

**CONSTITUTIONALISM, HUMAN RIGHTS AND
THE JUDICIARY IN NIGERIA**

by

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DECLARATION

I declare that **Constitutionalism, Human Rights and the Judiciary in Nigeria** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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ABSTRACT

The cultivation of a culture of constitutionalism remains the greatest challenge to Nigeria's constitutional democracy. Militarism affected in a very substantial way Africa's efforts to develop a culture of constitutionalism in the continent. Nigeria typifies the failed African effort in trying to establish an enduring democracy and constitutionalism. After ten years of transition from militarism to constitutional democracy and the euphoria of the country's return to democracy, the country is still on a slow march in the entrenchment of the practice of constitutionalism. This work primarily sets out to investigate the state of constitutionalism in Nigeria. Human rights and judiciary as constituents of constitutionalism are the main focus of that investigation. A crucial question that encapsulates the main objective of the study is how can Nigeria entrench a culture of constitutionalism?

The study, therefore, investigates the question whether constitutional formalism or textualism without more can guarantee constitutionalism. It advocates that constitutionality does not necessarily lead to constitutionalism. The work further probes into the nature, extent and reasons for the past failure of constitutionalism in the country and its current state. The study also embarks on an exploration into the mechanisms for the protection of human rights, the problems and challenges in Nigeria. The challenges include the introduction of the "new Sharia" by some States in Nigeria; the failure to accord socio-economic rights due consideration in Nigerian jurisprudence and the poor pace of the domestication of human rights norms. The work demonstrates the relationship and linkage between human rights, democracy and judicialism in the study of constitutionalism.

KEY TERMS

Communalism; constitution; constitutionalism; democracy; domestication; dualism; fundamental rights; human rights; international law; judicialism; judiciary; monism; treaties; universalism.

ABBREVIATIONS

AAA	American Anthropological Association
AC	Law Reports (Appeal Cases)
ACHPR	African Charter on Human and Peoples' Rights
ACRWA	African Charter on the Rights and Welfare of the Child
AFRC	Armed Forces Ruling Council
A-G	Attorney-General
AIR	All India Reporter
ALL ER	All England Law Reports
All NLR	All Nigeria Law Reports
ANLR	All Nigeria Law Repots (Reprints)
ATM	Awaiting Trial Men
AU	African Union
AUCPCC	African Union Convention on Preventing and Combating Corruption
BCLR	Butherworths Constitutional Law Reports
CCHCJ	Certified Copies of High Court (of Lagos State) Judgments
CDC	Constitution Drafting Committee
CDD	Centre for Democracy and Development
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
Ch	Law Reports (Chancery Division)
CHR	Case on Human Rights
CJ	Chief Judge
CJN	Chief Justice of Nigeria
CLO	Calabar-Oguja-Cross River
CLRN	Commercial Law Reports, Nigeria
CURE	Citizen United for Rehabilitation of Errants
DPSP	Directive Principles of State Party
DTN	Daily Times of Nigeria
CLR	Commonwealth Law Reports
EALR	East African Law Reports
ECHLR	European Convention on Human Rights and Fundamental Freedoms

ECSLR	East Central State Law Reports
ECHR	European Court of Human Rights
EFCC	Economic and Financial Crimes Commission
EHR	European Human Rights Reports
EHRLR	European Human Rights Law Review
FCA	Federal Court of Australia
FGM	Female Genital Mutilation
FHC	Federal High Court
FHCLR	Federal High Court Law Reports (Nigeria)
FMG	Federal Military Government
FREPR	Fundamental Rights (Enforcement Procedure) Rules
FRN	Federal Republic of Nigeria
FSC	Federal Supreme Court Reports
F2d	Federal Reporter Second Series (US)
GC	Grand Chambers
HRLRA	Human Rights Law Reports of Africa
IACHR	Inter-American Commission on Human Rights
IDEA	International Institute for Democracy and Electoral Assistance
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHLR	Interights Commonwealth Human Rights Law
ICJ Report	Report of the International Court of Justice
ICPC	Independent Corrupt Practices Commission
IHL	International Humanitarian Law
ILR	Israeli Law Report
ICRC	International Society of Red Cross
JCA	Justice of the Court of Appeal (Nigeria)
JHRLR	Journal of Human Right Law and Practice
JSC	Justice of the Supreme Court (Nigeria)
LEDAP	Legal Defence and Assistance Project
LRC (Const)	Law Reports of the Commonwealth (Constitution)
LRC	Law Reports of the Commonwealth

MASSOB	Movement for the Actualization of the Sovereign State of Biafra
MEND	Movement for the Emancipation of the Niger Delta
NAPTIP	National Agency for Prohibition of Trafficking in Persons
NBA	Nigerian Bar Association
NCLR	Nigerian Constitutional Law Reports
ND	No date
NGO	Non Governmental Organization
NE	Northeastern Report (US)
NCLR	Nigeria Constitutional Law Reports
NHRC	Nigerian Human Rights Commission
NLR	Nigeria Law Reports
NNPC	Nigerian National Petroleum Corporation
NRNLR	Northern Nigeria Law Reports
NSA	National Security Agencies
NWLR	Nigerian Weekly Law Reports
NZLR	New Zealand Law Reports
OAU	Organization of African Unity
OPCAT	Optional Protocol on the Convention against Torture
P	Page
Para	Paragraph
PCA	President of the Court of Appeal (Nigeria)
PDP	Peoples Democratic Party
PIL	Public Interest Litigation
PSCR	Pakistan Supreme Court Reports
PUCL	Peoples Union for Civil Liberties
QB	Law Reports (Queen's Bench Division)
SA	South African Law Reports
SAN	Senior Advocate of Nigeria
SC	Supreme Court Reports (Selected Judgments) (Nigeria)
SCC	Supreme Court Cases (India)
SCGLR	Supreme Court of Ghana Law Reports
SCNLR	Supreme Court of Nigeria Law Reports

SCR	Supreme Court Reporter (India)
S.Ct	US Supreme Court Reporter
SERAC	Social and Economic Rights Action Centre
SMR	United Nations Standard Minimum Rules for the Treatment of Prisoners
SPDC	Shell Petroleum Development Company
UCLA	University of California Los Angeles
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNISA	University of South Africa
UPLR	University of Pennsylvania Law Review
UPR	Universal Periodic Review
US	United States
WACA	Selected judgments of the West African Court of Appeal
WLR	Weekly Law Reports
WRN	Weekly Report of Nigeria

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CHAPTER 1

INTRODUCTION

1.1 Background to the study

Africa is tragically referred to as the continent of “failed,”¹ “unstable, poorly governed, conflict and poverty-ridden” states.² There is high level of corruption in government; systematic violations of human rights by the States and the individuals; and poor presence of democratic culture, among others in the continent. Kukah argues that “Africa spells failure on all fronts: political, economic, social and moral”.³ It has also been contended that the problems of the continent are rooted in the past and consequently:

The continent has suffered a painful history that includes some of the worst human tragedies: slavery, colonialism and apartheid. As a direct result, when African countries won independence they faced formidable constraints to development. These included an acute shortage of skilled human resources, political fragility and insecurity in ill-suited institutions.⁴

According to Awolowo, slave trade led to the brutalization and dehumanization of Black Africans, the depopulation of African towns and villages and the total disruption of communal and family life.⁵ In his words, “Africans were, consistently and without trammel, subjected to wholesale savagery and brutality unsurpassed in magnitude and scale in the annals of man...”⁶ The causes of African problems cannot be traced or rooted only in the past. After African countries gained independence, widespread abuses of human rights continued unabated. While Welch may be right that the destructive “effects of the periods of slavery, partition, and colonial rule have yet to be totally overcome”,⁷ it must be observed that some contemporary abuses or large-scale human rights violations in Africa may not have anything to do with slavery or the colonisation of the continent.

¹ World Bank, *The State in a Changing World: World Bank Development Report* (1997) 19-29; see also Kukah MH *Democracy and Civil Society in Nigeria* (1999) xiii.

² Hatchard J, Ndulo M and Slinn P *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2004) 6.

³ Kukah *supra* xii.

⁴ Hatchard, Ndulo and Slinn *supra* at 7.

⁵ Awolowo O *The Problems of Africa_the need for Ideological Reappraisal* (1977) 20-21.

⁶ *Supra* at 26. See also Welch C.E. *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations* (1995) 3 and Patterson O *Slavery and Social Death* (1982).

⁷ Welch *supra* at 3.

Such contemporary abuses include the violations of the rights of Christians in the name of Sharia as in the case of Nigeria; unjustifiable killing of persons by security agencies;⁸ the death of suspects in prison custody⁹ arising from inhuman prison conditions and inordinate delay in the trial of suspects.¹⁰ Furthermore, there are various discriminatory and inhuman practices prescribed against women, particularly the widows under traditions and customs. In some societies, a widow must not have a bath from the death of her husband until his burial. Various abuses are also perpetrated in the name of ethnic and religious conflicts as in the case of Nigeria, among others.

It is instructive to recall the gross violations of human rights by Presidents Idi Amin of Uganda, Jean-Bedel Bokassa of Central African Republic (later Emperor Bokassa I of Central African Empire), Macias Nguema of Equatorial Guinea and Mengistu Haile Mariam of Ethiopia in 1970s; and in the 1980s and 1990s by Presidents Jerry Rawlings of Ghana, Samuel Doe of Liberia, Siad Barre of Somalia, Ibrahim Babangida and Sani Abacha of Nigeria. The culture of violence and impunity still continue in Africa. The international community and the continent are still grappling with the Rwandan genocide of 1994 and the on going gross violations of human rights in Darfur, Sudan. Odinkalu is sadly right when he argues:

In the first two decades after African countries acceded to independence from the late 1950s, a world entranced by the cold war looked on indifferent to both the systemic denial of basic human rights by the continent's rulers and the dismantling of the institutions empowered to provide remedies for such wrongdoing. African rulers asserted domestic jurisdiction in order to preclude advocacy for remedies where such existed.¹¹

The readiness of African leaders to maintain a stranglehold on power at any cost led to the enthronement of despotism, authoritarianism and a culture of human rights violation. Some African leaders purporting to practice democracy, transformed their countries to one-party states. This presented an irresistible pull for the military to overthrow civilian governments and entrench despotism. Military rule has created instability in Africa. The painful result is a failure to enthrone the practice of democracy, constitutionalism, the rule of law and respect for human rights in most African countries.

⁸ *Agbo v the State* (2006) 6 NWLR (Pt977)545. See chapter 3.

⁹ *The Prosecutor*, No 2 (2002) 18. See chapter 3.

¹⁰ *Ozuluonye v the State* (1983) 4 NCLR 204 and *Ayambi v the State* (1985) 6 NCCR 141. See chapter 3.

¹¹ Odinkalu A "Regional Courts in Africa: A Promise in Search of Fulfillment" (2006) *Justice Initiative* 45.

Oko observes that:

A review of the democratic experiment in African nations reveals that most attempts to establish democracy are often short-lived and typically followed by military regimes. The gyration from democracy to authoritarianism has left most African nations deep in turmoil...¹²

Ambrose argues that:

'All over the continent, from Cape Coast to Cairo, Africans have experienced the woes of gross abuses inflicted by military dictators and self-styled life presidents. Under the leadership of these regimes, Africans have witnessed massive corruption, human rights abuses, and economic deprivations...'¹³

A descent to authoritarianism whether caused by a civil or a military dictator has serious effect not only on democracy but also on democratic institutions like the legislature and the judiciary. This also impacts gravely on constitutionalism. Salacuse lamented that "Africa's experience with constitutionalism has not been a happy one in the thirty years since most Sub-Saharan countries became independent".¹⁴ He maintained that the great enthusiasm that greeted the new democratic constitutions of the early 1960s which made provisions for democracy, protection of human rights and the rule of law had been dashed by military coups and autocratic rule. They came with the suspension of constitutional guarantees of rights and liberties. The failure of the African experience with constitutionalism, democracy and human rights protection should never be understood as having been caused by military factor alone. On the contrary, a combination of factors was responsible for the sad experience and they include the effects of colonialism, the greed and corruption of African leaders and their intolerant attitude towards the opposition, military adventure in politics, under-funded, weak democratic institutions, religious conflicts and ethnicity.

Africa's experience in the 1960s was one of a transition from colonialism to democracy and then a descent to authoritarianism. Africa is once more on transition from authoritarianism to democracy.¹⁵ This transition has imparted on the development of constitutionalism in the continent. As Africa continues to transit to democracy and hopefully constitutionalism, a question continues to recur; how will a culture of constitutionalism develop in Africa?

¹² Oko O "Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa" (2000) (33) *Vanderbilt Journal of Transnational Law* 574.

¹³ Ambrose BP *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (1995) xv. See also Ojo A *Constitutional Law and Military Rule in Nigeria* (1987) 242-246 and Nwabueze BO *Military Rule and Constitutionalism* (1990) 20.

¹⁴ Salacuse JW in his forward to (1988) *Third World Legal Study* xi.

¹⁵ Oko *supra* 574; Wiseman JA *Democratic Resurgence in Black Africa* (1991) 7 *Contemp. Rev.* 259; Ihonvbere JO "Towards a New Constitutionalism in Africa" London Centre for Democracy and Development (CDD) Occasional Paper Series No 4 (2000); Ihonvbere JO *Constitutionalism and Democratization in Africa: Lessons for Nigeria* (2002). The effort at democratization has not really stemmed the tide of gross abuses of human rights in the continent. "A survey of civil and political rights on the entire continent reveals a disturbing picture. In spite of the march towards democratization, many governments continue to kill, torture, detain citizens, illegally, and muzzle them with repressive laws": Ambrose *supra* 41.

Nigeria typifies the failed African dream in entrenching an enduring democracy and a practice of constitutionalism. The country is facing a lot of challenges transiting from despotism and authoritarianism of the past to democracy and constitutionalism. It has a population of almost 140 million people comprising over 250 ethnic groups.¹⁶ According to Welch, “no analysis of contemporary Africa can overlook the ‘sleeping giant’ Nigeria. It is Africa’s most populous country, accounting for nearly a fifth of the continent’s more than 550 million people”.¹⁷

Nigeria was under military rule and dictatorship for a long time. When it became independent in 1960, the civilian government that took over from the colonial administration was overthrown by the military in 1966. A military junta ruled the country until 1979 when it handed over power to a democratically elected government. That civilian government was overthrown in 1983 and for 16 years, the country was under military rule. This authoritarian rule ended in May 1999 when Olusegun Obasanjo, a retired army general and a former military Head of State was elected President. From 1966 to 1999 a period of 39 years, the military ruled Nigeria for 29 years. Igbuzor argues that “it is clear that the prolonged nature of military rule constricted democratic space, entrenched authoritarianism, and nurtured militarism in Nigeria.”¹⁸ It was against that background, that the country once more commenced its march to constitutional democracy and constitutionalism. This march includes efforts geared towards rights protection with the judiciary serving as the principal organ for the protection.

1.2 Research problem

Since independence in 1960, Nigeria has had four constitutions. They are the 1960, 1963, 1979 and 1999 Constitutions. The 1989 and 1995 Constitutions did not become operational at any time. After experimenting with the first three and more than ten years of the 1999 Constitution, the country is still on a slow march in its efforts to entrench constitutionalism.

¹⁶ *Nigeria Direct*, The Official Information Gateway of the Federal Republic of Nigeria <http://www.nigeria.gov.ng>[visited on 17/12/2006]

¹⁷ Welch *Protecting J Human Rights in Africa: Roles and Strategies of Non –Governmental Organizations* at 20

¹⁸ Igbuzor O “Dialogue for Constitutional Reform in Nigeria” being the text of a paper prepared for International IDEA Democracy-building and Conflict Management (DCM) 2004.

The development of a culture constitutionalism in Nigeria has continued to be marred by serious problems and challenges. The greatest obstacle had been military rule, which as stated earlier, took a greater part of the national life following Nigerian's independence in 1960. A return to civilian government in 1999 under a new presidential constitution, presented a new challenge and an opportunity to entrench constitutionalism in the country. The current experience has shown that having a civilian government and a constitution that has the features of constitutionalism, will not *ipso facto* guarantee the practice of constitutionalism and the concomitant human rights protection, rule of law and democracy, among others.

Five years after the civilian government under President Obasanjo, a writer analysed the administration thus:

A constructive analysis of governance in Nigeria's Fourth Republic from May 1999 to May 2004 will show that the outcome of democratic rule under President Olusegun Obasanjo has been a mixed bag of blessings and frustrations, *with its failures overshadowing the blessings*. Although, five years of democratic rule might be considered too short to reconstruct the damages (*sic*) that fifteen years (December 1983-May 1999) of military rule has caused. The fact that Obasanjo's policies and programmes has (*sic*) failed to yield the least expected democratic dividends has made some Nigerian civil society organizations and political parties to engage in demonstrations and rallies to express their grievances against the failure of Nigeria's Fourth Republic.¹⁹

Similarly, Abubakar argues: "However, the return to civil rule in Nigeria has not fundamentally altered the repressive tendencies and practices of the state towards its citizens. Although the 1999 constitution contains a section on fundamental rights, the citizenry continue to experience the repression of the state".²⁰

Some eight years down the line, constitutional development and human rights protection under Obasanjo were in a wobbling state. Human rights guarantee remains an important indicator of the practice of constitutionalism. The United Nations Committee on the Elimination of Racial Discrimination expressed concern on the human rights situation in Nigeria.²¹ The Committee said that there is a prevalence of inter-ethnic, intercommunal and interreligious violence in Nigeria.²² It further states that there are numerous reports of ill-treatment, use of excessive force and extrajudicial killings as well as arbitrary arrests and detentions by law enforcements agents.²³

¹⁹ John I "Governance and Constitution Reform in the Fourth Republic": The Nigerian Experience" being a paper presented at the Centre for Democracy and Development's Legislative and Governance Monitoring Workshop 6-8 June 2004 at the Nigerian Air Force Club, Kaduna [Emphasis supplied].

²⁰ Abubakar D "Constitutional Rights and Democracy in Nigeria" being the abridged text of lecture presented at the Centre for Research and Documentation (CRD) Kano 23 October 2002.

²¹ Concluding Observations of the Committee on the Elimination of Racial Discrimination: Nigeria 01/11/2005 CERD/C/NGA/CO/18 at the Sixty-Seventh Session 2-19 August 2005.

²² *Supra* para 14.

²³ *Supra* para 16.

The Committee further pointed out that Muslim women are subjected to harsher sentences than other Nigerians and observed that human trafficking, inclusive of foreign women, men and children remained a ‘‘serious problem’’ in the country.²⁴ In the sphere of democracy which is related to constitutionalism, the country is still on transition. Kukah queries: ‘‘Do Nigerians think they are transiting to democracy or are they transiting from military rule. Does one necessarily lead to the other? In other words, does the end of military rule automatically mean the beginning of democracy?’’²⁵ The termination of military rule does not *ipso facto* lead to the beginning of democracy or the practice of constitutionalism. There must be conscious effort on the part of the state to begin the transition and which will require as its foundation, a democratic constitution. That is the process Nigeria is going through with several pitfalls. There is a serious challenge to constitutionalism in the country. In 1995 when Nigeria was still under military rule, Suberu observed:

With two failed Republics, an abortion of its transition to a Third Republic, and a succession of military interventions, Nigeria broadly typifies a dismal record of constitutionalism in the African continent.²⁶

Does the above observation encapsulate the current situation in the country ? Has Nigeria made any improvement on that record? Since 1999, the country has been under a democratic government and a constitution that is supreme. The signal ought to be clear now that the country is at least on the path to constitutionalism. The facts on the ground indicate a worrying situation and confirm that there are serious problems militating against the development of constitutionalism, notwithstanding that the country is under a constitutional democracy. The central focus of this study will be to investigate the nature, extent and reasons for the failure of constitutionalism in the country. This is against the background that the country is under a ‘‘democracy’’ and the 1999 Constitution contains the core features of constitutionalism. Indeed, one of the greatest challenges to Nigerian constitutional democracy is to cultivate a culture of constitutionalism. The investigation will center on the judiciary and human rights which are two core features of constitutionalism.

The study probes the role of the judiciary in the enforcement of human rights in Nigeria. The judiciary remains the most important organ in the enforcement of human rights.²⁷ This is so because the constitution conferred on the judiciary the power of interpretation, enforcement of laws and the prescription of sanctions for the violations of laws. There are therefore legal mechanisms for enforcing human rights in the national courts.

²⁴ Concluding Observations of the Committee on the Elimination of Racial Discrimination: Nigeria 01/11/2005 CERD/C/NGA/CO/18 at the Sixty-Seventh Session 2-19 August 2005. para 20

²⁵ Kukah MH *Democracy and Civil Society in Nigeria* (1999) 105.

²⁶ Suberu RT ‘‘Institutions, Political Culture and Constitutionalism’’ in Baun MJ and Franklin DP (eds) *Political Culture and Constitutionalism: A Comparative Approach* (1995).

²⁷ Oputa CA *The Law and the Twin Pillars of Justice* (1981) 108, 110.

This text tries to show that rights protection and the judiciary as constituents of constitutionalism, advance and support the development of a culture of constitutionalism. The relationship between the concepts of constitutionalism, human rights and the judiciary on the one hand, and their relationship with democracy and good governance on the other hand, informed the choice of the topic of the study. With the foregoing in mind, the study will address the question how can Nigeria entrench a culture of constitutionalism?

1.3 Objectives or aims of the study

Firstly, this study aims at examining and analyzing the development of constitutionalism in Nigeria. Constitutionalism has core features. These include judicial review and human rights protection. The study brings to the fore the mechanisms for human rights protection, their strength and weaknesses. It will particularly examine how effective the judiciary has been in discharging its constitutional role of enforcing human rights. The study will seek to discover the factors and circumstances that act as drawback to the entrenchment of constitutionalism. Secondly, the study examines the place of international human rights instruments in the domestic protection of human rights in Nigeria. Nigerian has ratified many international human rights instruments. The study will focus on the issue whether the country has gone beyond mere ratification of the instruments to the domestication and enforcement of their provisions. Thirdly, the work seeks to establish that a naive and timid judiciary more than anything else will stunt the growth and development of constitutionalism. Fourthly, the study explores, advocates and recommends practices that will aid and strengthen not only human rights protection but constitutionalism. Fifthly, the author hopes that this study will contribute significantly to the discourse on constitutionalism after an examination of the core principles and practice of constitutionalism in Nigeria.

1.4 Rationale of the study

Justice Onnoghen of the Supreme Court said: “I hold the view that though we may continue to say that our democracy is at its infancy, we cannot lose sight of the fact that ours is a constitutional democracy based on the rule of law”.²⁸ If Nigeria is “a constitutional democracy based on rule of law”, it becomes imperative that a culture of constitutionalism must be entrenched in the country to sustain that constitutional democracy and the rule of law.²⁹

²⁸ *A-G Abia State v A-G Federation* (2006) 16 NWLR (Pt 1005) 265 at 420-421 paras H-A.

²⁹ Katz SN “Constitutionalism and Civil Society”, the Jefferson Lecture, University of California at Berkeley 25 April 2000, had argued that constitutionalism “is valuable insofar as it tends to produce and/or sustain a valuable end such as democracy”.

The lesson to be drawn from a systematic and clear exposition of the core features of constitutionalism, which include rule of law, rights protection, separation of powers, judicial review and democracy, will lead to improving the mechanisms for the protection of human rights. The significance of this study also lies in the fact that constitutionalism is associated with good governance.³⁰ Good governance in turn promotes human rights. There is also a linkage between the efficacy of a constitution and constitutionalism. Kanyongolo observes that “the existence of a constitution which articulates democratic values and principles is not sufficient for the establishment of the political system which is democratic in practice. However, it is equally true that a democratic constitution is a necessary condition for the development of democratic constitutionalism’’.³¹ Arguing the same issue in another way, Ihonvbere said:

Constitutions as documents mean nothing unless there is a culture of constitutionalism that anchors the democratic process on the people and derives its legitimacy in the working of the constitution through democratic institution.³²

The point being made is that constitutional formalism or textualism without more cannot guarantee constitutionalism. This study will not only aid a better understanding of constitutionalism but will demonstrate the need for making the political system more responsive to human rights violations, among others. This study also shows why Nigerians and indeed Africans should recognise the importance of cultivating the practice of constitutionalism in their societies. This study tries to demonstrate the linkage and relationship between constitutionalism, human rights and the judiciary within the Nigerian context. The study also examines the so-called “Nigerian situation” in the enforcement of human rights.³³

1.5 Assumptions underlying the study

A study of this nature is based on a number of assumptions or hypotheses. Consequently this work is anchored on some primary hypotheses. The first is the universality of human rights. The Vienna Declaration and Programme of Action 1993, unequivocally declares that: “The universal nature of these rights (Human Rights) and freedom is beyond question’’.³⁴

³⁰ Gutto S “Current concepts, core principles, dimensions, processes and institutions of democracy and the inter-relationship between democracy and modern human rights” paper presented at a Seminar organized by the Office of the High Commissioner for Human Rights, Geneva, 25-26 November, 2002 para 16 page 8. Detailed discussion on good governance and its relationship to democracy and human rights is done in Chapter 2, para 2.44 *infra*.

³¹ Kanyongolo FE “The Constitution and the Democratization Process in Malawi” in Sichone O *The State and Constitutionalism in Southern Africa* (1998) 2.

³² Ihonvbere JO “Politics of Constitutional Reforms and Democratization in Africa” (2000)(41) *International Journal of Comparative Sociology* 9 at 17.

³³ See chapter 5.

³⁴ World Conference on Human Rights, Vienna, 14-25 June 2003, *Vienna Declaration and Programme of Action*, para 1, UNGA A/CONF. 157/23 of 12 July 1993.

The Vienna Declaration also states that: “All human rights are universal, indivisible and interdependent and interrelated”.³⁵ The African Charter on Human and Peoples’ Rights also recognises the universality of human rights when it declares “that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality...”.³⁶ Several writers have also canvassed that human rights are universal. Arguing the issue, Silk said that the denial of the universality of human rights “may effectively destroy the meaning and value of the entire concept of human rights, there can be no basis for international protection if each society can determine its own list of human rights. The very significance of international human rights is their universality”.³⁷ Other writers who argued and supported the universality of human rights include Lama,³⁸ Wai,³⁹ Motala,⁴⁰ Gyekye⁴¹ and Donnelly⁴². In *Constitutional Rights Project and Civil Liberties Organization v Nigeria*⁴³, the African Commission while emphasizing the universality of human rights held that: “A basic premise of international human rights law is that certain standards must be constant across national borders, and governments must be held accountable to these standards.” Universalism ensures that in the sphere of human rights there are common standards which all humanity must adhere to.

The second assumption underlying this study is based on the principle of the inseparability of democracy and human rights. This underscores the fact that democracy and human rights are interdependent and interrelated. The Vienna Declaration of 1993 brings that relationship to the fore when it declared that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”⁴⁴ Similarly, Gutto argues⁴⁵ in favour of the inseparability of the two concepts. He insists that freedom of movement, freedom of peaceful assembly, freedom of association and freedom of expression are essential norms of human rights. He said that “without them, the organization and functioning of genuine democracy would be difficult to imagine.”⁴⁶

³⁵ World Conference on Human Rights, Vienna, 14-25 June 2003, *Vienna Declaration and Programme of Action*, para 1, UNGA A/CONF. 157/23 of 12 July 1993 at para 5.

³⁶ See the Preamble to the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act.

³⁷ Silk J “Traditional Culture and the Prospect for Human Rights in Africa” in An-Na’im AA and Deng FM (eds) *Human Rights in Africa: Cross-Cultural Perspectives* (1990) 291.

³⁸ Lama D “Human Rights and Universal Responsibility” text of a paper delivered at the NGOs The United Nations World Conference on Human Rights, Vienna Austria 15 June 1993.

³⁹ Wai DM “Human Rights in Sub-Saharan Africa” in Pollis A and Schwab P (eds) *Human Rights: Cultural and Ideological Perspectives* (1980) 116.

⁴⁰ Motala Z “Human Rights in Africa: a Cultural, Ideological and Legal Examination” (1989) (12) *Hastings International and Comparative Law Review* 373-410.

⁴¹ Gyekye K *African Cultural Values: An Introduction* (1989) 150.

⁴² Donnelly J *Universal Human Rights in Theory and Practice* (2003) 94.

⁴³ African Commission on Human and Peoples’ Rights, Comm. No. 102/93 91998) para. 14.

⁴⁴ World Conference on Human Rights, Vienna, para 8.

⁴⁵ Gutto S “Current concepts, core principles, dimensions, processes and institutions of democracy and the inter-relationship between democracy and modern human rights” at 16-17 paras 37-40.

⁴⁶ *Supra* at para 38.

Gutto went further to state that “human rights are best articulated and realized only in a democracy.”⁴⁷ This accounts for the relationship between the two. The symbiotic relationship between democracy and human rights is of great importance to this study.

The third assumption is related to the second. Militarism is incompatible with constitutionalism. This lies in the fact that military rule is incongruous with democracy, the doctrine of the separation of powers, rule of law and judicial review. A major character of militarism is the unchallengeability and unreviewability of the actions and laws of a military junta. This is usually assured by the insertion of ouster clauses in edicts, decrees or laws enacted by the military dictator. According to Nwabueze “The erosion of the Rule of Law resulting from legislative absolutism of the military government is attested to by the spate of *ad hominem* and *ex post facto* decrees and other military legislation repressive of individual liberty.”⁴⁸

Borokini emphatically asserted that military interventions in Nigeria have radically altered such constituents of constitutionalism like rule of law, federalism, law making, separation of powers, supremacy of the constitution and independence of the judiciary⁴⁹. . He equally argues that “The greatest danger to democratization and constitutionalism in Nigeria is the military. The military by nature, orientation and training is undemocratic... The best way of ensuring constitutionalism is to shut the military out of power and restrict it to its constitutional role.” If militarism is incompatible with constitutionalism, the monumental damage done to Nigeria during its long period of military rule becomes obvious.

The fourth hypothesis is that judicialism constitutes the “backbone”⁵⁰ or the “cornerstone”⁵¹ of constitutionalism. The judiciary is the guardian and the protector of the constitution and constitutionalism. In demonstrating this important role, Justice Niki Tobi of the Supreme Court argued that where, for example, the National Assembly *qua* legislature strays from a constitutional provision, the issue or question of constitutionality or constitutionalism arises, and courts of law in the exercise of their judicial powers,⁵² will put a stop to any excess or abuse in the exercise of legislative power or authority.

⁴⁷ Gutto “Current concepts, Core Principles, dimensions, processes and institutions of democracy” 16 at para 39.

⁴⁸ Nwabueze BO *Military Rule and Constitutionalism* (1990) 19; Welch *supra* at 27; Udombana NJ “The Rule of Law and the Rule of Man in Military Dictatorship” in Agbede IO ad Akanki EO (eds.) *Current Themes in Nigerian Law* (1997) 73.

⁴⁹ Borokini A “The Impact of Military Rule on Fundamental Human Rights in Nigeria” in Okpara O *Human Rights Law and Practice in Nigeria Vol.1* (2005) 355-356 and 370; Akande J *Constitutional Developments in the Challenge of the Nation* (1985) Chapter 1 Abubakar contends that the legacy of militarism and autocracy in Nigeria “not only entrenched a culture of violence and abuse of human rights in the political process, but above all, it undermined the culture of democratic contestation and constitutionalism”: Abubakar “*Constitutional Rights and Democracy in Nigeria*” 4.

⁵⁰ Motala Z *The Constitutional Options for a Democratic South Africa: A Comparative Perspective* (1994) 205; See also Nwabueze BO *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (1977), preface.

⁵¹ Oko O “*Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*” at f/n 67.

⁵² *A-G Abia State v A-G, Federation* (2006) 16 NWLR 265 at 381-382 paras H-A; See also *Amidu v President Kufuor* (2001-2002) SCGLR 86 where Kpegah JSC said that the Supreme Court of Ghana ensures “the maintenance of the culture of constitutionalism”. Same is true of the Nigerian judiciary.

Embedded in the above assumption is the fact that effective judicial review is contingent on a judiciary that is knowledgeable, dynamic and courageous; indeed one that is independent.⁵³ Part of the assumption is that the judiciary while interpreting the law, also makes law.⁵⁴

1.6 Scope and limitations of the study

The study is an investigation into the practice of constitutionalism in Nigeria. The emphasis is on the guarantee and enforcement of human rights and the role of the judiciary in the enforcement of the rights. The mechanism for the protection of human rights is an evolutionary process.⁵⁵ It is conceded that regional and international courts have mechanism for the enforcement of human rights. But the fulcrum of the study remains independent Nigeria which is a federation of 36 states with federal and state court structures.

While the 1999 Constitution of Nigeria is the main focus of the study, past constitutions like the 1960, 1963 and 1979 Constitutions were referred to, especially in areas where their provisions aid a better understanding of the subject of the study. This is particularly so because the fundamental rights provisions in all the country's past and present constitutions are essentially the same with slight differences in their arrangement and amplification.

Constitutionalism is an on going subject. Statutes are from time to time enacted and judicial decisions delivered. These will continue to shape the concept for better or worse. The work did not anticipate and consider future developments that may affect the study.

The Supreme Court has delivered a number of landmark decisions since the 1999 Constitution became operational, but few of these decisions relate to human rights.⁵⁶ There is, therefore, a dearth of judicial authorities by the Supreme Court on the subject. However, there is abundance of cases decided by the Supreme Court on fundamental rights provisions of the 1979 Constitution. The provisions are the same as those of 1999 Constitution. The cases will be examined and discussed.

⁵³ See the Conclusions of *The Law of Lagos*, International Commission of Jurists sponsored Conference on the Rule of Law, Lagos, Nigeria 1961.

⁵⁴ Bhagwati J ‘Human Rights as evolved by the Jurisprudence of the Supreme Court of India’ (1987) (13) *Commonwealth Law Bulletin* 236 at 237; Yadudu A ‘Issues, dilemmas, processes and possibilities of constitutional amendment’ *The Guardian* 28 January 2000, 8.

⁵⁵ Ambrose “*Constitutional Rights and Democracy in Nigeria*” 95.

⁵⁶ The decisions will later be examined.

This study does not pretend to have embarked on an exhaustive or comprehensive analysis or examination of the subject of constitutionalism in general and human rights in particular. The field of constitutionalism is controversial and diverse.⁵⁷ This study is primarily concerned with an examination of constitutionalism against the background of two of its components, human rights and the judiciary. Other components, namely, the rule of law and the doctrine of the separation of powers are not within the scope of the study.

The study also acknowledges that the National Human Rights Commission, civil societies, the Bar and the victims of rights violation have a role to play in the promotion and advancement of the practice of constitutionalism. A detailed study of their role is also outside the scope of this work and the text recommends that the issue should be a subject for further research. The subject of human rights is equally wide and it is an evolving one. Two categories of rights were essentially examined. They are civil and political rights; and social, economic and cultural rights. The choice of this categorization is informed by the fact that the two groups of rights represent a broad division of human rights. Civil and political rights represent the first generation of rights and socio-economic and cultural rights represent the second generation of rights. The sphere of socio-economic rights is an evolving jurisprudence in the country. Judicial cases are few and most of them were decided by High Courts which are courts of first instance. Their decisions are hardly reported.

1.7 Research methodology

The methodology engaged in this study is analytical and comparative. The analytical approach is adopted for literature review. The comparative approach is used while comparing and examining what happens in Nigeria in respect of any aspect of the study *vis-à-vis* other jurisdictions. The analytical approach gives the opportunity to collate, process, present and analyze data from courts and authors. This covers a wide range of jurisdictions. That way, the text identified gaps in the existing literature on the subject of the work which in the end, enabled the work to reach logical conclusions and offer prescriptions.

Similarly, the adoption of the comparative approach creates an insight into how courts in various jurisdictions promote constitutionalism through the enforcement of human rights. Their experience becomes relevant in examining the Nigeria situation and in identifying its weaknesses.

⁵⁷ Ihonvbere JO “*Politics of Constitutional Reforms and Democratization in Africa*” 29 at 14.

The study carries out a comparative analysis and evaluation of several foreign cases. An investigation into how courts in other jurisdictions have dealt with various aspects of the study is undoubtedly useful and serves as persuasive authority. The objective of the comparative analysis is to discover the best approach adopted by courts in various jurisdictions to promote constitutionalism. The study, for example, finds out that India, more than any other country has through judicial review developed the jurisprudence of directive principles. Its Supreme Court succeeded in doing that notwithstanding the clear provisions of section 37 of the Indian Constitution on the non-justiciability of the principles. The approach adopted by the Indian Supreme Court was based on the fact that the directive principles are complementary to and cannot be isolated from fundamental rights. The principles were used to expand the scope and province of fundamental rights.⁵⁸

After a review of the Indian experience and the few decisions of the Supreme Court of Nigeria on directive principles,⁵⁹ the study argues that the Nigerian provisions on directive principles are more accommodating over the issue of justiciability than the Indian provisions. It further argues that what it will require to develop a Nigerian jurisprudence on directive principles will be the collective action of aggrieved persons, the Bar and the judiciary to realize the full impact of the provision.

1.8 Literature review

A thorough literature review is vital to the success of any research work. The materials that were used came from primary and secondary sources. The primary sources include international and regional instruments on human rights and related matters; legislation_national, regional and international; judicial decisions by national, regional and international courts; resolutions, statements, reports and observations of the United Nations and regional bodies. The secondary sources that were consulted, examined and analysed include books, journal articles, papers and reports presented at seminars and workshops, newspapers and periodicals, commission reports, press releases and internet sources.

⁵⁸ Such cases include *Millin v the Administrator, Union Territory of Delhi* (1981) 2 SCR 576; *Kishen Pathnayak v State of Orissa* AIR 1989 SC 677; *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161; *Mohini Jain v State of Karnataka* AIR 1992 SC 1858; *Unnikrishana J.P. v State of Andhra Pradesh* (1993) 1 SCC 645; *Paschim Banga Samity and Ors v State of West Bengal* 1995 (3) SCC 42 and *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) II SCC 123.

⁵⁹ See *Attorney-General, Ondo State v Attorney-General of the Federation and Ors* (2000) 9 NWLR (Pt 772) 222; *Attorney-General, Lagos State v Attorney-General of the Federation* (2003) 12 NWLR (Pt 833) 1 and *Adebisi Olabisiye v Federal Republic of Nigeria* (2004) 4 NWLR (Pt 764) 80.

One of the challenges that confronted this study is the absence of many judicial decisions by the appellate courts based specifically on the human rights provisions of the 1999 Constitution. This is so because on the average, it takes civil appeals between five to ten years to be heard and determined by the Court of Appeal; and another five years by the Supreme Court. Criminal appeals take a shorter time because they enjoy a bit of fast tracking.

This is not to imply that the appellate courts have not delivered judgments in several landmark constitutional cases. On the contrary, they have, but such cases are based on disputes between the States and the Federal Government. Under section 232(1) of the 1999 Constitution, the Supreme Court has exclusive original jurisdiction in any dispute between the Federation and a State or between States if and in so far as the dispute involves any question, whether of law or fact, on which the existence or extent of a legal right depends.

Consequently, many cases which do not touch on human rights are instituted at the Supreme Court by the States and that accounted for the speed in their determination. The Abia State Government whose Governor from 1999-2007, Dr Orji Uzor Kalu had a sour relationship with the then President Obasanjo, was in the vanguard of instituting most of the cases. Abia State has unwittingly contributed immensely to the growth of Nigerian constitutional jurisprudence as shown in some of the cases below. Such cases decided by the Supreme Court and which arose out of disputes between the States and the Federal Government were on the separation of powers,⁶⁰ revenue allocation,⁶¹ rule of law,⁶² legislative judgment,⁶³ constitutional democracy,⁶⁴ constitutional interpretation,⁶⁵ judicial review,⁶⁶ *locus standi*⁶⁷ and fundamental objectives of state policy.⁶⁸

⁶⁰ See *A-G Abia State v A-G Federation* (2002) 6 NWLR (Pt 763) 264; *A-G Abia State and Ors v A-G Federation* (2003) 4 NWLR (Pt 809) 88; *A-G Lagos State v A-G Federation* (2004) 18 NWLR (Pt 904) 1 and *A-G Abia State and Ors v A-G Federation* (2006) 16 NWLR (Pt 1005) 265.

⁶¹ See *A-G Federation v A-G Abia State and Ors No.2* (2002) 6 NWLR (Pt 764) 542; *A-G Lagos State v A-G Federation* (2004) 18 NWLR (Pt 904) 1; *A-G Adamawa State and Ors v A-G Federation and Ors* (2005) 18 NWLR (Pt 958) 478 and *See A-G Abia State and Ors v A-G Federation and Ors* (2006) 16 NWLR (Pt 1005) 265.

⁶² See *A-G Lagos State v A-G Federation* (2004) 18 NWLR (Pt 904) 1 and *A-G Abia State and Ors v A-G Federation and Ors* (2006) 16 NWLR (Pt 1005) 265.

⁶³ See *A-G Adamawa State and Ors v A-G Federation and Ors* (2005) 18 NWLR (Pt 958) 581.

⁶⁴ See *A-G Abia State and Ors v A-G Federation and Ors* (2006) 16 NWLR (Pt 1005) 265.

⁶⁵ See *A-G Abia State and Ors v A-G Federation and Ors* (2002) 6 NWLR (Pt 763) 264 and *A-G Abia State v A-G Federation and Ors* (2005) 12 NWLR (Pt 940) 452.

⁶⁶ See *A-G Lagos State v A-G Federation and Ors* (2003) 12 NWLR (Pt 833) 1.

⁶⁷ See *A-G Lagos Adamawa State and Ors v A-G Federations and Ors* (2005) 18 NWLR (Pt 958) 581.

⁶⁸ See *A-G Ondo State v A-G Federation and Ors* (2002) 9 NWLR (Pt 772) 222 and *Olafisoye v F.R.N.* (2004) 4 NWLR (Pt 864) 580. This latter case is a criminal appeal based on 1999 Constitution wherein Ruling was delivered by the High Court on 4 July 2001. On appeal to the Court of Appeal, it delivered its judgment on 17 September 2001, less than three months after the decision of the High Court. The judgment of the Supreme Court was on 23 January 2003. No doubt the delivery of judgment timeously, impacts on the practice of constitutionalism.

Notwithstanding that much of the decisions of the Supreme Court on 1999 Constitution are not on human rights, the judgments are important and crucial to the study as they are based on other core features of constitutionalism, the separation of powers and rule of law. Much of the cases on human rights⁶⁹ are based on the 1979 Constitution but were delivered long after the 1999 Constitution came into effect.⁷⁰ The court has in the last two years delivered some judgments dealing with the enforcement of fundamental rights under the 1999 Constitution.⁷¹ The Court of Appeal has on its part delivered some constitutional cases based on the provisions of 1999 Constitution. The issues decided include judicial review,⁷² rule of law,⁷³ *locus standi*⁷⁴ and enforcement of fundamental rights⁷⁵. The decisions of the High Courts of the States, Federal and Abuja High Courts where most of the decisions originated are rarely reported.

The study discussed, analysed and synthesized most of the important judicial decisions on 1999 Constitution which have bearing on constitutionalism. This critical analysis is also extended to the 1963 and 1979 Constitutions, particularly the latter which was in operation from 1979 to 1999.⁷⁶ There is hardly any difference in the fundamental rights provisions contained in the 1979 and 1999 Constitutions. Because the 1979 Constitution was in operation for 20 years, it generated a lot of important decisions that shaped Nigerian constitutional jurisprudence. Such cases include *Uzoukwu v Ezeonu II*,⁷⁷ *Military Governor Lagos State v Ojukwu*,⁷⁸ *Onuoha Kalu v the State*,⁷⁹ *Nemi v A-G Lagos State*,⁸⁰ *Enwere v C.O.P.*,⁸¹ *Agbai v Okogbue*,⁸² *Agbakoba v the Director, SSS*,⁸³ and *Mojekwu v Mokekwu*.⁸⁴

⁶⁹ They include *Jack v University of Agriculture Makurdi* (2004) 5 NWLR (Pt 865), an important decision on the interpretation of section 42(1) of the 1979 Constitution (section 46(1) of the 1999 Constitution) which deals with concurrent jurisdiction of the State High Court and the Federal High Court to enforce fundamental rights. Case commenced in 1994 at the High Court where judgment was delivered on 22 September 1995. That of the Court of Appeal and Supreme Court were respectively delivered on 8 May 2000 and 20 January 2004. Also among the cases is that of *Abdulhamid v Akar* (2006) 13 NWLR (Pt 906) which commenced in the High Court in 1990 and judgment was delivered on 23 October 1992; in Court of Appeal and Supreme Court, 15 February 2000 and 5 May 2006.

⁷⁰ Under the Nigerian jurisprudence, the law applicable to an action is the law at the time cause of action arose: *University of Ilorin v Adeniran* (2003) 17 NWLR (Pt 849) 214 and *Rossek v ACB Ltd* (1993) 8 NWLR (Pt 313)

⁷¹ Some of the cases were referred to or examined in Chapter 3 *infra*.

⁷² *Adeleke v Oyo State House of Assembly* (2006) 16 NWLR (Pt1006) 608

⁷³ *A.N.P.P. V Benue State Independent Electoral Commission* (2006) 11 NWLR (Pt 992) 585.

⁷⁴ *A-G Akwa Ibom State v Essien* (2004) 7 NWLR (Pt 872) 288.

⁷⁵ *Onyekwuluje v Benue State Government* (2005) 8 NWLR (Pt 928) 614, *Director-General, State Security Service v Ojukwu* (2006) 13 NWLR (Pt 998) 575 and *Yusuf v Obasanjo* (2005) 18 NWLR (Pt 956) 96.

⁷⁶ 1979 Constitution became operational in 1979 as the supreme law of Nigeria and ushered in a civil administration. This administration was overthrown in 1983 by the military which left the constitution to continue to operate under the successive military governments until 1999. Though under the military, it lost its supremacy and most of the provisions on rights protection were suspended.

⁷⁷ (1999) 6 NWLR (Pt 2000); deals with right to the dignity of human person, right to freedom from discrimination and distinction between fundamental rights and human rights.

⁷⁸ (1991) 6 NWLR (Pt 18) 621; deals with judicial review and obedience to court orders by all persons and authority.

⁷⁹ (1998) 13 NWLR (Pt 583) 531; rules that death penalty is not unconstitutional.

⁸⁰ (1996) 6 NWLR (Pt 452) 42; held that a condemned prisoner is entitled to some rights.

⁸¹ (1993) 6 NWLR (Pt 299) 333 decides on the constitutionality of a holding charge.

⁸² (1991) 7 NWLR (Pt 204 391; decides that a rule of customary law which prescribes an automatic membership of age-grade association is unconstitutional.

⁸³ (1994) 6 NWLR (Pt 351) 475; rules on the right to own international passport. Same as *Ubani v Director, SSS* (1999) 11 NWLR (Pt 625)129.

⁸⁴ (1997) 7 NWLR (Pt 512) 263; held that any customary discrimination against women is unconstitutional; same decision was made in *Mojekwu v Ejikeme* (2001) ICHR 179.

Following the analysis later in this text of the preceding cases, many of them were found to support the hypothesis that the judiciary is the guardian of constitutionalism. A review of the literature on human rights, democracy and judicialism in Nigeria, reveals a number of limitations. These limitations are demonstrated in the course of the study. The existing literature failed to consider or discuss human rights, democracy and judicialism as part of a whole. In other words, they were not discussed as core features or components of constitutionalism. No effort was made to link the subjects to constitutionalism. The authors in this category include Ogbu,⁸⁵ Eze,⁸⁶ Gahia,⁸⁷ Bande,⁸⁸ Odje,⁸⁹ Sagay,⁹⁰ Odinkalu,⁹¹ Osipitan,⁹² Alabi,⁹³ Olagunju,⁹⁴ Vukor-Quarshie,⁹⁵ Obiaraeri,⁹⁶ Aguda,⁹⁷ and Nwabueze.⁹⁸ This text tries to fill the *lacunae* identified in the works of the authors listed above. This is against the background of the objectives and rationale of the study.

The list of the authors above is by no means exhaustive of the works of authors that were consulted on the point being canvassed.⁹⁹ This author believes that it will amount to placing too much burden on the readers if a writer would discuss core features of constitutionalism in a country, region or continent and leave the readers to draw conclusion on the impact of the writer's exposition on constitutionalism. It is like leaving a reader in a minefield that is partially charted and asking the reader to roam and find a way out. This is one of the limitations this study sets out to address. This supports one of the identified objectives of the study.

⁸⁵ Ogbu ON *Human Rights Law and Practice in Nigeria: An Introduction* (1999).

⁸⁶ Eze O *Human Rights in Africa Some Selected Problems* (1984).

⁸⁷ Gahia C *Human Rights in Retreat* (1993)

⁸⁸ Bande TM *Dimensions of Human Rights in Nigeria* (1998)

⁸⁹ Odje M "Human rights-their place and protection in the future political order" (1986) 21(3) *Nigerian Bar Journal* 82-100

⁹⁰ Sagay IE "Liberty and the Rule of Law as Inalienable Rights of Nigerian Citizens" (1996-98) (5) *Nigerian Current Law Review* 15

⁹¹ Odinkalu AC *Justice Denied (Area Courts System in the Northern States of Nigeria)* 1992.

⁹² Osipitan T "Safeguarding Judicial Independence under the 1999 Constitution" in Akinseye-George Y and Gbadamosi G (eds) *The Pursuit of Justice and Development Essays in Honour of Justice M. Omotayo Onalaja* 10-31.

⁹³ Alabi AA "Independence of the Judiciary via the 1999 Constitution of the Federal Republic of Nigeria" in Akinseye-George and Gbadamosi *supra* at 32-47.

⁹⁴ Olagunju T, Jinadu A and Oyoubaire S *Transition to Democracy in Nigeria* (1985-1993) 1993.

⁹⁵ Vukor-Quarshie GNK "Criminal Justice Administration Saro-Wiwa in Review" (1997) 8(1) *Criminal Law Forum* 110.

⁹⁶ Obiaraeri NO *Human Rights in Nigeria- Millennium Perspective* (2001)

⁹⁷ Aguda TA *The Judiciary in the Government of Nigeria* (1983).

⁹⁸ Nwabueze BO *The Presidential Constitution of Nigeria* (1982).

⁹⁹ Indeed other writers whose works suffer from same pitfalls, include Oputa CA *Human Rights in the Political and Legal Culture of Nigeria* (1989); Kukah MH *Democracy and Civil Society in Nigeria* (1999); Mahmoud AB "The Judiciary, Fundamental Human Rights and the 1999 Constitution of the Federal Republic of Nigeria" in Alemika EEO and Okoye FO *Constitutional Federalism and Democracy in Nigeria* (nd) and Oluduro O "Justicial remedies for violation of Fundamental rights in Nigeria" in Okpara O *Human Rights Law and Practice in Nigeria* Vol 1 (2005).

In so doing, attention is drawn to authors who tackled the question of constitutionalism from a narrow perspective like the impact of militarism on constitutionalism. The growing list of such writers include Nwabueze,¹⁰⁰ Ojo¹⁰¹ and Borokini.¹⁰² Some works have the word “constitutionalism” as part of their titles, but in their respective texts, there is no specific discussion or exploration on the concept of constitutionalism.¹⁰³ There are some studies that merely made tangential references to constitutionalism or a limited examination of the subject. The routine is that the issue of constitutionalism is embedded in studies in respect of other constitutional subjects as a subsidiary issue.¹⁰⁴ In this study, the subject of constitutionalism and its core features of human rights and the judiciary are examined within the same theoretical and practical framework.

The limitations which have been identified with reference to literature on Nigeria, apply with equal force to literature that examined human rights, democracy and judicialism, among others, from the African perspective.¹⁰⁵ In most of them, reference is usually made to various aspects of Nigerian constitutional history, democracy and human rights situation. The studies by Nwabueze¹⁰⁶ and Okoth-Ogendo¹⁰⁷ are among the outstanding on the subject of constitutionalism, much as they approached the subject from different perspectives.

¹⁰⁰ Nwabueze BO *Military Rule and Constitutionalism* (1992).

¹⁰¹ Ojo A *Constitutional Law and Military Rule in Nigeria* (1987).

¹⁰² Borokini A *The Impact of Military Rule on Fundamental Human Rights in Nigeria in Okpara* supra note 95 at 349–374.

¹⁰³ See for example, Kalu KA “Constitutionalism in Nigeria: A Conceptual Analysis of Ethnicity and Politics” *West African Review Issue 6* (2004) and Umezulike IA “Appointment Of a Chief Judge of a State in Nigeria: My Experience and the Ascent of Pragmatism and Constitutionalism” in Oyeyipo TA, Gummi LH and Umezulike IA (eds) *Judicial Integrity Independence and Reforms Essays in Honour of Hon Justice M.L. Uwais* 35–54.

¹⁰⁴ Such studies or works include the following: Mamman T “Inching Towards Constitutionalism and National Challenges of Pluralism and Religion in Nigeria” in Tobi N A *Living Judicial Legend Essays in Honour of Honourable Justice A.G Karibi-Whyte (CON)* (2006) 31-56; Anyanwu CU “Of Sovereignty, Grundnorm, Autochthonous Constitution, Conferences and the Stability of a Decolonized Federal State” in Gidado MM, Anyanwu CU and Adekunle AO *Constitutional Essays Nigeria Beyond 1999: Stabilizing the Polity through Constitutional Re-engineering* (2004) 11-41; Eri U “The Role of the Judiciary in sustaining Democracy in Nigeria” in Oyeyipo *et al supra* note 99 at 169-180; John I “Governance and Constitution reform in the Fourth Republic: The Nigerian Experience” *supra* ; Abubakar D “Constitutional Rights and Democracy in Nigeria” *supra*; Okpara O “History and Concept of National Law (II)” in Okpara O *supra* note 95 at 13-22; Suberu RT “Institutions, Political Culture and Constitutionalism in Nigeria” in Baun MJ and Franklin DP *Political Culture and Constitutionalism: A Comparative Approach* (1995).

¹⁰⁵ The literature include: Motala Z *Constitutional Options for Democratic South Africa: A Comparative Perspective* (1994); Nwabueze BO *Constitutional Democracy in Africa Volume 1* (2004) and *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (1977); Ihonvbere JO *Constitutionalism and Democratization in Africa* (2002); Ihonvbere JO “Politics of Constitutional Reforms and Democratization in Africa” (2000) 41(1) *International Journal of Comparative Sociology* 9; Oko O *Supra* note 9; Ebrahim H, Fayemi K and Loomis S *Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa* (1999); Ambrose BP *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (1995); Shivji IG *The Concept of Human Rights in Africa* (1989); Welch CE *Protecting Human Rights in Africa: Roles and Strategies of Non-governmental Organizations* (1995); Mamdani M “the Social Basis of Constitutionalism in Africa” (1990) (28) *J. Mod. Afr. Stud.* 359-74; An-Na’im AA and Deng FM (eds) *Human Rights in Africa: Cross-Cultural Perspectives* (1990)

¹⁰⁶ Nwabueze BO *Constitutionalism in the emergent States* (1973)

¹⁰⁷ Okoth-Ogendo HWO “Constitutions without Constitutionalism: Reflections on an African Political Paradox” in Greenberg D, Katz SN, Oliviero MN and Wheatley SC (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993); also in Shivji IG (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 23.

While Nwabueze, for example, examined in some detail the subject of constitutionalism in some African states,¹⁰⁸ Okoth-Ogendo in his critical analysis of the concept of constitutionalism draws attention to the dilemma of African constitutionalism. That is, an inclination by African elites to commit themselves to the idea of the constitution while at the same time rejecting the liberal democratic notion of constitutionalism.¹⁰⁹

This study investigated that perceived dilemma or paradox. A crucial question to this study is whether pre-colonial Africa had a concept of human rights. The debate is still raging. A denial of the existence of the concept in pre-colonial Africa would mean that the concept is totally a product of Western civilization, culture or liberalism.

Writers who canvassed that the concept did not exist in pre-colonial Africa include Nwabueze,¹¹⁰ Donnelly,¹¹¹ Kwame¹¹² and Ake.¹¹³ Ake, for example, did not get it right when he argued that “rights ... are not very interesting in the context of African realities... the right to peaceful assembly, free speech and thought, fair trial, etc... appeal to people with full stomach.”¹¹⁴ If a man on an empty stomach is accused of a misconduct against the communal ethos, the least he would expect is a fair hearing before sanction is meted out to him. His lack of “full stomach” will neither deny him of his right to fair hearing nor his awareness of his entitlement to a fair hearing.

There is a long list of authors who recognised the fact that some notions of human rights existed in pre-colonial Africa. Among them are Eze,¹¹⁵ Howard,¹¹⁶ Asante,¹¹⁷ Gyekye¹¹⁸, Motala,¹¹⁹ Elechi,¹²⁰ Busia,¹²¹ Wiredu,¹²² and Deng.¹²³ The analysis of their works in this text support the hypothesis that there is universalism of human rights.

¹⁰⁸ That was as 1973.

¹⁰⁹ Okoth-Ogendo “Constitutions without Constitutionalism: Reflections on an Africa Political Paradox II” at 66.

¹¹⁰ Nwabueze BO *Constitutional Democracy in Africa Volume 2* (2003).

¹¹¹ Donnelly J “Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights” (1982) (76) *The American Political Science Review* 308.

¹¹² Kwame S (ed) *Reading in African Philosophy: An Akan Collection* (1995) 253-269

¹¹³ Ake C “The African Context of Human Rights” (1987) *African Today 1st/2nd Quarters* 5

¹¹⁴ *Supra* note 109 at 5.

¹¹⁵ Eze *Human Rights in Africa some selected problems* at 12-14.

¹¹⁶ Howard RE “Group versus Individual Identity in the African Debate on Human Rights” in An-Na’im and Denga *supra* note 101 at 159-183.

¹¹⁷ Asante SKB “National Building and Human Rights in Emergent Africa” (1969)(2) *Cornel International Law Journal* 2, 72-107.

¹¹⁸ Gyekye K *African Cultural Values: An Introduction* (1996) 150,153.

¹¹⁹ Motala Z “The African Human Rights System: A Cultural Ideological and Legal Examination” (1989)(12) *Hastings International and Comparative Law Review* 373-410.

¹²⁰ Elechi OO “Human Rights and the African Indigenous Justice System” being a paper presented at the 18th International Conference of the International Society for the Reform of Criminal Law, 8-12 August 2004, Montreal, Quebec, Canada.

¹²¹ Busia Jr. NKA “The Status of Human Rights in Pre-Colonial Africa: Implications for Contemporary Practices” in McCarthy-Arnolds E et al (eds). *Africa, Human Rights and the Global System* (1994) 225-250.

¹²² Wiredu K “An Akan Perspective on Human Rights” in An- Na’im and Deng I *supra* note 101 at 243-260.

¹²³ Deng FM “A Cultural Approach to Human Rights among the Dinka” in An-Na’im and Deng *supra* note 101 at 261 -289.

This study rejects the Afro-negativist conception of human rights in pre-colonial Africa and argues in favour of the existence of some notions of human rights in pre-colonial Africa. The study explored the question of the universalism of human rights and concludes that the concept applied to pre-colonial Africa as much as to Europe prior to its colonisation of Africa. It also argues that human rights are embedded in the African practice of communalism, humanism, communitarianism and egalitarianism. The African emphasis on group rights does not negate individual rights. The African Charter on Human and Peoples' Rights recognized the historical tradition and values of African civilization which inspired the Charter's emphasis on group or peoples rights. In further debunking the claim that human rights did not exist in pre-colonial Africa, the study relies on some notions of human rights found in the jurisprudence of some societies in pre-colonial as well as contemporary Africa.

The study also investigates the difficulties and problems inherent in limiting the definition of human rights to humanity or humanism or placing undue emphasis on the right-holder being human. Literature and cases on such controversial issues as to when a foetus will be regarded as human being, if at all and whether the dead have any human rights, for example, a continuing right to privacy, were briefly examined.¹²⁴ The work examines some national constitutions and Bill of Rights. It then posits that some provisions on human rights are applicable to only human beings while others are applicable to "everyone" or "person" which will include non-human beings like corporations. All the authors referred to have in diverse ways made valuable contributions to the understanding of the subject of this study. But none of them has approached in a comprehensive and comparative manner, a study of constitutionalism in Nigeria. That crucial gap in previous literature and the limitations highlighted are what this study attempts to tackle in order to enhance and promote a culture of constitutionalism in Nigeria.

¹²⁴ See Lasok D' "The Rights of the Unborn" in Bridge JW Lasok D, Prerott DL and Plender RO *Fundamental rights* (1973) 19, Australian Human Rights and Equal Opportunity Commission "Human Rights Explained" <http://www.hreoc.gov.au/hr-explained/what.html#top> [accessed 8 February 2005]; Katme AM "The Humane/Human Rights of the Foetus/Unborn Child in Islam" <http://beehive.thisissexter.co.uk/default.asp> [accessed 18 February 2005], the Declaration of the Rights of the Child UNGA Resolution 1386(xiv) of 20 November 1959 (Preamble), *XvUK*, 13 May 1980, Application 8416/78 NJ 1981,110, *Hercz v Norway*, 19 May 1992, *Tijdschrift voor Gezondheidsrecht* 1993/35; *Christian Lawyers Association of SA v Minister of Health and*

1.9 Expected findings

The study is expected to come up with a number of findings. One of them is a form of flawed constitutionalism which will be called “fractured constitutionalism”. This represents the arrangement where a constitution has features of constitutionalism but the practice of constitutionalism is absent. What runs through most of the definitions on human rights is the claim of human rights being inherent in human beings. The study will find that there are attendant difficulties in limiting the definition of human rights to humanity or humanism or to human beings or as something inherent in human beings. This is particularly so as human rights are now extended to legal persons who are not natural persons. African traditional social structures or societies are based on the ideals of humanism, communalism or communitarianism, rather than individualism. Much as those ideals easily sustain group or communal rights, the work will establish that traditional African societies also sustain individual rights within the province of communality. The study will also find that pre-colonial Africa showed some flashes of constitutionalism. These include some basic human rights concepts like the right to fair hearing and traditional practice of democracy. In other words, constitutionalism pre-colonial Africa was not well developed at all. It was at a rudimentary stage of development when colonialism truncated its growth. The study will also confirm that military rule or militarism dismantled and destroyed structures that promoted constitutionalism; it did the same to constitutional democracy. The work will further show that the country’s transition from militarism to democratic rule does not *ipso facto* translate into the entrenchment of constitutionalism and constitutional democracy.

The greatest assault on rights protection following the country’s return to democracy was the introduction of the so-called “new Sharia” in 12 Northern States. This research will find that the new Sharia is unconstitutional in the sense that it violates, among others, the provisions of sections 10, 38 and 42 of the 1999 Constitution which respectively guaranteed secularism; right to freedom of thought, conscience and religion; and the right to freedom from discrimination.

In spite of the linkage and relationship between civil and political rights; and social, economic and cultural rights, the work is going to establish that Nigeria is yet to have a fully developed jurisprudence on socio-economic and cultural rights. In other words, socio-economic rights jurisprudence is still at a rudimentary stage of development in the country. Civil and political rights enjoy better protection than socio-economic rights. Closely related to the issue of socio-economic rights is the expected finding that the courts in Nigeria, can use the provisions on Directive Principles to supply content to fundamental rights and create ancillary rights as in India.

While Nigeria is a party to several international human rights treaties, the study will reveal that the pace of domestication is lamentably slow. It is also expected to find that the provision of section 12(1) of the 1999 Constitution is significantly contributing to the poor domestication of treaties in Nigeria. Other factors are religious, cultural and traditional beliefs of the people. The courts, it would be found, are ambivalent in the application of unincorporated international human rights standards to municipal law.

This study will also lead to the finding that judiciary is the watchdog and guardian of constitutionalism. The effectiveness of their role, largely depends on whether the judiciary puts on the toga of conservatism or activism in the course of exercising its judicial powers. Also related to judicial enforcement of human rights is the right of access to court. Another finding to be made is that the right of access to court is circumscribed by the concept of *locus standi* and several procedural challenges. These include the insistence that only a victim will apply for human rights enforcement; that the application for enforcement must be entered within 14 days of the grant of leave.

The study will also reveal that enlightenment, publicity and creation of awareness are important in bringing about change in the patriarchal attitudes, stereotypes, discriminatory traditional, customary and cultural practices against women. Indeed, the study is expected to establish that enlightenment and publicity are crucial in a society where most victims of human rights violations are unaware of their rights, what more, the violations of those rights.

1.0 Division of the study

This study is structured in six chapters. Chapter 1 is the introductory chapter which sets out the background to the study, the research problem, the objectives or aims of the study, the rationale, the assumptions underlying the study, the scope and limitations of the work; and the expected findings. It also discusses the methodology employed and the structure of the study.

Chapter 2 examines the definitional problems of constitutionalism, human rights and democracy. These are key concepts that are central to this work. Explanations of some other concepts have been made. This is to locate them within their proper contextual meanings. The chapter considers the contentious arguments over the question of universalism, relativism and indivisibility of human rights. It examines the issue whether some notions of human rights existed in pre-colonial Africa. Also addressed is the relationship between human rights, fundamental rights and democracy.

Chapter 3 introduces the making of the Nigerian Constitution of 1999, its legitimacy and how consistent its features are with the principles of constitutionalism and promotion of human rights. The chapter also investigates the protection of human rights in Nigeria. Human rights are called fundamental rights in the 1999 Constitution and they include the right to life under which the legal status of prisoners, traditional practices against women, trafficking in persons, corporal punishment, domestic violence and female genital mutilation were considered. Other rights include the rights to personal liberty, fair hearing and privacy, the right to freedom of thought, conscience and religion; the right to freedom of expression and the press; the right to receive information, the right to own, establish and operate any medium for the dissemination of information; the right to peaceful assembly and association; the right to freedom of movement, right to freedom from discrimination and the right to acquire and own immovable property. These are essentially civil and political rights except the right to own immovable property. The constitutional guarantee of these rights is critically analysed while highlighting areas of deficiencies. The chapter addresses the question whether having robust provisions on human rights protection in the constitution is enough to guarantee rights protection. The chapter equally addresses the question of the judicial protection of socio-economic rights and their constitutionalisation. It further examines the judicial applications of the rights in the Fundamental Objectives and Directive Principles of State Policy. The chapter argues in favour of using the African Charter to expand the scope and quantum of socio-economic rights in the country.

Chapter 4 comprehensively focuses on the issue of the domestication of international human rights norms. It discusses the extent of the country's willingness to comply with international and regional human rights instruments it has signed and ratified. The chapter also analyses the various mechanisms through which international human rights are domesticated including the problems and the challenges. The chapter also deals with the relationship between international law and domestic law, the monist and dualist theories, the concept of incorporation and transformation in international law and their application in Nigerian jurisprudence. The role of the judiciary in the domestication of international human rights norms is also discussed. Chapter 5 discusses the enforcement of human rights. It also probes the concept of *locus standi* and judicial work environment as inhibiting factors in the enforcement of human rights. It examines also the procedural difficulties that militate against rights enforcement; while also highlighting and examining the role of the judiciary in the enforcement of human rights. Chapter 6 is the concluding chapter. There is a synthesis and overview of some key findings made in preceding chapters. The chapter makes recommendations and definite findings on the state of constitutionalism in Nigeria.

CHAPTER 2

CONSTITUTIONALISM, HUMAN RIGHTS AND DEMOCRACY

2.1 Introduction

This chapter focuses on the definitional problems of some key concepts that are used in this study. They are constitutionalism, human rights and democracy. The chapter also examines their relationship and interdependence.

The chapter further addresses such crucial questions as the universalism and relativism of human rights. It examines the debate on the existence of constitutional democracy and human rights in pre-colonial Africa. Traditional African societies were and are still anchored on the concepts of communalism, humanism and communitarianism. These concepts are perceived to favour communal rights as against individual rights. The chapter also explores the issue whether a society that is based on communalism or communitarianism can protect individual rights.

The concepts of constitutionalism, human rights and democracy share a relationship. The chapter discusses that relationship. The chapter also explores the concept of good governance and its relationship with constitutionalism and democracy.

2.2 Constitutionalism, human rights and justice: the challenges

Before embarking on an examination of the definitional problems, among others, associated with constitutionalism, human rights and democracy, it is important to briefly consider the challenges facing constitutionalism, human rights and justice in Nigeria. As this study reveals, military rule impacts gravely on constitutionalism, human rights and justice in Nigeria.¹²⁵ Military dictators usually destroy democratic structures and promote impunity in governance.¹²⁶ They also suspend the constitutional provisions on human rights. The dictators use decrees and edicts to oust the jurisdiction of courts over certain subjects, particularly human rights.

Nigeria has been practising democracy since 1999. This is a positive development. In spite of that, human rights are still violated. There are a number of obstacles in judicial enforcement of human rights like the issue of *locus standi*¹²⁷ and the lack of facilities for justice administration.¹²⁸ Notwithstanding that technology has turned the world into a global village, it is common knowledge that most courts in Nigeria lack computers and recording machines.

¹²⁵ See detailed discussion in section 3.2.2 of chapter 3.

¹²⁶ Section 3.2.2 of chapter 3.

¹²⁷ See section 5.5 of chapter 5 where the issue is explored in detail.

¹²⁸ See section 5.4 of chapter 5.

Court proceedings are therefore recorded manually. Disobedience to court orders by the executive arm of government is still a norm in the country.¹²⁹ Against the foregoing background, the text is to consider the concepts of constitutionalism, human rights and democracy.

2.3 Constitutionalism

As important as constitutionalism is to constitutional development, democracy and good governance, its definition is quite controversial.¹³⁰ There is no acceptable definition. Though the lack of a universal definition does not affect its value which is acknowledged by most writers in political, constitutional and philosophical discourses.

Several writers have approached the definition of constitutionalism in diverse ways. Nevertheless, the major constituents of the concept cut across most of the definitions. Wormuth argues that the tradition of constitutionalism started in ancient Athens. He understands constitutionalism as denoting a kind of government designed to protect the principles of liberty whether or not they are supported by public opinion or elected representatives.¹³¹

Adewoye observes that the philosophy of constitutionalism is traceable to the natural rights doctrines of the Greek Stoics, the medieval Church and the *Magna Carta*. Its development took a rapid turn from the 17th century English revolution and spread to many countries in Western Europe during the 19th century.¹³²

In his descriptive definition of constitutionalism, Adewoye says that it denotes a set of principles in the governance of the polity.¹³³ According to Adewoye, constitutionalism entails the following attributes: effective restraints upon the powers of those who govern, the guarantee of the individual fundamental rights, the existence of an independent judiciary to enforce these rights, genuine periodic elections by universal suffrage, and the enthronement of the rule of law as reflected in the absence of arbitrariness and equality of all before the law.¹³⁴

¹²⁹ See section 5.4 of chapter 5.

¹³⁰ Ihonvbere JO “Politics of Constitutional Reforms and Democratization in Africa” (2000) (41) *International Journal of Comparative Sociology* (Questia online version at p6); Rosenfeld M “Modern Constitutionalism as Interplay between Identify and Diversity” in Rosenfeld M *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994) 3.

¹³¹ Wormuth FD *The Origins of Modern Constitutionalism* (1949) 3.

¹³² Adewoye O “Constitutionalism and Economic Integration” (online) .
<http://web.idrc.ca/en/ev-68408-201-1-DO-TOPIC.html> [accessed 2 May 2005].

¹³³ *Supra*.

¹³⁴ *Supra*.

According to Sartori,¹³⁵ liberal constitutionalism entails: a higher law, either written or unwritten called constitution; a judicial review; an independent judiciary; possibly, due process of law; and most basically, a binding procedure establishing the method of law-making which remains an effective check on the bare-will conception of law.

Li's characterization of constitutionalism is in terms of the supremacy of the law usually the constitution, sovereignty of the people, limited government, independent judicial review and rights protection.¹³⁶ Igbuzor defines constitutionalism as adherence to the letter and spirit of the constitution.¹³⁷ This definition is inherently defective. Adherence to the letter of the constitution may invariably guarantee constitutionality but not necessarily constitutionalism. If a constitution is deficient in the character or tenets of constitutionalism, like most socialist constitutions, these include the constitution of the former Soviet Union, adherence to its letter and spirit may not guarantee constitutionalism. This also means that having a written constitution does not necessarily result in the practice of constitutionalism. Britain does not have a written constitution, but it practices constitutionalism. In practical terms, Ikhariale said that constitutionalism "means a culture of complete submission to the rules and regulations formulated by the constitution."¹³⁸ This definition can also be faulted on the same ground as that of Igbuzor.

Henkin tried to present an all-embracing definition of constitutionalism. He argues that constitutionalism has the following elements:¹³⁹ government according to the constitution; separation of powers; sovereignty of the people and democratic government; constitutional review; independent judiciary; limited government subject to a bill of individual rights; control of the police; civilian control of the military; and no state power or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire constitution.

¹³⁵ Sartori G *The Theory of Democracy Revisited* (1987) 39.

¹³⁶ Li B "What is Constitutionalism?" *Perspectives*, Vol. 1 No. 6 (online)
<http://www.oicyt.org/perspectives/6-063000/what-is-constitutionalism.htm> [accessed 6 February 2005].

¹³⁷ Igbuzor O "Constitutional Reform in Nigeria: Perspectives from Civil Society"
<http://www.cddd.org.wc/cfcr/constitutional-reform.htm> [visited 2 May 2005]. John defines constitutionalism exactly in the terms as Igbuzor. See John I "Governance and Constitution Reform in the Fourth Republic: The Nigerian Experience" being a paper delivered at the Centre for Democracy and Developments Legislative and Governance Monitoring Workshop 6-8 June 2004 at the Nigerian Air Force Club Kaduna.

¹³⁸ Ikhariale M "Constitutionalism and the Third Republic" being the text of a paper delivered at the International Conference Centre Abuja, 26-28 November, 1992.

¹³⁹ Henkin L "Elements of Constitutionalism", (1994) Occasional Paper Series, Center for Study of Human Rights.

McIlwain rejects the doctrine of the separation of powers as a constituent of constitutionalism. According to him: “Among all the modern fallacies that have obscured the true teachings of constitutional history few are worse than the extreme doctrine of the separation of powers and the indiscriminate use of the phrase *checks and balances*.”¹⁴⁰

There is no gainsaying the fact that the principle of the separation of powers ensures that all organs operate within legal and constitutional boundaries. And by so doing, executive or legislative arbitrariness is checked not only in respect of matters concerning the liberties of the individuals but also in governance and law making. These act as safeguards to constitutionalism. The doctrine of the separation of powers is a core value of constitutionalism. Nwabueze was on a firm ground when he said that “constitutionalism requires for its efficiency a differentiation of governmental functions and a separation of its agencies, which exercise them”.¹⁴¹

According to Rosenfeld, “in the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights”.¹⁴² Rosenfeld was quick in conceding that not all constitutions are consistent with the demands of constitutionalism and constitutionalism does not necessarily depend on the existence of a written constitution.¹⁴³ She further argues that “the realization of the spirit of constitutionalism generally goes hand in hand with the implementation of a written constitution.”¹⁴⁴ It is correct that written constitutions cannot always guarantee the “spirit” of constitutionalism. A constitution put in place by a dictator to ensure his hold on power may not promote constitutionalism.

The foregoing definitions by various writers have a common characteristic. There is too much emphasis on legalism and formalism. Having in place institutional structures for the practice of constitutionalism is not enough. The text will examine other definitions that went beyond legalism and formalism to underscore in varying degrees the functional aspect of constitutionalism.

¹⁴⁰ McIlwain C *Constitutionalism: Ancient and Modern* (1947) 414. (Emphasis supplied).

¹⁴¹ Nwabueze BO *Constitutional Democracy in Africa Volume 1* (2003) 243.

¹⁴² Rosenfeld *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* at 3.

¹⁴³ *Supra* at 3.

¹⁴⁴ *Supra* at 3 [Emphasis supplied].

De Smith's conceptualization of the idea of constitutionalism is that it:

...involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content—Constitutionalism becomes a living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass. There is significant room for the enjoyment of individual liberty.¹⁴⁵

De Smith did not conceive constitutionalism as merely a structure or abstraction, but a “living reality.” Ihonvbere argues that “in liberal political discourse, constitutionalism revolves around the twin issues of individual rights and limited powers of government. These encompass the rule of law, separation of powers, periodic elections, independence of the judiciary and the right to private property among other critical issues.”¹⁴⁶ But more importantly, he observes that his understanding of the concept of constitutionalism “goes beyond a legalistic interpretation.”¹⁴⁷ He further refers to constitutionalism “as a process for developing, presenting, adopting, and utilizing a political compact that defines not only the power relations between political communities and constituencies, but also defines the rights, duties, and obligations of citizens in any society.”¹⁴⁸ To be of any meaning the rights so defined ought to be clear to the citizens. They should not only value and treasure the rights, the process of implementation must be transparent and effective. Murphy predicated his conceptualization of constitutionalism on human worth and dignity when he said that it “enshrines respect for human worth and dignity as its central principle. To protect that value, citizens must have a right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will.”¹⁴⁹

Reacting to this conceptualization of constitutionalism by Murphy, Katz says that it “refers back to liberal individualism” and then argues that this “is the basic notion of liberal democratic constitutionalism”.¹⁵⁰ According to Katz, Murphy's analysis is not so representative of the various “forms of constitutionalism conceptualized and practiced outside the western democracies.”¹⁵¹ Katz's argument does not add up. The essence of constitutionalism wherever practiced, must among others, be geared towards respecting human worth and dignity.

¹⁴⁵ De Smith SA *The New Commonwealth and its Constitutions* (1964) 106.

¹⁴⁶ Ihonvbere “*Politics of Constitutional Reforms and Democratization in Africa*” ; see also Shivji IG “State and Constitutionalism: A Democratic Perspective” in Shivji IG (ed) *State and Constitutionalism: A African Debate on Democracy* (1991) 27-54.

¹⁴⁷ *Supra.*

¹⁴⁸ *Supra.*

¹⁴⁹ Murphy WF “Constitutions Constitutionalism and Democracy” in Greenberg D, Katz SN, Oliviero MB and Wheatley SC (eds.) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) 3.

¹⁵⁰ Katz SN “Constitutionalism and Civil Society” being a paper presented as the Jefferson Lecture, University of California at Berkeley 25 April 2000.

¹⁵¹ *Supra.*

A practice, process, system and political compact by whatever name so-called that negates that basic tenet cannot lead to the development of a culture of constitutionalism. Therein lies the difference between authoritarian and totalitarian regimes that sometimes have constitutions, and political systems found on the ideals of democracy. If as Katz rightly contends that constitutionalism “is valuable insofar as it tends to produce and/or sustain a valuable end such as democracy,”¹⁵² it must also be valuable if its goal is to secure human worth and dignity.

Okoth-Ogendo started by drawing attention to what he perceives as the dilemma of African constitutionalism and observes that “no body of constitutional law or principles of constitutionalism appears to be developing in Africa, and might well fail to do so... The paradox lies in this simultaneous existence of what appears as a clear commitment by African political elites to the idea of the constitution and an equally clear rejection of the classical or at any rate liberal democratic notion of constitutionalism.”¹⁵³

This “dilemma” is not peculiar to Africa. It is found in several other continents such as America, Europe, particularly countries in the former Eastern Europe and Asia. In many cases, there is no “clear rejection of the classical or at any rate liberal democratic notion of constitutionalism” as contended by Okoth-Ogendo. Sometimes, it is simply a question of misconceptualizing an adherence to the constitution as leading to the practice of constitutionalism.¹⁵⁴ In that case, there is the expectation that structural features in the constitution which in our view merely provide the legalistic and formalistic framework, will without more, enshrine the culture of constitutionalism. Using Okoth-Ogendo’s catch phrase such a situation will lead to having a “constitution without constitutionalism”.

In the light of the foregoing, Okoth-Ogendo argues that “... all law, and constitutional law in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of power...”¹⁵⁵ On the essence of constitutionalism, his approach to the issue is clearly functional in nature.

¹⁵² Katz SN “Constitutionalism and Civil Society” being a paper presented as the Jefferson Lecture, University of California at Berkeley 25 April 2000.

¹⁵³ Okoth-Ogendo HWO “Constitutions Without Constitutionalism: Reflections on African Political Paradox” at 66.

¹⁵⁴ The relationship between constitution and constitutionalism is discussed *infra*.

¹⁵⁵ Okoth-Ogendo *supra* at 67. (Emphasis supplied).

Okoth-Ogendo argues that there is a broad agreement over the essence of constitutionalism which he opines is:

Fidelity to the principle that the exercise of state power must seek to advance the ends of society, that attainment has not been an easy matter. The political history of many societies is replete with struggles for an optimal balance between the few on whom constitutions confer power and the vast majority for whose benefit it is supposed to be exercised. What is clear is that in no society has that balance been achieved through the promulgation of a constitution, *per se*.¹⁵⁶

After pointing out the closeness between constitutionalism and constitution, Mangu argues that both should be distinguished. “The latter” he said, “refers to the form, to the document itself, while the former relates to the substance, to values embedded in the constitutional provisions.”¹⁵⁷ Some other writers have in diverse ways contributed to the discourse on the relationship between constitution and constitutionalism. Ambrose observes that: “Constitutionalism is not simply the provision of a written document, even one to which strict adherence is given. If the document does not provide for checks on government power, and if those checks are not then free to operate, then constitutionalism does not exist.”¹⁵⁸ On his part, Feldman says that it is “basic that the document identified as ‘the constitution’ is just one part of a successful constitutional arrangement”.¹⁵⁹ He further argues that: “Constitutionalism, properly understood, includes as well the institutions, practice, customs, and norms that guide and legitimize the exercise of public power.”¹⁶⁰

Similarly, Ihonvbere contends that “constitutions as documents mean nothing unless there is a culture of constitutionalism that anchors the democratic process on the people and derives its legitimacy in the workings of the constitution through democratic institutions.”¹⁶¹ This author argued elsewhere that having a constitution does not guarantee the development of a culture of constitutionalism,¹⁶² but it must be conceded that there is a crucial relationship between constitution and constitutionalism. As Rosenfeld rightly observes, “constitutions are especially apt vehicles for the institutionalization of essential requisites of constitutionalism.”¹⁶³ Indeed, it is a core constituent or feature of constitutionalism.

¹⁵⁶ Okoth-Ogendo HWO “Constitutions Without Constitutionalism: Reflections on African Political Paradox” at 66.

¹⁵⁷ Mangu AM “Constitutional Democracy and Constitutionalism in Africa” (2006) *Conflict Trends* 3-8.

¹⁵⁸ Ambrose BP *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (1995) 85-86. See also Haward R “Legitimacy and Class Rule in Commonwealth Africa: Constitutionalism and the Rule of Law” (1985) (No 2) *Third World Quarterly* 323.

¹⁵⁹ Feldman N “Imposed Constitutionalism” (2005) (37) *Connecticut Law Review* 882.

¹⁶⁰ *Supra*.

¹⁶¹ Ihonvbere “*Politics of Constitutional Reforms and Democratization in Africa*” at 8. See also Kanyongolo F “The Constitution and The Democratization Process in Malawi” in Sichone O (ed.) *The State and Constitutionalism in Southern Africa* (1998) 1-13 at 2.

¹⁶² Uzoukwu L “Reforming the 1999 Constitution through Judicial Review” being the text of a paper delivered at the British-Nigeria Law Week 23-27 April, 2001 at Abuja, Nigeria

¹⁶³ Rosenfeld *Constitutionalism, identity, Difference and Legitimacy: Theoretical Perspectives* at 14.

Constitutionalism, therefore, means much more than having a written or unwritten constitution. Repressive and authoritarian regimes such as those of Idi Amin of Uganda, Sani Abacha of Nigeria, Marcias Nguema of Equatorial Guinea, Haile Mengistu of Ethiopia, Jean-Bedel Bokasa of Central African Republic all had constitutions.¹⁶⁴ Saudi Arabia and Egypt have constitutions. But it is contentious to claim that constitutionalism prevailed in those regimes. Mbaku missed the point when he claimed that “notoriously violent and oppressive states such as apartheid South Africa had a constitution and practiced some form of constitutionalism.”¹⁶⁵ While it is conceded that apartheid South Africa had a constitution, it is equally true that it lacked the structured or formalistic features for the practice of constitutionalism and the actual practice of constitutionalism was absent. But Mbaku was right when he argues that the so called constitution of apartheid South Africa and those of other oppressive states “were legal documents, they were not legitimate instruments of governance.”¹⁶⁶

In the development of a culture of constitutionalism, the institutional structures or legal construct as well as the process are important. There should be a synthesis, connection and relationship between them. It is correct as argued by some writers that “... constitutionalism is a dynamic, political process, rather than a fixed mode of distributing power, rights, and duties,” but it is not always correct as also canvassed by them that “constitutional legitimacy thus is more often validated by political and social realities than by formal criteria.”¹⁶⁷ If a constitution as a supreme law is deficient in norms that guarantee human worth, dignity or human rights and democratic institutions, no degree of political and social realities can validate its legitimacy.

Constitutionalism should not be seen as a concept espousing legal, constitutional and democratic ideals only. It must be functional in the sense that its essence, process and practice must safeguard human rights, human worth and dignity, rule of law and good governance. Constitutionalism ensures that the exercise of governmental power and authority is limited and circumscribed to prevent arbitrariness, tyranny, parochialism, ethnicism, tribalism and inequality. It provides institutional framework for participatory and accountable government and conflict resolution.¹⁶⁸ The core features, constituents or institutional structures of constitutionalism include constitution (written or unwritten), human rights protection, separation of powers, participatory democracy, rule of law and judicial review. Constitutionalism in its nature as a dynamic process ensures a balance between its constituents and their values.

¹⁶⁴ See also Mbaku JM “Constitutionalism and Governance in Africa” (2004) (Issue 6) *West Africa Review* 8.

¹⁶⁵ *Supra.*

¹⁶⁶ *Supra.*

¹⁶⁷ Greenberg *et al* *Constitutionalism and Democracy: transitions in Contemporary World* 19 at xix.

¹⁶⁸ Mbaku JM “Minority Rights in Plural Societies” <http://www.india-semianr.com/2000/490/490%20mbaku.htm> [accessed 10 January 2007].

Having examined the various definitions of constitutionalism, the essence and values of the concept, the next issue to explore is the classification or categorization of constitutionalism by some authors. This is done to draw attention to certain peculiarities of the concept in some situations or climes. Hence one reads about “imposed constitutionalism” and “transformative constitutionalism”. There is also what is referred to as “democratic constitutionalism”.

“Democratic constitutionalism” appears to be contradictory or perhaps contentious. This is so because it is difficult to envisage an “undemocratic” constitutionalism. What more, democracy is a core constituent of constitutionalism and cannot be successfully separated from constitutionalism without the latter losing its content, value and meaning. In this work, an effort has been made to develop a nascent theory of “fractured constitutionalism”. This is a kind of constitutional arrangement and the practice associated with it. The forms of constitutionalism that have been identified are by no means exhaustive. But in this text, the concern are “transformative constitutionalism”, “imposed constitutionalism” and “fractured constitutionalism” because of their relevance to the study.

2.3.1 Transformative constitutionalism

Chief Justice Langa¹⁶⁹ argues that transformative constitutionalism has no single acceptable definition.¹⁷⁰ The word “transformation” also has definitional problems in juridical terms.¹⁷¹ Klare observes that the South African Constitution,¹⁷² is a document of transformative constitutionalism.¹⁷³ The constitution as a transformative document requires continuous interpretation to bring it in tune with a dynamic and changing country, nay, the world.¹⁷⁴

In the case of *Rates Action Group v City of Cape Town*,¹⁷⁵ Budlender AJ said *inter alia*:¹⁷⁵ “Ours is a transformative constitution... Our constitution provides a mandate, a framework and to some extent a blueprint for transformation of our society from its racist and unequal past to a society in which all can live with dignity.”¹⁷⁷

¹⁶⁹ Former Chief Justice of the Republic of South Africa.

¹⁷⁰ Langa O “Transformative Constitutionalism” being Prestige Lecture delivered at Stellenbosch University on 9 October 2006.

¹⁷¹ Moseneke D “The Fourth Bram Fisher Memorial Lecture: Transformative Adjudication” (2002)(18) *SAJHR* 309 at 315.

¹⁷² Constitution of the Republic of South Africa of 1996.

¹⁷³ Klare K “Legal Culture and Transformative Constitutionalism” (1998) (14) *SAJHR* 146.

¹⁷⁴ *Supra* at 155.

¹⁷⁵ 2004 (12) *BCLR* 13286.

¹⁷⁶ *Supra* at para 100.

¹⁷⁷ See also *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 (6) *BCLR* 728 (W) at para 51-52; *S v Makwanyane and Another* 1995(6) *BCLR* 665(CC) at para 262.

Because of the decisions of the Constitutional Court of South Africa and other courts in the country that the constitution is transformative,¹⁷⁸ Justice Langa argues that constitutionalism in South Africa is transformative. One flaw in the argument in favour of transformative constitutionalism is that it is tied to the transformative nature of a constitution. Constitutionalism is an evolving process and its practice or culture cannot be found on simple adherence to the constitution. Virtually all institutional, constitutional structures and systems where there is a transition from authoritarianism or militarism or despotism to democracy can be described as “transformative constitutionalism”.

2.3.2 Imposed constitutionalism

A well known exponent of this brand of constitutionalism is Feldman. According to him, “imposed constitutionalism is not, of course a new phenomenon.”¹⁷⁹ He argues:

Indeed, one of the most salient historical instances of imposed constitutionalism of greater moment (and more widely studied) than the cases of post war Japan and Germany is surely Military Reconstruction, the post-civil war process whereby occupied southern states were refused representation in Congress (and so, in effect, readmittance to the Union) until they ratified the thirteenth and fourteenth Amendments to the US Constitution. Debates about the justifiability or wisdom of *imposing constitutions* must take account of this history, and must remember that questions about balancing universal rights and majoritarianism were not suddenly born the day the Berlin Wall fell.¹⁸⁰

Japan represents an old and good example of this kind of constitutionalism. It would be recalled that after the defeat of Japan in the Second World War in 1945, American legal officers wrote a constitution for Japan, had it translated into Japanese, secured the acquiescence of the Japanese government which was in existence at the time but under the auspices of the United States occupation headed by the Supreme Allied Commander, General Douglas MacArthur.¹⁸¹ The Japanese situation is an “old-fashioned imposed constitutionalism”.¹⁸²

Feldman argues that this type of “wholesale imposition of an entire constitutional structure is increasingly rare, constitutions are being drafted and adopted in the shadow of the gun.”¹⁸³ He further said: “In the last decade in the former Yugoslavia, East Timor, Afghanistan and, yes, Iraq, interim or permanent constitutions have been drafted under conditions of *de facto* or *de jure* occupation”.¹⁸⁴

¹⁷⁸ See *Rates Action Group case*, 2004 (12) BCLR 13286.

¹⁷⁹ Feldman “*Imposed Constitutionalism*” at 859.

¹⁸⁰ *Supra* (emphasis supplied).

¹⁸¹ *Supra* at 857. For further details see generally Moore RA and Robinson DI *Partners for Democracy-Crafting the New Japanese State Under MacArthur* (2002).

¹⁸² *Supra* at 858.

¹⁸³ *Supra* (emphasis in original).

¹⁸⁴ *Supra*.

Feldman further argues that:

Each of these cases has seen substantial local participation in the constitutional process; but each has also seen substantial intervention and pressure imposed from outside to produce constitutional outcomes preferred by international actors including NATO, the United Nations, and international NGOs, as well as foreign states like United States and Germany. What is occurring in these contexts is the latest most sophisticated form of imposed constitutionalism raising its own problems and challenges.¹⁸⁵

One clear flaw in this form of constitutionalism is that the act of “imposing constitutions” is regarded as imposing constitutionalism thereby giving the impression that a constitution *per se* could create constitutionalism. It is difficult to comprehend why Feldman fell into that error when he had in the latter part of his work clearly said that it “is basic that the document identified as the constitution is just one part of a successful constitutional arrangement”.¹⁸⁶ He further said and rightly also that: “Constitutionalism properly understood includes as well the institutions, practices, customs and norms that guide and legitimize the exercise of public power”.¹⁸⁷

Choudhry while reacting to Feldman’s work agrees with him that “imposed constitutionalism and nation-building are nothing new.” He also made the mistake of confusing constitution or constitution-making with constitutionalism when he argued that:

Many imperial powers drafted the post-independence constitutions of colonies as part of the process of decolonization. Occupying military powers have recrafted constitutional orders of the vanquished foes as the United States did in Japan after the Second World War. Although the contexts varied both in space and time a basic pattern repeated itself. A foreign power would design the institutional and legal architecture of another political community without its consent. The constitution was presented as a *fait accompli*. Local participation—there was usually some—did not entail meaningful substantive decision-making power. Rather it was directed at ensuring the acquiescence of local elites with fundamental questions of constitutional choice safely remaining in foreign lands.¹⁸⁸

For Choudhry this represents imposed constitutionalism and nation-building; hence, it has to be faulted on the same ground as Feldman’s conceptualization of imposed constitutionalism.

¹⁸⁵ Feldman “*Imposed Constitutionalism*” at 858–859.

¹⁸⁶ *Supra* at 882.

¹⁸⁷ *Supra*.

¹⁸⁸ Choudhry S “Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities” (2005) (37) *Connecticut Law Review* 933.

2.3.3. Fractured constitutionalism

In this study, it would be discovered that there are certain institutional arrangements or constitutional orders that have the formal and legal structures of constitutionalism or the spirit of constitutionalism, but the evolving processes arising from those arrangements and structures present contradictory practices of constitutionalism. In such order, there is a limited conscious effort on the part of government and its agencies to conform to practices that promote and advance constitutionalism. In some other instances, there is a deliberate subversion and truncation of the structures, processes and practices put in place to develop a culture of constitutionalism.

Such contradictory practices are captured by the actions of the national government in being selective in obeying court orders. In other words when it suits government, it obeys a court order; when it thinks that it does not suit it, it unabashedly disobeys court orders. In such a system, there is selective enforcement of court orders; selective enforcement of human rights; selective compliance with the doctrine of the separation of powers and indeed selective compliance with the provisions of the national constitution. Electoral process in such a political order is marred by massive rigging and thuggery. The institutional and constitutional structure, order, arrangement, practices and processes encapsulated above is what in this text is regarded as a flawed constitutionalism. This text also calls such a process or structure fractured constitutionalism.¹⁸⁹ This text will show that Nigeria has a fractured constitutionalism.

2.3.4. Constitutionalism in pre-colonial Africa

Examining the concept of constitutionalism in pre-colonial Africa presents a daunting task. Much of African traditions and history are unrecorded. Consequently, materials and data that could aid a study of the subject are not easy to come by. It was only during the middle of the last century that research into pre-colonial African history and oral traditions started.¹⁹⁰ Maduna¹⁹¹ reflected on this dearth of record and argued:

Much of African political and legal tradition has not been recorded in writing. It was practiced but not so much reflected upon. And it is always difficult to identify and describe something that lacks written record. In fact one even finds the trend that some as a result of the lack (of) detailed historical recording of African tradition hold the view that such authentic African tradition has never been in existence. Nothing can be further from the truth. The salient features of the African tradition have been in existence all along and are still living practice among our people.¹⁹²

¹⁸⁹ As this study progresses, specific instances and examples of structures and practices that informed the development of this nascent theory of a form of constitutionalism will be presented. This cuts across the subsequent chapters of this work and will be part of the focus of this study.

