HUMAN RIGHTS IN NIGERIA:

LAW AND PRACTICE

By

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DECLARATION

I hereby declare that this dissertation has been written by me and that it is a record of my own research work .It has not been presented in any previous application for a higher degree. All quotations and references are indicated with specific acknowledgments.



Nuhu Mohammed *JAMO*

CERTIFICATION

We certify that this dissertation has satisfied the requirements of the Ahmadu Bello University for the award of the Degree of Doctor of Philosophy.

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DEDICATION

*This thesis is dedicated to my Late father **Alhaji Mohammed Amin Jamo** without whose encouragement this research would not have been possible but regrettably did not live long enough to see the work in its present form. May his gentle soul rest in perfect peace, Ameen.*

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FOREIGN STATUTES CITED

(1)ACT OF SETTLEMENT 1688 (ENGLAND)

(2)FRENCH DECLARATION OF THE RIGHTS OF MAN AND THE CITIZENS 1791

(3)UNITED STATES CONSTITUTION 1787

(4)INDIAN CONSTITUTION 1947

(5)UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

(6)INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

(7)INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

(8)EUROPEAN CONVENTION ON HUMAN RIGHTS

(9)AFRICAN CHARTER ON HUMAN AND PEOPLE' S RIGHTS

(10)AMERICAN CONVENTION ON HUMAN RIGHTS

(11)INTERNATIONAL LABOUR ORGANISATION DECLARATIONS

(12)UNITED NATIONS ORGANISATION CHARTER

(13)LEAGUE OF NATIONS COVENANT

(14)GENERAL ACT OF BERLIN CONFERENCE ON CENTRAL AFRICA 1885

(15)BRUSSEL CONFERENCE 1889

(16)GENEVA CONVENTION 1864

(17)CONVENTION ON THE ABOLISHING OF FORCED LABOUR

(18)SINGAPORE DECLARATION 1977

LOCAL LEGISLATIONS CITED

(A)CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1963
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.....130,136

(B)CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1979
..... 2,16,72,74,75,80,94,212,214,244,246,247

(C)CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA1999.....6,72,74,75,76,78, 77,80,87,95,96,97,99,101,102,103,105,108,111,112,114,115,116,117,118,120,121,122,125,126, 132,137,144,154,155,159,160,161,165,166,168,170,173,176,178,179,180,181,183,184,191,194, 206,121,214,222,226,280,232,239,240,244,246,247

(D)CRIMINAL CODE 215,216

(E)CRIMINAL PROCEDURE CODE.....192,194,195

(F)EVIDENCE ACT CAP 62 LAWS OF THE FED. OF NIGERIA.....132,162

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(I)CHILDREN AND YOUNG PERSONS LAW 1958.....223

(J)CONSTITUTION(SUSPENSION AND MODIFICATIONS) DECREE NO.1 1966.....67,270

(K)CONSTITUTION(SUSPENSION AND MODIFICATIONS) NO. 1 1984
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(L)CONSTITUTION (SUSPENSION AND MODIFICATIONS) DECREE NO. 17 1993.....67,268

(M)FEDERAL MILITARY GOVERNMENT (SUPREMACY AND ENFORCEMENT OF POWERS) DECREE NO. 17 1985.....272,273

(N)INTERIM .NATIONAL GOVERNMENT DISSOLUTION DECREE 109 1993 268

(O)STATE EXECUTIVE DISSOLUTION ETC DECREE 110 1993.....268

ABBREVIATIONS

(1)ALL NLR.....All Nigeria Law Reports

(2)CLR.....Commonwealth Law Reports

(3)NSCC.....Nigerian Supreme Court Cases

(4)NCC.....Nigerian Criminal Cases

(5)NRNLR.....Northern Region of Nigeria Law Reports

(6)NWLR.....Nigerian Weekly Law Reports

(7)NCLR.....Nigerian Constitutional Law Reports

(8)SCNLR.....Supreme Court of Nigeria Law Reports

(9)AIR..... All India Reports

(10)NCR.....Nigerian Criminal Cases

(11)SC (US).....Supreme Court

(12)AC.....Appeal Cases

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3. Adewale & Ors V Jakande & Ors(1981)1 NCLR 262.....109

4. A.G. (Oyo State) V L.O. Adeyemi (1981) 2 NCLR 186.....136

5. A.G. (Oyo State) V Bello (1986) 3 NWLR (Pt 45) 825.....153

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7. Akansas V Sanders,422 US 891 SCt 2586 (1979).....197

8. AkpalakpaV Igbaibo (1996) 9 NWLR (Pt 418) 50.....84

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11. Amalgamated Press Ltd V Queen (1961) WRNLR 268.....216

12. Ameida - Sanchez V United States 413 US 266(1973).....197

13. Apampa V Bologun Unreported Suit No 1/211/65 Judgement dated October 20,1970.....162

14. Ariori V Elemo (1983) All NLR 1.....128

15. Augustine Eda V Commissioner Of Police (Bendel State).(1982)1NCR 124.....129

16. Australian Communist Party V The Commonwealth.(1950/51) 43 CLR1.....234

17.Authur Nwankwo V The State (1981) NCLR 268.....216

18. Awolowo V Usman Sarki (1966) NSCC (Vol.4) 209.....150

19. Beck V Alabama (1980) 447 US 625.....90

20. Bello V A. G. (Oyo State) (1986) 3 NWLR (Pt 45)825.....152

21. Benant V United States 355 US 96 SCt 155(1957).....199

22. Berger V New York 388 US 41 (1973)....199

23. Buck V Bell 246 US 114(1976)....104,229

24. Chae Chan Ping 130 US 181 (1944)....229

25. Chambers V Maroney 399 US 42 (1970)....196

26. Carrol V United States 267 US 13(1925)....196

27. Cheranchi V Cheranchi (1961) NRNLR 24....218,223

28. C.J V Dickshitulu (1979) 2 SCC 34....79

29 Coker V Georgia 433 US 584 (1977)....88,117

30. Cooledge V New Hampshire (1971)403 US 443....193

31.Cupp V Murphy 412 US 291 (1973)....194

32. Deep Chand V State of U.P (1959) AI R, SCI 648....78

33. Doherty V Balewa (1961) NSCC (Vol 2) 248....133

34. Dixon Gopka V .I.G.P. (1961) 1 All NLR 423....152

35. D.P.P V Chike Obi (1961) NSCC (Vol.2)104....214

36. Dr. Basil Ukeagbu V A. G. (Imo State) NSCC (Vol.14)160....211

37.Dr. Denloye V M.D.P.D.C. (1968) All NLR.298....139

38.Dr. O. G. Shofekun V Akinyemi (1981)1 NCLR135....133

39.Duncan V Kahanamoku 567 US 1125(1943)....188

40 Edimunds V Florida (1982) 102 US 3368....90

41. Eisenstadt V Baird, 405 US 438 92 Sct 1029....199

42. Ekeaka Bahuifir V Linus Ukonu (1985) 2 NWLR 686....131

43. Eramus V Registrar of Trade Unions (1985) NSCC (Vol.16) (Pt 11) 766....220

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45. Ex Parte Milligan, 98 US 862 (1924).....235,238

46.Ex parte Olaokunrin V Oba of Owo (1983) NSCC Vol 17 (Pt 1) 245.....141

47. Eze V Queen (1950) 19 All NLR 1.....115

48. Fawehinmi V Abacha.(1996)9NWLR(Pt 475)710.....83

49. Furman V Georgia (1972) 408 US 238.....88,90,97

50. Fram Nasewanji V State of Bombay AIR (1951)Bom 216.....76

51.Gaji Ujah V A. G. Benue State(1983) CAR417.....114

52.Gani Fawehinmi V Akilu & Ano (1989) 1 NWLR (Pt.102)122.....288

53. Gani Fawehinmi V L.P.D.C. (1985) NWLR 300.....98,139

54.Gilbert V State of Minnesota 254 US 325(1920).....190

55.Godfrey V Georgia (1980)446 US 420.....90

56.Goldman V United States 316 US 129, 62 SCt 993 (1942).....199

57. Gopalanachari V State of Kerale AIR (1981) SC 624.....91

58. Gregg V Georgia (1976) 428 US 456.....88,98,117

59. Grisrwold V Connecticut, 382 US 479 SCt (1978).....192

60. Gwonto V The State (1983) SCNLR 142.....142

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63. Innocent Adikwu V House of Reps(1982)3NCLR284.....211

64. Isiyaku Moh V Kano N. A (1968) 1 All NLR 424.....128

65. Josiah V The State (1985) NSCC 125.....152

66. John Folade V A. G. Lagos State (1981) 2 NCLR 771.....128

67. Kauhasu V A. G. Zambia (1967) HP/273.....234

68.Katz V United States 389 US 387, 88 SCt 507.....199

69.Kerale Education Bill (1958) SC 956.....78

70. Kerale V Thomas (1976) SC 496.....79

71. Kuku V Olushoga (1962) I All NLR 625.....195

72.Lakanmi V A.G. (West) (1970) I UILR 201.....283,286

73.Lee V Florida, 392 US 378,88 Sct 2096(1968).....199

74.Lingappa V State of Maherashira, AIR (1985) SC 539.....79

75.Liverside V Anderson (1942) AC 204.....239

76. Maneka Ghandi V Union of India AIR (1978) SC 597.....91

77. Merchant Bank Ltd V Federal Minister of Finance(1961)1WNLR109.....126

78.Mekesh V State of M.P, AIR (1985)SC 537.....79

79.Minesville School District V Gobitis 310 US 538.....27

80.Mohini Jain V State of Kartanaka AIR (1992)1858.....79

81.Munn V State Of Illinois(1968) 486 US 1034.....88

82. Noah & Ors V A.G. (Fed) Unreported Suit No.101 PHE/33M/70 of May 2,1990.....288

83. Nafiu Rabiu V State (1980) 2 NCR 117.....157

84. Nardone V United States 302 US 379 (1937).....192

85. Nigerian Union of Journalist V A. G. (Fed) (1983) NCLR145 168

86. Nwankwo V Queen (1959) SCR 1068.....129

87. Obeya Memorial Hospital V Attorney (Fed)(1987) 3NWLR(Pt 60)325.....287

88. Odofin Bello V the State (1996) I All NLR 223.....152

89. Ojukwu V Lagos State Unreported suit No PHC/22/73 of 4th April 74

90. Okogie V Lagos State (1981) I NCLR 126.....79,210

91.Olasoji V A.G. (West) (1965) 1 All NLR 124.....217

92. Olawoyin V C.O.P. (1964) NSCC (Vol.2) 261.....152,218

93. Olaga Tellis AIR (1986) SC 108.....91

94. Olmstead V United States 272 US438(1928).....192,199

95. Olushola Ovegbami V A.G (Fed) (1982) 2 NCR 189.....120,211

96 Onu Obekpa V C.O.P (1981) 2 NCLR 420.....124

97.Orisakwe V Governor of Imo State (1982) 2 NCLR 420.....127

98. Patels V A. G. Zambia (1968) SJZ 1.....186,224

99.People V. Onofore 415 US 262 (1978).....168

100.Pollock V Williams 322 US 4 (1944).....100

101. R. V Kidman (1915) 20 CLR425.....234

102. R. V Oakes (1986) 26 DLR (4th)200.....225

103. Re Akoto (1961) GLR 523.....187

104. Re Dr. Olu Onogoruwa Unreported Suit No.FCA/7/117/79.....123

105. Roberts V Luiosiania 431 US 633(1976).....117

106. Robinson V California(1962) 37 US 660.....88,90,117

107. Seriki Pawa V Akanngbe (1960) NRNLR 24.....23

108. Shemfe V C.O.P. (1962) NMLR 82.....152

109. Silverhorne Lumber Co. V U.S. 251 US 385, 40 SCt 182 (1920).....201

110. Stanley V Georgia, 394 US 557, 89 Sct 1243 (1969).....167

111. Shugaba Darman V Minister of Internal Affairs. (1980) I NCLR 25.....134,178,190

112.State V. Nathaniel Unreported Suit L.HCt No.1/45/46/78.....130

113. State v Saunders 75 NJ 200, 218-220.....199

114.Tellis V Bombay Council (1987) LRC (Const) 351.....79

115.Warden V Hyden (1967) 387 US 294.....196

116.UPSE Board V Hari, AIR (1979)SC 65.....78

117 U.S V Brignoni Ponce 422 US 873(1975).....197

118.U.S V Chadwick 433 US 1 (1977).....196

119.U.S V District Court for Eastern District of Michigan 407US 297 SCt 2125.....204

120. U.S V Jeffers 342 US 48 (1951).....192

121.U.S V Matinez-Fuerte 428 US 543,3074 (1976).....197

122. U.S V Ortiz 422 US 891 (1975).....197

123. U.S V Robinowitz 399 U.S 59 (1950).....194

124. U.S V Santana 427 US 38 (1976).....196

125. U.S V Watson 425 US 411 (1976).....192

126. Warden V Hyden (1976) 387 US 294.....196

127.Woodson V North Carolina 428 US 280 (1976).....79,117

128.Yanor V The State (1965) NSCC (vol.4) 147.....149,152

129.Yerima V. Borno NA. (1968) I All NLR 397.....129

130.Youngstown Sheet & Tube Co. V Sawyer 342 US 579.....230

131.Yusuf Garba V University of Maiduguri (1986) I NWLR 550.....134,192

132. Zekhome & Ors V President Federal Republic & Ors (1990) 2 WBPN 58.....288.

1.1 GENERAL INTRODUCTION

Human Rights or what is commonly referred to as fundamental rights has become the most important or sometimes the most controversial political or constitutional concept of the twentieth century and is destined to take us into the twenty first century. From the 19th Century various movements have sought ways and means in which the powers of the state's machinery could be curtailed to safeguard the interest, liberty and freedom of the individuals. The writings of the various philosophers and thinkers of the 17th and 18th century provided an invaluable source of materials to draw from.

The constitution of the United States of America 1787 became the first constitutional and legal document which provides not only a definite expression to this concept of "rights" but also established institutional structures and machinery for giving them practical effects. With the benefit of the United States experience subsequent emerging nations attempted in their variety of ways provides for these rights as a bulwark against state power. These is however no uniformity in these attempts perhaps because the historical experiences of each nation varies in accordance with its own personalities.

To further compound the already difficult situation human rights as a political or legal concept was elevated from being a domestic or municipal subject matter to the

realm of international law. In other words human rights has become a subject of international law capable of enforcement against an erring states under the rules and by international institutions. The idea that an individual or a citizen could be made a subject of international legal instrument a completely new dimension to the enforcement complexity.

Nigeria as a member of the international community and many institutions could not be insulated from these development in the international law arena. On the eve of its independence various forces spearheaded by minority tribes sought and obtain a consensus to include a chapter on the fundamental rights in it's 1960 independence constitution. Such inclusion was considered as a protection against the possibility of domination and oppression of the minorities by the majority tribes who controlled the machinery of governance. All the subsequent constitutions have repeated substantially the provisions of that chapter.

The 1963 Republican constitution even though has severed the constitutional umbilical cord linking the British Crown with Nigeria, nevertheless reproduced in substantial portion the chapter on the rights. Although the 1979 constitution was held to e a "remarkable - departure" from the 1963 framework, the view at least in respect of the fundamental rights is erroneous because the

difference between the two constitution is very slight. In consequence the judicial decisions of the courts under the 1963 constitution to a large extent equally apply with full force under the 1979 constitution.

The military intervention in 1966 halted the considerable advance made by the Nigerian courts in the development and concretization of the Human Rights norms in our legal and political culture. The 13 years of military rule (1966 - 1979) destroyed almost completely the little human rights culture which the country had developed. It therefore became imperative, with the advent of the 1979 constitution, for the country and the legal system to learn afresh the culture of human rights in its understanding and respect. The courts, which were emasculated by the various military decrees including the usual ouster clauses over the period in question have to learn the exercise of their new found powers which they have not evoked in more than a decade.

The second attempt as constitutional democracy was rudely interrupted by the military take over of 1983 on the simple excuse of the civilians "mismanaging the country's economy." The second coming of the military spanned over a period longer than the first experience (1983 - date (199) and introduced into the country's political and legal culture two important concepts: self succession of an incumbent head of state and human rights abuse in its most

extreme form.

The Babangida/Abacha military regimes will go down in the annals of Nigerian history as the most brutal military oligarchy Nigeria had ever experienced with the later attaining the status of what one could safely referred to as 'Dictatorship'. The country's agony under Abacha was only brought to a halt by the demise of the dictator and the advent of Abdulsalami Abubakar.

General Abubakar's military administration set a transition programme in motion where ultimate objective is the return of the country to constitutional rule on May 29, 1999. It is hope that the country could now have a third trial at constitutional democracy and seek to develop Human Rights in its legal and political culture. It seem to me that there is the last opportunity for the nation to make a successful constitutional democracy and imbibe it in our legal system.

1.2 OBJECTIVE AND SCOPE OF THE RESEARCH

In view of the hazy and imprecise nature of Human Right and the controversies surrounding the operation of the concept, differences have merged in various jurisdiction as to how best to codify, protect, advance and enforce their legal efficacy. It is therefore necessary to determine from the onset the objective of the research. The main thrust of the research is to clear the haziness or bring to a fore the multidimensional nature of Human Rights

not only from the realm of municipal laws of Nigeria but equally from the international law perspective. In the context the contempt in perspectives of Human Rights especially from the Human Rights especially from the philosophical standpoint of the concept.

Another important objective of the research is to consider, albeit historically, Nigerian experiences in the operation and enforcement of Human Rights during one brief experiment at constitutional democracy. While the bulk of the research is devoted to the country's experiences under the 1979 constitution, this is not however to discountenance in any manner the country's experiences under the 1960 and the 1963 Republican constitutions especially in the context of judicial decisions.

The discussion will generally focus on such issues as the theoretical framework of these rights, their codification in the 1979 constitution and the scope of the various limitations placed upon the exercise of these rights.

Generally matters of human rights interpretation and enforcement to a large extent may depend upon the level of judicial activism of the courts. In otherwords sometimes enforcement of human rights may partake or encompass the political, social, economic and cultural values of a society depending on the level of its advancement and sophistication. It is imperative for a research of this

nature to examine the decisions of the various Nigerian courts and determine whether the courts were influenced or guided by some of these parameters in the exercise of their adjudicatory powers. The discussion of this segment will be viewed through the prism of the Anglo-American jurisprudence in view of their immense constitutional experiences in the area.

It is absolutely imperative to consider human rights from a broad perspective. This is because the dimensions of human rights have been shifted form the political to social and economic realms. The anchor upon which this shift was predicated was that political rights in themselves were meaningless without creating the appropriate or necessary condition for their enjoyment or exercise. While it is not the main issue for discussion in this research I shall examine briefly some aspect of these so-called social and economic "rights" as found under chapter II of the 1979 constitution.

In view of the complex nature of human rights as a constitutional concept and the scope of its operations especially in the context of their constitutional restraints, this problem has proved to be a thorn in the courts flesh. The central issue for the courts determination is the scale of balancing the individual rights against the state social or societal rights. The research will delve into the slippery area with a view to

establishing whether or not the courts have established any objective criteria for such determination.

The military in Nigeria have over a period of time become a potent political force. In fact the military have been in government for much longer period than over two trials of constitutional democracy. Therefore it is impossible to undertake any research on Human Rights without devoting a significant part to the military rule, and this work is no exception. In consequence the impact of military rule on civil and political liberties of Nigerian citizens will be considered at length. In Nigeria we had at one time been "privileged" of being rule by a military government whose "professed" philosophy of governance was "human rights". This research intends to unearth the myth surrounding that proposed policy and compare it with the reality of what was obtained.

1.3 RESEARCH METHODOLOGY

The principal source of materials for this research are textbooks, journals, law reports, pamphlets conference proceedings (both national and international) Human Rights groups most especially the non-governmental ones, the central anchor of the entire discuss in will be the 1979 constitution and the analysis of the research will be based upon authoritative expositions, propositions of respected and universally acclaimed authors and jurists of contemporary political and legal philosophy especially on

human rights jurisprudence, judicial pronouncements by the highest courts in some of the Anglo-American jurisdictions and all the superior courts of Nigeria and where necessary international institution were they safeguard or enforce human rights.

1.4 ORGANIZATIONAL STRUCTURE

This research is essentially divided into six principal chapters with Human Rights as the common thread not only binding them but equally but also establishing a the parameter of putting together the entire jigsaw puzzle.

The first chapter is a general introduction to the entire research. It considers a general background information on the importance of Human Rights in the political and legal culture of the 20th Century. The chapter set the ball rolling in defining the objective of the entire research seeks to achieve. In order not to leave any matter to speculation the chapter defines in precise and crystal the scope of the research. This is necessary because human rights concept is so amorphous and it transcends most of the political realm which precipitate its advent in the first place. The chapter further considers the methodology the research adopted and the materials used. It finally considers the structure and order of the presentation or sequence the research will take.

Chapter two deals with the complex issue of the

concepts of human rights. The chapter traces the historical evolution of human rights and its influence on the global constitutional development of emerging nations. Further the contentious issue of the of human rights as advanced by the various philosophers and political theorist will set the agenda for discussion in this chapter. The scope and nature of human rights for the remaining part of the research will be determined by the discussion here. Human Rights under international law will be core of the discussion of chapter three because of its relative and global importance. Human rights under the rules of international law have recently assumed an important role to the extent of regulating the relationship between states and in some cases the basis of United Nations economic sanction against erring states.

Chapter four is essentially one of the central point of the entire research work. The discussion commences with the historical circumstances of what gave rise to the inclusion of a chapter on fundamental rights in the 1960 Nigerian independence constitution. The inclusion of such a chapter being an innovation certain constitutional concepts for its successful operation were necessary There are constitutionalism and separation of powers. The meaning, nature and their codification under the 1979 constitution provides the necessary foundation in this chapter. A detailed examination of chapter IV of the 1979

constitution is made especially in the context of their limitations.

Chapter five considers in general and specific terms the role of the courts in enforcing human rights in Nigeria. Practical questions, issues and cases that came up for determination by the court and form the backbone of the discussion in the chapter. The interpretation of exceptions especially of section 45 vis-a-vis sections 34 - 38 will be made.

Chapter V centrally considers human rights under military governments in Nigeria. This will spanned through considering questions such as the legal and constitutional implications of military takeover, rule of law under the military and the impact of military rule on civil and political rights of Nigerians. The nexus between the long years of military rule and the risk and advent of human rights groups as advocate and guardian of democracy. The final part will conclude on the note of observations or findings of the research and some suggested reforms/amendments in certain areas considered necessary.

CHAPTER TWO:

HISTORICAL EVOLUTION OF HUMAN RIGHTS

2.1 INTRODUCTION

Following the rise of political ideology especially the political philosophy of liberalism in western Europe in the 17th and early 18th Century the contributions of the great philosophers and thinkers provided an immense source materials to draw from in fashioning out framework of government or constitution. In tracing the historical evolution of human rights one could neatly divide the historical periods to correspond to the experiences of the then great nations of Europe and America and other subsequent development of the concept. These countries are the Great Britain, United States, France, International Conventions, Declarations and Treaties including the relevant regional instruments.

2.2 UNITED KINGDOM'S BILL OF RIGHT

Perhaps the first known or recorded instrument of human civilization, on "rights" is the Bill of Rights 1688.[1] The English Bill of Rights is in a form of statute and because it is a statute it is part of the law of England. The historical account of what gave rise to the codification of the statute is a good example of the way in which a particular incident may precipitate a generally or even universally accepted norm or model.

The Bill of Rights was part of a major settlement

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[1] For the full text see Halsbury, Statutes, 3rd edition, Vol. 6, p.489.

between the Crown and Parliament consequent upon the struggles of the Stuart period. Like the Magna Carta, it is primarily a demarcation of powers but it also contained general principles of state policy and law. Some of these have come to assume universal significance e.g. the prohibition of illegal and cruel punishment was to appear in many other context including the Universal Declarations of Human Rights. The English Bill of Rights has inspired more sophisticated developments in other countries. .

The English Bill of Rights although not detailed in form covered a wide range of subjects, from taxation, spending power, standing army, to the right of petition, freedom of election, freedom of speech, trial by juries etc. Essentially the document severely curtailed and restricted the powers of the Crown (hitherto exercised by means of prerogative writs) in matters of imposing encumbrances on the citizens directly without the authorization or consent of the parliament. It is worth noting to quote the last paragraph of the English Bill of Rights thus,

> "And they [parliament] do claim, demand and insist upon all and singular the premises as their undoubted rights and liberties and that no declarations, judgements, joinings or proceedings to the prejudice of the people in any of the said premises ought in any wise to be drawn hereafter into consequence or example...."

The title of the bill conveys in graphic terms the intention of the statute in the following words,

> "An Act declaring the rights and liberties of the subjects and setting the succession to the crown."

There is no gainsaying that the bill clearly established that the Crown does not enjoy the so called "divine right to rule" as justified by earlier philosophers like Hobbes. The bill essentially provides that the powers of the Crown could be restricted, controlled and supervised by the commoners through form parliament i.e. directly elected representatives of the people.

This historical epoch paved the way for subsequent nations to borrow in part the English experience. Perhaps the next important country to attempt the codification of human rights in their instrument of governance, although without much success, was France.

2.3 FRENCH DECLARATION OF THE RIGHTS OF MAN AND THE CITIZENS, 1789

The historical experiences that led to the French Declarations materially differs from that of Great Britain. The French Revolution of 1769 saw the overthrow of the Barbourn dynasty and its replacement with a people-like-oriented system after a long span of virtual anarchy in the country. In consequence the country had a chequered and turbulent history since the Revolution. In fact it was not until 1789 that some semblance of normalcy and order was

restored i.e. after the rise of Napoleon Bonarparte.

The French Declaration of the Rights of man and the citizens was codified as an obvious reflection of the ideals behind the revolution. The declaration is a fairly complete code of the principles of constitutional government and the rule of law, and it is the first of its kind. There is no doubt that if it was not misused by the ideology of liberation it could have been a remarkable improvement upon the English Bill of Rights.

The Declarations provides for such things as equal rights and freedom of citizens, the purpose of all civil and political associations being the preservation of the natural and imprescriptible rights of man, which were define as liberty, property and resistance to oppression. The document also recognized that the sovereignty and all authority emanates from the people and therefore provides for the liberty of the citizens, prohibition of actions hurtful of the society, effects of legislation on citizens, prohibition against accusation, arrest or imprisonment except as determined by law, protection of opinions including religion opinions etc.[2].

In spite of its shortcomings the Declaration was to influence many constitutions of the parliamentary type of the 19th Century and later in Europe and Latin America.

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[2] For the Full text see *BASIC DOCUMENTS ON HUMAN RIGHTS* ed. Ian Browlie (1971) pp.8-10.

The Declarations was affirmed in the preamble to the French Constitutions of 1946 and 1958 i.e. the Fourth and Fifth Republic Constitutions respectively. By far the most important experience of a country, which was to have a profound influence and impact on the shape and character of the constitutions, especially on human rights, and other international instruments of many countries to date, was the United States. This makes it necessary to examine that country's experience in greater detail.

2.3 HUMAN RIGHTS UNDER THE UNITED STATES CONSTITUTION

The historical epoch that led to the evolution and codification of human rights under the United States constitution need to be recounted her in greater detail for two principal reasons. Firstly the United States constitution has after over 2 (two) centuries of operation continued to fascinate emerging nations and is mostly used as a anchor upon which the constitutions of those countries were predicated. Secondly the United States constitution was the inspiring document which largely crystallized into the 1979 and now the 1999 Nigerian constitution, the central feature of this research work.

In 1774 the British government imposed tax legislation on its 13 American colonies to which there was a widespread opposition. In the same year Samuel Adams, a member of the Massachusetts House of Representatives, arranged a meeting which all colonies were invited to send representatives.

All the colonies except Georgia attended and the meeting was styled the "First Continental Congress of 1774." The congress took place in Philadelphia between September and October of the same year. The Congress passed 10 Resolutions which in effect summarized the *RIGHTS* the colonies felt were *BASIC* to their existence which they felt Great Britain violated. This "Declaration of Rights" perhaps is the first attempt by a nation (baring Great Britain) or group of people to seek for a protection or enforcement of rights to be guaranteed under a codified law. It is significant to mention that of the ten [10] resolutions five [5] involved rights, liberty or freedom of the people in the colonies.

These include among others:

1. That they [the people] are entitled to life, liberty and property and they have never ceded to any foreign power whatsoever, a right to dispose of either without consent.

2. That our ancestors, who first settled in these colonies, were at the time of their emigration from mother country entitled to *ALL RIGHTS, LIBERTIES AND IMMUNITIES OF FREE AND NATURAL BORN SUBJECTS* within the realm of England.[3]

3. That by such immigration they by no means forfeited, surrendered or lost any of those rights, but they

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[3] All emphasis supplied

were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstance enable them to exercise and enjoy.

