laws via an Act of the National Assembly, nothing stops the law making body from repealing such a treaty and thus denying it the recognition given it through the adoption/transformation. But in as much as this has not been done, the courts must continue to accord it the status of a statute with an international flavour and thus apply it. This was the substance of the majority decision,²¹ when it ruled that in as much as section 4 of the State Security (Detention of Person) Act only suspended Chapter IV of the 1979 Constitution (dealing with Fundamental Human Rights) it never touched or mentioned cap. 10 which was then also in existence and so according to the court:-

*"A treaty is not deemed abrogated or modified by later statute unless such purpose has been clearly expressed in the later statute."*²²

Cap. 10 cannot therefore be affected by the ouster clause provided under section 4 of the State Security Act aforesaid.

On the issue of procedure to be adopted, the court reiterated the earlier principle laid down by it in *Fajinmi v. The Speaker, Western House of Assembly*²³ and *Ogugu v. The State*,²⁴ to the effect that:-

"Where there is no provision as to the procedure to be followed in enforcing the jurisdiction conferred, the plaintiff was entitled to bring the case in the usual form of an action and to have it heard."

Consequently, such a party could commence his action either by way of writ of summons or any other procedure permitted by law such as the Fundamental Rights (Enforcement Procedure) Rules.

Finally, one would not have done full justice to this review without commenting on the dissenting judgement of Achike J.S.C on the aspect dealing with hierarchy of laws in Nigeria. For the avoidance of doubt his Lordship stated as follows:-

21. The majority decision was four against three dissenting judgments. Ogundare, Iguh, Uwaifo and Ejiwunmi JJ.S.C gave the majority judgement while Belgore, Mohammed and Achike dissented.
22. *Ibid.*, at p. 292. c.f. the case of *Cook v. United States* 288 U.S 102.
23. (1962) 1 SCNLR 300.
24. (1994) 9 NWLR (pt. 366) 1.

"It may be recalled that the hierarchical classification in order of superiority of laws in Nigeria was enunciated by the Supreme Court in *Labiya v. Anretiola*.²⁵ For ease of reference, the order of superiority as on the 31st December 1984 runs thus:-

1. Constitution (Suspension and Modification) Decree 1984
2. Decrees of the Federal Military Government.
3. Unsuspended provisions of the Constitution 1979.
4. Laws made by the National Assembly before 31/12/83 or having effect as if so made.
5. Edicts of the Governor of a state.
6. Laws enacted before 31st December 1983 by the House of Assembly of a state, or having effect as if so enacted."

The ratio in *Labiya's* case is clearly to make decrees superior to an Act of the National Assembly made before the military take over on 31st December 1984. This was reiterated in the present case. Now the decision in this case was given on 28th April, 2000, about one year after the return to democracy rule in Nigeria,²⁶ what should therefore be the hierarchy of laws in Nigeria today? The court had the opportunity of pronouncing on this (even obiter) especially in the dissenting judgment under consideration when it mentioned *Labiya's* case.²⁷ However, we are left to conclude that since the National Assembly is the highest law making body in Nigeria today, its laws without doubt will now supersede any other law(s) be it in the name of decrees, edicts or whatever.²⁸ By extension, the law(s) made by the State House of Assembly will override any edict or even any decree for that matter (unless such a decree has also been enacted as an Act of the National Assembly). One may therefore safely argue that the decision in *Labiya's* case,²⁹ good as it was in 1992 is no more the law in Nigeria in view of the present circumstance of our democratic dispensation.

Conclusion

So far in this review, we have tried to look at treaties and what they entail, the types etc. We also tried to look at the theories governing their applicability (i.e. monism and positivism).

25. (1992) 8 NWLR (p. 258) 139.

26. Nigeria returned to domestic rule on 29th of May, 1999.

27. (Supra).

28. Coming of course after the 1999 constitution which is supreme to any other law(s).

29. (Supra).

We have discussed the ratio of the majority decision in this review such as the status of the African Charter on Human and Peoples' Rights, the application of the Charter in Nigeria, the procedure to be adopted in enforcing those rights guaranteed under the charter in view of the fact that the charter itself does not lay down any procedure and finally an examination of the ratio in *Labiya's* case,³⁰ as alluded to in the dissenting judgement of Achike J.S.C.

It is our conclusion that the African Charter on Human and Peoples Rights is an international treaty. A law making treaty for that matter whose provisions bind all parties to it in accordance with the Vienna Convention on the law of treaties 1969. It is a treaty/charter that has been adopted/transformed into the Nigerian municipal laws by virtue of cap. 10 Laws of the Federation of Nigeria and hence has passed the positivist theory. It has thus become a Nigerian statute. But as a statute with 'international flavour',³¹ where there is a conflict between it and other statutes, its provisions will prevail over those other statutes.

Finally, it is our position that the decision in *Labiya's* case,³² cited in the present case has been overtaken by events and consequently can no more be the law today in Nigeria.

30. (Supra).

31. Borrowed from Ogundare J.S.C in his leading judgement (supra) p. 289. para. E.

32. (Supra).