¹⁹⁰ Church J "The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience" [2005] *ANZLH E-Journal* 94-106 at 95.

¹⁹¹ Maduna PM was South African Minister of Justice and Constitutional Development.

¹⁹² Maduna PM Speech at the African Renaissance Conference on Constitutionalism, 16 November 1999, South Africa.

It is true that the salient features of African traditional practices are still much in existence notwithstanding the effect of colonialism, neocolonialism and modernity. The point is whether the examination of African traditional practices, political arrangements and institutions in pre-colonial time, will reveal the practice of constitutionalism.

Mbaku argues that many of those who express doubt about the value of a constitution to African societies believe that the main mode of constitutionalism in Africa is Eurocentric and that it is a byproduct of colonialism.¹⁹³ He concedes that there is some truth in that belief particularly when one considers the fact that most of the constitutions in Africa are either based on some European model or are copies of the constitutions of the African nations' former colonial masters.¹⁹⁴ However he was emphatic that "constitutionalism in Africa is not a gift of colonial rule".¹⁹⁵ He further contends that if constitutionalism "is understood as the process of developing institutional arrangements for a society, it predates colonial rule".¹⁹⁶ Popoola while supporting pre-colonial constitutionalism in Africa argues:

that in pre-colonial Yoruba land (in south-western Nigeria) there existed a kind of traditional constitutionalism with it (sic) complex system of checks and balances social structures, accountability and representation defined less in terms of selection procedures and more in terms of the affinity of ruler to the ruled all of which played a pervasive role in checking arbitrariness and abuse of power¹⁹⁷

A study on democracy in Nigeria found that "in the pre-colonial period the states and peoples in the territory now known as Nigeria engaged actively in a process of state formation, dissolution and reformation".¹⁹⁸ In relation to democratic ideas, it states that "accountability and representation were two major features of pre-colonial governance".¹⁹⁹ In *Re Southern Rhodesia*²⁰⁰ the Privy Council of the UK House of Lords noted:

Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or ideas of civilized society... On the other hand there are indigenous peoples whose legal conceptions though differently developed are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.

¹⁹³ Mbaku "*Minority Rights in Plural Societies*" 37.

¹⁹⁴ *Supra.*

¹⁹⁵ *Supra.*

¹⁹⁶ *Supra.*

¹⁹⁷ Popoola AO "Crisis of Governance in Africa: Lessons from Pre-Colonial Yoruba Constitutionalism" <http://www.utexas.edu/conferences/africa/2004/database/popoola.html> (visited on 11 January 2007).

¹⁹⁸ International Institute of Democracy and Electoral Assistance *Democracy in Nigeria* (2000) 4.

¹⁹⁹ *Supra.*

²⁰⁰ [1919] A.C. 211.

According to Allott, most competent scholars may not agree with the Privy Council that any African society existed in the first category in respect of whom it can be stated that their institutions cannot be reconciled with those of the civilized society. He added that “though there may well be particular institutions which we would find repugnant. No blanket rejection of any African legal system is therefore justifiable in the light of the present knowledge”.²⁰¹ The view in this research is that it is not possible to find any society in the world inclusive of Europe and America where all its practices, institutions and norms are consistent with civilized practices or human rights.

African nations as much as Europe have institutions that are repugnant to civilized society. The difference lies in degree only. After all, as late as the 20th century, slavery was legal in several European and American nations. A writer strongly contends and rightly too that “clearly the Igbo (political) system was a democracy that evolved independently and indigenously, a clear indication that democratic principle whether ancient or modern are not alien to Africans; they are rooted in the people’s indigenous tradition and values”.²⁰² He further explains that the pre-colonial political structure of the Kikuyu of modern Kenya typifies direct and participatory democracy like those of the Igbos.²⁰³

Having briefly focused on Africa’s pre-colonial political and legal arrangements, it could be seen that in pre-colonial period, flashes of the concept of constitutionalism existed. But any categorical finding on the practice of constitutionalism may be premature at this stage. That will be done after a full consideration of the question whether human rights and democracy existed in pre-colonial Africa.²⁰⁴

2.4 Evolution of human rights

Human Rights protection is a feature of constitutionalism. Human right is a modern term. It invokes principles that are as old as humanity. These basic principles are to be found not only in Christianity, Confucianism, Buddhism, Hinduism, Islamism and Judaism, but also in most local cultures and systems of beliefs²⁰⁵. Indeed, most if not all world ideologies espouse it.

²⁰¹ Allott A *Essays in African Law* (1960) 13.

²⁰² Nwauwa AO “Concepts of Democracy and Democratization in Africa Revisited” paper presented at the Fourth Annual Kent State University April 28-29 2003.

²⁰³ *Supra*.

²⁰⁴ This is done *infra*.

²⁰⁵ Pollis A and Schwab P (eds.) “Introduction” in *Human rights: Cultural and Ideological Perspectives* (1980) xiv.

The evolution of its concepts cuts across civilizations. The American Declaration of Independence of 1776²⁰⁶ and the French Revolution that resulted in the French Declaration of the Rights of Man and of the Citizen of 1789²⁰⁷ contributed in no small measure to the recognition of human rights.

Leary explains that “it should not be forgotten that the horrifying activities committed by Nazi Germany were the primary impulsion for the development of an international system for the protection of universal human rights”.²⁰⁸ The international community was shocked by the horrifying and horrendous violations of the rights of individuals under Nazi Germany and thought that humanity should devise a means of holding the perpetrators accountable for their dastardly and inhuman actions.

The Universal Declaration of Human Rights, adopted in 1948 by the UN General Assembly²⁰⁹ marked the beginning of the transformation of human rights from moral imperatives into rights that are legally recognized, internationally and nationally. One of the prime movers behind the Declaration, Eleanor Roosevelt, described it as a statement of principles that provided a common standard of achievement for all peoples and for all nations.²¹⁰ The Declaration gave the world the foundation for good governance, democracy, human rights and the rule of law.

The Declaration basically proclaimed two categories of rights. The first consists of civil and political rights; this includes the right to life, right to liberty, freedom of expression and the right to fair hearing. These are regarded as the first generation of human rights. The second generation of rights comprises economic rights, such as the right to education, the right to health and right to work. These rights are social, cultural and economic in content and orientation. The first and second generations of rights are focused on individuals. Two separate covenants that followed the Declaration gave impetus to the Declaration. They are the International Covenant on Civil and Political Rights (ICCPR)²¹¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²¹²

²⁰⁶ This was adopted by Congress on 4 July 1776 and *inter alia* said: “We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with inalienable rights that among these are life, liberty and pursuit of happiness...”

²⁰⁷ This also articulated certain human rights.

²⁰⁸ Leary VA “The Effect of Western Perspectives on International Human Rights” in An-Na’im AA and Deng FM *Human Rights in Africa: Cross-Cultural Perspectives* (1990) 15.

²⁰⁹ Adopted 10 December 1948, G.A. Res. 217A (III) , UN Doc. A/810, at 71 (1948).

²¹⁰ Roosevelt E “Adoption of the Declaration of Human Rights” (1948). <http://www.udhr.org/history/>[accessed 25 February 2006].

²¹¹ Entered into force 23 March 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) 999 UNTS 171.

²¹² Entered into force 23 March 1976, G.A. Res. 2200A XXI, U.N. Doc. A/6316 (1966) 993 UNTS 3.

According to Mary Robinson, the former UN High Commissioner for Human Rights:

These Treaties and the UN Declaration, known collectively as the International Bill of Rights, are the cornerstone of the remarkable body of international and regional instruments, well over seventy in number, which form the basis of international human rights law, and regulate the fundamental rights and freedoms of all individuals.²¹³

There is also the third generation of rights which are sometimes called “collective” or solidarity rights. Within this class of rights are environmental rights, the right to peace and security, right to development, right to separate identity and the right to self-determination. The African Charter on Human and Peoples Rights²¹⁴ made significant contribution to the development of these “solidarity rights” by making provisions for them. Apart from the classification of the rights as civil and political rights, economic, social and cultural rights, there are rights that are classified not necessarily as individual but group rights. They include children’s rights, refugee rights, women’s rights, minority rights, the rights of indigenous peoples, among others. These group rights, it must be pointed out, do not detract from the basic concept of human rights and they are not additional or superior to those belonging to the rest of the society. The group rights are the expression of basic rights, tailor-made to adequately protect the group concerned. There is also a further classification of human rights into substantive human rights and procedural human rights. The former are protected by the substantive law while the later are the procedural provisions for the enforcement of the substantive rights.

It has been contended that the reason behind the categorisation of the rights into civil and political rights, and economic, social and cultural rights are many. Keller argues that political and other conflicts played a dominant role in the drafting of the two Covenants. North–South divisions and cold war rivalries engendered an atmosphere of suspicion, especially with regard to the relative importance of the different rights.²¹⁵ The US, the Soviet Union and their allies were deeply suspicious of each other. The former was in favour of two separate covenants, believing that putting economic and political rights on the same level would threaten and undermine the rights of the individuals. They embraced the view that economic and social rights are non-justiciable and must be separated from civil and political right.²¹⁶

²¹³ Robinson M “Protecting Human Rights: the Role and Responsibilities of the Independent Bar” being a keynote address delivered at the inaugural World Conference of Barristers and Advocates, Edinburgh 28 June 2002.

²¹⁴ The African Charter came into force on 21 October 1986 having earlier been adopted in June 1981 by the Heads of State of countries that formed the Organization of African Unity (OAU) now the African Union.

²¹⁵ Keller LM “The Indivisibility of Economic and Political Rights” (July 2001) (1:3) *Human Rights and Human Welfare* 10. See also Stark B “Urban Despair, and Nietzsche’s Eternal Return: From the Municipal Rhetoric of Economic Justice to International law Economic Rights” (1995) 28 *Vand. J. transnat’IL* 185, 220.

²¹⁶ Keller *supra*. See also Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (1999) 67-88 (on justiciability).

Soviet Union and its allies strenuously contended that economic, social and cultural rights are as important as civil and political rights. There was much emphasis on the collective nature of the rights and it was argued that all rights must be equal because they are derivable by virtue of the right holders being citizens of the State.²¹⁷

The US continues to view with disdain, “economic, social and cultural rights which she refuses to consider as *rights*’”.²¹⁸ The US contemptuously regards them as Soviet invention²¹⁹ which must be treated as mere “goals” and “aspirations’”.²²⁰ The US signed the two covenants in 1977. It only ratified the ICCPR in 1992.²²¹ Notwithstanding the attitude of US and some Asian countries, it is almost generally acceptable that there is interdependence, interrelationship and interconnection between civil and political rights, and socio-economic rights.²²² Also recognized is the factum of the indivisibility of human rights.²²³

2.4.1 Definitional problems of human rights

Human rights like most concepts are not easily susceptible to precise and generally acceptable definition. Indeed, the basic concepts of human rights are better understood than its definition. Since the universal conception of the rights was brought about by the United Nations Universal Declaration of Human Rights, legal scholars and jurists have been grappling with the definition of human rights. Eze argues that “human rights represent the demands or claims which individuals or groups make on society, some of which are protected by law and have become part of *lex lata* while others remain aspirations to be attained in the future’”.²²⁴ This definition is too general in terms and hardly captures the essence of human rights as attributes that are universal and inalienable. Penal Reform International describes the rights as being fundamental to human existence.²²⁵ It maintains that they are neither gifts given at the whim of a ruler or a government and nor can they be taken away by any arbitrary government.

²¹⁷ Keller “ The Indivisibility of Economic and Political Rights” 10; Arambulo, Strengthening the Supervision of the International Convention on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects at 103.

²¹⁸ Alston P ‘Economic and Social Rights’ in Henkin L and Hargrove JL *Human Rights an Agenda for the Next Century* (1994) 137, 147-51(Emphasis supplied).

²¹⁹ Stark “Urban Despair, and Nietzschis Eternal Return: From the Municipal Rhetoric of Economic Justice to International Law Economic Rights” at 220.

²²⁰ Alston *supra* at 148.

²²¹ This she did with a lot of reservations.

²²² The details are discussed *infra* in Chapter 3.

²²³ The details are discussed *infra* in this Chapter.

²²⁴ Eze O *Human Rights in Africa Some Selected Problems* (1984) 5.

²²⁵ Penal Reform International *Introduction to Human Rights Training for Commonwealth Prison Officials* (1993) 1.

The rights are “inherent” in every human being. For Loman, human rights are “rights that every person has because he is a human being, no matter whether they are laid down in documents or not”.²²⁶ His study was from the perspective of Roman Catholic conceptions and teachings.

Chukwumaeze argues that they are rights “which inhere in a person by virtue of being a human being. Such rights are inalienable in the sense that a person cannot be deprived of them without a great affront to justice. Implied from the principles of inherence and inalienability is the fact that they are universal”.²²⁷

Henkin in a comprehensive manner, defined human rights in the following words:

... claims which every individual has, or should have, upon the society in which she or he lives. To call them human rights suggests that they are universal; they are the due of every human being in every human society. They do not differ with geography or do not depend on gender or race, class or status. To call them “rights” implies that they are claims “as of rights” not merely appeals to grace, or charity or brotherhood or love; they need not be earned or deserved. They are more than aspirations or assertion of “the good” but claims of entitlement and corresponding obligation in some political order under some applicable law, if only in a moral order under a moral law.²²⁸

Henkin also contends that:

When used carefully, “human rights” are not some abstract, inchoate “good”. The rights are particular, defined, and familiar, reflecting respect for individual dignity and substantial measure of individual autonomy, as well as a common sense of justice and injustice.²²⁹

Henkin argued that the rights are inalienable and that they cannot be bestowed, granted, limited, bartered or sold away. Some of the rights are undoubtedly non-derogable in some jurisdictions. But it is highly controversial to argue that they cannot be granted or bestowed or limited. Apart from the foregoing, there are other controversies associated with human rights and they include its attachment to humanism and its universality.

Gavison describes human rights as “rights that ‘belong’ to every person, and do not depend on the specifics of the individual or the relationship between the right-holder and the right grantor.”²³⁰ He further observes that human rights exist notwithstanding whether they are granted or recognized by both the legal and social system where the individuals live.²³¹ In his words, “human rights are moral, pre-legal rights.”²³²

²²⁶ Loman G “Human Rights and the Prisoners” in *8th World Congress Conferencia Internacional 1993 of the International Commission of Catholic Prison Chaplaincies* (1993) 51.

²²⁷ Chukwumaeze UU “Socio-Economic and Cultural Rights - The Panacea to Threats on Prospects (sic) of Successful Democracy in Nigeria” in Chukwumaeze UU and Erugo S (eds.) *In Search of Legal Scholarship (Essays in Honour of Ernest Ojukwu)* (2001) 33.

²²⁸ Henkin L “Rights: Here and There” (1981) *81 Columbia Law Review* 182.

²²⁹ *Supra.*

²³⁰ Gavison R “On the relationships between civil and political rights, and social and economic rights” in Coicaud J, Doyle MW and Gardner A (eds) *The Globalization of Human Rights* (2003) 25.

²³¹ *Supra.*

²³² *Supra.*

It is inconceivable how a “right” can exist and be subject to enforcement if neither the legal nor the social system recognises it as such. Another view is that human beings are holders of human rights because they are integral part of the human species. They enjoy these rights equally irrespective of sex, race, nationality and economic circumstances.²³³ Archbold argues that human rights are “the moral and/or legal claims arising from the inherent dignity of human beings.”²³⁴ Unlike Gavison who claimed that they are “moral, pre-legal rights,” the former said that they are “moral and/or legal claims”.

Justice Nnaemeka-Agu postulated that: human rights are part of the laws of the particular state. They are such rights which the particular state has selected from a plethora of rights and given to the citizens and other persons within its frontiers and made enforceable against the particular state or its agencies.²³⁵ The description here fits fundamental rights more than human rights. Although the former is part of the latter.²³⁶

A common thread that transverses most of the definitions of human rights is the claim of human rights being inherent in human beings.²³⁷ That claim is also reflected in various International Instruments and Statements on human rights.²³⁸ The latter include²³⁹ the Harare Declaration of Human Rights (1989), The Banjul Affirmation (1990), Abuja Confirmation (1991), Balliol Statement (1992) and The Bloemfontein Statement (1993).

In legal science, some of the rights have been extended to persons who under the law are legal persons but not natural persons or human beings. Such rights include the right to fair hearing. The New Zealand’s Bill of Rights²⁴⁰, in its section 29, expressly states that: “Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons”. There is no gainsaying the fact that the concept of legal personality covers human beings and non-human beings or artificial persons like corporations. Again, the reading of some national constitutions that contain Bill of Rights or Fundamental Human Rights, will reveal that some of the rights are applicable only to human beings; while others are applicable to “everyone” or “persons”.²⁴¹ It is not enough conceptualizing human rights as being inherent in human beings.

²³³ Ishay MR *The History of Human Rights; From Ancient Times to the Globalisation Era* (2004) 3.

²³⁴ Archibold C “The incorporation of civic and social rights in domestic law” in Coicaud *et al supra* note 98 at 56; see also Honderich T (ed.) *The Oxford Companion to Philosophy* (1995).

²³⁵ Nnaemeka-Agu P “The Role of Lawyers in the Protection and Advancement of Human Rights” (1992) 18 *CLR* 735.

²³⁶ The relationship between human rights and fundamental rights is discussed latter in this chapter.

²³⁷ See for example, Okpara O “ Nature of Human Rights” in Okpara O (ed.) *Human Rights Law and Practice in Nigeria Vol.* (2005) 36-38; Ajomo MA “Fundamental Human Rights Under the Nigerian Constitution” in Kalu A and Osinbajo Y (eds.) *Perspectives on Human Rights* (1992) 77.

²³⁸ Details are given *infra*.

²³⁹ See Interights *Developing Human Rights Jurisprudence, Volume 7* (1998) 219-237.

²⁴⁰ New Zealand Bill of Rights Act No 109 of 1990.

²⁴¹ Rights to life and fair hearing, for example, are available to everyone; but the right to vote is limited to citizens.

Human rights are universal and inalienable rights available to legal persons whether natural or artificial persons. Unlike human beings, not all the rights are available to corporate personalities by virtue of their status. Example has earlier been given of the right to vote in elections which is guaranteed to citizens only.

2.4.2 Fundamental rights as human rights

Human rights should not by virtue of the conceptualization of their indivisibility, be graduated or ranked in the order of importance. The Nigerian Bill of Rights is contained in Chapter IV of the 1999 Constitution and the human rights which are guaranteed constitutional protection are called fundamental rights. Does it mean that the rights so protected for example, the rights to privacy and fair hearing are more fundamental than other human rights and enjoy primacy over them? What then are fundamental rights and what is the relationship between them and human rights? Some scholars and jurists have tried to define fundamental rights. It has to be pointed out that the definition of fundamental rights is less problematic than that of human rights and the jurisprudential polemics are not as intense as in the case of human rights.

Justice Kayode Eso posits that fundamental rights “are not just mere rights. They are fundamental. They belong to the citizen. The Rights have always existed even before orderliness prescribed rules for the manner they are to be sought”.²⁴² It is important to state again that not all the rights belong to citizens; some are for the benefits of “any person” or “person” or “every person.” Adio J.S.C is of the view that a fundamental right is a right guaranteed in the Nigerian constitution and that it is a right which every person is entitled to when he is not subject to the disabilities prescribed in the constitution, “to enjoy by virtue of being a human being. They are so basic and fundamental that they are entrenched in a particular chapter of the constitution”.²⁴³ “Fundamental rights,” according to Justice Niki Tobi,²⁴⁴ “inhere in man because they are part of man.” In the case of *Ransome-Kuti v A-G, Federation*, Eso J.S.C had this to say of the nature of fundamental right: “...It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilised existence...”²⁴⁵

²⁴² *Saudu v Abdullahi* (1989) 4 NWLR (Pt. 116) 387 at 419 para C.

²⁴³ *Odogu v A-G Federation* (1989) 4 NWLR (Pt. 116) at 419 para C. Harmathy A, “Report on issue of fundamental rights in the Practice of the Court of Justice and the Constitutional Courts (of the Slovak Republic)”, Strasbourg 29 June 2006 CCS 2006/05, said: “...Fundamental rights form an important part of the identity of the different societies rooted in history, social and political culture. The choice of human rights is about the choice of fundamental values.” It is clear that this definition sees “fundamental rights” from the perspective of “fundamental values”.

²⁴⁴ *F.R.N. v Ifegwu* (2003) 15 NWLR (Pt. 842) 113 at 217 para A.

²⁴⁵ *Ransome Kuti v A-G, Federation* (1985) 2 NWLR (pt. 10) 211 at 229-230; See also *Badejor v Minister of Education* (1996) 9-10 SCNJ 51. fundamental rights have also been described as “those Human Rights which are selected from the plethora of Human Rights and entrenched, guaranteed and protected by the constitution which is the fundamental law of the land”: Nwabue U Rights of the Child in Nigeria (2002) 16.

Justice Chike Idigbe started by posing the question: “What then is a fundamental right?”

He then answered that:

As we all know, a legal right is that which the law protects and which can be enforced in courts of law; in other words, it is protected and enforced by the *ordinary law* of the land i.e the law created by the political sovereign which is Parliament. But there exist other rights which stand above the ordinary laws of the land and which are antecedent to the political society itself. These rights are indeed, primary conditions to any civilised existence. In societies governed under a written constitution these rights are not only protected, but are also guaranteed, by that Constitution. These rights are termed *fundamental rights* because not only, as the very term “fundamental” suggests, they are the primary conditions to civilised existence but, unlike the ordinary laws of the land which can be freely altered or changed by the Legislature (i.e in the ordinary process of legislation), they cannot easily be altered by Parliament (i.e the Legislature).²⁴⁶

Obiaraeri argues that “they (fundamental rights) are fundamental because they have been guaranteed by the fundamental law of the land, that is to say the constitution. Human rights are of much wider concept and apply at the international level. Human rights includes (sic) much more than the domestically guaranteed rights”.²⁴⁷

Okpara argues that: “ordinarily, fundamental rights are so called because they are entrenched in the Constitution.”²⁴⁸ He later said that the notion of fundamental rights is limited in scope and is confined within the realm of domestic law.”²⁴⁹ Perrott argued that:

Such rights are properly called fundamental when they are expressed in, or guaranteed by, laws which are basic or pre-eminent laws of the legal system in question, e.g rights specified in a written constitution, or in judgments of a superior court interpreting the Constitution, or in enactments of a legislature designed to render the constitution more specific in a certain area.²⁵⁰

Perrott’s description is flawed. Judgments of a superior court interpreting the constitution are not and cannot be regarded as being part of the “basic or pre-eminent laws of the legal system.”²⁵¹ Having regard to the foregoing definitions or descriptions of fundamental rights, the nature or the character of fundamental rights would suggest that they are human rights specially and domestically protected by the fundamental, basic, supreme law or constitution of a nation. They are justiciable and enforceable in the manner set out and guaranteed by law.

²⁴⁶ Idigbe C “Fundamental Rights Provisions in the Constitution” in All Nigeria Judges Conference Papers 8th-16th March 1982 (1983) 41-42.

²⁴⁷ Obiaraeri NO *Human Rights in Nigeria–Millenium Perspective* (2001) 30.

²⁴⁸ Okpara “Nature of Human Rights” at 51.

²⁴⁹ Okpara at 65.

²⁵⁰ Perrott, D.L “The Logic of Fundamental Rights” in J.W Bridge *et al* (eds) (107) 8.

²⁵¹ *Supra*.

In *Uzoukwu v Ezeonu 11*,²⁵² the President of the Court of Appeal, Justice Nasir who wrote the lead judgment explained that:

Due to the development of Constitutional law in this field (of human rights) distinct difference has emerged between “Fundamental Rights” and “Human Rights”. It may be recalled that human rights were derived from and out of the wider concept of natural rights. They are rights which every civilise society must accept as belonging to each person as human being. These were termed human rights. When the United Nations made its declaration it was in respect of “Human Rights” as it was envisaged that certain rights belong to all human beings irrespective of citizenship, race, religion and so on. This has now formed part of International Law.²⁵³

In respect of fundamental rights, Nasir P.C.A. further stated that “Fundamental Rights remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country: that is by the Constitution”.²⁵⁴ The distinction Justice Nasir sought to make between human rights and fundamental rights pales into insignificance. Human rights and fundamental rights are interconnected, interrelated and interdependent. Fundamental rights are part of a whole, that is, part of the jurisprudence on human rights. Both have their origin in the concept of natural rights. But as rightly argued by Nwabueze, human rights cannot not be asserted as legal claims against any one, be it the state or the individual by virtue of the law of nature or divine law of God.²⁵⁵ Both are primary conditions for civilised existence. They are universal in that they are inherent in human kind though there are exceptions; some rights like the right to fair hearing are also available to non-human beings like corporate entities. In some cases, both are available to all persons; in other cases they are available to citizens only, like the right to vote, right to join political parties and the right to contest election. Fundamental rights are guaranteed and protected by the constitution. Human rights are protected by international human rights instruments and in some cases they are domesticated by municipal law.

In some international affirmations, declarations and statements, there is a synthesis of the two concepts into what is called–Fundamental Human Rights. Some Nigerian courts, including the Supreme Court, have adopted that terminology.²⁵⁶ In *F.R.N. v Ifegwu*,²⁵⁷ Uwaifo J.S.C. boldly pronounced that “Fundamental rights are regarded as part of human rights.”²⁵⁸ Understandably so, as fundamental rights guaranteed by the Nigerian constitution do not cover all human rights. Economic, social and cultural rights which are human rights, though expressly recognised by the constitution, are made non-justiciable.

²⁵² *Uzoukwu v Ezeonu 11* (1991) 6 NWLR (Pt. 200) 708.

²⁵³ *Supra* 760-761 paras H-A.

²⁵⁴ *Supra* at 761 para A.

²⁵⁵ Nwabueze BO *Constitutional Democracy in Africa Volume 2* (2003) 7.

²⁵⁶ See for example, *F.R.N V Ifegwu* (2003) 15 NWLR (Pt 842) 113, 199 paras E-F.

²⁵⁷ *Supra* at 149.

²⁵⁸ *Supra* at 185 para B.

The fundamental rights provisions in the Nigerian constitution do not encompass all the human rights mentioned in the Universal Declaration of Human Rights and the elaborate provisions of the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. Some of the rights not covered are set out in Chapter II of the constitution, as the fundamental objectives and directive principles of state policy.

Falana opines that in the Nigerian context, “the terms ‘human rights’ and ‘fundamental rights’ are always used interchangeably.”²⁵⁹ Okpara is of the same view.²⁶⁰ This author agrees with both of them. Similarly, Ogbu contends that: “Human rights remain so, whether they occur in international plane or within municipal confines and whether they are called ‘human rights’ or ‘fundamental rights’ or ‘fundamental human rights.’”²⁶¹ In this study, fundamental rights are regarded as part of human rights and both terms will in certain circumstances be used interchangeably.

2.4.3 Indivisibility, universalism and relativism of human rights

In spite of the categorization of human rights into civil and political rights, and social, economic and cultural rights, there is no water-tight division between them. They complement each other in the sense that the enjoyment of political rights cannot be isolated from that of socio-economic rights. They are interconnected and interdependent and they cannot be graduated in order of importance. The right to life means nothing in the absence of the right to food. A person who has nothing to eat or who is faced with acute starvation can hardly enjoy the right to life.

In 1993, the World Conference on Human Rights declared and affirmed that “...all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.²⁶² The International Covenant on Civil and Political Rights (ICCPR) recognizes: “The ideal of free human beings enjoying civil and political freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”²⁶³

²⁵⁹ Falana, F *Fundamental Right Enforcement* (2004) 4.

²⁶⁰ Okpara *Human Rights Law and Practice in Nigeria Vol 1* at 51.

²⁶¹ Ogbu, ON *Human Rights Law and Practice in Nigeria: An Introduction* (1999) 31.

²⁶² The Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14-25 June 1993, UN Doc. A / Conf. 157/23, of 12 July 1993, para 5. See also para 1.

²⁶³ See its Preamble. ICESCR has an almost identical paragraph in its preamble too.

The New Delhi Statement on the justiciability of economic, social and cultural rights in South Asia recognised that human rights are indivisible and interdependent and that the rights entrenched in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and, where relevant, the Directive/Fundamental Principles of State Policy contained in some national constitutions represent statements of clear legal obligation for the States concerned. It further proclaims that the principles anticipated in those documents give direction to the States concerned in addition to giving content and meaning to fundamental rights enshrined in those constitutions.²⁶⁴

In *New Patriotic Party v Inspector-General of Police Accra*²⁶⁵, the Supreme Court of Ghana held:

All human rights and fundamental freedom are indivisible and interdependent: equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights. In the last resort, they are all-exercisable within a societal context and impose obligations on the state and its agencies as well as on the individual not to derogate from these rights and freedom.

The Harare Declaration on Human Rights notes that “there is a close inter-linkage between civil and political rights and economic and social rights; neither category of human rights can be fully realized without the enjoyment of the other.”²⁶⁶ The Supreme Court of India said that both are complementary, “neither part being superior to the other.”²⁶⁷

Some writers have also recognized the interconnectivity, interdependence and indivisibility of human rights. Amartya Sen, for example, emphasizes the “extensive interconnections between freedoms and the understanding and fulfillment of economic needs.”²⁶⁸ Keller argued that civil and political rights and economic, social and cultural rights “are inextricably intertwined.”²⁶⁹ Directive Principles of State Policy have direct relationship with economic, social and cultural rights specified in the ICESCR²⁷⁰. They also enjoy interconnectivity and interdependence with political rights.

²⁶⁴ Statement of Conclusions, Workshop organised by the UN Office of the High Commissioner for Human Rights on the Justiciability of Economic, Social and Cultural Rights in South Asia New Delhi 17-18 November 2001, para 10.

²⁶⁵ (2000) 2 HRLRA 1 at 79, para A-B. The Supreme Court thereby adopted the Statement by the Committee of Experts in the Report on the Proposals for a Draft Constitution of Ghana at page 62 para 128.

²⁶⁶ Harare Declaration on Human Rights, being the Concluding Statement of the Judicial Colloquium on the domestic application of international human rights norms held in Harare, Zimbabwe, 19-22 April, 1989 .

²⁶⁷ *State of Kerala v N.M. Thomas* 1976 2 SCC 310 at 367.

²⁶⁸ Sen A, *Development as Freedom* (1999) 147.

²⁶⁹ Keller LM “The Indivisibility of Economic and Political Rights” (July 2001) (Vol 1:3) *Human Rights and Human Welfare* Vol 1:3–July 2001, 2001, 13; see also Kothazi J. “Social Rights and the Indian Constitution” 2004(2) Law, Social Justice & Global Development Journal (LGD) http://www.go.warwick.ac.uk/elj/lgd/2004_2/kothari [visited on 13 February 2006].

²⁷⁰ See Final Report of the Committee on Review of Indian Constitution. Chapter 3

The African Chapter on Human and Peoples' Rights, in its preamble, *inter alia* states: "...that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". Notwithstanding that various international instruments, declarations and statements have not only recognized but proclaimed that civil and political rights and economic, social and cultural rights are interconnected, interdependent, interrelated and indivisible, they still accord primacy to political rights over economic rights.

Article 2(1) of ICESCR enjoins each state party "to take steps... to the maximum of its *available resources*, with a view of *achieving progressively the full realization* of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".²⁷¹ Alston and Quinn noted that the provisions should not be seen "as an escape hatch for states whose performance failed to match their abilities or as a lessening of state obligations. It (should be) viewed and defended simply as a necessary accommodation to the vagaries of economic circumstances".²⁷²

In practice, States use the provision as "escape hatch" to create a dichotomy between political and economic rights; subordinating the latter to the former and escaping from their obligations under the Covenant. The Covenant qualified their obligations and they are taking advantage of same. Arambulo rightly states that "...despite its prominence in many human rights documents as a permanent fixture in preambular paragraphs, the general understanding of the notion of indivisibility has remained superficial and vague, and in practice, the divisions between human rights continue to be sustained in the UN organs, including the treaty bodies themselves".²⁷³

²⁷¹ Emphasis supplied.

²⁷² Alston P & Quinn G "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987)(9) *Human Rights Quarterly* 156-229.

²⁷³ Arambulo K "Giving meaning to Economic, Social and Cultural rights: A Continuing Struggle" (2003)(3) *Human Rights and Human Welfare* 117. Sandra Liebenberg similarly argues that the normative separation of the two groups of rights has been reinforced by the provision of different enforcement mechanisms. Consequently, an independent, expert body was created under ICCPR called the Human Rights Committee, and which has the mandate to supervise States parties obligations under the covenant. This is further to a periodic reporting procedure, an optional protocol was adopted to the ICCPR which allowed the Human Rights Commission to consider communications of individuals claiming to be victims of the rights violations contained in the Covenant. According to her, this supervision of States parties obligations under the ICESCR was left to a working Group appointed by the UN Economic and Social Council. The result of this institutional differentiation, the two groups of rights, Civil and Political rights continue to benefit from the experience and evolving jurisprudence generated by an adjudicative procedure, when the supervision system for socio- economic rights was weak and ineffective: Liebenberg S "Judicial and Civil Society" initiatives in the Development of Economic and Social Rights in the Commonwealth http://www.communitylawcentre.org.za/ser/docs_2002/CHR_Millennium_Report.doc [accessed on 13 February 2006].

Arambulo went on to argue that in order to appreciate what the notion of indivisibility means in practical terms, there is the need to move beyond theory and conceptual analysis. Indivisibility he opines necessarily means the application of holistic rights-based approach to activities geared towards the protection and promotion of human rights, including economic, social and cultural rights.²⁷⁴

To lend support to Arambulo's claim that the proclamation of the indivisibility of human rights by international human rights documents is "superficial and vague," attention is drawn, for example, to the Georgetown Conclusions which clearly recognises that: "both civil and political rights and economic and cultural rights are integral, indivisible and complementary parts of one coherent system of global human rights".²⁷⁵ Disappointedly, it went on to state that "However even those economic, social and cultural rights which are not justiciable can serve as vital points of reference for judges as they interpret their constitutions and develop the common law..."²⁷⁶ The preference for the primacy of civil and political rights over economic, social and political rights has been replicated in several national constitutions. Civil and political rights receive extensive protection through their inclusion in the national constitutions as justiciable and enforceable rights. While socio-economic rights do in few national constitution.²⁷⁷

Closely related to the indivisibility of human rights, is the discourse on the universalism and relativism of human rights. As would be seen shortly, the universalism and relativism debate on human rights is very intense among scholars, writers, defenders and promoters of human rights. While some are affirming the universality of human rights, others are questioning it, sometimes introducing the notion of relativism. The first known attempt at the internationalization and universalization of human rights norms was through the Universal Declaration of Human Rights (UDHR) in 1948.²⁷⁸

²⁷⁴ Arambulo "Giving meaning to Economic, Social and Cultural Rights: A continuing Struggle" 117.

²⁷⁵ The Georgetown Conclusions on the Judicial Colloquium on the Domestic Application of International Human Rights Norms Held in Georgetown, Guyana 3-5 September 1996, Para 7. Equally, the Balliol Statement of 1992 on the Judicial Colloquium held at Balliol College, Oxford From 21-23 September 1992, similarly recognised that "the rights are integral and complementary" and that "not all rights are justiciable in themselves." See para 5 thereof.

²⁷⁶ *Supra*

²⁷⁷ See for example Article 37 of the Indian Constitution and Section 6(6)(c) of the 1999 Constitution of Nigeria.

²⁷⁸ Adopted and proclaimed by General Assembly Resolution 217A(III) of 10 December 1948.

The Universal Declaration is said to be the “foundational international legal instrument”²⁷⁹ on the universalization of human rights. The Declaration provides that: “Member States have pledged themselves to achieve, in co-operation with the United Nations, the promoting of *universal* respect for and observance of human rights and fundamental freedoms.”²⁸⁰ Soon after the text of UDHR was released in 1948, the American Anthropological Association (AAA) published a written statement wherein it rejected the universality of international human rights norms. It was argued that the rights and freedoms articulated in UDHR were non-universal, culturally, ideologically and politically. The Association viewed with concern the hypocrisy of the colonial regime which packaged and signed UDHR while they committed gross violations of the rights of the colonized people.²⁸¹

UDHR is the bedrock of international human rights regime. The universalism of human rights was given impetus, strength and emphasis by the Vienna Declaration and Programme of Action.²⁸² It provides as follows:

The World Conference on Human Rights reaffirm the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedom is beyond question.²⁸³

The Declaration goes further to state with considerable emphasis that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.²⁸⁴

²⁷⁹ Donnelly J. “The Relative Universality of Human Rights” *Human Rights and Human Welfare Working Paper No 33* <http://www.du-edu/gsis/hrhw/working/2006/33-donnelly-2006.pdf> [accessed on 15 January 2006]; forthcoming in *Human Right Quarterly*.

²⁸⁰ *Supra*, Article 6 of the Preamble [Emphasis supplied].

²⁸¹ Fox DJ “Women’s Human Rights in Africa: Beyond the Debate over the, Universality or Relativity of Human Rights” *African Studies Quarterly* (online Journal) <http://web.Africa.utl.edu/asq/v2/v2i3az.htm> [accessed on 4 January 2007].

²⁸² Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14-25 June 1993.

²⁸³ Vienna Declaration and Programme of Action, para 1 (Emphasis supplied). The United Nations Millennium Declaration, UNGA Resolution 55/2 of 8 September 2000, para 3 provides: “We affirm our commitment to the purposes and principles of the Charter of United Nations, which have proved *timeless and universal...*” [Emphasis supplied].

²⁸⁴ *Supra* para 5.

There is the temptation to argue that the foregoing provision of the Vienna Declaration and Programme of Action has introduced some relativism into the concept of universalism. In extreme case, it could also be said that it recognised both universalism and relativism in the notion of human rights.²⁸⁵ This will appear to be contradictory.

The African Charter also canvasses the universality of human rights which it did in a radical way. It states that the right to development, civil and political rights cannot be separated from social, economic and cultural rights “in their conception and as well as universality.”²⁸⁶ The development of an international human rights order or international human rights regime and the universalization of human rights norms contained in several international and regional human rights instruments have not stemmed the controversy over the debate on the universalism and relativism in human rights. Donnelly has made very substantial contribution to the debate.²⁸⁷ Central to Donnelly’s works is the argument in favour of a form of universalism which accommodates substantial space for important claims of relativism or “the relative universality” of human rights.²⁸⁸ As said earlier, canvassing for some relativism in the universalism of human rights appears contradictory. But in practical terms that may not be so.

The perspective in this text of some relativism in universalism of human rights is slightly different from Donnelly’s own perspective on the issue of human rights in pre-colonial Africa. The right to fair hearing is universal in nature. The Igbo, Efik and Yoruba people of Nigeria have the concept ingrained in their respective customary jurisprudence prior to colonialism in Africa. First and foremost, what gives primary sustenance, foundation and “validity” to the concept of fair hearing in the traditional societies is the tradition of the people. It also gives due recognition to the concept of fair hearing as a human right in a communitarian setting.²⁸⁹

²⁸⁵ Universalists and cultural relativists can use this paragraph to support of their respective positions or claims to universalism and relativism..

²⁸⁶ See the 8th preamble African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Laws of the Federation of Nigeria 1990, Cap 10.

²⁸⁷ He has done this through his literature spanning over two decades. His works include Donnelly J “Human Rights and Human Dignity: An Analytic Critique of Non-Western Human Rights Conceptions” (1982) 76 *American Political Science Review* 303–316; Donnelly J “Cultural Relativism and Universal Human Rights” (1984) 6 *Human Rights Quarterly* 400–419; Donnelly J *Universal Human Rights in Theory and Practice* (1989); Donnelly J “Traditional Values and Universal Human Rights: Caste in India” in Welch CEJ and Leary VA (eds.) *Asian Perspectives on Human Rights* (1990); Donnelly J “Post-Cold War Reflections on International Human Rights” (1994) 8 *Ethics and International Affairs* 97–118; Donnelly J. “Conversing with Straw Men While Ignoring Dictators: A Reply to Roger Ames” (1997) *Ethics and International Affairs* 207–214; Donnelly J “Human Rights and Asian Values: A Defence of ‘Western’ Universalism’” in Bauer JR and Bell DA (eds.) *The East Asian Challenge for Human Rights* (1999) and Donnelly J *Universal Human Rights in Theory and Practice* (2003).

²⁸⁸ This is reflected in his works *supra*.

²⁸⁹ See para 2.4.4 of this Chapter.

The universalism of human rights means that all societies recognize and have notions of human rights. Some are well developed than others. Equally, there is universality in the violations of human rights. No society whether primitive, advanced, civilized, developed or developing is isolated from human rights violations. The very act of violation does not repudiate the concept of universalism. What is important is whether there is a system established to remedy the infractions of human rights. Societies have in diverse ways provided traditional, customary, cultural or legal mechanism for the redress of these violations.

Brown took a direct shot at universality and argued that “the current international human rights regime, far from being genuinely ‘universal’ is actually a form of cultural imperialism, promoting the values of one civilization, that of the ‘West’ and undermining those of others”.²⁹⁰ He refers to the fact that Confucians and other promoters of “Asian values” criticise the individualism of Western notions of human rights; they favour family and extended kin group values. He also argues that some Islamists reject the claim to gender equality and religious freedom.

Lama contributing to the debate, disagrees with those who argue that universality of human rights cannot apply to Asia and other third world countries. He argues that:

Some Asian governments have contended that the standards of human rights laid down in the Universal Declaration of Human Rights are those advocated by the West and cannot be applied to Asia and other parts of the Third World because of differences in culture and differences in social and economic development. I do not share this view and I am convinced that the majority of Asian people do not support this view either, for it is the inherent nature of all human beings to yearn for freedom, equality and dignity, and they have an equal right to achieve that. I do not see any contradiction between the need for economic development and the need for respect of human rights.²⁹¹

On the effect of cultures, religions and traditions on the issue of universality, he argued further that:

The rich diversity of cultures and religions should help to strengthen the fundamental human rights in all communities. Because underlying this diversity are fundamental principles that bind us all as members of the same human family. Diversity and traditions can never justify the violations of human rights. Thus discrimination of persons from a different race, of women, and of weaker sections of the society may be traditional in some religions, but if they are inconsistent with universally recognized human rights, these forms of behaviour must change. The universal principles of equality of all human beings must take precedence.²⁹²

²⁹⁰ Brown C “Universal Human Rights: A Critique” in Patman RG (ed) *Universal Human Rights* (2000) 33.

²⁹¹ Lama D “ Human Rights and Universal Responsibility” text of a paper delivered at the Non-Governmental Organization, The United Nations World Conference on Human Rights, Vienna Austria, 15 June 1993.

²⁹² *Supra*.

Japan is an Asian country. It cannot be denied that it has “Asian values” or cultures and traditions that are either peculiar to the Asian societies or to the Japanese society. Since the Japanese Constitution came into force in 1948, post-war Japan has developed a culture and a practice of constitutionalism that could be regarded as the most enduring in Asia and one of the most successful in the world. Its rights regime and the mechanism of rights protection have never been compromised by the so called “Asian values”. The lesson here is that culture and tradition do not necessarily counter the notion of the universality of human rights. They may and sometimes do affect the quality and quantum of rights available to individuals or groups in a society. But just as human rights is an evolving concept, culture and tradition are equally dynamic and evolving. Several obnoxious customs and traditions have over a period of time gone through self-correction or have undergone changes in tune with modernity or contemporary ideas and practices. Obnoxious practices based on culture or tradition cut across all societies. Donnelly argues that:

In twenty years of working with issues of cultural relativism, I have developed a simple test that I pose to skeptical audiences. Which rights in the Universal Declaration, I ask, does your society or culture reject? Rarely has a single full right (other than right to private property) been rejected. Never has it been suggested to me that as many as four should be eliminated.²⁹³

Donnelly further posits that: “I will defend a weak cultural relativist position (strong universalist) that permits deviations from international human rights norms primarily at the level of form or implementation”²⁹⁴. Magnarella postulates that individuals cannot expect to exercise natural rights on the basis of an assumed universal moral standard except if these rights have been promulgated into positive law and are backed up by a law enforcement mechanism.²⁹⁵ He maintains that “unless these presumed natural rights are rendered specific as to rights and duty holders and content, they will be subject to controversy. The application of natural reason does not necessarily result in a general consensus.”²⁹⁶ In his view, “universally recognized, judicial enforcement mechanism do not exist”²⁹⁷.

²⁹³ Donnelly J, *Universal Human Rights in Theory and Practice* (2003) 94.

²⁹⁴ Donnelly *supra* at 90.

²⁹⁵ Magnarella PJ “Questioning the Universality of Human Rights” *Human Rights & Human Welfare Volume 3:1* Winter 2003, 16: He was reviewing the following books: Patman RG (ed) *Universal Human Rights* (2000); Meijer M (ed), *Dealing with Human Rights: Asian and Western Views on the Value of Human Rights* (2001); Hayden P: *The Philosophy of Human Rights* (2001).

²⁹⁶ Magnarella *supra* at 16-17.

²⁹⁷ Magnarella *supra* at 17.

Uniformity in the enforcement of human rights it must be conceded is difficult to achieve. But uniform mechanism for the enforcement of human rights is not what confers universality. Uniform enforcement may not even be possible in a country that operates a confederal or federal system of government. In a true federalism, each state may have its own enforcement mechanism. What is important is that each state or nation or region recognizes that a particular conduct offends human dignity and worth or human rights.

Again, several human rights provisions in several international human rights instruments can be enforced without being promulgated into positive law. The trials of some of the war criminals in Nuremberg Germany after the Second World War for offences against humanity were not based on any national positive law. The same situation applies to Rwanda where there are on going trials of some persons for genocide and offences against humanity, among other offences.

Magnarella also argues that many states are reluctant to see to the enforcement of human rights; and those who generally respect human rights oppose international supervision. He gives the example of United States that refuses to give recognition to the jurisdiction of any international human rights court including the new International Criminal Court.²⁹⁸ The ambivalent and contradictory conduct of United States over human rights issues is usually cited as one of the reasons for questioning the universality of human rights norms. US stands accused of tolerating human rights abusers like Israel, while condemning and isolating other abusers such as North Korea and Cuba. It is wrong to use the practice of relativism and selectivism over human rights violations by US to question the universality of human rights norms.

Similarly, deconstructing the conceptualization of universal human rights based on its alleged Western origin or that it is a form of western cultural imperialism or the advancement of Eurocentrism, is faulty. Donnelly rightly argues that “... human rights are too important to be rejected or accepted on the basis of their origins,”²⁹⁹ but he is wrong in claiming that they originated in the West. Falk while reacting to the above position, said that “it is not a matter of acceptance or rejection, but the realization that in a system so heavily dependent on patterns of voluntary compliance and normative socialization, the exclusion of participation at the origins may create a distance from the legitimating pulls toward compliance felt in Western societies”.³⁰⁰ In any event, as rightly pointed out by Brown, the term “West” is an analytical construct; it is not descriptive of any real unity and consequently, “there are as many ‘Wests’ as we want to be, none of which can claim authenticity.”³⁰¹

²⁹⁸ Magnarella “Questioning the University of Human Rights” 17

²⁹⁹ Donnelly *Universal Human Rights in Theory and Practice* at 70.

³⁰⁰ Falk R “Affirming “Universal Human Rights” (2003) (3) *Human Rights and Human Welfare* 80; he was reviewing Donnelly’s *supra*.

³⁰¹ Brown “Universal Human Rights: A Critique” at 33.

The universalisation of human rights entails that in matters of human rights enforcement, non-citizens shall not be treated differently from citizens. In other words, there shall be no discrimination in the quantum of right enjoyed by persons within a country on ground of nationality. The activities of the United States Government and its agencies post-September 11, appear to belie that notion. It would be recalled that on 11 September 2001, hijackers, mid-air, took four airplanes and turned them into instruments of terror. Their unprecedented act of criminality and terrorism, left some 3000 people dead, led to the total destruction of the World Trade Center, New York and a destruction of a part of Pentagon, American Defence Headquarters and its symbol of military might.

In a bid to contain this act of terrorism, the U.S “has witnessed a persistent, deliberate and unwarranted erosion of basic rights against abusive government power that are guaranteed by the U.S Constitution and international human rights law”.³⁰² Because the hijackers were all male, Muslim and citizens of Middle Eastern countries, the victims of these selective human rights abuses by U.S law enforcement agencies are Muslim men who are not US citizens.³⁰³

Universalism as opposed to relativism strengthens the notion of human rights. If national regimes are free to interpret the notions of human rights entirely within their own context and circumstances, there will be no need for the international community to intervene and protect human rights violations based on the universal understanding of the concept. Saddam Hussein and the Talibans would have had basis in respectively arguing that within their context, there were no human rights violations in Iraq and Afghanistan while their regimes lasted. Various Nigerian past dictators would have also argued in the same vein.³⁰⁴

2.4.4. Human rights in pre-colonial Africa

Having considered the question of the universalism of human rights,³⁰⁵ this study shall explore the concept within pre-colonial Africa to determine whether human rights existed in African societies prior to colonialism. Perhaps it needs to be restated that it was only during the middle of the last century that research into pre-colonial African history and oral traditions started.³⁰⁶ This drawback affects any study relating to pre-colonial Africa, be it constitutionalism, human rights or democracy. However, substantial data exist to aid an exploration of the subject.

³⁰² Human Rights Watch, “United States. Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees” Vol. 14, No. 4(9)-August 2002, 3.

³⁰³ *Supra* at 4.

³⁰⁴ Such relativism would destroy the concept of human rights.

³⁰⁵ Chapter 2 section 2.3.3

³⁰⁶ *Supra* section 2.4.3

Like in any other study, there is hardly any agreement among researchers, scholars and writers, whether philosophers, political scientists or anthropologists on the concept of human rights in pre-colonial Africa. Those who contend that they did exist and those who regard the idea as merely romantic, argue their respective positions with passion and vigour.

What were African social and political structures in pre-colonial Africa? African social structures or societies are founded on the ideals of humanism, communalism or communitarianism. According to Okany, Africa's sense of brotherhood and fellowship constitutes the foundation of African humanism.³⁰⁷ He explained that the spontaneous demonstration of feeling for each other and "this sense of obligation and the belief that we are our brother's keeper has held us together and preserved our solidarity and integrity. It constitutes the material, moral, spiritual and cultural bedrock of our communal life."³⁰⁸ Africans feel that they are collectively bonded to each other and to their respective communities. This sense of brotherhood, humanism and collectivism pervade the entire spectrum of the continent's social life. Indigenous African societies are not only humanistic; they are also communalistic in character.

The individuals live for communal and public good; values are based on the principles of communality. With individuals constituting the membership of the communities, they enjoy interdependent relationships in the pursuit of communal goals. In other words, the individual does not exist for himself alone, but for his community. The life of the individual is respected. The murder of an individual in the Igbo society could lead to an entire family or kindred going into exile to avoid the wrath of the family of the victim and the community. The individuals work very hard to secure communal happiness. The community in turn guarantees rights and protection to the individuals. Primarily, lands are communally owned. Family and individual ownership evolve from communal ownership. Individualism is a crucial factor in the conceptualization of human rights. Because of this emphasis on communalism, the question is whether African societies can apart from communal or group rights, sustain individual rights which are the foundation of human rights? According to Gyekye:

Communalism may be defined as the doctrine that the group (that is, the society) constitutes the focus of the activities of the individual members of the society. The doctrine places emphasis on the activity and success of the wider society rather than, though not necessarily at the expense of, or to the detriment of the individual.³⁰⁹

³⁰⁷ Okany MC *Osagyefo Dr Kwame Nkrumah: The Legend of African Nationalism* (2005) 359.

³⁰⁸ *Supra.*

³⁰⁹ Gyekye K *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (1987) 154.

Focusing on the Yoruba traditional culture, Gbadegesin posits that the value that it places on communal existence, emphasizes, among others, fellow-feeling and solidarity and this in turn leads directly to the social order of communalism.³¹⁰ Onwuachi's emphasis is on what he calls African spiritual communalism. This he argues is derivable from African indigenous principles of *"live and let live; collective sharing; common concern for one another; sense of belonging together; social Justice; economic progress and viability for all; and the African indigenous political process of participatory democracy."*³¹¹

African communitarianism or communalism or humanism does not imply total absence of individual rights. Communalism recognizes individuality and protects it and the rights appertaining thereto. The dynamics of communalism and interdependence recognize not only self actualization of the individual, but his status, dignity and worth. It emphasizes at the same time the pursuit of communal ethos, goals, values and good by the individual members that could be regarded as communal beings. Communalism does not amount to a negation of individual rights. In the view of Gyekye:

The respect for human dignity, a natural or fundamental attribute of the person which cannot, as such, be set at naught by the communal structure, generates regard for personal rights. The reason is that the natural membership of the individual person in a community cannot rob him of his dignity or worth, a fundamental and inalienable attribute he possesses as a person.³¹²

"The concept of human rights," Khushalani argued, "can be traced to the origin of human race itself."³¹³ It has been argued earlier that the concept invokes principles that are as old as antiquity.³¹⁴ Human rights notions are found in all societies³¹⁵ but in diverse degrees. It has forcefully been contended by Elechi³¹⁶ that the concept of human rights "is not purely a Western invention." Neither did the concept of human rights originate from any part of the world, or from liberal democracy, as postulated in some quarters. Arguably, all peoples of the world do not assent to the same basic values and beliefs, but what is certain is that every society has been concerned with the notion of social justice, the relationship between the individual and his/her political authorities.³¹⁷

³¹⁰ Gbadegesin S *African Philosophy: Traditional Yoruba Philosophy and Contemporary African Realities*. (1991) 65.

³¹¹ Onwuachi CP "African Identity and ideology" in *Festac '77 (1977)* 16 (italics in the original).

³¹² Gyekye K "Person and Community in African Thought" in Wiredu K and Gyekye K (eds.) *Person and Community. Ghanaian Philosophical Studies 1* (1992) 114; Gyekye *supra* at 156.

³¹³ Khushalani Y "Human Rights in Asia and Africa" (1983) 4(4) *Human Rights Law Journal* 403-442.

³¹⁴ See section 2.4 of this chapter.

³¹⁵ Pollis A and Schwab P (eds.) "Introduction" in *Human Rights: Cultural and Ideological Perspectives* (1980)xiv.

³¹⁶ Elechi OO "Human Rights and the African Indigenous Justice System" a paper delivered at the 18th International Conference of the International Society for the Reform of Criminal Law, 8-12 August 2004, Montreal, Quebec, Canada.

³¹⁷ Elechi *supra*.

Another writer, Wai, observes that “ it is not often remembered that traditional African societies supported and practiced human rights. Traditional African attitudes, belief, institutions, and experiences sustained the view that certain rights should be upheld against alleged necessities of state.”³¹⁸ This assertion Donnelly argues, “confuses human rights with limited government.”³¹⁹

Wai assertion creates no confusion. It is an expression of human rights based on traditional African values and beliefs within a limited government. El-Obaid and Appiagyei-Atua see the exercise of individual rights in the African traditional society as a reality and not a negation of communal development.³²⁰ They argued that:

Rather, the exercise of these rights leads to the attainment of human dignity and the proper functioning of the community... The issue, therefore, is not a lack of concept, but the lack of the expression “right”. In fact, the African notion of rights, described above, is similar to the Western notion of civil and political rights; the difference lies in regard to the entity (or entities) that ensures, and benefits from, the exercise of those rights. The African conception of rights is, therefore, community-based, resulting from the community’s interest in ensuring and benefiting from the exercise of rights, but personal or individual rights are emphasized first.³²¹

They were right in their contention that African societies lack the expression of the word “right”. The relationship between the individual and his community in the African society creates “right” and “duties”, notwithstanding that the society lacks words that express or adequately explain the concepts. After all, “human rights” is a modern term but what it represents has its origin in humanity or antiquity. M’baye argues in favour of rights in indigenous African society. He said: “In traditional Africa, rights are inseparable from the idea of duty. They take the form of a rite, which must be obeyed because it commands like a ‘categorical imperative’. In this, they tie in, through their spiritualism, with the philosophy of Kant”.³²² The concern of human rights, Asante posits,³²³ is to accord protection to human dignity and which in turn is based on the intrinsic worth of the person. Unapologetically, he rejects “the notion that human rights concepts are peculiarly or even essentially bourgeois or Western, and without relevance to Africa.”³²⁴

³¹⁸ Wai DM “ Human Rights in Sub-Saharan Africa” in Pollis and Schwab *Human Rights: Cultural and Ideological Perspectives* at 116.

³¹⁹ Donnelly *Universal Human Rights in Theory and Practice* at 70.

³²⁰ El-Obaid EA and Appiagyei-Atua “ Human Rights in Africa —A New Perspective on Linking the Past to the Present” (1996) (41) *McGill Law Journal* 819-854, 834.

³²¹ *Supra*.

³²² M’baye K and Ndiaye B “The Organization of African Unity” in Vasak K (ed.) *The International Dimensions of Human Rights* (1982) at 588-589.

³²³ Asante SKB “Nation Building and Human Rights in Emergent African Nations” (1969) 2 *Cornell Internal Law Journal* 72 at 72.

³²⁴ *Supra*.

According to Eze “because of the limited legal research in the field of human rights protection in pre-colonial Africa, it has not proved easy to extract from the mesh of African customary law the actual content of human rights during that period.”³²⁵ Human rights in traditional African societies cannot be found in customary laws alone. They are reflected in traditional usages, practices, attitudes and customs. Indeed, they are found in the institutional structures and practices of traditional African communitarianism or communalism. In spite of Eze’s cautious approach over the issue of human rights in pre-colonial Africa, he was quick to concede that he was not denying “the existence of human rights in traditional African societies, but the degree to which they were protected must be critically examined in the light of the concrete material living conditions of a given politico-socio-economic formation.”³²⁶

Deng did a treatise on human rights among the Dinka people of Sudan. He contends that “some notions of human rights are defined and observed by the Dinkas as part of their total value system. Respect for human dignity as they see it is an integral part of the principles of conduct that guide and regulate human relationships and constitutes the sum total of the moral code and the social order.”³²⁷

He argues that ultimately the duty in the observance of these principles is apportioned in accordance with a person’s position in the social hierarchy or structure as determined by descent, leadership position, age or gender, notwithstanding that some obligations toward fellow human beings are universal.³²⁸ He concluded as follows:

The experience of the Dinka suggests that they clearly had notions of human rights that formed an integral part of their value system: its overriding goals for life, its ideals for relationships between people, and its sense of human dignity. However, the logic of this value system stratified people according to descent, age, and sex in a way to create inequities that were recognized but tolerated, since dissidents lacked alternatives. The system was also conservative and oriented away from change and development. Furthermore, the effectiveness of the value system diminished as people moved away from the family and the lineage-oriented sense of the community.³²⁹

Wiredu postulates that the Akan society recognizes that human beings are entitled to some rights by virtue of “the intrinsic sociality of human status.”³³⁰

³²⁵ Eze OC *Human Rights in Africa Some selected Problems* (1984) 12.

³²⁶ Eze *supra* 13.

³²⁷ Deng FM “A Cultural Approach to Human Rights among the Dinka” in An-Na’im AA and Deng FM (eds.) *Human Rights in Africa: Cross Cultural Perspectives* (1990) 271.

³²⁸ *Supra*.

³²⁹ *Supra* at 288.

³³⁰ Wiredu K “An Akan Perspective on Human Rights” in An-Na’im and Deng (eds.) *Human Rights in Africa: Cross Cultrual perspectives* at 246.

He maintains that “membership in town and state brings with it a wider set of rights and obligations embracing the whole race of humankind.” On punishment and related issues, he explained that:

...the most important observation is that it was an absolute principle of Akan justice that no human being could be punished without trial. Neither at the lineage level nor at any other level of Akan society could a citizen be subjected to any sort of sanctions without proof of wrongdoing. This principle was so strongly adhered to that even a dead body was tried before posthumous punishment was symbolically meted out to him. The best-known example of this sort of procedure was the reaction to a suicide apparently committed to evade the consequences of evil conduct.³³¹

It will not be right to argue that traditional African societies in pre-colonial period did not recognize some notions of what are now known as human rights. In Nigeria for example, the right to fair hearing and the concept of fairness have undeniably been part of the customary jurisprudence, tradition and way of life of the Igbo, Yoruba and Efik people, among other ethnic nationalities in the country. This fact is encapsulated in the traditional concept of the Yorubas as follows:³³² He is king among the wicked who pass judgment after listening to evidence from only one side. (*Agb ti enikan dajo, agba osika*) Ear, hear the other side before you pass judgment. (*Eti gbo ekeji ki o to dajo*). We do not shave a person’s head in his absence. (*A ki ifa ori lehin olo*).

The Igbo people replicate similar basic principles which are found in Igbo proverbs and native jurisprudence. They include the following: Do not pass judgment on a man unless you have heard from him. (*A ga anu olu madu tutu ama ya ikpe*). Live and let live (*Biri ka m biri*).³³³ The kite and the eagle should perch (on the tree). This literally means recognition of equality or equal treatment. For the Efiks they have the rule engraved in their custom that:³³⁴ See the anterior and posterior sides of a dispute (before passing judgment) (*Moyun ndikut isu ye edem*).

The right to life is respected in traditional Igbo society. Oputa observes that “under Ibo ancient customary law, homicide was considered a very serious, as well as a very heinous offence and under that law homicide never went unpunished.”³³⁵

³³¹ Wiredu K “An Akan Perspective on Human Rights” in An-Na’im and Deng (eds.) *Human Rights in Africa: Cross Cultural perspectives* at 246 at 252.

³³² Ekundayo AAM “The Common Law of England _A Stranger or Indigene in Nigeria” in Ajomo MA (ed.) *Fundamentals of Nigerian Law* (1989) 214-216.

³³³ “Live and let live may also mean Egbe bere ugo bere. Literal translation of let the kite and the eagle should perch on the tree. See Akolisa COC *Principles of Igbo Law and Jurisprudence* (2003)1.

³³⁴ Ekundayo *supra* 216.

³³⁵ Oputa CA “ Crime in Nigerian Society” in Elias TO, Nwabara SN and Akpamgbo CO *African Indigenous Laws* (1975) 1-30, 9.

The Igbo society even distinguished between “*ochu*” which literally means murder and accidental killing³³⁶ which is known as “*oghum*”. The drawback is that the punishment for killing any one in Igbo society prior to colonialism was collective. The perpetrator and members of his kindred or village must flee to another kindred or village. This is called “*Oso Ochu*.”³³⁷

The properties left behind by the fleeing people are confiscated by the relatives of the deceased³³⁸ and members of his kindred or village. The killer’s village is “usually sacked, their huts burnt down, their walls pulled down and their (economic) trees felled”.³³⁹ The village is left in a state of desolation for a specified period which is usually three years. The idea of this collective punishment which undoubtedly was extreme was “to restore the social equilibrium.”³⁴⁰

It has been observed that proprietary right in the traditional African society has a dual nature:

Individual rights in land were recognized, in that individual creativity and enterprise and any wealth accruing therefrom were recognized, respected and protected. These rights were community based, however: land was seen as a community asset and resource, an ancestral heritage to be preserved for posterity and to which no individual was entitled to lay absolute claim.³⁴¹

Land ownership in traditional societies prior to colonialism was communal. Family and individual ownership evolved from communal ownership. Individuals who could afford it, purchased lands. Those not willing to sale pledged theirs. This system of land holding still pervades the customary jurisprudence in Nigeria, especially the Southern States of the country. Indeed, several proprietary rights over land are recognised.

A community may at any point in time terminate their communal right over a land by sharing the land among the different families that constitute the community. It could also make an outright grant to family or families. The above processes will lead to the evolution of family ownership of land. A family in turn may partition or allot family lands among the individual members of the family. This leads to the evolution of individual ownership of lands.

³³⁶ Oputa CA “ Crime in Nigerian Society” in Elias TO, Nwabara SN and Akpamgbo CO *African Indigenous Laws* (1975) 1-30, 9 .

³³⁷ *Supra* .

³³⁸ Oputa “Crime in Nigeria Society” at 10.

³³⁹ *Supra*.

³⁴⁰ *Supra*.

³⁴¹ EL-Obaid and Appiaphyei–Atua “Human Rights in Africa—A New perspective on Linking the Pass to the Present” 837.

On the distinction between partition and allotment of family property, the Court of Appeal held as follows:

The term “partition” may be used in its technical and strict sense to mean where family property belonging to a family is shared or divided among the constituent members of that family whereby each member of such family is conveyed with, and retains exclusive ownership of, the portion of the family land granted to him. In this sense, family ownership of such property is automatically brought to an end. On the other hand, a member of a family may be granted or “allotted” a portion of family property for limited or occupational use in the sense that the allottee *qua* user does not become an absolute owner of the portion allotted to him no matter the period of use. Invariably, while allotment can be made by the head of the family alone, partition on the other hand is brought about by the consensus of all the members of the family. In this regard, a partition which does not make provision for all of the constituent branches of the family is void.³⁴²

On the mode of partition of family property, the court said that although partition could be by deed, in customary law, oral partition is valid.³⁴³ On the meaning and implication of partition as means of terminating family ownership of property, the court held that one of the methods by which family property can be determined is through partition, whereby the property which belonged to the family is split into ownership of the constituent members of the family. The property may be, but is not invariably, divided among individual members of the family so as to vest absolute ownership in individual members. The division may be among constituent branches of the family.³⁴⁴ On the distinction between partition and allocation of family land, the court states that where there is partition, there will be no room for undistributed portions. Whereas, in allocation, the family could reserve or leave some portions unallotted to any member of the family. Where such a situation occurred, the court will hold that there was no partition.³⁴⁵

A family or individual can pledge its or his lands in the exercise of the right of ownership. This process will lead to a temporary parting of possession. The Supreme Court held in *Ufomba v Ahuchago*³⁴⁶ that under customary law, a pledgee of a land always goes into possession and has the right to put the land to some productive use. To that extent, such use is a kind of interest due on the amount of the loan. The very nature of a customary pledge is that it is perpetually redeemable and the pledgee has only a temporary occupation or licence. He must yield up the pledged land as far as possible in the form he took it originally. This means that he must put it to ordinary use so that its return to the pledgor should not be encumbered in any way. The planting of economic crops like cocoa or rubber can only be undertaken by the pledgee in possession at his own risk unless there is express contract permitting him to do so.³⁴⁷

³⁴² *Jaiyeola v Abioye* (2003) 4 NWLR (Pt810) 397 at 422–423 para G-A. The Court relied on the Supreme Court decision of *Olorunfemi & Others v Asho and Others* (2000) 2 NWLR (Pt 643)143 at 156 –160.

³⁴³ *Supra* at 422 paras E-F and 424 paras C-D.

³⁴⁴ *Supra* at 422–423 paras E-A; *Balogun v Balogun* (1943) 14 WACA 78.

³⁴⁵ *Supra* at 419 paras D-E *Majekodunmi v Tijani* (1932) 11 NLR 74 and *George v Fajore* (1939) 15 NLR 1.

³⁴⁶ (2003) 8 NWLR (Pt 821) 130.

³⁴⁷ *Supra* at 152 paras E-G and 154 paras A-F; *Okooko v Ezedalue* (1974) 3 SC 15.

On whether a pledgor's right of redemption under customary pledge can ever be foreclosed for any reason, the Supreme Court said that the pledgor's right of redemption cannot be clogged in any way by the pledgee, such as for instance by demanding an amount in excess of the sum for which the land was originally pledged or by planting on the pledged land, economic trees or by using other subterfuges to delay or postpone the pledgor's or his successor's right to redeem³⁴⁸.

Under the customary law, a member of a family having an interest in a family land may sue when the head of family neglects or refuses to do so. Even though the interests of individual members of a family or community in family or communal land are not exactly identical in content and quantity, a member can properly represent the family or community in defending their rights in the family or community land.³⁴⁹

Following the grant of a portion of family land, an individual can sell or dispose of his interests. Payment of the agreed purchase price by the purchaser coupled with the delivery of possession of the land to him created a valid sale of land to him under customary law. Accordingly, no such thing as a written contract or conveyance was necessary to reflect a valid sale.³⁵⁰ It has to be pointed out that the incidence of customary ownership of lands or proprietary right over property as articulated above remained the same from pre-colonial to colonial and post-colonial Nigeria. Therefore, the right to property was duly recognised in traditional Nigerian society prior to colonialism.

According to Mojekwu, the conception of human rights in Africa's communitarianistic society "was fundamentally based on ascribed status... one who has lost his membership in a social unit or one who did not belong—an outcast or a stranger—lived outside the range of human rights protection by the social unit."³⁵¹ Mojekwu's view is not correct in so far as he implies that outcasts and strangers do not have human rights in African society. They in some circumstances have diminished or limited rights. In the pre-colonial Igbo society, an outcast or a slave cannot aspire to a leadership position because of his status. Should he violate the communal ethos, he like any other person in the community is entitled to the right to fair hearing.

³⁴⁸ *Ufomba v Abuchago* (2003) 8 NWLR (Pt 821) 130 at 154 paras A-E .

³⁴⁹ *Mbamalu v Mozie* (2002) 2 NWLR (Pt 751) 2 NWLR (Pt 751) 345 at 362 paras A-E; *Omerede v Eleazu* (1991) 4 NWLR (Pt 183) 65.

³⁵⁰ *Adesanya v Adefonmu* (2000) 9 NWLR (Pt 672) 370 at 384 para B; *Yaya v Mogoga* (1947) 12 WACA 132; *Orasanmi v Idowu* (1959) 4 F.S.C 40 and *Griffin v Talabi* (1948) 12 WACA 371.

³⁵¹ Mojekwu CC "International Human Rights: The African Perspective" in Nelson JL and Green VM (eds.) *International Human Rights: Contemporary Issues* (1980) 86.

The concept of “ascribed status” is not peculiar to the traditional African society. It obtains in contemporary or modern societies. Not all human rights are available to citizens. After all, at some time in the political history of Europe and America, slaves because of their status had no rights whatsoever. In US, it was only in 1788 that women were granted the right to stand for election, and only in 1920 were they granted the right to vote by the 19th Amendment to the US Constitution. Even a prisoner at some point in US, because of his status, was regarded as being civilly dead.³⁵²

Swayed by Mojekwu’s viewpoint, Howard argues that:

The African concept of human rights is actually a concept of human dignity, of what defines “the inner (moral) nature and worth of the human person and his or her proper (political) relations with society”. Despite the twinning of human rights and human dignity in the Preamble to the Universal Declaration of Human Rights and elsewhere, dignity can be protected in a society that is not based on rights. The notion of African communalism, which stresses the dignity of membership in, and fulfillment of one’s prescribed social role in a group (family, kinship group, “tribe”), still represents accurately how many Africans appear to view their personal relationship to society.³⁵³

Howard further argued that: “This notion of dignity implies a different notion of justice than does the version based on human rights.”³⁵⁴ In so far as Howard sought to create the impression that African notion of justice which is based on dignity is different from one that is based on human rights, her position is not correct. Howard’s attempt also to differentiate between human rights, human dignity and worth is far from being convincing. Having acknowledged that there is a “twinning” of human rights and human dignity in the preamble to UDHR, she missed the point when she also argued that dignity can be protected by a society that is not rights-based. A society like traditional African society that has institutional arrangements for the protection of human dignity and worth cannot be said to be one not based on rights or a society that has no notions of human rights. Howard rejected the respective viewpoints of Deng³⁵⁵ and Wiredu³⁵⁶ on the recognition of human rights notion by the Dinka and Akan people. She argued that their positions “actually confirm the view that traditional Africa protected a system of obligations and privileges based on ascribed statuses, not a system of human rights to which one was entitled merely by virtue of being human”.³⁵⁷ On the contrary, their works fortified the contention that human rights existed in pre-colonial Africa.

³⁵² A detailed discussion is done in Chapter 3.

³⁵³ Howard RE “Group versus Individual Identity in the African Debate on Human Rights” in An-Na’im and Deng *Human Right in Africa: Cross Cultural Perspectives* at 165-166.

³⁵⁴ *Supra*.

³⁵⁵ Deng “A Cultural Approach to Human Rights among the Dinka” 194.

³⁵⁶ Wiredu “An Akan Perspective on Human Rights” 246.

³⁵⁷ Howard *supra* at 167.

Another Eurocentric view on human rights was canvassed by Leary. She argues that much as “the Western concept of human rights was introduced into the legal systems of many non-Western cultures through colonialism and the cultural influence of the West, it has not always been an easy transposition. To many in the third world, human rights remain an alien concept and an example of cultural imperialism.”³⁵⁸ It is very uncharitable to argue that human rights is “an alien concept and an example of cultural imperialism” in the third world. Such an argument shows a total disregard for the history, custom, tradition and structural arrangements in traditional societies in the third world. Leary further posits:

Concept of human dignity can be expressed by many terms: social justice, dharma, human rights. The particular form which the international community, under Western influence, has chosen to express human dignity, however, is the concept of human rights. Despite its Western origin, the concept of human rights must now be recognized as a universal term accepted throughout the world. But the concept is a dynamic and evolutionary one that has recently been extended to cover many aspects of human dignity not contemplated under the traditional Western rubric of human rights. Western influence, dominant in the origin of the development of international human rights norms, is now only one of a number of cultural influences on the development of international human rights standards.³⁵⁹

Leary acknowledges the close relationship between human dignity and human rights. She accepts that human rights cover many aspects of human dignity. This would mean then that the concept of human dignity is rights-based and African communitarianism which protects human dignity cannot be a society that is not based on rights.

Donnelly, another writer who holds Eurocentric view on the question of human rights, argues that the personal rights of pre-colonial Africans against their governments were anchored not on humanity but on such factors as age, sex, lineage, achievement, or community membership. In this regard, not all rights can be human rights. It was further argued that most of them are founded on sources other than humanity.³⁶⁰ Further debunking the claim of the existence of human rights in pre-colonial African societies, he argues that:

I am *not* claiming that Islam, Confucianism, or traditional African ideas cannot support internationally recognized human rights. Quite the contrary, I argue below that they logically can and in practice increasingly do support human rights. My point here is simply that Islamic, Confucian, and African societies did not in fact develop significant bodies of human rights ideas or practices prior to the twentieth century.³⁶¹

³⁵⁸ Leary VA in An-Na'im and Deng *Human Right in Africa: Cross Cultural Perspectives* 16.

³⁵⁹ Leary *suprat* 29-30.

³⁶⁰ Donnelly “The Relative Universality of Human Rights” 6.

³⁶¹ Donnelly “*supra* 7 (Emphasis in the original).

Donnelly in his Afro-negativist view on human rights, stressed:

Although traditional (Western and non-Western) cultures did not in fact endorse human rights, there is nothing in African, Asian, American, or European cultures, or most of the comprehensive doctrines that they contain, that prevents them from doing so now. We might even see empirically false arguments about traditional conceptions of human rights as misguided but understandable reflections of ongoing processes of contemporary endorsement³⁶²

Fukuyama has also argued that extending the concept of human rights to non-Western societies can be counterproductive.³⁶³ It has been shown that several notions of human rights are embedded in the culture, customs, values and traditions of indigenous African societies. Unless they are carefully examined, there will be a misguided conclusion that the notions of human rights did not exist in traditional African and even Asian societies.

Pagels in his seminal work, argues that the concept of human rights as constituting a legal claim was never known in antiquity, this was particularly so given that in antiquity it was the state that claimed or conferred rights on the individuals.³⁶⁴ Indeed, he maintained that the concept of human rights is associated with modernism in Europe.³⁶⁵ Relying on Pagel's work where he conducted a survey on the issue of human rights in ancient and traditional societies in Africa, America, Asia, Europe, Japan, China, among others, Nwabueze³⁶⁶ argued that Donnelly³⁶⁷ must be on a firm ground when he said that human rights received no recognition in traditional African societies. In the same vein, Nwabueze³⁶⁸ further argues that the viewpoints of writers like Asante³⁶⁹ who canvassed that the conception of human rights is an integral part of African humanism or Wai³⁷⁰ who posited that human rights were protected in traditional African societies, are just untenable.³⁷¹ In the light of the exposition in this text,³⁷² Nwabueze could not have been right when he rejected the argument that traditional African societies recognized the concept of human rights or had some notions of human rights.

³⁶² Donnelly "The Relative University of Human Rights" 19.

³⁶³ Fukuyama F "National rights and Human History" (2001) 64 *The National Interest* 29.

³⁶⁴ Pagels E "The Roots and Origins of Human Rights" in Henkin AH (ed.) *Human Dignity* (1979) 2.

³⁶⁵ *Supra* 6.

³⁶⁶ Nwabueze *Constitutional Democracy in Africa Volume 2*, 7.

³⁶⁷ Donnelly J "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" (1982) (82) *The American Political Science Review* 308.

³⁶⁸ Nwabueze *Constitutional Democracy in Africa Volume 2* 7-8.

³⁶⁹ Asante "Nation Building and Human Rights in Emergent African Nations" 72-108.

³⁷⁰ Wai "Human Right in Sub-Saharan Africa" at 115-45.

³⁷¹ Nwabueze *supra* 7-8.

³⁷² In section 2.4.4 of this Chapter.

2.5 Democracy

Democracy started to develop in ancient Greece as early as the 500's B.C. The word democracy comes from the Greek word *Demos*; this means the people. On the other hand, *Kratos*, means rule or authority. Literally, democracy is rule by the people.³⁷³ President Abraham Lincoln of United States, appreciating that democracy is rule by the people and self-government, described it as "government of the people, by the people and for the people."³⁷⁴ Democracy can be direct or indirect. In a direct democracy, classically termed pure democracy, citizens vote on government decisions and make laws or reject laws for their community. Such democracy was usually associated with city-states. It was practised by the ancient Greek city-state of Athens. For indirect democracy, government by the people is through their freely elected representatives and this is what is called representative democracy. Most votings in democracies are based on the rule of the majority. Modern democracy is mostly representative democracy.

Democracy has been associated with varied concepts and definitions. Even countries that operate or operated one party system claimed to be running a democracy. A good number existed in the former Eastern European Communists countries where political authority was concentrated on some members or few members of the ruling party under the guise of the principles of democratic centralism.³⁷⁵

Boateng argues that:

So strong has this dominance [the idea of democracy] become that even the most undemocratic countries either claim to be democratic or to be aspiring toward the establishment of democratic forms of government for their people. It is difficult to think of any country today which is prepared to admit that it has no belief in democracy even as a long term goal. More often than not, countries that still operate undemocratic forms of government seek respectability and acceptance by the international community by suggesting that democracy is of many kinds and that the particular forms they follow happen to be different from the Western model which may be suitable for the countries of Western Europe but not necessarily for all other countries.³⁷⁶

In its modern conception, democracy is often assumed to be liberal democracy, a form of representative democracy where the ability of elected representatives and the will of the majority to exercise decision-making power are subject to the rule of law, and usually moderated by a constitution which emphasizes the protection of liberties, freedoms and rights of individuals and minorities.³⁷⁷

³⁷³ *The World Book Encyclopedia Vol. 5* (2001)122.

³⁷⁴ *Supra* at 120.

³⁷⁵ *The World Book Encyclopedia Vol 5* at 120.

³⁷⁶ Boateng *EA Government and the Peoples Outlook for Democracy in Ghana* (1996)4.

³⁷⁷ Wikipedia, 'Democracy' <http://en.wikipedia.org/wiki/democracy> [accessed 18 June 2006].

Almost half of the population of the world now lives under liberal democratic regimes.³⁷⁸ The United States is credited with being the first liberal democracy. Attainment of that status did not come easy. There were gender restrictions, the practice of slavery and the denial of rights to African-Americans who were the descendants of slaves. While it is generally acknowledged that the world is a better place with democracy, there are few people who criticize democracy, albeit unjustifiably. One of them was Pierre Joseph Proudhon who said: “Democracy is nothing but the tyranny of majorities, the most abominable tyranny of all, for it is not based on the authority of a religion, not upon the nobility of a race, not on the merits of talents and riches. It rests upon numbers and hides behind the name of the people”³⁷⁹ There is controversy surrounding the definition of democracy; notwithstanding that, there are some basic principles or constituents of democracy that can be taken to be universal.

Elaigwu sets out four of them.³⁸⁰ The first one is that authority emanates from the people; they are the repository of power. This authority or power is usually delegated to a group of people who act as the representatives of the people. It may be Parliament, Senate, Congress or National Assembly. But ultimately, sovereignty lies with the people. The 1999 Nigerian Constitution is explicit on the source of sovereignty. It enacts in section 14(2)(a) that “sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers”.

The second constituent is the rule of law. Democracy presupposes the absence of the rule of might. The government will not only be a product of law but must govern in accordance with law. There must be legal mechanism for those who are aggrieved to seek legal redress.

The third characteristic according to Elaigwu is legitimacy. He said there are two aspects, input and output. The input element presupposes that government and/or the leader has the right to rule. The output dimension underscores the fact that the ruler must rule rightly.³⁸¹

³⁷⁸ Wikipedia, ‘Democracy’ <http://en.wikipedia.org/wiki/democracy> [accessed 18 June 2006].

³⁷⁹ Proudhon, PJ *Demokratie and Republik*, S.10.

³⁸⁰ Elaigwu JI “Commentary on Sharia‘a’h in African Democratization process” in Ostien P, Nasir JM and Kogelmann F (eds.) *Comparative Perspectives on Shari‘ah in Nigeria* (2005) 67.

³⁸¹ *Supra*.

The view in this text is that this third principle could be accommodated within the rubric of the rule of law. In a society where there is rule of law, government must be legitimate and governance must be in accordance with law. This rules out any forcible change of government. Once again, the Nigerian constitution has an express provision on the matter. Its section 1(2) states that: “Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.”

The fourth principle is that of choice. Election must be free and fair. The people must have a chance to choose their leaders. Elaigwu added as part of this choice, other forms of freedom, like freedom of worship, thought, and movement, among others.³⁸² This author’s view is that the rights of the citizens are more appropriately treated as a separate constituent of democracy. Individualism is accorded a prime place in democracy; and also, the rights of the individuals must be guaranteed. These rights are variously referred to as fundamental rights, basic rights or human rights.

The last principle is that of accountability. Since sovereignty and the mandate to rule come from the people, the leaders are accountable to them. This accountability implies that if government or elected officials are not satisfying their constituents or the people, they reserve the right to recall the elected officials before the expiration of their tenure or vote them out during election.³⁸³

Another constituent of democracy is the doctrine of the separation of powers. It means that the three branches of government namely, the Executive, Legislative and Judiciary should exercise power and authority within their own sphere. In Nigeria, section 4(1) of the constitution vests legislative powers of the Federal government in the National Assembly comprising of the Senate and the House of Representatives. Section 5 vests executive powers on the President and this may be exercised by him directly or indirectly or through the Vice President and Ministers of Government or other officers of the public service of the Federation. Under section 6, judicial powers are vested in the courts established for the Federation. The Constitution replicates the above arrangement for the States too.

³⁸² Elaigwu “Commentary on Sharia’a’h in African Democratization Process” 67.

³⁸³ A member of the Senate or House of Representatives in Nigeria pursuant to section 69 of the Constitution of Nigeria, may by a simple majority be recalled by members of his constituency registered to vote, in a referendum conducted by the Independent National Electoral Commission. The provision for the recall of a member of the State House of Assembly is in section 110 of the Constitution.

The concept of separation of powers postulates that the three branches of government are equal; that their functions are distinct and separate and that no branch will seek to interfere with each others powers. In practice, their functions sometimes overlap. As would be seen later, the courts are said to enact laws through judgments.

Anwar Ibrahim, a former Deputy Prime Minister and a leading force for reform in Malaysia contends that when people refer to democracy, they are referring to the institutions of civil society and governance. In a democracy he said: “The people will not fear reprisal from an authority issuing edicts that certain issues cannot be questioned. Such excesses would be met by public protest and outrage, and those calling for reform and greater accountability would not be forced underground, fleeing from arrest and oppression, and driven toward extreme positions”.³⁸⁴

He was emphatic that a dogmatic regime will not survive where the people are empowered with information and protected by constitutional guarantees of free speech.³⁸⁵ All that Ibrahim is saying is that freedom is a necessary concomitant of democracy. The paraphernalia of freedom includes “a free media, an independent judiciary, a viable opposition and transparent election procedures—that allow for open and vibrant debate and discussion”.³⁸⁶ Consequently, a regime that is oppressive, repressive and which does not guarantee freedom cannot be said to be democratic. It is necessary to add that freedom will, among others, include the freedom of religion, conscience and thought. Freedom of religion is sustained by secularism. In his descriptive definition of democracy, Gutto said thus:

Democracy is about the way society is organized and governed. Such conceptualization incorporates not only the institutional forms, norms and processes of political rule, including the manner in which people participate in choosing the political leadership and the structure of government, but also the cultural, social and economic organizations that determine and define the conditions under which and quality of life that people actually live.³⁸⁷

Can Gutto’s descriptive definition of democracy and others like it apply to political rulership, governance and conflict resolution in the indigenous African societies? An answer is to be found shortly.

³⁸⁴ Anwar Ibrahim, “Islam in southeast Asia Question and Answer” (an interview) The Pew Forum on Religion and Public Life, 7 April 2006, Washington DC.

³⁸⁵ *Supra.*

³⁸⁶ *Supra.*

³⁸⁷ Gutto S “Current concepts, core principles, dimensions, processes and institutions of democracy and the inter-relationship between democracy and human rights”, text of a paper delivered at a Seminar by the UN Office Commissioner for Human Rights on the Interdependence between Democracy and Human Rights, 25-26 November 2002.

2.5.1 Democracy in pre-colonial Africa

Democracy is usually seen as a Western construct and concept. The issue is whether African indigenous political systems, institutional arrangements and practices could have accommodated the ideals or basic principles of democracy? Eze observes that “the traditional Africa societies knew of institutionalized derogations from human rights. There was slavery. There was the *osu* system and the caste system epitomized by the untouchables: there was human sacrifice as well as the practice of killing twins in the superstitious belief that they will bring evil”.³⁸⁸ He said this in relation to human rights in pre-colonial Africa.

Is it possible to practice democracy in such a society? Let it be quickly stated that even in liberal democratic societies, human rights are abused. Nwauwa vigorously argues in favour of the practice of democracy in traditional African societies. He lamented that:

Discourses on democracy and democratization in Africa are usually presented in the West as though they are entirely new notions and practices to Africans. The idea of democracy itself is viewed almost exclusively as a Western concept of which African societies now stand desperately in need. Similarly, the presumption has been that democratic values and practices are alien to the African continent, with the West posturing as their cultural bearers and defenders. This mindset considers Africans as incapable of democratic thoughts and hence they should be infused with the “civilized” notion of Western democracy. What has been consistently ignored is that democratic values and processes have been as indigenous to Africans as they were to the ancient Greeks. African traditional political cultures and organizations would give credence to this conclusion. While the term *democracy*, now a Western buzzword for representative government, might have been borrowed from the Greeks, democratic thought and values have never been exclusively Greek or Euro-American preserve. Indeed, the desire for representation, inclusion, and participation in public affairs—essential elements of democracy—are universal to all humans; the difference rests in the methods of attaining these goals. To what extent a society “democratizes” is incontestably dependent on its socio-cultural milieu, whether it is African, European, American, Asian, or even Islamic societies.³⁸⁹

Much as there are several variants of democracy, there is no denying the fact that pre-colonial traditional African societies were built on consultation, consensus, conflict resolution and participatory rulership. There was no absolutism in rulership. The traditional rulership institutions were held accountable to the ruled. Kenyatta posits that having to submit to an autocratic ruler whether of a person or group, will to the Gikuyu people amount to “the greatest humiliation to mankind.”³⁹⁰

³⁸⁸ Eze O *Human Rights in Africa Some Selected Problems* at 13.

³⁸⁹ Nwauwa AO “ Concepts of Democracy and Democratization in Africa Revisited” paper presented at the Fourth Annual Kent State University Symposium on Democracy April 28-29 2003.

³⁹⁰ Kenyatta J *Facing Mount Kenya: The Tribal Life of the Gikuyu (1959)* 196.

The words or actions of the rulers were neither sacrosanct nor unchallengeable. These practices were undoubtedly attributes of participatory or limited government. In appropriate cases the rulers were deposed. It was argued by Nwala that “unanimity and all the rigorous processes and compromises... that lead to it are all efforts made to contain the wishes of the majority as well as those of the minority. In short, they are designed to arrive at what may be abstractly called “the general will of the people of the community.”³⁹¹ This is an expression of consensus and consultation in rulership and governance was the hallmark of the traditional socio-political order in African societies.

Nwauwa³⁹² maintains that before and after colonialism, African societies practiced some forms of democracy together with authoritarian rule. The advent of colonialism undermined the traditional participatory democratic system for nearly one hundred years. According to him, this was only revived on the eve of decolonialization and it took the garb of a parliamentary system. He said: “Since Roman times, the meaning of democracy has continually shifted, producing many variants. Democracy is now a relative concept; it no longer means the same thing to all peoples and cultures at all times. The ancient Romans took a practical approach to everything, including the principle of democracy”.³⁹³

The Igbo traditional society is known for its republicanism. The rulers were seen simply as first among equals. The wide political powers which rulers in the northern and western parts of Nigeria are known to wield in pre-colonial, colonial and post-colonial era, were totally absent in Igboland. Governance was intensely participatory and decision-making was built around consensus. Where it fails, decisions are taken by the majority in appropriate cases.

“The indigenous political system of the Igbo of southeastern Nigeria”, Nwauwa argues, “presents one of the most elaborate examples of direct and participatory democracy in traditional Africa.”³⁹⁴ He argues that “African democracy, therefore, transcended the realm of politics; it constituted an integral part of the peoples’ culture, which allowed everyone a sense of belonging.”³⁹⁵

³⁹¹ Nwala TU *Igbo Philosophy* (1985) 168.

³⁹² Nwauwa “Concepts of Democracy and Democratization in Africa Revisited” 256.

³⁹³ *Supra.*

³⁹⁴ *Supra.*

³⁹⁵ *Supra.*

Traditional African political structure and practices manifested some features of a democratic order. The degree of development or the dept of practice perhaps was not as much that of contemporary liberal democratic ideals and practices. After all, liberal democracy did not get to its present stage without going through an evolutionary process.

Unfortunately for Africa, its democratic practices and order were not allowed to evolve and develop to a level of sophistication. It was rudely terminated. The development of African traditional institutions, which this text has argued included the ingredients of democracy:

was stopped in its tracks by slave trade and colonization. Slavery and colonisation were, for us, synonymous. Only difference was that in slavery, Africans were chained and taken away, and those who remained were enslaved and chained at home. Both, slavery and colonization deprived us human rights. Additionally, slave trade robbed us of our best people. During this period of exploitation of the people of Africa, we also became victims of imposed values.³⁹⁶

2. 5.2 Democracy in contemporary Africa

The objective here is not to embark on a full discourse on democracy in contemporary Africa. But to briefly draw attention to democracy in Africa consequent upon the colonization and the decolonization of Africa. The colonial rulers were never concerned with promoting the growth of democracy in their colonies. Understandably, they did not want to provide an enabling environment for the colonized people to challenge their domination, dehumanization and brutalization by the colonial rulers. Wherever “democratic institutions” by whatever name were set up, they were only “democratic” in name but autocratic and despotic in practice. Such institutions never practiced the ideals of democracy.

When colonization was coming to an end, there were no conscious efforts to embark on a developmental process of democracy. Democratic institutions were suddenly set up on very weak foundations. There were structures without the culture and the practice of democracy. The process was flawed in conception and execution. Many of African countries became independent in the 1960s.

³⁹⁶ Geingob H, an Address presented at the official opening ceremony of the African Day Conference: Africa, Civilization and Destiny, 24 May 1999 at Windhoek.

In 1961, Smith Hempstone who had embarked on a three year voyage across the African continent said:

All that can be said at this juncture is that Western democracy is not going to work in Africa. Nor is government going to revert to a tribal framework. A new synthesis is in the making and something new in political organization is about to emerge, an “Afrocratic” system which utilizes the form but not the substance of democracy and draws much of its inspiration from indigenous institutions. This implies limited freedom of speech, irregular and semi-free elections, a one-party system and rule by popular dictator. Western democracy evolved from a given set of circumstances to fit the needs and aspirations of a small portion of the world’s population at a given point in time. This is not the time in Africa and parallel circumstances, needs and aspirations do not exist among the peoples and nations.³⁹⁷

According to Pham, what Hempstone was in effect saying was that “one should not expect much from the new African nations in the matters of democracy and human rights.”³⁹⁸ Pham is right. Newly independent African nations were not interested in promoting constitutionalism. But Hempstone was wrong in also blaming the unworkability of democracy in the new nations partly on indigenous institutions. Happily, the same Hempstone after his duty tour in Kenya as the Ambassador of United States confessed that: “It is profoundly racist to suggest that democracy is impossible in Africa. It will be difficult and messy. The process will likely be a protracted one. But we owe it to ourselves as much as to the Africans to support the pro-democracy forces in their struggle”.³⁹⁹

Africa’s experience with democracy has been a painful one. What was left of democracy by colonialism was destroyed by morally bankrupt African leaders and despots whether civilian or military, who muzzled opposition, became life presidents and turned their respective countries into one-party states. Human rights were recklessly violated. Mazrui has asked: “who killed African democracy?”⁴⁰⁰ He *inter alia* answered the question thus:

The cultural half-caste who came in from Western schools and did not adequately respect African ancestors. Institutions were inaugurated without reference to cultural compatibilities, and new processes were introduced without respect for continuities. Ancestral standards of property, propriety and legitimacy were ignored. When writing up a new constitution for Africa the elites would ask themselves, “ How does the House of Representatives in the United States structure its agenda? How do the Swiss cantons handle their referendum? I wonder how the Canadian federation would handle such an issue? On the other hand, these African elites almost never asked, “How did the Banyoro, the Wolof, the Igbo or Kikuyu govern themselves before colonization? In the words of the Western philosopher” Edmund Burke, “ People will not look forward to posterity who never look backward to their ancestors.”⁴⁰¹

³⁹⁷ Hempstone S *African–Angry Young Giant* (1961) 640-641.

³⁹⁸ Pham JP “Legitimacy, Justice and the Future of Africa” (2005)(5) *Human Rights and Human Welfare* 31.

³⁹⁹ Hempstone S *Rogue Ambassador: An African Memoir* (1997) 327.

⁴⁰⁰ Mazrui AA Who killed Democracy in Africa? Clues of the Past, Concerns of the Future” February 2002 (9) *No1 Development Policy Management Network Bulletin* 20.

⁴⁰¹ *Supra*.