4. That the foundation of English liberty and of all free government, is a right in the people to participate in their legislative council...

5. That they have a right to peacefully assembled, consider their grievances, and petition the king; and that all prosecution, prohibitory proclamations, and commitment of the same are illegal.[4]

At the tail end of the resolutions the delegates affirmed their claim to all these rights and insisted that these cannot be legally taken away or abridged without the people's consent or their representatives in their several provincial legislatures. The delegates further threatened to impose, what in the present day parlance be termed, economic sanctions against the British government, if their demands were not met. The demands were principally reduced to 14 items. The British government failed to act on all those resolutions and refused to satisfy the demands. In fact they made it clear that they intend to rule or govern the colonies by force.

This led to some military skirmishes and major

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[4] For a detailed historical discourse of this event see Fisher, S.G (1897) *"The Evolution of the constitution of the United States"*.

military engagements between the British troops and some American rebels led by George Washington. The British forces suffered major reverses and this led to the spread of the idea of independence. Richard Lee's proposals for independence and confederation was passed by Congress. Subsequently five people were appointed to write the documents. They were John Adams, Benjamin Franklin, Thomas Jefferson, Robert Livingstone and Rogers Sherman. Jefferson however did most of the writings and his draft, with some changes, was signed by members of the congress on August 2, 1776. The central theme of the entire text of the Declaration of Independence , like the declaration of rights, was the right of citizens which they possessed in a state of nature. One of the famous quotation from the independence Declaration was,

> "We held these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and pursuit of happiness. That to secure these right, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it and institute a new government..."

It is surprising to note that despite these eloquent

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declarations about natural rights of citizens in the colonies (which was the basis of the declarations) the article of confederation which formed the foundation or framework of government makes no direct reference to the rights. In fact the only references to anything connected with the rights in the entire document could be found in Article III.

After a brief trial with the Articles of Confederation it was discovered that it had several flaws which made it impossible to form a basis of a common viable government. It became necessary to urgently either to fashion out a new legal document to substitute the Articles or modify it to plug the newly discovered pitfalls.[5]

On February 21, 1787 Congress recommended that a convention be held at Philadelphia and all the states except Rhode Islands appointed their delegates. The mandate of the convention was expressed to be

> ".... the sole and express purpose of revising the Articles of Confederation and reporting to congress and the several legislatures such alterations and provisions therein as shall when agreed to in congress and confirmed by the states render the Federal Constitution adequate to exigencies of government and the preservation of the Union..."

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[5] See generally Burdict, C.K. (1922) *The law of the American Constitution: Its origin and Development.* cf Andrews, C.M. (1924) *The Colonial Background of the American Revolution*, Yale Univ. Press.

Instead of revising the Articles of Confederation as stipulated in their mandate and as advised and directed by congress, the delegates fashioned out an entirely new constitution. Some writers criticized this action on the ground that the convention had no legal authority to do what it did. For instance a respected scholar maintained that,

> "What they (the convention) actually did, stripped of all fiction and verbiage, was to assume constituent powers, ordained a constitution of government, of liberty, and demanded the plebiscite therein, over the heads of all existing legally organized powers..."[6]

Furthermore there were disagreements between or amongst scholars as to whether the constitution that emerged out of the convention's deliberations was really and truly a new document. For instance William Gladstone, the great English Statesman remarked,

> "... as the British constitution is the most subtle organism which has proceeded from progressive history, so the American constitution is the most wonderful work ever to struck off at a given time by the brain and purpose of man ... it had its root deep in the past and while containing some novel features,

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[6] Burgess, J.W. (1902) *Political Science and Comparative Constitutional Law*, Vol. I p.105.

it is the embodiment of many antecedents..."[7]

Against the background of the various writings of the great philosophers and thinkers of the time the Philadelphia convention was held. In view of the calibre of people appointed and delegates to the convention, it was rightly assumed that most of them, at least the most influential amongst them, were very much conversant with there rights and theories. Professor Farrand, a distinguished historian of the United States constitution, commenting on the qualification of the delegates concluded that,

> "Great men there were, it is true, but the convention as whole was composed of men such as would be appointed to a similar gathering at the present time: professional men, businessmen and gentlemen of leisure; patriotic statesmen and clever, scheming politicians; some trained by experience and study for the task before them, and others utterly unfit. It was essentially a representative body, taking possibly a somewhat higher tone from social conditions of the time, the seriousness of the crises, and

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[7] As quoted in Furgusson, J.H. et el (1953) *American System of Government*, McGraw Hill book pp 50-51 cf Farrand, M (1940) *The Framing of the United States Constitution*, Yale University Press pp. 38-39. Another view in Beard, C.A. (1913) *An Economic Interpretation of the Constitution of the United States*, McMillan

the character of the leaders."[8]

It appears that the background of the delegates to the convention substantially influenced the outcome of its overall deliberations especially in the nature and character of the document that emerged. Furgusson observed that,

> "There was little in the constitution that was new. The men who wrote the document were familiar with the government of the antiquity, the English constitution and the government of Western Europe. They were also familiar with the writings of the period, the most outstanding of which were *BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND*, John Locke's Two *TREATIES OF GOVERNMENT*, Montesqueui's *SPIRIT OF LAWS* and Rousseau's *SOCIAL CONTRACT*. Moreover they were saturated with the revolutionary literature with some of their contemporaries, including some of those in attendance at the convention helped to write and disseminate".[9]

It could therefore be argued that the constitution produced from the deliberation of the delegates was not "solely the product" of the "creative wisdom" of the founding fathers. Rather it was more accurate to say that the constitution is a digest of the most approved

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[8] Ibid p. 39.

[9] Ibid p.51.

principles and provisions of the charter of government with which the authors of the constitution were intimately acquainted.

The draft Constitution contained a proviso under Article III declaring that the ratification by the convention of [9]nine out of the [13] thirteen states should be sufficient for bringing into effect the constitution. The draft constitution was therefore sent to the Confederate Congress with the advice that the Congress should approve it, then refer it to the states legislature, which in turn should pass it along to the convention of the people in each state. It was further suggested that when [9] nine conventions approved it , congress should take steps to put the new government into operation.

It must be pointed out that Rhode Island had not been represented at the convention and the New York delegation had left the convention, partly in protest against the proceedings, and partly because a number of delegates had spoken in opposition to the constitution and the proposed method of ratification.

In the campaign for ratification people like Patrick henry and Richard Henry after noting that the document contained *NO BILL OF RIGHTS*, dwelt upon the dangers to liberty this portends. In general the most persistent theme of the campaign was that the states would be destroyed and the federal government will become

tyrannical. To offset these objections the Federalist[10] yielded to the extent of promising the addition of a bill of right as soon as the new government was organized.

On the 28th September, 1787 the congress adopted a resolution transmitting the constitution to the State legislatures and by the 21st June, 1788 nine (9) had ratified it. However the two most populous states New York and Virginia were yet to ratify it. Advocates of the new constitution recognized the necessity of their adherence if the new union was to be successful.

In the campaign for ratification in the state of Virginia convention the federalist prevailed by a majority of 10 votes but not without promising the addition of a bill of rights after ratification. Similarly after 5 (five) weeks of acrimonious debate the New York Convention ratified the constitution with a narrow margin of 3 votes, and then, only upon the condition that a bill of right be added at the earliest possible moment.[11]

In conclusion it was in the fulfilment of these promises made to these important states that the first 10 amendments, in the form of a' bill of rights, were

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10 Those who campaign tirelessly for the ratification of the new constitution wrote 77 Essays in the New York Press entitled "*The Federalist*" Notable among them are Alexander Hamilton, James Madison and John Jay.

11 See generally ELLIOT, J. "*Debates in the Several States Conventions on the Adoption of the Federal Constitution,* 2nd ed, 5 Volumes (1836 - 1945):

subsequently proposed and ratified at the first session of congress and came into force after the necessary ratification on 15th December, 1791. These rights are: Freedom of religion, press, speech, assembly, petition, right to keep and bear arms, quartering of soldiers in peacetime, freedom from search, protection of accused, trial by jury, no excessive fine or cruel punishment, other rights retained by the people, powers reserved for the states and the people.

It is worth noting that the 9th amendment makes clear that the enumeration of the rights in these amendments does not preclude the people from enjoying other rights that are reserved to them. This provision lend support to the argument that the fundamental rights of the people and their incorporation in the constitution is only to specify them as expressed limitations on the powers of the state. That being the case they are not conferred by or flow from the authority of the state. A greater examination of each of the aforementioned right will be made alongside the Nigerian provisions elsewhere in the research. Suffice to mention that the United States constitution established the pattern and substance which was to influence the greater portion of modern countries in making their constitution. Justice Stone of the United States Supreme Court explained the spirit behind the constitution thus,

> "The constitution expresses more than the conviction of the people that democratic

process must be preserved at all costs. It is also an expression of faith and *a command that freedom of the mind and spirit must be preserved,* which government must obey, if it is to adhere to that justice and moderation without which no free government can exist."[12]

2.4 PERSPECTIVES OF HUMAN RIGHTS

It is beyond dispute that no concept in the 20th Century generated a plethora of literature as the idea of human rights. This might not be unconnected with the fact that human rights is fundamental to mankind. Its respect, promotion and observance are prerequisite to the attainment of world peace and justice. Human Rights now become a subject matter of international law, treaties and covenants etc. On the national front human rights are proudly displayed in most constitutions of modern nations. In the words of a respected judge,

> "... in nearly every state (constitution) old and new, conservative, liberal or even radical, with capitalist, socialist or mixed economies; developed, developing and under developed countries..."[13]

The greatest problem associated with human rights today is the consensus of the relevant standard of their

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12 Dissenting in *MINESVILLE SCHOOL DISTRICT V GOBITI S* 310 US 586 (1940

13 Oputa, JSC *Human Rights in Political and Legal C ulture of Nigeria,* Idigbe Memorial Lecture 1989 p.48

implementation. Notwithstanding the fact that the term has been define there are still conflicting versions and perspectives of human rights, at least until recently, and in the words of Worika,

> "Sharp differences as to priorities, mechanism and procedures of enforcing them because of different cultural pattern, ideological inclinations, and development goals of western, non western and socialist societies.."[14]

Essentially therefore the discussion in this segment will focus on the contending perspectives on human rights especially on its definition, nature and sources. To "contend" is to argue, struggle or to be in open rivalry. The word "perspective" is a mental view of an event, facts etc in proper relationship. In this context the entire phrase must be understood to simply mean 'rival views'.

2.5.1 DEFINITION OF HUMAN RIGHTS

It was said that the theoretical representation of human rights was severely restricted or conditioned by the ideological position of the philosophers either consciously taken or otherwise.[15] By some ideas being "ideological" is meant that it formed part of our outlook upon the world

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[14] W orika, I.L., *Human Rights and Social Justice in Nigeria: Contending Perspectives.*

[15] Uchegbu, *A Universal Rights in the Commonwealth and Caribbean,* A seminar paper delivered at the University of West Indies on the 14th Feb. 1974 p.2

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upon the relation of man to the world and to society in all its manifestations. It must be appreciated that every theory from the idea and imagination of its author, and the truism or its falsity depends on large measure on the degree to which it can be crystallized in this posiac world.

Uchegbu's view about exponents views being conditioned is only correct to the extent that what "rights" belong to a man in a particular society depends to a considerable extent to the nature of a variety of factors prevalent in that society e.g. the rights of a man in a slave society may be fundamentally different with that of a feudal society. Therefore the political, social,economic structures prevailing in that society may be basis upon which some of these theories were founded. The question is: what is /are rights?

The word "right" originates from a Latin word "Rectus" which literary means "correct" as opposed to "wrong" or "crooked". Rights may also be regarded as being in accord with law, morality and justice. The Concise Oxford English Dictionary define right as, "what is just, fair treatment, ... justification, fair claim, being entitled to privilege or immunity ..." These definitions are unsatisfactory because none of them conveys adequately the idea of right as being either a political or constitutional concept although the second definition alluded to it by the

expression "entitled." This *lacuna* may perhaps be the result of the idea of "rights" from the perspective of being recent in origin. A scholar in fact observed that,

> "There is no expression in any ancient or medieval language correctly translated by our expression `rights', until near the close of the middle ages; the concept lacks any means of expression in Hebrew, Greek, Latin or Arabic, classical or medical, before about 1400, let alone in old English, or in Japanese even as late as 19th century ..."[16]

Philosophers like Hobbes and Kant equate a "right" with naked power. Hobbes thinks that anything is indeed a right which one may wish to make a right.[17] Kant considered a right as synonymous with power; the naked power to compel. However the mere fact that one may wish anything to be his and achieve his desire by the use of brute force is not synonymous with a right. Hollifeld perception is more in consonance with modern view of the term right. He conceptualizes rights as amoral power but regards this power as subsisting in the force of public opinion.[18]

Another writer equally argues that,

> "The doctrine of human rights is said to be a

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16 MacIntyre, A (1981) *After Virtue*, Notre Dame, University of Notre Dame press pp.69-70.

17 *Rudimentary Philosophy Concerning Government and Society* Chapter 1 p.14.

18 Holland (1937) *Jurisprudence*, O.U.P p.86.

proposal concerning the morally appropriate way of treating men and organizing society."[19]

The correct view however is that rights recognized by law, their violations becomes both legal and moral wrong.

Hollifield had observed the propensity on the part of lay and learned men to confuse the term with "privileges" as well as "power" with "immunity". He realized that the clue, which could limit the word to a definate and appropriate way was in the correlative "duty" One cannot deny that the concept of right unravelled in the idea of a right against another, that is to say, as a right to some to serve another person or group of persons.[20] Duty is in turn unravelled in the idea of 'a duty towards another', that is to say, "as a duty to act for the benefit of another person or group of persons." So duty looks to advantages and rights to disadvantages. This rights and duties are thus different ways of describing some single term relations between different people seen as one man's burden, seen now as another man's benefits.

The above analysis of right was challenged by Hart who argues, quite rightly that, although rights necessarily entails duties, the converse does not hold; that there are general duties towards others under criminal law that do

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19 Kamenka, E (1978) *The Anatomy of Arnold, Ideas and Ideologies in Human Rights*, Chapter 1 p.12.

20 Christopher Arnold, *"Analysis of Rights in Arnold, Ideas and Ideologies* p.76.

not give rise to any corresponding rights. He however conceded that the notion of a legal right has a special role to play in the civil law, but that rule is to be explained by the language of duty alone, since the language of duty occurs both in civil and criminal law.[21]

Perhaps the most obvious things to be said about rights is that they are constitutive of the domain of entitlements. They help to define and serve to protect those things which one can make a very special claim - a claim of right to claim to acquire anything as a matte o right is crucially different from seeking or obtaining it through grant of a privilege, the receipt of a famous or the presence of a permission.

To have a right to something is, typically, to be entitled to receive or possess or enjoy it and to do without securing the consent of another. As long as one has a right to anything, it is beyond the reach of another properly to withhold or deny it. In addition, to have a right is to be absolved from the obligation to weight a variety of what would in other contexts be relevant considerations; it is to be entitled to these rights, at least, *prima facie* without any more ado. To have a right to anything is, in short, to have a very strong moral and legal claim upon it. It is the strongest kind of claim

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21 Hart, L.A., *Bentham on Legal Rights in Oxford Essays in Jurisprudence*, Second series ed. Simpson, A.W.B. (Oxford 1973) pp 171-201

there is.[22]

On Hart's view, Wasserstrom argues that even if the concept of a legal rights makes sense under the rule of criminal law nevertheless it is not redundant in law. But that it serves to show the respect accorded to individuals under legal rules by allowing them to make a claim in a way that is not accommodated by ideas of duty. Actually a conception of rights puts the right holder, at least, in equal if not higher pedestal, whereas the conception of duty ignores this, perhaps that is why we talk of human rights not duties.[23]

The question therefore is, what is "human" about rights? Since the word "human" qualifies the word "rights", human rights are those rights possessed by human beings in contradistinction with other non-human creatures. This definition is rather too broad in the sense that it could include other "rights" which though regarded by the society as rights are not necessarily either protected by law nor capable of judicial enforcement e.g. "rights" under

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[22] See generally Wasserstrom, `*Rights, Human rights and racial Discrimination in Lyons (ed), Rights* (Belmont, C.A., Wardsworth, 1979) 46 at pp.48-50.

[23] See *Rights, Human Rights and Racial Discrimination, Journal of Philosophy LXI* (1964) pp. 628 - 641. Wassertrom identifies 4 characteristics of human rights: (1) It must be posed by all human being and human being only (2) It must be equally protected by all human beings (3) It must not include rights possessed by person by virtue of occupying certain positions (4) It must be capable of being asserted against the whole world.

customary law.

An idealistic view of human rights was said to be, "something of which no one may be deprived without a great affront to justice". There are certain deeds which should never be done. Certain freedom which should never be invaded"[24] The problem with this definition is that justice as a value system standard in a society varies from society to society, from time to time and from generation to generation.

2.5.2 CONCEPTUALIZATION OF HUMAN RIGHTS

Perhaps nothing exhibits the controversy surrounding human rights concept than the attempt by some philosophers to pin down its origin and sources. Some writers while conceding that human rights as understood today is new nevertheless argued that its origin could be traced to the natural or common law.[25]

Those who ascribed to the theory of natural law hold that rights are not only in existence but the central nature of man not only as a political being but also in his individual nature. The natural rights theory, which originated from religious law, was hinged on the idea that man is born free without any encumbrance or restrictions,

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[24] Eze, O. Op Cit p.5

[25] Kolakowski (1983) *Marxism and Human Rights* p.81, Cf Doment, L (1982) *A Modern View of Our Origin: The Christian Beginning of Modern Individualism*, Religion 12.

it is the society that restricts him. The rights are therefore inherently part of his nature. The idea that there are rights possessed by all persons in every age and situation is historically linked to the belief that man have these rights in a state of nature which is not only prior to the existence of the state but actually precedes the formation of society.[26]

The genesis of the argument of the natural law school adherents is that these "rights" are "natural" and do not owe their existence of either conferment, grant or acquisition. The origin of the rights is a matter of contention. For instance, Kolakowski[27] argues that,

> "... it is often stressed that the idea of human rights is of recent origin, and that is enough to dismiss its timeless validity. In its contemporary form, the doctrine is certainly new, though it is arguable that it is a modern version of natural law theory, whose origin we can trace back at least to Stoic[28] philosophers, and of course to Judaic and Christian source of European culture.

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26 J.J. Rousseu, *The Social Contract*, Bks 1 & II

27 Ibid

28 The Stoic philosophers were credited with originating the philosophical doctrine of natural rights and distinguished *jus naturale* and *jus gentium* and found that by the law of nature all human beings are equal, have equal rights and equal freedom, see Russell, B.A. (1945) *A History of Western Philosophy p. 275.*

> There is no substantial different between the right to life and stating that natural law prohibits killing..."

Regarding the origin and development of human rights being exclusively traced to the Judaic-Christian culture. A writer disagrees with the above view and posited that,

> "Human Rights has been a continues part of African tradition articulated in fundamental values such as fairness ... popular participation in public affairs, non-discriminatory participation in the life of the community and respect for the individual with the community. African tradition is replete with mechanisms and procedures, which had a limiting effect exercised by one official... communal welfare was a basic value which mitigated against any individual amassing great surpluses of wealth and property while it ensured that every individual in the community had access to the means for his survival and protection[29]

The origin of the idea of natural law comes from the notion of divine law based on the natural law theory of "dictates of reason." Due to the various criticism labelled against this theory over time, those who ascribed to the school of thought tried to justify it on the basis of what they called "natural rights." It is this that led

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[29] Mathews, *Human Rights, Crises in Africa,A* Seminar paper as quoted by Worika, I.L. op. cit.

to the criticism of writers about the true origin and nature of this so-called "natural rights." For instance Groitus complained that,

> "The whole concept underwent a metamorphosis from an emphasis on natural law to an insistence on natural rights, from an appeal to divine law which man as a rational creature would in fact discern and apply to a proclamation of the inherent and sacred rights of man."

Furthermore Maurice Cranston observed that,

> "a philosophically respectful concept of human rights has been muddled, obscured and debilitated in recent years by an attempt to incorporate into it specific rights of a different kind and of a different logical category.."[30]

Uchegbu clearly rejects the concept of human rights being quoted in divine or religious law when he wrote that,

> "In its religious manifestation human rights were only to be realized in heaven, a ticket of admission available to only those who had endured humanity in real life."[31]

There are many western liberal thinkers, who not only criticized the idea of "natural rights" but completely

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30 *Human Rights: Real and Supposed*, in Raphael (ed) (1967). *Political Theory and The Right of Man*, p.43.

31 Ibid Contrast this view with St. Aquinas, T. *Treaties on Summa Theological* (1226 - 1276) discussed in *Patterson jurisprudence: Men and Idea of Law*, p. 346 cf Lord, D (1979) *The Idea of Law*, Chapter 1, p.12.

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rejected it as basis either of determining human rights or its protection. For instance Bentham asserted that "right is the child of law." In his opinion, "from real law comes real rights but from imaginary rights (i.e. the so-called natural rights)... natural rights is simple nonsense, natural imprescriptible rights rhetorical nonsense, nonsense upon stilt." He therefore formulated questions to determine what "real rights" are:

1. Is it actually enjoyed?
2. Is it really enforced?
3. Is it a positive right?

In his further attack on `natural rights' Bentham maintained that, "that which has no existence cannot be destroyed - that which cannot be destroyed cannot require anything to preserve it from destruction.[32] Bentham's definition is not surprising if appreciated in the context of the positivist definition of law as "command of the sovereign backed by sanction."To Edmund Burke any talk about mutual right is "mischievous and meaningless because", according to him, " it stimulates revolutionary sentiments, it injected false ideas and vain expectations into men..."

Generally in the liberal western democracy the ultimate repository of rights is the human person. The

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[32] *Bentham On Legal Rights in Oxford Essays in Jurisprudence,* Second Series, ed. Simpson, (1973) O.U.P

individual is generally held in sacrilized position. There is a perpetual obsessive concern with the dignity of the individual, his worth, personal autonomy and property.[33] It is submitted that human rights were held by the individual and exercised principally in relations to society, usually in the person of the state against which they are mostly characteristically claimed. The theory of individualism postulates that the role of the state in relations to the rights is simply to create the necessary condition for the right to be meaningfully exercised. It is these twin ideas of rights being available against the society and individualism that were subjected to severe criticism by the Marxist School. Karl Marx theory on human rights were basically drawn from two of his studies *"On the Jewish question."*[34]

After a careful analysis of some aspects of the French Declarations and Pennsylvania and New Hampshire constitution he concluded that, "Freedom (or rights) or, as he calls it, "emancipation requires the ending of division between man as egoistic being in civil society and man as an abstract citizen of the state." Marx interpreted the basis of liberty in the context of what he called

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[33] *Human Rights and Human Dignity: An Analytical critique of non western conception of Human Rights,* Donelly (1986) *American Political Science Review* p.303 - 316.

[34] *Marx On Jewish Questions* (1843) in Tucker (ed) *The Marx-Engels Reader* 24 (1972).

"bourgeois society" to mean that,

> "Liberty as a right of man is not founded upon the relations between man and man, but rather upon separation of man from man. It is the right of such separation. The right of circumscribed individual, withdrawn unto himself..."

The Marxist argued that the whole idea of human rights and liberty are specific expression of a bourgeois society on the verge of collapse. Secondly regarding the concept of individualism Marx argued that,

> ".... Individuals are victims of the society in that their lives are prey to contingent of historical forces that no one separately or in alliance with others, can control; the society itself is alienated from real men and is governed by anonymous laws; individuality, as consequence of its isolation, is lost."[35]

From the foregoing it is clear that the Marxist considered the idea of individual or human rights as the product of divergent, competing and antagonistic forces or interests, created by the capitalist economic system. The Marxist believe that the idea of human rights implies a society in which the interest of each person is naturally and inevitably oppose to the interest of others, a society incurably torn asunder by the clash of private aspirations. The dominant motivations in the society are bound to be

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[35] Ibid.

egoistic not as a result of corruption of human nature - but because of the character of the economic system, which is inevitable conflict-laden. All rights and liberties in a bourgeois society asserts and codify the simple fact that each individual aspirations and interest conflicts with, and limited by the interests and aspiration of others.[36]

The general thesis of socialist theory is that in a socialist society there would be no state,[37] lead every individual to naturally and spontaneously identifies himself with the "values" and "aspirations", whatever their nature, of the whole.

Karl Marx objection was not merely to the list of rights, it was rather to the very notion of rights at all. His own conception of a revolutionary emancipation envisaged the union of man with man, a union that was social rather than legal and political. That is to say the focus has shifted from quantity to quality.

Marx was right to suggest that natural rights separate man from man the sense that it formally prohibits men from selling themselves into slavery, but he was wrong to have attributed the separating impulse entirely to egoism. If we think natural rights originates from the state as the

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[36] cf Will, K (1990) *Contemporary Political Philosophy: An Introduction*, Clarendon Press Oxford.

[37] Marx Conceptualized state as an organ of class rule, an organ for the oppression of one class by another. It is the cessation of an order which legalises perpetuate the

legal positivist do, because it guarantees them or if we regard them as demands for substantial benefits rather than opportunities, we shall misunderstood their real character, just as Marx did.

Finally, there are some few writers who insist that the original natural rights were extinct e.g. Sir Leslie Scarman maintained that humanity has made great advance in identifying social and economic rights and seeking to give effects to them. He however conceded that such venture depends upon the resources available to the state.[38] One may observe that a conception of human rights which ignores civil and political rights but stresses social and economic rights is tantamount to putting the cart before the horse. since invariably it is the former that guarantees the later.

In the same manner Uchegbu observed that there was a trilogy in the conception of a man "the natural man the super terrestrial man." It is contention that the insistence of natural man and natural rights that corresponds to it denies social impact on men which in the final analysis is the only real man and discussion relating to the rights of men are nothing really but those of the social rights of man[39] it must be pointed out here that not

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[38] Sir Leslie Scarman, *Centenary Declaration Lecture* at University of London, 13th October, 1976 discussed in Arnold Op. cit at pp. 32-33.

[39] Ibid p.2

all rights are social either in nature or character.'

CHAPTER THREE:

HUMAN RIGHTS AS A PRINCIPLE OF INTERNATIONAL LAW

3.1 INTRODUCTION

The various theories and disagreements on the nature origin and application of human rights seem to equally be shifted to the realm of international law. Basically the traditional idea was that human rights is a philosophy regulating the relationship between the individuals and the state in a specific polity, which have been traditionally considered to fall within the realm of domestic jurisdiction. This school of thought completely rejected the idea of the concept having any international, practical application since the purview of international law is entirely predicated on the norms which govern relationship between states.[1]

In consequent therefore the application and enforcement of international instruments in domestic jurisdiction are entirely, according to this above view, based on what the exponents referred to as "the rules of international morality." This view, is to say the least, erroneous in the sense that the recent enforcement of the rules of international law by the United Nations security Council has completely debunked this theory of morality as it applies to the realm of international law. The determination of this important issue from the onset is

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[1] Humphrey, *The International law of Human rights in the Middle 20th Century, The Present State of International Law and Other Essays* 75 International Law Association (1983).

necessary because the major feature of the discussion here is the evolution and application of international human rights, norms as contained in the various declarations, conventions, treaties and covenants.

3.2 HUMAN RIGHTS UNDER TREATIES AND THE LEAGUE OF NATIONS

The development of customary international law in the 19th and 20th century has made it possible for sovereign nations to enter into treaties for the purposes of protecting the rights of certain class of people. Certain treaties were aimed at slavery and slave trade e.,g. the General Act of Berlin Conference on Central Africa of 1885 affirmed that,"trading in slaves is forbidden in conformity with the principles of international law." Similarly in 1889, the Brussels Conference not only condemned slavery and slave trade but also agreed on measures for their suppression, including granting of reciprocal rights of search and the capture and trials of slave ships.

These noble ideals were continued by the League of Nations[2] following its establishment after the end of the First World War in 1919. Prior to this however, there were certain international instruments, apart from those mentioned above signed by the European powers e.g. the Geneva Convention of 1864, the signatory states undertook to respect the immunity of military hospitals, and their staff, to care for the sick and wounded and to respect the

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[2] See *The Slavery Convention 1926 amended by The Protocol of 1953* entered into by over 28 states.

emblem of the Red Cross. This convention was revised in 1929 and widely ratified.

Following the 1918 allied victory over Germany in the First World War and the various Peace Treaties collectively signed in France, the victorious powers sought to establish a permanent framework for relations between states. President Woodraw Wilson of the United States proposed to enshrine in the League of Nations covenant on article on religious freedom but when Japan proposed the inclusion of a clause on equality of nations and the just treatment of their Nationals, both proposals were withdrawn.

