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Core Freedoms in Nigerian and U.S. Constitutions: A Study in Difference

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INTRODUCTION: PERSPECTIVES AND METHOD

This article compares core freedoms in the United States Constitution with similar constitutional experience encountered in the Nigerian Constitution. It is a study in difference, illuminated by learned papers and discussion of these issues by judges, lawyers, professors, journalists and activists in Nigeria. Moreover, to add a third dimension, differences and similarities in constitutional experiences are shown within the contemporary framework of international norms.[1]

Rooted in comparative methodology and anthropological jurisprudence, the three-dimensional approach respects both difference and sameness in

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[1] See generally *Human Rights in Africa: Cross Cultural Perspectives* (A. An-Na'im & F. Deng, eds. 1990). Questions about the linkages between international human rights and U.S. constitutional law have a rich beginning literature. See Henkin, *Constitutional Rights and Human Rights*, 13 Harv. C.R.-C.L. L. Rev 593 (1978); Henkin, *Rights: American and Human*, 79 Colum. L. Rev 405 (1979); Lillich & Hannum, *Linkages Between International Human Rights and U.S. Constitutional Law*, 79 Am. J. Int'l L. 158 (1985); Lillich, *The United States Constitution and International Human Rights Law*, 3 Harv. Human Rights Yearbook 53 (1990) (summary of scholarship and problems to the present). Lester traces the influence of the American experience indirectly to former colonies now states in Africa, through the European Convention on Human Rights. Lester, infra note 14, at 541-42. See J. Read, *The Protection of Human Rights in Municipal Law, in Human Rights:* The Cape Town Conference 156 (C. Forsyth & J. Schiller eds. 1979); R. Lillich, *The Promotion of Human Rights by Domestic Courts: A Comparative Approach,* in *The Individual Under African Law: Proceedings of the First All-Africa Law Conference* 160 (P. Takirambudde ed. 1982). For a constitutional process of interpreting negative limitations, see Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. Cin. L. Rev. 3 (1983). For the relationship involving criminal law and procedure in U.S. constitutional law, see H. Hannum, *Materials on International Human Rights and U.S. Criminal Law and Procedure* (1989).

the separate cultures while adding to a traditional comparative constitutional study contemporary respect of norms from the international community.[2] This approach compares different structures supposedly derived from the same values (core freedoms, cooperation and national unity) with different cultures supposedly leading to similar constitutional structures (a strong executive; an independent judiciary; separation and division of powers). Core value-thinking thus does not become either a metaphysical problem of derivation of values from universals nor an exercise in the cultural relativism of radical empiricism or skepticism that negates shared value.[3] It does postulate respect for another culture in time, place and perspective. Also, the method is optimistic for it postulates the possibility of common core values but only after seeing difference. In this inquiry, respect fosters comparative method among the races and ethnic groups, between sexes and among religions and nationalities, for to affirm the worth of another is not to deny one's own dignity.[4]

In addressing the African Leadership Forum, Nigeria's former President, General Olusegun Obasanjo spoke to all Africa as the Nigerian Constituent Assembly began revision of its 1979 Constitution: "In the last resort, only we ourselves know what is really amiss with us and, what is more, only we as Africans can tell it as it is to ourselves. . . . Our destiny ultimately lies in our own hands."[5]

By choosing self-help and rejecting Western condescension, Nigerians confront many concrete and painful problems. Their constitution, written and unwritten, evolves to fit conditions in Africa. Rampant corruption of officials and citizens, an ongoing problem of serious proportions in Nigeria, requires both a national ethic to restrain raw selfishness and more effective policing of corruption without unduly repressing freedoms. The problem of

[2] See e.g., C. Levi-Strausse, *Structural Anthropology* (1963); G. Geertz, *The Interpretation of Cultures* (1973); E. Bodenheimer, *The Philosophy and Method of the Law* (rev. ed. 1974); E. Bodenheimer, *Power, Law and Society: A Study of the Will to Power and the Will to Law* (1973); L. Pospisil, *Anthropology of Law: A Comparative Theory* (1971); L. Pospisil, *The Ethnology of Law* (2nd ed. 1974); J. Hall, *Comparative Law and Social Theory* (1973); H. Ehrmann, *Comparative Legal Cultures* (1976); E. Hoebel, *The Law of Primative Man: A Study in Comparative Legal Dynamics* (1954); F. Northrop, *The Complexity of Legal and Ethical Experience* (1959); F. Northrop, *The Taming of the Nations: A Study of the Cultural Bases of International Politics* (1987); F. Northrop, *The Meeting of East and West: An Inquiry Concerning World Understanding* (1979). This Article is distinct from other comparative approaches in that it undertakes a three-way comparison, involving not only the legal cultures in the two countries studied but also international agreements.

[3] See, A. Renteln, *International Human Rights, Universalism v. Relativism* (1990).

[4] Karl Llewellyn, himself a noted scholar of folk-ways and the anthropological method, thought that the greatest legal fallacy in reasoning was the proposition, "if A, then not B". (*expressio unius est exclusio alterius*). The better logical expression should be "if A then also B". W. Twining, *Karl Llewellyn and the Realist Movement* (1973). See for example, E. Hoebel and K. Llewellyn, *The Cheyenne Way; Conflict and Case Law in Primitive Jurisprudence* (1941).

[5] As reported by Flora Lewis, *Straight Talk in Africa*, N.Y. Times, Oct. 30, 1988, §4 at 23. See C. Achebe, *The Trouble with Nigeria* 1-3 (1983); O. Obasanjo, *Africa Embattled* 5 (1988) ("If our system and structure have to evolve like those of most settled industrial societies, it would take time but it must be our own, designed by ourselves for ourselves").

economic decline requires national will and sacrifice to re-establish local productive agriculture and business, with markets and prudent development policies.[6] Structural upheavals since independence in 1960, with their vast displacements of populations and local economies have led directly to increased measures of control, repression and abuses of human rights.[7] And the contradiction between written guarantees of human rights and the incapacity of the benevolent state to protect and provide produces varying constitutional crises.[8]

Nigerian writers speak and write unceasingly about these struggles. Chinua Achebe, one of the most prominent, begins by a frontal rejection of traditional Western intellectual attitudes towards Africa. No one who is enlightened and cosmopolitan, he asserts, can quite grasp the concept of Africa. Achebe tells human stories that draw us inside a rich and diverse culture amidst radical change. Intellectuals in Europe and America, he argues, have used tactics of evasion. They seem to listen, but only carry on a brilliant monologue.[9] As a "missionary in reverse" to the West he has sought, well before the current fashion, to unmask the so-called "universal" tradition, revealing the lie about Africa that emanates from Western writers such as Joseph Conrad, whom he calls "a thorough-going racist".[11] Achebe thinks "the whole picture of Africa has been built upon small lies, big lies, distortions and blindnesses". Half the ancient Greek vocabulary comes from Africa, he points out, and African influences on cubism and Western art go unnoticed.[12] Talk of Western "migrations" ignores African migrations Westward through the slave-trade and others not forced. Western cultures have little respect for tribal customary law and practices, depite the high value customs place on communal life and interpersonal relationships. Conrad's *The Heart of Darkness*, not a great work of art for Achebe, symbolises this blindness, for it eliminates Africa as human.[12]

[6] Economic decline continues, fueled by corruption and leading to riots. See N.Y. Times, Int'l Sec., June 4, 1989, at 3 and N.Y. Times, June 19, 1989, at 34.

[7] Id. Stringent measures result in unrest, riots and further repressive measures.

[8] The Civil Liberties Organisation formed in Lagos in 1987 has documented "a continuous stream of cases illustrating shortcomings in Nigeria's judicial and law enforcement systems." Noble, "*In Nigeria, to Rot in Jail Is a Hazard of the Innocent*," N.Y. Times, Int'l Sec., June 29, 1989, at 5.

[9] A popular exception is S. Unger, *Africa: The People and Politics of an Emerging Continent* (3rd rev. ed. 1989).

[10] See his lecture at Amherst in 1975, in C. Achebe, *Hope and Impediments*, Selected Essays (1988).

[11] See also M. Bernal, *Black Athena: The Afro-Asiatic Roots of Classical Civilisation* (1987) (arguing that Greek civilisation owes a debt to African and Middle eastern cultures).

[12] "That this simple truth is glossed over in criticisms of his [Conrad's] work is due to the fact that white racism against Africa is such a normal way of thinking that its manifestations go completely unremarked. If you say to the West this is unacceptable, they will be shocked. Some will even resist it: they'll be kicking and screaming all the way, even as you drag them through the facts. . . . Can nobody see the preposterous and perverse arrogance in thus reducing Africa to the role of props for the breakup of one petty European mind?" Interview with Chinua Achebe, by Zia Jaffrey, in *Elle*, Oct. 1989, 208–210. In novels, short stories and other books, Achebe and other contemporary Nigerian writers seek their own authentic voices for

The transition to the Third Republic, from military to civilian government proceeds under a Constitution newly revised by the Constituent Assembly that President Babangida appointed in May 1988.[13] Nigeria faces these most difficult problems at the very time when all eyes are on events elsewhere, driven again by Western Values. The constitutional crises and opportunities, as in all great historic moments there or elsewhere, evoke the simplest and most profound purpose of all governments ensuring human security while protecting human freedoms and providing for human needs and dignity. Similar problems in different forms plague even the most advanced constitutional democracies. While the export of human rights and democracy has seemed a trade monopoly of the United States and the West,[14] a new Europe and the Americas might learn from the other direction, seeing the world through constitutional lenses different form their own. Unlike Eastern Europe with its revolutions that are ideologically comfortable to the West, Africa offers a fresh perspective closer in many ways to ethnic and national structures of the Middle East, especially in the influence of Islam, in confronting the problems of nations and power, of security and freedom.[15]

their own land. One way to get attention, they have found paradoxically, is to exclude. Nigerians now are their own judges, on their own, seeking their own way. See in particular, C. Achebe, *The Trouble with Nigeria* (1983) ("simply and squarely a failure of leadership").

[13] Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1989, Decree No. 12, Suppl. to Official Gazette Extraordinary No. 29, Vol 76, May 3, 1989—Part A, A 61. The revised Constitution as promulgated and scheduled for coming into force by October 1, 1992, is published as part of the Decree No. 12, at A 71 [hereinafter cited as Nig. Const. of 1989]. See also Decree No. 13 (dissolving the Constituent Assembly), id. at A 215; Decree No. 14 (transition to civil rule and lifting the ban on politics) id. at A 217.

[14] See Lester, *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537 (1988); Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 Am. Univ. L. Rev. 1, 32–64 (1982).

[15] For example, see Richard Joseph's essay, *Glasnost for Africa*, N.Y. Times, Dec. 28, 1989, at 23: "The majority of African states have been implementing for several years the same deep structural reforms in their economies that Eastern Europe is now undertaking: greater reliance on the market in setting prices and exchange rates, the closing or privatisation of inefficient state enterprises, the reduction of subsidies and swollen bureaucracies and the encouragement of private investment, both domestic and foreign". Joseph wants a Western version of glasnost to be applied to Africa. "The United States and the world community should insist that constitutional government and the rule of law be restored to all the people of sub-Saharan Africa and extended to those still oppressed by white minority rule in South Africa." He points out that demands for democracy, accountability and pluralism by the African people inevitably are greeted with "harsh repression" and he urges no financial assistance without glasnost. "Let us hear the true voices of the people. Let us hear more from Africa's silenced Lech Walesas and Vaclav Havels. Americans usually respond to such voices—but first they must be heard."

To criticise the muted voices from Africa and to ask where they are reinforces the point Achebe is making, supra note 12: Anyone travelling to Africa curious enough to listen hears many powerful voices. Achebe would have them speak more effectively to a few like the singer asked to dance to a deaf audience. Through this metaphor of difference, we might listen again to the words of Obasanjo (quoted by Joseph to make his quite different point): "We are amazed to the point of frustration as we watch substantial amounts of funds being appropriated for economic reforms in just a few countries of Eastern Europe, while we continue to wait for the West to honor its far more modest financial commitments" already made in Africa.

We shall see stark difference in the structures and values in each constitution. There are also similarities, but we see them more clearly only in the light of difference, when we cease viewing human rights and democracy for Africans, for example, as a universally-derived Western gift. The method also employs difference as a strategy to aid in seeing common ground in the human condition. Respecting each country's culture does not deny the possibility of common aspirations or common constitutional freedoms, a common fallacy leading from cultural relativism. Those freedoms most important to contemporary societies of different kinds and at different stages of development then might be seen as reciprocal gifts, even if universal moral truth is neither denied nor asserted as knowable.

After comparing the ways each country chooses to contain factions and corruption of civil society or community, this article proceeds to compare the American constitutional experience conveniently symbolised by Franklin Delano Roosevelt's "four freedoms" with similar core freedoms in the newly revised Nigerian Constitution of 1989 and, in turn, with various international human rights norms and the African Charter of Human and Peoples' Rights.

FACTIONS, CORRUPTION AND STRUCTURE

Factions can be described empirically in the culture of any society, even though the Madisonian version is a product of the Western Enlightenment. Factions are groups of people each bound by common passion such as communal loyalty, ethnicity or interest that advances their particular goals arguably at the expense of others (requiring individual or group sacrifice should the faction prevail nationally in a rule of law) or the common good (requiring aggregate long term interest to yield to the short term interest of a dominant faction or elite).[16]

The American Constitution organises unified power while avoiding tyranny, political disintegration and the corruption of power by structuring power to contain the evils of factions. Through limiting terms of elective office, distancing representatives from the citizenry and checking ambition against ambition, the founders subjected potential corruption of republican officials to popular scrutiny and contained if not prevented it outright.

In contrast, Nigerian traditions have little in common with the Western traditions of a good society grounded in the Enlightenment revival of reason and balance between republican civic virtue and individualism (both rational and romantic). In Nigeria, the problem of factions arises mainly from change in the bonds of ethnic and customary personal relationships

[16] See, for example the description of Nigeria's social order, *Elites and Social Stratification in Nigeria, A Country Study*, 113–36 (H. Nelson, ed. 4th ed. 1982) (emphasising the three ethnic tribal groupings, the Hausa, Yoruba and Ibo, and the absence of class consciousness except through the emerging status acquired from secondary education with its access to privileged positions and professions).

without a corresponding shift to strong personal allegiance to the nation.[17] Corruption of officials easily follows. In more than thirty years of independence since 1960, Nigeria has had two periods of civilian rule, but six *coups d'etat*.[18] Corruption and vote-rigging in the last period of civilian rule, from 1979 to 1983, when the military ousted the civilian government of the Second Republic, led the Armed Forces Council of the succeeding military government to anticipate similar evils in planning elections to return to civilian government in 1992. After promulgating the revised Constitution by decree in May 1989, the military government took paternal steps to ensure a two-party system. The aim was to prevent weakness from a possible proliferation of parties and resulting contention.[19] The government decree also prohibits any person who has ever held elective office from serving in the next civilian government.[20] Apart from its structure of federalism and separation of powers, the Nigerian Constitution of 1989 also seeks to forestall the emergence of a ruling faction by continuing the mandate of the 1979 Constitution that "there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that government or in any of its agencies".[21]

Both countries, though culturally different, have used plurism and the structure of dividing and separating power to control corruption by self-interested factions seeking power adverse to the common good of each tradition. In Nigeria, the present military government seeks to consolidate institutional controls through national and local police and federalism, with courts of all levels. In the United States, the tradition of pluralism and civic virtue with federalism in the structure of government, tends to contain corruption.[22]

[17] Id.

[18] For a short popular version, see S. Unger, supra note 9, 121-161.

[19] Noble, *All Names Will Be New on Nigeria's Next Ballot*, N.Y. Times, Int'l Sec., Jan. 14, 1990, at 6. See 20. Legum, *The Coming of Africa's Second Independence*, 13 The Washington Quarterly 129, 134-39 (1990) (one-party system of rule in Africa, especially in Nigeria, has failed). Similar concerns were expressed during the Obasanjo military government in its efforts to insulate the new civilian government under the 1979 Constitution from conditions leading to the military coup in 1966: proliferation of political parties, constitutional issues, north-south and ethnic conflicts, corruption, internal strife and demands for new states. Supra note 17 at 220, 269-75. The Shagari civilian government was unable to contain the pressures, and the military *coup* of 1983 ousted the four-year old civilian government. A bloodless *coup* in 1985, also military, by the current President, General Babangida, promised a return to civilian rule under a revised constitution.

[20] Noble, supra note 20. President Babangida, the military governor, announced in October, 1989, as he outlawed all political parties except the two sanctioned for elections, that he was determined to diminish the traditional pressures of tribe, religion and money. "This Government will not allow itself to fail in its duty by succumbing to the manipulation of those who want to use cheap and dangerous religious and ethnic loyalties for selfish political ends. We will not serve our people yesterday's food in glittering new dishes." In driving the thirteen other parties underground and stopping most political activity, President Babangida justified the measure by tying the tendency to corruption to "the traditional pressures of tribe, religion and money, which still exert great influence here". Id.

[21] Nig. Const. of 1979, art. 14(3); Nig. Const. of 1989, art. 15(3).

[22] Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984); but see Nelson, infra note 24.

A. Historical Conditions: Separating and Dividing Power

In the political debates prior to ratification of the United States Constitution in 1787, the argument against factions was particularly effective for the pro-constitution forces. They justified the union of thirteen states with separated national powers by explaining the danger to civil government of powerful special interest groups or factions that corrupt civic virtue of the republican polity.[23] The fear that factions corrupt government found expression in Hume's skepticism about the human propensity to use power virtuously when wielded ostensibly for the public good by representatives of the people.[24] Moderating the corrupting influence by separating and dividing counterpoised power centers might not affirm public virtue, but it would check the tendency of a party or branch to assume absolute power by rewarding one's friends and punishing one's enemies.[25]

Tradition in Nigeria draws less from a democratic polity with representatives engaged in deliberation or bargaining and more from the ideal-type of the ethnic community under a single wise king or chief who embodies and dispenses local custom.[26] More closely akin to a Homeric tradition of kings than a Periclean tradition connecting citizens of the polis and public leader, the ancient communal and ethnic conditions in what is now Nigeria yields

[23] The Federalist No. 10 (J. Madison). For a discussion of the meaning and importance of republicanism, see Shallope, *Republicanism and Early American Historiography*, 39 William and Mary Q. 334 (3rd ser. 1982).

[24] Factions played an important role in the distinction between moral norms of right and those of economic regulation in eighteenth-century pre-revolutionary America. Professor William Nelson has traced the history of the political structure during this crucial period by considering the distinction through the operation of factions (a distinction later articulated in the famous footnote four of Carolene Products). He argues that this history illuminates the deepseated political structures and values that continue to account in part for greater deference for majoritarian economic regulation than for moral. W. Nelson, *The Eighteenth Century Constitution As a Basis for Protecting Personal Liberty*, in Constitution and Rights in the early American Republic (W. Nelson & R. Palmer, ed.) 15, 18, 42–52 (1987). Nelson suggests "that eighteenth-century American governments legislated freely to promote economic growth and to distribute the gains of growth to favoured factions. Moral norms, in contrast, could not be imposed by legislation simply because dominant groups favoured them. Morality could be translated into law only when the community had arrived at a substantial consensus about its rightness" Id. at 18. This understanding of factions informs the need for moral consensus before legislating (the opposite of the modern court's deference to the majority unless there is a moral consensus about a fundamental right) and the check on corruption through separation and division of powers.

See also, D. Farber & S. Sherry, A History of the American Constitution (1990).

[25] The Federalist No. 51 (J. Madison).