The reasons articulated by Mazrui were some of the root causes that diminished the growth of democracy in Africa. In the 1990s, the political and democratic landscape in Africa started changing for good. The continent witnessed transformations and refocusing of democratic structures and practices. In Nigeria, the military quit governance and in 1999 a civilian government was democratically elected for the first time since 1983. Referring to this period, Geingob observes: “This decade has in a way, been the decade of Africa. The beginning of this decade saw the beginning of Africa’s process of democratization. Prior to this decade, there were only a few bright spots. However, the process on a continent-wide scale started in 1989 when most of Sub-Saharan countries saw an unprecedented increase in demands for democracy. Within the space of few years, the political map of Africa had changed dramatically.”⁴⁰² Also making his own contribution on the political fortunes of Africa within the period, Welch argues:

The magnitude of change is highly significant. Authoritarianism was on the retreat in tropical Africa from the start of 1990. Between January 1990 and July 1992, thirteen African heads of state were replaced, four of them voted out of office in competitive multiparty elections. We have already noted Ethiopia’s and Namibia’s critical drafting of constitutions, in which human rights and democracy figured prominently. The reluctant, partial political disengagement of the Nigerian military was, without question, pressured by the emergence of democracy as a continent-wide goal, as was the greater willingness of the Senegalese Parti Socialiste to consult opposition groups about revising the electoral code. Democracy, in short, has made significant, if irregular, progress through tropical Africa.⁴⁰³

These transformations and transitions from authoritarianism and despotism to democracy were not without problems, challenges and difficulties. They impact significantly on constitutionalism, judicialism and the protection of human rights.⁴⁰⁴

2.5.3 The relationship between democracy, human rights and good governance

The relationship between human rights and democracy has duly been acknowledged and emphasized by the Vienna Declaration which provides:

Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.⁴⁰⁵

⁴⁰² Geingob An Address presented at the official opening ceremony of the African Day Conference: Africa, Civilization and Destiny, 24 May 1999 at Windhoek.

⁴⁰³ Welch EC *Protecting Human Right in Africa: Roles and Strategies of Non- Governmental Organizations* (1995) 64

⁴⁰⁴ The extent of that impact is discussed in subsequent chapters.

⁴⁰⁵ Vienna Declaration and Programme of Action para 8.

It cannot be doubted that human rights are best protected and enforced in a political system that is democratic. Perhaps, it may even be contradictory to suggest that under an autocratic and despotic regime, human rights are enforced. It is possible for the legal regime to guarantee the rights in its formal structures but denied in practice. Consequently, democracy and human rights share a linkage. They are interdependent and interconnected in the sense that they support each other.

Gutto argues and rightly too that “the link, relationship and interdependence between democracy and human rights lie first, on the pursuit of human rights as an essential characteristic of modern democratic society. Human rights have developed into an essential indicator of democracy.”⁴⁰⁶ He further argues that: “Another relationship lies in *the dependence of democracy on human rights* for purposes of enforcement. Principles of democracy are normally expressed in more general terms than the norms and standards of human rights, for example, the principle of *representative democracy*.”⁴⁰⁷

The concept, the guarantee and the enforcement of human rights are so important to democracy that no system can genuinely be described as democratic without them. The mutual and symbiotic relationship between democracy and human rights is almost taken for granted. Both are ingredients of constitutionalism and they ensure the development of a culture of constitutionalism.

Earlier in this text, it was stated that constitutionalism is important to democracy and good governance. This is underscored by their symbiotic relationship. They support and sustain each other. The African Union Convention on Preventing and Combating Corruption (AUCPCC) was adopted in Maputo on 11 July 2003. It represents a regional consensus on what African States should do in the areas of prevention, criminalization, international corporation and assets recovery. Nigeria ratified the Convention on 5 August 2008. It is important that under Article 3 (1) of the Convention, State Parties are enjoined to abide by the principle of “respect for democratic principles and institutions, popular participation, the rule of law and good governance”.

⁴⁰⁶ Gutto *Current concepts, core principles, dimensions, processes and institutions of democracy and inter-relationship between democracy and human rights*” para 5. (Emphasis in the original).

⁴⁰⁷ *Supra* para 37.

On 30 January 2007, the African Union adopted in Addis Ababa the African Charter on Democracy, Elections and Governance. Out of the 53 countries who are members of the African Union, only Ethiopia, Mauritania and Sierra Leone have ratified the Charter. The Charter requires the ratification of 15 members to enter into force⁴⁰⁸. The objectives of the Charter include to promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights.⁴⁰⁹ They also include nurturing, supporting and consolidating good governance by promoting democratic culture and practice, building and strengthening governance institutions and inculcating political pluralism and tolerance.⁴¹⁰

The Convention and Charter demonstrate the importance of good governance and its linkage with democratic principles and human rights. Regrettably, the provisions of the Convention and Charter are yet to be implemented by the African Union members.

The General Assembly of the United Nations, at its Millennium Summit in September 2000, laid down its objectives for the 21st century which include the promotion of democracy and good governance.⁴¹¹ Abdellatif has explained that:

Good governance is, among other things, participatory, transparent and accountable, effective and equitable, and it promotes the rule of law. It ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.⁴¹²

It is clear that good governance as described by Abdellatif can only be realized in a democracy and democracy is a feature of constitutionalism. Good governance has also been linked to development of an enabling environment that is conducive to the enjoyment of human rights.⁴¹³ This has to be appreciated against the background that absence of good governance may affect the practice of democracy. This in turn may compromise the realization of human rights and the promotion of constitutionalism.

⁴⁰⁸ <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> [accessed on 10 February 2010].

⁴⁰⁹ Article 2(1) African Charter on Democracy, Elections and Governance

⁴¹⁰ *Supra*.

⁴¹¹ Fukuda-Parr Sakiko and Ponzio Richard *Governance: Past, Present, Future setting the governance agenda for Millennium Declaration* (Background paper on HDR 2002).

⁴¹² Abdellatif Am "Good governance and its Relationship to Democracy and Economic Development" being a paper presented at Global Forum III Workshop on Fighting Corruption and Safeguarding Integrity, Seoul 20-31 May, 2003. See also UNDP *Governance for Sustainable Human Development, Policy Paper UNDP 1997*, p2-3.

⁴¹³ *Supra*

2.6 Summary

The discourse in this chapter focuses on the definitional problems of constitutionalism, human rights and democracy. In respect of constitutionalism, it is argued that what is important is not its formalistic and legalistic structures, but the functionality of the concept; its actual practice divorced from formalism. In that way, it is possible to address the awkward situation where political systems have constitutions but deficient in the practice of constitutionalism. This stems from the fact that a constitution does not *ipso facto* guarantee constitutionalism.

An examination of the concept of human rights as a constituent of constitutionalism is carried out. The difficulties and challenges inherent in defining human rights in terms of its attachment to human personality were discussed. It is obvious that human rights are now available to human beings and non-human beings like corporations. Human rights in pre-colonial Africa received due consideration. The text has no difficulty in concluding that pre-colonial traditional African societies did recognize some notions of human rights. In Nigeria, especially among the Igbo people, the rights to life, fair hearing and property were very well developed in pre-colonial period. Another critical issue that was considered was democracy in pre-colonial African societies.

It was concluded after examining traditional African political structures, that much as there were several variants of democracy, the fact cannot be denied that traditional African societies are anchored on some democratic norms. One can only question the degree of their development. The relationship between human rights and democracy is also emphasized. Both are interdependent, interrelated and share a linkage. Democracy reinforces and protects human rights and the latter is an indicator of the former.

At the beginning of the chapter, after the discourse on constitutionalism, the text postponed a finding on whether there was constitutionalism in pre-colonial Africa. That approach had to be adopted because at that stage, the issue of human rights and democracy in pre-colonial Africa had not been discussed. Having done that and having found that some notions of human rights and democracy existed in indigenous African societies, it is now appropriate to make a finding on the issue of constitutionalism in pre-colonial Africa. Pre-colonial Africa showed some flashes of constitutionalism. Its constitutionalism was not well developed at all. It was at a rudimentary stage when colonialism terminated its growth.

CHAPTER 3

CONSTITUTIONALISM AND THE PROTECTION OF HUMAN RIGHTS

3.1 Introduction

The chapter mainly focuses on an examination of the protection of human rights which is a key feature of constitutionalism. The chapter seeks to explore and examine the constitutional provisions dealing with the protection and promotion of human rights in Nigeria. Besides, the chapter attempts to determine whether in practice the constitutional provisions on human rights succeed in promoting constitutionalism.

Since the 1999 Constitution constitutes the fulcrum of the study, developments that led to it, its main features, legitimacy, strength and weaknesses are to be examined in detail. The chapter will also highlight major international and regional human rights instruments which the country signed and ratified as part of its efforts towards the protection of human rights.

The country's tortuous transition from authoritarianism to constitutionalism is also considered. Militarism constitutes the greatest drawback in the entrenchment of constitutionalism in the country and the chapter briefly focuses on the effect of military rule on constitutionalism. In order to have a better appreciation of the subject of human rights protection, the discourse on human rights is categorized into two sections: civil and political rights; and social, economic and cultural rights.

The research also explores how the provisions on Directive Principles could be used to develop a whole gamut of rights protection. This will complement the provisions on socio-economic rights in the African Charter. As part of the study of social and economic rights, the status, justiciability and enforcement of the Fundamental Objectives and Directive Principles of State Policy will be examined. The chapter further considers the 1999 Constitution of Nigeria, military rule and constitutionalism. It examines the constitutional protection of civil and political rights; and social, economic and cultural rights.

3.2 The 1999 Constitution, military rule and constitutionalism

3.2.1 The 1999 Constitution

Following the death of General Abacha, General Abdulsalami Abubakar became the Nigerian Head of State. On 11 November 1998, the Head of State inaugurated the constitutional debate co-ordinating committee which was charged with the responsibility to, among others, pilot the debate on the new constitution for Nigeria, co-ordinate and collate views and recommendations canvassed by individuals and groups for a new constitution for Nigeria. The committee claimed that it benefited from the receipt of large volumes of memoranda from Nigerians at home and abroad and that it also received oral presentations at the public hearing at the “debates centres throughout the country”.⁴¹⁴ In its report, the committee said that the consensus of opinion of Nigerians was the desire to retain the provisions of the 1979 constitution with some amendments.

On receipt of the committee’s report, the Provisional Ruling Council (PRC) approved the report subject to some amendments made by it. The amendments “were deemed necessary in the public interest and for the purpose of promoting the security, welfare and good governance and fostering the unity and progress of the people of Nigeria with a view to achieving its objective of handing over an enduring Constitution to the people of Nigeria”.⁴¹⁵ The 1999 Constitution was then enacted into law as a schedule to decree No. 24 of 1999 with its commencement date as 29 May 1999.⁴¹⁶ In its preamble, is the misleading claim that “we the people” of Nigeria resolved to “make enact and give ourselves the following constitution”.

All members of the constitutional debate co-ordinating committee were appointed by the head of the military junta. The people of Nigeria neither elected the then government nor did it derive its authority from the people. Neither the people of Nigeria nor their duly elected representatives put the said committee in place. The said committee can, therefore, absolutely lay no claim to representing the people of Nigeria.

⁴¹⁴ See Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999.

⁴¹⁵ *Supra.*

⁴¹⁶ *Supra.*

It is an irony that in all the country's constitutions since 1979, which incidentally are all military contraptions, the military expressly inserted in each constitution a provision that claimed that the "people of Federal Republic of Nigeria" resolved to "make, enact and give to ourselves" a constitution.⁴¹⁷ That was a recognition that the source of authority was the people.

But in practice, the military failed to allow the Nigerian people to make, enact and give themselves a constitution. And whenever a partly elected, partly appointed and partly nominated body or an all-appointed body framed a constitution, it cynically and misleadingly claimed that it was done by the people of the Federal Republic of Nigeria. The constitutional debate coordinating committee made up entirely by persons hand-picked by a military junta and the Provisional Ruling Council (PRC) made up of 26 military officers,⁴¹⁸ all males, could never be representative of the Nigerian people.

For the preamble of the 1999 Constitution to reflect a true and accurate position, it ought to have stated that: "We the members of the Provisional Ruling Council, having firmly and solemnly resolved: do hereby make, enact and give to the Nigerian people the following Constitution:" A statement such as the foregoing could have saved Nigerians the misrepresentation inherent in the preamble to the 1999 Constitution.

It is not in doubt that the 1999 Constitution is a legal document, but it is of dubious and doubtful legitimacy in that it is not an enactment emanating from the will of the people. The source of authority of a constitution lies with the people. Indeed, constitution making belongs to the people and not to the government. It was, as Thomas Paine said "a thing *antecedent* to government; and a government is only the creature of a constitution"⁴¹⁹ Consequently James Wilson, one of the principal framers of the US constitution had argued that a constitution could never be an act of a legislature or of a government. He stated that it had to be the act of the people themselves and in their hands it is like "... clay in the hands of a potter; they have the right to mould, to preserve, to improve, to refine, and to furnish it as they please."⁴²⁰

⁴¹⁷ See the Preambles to 1979, 1989, 1995 and 1999 Constitutions.

⁴¹⁸ Igbuzor I "Constitution: Issues for Review" *National Interest* 4 March 2001, 33.

⁴¹⁹ Ripley BB and Scotnick EE (1989) Readings in American Government and Politics 12; see also *McCulloch v Maryland* Wheat 316 (1919).

⁴²⁰ *Supra*.

Where the people are not involved in a constitution-making process, such a constitution could not be described as legitimate. If the contrary is the case, a dictator or despot may purport to craft a constitution and give it the toga of legitimacy. Similarly, a clique or a group that forcibly overthrew a government under a legitimate constitution may produce a contraption without reference to the people and claim that it is a legitimate constitution. Osipitan and Amusa have forcefully argued that: “Popular participation in the constitution-making process is an important requirement for legitimacy, which the constitutions of most nations can hardly meet. For instance, since independence, Nigeria has not produced a constitution, which truly complies with the requirement of the autochthony school.”⁴²¹

It must be pointed out that autochthony and legitimacy are two different things. A constitution may be autochthonous without being legitimate and vice versa. Justice Tobi contends that “... an autochthonous constitution must be home-grown in the sense that it is home-made and not a product of imperialism or colonialism.”⁴²² It means that a constitution is the product entirely of indigenous efforts.

The 1999 Constitution can rightly be described as an autochthonous constitution; but definitely not a legitimate constitution because the people were not involved in the process of making the constitution. It has been argued that: “Nigerians are constantly challenging the legitimacy of the 1999 Constitution because, as they point out, the final draft was crafted and imposed by military officers.”⁴²³ While the legitimacy of the 1999 Constitution is open to question, the legality of same constitution can hardly be contested because it is the product of a legal process, that is, a decree; but not necessarily a product of rule of law. More importantly and as shall be demonstrated later, it has some features of constitutionalism like rights protection, the separation of powers, rule of law and judicial review.

3.2.2 Military rule and constitutionalism

Between 1 October 1960 when the country became independent and on 29 May 1999 when it returned to civilian rule for a period of 39 years, the country was under military rule or dictatorship for a combined period of 29 years. This makes Nigeria one of the leading countries in Africa with long history of military rule, coups and dictatorships. Since military rule is incompatible with constitutionalism, militarism had the painful effect of inhibiting the practice of constitutionalism in Nigeria for several years.

⁴²¹ Osipitan T and Amusa KO “The Search for Legitimacy of the 1999 Constitution” in Tobi N (ed) *A Living Judicial Legend Essays in Honour of Honourable Justice A.G. Karibi-Whyte* (2006) 25.

⁴²² Tobi N “The Legitimacy of Constitutional Change in the context of the 1999 Constitution” in Ayua 1 *et al* (eds) *Issues in the 1999 Constitution* (2000) 30.

⁴²³ International IDEA *Democracy in Nigeria* (2000) 12.

Prior to the present democracy in the country, the human rights situation in the country was bad. It was characterized by excessive use of force by security forces and extra-judicial killings at roadblocks, during patrols, at police stations, in the course of putting down protests, disturbances and pro-democracy rallies, when combating crimes and when dealing with detained persons. There were officially sanctioned murders, assassinations and disappearances of persons without trace. Further, people were detained without trial for indefinite periods of time, there was the ousting of the jurisdiction of the courts in respect of challenges to arbitrary detention and frequent extension of detention orders beyond the prescribed three months. Other instances of human rights violations include the refusal of government to comply with orders of court for the release of detainees or to produce detainees upon the grant of *habeas corpus* applications; continued and unabashed detention of trade union leaders, human rights activists, lawyers and journalists as well as detention of family members and other relatives of Nigerians living in exile or who had gone “underground” or into hiding.⁴²⁴

Special tribunals which were neither impartial nor independent were established to conduct trials in contravention of international human rights standards. There were the seizure of passports without reason(s) but with the apparent purpose of preventing the holders from attending international conferences or seminars touching on human rights; detention of persons upon their return from abroad and extremely harsh and life-threatening prison conditions. The detention of political detainees in remote locations; proscription of newspapers and magazines and the criminalization of criticism against the government or its activities were rampant.⁴²⁵ There were continued discriminatory practices and policies against women based on cultural beliefs and attitudes; denial of the right of women to own property in Igbo society; trafficking in women and children; domestic violence especially wife beating and widespread practice of female genital mutilation.⁴²⁶ The foregoing encapsulated the human rights situation during the various military dictatorships that the country had, particularly from 1984 until the return to democracy in May 1999. It is true as contended by Cervenka that :

One of the most alarming consequences of militarization in Africa has been the change in attitudes toward traditional values. Whereas respect for human life formerly occupied a central place, today life has become very cheap and in some countries the summary execution of political opponents has become a common practice.⁴²⁷

⁴²⁴ See UN General Assembly “Human Rights Questions: Human Rights Situations and Reports of Special Reporteurs and Representatives—The situation of human rights in Nigeria—Note by the Secretary-General” UNGA A/51/538 of 22 October 1996; UN Commission of Human Rights “Nigeria—Report of the Special Reporteur” E/CN. 4/1998/62.

⁴²⁵ *Supra.*

⁴²⁶ *Supra.*

⁴²⁷ Cervenka Z “The effect of militarization on human rights in Africa” in Anikpo MOC and Shepherd Jr. GW (eds) *Emerging Human Rights: The African Political Economy Context* (1990) 138.

Cervenka argued further:

Military rule, besides destroying the basic rights of individual, has also destroyed the concept of government legality. The soldiers assume the role of judges who pass judgment on the government's performance. There are also executioners who mercilessly punish the members of the government they overthrow. Charges of corruption, mismanagement, incompetence, and tribalism are the usual reasons by which the military justify the coup.⁴²⁸

The militarization of Africa and in particular Nigeria, led to the wholesale destruction of democratic institutions, human rights and the mechanisms for rights protection. According to Ojo:

Military Administration is necessarily a regime of force. Its manner of coming to power is invariably by a forcible subjugation and replacement of a pre-existing order in a way not contemplated by such old order. From whichever angle it is viewed, it is a violation of constitutionalism. Although it is possible to argue that the military have invariably been compelled to assume power as a result of the breakdown of constitutionalism this does not affect the fact of their initial unconstitutional act.⁴²⁹

In Nigeria, there was never a time when there was a "breakdown of constitutionalism", compelling enough for the military to overthrow a constitutional government. The only thing that could be conceded is that prior to the country's various military coups, the civilian governments had failed to develop a culture of constitutionalism and good governance. This was so notwithstanding that the formal and institutional structures for the promotion of constitutionalism were all in place. It has been rightly contended by Suberu that one of the basic threats to constitutionalism in Nigeria is the politicization of the military establishment.⁴³⁰ He concluded that "Nigeria broadly typifies the dismal record of constitutionalism in the African continent."⁴³¹

Abubakar who examined constitutional rights and democracy in Nigeria, *inter alia* rendered his verdict as follows:

Nigeria's political history has thus been fundamentally characterized by the existence of essentially autocratic rulers whether at local, state or national levels. The intervention of the military in the political process in the mid 1960s, opened the polity to authoritarian rulers. Military rule, particularly during the Babangida-Abacha epochs was characterized by massive abuse of human rights. The violent crises in Ogoni land in 1994-95 that culminated in the execution of Ken Saro Wiwa remains an important landmark in the abuse of basic constitutional/ human rights in Nigeria. The annulment of the June 12th Presidential election and the violent crises it generated in the polity further deepened the crises of Nigeria's transition.⁴³²

⁴²⁸ Cervenka "The effect of militarization on human rights in Africa" 138.

⁴²⁹ Ojo A *Constitutional Law and Military Rule in Nigeria* (1987) 242 -243

⁴³⁰ Suberu RT "Institutions, Political Culture, and Constitutionalism in Nigeria" in Baun MJ and Frankline DP (eds) *Political Culture and Constitutionalism: A Comparative Approach* (1995) 215.

⁴³¹ *Supra* 215. He wrote in 1995. By the end of this study, we will be in a position to know whether that conclusion which was true of Nigeria during military rule, is true of Nigeria more than 10 years after democratic rule.

⁴³² Abubakar D "Constitutional Rights and Democracy in Nigeria" being the abridged text of lecture presented at the Center for Research and Documentation (CRD) Kano, Nigeria 23 October 2002.

Abubakar was not alone on this issue of state repression and poor governance of the civilian government in Nigeria under the then President Obasanjo. A study which *inter alia* covered the first eighteen months of Obasanjo's administration reported thus:

Eighteen months into the country's democratic experiment, Nigeria continues to face economic, political and social uncertainties. Flash points of ethnic, communal, religious and resource conflicts persist. The economic environment is still unstable. The Niger Delta crisis has yet to be resolved, and environmental degradation in oil-producing regions remains a problem. Exacerbating this is the public perception that the Government has been insensitive and slow in addressing fundamental issues affecting Nigerians, such as poverty alleviation, resource distribution, infrastructure development, and security. An air of anxiety and uncertainty continues to pervade Nigerian society.⁴³³

Some eight years of the Obasanjo administration, the state of human rights and indeed, democracy degenerated to an alarming proportion. This raised a lot of questions. Is Nigeria a constitutional democracy? Is the practice of constitutionalism in the country progressing or retrogressing? Justice Onnoghen of the Supreme Court was emphatic that much as "we may continue to say that our democracy is at its infancy, we cannot lose sight of the fact that ours is a constitutional democracy based on the rule of law."⁴³⁴ This could well be so if we consider only the formal and institutional structures on constitutional democracy provided in the constitution.

Although constitutionalism and constitutional democracy are related, they are distinct. Expounding on their relationship, Mangu notes that: "Modern constitutionalism is democratic constitutionalism and modern democracy is a constitutional one."⁴³⁵ He further argued that: "Constitutionalism and democracy are so related that 'constitutional democracy' may appear to be a tautology."⁴³⁶ He is right because there is hardly any constitutionalism that could be described as "undemocratic constitutionalism". The practice of modern democracy is a fundamental constituent of constitutionalism. The two are inseparable. Constitutional democracy has been described as more than merely a concept, which may be realized by provisions in a constitution.⁴³⁷ Constitutional democracy is said to be:

... a way of life based on tradition, habit, national attitude and a democratic culture—a culture that regards the constitution as something inviolable and above political struggle for power. Such a democratic culture values fair play, mutual tolerance and rules, which promote acceptance and respect for the wishes of the people as the ultimate authority for government⁴³⁸

⁴³³ International IDEA *Democracy in Nigeria* 1.

⁴³⁴ *A-G Abia State v A-G Federation* (2006) 16 NWLR (Pt. 1005) 265 at 420–421 paras H-A.

⁴³⁵ Mangu AMB "Constitutional Democracy and Constitutionalism in Africa" in (2006) *Conflict Trend* 3-8.

⁴³⁶ *Supra*.

⁴³⁷ International IDEA *Democracy in Nigeria* 25.

⁴³⁸ *Supra*.

As militarism dismantled and destroyed the structures of constitutionalism, it did the same to constitutional democracy. And just as military rule is incompatible with constitutionalism; it also negates everything that constitutional democracy represents. Granted that Nigeria has transitioned from military rule to civilian government, this transition did not automatically translate into constitutionalism and constitutional democracy. Demilitarization involves not only a structural but a mental process. It was argued that: “The process of demilitarization of Africa will be a long and complex one, for it does not just mean a simple transfer of power from a military to a civilian government. It means, above all, a demilitarization of minds.”⁴³⁹

The psyche and attitude of the leaders and the ruled must change. Dialogues, discussions, debates, bargaining and persuasions must be elevated over the use of force or might. The practice of constitutionalism and constitutional democracy is more difficult than merely changing a government from military to civil rule. It has been advocated that “the new struggle for process-led constitutionalism represents Africa’s second liberation, second in significance only to the anti-colonial struggle”.⁴⁴⁰

⁴³⁹ Cervenka “The effect of militarization on human rights in Africa” 143.
⁴⁴⁰ International IDEA Democracy in Nigeria 143.

3.3 Constitutional protection of civil and political rights

Consequent upon the relationship between constitutionalism and constitutional democracy, they have some common constituents and one of them is the constitutional guarantee of fundamental rights. Nigeria is also a party to several international covenants, treaties and conventions on human rights. It ratified or acceded to some of the instruments⁴⁴¹ and some it merely signed.⁴⁴² There are few instruments or protocols in respect of which the country took no action whatsoever.⁴⁴³ In examining the protection of human rights, a broad categorization of civil and political rights; and economic, social and cultural rights is adopted. The choice of this categorization had earlier been explained in this text. This segment deals with the constitutional protection of civil and political rights.

Under civil and political rights, the text considers the right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to privacy and family life, right to freedom of thought, conscience and religion, freedom of movement, freedom of expression, right to freedom from discrimination, freedom of association and right to vote.

When Nigeria became independent on 1 October 1960, fundamental rights were entrenched in chapter III of the Independence Constitution. The provisions were retained in the 1963, 1979, 1989, 1995 Constitutions and now the 1999 Constitution. The fundamental rights so guaranteed are part of human rights. It had earlier been argued that the guarantee of rights is a notable constituent of constitutionalism.⁴⁴⁴

⁴⁴¹ These include Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of all forms of Discrimination against Women; Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women; International Convention on the Elimination of all Forms of Racial Discrimination and Convention on the Rights of the Child.

⁴⁴² These include Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children Child Prostitution and Child pornography.

⁴⁴³ These include Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Optional Protocol to the International Covenant on Civil and Political Rights; and Optional Protocol to the International Covenant on Civil and Political Rights and Second Optional Protocol to the International Covenant on Civil and Political Rights.

⁴⁴⁴ See chapter 2 section 2.3.

3.3.1 Right to life

Perhaps to underscore the importance of the right to life, it is the first in the list of fundamental rights guaranteed by the 1999 Constitution. While other fundamental rights are equally as important as the right to life, it is also true that the enjoyment of other rights is conditional upon the right holder being alive. Right to life is guaranteed by section 33 of the 1999 Constitution and is subject to some conditions like death sentence imposed by a court.

Deprivation of life in the execution of a sentence of death will arise where, for example, a person is convicted of murder by a court. Under the Criminal and Penal Codes, the offence of murder is punishable by death.⁴⁴⁵ The offences of armed robbery⁴⁴⁶, treason⁴⁴⁷ and instigation of invasion of Nigeria⁴⁴⁸ are all punishable upon conviction by death. Indeed, under the penal law, it is unlawful to kill any person unless such killing is authorized or excused by law.⁴⁴⁹ Section 33(2)(a) of the 1999 Constitution excuses death that resulted in the cause of self defence against unlawful violence or the defence of property in “such circumstances as are permitted by law”. The law will excuse killing that results from self defence against unprovoked assault⁴⁵⁰ and against provoked assault.⁴⁵¹ A person who is aiding in self-defence of another is also entitled to same protection.⁴⁵² A person who is defending his/her dwelling-house, is entitled to defend it to the extent of killing the aggressor, if such act becomes necessary to repel the attacker.⁴⁵³

A killing will be justified or excusable under section 33(2)(b) of the 1999 Constitution when it is done in order to lawfully arrest a person or prevent someone in lawful custody from escaping.⁴⁵⁴ The right to life is, therefore, subject to a lot of limitations in Nigeria. Nigeria not only signed and ratified the African Charter on Human and Peoples’ Rights, it went on to domesticate it as part of its municipal law.⁴⁵⁵

⁴⁴⁵ See section 319 of the Criminal Code Act, Cap C 38, LFN 2004. See also section 221 of the Penal Code Laws of Northern Nigeria, Cap 89, 1963.

⁴⁴⁶ Robbery and Firearms (Special Provisions) Act Cap 398, Laws of the Federation 1990.

⁴⁴⁷ Section 37 of the Criminal Code.

⁴⁴⁸ Section 37 of the Criminal Code.

⁴⁴⁹ Section 306 of the Criminal Code.

⁴⁵⁰ Section 286 of the Criminal Code.

⁴⁵¹ Section 287 of the Criminal Code.

⁴⁵² Section 288 of the Criminal Code.

⁴⁵³ Section 282 of the Criminal Code.

⁴⁵⁴ Most of the extra-judicial killings carried out by the police are predicated on claims that the victims were resisting lawful arrest or escaping from lawful custody.

⁴⁵⁵ This was done by the promulgation of The African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act which is now Cap A9 Laws of the Federation of Nigeria 2004.

The African Charter in article 4 recognizes that no person may be arbitrarily deprived of his life. Though the country ratified the ICCPR, it is yet to ratify the Second Optional Protocol to the ICCPR which provides for the total abolition of the death penalty; but allows States parties to retain death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol. This work did not find any official reason why Nigeria did not ratify the protocol in spite of its ratification of the African Charter. That failure may be on tardiness. Amnesty International argues that death penalty in Nigeria constitutes a violation of fundamental human rights that is, the right to life and the right not to be subjected to cruel, inhuman and degrading treatment.⁴⁵⁶ Much as it is legal to execute a person under sentence of death, the Supreme Court has held that it is clearly a breach of the right to life to execute a convict before his appeal is determined.⁴⁵⁷ The South African Bill of Rights, which is part of the 1996 Constitution,⁴⁵⁸ and which Bill is an undisputed model in Africa, provides in section 11 that “Everyone has the right to life”.

The provision is short, apt and clear. Under section 37 of the South African Constitution there may be derogation from the Bill of Rights during a state of emergency. But the Table of Non-Derogable Rights, makes it clear that even in such situation, the right to life and human dignity are entirely non-derogable. New Zealand’s Bill of Rights Act 1990⁴⁵⁹ in section 8 states that: “No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice”. Similarly, the Canadian Charter of Rights and Freedom 1982 provides in article 17 that: “Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”⁴⁶⁰ The phrase “principles of fundamental justice” is lacking in specificity and is imprecise. It is speculative. According to Amnesty International,⁴⁶¹ an organization that had been very active since October 2003 in campaigning for the abolition of the death penalty in West Africa, “the death penalty is the ultimate cruel, inhuman and degrading punishment. It violates the right to life. It is irrevocable and can be inflicted on the innocent”. If death penalty is imposed by a constitution under certain circumstances as derogation from the right to life, it will not be correct to say as Amnesty has done, that it violates the right to life.

⁴⁵⁶ Amnesty International ‘*Nigeria: The death penalty and women under the Nigerian Penal System*’ Press Release AI Index: AFR 44/007/2004 10 February 2004.

⁴⁵⁷ *Nosiru Bello v Attorney-General Oyo State* (1985) 5 NWLR (Pt 45) 825.

⁴⁵⁸ Constitution of South Africa of 1996.

⁴⁵⁹ New Zealand Bill of Rights Act 1990.

⁴⁶⁰ Canadian Charter of Rights and Freedom enacted as a Schedule B to the Canada Act 1982, c. 11, which came to force on 17 April 1982.

⁴⁶¹ Amnesty International “West Africa: Senegal abolishes the death penalty, who’s next?” Press Release AI index: AFR 49/001/2004 10 December 2004.

The fact that death penalty had been inflicted on the innocent is sadly true. Like in all cases of punishment for crime, the risk of executing the innocent pursuant to death penalty cannot be entirely eliminated. According to Amnesty,⁴⁶² since 1973, eight hundred and eighteen prisoners have been released from the death row in USA when evidence later emerged establishing their innocence of the crimes for which they were sentenced to death. In 2004, there were five of such cases. Some of them were almost executed after spending many years under death sentence. Common features in their cases include prosecutorial or police misconduct, the use of unreliable witnesses, confessions and sloppy defence representation.

Nigeria falls into the category of countries that Amnesty classified as “retentionists” in respect of death penalty. This means countries and territories which retain the death penalty for ordinary crimes. In this group are many of the countries in Africa.⁴⁶³ The story is not entirely depressing in Africa. Under the “abolitionist for all crimes”, that is a country whose laws makes no provision for the death penalty for any crime; there are 12 African countries in this category including South Africa, Senegal, Cape Verde, Cote d’Ivoire and Djibouti.⁴⁶⁴ There is yet another category called “abolitionist in practice”. This refers to a country which retained the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice, the reason being that it had not executed anyone during the past ten years and is believed to have a policy or established practice of not carrying out executions.⁴⁶⁵ There are 13 African countries in that category.

In spite of the fact that death penalty for people younger than 18 years is outlawed under international human rights law,⁴⁶⁶ some countries still execute child offenders. Amnesty reported⁴⁶⁷ that between 1990 and 2003, it documented 39 executions of child offenders in 8 countries: China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, the USA and Yemen.

⁴⁶² Amnesty International ‘‘Facts and Figures on Death Penalty’’ <http://web.amnesty.org/pages/deathpenalty-facts-eng> [accessed on 13 March 2005].

⁴⁶³ Amnesty International ‘‘Death Sentences and Executions in 2004’’ <http://web.amnesty.org/pages/deathpenalty-sentences-eng> [accessed on 13 March 2005].

⁴⁶⁴ *Supra.*

⁴⁶⁵ *Supra.*

⁴⁶⁶ The Convention on the Rights of the Child (CRC), Article 37 provides that ‘‘no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment’’. See also article 6.

⁴⁶⁷ Amnesty International ‘‘Executions of Child Offenders Since 1990’’ <http://web.amnesty.org/pages/deathpenalty-children-stats-eng> [accessed on 13 March 2005].

During the period and precisely in 1997, Nigeria executed one child offender, Chiebere Onuoha who was said to be 15 at the time of the offence, but was 17 at the time of execution on 31 July 1997.⁴⁶⁸ Within the period covered by Amnesty, there were 19 child offenders who were executed in the USA; 18 of them were 17 years old at the time of the offence; and one was 16 at the time of the offence.⁴⁶⁹

Section 33(1) of the 1999 Constitution which prescribed death penalty made no distinction between young persons under the age of 18 years and adults.⁴⁷⁰ This is incompatible with the country's obligations under article 37 of the Convention on the Rights of the Child, article 6(5) of the International Convention on Civil and Political Rights and Article 5(3) of the African Charter on the Rights and Welfare of the Child, all ratified by Nigeria.⁴⁷¹

At the 38th session of the United Nations Committee on the Rights of the Child, the Committee *inter alia* made this concluding observation on Nigeria: "In the context of the respect for the inherent right to life of a person under 18, the committee is seriously concerned about the applicability of the death penalty to persons below 18 under the Shariah law, and emphasizes that such a penalty is a violation of articles 6 and 37 (a) of the Convention."⁴⁷² The Committee further urged Nigeria to abolish by law the imposition of the death penalty for crimes committed by persons under 18 years of age and replace the already issued death sentences for persons under 18 with a sanction in accordance with the Convention.⁴⁷³ Having regard to the clear provisions of section 33(1) of the 1999 Constitution which guarantees a qualified right to life and provides for the deprivation of life in some circumstances, it will be futile to argue that death penalty in Nigeria is unconstitutional. After conceding that the constitutional guarantee of the right to life is subject to an explicit exception in favour of a death sentence ordered by a court upon conviction for a criminal offence, Nwabueze,⁴⁷⁴ still contends that this fact did not foreclose a consideration of the constitutionality of death penalty.

⁴⁶⁸ This negates Article 37 of CRC.

⁴⁶⁹ This contravenes Article 37 of CRC.

⁴⁷⁰ It used the words "Every person".

⁴⁷¹ Since the inception of civilian administration in Nigeria in 1999, condemned prisoners have hardly been executed.

⁴⁷² United Nations "Convention on the Rights of the Child" Committee on the Rights of the Child, Concluding Observation on Nigeria CRC/15/Add.257 of 13 April 2005.

⁴⁷³ *Supra*.

⁴⁷⁴ Nwabueze BO, *The Presidential Constitution of Nigeria* (1982) 411.

Nwabueze then argued with reference to a similar provision in the 1979 Constitution, that it may be concluded that a law authorizing killing as a punishment for crime arising from conviction and sentence by a court is unconstitutional and void if the death penalty is an inhuman or degrading punishment in all cases or in respect of a particular offence or because of the method or manner by which it is inflicted.⁴⁷⁵

In the case of *Onuoha Kalu v The State*,⁴⁷⁶ it was contended that the death penalty prescribed under section 319(1) of the Lagos State Criminal Code⁴⁷⁷ is inconsistent with the Constitution of 1979, section 30(1).⁴⁷⁸ Iguh J.S.C who delivered the lead judgment in the Supreme Court held as follows:

Besides, the right to life prescribed under the said Section 30(1) of the Constitution is a qualified right. It is not an unqualified right. It is also not in dispute that the imposition or execution of the death sentence in Nigeria is not subjected to any form of arbitrary, discriminatory or selective exercise of discretion on the part of any Court or any other quarters whatever. Therefore I entertain no doubt that the death penalty in Nigeria can by no stretch of imagination be said to be invalid or unconstitutional.⁴⁷⁹

The problem with the death penalty is that the justice system is far from being perfect; in many countries like Nigeria, it is flawed. A victim of such a system, who was sentenced to death and subsequently executed, would never have his right restored if he was later proved to be innocent. This happened to Sakae Menda was sentenced to death after a trial in Japan. Six times he was retried, before he was finally found not guilty.⁴⁸⁰ It has been rightly argued that “the death penalty is so horrified, the chances of error are so high, the death row phenomena is so repugnant, and the impossibility of correction is so draconian that it is simply unacceptable...”⁴⁸¹

In October 2004, the National Study Group on Death Penalty, charged with conducting a national debate in Nigeria on the death penalty, presented its report to the Federal Government. In his speech on the occasion of the presentation of its report, the Group’s chairperson called on the Federal Government to impose a moratorium on executions and commute to life imprisonment the sentences of death on prisoners whose appeals have been determined.⁴⁸²

⁴⁷⁵ Nwabueze BO *The Presidential Constitution of Nigeria* 412.

⁴⁷⁶ (1998) 13 N.W.L.R. (Pt 583) 531.

⁴⁷⁷ All other States in Southern Nigeria have similar provisions in their respective Criminal Code Laws.

⁴⁷⁸ The provision of section 30 (1) of the 1979 Constitution is same as section 33(1) of the 1999 Constitution.

⁴⁷⁹ The Court of Appeal was confronted with a similar issue in *Adeniji v the State* (2000) 2 N.W.L.R (Pt 645) 354 and it simply followed the decision of the Supreme Court in *Onuoha Kalu v the State supra* and held that the death penalty in Nigeria is neither invalid nor unconstitutional.

⁴⁸⁰ Maiko Taqusari “Death Row Conditions in Japan” in *Proceedings of International Conference on Human Rights and Prison Reform National C.U.R.E. (Citizens United for Rehabilitation for Errants)* (2001) 1.

⁴⁸¹ Rick Prashaw “Canadian Abolition and Extradition Law” in *Proceedings of International Conference supra* 9

⁴⁸² Report of the National Study Group on the Death Penalty (October 2003).

The chairperson relied on the aphorism that whoever is going to take the life of a person must first ensure that the person receives justice. It was the then President Olusegun Obasanjo, who was known to be personally opposed to the death penalty, that launched a national debate on the issue in November 2003.

When Nigeria returned to democracy in 1999, it was expected that civil and political rights, which were substantially eroded and compromised under successive military regimes, would be fully restored. After nearly ten years of democracy, rights violation is still part of the national life. In June 1999, barely a month after President Olusegun Obasanjo came to power, he appointed a Commission known as Human Rights Violations Investigation Commission chaired by a retired and highly respected Supreme Court Justice, Chukwudifu Oputa. It was mandated to, among others, investigate mysterious deaths, assassinations and other human rights abuses during the period January 1966–June 1998, and to make recommendations to redress past injustices and to prevent violations in future. The Commission which later was widely referred to by Nigerians as “Oputa Commission” or “Oputa Panel” was modeled after the South African Truth and Reconciliation Commission. The expectations of Nigerians were very high. A lot of revelations on extra-judicial killings in Nigeria were made during the public sittings of the Panel. The Commission concluded its assignment and made recommendations to the Federal Government.

Regrettably, consequent upon a judicial challenge by former Heads of State, General Muhammadu Buhari and General Ibrahim Babangida, the reports were neither officially released nor have the recommendations been implemented or a White Paper released. But unofficially, the reports are available. They have been serialized in some Nigerian newspapers and they are also available on the internet.⁴⁸³ The Oputa Commission had this to say about military rule and human rights, among others:

Military rule is absolute rule. It subverts and undermines the institutions of the state, imperceptibly initially but surely and gradually. It leads inevitably to moral and political corruption alongside the decay of time-honoured loyalties and values as well as institutional decay. In due course and as a manifestation of this deepening decay, cruelty and murder become the norms of governance.⁴⁸⁴

⁴⁸³ [Http://www.dawadu.com/oputa1.htm](http://www.dawadu.com/oputa1.htm); <http://www.nigerianmuse.com/nigeriawatch/oputa>. [accessed 13 February 2010].

⁴⁸⁴ Human Rights Violations Investigation Commission Report (Conclusions and Recommendations) May 2002, 14, Para 1. 52. At the end of our review of the human rights situation in democratic Nigeria, it will be possible to draw a conclusion as to whether, for example, cruelty and murder are no more “norms of governance”.

In May 1999 and October 2001, during the Obasanjo administration, there were massacres and gross violations of human rights in Odi, Bayelsa State and Zaki-Biam and other locations in Benue State respectively. This was how Human Rights Watch in its report, summarized the massacres:⁴⁸⁵

On October 22 to 24 2001, several hundred soldiers of the Nigerian army killed more than two hundred unarmed civilians and destroyed homes, shops, public buildings and other property in more than seven towns and villages in Benue State, in central-eastern Nigeria. The small town of Gbeji was among the worst-hit locations: more than 150 people were killed there alone, while more than twenty were killed in the larger market town of Zaki-Biam, and others were killed in several other villages. It was a well-planned military operation, carried out in reprisal for the killing of nineteen soldiers in the area two weeks earlier, which was attributed to members of the Tiv ethnic group. Those who died at the hands of the military were victims of collective punishment, targeted simply because they belonged to the same ethnic group... The events in Benue were strikingly reminiscent of a military reprisal operation which took place two years earlier, in Odi, in Bayelsa State in the south of Nigerian.

Nigeria's human rights record remains poor. The Government continues to abuse the rights of the people. Security forces are still committing extrajudicial killings.⁴⁸⁶ In *Agbo v The State*,⁴⁸⁷ a police constable disembarked from the motor vehicle in which he was traveling and went over to the other side of the road, where the deceased person's vehicle was properly parked. The police officer intended to ask the deceased why he blocked the road with his motor vehicle. An argument ensued between the police officer (appellant) and the deceased during which the appellant shot the deceased with pistol which the appellant had in his possession. While affirming the death sentence on the appellant and dismissing his appeal, Justice Muukhtar held:

Situations like this whereby policemen rashly bring out their guns, (albeit to merely threaten or frighten citizens) is rapidly becoming rampant. They are meant to use the guns to safeguard the lives of the citizenry they are paid to protect, but the reverse is the case. A policeman will not hesitate to pull the trigger of his gun at the slightest provocation, and would indeed do that with relish and reckless abandon, not caring whether the consequence of his act will be fatal. The incident in the instant case is a *locus classicus*. A law enforcement agent who is supposed to bring sanity and order on the road brings out his gun and fires it just because a driver obstructs his right of passage (that is even if there was an obstruction, as the evidence in court is that there wasn't.) In fact the mere fact that he deemed it necessary to bring out a gun from wherever he had kept it is enough act of recklessness, even if no shot was fired, and in this case there is ample evidence that it was. I believe such rash acts must be stopped to prevent innocent human lives from being wasted.⁴⁸⁸

⁴⁸⁵ Human Rights Watch "Nigeria Military Revenge in Benue: A Population Under Attack", April 2002, Vol 14, No 29A).

⁴⁸⁶ US Department of State, "Nigeria Country Reports on Human Rights Practices-2004" 28 February 2005, 1-2. US Department of State, "Nigeria Country Reports on Human Rights Practices-2005" 8 March 2006, 1-2; and US Department of State, "Nigeria Country Reports on Human Rights Practices-2006", 6 March 2007, 1-2. An NGO, Civil Liberties Organization described the Obasanjo government as "a dictatorship of a civilian variant": The Guardian, Monday, 20 December 2003, 3.

⁴⁸⁷ (2006) 6 NWLR (Pt 977) 545.

⁴⁸⁸ *Supra* at 586 paras A-E

In 2003, the convicted former Inspector-General of Police, Tafa Balogun gleefully announced that from March to November 2002, the police killed more than 1,200 criminals.⁴⁸⁹ It must be noted that those killed were mere criminal suspects; not people tried and sentenced to death. On 25 November 2005, a police sergeant shot and killed a surveyor, one Bartholomew Ochomah at a bus stop.⁴⁹⁰ On 8 December 2005, a police constable, beat to death a 42 year old Lagos based lawyer, Emma Uzoka, following a minor disagreement.⁴⁹¹ The killings cut across all classes of people; nobody is spared no matter his status.

It is not only the security agencies that demonstrate lack of value for life, the people also do. On 20 February 2004, in Asaga Community, Ohafia, Abia State, Mr Ukabi Njoku, a 77 year old man was beaten to death on the ground that he was a wizard. To the utter disgust of many Nigerians, on Monday, 17 October, 2005, a privately owned television station, Channels TV, aired the sadistic, callous and the dehumanizing killing of an 11 year old boy called Samuel. He was accused of attempting to kidnap a child. He was mercilessly beaten and burnt alive by a crowd of people. Until he finally died, the minor continued to protest his innocence but to no avail.⁴⁹²

When people resort to jungle justice, it is an indication of lack of confidence in the justice system or a failure of the justice system. In all cases reported, the perpetrators of the dastardly acts were hardly arrested and prosecuted. Vigilante groups and ethnic militias were also responsible for unlawful detentions, acts of violence, torture and killing of persons. In the South West of Nigeria, there is the Odua People's Congress; South East, the Movement for the Actualization of the Sovereign State of Biafra (MASSOB) and the Egbesu Boys in the Niger Delta Area.⁴⁹³

A vigilante group in Sandiya village, Konduga, Local Government Council Bornu State, on 6 January 2004, killed seven suspected religious fanatics. The Bornu State Commissioner of Police, Basiru Azeez was reported to have commended the village vigilante for their "gallantry". He further added that their action "saved the state and the country from embarrassment and grief."⁴⁹⁴

⁴⁸⁹ US Department of State, "Nigeria Country Reports on Human Rights Practices—2003" 25 February 2005, 2. Indeed in a chart which was presented to Human Rights Watch by the Inspector-General of Police in July 2004 in Abuja, 834, 821, 2021 and 3,100 armed robbery suspects were respectively killed in 2000, 2001, 2002 and 2003. Between January-March 2004, 422 were killed. See Human Rights Watch, "Rest in Pieces Police Torture and Death in Custody in Nigeria" Vol 17, July 2004, 15.

⁴⁹⁰ *Daily Sun*, Thursday, 22 December 2005, 14.

⁴⁹¹ *Daily Sun*, Monday, 12 December 2005, 7.

⁴⁹² *ThisDay*, Tuesday, 25 October 2005, 37.

⁴⁹³ Human Rights Watch, "Nigeria Human Right Development" World Report 2002 <http://www.hrw.org/wr2k2/africa8.htm> [accessed 20 November 2005].

⁴⁹⁴ *The Guardian*, Wednesday 7 January 2004, 4

What is responsible for the prevalence of police brutality, extortion and killings of innocent people? A Senate Committee that investigated the killing of some people on 30 June 2003 during a labour protest, argued that there had not been any real difference in operational style between the colonial police force that was established for the sole purpose of subjugating the Nigerian people or coercing them into submission, and the post-independence Nigerian Police.⁴⁹⁵ Another sad commentary on Nigerian human rights record, is the issue of political assassinations and violence. The most embarrassing was the killing of the then Justice Minister and Attorney-General, Bola Ige (SAN) in 2002. There have been other high profile killings.⁴⁹⁶ The US State Department while reviewing Nigerian human rights record in 2004, said: “There were politically motivated killings by the Government or its agents.”⁴⁹⁷ Similarly, in an editorial, the Daily Independent said “that instances abound where parties or factions loyal to those in the corridors of power are aided and abetted to commit these dastardly acts of political killings with impunity.”⁴⁹⁸ The persistent violation of the right to life in the country is a negation of constitutionalism.

3.3.2 Right to dignity of human person

Closely related to the right to life, is the right to dignity of human person. Life is worth nothing to a victim of torture, inhuman or degrading treatment. Section 34(1) of the 1999 Constitution provides for the right to dignity of human person. Section 34(2) goes on to provide that “forced or compulsory labour” does not include the following: any labour that is required in consequence of the sentence or order of a court; any labour required of members of the armed forces of the federation or the Nigerian Police Force in pursuance of their duties as such; in the case of persons who have conscientious objections to service in the armed forces of the federation, any labour required instead of such service and any labour required which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community. “Forced or compulsory labour” also does not include any labour or service that forms part of normal communal or other civic obligations for the well-being of the community; such compulsory national service in the armed forces as may be prescribed by an Act of National Assembly or such compulsory national service which forms part of the education and training of citizens of Nigeria as may be prescribed by an Act of the National Assembly.

⁴⁹⁵ *The Vanguard*, February 31, October 2003, 21.

⁴⁹⁶ On 22 February 2003, Ogbonnaya Uche, a Senatorial Candidate of All Nigerian Peoples Party (ANPP) was shot and killed; on March 2003, Chief Marshal Harry, a National Vice Chairman of the ANPP, who was formerly a prominent member of the ruling Peoples Democratic Party (PDP) was killed. Chief A.K. Dikibo who succeeded Marshal Harry as PDP National Vice Chairman for South - South was also killed. The list is endless.

⁴⁹⁷ US Department of State, “Nigeria Country Reports on Human Rights Practices —2004” 28 February 2005, 2.

⁴⁹⁸ *Daily Independent* (Editorial) “Resurgence of Political killings” 29 November 2005, B4. See also *The Punch* (Editorial) “Assassinations and Political Violence”, 6 January 2005, 16 wherein it was said: “With recent developments, there is a sense of foreboding in the air. The brazen recourse by the political class to kill and maim in order to get to office can be traced to the flawed perception of politics as the shortest route to wealth. Because most of the politicians loot and get away with it, those shut out are embittered and want to participate by all means, while those in power plot to remain”.

The words “torture”, “inhuman”, “degrading”, “slavery”, “servitude” are not defined in section 34 or any section of the 1999 Constitution. In article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Torture” is defined as:

... any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

According to Jim Murdoch,⁴⁹⁹ the distinction between “torture”, “inhuman” and “degrading treatment or punishment” reflects deference in the intensity of suffering and assessment of state purpose as determined by contemporary standards. The distinction would then appear to be a function of the degree or quantum of pain or suffering inflicted on a person.

Tobi J.C. A (as he then was) had opportunity in *Uzoukwu v Ezeonu II*⁵⁰⁰ to define the key words in section 30(1) of the 1979 Constitution and which provisions are the same with those of section 34(1) of the 1999 Constitution. The word “dignity” according to him, as used in the section, “conveys the meaning or connotation of being degraded at least in ones exalted estimation of his social status or societal standing”.⁵⁰¹ The word “torture” he said, “etymologically means to put a person to some form of pain which could be extreme. It also means to put a person to some form of anguish or excessive pain”.⁵⁰² He went on to state that it could be physical brutalization of the human person; and it could also be mental torture in the sense of mental agony or mental worry. This covers a situation where the person’s mental orientation is very much disturbed that he cannot think and rationally do things, as the rational human being that he is.⁵⁰³ In respect of the word “inhuman”, Justice Tobi said that it is the opposite of the word “human”. It then follows, he said, that “an inhuman treatment is a barbarous, uncouth and cruel treatment; a treatment which has no human feeling on the part of the person inflicting the barbarity or cruelty”.⁵⁰⁴ For “degrading treatment”, Justice Tobi said that it has the element of lowering the social status, character, value or position of a person. In other words, the victim develops some form of complex which is not dignifying at all.⁵⁰⁵

⁴⁹⁹ Murdoch J, “Liberty and Security of a Person in a State under the Rule of Law” being the text of a paper delivered at the British—Nigeria Law Week held on 23-27 April, 2001 Abuja, Nigeria.

⁵⁰⁰ (1991) 6 N.W.L.R. (Pt 200) 708.

⁵⁰¹ *Supra* 778.

⁵⁰² *Supra*.

⁵⁰³ *Supra*.

⁵⁰⁴ *Supra*.

⁵⁰⁵ *Supra*.

In defining “slavery”, Justice Tobi opined that it is “ the state of being held as a slave. It also conveys the institution of ownership of slaves: a state of being in drudgery. The word ‘servitude’ conveys generally similar meaning. It also means subjecting a person to compulsory labour or subjecting a person to irksome conditions like a slave”.⁵⁰⁶

Against the background of these definitions, the provisions of section 34(1) of the 1999 Constitution can be appreciated. A punishment that is unduly excessive may be by its length or severity or one that is very harsh having regard to the offence for which it is prescribed, may amount to torture. Equally, a punishment that is totally out of tune with contemporary society may be regarded as being offensive to human dignity.⁵⁰⁷ Infliction of punishment selectively or discriminatorily against a group or class of people like minorities or the poor will be cruel or amount to torture.⁵⁰⁸

The legal status of prisoners continues to present some problems in Nigeria. At some point, America and England had similar problems. In 1871, an American judge in the State of Virginia, Judge Christian described prisoners as being civilly dead and as slaves of the State.⁵⁰⁹ What that meant was that prisoners lost all legal identity.⁵¹⁰ When their liberty was restored after release from prison, convicted felons at the time had no right to vote, hold office, make contracts, own property or compose a will. Those rights, and many more, were forfeited to the State. These represented the situation in the 1880’s in USA.⁵¹¹ In England, as late as 1982, Lord Wilberforce asserted that under the English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which were not taken away expressly or by necessary implication by the fact of his imprisonment.⁵¹²

In *Nemi v A-G Lagos State*,⁵¹³ the Court of Appeal had to consider whether a condemned prisoner has a right to life or whether he is entitled to a remedy against inhuman or degrading treatment prescribed by the constitution. Therein, it was *inter alia* contended on behalf of the state that: “Simply put, a condemned prisoner has no right to life. There is no provision either by legislative action or judicial interpretation allowing a condemned convict to enforce any fundamental rights after conviction and sentence. He has no guaranteed right to life. He is as good as dead”.⁵¹⁴

⁵⁰⁶ *Uzoukwu v Ezeonu II* (1991) 6 NWLR (Pt 200) 708 788.

⁵⁰⁷ *Nwabueze The Presidential Constitution of Nigeria* 413.

⁵⁰⁸ *Furman v Georgia*, 408 U.S. 238 at 283 (1972).

⁵⁰⁹ *Ruffin v Commonwealth*, 62 Va (21 Gratt) 790, 796 (1871).

⁵¹⁰ See Cal. Pen Code Sec. 673, 674 (Deering), 1886.

⁵¹¹ Cummins E, “Prison Radicalism and the Return of civil Death in California: where are we now?”

http://www_oah.org/meetings/1997/cummins.htm [accessed on 12 March 2005].

⁵¹² *Raymond v Honey* (1982) 1 All ER 756; there is a similar decision in the South African case of *Minister of Justice v Hofineyer* (1993) 3 SA 131 (AD).

⁵¹³ *Nemi v Attorney-General Lagos State* (1996) 6 NWLR (Pt 452) 42.

⁵¹⁴ *Supra*.

The submission is simply shocking. Justice Uwaifo rightly faulted that submission in his lead judgment where he said:

The aspect that a condemned prisoner has no life, cannot enforce any fundamental rights and is therefore as good as dead is quite perturbing. It needs some questions and comments. Does it mean that a condemned prisoner can be lawfully starved to death by the prison authorities? Can he be lawfully punished by a slow and systematic elimination of his limbs one after another, until he is dead?⁵¹⁵

Justice Uwaifo further held that the sentence of death by hanging or execution cannot be done in a manner that contravenes the constitution. That there is nothing in sections 30(1) and 42(1)(2) of the 1979 Constitution⁵¹⁶ to suggest that a condemned prisoner may be inflicted with any form of punishment that may amount to torture or to inhuman or degrading treatment. There are two groups of people whose right to dignity of human person is the subject of gross violations in Nigeria. They are prisoners and widows. Prison and prison conditions remain sub-human, harsh and life threatening in Nigeria⁵¹⁷ like in most if not all African countries.⁵¹⁸

A study carried out by a non-governmental organization, Civil Liberties Organization established a graphic pattern of the violation of the right of prisoners and detainees in respect of torture, inhuman and degrading treatment.⁵¹⁹ In another report, it was found that “once inside their barracks or station, soldiers, security agents and police often used torture techniques to extract confessional statements from suspects and detainees”.⁵²⁰

Schabas concedes that regardless of international abolitionist trends, it is “still too early to say that capital punishment is deemed contrary to customary international human rights law”.⁵²¹ In his view too, prolonged stay on death row may violate human rights. In *Ogugu v The State*,⁵²² the appellant among others, contended that having stayed in prison confinement under a sentence of death for an unreasonable length of time, indeed from 28 February 1986 up to the hearing of his appeal in 1994, that it would amount to inhuman and degrading treatment contrary to the 1979 Constitution⁵²³ to uphold and execute the sentence of death passed on the appellant.

⁵¹⁵ *Nemi v Attorney-General Lagos State* (1996) 6 NWLR (Pt 452) 42. His Lordship relied on the Jamaican case of *Abbott v A-G Trinidad and Tobago* (1979) 1 WLR 1342.

⁵¹⁶ Both provisions are respectively *in pari materia* with S. 33(1) and S. 46(1) of the 1999 Constitution.

⁵¹⁷ US Department of State “Nigeria Country Report on Human Rights Practices-2004” 28 February 2005.

⁵¹⁸ See Penal Reform International, *Prison Conditions in Africa Report of a Pan African Seminar Kampala Uganda 19-21 September 1996* (1997) 23-79 and 119 120.

⁵¹⁹ Odinkalu AC and Ehonwa OL, *Behind the Wall: A Report on Prison Conditions in Nigeria and the Nigerian Prison System*, (1991).

⁵²⁰ Gahia C *Human Rights in Retreat* (1993) 30.

⁵²¹ Schabas WA *The Death Penalty As Cruel Treatment and Torture: Capital Punishment Challenged in the World's Courts* (1996) 204.

⁵²² *Ogugu v The State* (1994) 9 NWLR (Pt. 366) 1.

⁵²³ Though the case was decided on the 1979 Constitution, but the pitiable state of the prisoner thereat is not different from the current situation under the 1999 Constitution. In the case of *Ekanem V.A.I.G.P.* (2008) 5 NWLR (Pt 1079)97, the Court of Appeal did not think that it is part of the human rights of a prisoner to be provided with sleeping materials.

The Supreme Court relying on a technical issue, declined to pronounce on the matter. It reasoned that the constitutional question would only arise on appeal after a High Court has considered and adjudicated on the issue and the Court of Appeal has confirmed or reversed the decision of the High Court.⁵²⁴ Prisons in Nigeria are like concentration camps and prisoners are treated as if they are civilly dead or slaves of the state. The prisons are over-crowded, dirty, unhygienic and there is total absence of the basic needs of life. Feeding is extremely poor, very low in nutrition and water is a luxury. In most of the prisons, unconvicted prisoners defecate in their cells using buckets as toilet seats and for the collection of waste.

Prison authorities do not think that prisoners are deserving of any right and they operate in total disregard or perhaps in ignorance of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR).⁵²⁵ The Rules, for example, make provisions for standards⁵²⁶ in respect of accommodation, space, hygiene generally, personal hygiene, clothing, bedding and food for prisoners. With regard to feeding prisoners, which is basic and fundamental, Rule 20(1) provides that: “Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quantity and well prepared and served”. Since the existence of the prison system in Nigeria, the feeding of prisoners has never come close to meeting the requirements of that rule. That is why it is very difficult to find healthy prisoners in the country and prisoners continue to die on regular basis.

Prisoners who are yet to be convicted and are merely detained to await their trials if ever they will come are in worse situation. Their conditions are totally dehumanizing and inhuman. This class of prisoners is notoriously called “Awaiting Trial Men” (ATM) in Nigeria. Their cells or rooms are grossly over-crowded at all times. Sometimes they have no opportunity of taking real bath in weeks. Some have spent up to 10 years or more in prison awaiting trial. In some cases, the periods they have spent in custody are far longer than the maximum sentences prescribed for the offences over which they were charged or detained. Sometimes, their case files simply disappear and could not be traced. The foregoing conditions constitute part of a larger regime of torture to which prison inmates are subjected.⁵²⁷

⁵²⁴ *Ogugu v The State* (1994) 9 NWLR (Pt. 366) 1at 30 para E.

⁵²⁵ These Rules were approved by the United Nations in July 1957. A further Rule was added in 1977 and it extended the application of the Rules to persons arrested or imprisoned without a charge. Such persons will include, for example, those detained over immigration matters and awaiting deportation. The Rules which are 95 in number are a set of guidelines and they constitute minimum standards which prison authorities are expected to comply with.

⁵²⁶ See Rules 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

⁵²⁷ Gahia, *Human Rights in Retreat* 124-125.

Furthermore, the prisoners are physically, emotionally and spiritually degraded. Absence of medical care and extreme congestion of the cells, ensured that the prisoners are ravaged with diseases and death. Female prisoners give birth in prisons. Minors and their convicted or detained mothers are locked up in prison cells. This contravenes Rule 23 of the UN Standard Minimum Rules. In February 2004, there was rampage and riot in Ikoyi Prisons, Lagos over the death of a sick prisoner. The death was alleged to be due to negligence on the part of prison authorities. In its editorial on the riot, *The Guardian* said:

...alarming is the revelation that the country's decrepit and over crowded prisons are currently holding some 47,000 detainees awaiting trial. Where prison space had hardly ever been enough to take the full number of regular convicts, this figure is said to represent about 70 per cent of Nigeria's overall prison population. Added to this is the very familiar sub-human condition of the prisons all over the country, a sad commentary on the nation's penal justice system.⁵²⁸

The Guardian further contended that the nation's devaluation of life and dignity is so commonplace that the detainee is a mere statistic. Another vulnerable group that is subjected to indignities and inhuman treatment are widows. These are in the nature of traditional and customary practices. In a study, Okoye came up with well documented instances of inhuman, torture, bestial and degrading practices against widows in many parts of Nigeria which vary from place to place. They include:⁵²⁹ prohibition against taking a bath except once a week; restriction to a particular place and a rule that she must be accompanied should she wish to answer the call of nature; compulsory loud wailing at periodic intervals; she is stripped of all her cloths and is girded with a narrow piece of cloth, that is, just around the loin. Mandatory shaving of her hair including the pubic hair; presumption that she killed her husband and must prove her innocence; the proof of innocence includes drinking the water used in bathing the body of her dead husband. If she survives this gruesome treatment, her innocence is proved. She must sit almost naked on the bare floor close to her dead husband and she is forced to sleep with the dead husband as one last sexual act.

These bestial practices are ordained and sanctioned by customs and traditions. However, the practice is declining. The foregoing dehumanizing practices violate the human rights of the widows under the constitution and International Human Rights Instruments. The irony is that widowers are not subjected to equal degrading treatment. According to Chuwkudifu Oputa, "on the death of a wife, the husband is not subjected to any of these sadistic and dehumanizing experiences.

⁵²⁸ *The Guardian* "The Riot at Ikoyi Division," Thursday (Editorial), 19 February 2005, 16.

⁵²⁹ Okoye PU *Widowhood: A National or Cultural Tragedy* (1995) 43-125; see also Oputa C, "Women and Children as Disempowered Groups" in Kalu A and Osinbajo Y (eds), *Women and Children under the Nigerian Law* (nd) 9.

In some cultures, there is fear that the spirit of the dead wife may return at night to share the marital bed with him. To avoid this happening, another woman is found to keep the bereaved husband company.”⁵³⁰ Apart from traditional practices, trafficking in persons constitutes a violation of the right to the dignity of the human person. The victims of human trafficking are mostly women and children. Trafficking in persons whether for the purpose of prostitution, has always been prohibited under the Nigerian law.⁵³¹ The practice had been going on for several years, but it was largely internal. Women and children were trafficked from rural and traditional communities to render cheap labour like domestic service and farm work.

Trafficking only acquired notoriety in recent years when it assumed external character. Nigerian women were trafficked to Europe, the Middle East and other countries in Africa for the purposes of forced labour, domestic servitude, prostitution, pornography and other forms of sexual exploitations. Those recruited for sexual exploitation were predominantly from Edo and Delta States and they were trafficked to Europe particularly Italy. Apart from being trafficked for forced domestic and agricultural labour, children were recruited for street peddling, as merchant traders and beggars within the country and to West and Central African countries.⁵³² Girls were additionally being trafficked for commercial sexual exploitations. There was the trafficking of women and children from such other African countries as Ghana, Mali, Togo and Benin and to Nigeria for domestic, agricultural labour and prostitution. “More startling”, according to Olateru-Olagbegi, “is the reported incidents of trafficking of women from Thailand in Asia to Nigeria under the guise of entertainment but in reality for prostitution and other sexual exploitation”.⁵³³

When trafficking became a national embarrassment due to its sophistication and external element, the Federal Government was compelled to start taking action to combat it. The existing legal provisions against trafficking were considered inadequate and antiquated. On 14 July 2003, the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003⁵³⁴ was enacted. It created a body called the National Agency for Prohibition of Trafficking in Persons (NAPTIP) whose primary responsibility was combating trafficking. Inadequate funding remained a major constraint to the functions of NAPTIP.

⁵³⁰ Oputa Human Rights Violations Investigation Commission Report (Conclusions and Recommendations).

⁵³¹ See Sections 223(2), 224 and 225A of the Criminal Code and Section 272, 273 275 and 276 of the Penal Code.

⁵³² US Department of State “Nigeria Country Reports on Human Rights Practices_2004” 28 February 2005 1-2

⁵³³ Olateru-Olagbegi B “Legal Issues in Trafficking in Women” being a paper presented at the British_Nigeria Law Week held on 23-27 April at Abuja, Nigeria.

⁵³⁴ Laws of the Federation of Nigeria 2004, Cap. T23.

The Act also created various offences against the exportation of children out of Nigeria and their importation for forced or seduced prostitution;⁵³⁵ the procurement of children through deception, coercion, debt bondage with intent that such person will be forced into illicit intercourse with another person;⁵³⁶ causing or encouraging the seduction or prostitution of any child;⁵³⁷ procuring any person for prostitution, pornography and use in armed conflict;⁵³⁸ organizing foreign travel for the promotion of prostitution;⁵³⁹ enticing or kidnapping a child or a person of unsound mind out of the custody of the lawful guardian;⁵⁴⁰ buying or selling a person for employment or immoral purpose;⁵⁴¹ trafficking in slaves⁵⁴² and dealing in slaves.⁵⁴³

This law is comprehensive enough to tackle the problem of trafficking in persons in the country. The down side is the lack of will to fully implement and enforce its provisions and avert the violation of the right to dignity of human person. Another issue relevant to the subject under consideration is whether corporal punishment on both adult and juveniles is unconstitutional for being inhuman and degrading? There is no decision yet on the issue in Nigeria. But in *Ex Parte Attorney v General, Namibia: In Re Corporal Punishment by Organs of State*,⁵⁴⁴ the Supreme Court of Namibia had to address the issue whether corporal punishment is in violation of article 8(2)(b)⁵⁴⁵ of the Constitution of Namibia 1990 which prohibits torture or cruel or inhuman or degrading treatment or punishment. The Court returned the verdict that it is unconstitutional.

In *S v Juvenile*,⁵⁴⁶ the Supreme Court of Zimbabwe in its majority decision held that the imposition of judicial corporal punishment on juveniles constitutes inhuman or degrading punishment in violation of article 15(1) of the 1979 constitution of Zimbabwe. On the other hand, the minority decision distinguished between adults and juveniles and decided that the imposition of corporal punishment on adults is not unconstitutional.

⁵³⁵ Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003, section 11.

⁵³⁶ *Supra* section 12.

⁵³⁷ *Supra* section 13.

⁵³⁸ *Supra* section 15.

⁵³⁹ *Supra* section 16.

⁵⁴⁰ *Supra* section 19.

⁵⁴¹ *Supra* section 21.

⁵⁴² *Supra* section 23.

⁵⁴³ *Supra* section 24.

⁵⁴⁴ (1991) (3) SA 76.

⁵⁴⁵ Article 8(2) provides that: “no person shall be subject to torture or cruel, inhuman or degrading treatment or punishment”.

⁵⁴⁶ [1989] CRC (Const) 74. See 2 RADIC (1990) 131. In *Jackson v Bishop*, 404 F2d 571 (CA8 1968) corporal punishment by flogging or canning was on account of the acute physical pain it inflicts on the victim, held to be degrading.

In spite of the constitutional prescription against torture, inhuman or degrading punishment in the Nigeria Constitution, some provisions in the Criminal Code⁵⁴⁷ and Penal Code⁵⁴⁸ sanction caning as a means of judicial punishment on adults and juveniles. The country has promulgated the Child Rights Act⁵⁴⁹ which is geared towards protecting the rights and welfare of the child. Section 221 of the Act prohibits corporal punishment as a form of judicial sanction or sentence. The government is yet to do anything to address those concerns and reconcile the contradictory provisions on corporal punishment between the Child's Rights Act, the Criminal Code, the Penal Code and the Children and Young Persons Act.

A UN Committee recommends that Nigeria should abolish or amend all legislation prescribing corporal punishment as a penal sentence, in particular the Children and Young Persons Act. That Nigeria shall expressly prohibit corporal punishment by law in all settings, in particular in the family, schools and other institutions: and conduct awareness-raising campaigns to ensure that positive, participatory, non-violent forms of discipline are administered in a manner consistent with the child's human dignity and in conformity with the Convention, especially article 28 (2) as an alternative to corporal punishment at all levels of society.⁵⁵⁰

Another disturbing practice is domestic violence which is widespread in Nigeria. There is no statutory definition of domestic violence in the country unlike South Africa. Section 1(viii) of South African Domestic Violence Act 116 of 1998, defines it as physical abuse, sexual abuse, economic abuse, psychological or emotional abuse, verbal abuse, intimidation, stalking, harassment, damage to property, entry into complainant's residence without consent (where parties do not leave together). It includes any other controlling or abusive behaviour towards the complainant. Spousal abuse particularly wife beating is the most common domestic violence in Nigeria. Women who invariably are the victims hardly complain. The police which ordinarily is inefficient, do not intervene in domestic disputes. Domestic violence against women and which violence or abuse may be psychological, physical, sexual, emotional or financial between family members, cuts across all strata of the Nigerian society and impacts negatively on the human rights of women.⁵⁵¹

⁵⁴⁷ See section 18 of the Criminal Code Act, Cap. C 38 Laws of the Federation of Nigeria 2004.

⁵⁴⁸ Section 55 of the Penal Code applicable to all Northern States until the adoption of Sharia Law by 12 States in the North in 2000.

⁵⁴⁹ Child Rights Act, Law No 23 of 2003.

⁵⁵⁰ UN Committee on the Convention on the Rights of the Child, Concluding Observation on Nigeria CRC/15/Add-257 of 13 April 2005 at para 39.

⁵⁵¹ In May 2003, a Bill on violence against women was introduced in the National Assembly. It aimed to prohibit forms of violence such as harmful traditional practices and domestic violence, including marital rape. Under the Bill, courts will be able to issue protective orders against abusers from approaching or threatening victims of violence. There will also be Commission on Violence Against Women, to include representatives from religious organizations and non-governmental women's organizations, would monitor implementation of the law and provide rape crises centres and shelters for victims. Laudable as the Bill is, it is yet to be passed by the National Assembly.

It has been argued⁵⁵² that despite its prevalence, domestic violence was not recognised as a human right violation partly because it occurs in the privacy of the home and family relations.⁵⁵³ The government lacks the will to combat the problem and does not even have a clear policy on how to deal with the situation. Female genital mutilation (FGM) which is harmful to the health of women is widely practiced in the country. Much as FGM is practiced in all parts of Nigeria, it is more prevalent in Southern and Eastern parts of the country. Women from Northern States are less likely to be mutilated; “however, those affected are more likely to undergo the severe type of FGM known as infibulation”,⁵⁵⁴ according to US Department of State. The practice is rooted on cultural and traditional beliefs that uncircumcised women are more likely to be promiscuous and unsuitable for marriage.⁵⁵⁵ Hence, the indigenous forms of FMG include the removal of the clitoris or *labia minora* to the excision of the clitoris and the most harmful, which is infibulation.⁵⁵⁶ FGM is an act of torture and it also amounts to a degrading and inhuman treatment.

3.3.3 Right to personal liberty

The right to personal liberty is guaranteed by section 35 of the 1999 Constitution. Section 35(1) thereof provides that: “every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law.” The circumstances when it will be constitutionally permissible to deprive a person of his liberty are as follows: in the execution of the sentence or order of a court on respect of a criminal offence of which he has been found guilty;⁵⁵⁷ when a person fails to comply with the order of a court or in order to secure the fulfillment of any obligation imposed upon him by law. Others include the purpose of bringing him before a court in execution of the order of court or upon reasonable suspicion of having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence.

⁵⁵² Ikpeme A “Domestic Violence_Towards Zero Tolerance Strategies for Awareness” in *LEDAP Domestic Violence: Zero Tolerance Report of Network of Nigerian Men Against Domestic Violence* (2003) 80.

⁵⁵³ On the contrary, Hilary Clinton in a speech at the United Nations 4th World Conference on Women held in Beijing, China, in 1995, contends inter alia: “It is a violation of human rights when a leading cause of death worldwide among women ages fourteen to forty-four is the violence they are subjected to in their homes by their own relatives. It is violation of human rights when young girls are brutalized by the painful and degrading practice of genital mutilation”: Clinton H, *Living History* (2003) 305.

⁵⁵⁴ US Department of State 2004 Report “Nigeria Country Report on Human Rights Practices_ 2004” 28 February, 2005, 1-2.

⁵⁵⁵ *Supra.*

⁵⁵⁶ *Supra.*

⁵⁵⁷ Section 35(1) of 1999 Constitution.

Deprivation of liberty will also be permissible if it is for the purpose of the education or welfare of a person who has not attained the age of eighteen years; in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community or for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto.

Where a person has been charged with an offence and is detained in lawful custody awaiting trial, he shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence. Constitutionally permissible detentions from the above provisions are of five kinds: detention arising from conviction and sentence by a court in respect of a criminal offence; detention pursuant to an order of court; detention in respect of the commission of a criminal offence; detention to prevent the commission of a crime and protective custody.

The constitutional prescription⁵⁵⁸ which allows the deprivation of liberty upon a reasonable suspicion of a person having committed a criminal offence or to prevent a person from committing a criminal offence, is the subject of gross abuse by the police. Equally abused is the power conferred by the Police Act⁵⁵⁹ under which in certain circumstances, the police can arrest without a warrant.

In many cases, the police interpret the above provisions as giving them authority to arrest people as a result of unverified or uninvestigated tip-offs or acting on information from police paid agents called “informants”.⁵⁶⁰ Suspects arbitrarily arrested are detained in poorly ventilated police cells and in sub-human conditions which include over-crowding, sleeping on bare floor, lack of medication, poor feeding and total absence of sanitation and hygiene. The detention is routinely indefinite until the victims negotiate and buy their freedom. Those who cannot, may eventually be charged to court, dumped in prison and forgotten. Any person who cannot withstand the torture, may simply die and can be buried without reference to his relations.

⁵⁵⁸ Section 35(1)(a)-(f) of 1999 Constitution.

⁵⁵⁹ Section 24(1) Police Act, Laws of the Federation 2004, Cap P19. Under the provision, any police officer and any person assisting him can arrest without a warrant “any person whom he finds committing any felony, misdemeanour or simple offence, or whom he reasonably suspects of having committed or of being about to commit any felony, misdemeanour or breach of the peace”. He can also arrest if any person charges other person with committing a felony or misdemeanour or suspects another person of having committed a felony or misdemeanour. See also Section 10(1) of the Criminal Procedure Act, Laws of the Federation, 2004, Cap. C 41.

⁵⁶⁰ These are members of the public who secretly give police information on crimes and criminal suspects for reward. In many cases, information is given to settle scores with perceived enemies.

Due to the poor conditions of the cells, detainees succumb to disease and illness. Skin rashes are common place. Many victims are tortured and brutalized in order to extract confessions from them.⁵⁶¹ In detaining and torturing their victims, the police simply disregard all legal and constitutional provisions protecting the rights of the detainees. The constitution states that: “ any person who is arrested or detained shall be informed in writing within 24 hours (and in the language he understands) of the facts and grounds of his arrest and detention.”⁵⁶² This right has also been guaranteed by article 14(3)(a) of the International Covenant on Civil and Political Rights (ICCPR).

The constitution⁵⁶³ mandatorily provides that any arrested or detained person shall be brought before a court of law within a reasonable time and where he is not tried within a period of two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall be released unconditionally or upon such conditions as are necessary to ensure that he appears for trial at a later date. Unconditional release of a detainee is without prejudice to any further proceedings that may be brought against him.

On what the expression “reasonable time” means, the Constitution in section 35(4) states that it is a period of one day in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometres. In any other case, it is a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable. Under section 35(7), the provisions regarding “reasonable time” within which a suspect shall be brought to court, is inapplicable to a person detained or arrested upon reasonable suspicion of committing a capital offence, like armed robbery and murder. This provision constitutes a great drawback on the rights of murder and robbery suspects. When police want to indefinitely clamp someone in detention, they slam him with armed robbery or murder charge, sometimes, in collusion with persons who want to keep their “enemies” in indefinite detention.

⁵⁶¹ See Network of Human Rights Violations Monitors, National Human Rights Commission, UNDP and NORAD, *The State of Human Rights in Nigeria 2005–2006*, 11-15.

⁵⁶² Constitution of the Federal Republic of Nigeria 1999, Section 35(3).

⁵⁶³ Constitution of the Federal Republic of Nigeria, 1999 Section 35(4).

The provisions of section 35 of the Constitution, if implemented, will guarantee fairness to detainees. In practice, they are hardly complied with as a result of a number of factors which include lack of resources on the part of the detainees and the pervasive corruption in the country's penal system. In order to circumscribe the constitutional provision on the issue of bringing a detainee to court within a reasonable time, the police developed a practice whereby suspects detained for capital offences like armed robbery and murder, are charged before magistrate courts on what is known as "holding charge". This is in the full knowledge that the magistrate courts do not have the jurisdiction to try capital offences and what they do in such circumstances, is to order that the suspect be remanded in prison custody and the case file sent to the Director of Public Prosecution who would file, if necessary, a charge.⁵⁶⁴ The Court of Appeal had cause to consider the constitutionality of a "holding charge" in *Enwerem v C.O.P*⁵⁶⁵ pursuant to the provisions of the Constitution of the Federal Republic of Nigeria 1979.⁵⁶⁶ The court held that it is illegal and unconstitutional.

A lot of cases have captured the injustice in the country's justice system. One of them is the case of *C.O.P v Jackson Etuk and Others*,⁵⁶⁷ where in June 1992 five persons were charged with robbery. A non-governmental organization, LEDAP⁵⁶⁸, had in the course of the investigation of the plight of the detainees early 2002, shockingly discovered that the Director of Public Prosecution, Lagos State had in 1993 advised that all the suspects but one be released. But only one suspect was subsequently released. Meanwhile, one of the suspects had died in custody. When an officer of LEDAP visited the prison where they were detained, he met the surviving three suspects. He later filed an application for the issuance of production warrants in respect of the remaining three detainees and they were released on 15 February 2002, after over 9 years of waiting for a trial that never came.

In a report by Yawon, a Deputy Controller of Prisons, he said this of detainees awaiting trial: "Experience has shown that most of these inmates are innocent of the offences for which they were charged, and remained in the prison. This is why most of them spend 10 to 14 years in prison only to be discharged and acquitted at the end of the day for want of evidence".⁵⁶⁹

⁵⁶⁴ This is called the filing of "information" in the High Court.

⁵⁶⁵ (1993) N.W.L.R. (Pt 299) 333. Similar decision was given in *Olawoye v C.O.P.* (2006) 2 NWLR (Pt 965) 427 at 442.

⁵⁶⁶ The court considered the relevant provision of the 1979 Constitution that are *in pari materia* with Section 35(14) of the 1999 Constitution.

⁵⁶⁷ *The Prosecutor*, No. 2 (2002), 18.

⁵⁶⁸ Legal Defence and Assistance Project.

⁵⁶⁹ Yawon B "Prison Administration in Imo State" text of a paper delivered in October 2003 at the NBA Law Week, Owerri, Imo State, Nigeria .

An NGO, the Civil Liberties Organization (CLO) carried out investigation between 1988 and 1991 and came out with a frightening verdict: “Arrests were made arbitrarily and indiscriminately. Houses were raided and searched without warrant. It was not uncommon for property to be destroyed in the process of arrest. In some instances, the police arrested relatives or neighbours of unavailable suspects in an attempt to force the suspects to give themselves up”.⁵⁷⁰

Former Inspector-General of Police, Mr Sunday Ehindero, had in February 2005, when he addressed police officers said: “If you go to arrest a suspect and could not get him, device a technique, such as keeping surveillance instead of arresting his maternal or paternal relations”⁵⁷¹ This is an official acknowledgement of the fact that police arrest relation(s) of a suspect as a bait to get the suspect.

There have been several cases where the wife and/or children of a suspect are arrested, detained or held hostage until the suspect gave himself or herself up.⁵⁷² Persons who are found to be at the vicinity of a crime when it was committed are normally held for interrogation for periods ranging from few hours to several months. After their release, they are frequently asked to return repeatedly for further questioning.⁵⁷³ The consequence is that whenever crime is committed in the presence of witnesses they all disappear before the arrival of the police. People also are unwilling to help crime victims so that they will not be subjected to needless interrogation and possible detention. The most nauseating and scandalous injustice meted to detainees is that in many cases, they spent time in custody far longer than the prison term prescribed for the offences they allegedly committed and in respect of which they were detained.⁵⁷⁴ The country’s justice system is utterly flawed.

3.3.4 Right to fair hearing

Section 36(1) of the Constitution which guarantees the right to fair hearing provides as follows: “In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality”.⁵⁷⁵

⁵⁷⁰ Gahia *Human Rights in Retreat* 25.

⁵⁷¹ Human Rights Watch “Rest in Peaces Police Torture and Deaths in Custody in Nigeria”, July 2005, Vol. 17, No 11(A), 32-33.

⁵⁷² US Department of State “Nigeria Country Reports on Human Rights Practices_2006” 6 March 2007, 7.

⁵⁷³ *Supra*.

⁵⁷⁴ *Supra*.

⁵⁷⁵ Sections 21,22 and 33 of the 1960, 1963 and 1979 Constitutions respectively guaranteed the right to fair hearing.

The Constitution of Ghana 1992, in section 19, makes elaborate provision on the right to fair hearing just like the Nigerian Constitution. But 1996 Constitution of South Africa which guarantees access to courts provides in simple and less complex terms that: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.⁵⁷⁶ The South African Constitution, unlike the Nigerian and the Ghanaian⁵⁷⁷ Constitutions, did not import the concept of “civil rights and obligations” whose application by the courts has generated a lot of complexities and confusion. The concept has been the subject of severe criticism by Ogowewo.⁵⁷⁸

Under section 6(6) (b) of the 1999 Constitution, the judicial powers vested in the courts shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person. Any person alleging a constitutional infraction, must establish that his civil right and obligation have been impaired. Judicial application of the concept of civil rights and obligations has created considerable problems.⁵⁷⁹

Further safeguards⁵⁸⁰ for fair hearing are provided in the Constitution. The proceedings of the court and a tribunal shall be held in public⁵⁸¹ Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.⁵⁸²

⁵⁷⁶ See Constitution of South Africa, 1996 section 34 thereof.

⁵⁷⁷ Section 19 of the Constitution of Ghana, 1992.

⁵⁷⁸ Ogowewo T.I. “Wrecking the Law: How Article 111 of the Constitution of the United States led to the Discovery of a law of standing to sue in Nigeria” (2000) (No 2) (vol. xxvi) *Brooklyn Journal of International Law*, 527-589. According to Ogowewo the standing rule: “has wreaked and is still wreaking havoc across the entire face of Nigerian law, colliding with and demolishing settled legal principles in its wake in different areas of public and private law” at 529. According to him, the main problem arises from the interpretation placed by the courts on section 6(6)(b) of the Nigerian Constitution which *inter alia* provides for the judicial power of courts in matters, actions and proceedings “for the determination of any question as to the civil rights and obligations of that person...” at 536. Ogowewo argues that the courts were wrong in evolving a standing rule from the provisions. Ogowewo’s position is too wide. If a party is alleging that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained against, it means that he must establish his standing to invoke the judicial powers of the court.

⁵⁷⁹ See *Adesanya v President of the Federal Republic of Nigeria* (1981) 1 A.N.L.R. 1. These problems are examined in chapter 5 *infra*.

⁵⁸⁰ See Sections 36(2)-(12) of the 1999 Constitution of Nigeria

⁵⁸¹ The Tribunal or Court is authorized by section 36 (4)(a) of the Constitution to exclude persons other than parties or their legal practitioners from its proceedings in the interest of defence, public safety, public order, public morality, the welfare of persons under the age of 18 years, the protection of the private lives of the parties or for any other special circumstances in which publicity may be contrary to the interest of justice.

⁵⁸² Section 36(5).

There is a proviso that nothing in that provision shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts. For example, if a person is relying on a plea of alibi in defence of a charge of crime, he has the initial burden of providing facts regarding where he was at the time of the crime. When that is done, the burden shifts to the prosecution to rebut those facts. A person charged with a crime is entitled to be informed promptly in the language that he understands and in detail the nature of his offence. He shall be given adequate time and facilities for the preparation of his defence; defend himself in person or by legal practitioner of his own choice; examine in person or by legal practitioners, the witnesses called by the prosecution before any court or tribunal; have without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence.⁵⁸³

No person shall be held to be guilty of a criminal offence if his act or omission at the time it took place did not constitute an offence.⁵⁸⁴ No penalty shall be imposed for any criminal offence that is heavier than the penalty in force at the time the offence was committed.⁵⁸⁵ Double jeopardy is prohibited. A person who has been tried and convicted or acquitted by a court of competent jurisdiction, shall not be tried again for that offence or for any other offence having the same ingredients as the previous offence except upon the order of a superior court.⁵⁸⁶ This will arise, for example, where there is an appeal and the appellate court sets aside the judgment of the lower court and orders a re-trial of the case.

A person that shows that he has been pardoned for a criminal offence shall not be tried for that offence again. The effect of that pardon is to remove all disabilities arising from the conviction. Indeed, the pardon restores his rights in full to their state prior to the conviction.⁵⁸⁷ A person charged with a criminal offence has the option of testifying in his defence or not. If he chooses not to, he shall not be compelled to give evidence.⁵⁸⁸

A court or tribunal cannot convict any person charged with a criminal offence unless that offence is defined and the penalty for it is prescribed in a written law. Written law refers to an Act of the National Assembly or a Law of a State or any subsidiary legislation or instrument under the provisions of a law.⁵⁸⁹

⁵⁸³ Section 36(6)(a)-(e) of the 1999 Constitution.

⁵⁸⁴ Section 36(8).

⁵⁸⁵ Section 36(8).

⁵⁸⁶ Section 36(a).

⁵⁸⁷ President Olusegun Obasanjo was convicted for his alleged participation in a coup against the Abacha regime. He was subsequently pardoned under Abubakar's regime and was able to contest the presidential election in 1999 without any legal disability. He won the election too.

⁵⁸⁸ Section 36(11).

⁵⁸⁹ Section 36(12).

The principle of fair hearing embraces the plenitude of the doctrine of natural justice in the sense of the twin pillars of justice, that is, *audi alteram partem* and *nemo iudex in causa sua*. All courts are bound to comply with them. The meaning of each of them in sequential order is that the other party must be heard and no man shall be a judge in his own cause. The right to fair hearing has been the subject of pervasive abuse, brutal assault and violation by successive military dictatorships in Nigeria through the use of ouster clauses. The abuse and use of ouster clauses are in various forms. They may be used to generally oust the jurisdiction of the courts in the enforcement of fundamental rights or specially oust their jurisdiction in special cases like the use of the Writ of *Habeas Corpus*. The use of ouster clauses constitute gross derogation of the fundamental right of access to court.

Section 36(4) of the Constitution which provides that: “whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time”, has also been the subject of gross abuse. Having regard to Nigeria’s unedifying record of long pretrial detentions and inordinate delays in trials, this provision has generated a great deal of controversy in criminal trials. The said subsection which provides for the right to be tried in public within a “reasonable time” by an impartial court or tribunal, does not define “reasonable time” within the context of the provision. It is then left to the Nigerian courts to interpret the phrase.

In *Garba v The State*,⁵⁹⁰ the appellant was arrested in April 1969 and his trial commenced on April 1971, a period of about two years and two months. The Supreme Court said that: “we had occasion in the past to draw attention to this unjustifiably long period of trial. In this appeal there is nothing in the record explaining or justifying the long delay”. In any event, the court did not set aside the conviction of the appellant as the actual trial was said to have proceeded speedily, in spite of the delay at commencing the trial, as the evidence against the appellant was said to be overwhelming. In *Olaniyan v The State*,⁵⁹¹ the Court of Appeal, apologetically had this to say: “In addition, having regard to the *Nigeria situation* in general and the circumstances and nature of the offences against the appellant, I would have thought that a period of 2 years 8 months cannot be said to constitute a denial of the appellant’s right to a fair hearing within a reasonable time”.

⁵⁹⁰ (1972) 4 S.C 118 at 122 per Sowemimo Ag. JSC.

⁵⁹¹ (1987) 1 NWLR Pt. 48 156 at 161 (emphasis supplied).

The Court of Appeal did not explain what actually it meant by “the Nigerian situation”. Does it mean that the universality of human rights can be compromised in the Nigerian context and still be acceptable? In a later case, the majority judgment of the Supreme Court in *Effiom v The State*,⁵⁹² after referring to the above case and the phrase “Nigerian situation” therein used, said *inter alia*:

The *Nigerian situation* alluded to above which is nowhere to be found in any written code but under which government functionaries work in condition less than conducive and where they must at times make-do with obsolete or ill-maintained facilities, delay caused by taking an accused person to court promptly to face his trial, ought not to be placed at the door-steps of the prosecution. To hold otherwise, in a situation where longer periods of detention of accused persons awaiting trial for capital offences like the one under consideration is a daily occurrence, is to expect the impossible.

The foregoing statement which is an apparent justification of the violation of the right of the appellant has no constitutional basis. When inordinate delay in the trial of a criminal suspect is established, the consequence must follow. But in *Ariori v Elemo*,⁵⁹³ Obaseki J.S.C proffered a definition of “reasonable time”, in the following words: “Reasonable time must mean the period of time which in the search for justice, does not wear out the parties and their witnesses and which justice is not only done but appears to a reasonable person to be done”. In *Ozuluonye v The State*,⁵⁹⁴ the Court of Appeal was faced with a consideration of the provisions of 1979 Constitution that are *in pari materia* with section 36(4) of the 1999 Constitution. In that case it took four years for the trial court to hear evidence and deliver its judgment. The Court of Appeal allowed the appeal and quashed the conviction. A similar decision was reached in *Ayambi v The State*⁵⁹⁵ where the delay was about two years. In *Sambo v The State*,⁵⁹⁶ the same court curiously held that the said provision was not infringed notwithstanding a delay of seven years from the date of the offence to the date of judgment. The decision of the Supreme Court in *Effiom v The State*⁵⁹⁷ raised a lot of disturbing issues. In that case, from the date the appellant was arrested to the date of his conviction, spread through a period of five years and 10 months. His actual trial before the judge that eventually convicted him for murder, covered a period of two years and 11 months.

⁵⁹² (1995) 1 NWLR Pt. 373 507.

⁵⁹³ (1983) 1 S.C 13 at 24 per Obaseki JSC.

⁵⁹⁴ (1983) 4 NCLR 204.

⁵⁹⁵ (1985) 6 NCLR 141.

⁵⁹⁶ (1989) 1 CLRN 77

⁵⁹⁷ (1995) 1 NWLR (Pt. 373) 507

One of the issues that was formulated for the determination of the Supreme Court was whether there was trial within a reasonable time as envisaged by section 34(4) of the 1979 constitution. Because of the importance that the Supreme Court attached to the case, it invited as *amici curiae*, Attorneys-General of the States and a private legal practitioner,⁵⁹⁸ to file briefs and address the court. Only three Attorneys-General responded by filing briefs and only two of the three appeared to proffer oral argument in support of their briefs.⁵⁹⁹ The private legal practitioner and this author held the view that there was unreasonable delay resulting in breach of the constitutional provision on the right to fair hearing. While the two other *amici* were of the opinion that there was no undue delay in the trial and even if there was, it did not occasion any miscarriage of justice.

In resolving the issue, the Supreme Court in its majority judgment delivered by Onu J.S.C said that the commencement period for the applicability of the provisions of section 33(4) of the 1979 Constitution as to whether the appellant was given a reasonable time, was the date of arraignment.⁶⁰⁰ This decision is unduly restrictive and brings hardship to a suspect. It means that no matter the inordinate period a suspect spent in custody after his arrest before actual arraignment, that period will not be taken into consideration.

Although the appellant in the instant case was arrested on 27 March 1985 and first arraigned in court for trial on 15 December 1986, a period of about 21 months, the Supreme Court said there was neither delay nor inordinate delay as the period did not dim the memory of witnesses. As for the period of arraignment and his conviction which spanned two years and eleven months, the court held that it did not amount to unfair hearing or inordinate delay. According to the court, one cannot be oblivious of the “Nigerian situation”. And that the delay in the trial of the case has to be balanced with the merit of the case. The court held that:

While it is the correct principle of law to state that long intervals between the reception of oral evidence of witnesses in a trial and the delivery of judgment raises a strong presumption of contravention of the provisions of Section 33(4), in the instant case, this has not been established. This is because the period 4/5/88 and 7/12/91_a period of 2 years and 8 months_the learned trial judge clearly showed neither that his memory was lost nor dimmed.⁶⁰¹

⁵⁹⁸ This author who was the State Attorney-General of Imo State at the time was among those invited as *amici curiae*.