In the draft proposals however President Wilson included an article under which the League will require all new states to bind themselves, and as a condition precedent to their recognition, "to accord all racial and national minorities exactly the same treatment and security both in law and in fact that is accorded the racial and national majority of their people."[3] This no doubt was alluding to equal rights and protection of all citizens by the municipal laws of the signatory states. The Peace Conference however decided that the protection of minorities is to be decided or dealt with by the covenant but by other provisions and by declarations which certain states would be required to make on their admission to the League. Nevertheless two articles dealing with human

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[3] For a detailed discussion of the formation of the *League of Nations* see Humphrey, op. cit.

rights found their way into the League covenants:-

1. Article 22 of the League of Nations Covenant dealt with former colonies that had ceased to be under the control of their former masters resulting from war. In the words of the covenant,

> "peoples not yet able to stand for themselves under the strenuous condition of modern world were to be put under the tutelage of advanced nations."

This clearly established the concept and institution of *TRUSTEESHIP*. The countries vested with the trusteeship were enjoined by the covenant to administer the territories under situation that will guarantee among other things, "freedom of conscience and religion and the prohibition of abuses such as slave trade."

2. Article 23 provides that, "members of the League would endeavour to secure and maintain fair and human labour condition, undertake to secure just treatment for the native inhabitants of the territories under their control, and entrusted the League with the supervision of agreements relating to traffic in women and children.

One of the fallouts of Article 23 was the establishment of the International Labour Organization in 1919 whose major concern is "social justice"[4] The preamble to its constitution begins:

> "Whereas universal and lasting peace can be

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[4] The concept of social justice is broader than human rights but must be understood to have included it.

established only if it is based upon social justice."[5]

This reaffirmed the declaration of the victorious allied powers after the war of a permanent linkage between human rights and universal peace and security. The general conference of the International Labour Organisation at its 26th session in Philadelphia in 1944 adopted the aims and purposes of the organization and the principles which should inspire members. Some of the fundamental principles upon which the organization was founded includes *inter alia*," freedom of expression and association"[6] which were considered as essential to sustain progress, and that, "all human beings irrespective of race, creed, or sex, have the right to pursue both their material well being and their spiritual development in condition of freedom and dignity, of economic security, and equal opportunity."[7]

Although the theme of the Declarations were the attainment of social justice by workers universally the above provision went beyond that scope. For instance the is a clear indication and expression of human rights norms which could not technically be restricted or applicable to

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5 The International Labour Organization being a forerunner to the United Nations was one of the specialized agencies brought into relationship with the United Nations under Articles 57 and 63 of the United Nations Charter. It played a prominent and pioneer role in standard setting in carefully drafted convention dealing with specific subject matters.

6 See Part 1(a) of the Declaration

7 See Part 2 clause 1.

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labour condition only e.g. freedom of expression and association is an indispensable instrument in establishing and operating any democratic set up or society.

In addition the concept of equality has been extended to the political and spiritual realm which can conveniently be equated to the freedom of thought, conscience and religion. This was the first international legal instrument which, at least, codified in part, a universal standard for human rights norms.

On the eve of the Second World War in 1939, international law recognized a whole series of rules and institutions as well as procedures for their implementations, the effect of which was to protect the rights of individuals and groups e.g. the Convention Concerning Forced or Compulsory Labour of 1930 ratified by more than 130 countries. The convention was essentially aimed at practices in colonial countries and certain independent states at certain stage of development. Its focus is on forced labour as a form of economic exploitation.[8]

These series of international instruments made the first tentative attempt to make an individual a subject of international law. e.g. see *Part V of the International Labour Organisation Declarations*. Implicit in this declaration was the fact that though not legally

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[8] cf *Convention Concerning the Abolition of Forced Labour 1957*.

enforceable the content of the international instrument established a universal standard of labour applicable to all nations and peoples. This progress was halted due to the collapse of the League of Nations and the outbreak of the Second World War. The lessons learnt from that experience laid the foundation stone for the United Nations Organization, which we intend to consider, and the development of human rights under the United Nations.

.3 HUMAN RIGHTS UNDER THE UNITED NATIONS CHARTER

Following the collapse of the League of Nations and the outbreak of the Second World War in 1939, the allied powers consisting of the United States, France, soviet Union and Britain joined together to fight the German-Italian and Japanese war machine. The scourge of the war, which lasted for six (6) agonizing years until 1945, touched all parts of the globe. The destruction of lives and properties unleashed by the war was of such magnitude never experienced in human history e.g. the former Soviet Union alone was estimated to have lost 20 million people.[9]

The destructive effects of this war convinced the allied powers to start a rapprochement or exploring the

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[9] Shirer, W.L. (1953) *The Rise and Fall of the Third Reich*. Adolf Hitler was believed to have exterminated 6 million jews simply for being Jews! cf H.R. Trevor-Roger (1964) *Hitler's War Directives 1939 - 1945*, Pan Books, H.R. Trevor Roper (1947) *The Last Days of Hitler*, Pan Books, see also *Commandant of Auschwitz, The Autobiography of Rudolf Hess with Introduction by Lord Russel of Liverpool* , Pan Books.

possibility of establishing a universal body whose main or primarily objective was to "safeguard humanity from ultimate self destruction". Put differently, the entire idea or philosophy behind the establishment of the United Nations Organization was to safeguard and protect the global rights of people. The opening text of the preamble to the United Nations charter buttressed this view in the following words,

> "WE THE PEOPLE OF THE UNITED NATION DETERMINED to have succeeding generations from the scourge of the war, which twice in our lifetime has brought untold sorrow to mankind, and the reaffirm faith in fundamental rights, in the dignity and worth of human person, in the equal rights men and women..."[10]

From this preamble the founding fathers of the United Nations recognized not only the inter-dependence of nations but also the common goals and aspirations of the mankind. They realized that international peace and security is intractably linked to the idea of justice, social progress and better standard of life for all mankind which impliedly includes human rights. In this regard part of the preamble to the Charter affirmed the determination of mankind

> "to establish condition under which justice and

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[10] The name United Nations was devised by the United States President Franklin D. Roosevelt and was first used in the Declaration by the United Nations of 1st January, 1942 during the Second World War by the Representatives of 26 nations. cf *Basic Facts About the United Nations* published by the United Nations Department of Information(1990) New York, P.1

> respect for the obligations arising from treaties and other sources of international law can be maintained... to promote social progress and better standards of life in larger freedom...."[11]

In achieving these ends the signatories partly resolved,

> "... to employ international machinery for the promotion of economic and social advancement of all people".

The philosophy behind the establishment of the United Nations and its Charter graphically explained by none other than its former Secretary General in the following words,

> "The establishment of the United Nations in 1945 marked a new beginning in the affairs of the global community in agreeing to its charter and instituting a working system of international cooperation, governments resolved to put relations between nations on footing altogether different from the one which had caused recurrent conflicts and untold suffering over centuries. They made a joint determination to eradicate the scourge of war, strengthen peace in conformity with justice and international law, respect for equal rights large and small, promote social progresses, protect human rights and use the United Nations as a centre for harmonizing their actions in the attainment of these common goals...."[12]

The consistent reference to human rights in the preamble to the United Nations Charter clearly illustrates the

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11 Ibid.

12 Forward by Javier Perez de Cuellar in *Basic Facts About the United Nations* p.vii.

reverence attached to the concept and the desire of the international community to safeguard these rights. The birth of the United Nations provides a basic framework of the codification and possible enforcement of the international human rights norms.

In consequence various Articles and Sections of the United Nations Charter established the philosophy for the realization of these goals. For instance first chapter of the United Nations Charter which established the purposes and principles of the organization declared one of its objectives as,

> "to achieve international cooperation in solving international problems of an economic, social and cultural and *HUMANITARIAN* character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language or religion..."[13]

The signatories to the Charter bind themselves or undertake to promote, respect and enforce the fundamental rights of citizens and domiciles without distinction on any ground whatsoever. Various other provisions expressly referred to human rights e.g Articles 55, 62 and 68 of the Charter. In giving effects to these objectives members

> ".... pledged themselves to take joint and adequate action in cooperation with the organization for the achievement of the purposes set forth in Article 55"

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[13] See Chapter 1, Article 1 section 3 of the Charter and Article 13 clause (b)

The general mandate of the General Assembly to ensure that Article 56 pledges were fulfilled by states in which the situation of human rights becomes a matter of concern of the international community. Furthermore the various functions assigned to the principal organs of the organization e.g. the General Assembly[14] the Economic and Social Council[15]and the Security Council includes *inter alia*[16] matters relating to the promotion, protection and possible enforcement of human rights.

Since the establishment of the United Nations there has been a growing *corpus* of norms fixed in the form of instruments like resolutions, declarations or conventions, all adopted by the great majority of states throughout the international machinery they have created, whether at the regional or universal scale. Although declarations and resolutions by their very nature do not have a binding character of a multilateral treaty provision but their binding character may depend on a number of factors e.g. whether the resolution or declaration was adopted by consensus or a substantial majority, with unimportant abstentions in terms of numbers or whether it was adopted against a strong opposition. It must be pointed out that widely accepted treaties either originated or incorporated

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[14] See Chapter 1, Article 10.

[15] See Chapter X Article 10.

[16] Article 10.

principal elements of such resolutions or declarations.

The United Nations quasi-legislative activities over the last fourty years could be measured by the number of instruments adopted in the same period. A considerable number of these instruments involved the advancement and protection of human rights on a global scale.[17] There were basically a wide range of rights which the states agreed individuals shall have.[18] It is worth noting that though a particular right may be covered in an instrument of general application it may nevertheless be a subject of particular instrument of its own, having its enforcement and monitoring machinery separately.[19]

3.4 THE INTERNATIONAL BILL OF RIGHTS

As mentioned earlier human rights found expression in the League of Nations Covenants which in effect led to the establishment of the International Labour Organization. During the drafting of the United Nations Charter in San Francisco a proposal to embody "a ... declaration on the essential rights of man..." was put forward but not examined because a more detailed consideration was

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17 *The Universal Declarations of Human Rights 1948 and its two implementing international instruments of 1966 on Civil and Political rights and on social, economic and cultural, rights.*

18 The comparative table of these Covenants were reproduced as Annexure to this Chapter.

19 *For example the International Labour Organization Convention No. 105 on the Abolition of Forced Labour. cf Article 8 clause 3 of International Covenant on Civil and Political Rights.*

required. An examination of the articles relating to human rights in the United Nations Charter lend support to the idea of promulgating an "International Bill of Rights".

A major achievement of the draftsman of the United Nations Charter was the emphasis on the importance of "social justice and human rights" as the foundation of a stable international order. The United Nations General Assembly and the Social and Economic Council had given a lot of impetus to the development of *STANDARDS* concerning human rights. The United Nations had undertaken a general propaganda work[20] and the burden of drafting legal instruments containing detailed provisions.

After the closing session of the San Francisco conference the preparatory commission recommended to the first session or sitting of the General Assembly the establishment of a commission for the protection and

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[20] For example see the following publications by the U.N. Public Information Department. *Basic facts About U.N. (1989), Human Rights: Human Rights Machinery (1987) Fact sheet No.1, Human Rights: Advisory Services and Technical Assistance in the Field of Human Rights (Dec;1990 Fact sheet No.2, Human Rights: Programme of Action for the Second Decade to Control Racism and Racial Discrimination (Jan, 1989) Fact Sheet No.5, Human Rights: Enforced and Involuntary Disappearance (March 1989) Fact sheet No.6, Human Rights: Communication Procedure (May 1989) Fact sheet No.7, Human Rights; World Public Information Campaign for Human Rights (July 1989), Fact Sheet, No. 8 Human Rights: The Rights of Indigenous People (May, 1990) Fact Sheet No.9, Human Rights: The Rights of a Child (Sept. 1990) Fact sheet No..10, Human Rights: The committee on the Elimination of Racial Discrimination (May 1991) Fact sheet No.12.*

promotion of human rights as envisaged by Article 68 of the United Nations Charter. Consequently the Human Rights Commission was established early in 1946. In January, 1946 at the first sitting in London the General Assembly considered the Draft Declaration on Human Rights and Freedoms and submitted it to the Economic and Social Council "... for reference to the Commission on Human Rights in its preparation of an International Bill of Human Rights...." A drafting committee consisting of 8 members of the commission were selected with due regards to the geographical distribution.

The conflicting views as to the nature and content the Bill should take led the committee to draft two (2) documents: one in the form of declaration setting the general principles or standard of human rights. The other was in the form of convention which would define specific rights and their limitations. These draft articles were submitted to the commission. In the late 1947 the commission decided to apply the term, International Bill of human rights to the entire series of documents prepared and accordingly established two working groups: one on the declaration, and the other on the implementation.

The meetings of the commission from 24th May to 15th June decided to revise the draft declarations after taking due regards to the comments of governments. The Declarations was submitted to the General Assembly through the Economic and Social council at its Paris meeting on 10th December,

1948. The Assembly adopted the Universal Declaration of Human Rights as the first in the projected instruments. This was the first elaborate universal document specifically on the subject of human rights which established in detail the nature and content of the international human rights norms. It is intended to examine briefly some aspects of the Declaration.

3.5 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Preamble and Articles 1, 55, 56, 62 and 68 of the United Nations Charter explicitly made references to human rights and this justifies the view that they have provided the basis for elaboration of the content of standards and of the machinery for implementation and their protection. Although some writers conceded that the Declaration is not a legally binding document but nevertheless maintained that some of its provisions either constitute general principles of law [21] or represent elementary consideration of humanity. The fact that the Declaration was a product of the General Assembly it was considered as an authoritative guide in the interpretation of the Charter. Some jurists regarded it not only as having an indirect legal effect but as part of the Law of the United Nations.[22]

On the question of machinery for its implementation,

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[21] e.g. *Statute of International Court of Justice Article 38(1)(c)*

[22] See Brownlie (ed) op cit p.106 cf Ganji (1962) *International Protection of Human Rights*, Ezejiofor (1964) *Protection of Human Rights Under the law*

though the Declaration was a pacesetter, it was however not a treaty and therefore technically weak as an instrument of protection. Though its moral and persuasive authoritative force has never been in doubt, it has been generally recognized as expanding universally accepted norms. Perhaps because of its broad and imprecise nature it should be considered more as a charter of policy and objectives.

The Universal Declaration of Human Rights (hereinafter referred to as U.N.D.H.R.) laid down the international norms which states should aspire to codify in their domestic legislation and legal systems as a basis of governance. The opening paragraph of the preamble reaffirmed,

> "... recognition of the inherent dignity ,of the equality and inalienable rights of all members of human family is the foundation of freedom, justice and peace in the world..."

The remaining part of the preamble, after highlighting the dangers associated with the denial of human rights from historical perspective, reminded members states of their obligations in the protection and promotion of human rights and freedom. In consequence the General Assembly proclaims,

> "The Universal Declarations of Human Rights as a common standard of achievement for all people and all nations.."

It must be emphasized that most if not all of these rights contained in the Declaration were inspired by the United

States, French and other European experiences. Apart from the preamble the Declaration consists of 30 articles setting forth the human rights and fundamental freedoms to which all men and women universally, are entitled without any discrimination. Articles 1 and 2 laid down the basic philosophy upon which the Declaration was based.

> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should not act towards one another in a spirit of brotherhood."

This philosophical foundation was inspired by the French Declaration. Article 1 Of the U.D.H.R. thus define the basic assumptions of the Declarations;

> That the right to liberty and equality is man's birthright and cannot be alienated.[23] That because ' man is a rational and moral being he is different from other creatures on earth and therefore entitled to certain rights, and freedom which other creatures do not enjoy.

Article 2 sets out in a positive term the basic principle of equality and non-discrimination as regards the enjoyment of human rights and freedoms and negatively prohibits distinction of any kind, such as race, colour, sex, language, religion, political or

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[23] The probable equivalent of the Article under the U.S. constitution are the XIV and XV amendments which emphasized the principle of due process of law and equal protection of law and prohibition of any discrimination on account of race, colour or process condition.

other opinion, national or social origin, property, birth or other status..."

Article 3 proclaims the cornerstone of the declarations i.e. the right to life, liberty and security of person. There are a total of 30 articles in the declaration. The first 19 Articles dealt with civil and political rights to which all human beings are entitled while Articles 22-28 covers economic, social and cultural rights. Article 29 and 30 sought to establish a parameter upon which some aspects of the Declarations could be derogated from on the basis of procedure established by law.

In 1946 the Human Rights Commission was set up by the Economic and Social Council and has met annually since that time. The Commission undertakes studies, prepares recommendations and draft international instruments relating to human rights. It also undertakes special tasks assigned to it by the General Assembly or the Economic and Social Council including investigation of allegations concerning violations of human rights and the handling of communications relating o such violations. It cooperates closely with other United Nations bodies having competence in the field of human rights. It assists the Economic and Social Council in the coordination of activities concerning human rights in the United Nations system. The Commission established a number of bodies to assist it in its work.[24]

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[24] *Committee on the Elimination of Racial Discrimination, Human Rights Committee, Committee on*

The three implementing covenants of human rights at the global level were International Covenant on Economic an Cultural Rights, the International Covenant on Civil and Political Rights i.e. (ICESCR) and ICCPR) and the Optional Protocol. The covenants were treaties whose states parties i.e. nations which have formally agreed to abide by their provisions-undertake to respect, ensure and take steps for the full achievement of wide range of rights. The covenants recognized and define in detail most of the rights set out in the Universal Declaration and dealt with some additional rights as well.

3.6 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

This covenant was adopted in 1966 by 36 states and came into force on March 20, 1976 after 35 states had ratified or acceded to it. Its ratification paved the way for the establishment of the Human Rights Committee of 1976. This is a body of experts to supervise the implementation of the covenant. The documents define in extensive terms human rights and fundamental freedoms and set the standards which inspired more than 50 United Nations Human Rights Conventions, Declarations set of rules and principles.

In all 445 communications from individual involving 33 state parties had been examined by the Committee as at March, 1991. The Committee concluded its work and made its

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Economic, Social and Cultural Rights, Committee on the Elimination of Discrimination Against Women, Committee Against Torture.

views known in 119 cases and had established 93 instances that violation of the Covenants had occurred.

3.7 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Like ICCPR this Covenant entered into force in 1976 after the ratification of 25 states. The rights which the Covenant seeks to protect are of three kinds: right to work in just favourable conditions, the right to social protection..., the right to education ....." The Covenant breaks new ground in international treaty making by taking the advancement of human rights directly to government policies to promote economic, social and cultural developments.

3.8 OTHER INTERNATIONAL INSTRUMENTS

Because Europe was the main theatre of the Second World War, it is understandable that the first regional instrument (1950) concerning a broad spectrum of fundamental rights came into being shortly after the adoption of the U.N.D.H.R. As is evident from the express terms of the preamble to the European Convention and the context of the Convention itself, the convention was greatly influenced by the U.N.D.H.R. Although Europe chose to adopt at the time only the civil and political rights it later in 1961 adopt the European Social Charter (equivalent to ICESCR).

The second regional instrument that requires mention is

the American Convention on Human Rights 1969 which was inspired by the above covenants. The most recent regional instrument to have come into force was the African Charter on Human and People's Rights in 1987 although it had been adopted in 1981 by the Head of States and Governments at Nairobi. The determining reason would appear to have been that the minimum ratification required to trigger its coming into force was a majority of 26 member states of the O.A.U. whereas the level generally required for such treaties is a quarter or at most a third. This leaves only Asia to have regional charter of its own.

In so far as the Commonwealth is concerned, the Singapore Declaration of 1977 incorporates the resolute commitment by the commonwealth of the effective enjoyment and protection of human rights. At the Lusaka meeting of 1979, commonwealth Heads of Government appointed a working party to examine and make recommendations on a memorandum by the Gambia for the establishment of Commonwealth Commission for Human Rights. Commonwealth Heads of Government considered the Reports of the working party at the Melbourne Head of Governments Conference in 1981 and after further consideration by Commonwealth Law Ministers in 1983 it was decided to establish Human Rights Unit within the Commonwealth Secretariat to undertake such activities as might assist member states in the promotion of human rights, leaving for further study and deliberations the question of appropriate machinery for the

protection of human rights. It is worth mentioning that Nigeria was suspended from the commonwealth in 1996 over the execution of the so-called Minorities activist, Ken Saro-Wiwa & 8 others. The country's membership was only restored only when the country was returned to democratic rule in May 1999. Below is a comparative list of rights recognized in several International instruments.

COMPARATIVE TABLE BETWEEN RIGHTS UNDER DOMESTIC LAWS

AND THEIR CORRESPONDING INTERNATIONAL INSTRUMENT

MUNICIPAL LEGISLATION	INTERNATIONAL INSTRUMENT
1. Rights of peoples to self determination.	ICCPR 1(1), ICESCR 1(1), AFR 20
2. Rights of the people to dispose of their national wealth and resources	ICCPR 1(2), ICESCR 1(2) AFR 21
3. Right to equality and non discrimination	UDHR 1,2, & 7, ICCPR 2(1), 3 & 26, EHR 14, AMR 1(1) & 24, AFR 2 & 8
4 Right to effective judicial remedy	UDHR 8, ICCPR 2(3), EHR6, 13, AMR 25, AFR 7(1) & (A) & 26
5. Right to life	UDHR 3, ICCPR 6, EHR 2, AMR 4, AFR 4
6. Protection from torture or cruel, inhuman or degrading Treatment or punishment	UDHR 5, ICCPR 7 & 10, EHR 3, AMR 5(2) to (6), AFR 5
7. Protection from servitude and forced labour	UDHR 4, ICCPR 80, EHR, AMR 6, AFR 6
8. Right to liberty and security of the person.	UDHR 3 & 9, ICCPR 9, EHR 5, AMR 7, AFR 6.
9. Protection from imprisonment for inability to fulfil a contractual obligation.	ICCPR 11, EHR PROTOCOL 4 Art 1, AMR 7(7)
10. Freedom to movement	UDHR 13, ICCPR 12, EHR Protocol 4 Art. 2, AMR 22 (1) to (3)
11. Protection of alien from arbitrary expulsion	ICCPR 13, EHR Protocol 4, art. 4 (restricted to collective expulsions), AMR 22(6) to (8), AFR 12(4), 8(5).
12. Fair and public hearing, presumption of innocence, procedural guarantees, protection from double jeopardy	UDHR 10 & 11(1), ICCPR 114, EHR 5 & 6, AMR 8, AFR 7(1)

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13. Non-retroactivity of offence and punishments.	UDHR 11(2), ICCPR 15,EHR 7, AMR 9, AFR 7(2)
14. Recognition as a person before the law.	UDHR 6, ICCPR 16, AMR 3, AFR 5.
15. Protection of right to property	UDHR 17, EHR First Protocol Art. 1, AMR 21, AFR 14
16. Protection of privacy, family,home,correspondence honour and reputation.	UDHR 12, ICCPR 178 19(3) and(a), EHR 8 & 10(2), AMR 10 & 14, AFR 18 & 27
17. Freedom of thought, conscience and religion.	UDHR 18, ICCPR 18, EHR 9, AMR 12, AFR 8
18. Freedom of opinion and exposition of seeking, receiving and imparting information.	UDHR 19, ICCPR 19, EHR 9, AMR 12, AFR 8
19. Freedom of assembly	UDHR 20, ICCPR 21, EHR 11, AMR 15
20. Freedom of association and to form and join trade unions.	UDHR 20, ICCPR 22, EHR 11, AMR 16, AFR 10
21. Right to marry, equality of rights and protection of the family.	UDHR 16, ICCPR 3 & 23, EEHR 12, AMR 17, AFR 18
22. Rights of the child	ICCPR 24, AMR 17 (4) 8(5), 18, 19 & 20, AFR 18(3)
23. Political rights and access to public office	UDHR 21, ICCPR 25, EHR First Protocol Art 3, AMR 23, AFR 13
24. Right of ethnic, religious and linguistic minorities with regard to culture, religion or language	ICCPR 27
25. Prohibition of war propaganda and protection from advocacy of racial or religious hatred	ICCPR 20
26. Limitation on derogation in emergencies.	ICCPR 4, EHR 15, AMR 27

KEY

1.ICCPR.....International Covenant On Civil and Political Rights

2.ICESCR.....International Covenant On Social,

Economic and Cultural Rights

3.UNDHR.....United Nations Declarations On Human Rights

4.EHR.....European Convention On Human Rights

5.AMR.....American Convention On Human Rights

6.AFR.....African Charter On Human and Peoples Rights

CHAPTER FOUR

HUMAN RIGHTS UNDER THE 1999 NIGERIAN CONSTITUTION

4.1 INTRODUCTION:

The fundamental rights were first recommended to be incorporated into the 1960 Nigerian Independence Constitution by the Minorities Commission Reports of 1957.[1] The idea behind incorporating a chapter on fundamental rights was to assuage the fears of domination expressed by the minority tribes against the majority tribes on the eve of Nigeria's independence. In recommending the incorporation of the Chapter in the constitution the commission however cautioned that,[2]

> "....Provisions of this kind in the constitution are difficult to enforce and sometimes difficult to interpret . Nevertheless we think they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by someone whose rights are infringed. A government determined to abandon democratic principles or courses will find ways of violating them but they are of great value in preventing a steady deterioration in standard of freedom and the unobtrusive encroachment of a government on individual rights"

The genesis of the Commission's observation, which one could partly agree with, was simply that whether a citizen in a particular given polity enjoyed codified rights or not is to a considerable extent dependent upon the attitude of the government towards these rights (or

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1 For a detailed discussion of these factors and demands see Odumosu I.O. (1963) *Nigerian Constitution: History and Development, p. 246 - 256.*

2 See *Minorities Commission Report*, p.97 as quoted by Odumosu op. cit. at p. 244

rule of law generally) and its willingness to observe the constitutional limitations or restraints. Secondly the Commission's hesitation could be appreciated against the background that codified rights has not been part of either British history or constitutional experiences e.g countries like Canada, New Zealand and Australia which were former British colonies have no fundamental rights provisions in their independence constitutions.

Be that as it may, the fundamental rights Chapter came to be incorporated for the first time in the 1960 Nigerian Constitution although the British government tried to incorporate some of these rights into statutes and legislation. The rights under the 1960 constitution was provided in Chapter Three and spanned from Sections 18 - 33. These rights were repeated in the successive Nigerian constitutions with very little changes if any ,more particularly between the 1979, 1989, 1995 and the recently promulgated 1999 constitutions.

As discussed earlier the concept of human rights was derived from the idea that man is entitled to certain basic rights as a human being for living a free and meaningful life. According to one theory, man possessed these rights in a state of nature and when he enters into a civil society , he contracted to give part of his power to the government or the state on condition that the state or government so constituted shall protect these natural

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human rights of the individual. When the state violates this trust , the people have the right to take back the power from the government and invest it in some other government.[3]

Human rights in its earlier stages were regarded as irreducible minimum which individuals must have and the state cannot violate or encroach upon. With the growth of the activities of the state and the gradual shift from the policy or philosophy of *lassie faire* to *welfarism*, the state assumed more responsibility of transforming the society in all spheres be it social, economic or cultural in the attempt to improve the living conditions of the people.

The United States constitution which was the first to contain bill of rights in absolute terms but the courts for the protection of society's interest read limitations unto them. Subsequent constitutions have taken care to provide not only the various rights but also recognized the interest of the society by restricting or placing limitations upon them. Such constitutions attempted to strike a very delicate balance between the individual rights and society's interests. It is intended to consider these aspects elsewhere in this research. Suffice to say here that there are other categories of rights, which

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[3] *See John Locke, Two Treaties of Government, ed. Peter Laslett, N.Y. The New American Library, Mentor books, 1965.*

though important, were considered as of less efficacy because of their non- justiciabilility. These are the so-called social, economic and cultural rights and were provided in chapter two under the name of the fundamental objectives and directive principles of state policy.

4.2 FUNDAMENTAL OBJECTIVES AND DIRECTIVE PRINCIPLES UNDER THE NIGERIAN CONSTITUTIONS

The fundamental rights were conceived as rights of the individual as distinct from the general rights of the society to progress, development and attainment of the overall well being of the people and the society. This distinction makes it necessary to think of identifying other interests and goals of the society and to accord them a place in the scheme of constitutional government. It was the Irish who first gave practical content to this idea and incorporated the principles in their constitution by way of a chapter on "directive principles of state policy,"which was later followed by India in 1947 and Nigeria in the 1979 and 1999 constitutions. All these constitutions made the provisions of the chapter non-justiciable.