[26] See Asiedu-Akrofi, *Judicial Recognition and Adoption of Customary Law in Nigeria*, 37 Am. J. Comp. L. 571 (1989); Obasanjo, supra note 6; Butler, *The 1979 Constitution of the Federal Republic of Nigeria and the Constitution of the United States of America: A Historical and Philosophical Comparison*, 30 How. L. J. 1025 (1987). But see H. Nelson (ed.) supra note 17 at 114: "Nigerians—even those of a given ethnic category—do not have a unanimous view of the worth of emirs, obas (kings), or of occupations requiring a modern education. Some may defer to the power of a wealthy businessman or an educated bureaucrat but regard the incumbents of such positions as less worthy of deference than an oba or vice versa . . . . [M]any women among the Kanuri are not persuaded that maleness confers higher status, although they may be powerless to change the system in the near future".

more readily to corruption and faction when upset. Newly independent Nigeria ostensibly adopted American separation and division of powers model in the 1979 Constitution and it continued into the 1989 Constitution. The structure in fact, however, weakened traditional ways of dealing with factions through ostracism or community shame and has not yet reproduced the hoped-for modern American equilibrium. The intellectual Marxist ideology favoured by many elites discounted the liberal state's checks and balances that drew boundaries between a limited public domain and an energetic private sector. Critical Marxist rhetoric often appears in print in Nigeria, despite clear recognition that Marxist economics has led to as much corruption in the public sector by socialist elites driven by their own self-interest as by capitalist elites in theirs.[27]

The goal of weakening local or ethnic loyalties in Africa and transferring them to national unity with renewed allegiance and protection poses the twin problem of nation-building and development. The architecture of both Nigerian and American Constitutions seeks equilibrium in power relationships among many groups to achieve national unity. Even with similar aspirations for balance in power, different political cultures and traditions produce different means of development and modernisation. An early structure of private property and liberty in the United States framework with constitutionally protected private spheres for economic activity has an entirely different meaning in post-colonial Nigeria. After an initial period of central control over the economy, including land reform measures ostensively placing all land under state ownerships or control, Nigerian policy now prefers privatisation. Possession, a community-bound tradition, of land and things became the basis of new property with a glass from English common law on transferring in effect title. Reduction of the parastatal state-owned enterprises proceeds apace in favour of private capital investment needed from outside. The culture of communal property for political purposes while creating a new private enterprise economic culture for development and modernisation.[28]

Federalist-drawn structures also differ in each constitution. The American Constitution in dividing the popularly delegated powers between the expressed powers of the national government and the reserved powers of newly-independent individual states, retained the incentive for development in the people where commerce and civil society customarily had abided. The Civil War Amendments increased the national power but did not change its character. The Nigerian Constitution of 1979, on the other hand, emerged after a bloody three-year civil war in which some but not all of its nineteen

[27] In most of Africa, according to this rhetoric, the hegemonic factions of the bourgeoisie have resorted to political violence of a scale and kind that virtually amounts to fascism. While this massive political violence has enabled the bourgeoisie to hang on, the argument goes, it is at the same time deepening and radicalising the contradictions between them and the masses. C. Ake, Revolutionary Pressures in Africa 37 (1978).

[28] Legum, supra note 20, at 132.

states had prior territorial autonomy and few had a tradition of development.[29] Ethnic influence had been powerful at independence, but offered little incentive for development once the economy was centralised. The three African ethnic cultures remained largely non-territorial, even if concentrated in certain regions.[30]

While the second Nigerian republic had nineteen states, the 1979 Constitution creating them patterned the structure after the federal system of the three regions (reflecting ethnic or religious cultures) that retained in the first constitutional grant by the British.[31] The Constitution of 1989 adds two more states for a total of twenty-one (plus the Federal Capital Territory).[32] While allowing ethnic culture, each Nigerian constitution has sought to break ethnic allegiance and modernise the country through a national economy, including state trading of traditional products.

In the United States, the thirteen states previously had declared themselves independent and reserved all sovereign powers that their representatives speaking for an entire people had not expressly delegated. Even before independence, the English colonies haled congresses with themselves and Indian tribes to protect common interests.[33] Incentives for enterprise and expansion abounded, especially on the frontier where development was a way of life.[34] Hamiltonian national commerce competed with the Southern mercantilism economy dependent upon European markets.

In the Nigerian Constitution of 1979, the Constituent Assembly created or revised a comprehensive structure of government, almost out of whole cloth, with rights and duties spelled out for everyone, from the top down. The federal government, the states and the citizens all have rights and duties, as enumerated in some detail in the Constitution. No others are retained expressly. All essential relationships are constitutional and organic. The old communal relationships are transformed into those for the nation as a whole. While the culture of village community has been preserved, the nation-building process directly challenges this tradition, seeking organically to transfer it to the nation, while keeping alive local custom and organisation.

The framers of both Nigerian and American constitutions separated national power among three national branches. While Nigeria separated powers after a brief experiment with a parliamentary system that formed the base for its first constitution, the new political structure of the second republic in 1979 favoured a much stronger executive in fact than the United States adopted out of suspicion both of Monarch and Parliament. This revision

[29] H. Nelson, supra note 16 at 120–22.

[30] See Sinha, *The Axiology of the International Bill of Human Rights,* 1 Pace Y. B. Int'l L. 21, 45 (1989).

[31] Crowder and Abdullahi, infra note 96, at 188–89.

[32] Nig. Const. of 1989, art. 3(1) (the States of Akwa Ibom and Katsina added to original 19).

[33] R. Frothingham, *The Rise of the Republic of the United States* 118–121 (8th ed. 1902).

[34] J. Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956). See especially Chapter 1.

continued under the 1989 Constitution under the watchful eye of what appears to be a reappearing phenomenon, a transitional military executive ostensibly guarding against civilian corruption.[35] The very reason for a strengthened executive branch under a modified separation of powers system gives legitimacy for a strong leader, often military from the ethnic chieftain cultures. Even in the United States a strong monarchical tradition resides in the Presidency.

B. The Judiciary and the Political Branches

The judicial branches in each constitution, while separate from the other branches, operate differently. The American Supreme Court heads a separate and independent judicial branch with power of judicial review it exercises with varying degrees of restraint upon the national legislative and executive branches and upon the states. The Nigerian judicial branch while independent remains more differential to the political branches, because judicial review of legislation and state action does not have the same status as in the United States.[36] The executive exercises greater control over appointment and termination of judges. The appointment or recognition of various courts in addition to the federal courts remains explicit. State high courts, courts of appeal, traditional and customary courts and Sharia courts all operate under the provisions of the comprehensive Constitution. Under emergency decrees of the military government, pending transition under the 1989 Constitution, only the judicial branch still operates quasi-autonomously. While the Constitution permits such emergency decrees, the courts still might order release of a person held if not properly charged, if the matter reaches the courts. A problem, however, is that not all arrests reach the courts; nor are the judges inclined to find decrees invalid.[37] The extent of the power of judicial review of the constitutionality of statutes or executive orders remains uncertain.[38]

Judges in both state and federal courts at all levels in Nigeria appear well-educated and respected.[39] They are behind in case-load, have inadequate

[35] See Obasanjo, supra note 6 at 4–6. See also, C. Mwalimu, *The Influence of Constitutions on the Development of a Nation's Law and Legal System; The Case of Zambia and Nigeria,* 8 St. Louis U. Pub. L. Rev. 157, 176–77 (1989).

[36] Okere, *Judicial Activism or Passivity in Interpreting the Nigerian Constitution,* 36 Int'l & Comp. L. Q. 788 (1987). For a description of the juducial system in Nigeria, see Aguda, *Development in the Adjudicatory System* in the Challenge of the Nigerian Nation: An Examination of Its Legal Development, 1960–1985 (T. Aguda ed. 1985).

[37] See *Locked away in an Island Prison,* The Guardian, Sept. 18, 1988, at 5; Dept. of State, Country Reports on Human Rights Practices (1988), Brooke, *Nigerian Leader's Political Agility Keeps Trouble at Bay and Him in Power,* N.Y. Times, Aug. 11, 1988, at A6, col. 1.

[38] For a discussion of this issue under the Nigerian Constitution of 1979, see T. Aguda, *Development in the Adjudicatory System* in The Challenge of the Nigerian Nation: An Examination of Its Legal Development, 1960–1985 (T. Aguda ed. 1985) and C. Okpaluba, *Challenging the Constitutionality of Legislative Enactment in Nigeria:* The Factor of Locus Standi, 1982 Public Law 110 (1982).

[39] Judges in Nigeria have to deal with a complex body of law, because different yet equally valid systems of law exist. See Salamone, *The Clash Between Indigenous, Islamic, Colonial and Post-Colonial Law in Nigeria,* 21 J. Legal Pluralism 15 (1983) and J. Anifalaje, *Judicial Development of Customary Law in Nigeria,* 9 J. Legal Hist. 40 (1988).

support and often write their own summaries of testimony by hand. Yet, in the Anglo-American tradition, they are highly competent and contribute greatly both to social stability and to a sense of hope for at least the emerging Nigerian middle-class. Elite judges appointed by the federal and state executives seem to steer clear of scandal and maintain independence and legitimacy.[40] Reports of corruption in the press seem more closely associated with linking officials and business opportunities or bribes than with corruption of judges.[41]

The press reports controversial law cases as if the courts were accepted by the people. Quite clearly, however, creation of more positions of judges and more efficient court administrators will be necessary if the courts are to fulfill a major role in maintaining order and justice in a complex, highly customary and decentralised social structure. In customary societies courts or councils in one form or another historically have maintained some modicum of social order in resolving the most troublesome of everyday disputes.[42] Tension remains nevertheless between traditional cultural expectations and modern change such as the economic. administrative and legislative measures required for building and governing a modern nation. Social policies favoured by courts in helping to adjust to change could prove greatly advantageous to constitutional government. Perhaps for this reason, among others, the military government shows deference and reluctance to interfere with or to manipulate the courts overtly.

Nevertheless, the military government appeals to populist sentiment to hold the courts politically accountable in the time of transition to civilian government and sometimes intervenes. In public addresses, the state military governments may press judges (with the same rhetoric used by politicians in the United States) to simplify the law and make it less technical; to protect the human rights of the average citizen against violence and corruption; to get by without more scarce resources of court personnel and office space; and to set examples against corruption and crime by prompt convictions and severe punishment.[43] The military government shrewdly keeps the courts from too activist a role or from too much power.

Three executive branch interventions into legal process have been effective. First, the President, General Babangida, withdrew the issue of Sharia or Muslim law from the Constituent Assembly's agenda during the recent revision of the 1979 Constitution. That Constitution banned state

[40] See generally, R. Ola, *Introduction to Nigerian Administration* (1988).

[41] Outright pay-offs of political friends were seen to displace the traditional custom of dispensing favour to one's supportive tribe or elders. This cultural shift and the tragic dilemmas posed for the new Nigerian elites can be seen best through novels such as Chinua Achebe, *Things Fall Apart* (1958); *No Longer At Ease* (1960); *A Man of the People* (1966); and *The Anthills of the Savannah* (1987). The stories of Ben Okri likewise expose the old myths used to keep the new generation in its place and show personal life and corruption in modern Nigeria. See, especially, B. Okri, *Stars of the New Curfew* (1988).

[42] Supra note 2, references to primitive law sources.

[43] Address of Col. Robert N. Akonobi. Military Governor of the State of Anambra, Second Anambra Law Conference, Enugu, Nigeria, 7–9 December 1988.

religion and protected religious freedom, but it also empowered the states to establish Sharia courts to resolve appropriate disputes using Muslim personal law.[44] The review and possible revision of these provisons alarmed many of the 497-member assembly. Negotiating strategies emerged to seek advantage to both Christian and Muslim constituencies. Political commentators speculated that if the President had not withdrawn the jurisdiction under his power to control the agenda, the Assembly would have reached a compromise consensus along the lines of the 1979 Constitution. Others believed the President acted prudently and astutely to avoid a potential impasse that could have erupted in violence between Christians and Muslims.[45] Whichever view is the better one, the courts, ultimately the Supreme Court of Nigeria, will have to work out any conflicts, one case at a time, thus diffusing potential violence between religious factions. In effect the President's intervention and popular acquiescence legitimated the old constitution's provisions and strengthened the courts.

A second intervention occurs when the government holds the press to account for seditious reporting or violations of the *Official Secrets Act*. Reporters have been arrested without charge both for sedition and for passing on official secrets often leaked about corrupt officials.[46] Typically, several months pass, and before the matter reaches a court the reporter is released.[47] These moves have led to self-censorship, for reporters fear detention without charge. The *Official Secrets Act* prevents their publication by anyone, reporters, citizens or officials alike. And the Constitution expressly allows prohibitions against disclosure of information received in confidence.[48] The government recently has used economic crime charges to imprison a reporter for a tough story, charging but never trying or proving violation of the Act.[49] Reporters and editors, therefore, have to calculate their risks of offending the government, self-censorship under the rubric press responsibility.[50] Neither as abusive as the previous civilian governments nor as flagrant a violation of human rights as in countries where people simply disappear, the intervention is both effective and limited. Paradoxically, this auto-limitation increases the legitimacy of lesser

[44] A useful pamphlet widely circulated in non-Muslim Nigeria explains the tension between Christian and Muslim and the basics of Sharia in the Nigerian legal system. D. Byang, *Sharia in Nigeria: A Christian Perspective* (1988).

[45] See May, *Nigerian Military Is Reigning in One of the Freest Presses in Africa,* N.Y. Times, Apr. 30 1984, A7, col. 1; *A Voice out of Africa,* N.Y. Times, Sept. 18, 1983, §6 (Magazine), at 92, col. 2; and *Newswatch,* infra note 169.

[46] See Brooke, supra note 37; May, supra note 46; Cowell, *The Free Press in Africa: Walking a Narrow Line,* N.Y. Times, May 13, 1983, at A2, col. 3; and *A Voice out of Africa,* N.Y. Times, Sept. 18, 1983, §6 (Magazine), at 92, col. 2.

[47] See Brooke, supra note 37; May, supra note 46.

[48] Nig. Const. of 1989, art. 38(3)(a).

[49] Kraft, *Unlike Rest of Africa; Press Alive and Well in Nigeria,* L.A. Times, Apr. 28, 1987, at 1, col. 1.

[50] Journalists confirmed this in private discussion with the author and also added that no one knows how many people have been detained and then released before charges are brought.

interventions, for they may be less brutal than those by earlier civilian power struggles trying to eliminate rivals.

A third, more subtle, intervention to control the courts uses economic hardship. Despite reasonable availability to administrative officials, of physical office space, help, court personnel and supplies simply are not adequate for many judges. Also, requiring judges to retire at the age of 65, as if they were civil servants in the ministry of justice, increases the control over judges who may wish appointment or who might wish to continue to sit. Ironically, junior members of the bar have opposed this attempt to reduce the influence of experienced senior judges. One might have thought younger lawyers would like the measure, for it would create opportunities for upward mobility. It is seen instead as against the interests of younger lawyers who have learned from and respect senior judges and do not wish to appear before inexperienced and unpredictable new judges beholden to the government. Besides, some of the best and most "liberal" judges are the older ones well grounded in the Anglo-American common law tradition.

In contrast to the Nigerian Supreme Court, the United States Supreme Court is largely insulated from political pressure by lifetime appointments and a carefully cultivated tradition of judicial review and respect for the American Court. The American Supreme Court also controls its own docket so that by taking fewer cases it relieves pressure on resources that the Nigerian courts experience. The United States Supreme Court's function has been to exercise and to protect the judicial power. Under the supremacy clause, this function includes supervising the lower and state courts under the judicial power. In this constitutional structure for protecting civil and political liberties, change occurs slowly and may recede as it did after the Civil War and at present, with presidential apppointment of conservative justices. Ongoing procedural struggles in litigation often shape the substance of protection of important rights. The outcome of cases, for example, may depend upon the Supreme Court's rather technical determinations of whether it will follow or overturn a precedent, whether courts will review a statute facially or must await a specific litigated case, whether courts may use social science and statistics, whether burdens and standards of proof should shift, whether a statute is invalid for overbreadth or vagueness, and whether time, place and manner restrictions on free expression are permitted.

C. The Legislative Power and the Courts

The Nigerian National Assembly holds all legislative power under the 1979 Constitution and under the 1989 revision for the "peace, order and good government of the Federation. . . ."[51] Like its American counterpart, it consists of a Senate and a House of Representatives. The Constitution also

[51] Nig. Const. of 1989, art. 4.

allocates legislative powers of the states to their Houses of Assembly. Neither assemblies may oust the jurisdiction of the courts save as provided by the Constitution. The Nigerian separation of powers, as Chief Justice William Rehnquist, quoting an opinion of Justice Jackson wrote of the American structure, operates as a balance of each to the other, "the better to secure liberty".[52] The American structure ensures the possibility of limits to government through pluralism of public and private power centres: reserved and retained public powers and private rights. In contrast, the Nigerian Constitution itself allocates expressly all the positive guarantees of rights and duties and the positive responsibility of government to provide for the security and the welfare of the people.[53]

Government induced by self-interest or democratic pluralism maintains mutual checks on potential tyranny by the robust bargaining among factions. But bargaining as such does not necessarily lead to a good society. Under the American Constitution, this bargaining is sustained by the vision of civil society that creates intermediate institutions best ensured through freedom of expression, belief and religion. These values have led to the creation of private associations and affected elections. Programmes within the political branches at all levels of government especially are dominated by private market arrangements restraining government. In addition to the national powers sought by the two political branches, the Federal courts enforce Federal law through the judicial power brought to bear on actual cases or controversies, not abstract ones. It is fashionable for non-western commentators to view the United States' tradition ideologically from the perspective of "individualism and legalism" as anathema to ethnic, communitarian and customary traditions.[54] Seldom do European or other scholars, as Toqueville did, study the extent to which American state and local customs preserve co-operative and communitarian traditions.

It is true that Federal judges throughout the United States sit, divided into district courts and eleven circuit courts of appeal, and the District of Columbia and Federal circuits, applying Federal law. Where could there be more pluralism and diversity than in the fifty autonomous state

[52] *Morrison v. Olson,* 487 U.S. 654, [section VB of Chief Justice Rehnquist's opinion] quoting Justice Jackson: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity" *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[53] Nig. Const. of 1989, art. 15(2)(b) ("the security and welfare of the people shall be the primary purpose and responsibility of government"). But compare preamble to U.S. Constitution and the legislative power to provide for the common welfare. Crosskey, infra note 209.

[54] See e.g., Sinha, supra note 29 at 53 (arguing that a single-catalog of a Western-oriented approach to human rights follows from documents such as the American Declaration of Independence, espousing one dominant ideology, one historical unit, one single economic system, and one legal system administering rights). Sinha asserts, without empirical grounding, that the West believes that governments and societies are the same. One would have thought the West believes just the opposite.

governments also with courts in every county and with thousands of local governments with commissions, councils and courts organised from within to handle cases for 248 million people? Often state courts have concurrent jurisdiction over federal questions. Often overlooked are the autonomous communities of Native Americans, governed by an extensive system of local councils and courts, with jurisdiction over most of the country's one and a half million native American citizens. Nearly 150 of these local courts hear 200,000 civil and criminal cases annually, using indigenous code and custom. Indigenous local courts use different rules of evidence and procedure, although they must accord basic fairness in accordance with the United States Constitution.

The Federal courts in addition to state courts are available to all persons to protect the rights guaranteed by the Constitution, but varying customs and traditions control habitual life in most communities.[55] State courts may be more protective of community interests locally than are Federal courts. Arbitration and alternative dispute resolution systems constantly develop to meet private needs outside courts, and the Supreme Court has specifically encouraged party choice to direct cases from the courts. Settlement systems press those with disputes to settle out of court by negotiation.