⁵⁹⁹ This author submitted brief, appeared in court and proffered oral argument in support of the brief.

⁶⁰⁰ The provision of the section is *in pari materia* with that of section 36(4) of the 1999 Constitution.

⁶⁰¹ (1995) 1 NWLR (Pt 373)507 at 577 para. F

This finding can hardly be justified. No consideration whatsoever was given to the plight of the appellant who at some point was described as a “bag of bones” by the trial Judge in view of his physical condition. Justice Wali added a curious dimension when in his concurring judgment he opined that a “reasonable time” in England or United States and such other developed countries with modern equipment and better amenities at their disposal, may not and cannot be the same or be equated with “reasonable time” in a developing country like Nigeria.⁶⁰² He concluded that “judicial activism in my view does not mean judicial recklessness such that may lead to chaos, nor does it mean bending the law in favour of one side to the detriment of the order”.⁶⁰³ Ironically, His Lordship might have inadvertently “bent” the law in favour of the State against the appellant/convict. Any decision that justifies inordinate delay in the trial of a suspect on the ground that “reasonable time” has a meaning in Nigeria different from the developed countries is based on a faulty premise. Such a decision is inconsistent with the concept of human rights which has a feature of universality.

The right to fair hearing is a fundamental constitutional right guaranteed by the 1960, 1963, 1979 and 1999 Constitutions of the Federal Republic of Nigeria; a breach of it in a trial or adjudication vitiates the proceedings, rendering the same null and void and of no effect. Similarly, any judgment which is given without due compliance with and in breach of the fundamental right to fair hearing is a nullity and is capable of being set aside either by the court that gave it or by an appellate court.⁶⁰⁴

The right to fair hearing is so fundamental to our concept of justice that it cannot be waived or taken away by statute, whether expressly or by implication. Its breach cannot be condoned; thus, participation in the trial by a suspect cannot constitute a waiver of his right to fair hearing.⁶⁰⁵ On what constitutes a breach of the right to fair hearing, the Supreme Court in *Ejeka v the State*⁶⁰⁶ said that:

The principle of fair hearing is breached where parties are not given equal opportunity to be heard in the case before the court. Where the case presented by one party is not adequately considered, the party can complain that he was denied fair hearing. Fair hearing is not an abstract term that a party can dangle in the judicial process but one which is real and which must be considered in the light of the facts and circumstances of the case. A party who alleges that he was denied fair hearing must prove specific act or acts of such denial and not a mere agglomeration of conducts which are merely cosmetic and vain.⁶⁰⁷

⁶⁰² (1995) 1 NWLR (Pt 373)507 at 585 para. C.

⁶⁰³ *Supra* at 585 para. D.

⁶⁰⁴ *Adigun v A-G Oyo State* (1987) 1 NWLR (Pt 53) 678, 709 paras G-H. See also *Bamgboye v University of Ilorin* (1999) 10 NWLR (Pt 622) 290 and *Yusuf v Ilori* (2008) 6 NWLR (Pt 1083) 330.

⁶⁰⁵ (2005) 10 NWLR (Pt 934). *Bamgboye v University of Ilorin* 1999 10 NWLR Pt 622 290 at 355 paras F-G and *Menakaya v Menakaya* (2000) 10 NWLR (Pt 738) 203 at 556 paras D-E .

⁶⁰⁶ (2003) 7 NWLR (Pt 819) 408.

⁶⁰⁷ (2003) 7 NWLR (Pt 819) 408 at 421 paras C-E.

The African Commission on Human and Peoples' Rights had through communications brought before it, given decisions on violations of human rights in Nigeria particularly during the military regime. A number of them touched on the right to have one's cause heard under Article 7 of the African Charter. The decisions have also enriched the country's constitutional jurisprudence. In *Civil Liberties Organization v Nigeria*,⁶⁰⁸ the communication was filed by the Civil Liberties Organization, a Nigerian NGO. The communication alleges that the military government of Nigeria has enacted various decrees in violation of the African Charter, specifically the Constitution (Suspension and modification) Decree No. 107 of 1993, which not only suspended the Constitution but also specified that no Decree promulgated after December 1983 can be questioned in any Nigerian court; and the Political Parties (Dissolution) Decree No. 114 of 1993, which in addition to dissolving political parties, ousted the jurisdiction of the courts and specifically nullified any domestic effect of the African Charter.

The communication complains that the ousting of the jurisdiction of the courts in Nigeria to adjudicate the legality of any Decree threatens the independence of the judiciary and violates article 26 of the African Charter. The Communication also complains that this ouster of the jurisdiction of the courts deprives Nigerians of their right to seek redress in the courts for government acts that breach their fundamental rights, in violation of article 7 (1) (a) of the African Charter. Article 7 (1)(a) of the African Charter provides:

1. Every individual shall have the right to have his cause heard. This comprises:
 - (a) The right to an appeal to competent national organs against acts violating his fundamental rights as guaranteed by conventions, laws, regulations and customs in force.

The Commission held that the Charter remains in force in Nigeria and that notwithstanding the Political Parties Dissolution Decree, the Nigerian government has the same obligations under the Charter as if it had never revoked its domestic application. These obligations include guaranteeing the right to be heard. It further held that the decree in question constitutes a breach of article 7 of the Charter, the right to be heard; and that the ouster of the courts' jurisdiction constitutes a breach of article 26, the obligation to establish and protect the courts. It finally held that the act of the Nigerian Government in nullifying the domestic effect of the Charter constitutes a serious irregularity. In another communication, *Civil Liberties Organization v Nigeria*,⁶⁰⁹ the facts were that in March 1995, the Federal Military Government of Nigeria announced that it had discovered a plot to overthrow it by force.

⁶⁰⁸ African Commission on Human and Peoples' Rights, Comm. No. 129/94 (1995) 17th Session, Lome, March 1995.

⁶⁰⁹ African Commission on Human and Peoples' Rights Comm No 151/96 (1999) Kigali, Rwanda, 15 November 1999.

In consequence of the alleged discovery of a coup plot, several persons including civilians, serving and retired military personnel had been arrested in connection with the alleged plot. A Special Military Tribunal was established under the Treason and Treasonable Offences (Special Military Tribunal) Decree, which ousted the jurisdiction of the ordinary courts. The Military Tribunal was headed by Major-General Aziza, and was composed of five serving military officers. The tribunal used the rules and procedures of a court-martial, and no appeal lay from its judgment. The tribunal's decision was only subject to confirmation by the Provisional Ruling Council, the highest decision making body of the military government. The trial was conducted in secret, and the suspects were not given the opportunity to state their defence or have access to lawyers or their families. They were not made aware of the charges against them until at their trial. The suspects were defended by military lawyers who were appointed by the Federal Military Government. Thirteen civilians were tried by the tribunal and convicted for being accessories to treason and sentenced to life imprisonment. One other person was convicted as an accessory after the fact and sentenced to 6 months imprisonment. The life sentences were later reduced to 15 years imprisonment.

The communication alleges that following their arrests, the accused were held under inhuman and degrading conditions. They were held in military detention places, not in the regular prisons, and were deprived of access to their lawyers and families. They were held in dark cells, given insufficient food, no medicine or medical attention. The Commission found that while being held in a military detention camp is not necessarily inhuman, there is the obvious danger that normal safeguards on the treatment of prisons will be lacking. Being deprived of access to one's lawyer, even after trial and conviction, is a violation of article 7(1)(c) of the African Charter. It held that there was, among others, a violation of articles 7 (1)(a), (c) and (d) and 26 of the Charter. It then appealed to the Government of Nigeria to permit the accused persons to have a civil re-trial with full access to lawyers of their choice; and improve their conditions of detention. This never happened.

In *Constitutional Rights Project v Nigeria*,⁶¹⁰ a Nigerian non-governmental organization filed communication on behalf of five accused person who were accused of serious offences ranging from armed robbery to kidnapping. The police completed its case and submitted a report on 25 July 1995. In its report, the police linked the suspects to various robberies and kidnapping of young children which had occurred and for which ransoms were demanded.

⁶¹⁰ African Commission on Human and Peoples' Rights Comm No. 153/96 (1999) Kigali, Rwanda, 15 November 1999.

One of the kidnapped children escaped but the whereabouts of the others were unknown, although a ransom had been paid. The report concluded that the suspects should be detained under Decree No. 2 of 1984 (which permitted detainees to be held for three months without charge) in order to allow for further investigations and for the suspects to be charged with armed robbery and kidnapping. At the time the communication was brought, the suspects were in prison and no charges had been brought against them. The communication alleges violations of Articles 6 and 7 of the Charter in that nearly two years had passed and charges were not filed which amounted to an unreasonable delay. Thus, the detainees' rights under Article 7(1)(d) were also violated.

The Commission held that in a criminal case, especially one in which the accused is detained until trial, the trial must be held with all possible speed to minimize the negative effect on the life of a person who, after all, may be innocent. For the above reasons, the Commission finds violations of Articles 6,7 (1)(a) and (d) of the Charter and appeals to the Government of Nigeria to charge the detainees or release them.

The suspects were eventually charged with armed robbery which carried a death penalty. They were all found guilty. Except one of them who was a young person at the time of the commission of the offence and who is still being detained at the pleasure of the Imo State Governor, the others were publicly executed.

3.3.5 Right to privacy and family life

In 1890, two Americans, Samuel Warren and Louis Brandies, were the first in western society to call for the legal protection of the right to privacy which they simply described as "the right to be let alone".⁶¹¹ Their article on the subject brought about considerable influence upon the development of a new legal concept of privacy and which eventually crystallized into a principle of information privacy. The right is considered the essence of liberalism.⁶¹² The right was later recognised as a fundamental right by many international and national legal instruments. The right is guaranteed under section 37 of the 1999 Constitution, which provides that: "The privacy of citizens, their names, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected". It is the shortest of the sections guaranteeing fundamental rights under the 1999 Constitution.

⁶¹¹ Warren SD and Brandeis LD "The Right to Privacy" (1890) 4 *Harvard Law Review* 193.

⁶¹² Gaze B and Jones M, *Law, Liberty and Australian Democracy* (1990) at 326, 238 and 330. See also Kidd CJF "Freedom from Unwanted Publicity" in *Fundamental Rights*, Bridge JW, Lasok D, Perrott DL and Plender RO (1973) 43-59.

The soundness and reasonableness of the provision can hardly be questioned except for the unfortunate exclusion of the application of the provision to non-citizens. This is in contradistinction to most constitutional provisions on fundamental rights. Section 77 and 23 respectively of the 1960 and 1963 Constitutions of Nigeria guaranteed the same right to “every person”. The limitation of the right to “citizen” started with the 1979 Constitution in its section 34.⁶¹³

Eivazi rightly argued that: “privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person’s affairs...”⁶¹⁴ The notion of privacy is anchored on the premise that a person has the right and freedom to manage information about himself or herself and personal affairs without the intrusion of any person. From 1960 till date, there has been no reported decision of any court in Nigeria dealing with the violation of the constitutional right to privacy.

3.3.6 The right to freedom of thought, conscience and religion

The right to freedom of thought, conscience and religion is protected by section 38 of the 1999 Constitution. Section 38(1) thereof provides as follows: “Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance”.

Section 10 of the Constitution provides: “The Government of the Federation or of a State shall not adopt any religion as State religion”. This provision is plain and simple enough to admit no controversy. It guarantees religious neutrality on the part of the Federal or State Government. According to Peters, it is generally understood to mean that neither the legislative nor the executive power may in any way be used to aid, advance, foster, promote or sponsor a religion.⁶¹⁵ Until Zamfara State extended Sharia to criminal law in 2000 as against its hitherto limitation to Islamic personal law, and which was subsequently followed by eleven other Northern States, the provisions of sections 10 and 38(1) of the Constitution hardly commanded or attracted the attention of lawyers, academics, non-governmental organizations and religious groups.

⁶¹³ In contrast, similar provisions in 1996 South African Constitution, section 14 guaranteed the right to “everyone” and article 18(2) of the Constitution of Ghana, 1992 extends the right to “every person”. Article 12 of UDHR and article 17 of ICCPR respectively prohibit arbitrary or unlawful interference with the privacy, family, home or correspondence of any one. Surprisingly no provision of the African Charter guarantees the right to privacy. The rationale if any, is questionable.

⁶¹⁴ Eivazi S, “Employee’s E-mail Privacy and the Challenge of Advancing Technology” (2002), Vol 11 No 3, *The Commonwealth Lawyer* 26

⁶¹⁵ Peters R, *Islamic Criminal Law in Nigeria* (2003) 33.

The criminalization of certain conducts under the Sharia and the undisguised promotion and sponsorship of religion by some Northern States, generated legal and constitutional crisis in the country. The debate and controversy were on the issue whether the activities of the governments of the concerned Northern States amounted to the adoption of Sharia as a State religion in violation of constitutional provisions to the contrary. The debate was bitter and acrimonious. The issue also generated considerable tension in the country and even led to religious riots and the death of several people and the burning of mostly churches and some mosques.⁶¹⁶ Perhaps no other issue has so much polarized the Nigerian polity like the introduction of what has now come to be known as “new Sharia”. This text, will therefore, in some detail, consider the effect of the adoption of new Sharia on the right to religious freedom. It will also consider the constitutionality of that adoption.

3.3.6.1 Sharia

The practice of Islam has been in Nigeria since the eleventh century; while Sharia had been applied in the then Northern Region (now Northern States) of Nigeria before, during and since the colonial period. Undoubtedly, Sharia has been in force since the Islamic Jihad by Shehu Uthman Dan Fodio and the enthronement of the Sokoto Caliphate in 1804.⁶¹⁷ Consequent upon the colonization of the Northern part of Nigeria, the colonial administration extended recognition to Sharia and allowed Islamic customary law to continue to apply with some restrictions or modifications. The Sharia courts which were then known as area courts had jurisdiction only over matters of personal status law, such as divorce, inheritance and family or domestic disputes. The British codified criminal acts in the Penal Code which though influenced by the common law as practiced in Britain, retained many aspects of Sharia. Harsh punishments like death by stoning and amputations were excluded on the ground that they were “repugnant to natural justice, equity and good conscience”.⁶¹⁸ Floggings or whippings were retained in the Penal Code⁶¹⁹ as well as in the Criminal Code.⁶²⁰ They are still extant.

⁶¹⁶ US Department of State “Nigeria Country Report on Human Rights Practices–2004” 28 February, 2005, 1-2. 69.

⁶¹⁷ Human Rights Watch “Political Sharia? Human Rights and Islamic Law in Northern Nigeria” <http://www.hrw.org/reports/2004/nigeria0904/3.htm> [accessed 7 February 2005].

⁶¹⁸ This is a statutory provision contained in the various High Court Laws of the States and other enactments which enjoins the courts to observe and enforce customary law “...not being repugnant to natural justice, equity and good conscience”. This provision is called “repugnancy clause” or “repugnancy doctrine”.

⁶¹⁹ The Penal Code, Law was brought into operation on 30 September 1960 by the Penal Code Law, 1959 (Commencement) Notice, 1960 (Northern Region Law No 96 of 1960).

⁶²⁰ Section 18 Criminal Code Act, Laws of the Federation of Nigeria 2004, Cap C38.

For practising Muslims, Sharia is a way of life. It governs not only the private life but social relations and ethical codes for Muslims. In Sharia, the Quran and Hadith are subject to different interpretations by the diverse schools in Islamic jurisprudence. The Sunnis constitute the majority of Muslims in Nigeria. Within the Sunni Islam, there are four predominant schools of thought-Maliki, Hanafi, Hanbali and Shafi; each developed slightly varying beliefs and observes different traditions. They also formulate different prescriptions. The Sharia that is practiced in Northern part of Nigeria is based in most part on the Maliki school of thought which equally is dominant among the Muslims in the West and North Africa.⁶²¹

The practice of democracy returned to Nigeria following the 1999 national elections. Alhaji Ahmed Sani, was one of those elected as governors; his was for Zamfara State, one of the Northern States and also one of the 36 States in the federation. On 27 October 1999, the State enacted the Sharia Establishment Law, Law of Zamfara State, 1999 and it came into force on 27 January 2000. Ahmed Sani who instantly became the self-appointed champion of Sharia in Nigeria was accused of playing politics with Sharia. He had correctly judged the mood of the population that was fed up with rising crimes and other social vices. The introduction of Sharia was, therefore, not only popular in Zamfara State, but Muslims who constitute the majority in other Northern States started clamouring for similar introduction in their States. Advancing reasons for this perceived popularity, Human Rights Watch summarised the situation thus:

Foremost among these was public disenchantment with a government and a legal system which was failing people in many respects. There is widespread poverty across Nigeria, and the north is especially underdeveloped. There was the expectation among the general public that Shari'a, with its emphasis on welfare and the state's responsibility to provide for the basic needs of the population, would go some way towards alleviating their plight. People also felt frustrated with the law enforcement agencies and the judiciary; crime was increasing, yet the police and the courts were paralyzed by inefficiency and corruption.⁶²²

The new system no doubt was faster, less cumbersome and less corrupt in the dispensation of justice. But a price has to be paid and that is the violation of human rights and the resultant challenge to constitutionalism and constitutionality in Nigeria. However, capitalizing on the political success of the introduction in Zamfara State, other Northern State governors did not want to be left out, particularly when they, like their southern counterparts, could not deliver on their electoral promises of among others, bringing good governance and development. The said governors introduced their own Sharia legislation. So much so that by 2002, twelve states in the Northern part of Nigeria namely, Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara have adopted some form of Sharia into their criminal legislation.

⁶²¹ Human Rights Watch "Political Sharia? Human Rights and Islamic Law in Northern Nigeria" <http://www.hrw.org/reports/2004/nigeria0904/3.htm> [accessed 7 February 2005].

⁶²² *Supra*. See also Peters *Islamic Criminal Law in Nigeria* 33.

This generated international and national outrage. For example, Ezzat argued that there was “misuse of Sharia in Nigeria” and that it “was manipulated”.⁶²³ In a report by the Centre for Religious Freedom, it was said that the type of Islam being propagated in Nigeria which the report called “new Sharia”, was alarmingly similar to that imposed in Afghanistan under the Taliban.⁶²⁴ This is not entirely correct. The implementation and enforcement of Sharia in the Northern States, though harsh and extreme, the practice is yet to approximate to the extremism and brutality of the Taliban. Women in the affected States, for example, unlike the case of the Talibans, can attend schools if they so desire and practice their profession. There are some Sharia activists in Nigeria waging war from within against practices that negate human rights. Such activities were never tolerated by the Talibans. Under the Talibans, there was hardly any legal mechanism within the system to challenge the violations of human rights or curb the system’s extremism. Most of the 12 Northern States that adopted the Sharia, enacted Sharia Penal Code and Sharia Code of Criminal Procedure, based in most parts on that of Zamfara Code. One State, Niger opted to amend its existing legislation to make it comply with Sharia. It did not enact any new Sharia Penal Code and Code of Criminal Procedure. The adoption of Sharia by the States concerned had some inherent defects. Because the whole exercise was primarily intended to score a political advantage, it was haphazardly done.

According to Peters, “the first Sharia Penal Code enacted in Zamfara shows every sign of hasty drafting: incorrect cross-references, incorrect and defective wording, omissions and contradictions”.⁶²⁵ In spite of these defects, five other States have adopted the Zamfara Code verbatim or with minor changes. The Kano Penal Code, which is slightly different, has similar defects. These imperfections in the legislation were in the first place informed by time pressure under which the preparatory committees were forced to work.⁶²⁶ The general population was even less well-prepared for the introduction of the new Sharia. They were ill-informed about the procedure and their rights under the system. The fact that judicial officials, religious officials and others portrayed the decisions of Sharia courts as those of Allah rather than of the judges had a direct bearing on those whose rights were violated by the decisions of the courts. They were reluctant to challenge those decisions. This in turn led to the perpetuation of rights violations.

⁶²³ Qureshi E and Ezzat HR “Are Sharia Laws and Human Rights Compatible?” http://www.quantara.de/webcom/show_article.php_c-373/_nr-6/i.html [accessed on 20 February 2005].

⁶²⁴ The Centre for Religious Freedom. *The Talibanization of Nigeria: Sharia Law and Religious Freedom* (2002) 8.

⁶²⁵ Peters *Islamic Criminal Law in Nigeria* 33.

⁶²⁶ *Supra*.

3.3.6.2 The constitutionality of the new Sharia

Section 10 of the 1999 Constitution provides: “The Government of the Federation or of a State shall not adopt any religion as State religion”. This provision is clear, simple and unequivocal. There are no inherent ambiguities, except for a person who deliberately wants to subvert the provision. This provision, among others, means that neither the Federal or State Executive and Legislative authority may in any way be used to aid, advance, foster, promote or sponsor a particular religion or adopt an official religion. The provision does not permit the enactment of legal prescriptions, injunctions and punishments based on the principles and rules of a religion. It introduces the equality of all religions and government’s neutrality in religious matters.⁶²⁷

Peters summarised some of the arguments against the contention that the adoption of Sharia is in conflict with the above provision. They are as follows:⁶²⁸ that the Sharia, including Sharia Penal Law, has been an integral part of the Northern legal system up to 1960; that the introduction of a religiously-inspired law does not amount to the adoption of state religion; that the interpretation of section 10 canvassed by the opponents of the re-Islamisation of the legal system of the North is in conflict with those sections of the 1999 Constitution (such as sections 275-277 empowering the States to establish Sharia Courts of Appeal) that accord a special position to the Sharia and that freedom of religion as guaranteed in section 38(1) of the Constitution gives Muslims the right to practice their religion, which means living according to the Sharia.

On the argument that the Sharia Penal Law has been an integral part of the Northern legal system up to 1960, it was noted earlier that following the coming into operation of the Penal Code in 1960 and which was made applicable to Northern Nigeria, the Code included many components of Sharia and criminalised certain conducts but excluded harsh penalties such as death by stoning and amputations. Until the adoption of Sharia in 2000, the Penal Code remained an integral part of the legal system of the Northern States and still remained part of the legal system of the Northern States that are yet to adopt Sharia. The fact that the Penal Code which incorporated some aspects of the Sharia Penal Law was in operation up to 2000 in the concerned states, did not in any way support the claim that the adoption of Sharia in 2000 is nothing new and therefore, not in conflict with section 10 of the Constitution.

⁶²⁷ Peters *Islamic Criminal Law in Nigeria* 33-34

⁶²⁸ *Supra.*

The enforcement of the Penal Code did not elevate any particular religion over others by the former Regions or State Governments as the current practice. The lack of neutrality over religious matters and the adoption of Sharia as State religion, has well been captured by a sign post welcoming visitors to Zamfara, installed by the State Government. It reads: “Welcome to Zamfara State Home of Farming and SHARIA we wish you a happy stay courtesy of Zamfara State Government”.⁶²⁹

Governor Sani of Zamfara State claimed that the state had neither adopted a state religion nor declared Zamfara State an Islamic State. The actions of the State government clearly contradicted that claim. The Freedom House Report was right when it stated that the mere fact that the government had “not used specific words ‘Islamic State’ makes Islam no less an established religion.”⁶³⁰

The next argument relied on by the proponents of the adoption of Sharia is that the introduction of a religiously-inspired law does not amount to the adoption of a state religion. This argument is utterly untenable and unmeritorious. An enactment that declares that “an offence under the Quran, Sunnah and Ijtihad of the Maliki School of Islamic thought shall be an offence under the code”⁶³¹ is incontestably in conflict with section 10 of the constitution. Nwabueze had rightly argued that the United States Constitution which enjoined the State to “make no law respecting the establishment of religion”⁶³² is less precise than the provisions of our own constitution. But far less religious provisions than the ones we have, are being struck down by the US Supreme Court pursuant to the First Amendment.

The provision of the First Amendment which states that “Congress shall make no law respecting the establishment of religion...” is commonly referred to in American jurisprudence as “The Establishment Clause”. This generally has come to mean that government, federal or state, cannot authorise a church, cannot pass laws that aid or favour one religion over another, cannot pass laws that favour religious belief over non-belief and cannot force any person to profess a belief. Indeed, it enjoins government to be neutral towards religion and that it cannot be entangled with any religion.

⁶²⁹ The Centre for Freedom House *The Talibanization of Nigeria: Sharia Law and Religions Freedom* 8 (the picture of the signpost was part of the report).

⁶³⁰ The Centre for Freedom House *The Talibanization of Nigeria: Sharia Law and Religions Freedom* 8 58.

⁶³¹ See e.g. Zamfara Penal Code, section 92; Sokoto Penal Code, section 94; Jigawa Penal Code, section 95; Kebbi Code, S. 93 and Yobe Penal Code, S.92.

⁶³² Nwabueze B *Constitutional Democracy in Africa Volume 3* (2004)138.

In *Braunfeld v Brown*,⁶³³ Chief Justice Warren who read the judgment of the US Supreme Court had this to say: “If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect”.⁶³⁴ The adoption of Sharia no doubt is to discriminate invidiously between religions and the burden is direct and not just indirect to other religions. In *Edwards v Aguillard*,⁶³⁵ the question that called for determination at the US Supreme Court was whether the State of Louisiana’s “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction” Act (Creationism Act), was invalid being in breach of the Establishment Clause of the First Amendment. The Creationism Act forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in “creation science”. No school is required to teach evolution or creation science. If either is taught, however, the other must be taught.

The District Court held that the Creationism Act violated the Establishment Clause because it prohibited the teaching of evolution or because it required the teaching of creation science with the purpose of advancing a particular religious doctrine. The decision was affirmed by the Court of Appeal. At the Supreme Court, Justice Brennan delivered the opinion of the Court. According to him, the Establishment Clause forbids the enactment of any law respecting the establishment of any religion. The Court had to apply a three-pronged test to determine whether the legislation is consistent with the Establishment Clause. The test is as follows: First, the legislature must have adopted the law with a secular purpose. Second, the statute’s principle or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in excessive entanglement of government with religion. The court held that State action violates the Establishment Clause if it fails to satisfy any of these prongs.

This three-pronged test was adopted by the US Supreme Court in the case of *Lemon v Kurtzman*⁶³⁶ and has been applied in all cases coming before the court on the issue of Establishment Clause since its adoption in 1971.⁶³⁷ Justice Brennan opined that a governmental intention to promote religion is clear when the State promulgates a law to serve a religious purpose. That intention may be evidenced by the promotion of religion in general.

⁶³³ Kontvitz MR *Bill Rights Reader Leading Constitutional Cases* (1965) 180.

⁶³⁴ *Supra*.

⁶³⁵ 482 US 578; 107 S. Ct 2573; 1987 US LEXIS 2729; 96 L. Ed 2d 510 (1987).

⁶³⁶ 403 US 602, 612-613 (1971).

⁶³⁷ The three-pronged test which is also known as the lemon test has been applied in all cases on the Establishment clause since its adoption in 1971, except *Marsh v Chambers*, 463 US 783 (1983), where the court held that the Nebraska Legislature’s practice of opening a session with a prayer by a chaplain paid by the State did not violate the Establishment Clause.

While the Court is usually differential to a State's articulation of secular purpose, it is required to be sincere and not a sham or a ruse. He observed that the legislative history behind the Creationism Act reveals that the term "creation-science" as contemplated by the legislature that enacted the Act, embodied the religious belief that a supernatural creator was responsible for the creation of humankind.

The Establishment Clause forbids alike the preference of a religious doctrine or the prohibition of a theory which is deemed antagonistic to a particular dogma. In the opinion of the Court, the primary purpose of the Creationism Act is to endorse a particular religious doctrine, and to that extent, the Act furthers religion in violation of the Establishment Clause. Indeed, the Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act also seeks to apply financial support of government to achieve a religious purpose. The judgment of the Court of Appeal was affirmed.⁶³⁸ When the US three-pronged test is applied to the Nigeria situation, it may become obvious that the adoption of Sharia is violative of section 10 of the Constitution. Even without the application of the test to the Nigerian situation, the conclusion on the constitutionality of the "new Sharia" will still be the same.

The third argument being canvassed by those defending the adoption of Sharia is that the provisions of sections 275-277 of the 1999 Constitution empower the States to establish Sharia Court of Appeal and that the adoption of Sharia, cannot therefore be in conflict with section 10 of the Constitution. No less a personality than Justice Mohammed Bello, former Chief Justice of Nigeria supports that view. He said: "Even the Federation endorsed Sharia because both the Court of Appeal and the Supreme Court are Sharia Courts in exercising their jurisdiction on appeals relating to Sharia".⁶³⁹

⁶³⁸ The following are some cases where the US Supreme Court held the Establishment Clause to have been violated: *McCullum v Board of Education* 333 US 203 (1948)—Court finds religious instruction in public schools a violation of the establishment clause and therefore unconstitutional; *Engel v Vitale* 370 US 421 (1962)—Court finds school prayer unconstitutional; *Stone v Graham* 499 US 39 (1970)—Posting of the Ten Commandments in schools held unconstitutional; *Wallace v Jaffree* 472 US 38 (1985)—The state law enforcing a moment of silence in schools had a religious purpose and is therefore unconstitutional; *Abington School District v Schempp* 374 US 203 (1963)—Court finds the reading of Bible over school intercom unconstitutional; *Murray v Curlett* 374 US 203 (1963)—The forcing of a child to participate in Bible reading and prayer held unconstitutional and *Epperson v Arkansas*, 393 US 97 (1968)—Court says it is unconstitutional for the state to ban the teaching of evolution.

⁶³⁹ The Guardian, 29 November 1999; see also Yawuri AM "Application of Sharia Law: Issues, Challenges and Prospects" in Eze-Anaba I (ed) *Integrating Human Rights in the Sharia Court System in Nigeria* (2004) 71-80.

In his contribution on the issue of the constitutionality of the actions of States that adopted what has been called ‘‘new Sharia’’,⁶⁴⁰ Yadudu said:

I would make bold to assert that none of the initiative of the states implementing the Shariah can be said to have violated section 10 of the constitution which prohibits any state from adopting any religion as state religion. I have not as yet seen the plausible case made squarely equating what Zamfara has done with the adoption of an official religion. True, each state has legislated borrowing from a religious code.⁶⁴¹

Can the States in question borrow directly from Christian religious code and legislate for Christians? Can residents of a State who are non-Muslims be given the choice to trade on alcohol and alcohol related business without interference by Muslims or the State? Under the present setting, the answers to the foregoing questions are in the negative. Tabiu also argued in defence of the constitutionality of the ‘‘new Sharia’’. He said:⁶⁴²

Those who argue that the sharia is restricted to the matters of personal status enumerated in section 277 of the constitution are obviously ignorant of how Islamic law and customary law are administered in Nigeria. Day to day reality in the administration of justice in the country contradicts what they say.

This argument is misconceived. It is expected that he would have referred to a provision of the law that justified his claim of the application of new Sharia by Nigerian courts. Tabiu further argues that the objective of section 277 of the 1999 Constitution is to define the jurisdiction of Sharia Court of Appeal.⁶⁴³ He is right. But he totally missed the point when he said that in our legal system, it is not the constitution that directs what laws to apply in particular situations. Our view is that in some cases, the Constitution clearly delimits the scope and province of the law to be applied as in the case of section 277. To appreciate the untenability of the argument of those who rely on the provisions of section 277 of the Constitution to defend the constitutionality of the new Sharia in Nigeria, we shall examine section 277 of the 1999 Constitution which provides for the jurisdiction of the Sharia Court of Appeal. Section 277(1) enacts as follows:

The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of ISLAMIC PERSONAL LAW⁶⁴⁴ which the court is competent to decide in accordance with the provisions of subsection 2 of this Section.

⁶⁴⁰ The Centre for Religious Freedom, *The Talibanization of Nigeria: Sharia Law and Religious Freedom* (2002) 8. The ‘‘newness’’ refers to the fact that the initiates were new in Nigeria and certainly not to the fact that they are ‘‘new’’ to Sharia.

⁶⁴¹ Yadudu AH, ‘‘Benefits of Shariah and Challenges of Reclaiming a heritage’’ being the text of a paper delivered at the conference of the Nigerian Muslim Forum, UK 14 April 2001, London http://www.shariah2001.nmnonline.net/yadudu_paper.htm [accessed 1 June 2006].

⁶⁴² Tabiu M, ‘‘Sharia, Federalism and Nigerian Constitution’’ being the text of a paper delivered at the conference of the Nigerian Muslim Forum, UK on 14 April 2001, London. http://www/shariah2001.nmnonline.net/tabiu_paper.htm [accessed 1 June] 2006.

⁶⁴³ Tabiu ‘‘Sharia *supra*.’’

⁶⁴⁴ Emphasis supplied.

Section 277(2) provides that for the purposes of subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide any question of Islamic personal law relating to marriage, a *wakf*, gift, will or succession, an infant, prodigal or person of unsound mind. It is not in doubt that the jurisdiction or competence of the Sharia Court of Appeal has clearly been delimited by the provisions of section 277(2) to questions regarding Islamic personal law. Any State wishing to confer additional jurisdiction on the Sharia Court of Appeal pursuant to section 277(1), must limit the conferment to matters or issues regarding Islamic personal law. It is unconstitutional to enlarge the court's jurisdiction in view of the provisions of section 277(2) of the 1999 Constitution and confer such additional jurisdiction that is outside Islamic personal law.

It is, therefore, incompetent for any State to confer criminal jurisdiction on State Sharia Court of Appeal. Again, since appeal lies to the Court of Appeal as of right from the Sharia Court of Appeal in any civil proceedings relating to any question of Islamic personal law under the constitution,⁶⁴⁵ it becomes obvious that the Sharia Court of Appeal cannot be conferred with jurisdiction over a matter wherein no appeal lies to the Court of Appeal. Such cases will include criminal matters.

In *Muninga v Muninga*⁶⁴⁶, the Court of Appeal had to consider the scope of section 242(2) of the 1979 Constitution which provisions are same as those of section 277(2) of the 1999 Constitution. By the Constitution (Suspension and Modification) Decree 107 of 1993, schedule 2, section 242(2) of the 1979 Constitution was amended whereby the word "personal" was deleted from the main provision of the section. The court held that although the amendment was aimed at extending the jurisdiction of the Sharia Court of Appeal by the deletion of the word "personal", the purpose had not been achieved because the deletion (or amendment) in the said decree left untouched the specific jurisdiction of the Sharia Court of Appeal which remained limited as set out under section 242(2)(a)-(e) of the 1979 Constitution.⁶⁴⁷ If the deletion of the word "personal" did not achieve the purpose of enlarging the jurisdiction of the Sharia Court of Appeal, how then can the States that adopted the new Sharia lawfully confer additional jurisdiction on the said court outside Islamic personal law? That cannot be lawfully done.

⁶⁴⁵ See 1999 Constitution, section 244.

⁶⁴⁶ (1997) 11 NWLR (Pt 527)1.

⁶⁴⁷ *Supra* at 9 paras F-G.

Nwabueze is, therefore, right when he argues that it is needless to state that the power of a State to confer additional jurisdiction on Sharia Court of Appeal is controlled by the provisions of section 277(2) of the 1999 constitution. He said: “Any other view of the matter would do violence to the letter as well as the spirit of the provision. It would also render virtually nugatory the prohibition in Section 10”.⁶⁴⁸ Eso on his part, reacting to section 5 of the Sharia Law of Zamfara State, which among others, conferred unlimited civil and criminal jurisdiction on Sharia Court of Appeal of the State in Islamic law said:

This has clearly exceeded personal law. It is, with utmost deference to the lawmaker, a usurpation of the jurisdiction of the powers of the State High Court, with a substitution of the proceedings being brought in Islamic law. It is importing undisguisedly the Islamic religion as the State Religion of Zamfara. It clearly appears, we submit with respect, unconstitutional and would be null and void and be of no effect completely.⁶⁴⁹

Abati argued that the States that adopted the new Sharia are “law breakers who are imposing the Sharia beyond its constitutional limits.”⁶⁵⁰ Hon who canvasses the unconstitutionality of the new provision on Sharia, rejected the reliance placed on section 38 of the 1999 Constitution-Right to freedom of thought, conscience and religion-by those who defend the constitutionality of the new Sharia.⁶⁵¹ He opines that the “same section 38 which the Sharia State Governments are claiming that gave them the right to slam the Islamic legal code in their domains ought, in proper constitutional circumstances, to also protect Christians lawfully living in those states.”⁶⁵²

There is absolutely nothing in the provisions of section 38 of the 1999 Constitution that justifies the constitutionality of the new Sharia. On the contrary, the new Sharia and its discriminatory practices against Christians not only offend section 38 but also section 42(1) of the Constitution. The right to freedom of thought, conscience and religion, and the right to freedom from discrimination based on religion all fortify and complement the provision of section 10 of the Constitution.

⁶⁴⁸ Nwabueze B *Constitutional Democracy in Nigeria Volume 3* 138.

⁶⁴⁹ Eso K *Further Thoughts on Law and Jurisprudence* (2003) 132.

⁶⁵⁰ Abati R “Sharia, Ba Mu so”

http://www.nigerdeltacongress.com/sarticles/sharia_ba_mu_so.htm [accessed 6 June 2006].

⁶⁵¹ Hon S “1999 Constitution Sharia and Public Order”

http://www.nogerdeltacongress.com/articles/1999_constitution_sharia_and_public.htm [accessed 1 June 2006].

⁶⁵² *Supra*.

It offends common sense to claim that the action of a state government which is in deliberate aid and support of a particular religion as against other religions and non-believers, can be consistent with sections 10, 38 and 42 of the 1999 Constitution. Such action is clearly unconstitutional. What happened in Zamfara State and other states that adopted the new Sharia is an unabashed advancement, enforcement, promotion, fostering, sponsoring and aiding of a particular religion by state government. The entanglement of the state with religion is not only manifestly but outrightly excessive. There was no pretence that a clearly religious purpose was intended to be achieved. The defenders of the adoption of the new Sharia who rely on section 38(1) of the 1999 Constitution to argue that it gives the Muslims the right to practice their religion which means living according to the Sharia, overlook the rights of non-Muslims. The said section equally gives adherents of other religions the right to live in accordance with their faith or non-believers the right not to profess any religious faith. Even if it is stretched beyond its ordinary meaning, the provision does not and will not support the adoption of Sharia as a State religion or the entanglement of government with religion. There is no doubting the fact that the introduction of Sharia criminal law necessitates an entanglement with a state religion. Indeed, it amounts to the adoption of Islam as a state religion.

The adoption of the new Sharia in Northern Nigeria has in several respects, conflicted with the human rights of non-muslims. Section 42 of the 1999 Constitution as stated earlier guarantees the right to freedom from discrimination. International human rights instruments which Nigeria is party to or has ratified, also guarantee the right to freedom from discrimination. They are the UDHR (Article 7); ICCPR (article 14); CEDAW (article 2) and the African Charter (article 7). According to article 1 of CEDAW, the term “discrimination against women”:

shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

A main rule of Sharia is that the man is guardian over women. This is based on the Quranic verse:

Men are guardians over women because God has preferred some of them (men) over others (women), and because men support women from their wealth, therefore the righteous of women are devout and guard in their husband's absence what God would have them to guard, and those women whom you (men) fear to be disobedient, admonish them first, then reject them in bed, and finally beat them. But if they return to obedience do not seek to harass them more (4:34).

The general discriminatory practices against women in Islam in all spheres_public and private are anchored on the foregoing verse. Safi observes that “while Islamic sources differentiate men’s and women’s responsibilities within the family, all limitations on women’s rights imposed by classical scholars in the public sphere were based on either faulty interpretations of Islamic texts, or practical limitations associated with the social and political structures of historical society.⁶⁵³ Citing the Quranic verse (9:71)“the believers, men and women, are protectors one of another; they enjoin the right (*ma’ruf*) and forbid the intolerable (*munkar*); they observe regular prayers, practice regular charity, and obey God and His Messenger”,⁶⁵⁴ Safi contends that the Quran unequivocally assigns equal responsibilities to men and women for maintaining public order, but the classical jurists deny women political equality with men.⁶⁵⁵ He insists that the Quranic verse (4:34) cannot be used to deny women access to public office.⁶⁵⁶

Safi also argued that the jurists and scholars who champion discrimination against women also rely on the Hadith text which states: “they shall never succeed those who entrust their affairs to women”.⁶⁵⁷ Challenging the Hadith text as basis for inequality of men and women in public life, Safi contends as follows :⁶⁵⁸

The hadith statement is not given in the form of a directive, but rather it has to be understood in its historical and cultural context; in the context of a political culture that prescribes the hereditary rule over the principle of merit in determining political succession.

The hadith is a single statement that does not find support in most authoritative Islamic source, that is, the Quran.

The hadith stands in direct contradiction with the principle of moral and political equality of the sexes, a principle found by numerous Quranic verses. Finally, the hadith, being a singular narration (*khbar ahad*), is of a lesser degree of certainty than Quranic narration (*khbar mutawatar*), consequently it cannot overrule principles established in the Quran.

The Sharia as adopted, practiced, implemented and enforced in the concerned Northern States ordain gender inequalities. Under the Northern traditional and cultural setting, there have always been gender inequality, but the adoption and politicization of Sharia has given religious, legal and official recognition to gender inequality. It did same to traditional, cultural and religious prejudices against women.

⁶⁵³ Safi LM, “Human Rights and Islamic Legal Reform” <http://www2.iu.edu/my/deed/articles/humanz.pdf> [accessed 20 February 2005]

⁶⁵⁴ *Supra.*

⁶⁵⁵ *Supra.*

⁶⁵⁶ *Supra.*

⁶⁵⁷ *Supra.*

⁶⁵⁸ *Supra.*

The Sharia Penal Codes enact that a woman's evidence or testimony in a trial is only worth half that of a man, or the testimony of one male witness equals that of two female witnesses. There cannot be any rational justification for this gender inequality in the weight of testimony. There is also gender inequality in standard of evidence in respect of *zina*, extra-marital sex, which is referred to as adultery if the offender is married or fornication if not married. If convicted of *zina*, the punishment is death by stoning if the offender is married or has been married. In other cases, the punishment is one hundred lashes.⁶⁵⁹

Under the Maliki school of Islam, pregnancy is considered sufficient evidence to find a woman guilty of adultery. For a male accused, the provision under the Sharia Penal Codes stipulate that the act of adultery must have been witnessed by four independent individuals before the suspect can be convicted. Both Kano and Niger Penal Codes respectively enacts that *zina* (including rape) can only be proven by confession or four witnesses. For Kano, eight female witnesses will also suffice.⁶⁶⁰ The gender discrimination in standard of evidence ensures that while a woman is easily convicted of adultery; it is more difficult to convict a man of same offence.

The Constitution in section 34(1), Convention Against Torture and other international human rights instruments outlaw torture, inhuman, cruel or degrading treatment of persons. There is no gain-saying the fact that amputation, flogging and stoning to death which are prescribed punishments for various offences under the Sharia amount to torture, inhuman, cruel and degrading punishments. So also is blinding or the pulling out of teeth in retaliation, a form of torture.⁶⁶¹ In convicting and sentencing offenders to amputations, no distinction is made between adults and children. Children under the age of eighteen could be sentenced to amputation by Sharia Courts. Abubakar Aliyu, whose age falls between fourteen and eighteen was convicted by the Upper Area Court in Kebbi State and sentenced to amputation. His co-accused, who was about sixteen years of age was sentenced to fifty lashes and eighteen months in jail.

Section 36(12) of the Constitution enacts that "a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law". The Penal Codes of the states that have adopted Sharia with the exception of Kano, contain a provision making it punishable for any act or omission that is an offence under the Sharia notwithstanding that it is not stated to be an offence under the Penal Code itself.⁶⁶²

⁶⁵⁹ Peters *Islamic Criminal Law in Nigeria* 19.

⁶⁶⁰ *Supra*.

⁶⁶¹ Peters *Islamic Criminal Law in Nigeria* at 38.

⁶⁶² Zamfara Penal Code, section 92; Jigawa Penal Code, section. 92; Yobe Penal Code, section 92; Kebbi Penal Code, section 93 and Bauchi Penal Code, section 95.

This is in violation of the principle of *nulla poena sine lege* and the constitutional provision aforesaid. The repugnancy to the constitution by the provision has been conceded by a well known Islamic authority, Adegbite.⁶⁶³ There is no express provision in any of the Sharia Penal Codes on apostasy. It has been suggested that the preceding provision could be relied on to punish and sentence to death Muslims who change their religion, that is, apostasy (*ridda*).⁶⁶⁴ Apostasy also leads to loss of civil rights, such as the right to get married and the right to hold property. Section 38 of the Constitution expressly secures the right to change one's religion. Section 405 of the Zamfara Penal Code makes the worship or invocation of *juju* unlawful. It explains that *juju* includes the worship or invocation of any subject or being other than Allah. Under Section 406(d), the offence is punishable by death. Peters had rightly argued that the provision is dangerous as it could be used against all religious practices that are deemed un-Islamic.⁶⁶⁵

In a report, Peter Takirambudde rightly observes that “if the Sharia Courts had respected the due process rights enshrined in Nigeria’s constitution, many of these sentences would never have been imposed”.⁶⁶⁶ He insisted again he is right, that state governments and the Sharia Courts have failed to respect international human rights standards. They have also failed to follow what many adherents of Islam have argued are key principles of Sharia itself. The painful result has been the infringement of the fundamental rights guaranteed by the national constitution and international human rights norms.⁶⁶⁷

The report of the Centre for Religious Freedom summarized the problem arising from the implementation of the new Sharia in Nigeria thus:⁶⁶⁸

Instituted harsh , cruel and unusual punishments, including stoning in which the victim is to be buried with only the head and shoulders showing, before being stoned, amputations of hands, lashings, removal of eyes, and death by stabbing. Despite protestations to the contrary, it can require non-Muslims to be judged by Sharia courts, as, for example, in matters of marriage , or in disputes with Muslims. Is imposed on individual Muslims even if they want protection of their rights under the Nigerian constitution rather than subjection to the new Sharia.

⁶⁶³ Dr Adegbite L “Sharia in the context of Nigeria”, *The Sharia Issue: Working Papers for a Dialogue* 57-82.

⁶⁶⁴ Peters *Peter Islamic Criminal Law in Nigeira* 41-42.

⁶⁶⁵ Peter *Supra* 41-42.

⁶⁶⁶ Human Rights Watch “Nigeria: Under Islamic Law, Rights Still Unprotected” 21 September 2004.

⁶⁶⁷ *Supra* .

⁶⁶⁸ The Centre for Freedom House *The Talibanization of Nigeria: Sharia Law and Religions Freedom* 59-60.

It is, therefore, beyond controversy that the implementation and practice of the new Sharia have in several respects, violated the Nigerian constitution and the nation's obligation under several International Human Rights Treaties and Conventions. The brand of Sharia introduced, drew inspiration from Saudi's Whahabi Islam. This reflects negatively on the rights of Muslims and non- Muslims in the States concerned.⁶⁶⁹

3.3.6.3 Secularism in Nigeria

Is Nigeria constitutionally a secular state? Yadudu⁶⁷⁰ and Tabiu⁶⁷¹ hold the view that Nigeria is not a secular state. Abdulkader Tayob argues that religion has not been totally established in Nigeria.⁶⁷² According to him and he is right, in many ways Muslims and Christians enjoy special privileges from state funds. They are sponsored on pilgrimages to Saudi Arabia and Israel. Durham's view on secularism in Nigeria is that it will "fall somewhere in the range between cooperation and benign neutrality. There is nothing in the Nigerian constitution calling for harsh separationism of French or Turkish secularism", he said.⁶⁷³

In order to appreciate Durham's conclusion, it is important to understand his characterization of "accommodation" and "benign neutrality". He explains that, "accommodation is neutrality as substantive equality. Accommodation recognises that treating people in ways that ignore valid and distinctive religious requirements can work substantive injustice."⁶⁷⁴ "Benign neutrality", he said "is essentially formal equality with a reminder that when all other things are equal, there is no need to be hostile to religion".⁶⁷⁵ Durham's analysis does not detract from the doctrine of secularism. Indeed, it is accommodated within the rubric of secularism. He has characterized the French and Turkish secularism as "hard separationism,"⁶⁷⁶ but it is true that the countries in question still have some "accommodation" with religion and in some cases they exercise "benign neutrality" according to the dictates of the situation.

⁶⁶⁹ Compass Direct "Muslim Countries Offer to Help with Islamic Law in Nigeria" September 2000.

⁶⁷⁰ Yadudu "Benefits of Shariah and Challenges of Reclaiming a Heritage".

⁶⁷¹ Tabiu "Sharia, Federalism and Nigerian Constitution".

⁶⁷² Tayob A "The Demand of *Shari'ah* in African Democratisation Process: Pitfalls or Opportunities?" in Ostien P, Nasir JM and Kogelmann F (eds) *Comparative Perspectives on Shari'ah in Nigeria* (2005) 48.

⁶⁷³ Durham, Jr, WC "Nigerian 'State Religion' Question in Comparative Perspective" in Ostien *et al* 163.

⁶⁷⁴ *Supra* 158.

⁶⁷⁵ *Supra* 158.

⁶⁷⁶ *Supra* 163.

In spite of Turkey's secularism, it still pays imams' wages, provides religious education in public schools⁶⁷⁷ and has a Department of Religious Affairs that organizes the Muslim religion.⁶⁷⁸ In France, although the government is legally prohibited from funding religious activities except for Alsace–Moselle and military chaplains, it still provides funding for some private religious schools in respect of their non-religious activities as long as they apply the national curriculum and do not discriminate on religious grounds. Even in United States, that absolute separation has not been achieved. The country's currency has the motto "In God We Trust" and since 1954, the Pledge of Alliance contains the phrase, "One nation, under God".

The point being made is that a total and complete separation between the state and religion to the extent that the state has absolutely nothing to do with religion in any shape or form, directly or indirectly, may not be possible. Ostien and Gamaliel argue that the Nigerian state does not have a disestablishment clause that can compare with that of the United States.⁶⁷⁹ Similarly, Ibrahim Sada said having regard to certain constitutional provisions,⁶⁸⁰ there is an entanglement of government with religion or institutions that have religious agenda.⁶⁸¹

Tayob did not get it right when he said that section 10 of the Constitution "remains ambiguous." On the contrary, this text accepts Nwabueze's view that American clause is less precise than Nigeria's clause.⁶⁸² It is beyond dispute that section 10 of the 1999 Constitution is very unequivocal in outlawing any religion as State religion and that is a fundamental character of secularism. It is totally irrelevant that the constitution did not use the word "secular".

If the provision is respected, then the Federal and State governments will see themselves constitutionally bound to maintain neutrality over religious matters and treat all religions equally. In practice, the contrary is the case. The fact that the provision is violated certainly compromises the secular character intended by the provision. But that does not mean that constitutionally, Nigeria is not a secular state. The problem with Nigerian secularism is that it is honoured more in breach than in practice. The Federal Government and the States operate as if non-believers and believers in traditional religion do not exist. Only Christian and Muslim religions enjoy certain privileges as argued earlier. The practicalization of secularism will take its root when the Federal and State governments learn to respect the constitution and this is a fundamental principle in a democracy and constitutionalism.

⁶⁷⁷ Article 24, Constitution of Turkey 1982.

⁶⁷⁸ Article 136, Constitution of Turkey 1982.

⁶⁷⁹ Ostien P and Gamaliel JD, "The law of separation of religion and state in the United States: a model for Nigeria" in Amadi SOO *et al* (eds) *Religion in the United States* (2002) 14-32.

⁶⁸⁰ He cited sections 10, 38 247, 275-279 and 288 of the 1999 Constitution. Section 247 provides for the constitution of the membership of Sharia Court of Appeal; section 275 provides for the establishment of the Court; section 276 provides for the appointment of Grand Kadi and Kadis; section 278 repeats the issue of constitution of the court and section 279 provides for the practice and procedure of the Court. Sections 10, 38 and 277 have been set out in this chapter, *supra*.

⁶⁸¹ Tayob "The Demand of Shari'ah in African Democratization Process: Pitfalls or Opportunities" 47.

⁶⁸² Nwabueze *Constitutional Democracy in Africa Volume 3* 138.

3.3.7 Freedom of expression and the press

The early Nigerian Press started with newspaper evangelism.⁶⁸³ The 1880s saw the rapid growth of newspaper journalism in Nigeria, particularly in the Lagos area where a number of them was established but inevitably crashed after a short while. The establishment of most of the early Nigerian newspapers was informed by political and ideological considerations. Many of them adopted anti-colonial editorial policies. The pressure was so severe that Lord Lugard branded the then practice of journalism-“misleading journalism”.⁶⁸⁴ Indeed, pre-independent Nigerian newspapers had their pioneering efforts directed towards the propagation of nationalism, the democratization of governance, the decolonization of the country and the struggle to end imperialism.⁶⁸⁵ The development of the electronic media in Nigeria was not as rapid as its counterpart-the print media. The former started in 1954 with the establishment of the Nigerian Broadcasting Corporation.

In 1959, the Regional government in the West under the premiership of late Chief Obafemi Awolowo, set up the first television station in Nigeria. The Federal and State Governments enjoyed absolute monopoly of the electronic media until 1979 when private individuals were permitted to establish electronic media subject to the grant of presidential approval.

Ironically, while freedom of expression and the press was developing in Europe and America, Nigerian colonial masters were hell bent on muzzling that freedom in the colonies. The press was seen as an instrument of subversion against colonial authority. The early press laws were, therefore, geared towards containing this perceived subversion, while strengthening colonialism and imperialism.

The colonial contempt for freedom of expression was aptly demonstrated by Sir William Berkeley in 1671. For 38 years, he was the colonial Governor of Virginia. Writing to the colonial masters in London about the freedom of expression, he said: “But, I thank God, we have not free schools nor printing; and I hope we shall not for learning has brought disobedience and heresy and sects into the world; printing has divulged them and libels against the government . God keep us from both.”⁶⁸⁶

⁶⁸³ The earliest one was the Yoruba-language *Iwe Irohin* “newspaper” which was started in 1859 by Reverend Henry Townsend in Abeokuta. Nigerian’s first English newspaper was the *Anglo-African*. It was founded in Lagos in 1863 by Robert Campell, a Jamaican. The Daily Times was set up in 1926.

⁶⁸⁴ See Daily Times, *The Story of Daily Times 1976-1876*, (1976).

⁶⁸⁵ The West African Pilot founded by Dr Nnamdi Azikiwe in 1937 with its motto titled—“show the light and people will find the way” was in the forefront of that struggle. It did show the light and many found their way.

⁶⁸⁶ Lofton J, *Justice and the Press* (1966) 10.

No doubt this prayer was never granted. By late 19th century up to early 20th century, the colonial administration started reacting decisively against radical journalism which it considered a serious threat to its powers.⁶⁸⁷ It is the responsibility of the law to define with unmistakable clarity the boundary between right and wrong. This means that in the discharge of its fundamental function of informing, educating and entertaining, the press should clearly appreciate the legal environment as it concerns its duties. No where in the world is press freedom absolute. The right to press freedom has the jural correlative duty of not only practicing responsible and respectable journalism, but the duty to obey the laws of the land. The origin of this lies in antiquity. Blackstone an undisputed authority of English law said: “ Every person has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity”.⁶⁸⁸

The legal position above clearly encapsulates the position of the press under the common law, which following the colonization of Nigeria, became part of the Nigerian jurisprudence. That common law position is part of the rubric of the fundamental right to freedom of expression and the press guaranteed by the constitution. Section 39 of the 1999 Constitution which guarantees the freedom of expression provides:

39-(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.

(2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions.

No objection may successfully be raised against the foregoing provisions. The problem and difficulty lie with the qualifiers and limitations regulating the above provisions.⁶⁸⁹ During what is now regarded as the great debate on the draft constitution that was eventually promulgated as the 1979 Constitution, writers, speakers and commentators on either side of the divide, canvassed the propriety or otherwise of not specifically mentioning the press (other than in the marginal note) in a provision that is *in pari materia* with section 39(1) of the 1999 Constitution.⁶⁹⁰

⁶⁸⁷ The Official Secrets Ordinance was enacted in 1891; the Newspaper Ordinance was promulgated in 1903 and the then Sedition Ordinance in 1909. Of course the Military perfected the act of muzzling, intimidating and blackmailing the press through retrogressive and retroactive laws.

⁶⁸⁸ Blackstone W *Blackstone's Commentaries* Vol 4, 151-152.

⁶⁸⁹ The limitations are considered in chapter 5 *infra*.

⁶⁹⁰ Ofonagoro WI, Oko, A and Jinadu A (eds.) *The Great Debate* (nd) 121-201.

It must be noted that the lack of specific mention of the press in the provisions, other than on the marginal note, is not too serious an issue. The issue is whether the plenitude and amplitude of the provision guarantee adequate safeguards to the exercise of the freedom of expression.⁶⁹¹

The freedom of the press is certainly an integral part of the freedom of expression and undoubtedly the press is a principal medium in the exercise of that freedom of expression. Nwabueze⁶⁹², was right when he explained: “Although the press is not specifically mentioned, it is unquestionably comprehended in freedom of expression: ideas and information are imparted by speech, by the printed work in a newspaper or other publication, by means of a motion picture etc.”

The text will now briefly examine some other important clauses or provisions of section 39 of the 1999 Constitution.⁶⁹³ Section 39 not only guarantees the right to impart but also the right to receive information and ideas without interference. Understandably, the press or media, has the right to impart information and ideas, the public has the right to receive them.⁶⁹⁴

In *Leander v Sweden*,⁶⁹⁵ the European Court had to consider article 10 of the European Convention on Human Rights which is similar to section 39 of the 1999 Constitution and held that the right to receive information under article 10: “basically prohibits a Government from restricting a person from receiving information that others may wish or may be willing to impart to him”. It is still a matter of speculation as to what the attitude of Nigerian courts to the provision will be as they are yet to make any pronouncement on it.

The right to own, establish and operate any medium for the dissemination of information, ideas and opinion is protected by section 39(2) of the 1999 constitution. Under the said subsection, it is clear that any censorship or prior restraint placed on the establishment, ownership or operation of “any medium” for the dissemination of information, ideas and opinions is prohibited. Also prohibited is the licensing of the establishment, ownership or operation of Newspapers including magazines.

⁶⁹¹ After all, International Charters, Covenants and Conventions such as the Universal Declaration of Human Rights (1948) (Art. 19); International Covenant on Civil and Political Rights (1966) (Art. 19); American Convention on Human Rights (1969) (Art. 13); European Convention on Human Rights (1950) (Art. 10) and the African Charter on Human and Peoples’ Rights (1986) (Art. 9) did not specifically mention the press in their respective provisions on freedom of expression.

⁶⁹² Nwabueze BO *Presidential Constitution of Nigeria* (1982) 465.

⁶⁹³ See section 39(1).

⁶⁹⁴ *Supra*.

⁶⁹⁵ Judgment of 26 March 1989, Series A No. 246.

In *Archbishop Okogie v A-G Lagos State*⁶⁹⁶, “any medium” was interpreted to include “schools”. The court also rightly held that a fundamental right entrenched and guaranteed by the constitution is not liable to be abrogated by any executive act. The restriction must have the force of law. Executive orders, policies or administrative instructions which lack the sanction of law will not suffice. It must be noted that some of the regulatory provisions for newspaper ownership contained in some federal and state enactments cannot be justified having regard to section 39 of the 1999 Constitution.

For example, there are certain requirements which under the Newspapers Act 1990⁶⁹⁷ must be met before a newspaper, which definition includes a magazine, could be established. Under section 3 thereof, the proprietor, printer and publisher shall not cause to be printed or published or print or publish any newspaper, unless an affidavit is made, signed and sworn before a Magistrate or Commissioner for Oaths by each of them providing certain information. They will also execute a bond. The demand no doubt serves as a restraint on the right to freedom of expression in that it does appear that unless the requirements are met, no newspaper shall be printed or published.

Under section 22(1) of the Act, any person who authorizes for publication or publishes for sale in a newspaper any statement, rumour or report knowing or having reason to believe that such statement, rumour, report is false, shall be guilty of an offence. If convicted, he is liable to pay a fine of N400 or imprisonment for one year. Under section 22(2) of the Act, it shall not be a defence to a charge under the above subsection that a person did not know or did not have reason to believe that the statement, rumour or report was false unless he proves that, prior to publication, he took reasonable measures to verify the accuracy. What is the degree of reasonability that will suffice?

Under section 45(1)(b) of the 1999 Constitution, the right to freedom of expression may be limited “for the purpose of protecting the rights and the freedom of other persons”. The question is how to balance the right to freedom of expression, the right to privacy of public officials and figures who are in the public domain and the liability imposed by our law of defamation. This has a very important bearing on the practice of journalism in a democracy. Regrettably, the subject hardly receives the attention it deserves in our national discourse.

⁶⁹⁶ (1981) 2 N.C.L.R 337.

⁶⁹⁷ Newspapers Act, Laws of the Federation 1990, Cap 291.

In 1992, David Mellor, a Cabinet Secretary in Britain who was in charge of arts, sports and the media was excoriated, lampooned and lambasted by the British Press for his extra-marital involvement with an actress. Consequent upon the adverse publicity, he resigned his position. All the time, nobody questioned his competence on the job. In an editorial on the subject appropriately titled: “The private lives of public persons”, *The Guardian*⁶⁹⁸ newspaper posed a fundamental question: “What is of infinitely greater import is how much interference in their private lives, public officials must endure? At this level, the issue becomes universal and therefore germane to our Nigerian context”. The Newspaper went on to submit:

... leadership is a communal trust. Leaders ought to struggle in manifesting the highest ideals of society. The notion of the leader as an embodiment of the supremest intellectual and ethical aspirations of society is one probably as old as human society itself... No assessment of virtuous standing of a public official is reliable which would, for instance, put premium on administrative or organizational competence and disregard the function of personal moral conduct.⁶⁹⁹

In the exercise of the right to freedom of expression, can the press in Nigeria freely publish matters of public interest or concern relating to the moral lives or conduct of public officials and figures and be held not to be in breach of the right to privacy and the law of defamation?

Osinbajo and Fogam said:

An intriguing issue which also arises is whether a publication which infringes the privacy of a public figure in Nigeria can legitimately claim that the infringement is excusable because the victim is a public figure and the public has a right to know his activities. It is possible to argue that such a defence may not hold under the Nigerian Law.⁷⁰⁰

Such a defence may hold under the Nigerian law depending on how the courts exercise their interpretative jurisdiction. In *Nwankwo v The State*,⁷⁰¹ Olatawora, J.C.A. (as he then was) reacted to the issue as follows:

Those who occupy sensitive posts must be prepared to face public criticisms in respect of their office so as to ensure that they are accountable to the electorate. They should not be made to feel they live in an Ivory Tower and therefore belong to a different class. They must develop thick skin and where possible plug their ears with cotton wool if they feel too sensitive or irascible... It should not be misunderstood that the freedom under this Constitution is a licence for defamation as it is equally guaranteed that those who run foul of the law of defamation cannot call in aid this freedom.

The learned judge emphasized the right to freely criticize public officials under the pains of our law of defamation. The above represents the attitude of the Nigerian courts which is largely conservative than progressive;⁷⁰² and which position is found on traditional English law of libel.

⁶⁹⁸ *The Guardian* 8 August (1992) 14.

⁶⁹⁹ *Supra* .

⁷⁰⁰ Osinbajo Y and Fogam K *Nigeria Media Law* (1991) 14.

⁷⁰¹ Fawehinmi G *Nigerian Law of the Press under the Constitution and the Criminal Law* (1987) C 486 at C 514.

⁷⁰² See also the case of *Gomes v Punch (Nig) Ltd* (1999) 5 NWLR Pt. 602 203 at 312 paras C-E and 313 paras A-C.

3.3.8 Right to peaceful assembly and association

Section 40 of the 1999 Constitution guarantees that “every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests”.⁷⁰³ By extending the right to “every person”, there is the temptation to presume that non-citizens or aliens may form or belong to a political party in the country.

The South African Constitution guarantees everyone the right to peaceful assembly and the right to freedom of association.⁷⁰⁴ But it reserved the right to form a political party to citizens. Similarly, the 1992 Constitution of Ghana protects the right of all persons to freedom of association, but grants to all citizens the right and freedom to form or join political parties and to participate in political activities.⁷⁰⁵ The right given to “every person” by section 40 of the 1999 Constitution, when read together with section 222(b) of the same Constitution, it would be obvious that only citizens of Nigeria can be members of a political party. Section 222(b) provides that “the membership of the association (political party) is open to every citizen of Nigeria irrespective of his place of origin, circumstances of birth, sex, religion or ethnic grouping”. The problem is whether the above provision has circumscribed or delimited the clear provision of section 40 of the Constitution which expressly guarantees the right to every person. Since the provisions of a constitution are read as a whole,⁷⁰⁶ it is correct to argue that the right to belong to political parties in Nigeria is reserved for citizens only.

Under the customs and traditions that exist in several Igbo communities, there is what is known as the age-grade grouping or association, whereby a person born within a given period, automatically belongs to a particular age-grade. So within a community, there are several age-grade groups or associations. The association is essentially for social activities and communal development. The membership is automatic. This automatic membership has been challenged as infringing the fundamental rights to freedom of association.

⁷⁰³ Similar right was granted respectively by sections 25, 26 and 37 of the 1960, 1963 and 1979 Constitutions. Articles 10 and 11 of the African Charter respectively protects the right to free association and assembly. Article 20 of UDHR guarantees the right to freedom of peaceful assembly and association; while the right to freedom of association is protected by article 22 of the ICCPR.

⁷⁰⁴ See Constitution of South Africa 1996, sections 17 and 18 thereof .

⁷⁰⁵ Article 2(1)(e) and article 22(3).

⁷⁰⁶ In *INEC v Musa* (2003) 3 NWLR Pt. 806 72, it was held that the provisions of a Constitution are of equal strength and constitutionality. No provision is inferior to the other; and *a fortiori*, no provision is superior to the other.

In the case of *Agbai v Okogbue*,⁷⁰⁷ it was contended that the plaintiff being of Amakalu Alayi of Igbo stock, was, by custom, obliged to join an age group and that he could not opt out. He was also obliged by custom to pay all development levies imposed on members by the age group. The plaintiff's sewing machine was seized because he failed to pay the development levy for the purposes of building a health centre in their village. The plaintiff on the other hand contended that he was not a member of the age grade association in that his religion forbids him to join and that his sewing machine was seized because he refused to pay the contribution levied by the defendants for the construction of a health centre. The case was fought from the Chief Magistrates' Court all the way to the High Court, Court of Appeal and Supreme Court.

At the Supreme Court, the provisions of section 24(1) and 26(1) of the 1963 constitution applicable to the case and which are *in pari materia* with sections 38(1) and 40(1) of the 1999 constitution which respectively guarantees the right to freedom of thought, conscience and religion, and right to peaceful assembly and association were considered. The Supreme Court variously held that the grouping of young men into age groups is a well known custom throughout all Igbo communities. It is no more than a manner of dating or showing the age of the group in a society where age matters a lot and the art of writing had not been acquired. It stated that much as one would welcome development projects in the Community, there must be caution to ensure that the fundamental rights of a citizen are not trampled upon by popular enthusiasm. Freedom of religion and association being constitutional rights, enjoy superiority over local custom.

The court emphasizes that the concept of age grade *per se* does not offend the provisions of the Constitution. On the other hand, the idea of the automatic membership of every member of the age-grade into an association formed by the age-grade is an infringement of the freedom of association. It is a fundamental right of the individual to determine with who he will associate. The court then concluded that the custom, which translates the plaintiff, a member of the age-grade, automatically into membership of the Umukalu Age-Grade Association, without his consent, and merely because he is a member of their age-grade, is incompatible directly with the right to freedom of association guaranteed by the constitution. It has to be pointed out that section 34 (2)(e) (i) of the 1999 Constitution, recognises "normal communal or other civic obligations for the well-being of the community" which it excepted from the constitutional prescription against "forced or compulsory labour". There is no equivalent provision in the 1963 Constitution. The decision of the Supreme Court could have been different if a similar decision is to be taken under the 1999 Constitution.

⁷⁰⁷ (1991) 7 NWLR (Pt. 204) 391.

The case of *Nkpa v Nkume*,⁷⁰⁸ was concerned with communal levies imposed for development. The appellant, a member of the Jehova's Witness refused to join association of the women in the village, or at least contribute to their community development efforts on account of her religious beliefs. When persuasion failed, armed soldiers were engaged to intimidate her. Fearing for her life, she paid the sum demanded for the community's hospital/maternity project. The case turned on the interpretation of section 31(1)(c) and (2)(d)(i) of the Constitution of 1979 which has the same wordings as section 34(1)(c) and (2)(e)(i) of the 1999 Constitution. The Court of Appeal relying on *Agbai v Okogbue*⁷⁰⁹ held as follows:

Though, forced or compulsory labour does not include any labour or service that forms part of normal communal or other civic obligations for the well-being of the community. The kind of labour that is contemplated by this provision is forcing every able-bodied member of the community to take part in manual labour, like clearing the bushes along the community roads or generally keeping the village clean. In this regard, the imposition of an arbitrary levy in the nature of community development is not the kind of manual labour envisaged by the constitution.

The distinction the Court of Appeal sought to make above can hardly be justified. Levies are not arbitrarily imposed. Communities in Igbo land meet and agree on what is to be paid as levies. If the levy imposed to build a health centre or hospital/maternity is unacceptable; for the same reason, forcing able-bodied men to take part in manual labour be it for the clearing of bushes along community road or keeping the village generally clean, will also be unacceptable. It does appear that the Court of Appeal will not mind if able-bodied men are forced to build health centres by contributing labour but will reject their paying levies for the same purpose.

3.3.9 Right to freedom of movement

The right to freedom of movement is protected by section 41(1) of the 1999 Constitution. It states as follows: "Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom".⁷¹⁰

⁷⁰⁸ (2001) 6 NWLR (Pt. 710) 543.

⁷⁰⁹ (1991) 7 NWLR (Pt 204) 391.

⁷¹⁰ Similar provisions are contained in sections 26,27 and 36 respectively of the 1960, 1963 and 1979 Constitutions. Article 13 of UDHR and article 12 of ICCPR protects the right to freedom of movement and residence. The same right has also been guaranteed by article 12 of the African Charter.

The provision is made subject to any law that is reasonably justiciable in a democratic society that restricts the movement of any person who has committed or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria or the extradition of any person to be tried outside Nigeria or to serve a sentence outside Nigeria, provided there is a reciprocal agreement between Nigeria and such other country.

It is curious why the provision is limited to Nigerian citizens only. At least the first limb of section 41(1) of the Constitution which provides that: “Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof...” should have been made applicable to “every person” or “everyone” and that would have included aliens or non-citizens who are legitimately residing in the country. They too are entitled to freedom of movement. The freedom of movement is dependent on other ancillary rights without which the right of movement will be impaired. Flowing from the foregoing, the possession of a passport is a *sine qua non* to travelling out of the country. The right to own it is ancillary to the right of egress from Nigeria guaranteed by the constitution.

In *Agbakoba v The Director, SSS*,⁷¹¹ the appellant a lawyer and president of a non-governmental organization was invited by a body in The Netherlands to present a paper at a conference on human rights at The Hague. When he arrived the airport to depart for the conference, a security official impounded his passport and thus he was precluded from embarking on the journey. His personal visits to the office of the State Security Service, letters and pleas to the Attorney-General of the Federation, did not lead to the release of his passport. He then filed an action to enforce his fundamental rights.

At the High Court, the application was dismissed and he appealed to the Court of Appeal which *inter alia* held that by virtue of the provisions of section 38 of the 1979 Constitution (section 41 of the 1999 Constitution), article 12(2) of the African Charter on Human and Peoples’ Rights and article 13(2) of the Universal Declaration of Human Rights every citizen of Nigeria has the right of movement into and out of Nigeria. It further held that Immigration laws and practice in Nigeria show that without a passport a Nigerian cannot normally go out of the country. The grant or refusal of a passport affects the rights of individuals and their freedom to travel, as possession of a passport is a necessary condition of travel in the international community. The right not to have a passport impounded is a necessary concomitant of the freedom of exit, which is guaranteed by the constitution and the African Charter. The statement on the Nigerian passport that “a passport may be withdrawn at any time” is neither in accord with the constitution nor with any applicable law in Nigeria.⁷¹²

⁷¹¹ (1994) 6 NWLR (Pt 351) 475 .

⁷¹² *supra* 496-497 paras H-G.

The reasoning and conclusion were also followed in the case of *Ubani v Director, SSS*⁷¹³ and *Ajayi v A-G Federation*.⁷¹⁴ It is the practice during national elections in Nigeria, for the electoral body to place a ban on movements except for the purpose of going to cast a vote. The only classes of people exempted from the restriction on movements are those said to be on essential services or duties like medical doctors, electoral officials, police men and other security agents. In *Yusuf v Obasanjo*⁷¹⁵, that restriction was challenged. The Court of Appeal held that the restriction on movements of people on election days put in place by the Independent National Electoral Commission is unconstitutional. It is an infringement on the right to freedom of movement enshrined in section 41 of the 1999 Constitution. The contents of the manual for election officials, which provides for the restriction on movements of people is not a law, and not being a law it cannot have the force of suspending the constitutional provision.

3.3.10 Right to freedom from discrimination

Section 42(1) of the 1999 Constitution enacts that a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person be subjected or accorded a privilege or advantage either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions or privilege or advantage to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not subjected or accorded. Section 42(2) provides that no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth. The above provision is an effort to import the concept of equal treatment; but by limiting the right only to Nigerian citizens, inequality has been ordained. The New Zealand Bill of Rights Act 1990⁷¹⁶ and 1992 Constitution of Ghana⁷¹⁷ respectively guarantees the right to “everyone” and “all persons”.

Amien and Paleker referring to the South African experience on the issue of inequality said: “Given the history of our country, which was steeped in extreme inequality, grave oppression and massive exploitation, the significance of the values encapsulating equality for South Africa has been clearly expressed by our courts, most notably the Constitutional Court.”⁷¹⁸

⁷¹³ (1999) 11 NWLR (Pt. 625) 129.

⁷¹⁴ (2000) 12 NWLR (PT. 682) 509.

⁷¹⁵ *Yusuf v Obasanjo* (2005) 18 NWLR (Pt 956) 96.

⁷¹⁶ Section 19, Act No 109 of 1990.

⁷¹⁷ Article 17 of 1992 Constitution of Ghana.

⁷¹⁸ Amien W and Paleker M “Women’s Rights” *South African Human Rights Yearbook Vol 8* at 322

The view here is that primarily, it is the South African Constitution that duly expressed the significance or the importance of “the values encapsulating equality”⁷¹⁹ in its constitution unlike most jurisdictions including Nigeria.⁷²⁰ The South African provision on equality is more detailed than the Nigerian provision and it makes a distinction between unfair and fair discrimination. In other words, it follows from their provision that there are circumstances when discrimination will lead to fairness and when it will result to unfairness. Apartheid is one instance where it resulted to unfairness. In *Harksen v Lane No and Others*⁷²¹, it was noted that “insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality”. Having regard to the words “restrictions” and “advantage” used in the equality clause in section 42 of the 1999 Constitution, Nwabueze argued that: “What this means is that any restriction whatsoever imposed upon, or any advantage accorded to women by any law or any executive or administrative action of the government is unconstitutional and void if the restriction or advantage is not applied equally to men”.⁷²² Nwabueze is right if a strict interpretation is given to our equality clause. Interestingly, section 42 is not among those sections mentioned in section 45(1) of the Constitution which states that:

Nothing in Sections 37, 38, 39, 40 and 41 of the Constitution 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; or
- (b) for the purpose of protecting the rights and freedom of other persons.

Had it been among the sections so mentioned, it could rightly be argued that the “restriction” or “advantage” imposed upon or accorded to women or indeed any group could easily be justified on the ground that it is “for the purpose of protecting the rights or freedom” of women or that group. This problem which is inherent in the Nigerian equality clause has duly been taken care of by the South Africa equality clause which introduced the concept of unfair and fair discrimination. A comprehensive interpretation of section 39 of 1979 Constitution which is *in pari materia* with section 42 of the 1999 Constitution was made in the case of *Uzoukwu v Ezeonu II*.⁷²³

⁷¹⁹ The Constitutional Court then expounded the equality clause.

⁷²⁰ Section 9(1) 1996 Constitution of South Africa. Emphasis supplied.

⁷²¹ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC) 1511E-1512A.

⁷²² Nwabueze BO *Constitutional Democracy in Africa Volume 3* 455.

⁷²³ (1991) 6 NWLR (Pt 200) 708.

The appellants thereat alleged that the respondents treated and regarded them as slaves, descendants of slaves, or persons who were of inferior stock and for that reason prevented them from enjoying certain rights, such as owning properties, taking titles or taking part in developmental activities of the town. The respondents it was alleged required the appellants to observe a customary practice of “redemption” whereby the appellants would sacrifice a cow among other things, to the respondents, in order to be recognised as persons of equal status or for their disabilities to be overlooked.

The appellants then brought an application to enforce their fundamental rights to the dignity of their persons and freedom from discrimination. The High Court dismissed the application on the ground that the appellants did not establish that their fundamental rights were allegedly violated. On appeal to the Court of Appeal, it dismissed the appeal and *inter alia* made far reaching pronouncements on the right to freedom from discrimination. It variously held that having regard to the provision on freedom from discrimination, there are six possible grounds upon which a petition for the breach of the right could be brought. They are discrimination on the ground merely that the victim belongs to a particular community; discrimination on the ground merely that the victim belongs to a particular ethnic group; discrimination on ground of sex; discrimination found on ground of place of origin and discrimination based on religion or ground of political opinion.

The court held that the above grounds are disjunctive. And having regard to the phrase “by reason only that he is such a person”, an action can only be based on one of the grounds. Thus if there are other reasons for the discrimination or if it is based on one or more of these grounds and on other grounds not anchored on the constitution, the section cannot be invoked. It also held that if the restrictions, disabilities, advantages and privileges complained against apply to all citizens, then they no longer retain the status of discrimination and cannot come under the provision in question.

It held that the discrimination must be based on a “law in force” and in this context, “law in force” is defined to include not only Acts of the National Assembly, Laws of the House of Assembly, decrees, edicts, legislations made by local government but also includes Sharia and customary laws or on any executive or administrative action of the government. It is utterly ridiculous to limit the application of the section to discriminatory acts resulting from law in force or executive or administrative action of government. That means that discriminatory practices or acts perpetrated by individuals or groups are not covered by the provision.

In *Onwo v Oko*,⁷²⁴ the Court of Appeal held that in the absence of clear, positive prohibition which prevents an individual to assert a violation or invasion of his fundamental right

against another individual, a victim of such invasion can also maintain an action against another individual for the latter's act that caused damage to him or his property in the same way as an action could be maintained against the state for similar infraction. This decision is subject to any express provision to the contrary like the one contained in section 42 of the 1999 Constitution under consideration.

The court in *Uzoukwu's case* also considered and interpreted the provisions of section 39(2) of the 1979 Constitution which states that: "No citizen of Nigeria shall be subjected to any disability or deprivation by reason of the circumstances of his birth".⁷²⁵ This provision the court ruled, is yet another attempt by the constitution to protect the citizen in the enjoyment of his personal liberty and freedom, against any encroachment of such rights based on the circumstances of his birth.

It must be emphasized that the disabilities and deprivations arising from circumstances of birth that are out-lawed, are not limited to enjoyment of personal liberty and freedom but also to all other fundamental rights and civil rights. The phrase "circumstances of birth"⁷²⁶ according to the court, connotes more than issue of birth out of lawful wedlock. According to the court, even though slavery had long been abolished, the social stigma has unfortunately not completely abated. The phrase in question is wide enough to cover social stigma arising out of descent from slave parentage.

The constitution never made any attempt at prohibiting all things, which may be described as bad, unreasonable and so on. The constitution must be limited to its contents. The court however maintained that the status of slavery had been abolished and so was that of *Osus*.⁷²⁷

⁷²⁴ (1996) 6 NWLR (Pt. 456) 584.

⁷²⁵ The provision is same as that of section 42(2) of the 1999 Constitution.

⁷²⁶ *Uzoukwu v Ezeonu II* (1991)6 NWLR (Pt 200)708, 767 para. D.

⁷²⁷ *Osus* are persons whose ancestors were originally freeborn, but were subsequently bought by a family or individual at the "command" of a diviner and offered as slaves to some deity, whose wrath was aroused and whom the sacrifice of mere fowl or goat would not satisfy. See Balonwu MO "The Growth and Development of Indigenous Nigerian Laws as part of our Heritage from the British Colonial Policy of Indirect Rule" in Dr. TO Elias et al (eds) *African Indigenous Laws* (1975) 48. The Igbo society where the practice originated prescribes some legal and social disabilities and stigmas against the *Osus* including that the so-called freeborn shall not inter-marry with *Osus*. The practice was outlawed by the Abolition of *Osus* System Law Cap. 1 Laws of Eastern Nigeria 1956. Though, the discrimination against *Osus* had declined considerable, while persons are no longer offered to deities as *Osus*, some discriminatory practices against the descendants of *Osus* persist till date, especially the lack of intermarriage. Some of the so-called freeborns are so sensitive to it that if marriage is contracted without knowing that one party to it is an *Osus*, the other party on discovery of that fact, may immediately terminate the marriage for no other reason.

The court held that the property rights, the social rights, the economic and political rights acquired before the abolition have not been altered at all. The abolition stops a bad practice and builds equality for the future. It has no control on what had already been acquired. A historical fact cannot be obliterated by legislation. The law can only put a stop to an unwanted practice, it cannot say it never happened.⁷²⁸ In *Anode v Mmeka*,⁷²⁹ the Court of Appeal relying on section 42(2) of the 1999 Constitution held that the fact that the respondent was born out of wedlock was totally irrelevant and that could not deprive him from inheriting the estate of his maternal grandfather.

There is no such thing as absolute equality of rights, freedoms and privileges, even among members of one group. This notion is not guaranteed by the constitution. Women experience considerable discrimination in Nigeria. Government condones customary and religious practices against them. Many customary practices do not recognise women's right to inherit their husband's property. Widows are subjected to unfavourable conditions arising from discriminatory traditional and customary practices. "Confinement" is the most prevalent rite of deprivation to which widows are subjected; although the practice is more in the Eastern States of Nigeria or Igbo society.

3.3.10.1 Customary discriminatory practices against women

The concept of law through the centuries dictated by socio-cultural, religious and traditional norms and values of the different societies, treats women as inferior beings created as property or chattel for man, for his use and enjoyment and who should be relegated to the background.⁷³⁰ No group is subject to a more pervasive, solidly established and firmly defended system of discrimination as women. Justification is usually predicated on varied arguments based on Biblical⁷³¹ and Islamic authorities, among others.

⁷²⁸ *Uzoukwu v Ezeonu 11* (1991)6 NWLR (Pt 200)708 at 770-771.

⁷²⁹ (2008) 10 NWLR Pt 1094 1.

⁷³⁰ Taylor OP, "The position of women under Sierra Leone Customary Family Law" in Elias TO et al *African Indigenous Law* (1975) 195

⁷³¹ Cushman, RF, *Leading Constitutional Decisions* (1982) 358. Rosemary Thompson had argued that "God's order (as revealed in the scriptures) gives 'uniqueness' to male and female, but not identity; Men and women are neither equal nor unequal. The role of each sex is in exchangeable... Many of us believe in the right of a woman to be a full-time wife and mother...": "The Equal Rights Amendment and Bible Principles" (April 1977) <http://www.brfruitness.org/Articles/1977.12n2.htm>[accessed 5 February 2006]. Lord Stowell an English ecclesiastical judge had this to say: "it is the law of religion (Christian religion); and the law of this country (English common law which has an ecclesiastical foundation), that the husband is entrusted with authority over his wife... obedience is her duty". 1 Hagg Cons. 363 (Interpolations and emphasis supplied).

Nigeria has a long, painful and unfortunate history of gender discrimination which still persists. Apart from customary law, traditional practices and Sharia which ordain discrimination against women, some statutory laws are also discriminatory of women.⁷³² Rationalizing the situation under the Islamic law, Hamidullah said “... inspite of the capacity of Muslim Law to adopt itself and to develop according to circumstances, there will be no question of recognising the extreme liberty which a woman enjoys in fact and in practice, in capitalistic and the communistic West”.⁷³³ The personal experience of a female lawyer, Zainab in Sokoto, on her appearance before an Area Court encapsulates the discrimination against women in the name of Islam. She said:⁷³⁴

One incident occurred last year when I stood up to stand (appear) for a client in Talatan Mafara and the judge and his clerks, as if they planned it, all chorused ‘*a uzubillah*’i’. I was shocked but before I could get over the shock, they all staged a walk out protesting the presence of a lady lawyer in court. I had to leave the court premises full of embarrassment. I reported the matter to the NBA officials and the authorities of the Ministry of Justice. NBA wrote a letter while the Ministry of Justice did nothing.⁷³⁵

Under the Labour Act,⁷³⁶ no woman shall be employed on night work in a public or industrial undertaking or in any branch thereof or in any agricultural undertaking thereof.⁷³⁷ The only exception is in the case of nurses engaged in such undertakings or women holding responsible positions of management.⁷³⁸ These provisions are discriminatory on ground of sex and offend section 42(1) of the 1999 Constitution. These statutory provisions that accord differential or discriminatory treatment to women, relegate their individual capabilities to the background. According to Justice Brennan, statutory distinctions between sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without consideration to the actual capabilities of its individual members.⁷³⁹

⁷³² Uzoukwu L “Discrimination and Sexual harassment of Nigerian Women: The Legal Implications” being a Paper delivered at High Performance Seminar/ Workshop for Managerial Women, Owerri, 27-29 September 1989. Some of the provisions are found in the Labour Act 1974 and the Evidence Act, 1990.

⁷³³ Hamidullah M, *Introduction to Islam* (1981) 380.

⁷³⁴ Odinkalu AC, *Justice Denied (Area Courts System in the Northern States of Nigeria)*, A Report by CLO, (1992) 112-113.

⁷³⁵ The word ‘*a uzubillah*’i’ in the text means “ God forbid” obviously manifesting opposition to the court being addressed by a woman.

⁷³⁶ The Labour Act Chapter L 1 Laws of the Federation 2004.

⁷³⁷ Section 55(1).

⁷³⁸ Section 55(2).

⁷³⁹ *Frontiero v Richardson* 411 U.S 677 (1973).

A lot of deprivations against women are sanctioned by traditional practices and customary rules. Omiyi argues that one rule of customary law which all the traditional African societies are unanimous about is that in the customary law of intestate succession, the widow has no place in the sense that she can never inherit from her husband on intestacy. It is remarkable to find such uniformity in the customary laws of so many people with different origins, histories and customs.⁷⁴⁰ These customary discriminatory practices are more pronounced in the case of widows. Widowhood is almost synonymous with unfair practices.⁷⁴¹ These practices are not only retrogressive and oppressive but are unconstitutional, repugnant to every sense of fair play and civilized behaviour.⁷⁴² But the Courts until recently were reluctant to strike down these offensive customary practices.⁷⁴³

In *Oshilaya v Oshilaya*⁷⁴⁴, Odesanya, J. held that: “The customary law that a widow cannot inherit her deceased husband’s property has become so notorious by frequent proof in the courts that it has become judicially noticeable”. Beckley, J. held a similar view in the case of *Sogunro-Davies v Sogunro-Davies*⁷⁴⁵ where a wife was denied inheritance rights over the late husband’s estate. He said, “in an intestacy under native law and custom, the devolution of property follows the blood. Therefore a wife or widow, not being of the blood, has no claim to any cause”.

The Igbo customary jurisprudence on intestacy is not different. Widows and daughters are not entitled to any part of the estate of a man upon intestacy. It makes no difference that the daughters are the only surviving children of a man. In a study carried out by a team of lawyers on the customary law of inheritance and succession in Anambra and Imo States, whose people are of the Igbo race, the following findings were *inter alia* made: “Where a man is survived by daughters but not survived by sons, the daughters have no right to inherit his compound or any of his other lands or houses”.⁷⁴⁶ In the same vein, Aniagolu said that under the Igbo customary law, and many other places in Nigeria, women cannot inherit land but they can be granted usufructuary rights over land by their husbands or fathers. Such rights would not vest any estate in the women in respect of the land.⁷⁴⁷

⁷⁴⁰ Omiyi S “ A Critical Appraisal of the Legal Status of Widow under the Nigerian law” in Kalu AU, et al (eds) *Women and Children Under Nigerian Law* (nd) 74

⁷⁴¹ While considering the right to the dignity of human person *supra* we examined the dehumanizing practices against widows.

⁷⁴² Uzoukwu L “Containing Widowhood Practices 1” Sunday Statesman, 26 April, 1992, p.5.

⁷⁴³ Recent cases on the practices are considered *infra*.

⁷⁴⁴ (1972) 10 C.C.H.C.J. II.

⁷⁴⁵ (1929) 2 NLR 79 at 30

⁷⁴⁶ Obi SN, *Customary Law Manual - A Manual of Customary Laws obtaining in Anambra and Imo States of Nigeria* (1977) Article 156 p 103 .

⁷⁴⁷ Aniagolu AN, “Aspects of Customary Marriage and Divorce and their incidents upon family life” in Elias TO, Nwabara SN and Akpangbo CO, *African Indigenous Laws* (1975) 115.

In a majority decision, the Supreme Court in *Nzekwu and others v Nzekwu and others*,⁷⁴⁸ held that under the customary law of Onitsha,⁷⁴⁹ a widow on the death of her husband who had no son, can only deal with the late husband's property if she receives the consent of the family. She cannot by effluxion of time claim the property as her own. She has, the court added, a right to occupy the husband's house or any part of it, but that is subject to good behaviour. Her interest in the house and family land of her late husband is merely possessory and not proprietary. This means that she cannot dispose of it. This stamp of judicial authority given to a discriminatory against women by the highest court in the land was a serious set back to the rights of women. The discriminatory practices against women still endure notwithstanding the constitutional prescription against discrimination and the fact that Nigeria has ratified CEDAW. The country merely signed the Optional Protocol.⁷⁵⁰ Recent developments indicated that the courts are now prepared to tackle the challenges posed by the discriminatory practices against women.

In *Mojekwu v Mojekwu*,⁷⁵¹ the Court of Appeal had to consider whether it can lend its weight to the enforcement of "Oli-ekpe" custom of the Nnewi people of Anambra State who belong to the Igbo race. Under this custom, if a man dies and is not survived by any son, his brother will inherit his estate. Where the man is survived by a son who later died and that son was not himself survived by a son, the father's brother will inherit the estate. If on the other hand, the said brother dies and is survived by his own sons, his sons particularly the eldest son will inherit his late uncle's property. This first son is called "Oli-ekpe" meaning he inherited the property of his relation.

The "Oli-ekpe" inherits the land, the wives of the deceased and if the deceased was survived by daughters, he will give them away in marriage. He inherits the assets and liabilities of the deceased. Justice Niki Tobi who delivered the lead judgment on 10 April 1997, *inter alia* held as follows:

The appellant claims to be that "Oli-ekpe": Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilised sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs, which discriminate against the women folk in this country. They are regarded as inferior to men folk. Why should it be so? All human beings-male and female-are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional.⁷⁵²

⁷⁴⁸ (1989) 2 N.W.L.R. (PT 104) 373.

⁷⁴⁹ Which is part of Igbo land.

⁷⁵⁰ On 8 September 2000.

⁷⁵¹ (1997) 7 N.W.L.R. (Pt 512) 263

⁷⁵² *Supra* 305 paras A-C.

Justice Tobi went further in his landmark judgment to state:

Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we have freely chosen as a people. We need not travel to Beijing to know that some of our customs, including the Nnewi “*Oli-ekpe*” custom relied upon by the appellant are not consistent with our civilized world in which we all live today, including the appellant.⁷⁵³

In conclusion, he had no difficulty he said, in striking down the custom.

In *Mojekwu v Ejikeme*,⁷⁵⁴ the Court of Appeal had to consider the constitutionality of two Nnewi customs—“*Oli-ekpe*” or “*Ili-ekpe*”—(both are the same) and “*Nrachi*” ceremony. The incidence of “*Oli-ekpe*” or “*Ili-ekpe*” had earlier been considered. “*Nrachi*” ceremony is performed by a man who had no son but daughter(s). When it is performed on a daughter, she takes the position of a man in her father’s house. Technically, she becomes a “man”. She must stay unmarried for the rest of her life to give birth to male children for her father. The custom legalizes fornication as the woman, outside bounds of marriage is free to procreate in the name of her father without the benefit of a husband recognized by law. The Court of Appeal in its judgment delivered on 9 December 1999, said this of *Nrachi* custom:

The right to freedom of association is impaired. Such is unconstitutional. *Nrachi* custom is discriminatory even in its crude application. A daughter with the custom performed on her has upper-hand over the others without it. She can inherit while others without same cannot inherit. *Nrachi* custom entails contradictions galore.⁷⁵⁵

Justice Fabiyi after describing⁷⁵⁶ the custom as “ludicrous, ridiculous, unrealistic” and “perfidious”, went ahead to further hold:

I strongly feel that *Nrachi* custom is no longer worthy of application with modern day trends. No elite would agree that it be performed on his daughter as at now when the making of a Will can readily take care of situations calling for care. *Nrachi* custom is rendered otiose as it is absurd and fantastic. In the main, it is a farce, a sort of window dressing designed to oppress and cheat the woman folk. I have no hesitation in declaring that *Nrachi* custom is against the dictates of equity ... a female child does not need the performance of *Nrachi* ceremony on her to be entitled to inherit her deceased father’s estate.⁷⁵⁷

Justice Nike Tobi who presided and delivered a concurring judgment, said that *Nrachi* ceremony encourages promiscuity and prostitution. He held the custom to be discriminatory and that it violates the provision of the Nigerian Constitution which prohibits discrimination on ground of sex and article 6 of CEDAW.⁷⁵⁸

⁷⁵³ (1997)7 NWLR (Pt 512)263.

⁷⁵⁴ *Mojekwu v Ejikeme* (2001) 1 CHR 179.

⁷⁵⁵ *Supra* at 195 paras F-G; per Fabiyi J.C.A.

⁷⁵⁶ *Supra* at 196 paras A-B.

⁷⁵⁷ *Supra* at 196 paras C-F.

⁷⁵⁸ *Supra* paras C-E; 217 para F-H; 218 para A-C and 219 paras B-C.

It must be appreciated that the position taken by the Court of Appeal in the two cases we discussed may or may not be endorsed by the Supreme Court. In *Anode v Mmeka*⁷⁵⁹ which was decided on 10 December 2007, Saulawa, J.C.A who delivered the lead judgment said that the custom:

which permits a father to keep his daughter in the family home to procreate out of wedlock, due to lack of a male child, is morally, religiously and culturally obnoxious. Such a custom is repugnant to natural justice, equity and good conscience. It is antithetic to the well cherished tenets of fundamental human rights as enshrined under Chapter IV of the 1999 Constitution. The custom in question no doubt promotes sexual promiscuity in the society. And it is thus highly abominable.⁷⁶⁰

In the South African case of *Mthembu v Letsela*,⁷⁶¹ the constitutionality of the customary rule of succession (primogeniture) excluding women and their illegitimate off-spring from intestate succession was challenged. The applicant claims that she entered into a customary union with the deceased, and that a daughter was born out of the union. The deceased later died intestate and the respondent who was his father claimed that the deceased's property devolved on him as the deceased was not survived by sons or brothers. The respondent contended that no marriage existed between his son and the applicant. At the first hearing, the court concluded that the customary rule in question is not inconsistent with the fundamental guarantees of the constitution. The reason being that the devolution of the deceased's property onto the male heir involves concomitant duty to support and protect the woman and the children of the customary marriage. This duty the court held, was sufficient to discharge the initial presumption in favour of discrimination.