In view of the legalistic perspective which the term "right" was generally perceived or understood, the question to be determined is whether under the 1999 Nigerian Constitution there might be anything that could appropriately be referred to as "social and economic

rights."There has been a controversy as to whether the provisions of Chapter Two of the 1999 Constitution qualifies to be referred to as"rights".There are two schools of thought on this issue. The first school argued that "rights" are indivisible in their nature and it is virtually impossible to separate civil and political rights from social and economic rights. A scholar forcefully put the argument thus,

> *"Political mobilization by human rights activist is .. unlikely to succeed. where they failed to see joblessness and hunger as worthy of not only long term but short term attention... herein lies the underlying logic of the indivisibility of rights."*[4]

In the same vein Rawls argued thus:

> What is the purpose of freedom? Is it not so as to be empowered to act or to have power to do something? He concludes that, "where there is no positive rights to those basic resources that are necessary for individual agency then liberty itself has no value. An equal right to liberty does not mean an equal basic liberty to be free form coercion but also an equal right to those basic resources necessary for individual agency. For instance how can the right to life be guaranteed without structures in place for physical integrity and survival of a person? Food ,shelter and health must then be regarded as fundamental needs.

The second school of thought argued that the provisions of Chapter two of the 1999 Constitution could not properly be referred as "rights" for two basic

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[4] Osibanjo, Y. *Economic, Social and Cultural Rights: Developing A Training Agenda For Nigeria 1999* published by *Legal Research and Resource Dev.Council*

reasons:-

1. The Chapter referred to them as "principles" *NOT* "rights". The fact that they were described as "objectives" clearly shifts the responsibility to the policy makers and governments and *NOT* to the courts.
2. The Constitution clearly makes them non justiciable which reduces their legal efficacy .

It is necessary to consider these objectives and directive principles of state policy in detail especially in the context of the second school of thought. Chapter Two spanned from sections 13-24 of the 1999 Constitution and can be broadly divide into(7)seven principal headings. These are: the philosophical foundation of the polity or nation, the political objectives, educational objectives, economic objectives, foreign policy objectives and duties of a citizen. It is submitted that these objectives are in the nature of group rights of the society or the nation as a whole or the policies or guidelines the nation has formulated in a predetermined manner after due deliberations .These group rights are more in the nature of philosophical objectives to be realised by the government as and when feasible so as to transform Nigeria into an egalitarian society.

The main distinction between the fundamental objectives and the fundamental rights is that the rights are justiciable or judicially enforceable and the court can

declare state action invalid or illegal if it violates or contravenes or infringes any of the rights .On the other hand fundamental objectives are not capable of judicial enforcement i.e while they were recognised as rights, interests and goals of the society and general public, the constitution makes the rights merely political (as distinct from legal) ones not capable of being enforced by the courts[5].

The exclusion of the power of judicial review exercised by the courts must be interpreted to be subject to the other provisions of the constitution . For instance Section 13 provides that,

> "It shall be the duty of and responsibility of all organs of government and all authorities and persons exercising legislative ,executive and judicial power to conform to ,observe and apply the provisions of the
>
> fundamental objectives "

Item 60(a) of the Exclusive Legislative List vests in the National Assembly the power to make laws establishing and regulating an authority to promote and secure the enforcement or giving effects to the provisions of the fundamental objectives . While no legislation has ever been expressed to have been made pursuant to this provision, it is submitted that the Legal Aid Council and the Petroleum (Special) Trust Fund could have been established on the anchor of this provision.

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[5] *See Section 6 subsection 6 (c) of the 1999 Constitution*

The question has arisen as to how section 13 of the constitution can be reconciled with section 6 (6)(e) which excludes the directive principles from judicial powers in so far as Section 13 imposed an obligation or duty upon the courts to conform to, apply and observe the principles. The Indian Supreme Court in a number of cases took the view that the directive principles run subsidiary to the fundamental rights. In case of conflict the fundamental rights will override the directive principles and any law or state action giving effects to the directive principles, if found to be contrary or in conflict to the fundamental rights , the court has no option but to declare such a law as unconstitutional, null and void.[8] This decision of the court was taken notwithstanding the fact that the Indian constitution has declared as its ultimate objective the establishment of a welfare state.[7]

This decision of the Indian Supreme Court provoked criticism against the attitude of the court in interpreting similar provision in the constitution. In consequence wherever such a decision was handed down, the Parliament took the immediate step of amending the constitution so as to curtail the fundamental rights to the extent considered "necessary." The problem or friction

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[8] See *DEEP CHAND V STATE OF U.P (1959)AIR,SC 648,FRAM NASERWANJI V STATE OF BOMBAY,AIR (1951)BOM 216,UPSE BOARD V HARI, AIR(1979)SC65*

[7] *KERALE EDUCATION BILL, A.I.R (1958) SC 956*

between the parliament and the court become so acute that the Indian Supreme Court came up with a decision that the amending power of parliament does extend to altering the basic structure of the constitution and the court regards the fundamental rights as one of the basic fact of that structure.[8] Subsequently the Supreme Court interpreted some provisions of the fundamental rights broadly, especially Article 21, to include the directive principles[9] This will be examined in some details at the later part of this chapter.

In line with the decisions of the Indian Supreme Court on the legal scope and implications the fundamental objectives similar question came up for consideration before the Lagos High Court and later in reference to the Court of Appeal in the case of *BISHOP OKOGIE V LAGOS STATE*[10], In this case the Lagos State Government issued a circular to all schools in the state declaring its intention to take over all private schools with the professed aim or objective of giving effect to the provisions of Section 18 of the Constitution.

This action was challenged on the ground that it

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8 *See KERALA V THOMAS,AIR (1976)SC 496,C.J V DICKSHITULU (1979)2 SCC 34 ,MAKESH V STATE of M.P, AIR (1985) SC 537.LINGAPPA V STATE OF MAHARASHRA,AIR(1985)SC389*

9 *E.g in the case of TELLIS V. BOMBAY COUNCIL (1987) LRC (const) 351 The court expanded the right to life to cover the right to "means of livelihood". Also in 1992 the supreme court extended the right to life to cover the right to education in the case of MOHINI JAIN V STATE OF KARTANAKA, AIR (1992) 1858*

10 *(1981) 1 NCLR 218*

violates the fundamental rights of the pupils, their parents, teachers and proprietors of the private schools as to their freedom of expression. The government contended that the take over of private schools was necessary for giving effect to the educational opportunities to all citizens of the country. The court rejected the contention of the government and held the state action unconstitutional as it violates the freedom of expression under section 36 (similar to section 39 of the 1999 Constitution) as alleged by the applicant. Furthermore the action was also held to be contrary to the fundamental objectives relating to the economy under section 16 of the constitution.

The judgement of the Court of Appeal is worth further examination. The Court took the view that section 6(6)(e) and Section 13 of the Constitution could be reconciled only by taking the view that,

1. No individual can seek the enforcement of the directive principles through the courts as no such right has been conferred on any individual. Section 42 (now section 46 1999 Constitution) may be seen as a contrast on this point.
2. The court cannot invalidate any state action for not conforming with the directive principles.
3. The courts, in the exercise of their interpretation power, should give effect to the directive principles. Such a possibility exist where a court in interpreting an Act

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finds it possible to place two or more construction, then the court should adopt that construction or interpretation that will be in conformity with the directive principles.

The Lagos High Court and the Court of Appeal appeared to have followed the reasoning of the Indian Supreme Court in this respect by categorically stating that the directive principles are subordinate to the fundamental rights and in case of conflict between the two, the rights will prevail. This observation however must be read alongside the views expressed by the court in reconciling section 6 and 13 e.g the expression "reasonably justifiable in a democratic society' is so flexible that it allows a lot of a discretion to the court and in giving content to the such broad and generalized expression in the limitation provision on fundamental rights the court can give effect to a specific directive principle.

Notwithstanding the problem of non-justiciability of the directive principles they served excellent objectives. The objectives laid down the main policies, objectives and directives of the nation as a whole so that the determination is not left to the political expedience of political parties more particularly before the general elections. They save the nation from making a choice between the various, competing political, social and economic ideologies such as Capitalism, Communism and fascism etc. Although the fundamental objectives may not

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have immediate legal significance as they are not enforceable by the constitutional machinery, their enforcement can however be secured periodically more particularly at the time of elections by calling on the government and the political parties to account for their actions on the touchstone of the fundamental objectives.

The existence of the fundamental objectives makes it easy for the people to judge the performance of government and formulate a public opinion that will exert pressure and influence on the government . The vigilant and informed public and the press is absolutely necessary for the effective supervision of governmental performance in accordance with the fundamental objectives. Where the public opinion is absent or the public is totally indifferent to the performance of government the application of chapter two will not be of any help or use.

A recent World Bank estimate indicates that over 45% of Nigerians 100 million people exist below the poverty line. About 2/3 of the number are extremely poor . Furthermore 1/3 of the population are without health services,2/3 are without safe water and sanitation , 47.5 % are illiterate and United Nations Development Programme Human Development Index rank Nigeria 137 of the 174 member countries.[11] Perhaps these might have recently dramatically altered for

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[11] *Human Development Reports, Nigeria ,1996* pp.3 cf *Nigeria's Reports to the Economic and Social Council On the Implementation of the International Covenants on Economic, Social and Cultural Rights, 7th February,1996* ,E/1990/5 Adv 31

the worst in view of the countries recent economic performance and the scale of corruption including the breakdown of almost all institutional and infra structural facilities .

Howsoever one consider these figures they necessarily paint a picture that warrants the putting of the economic and social requirements of the people on top of the political or even constitutional agenda of Nigeria, if government was in reality meant for the people. Essentially the contents of chapter two were inspired by the Covenant on Economic, Social and Cultural Rights. While Nigeria is a signatory to this international covenant the authorities have so far failed to codify it into domestic legislation for enforcement purposes.

The African Charter on Human And People's Rights[12] seems to offer an opportunity for judicial advancement of economic , social , political and cultural rights of the people. The courageously active stand of the Court of Appeal in the case of *FAWAHINMI V ABACHA*[13] in applying the Charter to strike down oppressive legislation offers hope for the realization of these rights. The court of appeal also held that a custom which impedes the economic, social and cultural growth of the people should be rejected as being repugnant to natural justice , equity and good

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[12] *African Charter of Human and People's Rights CAP 10 LFN 1990*

[13] *(1996) 9 NWLR (Part 475) 710*

conscience.[14] Although the court was not called upon to consider any legislation on economic, social and cultural rights, this dictum shows that the courts may be willing to consider applying such principle which many had earlier thought were beyond judicial perimeter.

Section 17 of the 1999 Constitution provides for the social order upon which the Nigerian state shall be founded i.e freedom, equality and justice. In furtherance of this social order,

(a) Every citizen shall have equality of rights , obligations , and opportunities before the law;

(b) The sanctity of human person shall be recognised and human dignity shall be maintained and enhanced ;

(c) Exploitation of human and natural resources in any form whatsoever for reasons other then the good of the community shall be prevented ;

(d) Independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained;

Subsection 3 established the framework upon which the state shall direct its policy towards achieving some or all of the stated objectives . If one interprets the term "social" broadly which is irresistible, the scope of the term shall include educational objectives . Section 18 provides for those objectives to include the promotion of

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[14] *AKPALAKPA V IGBAIBO (1996) NWLR (Part 458) 533*

science and technology, eradication of illiteracy , provision of free and compulsory primary, secondary and university education "as and when it is practicable ."

Section 16 provides for the economic objectives of the nation. In consequence a duty was imposed upon the state:-

(a) to control the economy so as to secure the maximum welfare , freedom and happiness and every citizen

(b) protect the rights of a citizen to engage in economic activities outside the major sectors of the economy .[15]

(c) harness and distribute the material resources of the country or the community so as to serve the common good .

(d) prevent the concentration of wealth or the means of production and exchange in the hands of a few or a group.

(e) provide suitable and adequate shelter and food and to provide reasonable minimum wage.

In furtherance of these ideals the state shall direct its policies towards ensuring:

a) the promotion of a planned and balanced economic development.

b) that the national resources of the nation are harnessed and distributed as best as possible to serve common good..

c) that the economic system is not operated in a such a

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[15] *Major sector of the economy has been define as " a reference to such economic activities as may from time to time , be declared by a resolution of each house of the National Assembly to be managed and operated exclusively by the government of the federation shall be deemed to be major sectors of the economy ". Furthermore" economic activities" includes" activities directly concerned with the production ,distribution and exchange of wealth or of goods and services". The term "participate" includes " the rendering of services and supplying of goods."*

manner as to permit the concentration of wealth or means of production or exchange in the hands of few individuals or a group.

d) that suitable and adequate shelter, adequate food, reasonable national minimum wage, old age care and pensions and unemployment, sick benefits and welfare of the disabled are provided for all citizens.

All these objectives were inspired by the International Covenants on Economic, Social and Cultural Rights for which Nigeria is a signatory. In view of their non-justiciability it appears that the only option actually open for their "enforcement" is judicial activism by the courts. It is hoped that the Nigerian courts will moderate their strict legalistic approach in the interpretation of constitutional provisions. We shall however now examine fundamental rights provisions which are justiciable under Chapter IV of the 1999 constitution.

4.3 FUNDAMENTAL RIGHTS UNDER THE 1999 NIGERIAN CONSTITUTION

Right to life - Section 33

Almost all constitutions of nations that contained bill of rights guaranteed the right to life and the Nigerian Constitution is no exception. The obvious reason for this is that life is sacred the source and nature of which is beyond human comprehension. Professor Nwabueze put the point admirably when he wrote that,

> "Human life is, indisputably entitled to be protected by the state because of its sacredness. It is sacred

because it is God-given. It is completely beyond our power as human beings to bestow. Only God can bestow. It is sacred for ... it combines the dignity of the physical body and the dignity of human soul, the right to life is thus the ultimate of all human rights.[16]

There is no doubt that the right to life is the foundation upon which all other rights are predicated and that is why it is usually the first of all rights guaranteed under most constitutions. For instance section 33(1) of the 1999 Constitution provides that,

"Every person has a right to life, and no one shall be deprived intentionally of his life, save in the execution of the sentence of a court in respect of criminal offence of which he has been found guilty in Nigeria"

The question is: what is the meaning of the word "life" as used in this section? Although question regarding the meaning of the word "life" has never come up before a Nigerian court, some others jurisdiction may assist us in this direction. The United States Constitution provides that, "....no person shall be deprived of his life, without *DUE PROCESS OF LAW...*"[17] The phrase "due process of law" was consistently employed by the United States Supreme Court to determine what process is "due or

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[16] *Ideas and Facts In Constitution Making, p123*

[17] *See the 5th Amendment to the United States Constitution.*

appropriate or reasonable." The Court interpreted "due process" as not confined or restricted to matters of procedure only. It was therefore employed by the court to determine the constitutionality of the substantive provision of the law providing for the deprivation of life.[18]

The Supreme Court of the United States in the case of *MUNN V STATE OF ILLINOIS*[19] define the word "life" to mean," something much more than mere animal existence ". The inhibition against its deprivation extends to all those limbs and faculties through which life is enjoyed. The provision equally prohibits mutilation of the body or amputation of the leg or arm or the putting out of an eye or the destruction of any body organ with which the should communicates with outer world.

This view of the Supreme Court on the meaning of life is a classical statement accepted in all subsequent decisions. In consequence the court took it upon itself the responsibility of determining as to what circumstances could deprivation of life could be considered constitutional. The decisions of the court in respect o the right to life includes decisions on the right to dignity of human person which the court considered as part

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[18] *ROBINSON V CALIFORNIA (1962) 370 US 660 GREGG V GEORGIA, 428 US 156 (1976). FURMAN V GEORGIA (1972) 408 US 238, WOODSON V NORTH CAROLINA 428 US 280 (1976) COKER V GEORGIA 433 US 584 (1977)*

[19] *(1968) 456 US 1034*

of the right to life. It is submitted that the Nigerian courts, when called upon, should adopt this broad and comprehensive interpretation of the concept of life.

As regards the scope of the rights to life under section 33, the section first affirmed the existence of the right and proceeded to specify the exceptions. It is clear that the right has been guaranteed to every person and not to the citizens only, hence the opening word "*every*". The sub-section provides that no person shall be intentionally deprived of his life except in the specific case of execution of a sentence of a court. The word "intentionally" suggests that there can be deprivation of life "unintentionally" which will be regarded as constitutional. Fundamental rights were always regarded as rights against the state but the language in which this section was couched is such that the right could be available against an individual.

These exceptions clearly envisaged a situation where a criminal legislation could be employed to limit the operational scope of the right by imposing as punishment deprivation of life. The qualifications or limitations are that such a person must have been "tried" in Nigeria for an offence which attracts death penalty as a punishment. It is submitted that if the exception is read alongside section 4 of the constitution which vested on the legislature the general power to "make law for peace, order

and good government", then the right to life is only available against the executive arm of government. The right is not available against the legislative arm. In other words section 33 cannot be used or employed as a limitation on the power of the legislature to make law providing for death penalty as punishment. A person can only be tried by a court under a law passed by the legislature and the legislature has the power to make law providing for the deprivation of life the constitutionality of which cannot be challenged as a violation of section 33.

In the United States the Supreme Court had used the "due process clause" or "equal protection clause" to question the constitutionality of death penalty as a form of punishment. The court declared death penalty as "cruel and inhuman treatment" which violates the 8th and 14th amendments.[20] Later however the court changed its view and upheld the constitutionality of death penalty on the condition that the law itself must prescribe the standard of the extreme cases for which death sentence could be permitted.

Similarly the Irish and Indian constitutions[21] while guaranteeing the right to life omitted the phrase "due

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[20] *ROBINSON V CAIFORNIA (Supra), FORMAN V GEORGIA (supra) EDIMUNDS V FLORIDA (1982) 102 US 3368 BECK V ALABAMA (1980) 447 US 625, GODFREY V GEORGIA (1980) 446 US 420 The views expressed by the court in the last case is consistent with the views of the United Nations Human Rights Commission on similar right.*

[21] *See Article 21 Indian Constitution.*

process of law" and replaced it with the "the procedure established by law." The Indian supreme court has for a very long time taken the view that the word "law" mean any enactment by the legislature and the validity of the law depriving the life cannot be questioned under the constitution.

The Court later changed its view overruling earlier decisions and held that the word "law" means valid law. That being the case, every law providing for deprivation of life was subjected to the test of "reasonableness, 'fairness and justice" which gave the court the latitude to determine its constitutionality.[22] It is submitted that the Nigerian courts should adopt this interpretation to limit the powers conferred on the legislatures by the section. It is generally against the spirit of constitutionalism for the legislature or any other organ, to be conferred with unfretted powers on matters of life and death over the citizens.

Apart from this exception, there are others under the section. The right to life is not available if death results from the use of force as permitted by law as may be reasonably necessary.[23] (a) in defence of a person from unlawful violence or defence of property or (b) effecting

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[22] *MANEKA GANDHI V UNION OF INDIA, AIR (1978) SC 597 GOPALANACHARI V STATE OF KERALA, AIR (1981) SC 674 OLGA TELLIS, AIR (1986) SC 108.*

[23] *For the problems associated with right of self defence see Chukkol, K.S. (1988) The Law of Crimes in Nigeria, pp. 100 - 116.*

lawful arrest or preventing escape from lawful custody.[24] This exception is wide enough to allow an ordinary member of the public to inflict or cause death in an effort to give effect to the sub-section.

Furthermore the right to life could be lawfully deprived for the purposes of suppressing riot, mutiny and insurrection[25]. Riot takes place where there is civil disturbance, breakdown of law and order resulting in people taking the law into their own hands. Insurrection is an act of mass uprising of the people or a section of the people against a lawfully constituted authority. Mutiny[26] is restricted to Armed Forces, Para-Military forces and other security agencies including the police. It occurs when members of any of these armed services revolted against constituted authority.

There is no gainsaying that each of these events not only disrupts peace and security, law and order but also dislocates the entire society's equilibrium. In consequence it is submitted that these exceptions are cases of emergency and a legally "excessive" force may be employed depending on the gravity of the situation. However it is difficult to lay down any objective standard

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[24] *Section 33(2)(a) and (b) of the 1999 Constitution.*

[25] *subsection 2(c) of the 1999 Constitution*

[26] *See section 3 of the Armed forces Act 1960 as amended.*

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or general rule as regards this.[27]

Furthermore it must be pointed out that these enormous powers vested in the state is not without some form of restrictions. The constitution provides for certain conditions before the application of such force that could lead to a constitutional or lawful deprivation of life. These are:

1. That the use of such force must have been authorized by law which states the extent and circumstances in which the use of such force is permitted.
2. The use of force that will be justified must be such as is reasonably necessary for any of those circumstances mentioned earlier. As to what is "reasonably necessary". This is a question of fact to be determine on a case to case basis. Generally in criminal law there are provisions to the right of private defence as an exception to criminal liability subject to certain qualifications.[28]

In the case of *BELLO & ORS V A.G OYO STATE*[29] the Oyo state High Court convicted one Nasiru Bello of the offence of armed robbery and sentenced him to death on 30th october,1980.On the 12th November,1980 ,within the time

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[27] *For instance the Maitatsine riot of 1980 in Kano where the army had to be called upon to restore law and order because the police were unable to cope with the situation.*

[28] *See S. 52 Penal Code Law and Section 32(3) Criminal Code cf s.286 - 294 of the Criminal Code and Sections 62 - 66 of the Penal code.*

[29] *(1986) 2 NSCC 1257*

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prescribe by law ,he filed his notice of appeal against the said conviction in the Court of Appeal and a copy of the notice of appeal was served on the Attorney General of Oyo State. While the appeal was pending the Attorney General recommended to the Governor the execution of the said Nasiru Bello and in consequence thereof he was executed on the 5th of September,1981.The relatives of the deceased challenged the constitutionality of the execution on the ground of violating the right to life guaranteed under section 30 of the 1979.

The Supreme Court of Nigeria inter alia held that

(1) Although there is no statutory provision for stay of execution of a sentence of death pending the determination of an appeal, a stay of execution must be inferred from the provision of the constitutional rights of appeal of the convict. The Governor of a state cannot lawfully order the execution of a convict who has appeal against his conviction when his appeal has not been finally determined. Thus the execution of the deceased was unconstitutional and unlawful. The Court further held an action under Law of Torts for damages arising from this unconstitutional act could be maintained by the deceased administrators or executors.

4.4 RIGHT TO DIGNITY OF HUMAN PERSON: SECTION 34

This section is similar to section 18 of the 1963 and section 31 of the 1979 constitution except that the

1979 and 1999 provisions are more extensive and detailed as regards to the nature and type of conduct considered as offensive to sensitivity and the exceptions to such conduct.

Section 34 of the 1999 Constitution provides that every person is entitled to respect for the dignity of his person. The section proceeded to specify certain types of acts or conduct considered as offensive to human dignity. The specific mention of these acts cannot be interpreted as exhaustive cases of violation of human dignity but should only be taken as illustrations. In other words a part from those cases mention in the section if new types of inhuman conduct are practice the prohibition of the section shall be extended to cover those conducts.

Human dignity as a concept is not capable of any precise definition. What is human and what is dignity are relative terms both as to persons, time and circumstances. It neither means the susceptibilities or sensitivity of a highly touchy person nor does it mean the insensitivity of a highly indifferent person. Contextually the section seems to adopt the standard of a reasonable man and proceeded to prohibit the following conducts regarded as inhuman.

1. Torture inhuman or degrading treatment[30]

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[30] *See Section 34(1)(a) of the 1999 Constitution*

2. Slavery and / or servitude[31]

3. Forced or Compulsory Labour[32]

On cursory glance, it appears that the conduct mentioned were too few but should not be interpreted to mean that there are no other conducts which may not be offensive to human dignity. The specific mention of some types of conduct could only be regarded as by way of abandon caution. The right to respect human dignity is wider than those specified practices.

The word "dignity" is flexible enough and its content could be determined having regard to the stage of civilization, moral and ethics prevailing in a society at a given point in time. But it is certain that the dignity referred here is subject to fluctuation the exact stand of which could only be determined by the courts.

The words "torture, inhuman or degrading treatment" refer to the well known practice of torturing human beings or doing things which are offensive to human body or sensitivity. This provision is specifically directed at the state security agents, who engaged in the practice of torture, to extract an "alleged" confession from either an accused person or a person under detention. The word "treatment" is wider and includes punishment. The 1963 constitution had used the moral "punishment" but its

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31 *Section 34(1)(b) of the 1999 Constitution*

32 *Section 34(1)(c) of the 1999 Constitution*

deletion in the 1979 and 1999 constitutions should not be construed as being excluded from the section 34.

We shall examine few American cases for illustrative purposes. The United States Supreme Court in the case of *FURMAN V GEORGIA*[33] held that death sentence is unconstitutional. Two judges held it *per se* as cruel and unusual punishment because it involved calculated killing of a human being by the state thereby denying the executed person humanity and that death penalty is unusually severe and degrading punishment. It having been rejected totally by the contemporary society and that it does not serve any purpose more effectively than the less severe punishment of imprisonment.

The other three judges constituting the majority held death sentence as constitutional because existing law gave discretion to the judges and the jury that would enable them to discriminate on the penalty that was being implored. The dissenting Chief Justice pointed out that in the opinion of the two of the majority judges held that capital punishment may be valid if the laws provides standard for judges and jury to follow or by more narrowly defining the crimes for which the penalty was to be imposed.

Following this decision all the states in the United States amended their criminal law codes providing the

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[33] *supra.*

standard to guide the judges for awarding the sentence limiting death sentence to only first degree murder cases and separated the procedure for finding the guilt from the procedure for awarding the sentence. These legislations were challenged in the case of *GREGG V. GEORGIA*[34] and the Supreme Court held them as constitutional.

The majority judges took the view that death sentence for first degree murder is not in itself cruel and usual punishment. The fact that all the 50 states legislatures enacted such laws showed that a large proportion of the American society continue to regard it as an appropriate and necessary criminal sanction. The court further pointed out that death penalty is not a form of punishment that may never be imposed regardless of the circumstances of the offence, character of the offender and the procedure followed in reaching the decision to impose it.

Generally the United States Supreme Court regards the question of the right to life guaranteed under the 5th amendment as encompassing the prohibition against inhuman and degrading treatment. This was the basis which equally informed the decisions of the Indian Supreme Court in the cases considered under the section 33 above. One may ague that the criminalization of torture under the Nigerian constitution was to avoid its tacit legitimazation, by the state. The criminal law of some countries provides or at

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[34] *Supra*

least condoned the use of torture or inflicting inhuman and degrading treatment on suspects.[35] Torture was prohibited for the simple reason that it may lead to the punishment of innocent persons. The effect of torture on a human being is to deprive him of his humanity i.e. free will and reduces a person to the position of animal. It has the effect of forcing a person to do what he does not want to do. Torture is disrespectful of the dignity of human persons.

The second conduct outlawed under section 34[36] is slavery. Slavery has a specific meaning and refers to the incidence of slavery as known to history. But it may be possible that it is practice in disguise or various other forms or its different features may come up in human relations at different times. To guard against the practice of slavery , the constitution has used additional word "servitude" which may cover a disguise form of slavery.

Thirdly the constitution prohibits "forced and compulsory labour ". This phrase refers to those practices under which persons are subjected to physical coercion to do a particular work under pains of penalty. One of the major criticism against communism, as a philosophy of

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[35] *Torture was widely used in many Latin American countries in the 70's and 80's e.g. Peru, Chile, Uruguay, Paraguay, Honduras etc.*

[36] *See Section 34 (1)(b) of the 1999 Constitution*

government, was that it was founded upon forced labour. The system has been described by one scholar as "serfdom or a new slavery."[37] As to the nature of forced labour , Nwabueze condemned it in the following strong terms,

> "Forced labour is evil because it leaves the individual no choice but obedience to the orders of a superior, and it is no less evil because the new master is the state."[38]

It is clear from this that forced and compulsory labour is an antithesis of the right to personal liberty. The statement of the United States Supreme Court in the case of *POLLOCK V WILLIAMS*[39] clearly illustrates this point. The court held that, the defence against oppressive hours, pay, working conditions or treatment is the right to change employer. When the master can compel and the labourer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a hash overlordship or unwholesome condition to work.

The idea is that the freedom of choice is fundamental to every human being. An individual may as a matter of choice decide to enslave himself or do whatsoever with his life and the state will have no business interfering. Nwabueze rightly observed that,

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[37] Hayek, F.A. (1944) *The Road to Serfdom*, p.10.

[38] *Ideas and Facts* op. cit p.66

[39] *322 US 4 (1944)* ,

"Within the ambit of the general law the individual can conduct his affairs as suits him, he can slave himself and be as austere as he likes, he can deny himself certain wants or needs in order to achieve certain ends, but to subject to such a regime at the will of others in order to achieve ends determine by them is a form of oppression altogether intolerable to the nature of man."[40]

These provisions were no doubt directed specifically against the state. The words "forced and compulsory labour" being a very wide expression, the constitution has stated what does not amount to forced or compulsory. This prohibition cannot be extended to the various social and economic compulsion that operate upon an individual to do a particular work which he would not otherwise have done. Let us now examine each of the exceptions under the sub-section.

1. Any labour required in consequence of a sentence or order of a court.[41] This makes the legislature immune from the constitutional restrictions. The court can sentence a person to do a particular labour only if authorized by law. Neither the law nor the order .of the court can be challenged for violating this right. This belittles the significance or importance of the right against the might of the state.