When passion and interest drive factions to abuse power through collective majorities in communities, the Federal courts must use caution in overturning the local legislative bargains.[56] The tradition of respect for prior cases and the interest of preserving the judicial power from encroachment by the political branches through the technical instruments of court review ensures this stability and continuity in a human institution. The influence on this process of judicial review by any one of nine Supreme Court justices, who are appointed for life by succeeding presidents of different political philosophy, is gradual unless the dominant majority in important cases has been by one vote. In Nigeria, the turnover is greater, for judges must retire at the age of 65 with full pension and benefits. And a President has considerably more political discretion in changing a Chief Justice through inducing voluntary retirement or removal.[57]

The developing constitution in Nigeria uses separation of powers to strengthen the executive in relation to the national legislature. The military government justifies its ouster and discipline of civilian governments from

[55] Wiehl, *Indian Courts Struggling to Keep Their Identities,* N.Y. Times, Nov. 4, 1988, at B7, col. 3. See also Tso, *The Process of Decision Making in Tribal Courts,* 31 Ariz. L. Rev. 225 (1989); Duro Reina, 110 S. Ct. 2053 (1990); L. Tribe, *American Constitutional Law* 1466–74 (2nd ed. 1988); F. Cohen, *Handbook of Federal Indian Law* (1982). For an example of the operation of religious courts in the United States, see E. Firmage and R. Mangrum. *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints,* 1830–1900 (1988).

[56] See H. Nelson, supra note 16.

[57] Nig. Const. of 1989, art, 229(1) (subject to confirmation by Senate); art. 275 (mandatory retirement at age 65); art. 276 (1)(a) (removal by President with support of two-thirds majority of the Senate).

time to time by citing civilian corruption and election rigging.[58] Since Nigerian independence in 1960 only two civilian governments have held power, the most recent from 1979 to 1983. The corrupting power of factions and the confusion in structure inherited from the British seem thus placed under *de facto* guardianship of the military.

While the structure of separation of powers in the American and Nigerian constitutions are similar formally, the underlying political cultures within the two constitutions differ; yet, core values of freedom find deep roots in the separate traditions of each country. Viewing community values in the United States realistically through the eyes of the Nigerian tradition allows us to see the profound influence of local custom and tradition in both countries.

FORMAL CORE FREEDOMS: NEGATIVE LIBERTIES AND AFFIRMATIVE DUTIES

A. Common Origins: World War II and International Human Rights

While Eleanor Roosevelt deserves credit for much of the work leading to the monumental United Nations effort in adopting the Universal Declaration of Human Rights, it has earlier grounding in that terrible transition from economic depression to world war when human dignity itself stared into the abyss. In January 1941, just as World War II was racking Europe and about to engulf the rest of us, including Africa (indicating the unresolved break-up of the balance of power among colonial powers and their colonies), President Roosevelt gave his famous "four freedoms" message to Congress. He used the simplest expression invoking the most precious freedoms for all people threatened everywhere.[59] Recognising the traditions of liberty and equality, both ancient and modern, Roosevelt invoked four basic freedoms to form a core of human dignity binding people together powerfully enough to triumph over the destructive forces of totalitarianism.[60]

The core freedoms, later expanded and called the second bill of rights, are these: freedom of speech and expression, freedom of worship, freedom from fear and freedom from want.[61] Incorporated into the Atlantic Charter, these common ideals captured powerful human cries. They

[58] Noble, N.Y. Times, supra note 19.

[59] Eighth Annual Message to Congress, Jan. 6, 1941, reprinted in 3 The State of the Union Messages of the Presidents, 1790–1966, at 2875 (1966); Address by the President, 87 Cong. Rec. 44, 46–47 (1941).

[60] See Lauren, *First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations Charter,* 5 Human Rights Quarterly 1, at 4–5 (1983).

[61] No express mention of racial equality was included, however, in the 1941 address. See Lauren, supra note 60, at 4. By 1944, Roosevelt called for a second bill of rights providing expanded economic rights, "a new basis of security and prosperity . for all—regardless of station, race, or creed". Eleventh Annual Message to Congress, Jan. 11, 1944, reprinted in 3 The State of the Union Messages of the Presidents, 1790–1966, at 2875, 2880–81 (1966). See Sohn, supra note 14, at 32–33.

urgently responded to internal threats from economic depression and external threats to democratic government and liberties.[62] They helped galvanise the Allies' collective will. After repelling the external threat, the Great Powers joined with all other countries to extend these same principles into a United Nations Organisation, with a purpose of human dignity learned not only from moral philosophy but from the experience of total war in an impending nuclear age. The Charter gave Eleanor Roosevelt and other leaders a compelling legitimacy to craft a more detailed summary in the Universal Declaration of Human Rights.[63] Influencing the European Convention on Human Rights and Fundamental Freedoms, this experience also found its way into African and especially the Nigerian constitutions.[64]

The United States Constitution (with the Bill of Rights and Civil War Amendments) had grown from similar experience, but in a different world with problems arising from different circumstances. Roosevelt's conception of the four freedoms symbolised a transformation in the constitutional structure in the 20th century to cope with both internal and external threats to human dignity and democratic government. The Puerto Rican Constitution, adopted by compact with the Congress and observed by the United Nations, explicitly adopted many of these human rights guarantees. In effect, the freedoms were symbols that reconciled the negative limits on governmental power traditionally associated with the Western liberal state with the positive essentials to human dignity and freedom that come only from economic and social co-operation and productive activity led by a strong central government. The first two of Roosevelt's freedoms and the third in part negate governmental power. These represent the social compact tradition of self-government. Found in the Bill of Rights and the Civil War amendments, they reflect a certain anarchic streak embodied in the libertarian tradition constraining government action. They say nothing about positive rights or duties of citizens or of governments, leaving these rights and duties for autonomous individuals driven by self-interest and personal fulfillment (possibly with limited altruism) to work out privately or through representatives in the legislative process.[65] The final freedom,

[62] The Atlantic Charter also promoted self-determination, for Churchill the victims of Nazi rule, and for Roosevelt the colonial peoples. See Louis and Robinson, *The U.S. and the End of British Empire in Tropical Africa,* 1941-1951 in the Transfer of Power in Africa: Decolonization 1940-1960, at 27-55 (W. Louis and P. Gifford, eds. 1982).

[63] See J. Humphrey, *Human Rights and the United Nations: A Great Adventure* 31-77 (1984) for a personal memory of the drafting of the Universal Declaration of Human Rights, beginning with his own Secretariat draft that drew upon many drafts from countries and organisations, including one from the influential American Law Institute. Professor Sohn refers to a 1942 United States draft international bill of rights that included similar provisions. Sohn, supra note 60, at 35. See Lauren, supra note 60, at 7 for documentation of the drafting process inside the Department of State.

[64] Lester, supra note 14, at 541. They also found their way into the United States through, for example, direct influence in the Constitution of the Commonwealth of Puerto Rico.

[65] See Currie, *Positive and Negative Constitutional Rights,* 53 U. Chi. L. Rev. 864 (1986) (purpose of constitution to protect citizens from oppressive government not to secure from government affirmative services or entitlements).

freedom from want, and to some extent the third, freedom from fear, reflect a modern version of the nurturing, interdependent side of the state beginning in the Western tradition with the notion of a good society from Plato and Aristotle and in other traditions with the notion of the benevolent king or chieftain. Such a society prefers collective responsibility or co-operative activity by leaders and citizens with a modicum of civic virtue in the polity or ultimate responsibility for the community's well-being in the ruler. While it is fashionable to claim that human rights in the Universal Declaration and the United Nations Charter speak from a Western tradition, at the time Roosevelt addressed them he took a decidedly anti-colonialist stance[66] much revered in Nigeria before socialist and Marxist thought became predominant for a time. Most of the continent of Africa had been under colonial rule at the time of the "Four Freedoms" speech, and the impact of the international human rights experience, much of which began in the American experience, should not be discounted despite Afro-centric criticism of Western attitudes, as Professor Lillich has reminded us recently and Reid earlier.[67]

B. Different Structures and Philosophy

The constitutions of the United States and Nigeria differ in approaching positive and negative freedoms. In the United States, the remarkable power to strike down government action when confronted with one of the negative rights (or limitations upon power) rests with the Supreme Court and the inferior federal courts, widely respected as guardians of constitutional liberties. This negative restraint upon governmental power contrasts with the Nigerian enumeration of both positive rights and duties for citizens as well as allocating power, subject to express limitations upon both power and rights. In interpreting these more extensive rights and duties, the Nigerian courts have less certainty about their judicial review power. The enumeration of rights and duties in both the 1979 and 1989 Nigerian Constitutions sets out a more explicit (though not necessarily a more effective) political, economic and social philosophy of the relationship between individuals, groups, communities, and governments. And while the lengthy constitutional documents on 1979 and 1989 seem to combine the best in American, European and Third World political thought, African ethnic and customary arrangements form a powerful interpretive community for building governmental structures, under a strong executive. Former President Obasanjo explains this difference:

> "If our system and structure have to evolve like those of most settled industrial societies, it would take time but it must be our own, designed by ourselves for ourselves. . . . We opted for executive presidential

[66] See S. Unger, supra note 9, at 44.
[67] Lillich, supra note 1 at 59–61.

> system because our first constitution modelled on the British parliamentary system led to confusion and conflict at the critical time between the president who reigned and the prime minister who ruled; the Nigerian culture by and large admits only of the chief or the king who reigns and rules. The multi-national dimension of our society made a federal system of government imperative with nineteen states, where no state can hold the whole nation to ransom either because of its size, resources or strategic importance."[68]

Himself preferring a one-party political structure (with a clearly delineated role for the military) representing all the people both geographically and sectorially, Obasanjo insists also upon human rights and respects for human dignity. The sum total of constitutional rights and duties need to be spelled out between ruler and ruled. Gross abuses by government need to stop, but "citizens also have to be made to understand that there are sacred obligations, duties and responsibilities which they have to perform towards the corporate existence of their countries, the welfare of all and their own individual well-being".[69] Freedom of expression must be preserved but without detriment to the existence of the state. In effect, the strong executive acts as a guardian in determining this balance favouring national unity, much more effectively than do the courts.[70] In the recent military government the courts have been functioning, as explained above, although under emergency decree of that government.

In contrast to expectations both of positive entitlements and of duties of citizens in Nigeria and of the government, the American structure symbolises the underlying political theory of the negative "liberal" or limited state. The theory and practice negate total constitutional power in the positive state. Thus, no duties emanate to citizens from the constitution. While allowing maximum freedom in private individuals and groups to conduct transactions among themselves, Congress and the states have the political power and responsibility to provide for the public welfare by law in positive ways, creating rights and duties. One can find in the American Constitution no written affirmative human rights guarantees flowing from government to individuals (other than the pre-ambular provision to insure justice and provide for the general welfare) nor is any positive duty placed upon any or all the three branches to provide human services of the same kind provided in detail in the Nigerian Constitution and its schedules.[71]

[68] Obasanjo, supra note 5, at 5.

[69] Id. at 6.

[70] Under Obasanjo's military rule the federal central agrarian elites became national agencies. Later, Babangida continued the centralisation by professionalising and rationalising the civilian bureaucratic elite. Ola, *A Profile of the Higher Public Servant in the Nigerian Government,* 123 Int'l Soc. Sci. J. 49 (1990).

[71] A most recent judicial recognition of this political theory is articulated explicitly by Chief Justice Rehnquist in the case of *DeShaney v. Winnebago County,* 109 S. Ct. 998 (1989) holding that the Constitution does not place an affirmative obligation upon state and local governments to protect their citizens against harm from private individuals. The failure of a county

Even the Commerce Clause, Article IV's Privileges and Immunities Clause and the Fourteenth Amendment's Equal Protection Clause work negatively in this sense by tying legislative outsiders and minorities to legislative majorities in preventing legislative classifications that unfairly discriminate in creating affirmative rights and duties.[72]

The American founders' skepticism toward any governmental power controlled by faction, especially that of a temporary majority, or by an absolute monarch explains the difference between the two constitutions. Through saying what the state cannot do, as well as conferring only those powers expressly delegated to separated branches of government, the founders tried to reflect a retained right in the people to guard against the tendencies of government to accumulate total power. Skeptical about whether those in power would respect the reserved domain, Madison drew from Montesquieu and Hume diffusion techniques to assure the control of factions through limits and checks, the division and separation of powers, pitting ambition against ambition.[73]

Nonetheless, human rights both of the negative constitutional type, such as those listed in the Bill of Rights, and of the affirmative social and economic legislative kind have evolved over time in the United States.[74] Some reflect the fierce liberty of pre-Revolutionary colonists as well as pioneers who in the last century crossed the American continent to the Rocky Mountains and beyond and made the desert and prairies blossom. Part of the reason lay in the colonies' previous experiences, often forgotten. For 160 years before the American Revolution, Pilgrims and explorers and those seeking adventure or a new life populated the colonies under charters from the crowns of England and of other countries. Life in the colonies was religious, quarrelsome and anarchic.[75] With distance from Europe and with their own unique experiences with the native population and each other through various charters, privileges and immunities and rights of

social services agancy in Wisconsin to protect a boy from an abusive father even after notice of abuse did not violate the boy's rights under the 14th amendment not to be deprived by the state of life or liberty without due process of law. Chief Justice Rehnquist writes that the purpose of the Due Process Clause of the Fourteenth Amendment "was to protect the people from the State, not to insure that the State protected them from each other". Id. at 1003. The states have no affirmative constitutional duty to act in these circumstances. While the states are free to enact positive laws imposing liability upon welfare officials or other officials for failure of duty, "they should not have it thrust upon them by this Court's expansion of the Due Process Clause". Id. at 1007.

[72] See J. Ely, *Democracy and Dissent: A Theory of Judicial Review* 80–88 (1980).

[73] 2d. 80, 93.

[74] The Northwest Ordinance of 1787 imposed an affirmative duty to maintain religion and morality. Both state and federal governments have made legislative provision for affirmative duties such as the Medicare, Medicaid, the Food Stamp programs. Some state courts have held, based on state constitutions, that their states have affirmative duties. See e.g., *Rose v. Council for Better Education,* No. 88-SC-804-TG, slip op. (Ky. Sept. 28, 1989); *Edgewood Indep. School Dist. v. Kirby,* 777 S.W. 2d 391 (Tex. 1989) (Kentucky and Texas courts, respectively, holding that the state constitutions imposed an affirmative duty on the state governments to create and support free public schools).

[75] O. Handlin & L. Handlin, Liberty and Power: 1600–1760 (1986).

Englishmen through the ancient constitution, the human communities in the new world were already accustomed to greater diversity and freedom than Europeans with their collective memories of recent feudal relationships of protection, allegiance and service.[76]

We may contrast this American structure, a unique product of the Enlightenment anti-authority philosophy of human reason and social contract with the Nigerian Constitution of 1989, claimed by some to be a direct descendant of the post-four-freedoms era combined with the strong leader's social benevolence. As described above, the Nigerian Constitution is a comprehensive positive charter of relationships, duties, entitlements and powers both of governments of all kinds and of citizens. The distinctive European colonial tradition that influenced this constitution (generally letting local administration govern subject to colonial decree, unless contrary to natural justice) came to embrace the new international human rights tradition of a positive constitutional structure providing affirmative rights and duties, in effect a compact between a new government and citizens. While espousing separation and division of powers structurally similar to the American Constitution, the Nigerian Constitution is organic and relational. It provides a detailed, almost code-like enumeration of powers,[77] principles of state policy,[78] citizenship rules,[79] affirmative fundamental rights,[80] negative limitations to protect civil liberties,[81] and directives to the state for enumerated political, economic, social, eductional and cultural objectives.[82] Affirmative duties are placed not only upon the state to guarantee these human rights, but upon every person as well. All persons have the constitutional duty to accord human rights to others.[83]

[76] Yet, as Professor John Phillip Reid reveals, the rights, privileges and immunities of Englishmen as against government under their ancient constitution and preserved in colonial charters were invoked as grievances against the more radical British movement toward parliamentary supremacy (as urged by Bentham and Austin) over internal legislation, taxation and representation of the colonies. J. Reid, *Constitutional History of the American Revolution: The Authority of Rights* 211–237 (1986).

[77] Nig. Const. of 1989, arts. 4–13.

[78] Nig. Const. of 1989, arts. 14–24 (obligations of government, policy objectives, cultural policy, obligations of the mass media, national ethic and duties of the citizen).

[79] Nig. Const. of 1989, arts. 25–31.

[80] Nig. Const. of 1989, arts. 25–31 (Fundamental Rights). Patterned after human rights covenants and the 1979 constitution, these articles use language of positive right or entitlement: "Every person has a right to life" (art. 32; identical to old art. 30); "Every individual is entitled to respect for the dignity of his person" (art. 33(1); identical to old art. 31(1)); "Every person shall be entitled to his personal liberty" (art. 34(1); identical to old art. 32(1)); "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected" (art. 36); "Every person shall be entitled to freedom of thought, conscience and religion" (art. 37(1)); "Every person shall be entitled to freedom of expression" (art 38(1)); "Every person shall be entitled to assemble freely and associate with other persons" (art 39).

[81] Id., arts. 30, 31, 32, 33, 39, 40, and 42 (special jurisdiction for redress before High Court).

[82] Id., Chapter II (Fundamental Objectives and Directive Principles of State Policy), arts. 14–22.

[83] Article 1(1) states: "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria". Id.

Rejected is the political tradition of a negative liberal state that presumes pre-existing liberty expressed in common law and natural law for civil society.

C. Constitutional Differences and International Human Rights

The Nigerian Constitution is thought to reflect the profound influence of the human rights instruments emanating from the United Nations and regional charters as especially influenced in turn by the American, French and Russian revolutions. These instruments express the best normative aspirations of both the libertarian and the positive social good models that the international community can draw upon. It is revealing to note, however, that neither Nigeria nor the United States has made formal commitment to the most important of the human rights conventions.

At least four human rights treaties signed and submitted by President Jimmy Carter in 1978 are still before the Senate today. They are: the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the American Convention on Human Rights.[84] The United States, too, has signed but not yet ratified the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Nigeria has taken no action with regard to the Covenant on Economic, Social and Cultural Rights or with regard to the Covenant on Civil and Political Rights. Nigeria has signed and ratified the convention on discrimination against women and has acceded to, but not signed, the convention against racial discrimination.[85] Nigeria has signed but not ratified the convention against torture.[86] In addition, it has ratified the

[84] Message of the President Transmitting Four Treaties Pertaining to Human Rights, S. Exec. Doc. No. 95-C. D. E. & F., 95th Cong., 2d Sess. (1978).

[85] Although Nigeria has ratified the convention on the Elimination of Discrimination Against Women, the much criticised practice of female circumcision still persists in its most severe form, excision of the clitoris and partial sewing together of the sides of the vulva, in Nigeria. Perlez, *Puberty Rites for Girls Is Bitter Issue in Africa,* N.Y. Times Int'l, Jan. 15, 1990, at 4, col. 3. Two articles of the convention appear particularly apropos with regard to this practice. Art. 2(f) obligates the signitory states "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women". Art. 5(a) requires the state "[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" The African Charter, art. 18(3), also imposes an obligation on the states to "ensure the elimination of every discrimination against women". The circumcision practice is founded on the notion that women should be virgins at marriage and that sexual pleasure is the sole prerogative of men. Many women believe that circumcision is necessary to be accepted by other women and in order to marry. Perlez, N.Y. Times, supra. For a thorough discussion of the practice of female circumcision in various countries, see Slack, *Female Circumcision,* 10 Hum. Rts. Q. 347 (1988).

[86] United Nations, Multiliteral Treaties Deposited with the Secretary-General: Status as at 31 December 1988 (1989). For a list of human rights treaties the U.S. has ratified, see Strossen, Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal

African Charter on Human and Peoples' Rights. Just recently the United States ratified and implemented the Genocide Convention.[87] Nigeria has not yet ratified it.

Formally, the claim that these human rights instruments reflect language similarity and universal values whether in African constitutions or in Western traditions may have appeal. In cultural context, however, nothing could be further from the truth. The Nigerian structure of separation and division of powers, deceptively similar to that of the United States, rests upon an entirely different political attitude towards government. As Obasanjo explained above, the constitutional benevolent ruler and traditional commercial custom mean government in Nigeria, while in the United States the liberal or contractarian tradition of legislative bargaining under negative limitations of rights forms the idea of legislation and government, with suspicion of benevolence. The idea of obligation, which the law imposes on the state to furnish positive guarantees of basic human need and fulfillment, flows in Nigeria as a distinct social fact, more similar to a European tradition.[88] It is not much an American notion. The African view of law as consisting of ethnic and customary

Process Analysis and Proposed Synthesis, 41 Hastings L. J. 805, 811 n. 21 (1990). For a list of human rights instruments to which the U.S. is not a party, see id. at 812 n. 26. See also, International Human Rights Instruments: A Compilation of Treaties, Agreements and Declarations of Interest to the United States (R. Lillich ed. 1986, looseleaf updated annually).