At the second hearing, the court held that the alleged customary marriage was not proved and the daughter was one born out of wedlock; the daughter and the mother were not entitled to any share in the deceased's estate. The court further found that since under intestacy, illegitimacy is a bar to inheritance irrespective of whether the potential beneficiary is male or female, the rule was not discriminatory on gender grounds. Had it been in Nigeria, the fact that the applicant's daughter was born out of wedlock would have been irrelevant as section 42(2) of the Constitution provides that no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of birth. Criticising the judgment in *Mthembu's* case, Amien and Paleker forcefully contended that:

It is strange that in this constitutional era, the court adopted a passive approach on constitutional issues, by distancing itself from, and refusing to grapple with, the negative effects that traditional laws have on women in our society... The case is a crystal-clear example of the court perceiving itself as an institution insulated from the effects of traditions and customs impacting on African women.⁷⁶²

⁷⁵⁹ (2008) 10 NWLR (Pt 1094)1.

⁷⁶⁰ *Supra* at 19 paras B-C.

⁷⁶¹ *Mthembu v Letsela*, 1997 (2) SA 936 (T); 1998 (2) SA 675 (T).

⁷⁶² Amien and Paleker *South African Human Rights Yearbook Volume 8* at 370.

The *osu* caste system is a traditional discriminatory practice in Igbo land against a particular class of people. It is very retrogressive and primitive. Its origin lies in antiquity when human sacrifices were the norm. Families and individuals were dedicated to deities and they were consequently forbidden from interacting with the so-called freeborns. Those so dedicated became outcasts and the slaves of the land. In some cases, people who committed heinous crimes like murder, may escape societal sanction by voluntarily dedicating themselves to the deities and thereby becoming *osus*. Some people who were caught and sold into slavery in Igbo land, were also subsequently dedicated to deities and they became *osus*. According to Durojaiye and Onyebukwa:

Anybody that did anything with them *osus* risked contaminating his family with the curses of the outcast. Although a lot of people have since embraced Christianity and other liberal religions, the *osu* practice is one that has refused to die with time. It is one of the absurdities of the 21st century, that hundreds of years after the practice began, the *osu* caste system still haunts some people like a terrible nightmare that will not go away.⁷⁶³

The actual practice of having people dedicated to the deities and their becoming *osus*, had completely died out. What has refused to die out is the consequence of the dedication to the deities done at a time that was beyond human memories. Once the ancestor of any family is identified to be an *osu*, the so-called freeborn (non-*osu*) will avoid marrying from that family. When marriage is contracted in “error” and a family is discovered to be connected to *osus*, albeit remotely, it is enough for the uncompromising and die-hard freeborns to brazenly terminate a marriage.

The amazing thing about the obnoxious discriminatory practices against the *osus* is that education, Christianity and the promulgation of law⁷⁶⁴ have not in any manner substantially reduced this primitive and retrogressive practice of the Igbo race in Nigeria. Indeed, since the practice against *osus* was criminalized in 1956, there is no record of any single trial nor conviction against any person under the law.

⁷⁶³ Durojaiye and Onyebukwa “Osu caste system: 21st century absurdity in Igboland” *Daily Independent*, Thursday, 24 November 2005, E8.

⁷⁶⁴ The Eastern Nigerian Regional Government in 1956 promulgated the *Osu* Caste System Law No 13 of 1956 which criminalized the practice against *Osus*. It makes it an offence for any person, who among other things, by words, either spoken or written or visible representation or incites or encourages any person or any class of persons or the public generally to practice the *Osu* system in any way. The punishment is a fine not exceeding 50 pounds (N100). The law also provides that from the commencement of the law, any *Osu* shall cease to be one and shall be free and discharged from any consequences thereof. The law is still in operation in the five Eastern States of Nigeria-Imo, Anambra, Enugu, Ebonyi and Abia. In those states, the indigenous people are the Igbos. In practice, the law has no effect whatsoever.

Rationalizing the failure of this law, Obinabu, a Catholic priest, argues that: “the government cannot penetrate sphere of people’s (Igbos) spirituality, and that is precisely why the *osu* did not cease to be *osu* after the government had declared it utterly and forever abolished. The legislators and the law enforcement officers are equally afraid to deal with the *Osu* situation and their circumstances in Igboland...”⁷⁶⁵ Hard as the clergy tried, Christianity has not succeeded in transforming the attitude of the laity from discriminating against *osus* or treating them as pariahs.

The discrimination and the dehumanization of the *osus* constitute a gross violation of their human rights. Regrettably, the practice has defied technology, education and Christianity. In fact, government has almost given up on doing anything to save the *osus*.

3.3.11 The right to vote

Much as under section 40 of 1999 Constitution, the right to form or belong to a political party is guaranteed within the rubric of the right to peaceful assembly and association, but there is no express provision on the right to vote. However, section 13 of the Electoral Act 2006 guarantees the right to vote to a citizen of Nigeria who has attained the age of 18 years.

Notwithstanding that the right to vote is an important civil and political right, and therefore a human right; it is not listed among the fundamental rights guaranteed by the 1999 Constitution. Its non-inclusion does not in any way affect its value or importance. The right to vote is complementary to the right to peaceful assembly and association guaranteed by section 40 of the 1999 Constitution.

⁷⁶⁵ Obinabu PC *The Osu Caste System* (2004) 122.

3.4 Constitutional protection of social, economic and cultural rights

Nigeria is yet to have a fully developed jurisprudence on socio-economic and cultural rights. Its development is still at a rudimentary or perhaps primary stage. To underscore that fact, the only economic right guaranteed under fundamental rights provision of the 1999 Constitution, is in section 43 and that is, the right to acquire and own immovable property anywhere in Nigeria. Incidentally the 1960, 1963 and 1979 Constitutions made no provision on the right to acquire immovable property. The 1999 Constitution in chapter II prescribed the Fundamental Objectives and Directive Principles of State Policy. The provisions contain some economic, educational, environmental and social objectives which the state is enjoined to pursue and when implemented, will impact on the socio-economic rights of the people. The African Charter, which has been domesticated in Nigeria,⁷⁶⁶ has some elaborate provisions on some socio-economic or collective rights. The critical issue is whether the inadequate constitutional provisions on socio-economic rights could be redressed through the enforcement of the provisions of the African Charter.

3.4.1 Right to acquire and own immovable property

Section 43 of the 1999 Constitution guarantees the right of every citizen of Nigeria to acquire and own immovable property. The right is expressly made subject to the provisions of the constitution. One of such provisions that delimits the right is section 44 of the Constitution.

Section 44(1) provides as follows:

- No immovable property or any interest in any immovable property shall be taken possession compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things,
- (a) requires the prompt payment of compensation therefore; and
 - (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

⁷⁶⁶ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990.

Under section 44(2) of the 1999 Constitution, the right so guaranteed is subject to the general law relating to the imposition or enforcement of any tax, rate or duty; imposition of penalties or forfeitures for breach of any law, whether under the civil process or after conviction for an offence; relating to lease, tenancies, mortgages, charges, among others; relating to administration of the property of a person adjudged to be a bankrupt or insolvent; relating to the execution of judgments or orders of court; providing for the taking of possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals; relating to enemy property, trusts and trustees, limitation of actions and so on.

In section 44(3), the foregoing limitations notwithstanding, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by National Assembly. The constitution in section 315(5) enacts that nothing in the constitution shall invalidate some specific enactments therein mentioned; one of them is the Land Use Act which came into operation in 1978. Under section 28 of the said Act, the Governor of a state can revoke the right of occupancy over immovable property for overriding public purpose. The import of the foregoing, is that the right to own and acquire moveable and immovable property in the country is subject to numerous limitations, exceptions and regulations. Another remarkable feature is the use of the phrases “moveable property” and “immovable property”; these are more restrictive than the generic word “property” which is wider in scope and incorporates intangible property which will include incorporeal rights or the right to own intellectual property. It is the contention of Nwabueze that “there is no constitutional requirement that the compulsory taking of possession or acquisition must be for public purpose. Any purpose prescribed by the enabling law is permitted, whether it is for public welfare or not; the purpose may even be to enable the property to be transferred to another private person”.⁷⁶⁷

The assertion that a property could compulsorily be acquired and transferred to another private person is too general in terms to be correct. The Nigerian courts are consistent in holding that the right of occupancy over the immovable property of an individual cannot be revoked for public purpose and transferred to another individual.⁷⁶⁸

⁷⁶⁷ Nwabueze BO *Presidential Constitution of Nigeria* (1982) 521.

⁷⁶⁸ See for example, *Osho v Foreign Finance Corporation* (1991) 4 NWLR (Pt 184) 157.

3.4.2 Directive principles of state policy

Directive Principles of State Policy which are found in some national constitutions prescribe the ultimate goals and objectives of a state as well as espousing the paths to the realization of those set goals. The philosophy behind it is that a constitution as a fundamental code of a country should not only contain justiciable prescriptions. It should also contain provisions that inspire, inform and encourage governmental actions and activities in line with some declared objectives. These include social, economic, political, cultural, and environmental and foreign policy objectives. Perhaps, while civil and political rights espouse the ideological doctrines of political liberalism and sometimes capitalism; directive principles are inspired and nurtured by the ideals of socialism. The consideration of the subject will not be anchored on political ideologies.

Directive principles have direct relationship with economic, social and cultural rights specified in the ICESCR. They enjoy interconnectivity and interdependence with political rights. While many states have no difficulty in the constitutionalization of civil and political rights, they are reluctant to do so in the case of economic, social and cultural rights. For some states, rather than totally exclude socio-economic rights from their constitutions, they opt to have them in their constitutions as directive principles of state policy (DPSP) and make them non-justiciable. Such states include India, Ghana, Nigeria and Namibia. Part IV of the Constitution of India of 1950 contains the directive principles of state policy and most of the expressions there correspond to the individual rights enshrined in the International Covenant on Economic, Social and Cultural Rights. Article 37 of the Constitution declares in very clear terms that Part IV of the constitution on directive principles is non-justiciable. It enacts that the provisions shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. For the Constitution of Ghana 1992, the directive principles of state policy are contained in chapter Six.

Article 37 (2) of the 1992 Ghanaian Constitution, *inter alia* provides that the State shall enact appropriate laws to ensure the enjoyment of rights for effective participation in development processes and the protection and promotion of all other basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in the development processes. The Constitution further provides that in the discharge of the obligations stated above, the State shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development process.⁷⁶⁹

⁷⁶⁹ Constitution of Ghana 1992, Article 37(3).

In the 1999 Constitution of Nigeria, fundamental objectives and directive principles of State policy are contained in chapter II. The chapter makes provisions for political,⁷⁷⁰ economic,⁷⁷¹ educational,⁷⁷² foreign policy⁷⁷³ and environmental objectives.⁷⁷⁴ Section 13 of the Constitution provides as follows: “It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform, to observe and apply the provisions of this chapter of this constitution”. In pursuance of political objectives, section 15(3)(a) of the Constitution enacts that for the purpose of promoting national integration, it shall be the duty of the state to provide adequate facilities for and encourage free mobility of people; goods and services throughout the federation.

Section 16(2) (d) deals with economic objectives and provides that the State shall direct its policy towards ensuring “that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens”. Section 17 provides for social objectives. For the realization of the educational objectives, section 18(1) enacts that government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels. Towards the attainment of environmental objectives, it is provided in section 20 that the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria. Section 21(a) commands the State to protect, preserve and promote the Nigerian cultures, which enhance human dignity and are consistent with the fundamental objectives as provided in chapter II.

Ordinarily, having regard to the fact that these objectives are couched in mandatory terms and that all organs of government have a duty and responsibility to conform to and observe them, one would think that the chapter created some justiciable rights. However, section 6(6)(c) of the Constitution provides that:

- (6) The judicial powers vested in accordance with the foregoing provisions of this section—
- (c) shall not, *except as otherwise provided in this Constitution*, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is *in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution*.⁷⁷⁵

⁷⁷⁰ Constitution of the Federal Republic of Nigeria 1999, section 15.

⁷⁷¹ *Supra*, section 16.

⁷⁷² *Supra*, section 18.

⁷⁷³ *Supra*, section 19.

⁷⁷⁴ *Supra*, section 20.

⁷⁷⁵ Emphasis supplied.

The Namibian Constitution of 1990 has provision on principles of state policy in its chapter II. They cover the promotion of the welfare of the people, foreign relations, asylum, economic order, foreign investments and sovereign ownership of natural resources. But article 101 clearly provides as follows:

The principle of State Policy contained in this Chapter shall not of and by themselves be *legally enforceable by any Court*,⁷⁷⁶ but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The courts are entitled to have regard to the said principles in interpreting any laws based on them.

Similarly, article 37 of the Indian Constitution declares that the directive principles of state policy shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

The foregoing respective constitutional provisions of Nigeria, Namibia and India have entrenched the concept of non-justiciability in respect of the directive principles. In Black's Law Dictionary,⁷⁷⁷ "justiciable" is defined as a "matter appropriate for court review"; while "justiciable controversy" is *inter alia* defined as referring to "real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character". Arambulo argues that the term "justiciability" is "generally understood to refer to a right's faculty to be subjected to the scrutiny of a court of law or another (quasi-) judicial entity. A right is said to be justiciable when a judge can consider this right in a concrete set of circumstances and this consideration can result in further determination of this right's significance."⁷⁷⁸

Scott and Macklem broadly defined "justiciability" in the terms of "the extent to which a matter is suitable for judicial determination".⁷⁷⁹ On the other hand, Asante argued that a matter is non-justiciable if it cannot properly or satisfactorily be disposed of in a court of law.⁷⁸⁰

⁷⁷⁶ Emphasis supplied.

⁷⁷⁷ *Black's Law Dictionary* 6th Edition page 865.

⁷⁷⁸ Arambulo K "Giving Meaning to Economic, Social and Cultural Rights: A Continuing Struggle" in (2003) (3) *Human Rights and Human Welfare* 111at 114; Arambulo K, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights—Theoretical and Procedural Aspects* (1999) 55.

⁷⁷⁹ Scott C and Macklem P "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *Univ. Pennsylvania LR* 1, 37.

⁷⁸⁰ Asante SKB "Reflections on the Constitution, Law and Development" Lecture II, being the text of a paper delivered at Accra Ghana as J.B. Danquah Memorial Lectures 35TH Series 2002, 15.

It has to be observed that the concept refers to the ability of the courts to entertain a case and provide a remedy for an aggrieved party who is alleging the violation of a right. Where, therefore, a matter merely raises a hypothetical, academic or moot issue, such matter is non-justiciable and the jurisdiction of a court to entertain or review the matter with a view to granting a remedy cannot be lawfully invoked. Such a matter is then considered not fit or appropriate for judicial determination, consideration or enforceability in that it did not raise a justiciable controversy or dispute.

Maurice Pieterse did a synthesis on how directive principles promote social justice which according to him are in three ways.⁷⁸¹ Firstly, they indirectly promote accountability, transparency and the culture of justification by exerting moral pressure on the legislative and executive arms of government to discharge their socio-economic undertakings and constrain their policy options accordingly. Secondly, he opines that they aid interpretation, either for fully entrenched constitutional rights or for legislative provisions. In this manner, socio-economic interests could be accommodated in judicial deliberation through the “back door” of civil rights interpretations, thereby promoting the concept of interdependence and indivisibility of civil and social rights. Thirdly, he said that directive principles allow the judiciary to endorse legislative and executive initiatives which are geared towards social reform firstly by dismissing challenges that aim to frustrate them, and secondly, by making it possible for other arms of government to justify infringements and/or limitations on civil and political rights with reference to the directive principles. In this way, he argued that directive principles ameliorate the possible destructive impact of civil liberties on programmes that are aimed at social reforms. Directive principles provide support mechanism in the realization of human rights notwithstanding the provision on their non-justiciability.

⁷⁸¹ Pieterse M “Coming to Terms with judicial enforcement of socio-economic rights” (2004) 20 *SAJHR* 383 at 400; see also FI Michelman “Democracy-based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath” (2001) 69 *Fordham LR* 1898–1899; Motala Z “Socioeconomic Rights, Federalism and the Courts: Comparative Lessons for South Africa” (1995) 112 *SALJ* 61 at 72; E De Wet “The Enforceability of Socio-economic rights and Directive Principles/Legislative Commands with Special Reference to Constitutional Principle XI of the South African Transitional Constitution” (1995) 112 *SALJ* 462, 469; De Villiers B “Directive Principles of State Policy and Fundamental Rights. “The Indian Experience” (1992) 8 *SAJHR* 29-49; Liebenberg S “South African Evolving Jurisprudence on Socio-economic Rights. An Effective tool in Challenging Poverty” (2002) 6 *Law, Democracy and Development* 159,162;179-80.

3.4.3 Judicial application of directive principles and socio-economic rights: the concerns and justifications

Debates on the constitutionalization of socio-economic rights⁷⁸² and their judicialization have continued to rage in constitutional law and jurisprudence. The debates refused to abate notwithstanding the acknowledgement that human rights are interdependent and indivisible; and some countries have even gone ahead not only to constitutionalize, but have made socio-economic and cultural rights justiciable. Those who advocate against the constitutionalization and the judicialization of socio-economic rights, say the process favours only civil and political rights.

It has been argued that socio-economic rights are “choice-sensitive” matters that are appropriately left to political rather than judicial determination.⁷⁸³ The political organ in implementing socio-economic rights has to make a choice based on resources or policy. The judiciary is said to be ill-suited to deliberate on socio-economic rights which unlike civil and political rights are not “negative” but “positive” in nature. This means that they are incapable of immediate realization in that their implementation requires positive action on the part of the state. They are indeterminate, expensive to realize and achievable only progressively.⁷⁸⁴ Civil and political rights because of their “negative” nature, place restraint on the state and when their violations are proved, remedies are immediately realizable.⁷⁸⁵ The argument that socio-economic rights are not amenable to judicial enforcement, has “been widely discredited” and “adequately rebuffed”.⁷⁸⁶

The contention that the courts lack the skill to determine or enforce socio-economic rights which by their nature raise the problem of polycentricity is flawed. The term polycentricity as used denotes decisions that are capable of having effect on indeterminate persons or class. Matters with budgetary implications are thought to require special expertise which the courts lack.⁷⁸⁷ Judicial enforcement of civil and political rights equally has resource, financial, economic or budgetary implications or consequences. But the fact that socio-economic rights have budgetary consequences, it has been held, is not enough to bar their justiciability.⁷⁸⁸

⁷⁸² Directive Principles of State Policy are treated here as part of the corpus of socio-economic rights.

⁷⁸³ Davis DM “The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles” (1992) 8 *SAJHR* 478-79.

⁷⁸⁴ Pieterse “Coming to terms with Judicial enforcement of socio-economic rights” 389.

⁷⁸⁵ *Supra*.

⁷⁸⁶ Chirwa DM “An Overview of the impact of the International Covenant on Economic, Social and Cultural Rights in Africa” http://www.communitylawcentre.org.za/ser/docs_2002_/impact_of_socio-economic-rights-in-Africa-doc [accessed on 22 March 2006]. Leckie S “Another Step towards indivisibility: identify the key features of violations of economic, social and cultural rights” (1998) 20 *Human Rights Quarterly* 81 and de Vos P “Pious wishes or directly enforceable human rights? Social and economic rights in South Africa 1996 Constitution” (1997) 13 *SAJHR* 67.

⁷⁸⁷ Hlope J “The Role of Judges in a Transformed South Africa-Problems, Challenges and Prospects” (1995) 112 *SAJHR* 22, 28; McDermott PA “The Doctrine of Non-Justiciability” (2000) 35 *Irish Jurist* 280, 288

⁷⁸⁸ *Ex Parte Chairperson of the Constitutional Assembly. In re Certification of the Constitution of the Republic of South Africa, 1996*. 1996(4) SA744(CC) (“*First Certification Decision*”) para, 77.

In *August v Electoral Commission*⁷⁸⁹, the South African Constitutional Court reacting to the charge that the vindication of socio-economic rights presents the problem of polycentricity held: “We cannot deny strong claims timeously asserted by determinate people because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate group”.

A court should never be reluctant to adjudicate a claim simply because other indeterminate persons who are affected or are likely to be affected are not part of the parties before the court. This may result in determinate aggrieved persons suffering unnecessarily because of the tardiness, lack of interest or ignorance of indeterminate others. Pieterse has rightly argued that:

In reality, degrees of judicial involvement in polycentric matters must vary depending on the context of every specific case. In any event, there are polycentric elements to virtually all disputes before the courts. Certainly, civil and political rights matters are no less polycentric than socio-economic ones... One should not lose sight of the fact that several features of the judiciary make it well-suited to vindicate socio-economic rights. Unlike the legislature and executive, courts are able to provide individualized remedies to aggrieved claimants, and offer a comparatively speedy solution in the face of legislature or executive tardiness. Courts are experts at interpretation and are thus ideally suited to lend content to social rights and the standards of compliance that they impose.⁷⁹⁰

The contention that the courts lack expertise in respect of socio-economic or policy matters is not correct. Under the Nigerian constitution, one does not need to be a university graduate to occupy the offices of President, Vice President, Governor, Deputy Governor of a State or a member of the Senate or House of Representatives or Minister of Government. Only the positions of Federal and State Attorneys-General, Justice of the Supreme Court and Court of Appeal, Judge of the Federal and State High Courts require that a prospective appointee be a lawyer of not less than ten years post call experience. So apart from the demand of good education and experience, judges come from diverse backgrounds. Some are professionals in other fields before crossing over to study law. It is observed, therefore, that a socio-economic terrain cannot be unfamiliar to the judiciary for the purpose of enforcing socio-economic rights.

However, it must be conceded that in making laws, the legislature may during public hearings, draw from the views of experts. The executive arm of government can also benefit from the contributions of specialists in formulating and implementing government policies.

⁷⁸⁹ *August v Electoral Commission* 1999(3) SA1(CC) para 30.

⁷⁹⁰ Pieterse “Coming to terms with judicial enforcement of socio-economic rights” 395.

The courts are not left out too. Under section 57(1) of the Evidence Act,⁷⁹¹ the opinion of experts are relevant in judicial adjudication in Nigeria. Consequently, a court can rely on the opinion of an expert in arriving at the determination of a case. Judicial vindication of socio-economic rights has also been challenged on the ground that socio-economic matters present issues of politics and ideology. Consequently, their determination and enforcement by the judiciary “politicise” judicial task.⁷⁹² Having regard to the foregoing, Haysom posits that:

Socio-economic rights thus politicise justice and judicialise politics. They allow the courts, by enforcing socio-economic rights, to stray onto the political terrain, at the expense of the democratic process and political life is inevitably impoverished.⁷⁹³

Judicial review of civil and political rights like socio-economic rights, sometimes raise political issues directly or indirectly. In Nigeria, for example, the Supreme Court, the Court of Appeal and Election Tribunals sit over electoral matters. In the process, they sometimes invalidate the election of a person and in his place, declare another duly elected. An entire election may be voided and a fresh–election ordered. This sometimes leads to an invalidation of an electoral mandate. One cannot imagine a judicial task over socio-economic rights that will raise a more political issue than when the courts and tribunals exercise their jurisdiction over electoral matters. The argument that the judiciary should be politically neutral and abstain from decisions that politicise justice is misplaced. Elimination of political values and matters from adjudication is hardly feasible.

In truth, both constitutionalism and adjudication are inherently political. Courts, particularly in jurisdictions where judicial development of the common law is the norm, have always engaged in lawmaking , and society’s moral/ political values must necessarily intrude in this exercise. The same is true of constitutional interpretation.⁷⁹⁴

The insistence by classical liberalism that there should be a rigid separation between legal and political values, in practice pales into insignificance. The issue should no longer be whether judicialization and justiciability of socio-economic rights should be accommodated within constitutional jurisprudence and constitutionalism. The issue should be how to ensure that the judiciary does not shy away from enforcing socio-economic rights.

⁷⁹¹ Laws of the Federation of Nigeria, 1990, Chapter. 112.

⁷⁹² Pieterse “Coming to terms with Judicial enforcement of socio-economic rights” 396.

⁷⁹³ Haysom N “Constitutionalism, Majoritarian Democracy and Socio-Economic Rights” (1992) 8 *SAJHR* at 456; Ferejohn J “Judicializing Politics, Politicizing Law” (2002) 65 *Law and Contemporary Problems* 41, 44; Hopkins K “ Shattering the Divide–when Judges go too Far (March 2002) *De Rebus* 22, 26.

⁷⁹⁴ Pieterse “Coming to terms with Judicial enforcement of socio-economic rights” 398; see also Ferejohn J “The Political Nature of the Judicial Function” (1992) 55 *SAJHR* 412–13; Bhagwati PN “Judicial Activism and Public Interest Litigation “ (1985) 23 *Columbia J of Transnational L* 562, 565 and Klare KE “Legal Culture and Transformative Constitutionalism” (198) 14 *SAJHR* 146 and Haysom N “Giving Effect to Socio-Economic Rights: The Role of the Judiciary’ (1999) 1(4) *ESR REV* 11

Judicial activism has concomitant responsibility and that is, judicial deference or restraint, which among others enjoins a court not to make an order that is impossible to enforce.⁷⁹⁵ The concerns expressed against the judicial vindication of socio-economic rights are also applicable to directive principles of state policy for countries that have the directive principles in their constitutions. We shall examine how the judiciary in India, Nigeria and South Africa have handled the issue of the judicialization of directive principles.

3.4.4 Judicial application of directive principles in India

India, more than any other country has through judicial review developed the jurisprudence of directive principles and the domestication, justiciability and judicialisation of socio-economic rights. The development is stunning having regard to the fact that article 37 of the Indian Constitution of 1950 expressly stated that directive principles are non-justiciable, although they are fundamental in the governance of the country and the state has a duty to apply them in making laws. The judicial activism of the Indian Supreme Court has ridiculed the conservatism of other national courts on the subject.

Though, that activism was not developed over night. When a challenge of the primacy of fundamental rights over directive principles of state policy came up for the first time before the Supreme Court in 1951 in the case of *State of Madras v Champakam Dorairajan*⁷⁹⁶, the court unequivocally held that: “The directive principles have to conform to and run subsidiary to the chapter on fundamental rights”. Between 1975 and 1977, India under Indira Gandhi was under internal emergency. The aftermath was the wanton violation of the right to life, liberty and freedom of expression, among others. The courts in India particularly the Supreme Court appeared helpless. It was unable to provide remedies to victims of the emergency rule. Its image was seriously battered. When the state of emergency ended, there was political realignment. A popularly elected government that was in place was weak, and by 1978/1979, it was in near collapse. Significantly, it was during that period that the judiciary started the Public Interest Litigation (PIL) movement which radically re-shaped for good, the Indian jurisprudence on socio-economic rights.

⁷⁹⁵ Judicial enforcement of human rights will be fully considered in Chapter 5 *infra*.

⁷⁹⁶ (1951) SCR 525 .

The period following the emergency, “provided the right environment for the judiciary to redeem itself as a protector and enforcer of the rule of law. Judges woke up to this need and PIL was the tool the judiciary shaped to achieve this end. PIL was entirely a judge-led and judge-dominated movement”.⁷⁹⁷ PIL was aimed at liberalizing, popularizing and democratizing access to the justice system. Complex and sometimes confusing procedure for invoking the jurisdiction of the Supreme Court was deconstructed and simplified. The rules on standing were equally relaxed so much so that a postcard or ordinary letter could be treated as petition to the Supreme Court for it to commence judicial determination. Juridical formalism was forced to take the backstage.

The aftermath was that the court started interpreting article 21(the right to life and personal liberty) of the Constitution to encompass a gamut of other ancillary and integral rights which included many socio-economic rights and this resulted in a foundation for social justice. The remedies that resulted from PIL were said to be “unorthodox and unconventional and were intended to initiate affirmative action on the part of the state and its authorities,”⁷⁹⁸ but they were hugely successful.

The radical break with the liturgy of the past came to the fore with the landmark decision in the case *Maneka Gandhi v Union of India*.⁷⁹⁹ After Mrs Indira Gandhi lost power as Prime Minister of India, the passport of her daughter-in-law, Maneka Gandhi was confiscated by the new government. Maneka wanted to travel abroad on a speaking engagement but could not do so as a result of her passport having been impounded. She petitions the Supreme Court relying on article 32 of the Constitution which entitles a person to file a petition directly to the Supreme Court if the fundamental right of that person has been violated. She contended among others, that the seizure of her passport infringed the principles of natural justice.

On the part of the government, a preliminary objection was raised contending that the right to travel abroad was not a fundamental right and that article 32 of the Constitution was inapplicable and the petition was incompetent before the Supreme Court. It was further argued that the principles of natural justice were inapplicable.

⁷⁹⁷ Muralidhar S “Justiciability of Economic, Social and Cultural Rights—the Indian Experience” in “Circle of Rights, Economic, Social and Cultural Right Activism: A Training Resource” International Human Rights Internship Program and Asian Forum for Human Rights and Development, 2000, 436-37. See also Baxi U; “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” in Kapur J (ed) *Supreme Court on Public Interest Litigation Vol I*. (1998) A-91

⁷⁹⁸ Kothari J “ Social Rights and the Indian Constitution” 2004(2) *Law , Social Justice & Global Development Journal (LGD)* http://www.90.warick.ac.uk/elj/lgd/2004_2/kothari [accessed 13 February 2006].

⁷⁹⁹ (1978) 1 SCC 248.

The right to travel abroad was not specifically guaranteed by the Constitution but the petitioner relied on article 21 which guaranteed the right to life and personal liberty. In its judgment, the Supreme Court gave a wide connotation to “personal liberty” and held that it included all aspects of personal liberty. The right to travel abroad was held to have been accommodated within “personal liberty” and that it was protected under article 21. The Supreme Court further asserted that no one could be deprived of the right to go abroad except by procedure established by law. And to pass judicial scrutiny, an executive, quasi-judicial or legislative action would satisfy the just, fair and reasonable test.

This text will hereafter examine the social rights jurisprudence of the Indian Supreme Court encompassing the right to life, the right to food, the right to work, the right to education, the right to shelter and the right to health. The Supreme Court’s stance is that directive principles which are fundamental to the governance of the country are complementary to and cannot be isolated from fundamental rights.

Through creative interpretative skill and the need to dispense social justice, the Supreme Court has expanded the provisions of right to life to include some concomitant social and economic rights. That way “the court overcame the difficulty of justiciability of these economic and social rights, which were hitherto in their manifestation as Directive Principles of State Policy, considered unenforceable.”⁸⁰⁰ In *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*,⁸⁰¹ the court declared:

The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of human self.

The right to life is not considered as an end in itself but includes the bare necessities of life which cannot be isolated from economic needs. Much as the Supreme Court has held in some cases that the right to life encompasses the basic right to food, shelter and clothing,⁸⁰² a special and specific right to food was never canvassed before the court until the case of *Kishen Pathnayak v State of Orissa*.⁸⁰³

⁸⁰⁰ (1951) SCR 525

⁸⁰¹ (1981) 2 SCR 576.

⁸⁰² See *Francis Coralie Mullin v the Administrator, Union Territory of Delhi* (1981) 2SCR 516; *Chameli Singh v State of UP* 1996(2) SCC 549 and *Paschim Samity & Ors v State of West Bengal* 1996 (4) SCC 37.

⁸⁰³ AIR 1989 SC 677.

Until then, the Supreme Court merely gave direction to the government to take macro level measures such as irrigation projects to reduce the drought in Orissa, one of the poorest states in India where due to starvation, some people were forced to sell their children. The court declined to recognise as urged, that a distinct right to food as an integral part of the right to life, was being infringed.

In 2001, following several cases of starvation to death in the same State of Orissa, caused by massive droughts, many poor people started dying. Ironically, there was excess stock piles of grains in the stores of the central government and they were wasting. The issue captured national attention and became a full campaign for the right to food. A non-governmental organization, People's Union for Civil Liberties (PUCL) in April 2001, commenced a public interest litigation at the Supreme Court. The case is *Peoples Union for Civil Liberties v Union of India & Ors.*⁸⁰⁴ It sought for the enforcement of the right to food of the thousands of families that were starving to death in the drought affected States like Orissa, among others. The Supreme Court was disturbed by the wide spread cases of deaths through starvation and on its own enlarged the scope of the petition by the PUCL from the initially stated six drought affected States to include all the Indian States and Union Territories. It held that it was the responsibility of the government to prevent hunger and starvation.⁸⁰⁵

The court specifically recognized a right to food within article 21 of the Constitution and had to broaden the scope of the right to include the right to be free from starvation. It held that it is the responsibility of government to provide food to the aged, infant, disabled, destitute men and women who are in danger of starvation, pregnant and lactating women and destitute children.

The right to work is not one of those rights guaranteed under the fundamental rights provision of the Indian Constitution of 1950. But there are several provisions under the directive principles relating to the right to work, the protection of the health and security of workers, among others. In *Bandhua Mukti Morcha v Union of India*,⁸⁰⁶ Public Interest Litigation was instituted by a non-governmental organization which drew attention to the dehumanizing condition of bonded labourers in a quarry in Haryana. The quarry operations were in breach of the provisions of Minimum Wages Act, 1948 and the Bonded Labour (Abolition) Act 1976.

⁸⁰⁴ Writ Petition (Civil) No 196 of 2001, decided on 2 May 2003.

⁸⁰⁵ *Supra.*

⁸⁰⁶ (1984) 3 SCC 161

The court held that the non-enforcement of the legislation aforesaid was tantamount to the denial of the right to live with human dignity entrenched in article 21 of the Constitution. The court issued series of directions to enhance the welfare of workers for compliance by state authorities. The court also ensured that the implementation of these directions were monitored.

Article 45 of the Constitution of India, which is under the directive principles, states as follows:

The State shall endeavour to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of fourteen years.

This provision corresponds to that of article 13(1) of ICESR. Instructively, only article 45, among other articles under the directive principles, prescribed a time frame within which the enforceability of the provision shall be allowed. In *Mohini Jain v State of Karnataka*⁸⁰⁷, the Supreme Court while declaring that the charging of capitation fees for professional colleges was illegal said as follows:

The right to education flows directly from the right to life... the fundamental rights guaranteed under part III of the Constitution of India, including the right to freedom of speech and expression and other rights under article 19, cannot be appreciated and fully enjoyed unless a citizen is educated and conscious of his individualistic dignity... The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under part III. These principles have to be read into the fundamental rights. Both are supplementary to each other... without making the ‘right to education’ under article 41 of the constitution a reality, the fundamental rights under chapter III shall remain out of reach of a large majority which is illiterate.

The enforceability of the right to education came up again in the case of *Unnikrishnana J.P v State of Andhra Pradesh*,⁸⁰⁸ wherein a larger bench of the Supreme Court of five judges considered the matter. Again the case involved the issue of capitation fees, where some private medical and engineering colleges, challenged the state legislation regulating the charging of the fees from people seeking admission. In declining to accept the unenforceability of Directive Principles of State Policy, the court asked several pertinent questions:

It is noteworthy that among the several articles in part IV, only Article 45 speaks of a time- limit, no other article does. Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the State flout the said direction even after 44 years on the ground that the said article merely calls upon it to endeavour to provide the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44 years-more than four times the period stipulated in Article 45 convert the obligation created by the article into an enforceable right?⁸⁰⁹

⁸⁰⁷ AIR 1992 SC 1858.

⁸⁰⁸ (1993) 1 SCC 645

⁸⁰⁹ (1993) 1 SCC 645 paras, 172, 181 and 183, 733.

In the court's view, the right created by article 45 was clearly enforceable. As a result of the judgment of the Supreme Court aforesaid, the Indian Government in 1997, proposed the 83rd Amendment to the Constitution which sought to introduce a change to article 21 and to make the right to primary education for children up to 14 years of age a fundamental right. In 2002, the Amendment sailed through and was inserted into the Constitution as article 21A. Several States in India have in consequence enacted laws making primary education compulsory. They include the State of Madhya Pradesh, Goa, Andhra Pradesh, Gujarat, Bihar, Punjab, Maharashtra, Tamil Nadu West Bengal and Rajasthan. Some Union Territories followed suit and they include Delhi, Chandigarh and Pondicherry.

The right to health unlike other social rights presented less difficulty to the Supreme Court over the issue of justiciability and enforceability. Article 47 of the Constitution prescribes the duty of the state to improve public health. In *Consumer Education and Research Centre v Union of India*⁸¹⁰, the Supreme Court without equivocation held that the right to health is an integral part of a meaningful life. The case concerned the health of workers in the asbestos industry whose years of long exposure to the harmful chemical, could result in debilitating asbestosis. By a community of reading of article 21 of the fundamental right and relevant directive principles guaranteed in articles 39(e), 41 and 43 of the Constitution, the court held that the right to health and medical care is a fundamental right and it makes the life of the workman meaningful and purposeful with the dignity of the person.

In yet another case, *Paschim Banga Samity & Ors v State of West Bengal*,⁸¹¹ article 21 of the Constitution was held as vesting an obligation on the state to take every measure to preserve life. Preservation of life cannot be divorced from the provision of adequate medical facilities. While the right to shelter forms part of the right to an adequate standard of living provided for in article 11 of the ICESCR, there is no similar provision in the Indian DPSP. In *Municipal Corporation of Delhi v Gurnam Kaur*,⁸¹² the court declared that the Delhi Municipal Corporation had no legal obligation to provide those squatting on pavements, alternative shops for rehabilitation as the squatters had no legal enforceable right. In *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*,⁸¹³ which had to do with the eviction of squatters in a busy part of Ahmedabad city, the court *inter alia* held that: "... the State has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful."⁸¹⁴

⁸¹⁰ 1995(3) SCC 42.

⁸¹¹ 1996 (4) SCC 37.

⁸¹² (1989) 1 SCC 101. A similar decision was delivered in *Sodan Singh v NDMC* (1989) 4 SCC 155.

⁸¹³ 1997 II SCC 123.

⁸¹⁴ *Supra*, para 13, p. 133.

The lesson from the Indian experience is that in developing and advancing the jurisprudence on directive principles and socio-economic rights, the Supreme Court relying on those rights, enlarged and widened the scope of fundamental rights particularly the right to life and personal liberty contained in article 21. Directive principles are seen as being enforceable when they supply content to fundamental rights. The right as expanded through judicial decisions now contains such ancillary and complementary socio-economic rights like the right to livelihood, shelter, health, clothing, food, adequate nutrition and education. Rather than have a rigid dichotomy between directive principles and fundamental rights, the court considers them to be complementary to each other and in deserving cases, it harmonized the two, treating certain rights under the directive principles as integral parts of fundamental rights.

By liberalizing and simplifying the public interest litigation process, the court made it possible for the poor, the illiterate and disadvantaged people who ordinarily would be inhibited from approaching the court, to petition the court with no difficulty. The court has also developed far-reaching methods of granting remedies and making positive orders in respect of socio-economic rights against government, its agencies and even private bodies. Sometimes, the orders or directions are given in stages and the implementations are monitored through post-judgment procedure. This has encouraged the progressive realization of socio-economic rights.

Muralidhar had this to say: “The experience of Indian judiciary bolsters the vision of the Constitution as a dynamic and evolving document and not merely an expression of desired objectives in an open-ended time frame”.⁸¹⁵ He is right. What is the lesson for Nigeria?

3.4.5 Judicial application of directive principles in Nigeria

The first Nigerian Constitution to make provisions for Fundamental Objectives and Directive Principles of State Policy was the 1979 Constitution of Nigeria in Chapter II. The Draft Constitution that was a precursor to the 1979 Constitution was the result of a work by a Constitution Drafting Committee. When the Committee concluded its assignment in 1976, the *Daily Times*, a foremost newspaper in Nigeria at the time, sponsored debates and symposia on the Draft Constitution which took place in several centres all over the country from December 1976 to May 1977. The outcome of the exercise was later published.⁸¹⁶ Chapter II of the Draft Constitution made provision for what it described as the “Fundamental Objectives and Directive Principles of State Policy”.

⁸¹⁵ Muralidar S “ Implementation of Court Orders in the Area of Economic Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary” First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002, p.5.

⁸¹⁶ Ofonagoro W *et al* (eds) *The Great Debate Nigerian Viewpoints on the Draft Constitution* (1977).

A little bit of history behind chapter II is found in the Report of the Sub-Committee on National Objectives and Public Accountability of the Constitution Drafting Committee (CDC). The sub-committee was chaired by Ben Nwabueze and the first three articles state as follows:⁸¹⁷

Article 2: Any person may apply to a court of competent jurisdiction for a declaration whether any law or action of an organ or authority of the State or of a person performing functions on behalf of the organ or authority of the State is in accordance with the Directive Principles of Policy.

Article 3: A declaration by the court that a law or other action is not in accordance with the Directive Principles shall not render the law or other action in question invalid to any extent whatsoever and no other action shall lie against the State, any organ or authority of the State or any person on this ground.

Article 4: A declaration by the court that the State or an organ thereof is not complying with the Directive Principles shall nevertheless be a ground for the impeachment of the appropriate functionaries in accordance with the provisions of the Constitution in that behalf.

The Sub-Committee claimed that the provisions in the Indian and Pakistani Constitutions had served as their models and that they derived assistance from the United Nations Charter and the International Convention on Economic, Social and Cultural Rights.⁸¹⁸ The provisions recommended by the sub-committee, were far-reaching than that of the Indian and Pakistani Constitutions. They were novel and radical. Article 2 thereof clearly provides for the justiciability of Chapter 2 of the Draft Constitution on directive principles. Article 4 provides for sanction, albeit the impeachment of the appropriate functionaries against whom a declaration was made for not complying with the directive principles. The impeachment has to be in accordance with the provisions of the Constitution in that behalf. Rather than the above recommendations of the said sub-committee being adopted as such, a watered-down version found its way into the Draft Constitution as section 7(2) and it states:

Section 7(2). Subject to the provisions of subsection⁸¹⁹ of this section, no court of law shall have the power to determine any issue or question as to whether any action or omission by any person or authority, or as to whether any Law or any judicial decision is in conformity with this Chapter of this Constitution.

The chapter on directive principles in general and section 7(2) were the subject of intense debates by Nigerians. According to Jinadu, “the provisions of the Draft Constitution on Fundamental Objectives and Directive Principles of State have elicited the most acrimonious and intellectually stimulating discussion”.⁸²⁰ The Student Union of Ahmadu Bello University, Zaria charged that the non-justiciability clause was “undemocratic and open to abuse”.⁸²¹ It suggested that section 7(2) should either be deleted or the whole chapter should be removed from the constitution.

⁸¹⁷ Report of the Constitution Drafting Committee Volume II, (1976) 38.

⁸¹⁸ *Supra*.

⁸¹⁹ Section 7(3) of the Draft Constitution exempts the application of section 7(2) from sections 13 and 17 which deal with Directive on Local Government System and prohibition of State Religion.

⁸²⁰ Ofonagoro *et al* *The Great Debate Nigerian Viewpoints on the Draft Constitution* 1.

⁸²¹ A.B.U. Student Union “Rotimis Constitution: Our Opinions on Fundamental Objectives and Directive Principles of State Policy” in Ofonagoro *et al supra* note 403 41.

Obafemi Awolowo described the chapter as “a radical and enlightened innovation”.⁸²² He went on to argue that “the quality of the social objectives is destroyed, and the provisions under chapter II for these objectives are reduced to worthless platitudes, by section 7(2)(3) of the Draft”.⁸²³ Ojo opined that the inclusion of directive principles in the Draft Constitution had compromised the seriousness of the constitution, thereby unwittingly inviting cynicism. He advocated that they be expunged and left to where they appropriately belong that is, Party Political manifestoes.⁸²⁴

Nwabueze in reaction to what he called “this whole bogey about the objectives not being judicially enforceably”,⁸²⁵ argued that: “a constitutional duty has an inherent sanction by the mere fact that it is commanded by the constitution. It has moral, educative and psychological force for both the rulers and the governed, which is perhaps more important than the sanction of judicial enforcement”.⁸²⁶ If that is so, one wonders why the sub-committee under Nwabueze recommended limited justiciability in the first place. In so far as the rulers and the governed know that a constitutional duty is bereft of any enforceability or justiciability, it will neither command any inherent sanction nor any moral or psychological force. The tendency will be to treat it as a mere declaration or pious wish.

The *Nigerian Tribune* commented that the non-justiciability clause has rendered the entire “chapter useless to both the government and the people”.⁸²⁷ Sani considered the chapter “one of the most striking and commendable innovations”,⁸²⁸ although he thought that the title was clumsy. According to him, the “chapter no doubt attempts to spell out the ideological goals of this nation but regrettably does so in a rather evasive and half-hearted manner presumably because of the morbid fear held in some elitist quarters for any declarations of social values that have Marxist semblance or socialist exhortations”.⁸²⁹ For Emovon, the chapter “constitutes a bold step to planned economy and stability”.⁸³⁰

⁸²² Awolowo O “My Thoughts” in Ofonagoro *et al The Great Debate Nigerian Viewpoints on the Draft Constitution* 42.

⁸²³ *Supra* 43.

⁸²⁴ Ojo A in Ofonagoro *et al supra* 48.

⁸²⁵ Nwabueze BO “Where Dr Ojo Misfied” in Ofonagoro *et al supra* at 54.

⁸²⁶ *Supra*.

⁸²⁷ *Nigerian Tribune* “Tribune Comment on Fundamental Objectives” in Ofonagoro *et al supra* 55.

⁸²⁸ Sani H “Fallacies of the Nigerian Draft Constitution” in Ofonagoro *et al supra* 59.

⁸²⁹ *Supra*.

⁸³⁰ Emovon EU “Fundamental Objectives and Directive Principles and Public Accountability” in Ofonagoro *et al* 62.

A constituent assembly whose membership was partly appointed and partly elected was set up to deliberate on the Draft Constitution. It was further mandated to receive and collate public comments and debates on the Draft Constitution. The Assembly later submitted a revised Draft Constitution on 29 August 1978. The Assembly made no fundamental changes to the Draft Constitution.⁸³¹ The Supreme Military Council, the principal organ of the ruling military junta, on receipt of the Draft Constitution, arbitrarily inserted several new provisions before it took effect on 1 October 1979 as the Constitution of the Federal Republic of Nigeria. Section 6(6)(c) of the 1979 Constitution provides as follows:

The judicial powers vested in accordance with the foregoing provisions of this section-(c) shall not, except as otherwise provided in this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this constitution.⁸³²

The above provision has been retained in the 1999 Constitution also as section 6(6)(c). Justice Ojiako uncharitably described the above clause as “a sermon from the pulpit to be listened to and observed or regarded as mere rhetorics according to the dictates of one’s conscience”.⁸³³

Section 4(2) of the 1999 Constitution confers on the National Assembly the power to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the Executive Legislative List set out in Part 1 of the second schedule to the constitution. Item 60(a) in the Exclusive Legislative List prescribes-“the establishment and regulation of authorities for the Federation or any part thereof-(a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in the Constitution”. After referring to the said item 60(a), Uwais strenuously canvassed as follows:

The breathtaking possibilities created by this provision have sadly been obscured and negated by non-observance. This is definitely one avenue that could be meaningfully exploited by our legislature to assure the betterment of the lives of the masses of Nigerians, whose hope for survival and development in today’s Nigeria have remained bleak, and is continuously diminishing. The utilization of this power would ensure the creation of requisite bodies to oversee the needs of the weak and often overlooked and neglected society. It would also provide a unique and potent opportunity for our legislators to monitor and regulate the functions of these bodies, where Executive, for reasons best known to it, fails or neglects to prioritise and implement the provisions of Chapter II, and by extension, the welfare of all Nigerias.⁸³⁴

⁸³¹ Mottoh-Migan VR *Constitution Making in Post-Independence Nigeria: A Critique* (1994) 67.

⁸³² Section 7(2) of the Draft Constitution was replaced with this provision by the Constituent Assembly.

⁸³³ Ojiako GGI *In the Name of Justice* (1997) 10.

⁸³⁴ Uwais M “Fundamental Objectives and Directive Principles of State Policy: Possibilities and Prospects” in Nweze CC (ed) *Justice in the Judicial Process Essays in Honour of Honourable Justice Eugene Ubaezonu Enugu: Fourth Dimension Publishing Company* (2002) 179.

Uwais was undoubtedly right in his submissions. Regrettably, in Nigeria, the legislature is hardly pro-active. Bills that advance the selfish objectives of the members are more likely to command the interest and attention of the legislators than a Bill that will advance the welfare of Nigerians.

Like the legislators, the judiciary also has a role to play in promoting social justice in the country. The provisions of section 6(6) (c) of the 1999 Constitution has a phrase “except as otherwise provided by this constitution”. They can serve as the necessary tonic the judiciary needs for that exercise. Section 6(6)(c), by virtue of the said phrase, recognises that a constitutional provision may make any of the provisions of the Fundamental Objectives and Directive Principles of State Policy justiciable. Article 37 of the Indian Constitution does not have a similar phrase, yet the Supreme Court did so much as we have seen to develop a jurisprudence of social justice and economic rights.

What is the attitude of the Nigerian Supreme Court to the provisions on Fundamental Objectives and Directive Principles on State Policy in the 1999 Constitution? The case of *Attorney-General, Ondo State v Attorney-General of the Federation and others*⁸³⁵ presented the court with the first opportunity to examine certain provisions on directive principles. The Corrupt Practices and Other Related Offences Act No 5 of 2000 came into force on 13 June 2000. It seeks to prohibit and prescribe punishment for corrupt practices and other related offences throughout the Federal Republic of Nigeria. To implement its aims, the Act established a body known as Independent Corrupt Practices Commission (ICPC). By an originating summons filed in the Supreme Court on 16 July 2001, invoking its original jurisdiction under section 232(1) of the 1999 Constitution, the plaintiff, the Attorney-General of Ondo State sued the Attorney General of the Federation. He joined other 35 Attorneys-General of the States as parties as their rights might be affected by the action. He asked for certain reliefs. The principal one being that the Act is not in force in Ondo State and by extension in Nigeria. In summary, the plaintiff’s main contentions are that the Act is not in respect of a matter or matters either in the Exclusive Legislative List or the Concurrent Legislative List and therefore unconstitutional; that the National Assembly has no power to make laws with respect to the criminal offences contained in the Act and that sections 26(3), 28, 29, 35 and 37 of the Act are unconstitutional and void.⁸³⁶

⁸³⁵ [2002] 9 NWLR (Pt 772) 222.

⁸³⁶ *Supra* .

Section 15(5) of chapter II on directive principles states that the State shall abolish all corrupt practices and abuse of power. The provision of item 60(a) in the Exclusive Legislative List was earlier set out. Item 67 of the list provides: “Any other matter with respect to which the National Assembly has power to make law in accordance with the provisions of this constitution”. Item 68 provides: “Any matter incidental or supplementary to any matter mentioned elsewhere in this list”. Section 4 deals with the legislative power of the National Assembly.

According to the court, reading the above provisions of the constitution together and construed liberally and broadly, it can easily be seen that the National Assembly possesses the power both “incidental” and “implied” to enact the said Act, to enable the State, which for this purpose means the Federal Republic of Nigeria, to implement the provision of section 15(5) of the Fundamental Objectives and Directive Principles of State Policy. Under the provisions of section 3 of the Act, the ICPC is established with the powers to implement the provisions of the Act, both penal and otherwise. What the National Assembly did by the promulgation of the Act was aimed at eradicating corruption and corrupt practices in the country. It is an effort aimed at promoting and enforcing the observance of the provisions of section 15(5) of the Constitution.⁸³⁷

In his lead judgment, Justice Uwais held that having regard to item 68 in the list:⁸³⁸

...it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy. Hence the enactment of the Act contains provisions in respect of both the establishment and regulation of ICPC and the authority for ICPC to enforce the observance of the provisions of section 15 subsection 5 of the Constitution. To hold otherwise is to render the provisions of item 60(a) idle and leave the ICPC with no authority whatsoever.⁸³⁹

It was Justice Uwaifo who extensively dealt with the issue of directive principles in his concurring judgment and said:

As to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy in Chapter II of our Constitution, section (6(c) (sic)⁸⁴⁰ says so. While they remain mere *declarations*, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them, the nature of the consequences of which having to depend on the aspect of the infringement and in some cases the political will of those in power to redress the situation. But the Directive Principles (or some of them) can be made justiciable by legislation.⁸⁴¹

⁸³⁷ (2002) 9 NWLR (Pt 772) 222 , 312 paras F-H, per Wali JSC.

⁸³⁸ *Supra* 305 paras E-F.

⁸³⁹ Section 15(5) of the Constitution provides that the State shall abolish all corrupt practices and abuse of power.

⁸⁴⁰ Should read “ section 6(6)(c)”.

⁸⁴¹ *Supra* 382 paras A-B (Emphasis and interpolations are his).

Justice Uwaifo pointed out that not every section under chapter II is suitable for legislation which would result in sanctions, whether penal or compensatory for its breach.⁸⁴² He referred to the Indian case of the *State of Madras v Champakam*⁸⁴³ wherein the Indian Supreme Court held that: “The Directive Principles of State Policy have to conform to and run subsidiary to the Chapter on Fundamental Rights. That is the correct way in which the provisions found in parts III (Fundamental Rights) and IV (Directive Principles) have to be understood”.⁸⁴⁴

Having regard to the Indian situation as represented in *Champakam case*,⁸⁴⁵ Uwaifo J.S.C then said:

Whatever was necessary was done (in India) to see that they (Directive Principles) are observed as much as practicable so as to give cognizance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly working together, to give expression to anyone of them through appropriate enactment as occasion may demand. I believe that this is what has been done in respect of section 15(5) by the present Act.⁸⁴⁶

In the final result, the claim was only a partial success as the Supreme Court struck down as being unconstitutional, section 26(3) of the ICPC Act which placed a time limit within which to conclude the prosecution of an offence. It did so too to section 35 for violating the constitutional provisions on personal liberty. On the whole, the ICPC Act was saved as it is a legislation that gives force to section 15(5) of the directive principles of the constitution.

There are some salient issues arising from the judgment, particularly the concurring judgment of Justice Uwaifo that must be examined. The reference to *Champakan case*⁸⁴⁷ in order to capture the Indian situation, is not quite appropriate. The case which was decided in 1951 did not represent the current state of affairs in India. This work earlier considered several Indian cases that were decided from 1970s when the judiciary initiated the Public Interest Litigation (PIL) jurisprudence.⁸⁴⁸ In *Kesavananda Bharati v State of Kerala*,⁸⁴⁹ it was held that in building up a just social order, it is sometimes imperative that the fundamental rights should be subordinated to the directive principles.⁸⁵⁰

⁸⁴² (2002) 9 NWLR (Pt 722) 222, 383 para G.

⁸⁴³ (1951) SCR 525.

⁸⁴⁴ *Supra*, 531, interpolations supplied.

⁸⁴⁵ *Supra*.

⁸⁴⁶ (2002) 9 NWLR (Pt 772) 222, 391 paras E-H.

⁸⁴⁷ (1951) SCR 525.

⁸⁴⁸ See section 3.4.4 of this chapter.

⁸⁴⁹ (1973) 4 SCC 225.

⁸⁵⁰ (1973) 4 SCC 225 at 879.

Again in *State of Kerala v N.M. Thomas*,⁸⁵¹ it was held that fundamental rights and directive principles were complementary, “neither part being superior to the other”.⁸⁵² The above cases and others similarly decided, encapsulate the current state of Indian jurisprudence on socio-economic rights and directive principles.

Justice Uwaifo also gives the impression that it is for the Executive and the National Assembly to give expression to any of the provisions on directive principles through appropriate legislation. While not denying the fact that they have a role to play in enforcing the observance of the directive principles through legislation, the judiciary even has a greater role to play. It is not for cosmetic reasons that the judiciary is regarded as the last hope of the common person. In many cases, it takes longer time to meet societal needs through legislation than through judicial review. Again, considering the Indian experience, the social revolution⁸⁵³ was initiated, implemented and monitored by the judiciary. The Executive and Legislature were compelled to join and they did. As stated earlier, the insertion of article 21A, as an amendment to the Indian constitution was a direct consequence of the decisions of the Supreme Court. Many States and Union Territories in India also passed legislation making primary education compulsory, following Supreme Court decisions on the right to education.

Justice Uwaifo did not elaborate on what he meant by “uncertain ways of giving effect to the directive principles in Chapter II of our Constitution”.⁸⁵⁴ If by that he meant the enforceability through justiciability of some provisions of the directive principles, when there is no specific legislation giving force to the provisions, this author begs to differ. As we stated earlier, the phrase “except as otherwise provided by this constitution” in section 6(6)(c) of the 1999 Constitution, is clearly indicative of the fact that a part or parts of the directive principles may be justiciable on account of a constitutional provision. If that is so, relying on the provisions of directive principles, the courts in Nigeria can supply content to fundamental rights and thereby create ancillary rights as in India. This submission is accommodated within the purview of section 6(6)(c) of the 1999 Constitution. The practice cannot create “uncertain ways” or usual means of enforcing the observance of the directive principles. The way may be radical but it is neither unlawful nor unconstitutional.

⁸⁵¹ (1976) 2 SCC 310 .

⁸⁵² *Supra* 367.

⁸⁵³ That is the PIL movement.

⁸⁵⁴ (2002) 9 NWLR (Pt 772) 222, 391 paras E-H.

In *Attorney-General, Lagos State and Attorney-General of the Federation*,⁸⁵⁵ it was the judgment⁸⁵⁶ of Justice Tobi that dealt with the issue of justiciability of the directive principles. Instructively, he commented on the case of *A-G Ondo State v A-G, Federation*,⁸⁵⁷ earlier considered by us. This is what he said:

In *A-G Ondo State v A-G, Federation*,⁸⁵⁸ this court (Supreme Court) examined the provisions of section 15(5) of the 1999 Constitution and items 60,67 and 68 of the Executive Legislative List of the Second Schedule to the Constitution. Construing the provisions of section 15(5) of the Constitution and items 60,67 and 68 of the Exclusive Legislative List of the Second Schedule to the Constitution, this court gave teeth to Chapter 2 of the Constitution on *Fundamental Objectives and Directive Principles of State Policy*, a chapter which is ordinarily or normally non-justiciable.⁸⁵⁹

It has to be noted that the said judgment did not give much “teeth” to chapter II. After all, the substratum of the judgment of the Supreme Court was that “the Directive Principles (or some of them) can be made justiciable by legislation”.⁸⁶⁰ On the contrary, the view here is that it is the case of *Adebiyi Olafisoye v Federal Republic of Nigeria*⁸⁶¹ that actually gave teeth to the provisions of Fundamental Objectives and Directive Principles of State Policy. In that case, one of the issues that arose was “whether the provisions of the chapter are justiciable in law”.⁸⁶² In resolving that issue, Justice Tobi who delivered the lead judgment on behalf of a full bench of the Supreme Court, made several notable pronouncements on the justiciability of directive principles. He said:

In my humble view, the non-justiciability of section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words “except as otherwise provided by this Constitution”. This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the court.⁸⁶³

This according to Justice Tobi also means that where justiciability of the provisions of chapter II is guaranteed elsewhere in the constitution, of course, that will be the case.⁸⁶⁴ He referred to section 15(5) of the 1999 Constitution which states that “the State shall abolish all corrupt practices and abuse of power” and item 60(a) of the Exclusive Legislative List whereby the National Assembly is empowered to establish and regulate authorities “to promote and enforce the observance of the provisions of Chapter 2 of the constitution”.

⁸⁵⁵ (2003) 12 NWLR (Pt 833) 1.

⁸⁵⁶ Note that Uwais CJN, Ayoola JSC and Tobi J.S.C expressed minority views on two of the reliefs, namely reliefs 1 and 4.

⁸⁵⁷ (2002) 9 NWLR (Pt 722)222.

⁸⁵⁸ *Supra*.

⁸⁵⁹ Emphasis supplied.

⁸⁶⁰ *Supra* at 382 para B.

⁸⁶¹ (2004) 4 NWLR (Pt 764) 580.

⁸⁶² *Supra* at 661 para B.

⁸⁶³ *Supra* at 660 para F.

⁸⁶⁴ (2004) 4 NWLR (Pt 764) 580 , 660 para F.

Justice Tobi then held as follows:

A community reading of item 60(a) and section 15(5) results in quite a different package, a package which no more leaves Chapter 2 a toothless dog which could only bark but cannot bite. In my view, by the joint reading of the two provisions, Chapter 2 becomes clearly and obviously justiciable. And if I may fall back on section 6(6)(c) of the Constitution which provided for an exception clause, it is my view that section 6(6)(c) anticipates amongst other possible provisions, the provision of item 60(a).⁸⁶⁵

Having regard to the fact that Justice Tobi delivered the lead judgment of the Supreme Court, this judgment radically and positively advanced the Nigerian jurisprudence on directive principles. If followed and applied in subsequent cases concerning the promotion and enforcement of the observance of directive principles, especially over the rights of the individuals, it will usher in an era of social revolution in Nigeria in a way that may even approximate to that of India. The Nigerian provision on Directive Principles is more accommodating over the issue of the justiciability than the Indian provision. But it requires the will and action of the aggrieved persons, the Bar and the judiciary to realize the full impact of the provision.

Most national constitutions constitutionalise civil and political rights into fundamental rights or bill of rights, thereby making them justiciable and enforceable. Many countries have realized the need to accord constitutional protection to economic, social and cultural rights and have entrenched them along with civil and political rights in a bill of rights. The protection accorded socio-economic rights in such circumstances is direct and guarantees justiciability. Redressing their violations does not depend much on judicial activism, as in the case of indirect protection given to directive principles. Such direct constitutional protection according to Chirwa,⁸⁶⁶ “challenges the traditional liberal conception that a bill of rights is a shield from arbitrary interference in individual liberties by the state and underscores the fact that economic, social and cultural rights also impose negative duties and that the meeting of social needs through the imposition of positive obligations on the state is an equally fundamental value in a constitution”. Most of the constitutions the African countries adopted prior to 1990 made no guarantee for economic, social and cultural rights.⁸⁶⁷ Interestingly, some of them had no bills of rights at all.⁸⁶⁸

⁸⁶⁵ (2004) 4 NWLR (Pt 764) 661 paras F-H.

⁸⁶⁶ Chirwa DM “An Overview of the impact of the International Covenant on Economic, Social and Cultural Rights in Africa” http://www.Communitylawcentric.org.2a/ser/rights_in_africa_doc [accessed 15 March 2006]; see also Liebenberg S “The domestic protection of economic and social rights in domestic legal systems” in Aide A et al (eds) *Economic, Social and Cultural Rights* (2001) 55, 57.

⁸⁶⁷ Chirwa *supra* .

⁸⁶⁸ *Supra*. See example, the 1960 Constitution of Cote d’Ivoire, the 1966 Constitution of Malawi, the 1983 Constitution of South Africa, the 1985 Constitution of Sudan, the 1986 Constitution of Central African Republic and the 1966 Constitution of Botswana.

There were those that guaranteed only civil and political rights with not more than three guarantees of economic, social and cultural rights.⁸⁶⁹ The Egyptian Constitution of 1971 as amended up to 1980, made very robust provisions guaranteeing socio-economic rights like the right to the protection of the family, motherhood and childhood, health, social security, education, work and property.⁸⁷⁰ Some constitutions of some African nations from 1990 directly incorporated socio-economic rights. They include the Constitution of Madagascar,⁸⁷¹ the 1993 Constitution of Seychelles⁸⁷² and the 1996 Constitution of South Africa.⁸⁷³

As a result of the constitutionalization of social, economic and cultural rights in South Africa by the 1996 Constitution, Kevin Iles stated with glee that: “The South African constitution accordingly became the first constitution in the world to include entrenched and justiciable socio-economic rights alongside civil and political rights”.⁸⁷⁴ Having regard to our examination of the constitutionalization of socio-economic rights in African and non-African countries, it becomes obvious that Iles’ position is not only untenable but incorrect. South Africa was neither the first country in the world nor even in Africa to constitutionalize socio-economic rights. However, South Africa has done more than any other African country in the judicial vindication of socio-economic rights. To that extent, the judicial protection of the rights in South Africa is to be examined.

⁸⁶⁹ For example, the 1963 Constitution of Senegal as amended up to 1992, made provisions in articles 14-18 and 20 for the protection of marriage and family, education and work (Senegal adopted a new constitution in 2001) the 1959 Constitution of Tunisia as amended up to 1988, provides for the right to property in article 14, the 1968 Constitution of Mauritius as amended up to 1982 guarantees in articles 8 and 14, the rights to property and education; the 1977 Constitution of Tanzania guarantees in articles 22-24, the rights to work, just remuneration and property; the 1975 Constitution of Mozambique provides in article 29, 31 and 32, the protection of marriage, motherhood and childhood, right to work and education, the protection of the aged and disabled. See also Chirwa *supra* note 591.

⁸⁷⁰ See articles 7-39.

⁸⁷¹ The right to health, family protection, education, culture, strike, property and the protection of the aged and disabled are provided for in the articles 17-40.

⁸⁷² The rights to property, health care, special protection of working mothers, education, shelter, protection of the aged and the elderly, social security, environment and culture, are guaranteed by articles 26-36.

⁸⁷³ Sections 22-31 protect the rights to trade, occupation and profession labour relations, environment, property, housing, healthcare, food, water and social security, children, education, language and culture.

⁸⁷⁴ Iles K “Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses” (2004) 20 *SAJHR* 448, 449.

3.4.6 Judicial protection of social and economic rights in South Africa

The constitutionalization of social, economic and cultural rights in South Africa, was preceded by various debates and arguments on the wisdom and desirability of entrenching socio-economic rights in the constitution.⁸⁷⁵ The central issue in the debates was whether the realization of socio-economic rights is not more of a political and policy matter for the executive and legislative arms of government than a judicial matter.⁸⁷⁶ Several years after the constitutionalization of the rights was achieved, the debates are still on.⁸⁷⁷ Though much of the debates x-ray the role of the South African judiciary in the vindication or enforceability of the rights. To underscore the point that the debates still rage on, Justice Yacoob had this to say: “The question is therefore not whether socio-economic rights are justiciable under our constitution, but how to enforce them in a given case. The very difficult issue which must be carefully explored on a case-by-case basis”.⁸⁷⁸

Section 7(2) of the 1996 South African Constitution enjoins the state to “respect, protect, promote and fulfill the rights in the Bill of Rights”. It has been argued that those four words:

impose on the state a mixture of both positive and negative obligations. The duty to respect a right involves an immediate obligation on the state to refrain from legislative or other action, which interferes with enjoyment of the right. The duty to protect the right requires the state to take measures to prevent the right from being interfered with by other non-state actors. Promoting and fulfilling the right requires positive action on the part of the state to take legislative and other measures to assist individuals and groups in obtaining access to the right.⁸⁷⁹

The foregoing also repudiates the argument that socio-economic rights impose positive rather than negative obligations on the state. Michelman drew attention to a paradox in judicial vindication of socio-economic rights.

⁸⁷⁵ Pieterse M “Coming to terms with Judicial Enforcement of socio-economic rights” 383; Davis D “The Case Against Inclusion of Socio- Economic Right in a Bill of Rights Except as Directive Principles” (1992) 8 *SAJHR* 475; Sachs A “Towards a Bill of Rights in a Democratic South Africa” (1990) 6 *SAJHR* 1; Scott S and Macklem P “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” (1992) 141 *Univ Penn LRI*, 26–42; Haysom N “Constitutionalism, Majoritarian Democracy and Socio-Economic Right” (1992) 8 *SAJHR* 451-63, Mureinik E “Beyond a Chapter of Luxuries: Economic Rights in the Constitution” (1992) 8 *SAJHR* 464 –74.

⁸⁷⁶ We examined the issue *supra*.

⁸⁷⁷ Pieterse M *supra* 383-417; Iles K *supra* 604 448– 465; Davis D “Socio-Economic Rights in South Africa: The Record after 10 years” paper delivered at the University of Cape Town on 6 May 2004; Hogan G “Judicial Review and Socio-Economic Rights” in Sarkin J & Binchy W (eds) *Human Rights, the Citizen and the State: South African and Irish Perspectives* (2001) 1, 3; De Vos P “Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa’s 1996 Constitution” (1997) 13 *SAJHR* 67, 74.

⁸⁷⁸ *Government of the Republic of South Africa v Grootboom* (2001) I CHR 261 at 283 paras A-B.

⁸⁷⁹ Iles K “Limiting Socio-Economic Rights: Beyond the Internal Limitation Clauses” at 459.

According to Michelman:

By constitutionalizing social rights, the argument often run, you force the judiciary to a helpless choice between usurpation and abdication, from which there is no escape without embarrassment or discredit. One way, it is said, lies the judicial choice to issue positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against prevailing political will. The other way lies the judicial choice debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies of an unreviewable privilege.⁸⁸⁰

For the South African judiciary, there is hardly any choice other than upholding and enforcing the socio-economic rights duly guaranteed by the constitution. In the discharge of that constitutional role, the South African inherited legal culture would seem to hinder a free flow of that assignment. The South African legal culture has to a considerable extent been influenced by Anglo-Saxon legal culture of classical liberalism and the result is unfavourable disposition towards socio-economic rights.⁸⁸¹ Further to that is the conservatism of the South African judiciary; its abiding faith in legal positivism and a culture of almost total deference to the executive until 1994.⁸⁸² Pieterse argues⁸⁸³ that having regard to the fact that “a large proportion of South African’s legal fraternity were schooled in the legal culture” above described, one can then appreciate why the judges are certain “to feel ideological discomfort with enforcing socio-economic rights and to attempt instinctively to allay it by deferring to the legislative and executive branches in social/ political matters”. Caution is the golden thread that runs through the gamut of cases decided by the South African Courts, particularly the Constitutional Court.⁸⁸⁴

3.4.7 Realizing socio-economic rights through the African Charter

In respect of the African Charter on Human and Peoples’ Rights, Nigeria not only signed and ratified the Charter but went on to adopt it as part of its municipal law by enacting The African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act.⁸⁸⁵ Section 1 of the Act provides that:

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples’ Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

⁸⁸⁰ Michealman FI “The Constitution, Social Rights and Liberal Political Justification” (2003) 1 *International Journal of Constitutional Law* 13, 15.

⁸⁸¹ Pieterse “Coming to terms with Judicial enforcement of socio-economic rights” 398; Motala Z “Socio-economic Rights, Federalism and the Courts: Comparative Lessons for South Africa” (1995) 112 *SALJ* 68.

⁸⁸² Pieterse *supra* 398.

⁸⁸³ Pieterse *supra* 399.

⁸⁸⁴ Such cases include *Soobramoney. Minister of health Kwazul (1998) (1) SA 765 (CC) and Government of the Republic of South Africa v Grootboom* (2001) 1 CHR 261; 2001 (1) SA 46 (CC)

⁸⁸⁵ Laws of the Federation of Nigeria 1990 Chapter 10. (now Laws of the Federation, 2004 Cap A9).

The 1999 Constitution in section 12(1) enacts as follows: “No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly”. No doubt the domestication of the African Charter through legislation duly complied with the above constitutional provision. It is important to recall that under chapter II of the 1999 Constitution, provision is made for Fundamental Objectives and Directive Principles of State Policy. As earlier discussed, they include political, economic, social, educational, foreign policy, environmental and cultural objectives of the Federation of Nigeria. It has also been noted that the Constitution in section 6 (6)(c) makes non-justiciable, matters contained in the Fundamental Objectives and Directive Principles of State Policy set out in chapter II of the Constitution. Though non-justiciable, the economic, social and educational obligations imposed on the state by sections 16, 17 and 18 of the Constitution are more in scope than similar obligations imposed on member states by the African Charter.

Admittedly, economic, social and cultural rights and civil and political rights play complementary role to each other. This fact is clearly recognised by the African Charter in its preamble when it states: “...that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”. The International Covenant on Economic, Social and Cultural Rights recognises that it may not be easy to implement its provisions in one fell swoop. Consequently, it provides in article 2 for each State Party to take steps “...with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”. This is an admission that a state party may have all the will and good intention to implement the provisions but may lack the resources to do so. Hence, it may proceed to realize them through a gradual process. The African Charter does not have a similar provision. It simply mandates the States in article 1 to undertake to adopt legislative or other measures to give effect to the rights, duties and freedom enshrined in the Charter. This may be through an enactment adopting the Charter as part of the municipal law as was done by Nigeria or incorporating provisions on economic, social and cultural rights in the national constitution as in the case of South Africa and Ghana. The socio-economic rights guaranteed by the African Charter include the right to work (article 14); the right to enjoy the best attainable state of physical and mental health (article 16); and the right to education (article 17). Can the Nigerian Government rely on the non-justiciability clause in the Constitution among others, to avoid its obligation under the African Charter in respect of economic and social rights notwithstanding that it not only ratified the Charter but it incorporated it into the Domestic Law?

Chinonye Obiagwu is of the view that:

the provision of section 6(6)(c) 1979 and 1999 Constitutions operate as an ouster clause over ECOSOC (economic and social rights) provisions in chapter 2 of the Constitutions. To that extent, the powers of court to enforce those rights are prohibited. But the courts still have powers to enforce those rights as contained in the African Charter.⁸⁸⁶

Under section 1(1) of the 1999 Constitution, its supremacy is stated in very unequivocal terms. Under section 1(3), it is stated that: ‘‘If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void’’. The Supreme Court re-emphasised that the Constitution is the barometer on which the constitutionality of a law or statute is determined or measured. Where a statute is inconsistent or in conflict with any provision of the Constitution, the provision of the statute to the extent of the inconsistency will be null and void.⁸⁸⁷ The foregoing are constituents of constitutionalism. The contention of Obiagwu may appear untenable when viewed from the prism of constitutionality and constitutionalism. As it could be argued that constitution cannot expressly outlaw the enforcement of a right and the right is still subject to enforcement under a domesticated international instrument.

Having regard to the fact that the Charter has been domesticated and that under section 1(3) of the Constitution, any law inconsistent with the Constitution is void, Emmanuel Uko had this to say:

The envisaged problem with the implementation of the provisions of the African Charter on matters concerning the right to health care (social right) in Nigeria resolves around its conflict with the provisions of the Nigerian Constitution, which does not provide for the right to health care. Additionally, the enforcement mechanisms of the African Charter are at variance with those of the guaranteed fundamental human rights under Chapter 4 of the Nigeria Constitution, thereby casting some doubts as to which is subordinate, equal or superior in status. Of more serious implication is the consideration whether the justiciable socio-economic rights enshrined in the African Charter are consistent with, or complementary to, the non-justiciable and limited socio-economic rights provided in the Fundamental Objectives and Directive Principles of State Policy in Chapter 2 of the Nigerian Constitution.⁸⁸⁸

⁸⁸⁶ Obiagwu C *Promoting Economic, Social and Cultural Rights Using Domestic Mechanisms* paper presented at a Human Rights Seminar by LEDAP held in June 2005 at Owerri, Nigeria

⁸⁸⁷ *A-G, Lagos State v A-G, Federation* (2003) 12 NWLR (Pt 833) 1 at 244 paras A-D.

⁸⁸⁸ Uko EJ *Legal Rights of People Vulnerable to HIV/AIDS in Africa* (2004) *Codicillus* Vol. 45 No. 11 at 42-43.

Some issues raised above by Uko have long been settled by judicial cases in Nigeria. The enforcement mechanisms of the African Charter and the fact that the Nigerian Constitution is superior to the African Charter, notwithstanding that the Charter and the Act domesticating it are in “a class of their own”, have been confirmed by the Supreme Court.⁸⁸⁹ Again, the socio-economic rights contained in the African Charter are not more in scope than those in the directive principles of the Nigerian Constitution. However, the relationship between the constitution and the socio-economic rights guaranteed by the Charter remains a troubling one. In his own contribution, Nwabueze contends that:⁸⁹⁰

All laws in Nigeria inconsistent with the Constitution, including laws enacted for the purpose of implementing treaties, are void to the extent of their inconsistency with the Constitution. Their voidness in municipal law does not, as earlier explained, absolve the state from its treaty obligation in international law, as a state cannot plead municipal law in order to escape from its international obligations, but that in no way affects the validity of the legislation in domestic law.

In *Fawehinmi v Abacha*,⁸⁹¹ the constitutionality of the arrest and detention of a famous human rights lawyer was challenged based on the fundamental rights provision of the Constitution and the provisions of the African Charter. The High Court in declining jurisdiction relied on the ouster clauses in Decree 107 of 1993⁸⁹² and Decree 12 of 1994.⁸⁹³ At the Court of Appeal, the enforceability of the African Charter in the Nigerian courts called for determination. Justice Musdapher⁸⁹⁴ who wrote the lead judgment said as follows:

...the provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority ... It seems to me that the learned trial judge acted erroneously when he held that the African Charter contained in Cap. 10 of the Laws of the Federation of Nigeria 1990 is inferior to the Decrees of the Federal Military Government. It is common place, that no Government will be allowed to contract out by local legislation, its international obligations. It is my view, that notwithstanding the fact that Cap. 10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria.⁸⁹⁵

In his concurring judgment, Justice Pats-Acholonu noted that “by not merely adopting the African Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with greater vigour and strength than mere Decree for it has been elevated to a higher pedestal and... its violability becomes actionable”.⁸⁹⁶

⁸⁸⁹ *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 600) 228.

⁸⁹⁰ Nwabueze B *Constitutional Democracy in Africa Volume 2* (2003) 94.

⁸⁹¹ *Fawehinmi v Abacha* (1998) 1 HRLRA 549.

⁸⁹² Constitution (Suspension and Modification) Decree No. 107 of 1993.

⁸⁹³ Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994.

⁸⁹⁴ *Fawehinmi v Abacha* (1998) 1HRLRA 549.

⁸⁹⁵ *Supra* at 590-591 paras F-A.

⁸⁹⁶ *Supra* at 606 paras D-E.

Also in his concurring judgment, Justice Mohammed said that “ordinarily, a state, which is a party to a treaty, will not be permitted to legislate locally out of its obligations”.⁸⁹⁷ Nwabueze in his strident criticism of the decision of the Court of Appeal, argues that the decision in *Abacha’s* case is untenable. He stated that the effect of the decision would be to elevate the Charter and the statute that incorporated it into the Nigerian municipal law, above the Constitution.⁸⁹⁸ In his forceful criticism of the judgment, Nwabueze explained further:

For, if, as affirmed in a series of decisions of the Supreme Court, Decrees of the FMG (Federal Military Government) can effectively oust the jurisdiction vested in the courts by the Constitution to enforce its supremacy and, in particular, to enforce the fundamental rights it guarantees, but cannot oust their jurisdiction to enforce the rights guaranteed by the African Charter, then, the Charter and the statute incorporating it into Nigerian Municipal law would have been elevated to a status above the constitution. That would seem to me a monstrous result to inflict upon a country by judicial decision. With the greatest respect, the decision seems like judicial activism run riot.⁸⁹⁹

It is true that the Supreme Court, the Court of Appeal and the various High Courts have in several decisions confirmed that under a military administration or dictatorship, the decree is superior to the unsuspended parts of the constitution; while the constitution as amended by the military administration is superior to other laws in the country. That also appears to be the purport of Justice Musdapher’s statement that “while Decrees of the Federal Military Government may override other municipal laws, they cannot oust the jurisdiction of the court” in respect of the human rights contained in the Charter; and that of Justice Acholonu who said the Act incorporating the Charter has “a greater vigour and strength than a *mere* decree”. Reading the dictum of Justice Musdapher in context, it is obvious that the legal position as articulated by him cannot be said to be untenable. His decision is quiet appropriate. He held that “the provisions of the Charter are in a class of their own”⁹⁰⁰ and that can hardly be faulted. His reasoning is based on the fact as rightly stated by him that “no Government will be allowed to contract out by local legislation, its international obligations”.⁹⁰¹ Justice Musdapher did not imply that the Charter is superior to a decree or constitution; he appropriately stated that the provisions of the Charter are simply on “a class of their own”. Indeed, they are by customary international law on a class of their own.

⁸⁹⁷ *Fawehinmi v Abacha* (1998) IHRLRA 549 at 596 para D.

⁸⁹⁸ Nwabueze B *Constitutional Democracy in Africa Volume 2* at 93-94.

⁸⁹⁹ *Nwabueze supra* at 94.

⁹⁰⁰ *Fawehinmi v Abacha* (1998) 1 HRLRA 549.

⁹⁰¹ *Supra*.

It is the concurring judgment of Justice Pats-Acholonu that has created an anomalous situation. There is no doubt that the concurring statement of Justice Pats-Acholonu that the Act has been clothed with a “greater vigour and strength than a mere Decree” and “elevated to a higher pedestal”⁹⁰² could create the impression that the Act is superior to and overrides a decree or even the constitution. If that was intended to be the effect of his foregoing statement, then with respect, it is untenable. In any event, his judgment, is a concurring judgment which under the Nigerian jurisprudence and indeed, the common law jurisdiction, is not the judgment of the court and is not subject to an appeal. An uncomfortable aspect of the judgment of Justice Musdapher is where he held on the issue of domestic enforcement of the provisions of the Charter that the case of *Ogugu v The State*⁹⁰³ “is no authority for the proposition that the Fundamental Rights (Enforcement Procedure) Rules 1979 can be employed in a claim based on the Charter”.⁹⁰⁴ Two other Justices of the court concurred.

On the contrary, *Ogugu’s case* established the fact in question. It is surprising how their Lordships came to misconstrue an otherwise clear decision of the Supreme Court in *Ogugu’s case*. In *Ogugu’s case*, Chief Justice Bello who delivered the lead judgment said: “Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our laws fall within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto.”⁹⁰⁵ It is clear that Justice Bello meant that the Charter can also be enforced pursuant to the provision of Fundamental Rights (Enforcement Procedure) Rules 1979. Justice Ogwuegbu in his concurring judgment said that: “the provisions of the Charter are enforceable in the manner as those of Chapter 4 of 1979 Constitution by application made under Section 42 of the Constitution”.⁹⁰⁶ This captures the essence of the lead judgment encapsulated in the dictum of Justice Bello.

It is difficult to comprehend how the Court of Appeal misunderstood the judgment in *Ogugu’s case* as regards the enforcement of the provisions of the African Charter. The Court of Appeal eventually allowed the appeal holding that the High Court had jurisdiction to entertain the matter; though wrong procedure was adopted in invoking its jurisdiction.

⁹⁰² *Fawehinmi v Abacha* (1998) 1 HRLRA 549.

⁹⁰³ *Ogugu v The State* (1994) NWLR (Pt 336) 75.

⁹⁰⁴ *Supra* at 591-592 paras H.

⁹⁰⁵ *Supra* at 26 para H.

⁹⁰⁶ *Supra* at 47 para C.

The stage then shifted to the Supreme Court as *Abacha v Fawehinmi*,⁹⁰⁷ wherein the State appealed against the decision of the Court of Appeal and Fawehinmi cross-appealed on four issues. One being that the Court of Appeal was wrong in holding that the provisions of the Charter cannot be invoked pursuant to the Fundamental Rights (Enforcement Procedure) Rules 1979 (FREPR). The Supreme Court was unanimous in dismissing the main appeal by the government and by a majority of 4-3, it allowed the cross-appeal only on the issue that the Court of Appeal was wrong when it held that the provisions of the Charter cannot be enforced pursuant to the FREPR. In his lead judgment, Justice Ogundare stated that the African Charter is a statute with international flavour. He said:

Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent, I agree with their Lordships of the Court below that the Charter possesses “a greater vigour and strength” than any other domestic statute. But that is not to say that the Charter is superior to the Constitution...Nor can its international flavour prevent the National Assembly, or the Federal Military Government before it removed it from our body of municipal laws by simply repealing Cap. 10. Nor also is the validity of another statute be necessarily affected by the mere fact that it violates the African Charter or any other treaty, for that matter.⁹⁰⁸

He relied on the case of *Chae Chin Ping v United States*,⁹⁰⁹ where it was held that treaties are of no higher dignity than acts of Congress, and may be modified or repealed by Congress in like manner; and whether such modification or repeal is wise or just is not a judicial question. Referring to section 1 of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, the legal instrument that domesticated the Charter, Justice Ogundare observed that all authorities and persons exercising legislative, executive or judicial powers in Nigeria are enjoined to give full recognition and effect to the African Charter. That is, the plenitude of the Government of Nigeria cannot do anything inconsistent with the Charter. Section 1 was never suspended or repealed by any of the Constitution (Suspension and Modification) Decrees enacted between 1993 and 1999⁹¹⁰. The position then is that the courts’ jurisdiction to give “full recognition and effect” to the African Charter remained unimpaired.

⁹⁰⁷ *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 600) 228.

⁹⁰⁸ *Supra* at 289 paras D-F.

⁹⁰⁹ 130 US 181.

⁹¹⁰ *Supra* at 292 paras D-E.

It cannot be faulted that the National Assembly which domesticated the African Charter had the legislative competence to do so or legislate on any aspect of the Charter. In the case of *Attorney-General, Ondo State v Attorney-General of the Federation and Others*,⁹¹¹ the Supreme Court held that the directive principles (or some of them) can be made justiciable by *Legislation*.⁹¹² And that the National Assembly working together with the Executive, can give expression to any of the provisions of the directive principles through appropriate enactment.⁹¹³ Justice Tobi has said that the non-justiciability provided in section 6(6)(c) of the Constitution is neither total nor sacrosanct.⁹¹⁴

In view of the foregoing, it will be idle to argue that the provisions of the African Charter on socio-economic rights are at variance or inconsistent with the provisions of the directive principles or the non-justiciability clause contained in section 6(6)(c) of the 1999 Constitution. If as held by the Supreme Court, the provisions of the directive principles could be given expression or made justiciable by legislation or appropriate enactment, it follows that the socio-economic rights which are contained in the African Charter, rather than being inconsistent with the constitution, are complementary to the socio-economic rights contained in section 43(right to property) and chapter II of the Constitution. If national legislation can make socio-economic rights in chapter II justiciable, then the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act which is acknowledged to possess "a greater vigour and strength" than any other domestic statute⁹¹⁵ in the country, can equally confer justiciability on socio-economic rights.

3.4.8 Right to development

There is a symbiotic relationship between the right to self-determination, the right to development or right to natural wealth or resources. Under articles 1(1) respectively of ICCPR and ICESCR,⁹¹⁶ the right to self-determination encompasses the right of the people not only to freely determine their political status but to freely pursue their economic, social and cultural development. A similar provision is contained in article 20(1) of the African Charter.⁹¹⁷ Further to the foregoing provisions, the General Assembly of the United Nations on 4 December 1986 adopted the Declaration on the right to development.⁹¹⁸

⁹¹¹ (2002)9 NWLR (Pt 772) 222.

⁹¹² *Supra* at 382 para B (emphasis supplied).

⁹¹³ *Supra* at 391 paras E-H.

⁹¹⁴ (2004) 4 NWLR (Pt 764) 560 at 659 paras F-G.

⁹¹⁵ Per Ogundare JSC in *Abacha v Fawehinmi* (2000) 6 NWLR(Pt 660) 228 at 289 para E.

⁹¹⁶ The provisions are set similar.

⁹¹⁷ The provision is similar to article 1(1) of ICCPR and ICESCR.

⁹¹⁸ UNGA Resolution 41/128 of D December 1986.

The Declaration in its preamble states *inter alia*:

Recalling the right of peoples to self-determination by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development.

Recalling also the right of peoples to exercise, subject to the relevant provisions of both international Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources.

Article (1)(1) of the Declaration provides as follows:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

Article 2(1) of the Declaration provides that “The human person is the central subject of development and should be the active participant and beneficiary of the right to development”. From the above provisions, it is clear that right to development is embedded in the right of the people and their entitlement to participate, contribute and enjoy economic, social, cultural and political development. Again, the full realization of the right to self-determination is dependent on the human right to development wherein the human person remains the fulcrum, the subject and the beneficiary of the development.

Like most economic rights other than the right to property, the right to development is hardly asserted in Nigeria. The right was hardly mentioned until the people of Niger Delta started asserting their right to self determination. The agitation started when the Niger Delta people could no longer stand the degradation of their environment and the absence of basic social amenities. This escalated when security agents at the behest of the Federal Government started brutalizing, oppressing, dehumanizing and suppressing the people. Their struggle generated international recognition when their leader, a well known author and activist, Ken Saro-Wiwa along with eight others were executed in 1995. This was during General Abacha’s regime and on the eve of the Commonwealth Conference in Australia, wherein the deterioration of human rights in Nigeria was in the agenda of the Conference. In a well-documented research on the violence and injustice in the Nigeria Delta, ten years after the execution of Saro-Wiwa, Amnesty International said:

Ten years after the executions of writer and human rights campaigner Ken Saro-Wiwa and eight other members of the Ogoni ethnic community horrified the world, the exploitation of oil in the Niger Delta continues to result in deprivation, injustice and violence. Despite a return to civilian government in 1999 under President Olusegun Obasanjo, those responsible for human rights violations under military governments have not been brought to justice. The security forces continue to kill people and raze communities with impunity. The environmental harm to health and livelihoods that impelled the Ogoni campaign for economic and social rights remains the reality for many inhabitants of the Delta region.⁹¹⁹

⁹¹⁹ Amnesty International “Nigeria ten years on: injustice and violence haunt the oil Delta” AI Index: AFR 44/022/2005 of 3 November 2005; para 1.

Amnesty went on to report on the grim situation *inter alia*:

Niger Delta communities see little of Nigeria's oil revenues. Vast stretches of the region have erratic electricity supplies, poor water quality, and few functioning schools, health care centers, post offices or police stations. The only visible government presence in many parts is a heavily-armed security apparatus. The government provides very little infrastructure, public works or conditions conducive to employment.

The Nigerian government has hardly shown any understanding of the problems in the Niger Delta. The government has done nothing to promote, respect and enforce of human rights in the area. According to Amnesty International:

International oil companies have operated in the Niger Delta area of Nigeria since 1956, when oil was first discovered in Oloibiuri, in what is now Bayelsa State. Over the past half-century, the Nigerian government has earned billions of US dollars from its oil sector. Oil now accounts for over 98 per cent of Nigeria's exports and oil revenues for nearly 80 per cent of the national budget.⁹²⁰

On the need to achieve economic, social and cultural rights in the region, Amnesty International argues that:

International standards on economic, social and cultural rights allow for the fact that full realization of these rights can only be achieved progressively over time, where sufficient human technical and economic resources are available, including through international cooperation and assistance. Revenues from the oil sector provide Nigeria with the resources it needs to progressively achieve full realization of the economic, social and cultural rights of its population.

The Ogoni's in their Bill of Rights, lamented *inter alia*:⁹²¹

9. That in over 30 years of oil mining, the Ogoni nationality have provided the Nigerian nation with a total revenue estimated at over forty billion naira, thirty billion dollars.
10. That in return for the above contribution, the Ogoni people have received nothing.

The Ijaw youths in the Kaiama Declaration⁹²² *inter alia* articulated the damage and degradation to their environment and the denial of their right to natural resources thus:

That the unabating damage done to our fragile natural environment and to the health of our people is due in the main to uncontrolled exploration and exploitation of crude oil and natural gas which has led to numerous oil spillages, uncontrolled gas flaring, the opening up of our forests to loggers, indiscriminate canalization, flooding, land subsidence, coastal erosion, earth tremors etc. Oil and gas are exhaustible resources and the complete lack of concern for ecological rehabilitation, in the light of the Oloibiri experience, is a signal of impending doom for the peoples of Ijaw land.

⁹²⁰ Amnesty International "Nigeria ten years on: injustice and violence haunt the oil Delta" AI Index: AFR 44/022/2005 of 3 November 2005; para 1. para 1.1

⁹²¹ The Ogoni Bill of Rights of 26 August 1990, Boodi, Rivers State.

⁹²² The Kaiama Declaration of 11 November 1998 made at Kaiama, Niger Delta.

The same degradation, exploitation and marginalization were highlighted in the Declaration of Niger Delta Bill of Rights which *inter alia* provides as follows:⁹²³

That the dubious and nefarious policy alliance between the Nigerian State and multi national companies aimed at suppression and deprivation of the fundamental Rights of the Niger Delta people is the source of their political marginalization and the degradation of the quality of human life in this region.

The Federal Government only started waking up to the realities of the problems in the Niger Delta region when one of the most militant groups in the area called Movement for the Emancipation of the Niger Delta (MEND) resorted to kidnapping expatriate personnel working in the oil industries and oil services companies and demanding for huge ransoms. This severally led to increases in the world market price of crude oil until the recent world economic meltdown. Other militant groups and criminal gangs, finding kidnapping and the payment of ransom very lucrative, have resorted to kidnapping not just expatriate personnel working in the oil industry but public officials and private citizens.

Only in March 2007, the then President Obasanjo launched a Master Plan for the development of the Niger Delta and extended amnesty to the militias who lay down their arms. This new effort did not go deep enough to address years of economic exploitations, marginalization and gross violations of human rights in the region and lead to a progressive and full realization of the right to development. President Yar' Adua has created a Niger Delta Ministry in his cabinet to among others, supervise development in the Niger Delta area. Time will tell if it will succeed.

As canvassed earlier, human rights are inter-related and interdependent. That relation comes to the fore in the African Human Rights Commission decision in *Social and Economic Rights Action Centre for Economic and Social Rights (SERAC) v Nigeria*.⁹²⁴ SERAC in its communication *inter alia* alleged that the oil consortium exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages. The resulting contamination of water, soil and air had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, neurological and reproductive problems.

⁹²³ The Declaration of Niger Delta Bill of Rights of 10 November, 2000, paras 10-12.

⁹²⁴ African Commission on Human and Peoples Rights, Comm. No 155/96 (2001).

The Communication alleges that the Nigerian Government condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies. The communication contained a memo from the Rivers State Internal Security task Force, calling for “ruthless military operations” in the area. The Communication also alleged violations of articles 2,4,16,18(1),21 and 24 of the African Charter. The Commission in its decision stated that:

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.⁹²⁵

It further stated that the uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples Rights imposes upon the African Commission a crucial task. It stated that international law and human rights must be responsive to African circumstances; and that clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission held that it would apply any of the diverse rights contained in the African Charter. It welcomed this opportunity to make clear that there is no right in the African Charter that cannot be made effective. It noted that, the Nigerian Government did not live up to the minimum expectations of the African Charter.

The Commission found the Federal Republic of Nigeria in violation of articles 2,4,14,16,18(1),21 and 24 of the African Charter on Human and Peoples Rights. It appeals to the government of the Federal Republic of Nigeria to ensure protection of the environment, health livelihood of the people of Ogoniland.