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[40] *Ideas and Facts op.cit p.65*

[41] *See Section 43(2)(a) of the Constitution*

2. Any labour required of members of the armed forces of the federation or police as part of their duties or in the case of a persons who have conscientious objections to service in the armed forces, any labour required instead of such service.[42]It is necessary here to explain that by the professional calling of the military, police and other paramilitary services a specialized form of training is required since the primary function of these forces is safeguarding the security of a state from different perspectives. In consequence the exemption is justifiable and necessary e.g. it protects important policies in war time situations like conscription. The constitution was however careful to safeguard the interest of certain groups who may take a strong exception of this requirement by providing for a substituted service.

3. Any labour or service required during natural calamities for the well being of the community.[43] This provision enhances state security in the sense that where a community's survival is at stake either as a result of a natural or man made disaster every member of the at society is duty bound to assist (even at the pain of being forced) to ensure well being and survival of that community.

4. Any labour or service required that formed part of the

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[42] *See Section 34(2)(b) of the 1999 Constitution*

[43] *Section 34(2)(c)of the 1999 Constitution*

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normal community[44] or compulsory national service in the armed forces[45] or compulsory national service as part of education and training.[46]

In view of the difficulty in drawing a clear cut line between conducts that are within the legal framework and those outside the constitutional perimeter the United States Supreme Court decisions may assist us in determining its scope. In the case of *ROCHIN V. CALIFORNIA.*[47] Rochin was suspected of illegally possessing narcotics. When the police broke into his house he allegedly swallowed the narcotics. The police forced him to open his mouth and when he refused he was taken to a hospital and through stomach pump was forced to vomit the drug. The Court held this action of the police a violation of the right life and dignity of human person without due process of law.

In taking a strong exception to this practice the court pointed out that the process by which the conviction was obtained do more than offend some fastidious sentimentality. This is a conduct that will shock the conscience of every decent person i.e by first illegally breaking into the petitioner's home, the struggle to open his mouth and remove what was there, the forceful

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[44] *Section 34(2)(d)(i) of the 1999 Constitution*

[45] *Section 34(2)(d)(ii) of the 1999 Constitution*

[46] *Section 34(2)(d)(iii) of the 1999 Constitution*

[47] *Supra*

extraction of his stomach content .This course of proceedings by agents of government to obtain evidences bound to offend even the most hardened sensitivities. However in the case of *BUCK V BELL*[48] the Supreme Court held valid an Act which provides for sterilization of mentally defective persons so that the society may not suffer a large number of mentally defective persons with disastrous consequences.

The courts in Nigeria adopted similar position in the case of *ALHAJA HABIBAT MOGAJI V BOARD OF CUSTOMS AND EXCISE*[49] The Lagos Custom authorities found that smuggled goods are generally being traded in a local markets in Lagos. The Custom authorities decided to raid the entire market in order to apprehend and confiscate the contraband goods. The method used was that armed policemen were brought to the market and a detachment entered into the market and opened fire into the air, frightening all the market women then forcibly entering their shops, assaulting some of them, before carting away some of the goods found in the shops without taking any inventory. There was an allegation that some of the market women were stripped but this was not proved, but all other allegations were proved.

The court held that the entire operation was offensive to human dignity, disrespect to law and a flagrant

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[48] *246 US 114 (1976)*

[49] *(1982) 3 NCLR 723*

violation of laid down procedure for the purpose as provided in various laws. The Court pointed out that sudden opening of fire terrorized all the market women and smack of uncivilized behaviour when there is already a laid down procedure for such an act. Forceful entry and assaulting of women without showing them warrant and time to comply with the warrant did not speak well of the law enforcement agents. Taking away of goods without inventory was much more serious and reflect upon the integrity of the Custom and Excise Department. For all these reasons the Court held that the right to dignity and respect for human persons was flagrantly violated.

In conclusion one may argue that apart from the specified conduct or practices outlawed by the constitution as offensive to the dignity of human person the determination of whether a particular conduct by security agents violates the right is generally left for the courts to determine on a case to case basis. In this context it is difficult to draw any generalized objective standard for determining what conduct could in all circumstances be regarded as offensive to the dignity of human person.

4.5 RIGHT TO PERSONAL LIBERTY: SECTION 35

Section 35 of the Constitution confers on every person the right to personal liberty subject to certain exceptions specified therein. Traditionally no right comes into frequent conflict or at least under constant threat of

violations in the name of security than the right to personal liberty. The right to personal liberty is one of the most important pillars of any democratic polity. The question is: what is liberty?

Professor Nwabueze described liberty as an attribute or one of the attributes of human life. He divided liberty into two different types thus, ".. individual liberty and political liberty. Individual liberty, "to him.," connotes the freedom, within limits, of each person as an individual to think, feel, believe or disbelieve, speak and act as he likes without undue coercion or control by the arbitrary will of others, in particular by the state[50]:

He continued further that,

> "... political liberty means the freedom of a community to government itself (self government); that is to say, a community whose members collectively posses and enjoy, within limits, full political rights of freedom to govern themselves and to determine their destinies as a group..."[51]

Implicit in this definition of liberty is the fact that the two are intractably intertwined that one can hardly exist without the other. This view is however misleading that is why one must agree with James Bryce when he wrote that,

> "Between individual liberty and political liberty there is no necessary connection; each may exist with

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[50] *Ideas and Facts op cit. p.99*

[51] Ibid

the other."[52]

Section 15 of the Nigerian Constitution broadly confers in a positive sense the right to personal liberty and then goes on to state the circumstances in which a person may be deprive of the right. Generally personal liberty means freedom from physical restrain and usually it is taken to mean freedom from arrest and detention.

The 5[the] amendment to the United States Constitution provides that, "No person shall be deprived of his liberty ..... without due process of law." In an 1897 case the supreme court - interpreted the word "liberty" in the amendment to mean,

> ".. not only the right of the citizens to be free from mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways, to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or a vocation, and for that purpose to enter into all contracts which may be proper, necessary or essential to his carrying out to a successful conclusion the purpose above mentioned."[53]

The right to liberty guaranteed under the United States Constitution is all encompassing in its amplitude, *but it is respectfully submitted that the scope and meaning of*

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[52] *Modern Democracies (1920) Vol I, p.62*

[53] *ALLGEYER V LOUISIANA, 165 US 578 (1897)*

the Nigerian proviso under section 35 which 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 in accordance with a procedure permitted by law..."

partakes only of the first part of the United States Supreme Court definition but does not extend to the later part because of the exceptions provided under the Nigerian provisions. The section contained a number of grounds upon which a person may be arrested, detained or imprisoned. A close examination of these grounds or exceptions would reveal that the right is only available against the executive and not the legislature. We shall consider these exceptions later.

Furthermore the right to personal liberty is one of the pillars of any democratic set up because it directly conflicts or offends the power of the state to remove out of circulation any threat in the overall interest of the society. Negatively section 35 provides that personal liberty may be deprived in the circumstances permitted by law. This was meant to provide a delicate balance between the right of an individual and the general interests of the society.

The term "liberty" is qualified by the word "personal" in the sense that the individual is free from

physical restrain and constraints.[54] The freedom secured by section 35 is from physical restraint or restrictions to freedom to move about and pursue his vocation of life without state interference or restraint in any way. This means freedom from arrest, confinement or restricting a person to a particular place or prohibiting him from moving out of a particular place. Emphasizing the importance of personal liberty as an integral part of man's individuality, an eminent scholar maintained that,

> ... the ability to be, think and act was part of man's endowment as a whole, sane, normal human personality ..... the ability to be was the ability to live and enjoy life. The ability to think and act was the ability to protect life more securely, expand liberty more generously, to safeguard property more adequately, to ensure conscience more liberally and to advance happiness more easily."[55]

Writing on the same principle the famous philosopher J.S. Mill[56] on what he calls "simple principle" explained thus,

> "The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in away

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[54] *Neal Riemer, James Madison: Creating the American Constitution (1986) p.34*

[55] *See B.O. Nwabueze, Ideas & Facts pp48 cf In ADEWOLE & ORS V. JAKANDE & OTHERS (1981) NCLR 262 at 263 The court construed "personal liberty" under Section 35 to refer to 'privilege', 'immunity' or 'right' of a personal nature.*

[56] *"ON LIBERTY" in J.M. Robson (ed) Essays in Politics and Society (Toronto: University of Toronto Press, 1977) Vol. I pp.213-30 at p. 223 -224*

of compulsion and control, whether the means used be physical force in the form of legal penalties, or a moral coercion of public opinion. *That principle is, that sole end for which mankind is warranted individually or collectively, is interfering with the liberty of action of any of their members is self protection."*

It is beyond doubt that the most distinguishing feature of any democratic polity, I venture to say, is the protection of personal liberty of the individuals. In other words the first casualty of any dictatorial or totalitarian regime is the right to personal liberty. A note of caution must however be sounded here that the rights so guaranteed are not in absolute terms, and that care has been taken to protect in equal proportion the collective rights or interest of the society. As mentioned earlier the Nigerian Constitution is not an exception to this basic principle.

Section 35 contains a number of grounds upon which a person may be arrested, detained or imprisoned. A close examination of these exceptions [57] will lead to the inescapable conclusion that the right is not a right against the Legislature but against the Executive. If that is the purpose which in effect section 35 serves it ought

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[57] *All the grounds of exceptions mentioned in S.35(1) seems to have been taken from the summary of the grounds of lawful arrest and detention in Wade & Phillips On Constitutional and Administrative Law (1982) p. 442*

not to find a place in the fundamental right chapter, for even under the rule of law the Executive cannot deprive a person of his personal liberty without an authority of law. What was needed was a protection against the Legislature to prevent arbitrary arrest or unreasonable detention or arrest through oppressive laws.

The basis of these exceptions was that the right to personal liberty can be restricted in the circumstances specified in the section as permitted by law. The word "law" may be interpreted to mean a valid law - which did not contradict or contravene any provision of the constitution. It is submitted that the law which permits or authorized the deprivation of personal liberty should be just, fair and reasonable. The absence of these requirements under section 35 considerably reduces the importance and significance of the right. This becomes more when we consider the various circumstances under which the right can be abridged.

Firstly the right of personal liberty can be deprived in execution of a sentence or order of a court for criminal offence for which a person has been found guilty.[58] This provision did not make the question of justiciability of the law providing for the arrest or detention open to judicial review. If deprivation on the court order is justified, it means that the law under which the court

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[58] *See Section 35(1)(a) of the 1999 Nigerian constitution.*

imposed the sentence is justified and cannot be questioned on the ground that it is an unreasonable law or an unjust law. The resultant effect of this loosely worded provision is that in its desire to protect itself either from real or imaginary threat, the state (via the legislature) may pass a law (under any guise) providing for a deprivation of personal liberty. Whenever such a law was validly passed it cannot be challenge on the ground that it contravenes section 35.

Secondly when a person fails to comply with the order of the court [59] e.g. a person who commits contempt of court by failing to comply with its order or direction may be imprisoned. Here also the order of the court imposing such a punishment is not open to challenge even if it is unreasonable or arbitrary etc. It is however conceded that the court, being the foundation stone of constitutionalism, it is imperative that their power, independence including power to enforce its judgements or order must be protected. This must be balanced or exercised in the context of the law or with the sole purpose of promoting the spirit of the law.

Thirdly a person may arrested or detained for purposes of bringing him before the court of law or when the person is reasonably suspected to have committed an offence or his arrest or detention is considered reasonably necessary to

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[59] *See Section 35 (1)(b) of the 1999 Nigerian Constitution*

prevent him from committing an offence.[60] Reasonable suspicion has to be established on the basis of *prima facie* evidence which is ultimately judged by the court or magistrate before whom the person arrested or detained has to be produced with 24 hours in some cases and within a reasonable time in other cases. When the arrested or detained person charged with the offence is not shown by the records produced before the court to have committed the offence, his detention or arrest will be illegal.

In this context a mere suspicious or conjecture is not enough, the suspicion must be directly related to the material evidence the officer has at the time of arrest and detention. In the same manner when a person is suspected to be planning, trying or attempting to commit an offence, for the purpose of preventing him from committing the offence his arrest or detention must be regarded as reasonably necessary. It is only from this perspective that the arrest and detention of persons who either directly or indirectly posed a threat to the existence of the state could be justified. A note of caution must however be sounded here that the only circumstances surrounding the time and place of arrest or intended commission of the offence will determine whether the arrest or detention was reasonably necessary. In both cases of suspicion of committing an offence or preventing the

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[60] *See Section 35(1)(c) of the 1999 Nigerian Constitution*

purposes of preventing him from unlawfully entering into Nigeria or for his lawful expulsion or extradition etc.[62] It is from this perspective that the various immigration laws and regulations can be appreciated. Some of these legislation imposed certain requirements such as entry visa, passport and resident permit in order to monitor all foreigners entering into and residing in the country. The point must however be emphasized that the determination of who enters into a country or stays there except the citizens is a matter affecting sovereign right of a nation and is a recognized principle of international law. The use of the word or adjective "unlawful" to qualify "entry" and "lawful" for expulsion presupposes that the state exercise of such powers must be on the basis of the requirements established by law.

In the case of *SHUGABA DARMAN V MINISTER OF INTERNAL AFFAIRS*[63] the court held the Immigration Act 1963 as unconstitutional, null an void for contravening the provisions of section 35 of the constitution. In other words the basic requirements of lawful expulsion in the spirit of the section were completely absent in the Act.

Fifthly a person may be arrested or detained if he is suffering from infectious or contagious disease or if he is of unsound mind or addicted to drugs or alcohol or if he is

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62 *Section 35 (1)(f) of the 1999 Constitution*

63 *(Supra)*

vagrant.[64] The legalization of this arrest and detention is necessary for the purpose of protecting the community against the afflicted individual. Such a person if allowed to roam freely may spread the disease in the community precipitating an epidemic or if he is of unsound mind constitute a danger to the society because of his violent nature. These group of persons, if left unchecked, could pose a serious threat to the community which in turn could undermine the security of the state.

Furthermore, a person may be deprived of his personal liberty if he is below the age of 18 for the purposes of his education and training.[65] These cases cover minors who may be placed in custody for their education and training. The state is generally under an obligation to ensure continuity in the overall interest of the society. It is therefore incumbent upon those entrusted with machinery of state power to train future generations to become useful members of the society rather than a danger to it. The deprivation of the right of personal liberty on this basis is for posterity.

Finally a person may be arrested or detained in order to compel him to or secure from him discharge of an obligation imposed by law[66] e.g. a law may provide for an

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[64] *Section 35(1)(e)of the 1999 Constitution*

[65] *Section 35(1)(d) of the 1999 Constitution*

[66] *Section 35(1)(b) of the 1999 Constitution*

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arrest in order to compel a debtor to pay his debt. This provision may be criticized on the ground that the constitution attaches less significance and importance to personal liberty as compared to other legal obligations however trivial, unimportant or insignificant they may be. This is the direct result of the absence of condition of reasonableness of the law providing for arrest and detention. Under the United States Constitution the words "due process" has been held to include not only the procedural reasonableness but the reasonableness of the substantive law.[67]

Section 35 subsection (4) provides that any person who is arrested or detained and awaiting trial shall not be kept in detention for a period longer than the maximum period of imprisonment reserved for the offence with which he is charged. Ideally this provision takes care of the delay in the conduct of trials either because of the complicated nature of the case, evidence required , the congestion of the court's calendar etc. Practically this provision posed the greatest danger to personal liberty, because with the imprecise nature of, for instance the term "state security" and the over-zealousness of the security agents, it could or allow the authorities or their agents to sentence an accused to a maximum period of imprisonment

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[67] *ROBINSON V CALIFORNIA (1976) 370 US 660, GREGG V GEORGIA (Supra) WOODSON V NORTH CALIFORNIA (1976) 428 US 280 COKER V GEORGIA 433 US 584 (1977) ROBERTS V LOUISIANA 431 US 633 (1971)*

even though he has not been found guilty of any offence. This is a violation of the presumption of innocence guaranteed by the constitution under section 36(5).

The right to personal liberty can only be meaningfully protected when the person charged with an offence is tried as quickly as possible because any detention for an offence for which a person has not been found guilty amount to an illegal detention. It may be argued that to prevent the state or authorities from committing this illegality, such a person must be given the right to public apology and compensation as provided under section 35 sub section 6 if after being detained for the maximum period he was eventually found not guilty.

4.5.1 RIGHT TO SILENCE DURING INVESTIGATIONS

Subsection 2 of section 35 provides that any person who is arrested or detained is entitled to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice. This right covers the period of detention in police custody before the trial. Obviously this right was provided as a safeguard or protecting an arrested or detained person from being tortured, intimidated or any other form of coercion to extract information for use at his trial. It is a common knowledge that security agents extract alleged "confessions" from suspects. This provision minimized the possibility of convicting a suspect on such

illegally obtained evidence.

The right of silence, though important, from individual point of view needs to be balanced with the interest of public justice in punishing a real culprit and the duty imposed by law upon every member of the public to give information in his possession to tell the truth when asked. An arrested or detained person has a difficult choice to make between the exercise of his right to remain silent and to fulfil his legal obligation to tell the truth. Where he remains silent he runs the risk of wrongly being convicted. If he intentionally conceals the truth he runs the risk of being charged with perjury or willfully refusing to assist the police in the discharge of their lawful functions of investigating a crime and bringing the culprit to justice.

The provision also confers an additional right for an arrested or detained person to consult with a counsel or any other person of his own choice. The choice of who to consult is entirely at the discretion of the accused person. There is no duty imposed upon the state to provide him with a counsel or any other person for consultation. The difficulty of the language in this sub section is that it says "until after" which is capable of being interpreted to mean that after he has consulted with a counsel or friend, he cannot remain silent and avoid answering questions. Such an interpretation may not work in practice especially where a person refused to consult any legal

practitioner or any other person.

The Lagos High Court took the second view in the case of *OLUSHOLA OYEGBAMI V A.G. FEDERATION*[68] In this case the editor and a reporter of Sketch Newspapers were arrested on the basis of certain publications. When interrogated they refused to disclose their source of information and were charged with conspiracy to commit felony of false reporting. They challenged the constitutionality of the state action on the ground that it derived them their right to remain silent under section 32 subsection 2.

The court upheld their contention and held that it is a fundamental right of any person arrested or detained to remain silent until after consultation with a legal practitioner and even after such consultation, the arrested or detained person can still remain silent and refuse to answer any question put to him. The police in carrying out their investigation and questioning are bound to comply with and observe the relevant provisions of the constitution as they are intended to protect persons from improper police conduct. Persons arrested have fundamental rights during and after their arrest and detention.

Section 35(3) provides that any person, who is arrested or detained, shall be informed in writing within 24 hours in the language he understands of the facts and grounds for

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[68] *2 (1982) NCR 189*

his arrest and detention. The specific mention of "facts" and "grounds" is intended to avoid the controversy as to whether furnishing of grounds would entail giving all the detailed facts relating to the alleged offence. It would appear that it is not enough for the detaining authority to inform the arrested person the alleged offence but also the facts that constitute such an offence. Another problem is the idea that an arrested or detained person must be inform in writing in the language he understands. In view of the degree of illiteracy in our society it would seem that verbal information would satisfy the requirement of the section.

The right to be informed is a prelude to the right of production before the court within a reasonable time.[69] When the arrested person is produced before a magistrate, the object of it is to determine the basis of the facts and records before him whether there is any *prima facie* case made out by the detaining authority. He would be considerably assisted if he was informed of the facts and grounds of his arrest. Without the facts and grounds of arrest, the detained person will have nothing in respect of which he can consult a lawyer.

Furthermore the subsection provides that any person arrested or detained shall be brought before a court within "reasonable time".Reasonable time was define to mean 24

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[69] *Section 35(4)of the 1999 Constitution*

hours if within a radius of 40km from the place of arrest or detention there is a magistrate court and in other cases two (2) days or such other longer time as the court may consider reasonable in the circumstances of the case. The production before the court within a reasonable time is a very important safeguard against the misuse of the power of arrest or detention by the police or any other law enforcement agencies legally authorized . It enables a judicial mind to be applied to the facts of the case and arrive at a conclusion as to whether or not the facts and evidence placed before it, there is a *prima facie* case against the accused person.

In the case of *AUGUSTINE EDA V COMMISSIONER OF POLICE BENDEL STATE*[70] the Court of Appeal in Benin held section 17 *Criminal Procedure Act* and Section 23 of the *Police Act* as unconstitutional, in so far as they do not require production before the magistrate of an arrested person within reasonable time in all cases. The court took the view that it is the duty of the police to offer bail and bring the accused to the court of law within one or two days as the case may be. Whether the police grant bail or not it is their duty to bring him before the court within the said time. But once the police have offered the bail, it is for the accused to avail the bail by producing or providing the required security. And if he fails to do so,

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[70] *Section 35(4) and (5) of the 1999 Constitution*

his further detention will not be hit by the subsection.

If a *prima facie* case is not established, the court will be within its right to discharge the person forthwith subject to such conditions as may be necessary to make the person available for investigation of the offence and the trial should that trial be necessary. The Court in *EDA's* case has taken care to prevent a detention for a period longer than necessary but has not given any right as to bail generally and not prescribe any limitation on the power to grant bail.

The United States Constitution has a very solitary provision i.e the 8th amendment which provides that excessive bail shall not be required. In the absence of similar provision in Nigerian Constitution it is possible for the detaining authority, if the law permits, to demand excessive bail, the impossibility of which will have the effect of continues detention. It is only when the person is not tried within 2 months if he is not entitled to bail (i.e in cases of capital offences) or within 3 months if he is not released on bail that the sub section enjoins upon the detaining authority to release him forthwith with or without conditions. A release under this subsection will not prejudice any subsequent proceedings that may be taken against the person[71] Secondly such a release may be with or without conditions that could ensure his appearance at the

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[71] See *RE DR OLU ONAGORUWA (Unreported) suit No. FCA/7/117/79*

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time of the trial to answer the charges against him.

This right to be release creates a problem in that the words used are "if not tried". The question here: Does this right means or suggest that the trial be completed within 2 or 3 months as the case may be? Or the trial should begin within this period? There is no decision so far on this except perhaps under the ordinary law. The constitution seem to proceed on the presumption that the trial should begin within this period because the conclusion of a trial may depend on a number of factors or variety of circumstances. Some delays may be attributed to the prosecution, the court or the accused, his counsel or witnesses etc.[72]

As regards to the question of production in the case of *ONU OBEKPA V COMMISSIONER OF POLICE* [73] the defendant was charged with theft and was refused bail as it would prejudice the investigation of the offence. No circumstances were advanced in support of the prosecution request. The court held that under the constitution bail to a person accused of an offence other than a capital offence is a basic right and the right of release before the trial is much more basic if the trial is going to last more than 2 months for non-capital offences. The Court observed that

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[72] *This right is not available to person charged with capital offence, or an army or police officer who has been sentence to a term of imprisonment not exceeding 3 months by a duly authorized offer of the force.*

[73] *(1981) 2 NCLR 420*

the spirit behind the provision of section 32(4) is to keep an accused person out of incarceration until found guilty through the process of court trial. It is a conditional privilege which he is entitled to under the constitution.

Finally section 35(6) has a very meaningful provision i.e a right to compensation and public apology by the appropriate authority for an unlawful arrest and detention. In retrospect it appeared that though the constitution has conferred in a positive form the right to personal liberty as a check to the almighty powers of the state, the grounds of exceptions considered have substantially undermined its legal efficacy. From the discussion of the various exceptions under the section one disturbing trend seem to have emerged i.e the state and its various agencies, instrumentalities could conveniently circumvent these rights whenever they desire to do so. In other words an individual, notwithstanding these provisions, basically has no protection against the state. Though the courts have in most of the cases examined tried to water down some of the damage, which the exceptions seem to have made to the substantive right, the decisions were mainly those of high courts which are of persuasive authority. In consequence the burden is squarely n the superior courts to interpret these exceptions narrowly within the context of restricting the enormous powers of the state in favour of the individual rights. This calls for judicial activism by the

courts in contrast to the purely legalistic approach generally adopted by the Nigerian judges in the spirit of British tradition. Interpretation of constitutional provisions generally requires broad and liberal approach as evidenced by the United States Supreme Court progressive interpretation which has withstood the test of time.

4.7 THE RIGHT TO FAIR HEARING: SECTION 36

This section provides for the right of fair hearing in civil, criminal and administrative matters. The section also conferred certain other independent rights to a person accused of a criminal offence. Subsection 1 of section 36 provides that every person is entitled to "fair hearing within reasonable time before a court or tribunal constituted in such a way as to secure its independence and impartiality." These rights are only available where the civil rights and obligations are being determined including any question or determination against any person, government or authority.

The question of what is "civil rights" came up before the Supreme Court of Nigeria in the case of *MERCHANT BANK LTD V FEDERAL MINISTER OF FINANCE.*[74] The plaintiff was granted license to engage in banking business and the Federal Minister of Finance, in exercise of his powers under the Banking Ordinance, revoked the license. The company challenged the revocation on the ground that

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[74] *(1961) 1 WNLR 109*

carrying on banking business is a civil right and they were not given the right of fair hearing. The court rejected this contention and without defining what is a civil right held that a right of license to do banking business under the Banking Ordinance does not come within the meaning of civil right.

In the case of *ORISAKWE V GOVERNOR OF IMO STATE*[75] an allegation of gross misconduct were levelled against the plaintiff a traditional chief. Under the relevant chieftaincy laws the Commissioner was empowered to set up an investigation panel which he did not do. The Governor in exercising his executive authority appointed another committee which made recommendations without investigation. The Governor acting on the recommendations withdrew the chief's recognition.

The action was challenged on the ground of failure to give a right of fair hearing to the chief before the withdrawal of the recognition and the court upheld the contention and invalidated the Governor's order. The court observed that,

> "The plaintiff ,being a recognized chief before the withdrawal of the same by the Governor, had a legal status, duties and obligations imposed on him by law. If the right to fair hearing is to be a real right it must carry with it a corresponding equal right in the person accused of any misconduct to know the case

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[75] *(1982) 3 NCLR 678*

which is made against him. He must know the evidence against him and must be given the opportunity to contradict such adverse or incriminating evidence. This is the right of fair hearing and nothing short of it will suffice..."

While it is difficult to determine what the term "fair hearing"[76] means since it was not define by the section, the section however laid down certain criteria for its determination. For instance the proceedings must be conducted within "reasonable time," "before a court or tribunal established by law". However the tribunal must be constituted in such a manner as to make it independent and impartial. As to what constitute "reasonable time" no hard and fast rule can be laid down as to what may be a reasonable time in any given case. It depends on a number of factors surrounding the case such as the nature of the case, its complexity, the time taken by the parties to produce their evidence, time taken by counsels, availability of adequate number of courts and how congested the court's calendar is.

Some of the few cases decided by the courts may illustrate the meaning of the term "reasonable time". For instance in the case of *JOHN FOLADE V ATTORNEY GENERAL*

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[76] *The supreme court in ARIORI V ELEMO (infra) P.25 define it to mean "a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties to the cause." cf per Ademola CJN in ISIYAKU MOHAMMED V KANO N.A. (1968) 1 NLR 424 at 426.*

LAGOS STATE[77] The appellant was arrested and detained by the police. He was charged before a Chief Magistrate with an offence for which the court has no jurisdiction and the court refused to grant him bail. He challenged the constitutionality of his continues detention as a violation of his right to personal liberty and fair hearing. The court held that though the expression "reasonable time" has not been define by the constitution the expression must bear its ordinary para-material meaning in the context in which it was used. That is the right to speedy trial i.e. fair trial within a reasonable time guaranteed under the constitution is necessarily relative. It is consistent with delays and depends upon circumstances. It secures the right to the defendant but does not preclude the right to the public justice. The accused does not need to show actual prejudice by the delay before he will be entitled to complain about it or seek redress.

In the case of *NWANKWO V QUEEN*[78] the Supreme Court adversely commented on a 12 months delay between the time of arrest and actual trial before the Court. On the other hand in *YERIMA V BORNO N.A*[79] an attempt was made to include the time taken to include appeal proceedings in calculating the delay but the court rejected it on the

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[77] *(1981) 2 NCLR 771*

[78] *(1959)SCR 1064*

[79] *(1968) ALL NLR 397*

ground that the then section 22(2) of the 1963 Constitution (similar to section 36) applied to trials only and not to appellate proceedings. This is because a charge remained a charge until a person is convicted and it is the conviction that was generally appealed against. Section 22(2) therefore deals with trials at the first instance only.

In *STATE V NATHANIEL*[80] the accused was charged with murder and kept in custody for one full year even through the prosecution know all the witnesses and the case to be brought against the accused. The court held that the trial was not within a reasonable time and therefore violated the constitutional provisions.