[87] An event long overdue occurred when President Reagan signed into law a very weak bill barely implementing ratification of the United Nations Convention on the Prevention and Punishment of Genocide nearly 40 years after the United Nations General Assembly approved it on December 9, 1948. *President Signs Bill Ratifying U.N. Accord Against Genocide,* New York Times, 5 Nov. 1988, Nat'l Ed. at 3, col. 1. While President Harry Truman had submitted it to the United States Senate for advice and consent to ratification, the Convention languished in the Senate for many years. Ninety-seven other countries ratified it in the meantime. Consent by the Senate finally came February 19, 1986, subject to conforming legislation. Congress passed the enabling legislation in October, 1988, and the President approved it saying, "I am delighted to fulfill the promise made by Harry Truman to all peoples of the world . . ." Id. The new law defines genocide narrowly, claiming consistency with the Convention, as acting with a "specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group". Genocide Convention Implementation Act of 1988, H. R. 4243, S. 1851, 100th Cong (1988). One might just as easily conclude that the narrow definition of specific intent "in substantial part" (in contrast with the treaty language "in part") undermines the general purpose of the Convention to prevent creeping genocide by hidden and marginal attacks against the ideological front guard of a noxious racial or national minority thereby weakening its solidarity. For a highly critical review, see Paust, *Congress and Genocide: They're not Going to Get Away with it,* 11 Mich. J. Int'l Law 90 (1989). Nigeria has not yet ratified the Genocide Convention.

[88] Jorgensen, *Philosophy of Life and Ideology* (Who are We?), 21 U.C. Davis L. Rev 989 (1988) [recent Festschrift honoring Edgar Bodenheimer's contributions to jurisprudence]: "Edgar Bodenheimer represents the European cultural tradition, which since the days of Aristotle has regarded law as a tool for forming 'the good society' and not only a political device for 'suppression' (Marx) or for maximising 'public utility' (Bentham) . . . . The idea is that *justice* is a living, material conception which changes and adapts itself to the changing social conditions, but which retains a general structure based on the humn needs for freedom and security, reflecting the biological nature of being an individual and a social being". Citing Bodenheimer, *Individual and Organised Society from the Perspective of a Philosophical Anthropology,* in J. Soc. Biol. Struct. 207–26 (1986). But see Sinha, *The Anthropocentic Theory of International Law as a Basis for Human Rights,* 10 Case W. Res. J. Int'l L. 469 (1978).

community relationships,[89] contrasts sharply with the Marxist view of law as repression, with Bentham's notion of law as incorporating utility or with Nietzche's view of law as the rule of the weak to curb the will of the superior few.[90] Beyond that, the African chieftain has responsibilities for his village or community. Edgar Bodenheimer, after a lifetime of scholarship bridging all cultures, concluded that all societies that claim a legal system provide through law for the prominent values of liberty, security and equality, although their relative rank may vary. All these legal systems nevertheless subordinate their values to certain overriding considerations of the public good.[91]

Any positive constitutional guarantees, for example the right to employment or to a fair share of food, housing, income or wealth, necessarily entails greater power in the central government to enforce control over the co-operative activities of production and redistribution in order to assure the guarantees. In the Nigerian Constitution the various guarantees of well-being thus place an affirmative duty upon the state and federal governments to allocate resources to provide services for the people as well as to protect them and their consensual transactions. In the American Constitution, the allocation of power to provide for human services and entitlements is divided between the Congress and the states. These powers are exercised within the representative democratic processes, under one of the expressly delegated powers such as over commerce, or under the retained police power of the states. Since negative constitutional limitations found in a typical Bill of Rights have never been considered adequate to provide for the general well-being, the American constitutional structure anticipates a continuing response by the political branches and states interacting with the civil society that includes commerce. A constitutional duty upon the national government to provide basic human needs or entitlements does not easily yield to enforcement by the courts. The American judiciary may interpret limits to the legislative power to provide for basic needs, but may not itself create judge-directed government services, however desirable they may be, according to classic liberal theory.[92] In the Nigerian system

[89] Motala, *Human Rights in Africa: A Cultural Ideological, and Legal Examination,* 12 Hastings Int'l & Comp. L. Rev. 373 (1989) (contrasting and comparing the different human rights perspectives in the African Charter with the Western ideological values in most of the other human rights instruments). See also *Human Rights in Africa,* supra note 1.

[90] Id. See Sinha, supra note 30 (arguing that most human rights instruments reflect Western values of individualism and legalism insensitive to other value systems including African).

[91] Bodenheimer, Preface to the Chinese Edition of *Jurisprudence: The Philosophy and Method of the Law,* reprinted in 21 U.C. Davis L. Rev 973, 974 (1988).

[92] At least that is the prevailing political theory of the American liberal state in simple form. Scholars and realists often study the underlying structure of power and criticise or deconstruct the myth system of the liberal state and try to locate where power hides and operates; restoring republican virtue frequently becomes the ideal; but the foundations of the liberal state as described seem well-understood even as criticised. But note the recent Supreme Court decision permitting use of the judicial power to order a remedy of desegregating public schools requiring a municipal tax prevented by State law. *Missouri v. Jenkins,* 110 S.Ct. 1651 (1990). Negative libertarian conceptions of freedom, in the view of many American scholars, lead to absurd results. See, for example, I. Shapiro, *The Evolution of Rights in Liberal Theory* 288–97 (1986).

guidance to all branches of government emanates from an organic and comprehensive statement of policies, directions and expectations.

The judiciary in both liberal and positive states encounters theoretical and practical difficulty most often in protecting basic human rights. While a contemporary judiciary often develops judicial and constitutional policy through reasoning in particular cases, as an institution it lacks the instruments of political will and expertise needed to shape and sustain social policy in a complex democracy. Even assuming the legitimacy of its own political will, moreover, a court encounters grave practical difficulty when it requires the government to spend public money or appropriate it for a particular social service responding to a need.[93] Court orders requiring decisions allocating resources against the will of a popular majority that controls the taxing and spending authority confront democratic government directly. At most a court in a liberal democratic state can dismiss cases brought to enforce laws it thinks invalid (sedition charges, unlawful detention, or unlawful discrimination, for example) or hold officials in contempt in unusual cases of unconstitutional patterns of behaviour such as intentional racial desegregation in public schools, prison conditions amounting to cruel and unusual punishment, or failure of duty under law to clean up environmental pollution caused by the government's own neglect.[94] Even when it restructures an illegal practice by consent orders in institutional discrimination actions or conspiracies, a court must rely upon the expertise and political will of the parties (the government is nearly always a party) to initiate and agree. For all of these reasons, among others, most constitutions leave the implementation of programs to achieve positive entitlements to the elected political branches of government, either explicitly or by restraint.

Many programmes at all levels in the United States have been enacted into laws for economic and social welfare. The fact that they are not expressed in the Constitution in the same positive terms as in the Nigerian Constitution means merely that their desirability and implementation must be negotiated in legislative bargaining. Even when guided by affirmative language in constitutions such as Nigeria's the executive and the parliamentary assembly need to exercise political will not usually sustained over time by courts. The courts in Nigeria assume even less of a positive remedial function, despite the constitution's all-encompassing policies, than do courts in the United States.

[93] Several cases in which lower federal courts have ordered programmatic changes generally involving a federal remedy for constitutional abuse requiring appropriations under penalty of contempt may now go forward under Justice White's narrow opinion in *Missouri v. Jenkins* and in *Spallone v. United States,* 110 S.Ct. 625 (1990), cases that challenged the encroachment of judicial power to order compliance with a court-imposed remedy for constitutional abuse.

[94] *Missouri v. Jenkins* (school desegregation); *Tillery v. Owens,* 719 F. Supp. 1256 (W. D. Pa. 1989) (Prison conditions); *Ohio v. United States Department of Energy,* 689 F. Supp. 760 (S. D. Ohio 1989) (environmental pollution).

COMPARING SPECIAL MEASURES TO OVERCOME DISCRIMINATION

Especially troubling has been legal and *de facto* segregation of the races, dating from the end of slavery and the slave trade, as well as cultural attitudes of superiority of one race over another. Roosevelt in fact avoided explicit reference to racial equality in his "Four Freedoms" speech. Not until a year later, in 1942 after persuading Churchill to drop his objections, did Roosevelt face the issue and call for equality in the process of decolonisation and rebuilding after World War II.[95] This major shift prepared the way for recognising first in the United Nations Charter, later in international instruments and then in new constitutions for new nations that race-based discrimination could not be maintained either by official policy or by ignoring past societal practices.[96]

In attempting to rectify this history of past race discrimination, many institutions and governments have used "affirmative action" programmes or special preferences to ensure not only equal opportunity for minority participation, in addition to desegregation, but also to try to rectify this history in the future given the received societal preferences favouring the dominant established interests. The idea found expression in the Universal Declaration of Human Rights. Later the International Convention on the Elimination of All Forms of Racial Discrimination specifically obligated the parties to undertake policies to eliminate racial discrimination, including "special measures" to protect and develop certain racial groups. An exception to principles of equality, the special measures of favoured treatment would make up for past discrimination so long as "unequal or separate rights for different racial groups" are not maintained after the objectives of

[95] Supra note 61, at 2881; Address to Congress, reprinted in 11 Hum. Rts. Q. 173 (1989). Churchill was particularly concerned with colonial policies and with the undertones of racial superiority in the war then being fought. Supra note 60.

[96] In the United States the history of racial discrimination is intimately connected with the history of slavery. Winthrop Jordan, in *White over Black: American Attitudes Towards the Negro,* 1550–1812 (1968) provides a detailed examination of this association. Europeans began the slave trade in America in collusion with powerful African tribes. M. Crowder and G. Abdullahi, *Nigeria: An Introduction to Its History* 58–59 (1979). While few slaves lived in the Northern colonies, in the Southern colonies slavery became an integral part of social and economic life. In his book, *In the Matter of Color: Race and the American Legal Process* (1978), Federal judge Leon Higginbotham has studied the early beginnings of slavery in America. He found that in the colonies chattel slavery did not exist at common law. See also E. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975). The institution of slavery was introduced first in America through change in the instrument of indentured service. Higginbotham at 32–35. All indentured servants at common law were bound by contract to service for a usual period of years of apprenticeship, then released as free tradesmen. Id. at 155–56. Fearing an uprising of all indentured servants, the plantation owners and overseers turned indentured white against indentured black, influencing the courts to recognise full chattel ownership of Africans but not of Europeans. For a description of this process in Virginia, see id. at 50–55 and E. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* 328–37 (1975). In ancient times and even until the slave trade, slavery was never based entirely upon race. D. Davis, *The Problem of Slavery in Western Culture* 49–50 (1966). In Nigeria, the slaves that fed the slave trade were captives in tribal wars, prisoners or others of the same race. Crowder and Abdullahi, supra at 58–59.

full and equal enjoyment of human rights and fundamental freedoms have been achieved.[97]

A. Special Preferences in United States

Commitments to social justice in the United States beyond formal equal opportunity by special measures of "afirmative action" have led in turn to charges of "reverse discrimination," or unfair preferences accorded minorities over members of the majority in affirmative policies based upon quotas, goals or preferences to overcome past discrimination but prospectively not compensatorily.[98] The judiciary in this situation in the United States has assumed a special role to review these types of programmes. First, for a time, the Supreme Court favourably interpreted state-sponsored preferences along the lines of the human rights conventions, although they never were invoked.[99] Recently, the Court has started to reduce or, in effect, to terminate the prospective impact of these special preferences (with Congress reacting to reassert some of them). Second, the Court has distinguished between intentional and merely benign discrimination. Government or courts may rectify past intentional discrimination by remedial

[97] Art. 2(2), International Convention on the Elimination of All forms of Racial Discrimination, opened for signature by G. A. Res. 2106 A (XX), Dec. 21, 1965; entry into force Jan. 4, 1969; U.S. signed, Sept. 28, 1966, submitted to U.S. Senate Feb. 23, 1978.

[98] These provisions justifying preferential treatment until the condition has been repaired follow the same moral consideration as in assisting trust territories or in the old system of Mandates of the League of Nations to bring former colonial nations into full nationhood. Id.

The difficulty in this special justice is in the terminating process. Who decides to withdraw special measures once granted, to comply with the principle of no maintenance of unequal or separate rights for different racial groups after the objectives have been met? How is this provision implemented to avoid further and future dependencies and the resulting political retaliation upon termination? In the United States, that decision function recently has been assumed by the Supreme Court, using the underlying theory of individual justice in a race-neutral setting driven by the Fourteenth Amendment. The Supreme Court terminates any special justice based on racial quotas not meeting the very rigorous standard of strict scrutiny of race-based classifications (albeit minority) on the theory that justice is colour-blind and individuals of all races are protected equally under the Amendment. See *City of Richmond v. J. A. Croson Company,* 488 U.S. 469 (1989) (Richmond's official 30% minority set-aside for all city construction contracts violated the equal protection clause as being race-based classification not meeting the higher standard of scrutiny). See also, *Wards Cove Packing Company, Inc. v. Atonio,* 109 S.Ct. 2115 (1989) (shifting the burden of proving discrimination as a result of disparate impact to plaintiffs, undercutting the earlier burden placed upon defendants after a facial showing of disparate impact to prove that discriminatory effects were directly related to defendant's business needs); *Martin v. Wilks,* 109 S.Ct. 2180 (1989) (allowing a challenge to consent order by white firefighters alleging discrimination).

[99] As Professor Lockwood points out, however, the argument against racial discrimination from the human rights provisions of the United Nations Charter and the Universal Declaration of Human Rights, among other principles, was made very strongly in various briefs filled with the Supreme Court in *Brown v. Board of Education*. While the opinion did not use any of these arguments, for the public mood in the McCarthy era was not kindly to the United Nations, they might have been very influential considering the embarrassment of domestic injustice to international leadership of the strongest democracy of the time. Lockwood, The United Nations Charter and United States Civil Rights Litigation: 1946–1955, 69 Iowa L. Rev. 901 (1984).

measures such as race-based quotas. The Supreme Court, however, now requires stricter showing of a compelling interest in programmes to eliminate the effects of past societal discrimination when the impact of goals or quotas unreasonably affect other individuals not found to be culpable of intentional discrimination. Burdening one innocent person to provide special preferences to another on the basis of race, as the Court frames the question, has been exploited politically, enflaming a backlash against minorities most needing help. Third, the Court gives greater deference to racial preferences enacted by the Congress than by state or local government.[100] The model of the negative liberal state with protection for individual liberties and rewarding merit equally has been turned to protect a few individuals in the racial majority from being unreasonably burdened for measures that are the duty of all without a showing of intentional discrimination.[101]

B. Special Preferences in Nigeria

While drawing upon the human rights conventions, the Nigerian Constitution of 1989, makes no explicit reference to special measures regarding past discrimination. The government, however, imposed quotas in 1978 to ensure that schools and government agencies reflected the "federal character" of Nigeria. Five percent of certain levels of jobs in the civil service and in government-owned corporations are set aside for applicants from each of Nigeria's states. Similarly, the cut-off point for the admissions test to government-financed college, preparatory schools are established by the 500th-ranking student in each state.[102] Article 217 of the 1989 Constitution provides that the armed forces also reflect the "federal character" of Nigeria. Even the membership of the Supreme Court is expected to reflect to some extent the religious and ethnic diversity of Nigeria.[103]

The reserved places are intended to reduce ethnic conflict.[104] These preferential policies specifically are designed to allow the Hausa-Fulani of northern Nigeria greater access to jobs and government positions. This ethnic group resented the dominance of the Ibos who were better educated,

[100] *Metro Broadcasting v. F.C.C. et al.* 110 5, Ct. 2997 (1990) (case no. 89-453).

[101] See e.g., *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986) (invalidating an attempt by a local school board to maintain a racially integrated faculty, at a time when the school board had to reduce the number of faculty members that it employed, by laying off white teachers before laying off black teachers with less seniority) and City of Richmond, supra note ????.

[102] Brooke, *Ethnic Quota for Nigerians Is Challenged,* N.Y. Times, Nov. 6, 1988, §1 at 19, col. 1. The quotas apply to only the lower ten grades of the seventeen-grade system in the civil service. Kotch, *Nigeria's Legendary Permsecs Make Way for New Order,* Reuter Library Report, Apr. 6, 1988.

[103] I. Okafor, *Uncertainty of Law: A Review of Appellate System of Justice in Nigeria,* Second Anambra State Law Conference, 1988, Enugu, Nigeria, 7-9 Dec. 1988.

[104] See Diamond, *Social Change and Political Conflict in Nigeria's Second Republic in The Political Economy of Nigeria* 72-75 (I. Zartman ed. 1983) and Diamond, *Nigeria in Search of Democracy,* Foreign Affairs 905, 920-21 (1984).

reportedly because the British concentrated schools in southern Nigeria, which they controlled directly. Fewer schools existed in northern Nigeria which the British ruled indirectly through the Muslim emirs.

The preferential policies have at times led to ethnic conflict and charges of reverse discrimination.[105] An indirect recognition of the ethnic conflict and former dominance of the Ibo in both the private and public sectors is Article 144(3) which requires the President to appoint at least one minister from each state and requires that the minister be a native of that state. Article 15(3) specifies, further, that "there shall be no predominance of persons from a few States or from a few ethnic . . . groups" in the federal government or its agencies.[106] The Constitution forbids discrimination among Nigerian citizens on the basis of race, sex, religion, circumstances of birth, place of origin, ethnic group, different communities or political opinion, a potential challenge to preferential policies were judicial review available as it is in the United States.[107]

SEDITION AND FREE EXPRESSION

A. Common Values in Constitutions and International Instruments

Nothing better reveals the core of agreement and disagreement with fundamental values than how the Nigerian Constitution of 1989 and the American Constitution each treats sedition and free expression, as compared with the guarantees provided in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. Four central values with varying weights undergird freedom of

[105] T. Sowell, *Preferential Policies: An International Perspective* 69–76 (1990); Kotch, supra note 103; Harden, *Two Decades Later, Biafra Remains Lonely Precedent,* Washington Post, June 27, 1988, at A1. Biafra was the Ibo region of Nigeria that attempted to establish independence when a predominantly northern Moslem group of officers staged a countercoup after an Ibo-dominated military group announced a policy of establishing national norms for all civil service applicants at the state and federal level. Over one million people died in the resulting civil war. Id. A recent court case may help blur the ethnic distinctions and promote national integration. The Nigerian Supreme Court, contrary to prevailing legal tradition, held that a person could change his ethnic identity. The case involved a dispute over which customary law should be applied when a Yoruba man who had lived for many years in Benin died intestate. See Sagay, *The Dawn of Legal Acculturation in Nigeria—A Significant Development in Law and National Integration: Olowu v. Olowu,* 30 J. Afr. L. 179 (1986).

[106] For a discussion of the constitutional and statutory attempts to structure ethnic conflict in Nigeria, see Jinadu, *Federalism, the Constitutional State, and Ethnic Conflict in Nigeria,* 15 Publius 71 (Spring 1985). Article 15(4) states: "The composition of the Government of a State, a Local Government or any of the agencies of such Governments, and the conduct of the affairs of the Government or such agencies shall be carried out in such manner as to recognise the diversity of people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation".