There is landmark a decision that is not directly on the right to development, but the finding made against environmental degradation in Ogoniland impacted positively on the right of the Ogoni people to development. It is the case in *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited*.⁹²⁷

⁹²⁵ African Commission on Human and Peoples Rights, Comm. No 155/96 (2001).

⁹²⁶ Unreported decision of Federal High Court Benin Division in Suit No FHC/B/CS/53/05 delivered on 14 November 2005.

In *Gbemre's* case, the High Court held as follows:

That the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's Community is a violation of their fundamental rights to life (including healthy environment) and dignity of human person guaranteed by the Constitution of Federal Republic of Nigeria, 1999 and reinforced by the African Charter on Human [Right] Procedure Rules (Ratification and Enforcement) Act. It further held that the flare of the 1st and 2nd Respondents to carry out [an] environmental impact assessment in the Applicant's community concerning the effects of their gas flaring activities is a violation of the Environment Impact Assessment Act, and contributed to the violation of the Applicant's said fundamental rights to life and dignity of human person.⁹²⁷

Again this decision though not directly on the right to development but on environmental degradation affects the right to development. Environmental degradation has a negative impact on development.

3.5 Summary

In spite of the country's various efforts in constitution-making, none of its constitutions from 1960 to 1989, could be said to have satisfied the requirement of legitimacy which is an essential ingredient in constitution-making process. This affects the 1999 Constitution too. The failure did not however, affect the legality of the constitutions.

All the country's constitutions made provisions for formal and institutional structures that are capable of promoting constitutionalism, including elaborate provisions on the protection of civil and political rights. Following the examination of the functionality of the mechanism for the protection of human rights, it becomes obvious that the system was fundamentally defective and could hardly lead to the development of a culture of constitutionalism. Also noticeable is the fact that civil and political rights enjoy better protection than socio-economic and cultural rights. This ought not to be so as human rights are interdependent, interconnected and indivisible. Again, the country's jurisprudence on socio-economic rights is far from being developed.

Indeed, in respect of rights protection, no serious development in the entrenchment of constitutionalism has taken place since the country's transition from militarism. Although, the African Charter has been domesticated into municipal law, the advantage of that domestication is not replicated in the enforcement and application of its provisions. The application of its provisions on socio-economic and cultural rights is slow. Apart from the enforcement of the provision of the African Charter, it was found that the courts can rely on the provisions on Directive Principles to develop a whole gamut of rights protection to complement civil and political rights.

⁹²⁷ Unreported decision of Federal High Court Benin Division in Suit No FHC/B/CS/53/05 delivered on 14 November 2005.

CHAPTER 4

DOMESTICATION OF HUMAN RIGHTS NORMS

4.1 Introduction

This chapter deals with the domestication of human rights norms, that is, how international human rights norms are incorporated into the domestic law and become part of the municipal law. International law led to the internationalization of human rights. Consequently, the chapter examines the relationship between international law and domestic law. It also discusses monism and dualism which are the two main theories concerning the relationship between international law and domestic law. Treaties and customary international law constitute the most important sources of international law. The chapter also discusses the place of treaties and customary international law in the relationship between international law and domestic law.

The chapter further examines the constitutional provision on the incorporation of international law into domestic law, how it has been interpreted and applied. Domestic courts are important organs in the domestication of international human rights norm. The chapter examines the role of Nigerian and some foreign courts on the issue of the domestication of international human rights norms.

4.2 International law and human rights

As a result of the atrocities committed during the Second World War, it became imperative to explore for mechanisms aimed at protecting the rights of persons against arbitrary exercise of state power. That effort led to the development of international human rights law. It was thought that if there had been an effective international system for the protection of human rights during the Second World War, the atrocities and gross violations of human rights perpetrated by Nazi Germany, could have been prevented.⁹²⁸

The adoption of the Charter of the United Nations in San Francisco on 26 June, 1945 laid the foundation for a new international legal order. The Charter left no one in doubt regarding its intention when it *inter alia* clearly reaffirmed in its preamble, the “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”⁹²⁹ It also stated the determination of the peoples of the United Nations “to employ international machinery for the promotion of the economic and social advancement of all peoples”.⁹³⁰

⁹²⁸ See Rossiter C *Constitutional Dictatorship—Crisis Government in the Modern Democracies* (1963) (Preface).

⁹²⁹ Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force October 24, 1945.

⁹³⁰ *Supra*.

The purposes of the United Nations as set out in the Charter include as follows:⁹³¹

To maintain international peace and security, and to that end; to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.,

International law became a vehicle in the realization of the objectives of the Charter. In other words, international law laid the foundation for the internationalization of human rights and international human rights regime. Indeed, the development of international human rights was strengthened following the adoption by the United Nations General Assembly of the Universal Declaration of Human Rights (UDHR) on 10 December 1948.⁹³² As a result of sustained pressure from the international community, the safeguard and enforcement of human rights became a major objective of international law.⁹³³ As stated earlier,⁹³⁴ the UDHR, the International Covenant on Civil and Political Rights with its two Optional Protocols, and the International Covenant on Economic Social and Cultural Rights, constitute what is known as International Bill of Human Rights.

It has been said that:⁹³⁵

A series of international human rights treaties and other instruments adopted since 1945 have conferred legal form on inherent human rights and developed the body of international human rights. Other instruments have been adopted at the regional level reflecting the particular human rights concerns of the region and providing for specific mechanism of protection. Most States have also adopted constitutions and other laws which formally protect basic human rights. While international treaties and customary law form the backbone of international human rights law other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development.

Customary international law and conventional international law constitute the primary sources of international law.⁹³⁶ Customary international law derives from state practices generally, especially when states feel a sense of obligation to follow certain practices relating to human rights.

⁹³¹ Article 1 of the Charter of the United Nations. Several provisions of the Charter made specific references to human rights. They include articles 55(c), 62(2) and 76(C).

⁹³² G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

⁹³³ Dugard J *International law: A South African Perspective* (2000), Chapter 13.

⁹³⁴ Chapter 2 *supra* section 2.4.

⁹³⁵ <http://www.ochr.org/EN/ProfesionalInterest/Pages/internationalLa> (accessed on 8 February 2009).

⁹³⁶ See article 38 of the Statute of the International Court of Justice.

On the other hand, conventional international law results from international agreements or treaties. Indeed, treaties constitute the principal source of international human rights. There are nine core international human rights treaties; namely the International Convention on the Elimination of all Forms of Racial Discrimination; International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and International Convention for the Protection of All Persons from Enforced Disappearance.⁹³⁷

The internationalization of human rights reached all time high after World War II. Several human rights treaties and international law standards were put in place to ensure the protection of human rights. Ironically, the development of human rights was confronted with the challenge of increased violations of human rights. The international protection of human rights also encourages human rights protection within national and regional regimes. As new impetus was being accorded to international law, it was inevitable that international law had to undergo changes to accommodate the new challenges of the 21st Century. Slaughter contends that:⁹³⁸

International law today is undergoing profound changes that will make it far more effective than it has been in the past. By definition, international law is a body of rules that regulates relations among states, not individuals. Yet over the course of the 21st century, it will increasingly confer rights and responsibilities directly on individuals. The most obvious example of this shift can be seen in the explosive growth of international criminal law.

By its nature, international law requires domestic measures to ensure that the obligations created under international law are enforced in the municipal regimes. This gives rise to a symbiotic relationship between the two regimes.

4.3 Relationship between international and national law

The UDHR in its preamble states that "... if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, the human rights should be protected by the rule of law."⁹³⁹ This statement captures the relationship between international law and national law.

⁹³⁷ <http://www.ochr.org/EN/ProfesionalInterest/Pages/internationalLa> (accessed on 8 February 2009).

⁹³⁸ Slaughter A "Leading through the law" (2003) (27)(Issue 4) *The Wilson Quarterly*, 39.

⁹³⁹ Universal Declaration of Human Rights at para 3.

The principle of the rule of law accords national law⁹⁴⁰ a prime place in the domestic protection of human rights. Pityana argues that “the best remedy for the enforcement of rights is in the domestic sphere”.⁹⁴¹ In the same vein, Higgins stated that “the easiest way for an individual to enforce his rights is before his own courts, and not before an international tribunal... Many human rights treaties specifically require that states parties provide a legal remedy for any violation of the rights there guaranteed.”⁹⁴² Because of the importance of national law to international law and *vice versa*, a relationship between the two developed. There are two main theories that have emerged with respect to the relationship between international and national law; the monist and the dualist theories which are discussed below.

4.3.1 Monism

This school of thought regards international and national law as parts of the same system, a single or universal legal order or concept of law. This school preaches the unity of legal science and has a unitary conception of law.⁹⁴³ A leading exponent of this school, Kelsen, posited that a rejection of monism would translate into a denial of the character of international law.⁹⁴⁴ It is obvious that the monist theory de-emphasizes the role of state sovereignty.⁹⁴⁵ Monism even accords international law the status of superiority over national law. Starke accepted the primacy of international law over national law.⁹⁴⁶ In Lauterpacht’s view, the superiority of international law is predicated on the fact that it offers the best guarantee for the human rights of the individuals.⁹⁴⁷

Acceptance of the monist position means that international law does not require to be translated into national law since the act of ratification of a treaty, automatically incorporates it into the domestic law. This further means that a citizen of a state can directly invoke international law just like national law and the domestic courts can equally directly apply international law. This creates a situation where in the event of conflict between the two, international law will prevail.

⁹⁴⁰ The term “national law” is used interchangeably with “domestic law” and “municipal law”.

⁹⁴¹ Pityana NB “ Hurdles and Pitfalls in International (Human Rights) Law: the Ratification Process of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples’ Rights” being the text of UNISA inaugural address delivered on 12 August 2003.

⁹⁴² Higgins R “The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom” in Conforti B and Francioni F (eds) *Enforcing International Human Rights in Domestic Courts* (1997) 37-58 at 38.

⁹⁴³ See for example, Starke JG “Monism and Dualism in the Theory of International Law” (1936) 17 *BYIL* 66 at 74; Dugard *International Law: A South African Perspective*. 43.

⁹⁴⁴ Kelsen H *Principles of International Law* (1967) 556-562.

⁹⁴⁵ Brownlie I *Principles of Public International Law* (1990) 33.

⁹⁴⁶ Starke JG *Introduction to International Law* (1989) 75.

⁹⁴⁷ Lauterpacht H *International Law and Human Rights*(1950) 61.

4.3.2 Dualism

The dualists perceive international law and national law to belong to two different systems, having different nature and character. Two leaders of this school are Triepel⁹⁴⁸ and Anzilotti.⁹⁴⁹ They advocate that while national law regulates the relationship between the state and its citizens or between its citizens, international law on the other hand only regulates the relationship between states. The dualist theory insists that municipal law being of a separate system, for the domestic courts to apply international law or treaty, it must be incorporated or transformed into the domestic system. Pityana said that the dualists are inclined to give municipal law primacy over international law.⁹⁵⁰ In practical terms, what this means is that international human rights treaties which have been ratified by a state cannot in principle be invoked in the national courts unless they have been domesticated, thereby becoming part of the national law. The implication is that should there be a conflict between the two, the national law shall prevail.⁹⁵¹ In practice, the possibility of a clash between monism and dualism cannot be ruled out. According to Higgins:

Which ever view you take, there is still the problem of which system prevails when there is a clash between the two. One can give answers to that question at the level of legal philosophy; but in the real world the answer often depends upon the tribunal answering it (whether it is a tribunal of international or domestic law) and upon the question asked. The International Court of Justice has indicated that for it domestic law is a fact.⁹⁵²

From whatever perspective one examines the relationship between national and international law, the interaction between the two systems enriches both systems. Zimnenko⁹⁵³ argues that in the examination of the role that international law impacts on the legal system of a state, the principal concern should not necessarily be whether national law is consistent with international law. On the contrary, he opines that scholars should carry out an investigation of the nature of the mechanism put in place in the national legal systems that will enable the national courts to use international law to resolve disputes.⁹⁵⁴

⁹⁴⁸ Triepel H *Volkerecht und Landersrecht* (1958) Scientia.

⁹⁴⁹ Anzilotti D *Corso di diritto Internazionale* (1955).

⁹⁵⁰ Pityana “Hurdles and Pitfalls in International (Human Rights) Law”. This view represents more of monistic rather than dualist principle.

⁹⁵¹ Brownlie *Principles of Public International Law* 33.

⁹⁵² Higgins R *Problems and Process: International Law and How We Use It* (1994) 205.

⁹⁵³ Zimnenko BL *International Law and the Russian Legal System* (Edited and translated with an Introduction by Butler W) (2007)5.

⁹⁵⁴ *Zimnenko International Law and The Russian Legal System* 5.

4.3.3 Incorporation and transformation theories

Both theories concern the application of international law to municipal law. The central focus being that unless international law is specifically adopted or incorporated or transformed into domestic law, it cannot apply in the municipal legal system.

4.3.3.1 Incorporation

The cardinal principle in the theory of transformation of international law is anchored on the monistic ideals regarding the relationship between international and national law. Under the incorporation doctrine, international law is automatically considered to be part of municipal law without the means of statute, legislation or Act of parliament or legislature.⁹⁵⁵ This is based on the understanding that international and national law belong to the same legal order.

4.3.3.2 Transformation

Transformation is based on the ideals of dualism which regard international law and municipal law as two separate systems. This means that international law is not automatically adopted into municipal law. It has to undergo a transformation process before becoming part of the same legal order with municipal law.⁹⁵⁶ The transformation may be through statute or legislation. In any case, there must be a deliberate act that transforms international law into municipal law. The process or the legal requirements of transforming international law into municipal law varies from state to state.

4.4 Customary international law

Customary international law like conventional international law (treaties), is a source of international law.⁹⁵⁷ Expectably, basic human rights obligations form part of customary international law. It must be appreciated that the legal effect of customary international law is totally different from that of conventional international law. For example, a rule of customary international law is binding on all nations other than a state that has become a persistent objector. On the other hand, non-parties are not bound by a treaty.⁹⁵⁸

⁹⁵⁵ *Trendtex Trading Corporation v Central Bank of Nigeria* (1977) 2 W.L.R 356 at 364.

⁹⁵⁶ *Supra*.

⁹⁵⁷ Stark *Introduction to International Law* at 35-41; Brownlie *Principles of Public International Law* at 4-11 and American Law Institute *Restatement of the Law, Third, the Foreign Relations Law of the United States* (1987) section 102(1)(a).

⁹⁵⁸ United Nations *Human Rights in Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003)10.

Article 38(1)(b) of the Statute of the International Court of Justice, states that the court shall apply “international custom, as evidence of a general practice accepted as law”. The question that then follows is how can a rule of customary international law be established for the purpose of creating binding legal obligations among states? The International Court of Justice in the *North Sea Continental Shelf Cases* stated that the evidence required in the establishment of custom is as follows: ⁹⁵⁹

Not only must the acts concerned amount to a settled practice but must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

Implicit in the above passage is the fact that customary international law is created when there is evidence of acts showing a “settled practice” (*usus*) among states and the belief that a state has obligation to be bound by a customary law (*opinio juris sive necessitatis*). It follows that in examining the evidence in proof of a customary law, a court is bound “to assess the existence of one objective element consisting of the general practice, and one subjective element, namely, that there is a belief among states as to the legally” ⁹⁶⁰ binding nature of this practice.

Widespread repetition of similar acts over time by states is relevant in determining state practice. Equally relevant are acts of states which must occur out of a sense of obligation. There must be some degree of generality and consistency over practice of states. In *Michael Domingues v United States*,⁹⁶¹ the Inter-American Commission on Human Rights while confirming that rules of customary international law cannot be the subject of a definitive or exhaustive enumeration, held that:

There nevertheless exists a broad consensus in respect of the component elements required to establish a norm of customary international law. These include:

- (a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
- (b) a continuation or repetition of the practice over a considerable period of time;
- (c) a conception that the practice is required by or consistent with prevailing international law;
- (d) general acquiescence in the practice by other states.

⁹⁵⁹ (1969) ICJ Reports 44 para 77.

⁹⁶⁰ Brownlie *Principles of Public International Law* 8.

⁹⁶¹ October 22, 2002, Report No 62/02 Merits Case 12. 285, para 46.

The Commission went on to emphasize that in proving customary norms there must be due regard for state practice, among others and in respect of the binding nature of customary international law, it held as follows.⁹⁶²

48. Once established, a norm of international customary law binds all states with the exception of only those states that have persistently rejected the practice prior to its becoming law. While a certain practice does not require universal acceptance to become a norm of customary international law, a norm which has been accepted by the majority of States has no binding effect upon a State which has persistently rejected the practice upon which the norm is based.

The American *Restatement* has made provision on the evidence of customary international law. Section 103(1)(2) of the *Restatement* describes the evidence of customary international law thus:

- (1) Whether a rule has become international law is determined by evidence appropriate to the particular source from which that rule is alleged to derive (102).
- (2) In determining whether a rule has become international law, substantial weight is accorded to
 - (a) judgments and opinions of international judicial and arbitral tribunals;
 - (b) judgments and opinions of national judicial tribunals;
 - (c) the writings of scholars;
 - (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.

State's pronouncements can be of diverse nature. It may be official or unofficial. But the one that is relevant in determining a state practice is the official pronouncement of states. This may be found in gazettes and other official publications, including press releases, state laws and legislations.

The International Law Commission included the following as sources where evidence of customary international law could be found: treaties, decisions of national and international courts, national legislation, opinions of national legal advisors, diplomatic correspondence and practice of international organizations.⁹⁶³ There is no doubt that no list can be regarded as exhaustive as the subject is an evolving one. On whether the practice relied upon in establishing a state practice has to be in absolutely rigorous conformity with customary rule, the International Court of Justice returned a negative answer in *Nicaragua v the United States of America*.⁹⁶⁴

⁹⁶² *Michael Dominques v United States* October 22, 2002, Report No 62/02 Merits Case 12. 285, paras 47 and 48.

⁹⁶³ International Law Commission (1950) *2 Year Book International Law Commission* 367, U.N. Doc A/CN.4/Ser.a/1950/Add.1 (1957). See also Brownlie 1 *Principles of Public International Law* (2003)6 where he listed material sources of evidence of customary international law to include among others, "diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g manuals of military law, executive decisions and practices, orders to naval forces etc, comments by governments on drafts produced by International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly".

⁹⁶⁴ ICJ Report (1986) 98.

The court *inter alia* held as follows:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of the rule, not as indications of the recognition of a new rule⁹⁶⁵

4.4.1 Norms of *jus cogens*

Under Article 53 of the Vienna Convention on Law of Treaties,⁹⁶⁶ a *jus cogens* norm or peremptory norm of general international law is:

a norm accepted and recognised by the international community of States as a whole as norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It follows that such a norm describes the barest minimum of acceptable behaviour that no state may derogate from it. While not all human rights norms are peremptory norms (*jus cogens*), several norms could be identified as being within this category, such that an international agreement that violated them is void. They include genocide, slavery or slave trade and torture. According to Bhuta, *jus cogens* norms are those rules which protect the over all interests and values of the international community, and cannot be derogated from by the subjects of international law. *Jus cogens* rules, he said, represent “conspicuous common interest” that expressed shared criteria for what is right and good in human life; they presuppose that the international community of nations shares certain universal objects and moral imperatives, which form the basic rules for an international public order. On the other hand, the obligation of any given state to observe *jus cogens* norms is owed to the international community as a whole.⁹⁶⁷

In *Michael Domingues v United States*,⁹⁶⁸ the Inter-American Commission on Human Rights had to decide whether there is an international *jus cogens* norm prohibiting the execution of juvenile offenders. It also faced a determination whether United States had acted contrary to that norm by sentencing Michael Domingues to the death penalty for a crime that he committed when he was 16 years of age.

⁹⁶⁵ *ICJ Report* (1986) at para 186.

⁹⁶⁶ U.N. Doc/A/CONF.39/27 (1969).

⁹⁶⁷ Nehal Bhuta “How Shall We Punish the Perpetrators? Human Rights, Alien Wrongs and The March of International Criminal Law” (2003) *MULR* 10. See also L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988)5.

⁹⁶⁸ *Michael Domingues v Unites States* Report No 62/02, Merits Case 12.285, Opinion of the Inter-American Commission on Human Rights of 22 October 2002, para 49.

The Commission decided *inter alia*:⁹⁶⁹

Turning to the rules which govern the establishment of rules of *jus cogens*, this Commission has previously defined the concept of *jus cogens* as having been derived from ancient law concepts of a “superior order of legal norms, which the laws of man or nations may not contravene” and as the “rules which have been accepted, either expressly by treaty or tacitly by custom as being necessary to protect the public morality recognized by them”.

In the Commission’s view⁹⁷⁰, the evidence tendered before it clearly show that by persisting in the practice of executing offenders under age 18, the U.S stands alone amongst the traditional developed world nations and those of the inter-American system, and has also become increasingly isolated within the entire global community.⁹⁷¹ The overwhelming evidence of global state practice as established in the case displays a consistency and generality amongst world states showing that the world community considers the execution of offenders aged below 18 years at the time of their offence to be inconsistent with prevailing standards of decency. In the view of the Commission, a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of the commission of their crime.⁹⁷²

The Commission said that it is satisfied, based upon the information before it, that this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*. It said that nearly every nation has rejected the imposition of capital punishment to individuals under the age of 18. They have manifested this through ratification of the ICCPR, United Nations Convention on the Rights of the Child, and the American Convention on Human Rights and treaties in which this proscription is recognized as non-derogable, as well as through corresponding amendments to their domestic laws. The Commission said that the acceptance of this norm traverses political and ideological boundaries and efforts to detract from this standard have been vigorously condemned by members of the international community of nations as impermissible under contemporary human rights standards.⁹⁷³ Indeed, it may be said that the United States itself, rather than persistently objecting to the standard, has in several material respects recognized the propriety of this norm by, for example, prescribing the age of 18 as the Federal standard for the application of capital punishment and by ratifying the Fourth Geneva Convention without reservation to this standard.⁹⁷⁴

⁹⁶⁹ *Michael Domingues v Unites States* Report No 62/02, Merits Case 12.285, Opinion of the Inter-American Commission on Human Rights of 22 October 2002, para 55.

⁹⁷⁰ *Supra* para 49

⁹⁷¹ *Supra* para 49

⁹⁷² *Supra* para 84.

⁹⁷³ *Supra* para 85.

⁹⁷⁴ *Supra* para 85.

It was on that basis that the Commission considered that the United States is bound by a norm of *jus cogens* not to impose capital punishment on individuals who committed their crimes when they were below 18 years of age.⁹⁷⁵ As a *jus cogens* norm or peremptory norm, this proscription binds the community of States, including the United States.⁹⁷⁶ The norm cannot therefore be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise.⁹⁷⁷ The Commission examined domestic practice and equally found as follows:

Domestic practice over the past 15 years therefore evidences a nearly unanimous and unqualified international trend toward prohibiting the execution of offenders under the age of 18 years. This trend crosses political and ideological lines and has nearly isolated the United States as the only country that continues to maintain the legality of the execution of 16 and 17 year old offenders, and then, as the following discussion indicates, only in certain state jurisdictions.⁹⁷⁸

The execution of juvenile offenders casts a stain on American constitutionalism. Guarantee of rights we have found out, is a notable constituent of constitutionalism. In the domain of rights protection, the rights of a child is expected to occupy a prime place because of the vulnerability of a child. Section 702 of the *Restatement*⁹⁷⁹ has listed as binding customary international law, the following norms: genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights. Any international agreement that violates any of the foregoing norms is void.⁹⁸⁰

In the *Barcelona Traction* case, Judge Ammoun of the ICJ, observed that obligations of *jus cogens* “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.⁹⁸¹ The court further added that while some “of the corresponding rights of protection have entered into the body of general international law... others are conferred by international instruments of a universal or quasi universal character”.⁹⁸² The lists are by no means exhaustive.

⁹⁷⁵ *Michael Domingues v United States* Report No 62/02, Merits Case 12.285, Opinion of the Inter-American Commission on Human Rights of 22 October 2002, para 49.

⁹⁷⁶ *Supra*.

⁹⁷⁷ *Supra*.

⁹⁷⁸ *Supra*.

⁹⁷⁹ Brownlie *Principles of Public International Law* 35.

⁹⁸⁰ *Michael Domignues v United States, supra*.

⁹⁸¹ ICJ Reports (1970) at 32 para 33.

⁹⁸² *Supra*. In the Declaration of the International Seminar on the Legal Status of the Apartheid regime and other Legal aspects of the struggle against Apartheid held on 13-16, August 1984, in Lagos, it was stated that it is accepted that non-discrimination is a case of *jus cogens*, apartheid, which perhaps is the monstrous form of racial discrimination, constitutes a case of violation of *jus cogens*.

4.4.2 International humanitarian law

International humanitarian law (IHL) is regarded as part of customary international law. According to the International Society of the Red Cross (ICRC), international humanitarian law is:

A set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict. International humanitarian law is part of international law, which is the body of rules governing relations between States.⁹⁸³

The main source of IHL is found in the four Geneva Conventions of 1949. The central focus of the Conventions is the regulation of conduct during hostilities or armed conflicts. The Conventions are supplemented by two Protocols of 1977 relating to the protection of victims of armed conflicts. IHL applies only to armed conflict and to all parties involved in the conflicts. It does not matter who provoked or started the conflict. The conflicts are categorized into international armed conflicts and non-international armed conflicts.⁹⁸⁴ The former anticipates the involvement of at least two States and the latter is in respect of armed conflicts within a state and not involving another state. The first,⁹⁸⁵ second⁹⁸⁶, third⁹⁸⁷ and fourth⁹⁸⁸ Conventions respectively set out rules for protection of the wounded and the sick in armed forces in the field; the wounded, the sick and shipwreck members of the armed forces at sea; relative to the treatment of prisoners of war; and relative to the protection of civilians in time of war. With the passage of time, the need arose to supplement the law regulating armed conflicts to take care of developments after the 1949 Convention.⁹⁸⁹

This led to two Additional Protocols in 1977. Protocol I deals with the protection of victims of international armed conflicts and Protocol II aims to enlarge the protection accorded to the victims of non-international armed conflicts. International humanitarian law principally seeks to protect non-combatants like civilians, religious and medical military personnel. This group does not take part in fighting. Furthermore, it extends protection to those who originally were taking part in fighting but had ceased to take part. These include the wounded, shipwrecked sick combatants and prisoners of war.⁹⁹⁰

⁹⁸³ [Http://www.icrc.org/web/eng/siteenngO.nsf/html/humanitrian-law-factsheet](http://www.icrc.org/web/eng/siteenngO.nsf/html/humanitrian-law-factsheet) (accessed on 17 February 2009).

⁹⁸⁴ *Supra*.

⁹⁸⁵ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No.1) Aug. 12, 1949, 6 UST 3114, TIAS No 3362, 75 UNTS 31.

⁹⁸⁶ Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 UST 3217, TIAS No 3363, 75 UNTS 85.

⁹⁸⁷ Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. 11), Aug. 12, 1949, 6 UST 3316, TIAS No 3364, 75 UNTS 135.

⁹⁸⁸ Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 UST 3516, TIAS No 3365, 75 UNTS 287.

⁹⁸⁹ Kwakwa EK *The International Law of Armed Conflict: Personal Field Application* (1992) 19.

⁹⁹⁰ <http://www.icrc.org/web/eng/siteenngO.nsf/html/humanitrian-law-factsheet> (accessed on 17 February 2009).

4.4.2.1 The Geneva Conventions as customary law

It may be argued that rules relating to war having been codified in the form of treaties it is of no moment canvassing the customary character of the four Geneva Conventions. However, Meron had argued that:⁹⁹¹

In numerous countries where customary law is treated as the law of the land but an act of the legislature is required to transform treaties into internal law, the question assumes importance if no such law has been enacted. Failure to enact the necessary legislation cannot affect the international obligations of these countries to implement the Geneva Conventions; but invoking a certain form as customary rather than conventional in such situations may be crucial for ensuring protection of the individuals concerned.

He also observed that many states parties to the Geneva Conventions are yet to adopt such legislation.⁹⁹² Flowing from his observation, it is imperative that in the event of armed conflict, states that have not domesticated the Conventions must however, be held accountable for any breach of the law of war. Those who do not agree that Geneva Conventions are declaratory of customary law, concede that some provisions of Convention No IV are declaratory of customary law.⁹⁹³ On the importance of considering Geneva Conventions as being declaratory of customary law, Meron said:

Nevertheless, consensus that the Geneva Conventions are declaratory of customary international law would strengthen the moral claim of the international community for their observance because it would emphasize their humanitarian underpinning and deep roots in tradition and community values. It may also represent a step in the process that begins with the crystallization of a mere contractual norm into a principle of customary law and culminates in its elevation to *jus cogens* status (a norm of *jus cogens* can mature also through other processes).⁹⁹⁴

He added that obviously, the invocation of a norm as being conventional and customary adds at least rhetorical strength to the moral claim for its observance and affects its interpretation. Thus, to underline the grave nature of certain violations, the ICJ observed in the *Iranian Hostages* case that the obligations in question were not merely contractual but also obligatory under general international law.⁹⁹⁵

The relationship between Geneva Conventions and customary law is not free from difficulties. Baxter drew attention to one of them which centers on State practice. He opined that as the number of states parties to a treaty increases, it becomes more difficult to establish “what is the state of customary international law dehors the treaty”.⁹⁹⁶

⁹⁹¹ Meron T “The Geneva Conventions as Customary Law” (1987) (81) Issue 2 *American Journal of International Law* 348 at 348-349. See also Meron T “Applicability of Multilateral Conventions to Occupied Territories” (1978) (72). *American Journal of International Law* 542, 543, 548-50.

⁹⁹² *Supra* at 349 .

⁹⁹³ Meron *supra*. See also Dinstein Y “Expulsion of Mayors from Judea” (1981) (8) *Tel Aviv University Law Review* 158 (in Hebrew).

⁹⁹⁴ *Supra* at 350.

⁹⁹⁵ *United States v Iran* (1980) ICJ REP 3, 31; Meron *supra* at 350.

⁹⁹⁶ Baxter RR “Treaties and Custom” (1979) (129) *Recueil Des Cours* 27 at 64, 73.

This is so because increase in the number of states parties to a treaty translates to a decrease in the number of non-parties. Baxter posed a pertinent question and tried to supply an answer when he said:

Now that an extremely large number of States have become parties to the Geneva Conventions... who can say what the legal obligations of combatants would be in the absence of the treaties? And if little or no customary international practice is generated by the non-parties, it becomes virtually impossible to determine whether the treaty has indeed passed into customary international law.⁹⁹⁷

In view of the fact that rules of customary law are unwritten and research into state practice is necessary to establish their existence, the international community at the 26th International Conference of the Red Cross and Red Crescent (ICRC),⁹⁹⁸ requested the ICRC to embark on a study for the purpose of identifying and facilitating the application of existing rules of customary international law. It is instructive that “the study does create new rules of international humanitarian law but rather seeks to provide the most accurate snapshot of existing rules of customary international humanitarian law.”⁹⁹⁹ The study¹⁰⁰⁰ led to a number of important findings. According to the ICRC:¹⁰⁰¹

While the four Geneva Conventions of 1949 have been ratified universally, other treaties of international humanitarian law have not. This is the case, for example of the 1977 Additional Protocols to the Geneva Conventions. The study shows, however, that a number of rules and principles contained in these treaties also exist under customary law, such as a significant number of rules governing the conduct of hostilities and the treatment of persons not or no longer taking a direct part in hostilities. As part of customary international law, these rules and principles are applicable to all States regardless of their adherence to relevant treaties... The study also shows that a large number of customary rules of international humanitarian law are applicable to both international and non-international armed conflicts. As a result, for the application of these rules, the qualification of the conflict as international or non-international is not relevant. These rules apply in any armed conflict.

⁹⁹⁷ Baxter RR “Treaties and Custom” (1979) (129) *Recueil Des Cours* 27 at 64, 73.at 96.

⁹⁹⁸ The Conference took place in December 1995. <http://www.icrc.org/web/eng/siteengO.nsf/htmiial/customary-law-q-a-150805> [accessed on 17 February 2007]

⁹⁹⁹ *Supra*.

¹⁰⁰⁰ The extensive research by ICRC and some renowned experts produced a 5000- page study that identified 161 rules which were found to be customary law today. The initial result of the study led to the publication of 2 volumes of work in 2005: The first one was Henchaerts J and Doswald-Beck L (eds) *Customary International Humanitarian Law Volume I Rules (2005)* and Henchaerts I and Doswald-Beck L (eds) *Customary International Humanitarian Law Volume II Practice Parts 1 and 2 (2005)*. Volume 1 contains a comprehensive analysis of the customary rules of international humanitarian law that are applicable in international and non-international armed conflicts. Volume 2 contains, for each aspect of international humanitarian law, a summary of the relevant treaty law and state practice.

¹⁰⁰¹ The Conference took place in December 1995. <http://www.icrc.org/web/eng/siteengO.nsf/htmiial/customary-law-q-a-150805> [accessed on 17 February 2007]

The 161 rules which were identified by the study to be customary law were categorised and dealt with various subjects.¹⁰⁰² Customary international humanitarian law is said to fill some gaps in the protection available to victims of armed conflicts in treaty law. The gaps result from either the lack of ratification of relevant treaties or from lack of adequate provisions on non-international armed conflicts in treaty law.

4.5 Domestication of treaties

International treaties (conventional international law) constitute the most prominent source of international human rights law. Treaties may be bilateral or multilateral. International human rights treaties are generally multilateral. The interpretation of international treaties is regulated by the Vienna Convention on the Law of Treaties 1969. Treaty has been described as:¹⁰⁰³

Generally a *legally binding written agreement concluded between States*, but can also be an agreement between, for instance, the United Nations and a State for specific purposes. Treaties may go by different names, such as *convention, covenant, protocol, or pact*, but the legal effects thereof are the same. At the international level, a State establishes its consent to be bound by a treaty principally through *ratification, acceptance, approval, or accession* only exceptionally is the consent to be bound expressed by *signature*... Once a treaty has entered into force and is binding upon the States parties, these must perform the treaty obligations “in good faith” (*pacta sunt servanda*). This implies, inter alia, that a State cannot avoid responsibility under international law by invoking the provisions of its internal laws to justify its failure to perform its international legal obligations.

It may be recalled that this text examined the relationship between international law and municipal law, the doctrines of monism, dualism, incorporation and transportation. It is clear that in practical terms, international human rights treaties are not enforceable within some domestic jurisdictions unless incorporated or transformed into the municipal law.

¹⁰⁰² They include: Part 1. The Principle of Distinction: 1. Distinction between Civilians and Combatants (Rules 1-6); 2 Distinction between Civilian Objects and Military Objectives (Rules 7-10); 3. Indiscriminate attacks (Rules 11-13); 4. Proportionality in attack (Rule 14); 5. Precautions in attack (Rules 15-21); 6 Precautions against the effects of attacks (Rule 22-24); Part II. Specifically protected Persons and Objects: 7. Medical and religious personnel and objects (Rules 25 -30); 8. Humanitarian relief personnel and objects (Rules 31-32);9. Personnel and objects involved in a Peacekeeping Mission (Rule 33); 10. Journalists (Rule 34); 11. Protected zones (Rules 35-37); 12. Cultural property (Rules 38-41); 13. Works and Installations Containing Dangerous Forces (Rule 42); 14. The Natural Environment (Rules 43-45); Part III. Specific Methods of Warfare: 15 Denial of quarter (Rules 46-48); 16. Destruction and seizure of property (Rules 49-52); 17. Starvation and access to humanitarian relief (Rules 53-56); 18. Deception (Rules 57-65); 19.

¹⁰⁰³ United Nations *Human Rights in Administration of Justice* 7. Emphasis original.

Section 12(1) of the 1999 Constitution of Nigeria provides that: “*No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been entered into law by the National Assembly.*”¹⁰⁰⁴ In view of the foregoing constitutional provision, Egede rightly argued that:

Nigeria operates a dualist system, whereby treaties, including those dealing with human rights, cannot be applied domestically unless they have been incorporated through domestic legislation. Although not specifically stated in the constitution, the practice in Nigeria, similar to that of the United Kingdom, is that the executive arm of central government has the exclusive power to enter into an international treaty. For the treaty to be enforceable in Nigeria, under section 12(1) of the 1999 Constitution, it must be enacted as law by the legislative arm of central government.¹⁰⁰⁵

The legal unenforceability of international treaties, unless domesticated, is a practice in countries with the dualist system. While examining the legal situation in Ghana on the subject Kludze states:¹⁰⁰⁶

In contrast, a treaty which was ratified by the Republic of Ghana does not create or confer a right in Ghana until and unless its provisions are specifically enacted into the laws of Ghana by an enabling Act of Parliament... A treaty is not enforceable in the Ghanaian courts as if it were a part of the laws of the land. Therefore, if a treaty is to effect or affect the municipal law of Ghana, there must be an enabling legislation which specifically declares the treaty provision to be a law of the land.¹⁰⁰⁷

Much as the provisions of section 12(1) of the 1999 Constitution are unequivocal and mandatory in nature, what the Nigerian courts can make out of them is an entirely different matter. This is because in the interpretation of constitutional provisions, if the courts adopt purposive, liberal, progressive and dynamic interpretation, a healthy jurisprudence may develop out of an apparently strict constitutional provision. The text found such practice in the Indian interpretation of its constitutional provisions on Directive Principles.¹⁰⁰⁸

¹⁰⁰⁴ Emphasis supplied.

¹⁰⁰⁵ Egede E “Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria” (2007) (51)(2) *Journal of African Law* 249-284, 250.

¹⁰⁰⁶ Kludze AKP “Constitutional Rights and their Relationship with International Human Rights in Ghana” (2008) (41) *Israeli Law Review* 677-702 at 681.

¹⁰⁰⁷ *Supra*.

¹⁰⁰⁸ Chapter 3 *supra*. The attitude of Nigerian courts to the subject of the transformation of international human rights treaties into municipal law will be discussed *infra*.

4.5.1 Domesticated human rights treaties in Nigeria

The pace of domestication of international and regional human rights instruments by respective African states is rather slow and that this has resulted in non-applicability of the provisions of these instruments in national courts.¹⁰⁰⁹ Notwithstanding that Nigeria is a party to several international and regional human rights instruments by signature, ratification, accession or succession,¹⁰¹⁰ the domestication of these instruments is lamentably slow. Nigeria has taken no action whatsoever in respect of some international human rights treaties.¹⁰¹¹

A consultative meeting of the Department of International and Comparative Law of the Federal Ministry of Justice, Nigeria (DICL),¹⁰¹² captured the challenges in the domestication of treaties in Nigeria. Some of the challenges identified included the failure of other Federal Ministries to consult the Ministry of Justice regarding the signing of international agreements; the lack of adequate liaison between the Presidency and the Federal Ministry of Justice regarding the signing of international agreements and the lack of domestication of treaties that have been ratified.¹⁰¹³

In its Report, the meeting observed and made recommendation on the domestication of treaties as follows:

Nigeria has ratified a range of human rights treaties and the Constitution requires that legislation be adopted to give effect to these treaties within the domestic jurisdiction. The Unit will have to prioritise the treaties it would want to domesticate within the next two years and different criteria (that) could be used for this. One criteria may be the importance of the treaty to improve the lives of Nigerians. Another may be the ease with which the legislation would pass through the legislature.¹⁰¹⁴

Implicit in the foregoing recommendation is the fact that it is not easy to have a legislation that domesticates international treaty to pass through the legislature in Nigeria.

¹⁰⁰⁹ Resolutions and Recommendations of the Second African Regional Conference for Women Judges held in Nairobi, Kenya on 6-8 August, 2001.

¹⁰¹⁰ See chapter 3 section 3.3.

¹⁰¹¹ *Supra* .

¹⁰¹² See the Report of the Consultative Meeting of the Department of International and Comparative Law of the Federal Ministry of Justice, 14-15 March, Abuja, Nigeria. The consultative meeting on human rights enforcement was the final phase in a year-long project that was undertaken jointly by the DICL of the Federal Ministry of Justice, Nigeria, Alliance for Africa and the Security, Justice and Growth Program of the UK Department for International Development. The meeting held on 14-15 March 2006 in Abuja- Nigeria. Two Experts made presentations on the regional and international human rights enforcement mechanisms. The DICL is expected to play key role in the domestication of treaties. That includes identifying any areas of conflict with the Constitution and other municipal laws.

¹⁰¹³ *Supra*.

¹⁰¹⁴ *Supra*.

A typical example was the Bill at the National Assembly which sought to domesticate the Convention on the Elimination of all Forms of Discrimination against Women which Nigeria ratified on 13 June, 1985. This is discussed later in this section. Few regional and international treaties have been fully domesticated in Nigeria. Perhaps to demonstrate the importance of transformation of international treaties in the Nigerian legal system, the treaty establishing the African Union was after ratification, given the force of law in Nigeria by the Treaty to Establish the African Union (Ratification and Enforcement) Act, 2003¹⁰¹⁵. The African Union treaty was made a Schedule to the Act.

4.5.1.1 Geneva Conventions

In 1960, by an Act of Parliament, the four Geneva Conventions of 1949 which are treaties on international humanitarian norms were given legal force in Nigeria.¹⁰¹⁶ The four Conventions were fully domesticated.

4.5.1.2 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights was transformed into Nigerian municipal law on 17 March, 1983. This was done through the promulgation of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.¹⁰¹⁷ The text of the African Charter on Human and Peoples' Right was made a Schedule to the Act. Section 1 of the Act enacts as follows:

As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

The Act makes it very clear that the Charter shall have the “force of law” and “full recognition and effect” in Nigeria. Its application without exception, extends to all authorities and persons exercising legislative, executive or judicial powers in Nigeria. This means that the provisions of the African Charter shall not be enforceable against authorities and persons who do not exercise legislative, executive or judicial powers in Nigeria. The African Charter, more than any other international and regional human rights treaty, enjoys prominence, recognition and enforcement in Nigeria.¹⁰¹⁸

¹⁰¹⁵ Laws of the Federation of Nigeria 2004.

¹⁰¹⁶ Laws of the Federation of Nigeria 1960, No 54 now published as Cap. 93, Laws of the Federation of Nigeria 2004.

¹⁰¹⁷ Cap 10, Laws of the Federation of Nigeria 1990.

¹⁰¹⁸ Most rights guaranteed under the Charter are considered in Chapter 3 *supra*. The enforcement of the Charter rights is also considered in Chapter 5 *infra*.

4.5.1.3 Conventions on the Child of Rights

Sometimes, some human rights treaties are partially domesticated in Nigeria in the sense that rather than have the treaties contained in schedules to statutes, substantial or most provisions of the treaties are adopted or incorporated into municipal law. There may be no explicit reference to the international human rights treaty that was partially domesticated in the relevant domestic statute. Some human rights treaties even enjoin the state parties “to adopt such legislative or other measures as may be necessary to give effect to the rights recognized” in the treaty concerned.¹⁰¹⁹ Some encourage progressive measures that will lead to full realization of the rights contained in a human rights treaty.¹⁰²⁰ There is nothing wrong in the partial domestication of a treaty by a state party. Such a partial process may eventually lead to a full realization of the provisions of a human rights treaty. Nigeria ratified the Convention on the Rights of the Child (CRC) on 19 April, 1991 and the African Charter on the Rights and Welfare of the Child (ACRWC) on 23 July 2001. The Child Rights Bill was first drafted in 1993, barely two years after the ratification of the Convention on the Rights of the Child. There was immediate opposition from religious groups and traditionalists.¹⁰²¹

This stiff opposition led to the setting up of a special committee with a view to harmonizing the provisions of the Child’s Bill with religious and customary beliefs.¹⁰²² The main opposition came from the Northern States of Nigeria where Islam is the predominant religion. The opposition contended that some provisions of the proposed law were incompatible with Islamic beliefs, values and injunctions. Child girl marriage is widely practiced in the Northern States of Nigeria and the practice is not inconsistent with Islamic values and traditions. Furthermore, forced marriages were tolerated and as soon as a girl reaches puberty, the age notwithstanding, she could be given out in marriage. The reason adduced for this is “to prevent ‘indecent’ associated with premarital sex or for other cultural and religious reasons”.¹⁰²³ Expectedly, the main opposition was targeted at a provision in the proposed law setting 18 years as the minimum age for marriage. It was contended that the provision was inconsistent with religious and cultural beliefs in many parts of the country where a girl could be given out in marriage at a younger age.¹⁰²⁴

¹⁰¹⁹ Article 2(2) of the International Covenant on Civil and Political Rights; article 1(1) of the African Charter on the Rights and Welfare of the Child.

¹⁰²⁰ See for example, article 2 of the International Covenant on Economic, Social and Cultural Rights.

¹⁰²¹ Alemika EEO, Chukwuma I, Lafratta D, Messerli D and Souckova, J, “Rights of the Child in Nigeria”, a Report prepared for the Child 38th Session, Geneva January 2005.

¹⁰²² *Supra*.

¹⁰²³ US State Department “2007 Country Reports on Human Rights Practices” in Nigeria, 11 March 2008.

¹⁰²⁴ Alemika, *supra*

Again, the traditionalists and Moslems were opposed to any attempt to outlaw female genital mutilation (FGM) which is culturally and traditionally justified. Indeed, FGM is still practiced in the country; approximately 19 percent of the female population had been victims of FGM, although the practice had declined steadily in recent years. In view of the opposition to the Child Rights Bill, the National Assembly threw it out in October 2002¹⁰²⁵. There was public outcry. There were criticisms against the action of the National Assembly by many international and national NGOs and indeed the civil society. There was a rethink and the Bill was eventually passed into law¹⁰²⁶ and the Child Rights Act ¹⁰²⁷ was promulgated. Neither the Convention on the Rights of the Child nor the African Charter on the Rights and Welfare of the Child was made a schedule to the Act. But a close examination of the provisions indicates an effort to domesticate many provisions of the aforesaid international and regional instruments on the rights of the child. Article 3(1) of the Convention on the Rights of the Child States: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*”

Article 4(1) of the African Charter on the Rights and Welfare of the Child provides as follows: “In all actions concerning the child undertaken by any person or authority *the best interests of the child shall be the primary consideration*”. Section 1 of the Child Rights Act enacts as follows: “In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, *“the best interests of the child shall be the primary consideration*”. The similarity in the above provisions of the CRC, ACRWC and CRA is too obvious. It was said that by the CRA, Nigeria “domesticated the provisions of the CRC and ACRWC, through the enactment of the Child’s Rights Act (CRA), which focuses on the following key principles: survival, development, protection and participation.”¹⁰²⁸ Similarly, the Minister of Women’s Affairs, Nigeria said: “The Act (CRA) gives legal effect to the commitment made by Nigeria under the UN Convention on the Rights of the Child and the African Union Charter on the Rights and Welfare of the Child.”¹⁰²⁹

¹⁰²⁵ The National Assembly did not as much give any official reason for its conduct.

¹⁰²⁶ Alemika, *et al* “Right of the Child in Nigeria”..

¹⁰²⁷ Childs Rights Act, Law No 23 of 2003.

¹⁰²⁸ The Network of Human Rights Violations Monitors in collaboration with the National Human Rights Commission, UNDP and NORAD, “The State of Human Rights in Nigeria 2005-2006 “ (nd).

¹⁰²⁹ Egede “Bringing Human Rights Home. An Examination of the Domestication of Human Rights Treaties in Nigeria” at 268; Press briefing by the Honourable Minister of Women’s Affairs, Akpan or held on 14 September 2004 at the National Centre for Women Development, Central Area, Abuja, available at <http://www.nigeriafirst.org/docs/wapress.htm>.

Egede on the other hand states that: “it is common knowledge that the act (CRA) is an attempt to domesticate the provisions of the United Nations and African Union Conventions”.¹⁰³⁰ He further said that : “A perusal of the act (CRA) reveals that in reality, it is intended to implement the provisions of these conventions, since it conforms to a large extent to these conventions, the act defines a child as a person under the age of eighteen years”¹⁰³¹ and requires that, in every action, the best interest of the child shall be the primary consideration.¹⁰³² The United Nations Committee on the Rights of the Child has even said that it “welcomes the initiatives taken by the State party (Nigeria) to reform its laws relating to children *to bring them in line with the requirements* of the Convention (CRC), in particular the adoption of the Child Rights Act in May (sic) 2003”.¹⁰³³

What is certain, however, is that substantial provisions of the CRC and ACRWC have been domesticated by the CRA. Much as the CRA is a federal enactment, it is not being enforced in many parts of the country. This stems from the fact that issues touching on the child are not in the Exclusive Legislative List of the Constitution.¹⁰³⁴ This would have made the Act upon enactment, enforceable in all States of Nigeria. Section 12 (1)(2)(3) of the 1999 Constitution provides as follows:

- 12 (1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.
- (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
- (3) A Bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

Section 12(3) of the Constitution is particularly relevant having regard to the problem now confronting the CRA. The enactment of the CRA in 2003 raised the presumption that the Bill that led to the CRA was ratified by a majority of all Houses of Assembly in the Federation prior to the assent of President before it became law.

¹⁰³⁰ Egede “Bringing Human Rights Home. An Examination of the Domestication of Human Rights Treaties in Nigeria” at 268.

¹⁰³¹ Section 277 and articles 1 and 2 of the CRC and ACRWC respectively.

¹⁰³² Egede at 269. See Section 1 and articles 3 and 4 of the CRC and ACRWC respectively.

¹⁰³³ United Nations Committee on the Rights of the Child, 38th session, consideration of Reports submitted by States Parties under Article 44 of the Convention. Concluding Observations: Nigeria CRC/C/15/Add. 257, 13 April 2005.

¹⁰³⁴ See 4(3) of the 1999 Constitution. The National Assembly has the power to make laws for the peace, order and good government of the Federation of Nigeria or any part thereof with respect to any matter included in the Exclusive Legislative List, except as otherwise provided in the Constitution, it does so to the exclusion of the Houses of Assembly of States.

The absurd situation is that consequent upon the enactment of the CRA, the Houses of Assembly of the federating states in Nigeria are being encouraged to promulgate State laws that will give the CRA the force of law within the States. That process is dogged by the same objection that confronted the Bill on CRA before it was passed into law. Some 16 States out of 36 States of the Federation are said to have adopted the CRA.¹⁰³⁵ The 16 States in question do not even represent a simple majority of all the States in Nigeria and that reflected an effort that spanned a period of nearly 7 years since the enactment of CRA.

The challenges against CRC adequately underscores the fact that religion, culture and traditions are capable of undermining the domestication of treaties in general and CRC in particular. The problem was recognized by ACRWC. In article 1(3) it provides that: “Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be *discouraged*”. This provision is weak and does not go deep enough in creating clear obligations on states parties in respect of obnoxious customary and religious practices. It does appear that the Charter realized the inadequacy of the provision, hence its article 21 is directly aimed at protecting the child against harmful social and cultural practices. article 21 of ACRWC provides as follows:

1. State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
 - (a) those customs and practices prejudicial to the health or life of the child; and
 - (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriage in an official registry compulsory.

The provision is clear, positive and direct enough to protect a child against harmful social and cultural practices. What may be difficult to come by is the will of the State parties to domesticate the ACRWC including the above provision.

¹⁰³⁵ See the Nigeria CEDAW NGO Coalition Shadow Report submitted to the 41st Session of the United Nations Committee on the Elimination of all Forms of Discrimination against women held at the United Nations Plaza, New York, 30 June-18 July 2008 where it was said: “the National Assembly passed the Child Rights Act (CRA) into law in 2003 to promote and protect the rights of the child. The Act specifically responds to the situation of the girl child and her vulnerability to violence, sexual abuse, early/forced marriage and other forms of sexual exploitation. This Act has however been adopted in only 16 States (Abia, Anambra, Bayelsa, Ebonyi, Edo, Ekiti, Imo, Jigawa, Kwara, Lagos, Nasarawa, Ogun, Ondo, Oyo, Plateau, and Taraba) out of the 36 States of the Federation. Osun and Rivers States legislature have passed the law but still waiting for the Governors to assent. Most of the states in the north of Nigeria have refused to adopt the Act on the grounds of culture and religion”.

Undoubtedly, there is a universal recognition of the importance of the CRC. Kaime observed that: “The near-universal ratification of the Convention on the Rights of the Child affirms a shared recognition of the universality of children’s rights and indicates increasing support and acceptance by the world community of the need to promote and protect children’s right.”¹⁰³⁶ He based his observation on the fact among others, that from the United Nations record, CRC has been ratified by every nation in the world other than the United States of America and Somalia.¹⁰³⁷ Unless the Nigerian Government aggressively addresses the issues of forced and early marriages, harmful social and traditional practices against children, the violations of their rights under various guises will continue unabated.

The UN Committee on the Rights of the Child expressed concern that under-aged girls once married are not afforded the protection guaranteed by the Convention.¹⁰³⁸ The Committee recommends that State party, that is, Nigeria should develop sensitization programmes involving the community on the need to curb the practice of early marriage.¹⁰³⁹ The Committee was equally concerned with the lack of sufficient interventions by the State Party to address harmful traditional practices.¹⁰⁴⁰ It recommends that the State Party, as a matter of urgency, should take all necessary measures to eradicate all harmful traditional practices against children.¹⁰⁴¹

4.5.1.4 Conventions against Trafficking in Persons

Nigeria ratified the United Nations Convention against Transnational Organized Crime (UNTOC) on 28 June 2001. The objective of the Convention is to promote and encourage cooperation towards preventing and combating transnational organized crime more effectively. When human trafficking gained notoriety as one of the largest criminal activity in the world,¹⁰⁴² with its transnational character, there was the need for an effective action to prevent and combat trafficking in persons, especially women and children. This called for a comprehensive international action in the nations of origin, transit and destination. There was the further need to have a universal instrument to combat all aspects of trafficking in persons.

¹⁰³⁶ Kaime T “The Convention on the Rights of the Child and the Cultural Legitimacy of Children’s Right in Africa: Some Reflections” (2005) (5) *African Human Rights Journal* 221 at 221-222; See also Ncube W (ed) *Law, Culture, Tradition And Children’s Right in Eastern and Southern Africa* (1998) 289.

¹⁰³⁷ See Convention on the Rights of the Child, Status as at 19 February 2009 <http://www.teaties.un.org/Pages/viewDetails.aspx?svc=TREATY&iol=13> [accessed on 19 February 2007].

¹⁰³⁸ United Nations Committee on the Rights of the Child, 38th Session .

¹⁰³⁹ *Supra* .

¹⁰⁴⁰ *Supra* .

¹⁰⁴¹ *Supra* .

¹⁰⁴² “Human trafficking is said to be the third largest criminal activity in the world after arms and drug trafficking”: Olujuwon T “Combating Trafficking in Person: A case study of Nigeria” (2008) (24) (No1) *European Journal of Scientific Research* 23-32 at 23.

It was imperative to have international human rights instruments to supplement UNCTOC and adopt “measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights”.¹⁰⁴³ This led to the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons.¹⁰⁴⁴ The Protocol which was ratified by Nigeria on 28 June 2001, entered into force on 25 December, 2003. On 24 July 2003, Nigeria promulgated the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act.¹⁰⁴⁵ The Act substantially domesticated the Protocol but it did not explicitly refer to it. One unique thing was that Nigeria largely domesticated the Protocol even before it entered into force. With Nigeria said to be “the largest single source of trafficked women to Europe and Asia”¹⁰⁴⁷ and “a source, transit and destination country for trafficked persons”,¹⁰⁴⁶ one can appreciate the anxiety of the Nigerian Government in urgently domesticating the Protocol in less than three years of ratifying it and without even the Protocol entering into force.

An analysis of the Protocol and the Act,¹⁰⁴⁸ shows that the Act set out to substantially domesticate the Protocol. The act¹⁰⁴⁹ adopted in large part the definition of “trafficking in persons” contained in the Protocol.¹⁰⁵⁰ Article 5(1) of the Protocol enjoins each state party “to adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally”. In other words, the Protocol calls for the criminalization of various conducts expressed in the definition of “trafficking in persons”. The Nigerian Act did just that in sections 11-24, 26, 27, 28 and 29 wherein various offences were created.¹⁰⁵¹

¹⁰⁴³ See Preamble to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.

¹⁰⁴⁴ *Supra*.

¹⁰⁴⁵ No 24 of 2003.

¹⁰⁴⁶ Nwogu V “Trafficking of Persons to Europe: the Perspective of Nigeria as a Sending Country” being the text of a paper delivered at the British Council, Lisbon, Portugal on 4-5 March, 2005.

¹⁰⁴⁷ US State Department “2007 Country Report on Human Rights Practices in Nigeria, 11 March 2008.

¹⁰⁴⁸ Trafficking Persons (Prohibition) Law Enforcement Administration Act, No 24 of 2003.

¹⁰⁴⁹ Section 50 *supra*.

¹⁰⁵⁰ Article 3 *supra*.

¹⁰⁵¹ The offences include using deception, etc to induce or force a person under 18 years into illicit sexual intercourse, section 12; encouraging the prostitution, seduction or indecent assault of a person under the age of years, section 13; procurement of a person under 18 years to have unlawful carnal knowledge in Nigeria or outside Nigeria, section 14; Procurement of any person for prostitution, pornography and use in armed conflict, section 15; organizing or promoting foreign travel which promotes prostitution, section 16; conspiring to induce any person under the age of 18 years by means of false pretence to have unlawful carnal knowledge, section 17; procurement of the defilement of any person by threats, fraud or drug administration, section 18; kidnapping from guardianship any person under the age of 18 years or a person of unsound mind, section 19; kidnapping or collecting any person in order to kill the person, section 20; buying or selling a person for a purpose, section 21; using a person in Nigeria or outside Nigeria for forced labour, section 22; traffic in slaves, section 23, slave dealing, section 24; etc.

Article 6 of the Protocol enjoins States parties to make provisions for assistance to and protection of victims of trafficking in persons such as medical and material assistance; ensure the provision of measures in the domestic legal system for victims of trafficking to obtain compensation. The Act made those provisions in section 36, 37 and 38 of the Act which guaranteed treatment, non-detention or prosecution of trafficked persons and the right to compensation. Under articles 9 and 10 respectively, each State party undertakes to establish comprehensive policies, programmes and other measures to prevent and combat trafficking in persons and encourage information exchange and training among law enforcement agents. The Act in its section 1, created a body known as National Agency for Prohibition of Traffic in Persons and other Related Matters¹⁰⁵² and it is entrusted with the responsibilities among others, created by articles 9 and 10 of the Protocol and domesticated by the Act.

4.5.2 Non-domesticated human rights treaties

Since the pace of domestication of human rights in Nigeria is extremely slow, the number of non-domesticated or unincorporated treaties far out-number the domesticated ones. On 9 February, 2009, Ojo Maduekwe, the Nigerian Minister of External Affairs, informed the United Nations Human Rights Council's Universal Periodic Review (UPR) and rightly also that the Nigerian President Alhaji Musa Yar'Adua, had on 19 February, 2009:

Signed the instruments of accession to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the International Convention for the Protection of All Persons from Enforced Disappearance; Convention on the Prevention and Punishment of the Crime of Genocide; and the Optional Protocol to the Convention Against Torture. In addition, Nigeria has now ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities.¹⁰⁵³

It is extremely difficult to comprehend why an international human rights instrument as important as the Convention on the Prevention and Punishment of the Crime of Genocide, which came into force on 12 January, 1951 was not ratified by Nigeria until 2009. However, of the non-domesticated treaties, none has generated much prominence, passion and controversy like the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

¹⁰⁵² Section 1 of the Trafficking in Person (Prohibition) Law Enforcement and Administration Act.

¹⁰⁵³ Maduekwe "Nigeria Progress in Democratic Governance, Promotion and Protection of Human Rights" being the text of a Statement during the 4th session of United Nations Human Rights Councils Universal Periodic Review (UPR) of the Federal Republic of Nigeria held in Geneva on 9 February 2009: *The Guardian*, Friday, 20 February, 2009 71-72, 71.

The treaty was ratified by Nigeria on 13 June, 1985. It would be recalled that the opposition against the CRA was based on religious and traditional beliefs. In spite of the vulnerability of women, the opposition against the domestication of CEDAW is based on those grounds too.¹⁰⁵⁴ It is not that efforts are not being made to domesticate CEDAW; the problem is that the opposition against its domestication is intense and severe. The opposition has so far neutralized the efforts of non-governmental organizations and the civil societies to see to the domestication of CEDAW. Some State Governments in Nigeria have even enacted laws that seek to guarantee the protection of women against harmful practices.¹⁰⁵⁵ It was in 2006 that the “Abolition of All Forms of Discrimination Against Women in Nigeria and other Related Matters Bill 2006” which sought to domesticate CEDAW and give the force of law to its provisions was placed before the National Assembly. But the National Assembly threw it out in 2007. It was said that a misrepresentation of Articles 12 and 16 led to the rejection of the Bill.¹⁰⁵⁶ It has rightly been contended that:¹⁰⁵⁷

Article 12 which basically provides for sexual and reproductive health rights, has been conservatively interpreted as that which seeks to legalise abortion under the disguise of reproductive health and family planning. Article 16, on the other hand, has been criticized as anti-religious and contrary to culturally laid-down rules on betrothal and marriage. The points against article 16 includes the age of marriage, compulsory registration of all marriage in an official registry, rights on the choice of family name; full consent in betrothal and marriage among other points; as it is feared that men’s dominant power in marital issues, which has generally become the norm, would be challenged by women.

¹⁰⁵⁴ See Egede “Bring Human Rights Home. An Examination of the Domestication of Human Rights Treaties in Nigeria” at 274 where it was said that: “There have been calls on several occasions for the government to take steps to domesticate those human rights treaties which Nigeria has ratified. For example, a non-governmental agency, Women in Law and Development in Africa (WILDAF) has been at the forefront of the call for Nigeria to domesticate the CEDAW, which Nigeria has ratified, in order to strengthen the domestic protection of women against discrimination, an issue that, in many ways, is rampant in various societies in Nigeria. The failure to domesticate certain human rights treaties that Nigeria has ratified is, to an extent, attributable to opposition in certain parts of the country to such implementation, on the grounds that the human rights treaties contain provisions which are contrary to local beliefs and cultural values”.

¹⁰⁵⁵ See the Nigerian CEDAW NGO Coalition Shadow Report submitted to the 41st Session of the United Nations CEDAW Committee where it was said: “in defining the obligation to eliminate discrimination against women in Nigeria, some states governments in Nigeria have enacted the following laws: Malpractices Against Widows and Widowers (Prohibition) Law 2005 in Ekiti, Enugu, Imo, Ebonyi and Anambra State; Law to Prohibit Domestic Violence Against Women and Maltreatment, Law No 10 of 2004 by the Cross Rivers States Government; Inhuman Treatment of Widows (Prohibition) Law 2004 of Edo State; Law Prohibiting Domestic Violence in Lagos State 2007 (Passed by the House but not signed) and Ekiti State; Law Prohibiting Withdrawal of the Girl from School for Marriage in Kano, Niger, Gombe, Bauchi and Borno States; Schools’ Rights (Parents, Children and Teachers) Law No 2, 2005 Rives State.; Street Trading Restriction Law, 2004 Anambra State; Women’s Reproductive Rights Law, 2005 Anambra State”.

¹⁰⁵⁶ *Supra.*

¹⁰⁵⁷ *Supra.*

In view of the importance of CEDAW in the protection of the rights of women, some courts in Nigeria, as will be seen later, appear to be demonstrating their impatience over its non-domestication by relying on some of CEDAW's provisions when adjudicating on cases touching on the violation of the rights of women. This confirms the fact that through the activities of the national courts, a robust national human rights jurisprudence may develop out of the application of non-domesticated treaties.

4.6 Judicial interpretation of section 12(1) of the 1999 Constitution

It was submitted earlier that much as the provision of section 12(1) of the 1999 Constitution¹⁰⁵⁸ is clear and mandatory in nature, a lot depends on how the national courts may decide to interpret it. A strict interpretation will surely slow down the domestication of treaties in Nigeria. In the case of *African Reinsurance Corporation v Fataye*,¹⁰⁵⁹ the Supreme Court while interpreting section 12(1) of the 1979 Constitution which provision is same as section 12(1) of the 1999 Constitution, held that a treaty that has been ratified by Nigeria, has no force of law until it has been enacted into law by national legislation.

However, the *locus classicus* on the issue is the case of *Abacha v Fawehinmi*.¹⁰⁶⁰ The Supreme Court had opportunity to interpret section 12(1) of the 1979 Constitution and the place of the African Charter in the country's jurisprudence.¹⁰⁶¹ Justice Ogundare, who delivered the judgment of the Supreme Court explained:

Suffice it to say that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. See section 12(1) of the 1979 Constitution which provides: "12(1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly (AFRC)".¹⁰⁶² (See now the re-enactment in section 12(1) of the 1999 Constitution). Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts.¹⁰⁶³

¹⁰⁵⁸ Section 12(1) of the 1999 Constitution enacts as follows: "No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been entered into law by the National Assembly".

¹⁰⁵⁹ (1986) 3 NWLR (Pt 32)811.

¹⁰⁶⁰ (2000) 6 NWLR (Pt 660) 228.

¹⁰⁶¹ It has been stated earlier that its provisions are same as those of section 12(1) of the 1999 Constitution. The court expressly stated that the section under consideration is "now the re-enactment in section 12 (1) of the 1999 Constitution", *supra* at 288 para G. The aspect of the case dealing with the African Charter has been considered in Chapter 3 section 3.5.2.8 *supra*.

¹⁰⁶² Armed Forces Ruling Council (AFRC) was the principal organ of the Federal Military Government at the time and exercised executive and legislative functions.

¹⁰⁶³ *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228 at 288 paras F-G. Note that reference to section 12(1) of the constitution in the quotation is original.

Justice Ogundare referred to the decision of the Privy Council in *Higgs & Anor. v. Minister of National Security and Others*.¹⁰⁶⁴ where it was held that:

In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the Crown. Treaties formed no part of domestic law unless enacted by the legislature.

Domestic courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizens' rights and duties in common or statute law.

They might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizen that the government in its acts affecting them, would observe the terms of the treaty.¹⁰⁶⁵

According to Justice Ogundare, the above passage represents the correct position of the law, not only in England but in Nigeria as well.¹⁰⁶⁶ The lead judgment of Justice Ogundare is clear in its strict construction of the constitutional provision in question. International treaty does not become enforceable within Nigeria's domestic jurisdiction unless incorporated into the municipal law by legislation. In his concurring judgment, Justice Belgore *inter alia* noted that in some cases, when a municipal statute and a domesticated treaty have provision on the same subject, the municipal courts may prefer the domesticated treaty like the African Charter.¹⁰⁶⁷ He then concluded that:

The net result in many cases is that municipal courts may not automatically apply treaties entered into between their State and foreign States if those treaties would modify domestic laws. However, if the domestic laws in question are modified to accommodate the articles of the treaties municipal courts will enforce them, not because they are treaties but for the reasons only that they have become parts of municipal laws.¹⁰⁶⁸

On whether a state can enact a legislation that is inconsistent with its international obligation under a treaty, Justice Mohammed said:¹⁰⁶⁹

But a State is always at liberty if it deems desirable due to domestic circumstances or international consideration to legislate a law inconsistent with its treaty obligations. I agree that such an exercise will be without prejudice to any remedies available against the state in international law at the instance of the other states who ratified the treaty. Once the state decides to exercise such right through legislation the courts in that country are bound to follow the promulgated law.

¹⁰⁶⁴ The Time, 23 December 1999.

¹⁰⁶⁵ *Fawehinmi v Abacha* (2000) 6 NWLR (Pt 660) at 288-289 paras H.

¹⁰⁶⁶ *Supra*.

¹⁰⁶⁷ *Supra* 299 para F.

¹⁰⁶⁸ *Abacha's case* at 299 para F-G. It must be noted that because the case before the Supreme Court calls for constitutional interpretation, 7 Justices (as against 5 justices, if it were a non-constitutional matter) considered the case. The 7 Justices were unanimous in confirming the dualist nature of the relationship between municipal law and international law under section 12(1) aforesaid. 3 of the Justices dissented on an issue that was unrelated to section 12(1) of the Constitution.

¹⁰⁶⁹ *Supra* at 301 para E.

Justice Mohammed relied on the English case of *McCarthy Ltd v Smith* where Denning MR said:

if the time should come when our Parliament deliberately passes an Act with the intention of repudiating a Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.¹⁰⁷⁰

The position of Justice Mohammed appears to be in conflict with that of Justice Uwaifo when he said that: “There is therefore a presumption that a statute (or an Act of Parliament) will not be interpreted so as to violate rule of international law. In other words, the courts will not construe a statute so as to bring it into conflict with international law.”¹⁰⁷¹ Justice Uwaifo’s position is in consonance with article 27 of the Vienna Convention on Law of Treaties which states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

In the *Registered Trustees of National Association of Community Health Practitioners of Nigeria v Medical and Health Workers Union of Nigeria*,¹⁰⁷² the issue that called for determination among others, at the Supreme Court, was whether the Court of Appeal was right when it held that the provisions of clauses 87 and 89 of the International Labour Convention have no legal force in Nigeria since the Convention has not been ratified by the National Assembly, even though signed by Nigeria. The issues before the Supreme Court required it to interpret the provision of section 12(1) of the 1999 Constitution. Justice Mukhtar who delivered the judgment of the Supreme Court had this to say on the provision of section 12 (1) of the 1999 Constitution:

In essence, what the legislature meant or intended is that for a treaty to be valid and enforceable, it must have the force of law behind it, albeit it must be supported by a law enacted by the National Assembly, not bits and pieces of provisions found here and there in the other laws of the land, but not specifically so enacted to domesticate it, to make it a part of our law. To interpret similar provisions as being part of the International Labour Organization Conventions just because they form parts of some other enactments like the African Charter, and Peoples Rights etc will not be tolerated.¹⁰⁷³

It is observed that where there are provisions in municipal laws like the African Charter that are similar to some provisions in the International Labour Conventions, they can properly be invoked and applied pursuant to the municipal laws that contain such provisions and not the International Labour Organization Conventions.

¹⁰⁷⁰ (1979) 3 All E.R 325 , 329.

¹⁰⁷¹ *Abacha’s case supra* 345 paras F-G.

¹⁰⁷² (2008) 2 NWLR (Pt1072) 575. This case appears unprecedented in respect of the speed with which it reached the Supreme Court. The High Court delivered its judgment on 16 July 2004 and less than one year after, precisely on 13 April 2005, the Court of Appeal delivered its decision. That of the Supreme Court followed on 11 January 2008. It took total period of 3 years and 6 months between the decision of the High Court and the Supreme Court. Ordinarily, it would on the average take 4-6 years in the Court of Appeal alone for a decision to be given. The congestion in respect of matters for hearing in the Court of Appeal is legendary.

¹⁰⁷³ *Supra* at 623 paras C-E.

Justice Mukhtar concluded his interpretation of section 12(1) of the 1999 Constitution thus:

In so far as the International Labour Organizations Convention has not been enacted into law by the National Assembly, it has no force of law in Nigeria and it cannot possibly apply. See also *Abacha v Fewehinmi* (2000) 6 NWLR (Pt 660) 228 at page 28 where Ogundare, JSC of blessed memory has this to say: “Suffice to say that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly”. As can be seen from the above, the learned justice took pains in expounding on the necessity of such international treaty or Convention to be domesticated before it can be invoked and applied to cases in Nigeria. That is in fact what the learned judge should have done rather than accept and grant the relief hook, line and sinker.¹⁰⁷⁴

4.7 Judicial application of non-domesticated treaties

In view of the Supreme Court’s interpretation of section 12(1) of the 1999 Constitution, it can be argued that unincorporated or non-domesticated treaties have no place in Nigeria’s jurisprudence. However, some of the concurring judgments in the case of *Abacha v Fewehinmi*, appear to have left the door slightly open for unincorporated treaties to play a role in the country’s jurisprudence. For example, Justice Achike had this to say:

... unincorporated treaties cannot change any aspect of Nigerian Law, even though Nigeria is a party to those treaties. Indeed unincorporated treaties have no effect upon the rights and duties of citizens either at common law or statute law. They may however indirectly affect the rightful expectation by the citizen that governmental acts affecting them would observe the terms of the unincorporated treaties.¹⁰⁷⁵

On the other hand, Justice Ejiwunmi after referring to section 12(1) aforesaid gave an interpretation of its provision that appears to be too strict. He said:¹⁰⁷⁶

It is therefore manifest that no matter how beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly. This position is generally in accord with the practice in other countries.¹⁰⁷⁷

Justice Ejiwunmi further made a statement similar to that of Justice Achike¹⁰⁷⁸ to the effect that unincorporated treaties can still play a useful role in the country’s jurisprudence. He said:

If such a treaty is not incorporated into the municipal law, our domestic courts would have no jurisdiction to construe or apply it. Its provisions cannot therefore have any effect upon citizens’ right and duties. However, it is also pertinent to observe that the provisions of an incorporated treaty might have indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty.¹⁰⁷⁹

¹⁰⁷⁴ *Abacha v Fewehinmi* (2000) 6 NWLR (Pt 660) 228 at 631 -632 paras H-C. Note that the reference to *Abacha’s* case in the quotation is original.

¹⁰⁷⁵ *Supra* .

¹⁰⁷⁶ *Supra* at 356-357 paras H-A.

¹⁰⁷⁷ *Supra*.

¹⁰⁷⁸ *In Abacha’s case supra* .

¹⁰⁷⁹ *Supra* at 357 para D-E.

One important issue that Justice Ejiwunmi and Justice Achike made was that unincorporated treaties could aid the interpretation of national statutes. It would be recalled that the Bangalore Principles entreated the national courts *inter alia* as follows:

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from National Constitutions, legislation or Common Law.¹⁰⁸⁰

But the Abuja Affirmation which expressly reaffirmed the principles stated in Bangalore Principles, *inter alia* said as follows: “In the legal systems of the Commonwealth, international human rights norms appearing in international treaties are not as such, part of the domestic law, unless and until specifically incorporated by national legislation...”¹⁰⁸¹ It went on to state that the general principles of international human rights instruments are relevant to the interpretation of national bills of rights and laws. It adds that in cases where choices have to be made between competing interests in the discharge of the judicial function, there is an impressive body of case law which affords useful guidance to the national courts. These are notably, the judgments and decisions of the European Court and Commission on Human Rights, the judgments and advisory opinions of the Inter-American Court of Human Rights, and decisions and general comments of the United Nations Human Rights Committee, decisions from Supreme Courts of Commonwealth jurisdictions and writings of eminent scholars and jurists.¹⁰⁸²

Michael Anderson writes that traditionally, courts in the Commonwealth of Nations were hesitant to give domestic effect to international human rights standard unless a treaty provision has directly been incorporated into national law through an enabling statute.¹⁰⁸³ He went on to argue and rightly too, that the last 15 years have witnessed something of a revolution in this area and the result is that judges are not only relying directly upon international standards in their decision-making, but even enforcing such standards directly as the applicable law.¹⁰⁸⁴

¹⁰⁸⁰ Concluding Statement of the Judicial Colloquium held in Bangalore, India, from 24-26 February 1998, paragraph 7 thereof in Commonwealth Secretariat and Interights *Developing Human Rights Jurisprudence Volume 7 Seventh Judicial Colloquium on the Domestic Application of International Human Rights Norms* (1978) 217-218

¹⁰⁸¹ Concluding Statement of the Judicial Colloquium held in Abuja, Nigeria, from 9-12 December 1991 para 17(I).

¹⁰⁸² Concluding Statement of the Judicial Colloquium held in Abuja, Nigeria 9-12 December 1991. para 17(ii)(iii).

¹⁰⁸³ Anderson M “Domestication of International Human Rights Law-Trends in the Commonwealth Including the UK” being a paper delivered at the British-Nigerian Law Week 23-27 April 2001 at Abuja.

¹⁰⁸⁴ *Supra*. Note the 15 years he referred to was as at April 2001.

The use of international human rights standards to interpret the provisions of national law or the application of unincorporated treaties by the national courts has been a long practice in the constitutional jurisprudence of India. What is the attitude of the Nigerian courts? In the 1980s, a number of the High Court in Nigeria refused to invoke international human rights norms into the municipal laws in spite of invitations to do so.¹⁰⁸⁵

In *Mohammed Garuba v Lagos State Attorney-General*,¹⁰⁸⁶ Justice Longe held that the African Charter on Human Rights, of which Nigeria is a signatory, is now part of the Nigerian Law. Even if any aspect of it is suspended or ousted by any provision of our local law, the international aspect of it cannot be unilaterally abrogated, he added.¹⁰⁸⁷

In a decision of the Court of Appeal in *Asika v Atuanya*¹⁰⁸⁸ delivered on 24 January 2008, Denton-West J.C.A. who delivered the judgment of the court made far-reaching pronouncements on the application of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), an unincorporated treaty in Nigeria. He said:¹⁰⁸⁹

Native law and custom, which discriminate against women, are repugnant to natural justice, equity and good conscience and must be abolished. It is well founded in Article 2(7) of the United Nations (UN) 1979 Convention on the Elimination of all Forms of Discrimination Against Women. *This convention has universal jurisdiction and it is applicable to Nigeria, as Nigeria is a party to the convention.* In Article 2(7) of the UN Convention 1979 on the Elimination of all Forms of Discrimination Against Women it is stated *inter alia* that: “Government shall take all appropriate measures including legislation to modify or abolish all existing laws, customs or practices which constitute discrimination against women” Further under Article 16 of the 1948 Universal Declaration of Human Rights, men and women are entitled to equal rights as to marriage, during marriage and at the dissolution. The African Charter on Human and Peoples’ Rights is part of Nigeria’s domestic law.

Justice Denton-West empathically asserted that CEDAW, an unincorporated treaty is applicable in Nigeria since she is a party to the Convention. The case of *Abacha v Fawehinmi* was even referred to by the judge in his judgment. However, the decision in that case is in direct conflict with that of Justice Denton-West.¹⁰⁹⁰

¹⁰⁸⁵ See *Nigerian Union of Journalist & Anor v A-G of the Federation* (1986) LRC (Const) 1: *Onagoruwa v Babangida* Suit No. LD/658/87 of 18 May 1987 reported in G Fawehinmi *Nigerian Law of the Press Under the Constitution and the Criminal Law* (1987) C28; *Komolafe v A-G Federation*, Suit No. FHC/2/1959 of 1 December 1989.

¹⁰⁸⁶ Suit No. ID/559M/90 (Unreported) of 31 October 1990. Chidi Odinkalu did a masterly review of the case “*Mohammed Garuba & Others v Lagos State Attorney-General & Others: A Case for Municipal Application of International Human Rights Norms*” (1991) *JHRLP* Vol. 1 No. 123-140. He rightly described the ruling by Justice Longe as “bold, imaginative and decisive...” at 125.

¹⁰⁸⁷ See *Mojekwu v Mojekwu* (2001) 1 CHR 179.

¹⁰⁸⁸ (2008) 17 NWLR (Pt 1117) 484.

¹⁰⁸⁹ *Supra* at 515-516 paras H-Emphasis supplied.

¹⁰⁹⁰ *Supra*.

If the application of unincorporated international human rights instruments to national laws is ambivalent in Nigeria, it is not so in some other Commonwealth nations. In *A-G, Botswana v Dow*,¹⁰⁹¹ Justice Aguda articulated his opinion thus:

I take the view that in all these circumstances a court in this country, faced with the difficulty of interpretation as to whether or not some legislation breached any of the provisions entrenched in Chapter II of our Constitution which deal with Fundamental Rights and Freedoms of individual, is entitled to look at the international agreements, treaties, obligations entered into before or after the legislation was enacted to ensure that such domestic legislation does not breach any of the international conventions, agreements, treaties and obligations binding upon this country save upon clear and unambiguous language.¹⁰⁹²

According to Justice Aguda, it does not even matter whether or not such international conventions, agreements, treaties, protocols or obligations have been expressly incorporated into domestic law.¹⁰⁹³ Justice Dumbutshena of the Supreme Court, Zimbabwe in *A Juvenile v State*¹⁰⁹⁴ was of the view that it was an “added advantage” that the courts of Zimbabwe were “free to import into the interpretation of (the Constitution) similar provisions in international and regional human rights instruments...”¹⁰⁹⁵ By so doing according to him, the international human rights norms end up becoming part of their domestic human rights and enrich their human rights jurisprudence. In *Van Gorkom v Attorney-General*,¹⁰⁹⁶ the New Zealand Supreme Court while invalidating discriminatory conditions laid down by a Minister pursuant to a subordinate legislation, specifically relied on international instruments including the Universal Declaration of Human Rights, the Convention on the Elimination of Discrimination Against Women, and an ILO Convention to which New Zealand was not a party.¹⁰⁹⁷ Justice Mwalusanya of the High Court of Tanzania in *Republic v Mbushuu and Anor*,¹⁰⁹⁸ said that “international human rights instruments and court decisions of other countries provide valuable information and guidance in interpreting the basic human rights in our constitution”.¹⁰⁹⁹

¹⁰⁹¹ (1999) 1 HRLRA 1. Aguda J.A., a Nigerian, retired as a State Chief Judge in Nigeria but continued to sit in Botswana Appeal Court.

¹⁰⁹² *Supra* at 131 paras A-B.

¹⁰⁹³ *Supra* at 131 para C.

¹⁰⁹⁴ [1989] CRC(Court)774.

¹⁰⁹⁵ *Supra* at 782 G-H.

¹⁰⁹⁶ [1977] INZLR 535 at 542-543.

¹⁰⁹⁷ Contrast with the Nigerian case of *Medical and Health Workers Union of Nigeria (MHWUN) V Minister of Labour and Productivity* (2005) 17 NWLR (Pt 953)120, where the Court of Appeal set aside the decision of the Federal High Court which relied on ILO Convention which Nigeria signed, on the ground that the National Assembly has not enacted the Convention into law. The Supreme Court confirmed the decision of the Court of Appeal. See *Registered Trustees of National Association of Community Health Practitioners of Nigeria v Medical and Health Workers Union of Nigeria* (2008) 2 NWLR (Pt 1072) 55.

¹⁰⁹⁸ [1994] 2 LRC 335.

¹⁰⁹⁹ *Supra* at 342d.

After referring to the Bangalore Principles, *The State v Petrus and Another*,¹¹⁰⁰ a decision of the Botswana Court of Appeal and *Catholic Commission* case,¹¹⁰¹ a decision of the Supreme Court of Zimbabwe, Justice Mwalusanya concluded that death penalty was cruel, inhuman and degrading punishment contrary to the Tanzanian Constitution. Justice Nwalusanya no doubt adopted a progressive approach.

According to Justice Shameen, the Bill of Rights contained in the 1997 Constitution of Fiji allows the High Court in interpreting the Bill, to draw on principles of international human rights law. She further said that “the Constitution gives the judiciary *carte blanche* to use international conventions (whether ratified by Fiji or not) and decisions such as those of the European Court of Human Rights, the Constitutional Court of South Africa, the Canadian Supreme Court and the International War Crimes Tribunals in the development of human rights law in Fiji”.¹¹⁰² What section 43(2) of the 1997 Constitution of Fiji provides on interpretation is that: “In interpreting the provisions of this Chapter (Chapter 4, Bill of Rights), the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter”.

It does appear that the above claim of Justice Shameen is wider than what the Constitution provides in section 43(2) aforesaid. Similarly, section 39(1) of the South African Bill of Rights provides as follows: “When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; may consider foreign law”.

The Nigerian Constitution does not have a provision similar to section 43 (2) of the Constitution of Fiji or section 39(1) of the Bill of Rights of South Africa. This may be one of the factors responsible for the ambivalence of the Nigerian courts in adopting and applying international human rights norms. Where the courts are statutorily or constitutionally enjoined to draw from international and comparative human rights law, this will aid the development of a dynamic national human rights jurisprudence.

¹⁰⁰⁰ [1985]LRC (Court) 699.

¹⁰⁰¹ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney- General and Others* [1993] 2 LRC 279.

¹⁰⁰² Shameen M “The Independence of the Judiciary in Fiji”, a paper presented to the International Commission of Jurists Queensland, 21 July 2004.

The Supreme Court of India in *Vishaka v State of Rajasthan* said:¹¹⁰³

The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

Again, in *People's Union for Civil Liberties v Union of India and Another*,¹¹⁰⁴ while reacting to the criticism against the reading of the provisions of conventions and covenants into the national laws, the Indian Supreme Court held:

For the present, it would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such. So far as multi-lateral treaties are concerned, the law is, of course, different and definite.

In *Roper v Simmons*¹¹⁰⁵, Justice Kennedy who read the opinion of the US Supreme Court, while adverting to the impact of the opinion of the world community on US law on the issue of death penalty for juvenile offenders said:

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici curiae* 10-11. *The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.*

The court further held: "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom".¹¹⁰⁶ Even Justice O'Connor who delivered a dissenting judgment disagreed with another dissenter, Justice Scalia on the issue of the influence of international law on American's Eighth Amendment jurisprudence. This is what he said: "Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency".¹¹⁰⁷

¹¹⁰³ AIR 1997 SC 3011 at 3015.

¹¹⁰⁴ (1997) 3 SCC 433 at 442.

¹¹⁰⁵ 543 US (2005) 24. Emphasis supplied. But note that the reference to a Brief is part of the quotation.

¹¹⁰⁶ *Supra* at 25.

¹¹⁰⁷ *Supra* at 18-20.

Still on the current trend in the evolving relationship between national law and international law, Justice Kirby said that: “Still more commonly and frequently principles and ideas expressed in international law, especially so far as that law expresses universal principles of human rights, now have a tendency to seep into the decisions of national courts when judges expound their own municipal law”.¹¹⁰⁸ On contemporary expansion of international law and its relationship with international, regional and national courts, Justice Kirby said:¹¹⁰⁹

Judges in international, regional and municipal courts live and work in the world that they know and are part of. In that world, today, they cannot ignore the rapid, contemporary expansion of international law. Unless incorporated, it does not bind them as legal norms (save possibly in peculiar circumstances such as crimes of universal jurisdiction). But this does not mean that municipal judges will ignore the advent of international law, particularly where that law concerns the universal values of civilized nations.

The pro-active effort of Justice Denton-West in *Asika v Atuanya*¹¹¹⁰ must be commended. Much of that activism must be demonstrated by the municipal courts. The universal principles of human rights, must be allowed “to seep into the decisions of national courts when judges expound their own municipal law.”¹¹¹¹ After all, in accordance with the principle of *pacta sunt servanda*, when a treaty enters into force, the states parties must hold themselves bound by it.¹¹¹² They must also not invoke the provisions of municipal law as justification for their failure to discharge their obligation under a treaty.¹¹¹³

The question whether a state like Nigeria will be permitted to rely on domestic law to avoid its obligation under a treaty was among the issues canvassed in the case of *Cameroun v Nigeria; Equatorial Guinea Intervening*¹¹¹⁴ at the International Court of Justice. In the main, it involves dispute concerning the land and maritime boundary between Cameroun and Nigeria. Therein, Cameroun argued that the Yaounde II Declaration and the Maroua Declaration provide a binding definition of the boundary delimiting the respective maritime spaces of Cameroun and Nigeria.

¹¹⁰⁸ Kirby M “Domestic Courts and International Human Rights Law—the ongoing Judicial Conversation”, The Hondius Lecture 2008, delivered on 26 October 2008.

¹¹⁰⁹ Kirby *supra*.

¹¹¹⁰ (2008) 17 NWLR (Pt 1117) 484.

¹¹¹¹ Kirby *supra*.

¹¹¹² See Article 26 of the Vienna Convention on the Law of Treaties, 1969.

¹¹¹³ Article 24 *supra*.

¹¹¹⁴ Njemanze, BA *The Legal Battle Between Cameroun and Nigeria over Bakassi Peninsula* (2003) 27-163 (The entire text of the decision is reproduced thereat).

It was argued also that the signing of the Maroua Agreement by the Heads of State of Nigeria and Cameroun on 1 June 1975 expresses the consent of the two States to be bound by that treaty; that they manifested their intention to be bound by the instrument they signed; that no reservation or condition was expressed in the text and that the instrument was not expressed to be subject to ratification.¹¹¹⁵ Nigeria on its part stressed that Yaounde II Declaration was not a binding agreement but simply represents the record of a meeting.¹¹¹⁶ It was further argued that the Maroua Declaration lacks legal validity, since it was not ratified by the Supreme Military Council after being signed by the Nigerian Head of State¹¹¹⁷ as required under the 1963 Nigerian Constitution in force at the relevant time (June 1975). The agreement it was argued further was therefore subject to ratification.

The International Court of Justice *inter alia* held that: “the court cannot accept that Maroua Declaration was invalid under international law because it was signed by the Nigeria Head of State of the time but never ratified”.¹¹¹⁸ While rejecting the argument put forward by Nigeria that its constitutional rules regarding the conclusion of treaties were not complied with, the court refers to article 46, paragraph 1 of the Vienna Convention on the Law of Treaties which provides that: “[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its international law of fundamental importance”.¹¹¹⁹

4.8 Judicial application of customary international law

Once conventional international law is incorporated into the municipal law, the national courts are bound without more to apply it and protect the rights thereby guaranteed. In view of the exposition on customary international law in this text, it is obvious that its application is dependent upon its proof.¹¹²⁰

If the approach of the national courts in Nigeria to rely on the provisions of international human rights standards to interpret statutes is very slow or ambivalent, the application of customary international law by national courts is extremely rare. This is so notwithstanding that an established rule of customary international law, unlike conventional international law will not be subjected to the provisions of section 12(1) of the 1999 Constitution.

¹¹¹⁵ Njemanze *The Legal Battle Between Cameroun and Nigeria over Bakassi Pennisula* para 253 at 136. Maroua Declaration/Agreement was treated as bilateral treaty between Nigeria and Cameroun.

¹¹¹⁶ *Supra* para 257 at 137.

¹¹¹⁷ *Supra* para 258 at 137.

¹¹¹⁸ *Supra* para 264 at 139.

¹¹¹⁹ *Supra* para 265 at 140.

¹¹²⁰ See para 4.4. *supra*.

The application of customary international law becomes automatic upon its proof. According to Anderson:¹¹²¹ “Although customary international law is said to form part of the common law in all Commonwealth jurisdiction, judges have been cautious to incorporate human rights standards in this way. There has been a singular reluctance to follow the enthusiasm of the US courts in treating human rights standard as customary international law”.

Perhaps the reluctance of the Nigerian courts to apply customary international law may be due to the fact that most of the prohibitions listed as binding under customary international law,¹¹²² are equally prohibited under various statutes in Nigeria.¹¹²³ It will be a lot convenient to rely on national statutory laws in dealing with matters connected therewith, than relying on customary international law.

4.9 Summary

This chapter discussed the relationship between international law and municipal. In so doing, it considered the theories of monism, dualism, incorporation and transformation. The relationship between them is of crucial importance, hence the municipal courts are the main vehicles in the enforcement of international human rights. The chapter also explored the nature and character of customary international law and conventional international law. The major distinction between the two being that a rule of customary international law is binding on all the nations other than a state that has become a persistent objector. On the other hand, non-parties are not bound by conventional international law.

The difficulty in proving customary international law was highlighted. However, attention was drawn to uncontentious examples of customary international law such as genocide, systemic use of torture, slavery, arbitrary detention and racial discrimination. The text also examined International humanitarian law which is regarded as part of customary international law.

¹¹²¹ Anderson “ Domestication of International Human Rights Law_Trends in the Commonwealth including the UK”.

¹¹²² Section 702 of American Law Institute Restatement *The Law, Third, the Foreign Relations Law of Untied States* (1987) has listed as binding customary international law, the following norms: genocide; slavery or slave trade; the murder or causing the disappearance of individual; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights.

¹¹²³ Such statutes include the Fundamental Rights provision of the 1999 Constitution, particularly sections 34 (right to dignity of human person); section 35 (right to personal liberty); section 41(right to freedom of movement); section 42 (right to freedom from discrimination); the Trafficking in Person (Prohibition) Law Enforcement and Administration Act No 24 of 2003 particularly section 23 (traffic in slaves); section 24 (slave dealing); the Criminal Code Act, section 319 (murder) and the Penal Code Cap 89, Laws of Northern Nigeria, 1963, section 220 homicide).

The domestication of treaties (conventional international law) was discussed. This was done against the background that international treaties constitute the most prominent source of international human rights law. Domesticated and non-domesticated human rights treaties were also examined. The text reveals that the pace of domestication of treaties in Nigeria is rather slow. Religious, cultural and traditional beliefs were found to contribute to the slow domestication of treaties in Nigeria. Furthermore, the provision of section 12(1) of the 1999 Constitution which enacts that a treaty that has been ratified by Nigeria has no force of law until it has been enacted into law by national legislation, equally contributes to the slow pace of domestication.

The chapter highlighted the evolving practice by the Nigerian Court of Appeal, whereby international human rights standards created by unincorporated treaties are adopted and relied upon in the enforcement of human rights. A comparative overview of that practice was equally carried out. The chapter advocated the encouragement of the activism of some Nigerian judges who when they expound municipal law, allow the universal principles of human rights to seep into their decisions.

CHAPTER 5

JUDICIAL ENFORCEMENT OF HUMAN RIGHTS

5.1 Introduction

National courts play a dominant role in the enforcement of human rights. Judicial enforcement of human rights will, therefore, be the central focus of this chapter and that includes the interpretative jurisdiction of the courts. In other words, the chapter discusses judicialism as the bedrock of constitutionalism.

The chapter considers the effect of judicial work environment on the enforcement of human rights. Due to the importance of the concept of *locus standi* in public law in general and the enforcement of human rights in particular, the chapter also discusses the concept. The chapter also explores the procedural challenges militating against the enforcement of human rights in Nigerian courts and the remedies available to the victims of human rights violations.

5.2 Judiciary and constitutionalism

The judiciary as the guardian of constitutionalism ensures that the organs of government do not stray into the sphere of each other, and that powers and authority are exercised within prescribed constitutional boundaries. The role of the judiciary includes the protection and enforcement of the rights, and more importantly, the supremacy of the constitution. The Supreme Court held that certain interrelated propositions flow from the acknowledged supremacy of the constitution and by which the validity of any impugned provisions will be tested.¹¹²⁴ According to the court, all powers, legislative, executive and judicial must ultimately be traced to the constitution and the legislative power of the legislature cannot be exercised inconsistently with the constitution. Furthermore, where the constitution has enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the constitution has enacted must show that it derived the legislative authority to do so from the constitution. Where the constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those conditions in any way, directly or indirectly, unless the constitution itself as an attribute of its supremacy, expressly authorises such alteration.

¹¹²⁴ *INEC V Musa* (2003) 3 NWLR (Pt. 806) 72 at 157 paras D-G.

Having robust, generous and grandiose provisions in the constitution on the key elements of constitutionalism or on the practice of constitutionalism will not be useful or relevant if the judiciary does not breathe life, meaning, purpose and content to those provisions. Therein lies the importance of the role of the judiciary and its power of enforcement. Kpegah said in *Amidu v President Kufuor*,¹¹²⁵ that the Supreme Court of Ghana ensures “the maintenance of the culture of constitutionalism”. This statement is true also not only of the Nigerian Supreme Court but the country’s judiciary. And that maintenance is through the exercise of judicial powers.