In *ARIORI V ELEMO*[81] the action in this case was filed in 1960 but came up for trial in march 1972. The trial took 3 years 7 months of which 15 months were taken for writing judgement. The validity of the entire trial was challenged as not being within reasonable time. The Supreme Court held the trial invalid for violating section 22(2) of the 1963 Constitution. The court observed that,

> "Reasonable time must mean the period of time in which the search for justice does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to

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[80] *(1976) L.H.C. Unreported Suit No.45/56/75*

[81] *(1983)1 SCNR 1*

reasonable persons to have been done."[82]

The reasonable time for the consideration and delivery of judgement depends on the time an active, healthy and mentally alert judge takes to read and consider all the evidence and write his judgement with full and complete consciousness of all the impression of witnesses at the trial. A period of time which dims or losses the memory of impressions of the witnesses is certainly long and unreasonable.

Similarly in the case of *EKEAKA BAHUIFIR V LINUS UKONU.*[83] There was an action for declaration of title to land. Hearing began in November, 1979, final address in June, 1981 and judgement in July, 1981. The trial was full of adjournments and it was alleged that the long delays made it impossible for the trial judge to recollect demeanor and even ability of witnesses hence there was a denial of fair hearing. The Supreme Court distinguished *ARIORI's CASE* as dealing with the delivery of judgement whereas this case relates to the delay in the trial itself. The Court held on the facts that the delay violates the requirement of reasonable time in the context of section 33 and this can only be determined in the light of the circumstances and peculiarities of each case. It is therefore not possible to lay down a fixed rule as to what

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82 *Ibid p.25*

83 *(1985) 2 NWLR 686*

can be reasonable time in a trial of every case. Some cases by their nature are short or lengthy by reason of the number of witnesses to be called or the length of their testimonies, others involved witnesses who do not live in the community, country or within the court's jurisdiction, the document to be put in evidence etc.

As pointed out earlier the nature of fair hearing to be given either by the court or tribunal established by law must be in such a manner as to secure "its independence and impartiality" . These qualifying words apply to tribunals and not to courts of law which are as a matter of jurisprudence independent and impartial because of their procedure for appointment, privilege accorded to the judges and their security of tenure. The relevant constitutional provisions were adequate in ensuring that the courts function independently and impartially. Where a court does not function in accordance with the spirit of this principle the fault lies with the person in charge and not with the laws or the constitution of the court.[84] Tribunals may be created by law but not by executive order. The law establishing the tribunal must itself provides for the various conditions that are necessary to make the tribunal function impartially and independently. Let us examine some of these issues came up before the court.

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[84] *Section 2(1) of the Evidence Act define a court to mean," all judges and magistrates and, except arbitrators, all persons legally authorized to take evidence."*

In the case of *DOHERTY V BALEWA*[85] the Commission and Tribunals of Inquiries Act 1961 empowered the Prime Minister to appoint Commissioners to make inquiries. The Commissioners was empowered to compel attendance of witnesses and to punish any witness(es) by fine or imprisonment who failed or neglected to comply with the Commissioner's order. The fine and imprisonment were said to be enforceable in the same manner as the one imposed by a magistrate court. The exercise of such power either by the Prime Minister or the Commissioners could not to be enquired into in any court of law.

The Supreme Court held these provisions of the Act as unconstitutional because they violated, among others, the right to fair hearings in so far as the commissioner was not a court or judicial tribunal. The making of the Prime Minister's and Commissioner's decision as final is unconstitutional.

In the case of *DR. O.G. SHOFEKUN V AKINYEMI*[86] the Civil Service Regulations were amended making it unnecessary to take a public officer to a court of law. Instead such matters were to be investigated by an investigating panel and thereafter the case decided by the Civil Service Commission. The Supreme Court held the amendment unconstitutional on the ground that once a person

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[85] *(1961) NSCC (Vol.2) 248*

[86] *(1981) 1 NCLR 135*

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is accused of a criminal offence, he must be tried in a court of law. Where the complaint of his accusers can be ventilated in public which will ensure the right of fair hearing as provided under the constitution. In substance the amendment actually dispensed with the due process of law.

Similarly in the case of *SHUGABA ABDULRAHMAN DARMAN V MINISTER OF INTERNAL AFFAIRS*[87], the applicant was deported to the Chad Republic on the ground that he as not a citizen of Nigeria. The Federal Government however subsequently set up or appointed a tribunal to investigate the question of the applicant's citizenship.

The High Court as well as the Court of Appeal held the government's action as unconstitutional on the ground that the constitution vested judicial powers in the courts. The Court further observed that citizenship is a civil right and as such, determination of that question can only be by a court not tribunal. On citizenship depends on a number of fundamental rights the enforcement for which was exclusively vested in the high courts under Section 42 of the1979 Constitution and that power cannot be exercised by any other tribunal or authority.

In YUSUF GARBA V UNIVERSITY OF MAIDUGURI[88] a group of students were disciplined by expulsion by the University on

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[87] *(1980) 1 NCLR 25*

[88] *(1986) 1 NWLR 550*

the ground that they were found to have committed arson, looting, destruction of property and indecent assault. This action was taken by the Vice Chancellor on the recommendations of a Disciplinary Investigation Panel which examined a number of students but the students were not told the charges against them nor were they given the opportunity to defend themselves by making representation.

The Supreme Court held the expulsion order unconstitutional for denying the students the right of fair hearing. The Court observed that the grounds on which the students were expelled were serious criminal charges and for that they can only be tried by the courts and not by the university authorities. The court however pointed out that the disciplinary power of the university could be evoke in minor cases without actually specifying the distinction between minor and major cases.

The example of minor misconduct the Supreme Court gave was when a student slaps the Vice Chancellor, disciplinary action could be taken against such student. The contention of the supreme court was that the students and the university campus are all subject to the law of the land without any exception. In other words the process of criminal justice should operate fully both within and outside the campuses. If this argument were to be accepted one wonders whether the criminal justice process does not apply equally to minor offences.

In the case of *ATTORNEY GENERAL (OYO STATE) V. L.O. ADEYEMI*[89] a Boundary Commission was appointed to demarcate boundary between the communities of Ogbomosho and Oyo. The decision of the Commissioner was confirmed by an Appeal Tribunal provided for the purpose consisting of the State Chief Judge and two other judges of the high court. It was contended that neither the Commissioner nor the Appeal Tribunal was a court or tribunal within the meaning of section 22 of the 1963 constitution and hence cannot determine the civil rights of the people.

The majority of the court rejected this contention and concluded that apart from the courts, tribunals can lawfully and legislatively or judicially adjudicate and decide issues involving civil rights and obligations of citizens. The only condition is that it must be independent and impartial and in the present case, the appeal tribunal satisfies this condition and the hearing given was fair and within reasonable time.

The dissenting opinion regarded the Commission as well as the appeal tribunal as outside the hierarchy of courts and the decision of the appeal tribunal was to have effect only after notice was published by the government and not before, therefore it could be called a court or tribunal. On appeal the Supreme Court which was also divided, three judges took the view that the commission was a judicial

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[89] *(1981) 3 C.A.R 1054*

tribunal and the remaining two judges maintained that it was an administrative tribunal exercising judicial powers.

The constitution has taken care not to unduly restrict the powers of governmental agencies to determine issues or matters in public interest without being hamstrung with technicalities. The power of these agencies to determine matters of civil rights and obligations of the people is however subject to certain conditions. A law may be made conferring on the government or any other authority the power to administer the laws and when in the administration of the laws, a person's civil rights and obligations were affected, then such a law will not be invalidated if it provides for the following:-[90]

1. That the person who is likely to be affected by the determination of such an authority should be given such an opportunity or the right to make a representation before a decision affecting him is made.[91]
2. Such a law should not make the determination or decision of such an authority as final or conclusive. That means the law must give to the person affected the right to appeal against the decision of the authority.[92]

This right to fair hearing will arise only when a person's civil rights and obligations are determined. The

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[90] *Section 36 subsection 2 of the 1999 Constitution*

[91] *See section 36 subsection 2 clause (a) of the 1999 Constitution*

[92] *See section 36 subsection 2 clause (b)* of the 1999 Constitution

expression "civil rights and obligations" is wider than strictly legal rights and obligations because there may be many rights, privileges, franchise that may not fall strictly within the definition of legal rights. However the courts seem to in most cases equated civil rights and obligations to legal rights and obligations. Perhaps when the matter is explored further such a distinction may be noticed and the purpose of section 36 will be widened so as to cover rights and obligations which are not strictly legal rights and obligations.

The right to fair hearing will be available when a decision is made against any government, person or authority. This suggest that the determination by or against government need not strictly relates to any civil rights and obligations. The mere fact that the matter is against government or person or authority or any question is being decided that person is entitled to fair hearing.

Fair hearing in section 36 is wider then the principles of natural justice. The principles of natural justice consists of (1) notice and hearing (2) the authority should be impartial and not bias. The principle of fair hearing seems to be wider and may in addition to natural justice include the right to appeal, a reasoned decision etc. A person under the principles of natural justice is entitled to a notice of charges or the matter against him and he should be given the opportunity to make a representation

against these allegations or matters. He can only make adequate representation if he knows the entire case, the evidence against him and is given the opportunity to present his own case and evidence including the right to contradict the case and evidence against him. He can examine his own witnesses and produce a documentary evidence in support of his case and to cross examine the witnesses against him.[93]

The presentation of his case may be either oral or in writing or it may be by the person concerned or through a legal representative. This may depend upon the circumstances of the case, the nature of the case or the law applicable. The authority deciding the case must not be bias against the person or be favourably disposed towards either of the parties. The judge or deciding authority should not have any personal or a pecuniary interest either in the subject matter involved in the case or in the parties to the case. From this rule against bias, the courts have excluded what is called departmental or policy bias.

In the case of *GANI V LEGAL PRACTITIONER DISCIPLINARY COMMITTEE*[94] the applicant, a legal practitioner, published Nigerian Constitutional Law Reports and in his Editorial to the Second Volume attacked the Federal Attorney General's

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[93] *See Dr. DENLOYE V M.D.P.D.C. (1968) ALL NLR 298.*

[94] *(1985) 2 NWLR 300*

stand on *locus standi* in *ADESANYA'S CASE*[95] The applicant was served with a notice from the Federal Attorney General's office calling his attention to an advertisement in the *West Africa Magazine* of March 23, 1981, to show cause why he should not face the Legal Practitioners Disciplinary Committee for advertising himself as "a famous reputable and controversial Nigerian Lawyer". Under the *Bar Council Act* legal practitioners were prohibited from advertizing themselves.

Subsequent to this a Disciplinary Committee was set up with the Federal Attorney General as its chairman. The applicant challenged the validity of the proceedings on the ground that he will be denied fair hearing under Section 33 in as much as in the circumstance of the case, the Attorney General was bias against him. The applicant's contention was upheld by the court which observed that

> "The facts and circumstances were sufficiently capable of raising fear and suspicion in applicants mind as to fair trial because the Attorney General was the complainant, prosecutor and the judge. The Disciplinary Committee was a quasi.judicial authority as it could inflict punishment. But because of the circumstances of the case and the Attorney General being a bias Chairman, the Committee cannot be said to be constituted in a manner likely to secure its independence and impartiality hence section 33 was

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[95] *(1981) NSCC (VOL.12) 146.*

breached."

On appeal the Supreme Court held that the Committee was a judicial tribunal and in the circumstances there was a real likelihood of bias against the applicant.

In *YUSUF GARBA'S Case*[96] the Supreme Court held that the students were denied fair hearing also on the ground that the Chairman of the Disciplinary Investigation Panel, namely the Deputy Vice Chancellor, was also a victim of the students alleged activities and therefore a witness. Hence the chairman being a witness, a victim as well as a judge, there was a real likelihood of bias in violation of Section 33.

In the *case of EX PARTE OLAKUNRIN V. OBA OLOWO OF OWO*[97] the Chieftaincy Laws of Ondo State empowered the Governor to suspend or depose a chief if it was required according to customary laws or if it is necessary in the interest of peace, order or good government. The Governor delegated this power to an Oba .In respect of minor chiefs, an inquiry was to be held if necessary. The applicant and the Oba had some differences and the Oba without holding any inquiry deposed the appellant as a chief. This was challenged on the ground that there was no fair hearing and the Oba was a bias person.

The Supreme Court rejected this contention and held that,

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96 *(1986) NSCC Vol. 17 (pt 1) 245(supra)*

97 *(1985) NSCC Vol. 16 (pt 1) 220*

"The principles of natural justice apply to quasi-judicial as well as administrative authorities. In this case there was a real likelihood of bias but the common law qualification of interest or bias may be waived or removed expressly by statute . In this instant case the disqualification of bias was removed by the rules delegating the power to the Oba. It is a settled rule that a person who is prima facie disqualified for interest or bias may be held on ground of necessity as competent and obliged to adjudicate if no other duly qualified tribunal can be constituted. The petitioner who knew his traditional duties should have asked of the details of his derelictions."

The dissenting judge however held that the rule against bias applied to the facts of the case and there was a clear violation of Section 33 of the constitution. With due respect to the court the dissenting judgement appeared to be the correct position of the law because the mere possibility of bias as addressed by the court is sufficient to invalidate the decision. By the rule of bias a person need not prove actual bias, the facts of its possible existence suffices. Secondly the fact that the applicant was never given a chance to confront the accusation or charges against him is no doubt a violation of Section 33.

One of the most important exceptions to the right of fair hearing is that there might be certain matters decided by an administrative authority while they administer or

enforce laws under Section 36 subsection 2. If any decision of the administrative authority taken while administering the law adversely affects or is likely to affect any person then that person is entitled to only two rights and not the other rights provided under the main part of the fair hearing. The two rights that must be given to him are: the right to an opportunity to make a representation to the administrative authority whose decision is likely to affect him and secondly that he should be given the right of appeal against the decision of the administrative authority. Other rights like the right to be heard by a court or tribunal independent and impartial may not be provided, so also the right of determination within reasonable time which may not be available to the full extent so provided in the main part.

It is only through the rights to make representation that some aspects of reasonable time may come in. An aggrieved person will not be allowed to contend that the administrative authority is bias for the any reason because the law confers the power to decide the issue on the administrative authority. The right of representation will take in the rights such as notice, hearing, knowing the case in detail giving reason for the conclusion of the decision. The extent of representation by a lawyer or otherwise will depend on the circumstances of the case and the law in question. Having dealt at length with the

principles of fair hearing in civil matters it is necessary to wrap up our discussion by briefly examining the larger portion of the right which deals with fair hearing in criminal matters.

4.7.1 FAIR HEARING IN CRIMINAL MATTERS

Generally section 36(4) - (13) deal with the fair hearing in criminal matters. We shall however restrict our discussion to those rights which are relevant to the major issues considered earlier. This is not to underplay the importance of the other rights. Section 36 subsection(4) provides for fair hearing in a general way and subsection(6)specifically referred to or mentioned individuals rights of an accused person. Strictly speaking, the individual rights mentioned in subsection (6) should form part of the fair hearing or fair trial. The individual rights mentioned in subsection (6) should not be interpreted to mean they are the only rights available in criminal process as part of the fair hearing. The rule of interpretation namely "*ejusdem eneris*" should be applied in interpreting the relative purpose of subsections (4) and (6). When they are so interpreted, it would mean that sub-section (4) provides the main right of fair hearing and fair trial and the individual rights mentioned in sub section (6) are not exhaustive of fair trial but serve only as illustrations of fair hearing or fair trial. In other words, the right of fair hearing or trial may embrace many

other rights in addition to the individual rights mentioned in subsection (6).

The main right in subsection 4 is that when a person is charged with a criminal offence unless the charge is withdrawn, he shall be entitled to a fair hearing within a reasonable time by a court or tribunal. Unlike subsection (1) the word "tribunal" has not been qualified by the words "independent and impartial." This omission appears strange and is likely to be interpreted to mean that while determining civil rights and obligations, the tribunal must be independent and impartial but for trying criminal cases the tribunal may not be so independent and impartial. As a matter of fact independence and impartiality is more required in criminal cases then in civil cases.

The 1963 Constitution had used the expression judicial tribunal but in the 1979 and 1999 Constitutions the word "judicial" has been deleted, perhaps because of some decisions which held invalid the determination of criminal charges by an administrative tribunal which was not strictly a judicial tribunal or a court. Nonetheless the seriousness of the criminal cases will make the court disregard the omission of the qualifying words and insist that the tribunals, even if not judicial, should be independent and impartial to the same extent as in civil matters.

4.7.2 PRESUMPTION OF INNOCENCE

Subsection (5) provides that any person who is charged with a criminal offence shall be presumed, innocent until proved guilty. However the accused may be burdened with the proof of a particular fact. Generally the prosecution has the burden of proving the case "beyond reasonable doubt" to establish the guilt of the accused person. In such a case the accused may keep silent and do nothing, if there is the slightest doubt in the evidence of the prosecution, the accused is given the benefit of the doubt and discharged. However it may be that the evidence produced by the prosecution leads to certain inference against the accused person. In such a case, he runs the risk of being found guilty.

This principle is fundamental in those legal systems which adopt *accusatorial method and not inquisitorial method of trying criminal cases.* In some European countries inquisitorial method is adopted under which there is an obligation on the accused to state the facts that were within his knowledge and the prosecution case may be based upon such statements. The exception to the rule is that the law may impose upon the accused person the obligation of proving a particular fact. Proof of a particular fact is different from the proof of a charge. It is only in respect of a certain matters of a detailed nature that can reasonably be said to be within the personal knowledge of the accused, the law imposes a duty upon him that if he

does not prove to the contrary, the law will presume he has done those things. For instance if a public officer has enriched himself and the public assessed his known sources of income, it will presumed that he accumulated wealth by corrupt means. In this case the law may impose an obligation on him to prove that he accumulated the wealth legally or not by corrupt means. In this case the burden of the prosecution is to prove his known or declared sources of income and the amount of wealth accumulated by him and then established that it was in excess of such income. After that the onus is shifted to the accused person to prove the facts of how he acquired the additional wealth.

This departure from the fundamental principle of criminal law was justified on the ground that in complicated social and economic offences, the knowledge of the offence and the related facts are either exclusively known to the offender only or that they are so deep as to make it impossible for the prosecution to lay his hands on all the relevant facts.

In the case of *IBEZIAKO V. C.O.P*[98] the Constitutional validity of Section 160 of the Criminal Procedure Code was challenged on the ground of violating of the right of presumption of innocence. The section in question authorized the magistrate to take evidence from the

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[98] *(1963) 1 ALL NLR 61*

prosecution and frame charges when he is of the opinion that there was a sufficient ground for presuming the accused has committed the offence. The contention was that when the magistrate framed the charge against the accused person the presumption of innocence is already destroyed and therefore the accused could not possibly have a fair trial by the same magistrate.

The Court rejected this contention and held that section 160 of the Criminal Procedure Code means no more than that the magistrate is simply directed to formulate what seems to him to be an appropriate charge for the offence which *prima facie* appears to have committed. It does not mean hat the magistrate has made up his mind to convict the accused.

With due respect to the honourable court it is difficult for one to appreciate the rational basis of the argument. Firstly the magistrate who framed up a charge against an accused on the basis of the evidence presented before him could hardly conduct the trial of such case with an open mind. Secondly it is my considered opinion that the mere framing of the charges by the magistrate clearly raises the presumption of guilt instead of innocence. It might perhaps be better if the accused was sent to another court to be tried instead of the same magistrate.

1.8 OTHER RIGHTS UNDER SUBSECTION (6)

This subsection confers other independent rights to any

person charged with a criminal offence. These includes:

1. The right to be informed promptly in the language that he understands and in detail the nature of the offence . This simply means the moment the charges were framed against a person, he must be given a copy of the charge sheet in the language he understands. "Promptly" means as soon as the charges are framed and nature of the offence means all those details of the charge against him that will enable him to know the charges to answer. This is basic in the sense that unless the accused person knows the full case against him, he may not avail himself the other rights under the subsection.

2. Secondly an accused person is entitled to adequate time and facilities to prepare his defence. The adequacy of the time would depend upon the circumstances of the case, the nature of the offence and the evidence that needed to be collected to meet the charges. The "facilities" does not mean that the state should provide anything or everything that is required for the accused to prepare his defence. The right is more in the negative in the sense that the state should not prevent or place obstacles in the way of his preparing the defence.

In the case of *YANOR V THE STATE*[99] the police were unable, after several attempts, to procure a man who was a material witness for the defence. The court rejected the

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[99] *(1965) NSCC (VOL.4) 147*

defendant request for adjournment to enable him to produce that witness. The court's denial of adjournment was challenged on the ground the accused person was not given adequate time and facilities to prepare his defence. The court held that the request for adjournment was rightfully rejected because previous unsuccessful attempts had been made to produce the witness and the applicant failed to show the likelihood of witness being produced at any particular time. It was therefore his duty to produce the evidence which he relied in his own defence and therefore putting off the trial could not be adverse to justice but may only delay it.

3. An accused person has the right to defend himself whether in person or by a legal practitioner of his choice. This does not mean that the state is under the obligation to provide and pay for the services of a counsel whom the accused person wants for his own defence. It simply means that the court cannot compel the accused to have any particular lawyer who should represent him. The matter is completely at the choice or discretion of the accused person.

The question came up before the Supreme Court in the case of *AWOLOWO V USMAN SARKI*[100] where the applicant was charged with treasonable felony. He engaged the services of a lawyer (a non-Nigerian). When the lawyer arrived at

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[100] *(1966) NSCC (VOL.4) 209*

Lagos Airport he was served with an order of the Minister of Internal Affairs that he was not permitted to enter Nigeria. Under section 13 of the immigration Act the Minister was vested with the power to deny entry into Nigeria to any (a non-Nigerian) if he is satisfied that it is in public interest.

The applicant challenged the validity of this order on the grounds that the constitution gave him the right to choose a counsel who will defend him. Therefore the Minister's order prohibiting his lawyer form entering into the country amounted to denying him representation by a lawyer of his own choice. Secondly the Minister exercise of the power vested in him under section 13 *was mala fide*. The Supreme Court rejected this contention for the following reasons:

The defendant can choose any lawyer he wants provided such a lawyer is registered and eligible to practice in Nigerian courts under the Legal Practitioners Act. Secondly the Court further held that the lawyer selected by the defendant must be a person who is in Nigeria or can enter Nigeria as a matter of right. The applicant cannot insist upon a lawyer who has no right of entry into Nigeria or to be in Nigeria. Thirdly the Minister's power under the Immigration Act being a discretionary one it is not for the court to substitute their own judgement for that of the Minister nor can the minister order be questioned on the

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ground of *"mala fide"*.

This landmark judgement has been criticized on the grounds that the defendant's lawyer, through not a Nigerian, is entitled to practice in the Nigerian courts. Secondly that the court was wrong in saying that minister's discretion could not be reviewed by the court at all. If the court had taken the circumstances of the case into account, it would have found that the Minister's opinion of denying entry to the lawyer was in no way connected with public interest, national interest or security of the state and under normal circumstances the person would have gained entry into Nigeria without any problem.

It is however true that the choice of the lawyer must be confined to the lawyers who as of rights are in Nigeria, registered and eligible to practice before Nigerian courts. If the choice is not so limited, then there may be a case where in serious offences, the accused chooses a lawyer whose activities are against Nigeria or who may be a security risk more particularly in offences, wherein confidential and highly secret or classified government information need to be placed before the court.[101]

Other ancillary rights directly interrelated with these

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[101] *DIXON GOPKA V. INSPECTOR GENERAL OF POLICE (1961) 1 ALL NLR 423*
EZE V. QUEEN (1950) 19 NLR 110, SHEMFE V C.O.P (1962) NRLNLR 87
OLASOJI V A.G. (WEST) (1965) 1 AllNLR 124,YANOR V. THE STATE (Supra)
OLAWOYIN V COMMISSIONER OF POLICE (1964) NSCC (VOL.2) 261
ODOFIN BELLO V STATE (1966) 1 ALL NLR 223
JOSIAH V STATE (1985) NSC UZODIMA V C.O.P (1987) NCR 4

major rights are the right to examine and cross examine all witnesses (including your own witnesses) either by the accused in person or his legal practitioner. This is to make it possible, through the process, to contradict the evidence against him or destroy the credibility either of the prosecution's witnesses or their testimony.

Furthermore the accused has he right to an interpreter free of charge if he does not understand the language of the court. This requirements in accordance with the principle of criminal law that the accused should know everything that happens in his case so that event if found guilty he should go with the impression that nothing has been due behind his back and the guilt is based upon the materials that came to his knowledge at the trial.[102]

4.9 BAR AGAINST EX-POST FACTO LAW

(PROHIBITION AGAINST RETROSPECTIVE LAW)

The prohibition against *ex post facto* law was provided under section 36(8) and section 4(9) appears wider in scope than Section 36(8). The legislature ordinarily has the power to make laws prospectively as well as retrospectively i.e. a law may be made to take effect in future or bit may be applied to act or events that had already taken place. Every retroactive law results in injustice and runs contrary to the general principles that everyone is presumed to know the law and should conduct himself

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[102] *AJAYI V ZARIA N.A (1964) NNLR 61,GWONTO V THE STATE (1983) SCNLR 142*

accordingly.

In respect of criminal law and offences in most countries, the constitution prohibited the enactment of retroactive legislation. Under section 4(9) of the constitution the National as will as States Assembly are prohibited form making law in relations to any criminal offence whatsoever that will have retrospective effect. Section 36(8) provides that no person shall be tried for a criminal offence on account of an act or omission which did not at the time constitute an offence. Further no penalty can be imposed heavier than the penalty that was imposed at the time the offence was committed.

The prohibition of *ex post facto* legislation is provided under the United States constitution in general terms but the court have restricted its application to only criminal matters and criminal offences and not to civil laws. The Courts in United States had interpreted this right to mean that an offence cannot be created retrospectively to the disadvantage of the accused or that the evidence required for establishing the guilt should not be reduced to a lesser one retrospectively or a penalty which is higher than the prescribed act the time of committing the offence should not be imposed or no penalty can be prescribed where none was provided when the offence was committed. This broad scope by the prohibition may perhaps be read into the provisions of section 4(9) of the

limitation upon the power of prosecution of the state to put in danger of life and limbs of a private individual. If the state can arraign any person before a court at the time of its choosing, this power is likely to be misused and if checks are not placed upon this privilege of the state a person can be prosecuted, arrested and punished again and again for the same offence until he finally dies.

The rights under subsections (9) and (10) is slightly narrower than the right under the United States Constitution. Under these subsections when a person is tried for a criminal offence and either convicted or acquitted, he shall not be retried for the same offence or an offence which has the same ingredients as that of the offence for which he has been tried. The are certain conditions to be fulfilled for a person to be avail this right. Firstly a trial will prohibit a second trial only when the first trial was before a court of competent jurisdiction and if the first trial was before a court which was not competent, the person may be tried again for the same offence before a competent court.

Secondly the second trial will be barred only when the first trial is completed and resulted in either conviction or acquittal. If the first trial terminated in the middle for any reason whatsoever or the entire process having been gone through or somehow the case was discharged without the judge recording conviction or acquittal, the second trial

will not be barred.

Thirdly the second trial will be prohibited if the first trial was a criminal offence. That means if the same act is triable under civil law, then civil proceedings cannot be a bar to the criminal prosecution.

Fourthly the second prosecution or trial will be prohibited only when the first trial has resulted in either a conviction or an acquittal. The law permits the right of appeal to the accused as well as the prosecution against the judgement of the trial court. In England the prosecution cannot appeal against a verdict of conviction. This question came up for determination in the case of *NAFIU RABIU V THE STATE*[103] In this case the prosecution appeal against the verdict of acquittal of the high court and the defendant raised the plea of double jeopardy. The supreme court rejected this contention and held that an appeal proceeding is not a new trial. The court further pointed out section 33(9) itself makes exception to the double jeopardy by providing that the superior court may order a retrial.

Fifthly the second prosecution would be barred if the first prosecution was either for the same offence or an offence involving the same ingredients. This clarification removes some of the controversies that the United States Supreme Court found difficult to resolve as to what is

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[103] *(1980) 2 NCR 117 or (1980) 8-11 SC 130*

meant by the "same offence". Under the sub-section the controversy was resolved by restating that the offence in both trials must involve the same ingredients. If the ingredients differ or the nomenclature differ, then the first prosecution will not be a bar to the second prosecution. It becomes possible for the state to prosecute a person more than once for the same act as separate and independent criminal offences.

To prevent this from happening, the constitution seems to have adopted the test of substance namely ,the names of the two offences are not very material. What is to be considered is whether the offences under the two proceedings have the same ingredients or constituents elements that require the same evidence to prove those ingredients. The second prosecution will be barred when the offences in both trial are the same in this respect. The exception, however, as noted earlier is that the superior court in disposing of an appeal may order retrial. This is a second trial for the same offence. But the constitution having made it an exception to the rights, the plea of double jeopardy will not be available in such cases. The trial of a person for the criminal offence is prohibited when he has already been pardoned for that offence.