[107] Nig. Const. of 1989, art. 41. In the United States, Congress has greater power to implement preferential policies to rectify past discrimination in cases of set-asides in government contracts and in licenses for radio or television stations than the states whose preferential racial policies are strictly scrutinized. See Fullilove case and the recent FTC licensing case, supra note 100.

expression as a political ideal in these instruments: (1) protection of political participation in the democratic process through debate and discussion; (2) the search for political and other truth through robust discourse in ideas; (3) personal or group fulfillment and autonomy through individual and group expression; and (4) preparation for adjustment or resistance to change, including expression of pent-up anger. These values, especially the last one, are socially useful in all states, as Mr. Gorbachev's encouragement of freer expression in the Soviet Union reveals and national control of expression in China, Rumania, Albania, Cuba and other countries confirms.

The Nigerian Constitution guarantees the right to freedom of expression by affirmative grant.[108] These guarantees, limited by provisions similar to those found in human rights conventions, allow the government to override free expression when the national interest requires, by law compatible with democratic society. They further allow the government to control radio and television broadcasting.[109] Article 38 of the Constitution is similar to Article 19 of the Universal Declaration of Human Rights, which reads:

> 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 regardless of frontiers.

Also expressed as Article 19 of the International Covenant on Civil and Political Rights, this freedom yields to other overriding limitations in the Covenant. These limitations must be provided by law and must be necessary to respect the rights or reputations of others or to protect the national security, public order or public health or morals. Article 20 of the Covenant prohibits "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." The International Convention on the Elimination of All Forms of Racial Discrimination would extend this limitation to ideas inciting racial hatred or theories of racial or

[108] Nig. Const. of 1989, art. 38: "(1) Every person shall be entitled to freedom of expression including freedom to hold opinions and to receive and impart ideas and information without interference." Limitations to this right include laws reasonably justifiable in a democratic society and the creation of government monopoly over radio and television broadcasting. It should be noted that many government officials in Nigeria do not believe that the press should fulfill a watchdog role even though Article 17 in Chapter 2 (Fundamental Objectives) states: "The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and highlight the responsibility and accountability of the Government to the people". Instead, they believe the press should co-operate with the government and help the government achieve its goals. The federal Minister of Information indicated in 1984 that the Nigerian newspapers have a duty to ensure peace, unity, progress and stability. The idea of developmental journalism is not unusual in the Third World and contrasts with the West's view of the role of the press. Seng and Hunt, *The Press and Politics in Nigeria: A Case Study of Developmental Journalism,* 6 B.C. Third World L. J. 85 (1986).

[109] Nig. Const. of 1989, art. 38.

ethnic superiority and require positive measures of elimination of such ideas, whether official or not.[110]

The African Charter on Peoples' and Human Rights provides less protection for individual expression, requiring the "right to express and disseminate" opinions as well as the right to free association to be within the law. Favouring solidarity and the collective good, the African Charter places less importance on the values of individual expression and the political marketplace of ideas and more on those of the community.[111]

The First Amendment to the United States Constitution contrasts sharply with the language of the Nigerian Constitution and the human rights instruments because it is cast in a negative prohibition that appears absolute (but is not):

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

B. Difference in Meaning and Protection

When compared, these various ways of shaping freedom of expression plainly show differences in political assumptions about the constitutional state and the control of criticism of the government or of expression of racial hatred. Seditious libel means criticism of the government to undermine its authority or reputation, with the tendency to breach the peace through contentiousness and rebellion. That kind of speech is now protected as speech relating to core values of the first and second kinds above in both constitutions. All speech, however, has limits; and therein lies the role of the courts in each country in deciding whether government has sufficient justification in imposing limits to criticisms against government.

[110] International Convention on the Elimination of All Forms of Racial Discrimination, Article 4: Condemning ideas of racial superiority or hatred and discrimination in any form, the Convention obligates the Parties "to undertake to adopt immediate and positive measures designed to eradicate all incitement to, or act of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*" to take three actions:

1. All dissemination of ideas based on racial superiority or hatred, in addition to the incitement to racial discrimination or violence against racial or ethnic groups shall be made punishable by law.
2. Organisations and propaganda activities that promote and incite racial discrimination, including participation in such organisations or activities, shall be made illegal and punishable by law.
3. Public authorities of national or local public institutions shall not be permitted to promote or incite racial discrimination.

[111] African Charter of Peoples' and Human Rights, Articles 9, 10 & 11. For a discussion of the methods used by governments in sub-Sahara Africa to control the press, see Wilcox, *Black African States in Press Control Around the World* (J. Curry and J. Dassin eds. 1982).

1. Difference in Received Traditions

At the time of the American Revolution in 1776, the common law of free speech only protected against prior restraint or censorship.[112] Thus the right to free speech did not protect seditious libel or harms from private libel. Blackstone's commentaries reflected the tradition received in the colonies from England:

> [T]he *liberty of the press* is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. . . . [I]f [a person] publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. . . . [T]o punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, a government and religion, the only solid foundations of civil liberty.[113]

But at that time, truth of the alleged libel could not be used as a defence, nor would a jury decide the criminality of the libel. A jury could determine only the fact of publication of defamatory matter, not whether the publication was truthful or defamatory.[114] The *Peter Zenger* case in 1735 and subsequent history surrounding the *Alien and Sedition Acts* allowed jury trial of the fact of libel and the defence of truth.[115] In Nigeria, the question of fact and defence of truth are matters tried before a judge without a jury, a received English tradition.[116]

In the 16th and 17th centuries in England, even advocacy to change the law could be punished as sedition.[117] Private defamation could be tried as sedition if it provoked bad blood and revenge thus disturbing the peace.[118] Remnants of these restrictions, although narrowed, appear in the above definition of sedition. In other countries similar interpretations immunised the soverign power from popular criticism, until the political revolutions began to introduce a structure to distinguish legitimate from illigitimate criticism of government. This English tradition remains influential to Nigerian law, in addition to ethnic traditions where expression is

[112] L. Levy, Emergence of a Free Press 5–13 (1985).

[113] Sir William Blackstone, *Commentaries on the Laws of England* (London 1765–69), book 4, chap. II, 151–52 quoted in Levy, note 112 at 13.

[114] L. Levy, supra note 112.

[115] Id. at 38–45, 297–349. See also, J. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* 418–433 (1956) (arguing that the truth provision of the Sedition Act was virtually worthless to defendants because the judges' instructions held that the defendants had to prove the truth of their writings, thus they were presumed guilty until they could prove otherwise).

[116] *Director of Public Prosecutions (DPP) v. Chike Obi,* [1961] All N.L.R. 186; *Queen v. the Amalgamated Press (of Nigeria) Ltd. and Another,* [1961] All N.L.R. 199.

[117] L. Levy, supra note 112.

[118] Id. at 7.

community-bound and less protective of individual self-expression. Truth has been irrelevant to the definition of seditious libel, for governments have greater fear of threats from truthful criticisms than from false ones.

2. Difference in Adapting Common Traditions

The current state of constitutional protection of free expression in the United States differs substantially from the original meaning when free speech was first protected in the Constitution of Pennsylvania and later entered the national Bill of Rights. The Nigerian protection of free expression at the present time is closer to the original understanding in the American Constitution. The present Nigerian Criminal Code continues this tradition, prohibiting seditious words or seditious publications, defined as intending "to bring into hatred or contempt or to excite disaffection" against the government; "to excite . . . the inhabitants of Nigeria to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Nigeria as by law established"; "to raise discontent or disaffection amongst . . . inhabitants of Nigeria," or "to promote feelings of ill-will and hostility between different classes of the population of Nigeria".[119]

Traditional seditious libel thus receives less protection from the courts under the evolving Nigerian Constitution than in the United States. In the present state of emergency, for example, various measures have been taken against journalists who publish detailed, not merely ideological, criticisms of public officials. Moreover, since Nigeria has an official secrets act, occasionally a journalist will be arrested for publishing information falling under the category of "economic crimes".[120] Recently a well-known Nigerian lawyer, Chief Gani Fawehinmi, gave an interview to quality magazine, in which he called on Nigerians to have nothing to do with the present Federal Government of Nigeria and made offensive remarks about the Government.[121] He was promptly arrested and detained under *Decree No. 2 of 1984*, making it an offence for any person to criticise the government or any functionary of government. Many journalists have been placed in prison for contravening the Decree. Often, they are released after being

[119] Sec. 50(1), Criminal Code Cap. 42 Laws of Federation of Nigeria and Lagos 1958. Decree No. 4 of the military government that came to power in 1984 specifically prohibited judicial review of the decisions of the special tribunal set up to try journalists who published false material or who ridiculed any public official. For a discussion of this decree, see Okagbue, *Development of Criminal Law and Procedure in The Challenge of the Nigerian Nation: An Examination of Its Legal Development,* 1960–1985, at 78–79 (T. Aguda ed. 1985). See also, Karibi-Whyte, *Sedition and Publication in Nigerian Press Law* (T. Elias ed. 1969).

[120] May, *Nigerian Military Regime is Reigning in One of the Freest Presses in Africa,* N.Y. Times, Apr. 30, 1984, at A7, col. 1; Cowell, *The Free Press in Africa: Walking a Narrow Line,* N.Y. Times, May 13, 1983, at A2, col. 3; amd *A Voice Out of Africa,* N.Y. Times, Sept. 18, 1983, §6 (Magazine), at 92, col. 2; *Nigerian Journalists Arrested,* Washington Post, Apr. 9, 1987, at A43; and Legum, *Africa's Journalists Battle Uphill to Get and Keep Press Freedom,* Christian Science Monitor, Nov. 24, 1986, at 13.

[121] Letter to the author from Justice E. Ozobu, Anambra State Court, on file with the author. The interview with Quality Magazines has not been verified.

detained some time but before being charged in front of a judge. In the case of Chief Fawehinmi, his lawyers obtained a writ of summons challenging the Decree as unconstitutional. The security agent released him and the case never was heard. Although the transition to civilian government will mean the revision of emergency decrees, the constitutional questions of the power of the Nigerian courts to hold a decree unconstitutional has yet to be tested.[122]

A distinct Nigerian tradition may be observed in the custom of arrest for alleged sedition and then released after a lengthy detention but before arraignment.[123] Moreover, in the *Obi Case*, decided soon after independence, the Nigeria Supreme Court upheld the old crime of sedition (defined above) against a challenge under the new constitutional provisions guaranteeing fundamental human rights.[124] However, in 1983 the Court of Appeals in Anambra State challenged the Supreme Court's reasoning in *Obi*. The appeals court unanimously reversed the conviction for sedition of Chief Arthur Nwankwo who had published a book critical of the governor. The justices stated that the law of sedition as applied to *Obi* violated the constitutionally guaranteed freedom of expression.[125] The *Obi* case might be questioned under the 1989 Constitution as a result of the challenge from the Anambra State Court.[126] Because the human rights provisions contained in the old constitution were not found to limit the sedition law as enacted, however, the Nigerian Supreme Court may have to reinterpret the continuing relevance of *Obi*.

Special problems may arise, however, with derogations from fundamental rights and judicial review of acts under emergency decrees. Nigerian courts have attempted to construct a doctrine of narrow interpretation of decrees that oust them of jurisdiction and to nullify by review any actions in excess of the jurisdiction asserted in the decrees.[127] These restraints in private expression may find justification in the human rights conventions.[128]

In the United States, the First Amendment requires the government to justify intrusions on free expression according to even stricter judicial standards to review. Independent and speech-protective balancing through the courts preserves in the people the ultimate power over criticism. Neither state nor Federal government has final say about when expression, in particular sedition, may be curtailed. The courts, as guardians of constitutional

[122] Id.

[123] Generally under Decree No. 2. See Fagbohun, *Liberty, Fairhearing and the New Military Decrees*, 4 Journal of Private and Property Law 17, 30 (1985). See also Dept. of State, Country Reports on Human Rights Practices for 1987, at 222-25 (1988).

[124] *Director of Public Prosecutions (DPP) v. Chike Obi*, [1961] All NLR 186.

[125] *Nwanko v. State*, FCA/E/111/83 (1983). See Nig. Const. of 1979, art. 36(1).

[126] Supra notes 124 and 125.

[127] Fagbohun, supra note 123. See Seng and Hunt, *The Press and Politics in Nigeria: A Case Study of Developmental Journalism*, 6 B.C. Third World L. J. 85, 91 (1986).

[128] See infra notes 149-159 and text.

liberties, make that final judgement. The Supreme Court has the final say whether a law passed by the Congress and approved by the President to curtail expression critical of government violates the express prohibition against abridging speech. That protection, though not perfect, gives practical meaning to the political philosophy that reserves political power to individuals and groups in the private sector and empowers private resources to control expression free from all but the most compelling restraints.

The Nigerian Constitution with a common tradition differently received subjects private expression to a collective duty and penalties for sedition so long as prescribed by law compatible with democratic society.

C. Difference in National Security Limitations

A limitation on free expression is possible for national security. Here again, there are apparent differences between the American Constitution and the Nigerian Constitution and its counterpart in the International Covenant. The *Pentagon Papers* case is a good example of judicial interpretation of the negative command more protective of private expression than either the Nigerian Constitution or the International Covenant.[129] Daniel Ellsberg, a former Pentagon official, leaked the secret "Pentagon Papers" to the New York Times during the Vietnam war, with a view to making them public. Nowhere else, surely not in Nigeria or Europe, would he have succeeded so easily in his purpose. The government attempted to enjoin publication because the papers contained confidential government documents. The Supreme Court refused to enjoin publication absent a compelling national interest showing immediate danger as a result of publication. That case reflects the United States tradition of reluctance to permit prior restraint or censorship of information in the hands of the press, regardless of any illegal action in conveying information to the press initially. Unlike Nigeria, Great Britian and most countries, the United States has no official secrets act holding journalists or citizens to account through criminal penalties for revealing government secrets in their hands (the government did charge Ellsberg with espionage; but because the FBI conducted an illegal search of his psychiatrist's office, the charges were dismissed on grounds of abuse of prosecutorial discretion).

Controls on the classification of government information have tightened considerably to serve the national security interest in the United States. For example, a whistleblower named Samuel Morison, a civilian employee of the Navy and son of a distinguished naval historian, is the first person in United States history to have been convicted of espionage not for selling secrets to the enemy, but for selling restricted information about ships to a commercial publisher.[130] By interpretation of the *Espionage Act* and other

[129] *New York Times Co. v. United States,* 403 U.S. 713 (1971).

[130] *United States v. Morison,* 604 F. Supp 655 (D. Md. 1985) *cert. den.* 109 S. Ct. 259 (1988). In another example of the Court's tightening controls over government information, a U.S. citizen and a former CIA agent who resided abroad, Philip Agee, lost the privilege to carry his U.S. passport because he published a list of CIA agents abroad thereby exposing them to

measures, the Supreme Court has moved close to an implied official secrets limitation on free expression similar to Nigeria's. We await another time for an authoritative answer to whether the threat to national security justifies the use of the *Espionage Act* in peacetime.

Both the Nigerian Constitution and the International Covenant make it clear that for national security reasons, a government can restrict this kind of publication under a law consistent with a democratic society. The Nigerian sedition statute poses no constitutional problem to punishing violations from the press or from any citizen.[131] Under standards of judicial review in the United States, any restrictions must be for the most compelling reasons (presenting a clear and present danger). Might a treaty provision without a reservation furnish such a compelling national interest? The Supreme Court has struck down a law that prohibited signs or pickets derogatory to a foreign government within 500 feet of that government's embassy in Washington.[132] Obligations of international law to maintain respect for foreign embassies did not provide a sufficiently compelling national interest to limit political speech. That is a classic "no prior restraint" case where the United States refused to punish seditious libels or political criticisms against foreign governments proximate to their embassies. The Supreme Court also to great public outcry extended the right to symbolic free expression to burning an American flag on a courthouse steps in a political protest.[133] The Nigerian Constitution, in contrast protecting a symbol of national unity, states that it "shall be the duty of every citizen to . . . respect the National Flag . . .".[134]

D. Difference in Protecting Subversive Advocacy

Protection for subversive advocacy similarly differs in each country. As the United States became more secure, free expression found greater protection. Prosecutions under the *Espionage Act* during the First World War for publishing criticism of the draft and advocacy of action tending to curtail production of war material provoked Supreme Court Justice Oliver Wendell Holmes to develop the "clear and present danger" test for punishing subversive speech.[135] During the twenties and thirties, the so-called "Red-scare" or perceived threat from international communism and

danger. *Haig v. Agee,* 453 U.S. 280 (1981). In another case Frank Snepp, a former CIA agent, published a book about the CIA's operations in Vietnam. It contained nothing secret, but the book was published without CIA approval as required in the initial conditions of employment. Because he breached his agreement Snepp forfeited to the government all royalties from the book under a theory of constructive trust imposed by the Federal District Court. *Snepp v. United States,* 444 U.S. 507 (1980).

[131] See supra note 119.

[132] *Boos v. Barry,* 485 U.S. 312 (1988).

[133] *Texas v. Johnson,* 109 S. Ct. 2533 (1989); United States v. Eichman, 110 S. Ct. 2404 (1990).

[134] Nig. Const. of 1989, Sec. 24(a).

[135] See, *Schenck v. United States,* 249 U.S. 47 (1919).

revolution led to successful prosecutions under the criminal syndicalism statutes in states such as New York and California.[136] But the values of free expression were revealed best in Justice Holmes' dissent in *Abrams v. United States*[137] and in Justice Brandeis' concurrence in *Whitney v. California*.[138]

After sustaining convictions for Communist conspiracy advocating forceful overthrow of government during the MaCarthy era of repression, the Supreme Court used Holmes and Brandeis to shape what has been accepted by succeeding justices as the contemporary understanding of the limits to subversive advocacy. In *Brandenburg v. Ohio*, the Court reversed a conviction under Ohio's criminal syndicalism law punishing advocacy of unlawful acts.[139] The test became whether such advocacy incited imminent lawless behaviour. in the *Brandenburg* case, racist slurs and white supremacist verbal attacks were made while hooded Klu Klux Klan members, some armed, stood by while the leaders spoke. These verbal assaults, according the Supreme Court, did not directly incite violence or immediate unlawful action that would justify the state to punish the speakers for the statements.[140] The length to which the Supreme Court will protect speech despite

[136] See *Gitlow v. New York,* 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927).

[137] *Abrams v. United States,* 250 U.S. 616 (1919). Justice Holmes wrote in dissent:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the unlawful and pressing purposes of the law that an immediate check is required to save the country. . . .

[138] *Whitney v. California,* 274 U.S. 357 (1927). Justice Brandeis wrote eloquently, concurring:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it. [footnote omitted]

[139] *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

[140] *Id.*

its racist or hateful message is demonstrated in the case of *Smith v. Collin*, where the Federal courts allowed a group of neo-Nazis bearing swastikas to rally in a predominately Jewish suburb of Chicago, in the face of city ordinances prohibiting such marches.[141]

The United States today protects freedom of individual expressions at least as much, probably more, than any other country. Yet, a national debate is under way over the control of the constitutional environment for information made available through science and technology for various purposes, from national security to advertising of commercial products and political campaigns, as well as a civil environment for discourse involving jarring hatreds and dissonant artistic expression. Some information, collected by intrusive methods of snooping by governmental and private groups alike, invades the most private of domains and the most proud and traditional of cultures. Intimate details of individuals' private lives often are made public despite damage to the integrity of reputations because the news media service an insatiable market for revelations of a Senator's sexual escapades or for political cartoons mocking a minister's self-righteousness with parody.[142] The Court also upheld restrictions on playing loud rock music in Central Park in New York City by discretion of sound technicians.[143] Other than these few instances, however, the Supreme Court has not substantially revised its strong protection of communicative matter criticising government.

Protection in Nigeria for subversive or offensive expression is close to the international standards. Limits to such expression find legitimacy in public order and morality through law consistent with a democratic society. The power balances of structure underlying decisions limiting expression are explicitly stated in the Constitution together with legitimacy for a public purpose override of individual expression. These are not so easily found in the American Constitution, for they derive through Court interpretation and process, found in negative liberty. The tradition in Nigeria, however, remains robust and as varied as the number of newspapers, customs and local habits and modes of expression.