According to Motala, “judicialism is the backbone of constitutionalism.”¹¹²⁶ Similarly, Oko argued that judicial review is “the cornerstone of constitutionalism”.¹¹²⁷ For Nwabueze, “judicialism is the practical instrument whereby constitutionalism may be transformed into an active idea of government, it is our best guarantee of the rule of law and liberty”.¹¹²⁸ According to Ndulo:

The maintenance of an independent and accountable judiciary is fundamental to constitutionalism and the protection of human rights. The world wide emergence of constitutions with wide-ranging and justiciable Bills of Rights has rekindled public awareness and interest in the role of courts as forums through which to seek individual and collective justice and the sustenance of a democratic culture. In democratic states courts are asked to review government’s acts for compliance with the Bill of Rights. Only an independent judiciary can effectively review governmental acts and ensure the constitutional guarantee of human rights. Review of governmental acts by an independent body in the interests of maintaining the efficacy of the constitutional guarantee of individual rights is an essential and important mechanism of democratic governance. Such a review being at the instance of an individual assures the individual’s personal participation in government.¹¹²⁹

Prempeh also contended that “the contemporary African approach to promoting constitutionalism has been simply to ‘judicialize’ it”.¹¹³⁰ He further argued that “Bills of rights and constitutional courts and supreme courts with constitutional review authority are thus *de rigueur* in post-transition”.¹¹³¹ The term “juridical constitutionalism”¹¹³² or “judicial constitutionalism”¹¹³³ have been used all in a bid to underscore the importance of judicialism in constitutionalism.

¹¹²⁵ [2001-2002] SCGLR 86.

¹¹²⁶ Motala Z *Constitutional Options for a Democratic South Africa; A Comparative Perspective* (1994) 206.

¹¹²⁷ Oko O “Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa” (2000) (33) Issue 3 *Vanderbilt Journal of Transnational Law* 573.

¹¹²⁸ Nwabueze BO *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (1977) preface.

¹¹²⁹ Ndulo M “The Judiciary, Constitutionalism and Human Rights” in US National Intelligence Council, *Democratization in Africa: What Progress Toward Institutionalization* (2008) 81.

¹¹³⁰ Prempeh HK “The Persistence of ‘Imperial Presidency’ in US National Intelligence Council *supra* at 105.

¹¹³¹ *Supra*.

¹¹³² *Supra*.

¹¹³³ Yusuf HO “The Judiciary and Constitutionalism in Transitions: A Critique” (2007) (7) Issue 3, Article 4 *Global Jurist* 1.

The extent of the guarantee or protection of human rights in a country is measured not by the width of the relevant constitutional provisions, but the manner or nature in which such provisions are interpreted and implemented.¹¹³⁴ Having regard to what has been referred to as the executive's stranglehold over the legislative arm of government, citizens look increasingly up to the judiciary to see to executive accountability and the protection of their basic rights.¹¹³⁵ The judiciary acts both as a watchdog over the other organs of government and ensures their fidelity to the doctrine of separation of powers. It acts as the primary protector of the citizens' rights within its boundaries.

Elaborate provisions in the constitution or Bill of Rights in respect of the rights of the citizenry are not in themselves enough to guarantee the implementation or the enforcement of the provisions on the rights. It requires judicial enforcement to give effect and live to those provisions. This author had argued that:

A constitution is not a mere monument for the nation and generations yet unborn. Therefore, the courts should adopt a flexible, progressive, functional and purposive approach rather than strict, legalistic, conservative and mechanistic approach to constitutional interpretation. A contrary approach, will among others, stifle the development of healthy constitutional jurisprudence.¹¹³⁶

The quantum, quality, efficacy and significance of the rights available to the citizen are a direct function of a visionary, activist, knowledgeable, independent and courageous judiciary. A constitutional guarantee of a right may be inadequate, but in espousing and expounding the provisions thereat through judicial review or enforcement, the courts may breath life into them.

In *Nafiu Rabiu v Kano State*,¹¹³⁷ Udoma, stated:

My Lords, it is my view that the approach of this court (Supreme Court) to the construction of the Constitution should be and so it has been, one of liberalism, probably a variation of the theme of the general maxim *ut res magis valeat quam pereat*. I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.¹¹³⁸

¹¹³⁴ Nariman FS "Judicial Aspects of Human Rights Protection in India" (1992) (17) (No 4) *International Legal Practitioner* 118 at 112.

¹¹³⁵ Pieterse M "Coming to terms with Judicial Enforcement of Social Economic Rights" (2004) 20 *SAJHR* 383 at 388.

¹¹³⁶ Uzoukwu L "Addressing the Legitimacy of the 1999 Constitution through the Reform Process" being a paper presented at the British—Nigerian Law Week 23-27 April 2000, Abuja, Nigeria.

¹¹³⁷ *Nafiu Rabiu v Kano State* (1980) 8-11 SC 130.

¹¹³⁸ *Supra* at 151.

This statement has been emphasized and re-emphasized in several decisions of the Supreme Court and the Court of Appeal.¹¹³⁹ In India, the Supreme Court is said to have developed three basic commitments to aid the promotion of human rights: one is the commitment to participative justice, the other is the commitment against arbitrariness and the last one is the commitment to just standards of procedure.¹¹⁴⁰

The Balliol Statement of 1992 declares that:

In democratic societies fundamental human rights and freedoms are more than paper aspirations. They form part of the law. And it is the special province of judges to see to it that the law's undertakings are realized in the daily life of the people. In a society ruled by law, all public institutions and officials must act in accordance with the law. The judges bear particular responsibility for ensuring that all branches of government-the legislature and the executive, as well as the judiciary itself-conform to the legal principles of a free society. Judicial review and effective access to courts are indispensable, not only in moral times, but also during periods of public emergency threatening the life of the nation. It is at such times that fundamental human rights are most at risk and when courts must be especially vigilant in their protection.¹¹⁴¹

Expectedly, the courts in Nigeria followed the concept of traditionalism in the interpretation of statutes and the Constitution, until much later in the development of her jurisprudence after independence.

Nigeria is still recovering from its long period of military dictatorship and militarism. The period saw gross violations of the rights of the people. The right of access to courts over some causes of action was either restricted or abolished. When the country returned to democracy, the judiciary became active in asserting its constitutional role.

In *Attorney-General of the Federation v Abule*,¹¹⁴² the Court of Appeal emphasizes that the constitution being the organic law of the country declares in a formal, emphatic and binding principles the rights, liberties, responsibilities among others, of the people including the government. It is, therefore, the duty of the authorities, which include the judiciary, to ensure its observance.

¹¹³⁹ See for example, *Adesanya v President of the Federal Republic of Nigeria* (1981) 1 ANLR1; *A-G, Abia State v A-G, Federation* (2002) 6 NWLR (Pt 763) 264 at 485-486 paras G-F; *A-G, Ondo State v A-G, Federation* (2002) 9 NWLR (Pt 772) 222 at 340 paras B-D; *A-G, Ondo State v A-G, Ekiti State* (2001) 17 NWLR (Pt 743) 706 at 767-768 paras F-A, 776-777 paras E-A; *Orhiunu v F.R.N.* (2005) 1 NWLR (Pt 906) 39 at 55 paras B-C and *A-G, Abia State v A-G Federation* (2003) 4 NWLR (Pt 809) 124 at 230 paras C-E.

¹¹⁴⁰ Bhagwati PN "Human Rights as evolved by the Jurisprudence of the Supreme Court of India"(1987) 13 *Commonwealth Law Bulletin* 236 at 237.

¹¹⁴¹ Para 6, Balliol Statement of 1992, being the Concluding Statement of the Judicial Colloquium held at Balliol College, Oxford, 21-23 September 1992 in *Interights Developing Human Rights Jurisprudence Volume 7* (1998) 232 -234.

¹¹⁴² (2005) 11 NWLR (Pt 936) 369.

Fundamental rights being part of human rights are protected to promote human dignity and liberty. The position of the courts is therefore very important for the aim of safeguarding the fundamental rights of persons through effective intervention in cases where it is shown that such rights have been or are being threatened.

On the role of judges in America in respect of judicial review, Chief Justice Warren in *Trop v Dulles*¹¹⁴³ had this to say:

We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguard that protects individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence... When it appears that an Act of Congress conflicts with one of the provisions of the Constitution, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less.¹¹⁴⁴

In *A-G Abia State v A-G Federation*,¹¹⁴⁵ Tobi emphasized that where the National Assembly or the State House of Assembly in the exercise of its constitutional power to make laws, strays from the constitutional purview of section 4(2) and section 4(7) of the Constitution respectively and a question as to constitutionality or constitutionalism arises, “the courts in the exercise of their judicial powers, when asked by a party, will move in to stop any excess in exercise of legislative power.” Indeed, the judiciary is the watchdog, bedrock and guardian of constitutionalism. The wise words of Justice Warren equally represent what should guide the Nigerian courts when they exercise their judicial powers.

5.3 The judicial system in Nigeria

Under the structure of courts in Nigeria, the Federal Courts are the Supreme Court, the Court of Appeal and the Federal High Court.¹¹⁴⁶ The Federal Capital Territory, Abuja, has High Court, Sharia Court of Appeal and Customary Court of Appeal.¹¹⁴⁷

¹¹⁴³ (1958) 356 US 86.

¹¹⁴⁴ *Supra* at 104.

¹¹⁴⁵ (2006) 16 NWLR (Pt 1005) 265 at 381-382 paras H-A.

¹¹⁴⁶ Odinkalu AC *Justice Denied* (1992) 19. See also sections 230-231, 237-238, 249 and 250 of the 1999 Constitution.

¹¹⁴⁷ Sections 255, 260 and 265 of the 1999 Constitution.

There are also the National Assembly Election Tribunals, Governorship and the Legislative Houses Election Tribunals¹¹⁴⁸, among other Tribunals. The Constitution established High Courts for the States. Sections 275 and 280 of the Constitution, respectively provides that there shall be for any state that requires it, a Sharia Court of Appeal and a Customary Court of Appeal for that State. Some states have taken advantage of this constitutional provision, which gives them the discretion to set up the said courts, to establish Sharia Court of Appeal and Customary Court of Appeal.

The National Assembly and the State Houses of Assembly have been given constitutional powers to make laws for the establishment of courts other than those mentioned by the constitution.¹¹⁴⁹ The National Industrial Court was established by an Act of the National Assembly¹¹⁵⁰. Some States have also established courts such as Area Courts, Magistrate Courts, Revenue Courts, Environmental Courts and Mobile Courts. However, appeals from State Courts eventually go to Court of Appeal and then to the Supreme Court in cases where the parties have right of appeal.¹¹⁵¹

It must be pointed out at this stage that the primary obligation of enforcing the provisions of Chapter IV of the 1999 Constitution which guaranteed fundamental rights is conferred on Federal and State High Courts within a state.¹¹⁵² Thereafter, their decisions are subject to appeal to the appellate courts up to the Supreme Court. A person cannot therefore go to the Customary and Sharia Courts primarily to enforce the provisions of Chapter IV of the Constitution. However, such courts and other courts not expressly conferred with the responsibility of enforcing the provisions of Chapter IV, have a legal and constitutional obligation of applying the constitutional provision on fair hearing in their deliberations.

The 1999 Constitution guarantees judicial powers in section 6 (1)(2). It provides thus:

6-(1) The judicial powers of the federation shall be vested in the courts to which this section relates, being courts established for the Federation.

(2) The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution for a State.

¹¹⁴⁸ Section 285 of the 1999 Constitution.

¹¹⁴⁹ See section 6(4) (a) of the Constitution.

¹¹⁵⁰ Trade Dispute Act Cap 432 Laws of the Federation 1990, section 19(1).

¹¹⁵¹ Some State Courts like State Election Tribunals do not have appeals arising therefrom go beyond the State Court System.

¹¹⁵² See section 46(1) of the Constitution; Order 1 Rule 2 of FREPR and *Jack v University of Agriculture Makrudi* (2004) 5 NWLR (Pt 865) 208.

Section 6 (a)(b), the Constitution further provides that:

- (6) The judicial powers vested in accordance with the foregoing provisions of this section shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;
- (a) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.
- (b)

The above provision of section 6 encapsulates the plenitude and amplitude of judicial powers as guaranteed by the Constitution. The exercise of legislative powers by the National or State Assembly is subject to the provisions of the 1999 Constitution and particularly the jurisdiction of the courts. Section 4(8) of the 1999 Constitution provides as follows:

Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

Equally, the exercise of the executive powers of the federation ¹¹⁵³ and of a State ¹¹⁵⁴ is subject to the provisions of the Constitution. The aforesaid provisions have once more underscored the position of the judiciary as the guardian of the constitution and constitutionalism.

5.4 Judicial work environment

The dispensation of justice by the judiciary is conditioned by the environment where judicial officers work. What this means is that the enforcement of human rights by the courts is enhanced or compromised by a number of factors. These factors include judicial work conditions and the attitude of the executive arm of government to judicial orders. It is conceded that the constitution made sufficient provisions to secure the independence of the judiciary. This includes security of tenure,¹¹⁵⁵ but this independence can easily be compromised by poor workplace conditions.

¹¹⁵³ Section 5(1) of the Constitution.

¹¹⁵⁴ Section 5 (2) of the Constitution.

¹¹⁵⁵ See for example sections 292 of the Constitution 1999 on the removal of judicial officers. Judicial funds are part of the Consolidated Revenue Fund. See sections 81(3) and 162(9) of the 1999 Constitution.

Badejogbin after examining the administration of justice under the Obasanjo administration noted that:¹¹⁵⁶

The poor condition of the nation's judiciary is worrisome. It belies any demonstrable commitment to enhancing the environment of judicial institutions by this administration, or to judicial reforms at all. This is not to say there have not been justice sector reforms initiated by the administration. The point however is that sector reforms have proceeded at an excruciatingly slow pace. While some attention has been paid to prison reform, legal aid, and fighting financial crimes, there is no urgency shown in resolving the distress in the judiciary. This, to put it mildly, is an irony, as there cannot be effective justice services delivery without identifying the vital role the judiciary plays in the administration of justice, and dealing with capacity and other dysfunctions in the judicial process.

Badejogbin explained further that the overall, the slow-paced system of administering justice and the sad state of physical and operational facilities in the courts reflect perennial problems of funding inadequacy confronting the administration of justice. Poor funding he said is capable of not only impeding efficiency, it can also undermine the independence of the judiciary.¹¹⁵⁷

This makes judicial proceedings excruciating and slow and impacts negatively on justice administration. Much as the financial package of judicial officers has substantially improved under the Yar'Adua administration, the same thing cannot be said about the work conditions. In most of our courts, proceedings have not been computerized. Judges still record proceedings manually. The situation in the States are far worse than at the federal level. While the Federal Government is increasing its fiscal obligation to the judiciary, that of the States is shrinking. In the recent past, workers in most State judiciaries (excluding judges and magistrates) embarked on strikes. They were agitating for parity in work conditions with their federal counterparts.

In *Civil Liberties Organization v Nigeria*¹¹⁵⁸ the African Commission stated that many governments in Africa intentionally take steps to weaken domestic courts, thereby hampering the smooth administration of justice. The independence of the judiciary is compromised by executive lawlessness. That is to say, one of the problems militating against the development of a culture of constitutionalism and the enthronement of rule of law in Nigeria is executive disobedience of court orders. In protest against this dangerous assault on constitutionalism, the Nigeria Bar Association (NBA) embarked on a nationwide boycott of courts in Nigeria on 13-14 March 2006.

¹¹⁵⁶ Badejogbin O "The Judiciary under President Obasanjo's Administration: How well so far? Access to Justice Journal 2 (<http://www.accessstojustice.org/Hojzhowe//php>) (accessed 22 January 2010).

¹¹⁵⁷ *Supra*.

¹¹⁵⁸ Communication No 101/93 (2000) AHRLR (ACHPR 94) reprinted in Seventh Annual Activity Report of African Commission on Human and Peoples Rights Annex para 14.

Odogiyon, the former President of the NBA, *inter alia*, gave reasons for the boycott thus:

This action is aimed at protecting the Rule of Law and protesting the contempt and ridicule that the political leadership hold for Rule of Law. We single out for protest the consistent and persistent disobedience of court orders exhibited by the Executive arm of the State and Federal Governments, and the issue of violations of constitutional and fundamental rights of citizens.¹¹⁵⁹

Through the boycott, the NBA also intended to let Nigerians have the experience of how it feels and what it would take to live in a society without courts of justice. In that regard, the association succeeded.¹¹⁶⁰ Public outcry against executive disobedience of court orders was deafening. Subsequent events show that the attitude of government to court orders has not change. Just before he left office on voluntary retirement in July 2006, the former Chief Justice of Nigeria, Justice Muhammed Uwais, condemned governments' disobedience of court orders. The pronouncement of His Lordship was based on his experience from his vintage and privileged position as Chief Justice. The Federal Government was rattled. *ThisDay* Newspaper encapsulated the event in this manner:

Just before Uwais quit the Supreme Court, the normally taciturn Chief Justice had raised an alarm, warning of the dire consequences that may flow from the administration's selective obedience of court orders. And presumably as a follow-up, Uwais described the federal government's continued seizure of Lagos Council funds, despite a subsisting judgment of the Supreme Court to the contrary, as criminal and expressed regret over his inability as Chief justice to order the arrest of those responsible.¹¹⁶¹

The Supreme Court's decision alluded to was the case of *Attorney-General Lagos State v Attorney-General of the Federation*¹¹⁶² where the court in very clear and unmistakable terms held *inter alia* that the President of Nigeria has no power vested in him either by executive or administrative action to suspend or withhold for any period whatsoever the statutory funds due and payable to Lagos State Government in respect of Local Government Councils in the State. The Obasanjo administration had ignored that judgment giving one tenuous reason or the other. Under the then Federal-Attorney General, it embarked on a misleading interpretation of the judgment all in a bid to avoid complying with it. It was the present administration of Yar'Adua that complied with the decision.

¹¹⁵⁹ Odogiyon L "Why we are embarking on court boycott, by Nigerian Lawyers", *The Guardian* 13 March 2006 12.

¹¹⁶⁰ The boycott received the support and endorsement of several Nigerians. It also attracted several Newspaper commentaries and editorial. See Nigerian Tribune "On the Lawyers' Boycott" 29 March 2006, p 10; *ThisDay* "The Lawyers Court Boycott" 23 March 2006, 9 and *Daily Champion* 'Lawyer Boycott of courts 24 March 2006.

¹¹⁶¹ *ThisDay* "A Running Sore" (Editorial) 4 July 2006, 17.

¹¹⁶² (2004) 18 NWLR (Pt 904) 1.

Executive disobedience of court's orders was condemned at a Bar Conference.¹¹⁶³ The NBA also accused the Economic and Financial Crimes Commission (EFCC) under its former chairman of Nuhu Ribadu, a lawyer and Mallam Nasir El-Rufai, a former Minister of Federal Capital Territory of representing the new face of government's disobedience to court orders. In respect of EFCC, it called it a "Gestapo organization" which "operates as if it is above the law, arresting and detaining people for weeks or months without charging them for any offence in court. It disregards court injunctions not to arrest and treat with disdain court orders to release those detained".¹¹⁶⁴ It even called for the removal of Ribadu as the Chairman of EFCC.

The operational style of EFCC has been the focus of several criticisms.¹¹⁶⁵ Its method is consistent with the practice under a military dictatorship than a democracy. Suspects are arrested and detained for several weeks and months in utter disregard of the constitutional provision on fair hearing and personal liberty. When orders of court are obtained for the enforcement of the liberties of the detainees, the Commission will treat such orders with contempt. There appears to be no end to the assault on the fundamental rights of citizens. In admonishing the EFCC, the Guardian pointedly said that the dignity of Nigerians whether rich or poor must at all times be respected by law enforcement agencies. The EFCC it said, should "get on with the job (of fighting corruption) but to do so in a civilized manner and not as an instrument of coercion. The EFCC can benefit from a lesson on human rights and must ensure that the taxpayers' resources are not used to promote a private agenda. When it behaves with decorum and restraint, the EFCC can be assured of the continuing support of our people as it sanitizes a polluted environment".¹¹⁶⁶ Not much have been reported on executive lawlessness and disobedience to court orders under the present civilian administration. Even the EFCC in spite of its regrettable complaint against judicial orders, has been complying with them.

¹¹⁶³ The Nigerian Bar Association Annual General/Delegates Conference which took place in Port Harcourt, Rivers State on 26 August–1 September 2006.

¹¹⁶⁴ *Daily Sun* "Sack Ribadu now, NBA tells Obasanjo" 30 August 2006; *The Guardian*, NBA Begins Conference, demands removal of EFCC Chief 30 August 2006, The NBA's charge against EFCC has been the subject of a number of commentaries. See for example, Levi Obijiofor "EFCC, convicted by lawyers," *The Guardian* 1 September 2006, p 51, Reuben Abati "Ribadu and his learned friends" *The Guardian*, 1 September 2006, p 51, Duro Onabule "NBA's showdown with Nuhu Ribadu," *Daily Sun*, 1 September 2006, p 5.

¹¹⁶⁵ Sonnie Ekwowusi, "Executive Lawlessness vs Rule of Law" *ThisDay* 19 July 2006, p 16 Ethelbert Okere "My narrow escape from EFCC net" *Daily Sun* 1 September 2006 p 19, *The Guardian* "Lagos Speaker condemns arrest of Plateau lawmakers", 1 September 2006, p 7; Sani Yeyima "Efcc should be transparent" *ThisDay* 1 September 2006, p 7.

¹¹⁶⁶ *The Guardian* "EFCC and Mike Adenuga" (Editorial) 18 July 2006. See also *ThisDay* "The sacking of Bello" (Editorial) 5 July, 2006

What is Nigeria's attitude to interim measures issued by the African Commission? Under the provisions of Rule 11(1) of the African Commission's Rule of Procedure, the Commission can issue interim measures to "avoid irreparable damage being caused to the victim of the alleged violations". The Commission may *suo motu* or on the application of the author(s) of communication, issue interim measures. The issuance of interim measures has no bearing on the merit of a case. The major problem with interim or provisional measures issued by the Commission is that of non-compliance.

One outstanding example in that regard is the case of *Constitutional Rights Project, Interights (on behalf Ken Saro-Wiwa Jnr) v Nigeria*,¹¹⁶⁷ where Saro-Wiwa who was a well-known writer, human rights and environmental activist, and leader of the Movement for the Survival of the Ogoni Peoples (MOSOP), and eight other Ogonis were sentenced to death by a tribunal. Their trial was not in accordance with due process. Communications were filed on their behalf before the African Commission.

The Commission granted interim measures to stay their execution pending the determination of the Communication. The Federal Military Government of Nigeria which had an unenviable record of not complying with court orders, including the decisions¹¹⁶⁸ of African Commission, treated the interim measures with contempt and went a head with the executions.¹¹⁶⁹ The Commission observed on the execution which breached its interim measures as follows:

The Commission assist States parties to implement their obligations under the Charter. Rule 111 of the Commission's Rules of Procedure (revised) aims at preventing irreparable damage being assured to a complainant before the Commission. Execution in the face of the invocation of Rule 111 defeats the purpose of this important rule. The Commission had hoped that the Government of Nigeria would respond positively to its requests for a stay of execution pending the former's determination of the communication before it.¹¹⁷⁰

The Commission further commented that the execution:

...is a blot on the legal system of Nigeria which will not be easy erase. To have carried out the execution in the face of pleas to the contrary by the Commission and world opinion is something which we pray will never happen again. That it is a violation of the Charter is an understatement.¹¹⁷¹

¹¹⁶⁷ Communication No 60/91, 1994-1995, African Commission Annual Activity Report, Annexure IV.

¹¹⁶⁸ One notable exception was the interim measure issued in respect of General Zamani Lekwot. See *Constitutional Rights Project v Nigeria (in respect of Zamani Lekwot and 6 others)* Communication No 87/93, 8th Annual Activity Report of the African Commission, 1994-1995, Annexure VI.

¹¹⁶⁹ Communication No 60/91, 1994-1995, African Commission Annual Activity Report, Annexure IV.

¹¹⁷⁰ *Supra* para 114.

¹¹⁷¹ *Supra* para 115

5.5 *Locus standi*

The invocation of the jurisdiction of the court as the cornerstone of constitutionalism is not unrestricted. Any party that desires a relief from court, must have the *locus standi* to activate the jurisdiction of the court. Under section 6(6)(b) of the 1999 Constitution, the judicial powers vested in the courts “shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, *for the determination of any question as to civil rights and obligations of the person*” .¹¹⁷²

Flowing from the provision, whoever is seeking the invocation of the jurisdiction of the court, must show that the action or matter sought to be redressed affected his “civil rights and obligations”. This means that he must establish his standing or *locus standi* to institute the action. There is no unrestricted right of access by everyone to seek redress for any threatened or actual transgression of the provisions of the Constitution or violation of legal and constitutional rights. This brings us to the concept of *locus standi*. The concept of *locus standi* has been a controversial one in the country’s jurisprudence and constitutional law. Sometimes, litigants are denied the right to judicial enforcement of their claims based on a restrictive conception of *locus standi*.

The term *locus standi* denotes the legal capacity to institute proceedings in a court of law. It is used interchangeably with terms like “standing” or “title to sue”. It also represents the right or competence to institute proceedings in a court of law for redress or assertion of a right enforceable at law.¹¹⁷³ A person has *locus standi* if he or she can show sufficient interest in the action and that his civil rights and obligations have been or are in danger of being infringed.¹¹⁷⁴

5.5 .1 *Locus standi* in public law

The concept of *locus standi* in public law may be of relevance to victims of human rights violations, especially in cases where NGOs or even individuals other than the victims themselves, institute public interest litigations to protect the rights of victims of human rights violations. India has a well developed jurisprudence on such public interest litigations.

¹¹⁷² Emphasis supplied. The wording of section 6(6)(b) of the 1979 Constitution is same as that of section 6(6)(b) of the 1999 Constitution.

¹¹⁷³ *Adesanya v President of the Federal Republic of Nigeria* (1981) ANCR 1; *A-G Kaduna State v Hassan* (1985) 2 NWLR (Pt 8) 483; *Adefulu v Oyesili* (1989) 5 NWL (Pt 122) 377; *Benaji v Obasanjo* (2008) 9 NWLR (Pt 1093) 540.

¹¹⁷⁴ *Olagunji v Yahaya* (1998) 3 NWLR (Pt 542) 501; *Ogbuehi v Governor, Imo State* (1995) 9 NWLR (Pt 417)53 and *Okafor v Asoh* (1999) 3 NWLR (Pt 593) 35.

The question of *locus standi* in public law has always been problematic and controversial. The *locus classicus* on the issue of *locus standi* in public law in Nigeria is the case of *Adesanya v President of the Federal Republic of Nigeria*.¹¹⁷⁵ The President in the exercise of his constitutional power, pursuant to section 141(1) of the 1979 Constitution appointed the Hon. Justice Victor Ovie-Whiskey, as a member and chairman of the Federal Electoral Commission. The appointment was confirmed by the Senate in accordance with the Constitution. The appellant, who was a Senator at the time, was dissatisfied with the confirmation, although he participated in the proceedings, which resulted in the confirmation of the said appointment in the Senate. He commenced action in the High Court, *inter alia* claiming that the appointment of Justice Ovie-Whiskey was unconstitutional, null and void in that at the time of the appointment, he was the Chief Judge of Bendel State¹¹⁷⁶ and was disqualified from being appointed a member of the Federal Electoral Commission. The High Court granted the declaration sought and set aside the appointment on the ground of unconstitutionality. The respondents, the President and Justice Ovie-Whiskey, appealed to the Court of Appeal and the court *suo motu* raised the issue of the locus of the appellant to institute the action. It then invited the parties to address it on the issue.

After holding that the term ‘*locus standi*’ denotes the capacity to institute proceedings in a court of law, Justice Fatai-William posed a number of questions to wit:

The questions which, of course, naturally arise are these. If, in a developing country like Nigeria with a written constitution, a legislative enactment appears to be *ultra vires* the Constitution or an act infringes any of its provisions dealing with Fundamental Rights, who has *locus standi* to challenge its constitutionality? Does (or should) any member of the public have the right to sue? Or should *locus standi* be confined to persons whose vested legal rights are directly interfered with by the measure, or to persons whose interests are liable to be specially affected by its operation, or to an Attorney General who is a functionary of the Executive Branch? Experience has shown that different legal systems have offered diverse answers, sometimes experimental answers, to these questions.¹¹⁷⁷

Justice Fatai-Williams held¹¹⁷⁸ that it is significant to note that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution. It is a country where rumour mongering is the pastime of the market places and the construction sites.

¹¹⁷⁵ (1981) ANLR 1. See also the cases of *Bolaji v Bamgbose* (1986) 4 NWLR (Pt37) 632 at 652 para B; *Fawehinmi v Akilu* (1987) 4 NWLR (Pt 67) 797; *Fawehinmi v President FRN* (2007) 14 NWLR (Pt 1054) 275; *Keyamo v House of Assembly, Lagos State* (2000) 12 NWLR (pt 680) 196.

¹¹⁷⁶ Bendel State does not exist any more. Out of it, Delta State and Edo State were created.

¹¹⁷⁷ *Adesanya v President of the Federal Republic of Nigeria* (1981) ANLR1 21-22.

¹¹⁷⁸ *Supra*.

Justice Fatai-Williams further held that, to deny any member of such a society who is aware or believes, or is led to believe that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our legislative houses, whether Federal or State, is unconstitutional, access to a court of law to ventilate his grievance on the flimsy or innocuous excuse of lack of sufficient interest, is to provide a ready recipe for organized disenchantment with the judicial process.

The court stated that the law relating to *locus standi* had its origin in the common law. *Locus standi* is also derivable from the Constitution, and the Fundamental Rights provisions in Chapter IV of the Constitution. The court explained that: “Indeed a close scrutiny of our Constitution shows that the flood-gates of litigation have not been left wide open.”¹¹⁷⁹ Fatai-Williams was of the view that where there is an infraction of section 1 of the 1979 Constitution, which prescribes the supremacy of the Constitution, and section 4 thereof which deals with the legislative powers of the National Assembly, it is possible for any person to institute an action in court and seek appropriate relief. He said:

In my view, any person, whether he is a citizen of Nigeria or not, who is resident in Nigeria or who is subject to the laws in force in Nigeria, has an *obligation* to see to it that he is governed by a law which is consistent with the provisions of the Nigerian Constitution. Indeed, it is his *civil right* to see that this is so. This is because any law that is inconsistent with the provisions of that Constitution is, to the extent of that inconsistency, *null and void* by virtue of the provisions of sections 1 and 4 to which I have referred earlier.¹¹⁸⁰

The interpretation here is liberal enough to justify an expectation that the court did introduce a relaxation of the issue of locus in public law. This is not exactly so for the court quickly added that for such a person to exercise his basic civil right and obligation, he must comply with the provisions of section 6(6)(b) of the 1979 Constitution (which is the same as the provisions of section 6(6)(b) of the 1999 Constitution). However, Justice Fatai-Williams observed that he did not think that this particular civil right (as opposed to fundamental right) and obligation should be restricted in any manner by technicalities.

On the *locus standi* of a Plaintiff where he seeks to establish a “private right” or “special damage”, either under the common law or administrative law, in non-constitutional litigation, by way of an application for *certiorari*, prohibition, or *mandamus* or for a declaratory and injunctive relief, the Supreme Court said that the law is now well settled that the plaintiff will have *locus standi* in the matter only if he has a special interest in the performance of the duty sought to be enforced, or where his interest is adversely affected.

¹¹⁷⁹ *Adesanya v President of the Federal Republic of Nigeria* (1981) ANLR1 21-22 at 25.

¹¹⁸⁰ *Supra* at 27.

As to what constitutes a sufficient interest or special interest, or interest adversely affected, it will, of course, depend on the facts of each case. On whether an interest is worthy of protection, is a matter of judicial discretion, which may vary according to the remedy a party seeks.¹¹⁸¹ Finally, Justice Fatai-Williams insisted that in the Nigerian context and having regard to the detailed provisions of the 1979 Constitution, the point must be stressed that there are explicit provisions therein which dealt with the *locus standi*, which is required in order to sustain a claim where there has been an infraction of specific provisions of the Constitution. Consequently, other infringements of the provisions of the Constitution, to which no restrictions are attached, should not be fettered by the common law or the administrative law concept of *locus standi*. The complainant in such cases should be accorded a hearing subject only to constitutional restrictions.¹¹⁸² He finally held that the Appellant had no *locus standi* to institute the action.

5.5.2 *Locus standi* under the 1999 Constitution

The concept of *locus standi* as expounded in *Adesanya's case* is unduly rigid and restrictive. *Adesanya's case* was decided under the 1979 Constitution. But the provisions of section 6(6)(b) of the 1979 Constitution which were considered in the case, have exactly the same wording as the provisions of section 6(6)(b) of the 1999 Constitution. However, this text is to consider some cases on the issue of *locus standi* decided on section 6(6)(b) of the 1999 Constitution to find out whether there has been a shift from the position adopted by the Supreme Court in *Adesanya's case* on the issue of *locus standi*.

In *Keyamo v House of Assembly, Lagos State*¹¹⁸³ Oguntade, took the view that: “As a member of the Nigerian Society, every citizen has an interest in the good governance of the society and inferentially we are all therefore interested in ensuring that we are governed by just laws and that the observance of the law and good order be enforced at all times.”¹¹⁸⁴ In spite of the aforesaid pronouncement, Justice Oguntade agreed with the lead judgment where Justice Galadima held that the mere fact that an act of the executive or legislature is unconstitutional without any allegation of infraction of or its adverse effect on one’s civil rights and obligations poses no question to be settled between parties in court.¹¹⁸⁵

¹¹⁸¹ *Adesanya's case* (1981) ANLR I at 29.

¹¹⁸² *Supra*.

¹¹⁸³ (2000) 12 NWLR (Pt 680) 196. See also *Fawehinmi v Akilu* (1987) 4 NWLR (Pt 67) 797.

¹¹⁸⁴ (2000) 12 NWLR (Pt 680) 196 at 218.

¹¹⁸⁵ *Supra* at 216.

In his critique of the stand of the Court of Appeal, Justice Nweze¹¹⁸⁶ forcefully contended that:

With due respect to their lordships, this sort of legalistic conclusion overlooks the positive dimension of the guardianship role of the judiciary. Surely, it is in interest of the stability of democracy that the courts should be able to pronounce on the constitutionality of acts of the executive or legislature. The appropriate question should be: is it in the public interest? If it is, it is immaterial whether the plaintiff, as in this case, has shown sufficient interest in the matter or not.¹¹⁸⁷

In *Fawehinmi v President F.R.N.*,¹¹⁸⁸ the appellant, at the time of instituting the action was the chairman of a political party, a former presidential candidate, a tax payer and a Senior Advocate of Nigeria who subscribed to an oath under the Legal Practitioners Act to support and uphold the Constitution of Nigeria. The appellant challenged in the Federal High Court the allowances that were being paid to two Ministers of the Federal Republic of Nigeria which were in foreign currency and far above what was authorized by Certain Political, Public and Judicial Office Holders (Salaries and Allowances, etc) Act No 6 of 2002.

A preliminary objection was taken challenging his *locus standi*. The Federal High Court ruled that the appellant had no *locus standi* to maintain the action. He appealed to the Court of Appeal. The Court of Appeal held that the term *locus standi* cannot be divorced from the provisions of section 6(6)(b) of the 1999 Constitution since it provides that the constitutional right of a citizen to institute an action in court can only be exercisable by a person who has complaints touching on his civil rights and obligations. Where a plaintiff fails to raise in his statement of claim or in the affidavit in support of his originating summons any question as to his civil rights and obligations that have been violated or injured, the statement of claim or the originating summons as the case may be will be struck out.¹¹⁸⁹

It was further held that it will definitely be a source of concern to any tax payer who watches the funds he contributed or is contributing towards the running of the affairs of the State being wasted when such funds could have been channeled into providing jobs, creating wealth and providing security to the citizens.¹¹⁹⁰ Such an individual has sufficient interest in coming to court to enforce the law and to ensure that his tax money is utilized prudently.¹¹⁹¹

¹¹⁸⁶ A Judge of the High Court of Enugu State at the time but now Justice of the Court of Appeal.

¹¹⁸⁷ Nweze CC “Judicialization of Politics: Imperatives of Constitutional Adjudication in the Evolution of Democratic Culture” being the text of a paper delivered under the auspices of the NBA, Owerri branch at Owerri, Imo State, Nigeria, 30-31, May 2005.

¹¹⁸⁸ (2007) 14 NWLR (Pt 1054) 275.

¹¹⁸⁹ *Supra* at 331 paras C-E.

¹¹⁹⁰ *Supra* at 341 paras G-H.

¹¹⁹¹ *Supra*.

Justice Aboki ¹¹⁹² who wrote the lead judgment said that the Supreme Court “has now departed from the former narrow approach in the *Adesanya’s case* ¹¹⁹³ and the subsequent decisions”. ¹¹⁹⁴ On the desirability to extend the frontiers of the concept of *locus standi* in order to enforce and protect the Constitution, Justice Aboki said: ¹¹⁹⁵

In our present reality, the Attorney–General of the Federation is also the Minister of Justice and a member of the Executive Cabinet. He may not be disposed to instituting an action against the Government in which he is part of, it may tantamount to the Federal Government suing itself. Definitely he will not perform such a duty. Importantly too, there is no provision in the 1999 Constitution for the State to sue itself. Since this country attained independence from the British Colonial Administration almost forty seven years ago, I know of no reported case of any superior court in Nigeria where the Attorney–General of the Federation has instituted an action against the Federal Government, or an Attorney–General of a State suing his State Government on account of a violation of the provisions of the Constitution or a legislation contrary to the provisions of the Constitution.

Before Aboki allowed the appeal and held that the appellant had *locus standi* to maintain the action, he proffered a view on the need to amend the constitution on the issue of *locus standi* and access to court. He held:

It will be appropriate at this point to proffer that for this country to remain governed under the rule of law in view of the controversies the problem of *locus standi* has generated especially in constitutional matters, it is suggested that any future constitutional amendment should provide for access to court by any Nigerian in order to preserve, protect and defend the Constitution. ¹¹⁹⁶

The decision was undoubtedly revolutionary. It expanded the frontiers of the concept of *locus standi*. It was therefore a welcome development in the country’s jurisprudence. But we must not forget the fact that it was a decision of an intermediate appellate court. The battle has since shifted to the Supreme Court. Its decision is eagerly being awaited.

5.5.3 *Locus standi* in fundamental rights enforcement

As will be seen subsequently, the rules of standing in the enforcement of fundamental rights are liberalized. They are not as rigid as in the case of other constitutional litigations. The Constitution has conferred “special jurisdiction” on the High Courts for the enforcement of fundamental rights.

¹¹⁹² *Fawehinmi v President F.R.N* (2007) 14 NWLR (Pt 1054) 275 at 336 para G.

¹¹⁹³ *Supra*.

¹¹⁹⁴ See *Fawehinmi v Akilu* (1987) 4 NWLR (Pt 67) 797; *Williams v Dawodu* (1988) (Pt 87) 189 and *S.P.D.C. Ltd v Nwaka* (2001) 10 NWLR (Pt 720) 64

¹¹⁹⁵ *Fawehinmi v President F.R.N* (2007) 14 NWLR (Pt 1054) 275 at 334 paras B-G.

¹¹⁹⁶ *Supra* at 343 para C-D.

Section 46(1) of the 1999 Constitution reads as follows:

- 46 (1) Any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.
- (2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any right to which the person who makes the application may be entitled under this Chapter.

Pursuant to a provision in the 1979 Constitution,¹¹⁹⁷ the Chief Justice of Nigeria made rules for the enforcement of fundamental rights. These Rules called the Fundamental Rights (Enforcement Procedure) Rules (FREPR) came into effect on 1 January 1980. Section 2(1) thereof provides as follows: “Any person who alleges that any of the Fundamental Rights provided for in the Constitution and to which he is entitled, has been, is being, or is likely to be infringed may, apply to the Court in the State where the infringement occurs or is likely to occur, for redress”. Perhaps, because of the clarity of section 46(1) of FREPR on the issue of standing in the enforcement of fundamental rights, there is a dearth of cases on the issue. Flowing from the provisions of section 46(1) aforesaid, all that an applicant or a victim of human rights violation requires to enforce his rights is to allege any of the following:

- (i) That his right under any of the provisions of Chapter IV of the 1999 Constitution *has been contravened*; or
- (ii) That his right under the said Chapter *is being contravened*; or
- (iii) That his right under the aforesaid provision *is likely to be contravened*.

In *F.R.N. v Ifegwu*,¹¹⁹⁸ Justice Tobi stated that the enforcement procedure has three limbs.¹¹⁹⁹ The first limb is that the fundamental right contained in Chapter IV of the Constitution has been physically contravened or infringed. This means that the act of contravention or infringement is completed or actualized and the person concerned goes to court to seek redress. In respect of the second limb, the fundamental right in question is being contravened or infringed. In this respect, the act of contravention or infringement may or may not be completed. For the act that is yet to be completed, there is sufficient overt act on the part of the respondent that the process of contravention or infringement is physically in the hands of the respondent and that the act of contravention or infringement is in existence substantially.

¹¹⁹⁷ Section 42(3) of the 1979 Constitution. Same provision is contained in section 46(3) of the 1999 Constitution.

¹¹⁹⁸ (2003) 15 NWLR (Pt 842) 113.

¹¹⁹⁹ *Supra* at 216 paras E-H.

In the third limb, there is the likelihood that the respondent will contravene or infringe the fundamental right(s) of the applicant or the person concerned. According to Justice Tobi, while the first and second limbs may graduate together into certain situations, the third limb of the subsection is entirely different. By the third limb, the person concerned may not wait for the completion of the act of contravention or infringement.¹²⁰⁰ A close scrutiny of the provisions of section 46(1) of the 1999 Constitution and Order 1 Rule 2(1) of the Fundamental Rights (Enforcement Procedure) Rules shows that the rule of standing in the enforcement of fundamental rights has been liberalized. Any person who “alleges” that his fundamental right has been, is being, or is likely to be infringed, has the requisite locus to invoke the jurisdiction of the High Court in the state where the infringement occurs, for redress.

In *Anuka Community Bank v Olua*,¹²⁰¹ Tobi J.C.A (as he then was) had this to say in his lead judgment on the issue of locus in fundamental rights enforcement: “A fundamental right is fundamental because it is basic, primary, essential and important. It can be enforced any time and all that an applicant can show is that he has the *locus standi* in the sense that his fundamental right has been contravened or is being contravened or likely to be contravened”.

The provisions of section 46(1) of the 1999 Constitution on the issue of locus will hardly present any controversy where the victim is the applicant in an application to enforce his fundamental rights. In that case, it is enough for him to allege that his fundamental rights have been contravened or is being contravened or likely to be contravened. There could be a situation where the victim is not the applicant but another individual acting on his behalf or even an NGO.

5.5.4 *Locus standi* to enforce human rights on behalf of a person

As stated earlier, where the proceeding for human rights enforcement is instituted by the victim or the person concerned, there can hardly be any controversy over the issue of locus. There will likely be a problem where the enforcement is in the name of a person who is not the victim but is seeking redress for the victim. Section 46(1) of the 1999 Constitution states that where a person alleges that his fundamental right “has been, is being or likely to be contravened in any state *in relation to him*”,¹²⁰² he can then apply for relief. This gives the impression that the victim of the actual or threatened violation is the person who has to apply for appropriate redress.

¹²⁰⁰ *Supra.*
¹²⁰¹ (2000) 12 NWLR (Pt 682) 641 at 662 paras F-H.
¹²⁰² Emphasis supplied.

This means that the act of contravention or infringement must be “in relation” to the person applying for enforcement. Perhaps, it is in view of the foregoing that Falana emphatically stated: “Under no circumstance can an application be filed in the name of any person other than that of the complainant”.¹²⁰³ He holds tenaciously to his view notwithstanding that he even referred to decided cases that did not support his stand.¹²⁰⁴

In *Richard Oma Ahonorogho v Governor of Lagos State*,¹²⁰⁵ a legal practitioner filed the proceeding in his name to enforce the fundamental right to life of one Augustine Eke, who was 14 years at the time. He had been convicted for armed robbery, which carried a death sentence. The application was predicated on the fact that as a minor he could not be sentenced to death. The locus of the lawyer applicant was challenged by way of preliminary objection. In dismissing the objection, Onalaja J (as he then was) *inter alia* held that after a very careful consideration on the knotty definition of *locus standi*, he was of the view that the applicant has the *locus standi* or competence and/ or sufficient interest for the enforcement of the fundamental right of the victim of the violation.

In another case, *Ozekhome v The President*,¹²⁰⁶ a legal practitioner made the application to enforce the rights of the 2nd—24th applicants who were in detention. His locus was challenged in *limine*. Segun J. held that the legal practitioner has sufficient interest in the matter, which includes taking steps to ensure the success of the litigation. He said that on the face of the summons, he was an interested party.

Falana criticized¹²⁰⁷ this judgment on the ground that Segun J. did not advert his mind to the case of *Fawhinmi v Nigerian Bar Association*¹²⁰⁸ where Karibi-Whyte J.S.C *inter alia* said: “The right of audience as a legal practitioner before the court is in abeyance whilst a legal practitioner is also a litigant before the court. In his role as a litigant he is not appearing in court as a legal practitioner. He therefore cannot exercise the right of audience and the right to represent a co defendant in the action”. Falana appears to have mixed up two issues. The first is the right of a legal practitioner to defend himself and co-defendants or perhaps to prosecute a case for himself and co-plaintiffs. The second relates to his *locus standi* as a litigant.

¹²⁰³ Falana F, *Fundamental Rights Enforcement* (2004) 36 para 302.

¹²⁰⁴ *Richard Oma Ahonorogho v Governor of Lagos State* (1994) HLP Vol. 4 Nos 1, 2 and 3, P. 185; *Ozekhome v The President* 1 NPILR 345 at 359.

¹²⁰⁵ (1994) HLP Vol 4 Nos 1, 2 and 3 at 185.

¹²⁰⁶ 1 NPKR 345 at 359

¹²⁰⁷ *Supra* at 38 para 3.05

¹²⁰⁸ (1989) 2 NWLR (Pt 105) 494 at 547.

The two have different considerations and requirements. The right of audience of a legal practitioner, which is in abeyance when he is a litigant, does not affect his *locus standi* as a litigant if he has it. Consequently, if a court rules that the right of audience in a particular case is in abeyance, it does not translate to a pronouncement of the absence of *locus standi*.

In *the Registered Trustees of the Constitutional Rights Project (CRP) case*,¹²⁰⁹ Justice Onalaja held that CRP, a non-governmental organization incorporated in Nigeria and which has an observer status with the African Commission on Human and Peoples' Right in Banjul, has *locus standi* to apply for the enforcement of the African Charter for the benefit of seven condemned men. This matter did not get up to the Appellate Court. Had it gone there, it would have been struck down under the strict application of the concept of *locus standi*. This case is also significant in that it is the only known reported Nigerian case where *locus standi* was granted to an NGO to enforce human rights.

In another decision of the Lagos High Court, *Tell Communications Ltd v State Security Service*,¹²¹⁰ Justice Adeyinka held that the second-sixth applicants being editors of a company, have no *locus standi* to bring an action against the seizure of copies of the company's magazines by security agents. However, they are entitled to bring an action to enforce their own fundamental rights as editors of the magazine but not that of the company.

Falana's contention that an application for the enforcement of right must be filed in the name of the complainant, finds justification in the case of *Uzoukwu v Ezeonu II*,¹²¹¹ where the President of the Court of Appeal, Justice Nasir held that: "The complainant or applicant must be the person whose right has been or is likely to be contravened". The stance of Nasir who incidentally delivered the lead judgment is too rigid and restrictive.

A purposive and liberal interpretation of the provisions of section 46(1) of the 1999 Constitution will accommodate a situation where a person other than the complainant filed the application on behalf of the complainant. Assuming the victim is held incommunicado and could not be reached to give the necessary consent for the application to be filed in his/her name or on his/her behalf, will the right be denied in consequence of the said detention? Such a scenario does not represent the intendment of section 46(1) of 1999 Constitution. A restrictive interpretation and application of the rule on standing as done by Nasir negates the advancement of human rights.

¹²⁰⁹ Case reported in Onalaja MO, *Commentaries from the Bench Part IV* (2003) 300.

¹²¹⁰ (2000) HRLRA 104.

¹²¹¹ (1991) 6 NWLR (Pt 200) 708 at 762 para A.

In *A-G Botswana v Dow*,¹²¹² such a rigid interpretation was rejected in favour of a purposive and liberal one. The respondent, Unity Dow, is a citizen of Botswana. She got married to an American who, although resident in Botswana for nearly 14 years, is not a citizen of Botswana. Prior to their marriage on 7 March 1984, a child was born to them on 29 October 1979. After their marriage, they had two more children.

In terms of the laws in force prior to the Citizenship Act of 1984, the daughter born before the marriage is a Botswana citizen. Whereas in terms of the Citizenship Act of 1984, the children born during the marriage are not citizens of Botswana (although children born of the same parents), and are therefore aliens in the land of their birth. The respondent alleged several cases where her right to freedom of movement had been infringed by immigration regulations restricting the duration of stay of her children in Botswana at one time or the other, and situations where undue delay and restrictions had been placed on her by airport officials either on her way out of or into Botswana. Because of the disability placed on her children, they were not treated as Botswana citizens, she contended. Consequently, she sued the appellant at the High Court of Botswana and claimed several reliefs for the infringement of her fundamental rights. She argued that certain provisions of the Citizenship Act of Botswana, 1984, infringed her rights. The trial Judge found in favour of the respondent. The appellant was dissatisfied and appealed to the Appeal Court of Botswana. At the Court of Appeal, the appellant challenged the locus of the respondent to institute the proceedings.

Justice Amissah, who delivered the lead judgment said that the case as he understood it is that the respondent is saying that due to the disabilities under which her children were likely to be placed in her own country of birth by the provisions of the Citizenship Act, her own freedom of movement protected by section 14 of the Constitution was correspondingly likely to be infringed and that gave her the locus under section 18(1) of the Constitution to come to court to test the validity of the Act. What she says is that it is her freedom, which has been circumscribed by the disabilities placed on her children. If there is any substance to this allegation, Justice Amissah said that the courts ought to hear her. He stated that the argument that a mother's relationship to her children is entirely emotional and that an emotional feeling cannot found a legal right, does not sound right to him. He further said that he was not impressed by the argument that a mother has no responsibility towards a child because it is only the guardian who has a responsibility recognized by law, and in Botswana, that guardian is the father.¹²¹³

¹²¹² (1998) 1 HRLRA 1.

¹²¹³ *A-G Botswana v Dow* (1998) 1 HRLRA1 at 112-113 paras G-C.

In his concurring judgment, Justice Aguda said:¹²¹⁴

The Constitution of Botswana like many other Constitutions of the Commonwealth framed in the past 30 years or so have clearly shut the door of the Court of those countries against “ a mere busy body who is interfering in things which do not concern him”, and those Courts “are not places for those who wish to meddle in things which are no concern of theirs”, “just for the pleasure of interfering, or proclaiming abroad some favourable doctrine of theirs, or of indulging a taste for forensic display”. Under our Constitution as well as under the Constitutions of other countries with similar provision—see Section 42, and Section 44 of the Constitution of the Federal Republic of Nigeria, 1979, and 1989 respectively—for a person to have the locus he must ‘allege’ that any of the entrenched fundamental rights provisions” has been, is being or likely to be contravened” “in relation to him”.

Justice Aguda agreed with the lead judgment that the respondent had the locus to bring the action. Interestingly, the provision of section 46(1) of the 1999 Constitution of Nigeria and section 18(1) of the 1966 Constitution of Botswana are identical. They respectively have the phrases “*has been, is being or likely to be contravened*” and “*in relation to him*”. Yet while in *Uzoukwu’s case*, the Nigerian Court of Appeal prefers a restrictive interpretation of the provision; in *Dow’s case*, the Botswana Court of Appeal which included Justice Aguda, a Nigerian Judge, who was on secondment to the Court of Appeal of Botswana, opted for a liberal interpretation of the provision.

The problem inherent in sections 46(1) and 18(1) respectively of the Nigerian and Botswana Constitutions was anticipated to some measure, by the draftsman in the case of the 1979 Constitution of Zimbabwe. Under section 24(1) of the 1979 Constitution of Zimbabwe, locus is not only given to the person who alleges his right “has been, is being or is likely to be contravened in relation to him”, but extends to, “in the case of a person who is detained, any other person who alleges such a contravention in relation to the detained person”. He may apply for redress.

The South African constitutional provision on the entitlement to seek reliefs for the enforcement of the rights in the Bill of Rights, is one of the most robust, generous and certain we have come across. Section 38 of the 1996 Constitution of South Africa provides:

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
 - a. anyone acting in their own interest;
 - b. anyone acting on behalf of another person who cannot act in their own name;
 - c. anyone acting as a member of, or in the interest of, a group or class of persons;
 - d. anyone acting in the public interest; and
 - e. an association acting in the interest of its members.

¹²¹⁴ *Dow’s case* (1998) 1 HRLRA1 at 136 paras D-G.

The provision is wider in scope than the Nigerian, Botswana and Zimbabwean constitutional provisions on the subject. Under section 38 (d) of the South African Constitution, locus is not tied to the interest of the victim, it is extended to “anyone acting in public interest”. Where the victim of violations of rights is not willing to seek redress or lacks the means to seek redress, a member of the public, acting in “public interest” may seek relief on his behalf. Section 38(c) of the South African Constitution clearly recognizes and legitimizes class action in the application of relief over the transgression or infringement of the Bill of Rights.

The sad experience of the long period of gross violations of human rights under the apartheid regime in South Africa, undoubtedly accounts for the robust provisions in the South African Constitution that guarantee and protect human rights. In India, the relaxation of the standing rule was achieved through the decisions of the Supreme Court and not legislative or executive action. In view of the problems attendant to the traditional conception of standing, the Supreme Court of India decided to depart from it. According to Justice Bhagwati, where a legal wrong or injury is caused to a person or to a determinate class of persons by reason of the infringement of their constitutional or legal rights, and such determinate class of persons is, by reason of poverty, disability, or socially or economically disadvantaged position, incapable of accessing the court for a remedy, any member of the public or social action group acting *bona fide* can maintain an action in the High Court or the Supreme Court and seek judicial relief for the infringement of the right of such a person or determinate class of persons.

He further stated:

The Supreme Court of India felt that when any member of the public or social organization espouses the cause of the poor, he should be able to move the court by just writing a letter, because it would be quite harsh to expect a person acting *pro bono publico* to incur expenses from his own pocket in order to go to a lawyer and prepare a regular position to be filed in court for the enforcement of the fundamental rights of the poor.

In such a case, a letter addressed by him to the court can legitimately be regarded as an appropriate proceeding within the meaning of Article 32 of the Constitution. The Supreme Court thus evolved what has come to be known as “epistolary jurisdiction”, where the court can be moved by just addressing a letter on behalf of vulnerable class of persons.¹²¹⁵

¹²¹⁵ Bhagwati PN “Liberty and Security of the Person in India, with Particular Emphasis on Access to Courts” in *Interight Developing Human Rights Jurisprudence Volume 7* (1998) 203 at 212

The India Supreme Court has demonstrated that the judiciary perhaps more than the legislative and executive organs of government, plays a very active role in the enforcement and realization of human rights. In spite of the efforts of High Courts to allow third parties including NGOs to file applications to enforce the rights of victims of human rights violations, section 46(1) of the Constitution should be amended to expressly confer appropriate *locus standi* on NGOs. While section 46(1) of the 1999 Constitution restricts the *locus standi* to apply for enforcement of fundamental rights to victims of such violation, the African Commission on Human and Peoples' Rights has adopted a very broad approach to the subject. The Commission's guidelines¹²¹⁶ on the submission of communications makes provision on who can submit a communication to the Commission. The guidelines provide as follows:

Anybody, either on his or her own behalf or on behalf of someone else, can submit a communication to the commission denouncing a violation of human rights. Ordinary citizens, a group of individuals, NGOs, and States Parties to the Charter can all put in claims. The complainant or author of the communication need not be related to the victim of the abuse in any way, but the victim must be mentioned.

Complaining on behalf of someone else, for example, a prisoner who can't submit a communication himself or who does not want the authorities to know that he is petitioning is very helpful.

Pursuant to the said liberal approach in respect of who can submit a communication, the Commission in *Malawi African Association and Others v Mauritania*¹²¹⁷, determined as follows:

Article 56, 1 of the Charter demands that anyone submitting communications to the Commission relating to human and peoples' rights must reveal their identity. They do not necessarily have to be the victims of such violations or members of their families. This characteristic of the African Charter reflects sensitivity to the practical difficulties that individual can face in countries where human rights are violated. The national or international channels of remedy may not be accessible to the victims themselves or may be dangerous to pursue.

The inconsistency between the provisions of section 46(1) of the 1999 Constitution on locus for the enforcement of human rights and the African Commission guidelines on locus, should be reconciled through an amendment to the former.

¹²¹⁶ The African Commission on Human and Peoples' Rights Information Sheet No 2.

¹²¹⁷ Communications Nos 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000) <http://www1.umn.edu/humanrts/africa/comcases/54-91.html> [accessed on 6 February 2010]. See also *organization Mondiale Contre La Torure et al v Zaire* (Merits) reprinted in (1997) 4 *International Human Rights Reports* 89,92.

5.5.5 Justification for the restrictive application of the *locus standi* rule in public interest litigations

Several reasons have been canvassed on why it is necessary to restrict the right of a private individual to institute an action over an infringement of public rights. *In Rex v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Business Ltd*, the need for the restriction was rationalized thus:

To prevent the time of the court being wasted by busy-bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty public officers and authorities might be left in as to whether they could safely proceed with administrative action when proceedings for judicial review of it were actually pending, even though misconceived¹²¹⁸.

Sir William Blackstone stated that “it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common with the rest of his fellow subjects”.¹²¹⁹ In *Smith v. A.G. for Ontario*,¹²²⁰ Justice Duff emphasized that the liberalization of the restriction on individual’s standing in public interest litigation “would lead to grave inconvenience”. The Supreme Court of the United States in *Baker v Carr*¹²²¹ justifies the restriction on the ground that it is necessary “to ensure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends”. Dealing with the Nigerian perspective, Justice Nnamani in his concurring judgment in *Fawehinmi v Akilu*¹²²² states that he does not subscribe to the notion of “throwing the gates wide open” even in the area of criminal law, “for no one would want busybodies to sprout all around us. A dose of controlled liberalism would do no harm...”

The Law Reform Commission of British Columbia captured the dilemma in the liberalization of the standing rule. It said:

All developed legal systems have had to face the problem of adjusting conflicts between two aspects of the public interest—the desirability of encouraging citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him.¹²²³

¹²¹⁸ (1982) AC 617. The dictum was adopted by Obaseki JSC in *Fawehinmi v Akilu* (1987) 4 NWLR (Pt 67) 797.

¹²¹⁹ Blackstone William *Blackstone’s Commentaries* 17ed Book IV, 106.

¹²²⁰ (1924) S.C.R. 331 at 337.

¹²²¹ 369 US 180, 284.

¹²²² *Supra* at 767.

¹²²³ The Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest* LRC 46 (1980) .

Describing the fear of multiple litigation as “exaggerated”, the said Commission opines: “... we do not believe that if any member of the public were competent to sue in respect of public rights, the floodgates of litigation would be opened, clogging both the judicial and administrative processes. Public apathy, and the expense and inconvenience of litigation are inhibiting factors”.¹²²⁴ Similarly, Professor Zamir has contended that: “people are not keen to rush to the courts. It is in their interest to avoid the inconvenience and expense of litigation rather than to commence proceedings on trivial matters.”¹²²⁵

In *A-G. ex. Rel. McWhirter v Independent Broadcasting Authority*,¹²²⁶ Lord Denning stated the need to avoid multiplicity of actions originated in the field of public nuisance, where there was real concern for multiple damage suits. He then questioned the rationality in restricting locus in public interest litigations where a member of the public merely seeks a declaration or an injunction. In such a case, there will be no question of multiple damage suits. Public authorities are usually afraid of the relaxation of standing rule, which will lead to their defending multiple suits wherein damages are claimed. Again, there is hardly any evidence to justify the claim that “busybodies” or “meddlesome interlopers” would be less committed to presenting their cases in court than those whose standing the courts upheld. This is what Professor Jaffe said on the point:

It is argued that unless the plaintiff is a person whose legal position will be affected by the court’s judgment, he cannot be relied on to present a serious, thorough and complete argument. I do not know whether there is any way of finding out whether non-Hohfeldian plaintiffs are less zealous than Hohfeldian ones. My own recourse is to my understanding of human nature, which tells me that there is no predictable difference between the two. If it were thought that self-aggrandizement is a more dependable motive than ideological interest, I would point out that it usually requires a financial outlay to undertake a lawsuit, so that once launched the ideological plaintiff has, at least, committed a sum of money and so, in some sense, has a financial investment to protect.¹²²⁷

Restrictions on standing in public interest litigations deny the society or public the benefits that are likely to accrue if the courts are to hear on the merits and make pronouncements on certain public actions that they would have otherwise denied standing to the plaintiffs.¹²²⁸ It has also been contended that “one man’s ‘busybody’ may be another’s saviour.”¹²²⁹

¹²²⁴ The Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest* LRC 46 1980.

¹²²⁵ Zamir I, *The Declaratory Judgment* (1962) 272.

¹²²⁶ (1973) Q.B. 629. See also the comments of Lord Edmund Davies in *Gouriet v U.P.W.* (1977) 3 ALL E.R. 70.

¹²²⁷ Jaffe LJ “The Citizen as Litigant in Public Actions: The Non – Hohfeldian or ideological plaintiff (1968) 116 4 of *Penn L. R* 1033, 1037-38.

¹²²⁸ Davies KC *Administrative Law of the Seventies* (1976) 521-523. See also M. Cappelletti, *Public interest parties and the Active Role of the judge in Civil Litigation* (1975).

¹²²⁹ The Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest* LRC 46 1980.

The fear of multiplicity of actions could be contained where the courts exercise their discretion judicially and judiciously. It has always been part of Nigerian's jurisprudence that the courts may not only strike out vexatious and frivolous actions but may condemn the plaintiffs to substantial costs. But whether a public suit is vexatious or not, the courts have a discretion to grant declaratory or injunctive reliefs whether in public or private litigations. The courts may exercise the discretion not to grant a declaratory relief even where an action is admitted or uncontested.¹²³⁰ In injunctive reliefs, the courts may on ground of balance of convenience, refuse to grant the relief even if other conditions are met.¹²³¹ In exercising that discretion, they are guided by a number of factors. Strayer observed:

...they (the courts) have a discretion to refuse the declaration even when the action is properly instituted. Even if the plaintiff has standing, considerations of utility may deter the court from granting the declaration. The importance of the issue to the parties, the usefulness of a declaration in the dispute, the existence of sufficient facts on which to base a decision, the question of whether matters of public importance may also be conveniently settled at the time, the balance of convenience to the parties, and similar criteria will influence the court in the exercise of its discretion.¹²³²

There is hardly any persuasive argument that a relaxation of the strict rule of standing in public interest litigations will lead to multiplicity of suits and clog the administration of justice. The liberalization of standing rule by section 38 of the 1996 Constitution of South Africa in respect of the enforcement of the Bill of Rights, has not led to any explosion or uncontrollable explosion in litigations in the country. Our view is that even if the relaxation had been extended to public interest litigations, it would still not lead to any clogging of the wheel of the administration of justice. Attention was earlier drawn¹²³³ to the finding by Justice Aboki¹²³⁴ on reasons why from the Nigerian perspective, the rule of *locus standi* should be liberalized or relaxed. Justice Aboki opined that:

It will be appropriate at this point to proffer that for this country to remain governed under the rule of law and in view of the controversies the problem of *locus standi* has generated especially in constitutional matters, it is suggested that any future constitutional amendment should provide for access to court by any Nigerian in order to preserve, protect and defend the Constitution.¹²³⁵

¹²³⁰ *A-G Federation v Ajayi* (2000) 12 NWLR (Pt 682) 509 at 527 para C.

¹²³¹ See *Kotoye v CBN* (1989) 1 NWLR (Pt98) 419; *Ikechukwu v Nwugo* (1989) 2 NWLR (Pt 1010) 99 and *Allied Bank (Nig) PLC v Bravo W.A. Ltd* (1996) 3 NWLR (Pt 439) 710.

¹²³² Strayer B *Judicial Review of Legislation in Canada* (1968) 106; See also Oyudo GO *Locus Standi and Declaration Actions* (1987) 548-547.

¹²³³ See para 5.4.1 hereof.

¹²³⁴ *Fawehinmi v President, FRN* (2007) 14 NWLR (Pt 1054) 275 at 334-336 paras B-F.

¹²³⁵ *Supra* at 343 paras C-D.

Justice Aboki was right when he held that the constitutional provision on *locus standi* should be amended to grant unrestricted right of access to court to any Nigerian in respect of constitutional matters. This will aid the preservation, protection and defence of the Constitution.

5.6 Validity of the Fundamental Rights (Enforcement Procedure) Rules (FREPR).

Before considering other procedural challenges in the enforcement of human rights, it is necessary that the text examines the validity of the FREPR. This has become necessary because as stated earlier, the FREPR was made pursuant to the provision of section 42(3) of the 1979 Constitution and which Constitution has been replaced by the 1999 Constitution. The FREPR no doubt is by virtue of section 315 of the 1999 Constitution, an existing law. It remains extant until repealed. Section 315 (4)(b) of the Constitution defines an “existing law” thus: “Any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date”. Falana relied on the aforesaid provision and rightly contended as follows:

Following the emergence of the 1999 Constitution it has been contended, in certain legal circles, that the FREP Rules are no longer valid. The basis of such contention is that the 1979 Constitution under which the FREP Rules were made is no longer in operation. With respect, such contention is highly erroneous having regard to the provision of section 315(4)(b) of the 1999 Constitution wherein an “existing law” has been defined...¹²³⁶

He argued and rightly too that FREPR is an “enactment” within the intendment of section 315 of the 1999 Constitution and therefore an existing law¹²³⁷ The Lagos High Court in *Ibrahim vs Industrial Training Fund Governing Council & 2 Ors*¹²³⁸ held:

The Fundamental Rights (Enforcement Procedure) Rules 1979 were made by the Chief Justice of Nigeria pursuant to powers conferred on him by Section 42 of the 1979 Constitution. These Rules were re-enacted in 1990 by the defunct Federal Military Government of Nigeria as Cap 62 Laws of the Federation of Nigeria 1990. Cap 62 is an extant and existing Law and does not in my view cease to be operational merely because the 1979 Constitution had been replaced by that of 1999—which in any case contains the exact provisions as Chapter 4 of the latter—Fundamental Rights. See section 315 of the 1999 Constitution.¹²³⁹

¹²³⁶ Falana *Fundamental Rights Enforcement* (2004) 13.

¹²³⁷ See also Falana *supra* at 14.

¹²³⁸ (2001) 10 LHCR 80 at 82.

¹²³⁹ *Ibrahim v Industrial Training Fund Governing Council & 2 Ors* (2001) 10 LHCR 80 at 92. See also Falana *Fundamental Rights Enforcement* at 14-15.

The court rightly held that a contrary decision would lead to absurdity. The Rules having been made pursuant to a constitutional provision, have been held by the Court of Appeal in *Abia State University, Uturu v Anyaibe*¹²⁴⁰ to have “the same force of law as the Constitution itself”. We must quickly add that if any provision of the Rules is in conflict with any provision of the Constitution, it shall to the extent of its inconsistency be void.

5.7 Procedural challenges in the enforcement of fundamental rights

The Fundamental Rights (Enforcement Procedure) Rules (FREPR) are meant to facilitate easy access to the High Court for a speedy enforcement of fundamental rights. Ironically, the pedantic, technical and mechanical interpretations of the Rules, are in some cases, achieving the exact opposite. Some provisions of the Rules as interpreted and applied by the courts will now be examined.

5.7.1 The principal claim in the application must be for the enforcement of fundamental rights

The courts have held that it is a condition precedent to the invocation of the court’s jurisdiction to enforce fundamental rights that the principal claim must be based on an alleged or threatened violation of any of the provisions of Chapter IV of the Constitution and which Chapter deals with fundamental rights. Any failure to comply with this condition precedent renders the application incompetent and the court will not have jurisdiction to entertain it. Sometimes, the determination by the courts of what is the main, principal or incidental claim pales into confusion. The case of *Egbonu v Bornu Radio Television Corporation*¹²⁴¹ aptly shows how confusing and unjust, the interpretation of what a “principal claim” is, could be to an applicant. In the case, a preliminary objection was raised that the action was based on a wrongful dismissal and did not fall within the provisions of Chapter IV of the Constitution. It was argued that it is not a fundamental right for any person to be employed or to retain his employment. The High Court dismissed the objection. Thereafter, the matter was heard on the merit and the High Court declared the letters of suspension and termination of the appointment of the applicant illegal, unconstitutional, null and void. It was ordered that the respondent corporation, Bornu Radio Television Corporation should, reinstate the applicant to his job. The corporation appealed to the Court of Appeal.

¹²⁴⁰ (1996) 1 NWLR (Pt 439) 646 at 660 -661. See also *Fawehinmi v President, FRN* (2007) 14 NWLR (Pt 1054) 275 at 342-343 paras H-A where it was *inter alia* held that a statute made pursuant to the Constitution enjoys constitutional flavour and dignity.

¹²⁴¹ (1997) 12 NWLR (Pt531) 29.

The court allowed the appeal. The Court of Appeal held that when an application is brought under the Fundamental Rights (Enforcement Procedure) Rules, 1979, a condition precedent to the exercise of the Court's jurisdiction is that the enforcement of fundamental right or the securing of the enforcement thereof should be the main and not an accessory claim. In other words, the enforcement of fundamental rights or securing the enforcement thereof, should from the applicant's claim as presented, be the principal or fundamental claim, and not an accessory claim.¹²⁴²

In this case, the court said that the alleged breach of fundamental right of fair hearing under section 33 of the Constitution of the Federal Republic of Nigeria, 1979¹²⁴³ flows from the alleged suspension and termination of the appointment of the respondent. The termination of the appointment of the applicant was, having regard to all the circumstances in the case, including the reliefs claimed, the grounds for claiming the reliefs, the facts deposed to in the affidavit and further affidavit of the applicant, and most of the findings made by the learned trial Judge, the main claim or the fundamental issue in the case. The court held that it was the cause of action. On further appeal to the Supreme Court, it stated that the applicant's claim was partly for wrongful dismissal or termination of appointment and partly for breach of fundamental right.¹²⁴⁴ It further held that the principal claim being wrongful termination of appointment, which ought to be commenced by a writ of summons and which the applicant failed to do, the action was incompetent and it was struck out. It endorsed the judgment of the Court of Appeal on the incompetence of the claim.

Justice Uwais in his concurring judgment said that it would appear that where a set of facts or cause of action gives rise to multiple causes of action including a breach or threatened contravention of a fundamental right under the Constitution, the party so affected, as plaintiff, would have to bring two different actions at the same time. One of such actions will be by a writ of summons according to the provisions of the High Court (Civil Procedure) Rules and the other by a motion *ex parte* in accordance with the provisions of the Fundamental Rights (Enforcement Procedure) Rules. He said if that was done in the same High Court, it would perhaps be possible to have the cases consolidated.

¹²⁴² See *Federal Minister of Internal Affairs & Ors v Shugaba Abdulrahman Darman* (1982) 3 NCLR 915.

¹²⁴³ Same provision is contained in section 36 of the 1999 Constitution.

¹²⁴⁴ *Egbuonu v Bornu Radio Television Corporation* (1997) 12 NWLR (Pt 531) 29 at 40 para D.

However, he said that it seems that this may not be possible if the case based on fundamental rights is instituted in the Federal High Court since that court lacks the jurisdiction to hear some categories of the cases that could be initiated by a writ of summons. Consolidating a case initiated by writ of summons which invariably will need the calling of oral evidence, and a case filed pursuant to the FREPR which is based on affidavit evidence, is procedurally difficult, if not irregular. Justice Uwais appears to have overlooked that difficulty. The other issue is that it will amount to utter waste of resources and time if when a set of facts gives rise to multiple causes of action, multiple actions are instituted. There are several other Supreme Court and Court of Appeal cases all emphasizing that in a fundamental right application, the main or principal claim must be for the enforcement of fundamental right.¹²⁴⁵ Neither section 46(1) of the 1999 Constitution nor Order 2 (1) of the FREPR or any of its provisions stated that the principal claim must be based on the enforcement of a fundamental right. What should concern the courts should be the issue whether there is any allegation in the application that a person's fundamental right has been, is being or is likely to be infringed.

In *Anuka Community Bank v Olua*,¹²⁴⁶ it was argued in the Court of Appeal that the enforcement of fundamental rights of the applicant was not the main or principal cause of action and that the lower court was wrong to assume jurisdiction over the matter. In spite of the earlier decisions on the issue in favour of the said argument, Justice Tobi (as he then was) who delivered the judgment of the Court of Appeal rejected that argument and said: "The Constitution of the Federal Republic of Nigeria or any other constitution did not provide that the right of an individual to enforce his fundamental rights depends on a consideration whether the right breached is the "main or principal cause of action or fundamental issue before the court"¹²⁴⁷

Notwithstanding that the judgment of Justice Tobi is consistent with the provisions of the Constitution and promotes the cause of justice, the judgment will hardly be effective in Nigerian jurisprudence.

¹²⁴⁵ *Tukur v Government of Gongola State* (1997) 6 NWLR (Pt 510)549; *Uzoukwu v Ezeonu II*(1991)6 NWLR (Pt 200)708; *Sea Trucks Nig. Ltd v Pyne* (1999) 6 NWLR (Pt 607) 514; *Sokoto L.G. V Amale* (2001) 8 NWLR (Pt714) 224; *Dangtoe v Civil Service Commission of Plateau State* (2001) 4 SC (Pt. 11) 43.

¹²⁴⁶ (2000) 12 NWLR (Pt 682) 641.

¹²⁴⁷ *Supra* at 662 paras F-G.

This is because there are judgments of the Supreme Court¹²⁴⁸ which are to the contrary on the issue and which are binding on the Court of Appeal and High Courts under the doctrine of *stare decisis*.

Even if the claim or the enforcement of fundamental right is not the main or principle claim, but an incidental or accessory claim, the court should grant the relief if it is established and discountenance other claims. After all, the principle of severance of claims is duly recognized in the Nigerian law.¹²⁴⁹ The courts should not use obvious technicalities to stay the hands of justice. The trend in Nigerian law is that the court must do substantial justice rather than enthrone injustice on grounds of technicality.¹²⁵⁰ One area where the need to render substantial justice is very important is in the enforcement of fundamental rights.

5.7.2 The categories of persons that can apply for enforcement of the fundamental rights

Neither section 46(1) of the 1999 Constitution nor Order 1 Rule 2(1) of FREPR expressly defines the category of persons that can apply for the enforcement of their fundamental rights. In *Ahmad v S.S.H.A.*,¹²⁵¹ the Court of Appeal held that:

... there is no limitation or qualification to the nature of persons who may seek to enforce contravention of their right under Chapter IV of the Constitution. The enforcement of the right guaranteed under Chapter IV is beyond any argument and are without exception or qualification for all persons. The sections (sections 36 and 46 of the 1999 Constitution) undoubtedly give access to court for enforcement of the rights guaranteed under Chapter IV of the Constitution to all manner of people, without exception, who claim their rights have been trampled upon; just as section 6(6) gives access to court for enforcement and determination of all civil rights and obligations including right guaranteed under Chapter IV of the Constitution.¹²⁵²

It is our view that the provisions of section 36(1) and section 46(1) (2) aforesaid must be read subject to the specific provisions guaranteeing fundamental rights. As earlier noted in this text,¹²⁵³ some of the rights are limited to citizens and some are granted to “every one” or “any person”.

¹²⁴⁸ Such judgments of the Supreme Court include *Egbonu v Bornu Radio Television Corporation* (1987) 12 NWLR (Pt 531) 29 and *Tukur v Government of Gongola State* (1997) 6 NWLR (Pt 510) 549 and *F.R.N V Ifegwu* (2003) 15 NWLR (Pt 842) 113. Some recent cases where it was adjudged that in actions to enforce fundamental rights, the principal or main claim must be based on the enforcement of a fundamental right include *Gafar v Government of Kwara State* (2007) 4 NWLR (Pt 1024) 251 (Supreme Court); *W.A.E.C v Akinkunmi* (2008) 9 NWLR (Pt 1091) 151 (Supreme Court) and *W.A.E.C. v Adeyanju* (2008) 9 NWLR (Pt 1092) 270 (Supreme Court). All these cases were decided after the judgment of Niki Tobi J.C.A (as he then was) in *Amuka Community Bank v Olua supra*.

¹²⁴⁹ See *Nwobodo v Onoh* (1984) 1 SC 1.

¹²⁵⁰ *Falobi v Falobi* (2002) 30 WRN 50 and *Nishizawza Ltd V Jethwani* (1984) 12 S.C. 234.

¹²⁵¹ (2002) 15 NWLR (Pt 791) 539.

¹²⁵² *Supra* at 563 paras B-D.

¹²⁵³ Chapter 3 *supra* .

“Any person” under section 46(1) or “a person” under section 36(1) cannot be relied upon by a non-citizen to invoke the jurisdiction of the High Court for the enforcement of the fundamental right of privacy under Section 37. The right under the section is guaranteed to citizens alone. Again, a corporation cannot come within the definition of a “citizen”. It is, therefore, not correct as held by the Court of Appeal that there is no limitation or qualification on the nature of persons who may invoke the jurisdiction of the High Court for the enforcement of fundamental rights.

Artificial persons are entitled to enforce their fundamental rights subject to any limitation contained in the particular provision creating the right. Adeyinka J has held that sections 36, 40 and 41(1) and (2) (sic) “apply to a person both human and corporate person”.¹²⁵⁴ Other than his mistaken reference to section 41(1)(2) instead of section 42(1)(2) which he intended and had mentioned earlier, Justice Adeyinka was right. Sections 36 and 40 of the 1979 Constitution respectively creates the right to freedom of expression and the right to property. Section 42 thereof creates the right of redress.

One of the issues that arose in *Onyekwuluje v Benue State Government*¹²⁵⁵ was whether the provisions of Chapter IV of the 1999 Constitution on fundamental rights apply to artificial persons. The respondents’ counsel argued that Chapter IV of the 1999 Constitution, does not apply to artificial persons. That they are rights peculiar to human beings and that they are recognized as belonging to individuals by the very fact of their humanity.¹²⁵⁶ He further contended that the second appellant being a limited liability company, is not a “person” within the contemplation of the Fundamental Rights (Enforcement Procedure) Rules, 1979. And that it is not entitled to any of the benefits of the application brought under the said Rules.¹²⁵⁷

Justice Ogbuagu rejected the submission and stated that it must be borne in mind that it is settled law that a limited liability company such as the second appellant (if indeed limited), is at common law, a *persona ficta* that is, a juristic personality. Consequently, it can only act through its agents or servants.¹²⁵⁸

¹²⁵⁴ *Tell Communication Ltd v State Security Service* (2000) 2 HRLR 104 at 138 para H.

¹²⁵⁵ (2005) 8 NWLR (Pt 928) 614 .

¹²⁵⁶ *Supra* at 646 paras B-C. He relied on Umezuruike UO, *Introduction to Public International Law* (1999)144.

¹²⁵⁷ *Supra* at 646 paras C-D. He relied on Nwabueze BO, *Ideas and Facts in Constitution Making* (1999) 112.
¹²⁵⁸ *Onyekwuluje v Benue State Government* (2005) 8 NWLR (Pt 928) 614 at 646 paras E-F. See the observation/pronouncement in *Lennards Carrying Co. v Asiatic Petroleum Co Ltd* (1915) A.C. 705 at 713-714 by Viscount Haldane, L.C; the case of *Mitchell v Egyptian Hotels Ltd* (1915) A.C. 1022 at 1037 and our local case of *Kate Enterprises Ltd v Daewoo (Nig) Ltd* (1985) ANLR (Pt. 1) 236; (1985) 2 NWLR (Pt. 5) 116 at 135-per Uwais, JSC (as he then was).

He held that a company or corporation could only conduct its affairs through its officers, particularly like the Managing Director (such as the first appellant), directors and others in similar position. This is because the company or corporation, is itself, a legal abstraction and therefore, what these people say at one time or the other, can become relevant or material if any dispute should arise at any time touching on them.¹²⁵⁹ Justice Ogbuagu further held that limited liability companies like the second appellant are not robots. They act and operate, through human, beings that is, person or persons. He considered the argument that Chapter IV of the 1999 Constitution does not apply to artificial persons as faulty and misconceived.

5.7.3. Whether the facts in support of the application shall be contained in the statement or verifying affidavit

Ordinarily, whether the facts in support of an application for the enforcement of fundamental rights shall be stated in the Statement in support of the application or the Verifying Affidavit should be the least issue that should bother the courts. Strangely, that is not so. Order 1 Rule 2(3) of the FREPR provides thus: “An application for such leave must be made *ex parte* to the appropriate court and must be supported by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by an affidavit verifying the facts relied on”.

In *Oyawole v Shehu*,¹²⁶⁰ this provision came up for interpretation. The applicant stated the facts in support of his application in a supporting affidavit. The High Court refused to grant leave on the ground that there was a breach of a condition precedent, that is, the provisions of Order 1 Rule 2 (3) of FREPR. It reasoned that the facts should be stated in the statement and then verified by an Affidavit. On appeal to the Court of Appeal, it dismissed the appeal, holding that an affidavit, which contained all the facts the applicant was relying on in the application was defective. The Court further held that by virtue of Order 1 Rule 2(3) of the Fundamental Rights (Enforcement Procedure) Rules 1979, an applicant is required to set out the facts relied on in the statement in support of his application. The statement of facts should not be on oath. After setting out the facts, an applicant is then required to verify on oath the facts relied on. In the instant case, it said that the appellant did not state the facts in the statement in support.

¹²⁵⁹ *Supra* at 646 paras G-H. The cases of *Bolton (Engineering) Co. Ltd v Graham & Sons* (1957) 1 Q.B. 159 at 172-173; *Lennards Carrying Co. Ltd v Asiatic Petroleum Co. Ltd (supra)*, and *Carlen (Nig) Ltd v UNIJOS & Anor.* (1994) 1 NWLR (Pt. 323) 631 at 669-670; (1994) 1 SCNJ 72 and *Nwobosi v A.C.B. Ltd* (1995) 6 NWLR (Pt 404) 658.

¹²⁶⁰ (1995) 8 NWLR (Pt 414) 484.

Instead, the facts giving rise to the proceedings were contained in a supporting affidavit in contravention of Order 1 Rule 2(3) of the Fundamental Rights (Enforcement Procedure) Rules.¹²⁶¹

On the effect of the failure to verify facts relied upon in an application for the enforcement of fundamental rights, the Court said it makes the application incompetent. According to the Court of Appeal, by virtue of Order 1 Rule 2(3) of the Fundamental Rights (Enforcement procedure) Rules, 1979, verifying the facts relied upon is a condition precedent to granting leave to enforce fundamental right. This is because, at this stage, the proceeding is *ex parte* and the order to be made would be based on facts, and such facts must be verified by an affidavit. The verifying affidavit is the *prima facie* evidence of the statement in the application. And it would certainly not be sufficient to merely aver in the affidavit in support of the application that the deponent thereof believes the facts contained in the supporting affidavit to be true and correct.¹²⁶² There is nothing in the provisions of Order 1 Rule 2 (3) of FREPR that indicates that the facts relied on must be contained in the Statement rather than affidavit.

In *Director, SSS v Agbakoba*¹²⁶³ the facts were stated in a supporting affidavit. Though it was not challenged, the Court of Appeal could not be bothered as it granted the reliefs sought. Ayoola J.C.A (as he then was) who read the lead judgment said: “in the procedure under the Rules, the affidavits constitute the evidence”.¹²⁶⁴ It beats comprehension how the Court of Appeal in *Oyawole’s case* declined to allow the appeal over something as mundane as where the facts in support of an application were stated. The important issue ought to have been whether the facts as stated in the statement and verified on affidavit or as entirely stated in an affidavit established an infringement of a fundamental right. In which case, the court was duty bound to have granted the reliefs rather than elevating technicality over justice.

¹²⁶¹ (2005) 8 NWLR (Pt 928)614 at 494–495 paras H-A. The decision in *Oyawole’s case supra* has been followed by the Court of Appeal in *D- G, SSS v Ojukwu* (2006) 13 NWLR (Pt 998) 575.

¹²⁶² *Onyawole v Shehu* (1995) 8 NWLR (Pt 414) 484 at 495 para C.

¹²⁶³ (1994)6 NWLR (Pt 351) 475.

¹²⁶⁴ *Supra* at 500 para 9.

5.7.4 The hearing of the application for enforcement of the right must be entered within 14 days of the grant of leave

After leave has been granted to an applicant on an *ex parte* application to enforce his fundamental right, he must pursuant to Order 2 Rule 1 (2), file the motion or originating summons and “the motion or summons must be entered for hearing within fourteen days after such leave has been granted”. The initial difficulty regarding this provision is what happens where through no fault of the applicant, the application whether by motion or summons, is not entered for hearing within 14 days of the grant of leave?

In *Ogwuche v Mba*,¹²⁶⁵ the High Court granted leave to the respondents on 27 July 1989 and fixed the return date for the hearing of the motion on notice to 7 September 1989. This was a period of more than 40 days after leave was granted pursuant to the *ex-parte* application. After the hearing of the motion on notice, the High Court ruled in favour of the respondents. The appellants appealed to the Court of Appeal and among the issues raised by them was the incompetence of the application in that the return date was not within fourteen days of the grant of the leave. The Court of Appeal (Jos Division) held that the return date for the hearing of the motion on notice was crucial and that it must be within fourteen days from the date the leave was granted. Any thing more than that invalidates the whole proceedings. It observed that in the matter on appeal, the return date was fixed for the 7 September 1989, more than forty days after leave was granted to the respondents and that this was more than the period of fourteen days allowed by law. The court further held that the word “must” as used in Order 2 Rule 1(2) of FREPR is mandatory and that effect must be given to the word. Therefore, the court must fix the motion on notice for hearing within fourteen days.

The appeal was allowed and the judgment of the High Court was declared a nullity. It is inconceivable that a party would be denied justice on account of the fault or mistake of the court. This contradicts the entire essence of justice in that a party is allowed to suffer injustice through the fault of the very court that he submitted his case for justice. It is shocking that the injustice was still condoned after it was discovered that it was the fault of the court that caused the matter being fixed beyond fourteen days after leave was granted.

¹²⁶⁵ (1994) 4 NWLR (Pt 336) 75.

The embarrassing and unjust situation created in *Ogwuche's* case where it was held that the proceedings must take place within fourteen days of the grant of leave, was criticized in another decision of the Court of Appeal (Enugu Division) as being too wide and not representing the law.¹²⁶⁶

In *Attorney-General, Federation v Ajayi*,¹²⁶⁷ one of the grounds the appellant sought to impugn the judgment delivered in favour of the respondent at the High Court, was that the motion on notice was entered for hearing more than fourteen days after leave was granted. The Court of Appeal (Lagos Division), per Aderemi J.C.A (as he then was) held as follows: "... the fixing of matters for hearing in the court is an exclusive function of the court officials. Where there is any default in the performance of the functions of the officials of the court the blame cannot and must never be placed at the door step of a litigant who is seen to have carried out his own duty under the law or the rule."¹²⁶⁸

The Court refused to follow *Ogwuche's* case and further held that it will be contrary to all principles to allow litigants to suffer for the mistake of the court registry. The registries as well as the parties are duty bound to observe the rules of court. Litigants or counsel on their behalf file applications at the court registry. The registry has the obligation of giving a hearing date.¹²⁶⁹

The case of *Umoh v Nkan*,¹²⁷⁰ presented a different scenario. There the respondents who had fourteen days to file the motion on notice did not do so until sixteen days after leave was granted and two clear days after leave had lapsed or was extinguished. Nevertheless, the application was heard and granted in favour of the respondents. On appeal to the Court of Appeal (Calabar Division), it was held that there was non-compliance with Order 2 Rules 1(2) of the Fundamental Rights (Enforcement Procedure) Rules, 1979. The said Order 2 Rule 1(2) which prescribes that the summons or motion on notice must be fixed for hearing within fourteen days of obtaining leave to enforce fundamental rights and its non-compliance rendered the proceedings on the motion on notice a nullity. It was also held that the trial court lacked the jurisdiction to hear the motion on notice.

¹²⁶⁶ *Ezechukwu v Maduka* (1997) 8 NWLR (Pt 518) 625 at 671 per Ubaezonu, J.C.A.

¹²⁶⁷ (2000) 12 NWLR (Pt 682) 509.

¹²⁶⁸ *Supra* at 532 para H.

¹²⁶⁹ (2008) 14 NWLR (Pt 1106) 161.

¹²⁷⁰ (2001) 2 NWLR (Pt 701) 512.

Consequently, the Court of Appeal ruled that the judgment that was delivered by trial court on the 3 December 1998 was delivered without jurisdiction and is a nullity. The judgment of the Court of Appeal is consistent with the relevant provision of the FREPR. The applicant failed to file the motion on notice within 14 days of the grant of leave and he should accept the consequences of that failure.

In *EFCC v Ekeocha*,¹²⁷¹ in which the Court of Appeal delivered judgment on 15 February 2008, it was emphasized that the motion for enforcement must be filed and entered for hearing within 14 days. It was further held that the procedure provided in the FREPR is a special one and that non-compliance is incurably fatal to the enforcement of the remedy or right.

5.7.5 The motion or summons must be served on all the parties directly affected

Order 2 Rule 1(3) of the FREPR provides as follows:

The motion or summons must be served on all persons directly affected, and where it relates to proceedings in or before a Court, and the object is either to compel the court or an officer thereof to do any act in relation to the proceedings or to quash them or any order made therein, the motion or summons must be served on the registrar of the court, the other parties to the proceedings and, where any objection to the conduct of the judge is made, on the judge.

Ordinarily, the above provision should not attract any controversy, as it is consistent with the principles of fair hearing. The only problem is whether the provision stipulates that service must be personal and which excludes substituted service by pasting the processes on the last known abode or work place of the respondent. In *Beko Ransome-Kuti v State Security Service*,¹²⁷² the Federal High Court held that the said Order 1 Rule 1(3) did not prescribe any mode or manner of service of the motion or summons on all the persons directly affected. That being the case, it further held that the rule does not exclude substituted service which may take different forms, for example, by pasting the processes at the last known address or work place of the person affected, or by posting the processes to the last known address of the person to be served or by advertisement, among others.

The judgment is in accord with the law regarding service in a case where no particular mode or manner of service is stipulated. But the Court of Appeal (Enugu Division) had a different view in *Ngige v Achukwu*.¹²⁷³

¹²⁷¹ (1995) FHCLR 397 at 402.

¹²⁷² (2005) 2 NWLR (Pt 909) 123.

¹²⁷³ (2005) 2 NWLR (Pt 999) 123.

In Ngige’s case, the Governor of Anambra State, the State Attorney-General and the Inspector-General of Police were all respondents in the application for the enforcement of fundamental right. The court granted an order for the first appellant, the Governor, to be served by means of substituted service. It eventually granted the reliefs sought in the substantive matter. On appeal, the mode of service of the process on the appellants was challenged on the ground that it was not personal service. Ogebe J.C.A (as he then was) delivering the judgment on appeal said: “A motion must be served on all persons directly affected. *This rule connotes that the service must be personal.* The first appellant was ordered to be served by substituted service contrary to the express provisions of Order 2 Rule 1(3)”.¹²⁷⁴

There is nothing in Order 2 Rule 1(3) of the FREPR that explicitly or implicitly provides that the mode of service must be personal service. Again, the judgment overlooked one very important fact and that is, there is usually tight security cordon around some public officials and this makes it difficult to serve them with court processes.

These officials include the Governor of a State, Inspector-General of Police, State Commissioner of Police and Federal Attorney-General. Court officials cannot easily break through the security cordon. It is also a known fact that when some parties to a legal process get wind of a process filed in court, they resort to evading service. In such a case, it becomes extremely difficult to effect personal service. Such parties are usually served by substituted means. The judgment is yet another clog on the enforcement of fundamental rights.

5.7.6 An affidavit of service must be filed before the hearing of application

Order 2 Rule 1(4) of the FREPR provides as follows:

An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the motion or summons must be filed before the motion or summons is listed for hearing, and if any person who ought to have been served under paragraph 3 has not been served, the affidavit must state that fact and the reason why service has not been effected, and the said affidavit shall be before the Court or judge on the hearing of the motion or summons.

This provision did not indicate who should swear to an affidavit of service. Under the country’s civil procedure rules, it is generally the duty of court bailiffs to serve court’s processes and depose to and file affidavit of service. Though, upon an application, a court may appoint any person as a special bailiff to effect service of court’s processes.

¹²⁷⁴ *Supra* at 142 para G. Emphasis supplied.

Notwithstanding that Order 2 Rule 1(4) made no mention whatsoever that it is the applicant who must depose to the affidavit of service, the Court of Appeal in *The State v The Commissioner of In re: Appolos Udo*,¹²⁷⁵ rejected the argument of the applicant's counsel that the officers of court have the responsibility of deposing to the affidavit of service and that it will be patently unjust to deny the applicant a relief which he may otherwise be entitled to purely on a technical defect not due to his own error. The court eventually refused the application. It held as follows:

The affidavit must be deposed to by the Applicant (in this case the Appellant or any person who has authority to do so) to construe otherwise is to make an officer of the court who ordinarily is to report process of service to state reasons why process of court has not been served. It is therefore my view that the affidavit must be filed and sworn to by the Applicant before the motion can be heard or listed for hearing.¹²⁷⁶

Apart from the fact that Order 2 Rule 1(4) placed no obligation on the applicant, it is untenable and legally indefensible for an applicant who has no duty to effect service, to be the one to depose to an affidavit of service after the bailiff or an officer of court had affected service of court's processes. The judgment does not represent the true state of the law.¹²⁷⁷

An opportunity occurred for the Court of Appeal to adopt a purposive interpretation of Order 2 Rule 1(4) of the FREPR in *Chukwuogor v Chukwuogor*,¹²⁷⁸ but it declined to take advantage of it. It followed and relied on the strict and rigid interpretation in *Re Appollos Udo*.¹²⁷⁹ It held that there is no doubt that the content of the affidavit envisaged in Order 2 rule 1(4) of the Fundamental Rights (Enforcement Procedure) Rules must be supplied by the applicant or deposed to by him.¹²⁸⁰ That where the law prescribes the doing of a thing as a condition for the performance of another, failure to do such thing renders the subsequent act void.¹²⁸¹ The above interpretation like the one in *Re Appollos Udo*¹²⁸² made a fundamental error. The Court of Appeal in either case glossed over the fact that it is the court bailiff that serves the legal processes. So an anomalous situation is created whereby after the service of the process or processes by the court bailiff, an applicant who in most cases did not accompany the bailiff to serve the processes, will then depose to and file an affidavit stating how service was done in breach of the hearsay rule. This is one technicality that defies comprehension.