The provision of subsections 9 and 10 raised the problem as to what exactly is its scope. If the pardon is

granted after a person has been found guilty by the court, there is a need for an express provision to bar the second trial. However a pardon can be granted not only to a person who is found guilty of a criminal offence . Although it is difficult to understand what the exact scope is, it is however submitted to under the subsection a trial for criminal offence will be prohibited only when a person is pardoned for that criminal offence. There must be a formal charge of committing a criminal offence formulated against the person and that is done either by filing charges, or during a trial. This view will exclude cases where pardon is granted without reference to any particular offence. Another problem raised by the sub-section is whether *NOLLE PROSEQUI* will qualify as a pardon within the perimeter of this section.

4.11 IMMUNITY FROM SELF INCRIMINATION (RIGHT TO SILENCE)

Section 36(11) provides that a person tried for a criminal offence shall not be compel to give evidence at the trial. Such an immunity before the trial has already been considered under section 35(2) i.e. right to silence of an arrested or detained persón. When these rights were taken together it appeared that the right to silence or immunity from self incrimination under the 1979 and 1999 Constitutions is much more restricted than the one available under the United States constitution. The right is available to a person who is either arrested or detained

or being tried for a criminal offence. In the United States the immunity can be claimed even by a person who was not at the time arrested or detained or being tried for a criminal offence. Under section 36(11) the immunity from self incrimination was given to an accused person only. The accused cannot be compel to give evidence. The word evidence includes oral testimony and documentary evidence.

The object of the immunity is to prevent a person from being coerced to admit the commission of an offence and reinforced the principle of criminal law considered earlier that a person shall be presumed innocent at a trial until proved guilty. The right is for the accused and he may decide to waive it. When the chooses to remain silent the court cannot compel him to take a witness stand nor could the court or the jury derive any adverse inference against him for his refusal to testify. If the accused chooses to take the witness stand and makes statements then he opens himself to cross examination, he cannot claim this immunity. Having taken the witness stand his refusal to testify will amount to contempt of court.

When a person claims immunity from self incrimination, he indirectly raises suspicion in the mind of the people of committing the offence. It may result in his reputation or respectability in the eyes of the public being smeared, but that is the price one has to pay for choosing to exercise his immunity from self incrimination. The immunity can be

claimed only when the person think that the disclosure of the information will criminally incriminate him. This is different from an imaginary danger or apprehension that the disclosure of particular information will incriminate him in another proceeding. There is an exception to this right that is recognized in various legal systems i.e the state may grant immunity from prosecution to a person who agreed to testify and give information about the commission of certain offences. This exception can be justified on the ground that in certain circumstances, the granting of immunity from prosecution will be the only way or provide the only avenue of bringing other criminals to justice.

Subsections 9-12 of section 36 provides that no person shall be convicted of any offence unless that offence has been defined and a penalty imposed under a written law. This was meant to restrict the power of the state or its agents and functionaries from "arranging" to unjustly punish an innocent citizen.

The provision of subsection 13 is important in the context of protecting state secrets or state matters from public disclosures. The subsection provides that the proceedings of courts or tribunals under section 36 including the announcement of its decision must be held in public. This is without the prejudice of the power of the court to exclude from its deliberations persons other than the parties or their legal practitioners in the interest of

public defence, public safety, public order. In addition a Commissioner or Minister was empowered in any proceedings of a court to tribunal to satisfy that body that it is not in public interest for such matters to be publically disclosed, the court or tribunal shall make arrangement for evidence relating to that matter to be heard in private.

This is an attempt to ensure a balance between the right of an individual to a fair hearing and the interest of the state in safeguarding and protecting its vital secrets in the interest of the society. The question has come before the court as to whether the minister or commissioner has the absolute discretion to determine whether a particular matter or document could be disclosed before the court or otherwise it is a privileged information. In *APAMPA V BALOGUN*[104] it was held that the provision of section 219 of the *Evidence Act* was void to be extent that it was inconsistent with the provision of the constitution in that a litigant, part of whose evidence a minister has an absolute discretion to prevent the court form hearing, cannot be held to have had a fair hearing.

From our discussion of the various rights provided under section 36 it is clear that the section has attempted in a detailed manner to provide for the procedure of trials with the view of protecting the accused person without sacrificing the interest of public justice. The various

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[104] *Unreported, Ibadan Civil sit 1/211/65 judgement dated October 20 1970*

rights under the section were meant to prevent either an unfair trial, sham trial or even secrete trials which seems to be prevalent in many developing countries. The historical incidence of these types of trials especially in Latin American and developing countries were generally or almost exclusively related to human rights. It is for this reason that most advanced democracies including the United States consider most of these trials as political trials rather than criminal. Nigeria has immensely benefited from these nations experiences hence the codification in an elaborate manner all those aspects of a trial which will ensure that a person or party to *any proceedings* receives a fair trial or at the very least be seen to have had a *FAIR HEARING.*

CHAPTER FIVE:

RESTRICTIONS AND DEROGATION OF HUMAN RIGHTS

5.1 INTRODUCTION

In the discussion of Chapter three the rights guaranteed under sections 33 - 36 were considered. The remaining rights i.e. those guaranteed under sections 37 - 46 shall form the core of the examination of this chapter. The approach to the discussion here differs slightly from the previous chapter because it will be predicated from a multi-dimensional approach in the following sequence. Firstly the substantive rights as guaranteed by the sections will be analyzed. Secondly the exceptions under the various sections of the rights, if any, will be discussed as part of the general implications of section 45 which essentially provides for the restrictions and derogation of the fundamental rights from sections 37-45 within the permissible constitutional perimeter. The chapter will examine the relationship between emergency powers and human rights and determine its operational efficacy under such unusual times. Finally the mechanism for enforcing these guaranteed rights shall be the epilogue to the chapter.

5.2 RIGHTS GUARANTEED UNDER SECTIONS 37 - 44

Essentially one can argue that most of the rights guaranteed under these sections were rights that are not individualistic in their exercise. In fact they could be said to be rights that only become active when they were exercised

against others or exercisable only in relations to others. These rights can easily be categorized as properly falling between Sections 33 - 44 of the 1999 constitution . It is intended to consider briefly the major aspects of these rights before examining the exceptions and the circumstances under which they may be applicable.

5.2.1 RIGHTS TO PRIVACY: SECTION 37

The right to privacy under the constitution is provided on the following terms,

> "The privacy of citizens, their homes, correspondence, telephone conversation and telegraphic communication is hereby guaranteed and protected."

This right is the shortest in Chapter IV but no less important then others. The Constitution has not define what the word "privacy" means for us to ascertain what was being protected. However by relating it to "homes, correspondence, telephone conversations and telegraphic communications," we have a fairly good idea of what is being protected. The question here is whether the specified list was exhaustive and anything outside it will not enjoy the constitutional protection. It is submitted that the matters of similar nature e.g. fax, e-mail etc will be available to the constitutional protection.

In the United States there was a right described by the courts and constitutional law writers as the rights to

privacy.[1] The fourth amendment to the U.S. constitution provides that,

> "The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to search, ad the persons or things to be seized."

It is respectfully submitted that the right to privacy simply means "the right to be left alone." The right to be left alone certainly implies freedom from governmental intrusion. The fact that a person is alone when exercising this right further suggests that the government particularly if, as in a constitutional democracy, it is a limited government has no valid interest to protect by intrusion. To what degree our concept of limited government means that government may use its police power only when human behavior has spill once effects?

If privacy is a personal right, which it is, privacy then establishes a barrier against intrusion from outside. Our volition determines what we will do in the realm of protected behavior. Given the right of privacy as a personal right, is it constitutional for the government to punish "crimes without "victims"? Behavior which because of a

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[1] *STANLEY V GEORGIA, 394 us 557, 89 SCt 1243 (1969)*

certain notion of morality that the state is enforcing are called "crimes" but which in objective terms would seem not to be because the individual involved freely consented e.g. prostitution, homosexuality, drug addiction etc.[2]

The punishing of "private morality" contradicts the view of J.S Mill[3] that,

> "the only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others. His own good, either physical or moral,is not a sufficient warrant".

The permissible limitations to be placed upon the rights were provided under section 45(1) (a) and (b) of the constitution and it shall be considered under restrictions and derogation of the fundamental rights. Suffice to say that the rights to privacy appears to be available not only against the state but also against the individual.

5.2.2 FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION: SECTION 38

Religion in Nigeria has recently assumed an ever greater significance in the country's body politic. This phenomenal rise could perhaps be attributed to the long years of military rule and its inclination to suppress, stifle or ban by proscription all meaningful and lawful avenues of

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[2] *See PEOPLE V. ONOFORE 415 2nd (1978)*

[3] *On Liberty*

dissents except religious organizations. This attitude of the government brought the religious organizations to the forefront of the political agenda. Perhaps realizing the enormous powers they possessed , these religious associations or organizations employed it to even question political and administrative appointments on religious grounds. The clergy recently seem to be employing religion, being the most sensitive instrument, to preach disunity, cause disaffection, discord and disaffection sometimes leading to rioting and loss of several innocent lives and a lot of property. It is no exaggeration to say that religion in Nigeria today is the most potentially explosive weapon,and if left in the hands of irresponsible people, capable of being employed to destroy the nation.

Section 38 positively conferred freedom of thought, conscience and religion upon every person. Section 10 prohibits the government of the federation or of the state from adopting any religion as a state religion. It is this principle which has been erroneously described as "secularism". The 1999 Constitution has not use the word "secularism" and one is at a loss as to the source of the view currently being peddled. It was wrongly argued that secularism means that ," in matters of religion the state must adopt an attitude of neutrality " i.e it should not favour any

particular religion or discriminate against any particular religion.

It is submitted that the so-called concept of doctrine of secularism in its origin and nature is a religious concept. Secularism is a doctrine of the Church. The Christian religion is generally apolitical and it separates the state from the church. This separationist philosophy is a total contradiction to Islamic integrated approach to life. In christian faith people are required to "give unto Ceaser what is Ceaser`s, and unto God what is God's".This injunction laid the foundation in Christian societies for complete separation of the state (politics) from religion and it came to be known as secularism. By the doctrine of secularism, christianity has no theory of state or society. Secularism therefore is a fundamental tenant of Christian faith.

The freedom guaranteed under section 38 has been described to include "thought and conscience". The freedom of religion has been denied to persons who have formed or are members or take part in the activities of secret societies. Part IV, section 318 of constitution, the interpretation section, define "secrete society" in a very extensive and exhaustive term.

One may observe that the definition is not scientific because of its fluid nature .The freedom under the section

appears to be much wider than the freedom of religion strictly speaking because it includes freedom of "thought and conscience" apart from religion. That means the "thought" can be related to or in respect of matters other than religion. There can be thought relating to or pertaining to economic, political,social or cultural matters provided they are organized in a form of ideas or likely to overlap with freedom of expression as provided under section 39.

The word "conscience" cannot be precisely defined in objective terms. It is submitted that it includes but not limited to mattes to which a person has certain convictions. Religion is capable of being interpreted differently depending upon what type of religion it is. Where a particular religion believe in the existence of God it has come to mean one's own relations with his creator and the obligation in one's reverence to His being and character and the obligation to obey His will. In this sense, the belief is in the existence of God, man's relationship with God, man's reverence to Him and obedience to all that has been prescribed or laid down by God.

The religions which do not believe in God may have other forms of belief as to the creator of man or as to any super being that has control over man and his affairs or the imagining or the conceptualization of any being to whose will

the man chooses to submit. Religion is said to be different from superstition in the sense that what is a religion or one's own belief in respect of a belief which may rationally be explained whereas matter of superstition may be difficult to explain rationally within reason or understanding. The dividing line between religion and superstition may be difficult to demarcate in certain cases because even in respect of religious practices superstition came to be added.

The freedom of religion under section 38 includes the freedom of one to change his own religion. It is submitted that the proviso is unnecessary because freedom of religion means the religion which a person adopts at a given point of time as a basis of governing his belief. The scope of this right must be interpreted or understood to mean the ability of person to give up a particular belief (religious) and start believing in the other. Nonetheless the proviso emphasized that the state cannot in anyway impose any religious belief upon a person.

The word "freedom" means a free or voluntary change of religion without compulsion, fraud, undue influence or inducement. The matters of belief were concerned with a man's mind and heart but the freedom of religion is not restricted to mere belief. It extends to practicing of the belief in a variety of ways. The constitution has acknowledged that the

practice of religion is as important as the belief in the religion. The practice of religion may be in the form of worship as prescribed by the religion itself or the performance of certain rites, ceremonies, or observances which may equally be imposed by the religion.

In addition the propagation of religion by teaching or otherwise was also guaranteed. This is natural because a man always likes to tell others the virtues or the benefits of what he believes in. The teaching of religion or communicating the religious knowledge from generation to generations is also essential. This manifestation of religion may either be in private or in public. It is the public aspect that needs to be controlled, check and regulated. This aspect we shall deal with under restrictions and derogation. Let us consider the freedom of expression.

5.2.3 FREEDOM OF EXPRESSION :SECTION 39

Section 39 provides for freedom of expression and the press. It says that every person is entitled to freedom of expression including the freedom to hold opinion, receive and impart ideas and information. For imparting ideas and information it is necessary that the individual has the latitude of adopting "any medium" whatsoever. The freedom of expression could be exercised orally or in writing, through the press or other electronic media.

In this regard section 39 further provides that, the freedom extends to owning, establishing and operating any medium whatsoever. However radio, television and other electronic media can only be owned or operated by a state or a federal government except if authorized by the President on the fulfillment of the conditions laid down by an Act of the National Assembly.

There is no separate freedom for the press even though the marginal notes mentioned "the press". This may have affected the scope of the freedom of the press not to be as extensive as those found under the U.S. Constitution. One may venture to say that the Nigerian press has not in its practice of journalism exhibited the necessary sense of either maturity or responsibility for one to consider widening the scope of the freedom. In other words they flagrantly abuse the existing freedom by publishing slanderous and libelous stories, sometimes even seditious and in some cases outright falsehood against public officers.

The substantive right is freedom of expression. A person may express his ideas, opinions or convey information by any means available to him. The constitution did not restrict the means of conveying such information and ideas. The medium could be by words, in writing, printing, drawing, sculpture or even through signs or gestures like in miming. The expression

writing may be in the forms of letters, articles, bills, pamphlets, cartoons newspapers or any other written form.

The ideas and opinions that person is free to hold may relate to any subject matter be it social, economic, political, cultural, whether moral, immoral, ethical, religious etc. The right has been extended to receive generally may be in a negative form in that the there can be no restriction preventing a person from receiving particular ideas or information. But on the part of government it may take a positive form of the obligation to inform the public on the true state of affairs in matters of public life, workings of the government and whatever is necessary to keep the public informed. This is necessary in building up an informed public opinion so vital to the functioning of a democracy and to make the government accountable to the people.

The mass media may assume the obligation to publish matters that are necessary for the information of the public. The right has been extended to include systematic imparting of information and ideas through educational institutions or advocating ideas through seminars, lectures, speeches, indoors or outdoors as many be necessary. There are simply no limitations in this respect. The imparting of ideas and information may be in an organized form or by way of slogan shouting or by processions, assemblies etc or perhaps through

institutions like mass media, press, radio, television etc. In respect of the mass media the National Assembly has the power for regulating their establishment and operations. The principal idea being that there are quickest mode of communicating with the people directly and indeed has a very powerful impact or influence in the minds of the people.

The impact on the people is so direct and substantial that its use in an unrestricted manner cannot be left entirely on private hands. In addition it has the danger of putting the powerful media in the hands of the government which can thwart or obstruct any public opinion at any given point of time on any issue. This could make it possible for the government to control, by the use of its monopoly position, the minds and views of the people.

Freedom of expression may be of different kinds. Certain expression may be harmless in their nature while others may not be so or one may express a view or opinion which may affect the right and interest of others. The exact scope of the possible restrictions that could be placed upon the freedom will be considered later in this chapter.

5.2.4 FREEDOM OF ASSEMBLY AND ASSOCIATION: SECTION 40

Section 40 conferred on every person the right to assemble and associate with others including the right to form a political party, trade union or any other association for the

protection of his interest. The right was denied to a political party which has been refused recognition by the Independent National Electoral Commission (INEC) and to a person who may be elected without being sponsored by a political party.

The right to assemble does not mean that person can assemble anywhere they like. They can exercise the right on a public property that has been traditionally allowed to be used by the authorities.. But this right cannot be claimed against government property whose use is meant for governmental purposes only. If the assembly is to be held on any private property, it is a matter between those holding the assembly and the owner of the property.

There are no restrictions to the purposes for which associations can be formed. The section mentions political parties and trade unions only by way of illustrations. The right to form associations includes the right to choose the purpose for which the association is formed and lay down who shall be members nd the mode of functioning of the association. Unless any of the matters mentioned in section 45(1) are likely to be affected or there is a danger of any of the interest being threatened. The right to form association includes the right to continue the association as long as the

members decide to do so according to the constitution of the association.

5.2.5 FREEDOM OF MOVEMENT: SECTION 41

Section 41 confers the right on every citizen to move freely throughout Nigeria and to reside in any part of the country. No citizen of Nigeria can be expelled from Nigeria nor can he be denied entry into Nigeria or exit therefrom.

In the case of SHUGABA DARMAN V MINISTER OF INTERNAL AFFAIRS[4], the applicant was deported from Nigeria to the Republic of Tchad on the ground of being an "undesirable alien" and a "security risk". Thereafter the Federal Government set up a Tribunal to determine his nationality. The High Court granted a perpetual injunction to restrain the Tribunal from sitting. The court held that issues of citizenship are matters of fundamental right because on it depend the existence or non existence of other rights, therefore such matters can only be determine by a court and not a tribunal .The court after having established that the applicant was a Nigerian declared the order of deportation issued by the Minister of Internal Affairs as unconstitutional, null and void for violating section 38 (similar to section 41)which provides that no Nigerian can be expel from Nigeria.

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[4] *Supra*

Freedom to move means freedom from obstruction. This freedom is more in the negative than in the positive form of imposing upon the state a positive obligation to provide one with the means for the movement. In the same manner residing anywhere in the country means the person is completely free to choose a state, city, village or hamlet in which to establish his place of abode. This does not impose a positive obligation on the state to provide you the land or the house to live in at the place of your choice. A citizen is entitled to go out of the country as he wishes and this could give him the consequential right to a passport. This is necessary to actualize the right to freely move out of the country.

5.2.6 FREEDOM FROM DISCRIMINATION: SECTION 42

Section 42 confers the right to freedom from discrimination on certain grounds only. This section is negative and does not provide for the positive right of equality before the law to all persons. Secondly the discrimination that is prohibited is only on the grounds mentioned in the section and that suggests that discrimination on any other ground may be justified. The absence of positive right of equality before the law enables the state to make classifications between persons and persons, subject matter to subject matter things and things to any extent whatsoever, treating differently persons or things in different category or groups. The

equality clause as is found under other constitutions such as the United States or India and it has been a source of inconvenience and problem for the state. These problems however do not arise under section 42 .

The discrimination prohibited under section 42 is *"ONLY"* on grounds of community, race, ethnicity, place of origin, religion, sex or political opinion. The discrimination prohibited is that by law or in the administration of law or by administrative action, that persons belonging to any of these categories may not be subjected to disabilities or disadvantages or accorded privileges or advantages to which persons belonging to other category are not subjected or which they are not accorded e.g. on ground of ethnicity the state cannot confers benefits on one ethnic group or impose disabilities or disadvantages on one ethnic group and not on other ethnic groups.

The discrimination prohibited by section 42 will apply only if the discrimination is on any of these grounds *"ONLY"*. This suggests that any of these grounds alone cannot be the basis of discrimination or favorable treatment e.g. if in a given state or a particular community or persons of particular place of origin are educationally or economically disadvantaged or backward, then special benefits may be conferred on such a group and that will not be hit by section

42 because the benefits on such group of people will not be regarded as only on ground of community or place of origin. The same principle may apply to cases of hostile discrimination because the section deals with hostile discrimination and favourable treatment.

The major exception to section 42 is that it will not apply to matters of appointment to public offices in the military and the police force and in the body corporate which were established by law. That means in matters of appointments of public officers there can be discrimination even on the sole grounds mentioned in section 42. Section 42 must be read alongside section 14(3) and (4) which imposed an obligation on the federal and state governments of ensuring that appointments or composition of such governments or their agencies must reflect the federal character or diverse nature of the states or local governments. The constitution has introduced a new body known as Federal Character Commission under section 152.

This is to ensure that there is no predominate of one ethnic group or persons from few states or sectional group in that government or its agencies. Section 42(3) prohibits discrimination against a person purely for the circumstances of his birth. This appears to be meant as a protection and bulwark against persons born outside wedlock.

5.2.7 RIGHT TO PROPERTY: SECTION 43

Section 43 is a new innovation, there was no corresponding provision under the 1979 constitution. The section positively conferred on every Nigerian the right to acquire and own immovable property anywhere in Nigeria. Section 44 is not so much the right to property but right against compulsory acquisition of property. In every country the state is considered to have the absolute sovereign power to take private property for public use. The right of the state to take private property against the individual for public use or purpose is known as *POWER OF EMINENT DOMAIN.* Such a power is recognized in the state even when there is no constitutional provision conferring such power. The state is the final authority to decide what property should be acquired by the state for public use.

When private property is taken under this power, it can only be for public purposes and on payment of compensation to person concerned. In addition to the *power of eminent domain,* the state was also given the power to restrict, destroy or regulate private property when it is required in the interest of the public e.g demolishing of a house in a dilapidated condition which could be dangerous to health or human habitation or pulling down a structure to prevent the spread of fire to other places.

There may also be restrictions on the enjoyment of private property for the benefits of the larger section of the society e.g. rent control regulation, planning regulations. When property is restricted by state regulations the payment of compensation is not a condition because the state is not taking the property for its own purposes but to make adjustments between the right of the individual and the interest of the society at large.

Section 44 provides that movable property or interest in an immovable property can be taken possession of compulsorily and no interest or rights in such property can be compulsorily acquired except by a law, for the purposes authorized by law, provided such a law provides for prompt payment of compensation and determination of a person's interest in the property acquired and the amount of compensation to be paid by a court or tribunal or other body vested with the jurisdiction .

Section 44 only applied to cases of compulsory acquisition i.e. private property is acquired and vested in the government and the compulsory acquisition means that it is done against the will of the person concerned. · The property can only be acquired when authorized by law. That means an executive action has no authority in law and there can be no acquisition. The law providing for the acquisition must also

provide for "prompt" payment of compensation. Prompt payment of compensation may mean within reasonable time i.e relevant to ascertaining the amount of compensation equivalent to the value of the property deprived of. The equivalence is determined on the basis of the market value of the property at the time of the acquisition which means the price a willing buyer will pay to a willing seller. Section 44 (2) specified number of subjects that come under the police power concept and therefore if any person's property right is affected in respect of any of these matters, there is no obligation on the state to provide for payment of compensation. In other words in those areas or cases, the right under section 44(1) are not available.

5.3 RESTRICTIONS AND DEROGATION OF FUNDAMENTAL RIGHTS: SECTION 45

It is a universally recognized principle that since a society was made up by a collection of individuals then it is necessary that the interest of the society be equally protected as that of the individual. In fact one can assert that the right of an individual in any society depends upon the continued existence of an organized and coherent society.

The *Concise Oxford Dictionary* defines "restrictions", as "to confine, bound, limitation placed upon action." It equally define "derogate" as , "to take away from a part of a right", while *Mozley and Whiteleys Law Dictionary* defines it

as " to take away from or evade." Essentially the central issues for discussion in the segment is to examine the restrictions placed upon the fundamental rights in the of form of exceptions and the circumstances under which the rights could be derogated form in the context of sections 37 - 45 of the 1999 Constitution.

Before venturing into the main issue for discussion we shall make an incursion into the necessity of providing exceptions to some or all of these rights. Lord Denning in his book *FREEDOM UNDER THE LAW* observed that,

> "It is a fundamental principle that, where there is any conflict between the freedom of the individual and any other rights or interest, then no matter how great or powerful these others may be, the freedom of the humblest shall prevail over it..."

With due respect to his Lordship this is overstating the issue because he failed to make an exception of society's interest. It is beyond dispute that when an individual's right comes into conflict with society's rights, the individual's right must give way. It is the laws made or deemed to have been made under the derogation and restrictions provisions that enables our society to remained civilized and largely peaceful. Even in periods of emergency most of these rights remained the beacon of hope. While it

may be necessary to curtail the rights of an individual in the interest of the society , at other times the individual rights will take precedence. The problem here is to determine exactly the parameter of such determination. In emphasizing this problem Justice Holmes of the U.S. Supreme Court observed that,

> "All rights tend to declare themselves absolute to their logical extreme, yet all in fact are limited by the neighorhood of principles of policy which are other than those on which a particular right is founded and which becomes strong enough to hold their own when a certain point is reached...."

With due respect the learned Justice has failed to specify such important points where a clear line or demarcation could be drawn. It is necessary to mention that in any system of rights there may be certain corresponding duties. There could be no absolute rights in any society primitive or otherwise as human life and consequently all other fundamental rights flowing therefrom would be rendered totally nugatory if rights were without exceptions. It is no surprise that for every right stated, exceptions have at the same time been allowed.

The major idea or principles being that the right ought to be the rule while the restraint is the exception e.g. in the Zambian case of *PATEL V ATTORNEY GENERAL OF ZAMBIA*[5] the

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[5](1968) SJZ 1

court held that the bill (rights) is a bill of rights not a bill of exceptions. In that case the court imposed upon the state the burden of proving that a derogation from a protected right on the ground of public security is reasonably required in that interest.

This position is slightly reversed in Ghana. In the case of *RE AKOTO*[6] the Supreme Court of Ghana held that the object of preventive detention is to "prevent the commission of acts which may endanger public order and security of the state". Thus detention may be ordered as much on actual conduct dangerous to public security as in order to prevent such conduct. It is not for the detaining authority to prove that it acted in good faith as the court will presume good faith on the part of the high officers of the state in the discharged of their duties. The onus is on the person alleging bad faith to prove it.

With profound respect to the Court ,this decision to say the least, appeared to have completely undermined the efficacy of the right for various reasons. Firstly it is difficult to determine whether the court has actually adverted its mind to the possibility of employing such unrestricted or unfretted powers to establish a dictatorship which could extinguish all rights. This was infact what subsequently happened during the

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[6] *(1961) GLR 523*

rule of Dr. Kwame Nkurmah. It is submitted that the court's view on the state officials being responsible in the exercise of their lawfully granted powers is uncharacteristic of African nature or perhaps culture. It is this type of danger that was highlighted by Murphy J. in the United States Case of *DUNCAN V. KAHANAMOKU*[7] in the following words.

> "Those who founded the nation know fully well that the arbitrary powers of conviction and punishment for pretended offenses is a hallmark of despotism... From time immemorial despots have used real or imagined threat to the public welfare as an excuse for needlessly abrogating human rights. The excuse is of no less unworthy of ones tradition when used in this day of atomic warfare or at a future time when other types of warfare may be devised.... There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension..."[8]

In the same a repeated Indian Judge echoed this warning in the following words,

> "We must therefore take care to ensure that in no situation, however grave it may appear, shall we allow *BASIC* human rights to be derogated for an apparently justifiable cause. There is always a tendency in the

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[7] *567 US 1125 (1943)*

[8] ~~*456 US 1089 (1941)*~~ Ibid P. 1209

welders of power, in order to perpetuate their power to continue derogation of human rights in the name of security of the State. Effective respect for human rights must place two kinds of restrictions on the forces of derogation. It must limit the circumstances and specify the procedures under which derogation may be legitimately invoked and it must also identify and reserve certain core human rights such as the right to life or the right to personal liberty or freedom from ex *post facto* criminal laws which are the most vital form a political science perspective, as absolutely non derogatable...."[9]

While it may be necessary to restrict the rights of the individual in society's interest, it is equally imperative to ensure that individual rights are secured against the majority if they are to have any meaning. In this context Nwabueze quoted with approval the statement by Carl Friedreich that, "By definition a constitutional democracy is one which does not grant all powers to the majority."[10] Mills equally was of the view that,

"The will of the majority, practically means the will of the most numerous or the must active part of the people; the majority or those who succeed in making themselves the majority; the people consequently, may desire to

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[9] *Hon. Justice P.N. Bhagwati inaugural address to delegates to Judicial Colliquium in Banglore India held between 24th - 26th February, 1988*

[10] Nwabueze, B.O. (1982) *Presidential Constitution of Nigeria* p.123.