E. **Difference in Private Libel Actions**

In both countries, private libel actions affect the freedom of speech, but not by prior restraint. In the United States, the Supreme Court has applied freedom from government censorship to private libel suits against news media defendants for defaming public officials or figures. The justification

[141] *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978); *aff'd*, 578 F. 2d 1197 (7th cir., 1978); *cert. den. Smith v. Collin*, 439 U.S. 916 (1978). See also earlier litigation enjoining the denial of a parade permit, National Socialist Party v. Skokie, 432 U.S. 43 (1977).

[142] *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

[143] *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989) (regulation promotes a "substantial government interest that would be achieved less effectively absent regulation" not by means least restrictive or intrusive).

is to prevent undue risk of self-censorship by the media thereby chilling the robustness of public debate. Before a public official or figure can recover damages for libel against a media defendant, such a plaintiff must prove malice—that is that the publisher knew of the falsity of the defamation or acted in reckless disregard of whether it was true or not.[144] Even private persons allegedly defamed by the press now must prove falsity as well as fault to recover damages.[145] The First Amendment in the United States protects the press from the restraints implicit in the old common law doctrine of "libel per se" or strict liability for defamation of a private reputation. The value of a vigorous, unintimidated press is more important than occasional harm to reputation and far weightier than an offended official's sensitivity.[146]

In Nigeria, nowhere near the same degree of protection from common law and statutory libel actions would be countenanced. Common law libel remains unaffected by Constitutional standards. Defamed public officials may bring ordinary libel actions without needing to meet a higher constitutional standard of liability. For example, in 1984 a high court judge in Lagos found that the Nobel Prize winner Wole Soyinka libeled a commissioner of the former military government in his novel, *The Man Died*, and ordered the book banned.[147]

F. Comparing Constitutional Limitations on Free Expression with Human Rights Conventions

One of the problems revealed at once is whether the human rights conventions, even if not in effect but as they have drawn upon and in turn influenced national constitutions, might give governments a good reason to limit free expression more easily than otherwise permitted by the limitations in the national constitution. In the United States, the freedom is assumed under the First Amendment, and its positive grant unnecessary. The same question might be suggested in justification of legislation or emergency acts in Nigeria. A limitation upon government power presumes a pre-existing liberty. Future content of the freedom of expression is defined by what government cannot invade. Court interpretation, not an express

[144] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[145] *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

[146] A controversy surfaced quite recently within the Supreme Court over whether the Court has struck an improvident balance in protecting the value of all speech as against harm to reputation or privacy interests. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). Justice White in a recent opinion favours reconsidering the entire constitutional protection of defamatory speech and advocates returning to the original understanding. Id. As yet, this opinion is a minority view. The debate extends as well to information which, if published, might harm national interests broadly defined and controlled by the bureaucracy. In this debate, the citizens' civil liberties to free expression for the purpose of enlightened choices in self-government would be balanced against perceived dangers in a new age where the control of information and media technology translates into political power.

[147] Seng and Hunt, *supra* note 108 at 87.

Constitutional override, defines in the United States when speech may have to yield to compelling state interests. In contrast, both the Nigerian Constitution and the human rights covenants assert the right affirmatively, as if positively granted by the community, then allow a public order override when necessary to further a democratic society.

Article 19 of the International Covenant on Civil and Political Rights, based upon similar wording of the Universal Declaration, provides limitations similar to those effectively adopted by the Nigerian Constitution. When President Carter signed and sent the human rights treaties to the United States Senate in 1978 for approval, he addressed the problem of potential curtailment of free expression by adding reservations.[148] One of the most significant reservations would limit the effect that Articles 5 and 20 of the Covenant might have. The fear is that those articles might authorise restriction of the freedom of expression provided for in Article 19 in ways incompatible with the broad range of expression protected by the courts through interpreting the negative language of the First Amendment and thus undercut protection for the freedom of speech and press in the Constitution of the United States.[149] Let us examine that claim by comparing the free expression guarantees in each constitution against those of the Covenant.

The first paragraph of Article 5 of the International Covenant on Civil and Political Rights provides that nothing in the Covenant may be interpreted as implying for any State, group or person the right to engage in any activity or to perform any act aimed at the destruction of any of the rights of freedoms recognised in the Covenant or at their limitation to a greater extent than provided for in the Covenant. This provision indirectly might have the practical effect of an international obligation that could empower the government to limit freedom of speech beyond the current protections under the Constitution. For example, one might interpret Article 5 to obligate the government to forbid an individual from advocating that the government change laws affecting the rights of others. Moreover, Article 20 requires affirmative government action to repress expression advocating national racial or religious hatred inciting "discrimination, hostility or violence". Because some of that expression may be constitutionally protected, the President's reservation states that the United States would not interpret the Covenant as requiring or authorising legislation that would restrict the right of free speech protected by the Constitution, laws and practice of the United States.[150] In a strict sense, of course, that reservation begs the question whether a court would find conflict between the treaty and the Constitution, for no treaty can enter into force intruding upon the Bill of Rights, a negative limitation upon all power, including the treaty power. The Nigerian Constitution would permit no greater restriction than

[148] See Message of the President, note 59 above.
[149] See text at page ???, for language of the First Amendment.
[150] See Message of the President, note 59 above.

provided by the Covenant, but not as much freedom as the United States First Amendment. But would the United States be in breach of an international obligation were it to fail to control private expression intruding upon the liberties of other persons such as personal verbal attacks on public figures or personal racial or sexual epithets?

The current test for determining whether to punish inciteful speech, when combined with the limits upon libel suits against the media by public officials, offers much greater protection for speech criticising government, advocating lawless behaviour or harming privacy or personal reputation than provided under the International Covenant on Civil and Political Rights. That Covenant aims more at prior government censorship than sedition or libel, consequential harms. The private international human rights organisation, "Article 19," was established in 1986 to promote free expression and the right to receive and impart information. Its first *World Report 1988*[151] did not give prominence to whether other provisions of the Covenant might undercut the strength of Article 19. For example, is the speech protected in the *Brandenburg* case mentioned above, advocacy of racism and white supremacism, prohibited under Article 20(2) of the Covenant? As suggested earlier, by allowing private speech that advocates national hatred based on race or religion, a government tolerates such advocacy, even if it is not national policy. That tolerance seems to be at variance with Article 20(2), which states:

> Any advocacy of national racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

On the other hand, the provision could be interpreted consistently with the First Amendment if the obligation simply means outlawing speech amounting to official national advocacy of racial or religious hatred, not the failure to prevent such private advocacy.[152] Moreover, the First Amendment's strict protection of speech criticising the government, libeling individuals or offending public order or health or morals varies from the spirit of the Covenant to safeguard "special duties and responsibilities" owing to the rights of others, including the security and well-being of certain cultural groups and the larger polity. Article 19(3)(a) permits restrictions on free expression to protect the "rights and reputations of others". This provision, some argue, preserves the common law of libel for defamation of officials.[153] United States Constitutional law, in a narrow sense,

[151] *Information, Freedom and Censorship:* The Article 19 World Report 1988 (1988).

[152] Such a case involving Denmark's prohibition against private race and hate speech, *Director of Public Prosecutions v. Jersild,* is before the European Commission on Human Rights, challenged by a television station that had been sanctioned under the law for reporting such private speech. See Judgement of February 13, 1989, Supreme Court, Denmark, English translation by official translator.

[153] *Information, Freedom and Censorship:* The Article 19 World Report 1988, at 294 (1988).

squares with the provision, for it permits libel actions by officials but only for malicious defamation. Private individuals need only prove the libel false and the media defendant at fault. In Nigeria, the received common law appears consistent with the international standards allowing greater protection for defamation directed against anyone.

Article (19)(b) permits limitations on speech to protect national security. That provision does not necessarily conflict with First Amendment protection in the United States. Supreme Court decisions permit limits to subversive advocacy or sedition when the expression incites to imminent lawless actions or danger. Finally, Article 19 permits limitations on expression to protect the public order, health or morals. Supreme Court decisions, while mainly speech protective, do allow bans on obscenity, appropriate zoning of adult movies and bookstores, and restrictions on deceptive or objectionable advertising and offensive or pornographic messages involving children.[154]

No facial conflict arises between the Nigerian Constitution and Article 19, the source of the Nigerian constitutional protection for free expression. Articles 38 and 43 of the Constitution of 1989 are similar to Article 19(2) and Article 5 of the International Covenant on Civil and Political Rights (compared above with the First Amendment and cases), in that the freedom of expression is guaranteed subject to limits "in the interest of defence, public safety, public order, public morality or public health . . .".[155] By way of comparison, Article 9 of the African Charter on Human and People's Rights confirms the right of free expression and adds to that right, the right to receive information, subject to similar limitations.

While private racist, sexist and hate speech receives protection under the First Amendment, in contrast with the Convention's duty in Article 20(2) to

[154] See e.g., *Miller v. California,* 413 U.S. 15 (1973) (Court held obscene material is not protected under the First Amendment and set standard for determination of obscenity); *Freidman v. Rodgers,* 440 U.S. 1 (1979) (Court upheld Texas law which prohibited the practice of optometry under an assumed or trade name); *Young v. American Mini Theatres, Inc.* 427 U.S. 50 (1976) (Court held city of Detroit could enact special zoning laws relating to theatres showing sexually explicit films); *Osborne v. Ohio,* 110 S. Ct. 1691 (1990) (Court held that Ohio law prohibiting possession of child pornography complied with First Amendment).

[155] Nigerian statutes have modified little the common law on obscenity which defined obscenity as "the tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall" The Children and Young Persons (Harmful Publications) Act of 1961 defined as indecent any book or magazine likely to fall into the hands of a child which portrayed the commission of a crime, acts of violence or cruelty, or incidents of a repulsive nature, if the work as a whole would tend to corrupt the child. Some defenses to a charge of violating obscenity laws exist. They are: 1) that the exhibition took place in a private home; 2) that the exhibition took place via television or sound broadcasting; 3) that the person charged had no knowledge or any reason to believe that the article in question was obscene because he had not examined the publication; 4) that the publication serves the public good because it is in the interests of science, literature, art or learning; and 5) that the prosecution did not begin for more than two years after the alleged offense. The last defense does not apply to violations of the Children and Young Persons Act. *See* Adeyemi, Obscene and Indecent Publications in Nigerian Press Law (T. Elias ed. 1969).

repress national advocacy of it, a possibility remains that under some circumstances First Amendment jurisprudence might permit group libel or civil penalties or damages for the harm caused groups by private racist, sexist or hate speech.[156] The provisions of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination clearly would require modification of the current interpretation of the First Amendment.[157] At present, a state regulation of racist or hate speech (or a libel action) must closely link malice or direct incitement to violence or harm. The Supreme Court maintains, in the tradition of Justice Brandeis, that unless no time is possible for public discourse to reveal the error of racism and hate or expression tending to show subordination of women the solution lies in public debates, not more repression of expression.[158] When despised minorities may speak out and advocate their passionately held interests, free from repression, the danger that a single dominant faction with an orthodoxy will take control and silence opposing factions diminishes despite the verbal or symbolic conflict. In Nigeria with large Muslim population, however, there may be limits to blasphemous speech and the proclivity to stir ethnic violence.[159]

RELIGIOUS LIBERTY

Free expression and religious liberty always have been closely associated in the Anglo-American tradition, from the time when church and state in England merged under Henry VIII and sedition included heresy and blasphemy. Similar linkages appear in the American and Nigerian Constitution and traditions.

A. Difference in Structure and Religious Culture

After the American Revolution, the new country separated church and state in the national government through the First Amendment, but leaving the possibility of establishments to the states. The religion clauses of the Bill of Rights symbolise the second of Roosevelt's freedom. Expressed as simple prohibitions upon the state, the clauses read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .". The two "religion clauses", one protecting against an establishment and the other protecting religious freedom may contradict each other. Recent cases demonstrate the tension, for if the religious liberty of one group is treated favourably, that preference itself may amount to an establishment disfavouring other religions. In interpreting the clauses, the most recent Supreme Court decisions tend toward accommodating religious

[156] *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Hustler Magazine v. Falwell.*
[157] Supra note 84.
[158] See supra note 138.
[159] H. Nelson, supra note 17 at 220, 271–72.

liberty even at the expense of some establishment.[160] Except for some, as yet, minority views, no affirmative duty has been placed on government to sustain religious liberty.[161]

Compared with the negative limitations in the United States Constitution that guard against an establishment or government interference with religious liberty, the Nigerian Constitution guarantees religious freedom in positive language: "Every person shall be entitled to freedom of thought, conscience and religion . . .".[162] The next two sections place restraints that appear to favour religious choice. The first prevents an education system from requiring unwanted religious instruction. The second prevents education systems from prohibiting religious instruction in the public schools for students of a particular religious community or denomination. Nigeria has diverse religions, from the strong Muslim religions in the north to a multitude of Christian religions in the south. Also traditional religions (sometimes referred to as animism) subside along side and often are incorporated in the major monotheistic religions.[163] In contrast to the American distinction between public and private, the Nigerian structure prohibits any "place of education" whether public or private from requiring religious instruction of students in other than their own religious beliefs.

America also has wide diversity of religious beliefs from major organised Catholic, Protestant and Jewish religions, to atheism, deism, New Age cults, a rapid increase in Muslims (as many as Mormons) and Eastern religions.[164] The kind of prohibition found in the Nigerian Constitution would entangle the state in private or parochial instruction, and would accommodate religious liberty at the expense of an establishment problem through public religious instruction even excusing those not wanting it.[165] The public or a religious community might still provide religious instruction in Nigeria for those of particular beliefs without any constitutional limitation other than non-coercion. Moreover, to accommodate Muslims in Nigeria, Article 6 and Articles 259 to 263 of the 1989 Constitution permit a state to establish a Sharia Court of Appeals.[166] The Sharia is the Muslim law that governs all conduct of Muslims, not distinguishing between religious and secular purposes. With this express exception, the Nigerian Constitution, even as revised, has addressed the major question of establishment not by prohibiting government assistance to religion or even

[160] See *Lynch v. Donnelly,* 465 U.S. 668 (1984); Choper, *Defining Religion in the First Amendment,* 1982 U. Ill. L. Rev. 579.; L. Tribe, *American Constitutional Law* 1283–88 (2nd ed. 1988).

[161] See Employment Div., Dept. of Human Resources of Oregon v. Smith, 110 S. Ct. 1595 (1990) (Scalia, J., concurring).

[162] Nig. Const. of 1989, art. 37(1) (identical to art. 35(1) in the 1979 Constitution).

[163] H. Nelson, supra note 16 at 123–24.

[164] See desription of trends in J. Naisbitt & P. Anburdene, Megatrends 2000, 270–284 (1990).

[165] Providing even voluntary religious instruction or voluntary prayer at a public school violates the establishment clause of the American Constitution. *Abington School Dist. v. Schempp,* 374 U.S. 203 (1963); *Wallace v. Jaffree,* 472 U.S. 38 (1985).

[166] The language is quite similar to that in the 1979 Constitution.

by preventing the national government from interfering with state governments' own establishments (as some in America believe was the original understanding in the American Constitution[167]), but by prohibiting any official state religion through Article 11 of the 1989 Constitution (Article 10 in the 1979 Constitution): "The Government of the Federation or of a State shall not adopt any religion as State Religion".

On November 28, 1988, as the 1979 Constitution was being revised, an important constitutional event confirmed the extreme delicacy of the balance of power expressed in the religion articles.[168] The Constituent Assembly then in the midst of revision erupted in acrimonious debate over whether to continue the old Sharia court provisions in the new constitution or whether to extend them by creating a Federal Sharia Court of Appeal. Fearing outbreaks of religious violence and civil disorder between Christians and Muslims, President Babangida decisively withdrew from the agenda of revision the articles on Sharia courts, thereby allowing the status quo worked out in the 1979 Constitution to remain.[169] The overriding constitutional principle of no state religion seemed to undergird the action, although some political observers thought that the Assembly was close to compromise along the same lines and that "dousing the fire" of Sharia merely postponed the inevitable conflict to a later time.

The decision in Nigeria to maintain decentralised structures and keep current religious balances is remarkably similar to the original understanding of the establishment clause's function in the American Constitution, apart from a stricter separation of church and state. Congress was foreclosed from passing any law "respecting an establishment of religion" thus preventing not only a national establishment, but also keeping Congress from interfering with the States' decisions whether or not to establish a state religion and whether or not to aid establishments.[170] In Nigeria, the ban on any state religion, whether state or federal, is clearer than in the original understanding of the First Amendment, whose function kept the Federal government entirely out of any state policy on religion. Only after the Fourteenth Amendment incorporated the religion clauses did the establishment clause apply as against the states.[171]

[167] See Chief Justice Rehnquist's dissent in *Wallace v. Jaffree;* but see L. Levy, The Establishment Clause: Religion and the First Amendment (1986).

[168] See supra note 44 and text.

[169] Hammer on Sharia Debate, in Newswatch, Nigeria's Weekly Newsmagazine, Dec. 12, 1988, at 14; Awe, AFRC takes Sharia off CA agenda, Vanguard [Nigeria], Nov. 29, 1988, at 1; and Decisive Decision, The Democrat [Nigeria], Dec. 1, 1988, at 1.

[170] L. Levy, supra note 168.

[171] Before the Fourteenth Amendment was ratified, the Bill of Rights did not apply to the states. *Barron v. Baltimore,* 7 Peters (U.S.) 423 (1833). The Court held specifically in *Permoli v. New Orleans,* 3 Howard (U.S.) 589 (1845) that the Establishment Clause did not apply to the states. Although the Court held in *Gitlow v. New York,* 268 U.S. 652, 666 (1925) that the First Amendment's protection of freedom of speech and press was incorporated into the Fourteenth Amendment's due process clause and applied against the states, not until *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940) did the Court specifically hold that the clause incorporated the religion clauses of the First Amendment.

Unlike European countries such as Italy whose *Concordat* with the Catholic Church provides optional religious instruction in public schools even after Italy separated the Church from the state, no religious instruction may be provided in the curriculum of any public school in the United States no matter how voluntary the student's choice may be.[172] Nor may the government use taxes to pay instructors in private religious schools.[173] We know from American history that paying ministers from public tax revenues was the early practice in Virginia and Massachusetts, before the Revolution.[174] In contrast to Article 11 in the Nigerian Constitution prohibiting any state or federal "State Religion", the American Constitution originally did nothing to prevent the states from having establishments. The First Amendment prohibited Congress only from establishing a national religion or interfering with the states' choices "respecting an establishment of religion".[175]

More clearly than in free speech we also see the relationship between the central government and the states in a federal union. Just as the issue is of paramount importance in Nigeria's debate over the Sharia, so also it occurs regularly in Constitutional litigation and political controversy in the United States. As recently as 1983 a Federal judge in Alabama ruled that the First Amendment establishment clause prevented only the national government from establishing or interfering with the state's power to establish or disestablish religion.[176] The case challenged an Alabama law that required a moment of silence at the beginning of each day for prayer or meditation. A family objected to the coercive effect on the religious beliefs of their

[172] Illinois ex rel, *McCollum v. Board of Education*, 333 U.S. 203 (1948).

[173] *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985).

[174] 1 S. Ahlstrom, *A Religious History of the American People* 182–99, 242–46 (1972).

[175] The amendment reflected the people's wish that the national government not establish a national religion or affect the states' choices regarding an establishment of religion. L. Levy, *Constitutional Opinions: Aspects of the Bill of Rights* 135–60 (1986). By the time the Fourteenth Amendment was adopted, many states protected religious liberty in their own constitutions and all had disestablished religion. See Anson Stokes' discussion of the process of establishing religious freedom in the states in 1 *Church and State in the United States: Historical Development and Contemporary Problems of Religious Freedom under the Constitution* 358–446 (1950). As indicated supra note 171, the Court did not specifically apply the religion clauses against the states until 1940. In 1943 the Court struck down a West Virginia law requiring a flag salute and the pledge of allegiance as violative of religious liberty. *West Virginia State Bd. of Educ. V. Barnette*, 319 U.S. 624 (1943). In later cases the Supreme Court decided that nondenominational prayer could not be required in public schools in New York (*Engel v. Vitale*, 370 U.S. 421 (1962)); that the states could not require the Ten Commandments to be posted on classroom walls in public schools (Stone v. Graham, 449 U.S. 39 (1980)); that public school teachers could not teach even secular subjects in religious schools (*Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985)); and that direct tax support of religious institutions violates the establishment clause (*Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). On the other hand recent decisions allow tax support or deductions to individual families to use for transportation or tuition when made available neutrally to public and private school student parents alike. *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Mueller v. Allen*, 463 U.S. 388 (1983).