¹²⁷⁵ (1987) 4 NWLR (Pt 63) 120.

¹²⁷⁶ *Supra* at 126 paras E-F.

¹²⁷⁷ Similar decisions were given by Ahanonu J of the High Court of Enugu in *Nwaeze v Inspector-General of Police* (2001) ICHR 449 and Adah J at the Federal High Court in *Odojin v Inspector-General Police* (2001) ICHR 440.

¹²⁷⁸ (2006) 7 NWLR (Pt 979).

¹²⁷⁹ *Supra* .

¹²⁸⁰ *Supra* 318 para D.

¹²⁸¹ *Supra* at 319 para E.

¹²⁸² *Supra* .

It was further held that non-compliance with the mandatory provisions of Order 2 Rule 1(4) of the said Rules is not a mere technicality. It is a fundamental vice that affected the root of the application. And that the failure to file the affidavit by the applicant affects the hearing of the application and the application cannot be said to be properly before the court.¹²⁸³ The appellants' counsel argued that they filed an affidavit of service on 9 November 2001 in compliance with the provisions of Order 2 Rule 1(4) of the said Rules. But the Court of Appeal said that from the record of proceedings, the order of the court granting leave to the appellants to enforce their fundamental rights, slated the motion on notice for hearing on 10 April 2001. Therefore, the affidavit of service filed on November 2001 was filed 7 months after the matter was entered for hearing. It held "that the said affidavit was filed hopelessly out of time prescribed under Order 2 Rule 1(4) of the Rules".¹²⁸⁴

If the Court of Appeal was inclined to do justice or substantial justice, it would not have bothered itself about the actual date the affidavit of service was filed provided it was filed before the motion on notice or summons was eventually heard. A party who was duly served with the originating processes, will be given opportunity to truncate the cause of justice if the affidavit was filed after the matter had been listed for hearing but before it was actually heard. Situations frequently occur where after a matter is listed for hearing, it may not go on and is adjourned to a new date. A respondent will not suffer any injustice if the affidavit in such circumstances was not filed before the matter was listed for hearing, but eventually filed before the matter was indeed heard. The Court of Appeal justified its decision when it held that:

In the interpretation of statutes, a court is obliged to adhere strictly to the interpretation only intended by the legislature even if such strict construction appears punitive to the litigant. Courts do not administer justice in the abstract and the justice administered by the courts is justice in accordance with the law. It is only by the orderly administration of law and obedience to the rules that legal justice can be attained.¹²⁸⁵

The above dictum represents an adherence to technicality at the expense of justice. It will work injustice and scandalously defeat the whole purpose of the enforcement of fundamental rights if a court will still be "obliged to adhere strictly" to a construction of statute that "appears punitive to the litigant". This will run against the demand of the law that the courts must render substantial justice.

¹²⁸³ *Chukwuogor v Chukwuogor* (2006) 7 NWLR (Pt 979) at 320 paras A-B.

¹²⁸⁴ *Supra* at 320 paras F-H.

¹²⁸⁵ *Supra*.

5.7.7 The FREPR as one of the modes for the enforcement of fundamental rights

It is inconceivable that the mode of enforcement of fundamental rights will stir any controversy in Nigeria. Unfortunately it does. Among writers, there is divergence of opinions. Falana contends that the FREPR “constitute the only mode of procedure for securing the enforcement of fundamental rights in Nigeria”.¹²⁸⁶ On the other hand, two writers have argued to the contrary and insist that: “Neither section 46 of the 1999 Constitution nor the rules made under it excludes the application of other means of their enforcement whether under the common law, statute or rules of court.”¹²⁸⁷ Among the courts, there are conflicting decisions too.¹²⁸⁸

On whether the procedure in the FREPR for enforcement of fundamental rights provisions in the Constitution and African Charter, constitute the only permissible mode of enforcement, the Court of Appeal held that though the procedure for enforcement of the rights guaranteed under African Charter may be through the Fundamental Rights (Enforcement Procedure) Rules, that does not constitute the only permissible mode. It is permissible to come by way of originating summons as well. The manner by which the enforcement of the fundamental rights provisions in Chapter IV of the Constitution is brought is irrelevant, as long as it is clear that such application is seeking redress for an infringement of the rights guaranteed under the Constitution.¹²⁸⁹ It has also been held by the Court of Appeal that declaratory and other reliefs can be sought and obtained to enforce and protect fundamental rights by filing an action in a High Court and that the manner in which the court is approached for the enforcement of a fundamental right does not matter once it is clear that the originating process seeks redress for the infringement of the rights so guaranteed under the Constitution. The court process may be by the Fundamental Rights (Enforcement Procedure) Rules or by originating summons or indeed by writ of summons.¹²⁹⁰

Among the Justices of the Supreme Court, there are conflicting opinions too. In *Din v Attorney-General of the Federation*,¹²⁹¹ Justice Nnaemeka-Agu held the opinion that the FREPR prescribed the correct and only mode of enforcement of fundamental rights. Justice Eso had a contrary opinion in *Saude v Abdullahi*.¹²⁹²

¹²⁸⁶ Falana *Fundamental Rights Enforcement* at paragraph 2.22.

¹²⁸⁷ Ojukwu E and Ojukwu C, *Introduction to Civil Procedure* (2002) 358.

¹²⁸⁸ In *Lafiaji v Military Administrator Kwara State* (1995) FHCLR. 321, Jega J of the Federal High Court, Ilorin, held that FREPR is not the only mode for enforcement. The Court of Appeal in *Udene v Raphael Ugwu* (1997) 7 NWLR (Pt 471) 57 and *Ezechukwu v Maduka* (1997) 8 NWLR (Pt 518) 635, respectively held that FREPR constitute the only mode of procedure for the enforcement of fundamental rights.

¹²⁸⁹ *Oruk Anam L.G. v Ikpa* (2003) 12 NWLR (Pt. 835) 588 at 577–578 paras H–B. *Saude v Abdullahi* (1989) NWLR (Pt 116) 387 [referred to and followed].

¹²⁹⁰ *A-G, Federation v Abule* (2005) 11 NWLR (Pt (36) 369 at 390 paras B – D.

¹²⁹¹ (1988) 4 NWLR (Pt 87 147 at 186.

¹²⁹² (1989) 4 NWLR (Pt.116) 387 at 4.8– 419.

According to Justice Eso, the manner of enforcement of fundamental right did not matter provided that it is clear that it seeks redress for the enforcement of the fundamental rights guaranteed by Chapter IV of the Constitution. Equally in *Ogugu v the State*,¹²⁹³ Justice Bello asserted that section 42 of the 1979 Constitution¹²⁹⁴ does not exclude the application of other means of enforcement of fundamental rights under the common law or statutes or rules of courts.

The controversy was finally put to rest in *F.R.N. v Ifegwu*¹²⁹⁵ where in delivering the judgment of the Supreme Court, Justice Uwaifo said:

It is not in doubt that declaratory and other reliefs can be sought and obtained to enforce and protect fundamental rights by filing action in a High Court. The manner in which the court is approached for the enforcement of a fundamental right is hardly objectionable once it is clear that the originating court process seeks redress for the infringement of the right so guaranteed under the Constitution. The court process could come by Fundamental Rights (Enforcement Procedure) Rules or by originating summons or indeed by writ of summons. That seems to underline the concerns in regard to redressing a contravention of a fundamental right by liberalising the type of originating process without the person affected being inhibited by the form of action he adopts. It is enough if his complaint is understood and deserves to be entertained.

It is now clear that the mode of enforcement of fundamental rights in Nigeria is not restricted to the procedure in the Fundamental Rights (Enforcement Procedure) Rules. An aggrieved party or the applicant can come under any form of action under the common law, statute or rules of court; provided it is clear that he seeks a redress for the enforcement of fundamental rights. The liberalization of the procedure for the enforcement of fundamental rights is highly commendable. It promotes justice.

5.7.8 Applicability of the FREPR to the African Charter and other human rights treaties

Order 1 Rule 2 (1) of the FREPR provides as follows: “Any person who alleges that any of the Fundamental Rights provided for in the Constitution and to which he is entitled, has been, is being, or is likely to be infringed may apply to the Court in the State where the infringement occurs or is likely to occur, for redress”. In Order 1 Rule 2 of the FREPR, it is stated that “*fundamental right* means any of the Fundamental Rights provided for in Chapter IV of the Constitution”. It is easy to conclude from the foregoing provisions that the FREPR can only be relied upon to enforce the rights guaranteed under Chapter IV of the Constitution. However, in view of the full domestication of African Charter in Nigeria, can the provisions of the FREPR be relied upon to enforce the rights provided under the Charter?

¹²⁹³ (1998) 1 HRLR A 167 at 187 para D-E. See also *Director, SSS V Agbakoba* (1996) 3 NWLR (Pt 595) 314.

¹²⁹⁴ Section 46 of the 1999 Constitution.

¹²⁹⁵ (2003) 15 NWLR (Pt 842) 113 at 179 paras B-E.

It has to be recalled that under the fundamental rights provision of the Constitution, the only economic right guaranteed is the right to property.¹²⁹⁶ On the other hand, the African Charter made provisions for a number of socio-economic rights.¹²⁹⁷

Unlike other mechanisms for the enforcement of rights including human rights in the Nigerian legal system, the FREPR was enacted to aid a speedy enforcement of fundamental rights. There is therefore a lot to gain if the provisions are applicable to the African Charter.

The issue of the applicability of the FREPR in the enforcement of the rights guaranteed by the African Charter came up in *Ogugu v State*.¹²⁹⁸ In dealing with the issue, Justice Bello who wrote the lead judgment of the Supreme Court had this to say:

I am inclined to agree with Mr. Agbakoba that the provision of Section 42 of the Constitution for the enforcement of the fundamental rights enshrined in chapter IV of the Constitution is only permissible and does not constitute a monopoly for the enforcement of those rights. The object of the Section is to provide a simple and effective judicial process for the enforcement of fundamental rights in order to avoid the cumbersome procedure and technicalities for their enforcement under the rules of the common law or other statutory provisions. The object has been achieved by the Fundamental Rights (Enforcement Procedure) Rules 1979¹²⁹⁹.

Justice Bello further held as follows:

However, I am unable to agree with Mr. Agbakoba that because neither the African Charter nor its Ratification and Enforcement Act has made a special provision like Section 42 of the Constitution for the enforcement of its human and peoples' rights within a domestic jurisdiction, there is a lacuna in our laws for the enforcement of rights. Since the Charter has become part of our domestic laws, the enforcement provisions like all our other laws fall within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto.¹³⁰⁰

Still on the issue, Justice Bello stated that "the human and peoples' right of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court".¹³⁰¹ The effect of the foregoing pronouncements of Justice Bello is that the FREPR like other rules, practice and procedure, can be relied upon to enforce the rights created by the African Charter. If there is any doubt in respect of the pronouncements of Justice Bello, and there is none, the contribution of Justice Ogwuegbu in the case was direct and pungent.

¹²⁹⁶ See Sections 43 and 44 of the 1999 Constitution.

¹²⁹⁷ Such rights include the right to work under equitable and satisfactory conditions, Article 15; the right to enjoy the best attainable state of physical and mental health- article 16; the right to education, Article 17; the right to wealth and natural resources, Article 21; the right to economic, social and cultural development, Article 22 and the right to a general environment favourable to development, Article 24.

¹²⁹⁸ (1998) 1 HRLRA 167.

¹²⁹⁹ *Supra* at 187 paras D-G.

¹³⁰⁰ *Supra* at 187 paras G-H.

¹³⁰¹ *Supra* at 189 paras A-B.

Justice Ogwuegbu held as follows:

By the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Vol. 1 Laws of the Federation of Nigeria. 1990, Nigeria adopted the African Charter on Human and Peoples' Rights as part of their municipal law. The provisions of that Charter are enforceable in the same manner as those of Chapter 4 of the 1979 Constitution by application made under Section 42 of the Constitution.¹³⁰²

In *Abacha v Fawehinmi*,¹³⁰³ the trial court *inter alia* held that it amounted to the use of a wrong procedure for the applicant thereat to rely on the FREPR to enforce the right guaranteed by the African Charter. The Court of Appeal endorsed the decision of the trial court on the issue.¹³⁰⁴

On appeal to the Supreme Court, Justice Ogundare who delivered the judgment of the court, while relying on the aforesaid pronouncements of Justice Bello in *Ogugu's case*, said that the applicant at the trial court could have come by way of an action commenced by writ or by any other permissible procedure such as the FREPR. He held that the Court of Appeal erred in holding that the applicant used a wrong procedure. And that the trial court was equally wrong in declining jurisdiction to entertain the action for the same reason.¹³⁰⁵ In his contribution on the issue, Justice Achike had this to say:¹³⁰⁶

I cannot agree more with learned cross-appellant's counsel that *Ogugu v State (supra)* is a good authority that the African Charter, having been duly incorporated into our municipal laws, it would follow that the procedural provisions set out in the Fundamental Rights (Enforcement Procedure) Rules under Chapter 4 of the 1979 Constitution for enforcing fundamental rights enshrined in the Constitution, are applicable by extension, to the provision of the African Charter.

Justice Uwaifo on his part held that “ in this particular situation in which reliance is placed on the African Charter where no procedure for commencing action is provided, there can be no doubt that any appropriate procedure may be adopted and this includes the Fundamental Rights (Procedure) Rules”.¹³⁰⁷ From the forgoing, it is clear that in invoking the jurisdiction of the High Court to enforce any of the rights created by the African Charter, an applicant is entitled to rely on the provision of the FREPR.

¹³⁰² *Ogugu v State* (1998) 1 HRLRA 167 at 216 paras C-E.

¹³⁰³ (2000) 6 NWLR (Pt 660)228.

¹³⁰⁴ The decision of the Court of Appeal is reported in (1996) 9 NWLR (Pt 475) 710.

¹³⁰⁵ *Abacha v Fawehinmi* (2006) 6 NWLR (Pt 660) 228at 293- 294 paras H-A.

¹³⁰⁶ *Supra* at 320- 321 paras H-D.

¹³⁰⁷ *Supra*.

The same situation is not applicable to non-domesticated treaties like International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

A search of the Nigerian law reports did not reveal any case where an applicant sought to rely on the FREPR to enforce any of the human rights contained in ICCPR, ICESCR, CEDAW or any undomesticated treaty or treaties. Equally, there is no decision of any Nigerian court on the propriety or otherwise of invoking the provisions of the FREPR to enforce rights provided for in undomesticated treaties. The activism of some Nigerian judges who when expounding municipal law, allowed the universal principles of human rights to seep into their decisions, should be encouraged. That is how far the courts are prepared to go for now.

5.8 Right to legal representation

It is clear from the examination of the procedural challenges in the enforcement of human rights that the challenges are technical in nature. To that extent, it requires a legal practitioner to be articulate and file an action pursuant to the rules to enforce human rights in Nigerian Courts. The inability of a victim of human rights violations to have legal representation will negatively impact on the right to enforce human rights.

Under section 36 of the 1999 Constitution, the right to fair hearing includes the right to every person who is charged with a criminal offence to defend himself in person or by legal practitioners of his choice. Every litigant has the right to file proceedings to enforce his/her legal rights in a court of law. But it will require one trained in the niceties of law to overcome legal technicalities and file appropriate legal processes in court.

Where, therefore, a victim of human rights violations does not have the capacity to brief a lawyer to prosecute his cause in court, he/she is likely to be without a remedy. The right to legal representation is therefore a crucial factor in the enforcement of human rights.

In 1976, the Federal Government established the Legal Aid Council which is a statutory body. The Council is charged with the responsibility of operating a scheme for the grant of free legal aid in certain proceedings to persons with inadequate means.¹³⁰⁸

¹³⁰⁸ Legal Aid Act Cap. L9 LFN 2004, Sections 1, 7 and second schedule.

The proceedings in respect of which legal aid may be given is grossly limited. They are murder, manslaughter, maliciously or willfully wounding or inflicting wounding, assault occasioning actual bodily harm, common assault, affray, stealing, rape for criminal matters. In respect of other matters, legal aid is limited to civil claims in respect of accidents and civil claims to cover breach of Fundamental Rights as guaranteed under Chapter IV of the Constitution of the Federal Republic of Nigeria.¹³⁰⁹ Human rights outside Chapter IV of the Constitution are not covered by the Legal Aid scheme. This unfortunately means that poor victims who intend to press claims solely under the African Charter are not entitled to legal aid.

The challenges confronting the Legal Aid Council have been highlighted *inter alia* as follows:

The Nigerian state has an obligation to provide legal assistance to defendants who cannot afford to pay for a lawyer. The Legal Aid Council, a parastatal body, was created by the federal government in 1976 with the mandate of providing free legal assistance and advice to Nigerian citizens who could not afford the services of a private lawyer. However, like many other bodies set up by the government, the Legal Aid Council is seriously under funded and unable to provide services in all but a small number of cases. In theory, the Legal Aid Council has an office in thirty-four of Nigeria's thirty-six States, but in practice, the capacity of these offices is extremely limited, and in 2003, there was only one Legal Aid Council lawyer in each State. By the end of 2003, the Legal Aid Council has not yet provided lawyers to any of the defendants tried by Shari'a courts and sentenced to death or amputation.¹³¹⁰

The Legal Aid Act requires an amendment to cover all claims based on human rights not just claim arising from breaches of Chapter IV of the Constitution.

5.9 Remedies for the breach of fundamental (human) rights

When there is a breach or violation of fundamental (human) rights, whether civil and political rights or economic, social and cultural rights, the remedy or remedies available to the victim of the breach, depends on a number of factors. These include the form of action relied upon in enforcing the right breached and the nature of the relief(s) claimed or sought by the victim of the violation. This is particularly so because under the Nigerian jurisprudence and indeed in the common law countries, a court has no jurisdiction to award a party a relief he did not claim. The court is not a Father Christmas and cannot award a relief not sought by a party.¹³¹¹ Again under Order 2 Rule 2(3) of the FREPR, it is for the applicant in the application to enforce fundamental rights, to set out among others, the relief(s) sought by him.

¹³⁰⁹ *Supra*, second schedule.

¹³¹⁰ Human Rights Watch "Political Shari'a? Human Rights and Islamic Law in Northern Nigeria: VI. Absence of legal representation" <http://www.hrw.org/reports/2004/nigeria090416.htm> [accessed on 10 January 2010].

¹³¹¹ *See NDIC V Savannah Bank PLC* (2002) 51 WRN 19, *Yourin v Ayuya* (2001) 44 WRN 85.

Some of the remedies available to a victim of human rights violation, depending on the right breached, include the following: a declaration; monetary compensation and public apology, release from custody; an order restraining or prohibiting a continuing breach; an order of *certiorari* quashing a judicial, executive or administrative action that is in breach of a fundamental right; an order of mandamus to compel the performance of a public duty that is in breach of a fundamental right; an order of prohibition against the breach of a right; and the setting aside or the quashing of any proceeding that violates the right to fair hearing, among others.

The list of reliefs can hardly be exhaustive. It is an evolving subject. This section will however discuss some of the reliefs or remedies available to victim(s) of human rights violations.

5.9.1. The grant of a declaratory remedy

In an action for the enforcement of fundamental rights, a party may seek a bare declaration relating to his right or may seek for a declaratory relief and other reliefs. Where several reliefs are sought including a declaratory relief, the court may grant only a declaratory relief.

It has been held in *Ekanem v A.I.G.P.*¹³¹², that “generally, a declaratory order of court simply proclaims the existence of a legal situation. It may contain a specific order to be carried out, it may not necessarily direct the carrying out of an order”. The court in the case hereof therefore granted a declaration that the arrest and detention of the applicant was wrongful and unlawful.

The second relief sought by the applicant was in the following terms: “A declaration that the removal of the applicant’s wearing apparels save his shorts, the none provision of bed or other sleeping materials thus causing applicant to stand sleeping... is degrading treatment, torture, and therefore unconstitutional, wrongful and unlawful.”¹³¹³ Justice Omage who delivered the lead judgment in the case had this to say in respect of the above relief:

On the second relief for declaration i.e. where the applicant seeks a declaration that his captors should have provided him with sleeping materials and should not have removed his clothes except for his shorts. I am not of the view that such a declaration would not have been utopian in the Nigerian context whether the detention was in the Police Station or the prisons, having read about the general custodial situation in Nigeria. I am also of the view that the relief sought is not justiciable... I do not know of any guaranteed right to be provided on arrest with a bed to sleep on though it is practicable to expect a detained person to sleep. Where he lies on before he sleeps is another matter. Every human is entitled to a fundamental right when only he is not subject to any constitutional disability. A person who is detained for an offence within the law is subject to a constitutional disability.¹³¹⁴

¹³¹² (2008) 5 NWLR (Pt 1079) 97 at 111 paras B-C. In *Anode v Mmeka* (2008) 10 NWLR (Pt 1094) 1, the Court of Appeal confirmed the grant of a lone relief of declaration in respect of the right against discrimination pursuant to section 42(2) of the 1999 Constitution.

¹³¹³ (2008) 5 NWLR (Pt 1079) 97 at 111.

¹³¹⁴ *Ekanem v A.I.G.P* (2008) 5 NWLR (Pt 1079) 97 at 111 -112 paras G-C.

Justice Omuogbo concluded by holding that the relief “is not justiciable, not fundamental...” and that “it is utopian and unenforceable.”¹³¹⁵ Certainly, if the applicant established that while in detention that his wearing apparel save his shorts were removed and that he was not provided with a bed or other sleeping materials thus causing him to stand while sleeping, that would amount to a degrading treatment and torture; it is in breach of the applicant’s fundamental rights.

The decision of Justice Omuogbo constitutes a serious setback to judicial enforcement of human rights in Nigeria. A person who is in custody over the allegation of committing an offence or even in prison, is entitled to the protection of his human rights.

The Court of Appeal in *Adikwu v Federal House of Representatives*¹³¹⁶, had this to say on the propriety of a declaratory relief :The jurisdiction of the court to make a declaratory order without consequential relief is at large and most useful jurisdiction. It is a particularly valuable jurisdiction in cases where a legal dispute exists but where no wrongful act entitling the applicant to seek coercive relief has been committed.

By making an order declaratory of the rights of the parties, the court is able to settle the issue at a stage before the *status quo* has been disturbed. Inconvenience and the prolongation of uncertainty are avoided. A declaratory judgment differs no doubt from other judicial orders in that it declares the law or the rights of the parties without pronouncing any sanction directed against the plaintiff or the defendant. In other words the non-enforceability of a declaratory order has been regarded as the weak spot in its armour, as there is no sanction built into a declaratory relief. But this is of little moment in suits involving the State or public authorities who have quite persistently complied with the declaratory order made by the court.

5.9.2 Remedy for the violation of the right to property

Section 44 of the 1999 Constitution prohibits the taking of possession compulsorily or compulsory acquisition of moveable property or any interest in an immovable property except under circumstances prescribed by law. No doubt, the proprietary right thereby protected is limited. On the other hand, section 37 of the Constitution, though did not guarantee any proprietary right, it guarantees the right of privacy of the homes of citizens, among others. The sore point has been whether section 44 of the Constitution guarantees private property rights the violation of which could be redressed through the FREPR.

¹³¹⁵ (2008) 5 NWLR (Pt 1079) 97 at 111 paras C-E.

¹³¹⁶ (1982) 3 NCLR 375 at 385.

In *Korkoro-Owo v Lagos State Government*¹³¹⁷ the appellants, as applicants, brought an application at the High Court of Lagos State pursuant to the Fundamental Rights (Enforcement Procedure) Rules, 1979 for leave to apply for the enforcement of their fundamental rights. They sought for an order of interim injunction restraining the respondents, from “carrying into effect the forceful evacuation and demolition of residences in Maroko, Lagos State (wherein the said applicants were residents) and which said demolition is scheduled for Friday 13, 1990 pending further order of this Honourable Court”. The High Court held that the applications adopted a wrong procedure. They sought declarations accordingly and perpetual injunction to restrain the respondents from carrying into effect the scheduled forceful eviction and demolition of houses in Maroko, Lagos State.

On appeal to the Court of Appeal, Justice Ayoola delivering the judgment of the court, emphatically said that where in an application for the enforcement of fundamental rights, the affidavit shows that in substance, the application is to establish private property right, the court would be entitled to hold that a wrong procedure had been adopted or to refuse the application on the ground that the issue was not one of infringement of fundamental rights.¹³¹⁸ On the question whether the case before the court seeks to establish private property rights, Justice Ayoola said:

The facts deposed to in the affidavit in support of the application, if believed, show clearly, in several respects, allegation of threatened infringement of the appellants’ fundamental rights. It will be an appalling situation if in our day and age and with the level of development of our law a citizen who has made allegations of such high-handed and callous disregard of rights and interests of the citizen were to be denied access to justice without as much as a hearing on the merits of his allegation.¹³¹⁹

The judgment no doubt meets with the justice of the matter. The sad commentary is that at the end of the day, the judgment was never complied with and the forcible eviction and demolition of houses in Maroko were eventually carried out. But it is too sweeping to state that private property rights cannot be enforced pursuant to fundamental rights application. Much will depend on the circumstances of the case.

¹³¹⁷ (1995) 6 NWLR (Pt 404) 760

¹³¹⁸ *Korkoro-Owo v Lagos State Government* (1995) 6 NWLR (Pt 404) 760 at 765 para D.

¹³¹⁹ *Supra*.

After all, section 44 of the Constitution *inter alia* protects the possession of moveable property or any interest in an immovable property being taken compulsorily. Used as an adjective, the word “compulsory” means “involuntary; forced; coerced by legal process or by force of statute”.¹³²⁰ Compulsory taking of possession of a property can infringe private property right. When that occurs it could be redressed through fundamental rights application.

In *Federal Ministry of Commerce and Tourism v Eze*,¹³²¹ the applicant contends that the removal and seizure of his property by the 2nd appellant without a hearing violates due process of law. The jurisdiction of the State High Court to hear the application was challenged and it was struck out. The appellants appealed to the Court of Appeal (Calabar Division). Justice Adamu who delivered the judgment of the Court of Appeal held *inter alia* as follows:

The actual cause, reason, or ground for the respondent’s action in the present case as we have seen was for the seizure of his properties by the appellants. There is adequate remedy under the common law for him to pursue in an ordinary civil action to recover his seized items or properties-e.g tort or detinue or conversion. Again, the said respondent claimed that his fundamental right to fair hearing was contravened by the appellants’ seizure. This cannot be so because there is nothing to show that the appellants heard or made any decision in the form of judicial or *quasi-judicial* hearing before they seized the properties.¹³²²

Justice Adamu went on to hold that it is common knowledge that some petrol dealers are in the habit of manipulating or altering their pumping machines and thereby inflating their pump prices. This dishonest exploitation of customers or consumers by the fuel dealers, he said, is regarded as an undesirable practice that should be stopped or curtailed. This led the appellants and other agencies of the Federal Government to undertake unscheduled visits of inspection to petrol stations with a view to tracing the erring dealers involved in the nefarious practice. It was his view that the appellants’ action was, therefore, in public interest. Furthermore, since there was no hearing as alleged by the respondent in his application, his remedy should more appropriately be pursued under the relevant law of tort or under the common law for the recovery of his seized items or properties. He concluded that an application under the fundamental right procedure rules was an inappropriate method or procedure and the action was only a sham.¹³²³

¹³²⁰ *Black’s Law Dictionary*, 6th Edition at 287.

¹³²¹ (2006) 2 NWLR (Pt 964) 221.

¹³²² *Supra* at 247 paras A-D.

¹³²³ *Supra* at 247 paras D-G.

Contrary to the decision of the court an unlawful seizure of property could properly be challenged under proceedings brought pursuant to the Fundamental Rights (Enforcement Procedure) Rules. Such a seizure could amount to “taking of possession compulsorily” within the intendment and scope of the provisions of section 44 of the 1999 Constitution. There is nothing implicit or explicit in the provisions of section 44 aforesaid which renders incompetent an application seeking relief against seizure of a person’s property.

One of the reliefs sought by the applicant was an order for the release of the seized property and that relief can stand on its own without necessarily being tied to the issue of fair hearing. In other words, had the Court of Appeal wanted, it could have granted the relief against seizure without linking it to the issue of fair hearing. A different approach was adopted in the *Nigerian Navy v Garrick*.¹³²⁴ At the High Court of Cross River State, the applicant/ respondent on 13 August, 2001 filed a motion *ex parte* for leave for the enforcement of his fundamental rights under the Fundamental Rights (Enforcement Procedure) Rules. He alleged that on 11 August 2001 at about 6.10 am, he and other occupants were forcefully and unlawfully thrown out of his residence at No. 20 Ikot Esu Square, Diamond Hill Calabar by officers and men of the Nigerian Navy. He also alleged that the officers and men destroyed his house and other properties and held him hostage on the said property for eight hours, hence the suit. The application for leave was granted to the respondent on the same day by the High Court. Thereafter, the respondent, on 15 August 2001, filed a motion on notice where he sought for some reliefs. On 10 September, 2001, the trial High Court in its ruling granted all the prayers of the respondent for violation of human rights.¹³²⁵

The High Court no doubt displayed a lot of courage and inclination to protect the rights of a victim of gross abuse or brute force and violence by officers of the Nigerian Navy who showed a high degree of lawlessness. Dissatisfied with the ruling and the orders made, the appellants appealed to the Court of Appeal (Calabar Division). In determining the appeal, the Court of Appeal considered the provisions of section 46(1) and (2) of the 1999 Constitution. It held.¹³²⁶

Everybody (including private individual, public individual, government or police) is forbidden to take possession or repossession of premises by self-help, force, and strong hand or with a multitude of people. Everyone entitled to possession or repossession of premises can only do so by due process of the law. They must apply to the courts for possession and act on the authority of the court. When the appellants decided to eject the respondent *Viet Armis* and without any order of court, they were breaking the law of the land, which they swore to defend.¹³²⁷

¹³²⁴ (2006) 4 NWLR (Pt 969) 69. Judgment was delivered on 30 June 2005, only 16 days separated the delivery of judgment in *Eze’s case* and *Garrick’s case*.

¹³²⁵ *Supra* at 93-94 paras C-B.

Justice Omokri who read the lead judgment strongly condemned the acts of the officers and by so doing gave hope and succour to many Nigerians who have the impression that members of the armed forces can break the law and get away with it. He said:

The act of the officers and men of the Nigerian Navy, is unlawful, barbaric and cannot by any stretch of the imagination be described as “an executive or administrative action or decision by the Federal Government or any of its agencies’’. To say the least, their acts are most unfortunate particularly at this time of our nascent democracy where the rule of law is supreme.¹³²⁸

This judgment cannot be faulted unlike that in *Eze’s case* which was delivered by the same Court of Appeal, Calabar Division, 16 days before the judgment hereof. Justice Omokri rightly struck at the essence and ambit of section 44 of the 1999 Constitution when he said that private and public officials, government and or police are forbidden to take possession or repossession of premises by self-help, force and strong hand.

5.9.3 Remedy for the breach of the right to fair hearing

The right to fair hearing is a fundamental constitutional right guaranteed by the Constitution of the Federal Republic of Nigeria, 1999 and a breach of it in trials or adjudication vitiates the proceedings rendering same null and void and of no effect.¹³²⁹ It is not relevant for a court to consider whether the breach of the right to fair hearing did in fact affect a proceeding or event. Once the breach of the right is established, a party does not need to prove anything else. The consequences of the infringement will then follow.¹³³⁰

Because of the importance of the right to fair hearing, courts of law cannot sacrifice the constitutional principle of fair hearing on the altar of speedy hearing of cases when the content of the speedy hearing is not in consonance with fair hearing.¹³³¹ It is always better to err on the side of caution as justice rushed is justice denied.¹³³²

¹³²⁶ *Nigerian Navy v Garick* (2006) 4 NWLR (Pt 969) 69 at 103–104 paras H-C.

¹³²⁷ See *Ojukwu v Gov., Lagos State* (1985) 2 NWLR (Pt. 10) 806.

¹³²⁸ *Supra* at 104 paras C-E.

¹³²⁹ See *Yusuf v Ilori* (2008) 6 NWLR (Pt 1083) 330 at 351 paras E-G; *A-G Rivers State v Ude* (2006) 17 NWLR (Pt 1008) 436; *Ceekay Traders Ltd v General Motors Co Ltd* (1992) 2 NWLR (Pt 222)132; *Ekufor v Bomor* (1997) 9 NWLR (Pt 519) 10; *Salau v Egeibon* (1994) 6 NWLR (Pt 348) 23 referred to (P 351) , paras E-G.

¹³³⁰ *Adigun v A-G Oyo State* (1987) 1 NWLR (Pt 53) 678, 709, GH.

¹³³¹ *Abubakar v Yar’Adua* (2008) 4 NWLR (Pt 1078) 465 at 503 paras B-D.

¹³³² *Supra* at 537 para A.

5.9.4 The remedy of damages or compensation and public apology

Section 35(6) of the 1999 Constitution expressly provides as follows: “Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person...” This provision is peculiar in the sense that unlike most other provisions on fundamental right, section 35 of the 1999 Constitution not only created the right to personal liberty but also the remedies to be granted in the event of unlawful arrest and detention. It must be pointed out that the provisions do not foreclose the grant of other remedies like an injunction to restrain a continuing breach.

In *Ekpu v A-G Federation*¹³³³, Jinau held that: “Having declared the arrest and detention of the applicants illegal, unlawful and unconstitutional I hold that the applicants are entitled to the award of damages”. Jinau Justice made the award after holding that the arrest and detention of the applicant were illegal, unlawful and unconstitutional, consequent upon the breach of their fundamental rights guaranteed under the Constitution and the African Charter. The award of compensatory damages must not be contemptuous or grossly low. It must be commensurate to the injury suffered by the victim. In *Odogu v A-G Federation*¹³³⁴ Justice Ogundare agreed with the pronouncements of Justice Ayoola when he said:

Besides, although the learned judge made reference to the “ordeal and deprivation” suffered by the applicant during the period of his arrest on 4th August 1980 and his release on 31st March, 1988 and he mentioned a few other things which he said he took into consideration, which had been alluded to earlier in this judgment, it is manifest that the amount awarded as compensation for deprivation of liberty of such obvious enormity with consequential personal and sentimental impact as profound and grave as the learned judge himself mentioned, was so grossly low as to be an erroneous estimate.

Financial compensation may be awarded for any breach of the rights guaranteed under the Constitution and African Charter. There is nothing in the provisions of Chapter IV of the 1999 Constitution which precludes a claim of monetary compensation being made to an applicant, for the violation of his fundamental right and unless special damages are claimed, the award is usually one in general damages: *Candide-Johnson Edigin*.¹³³⁵

In *Navy v Garrick*,¹³³⁶ the sum of N50,000,000.00 was among other remedies, awarded as general damages for the breach of the applicants right to the dignity of the person; the right to personal liberty; the right of private and family life and right to property.

¹³³³ (1998) 1 HRLRA 391 at 421 paras A-D. See also *Obisi v Nigerian Navy* (1999) 1 FHCLR 609.

¹³³⁴ (2000) 2 HRLRA 82 at 96.

¹³³⁵ (1990) 1 NWLR 665 paras C-H.

5.9.5 The remedy of injunction

Injunction relief is a discretionary remedy. It may be interim, interlocutory, perpetual or mandatory depending on the nature and circumstances of a case and the relief(s) sought. In the case of *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited*,¹³³⁷ the applicant brought an action in a representative capacity for himself and on behalf of each and every member of his community in the Niger Delta Area. He contended *inter alia* that the continuing flaring of gas in his community, in the course of the oil exploration and production activities of Shell Petroleum Development Company Limited (SPDC) and Nigerian National Petroleum Corporation (NNPC) leading to the spoilation and degradation of his environment was in breach of the fundamental rights to life and the dignity of human person of members of the Community as guaranteed by the Constitution and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act.¹³³⁸

The articles guaranteed the right to life and integrity of the person, the right to health and the right to a general environment favourable to development. The court among others, declared that the provisions of section 3(2)(a)(b) of the Associated Gas Re-injection Act and section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations under which continued flaring of gas in Nigeria may be allowed are inconsistent with the applicant's right to life and dignity of human person enshrined in the Constitution and in the African Charter. The court then granted an injunctive order against the respondents restraining them from further flaring of gas in the applicant's community.

An order of interlocutory injunction may be granted as an interim measure in an application for the enforcement of fundamental rights. In the case of *Olisa Agbakoba v Director, State Security Service*¹³³⁹, the applicant, following the refusal of his application for the release of the passport seized by the respondents, appealed to the Court of Appeal. While the matter was pending on appeal, the appellant applied for an order of interlocutory injunction to enable him to attend the world human rights conference in Vienna.

¹³³⁶ (2006) 4 NWLR (Pt 969)69.

¹³³⁷ An unreported decision of the Federal High Court, Benin in Suit No FHC/B/53/05 delivered on 14 November, 2005.

¹³³⁸ Laws of the Federation of Nigeria, 1990, Cap. 10.

¹³³⁹ (2000) CHR 168 Some of the cases include *Michael Harrington v J.B. Schlesinger* 32 S.F 2d 455 (175); *M.J Harrington v George Bush* 553 Federal Reporter 2d. Series (1977) p 190 and *R.N. Norlan Daughtrey v Jim Carter* 584 Federal Reporter 2nd Series 1050 (1978), all the cases show that the status of a congressman or any other legislator does not give him standing to institute an action for declaration that the action of the Executive breach of government is illegal. Some other cases include *Gouriet v Union of Post Office Workers* (1977) 3 All E.R. 70; *LPTB v Moscron* (142) 1 Aiie. R. 97, *Clark v Person Rural District Council* (1929) 1 Cn 287 249; *Paul Poe v Abraham Union* 367 US 497 Led 62nd 989, 81 S.U 1752.

In granting the application, the Court of Appeal ordered the appellant to deposit the passport with the Deputy Chief Registrar of the Court of Appeal upon his return from the Conference pending the determination of the substantive application. In justifying the granting of the order of the court (per Justice Ayoola) said as follows: “ ... the court in making an order in an application for interlocutory injunction, is in my view, not restricted by the terms of such order proposed by the Applicant. It is for the court in the absence of special circumstances to impose such restraint as will suffice to stop the mischief and keep things as they are until hearing.”¹³⁴⁰

What this section tried to do is to highlight and discuss some of the reliefs available to victims of human rights violations. It is extremely difficult to deal with an exhaustive list of reliefs or remedies. This stems from the fact that unless the law restricts the reliefs a court can grant, the issue is at large and depends on several factors. These include the forms of action or procedure invoked in applying for the enforcement of human rights; the particular reliefs claimed by the applicant; the evidence led in proof of the claim, remedy or relief; the circumstances of the case and the attitude of the court. A court that wears the toga of conservatism is less likely to award reliefs that meet the justice of a case than a court that is pro-active. The quantum and quality of relief(s) an applicant gets depends on a court. This again underscores the importance of the judiciary not only in the enforcement of human rights but in the promotion of constitutionalism.

5.10 Summary

What was done in this chapter was to explore the role of the judiciary in the promotion of constitutionalism, particularly in the enforcement of human rights. This led to the finding that the judiciary is the bedrock, watchdog and guardian of constitutionalism. The milieu under which the judiciary enforce human rights was also examined.

Due to the importance of the concept of *locus standi* in public law generally and particularly in the enforcement of human rights, the chapter examined the concept and the challenges associated with it. It was advocated that there should be a relaxation of the rigidity of the concept to aid easy access to the courts.

¹³⁴⁰ (2000) CHR 168 at 176–177.

The right of access to court for the enforcement of human rights is not only circumscribed by the concept of *locus standi* a victim of human rights violation is also confronted by a number of procedural challenges. This Chapter discussed a number of them which retard and act as a drawback to the enforcement of human rights in the court .To aid the protection of human rights and advance the course of constitutionalism, those procedural challenges including those arising from application pursuant to the FREPR-the principal procedural mechanism in human rights enforcement must be addressed.

The chapter also focused on the remedies or reliefs available to a victim of human rights violation. Specific remedies were examined. The point was stressed that it is not possible to have an exhaustive list of remedies. The reason is simple. The scope of remedies that a court can grant is not closed. Much depends, for example, on the form of action relied upon in any given case, the facts of the case and the reliefs as formulated.

The chapter further stressed that much also depends on the inclination and attitude of the court in question. While judicial activism and dynamism will promote the generous grant of remedies, judicial conservatism and timidity will achieve an opposite result. The point was finally made that the judiciary has a fundamental role to play in the development of constitutionalism.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 Summary of findings

While examining the concepts of constitutionalism, human rights and fundamental rights,¹³⁴¹ the inherent problems and definitional difficulties in attaching human rights to humanity or the undue emphasis on the right's holder as a human being were brought to the fore.¹³⁴² Since the concept of rights in general and human rights in particular now extend to legal persons like corporations,¹³⁴³ the work found that it is awkward tying the definition of human rights to humanity or "humanness".

In view of the relationship between human rights and fundamental rights,¹³⁴⁴ the study came to the conclusion that fundamental rights are integral part of human rights. Indeed, they are human rights specially protected by the fundamental, basic, supreme law or constitution of a nation.¹³⁴⁵ The intense and controversial debate between the question of the universalism and relativism of human rights notwithstanding,¹³⁴⁶ the study concluded that universalism as opposed to relativism strengthens the notion of human rights.

The study confirmed the universalism of human rights. This is based on the fact that if national regimes have the option to interpret the concept of human rights entirely within their own context, meaning and circumstances, there will be no standard for the international community to hold a state accountable for human rights violations.

There will also be no basis for the intervention of the international community in appropriate cases to protect human rights against state violations. A well-established culture of constitutionalism has a direct relationship with the growth and enforcement of human rights within a national regime.

¹³⁴¹ See Chapter 2 *supra*.

¹³⁴² *Supra*.

¹³⁴³ See paragraphs 2.4.1 and 5.7.2

¹³⁴⁴ *F.R.N v Ifegwu* (2003) 15 NWLR (Pt 842) 113 at 217 para A; Falana F *Fundamental Right Enforcement* (2004) 4, Ogbu ON *Human Rights Law and Practice in Nigeria. An Introduction* (1999) 31 and Okpara O "Nature of Human Rights" in Okpara O (ed) *Human Rights Law and Practice in Nigeria* Vol 1 (2005) 51.

¹³⁴⁵ See Chapter IV, 1999 Constitution.

¹³⁴⁶ The Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14-25 June 1993, UN Doc A/Conf. 157/23 of 12 July 1993, paras 1 and 5; Donnelly J "Cultural Relativism and Universal Human Rights" (1984) (6) *Human Rights Quarterly* 400-419, Donnelly J *Universal human Rights in Theory and Practice* (2003) 94; Brown C in Patman RG (ed) *Universal Human Rights* (2000) 23; Lama D "Human Rights and Universal Responsibility" being the text of a paper delivered at the Non-Governmental Organization, the United Nations Conference on Human Rights, Vienna, Austria 15 June 1993; Magnarella PJ "Questioning the Universality of Human Rights" (2003) (3:1), *Human Rights and Human Welfare* 16; Falk R "Affirming Universal Human Rights" (2003) (3) *Human Rights and Human Welfare* 80.

Consequent upon the analysis of the quantum and scope of rights guaranteed by the 1999 Constitution of Nigeria,¹³⁴⁷ including the breach of the rights and their enforcement, the study established that the entrenchment of constitutional provisions guaranteeing rights will not *ipso facto* lead to or guarantee constitutionalism.

The study also found that militarism inflicted substantial damage to human rights and democracy in Nigeria¹³⁴⁸ and compromised the development of constitutionalism. There is no doubting the fact that human rights record in Nigeria has improved from what it used to be under the country's various military dictatorships. However, the country, is still grappling with various and sometimes, gross acts of human rights violations. These include extra-judicial killings, cruel, inhuman and degrading treatments which have been elevated to greater heights under Sharia; police brutality, extortion and killing of innocent people; treatment of prisoners as if they were civilly dead; the turning of prisons into something close to concentration camps; bestial and degrading traditional practices against women; trafficking in women and children; domestic violence, female genital mutilation; arbitrary arrests and long pre-trial detentions; indiscriminate arrests of journalists; the *osu* caste system; forcible evictions from property; the invasion of the privacy of homes and the repression of the rights of the people of Niger Delta area of the country.¹³⁴⁹ These acts were found to negate and compromise constitutionalism.

¹³⁴⁷ See Chapter 3. See also sections 33-44 of the 1999 Constitution as discussed in Chapter 3 *supra* on the guarantee of fundamental rights.

¹³⁴⁸ Oko O "Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa" (2000) (33) *Vanderbilt Journal of Transnational Law* 574. A writer argues that "All over the continent, from Cape Coast to Cairo, Africans have experienced the woes of gross abuses inflicted by military dictators and self-styled life presidents. Under the leadership of these regimes, Africans have witnessed massive corruption, human rights abuses, and economic deprivations...": Ambrose BP *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (1995) xv. See also Ojo A *Constitutional Law and Military Rule in Nigeria* (1987) 242-246 and Nwabueze BO *Military Rule and Constitutionalism* (1990) 20.

¹³⁴⁹ See generally Amnesty International "Nigeria: *The death penalty and women under the Nigerian Penal System*" Press Release AI Index AFR 14/007/2004 10 February 2004; Human Rights Violations Investigation Commission Report (Conclusions and Recommendations) May 2002 p 14, para 1. 52; Human Rights Watch "Nigeria Military Revenge in Benue: A population Under Attack," April 2002, Vol 14, No 29A pp 2-3. US Department of State, "Nigeria Country Reports on Human Rights Practices—2004" 28 February 2005, 1-2. US Department of State, "Nigeria Country Reports on Human Rights Practices—2005" 8 March 2006, 1-2; and US Department of State, "Nigeria Country Reports on Human Rights Practices —2006", 6 March 2007, 1-2 An NGO, Civil Liberties Organization described the Obasanjo government as "a dictatorship of a civilian variant" *The Guardian*, Monday, 20 December 2003, .3; *Agbo v The State* (2006) 6 NWLR (Pt 977) 545; Okoye PU *Widowhood: A National or Cultural Tragedy* (1995) 43-125; See also Oputa C, "Women and Children as Disempowered Groups" in Kalu A and Osinbajo Y (eds), *Women and Children under the Nigerian Law* (nd) 9; Obinabu PC *The Osu Caste System* (2004) 14-32; Yawon B "Prison Administration in Imo State" text of a paper delivered in October 2003 at the Law Week, Owerri, Imo State, Nigeria.

The study also found that the introduction of “new Sharia” in 12 Northern States of Nigeria was politically motivated and the Governors of the States concerned respectively reaped political successes out of it.¹³⁵⁰ This new Sharia which was harsh and extreme in respect of the punishments it prescribed, drew inspiration from Saudi’s Wahabi Islam.

The work found that the provision of section 10 of the Constitution, which outlawed state religion, is clear, simple and unequivocal. The section prohibits the Federal or State Government from in any manner aiding, fostering, advancing, promoting, sponsoring or adopting an official religion. The section introduces the equality of all religions and government’s neutrality in religious matters. The study found that the practice and implementation of the new Sharia have in many respects, violated section 10 of the Nigerian Constitution and the nation’s obligations under several international human rights treaties and conventions. Furthermore, the right to freedom of thought, conscience and religion guaranteed by section 38 of the Constitution cannot provide any basis to argue in support of the constitutionality of the new Sharia. On the contrary, the unconstitutionality of the new Sharia is further confirmed by its discriminatory practices against Christians in breach of section 42(1) of the Constitution. The involvement of 12 Northern States in fostering the new Sharia amounts to governments’ unconstitutional entanglement with religion and the adoption of Islam as a state religion.¹³⁵¹

Against the background of this culture of violence and breach of human rights, the application of international human rights norms in the country’s jurisprudence becomes necessary. The study established that while the country has signed several international human rights instruments and can claim that its legal provisions on the protection of human rights meet minimum international standards and parameters, the enforcement and implementation of the provisions fell short of international standards. In other words, the domestication and implementation of international human rights norms are painfully slow.¹³⁵²

¹³⁵⁰ US Department of State *supra*; Human Rights Watch “Political Sharia? Human Rights and Islamic Law in Northern Nigeria” <http://www.hrw.org/reports/2004/nigeria0904/3.htm> [accessed 7 February 2005]. Abdullahi Ahmed An-Na’im “The incremental success of African Constitutionalism and the Challenges of Consolidation and Maturity” being a Keynote Address delivered at the Nigerian Bar Association Annual General/Delegates’ Conference 2006 held in Port Harcourt, Nigeria on 26 August—1 September 2006.

¹³⁵¹ Centre for Religious Freedom *The Talibanization of Nigeria: Sharia Law and Religious Freedom* (2002), <http://www.freedomhouse.org/religion/publications/talibanization/summary.htm> [accessed on 4 March 2005]; Nwabueze BO *Constitutional Democracy in Africa Volume 3* (2004) 38; Freedom House *The Talibanization of Nigeria: Radical Islam, Extremist Sharia and Religious Freedom* (2002) 8; Eso K *Further Thoughts on Law and Jurisprudence* (2003) 132; Peters R *Islamic Criminal Law in Nigeria* (2003) 33; Qureshi E and Ezat HR “Are Sharia Laws and Human Rights Compatible?” http://www.quantara.de/webcom/show_article.php_c-373/_nr-6/i.html [accessed on 20 February 2005].

¹³⁵² This is underscored by the fact that the only socio-economic right guaranteed under the 1999 Constitution is the right to property, Section 43.

One area where little progress has been recorded is in the jurisprudence of socio-economic rights. Nigeria is yet to have a fully developed jurisprudence on socio-economic and cultural rights. Lawyers and the courts are still cautious over the judicialisation of socio-economic rights. Though the courts are hardly pro-active over the issue, the attitude is gradually changing.¹³⁵³

The study advocates that the issue should no longer be whether socio-economic rights should be accommodated within the rubric of constitutional jurisprudence and constitutionalism. On the contrary, the courts should feel free to enforce socio-economic rights. This will easily be achieved if human rights are considered as being interrelated and interdependent. Accordingly, civil and political rights should not be considered in isolation of socio-economic rights.

The study found that by relying on Directive Principles, the courts could supply content and breathe life into fundamental rights, thereby creating ancillary rights as in the case of India.¹³⁵⁴ The method may be radical, but it is neither unlawful nor unconstitutional. The Nigerian provision on Directive Principles is more accommodating on the issue of justiciability than the Indian provision. It requires the will and the action of the Bar, the litigants and the judiciary to realize its full impact and potentials.

The Supreme Court has held that Directive Principles (or some of them) could be made justiciable through legislative enactment.¹³⁵⁵ The National Assembly gave legal expression to socio-economic rights contained in the African Charter.¹³⁵⁶ The study therefore found that if national legislation can make socio-economic rights in Chapter II justiciable, then no person can rightly query the justiciability of socio-economic rights contained in the African Charter, more so when the Charter has been domesticated in Nigeria.

¹³⁵³ See *Gbemre v Shell Petroleum Development Company Nigeria Ltd* unreported decision of the Federal High Court, Benin City in Suit No FHC/B/C/153/05 delivered on 14 November 2005.

¹³⁵⁴ Kothari J “Social Rights and the Indian Constitution” 2004(2) *Law, Social Justice & Global Development Journal (LGD)* http://www.90.warick.ac.uk/elj/lgd/2004_2/kothari [accessed 13 February 2006]; *Maneka Gandhi v Union of India* (1978) 1 SCC 248; *Francis Coralie Mullin v the Administrator, Union Territory of Delhi* (1981) 2SCR 516; *Chameli Singh v State of UP* 1996(2) SCC 549 and *Paschim Samity & Ors v State of West Bengal* 1996 (4) SCC 37. *Pathnayalc v State of Orissa AIR* 1989 SC 677; Muralidhar S “Justiciability of Economic, Social and Cultural Rights—the Indian Experience” in “*Circle of Rights, Economic, Social and Cultural Right Activism: A Training Resource*” International Human Rights Internship Program and Asian Forum for Human Rights and Development, 2000, pp 436-37. See also Baxi U; “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” in (ed) Japur J *Supreme Court on Public Interest Litigation* (1998) (1) A-91.

¹³⁵⁵ See *Attorney-General, Ondo State v Attorney-General of the Federation & Others* (2002) 9 NWLR (Pt 772)222 which is discussed in Chapter 3 *supra*.

¹³⁵⁶ See the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap. 10 Laws of the Federation of Nigeria, 1990.

The socio-economic rights in the African Charter are neither inconsistent nor contradictory to the non-justiciability clause on Directive Principles contained in the constitution. On the contrary, the socio economic rights in the African Charter are complementary to the socio-economic rights in Chapter II and the right to property (section 43) of the Constitution.

The enforcement of a human right by an aggrieved party or the successful invocation of the power of judicial enforcement depends not only on the merits of the case but on a visionary, activist, knowledgeable, independent and courageous judiciary. A constitutional guarantee of a right may be inadequate or the provisions may be too technical and strict, but in espousing and expounding the provisions in the exercise of its power of judicial enforcement, a court may redress the inadequacy and give purposive interpretation to the provisions. Consequently, the work established that indeed the judiciary is but the guardian of constitutionalism.¹³⁵⁷ The study also concluded that the practice of constitutionalism depends on a very large measure on judicialism.¹³⁵⁸

But the power of judicial enforcement of human rights is unduly restricted in public interest litigations due to the traditional and narrow conception of *locus standi* by Nigerian courts.¹³⁵⁹ The rule of standing in the enforcement of fundamental rights pursuant to the Fundamental Rights (Enforcement Procedure) Rules (FREPR) is relaxed and liberalized when compared with the concept in public law. It still has its own limitations.¹³⁶⁰

The study considered the procedural challenges that inhibit the due enforcement of fundamental rights. These challenges flow from the courts' interpretation and application of the FREPR. Although the rules are meant to facilitate easy access to the High Court for speedy enforcement of fundamental rights, it is ironical that the technical, rigid and mechanical interpretations of the Rules were found to lead to unjust results.¹³⁶¹

¹³⁵⁷ Motala Z *Constitutional Options for a Democratic South Africa; A Comparative Perspective* (1994) 206.
¹³⁵⁸ Oko O "Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa" (2000) (33) Issue 3 *Vanderbilt Journal of Transnational Law* 573. See also Nwabueze BO *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (1977) preface.

¹³⁵⁹ *Adesanya v President of the Federal Republic of Nigeria* (1981) ANCR 1; *A-G Kaduna State v Hassan* (1985) 2 NWLR (Pt 8) 483; *Adefulu v Oyesili* (1989) 5 NWLR (Pt 122) 377; *Bewaji v Obasanjo* (2008) 9 NWLR (Pt 1093) 540. *Olagunji v Yahaya* (1998) 3 NWLR (Pt 542) 501; *Ogbuehi v Governor, Imo State* (1995) 9 NWLR (Pt 417) 53 and *Okafor v Asoh* (1999) 3 NWLR (Pt 593) 35; (1981) ANLR 1. See also the cases of *Bolaji v Bamgbose* (1986) 4 NWLR (Pt37) 632 at 652 para B; *Fawehinmi v Akilu* (1987) 4 NWLR (Pt 67) 797; *Fawehinmi v President FRN* (2007) 14 NWLR (Pt 1054) 275; *Keyamo v House of Assembly, Lagos State* (2000) 12 NWLR (pt 680) 196.

¹³⁶⁰ See section 46(1) of the 1999 Constitution.

¹³⁶¹ See for example, *Tukur v Government of Gongola State* (1997) 6 NWLR (Pt 510) 549; *Uzoukwu v Ezeonu II* (1991) 6 NWLR (Pt 200) 708; *Sea Trucks Nig. Ltd v Pyne* (1999) 6 NWLR (Pt 607) 514; *Sokoto L.G. V Amale* (2001) 8 NWLR (Pt714) 224; *Dangtoe v Civil Service Commission of Plateau State* (2001) 4 SC (Pt. 11) 43; *Oyawele v Shehu* (1995) 8 NWLR (Pt 414) 484; *D-G, SSS v Ojukwu* (2006) 13 NWLR (Pt 998) 575; *Ogwuche v Mba* (1994) 4 NWLR (Pt 336) 75; *The State v The Commissioner of Police & Anor: In re Appolos Udo* (1987) 4NWLR (Pt63) 170; *Nwaeze v Inspector-General of Police* (2001) ICHR 449 and *Odofin v Inspector – General Police* (2001) ICHR 440.

The procedural challenges in the enforcement of human rights highlighted in this study could be redressed if there is a change of attitude on the part of the judiciary. Once the judiciary adopts a dynamic and purposive approach towards the enforcement of human rights it will not allow technicalities to stay its hands and frustrate the realization of justice.

In 1965, Legun argued that Nigeria was “the only really ‘open society’ in all Africa.”¹³⁶² In 1995, thirty years after, Suberu sadly stated that “Nigeria broadly typifies the dismal record of constitutionalism in the African continent.”¹³⁶³ The work found that Nigeria’s descent into authoritarianism not only seriously affected its democracy and democratic institutions like the judiciary, it equally affected the protection of rights. What then can the study’s findings and conclusions¹³⁶⁴ be said to portend for Nigerian constitutionalism?

While the 1999 Constitution of Nigeria is generally accepted to be an imposition by the military, theoretically and in practical terms, the nation does not have an imposed constitutionalism. The imposition was unlike the case of Japan whose Constitution was drafted and imposed on the nation by the Americans at the end of Second World War.¹³⁶⁵

Elsewhere in this text, what is called “fractured constitutionalism”¹³⁶⁶ is defined. The study advocates that this type of constitutionalism or phenomenon will obtain in a situation where there is limited and instalmental recognition and enforcement of human rights or their irregular or qualified respect in practice.

¹³⁶² Legum C “What Kind of Radicalism for Africa?” (1965) (43) *Foreign Affairs* 244.

¹³⁶³ Suberu RT “Institutions, Political Culture and Constitutionalism in Nigeria” in Baun MJ and Frankline DP (eds) *Political Culture and Constitutionalism: A Comparative Approach* (1995) 215; International institute for Democracy and Electoral Assistance (International IDEA) *Democracy in Nigeria* (2001) 21, the issue was also raised that “Nigeria has produced 10 written constitutions but is yet to entrench constitutionalism” This captures what Okoth-Ogendo calls “African Political Paradox” where there are “Constitutions without constitutionalism”: Okoth-Ogendo HWO ‘Constitutions without Constitutionalism; Reflection on African Political Paradox’ in Greenberg D, Katz SN, Oliviero MB and Wheatley SC (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993)3.

¹³⁶⁴ Findings and Conclusions made in chapters 1-5.

¹³⁶⁵ See Fieldman N “Imposed Constitutionalism” (2005) *Connecticut Law Review* Vol 37, 857 at 859.

¹³⁶⁶ Chapter 2 *supra*

It will include for example, where a constitution has the key constituents of constitutionalism but they are limited in practice. Such a nation where there is fractured constitutionalism as in the case of Nigeria, cannot, based on the quantum and quality of political and civil liberties thereat, be described as a free society or country. At best, it is partly a free country.¹³⁶⁷

6.2 Recommendations

In view of the findings made, the study advocates that the pillars of constitutionalism must be strengthened to ensure the promotion of democracy and good governance. How can it be done in the Nigerian context to promote constitutionalism? That is to say, what can be done to address the “fracture” in the country’s constitutionalism and start dismantling the challenges and the obstacles established by the findings in this study? The “fractures” are compromising and stultifying the growth and practice of constitutionalism in Nigeria. In order to strengthen the practice of constitutionalism, the study recommends some constitutional amendments. The concept of *locus standi* in public law which has received rigid applications and interpretations by the courts while espousing and expounding their judicial powers pursuant to section 6(6)(b) of the 1999 Constitution, requires a constitutional amendment. Such a constitutional amendment will grant any Nigerian the right of access to court to preserve, protect and defend any infraction against the constitution.¹³⁶⁸ Such an amendment will allow any Nigerian to invoke the judicial machinery in respect of a public derelict.¹³⁶⁹

¹³⁶⁷ Instructively, in Freedom House *Freedom in the World 2006: The Annual Survey of Political Rights and Civil Liberties* (2006) rated Nigeria as “partly free”. Ghana Mali, South Africa, Mauritius, Botswana, Namibian, Sao Tome and Principe, Senegal, Lesotho and Cape Verde were the only African countries that were rated ‘free’ These 11 countries represent 23% of the countries in sub-Saharan Africa. None of the countries in North Africa is rated ‘free’. The most discomforting aspect of the outcome of the survey is countries like Liberia and Sierra Leone where Nigeria sacrificed the lives of some her soldiers to help in installing democracy were rated as “partly free” like Nigeria. In yet another study by Freedom House which analyzed in the last 10 years, political rights and civil liberties, key constituents of democracy, in 193 countries and 15 related and disputed territories, the verdict on Nigeria is that the country is “partly free”. A country that is “partly free” cannot claim to be practicing democracy. The same study found that Ghana, Benin, Gambia, Mali and Senegal are free countries: Freedom House *Freedom in the World 2008*. See also US State Department, “*Nigeria; Country Report on Human Rights Practices 2007*”, released by the Bureau of Democracy, Human Rights and Labor, 11 March 2008 and Chris Albin-Lackey “Democratic Developments in sub-Saharan African: Moving forwards and backwards” being testimony on behalf of Human Rights

¹³⁶⁸ *Fawehinmi v President, FRN* (2007) 14 NWLR (Pt 1054) 275 at 343 para C-D.

¹³⁶⁹ *Supra* at 334-336 paras B-F; *Nwankwo v Ononeze-Madu* (2009) 1 NWLR (Pt 1123) 671 per Saulawa J.C.A. *supra* at 716 paras C-F.

With such a constitutional amendment, persons who took actions in court to preserve and protect the constitution for the benefit of the public, groups, individuals or themselves can no longer be described by the courts as “professional litigants, busybodies, meddlesome interlopers and cranks who have no real stake or interest in the subject matter of litigation they are seeking to pursue.”¹³⁷⁰ In the same vein, a public interest litigant will no more be castigated and described as a person who:

...cannot play the role of an archivist and build a shrine to preserve the sacred provisions of the Constitution. He is not a sentry or watchman to ward off all those he suspects to be real or potential offenders and transgressors of the Constitution. He has not been enlisted in the “State Army or Police” by any statute to take up arms against all those he considers to be aggressors of the Constitution.¹³⁷¹

In respect of the enforcement of fundamental rights, it is recommended that amendments to section 46(1) of the 1999 Constitution and Order 1 Rule 2(1) of the Fundamental Rights (Enforcement Procedure) Rules (FREPR) be effected. It would be recalled that FREPR was made pursuant to section 42(3) of the 1979 Constitution. Such amendments will among others, make it abundantly clear that any group, unit, families, class of persons, non-governmental organizations, association or individual, acting for themselves or on behalf of others or even in public interest can approach the High Court for the enforcement of fundamental rights.

If there are such amendments, the courts will no longer deny a family as a unit the right to enforce fundamental rights by holding that:

A family as a unit cannot commence an action on infringement or contravention of fundamental rights. To be specific, no Nigerian family or any foreign family has the locus to commence action under Chapter 4 of the Constitution or by virtue of the 1979 Rules. The provisions of Chapter 4 cover individuals and not a group or collection of individuals. The expressions “every individual”, “every person”, “any persons” “every citizen” are so clear that family unit is never anticipated or contemplated.¹³⁷²

The above dictum has unduly restricted the right of a family to seek for the enforcement of fundamental right.

¹³⁷⁰ *Bewaji v Obasanjo* (2008) 9 NWLR (Pt 1093) 540 at 574 paras G-H, per Omoleye J.C.A. who delivered the lead judgment.

¹³⁷¹ *Supra* at 576 paras A-C.

¹³⁷² Per Tobi J.C.A. (as he then was) in *Okechukwu v Etukokwu* (1998) NWLR (Pt 562) 51.

The amendment being advocated herein should be in the nature of section 38 of the 1996 South African Constitution. This should grant *locus standi* to anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.

The suggested amendment is wide and generous enough to guarantee *locus standi* to any person, group, class of persons or association that desires to commence an action in their own interest, on behalf of any other person, in the interest of a member or members of a group or in the public interest, to enforce and protect human rights.

Since human rights are “universal, indivisible and interdependent and interrelated”,¹³⁷³ the separation of civil and political rights, and economic, social and cultural rights in the 1999 Constitution ought to be removed through constitutional amendment. There is no clear reason why the only economic right given constitutional protection under Chapter IV of the 1999 Constitution is the right to property.¹³⁷⁴

Similarly, as part of that dichotomy, the constitutional provisions on Fundamental Objective and Directive Principles of State Policy,¹³⁷⁵ although not very elegant, contain some economic, social and cultural rights,¹³⁷⁶ that have been declared to be non-justiciable by the Constitution.¹³⁷⁷

¹³⁷³ The Vienna Declaration and programme of Action, World Conference on Human Rights, Vienna 14-25 June 1993, UN Doc. A/Conf. 157/23 of 12 July 1993, para 5. See also para 1 thereof. See also Harare Declaration on Human Rights, being the Concluding Statement of the Judicial Colloquium on the Domestic Application of International Human Rights Norms held in Harare, Zimbabwe, 19-22 April 1989; African Charter, the Preamble; *State of Kerala v N.M. Thomas* (1976) 2SCC 310 at 367; *New Patriotic Party v Inspector General of Police Accra* (2000) 2 HRLRA 1 at 79 paras A-B; Sem A, *Development as Freedom* (1999) 147; Ikeller LM “*The Indivisibility of Economic and Political Rights*” (July 2001) (Vol 1:3) *Human Rights and Human Welfare* 13; See also Kothazi J, “Social Rights and the Indian Constitution” 2004(2) *Law, Social Justice & Global Development Journal* (LGD) wick.ac.uk/eli/lgd/2004_2/kothari (accessed on 13 February 2006); See Final Report of the Committee on Review of Indian Constitution. chapter 3 <http://lawmin.nic.in/ncrwc/finalreport/vich3/htm> (accessed on 13 February 2006]

¹³⁷⁴ See sections 43 and 44 of the 1999 Constitution.

¹³⁷⁵ Chapter II of the 1999 Constitution.

¹³⁷⁶ Sections 13-24 of the 1999 Constitution.

¹³⁷⁷ Section 6(6)(c) of the 1999 Constitution.

It is recommended that the Constitution be amended with a view to bringing the provisions of Chapter II of the Constitution under Chapter IV of same Constitution. Such an amendment will accord the provisions on Directive Principles the same status, vigour and strength as the provisions on fundamental rights. This will address the controversy on the non-justiciability of the provisions on Directive Principles. Alternatively, clearly articulated economic, social and cultural rights that are in consonance with international standards,¹³⁷⁸ should be introduced and incorporated into Chapter IV of the Constitution as part of fundamental rights.

Part of the constraint against the promotion and the practice of constitutionalism in Nigeria is the provision of section 12(1) of the 1999 Constitution. This contributes in no small measure to the slow pace of domestication of human rights treaties. It is recommended that the dualism introduced by section 12(1) aforesaid whereby no treaty to which Nigeria is a party, is enforceable unless it has been domesticated by an Act of the National Assembly, be abolished through an amendment to section 12(1). The ultimate beneficiaries of human rights treaties are individuals. They latter also are the ultimate losers when human rights treaties are unenforceable in the municipal courts due to non-domestication. The study concludes that it is difficult to find any justifiable reason why human rights treaties which Nigeria has ratified cannot be granted automatic application in our domestic courts.¹³⁷⁹ Alternatively, a constitutional amendment may provide for pre-ratification scrutiny by the National Assembly. What this means is that before a treaty is ratified by the country, the National Assembly¹³⁸⁰ will scrutinize and give its consent by way of a resolution. Once done, the state then proceeds to ratify a human rights treaty and upon ratification, the treaty becomes enforceable in the domestic or municipal courts. The suggested constitutional amendment will eliminate the cumbersome and difficult procedure of getting the National Assembly to enact a law domesticating a human rights treaty.¹³⁸¹

¹³⁷⁸ Such rights should include rights to environment; housing; health care, food, water and social security; education; language and culture, language, tradition and religion; work and the rights of children minorities and the disabled.

¹³⁷⁹ See Egede E “Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria” (2007)(2) *Journal of African Law* 249 at 284; Citizen’s Forum for Constitutional Reform, Report of Colloquium on Social and Economic Rights, held in Abuja on 5-8 July, 2000.

¹³⁸⁰ In Australia, there is now, “ a lively discussion of the need to improve the procedures for the ratification of international treaties and to provide for pre-ratification scrutiny by the Federal Parliament”: Kirby, M “The Growing Rapprochement between International Law and National Law” being Essay to Honour His Excellency Judge C.J. Weeramantry by Justice Michael Kirby”
http://www.hcourt.gov.au/speeches/kirby/kirbyj_weeram.htm [accessed on 4 February 2009].

¹³⁸¹ The difficulty in getting the National Assembly to domesticate CEDAW was discussed in Chapter 4 *supra*.

Undoubtedly, it is easier to get the National Assembly to pass a resolution on any subject than to get it to enact a law which has to pass through several processes before it is either thrown away or sent to the President for his assent. Another provision of the Constitution that requires an amendment is section 33(1) of the 1999 Constitution. This section which prescribed death penalty made no distinction between young persons under the age of eighteen years and adults.¹³⁸² This is incompatible with the country's obligations under some human rights treaties, namely, article 37 of the Convention on the Rights of the Child, article 6(5) of the International Convention on Civil and Political Rights and article 5(3) of the African Charter on the Rights and Welfare of the Child, all ratified by Nigeria.¹³⁸³ It therefore requires an amendment to provide a clear distinction between adults and young persons under eighteen years of age who should not be sentenced to death.

The right to freedom of movement is protected by section 41(1) of the 1999 Constitution and provides: “*Every citizen of Nigeria* is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom”.¹³⁸⁴ It is rather strange and curious why the provision is limited to Nigerian citizens only.

At least the first limb of section 41(1) of the Constitution which provides that “*Every citizen of Nigeria* is entitled to move freely throughout Nigeria and to reside in any part thereof...” should have been made applicable to “every person” or “everyone” and that will include aliens or non-citizens as is done in some other legislaiton.¹³⁸⁵ Non-citizens who are legitimately residing in another country are entitled to freedom of movement. An amendment should be made to the provision to guarantee the right to movement to “every person” or “everyone” or “all persons”. Alternatively, the right should be conferred on all persons who are lawfully or legitimately residing in Nigeria.

¹³⁸² Chapter 4 *supra*.

¹³⁸³ It used the words “Every person”.

¹³⁸⁴ Since the inception of civilian administration in Nigeria, condemned prisoners have hardly been executed.

¹³⁸⁵ Emphasis supplied.

Under Section 315 of the 1999 Constitution, the National Security Agencies (NSA) Act, which is a military heritage, is an existing law. Section 315 (1) provides that an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of the Constitution. Apart from the general provisions above, section 315(5) of the Constitution enacts as follows:

Nothing in this Constitution shall invalidate the following enactments, that is to say—

- (a) the National Youth Service Corps Decree 1993;
- (b) the Public Complaints Commissions Act;
- (c) the National Security Agencies Act;
- (d) the Land Use Act;

and the provisions of those enactments shall continue to apply and have full effect in accordance with the tenor and to like extent as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of Section 9(2) of this Constitution.

Section 315(6) of the Constitution provides that the above enactments shall continue to have effect as federal enactments and as if they related to matters included in the Exclusive Legislative List. There is no doubt that neither the constitutional debate co-ordinating committee, nor the then Armed Forces Ruling Council (AFRC) ever took note of the provisions of Section 7 of the National Security Agencies Act before it was listed among the Acts in section 315(5) of the Constitution. Section 7 of the National Security Agencies Act enacts as follows:

If any other law including the Constitution of the Federal Republic of Nigeria is inconsistent with the provisions of this Act the provisions of this Act shall prevail, and that other law shall, to the extent of the inconsistency, be void.

The embarrassing scenario becomes obvious when it is realized that the supremacy of the constitution is confirmed by section 1(1) of the Constitution and under section 1(3), if any other law is inconsistent with the provisions of the Constitution, the constitution shall prevail, and that other law shall to the extent of the inconsistency be void. Notwithstanding that the Constitution has clearly proclaimed its supremacy over any other law in Nigeria, the same Constitution also expressly saved the NSA Act which, in its section 7, proclaims its supremacy over the constitution. The Constitution, notwithstanding the said section 7 of the Act, has expressly enacted that the provisions of the Act, including section 7 aforesaid, “shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution and shall not be altered or replaced except in accordance with the provisions of section 9(2) of this Constitution”. The provision on the mode of altering or repealing any part of the Constitution as provided under section 9(2) of the 1999 Constitution is very rigid. This should not deter any effort aimed at amending any provision of the Constitution that deserves to be amended. The text confirmed how the military’s aversion for the supremacy of the Constitution has inflicted monumental damage to the nation’s constitutionalism.

It would be easier for the courts to strike down the said provisions of section 7 of the Act for being not only inconsistent with the Constitution,¹³⁸⁶ but contradictory of a primary character and principle of constitutionalism. No action has yet been taken to challenge the constitutionality of the provision in a court of law. When this is done, the courts will be presented with the opportunity to strike down the provision.

Section 37 of the 1999 Constitution which guarantees and limits the application of the right to privacy to only citizens of Nigeria cannot be justified. Every person who is resident in Nigeria is entitled to the privacy of his home and family. In some other jurisdictions, the prescription on the right to privacy is not limited to citizens alone.¹³⁸⁷ The section requires an amendment to provide that all persons in Nigeria are entitled to the privacy of their homes, correspondence, telephone conversations and telegraphic communications.

Under section 42 of the Constitution the right to freedom from discrimination like the right to privacy is guaranteed to a citizen of Nigeria. The applicability of the provision to only Nigerian citizens is not in tune with what obtains in other countries.¹³⁸⁸ Ironically, a constitutional provision that seeks to prohibit discrimination ended up ordaining and sanctioning discrimination against non-Nigerians. What it means for example, is that foreigners who are married to Nigerians and who have not acquired Nigerian citizenship are not entitled to the protection of section 42 of the Constitution. Another flaw in the provision of section 42 of the Constitution is that it is too restrictive.¹³⁸⁹ The discrimination that is prohibited is one that results from “the practical application of any law in Nigeria or any executive or administrative action of government”. The section does not cover discriminatory practices by individuals and private organizations.

¹³⁸⁶ Section 6(2)(a) of the 1982 Canadian Charter of Rights and Freedoms provides that “Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right- to move to and take up residence in any province”; article 21(1)(g) of the Constitution of Namibia enacts that: “All *persons* shall have the right to: move freely throughout Namibia”; section 18(1) of (1990) New Zealand Bill of Rights Act provides that: “*Everyone lawfully* in New Zealand has the right to freedom of movement and section 21(1) of the 1994 South African Constitution equally provides that: “Everyone has the right to freedom of movement.

¹³⁸⁷ Uzoukwu L “Security Votes and the Law: The Use, the Misuse and the Abuse” in Akinseye–George Y and Gbadamosi G (eds). *The Pursuit of Justice and Development Essays in Honour of Justice M Omotayo Onalaja* (2004)136 at 151-154.

¹³⁸⁸ Article 18(2) of the 1996 Constitution of Ghana provides that: “No person shall be subjected to interference with the privacy of his home, property, correspondence or communication...”; section 14 of the 1994 Constitution of South Africa prescribes that: “Everyone has the right to privacy...”; article 13 of the Constitution of Namibia enacts that: “No person shall be subject to interference with the privacy of their homes, correspondence or communication ...”

¹³⁸⁹ Section 19 (1) of the 1990 New Zealand Bill of Rights Act states that: “ Everyone has the right to freedom from discrimination...”, section 9(3) provides that “the State may not unfairly discriminate directly or indirectly against anyone...” and section 9(4) also provides that “No person may unfairly discriminate directly or indirectly against anyone”; article 17(2) of the 1996 Constitution of Ghana prescribes that “A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status” and article 10(2) of the Constitution of Namibia enacts as follows: “No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status”. One remarkable thing in the above provisions is their application not limit to citizens alone but includes non - citizens.

It was earlier pointed out that the new Sharia and its discriminatory practices against Christians not only offend section 38 but also section 42(1) of the 1999 Constitution.¹³⁹⁰ The right to freedom of thought, conscience and religion, and the right to freedom from discrimination based on religion, all fortify and complement the provision of section 10 of the Constitution on secularism. This work concludes that the activities of a state government which is in deliberate aid and support of a particular religion as against other religions and non-believers violate sections 10, 38 and 42 of the 1999 Constitution and that such activities are clearly unconstitutional.¹³⁹¹ Justification for the unconstitutional practices can neither be found in any of the foregoing sections nor section 277 of the Constitution. In spite of the dubious attempt by the proponents of the new Sharia to disingenuously misinterpret the provisions of section 277 to justify the unconstitutional practices of the new Sharia, it is not in doubt that the said sections are clear and unequivocal and no amendment is recommended.

The unfortunate thing is that the victims of these unconstitutional practices are not seeking the protection of the rights in courts and which will move the courts to make pronouncements on the unconstitutionality of the offensive practices. Unless the victims activate the jurisdiction of the courts, the courts cannot exercise their judicial powers. This takes us back to the question of the relaxation of the concept of *locus standi*. If the law clearly grants locus to associations, bodies, non-governmental organizations and individuals to protect the rights of others or take out public interest litigations, the courts will be presented with the opportunity to make pronouncements on the constitutionality of those offensive practices. This also underscores the importance of the further issue of educating the public, particularly the uninformed victims of human rights violations on their rights and the need for enforcement.¹³⁹² Certain provisions of the Criminal Code and Penal Code which are inconsistent with the constitutional provisions on torture, inhuman and degrading treatment should be amended.¹³⁹³

¹³⁹⁰ See Citizen's Forum for Constitutional Reform.

¹³⁹¹ Chapter 3 *supra* para 3.5.1.6. See also UNGA, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur Mission to Nigeria, 4-10 March, 2007. ALHRC/7/3/Add. 4 of 22 November 2007. Eso K *Further Thoughts on Law and Jurisprudence* (2003) 132. Abati R "Sharia, Ba Mu so" http://www.nigerdeltacongress.com/sarticles/sharia_ba_mu_so.htm [accessed 6 June 2006]. See also Peters *supra* note 332. Hon S "1999 Constitution Sharia and Public Order" http://www.nogerdeltacongress.com/articles/1999_constitution_sharia_and_public.htm [accessed 1 June 2006].

¹³⁹² This is discussed *infra*.

¹³⁹³ Section 34(1) of the 1999 Constitution.

Section 17 of the Criminal Code includes whipping or caning among the punishments that may be inflicted under the Code. Whipping in addition to a term of imprisonment, may be inflicted for various offences under the Penal Code including defilement of young girls,¹³⁹⁴ offences that endanger life or health¹³⁹⁵ and assaults on females.¹³⁹⁶ Section 295 of the Criminal Code makes it lawful for “*a blow or other force*” to be inflicted as a form of correctional punishment of children, servants and apprentices by a father, mother, master or guardian. Such punishment is crude, degrading, dehumanizing and amounts to torture. No degree of “*blow or other force*” on a child or any other person can be justified, particularly when the punishment is not tied to the commission of any offence under the law.

Under section 55 of the Penal Code, children, servants, apprentices and wives may among others, be chastised and beaten as a correctional measure. Section 68(1) of the Penal Code prescribes the punishment of caning and *Haddi* lashing for certain offences under the Code. There is no denying the fact that there is a failure of the Nigerian justice systems—whether criminal or civil. This affects the practice and the development of the culture of constitutionalism. The failure is found in the country’s penal system; policing system and judicial system.¹³⁹⁷ Various reports by presidential commissions on the justice sector have in diverse ways confirmed that the country’s justice system is utterly sick.¹³⁹⁸

The prison and detention conditions remain harsh and life threatening. Pre-trial detentions are intolerably long and inadequate health and medical facilities have contributed to the death of numerous prisoners.¹³⁹⁹ The Government must seriously address these problems.

¹³⁹⁴ Sections 218, 219, 221, 222 and 225A of the Criminal Code.

¹³⁹⁵ *Haddi* punishments is prescribed for Muslims for the offences of adultery –sections 387 and 388 of the Penal Code; defamation and injurious falsehood sections 392 and 393 of the Criminal Code; among other offences.

¹³⁹⁶ Section 55 and 68(1) of the Penal Code.

¹³⁹⁷ According to the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions, who carried out a visit to the country in 2005: There is no single entry point for reformers of the dismally inadequate Nigerian criminal justice system. Virtually every component part of the system functions badly. The result is a vicious circle in which each group contributing to the problem is content to blame others. Thus for example, police officers complain about a lack of resources, but the politicians complain that the police are thugs and their performance undeserving of increased resources. The judiciary blames the prison system and the police for the scandalous number of uncompleted cases, while the police observe that arresting robbers is futile because the courts will never convict them. It is essential to understand the vicious cycle of blame and for all actors to acknowledge their own responsibilities (E/CN.4/2006/53/Add.4.para. 88)

¹³⁹⁸ Presidential Commission on Reform of the Administration of Justice in Nigeria *Proposals for Reform of the Administration in Nigeria*, February 2006; Report of the Presidential Commission on the Police Reform, May 2006 and Presidential Committee on Prison Reform and Rehabilitation (2006). A Committee was set up to harmonize the Reports of the aforesaid Commissions and it turned in its own Report. The Report of the Presidential Harmonization Committee on the Review of Key Recommendations from the Reports of the Presidential Commission on Reform of the Administration of Justice, Presidential Committee on Prison Reform and Rehabilitation and the Presidential Committee on Police Reforms, March 2007.

¹³⁹⁹ US State Department, “Nigeria Country Reports on Human Rights Practices 2007”, 11 March 2008; US State Department, “Nigeria Country Reports on Human Rights Practices 2008”, 25 March 2009.

The penal system must adequately be funded, prison infrastructures rehabilitated and health-care delivery improved. Meanwhile, there should be the decongestion of the prisons. Also important is the capacity-building for prison personnel to bring them in tune with the demands of justice in the 21st century. The police and the justice systems also require adequate funding. Their personnel should benefit from regular capacity-building programmes. Police personnel must be exposed to trainings on human rights. There should be adequate internal mechanism for enforcing discipline within the police force personnel. Those who violate the rights of persons must be sanctioned adequately.

In respect of the judicial system, the quality of justice delivery must include timelines. It scandalizes the rule of law and compromises the practice of constitutionalism where justice delivery is associated with long delays. In *Gafar v Government, Kwara State*,¹⁴⁰⁰ an application to enforce fundamental rights was commenced at the Federal High Court, Ilorin in 1995. On 2 August 1995, the court delivered a ruling dismissing a preliminary objection challenging the competence of the action. An appeal against the ruling to the Court of Appeal was delivered on 7 May 1997. In other words, the journey from the High Court to the Court of Appeal took nearly 2 years. The appeal to the Supreme Court came to an end on 9 February 2007, when the court delivered its judgment. A period of nearly 10 years lapsed from the date of judgment in the Court of Appeal to the Supreme Court. The entire journey from the High Court through to the Supreme Court took nearly 12 years to deal with an objection challenging the competence of the court to entertain an action to enforce fundamental right.

The delay is totally inexcusable and it utterly contradicts the essence of enacting the FREPR which is to ensure speedy, simple and effective enforcement of fundamental rights.¹⁴⁰¹ A system that takes 12 years to finally determine whether an application to enforce fundamental rights is competent or not, is gravely flawed. There should be an amendment to the FREPR enjoining the courts to give the highest priority to the hearing of applications on the enforcement of fundamental rights. Again, the improvement of the systems for delivery of effective justice services must be a continuous exercise and not sporadic one.

¹⁴⁰⁰ (2007) 4 NWLR (Pt 1024) 375.

¹⁴⁰¹ In *Abdulhamid v Akar* (2006) 13 NWLR (Pt 996) 127 at 149 para G. it was held per Akintan J.S.C. that the aim of FREPR: “is to provide a simple and effective judicial process for the enforcement of fundamental rights in order to avoid cumbersome procedure and technicalities for their enforcement under the rules of the common law or other statutory provisions”.

For example, capacity building for judicial officers must be continuous. Their knowledge must continuously be updated on human rights treaties, protocols, among others. After all, there is no end to knowledge. Perhaps, an exposure to the United Nations Standard Minimum Rules for the Treatment of Prisoners,¹⁴⁰² would have led to a contrary decision in *Ekanem v A.I.G.P.*¹⁴⁰³ where a detainee was denied the right to be provided with sleeping materials and it was held that his claim was not justiciable. Curiously, the detainee was a mere suspect and not a convict and was entitled to the presumption of innocence.

Education is central in the promotion, realization and enforcement of human rights. It has been said that “aware citizens serve as the chief foundation of human rights.”¹⁴⁰⁴ The Universal Declaration of Human Rights (UDHR) also emphasizes the importance of education in the strengthening of human rights and fundamental freedoms.¹⁴⁰⁵ It is true that “crucial publicity is needed so that citizens will not only know their rights but will be able to form public opinion.”¹⁴⁰⁶ Within the African context, “more often than not, human rights are alien to most victims of human rights violations”¹⁴⁰⁷ to assert.

The promotion and enforcement of human rights will continue to suffer a serious setback if the victims of human rights violations are not even aware that they have such rights that were violated. Lack of awareness will encourage impunity and increased violations of human rights. In other words, there will be a tendency for the violators to continue assailing the rights of their victims unless they are challenged by the victims or those acting on behalf of the victims.

¹⁴⁰² Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C(XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Article 17 of the Rules is relevant hereof. It provides as follows: 17. (1) “Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degraded or humiliating. (2) All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed as often as necessary for the maintenance of hygiene. (3) In exceptional circumstances, whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing.

¹⁴⁰³ *Supra*. It would be recalled that therein *Omage J.C.A.* held on the issue on whether the right to provide a detainee with sleeping materials is justiciable as follows: “On the second relief for declaration i.e. where the applicant seeks a declaration that his captors should have provided him with sleeping materials and should not have removed his clothes except for his shorts. I am not of the view that such a declaration would not have been utopian in the Nigerian context whether the detention was in the Police Station or the prisons, having read about the general custodial situation in Nigeria. I am also of the view that the relief sought is not justiciable”.

¹⁴⁰⁴ Welch CE *Protecting Human Rights in Africa: Roles and Strategies of Non-governmental Organizations* (1995) 51.

¹⁴⁰⁵ Article 26.

¹⁴⁰⁶ Abioye F and Mnyongani F “Governance, Human rights and the Public Sphere in Africa: the case of Zimbabwe” CODESRIA 12th General Assembly, 7-11 December 2008, 15.

¹⁴⁰⁷ Ambrose BP *The Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (1995) 89.

As shown earlier, the creation of awareness on human rights or human rights education should not be limited to victims of the violations. State organs and agencies engaged in the protection and enforcement of human rights including prison, police and judicial personnel and indeed the general public require human rights education, either formally or informally. For example, it is only through critical creation of awareness and publicity that the public will understand and appreciate that economic, social and cultural rights are as important as civil and political rights. It is necessary to engage educational and information programmes that are designed to promote, enhance and create awareness and understanding of economic, social and cultural rights, both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labour movement.¹⁴⁰⁸

Enlightenment, publicity and creation of awareness will in the long run start changing patriarchal attitudes, stereotypes, discriminatory traditions, customary and cultural discriminatory practices against women. Sustained publicity and enlightenment will discourage the practice of *osu* caste system and female genital mutilation. The opposition against domestication of CEDAW and the promulgation of Child Rights Law by some states in Nigeria for instance, could have been overcome by enlightenment and publicity. This study reveals that the opposition against them is rooted on religious and traditional beliefs. Legislation alone will not lead to an eradication of traditional, customary and religious beliefs.¹⁴⁰⁹ As found in this study, it has not worked in respect of the *Osu* caste system. For enlightenment, publicity and education to be effective, it requires the role of a number of stakeholders. They include the National Human Rights Institutions, non-governmental organizations or bodies,¹⁴¹⁰ the Bar,¹⁴¹¹ the media,¹⁴¹² the Churches and indeed, the civil societies.¹⁴¹³ They may partner among themselves in that regard.

¹⁴⁰⁸ Summary Report of the Stakeholders' Conference on Constitution-making; Ratification and Domestication of international Instruments in Sub-Saharan Africa held at Orion Safari Lodge, Rustenburg, South Africa, 27 February- 3 March 2007.

¹⁴⁰⁹ For example, Thoko Karime, said this in respect of children's right in Africa: "However, it must also be appreciated that there are some practices which militate against the implementation of children's right within the African cultural context. These practices cannot be eradicated by a simple process of legislation of alternative norms. There is a need for an appropriately structured internal discourse directed at the re-evaluation, reformulation and replacement of values. This process, it is submitted, must be done in a manner which is neither culturally offensive nor results in the loss of African cultural integrity": Karime T, "The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections" (2005) (5) *African Human Rights Journal* 221 at 273.

¹⁴¹⁰ Welch *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations* at 51-53.

¹⁴¹¹ Ambrose The Democratization and the Protection of human Rights in Africa at 90-91; Lord Goldsmith and Cowdery NR "The Role of the Lawyer in Human Rights" (1999) (4) No 2) HRI News Letter of the IBA Human Rights to Institute 1.

¹⁴¹² Summary Report of the Stakeholders' Conference on Constitution-making *supra*.

¹⁴¹³ Welch *supra*; Vienna Declaration and Programme of Action (1993) *supra*.

This study also found that militarism dealt a devastating blow to constitutionalism in Africa in general and Nigeria in particular.¹⁴¹⁴ For over eleven years, Nigeria has been under democracy without any interference by the military. In order for that culture of non-interference to continue, it is necessary that the military is trained on the ideals of democracy and their role in the defence of the sovereignty of the country and democracy. A culture of military subjugation to civil authority and democracy must be entrenched and sustained. The stakeholders must be involved.¹⁴¹⁵

Again, because of the failure of the police to secure life and property in Nigeria, soldiers are increasingly being called upon to play a role in that regard. The military is currently playing that role in the Niger Delta region of Nigeria. Several States have established joint police-military task forces on security. This work earlier dealt with the devastating consequences of the invasion of Odi in Bayelsa State and Zaki Abiam in Benue State by the military.¹⁴¹⁶ The Nigerian military is also playing critical role in peace keeping in several parts of the world. The increasing military interaction with the civilian population in the course of its peace keeping operations, calls for the training and the enlightenment of the military on human rights standards and practices.¹⁴¹⁷ This will promote human rights and reduce the areas of friction between the military and the civilian population.

Nigeria has ratified a number of human rights treaties. There are some that have not been ratified in spite of their importance in the protection of human rights. For example, Nigeria has not acceded to the First Optional Protocol to ICCPR. The consequence is that it has not recognized the competence of the Human Rights Committee to consider complaints by individuals regarding violations of the Covenant.

¹⁴¹⁴ Oko O “Consolidating Democracy on a Troubled Continent; A Challenge for Lawyers in Africa” (2000) (33) *Vanderbilt Journal of Transnational Law* 574. A writer argues that “All over the continent, from Cape Coast to Cairo, Africans have experienced the woes of gross abuses inflicted by military dictators and self-styled life presidents. Under the leadership of these regimes, Africans have witnessed massive corruption, human rights abuses, and economic deprivations...” Ambrose BP *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (1995) xv. See also Ojo A *Constitutional Law and Military Rule in Nigeria* (1987) 242-246 and Nwabueze BO *Military Rule and Constitutionalism* (1990) 20; Suberu RT “Institutions, Political Culture, and Constitutionalism in Nigeria” Baun MJ and DP Franklin (eds) *Political Culture and Constitutionalism: A Comparative Approach* (1995) 197, 213, 215.

¹⁴¹⁵ This also noted *supra* includes the Ngos, Bar, media Churches and National Human Rights Commission. Cervenka Z “The Effect of Militarization on Human Rights in Africa in Shepherd Jr GW and Mark OC (eds) *Emerging Human Rights: The African Political Economy Context*.

¹⁴¹⁶ Chapter 3 *supra*.

¹⁴¹⁷ See Ajoni K.F. Ag. Executive Secretary, National Human Rights Commission, Statutory Report of the National Human Rights Commission for the year 2006 presented at the 2001 Annual Bar Conference of the Nigerian Bar Association 26 August - 1 September 2006, Port Harcourt, Nigeria.

Nigeria has also not ratified the Second Optional Protocol aiming at the abolition of the death penalty. Further, Nigeria has not recognized the competence of the Committee against Torture to receive communications from individuals under Article 22 of Convention against Torture and has not signed the Optional Protocol on the Convention against Torture (OPCAT).¹⁴¹⁸ The country must increase the pace of ratification and domestication of human rights treaties.

This study did not pretend to cover in a substantial way the vast subject of constitutionalism in Africa, nay, Nigeria. The study is essentially limited to an investigation of the subject of constitutionalism, the protection of human rights and the role of the judiciary as the watchdog and guardian of constitutionalism. There are still other important areas of constitutionalism that call for further research and investigation. Some writers¹⁴¹⁹ and this study have highlighted the important role the National Human Rights Commission, non-governmental organizations, Bar, media, Churches and indeed the civil societies can play in human rights education, enlightenment and thereby aid the promotion, defence and enforcement of human rights. A further research on the subject will advance the course and the value of constitutionalism.

Similarly, this study also explored but not in a comprehensive manner, the linkage between good governance, democracy and human rights.¹⁴²⁰ They support and sustain each other. Indeed, there is a principle of inseparability underlying their relationship. The study recommends further research on that relationship within the African context. Such a research will aid the development of knowledge on the subject of this study and further bring to the fore the value of democracy and human rights as core constituents of constitutionalism.

¹⁴¹⁸ UNGA Human Right Council, A/HRC/7/3/Add.4 of 22 November 2007 *supra* para 12.

¹⁴¹⁹ Stakeholders' Conference on Constitution-making.

¹⁴²⁰ Chapter 2 *supra*. See also Gutto S "Current concepts, core principles, dimensions, processes and institutions of democracy and the inter-relationship between democracy and modern human rights" being the text of a paper delivered at the United Nations, OHCHR Seminar on the Interdependence between Democracy and Human Rights held in Geneva 25-26 November 2002, wherein the interdependence was examined. See for example, para 5 therein the link, relationship and interdependence between democracy and human rights lie first, on the pursuit of human rights as an essential characteristic of modern democratic society. Human rights have developed into an essential indicator of democracy. Second, core principles of democracy are refined and reformulated in the social process not rights, freedoms and duties, thus rendering them enforceable through judicial and other independent forums of adjudication. A dialectical relationship is identified there since the enforcement of rights is most likely in a democracy. Third, the human rights norms of equality and human dignity reinforce and are reinforced by theories and practices associated with social and economic democracy. See Fischer-Buder K (ed). *Human Rights and Democracy in Southern Africa* (1998).

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