[176] *Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104 (S. D. Ala. 1983), *rev'd Wallace v. Jaffree*, 472 U.S. 38 (1985).

children in public schools if they were forced to participate in this "moment of silence" for prayer or meditation. The trial court disagreed. The Bill of Rights, the federal district court judge wrote, did not apply against the states through incorporation by the Fourteenth Amendment. If a state wanted to support religion, it could do so.[177] This tention between the national and state powers over religion (recall that all of the states had separated religion from secular power well before the Civil War) reveals the wisdom of federalism in dividing power when fueled by religious fervor. The federal judge ignored contrary Supreme Court precedent and held that under the states' reserved powers, Alabama could require a moment of silence for prayer or meditation in the public schools at the beginning of the day. When the Alabama case reached the Supreme Court, Justice Stevens sharply criticised the lower court judge for his interpretation that a state could establish a religion if it so chose.[178] The opinion of the Court emphatically reconfirmed and explicitly made clear that the Fourteenth amendment did indeed extend the religion clauses to all citizens as against the states.

B. The Courts and Politics in Religion

With national political campaign reflecting a majoritarian interest in religion in public schools, Supreme Court interpretations have become a political issue today in the United States. Putting prayer back in school and insisting upon enforcing values that are based on religion are issues in presidential campaigns just as religious liberty and tolerance have political and constitutional consequences in Nigeria. Recent presidential elections focus on the kind of justices the President will appoint for life to the Supreme Court, hoping that they may interpret the Constitution more to the liking of the presidential majority view.[179] As the United States does not have parliamentary supremacy to overrule decisions of the Supreme Court in constitutional interpretations, the judicial philosophy of those appointed to the Court may become controversial, as it was in the nomination and the rejection by the Senate of Judge Robert Bork.[180] Because a democratic majority cannot change the Constitution as interpreted by the Supreme Court, any such change must go through an onerous amendment process. That is one of the structural protections afforded minority religions or non-believers.

In Nigeria, the constitutional structure reflects the political balance to accommodate religious pluralism. The guardian of an older constitutional understanding of religious liberty and tolerance ironically has been the

[177] *Id.*

[178] *Wallace v. Jaffree*, 472 U.S. 38 (1985).

[179] See e.g., Totenberg, Did Americans Vote for This, too? Christian Science Monitor, Nov. 24, 1980, at 23. See L. Tribe, American Constitutional Law 64 (2d ed. 1988) (The Appointment Process is political) and recent hearings, including the replacement for Brennan.

[180] E. Bronner, *Battle for Justice: How the Bork Nomination Shook America* (1989).

military government in recent years, although the courts will have a continuing role. Any change to the advantage or disadvantage of either the Christians or Muslims (or traditional religions) easily could lead to the outbreak of violence between religious communities, as it did during the Shagari government.[181] Having withdrawn the religion issue from the agenda, the military government in effect took a constitutive action in which most people have appeared to acquiesce. The constitutional result gives further legitimacy to the courts in Nigeria to interpret the meaning of the Constitution's religion clauses, thereby reinforcing the courts as guardian of religious liberties in Nigeria under the 1989 Constitution.

The most recent decisions of the American Court continue the tradition of religious liberty by accommodating the majority if no state endorsement of religion or coercion against religious beliefs is attempted. Accommodating various majoritarian religious beliefs while at the same time not favouring any particular belief, while crucial to maintaining the peaceful co-existence of various religious factions, suggests confusion. In both Nigeria and the United States, the different political experiences and constitutional processes nevertheless confirm a common problem. Using state power in service of moral positions from religion often enflames civil disturbance and inter-religious violence. Indeed, Justice Brennan has explained that if the secular state helps religion, then it is in danger of corrupting the sacred; the secular power captures the sacred.[182] When the state political process favours one religion over another or gives tax support to religion, the state creates political insiders and outsiders,[183] and bitter resentments of one religion against another or against civil government, nearly always lead to passionate intolerance and even to a breakdown in civil government. In thousands of ways, a dominant orthodoxy may repress unpopular cults and newer sects that threaten orthodox beliefs; the resentment and rage from repression directly leads to fanatical reaction and often violence.

There are few easy answers to the political dilemma of a world of many religious beliefs and non-beliefs other than tolerance.[184] The American

[181] As it did in the Shagari era in the Kano riots. See H. Nelson, supra note 16 at 271–72.

[182] *Lynch v. Donnelly*, 465 U.S. 668 (1984) (Brennan, J., dissenting).

[183] Supreme Court Justice Sandra Day O'Connor, in a contemporary interpretation, has developed a potentially influential guide to court decision as to when a state makes a law "respecting an establishment". In the silent prayer case, *Wallace v. Jaffree*, she wrote a concurring opinion expanding the three-part Court-developed test a law must pass in order not to constitute an establishment of religion. The test, enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971) stated that to pass Constitutional muster against a claim that it is an establishment of religion, a law or regulation must 1) have a primary secular purpose, 2) neither advance nor inhibit religion and 3) not excessively entangle church and state. This abstract signpost was given significant meaning by Justice O'Connor's view that a law must not endorse a religion, thereby creating political insiders and outsiders, nor coerce any belief. In an earlier case, *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice O'Connor concurred in holding that a Christmas creche that formed part of a wider display of secular symbols did not convey a message of political insiders and outsiders when viewed objectively.

[184] Richards, *Toleration and the Constitution* 165–227 (1986).

Constitution, by separating church and state succeeds as well as any and better than most in this endeavour. Protecting against state action that creates political insiders and outsiders based on belief minimises the retaliation that might threaten civil order where the disfavoured outsiders are repressed and later could become an impassioned and violent political faction.[185] By ensuring religious liberty with equal treatment and with no state laws favouring any establishment, broader civil and political liberties and democratic social order is preserved, especially when free expression protects robust debate among diverse religious points of view. Religious political factions, within these limits, may argue vigorously and seek to have their interests reflected in the legislative process, also protected by the freedom of expressing.

The tradition of pluralism in religious beliefs and tolerance of religion, when freedom of expression thrives, reduces the danger of religious factions. The legitimacy for expressing deeply-held views in a political process, accompanied by the tolerance for compromise, is an ironically secular method of humanising religious intolerance and its own justification for separating church from state. From the Nigerian Constitutional experience, Dale Omotunde, a professor of communications, wrote an essay on tolerance in the aftermath of the Sharia controversy. It had a universal theme:

> Tolerance is not only needed to avoid disaster, but is also needed if a community is to remain healthy. Unfortunately extremism has no room for tolerance. It is in the iron hold on dogma and not in the dogma itself that the danger lies. Because intolerance has no room for compromise an intolerant community—be it in politics or in religion—is headed for violence and collective suicide.
>
> An executive *fiat* alone may not solve the problem. It is like prescribing aspirin for rheumatism, a mere palliative. The ban on the sharia debate is a stop-gap. The fundamental monster of religious intolerance is still alive, spoiling for a fight another day. History, as always, has a way of repeating itself, but man in his infinite folly has a habit of not learning from the past.[186]

C. **Difference in Accommodating Religious Freedom to Majority**

The United States Supreme Court has been working out a jurisprudence to justify limits upon religious freedom when a compelling or significant state or national interest collides with religious belief. Over a hundred years ago, the Supreme Court upheld a law prohibiting polygamy as practiced in Utah by the Mormons.[187] Yet, more recently, the Amish, a gentle religious

[185] *Wallace v. Jaffree,* 472 U.S. 38 (1985).

[186] Dele Omotunde, *The Squirrel and the Tree,* in Newswatch, Nigeria's Weekly Newsmagazine, Dec. 12, 1988, at 13.

[187] *Reynolds v. United States,* 98 U.S. 145 (1879).

farming people, were relieved of compulsory public education for their children after the eighth grade, in order to fuilfill the religious requirements to learn skills in their community through working.[188] Members of the same religious group, however, were not relieved from paying Federal social security taxes when employing their own members even though they refuse retirement benefits and take care of their own.[189] Seventh-Day Adventist have been relieved of burdens for refusing to work on their sabbath as required by their religion.[190]

In Nigeria when official elections were held on Saturday, thousands of Adventists protested the infringement of their religious liberty, citing the human rights provisions of the new Constitution. The Supreme Court of Nigeria refused to determine the issue arguing that the election would have turned out the same even if the Adventists had all voted for the losing candidate.[191]

We see an increase of similar restrictions on religious liberty in the United States as well. When a significant government institution or programme is being administered by neutral nondiscriminatory regulations, burdens on religious practices may be justified. Military regulations may prohibit religious headgear such as *yamulkas* and turbans.[192] Native Americans may not be exempted from furnishing social security numbers as a condition for receiving food stamps even if identity by a number violates their religious belief.[193] Muslim inmates in a maximum security prison have no right to attend their Friday religious services as a group when the services conflict with work assignments and security rules.[194] Native Americans cannot prevent the government from building a road that would disrupt a sacred place on public land where religious rituals demand serenity and isolation.[195] Nor is the use of *peyote* for religious ceremonial purposes exempt from criminal laws against using drugs generally.[196] A public school "secular humanism" curriculum required of all children does not unduly burden the religious liberty of children of fundamentalist religious families.[197] "Scientific creationism" based on the Bible may not be required

[188] *Wisconsin v. Yoder,* 406 U.S. 205 (1972).
[189] *United States v. Lee,* 455 U.S. 252 (1982).
[190] *Sherbert v. Verner,* 374 U.S. 398 (1963).
[191] *Dickson Ojeigbe & Another v. Marcus W. Ubani & Another,* [1961] All N.L.R. 277.
[192] *Goldman v. Weinberger,* 475 U.S. 503 (1986).
[193] *Bowen v. Roy,* 476 U.S. 693 (1986).
[194] *O'Lone v. Shabazz,* 482 U.S. 342 (1987).
[195] *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988).
[196] Employment Div, Dept. of Human Resources of Oregon v. Smith, 110 S. Ct. 1595 (1990). In lowering the scrutiny from requiring a compelling government interest to something less, Justice Scalia said the Court's precedents applying the compelling state interest test "have nothing to do with an across-the-board criminal prohibition on a particular form of conduct". He said American society would be "courting anarchy" if the Court endorsed the approach of granting "constitutionally required religious exemptions from civic obligations of almost every conceivable kind". He explained that minority sects may well have to accommodate the majority in these matters.
[197] *Smith v. Board of School Comm'rs,* 827 F.2d 684 (11th Cir. 1987); *Mozert v. Hawkins County Bd. of Educ.,* 827 F.2d 1058 (6th Cir. 1987).

as part of the public school curriculum. Nor can a state require Biblical creationism to be offered whenever scientific human evolution is taught, even when Darwin's theory contradicts the religious beliefs of some children.[198] That task is left to the churches. The history of religion, however, may be taught. The Supreme Court recently decided that a Christmas creche in a public place violated the Establishment Clause, but that a Jewish *Menorah* may be displayed with a Christmas tree outside a public building.[199] Recently a federal court in the district of Columbia held that the Marine corps cannot maintain a Roman cross on one of its bases.[200]

D. Comparing Constitutional and International Standards

The Nigerian Constitution reflects almost literally the international provisions protecting freedom of religion. Article 18(1) of the International Covenant on Civil and Political Rights states:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The African Charter[201] and Article 37(1) of the 1989 Nigerian Constitution essentially restate this provision. The United States Constitution and cases interpreting it protect religious liberty at least as much, as explained above. However, the International Covenant also provides that freedom to manifest one's religion may be subject to limitations to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Again, while the United States' cases which limit the free exercise of religion seem to be consistent with this provision, one could interpret the limitations as providing a stronger basis than presently recognised for burdening such liberties.

Unreported Nigerian Constitutional Caselaw suggests that an action for nuisance stemming from religious worship would be upheld.[202] Similar interpretations of limitations in the 1979 Nigerian Constitution found in

[198] *Edwards v. Aguillard,* 482 U.S. 578 (1987).

[199] *County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 109 S. Ct. 3086 (1989).

[200] *Jewish War Veterans v. United States,* 695 F. Supp. 1 (D.D.C. 1988).

[201] African Charter on Peoples' and Human Rights, art. 8: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms".

[202] *Odugbesan v. Ogunsanya & Others,* Suit No. LK/354/70, delivered Feb. 9 1970 (unreported Coram, Adefarasin J.), referred to in correspondence with author from the Hon. Mr. Justice E. Ozobu, High Court Abakaliki, Nigeria, March 2, 1990.

Article 41(1)(a), and identical provision in the 1989 Constitution, which states:

> Nothing in [article] . . . 36 . . . shall invalidate any law that is reasonably justifiable in a democratic society—(a) in the interest of defence, public safety, public order, public morality or public health. . . .

The United Nations declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief mirrors the language of the International Covenant and the Nigerian Constitution, with one interesting alteration. While the International Covenant guarantees the right to have *or adopt* a religion, the Declaration omits the term "adopt".[203] The drafters omitted this phrase in order to avoid an implicit approval of proselytising, thought to accompany colonialism.[204] The 1979 and 1989 Nigerian Constitutions retained the freedom "to manifest and propagate" religion.[205] The strong tradition of free speech in the United States together with free exercise jurisprudence would probably not permit limits upon proselytising in the United States beyond those limits set by neutral time, place and manner restrictions. The same conclusion would seem to follow from the Nigerian Constitution.

E. Summary of Difference in Structure and Culture

In summary, religious freedom and tolerance, one of Roosevelt's four freedoms, still drives constitutive processes both from within countries and through international human rights instruments. In comparing the American and Nigerian experience, the two constitutions now limit decisions of both the state and the federal governments in either endorsing particular religions or in burdening religious liberties. In comparing the religious liberties of the two countries with the international human rights instrument, they show common and universal concerns, especially in the relationship between religion and democratic government, where freedom of expression of diverse belief and religious factions not threatened in the political process make good government possible. The sameness of values, however, does not find similarity in structure or power. The African religious and local traditions are central ways of life mirroring in many ways the express Constitution while barring the State from establishing any one as a State religion. The State does, however, support various religious beliefs through family and community choices. The problem of accommodation to the dominant religions by minority sects is troublesome. In America, religious practices are more private and the tradition is to keep the State out. Dominant religious beliefs in particular places, however,

[203] G. A. Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, UN Doc. A/36/51 (1981).
[204] D. Sullivan, *Advancing the Freedom of Religion or Belief Through the U.N. Declaration on the Elimination of Religious Intolerance and Discrimination,* 82 Am. J. Int'l L. 487 (1988).
[205] Nig. Const. of 1979, art. 35(1); Nig. Const. of 1989, art. 37(1).

increasingly find accommodation by courts so long as the religious liberty of others is not coerced. Freedom of expression appears to protect minority cults in the United States more than the Establishment clause.

PROPERTY AS HUMAN RIGHT

Just as the negative limits placed by the American Bill of Rights upon the power of national or state governments protect the positive values of human dignity, so also "property" rights similarly are grounded in a people's general welfare and security through incentives and rewards for productive work and the fair distribution of surplus. While liberal democracies such as the United States favour the private sector and provide less of a role for government control of the means of production than socialist states, all societies, including the Nigerian, expect their governments to provide for the general economic well-being directly or through the legal system of protection. Nigeria has been working out according to its own traditions, history, and values the appropriate mix and balance between the public and the private sectors. This mix provides a nation's system of incentives to produce and distribute public and private goods, such as food, housing, medical care, education, transportation and other necessary products and services. All societies provide incentives for productive work and investment. "Property" is the main symbol for expressing the idea that human beings as individuals or co-operatively ought to benefit from the fruits of productive work and have protection against bullies or powerful governments unjustly taking the fruits of labour or investments. The Nigerian and American Constitutions both provide some protection for "property". Yet each society also provides a way to subordinate individual selfishness to the common good through taxes, government programs and regulation. "Private property" is the right to exclude others from interests in land or things, or from taking or preventing just rewards for meritorious work or return on investment. All societies aspire to provide some security for human individuals or groups to be free from the intrusions of the more powerful in these private economic expectations.

The task is not to justify one ideology as against another for the most productive and just society but to examine how the United States and Nigerian Constitutions each treat property as a human right and to compare that difference with the various international human rights instruments. Here, we must first distinguish between the personal or group private right and the general welfare, a distinction drawn in both constitutions. The comparison will be understood best if we refer first to the international human rights regarding property or economic well-being.

A. International Treatment of Property and Well-Being

The international human rights community refers to rights of development as "second generational" entitlements for economic, social and cultural

rights, derived from the duty of co-operation placed on each country by consensus of the international community of states or in its constitution, in contrast with "first generational" rights of civil or political liberty or negative limits against the State. We best see these positive aspirations in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Political and Civil Rights and the International Covenant on Economic, Social and Cultural Rights. The right of self-determination expressed in Article 1 of the latter Covenant, for example, confirms the autonomy of each people to control and dispose of their wealth and resources for the development and welfare of the country. Different standards of treatment of property when taken for public use and even for protection of private property appear in the conventions.

Specific provisions in the African Charter of Human and Peoples' Rights place an emphatic duty upon all African states to ensure the right to development and the "right to property" subject to laws expressing the general interest of the community. The wording of the African Charter guarantees work over private property. Article 14 states: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community . . .". There is no guarantee of protection of individual ownership of property.[206] The right to work, protection of families, right to education and the protection of morals and traditional community values are entitlements that fall upon each African state under the Charter. If a "people's" property is unjustly taken from them, they have the collective right to its lawful return as well as to adequate compensation.[207]

These well-known anti-colonial and anti-imperialistic provisions assume analytic importance in comparing these notions of property with those protected under the United States Constitution. There are differences, of course; but many of the same anti-colonialist values inhere in both the United States Constitution and in the African Charter as well as in specific African constitutions. The main difference, one that spans 200 years, is between the affirmative obligation of the state in the African Charter implying a centralised economy with guarantees, in contrast with strong doubts in the United States Constitution about giving the central state too much power over the means of production. The central governmental role for development economics especially in Third World countries is being challenged by a number of experienced developmental economists.[208]

[206] Motala, *Human Rights in Africa: A Cultural, Ideological, and Legal Examination,* 12 Hastings Int'l & Comp. L. Rev. 373 (1989), argues that private ownership of property should not be considered a universal right, because traditionally in Africa ownership of property was communal.

[207] African Charter, arts. 14–18, 21, 22. But see §28 of the *Land Use Act* of 1978 which states that the right of occupancy can be revoked for a public purpose without compensation.

[208] See P. T. Bauer, *Reality and Rhetoric: Studies in the Economics of Development* (1984), especially chapters 6 through 9 on Africa and Nigeria.

B. **Property in United States Constitution**

The United States Constitution expresses no affirmative duty on government to provide for basic human needs. A structure of law-making power was delegated, however, by which the needs of future generations might be provided. We now live in different times and cultural situations. Much social and economic legislation, both state and Federal, responds to the post-industrial, highly interdependent society of today that creates new problems of human need. In the preamble to the United States Constitution we find five major purposes of government, including a general welfare clause. Some scholars believe that this provision, together with the power in Congress under Article 1 to provide for the general welfare of the United States and to regulate commerce, places upon the national government through Congress the responsibility to provide for the general welfare.[209] Nothing better states the purpose of the Constitution than its preamble.[210] Government's purposes are to establish justice and secure "the blessings of liberty" subject to providing for the common defence, the general welfare and domestic tranquility. While the Constitution provides no specific economic entitlements of property or welfare, it does provide the power to fulfill the responsibility of Government for the general welfare and hence the new property concepts grounded in entitlement legislation protected by due process.[211]

The American Constitution, contrary to popular opinion, nowhere requires a private capital or free-enterprise economy, although a consensus developed in the 19th century to protect private enterprise, and a structure is now entrenched. It does protect private property from confiscation or arbitrary government action. But all property is subject to reasonable

[209] W. Crosskey, *Politics and the Constitution in the History of the United States* (2 vols., 1953; vol. 3, 1981).

[210] Preamble, U.S. Constitution:

We the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

[211] *Goldberg v. Kelly,* 397 U.S. 254 (1970) (public assistance benefits could not be terminated without an opportunity for a hearing before termination) and *Perry v. Sinderman,* 408 U.S. 593 (1972) (junior college teacher might be able to establish at a hearing that the junior college had the equivalent of tenure). The Court noted in *Board of Regents v. Roth,* 408 U.S. 564, 576 (1972) that a prerequisite of Fourteenth Amendment due process protection was the present enjoyment of the statutory entitlement. That is, the property right was derived from state action. See C. Reich, *The New Property,* 73 Yale L. J. 733 (1964) and F. Michelman, *Property as a Constitutional Right,* 38 Wash. & Lee L. Rev. 1097 (1981). See also L. Tribe, American Constitutional Law 685-718 (2d ed. 1988). At the same time, the Court declined to create rights. See e.g., *San Antonio Indep, School Dist. v. Rodriguez,* 411 U.S. 1 (1973), *reh'ing denied* 411 U.S. 959 (1973) (Court reversing a district court ruling that the Texas school financing system violated the equal protection clause of the Fourteenth Amendment and declaring that education was not a constitutional right). However, states have an independent power to create property rights in their constitutions. See e.g., *Rose v. Council for Better Educ.,* No. 88-SC-804-TG slip op. (Ky Sept. 28, 1989) and *Edgewood Indep. School Dist. v. Kriby,* 777 S.W. 2d 391 (Tex. 1989).

regulation and may even be taken and redistributed for public purpose, so long as just compensation is paid. The Fifth Amendment to the Constitution makes this explicit. Sometimes other human rights are more important than property rights. For example, states may require private shopping centres to permit free expression, even if the owner does not like the speech, without violating the Constitution.[212] Supreme Court Justice Thurgood Marshall has written in an opinion that at some point a Federal interest in protecting private property as a human right would outweigh others' rights to free expression, but that the property interest in a private shopping centre did not qualify, so long as the state's constitution reasonably allowed such free expression there and the owner could freely indicate his or her views.[213]

The states may take private property from one owner and give it to another for the public purpose of providing housing for low-income families, so long as just compensation is paid. In the 1960s, the State of Hawaii redistributed residential parcels on huge private estates covering much of the land in the Hawaiian Islands to persons who were leasing their homes built on the estates. Fair market value had to be paid to the owners, but taking from one and giving to another was not unconstitutional.[214] The role of the Federal Courts in cases such as these is to review the state action to see that so-called "naked transfers" indeed serve a reasonable public purpose and that just compensation is paid.

The Nobel Prize winner James Buchanan of George Mason University in Virginia and others have been working for many years on a theory of public choice that examines the economic and power incentives of state officials in their public decisions.[215] The studies show that in order to keep power, officials often "rent" their offices for personal advantages that lead to deferring or passing on to the people the actual costs of public decisions. The result often deters efficient economic development. For example, when voters refuse to raise taxes that could be used to pay for land taken from private owners, a public zoning commission may try to use its power to obtain from a developer a public benefit such as an easement. Another example is the use of high tariffs to protect inefficient local industries and to give favorable treatment to exports by subsidies.

In some situations regulations redistribute wealth. The courts decide when such regulations are takings, not the public officials. If these situations are in reality "regulatory takings", then the taxpayers as a whole should bear the cost. The great difficulty, and one that judicial review uniquely serves to remedy, is when the public choices by officials unfairly burden the owners of private property for the benefit of others. Recently,

[212] *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980).

[213] Id. at 91-94 (Marshall, J., concurring).

[214] *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984).

[215] See, J. Buchanan & G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962); for further explanation of public choice theory, see D. Mueller, *Public Choice* (1979) and R. Hardin, *Collective Action* (1982).

the Supreme Court said that the California Public Utilities Commission could not require an electric utility company to include messages opposing rate increases in its billings.[216] Here the free speech of the property owner not to communicate unfavourable messages outweighed the Commission's interest in wanting customers to have information against rate increases. More recently, the Supreme Court held that a coastal zoning requirements of an easement before a building permit could be granted was a compensable taking.[217] And the denial of permission to rebuild a church-owned camp washed out in a flood was a compensable temporary taking for the period.[218] On the other hand, a complex environmental mining regulation requiring certain pillars of coal to be left in the ground to prevent subsidence from subsurface mining was not a taking.[219]

While the Constitution and Bill of Rights protect property from uncompensated takings by governments, nothing prevents a state from taking ownership of the means of production if it capitalises it from tax revenues by consent of the people's representatives. Since the rents of political office nearly always add cost and inefficiency in production and distribution of goods and services, the question of social and economic justice almost always falls to the democratic legislative process of bargaining, where the votes of the people's representatives might provide mutual benefits without social upheaval.

Until President Roosevelt's New Deal in the 1930's the Supreme Court struck down legislative enactments that burdened private enterprise. With new Court appointments and more deferential judicial review of laws passed by democratic majorities in economic welfare cases, a social revolution occurred, focused on Roosevelt's Four Freedoms mentioned earlier. Later on, the Supreme Court introduced standards of judicial review to ensure Constitutional status to government entitlements provided by statute.[220] Currently controversial is the question whether any conditions in government programmes unconstitutionally transfer wealth from one private group to another. Professor Richard Epstein thinks that the courts should apply strict judicial standards of review in addressing the question:

> The object of government is to maximise the co-operative surplus of human activities in all domains, and the object of the Court is to help ensure effective government. The Court therefore should not sanction abuses of the political process, whether they offend speech, liberty or property. Instead, a presumption of distrust should attach to all government action. That presumption should allow the Court to organise its thinking on unconstitutional conditions in particular and

[216] *Pacific Gas & Electric v. Public Utilities Comm'n,* 475 U.S. 1 (1986).
[217] *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987).
[218] *First English Evangelical Lutheran Church of Glendale v. Los Angeles,* 482 U.S. 304 (1987).
[219] *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987).
[220] *Goldberg v. Kelly,* 397 U.S. 254 (1970).

constitutional law in general around one proposition: where the Court routinely allows strategic behaviour and implicit wealth transfers by government, there constitutionalism ends.[221]

In partial agreement, Professor Kathleen Sullivan would apply a "good society" model drawn from Aristotle and the tradition of civic republicanism to define unconstitutional conditions.[222] For her the Constitutionality of conditions aimed at wealth distribution would depend upon a degree of scrutiny of the condition (say of allowing a permit to build a house near a beach on the granting of an easement) that corresponded to a standard of review for the initial action. Constitutionalism might then offer support for affirmative redistribution of wealth between private parties less than a complete naked transfer.[223] This community-oriented view of economic well-being seems more compatible with the Nigerian culture and also its constitutional structure for defining property and limiting it for community purposes. The localised and small community tradition of trading and customary use by possession, however, creates a powerful counter-poise to centralised ownership.

C. Property in Nigerian Constitution

The purpose for the Nigerian Constitution of 1989 (as well as the earlier versions) is to promote "good government and welfare of all persons in our country on the principles of Fredom, Equality and Justice . . ." and "the Unity of our people". Also expressed, in contrast to the American preamble, is the idea of national sovereignty "under God dedicated to the promotion of inter-African solidarity, and world peace, international co-operation and understanding".[224]

The Nigerian Constitution requires substantial national planning and management of the major sectors of the economy, as an explicit policy directive. Traditional property interests are protected from compulsory taking without compensation through the courts. But ownership of sub-surface mineral and natural gas rights is allocated to the Government, as is the ownership of the mass media other than newspapers.[225] Group or "peoples" rights in property as such find no explicit protection except through general provision.

In Nigeria much of the recent constitutional discussion about property has centred on the *Land Use Act* of 1978, which declared that lands are to be held in trust for the people. Both the 1979 and 1989 Constitutions contain provisions declaring that nothing in the constitution invalidates that

[221] Epstein, *The Supreme Court, 1987 Term, Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent,* 102 Harvard Law Review 5, 104 (1988).
[222] Sullivan, *Unconstitutional Conditions,* 102 Harv. L. Rev. 1415 (1989).
[223] Id. at 1499–1500.
[224] Nig. Const. Preamble.
[225] Nig. Const. arts. 42(1)(3) and 38(2).

act.[226] Nonetheless, the courts have split on the constitutional standing of the act. In *Kwocha v. Governor of Anambra State*[227] and *L.S.D.P.C. v. Foreign Finance Corp.*[228] judges suggested that the Act had precedence over the Constitution. On the other hand, in *Dada v. Governor of Kaduna State*[229] and in *Kanada v. Governor of Kaduna State and Anor.*,[230] judges ruled that any provision of the Act conflicting with the Constitution was void. When *Dada* was appealed, the Supreme Court declined to decide the question of precedent.[231]

Much of the controversy surrounding the Act relates to the vesting of all the land in a state in the governor, to be held in trust for all Nigerians. The act empowers the governor to grant a statutory right of occupancy over any land. However, pre-existing rights are not to be disturbed, and local governments have the power to grant a customary right of occupancy over non-urban land.[232] The process of condemnation for public purposes begins when the governor sends notice of revocation of the right of occupancy which is effective immediately and no compensation is due,[233] but the occupant's unexhausted improvements are compensable.[234] Although the governor's power was vested during a time of military rule, in *Nkwocha v. Governor of Anambra State*, the power of a civilian governor also to revoke the right of occupancy was upheld.[235]

The public use requirement in both countries is the only effective check on the government's power to take property so long as compensation is paid. In contrast to the United States Supreme Court's expansive definition of public use in *Midkiff*, Nigerian courts have held that the public use

[226] For a discussion of the act and developments leading to its passage, see Oluyede, *Development in Land Law and Law of Conveyancing in the Challenge of the Nigerian Nation: An Examination of Its Legal Development,* 1960–1985, at 96–120 (1985).

[227] 6 S.C. 362 (1984).

[228] 1 NWLR 413 (1987).

[229] FCA/K/12.

[230] 4 NWLR 36 (1986).

[231] For a discussion of the *Land Use Act* and its constitutional position, see Omotola, *Volcanic Development in Nigerian Law of Real Property,* 14 Nig. J. Contemp. Law 46 (1984–1987); J. Omotala, *Law and Land Rights: Whither Nigeria?,* Inaugural Lecture Series (1988); Oyewo, *Right to Property and Forfeiture of Assets,* 8–9 J. of Private and Property Law 87 (1987–1988); Fekumo, *Does the Land Use Act Expropriate?—A Rejoinder,* 8–9 J. Private and Property Law 5 (1987–1988).

[232] §§5–6, 34, 36. Considerable similarity exists between the *Land Use Act* of 1978 and the United States government policy toward Native Americans and their land. In both situations, the government declared that the lands would be held in trust and that the inhabitants had a right of occupancy. The customary right of occupancy in Nigeria was nonalienable, as was the Native American aboriginal title. To some extent the policies in both countries reflect paternalism. In the case of Nigeria, there is a tradition of the tribal and village elders supervising communal life. The paternalism in the United States is more malevolent, being based on Anglo-American ethnocetricity. Both Native American and Nigerian cultures have a strong tradition of communal ownership of land. For a discussion of court cases and laws relevant to Native American lands, see Coulter and Tulberg, *Indian Land Rights,* 3 Antioch L. Rev. 153 (1985).

[233] §28.

[234] §29.

[235] 6 S.C. 363 (1984).

requirement is not met when the right of occupancy is revoked in order to give the same right to another citizen.[236] The courts have further restricted a governor's power by holding that the revocation process requires more than notice. The holder of the right of occupancy has the right to be heard. Furthermore, the governor must specify which of the public purposes listed in §50(1) of the Act is applicable in a particular revocation.[237]

D. **Property and Corruption**

A major concern in the relation of government to private property and wealth is corruption, the fear that those in power reward friends by naked transfers under colour of law. American pluralism of the Madisonian variety aims almost directly at checking the corrupting influence of power and wealth on the civic virtue of the elected leadership and government, but recognising that benefits often accrue to the winners and their friendly factions. Property, when widely shared in each culture, on the other hand, serves the important function of checking unbridled governmental power or corruption. The constitutions of each country do not define property, leaving it to the customary or statutory law, but both do protect it from takings for public purpose without compensation. Thus, the institution of private property protected in the American and Nigerian Constitutions, when considered alongside the affirmative social and economic policies also made explicit in different ways in the two Constitutions, serve human rights by limiting power, even if in the public process private wealth accumulates disproportionately and sometimes corrupts. One remedy Madison proposed was the term of office and elections to prevent excessive corruption yielding tyranny. In Nigeria, the remedy has been a less than satisfactory political solution, for corruption has been rampant. A military solution has emerged; it ousts a corrupt civilian regime through benevolent action of a new military regime. Nationalistic and potentially subject to the same forces of corruption, the military regime governs for a limited time, until elections are called and a new civilian government installed.

CONCLUSION

The United States has worked out its own history beginning in a colonial past with aspirations of freedom and strong civil order amidst an anarchistic or libertarian streak. Nigeria reflects its own traditions, with quite different political underpinnings. Ethnic and customary practices survive notwithstanding the colonial era, while modern Nigeria draws upon a post-World War II tradition of human rights. Each country aspires for equal liberty with varying degrees of civility and tolerance in the public

[236] Foreign Finance Corp. Ltd. v. L.S.D.P.C. & Ors, unreported suit No. ID/552/80 (1980), aff'd CA/L/18/85 (1987).

[237] See Note, Revocation Process: *Obikoya & Sons Ltd. v. Governor of Lagos State* (1987) 1 NWLR (Pt. 50) 385, *L.S.D.P.C. v. Foreign Finance Corporation Ltd.* (1987) 1 NWLR (pt. 50) 415, 8-9 J. of Private and Property Law 102 (1987-1988) (authored by A. Utuama).

discourse depending upon cultural traditions; and each remains committed to freedom, especially through constitutional limits on the political branches determined by the courts in both countries. There is greater traditional deference in Nigerian courts to the political branches and customary law of communities.

Concerning the human condition, struggles in these diverse cultures to identify fundamental values and maintain respect for them in vastly different developing and post-industrial societies are tasks more formidable than they have ever been for single societies. The universal human aspirations enunciated in Roosevelt's Four Freedoms speech—the freedom to speak and publish freely; the freedom to worship according to one's own conscience; the freedom from fear of violence and war; and the freedom from needing food, shelter or education—have powerful but different contemporary lives in Nigeria and in the United States. This article compared the most important differences and similarities, and these may be summerised as follows:

A. Difference and Similarity in Constitutional Theory

In the United States, a belief in the corrupting influence of power led to republicanism and a system of government which separated powers along functional lines and to the division of state from national power. The founders also believed that the large geographic area comprising the national territory insured that no faction would be able to capture the national government. The judicial branch further serves to protect minority interests from temporary legislative majorities through its review of state and congressional legislation under a Bill of Rights now mostly applicable as against all government.

In contrast, modern Nigeria did not begin in a tradition of civic republicanism; its tradition is one of traditional *obas* or chiefs operating through customary law. Nonetheless, starting in 1979, its constitutions have reflected the decision to separate government into three branches and divide it between the federal and state governments. The judicial branch in Nigeria is far more deferential to the political branches than federal courts are in the United States because in part reflecting a British tradition of parliamentary supremacy, the Nigerian Supreme Court has not achieved the same ability as the American Supreme Court to strike down laws or policies in conflict with the constitution.

The two constitutions also differ in that core freedoms in the American Constitution are expressed as negative restraints upon government, limiting the state's capacity to intrude too far in the tradition of classic liberalism. The Nigerian Constitution organically prescribes positive guarantees to citizens and duties and responsibilities of citizens to each other. The document reflects a tradition of communitarianism, an organic conception of the state. In practice, incentives induce private co-operation in the United States; and restraints on power limit government in Nigeria.

B. Difference in Core Freedoms

1. Preferences

Both countries have enacted preferential policies for certain racial and ethnic groups. The practices, widely disputed, find support in the international convention on the elimination of racial discrimination. In the United States, affirmative action policies initially sought to overcome the effects of slavery by equal access to public goods. These policies later expanded to provide entitlements and these were extended to encompass other minorities and women and saw the rise of new opposition groups and a constitutional reaction against "reverse discrimination". In Nigeria the numerically dominant Hausa-Fulani used preferential policies to displace the Ibo from schools and government positions, especially after the civil war, allegedly evening the playing field, compensating for the lack of schools in the Hausa-Fulani area during the period of British rule.

2. Freedom of Expression

Both countries value freedom of expression, stated as a limit on the government's ability to regulate speech and press in the United States and stated as an affirmative entitlement in Nigeria. Nigeria's constitutional provisions are similar to the international agreements that limit the freedom of expression when necessary to protect the rights or reputation of others, the national security or public health or morals. The American Constitution has no such provisions, but the Supreme Court has recognised similar restrictions on freedom of expression. The limitations are more tightly drawn, however, than in Nigeria or in the international agreements. Unlike Nigeria, the United States has no *Official Secrets Act*, but the *Espionage Act* and employment contracts have been used to limit the dissemination of government information. The American Court requires a compelling national interest, usually defined as an immediate threat to security or incitement to imminent lawless behaviour, to restrict speech. Also unlike the law in Nigeria, if the defamation plaintiff in the United States is a public official or figure, then he or she must prove malice as well as falsity. Nigerian libel law has not been constitutionalised.

3. Religious Liberty

The two countries' constitutions as well as pertinent international agreements and standards value the fundamental right of religious liberty. The United States differs in demanding greater separation of church and state. For example, in Nigeria non-coercive religious instruction is permitted in government-financed schools. Both countries struggle with accomodating majoritarian beliefs of community or ethnic regions) while protecting the religious freedoms of all. Nigeria is more concerned with seeking to reduce potential violence or upheaval from religious conflict than the United States has been. The United States seeks to limit the more subtle effects of

religious conflict through public policies to accomodate the dominant religious majorities so long as they do not coerce minorities.

4. Property

Private property is protected but not granted in both constitutions. Each requires compensation for private property taken for public use. The Nigerian Constitution broadens public ownership of important public goods such as subsurface minerals and communications. The American Supreme Court has defined public use more expansively than have the courts in Nigeria when considering the power to take property for a public purpose so long as compensation is provided. In further contrast, the *Land Use Act* of 1978 gives the Nigerian state governors considerable power over land in their states, and statutory and customary rights of occupancy are important in Nigeria, while common law remains the cornerstone of American property law.

C. Standing in Another Culture's Time and Place

Both in developing countries and in advanced democracies the struggles for core freedoms amidst cultural diversity in a global society are daunting. The comparative method used in this article of analysing differences in key freedoms in structure and culture between the two countries and in emerging international norms, requires standing in another society's time, place and cultural values. Attempting that, we find these common values:

1. Written positive guarantees mean nothing without political will and negative restraints do not themselves define the common good.
2. Unifying aspirations and ideals are expressed in the Constitution as a national story of founding or creation.
3. Each society values judicially-protected limits to state coercion, public power and corruption.
4. Each society values community development through the process of non-state wealth production and distribution, with concern for exploitation and compensation of private property is taken for public purpose.
5. Each culture values respect for personal and group expression, enlightenment and autonomy.
6. Each culture values co-operation by individuals in achieving community goals and has suspicion of public officials but not so frequently community leaders.

If national elites and average citizens alike can place themselves inside another country to imagine what the human condition there is like, and if each human being is capable of the same imagination with other human beings within their own diverse cultures, only then might we understand whether anything of fundamental value to one culture or race is common to another or important enough to unite us in co-operation toward common goals through enlightened common interest to escape the cares of our own ethnic or national ignorance.