> bppress a part of their number, and precaution are as much needed against this as against any other abuse of power."[11]

The Nigerian courts had given a judicial recognition to the principle in the case of *SHUGABA DARMAN V MINISTER OF INTERNAL AFFAIRS*[12], Per Karibe-Whyte JCA (as he then was),

> "It is of undoubted relevance to bear in mind that the provisions of fundamental rights was designed to protect the individuals against coercion and oppressive exercise of governmental authority and *abuse of majority powers..."*

The major problem which seems to confront most courts in many jurisdiction is the balancing scale to be used in ensuring that the pendulum does not unduly swing at the expense of either rights of the individuals or that of the society. The approach of the courts varies from one jurisdiction to the other. It is submitted however that the attitude of the courts in interpreting the scope of the power to impose restrictions (lawful) by the legislature could in fact determine the difference between democracy and dictatorship.

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[11] *J.S Mill, On Liberty* (1956) Cap 1.

[12] (1982) 3 NCLR 905 at 976 **cf** Brandeis J. in *GILBERT V STATE OF MINNESOTA 254 US 325 (1920) p. 338* "Like the course of the heavenly bodies, harmony in natural life is the resultant of the struggle between contending forces. In fact expression of conflicting opinions lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril."

Section 45(1) provides that , "*Nothing in S.37, 38, 39, 40 and 41 of this 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 purposes of protecting the rights and freedom of other persons.*" It is intended to examine the scope of these exceptions in comparison with the U.S. supreme courts decisions on similar rights.

5.3.1 RESTRICTIONS ON THE RIGHT TO PRIVACY

The permissible limitation or restrictions on the right to privacy was provided under section 45(1) quoted above. That is the right of privacy may be denied or restricted by a law which is "reasonably justifiable in a democratic society "and which is "in the interest of defence,public safety, public order, public morality and public health and for the protection of the rights and freedom of other persons."The Nigerian provision in respect of the right to privacy under section 37 earlier on discussed is an improvement upon the United States position in so far as it has used the word "correspondence, telephone and telegraph." In the United States the courts had to interpret broadly the words "paper and effects" to cover all means and methods that man uses to preserve his knowledge or information etc about his affairs

which he prepares to keep out of the public eye or the knowledge of any other persons.[13] Hence by progressive interpretation, new methods of correspondence, communication, recording of information and materials such as telephone, telegraph, wireless electronic devices have been brought within the cope of the right of privacy. The right to privacy in the United States. was held by the courts to have been violated where there was a physical invasion of the constitutionally protected area and when there is actual seizure of physical object.[14] The privacy is equally violated when there is an arrest or search. Arrest of a person can be made ordinarily upon a warrant which can be issued only when "a probable cause" is shown. A probable cause exist when an officer has personal knowledge or trustworthy information that an offence has been committed. It is however not always necessary that there should be a warrant of arrest.[15]

In certain exceptional circumstances when the offence is committed in the presence of the officer or the officer fears that the offender is likely to escape, he can arrest without a warrant. For probable cause to be shown, the information

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[13] *NARDONE V U.S, 302 US 379 (1937)* **cf** *OMSTEAD V U.S., 277 US 438 (1928), Ex parte Jackson, 96 US 727 (1877), GRISWORLD V CONNECTICUT, 382 US 479 SCt(1878)*

[14] *UNITED STATES V JEFFERS 342 US 48 (1951)*

[15] *See UNITED STATES V WATSON, 425 US 411, 965 SCt 820 (1976) cf Section 81 Criminal Procedure Code which authorized search without warrant.*

about the commission of the offence is not enough, the officer must have such information or knowledge which a reasonable or prudent man will consider as justifiable for making a specific arrest. Searches of a person's house, papers, goods and effects can be made upon a warrant issued by a judicial officer, who will do so only when a law enforcement officer on oath or affirmation satisfies him that there is a probable cause.

The procedure requires an officer to fill out an application which particularly described what the authorities expect to find and where they expect to find it. Not only must the affidavit deal with specifics, but it must set them out to the extent that a neutral and detached magistrate can independently determined if such information demonstrates "probable cause" to justify the using of the warrant. The affidavit must set out sufficient facts to enable the judge to reach his independent conclusion that probable cause exist.[16] In other words there must exist a reasonable belief and information about the commission of an offence that requires search is necessary. The interposition of a judicial officer in the process is considered a sufficient safeguard as to the existence of a probable cause so that the enforcement agents

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[16] *See COOLIDGE V NEW HAMPSHIRE (1971) 403 US 443*

or officers in their zeal and enthusiasm do not regard everything as probable cause.

In certain circumstances searches can be made even without warrant.[17] When a valid arrest was made, the officer making the arrest can search anything, that is in plain sight within the immediate area of arrest e.g. if a man is arrested in a room the arresting officer can search the room and everything that he can see in the room.[18] But that does not give him the justification to search other rooms and places in the house. This limited search without warrant is justified on the ground that the suspect at the place he is found is likely to have material evidence in connection with the crime under investigation.

In Nigeria there are various legislation governing or conferring the power of search and seizures on various security agencies. One must conceive that these legislation were made or validated pursuant to section 45(1) of the Constitution. There are generally several types of searches for which warrant may be issued and under the Criminal Procedure Code which includes,

1. Search for specific document or things.[19]

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[17] *See CUPP V MURPHY, 412 US 291 (1973)*

[18] *UNITED STATES V ROBINOWITZ, 339 US 59 (1950).*

[19] *See Section 74 Criminal Procedure Code*

2. Search for stolen property.[20]

3. Search for a person wrongfully confined.[21]

Under Schedule 4 Part 1 of the *Exchange Control Act 1962* ,a Justice of the Peace, if satisfied by information on oath given by a person authorized by the Minister of Finance that there is reasonable ground for suspecting that an offence against the Act has been or is being committed and that the evidence of the commission of the offence is to be found in any premises specified in the information or in any vehicle, vessel or aircraft so specified may grant a search warrant to enter the premises etc at anytime within one month from the date of the warrant to search the premises.[22]

In the case of *KUKU V OLUSHOGA*[23] it was held that a warrant issued under section 76 Criminal Procedure Code was a judicial act, interposing between the complainant , a member of the public and the arrest and detention of a person under such warrant. The complainant was not held liable for such detention.

Furthermore in Part 3 Schedule 4 Paragraph 11 a Custom or Immigration officer may search a traveler who arrives or is

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[20] *See Section 76 Criminal Procedure Code*

[21] *See Section 77 Criminal Procedure Code*

[22] *See Section 77 Criminal Procedure Code*

[23] (1962) 1 ALL NLR 625

about to leave Nigeria if he has a reasonable ground for suspecting that the traveler has about his person anything prohibited to be exported or imported.[24]

In both the United States and Nigeria when for arrest or search the officer has to enter a house, he is required to identify himself and then he alone that can enter the place, unless "forced entry" has become necessary in "hot pursuit." In the former Northern Nigeria under section 78 Criminal Procedure Code the search must be conducted in the presence of two witnesses who are respectful inhabitants of the locality and are in no way connected with either the investigation or the police. And that the inventory of the items or goods seized must equally be made. The issue of "hot pursuit" in the United States is actually regulated by "the principle of test of immediacy."[25]

The arrest, search or seizure of automobiles and their occupants present a difficult problem.[26] In such cases where the officer suspects the occupant of a car or that the car carries a contraband or has material evidence in a criminal

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[24] *See also Section 8(1) Customs and Excise Act 1962 cf Produce (Enforcement of Export Standards) Act, Sections 131 - 133, See also Section 170 Criminal Procedure Act.*

[25] *See WARDEN V HYDEN (1967) 387 US 294, U.S. V SANTANA 427 US 38 (1976).*

[26] *U.S. V CHADWICK, 433 US 1 (1977)* When a car is stop for the arrest or seizures of the persons and goods in the car there will be no time to get a warrant. *See CHAMBERS V MARONEY, 399 US 42 (1970) CARROL V U.S., 267 US 13 (1925).*

case he can stop and search it, a warrant is not insisted for such arrest or seizure. The stopping of the car violates the rights to property, freedom of movement and the right to privacy. The moment the car was stopped it amounts to an arrest but the arrest is not meant in the conventional sense. It takes place when a person was arrested by an officer or his movements are made subject to the permission of the officer. Therefore when the car was stopped there is an arrest. The search without warrant that is permissible in that case is restricted to what the officer can see in the car but does not extend to thorough search of the car. Although as to this the U.S. Supreme Court had taken different views at different times.

The rule requiring probable cause for searches and seizures in the U.S. is relaxed in the case of boarder and air travelers and passengers.[27] In the case of goods crossing borders, the right of privacy was held not applicable for the simple reason that general searches and detention of persons crossing the borders was necessary in order to verify the citizenship of the persons, the legality of the travel and prevent the transportation of goods in an illegal manner.[28]

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[27] *AMEIDA - SANCHEZ V. UNITED STATES 413 US 266 (1973), UNITED STATES V BRIGNONI PONCE, 422 US 873 (1975).*

[28] *AKANSAS V. SANDERS, 442 US 891, 99 SCt 2586 (1979) U.S. V ORTIZ, 422 U.S. 891, 95 SCt 2585 (1975) U.S. V MATINEZ-FUERTE, 428 US 543, 96 SCt 3074 (1976).*

This is consistent with the provisions of the Custom and Excise Act examined earlier. However the Supreme Court (U.S.) later held the general patrolling and stopping of each and every car or vehicle within the border area or zone as unconstitutional unless there was reasonable suspicion that they are carrying goods or passengers illegally.

The question of search of air passengers has not reached the Supreme Court yet but the lower court have held as constitutional general searches of passengers and goods because of the danger of greater magnitude in the safety of aircrafts and passengers required that no risks can be taken and irrespective of whether any person is suspected or not, a general search of each and every passenger and their goods may be justified.

While wiretapping and electronic surveillance such as telephone tapping, bugging, eaves dropping and other modes of electronic surveillance have been largely used to violate the privacy of the individuals, their homes and correspondence, in the earlier cases the courts have taken the view that when a telephone is tapped or telephone conversation is recorded by planting listening devices in public telephone booths or by eavesdropping or concealing electronic instruments in the house of a person or watching the movement of the person at a distance, as not unconstitutional on the ground that the words

seized by the process are not physical objects under those tests mentioned earlier. It cannot be said that privacy was violated.[29]

The position in Nigeria could be found under the *WIRELESS TELEGRAPHY ACT 1961 No. 31* which *inter alia* provides that,

> "telephone tapping could be undertaken by the appropriate executive agency to detect crime being planned by the use of that instrument ."

This provision is however subject to certain procedural in-built safeguard like the interposition of a judicial officer before such authorization or approval is granted. The physical invasion test was abandoned by the U.S. Supreme Court by saying that the right of privacy is of the person and not the place. What a man decides to keep as private even in public place, the right of privacy is available to him. He will however not have the right of privacy when he exposes to public gaze or knowledge of things that are in his private place.[30]

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29 *See OLMSTEAD V. U.S.* (Supra) This test was later overruled by the Supreme Court in the case of *GOLDMAN V U.S. 316 US 129, 62 SCt 993 (1942). In BENANT V U.S., 355 US 96, 78 SCt 155 (1957)* The Supreme court held that evidence obtained via wiretapping by state law enforcement authorities was inadmissible in a Federal Court. Further in *LEE V FLORIDA, 392 U.S 378, 88 SCt 2096 (1968)* The usage of such evidence was held as unconstitutional. The whole matter was finally laid to rest in *KATZ V US 389 U.S. 387, 88 SCt 507 and BERGER V N.Y. 388 US 41, 87 SCt 1873* when the Supreme Court made it clear that both wire-tapping and eavesdropping are to be considered as searches and intercepted communications are to be regarded as seized materials under the terms of the 4th and 14th amendment .

30 The supreme court in this case *EISENSTADT V BAIRD, 405 US 438, 92 Sct 1029* carefully distinguished between public dissemination of what might have been considered inimical to public morality and individual recourse to the same material out of public arena. There is a distinction between public and private morality and private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality. cf *STATE V SAUNDERS 75 N.J. 200, 218 - 220 .*

While extending the right of privacy against wiretapping, telephone bugging and other electronic surveillance devices the United States Supreme Court laid down certain guidelines for making them constitutional the violation of the right to privacy by these methods. The court held that by those methods the privacy violation may be constitutional if done under a judicial consideration; after thorough investigation and that it is restricted only to the law enforcement. Even the need of state security within the country relating to foreign affairs has been brought under these guidelines so that on these sensitive issues the state should not violate the right or privacy of the individual. The necessary judicial authority could be given only when the law enforcement agents show probable cause. On the issue of national security we shall examine remaining nagging problem of seeking to balance the interest of the individual and that of the state later.

The admissibility or otherwise of evidence obtained through the violation of the right to privacy by the use of these electronic instruments is a little confusing in Nigeria. Generally at common law seizure of evidence by illegal means was not viewed as affecting the quality of the materials obtained. This is a dangerous proposition because as the United States Supreme Court observed that, such material or information should not be admissible in evidence. The

reasoning of the court being that unless they are made inadmissible right to privacy and the authorities will disregard the right to privacy and continue violating it unconstitutionally with impunity. The right is made meaningful and of substance only when such materials are excluded from admissible evidence[31]

This exclusionary rule developed by the U.S. Supreme Court has been criticized on the ground that tit has totally neglected the interest of public justice. It was argued that mere technical violation by the police officer or negligence or corrupt practices on his part will result in the escape of the offender from public justice. This rule will enable the whole prosecution case to fall to the ground. Although an attempt was made by the U.S Supreme Court to overrule this principle it failed because there was no suitable alternative that could adequately protect the right to privacy as well as to satisfy public justice. It is submitted that the wording of the section invites actually the court to strike a balance between the principal competing values of the criminal justice process. On the other hand the need to have a thorough and efficient law enforcement which affords all of us safety and the future need each of us has in wanting to assure that

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[31] *This is what is referred to as the "doctrine of fruit of the poisonous tree" established in the case of SILVERHORNE LUMBER Co. V U.S., 251 US 385 40 Sct 182 (1920) The doctrine also came to be applied to evidence gained as a result of leads produced by coerced confession.*

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individual rights will be respected when we are suspected or accused of committing a crime. Friction results because frequently methods which the police found most efficient or convenient are of a kind which transgress standards predicated on respect for the worth of the individual liberty.

It is submitted that the Scottish Courts approach offers a viable alternative in the search for a balancing scale and the protection of each of the competing interest. In the case of *LAWRIE V MULR SCOTS* Lord Cooper observed that,

> "It seem to me that the law must strive to reconcile the two highly important interests which are liable to come into conflict: (a) the interest of the citizens to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) that the interest of the state to secure the evidence bearing upon the commission of the crime and necessary to enable justice to be done shall not be withheld from the courts of law on any formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily the protection for the innocent citizens against unwarranted, wrongful and perhaps high handed interference; and the common sanction is an action for damages.' The protection is not intended as a protection for the guilty citizens against the efforts of the public to vindicate the law... the interest of the state cannot be magnified to the point of causing all the safeguards for the

protection of the citizens to vanish, and offering a positive inducement for the authorities to proceed by irregular needs."[32]

A nagging problem which remained in the area of electronic surveillance is the extent to which the interpretation of the 4th amendment compels the judiciary to oversee surveillance in matters relating to national security? This suggests a potential clash between the courts intent on stringently enforcing the constitutional guarantee of judicial supervision and the constitutional commitment of protecting the national security by the executive. In response to this highly sensitive and technical problem the United States Congress in 1978 responding to the perceived abuse of government wiretapping and eavesdropping in the name of national security enacted *"Foreign Intelligence Surveillance Law"*.

The law *inter alia* provides that,

"No bugging or wiretapping without prior judicial approval was to be initiated by federal intelligence or law enforcement agents against an American citizen, a lawfully resident alien or any of various incorporated or incorporated domestic organizations, the law requires agents seeking for a warrant for any electronic surveillance of the above parties to first produce

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[32] As quoted by Shani, B.M. *Some Aspects of Criminal Procedure in the Northern States p.46-7*

evidence of criminal activity. The laws imposed stiff penalties for violations and provided stiff penalties for violations and provided for recovery of compensatory and punitive damages and legal and investigative fees by an aggrieved party..."

In the case of *UNITED STATES V UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF MICHIGAN,*[33] The question for determination by the court was the power of the President, acting through the Attorney General to authorize electronic surveillance in internal security matter without prior judicial approval. The United States Supreme Court held that the interposition of judicial approval was meant to safeguard the rights of the citizens against possible abuse. Therefore any such authorization was unconstitutional ,null and void.

In conclusion it was suggested that illegally collected evidence may be admitted in evidence against the person whose privacy under section 41 could be larger and more exclusive then the one upheld in the U.S. This is because the restrictions can be imposed "in the interest of "which expression gives the state the privilege to impose the restriction which are far more remotely connected to any of the matters mentioned there. The state may not be required to justify the restriction with reference to the immediate need

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[33] *407 US 297 SCt 2125 (1972).*

of protecting any of those matters. This point we shall examine when we take up freedom of expression.

5.3.2 RESTRICTIONS ON THE FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

The extent to which religion can be protected or propagated particularly in public will depend upon the necessity the state feels for the protection of mattes as mentioned in section 41 i.e. defence, public health and for the protection of the rights and freedom of others.The teaching of religion can be by propagation, preaching (out doors and indoor) or they can be done in a systematic and scientific way in educational institutions. When religion is to be taught in educational institutions, the constitution seeks to protect the freedom of every person's religion. Every religious community or denomination is entitled to establish its own educational institution, and when it does so, it could make instructions in its own religion as compulsory or obligatory for its own pupils and not to the pupils belonging to other religions. The constitution did not say that the state prohibit imparting of religious instructions in schools. The absence of such a prohibition means that in other educational institutions, the state may prohibit the imparting of religious instructions but when the state did not prohibit the imparting of religious instructions, these institutions may

provide such instructions on the condition that they cannot compel a student to receive religious instructions or take part in religious ceremonies if that is not the student's religion or is not a religion authorized by his parents or guardian. It must be noted that religious instructions is not contaminous with moral instructions although instructions in morals may be derived or based upon religion.

Under section 41 restrictions on the freedom of religion may be imposed by law on any of the grounds mentioned there provided those restrictions "are reasonably justifiable in a democratic society". Although the expression or phrase has not been fully defined by the courts, we shall have recourse to discuss it fully and the few perception of the courts on it.

Ordinarily "thought, conscience and religion" should not be subject to the state control when they are not manifested in some overt way, as by speech, religious worship, practices observances or other conduct. Thoughts, conscience and religion by themselves alone unaccompanied by action cannot harm the specified public, interest nor can they be meaningfully controlled in anyway. These are generally unqualified and absolute freedom. public peace,public safety, public security, public morality may justifiably form the

basis of state control. It is however an error to leave general welfare out of the basis of establishing control.

5.3.3 RESTRICTIONS AND DEROGATION ON FREEDOM OF EXPRESSION

This right may be restricted as provided under section 45. It may be necessary to examine the scope of freedom of expression under the United States Constitution and the court's attitude to it before examining the scope of the Nigerian provision. The courts in the United States have classified (expression) speech into pure speech and speech plus conduct involving breach of peace, academic freedom and the press. Such a classification makes it possible for the courts to curve out different extent of permissible limitations for different types of speeches depending upon its importance and significance to the people's freedom.

Pure speech has been given the higher importance i.e. the words verbal or written do not by themselves caused injury or harm to others. People listen or read and just forget about them or those convinced of it may come to adopt those views or opinions. Such a maximum freedom is necessary so that in the free market of ideas, people receiving ideas or information through antagonistic sources will be in a better position to know the truth of any matter, opinion or idea. This type of speech is not allowed to be restricted in any way.

Speech plus conduct such as marches, procession, assemblies etc, tend to affect the rights or interest of others . Such procession and marches in the street, in public places like street corners, parks can limit the use of such public property by other persons. By its very nature such a form of speech need to be regulated. The speech involving breach of peace requires more control and limitations because it poses more danger to the peace and tranquility of the society. The restrictions of the speech is only justified when the danger emanating or resulting from the speech is eminent and threatens to unleashed the evil. This must be much more than a mere inconvenience, annoyance or discomfort to the public. This however depends upon the level of tolerance to the antagonistic views that the people have in a given society. The higher the level of tolerance to the opposite view, the lesser will be the restrictions that could be imposed on the freedom.

As to academic freedom, the courts have not allowed any restrictions whatsoever for the reason that a free democratic society will never allow the restriction of expression in the classroom. It is in the 'classroom and educational institutions that ideas grow, are communicated,changed, modified and even abandoned by examining each thoroughly in its own merit.

Press freedom essentially lies in freedom from prior restraint i.e. the essence of person's freedom lies in the absence of press censorship. That means for anything to be published the clearance or permission of the authorities of the government should not be required. It does not mean that any person publishing a matter will be immune from being punished under a law which that publication violates. In exceptional circumstances such as the need for defence, emergency situation, or a greater disturbance to public peace censorship may be justified. The freedom of the press is available to those publications that are of public interest. Advertizement, commercial writings or other forms of expression for commercial purposes however are not protected by this. Their object being profit, not advancement or propagation of knowledge,opinions, idea or information. However there may be paid advertizement for informing the public and given matter, issue of ideas. This method is usually resorted to for the causes of the poor or disadvantaged people when the press or media is controlled by the financially powerful. Such paid advertizement whose object is not profit but to express ideas are protected by the constitution.

The clarification so made above are necessary or may be relevant for considering the scope of freedom of expression

under the Nigerian constitution, when the courts came to determine the meaning of the expression or phase "reasonably justifiable in a democratic society". The extent of the limitations on a given speech or under a given circumstance will depend on the meaning the court had to give, to the language of sub-section 3 of section 39 and section 45 of the constitution.

For instance the doctrine of clear and present danger in the United States may not be applicable to section 39 because section 45 permits imposition of restrictions in the interest of defence etc. The words "in the interest of "may permit restrictions even where the necessity may not be immediate, but in the possible or foreseeable future or where the affectations of any of those matters is reasonably expected.

The courts in Nigeria have held that for exercising the freedom of expression the individual is entitled to establish educational institutions like schools, universities etc. In the case of *BISHOP OKOGIE V LAGOS STATE*[34] the Lagos High Court and the Court of Appeal held that the Lagos state government circular intending to take over private schools violated freedom of expression of the students, parents, teachers and managers of the schools.

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[34] Supra

In the case of *Dr. BASIL UKEAGBU V A.G. IMO STATE*[35] the Supreme Court held that an individual has the right to establish a university but in this case the establishment of the university is not protected because the applicant had not obtained the permission of the National Universities Commission and other relevant authorities under the *National Universities Commission Act, Joint Admission And Matriculation Board Act* etc. The view of the Court was that the right to establish a university can only be subject to the approval of the authorities under the appropriate laws of the National Assembly. The laws are to regulate the educational institutions and they should not prohibit or obstruct the freedom to establish the institution that section 36 (similar to the now S.39) has given to the individual.

In the cases of *TONY MOMOH V SENATE OF THE NATIONAL ASSEMBLY*[36], *OLUSHOLA OYEGBAMI V A.G. (FEDERATION)*[37], *INNOCENT ADIKWU V HOUSE OF REPRESENTATIVES*[38] the Lagos High Courts considered the question as to whether the Editors and Reporters of Newspapers can be summoned by the authorities to

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35 (1983) N.S.C.C. (Vol. 14) 160

36 (1983) INCR 462

37 (1983) NSCD 284

38 *(Supra)*

disclose their sources of information or news they published. The court invalidated the orders on the ground that it would violate their freedom of expression.

The courts expressed the view that an attempt to force a newspaper to disclose sources of information given in confidence violates the freedom of expression. The courts by way of *obiter* maintained that the constitution guaranteed freedom of expression and the free flow of information and ideas. This right if not protected by the courts the process sources will dried up and consequently the public will be deprived of being informed on matters of national interest. The newspapers can investigate matters provided they are protected by the constitutional shield of confidentiality.

The Court of Appeal however overruled *TONY MOMOH'S* case and held that under section 36, the freedom of the press is no more no less than the freedom of the individual. As such the press cannot claim exception from answering questions for the purpose of assisting the authorities in a lawful investigations.

With due respect to the Court of Appeal the decision must be viewed with caution because if the press enjoyed the same degree of freedom as the individual then under section 34 an individual has the right to refuse answering any question in an on going investigation.

There are substantive restrictions contained in section 39. These includes:

1. For the purpose of preventing disclosure of information received in confidence. Any communication that is confidential is out of the reach of freedom of expression.
2. For the purposes of maintaining the authority and independence of the courts. This provision justifies the prevention of making any statement or comments upon the court in such a way as to disobey court's order or undermine peoples confidence in the dispensation of justice by the courts. The court may prevent reporting or comments upon a matter that is being tried by the court in order to ensure fair trial.

Under this head, any matter *which is subjudice* cannot be reported or commented upon. The reporting of a court's proceedings may be controlled by the court in the interest of justice and fairplay so that the mind of the judge or that of the jury is not influenced or affected by anything except what transpired or took place at the court itself.

3. Restrictions may be imposed for the purposes of regulating the use and operation of telephone, radio and television. The regulations of these mass media is necessary in the interest of the public because they have such a large coverage on

public matters and this will ensure that they operate in such a way as to be fair to everyone.

4. Restriction may also be imposed upon public officers and members of the Armed Forces or the Police. The restriction here provided seems to be too wide as it is not in anyway conditioned or restricted to the discharge of their functions or duties. If the scope of this restriction extend to matters beyond their functions and duties then the provision is a retrogressive step because just because a person chooses to become a public officer he may be asked to give up his freedom of expression completely.

5. Under section 45 restriction may be imposed in the interest of defence, public safety, public order, public morality and public health.

The question was considered by the Supreme Court in the case of *DIRECTOR OF PUBLIC PROSECUTION V CHIKE OBI*[39], the respondent published a pamphlet containing the following statements,

> "Down with the enemies of the people, exploiters of the weak and oppressors of the poor. The day of those who enriched themselves at the expense of the poor are numbered. The common man in Nigeria can today no longer be fooled by sweet talks at election times to be

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[39] *(1961) N.S.C.C. (Vol. 2) 104 or (1961) 1 ALL NLR 186 esp. p.196.*

exploited and treated after the booty of office has been shared among the politicians."

He was charged for committing the offence sedition under section 51 of the Criminal Code. Sedition was defined under the law as, "*to bring hatred or contempt or exciting disaffection against the President, Governor, Federal Government as by law established or against administration of justice,to excite persons, to attempt to procure alteration of matters established by law otherwise then by lawful means, to raise discontent or disaffection among people or to promote feelings of ill-will or hatred between different classes of persons.*" There was an exception to this provision which states that, "*pointing of mistakes in any measure taken by the government for improving them to persuade people to procure alteration by lawful means etc will not constitute sedition.*"

The Supreme Court held section 51 of the Criminal Code as constitutional on the following grounds:

> *It is legitimate and constitutional by means of fair comments to criticize the government of the day but not in a malignant manner, for these by their very nature TEND TO EFFECT PUBLIC peace. It must be justifiable in a democratic society to take reasonable steps or precautions to preserve public order and this*

may involve prohibition of acts, which if unchecked and unrestrained MIGHT LEAD TO DISORDER EVEN THOUGH THOSE ACTS IN THEMSELVES WOULD NOT DO SO DIRECTLY.[40]

This view rejects the United States Supreme Court's view of *CLEAR AND PRESENT DANGER* which alone justifies the imposition of restrictions. According to this view, if a particular act of speech has a tendency to create a public order problem, the restriction can be imposed even though there is no immediate threat or danger directly arising form that particular acts This view was followed by the supreme court in the case of *AMALGAMATED PRESS V QUEEN*[41] where the freedom of expression imposed by section 51 of the Criminal Code and section 59 Criminal Code was constitutional. That section provided for punishment of publication of false news likely to cause fear and alarm. The court observed that the constitution guaranteed nothing but ordered freedom and it cannot be used as an basis to spread false news likely to cause alarm or fear to the public. In the case of *ARTHUR NWANKWO V THE STATE*[42] the Court of Appeal distinguished CHIKE

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40 *All emphasis in the original*

41 *(1961) WNLR 268*

42 *(Supra)*

OBI's case on the ground that the publication in the present case (i.e. a book on Governor Jim Nwobodo of Anambra State) is not directly likely to result in the disturbance of public peace. Therefore the plaintiff cannot be prosecuted for sedition.

The Court in distinguishing *OBI's* case pointed out that the condition of Nigerian society that existed when Chike Obi's case was decided no longer exist today and the publication of such book can no more present danger to public piece in the country.

6. Restriction can also be imposed by way of regulating cinema films and for the purpose the court here justified very extensive control and checks on cinema films even before they were passed or cleared for public show or viewing. Censorship of films is held justified because of their impact on the minds of young persons. In the same way such regulation of these publications was justified on the ground of public morality and preventing decay in public life.

The conservative test of determining the obscenity of publication is where it tends to corrupt and debase the mind of the persons which are open to such impressions and into whose hands such materials are likely to pass. With societal progress, in the United States the conservative test was replaced by another test. According to the test a publication

is obscene only if it is not of society's redeeming value and the court should take into account the standards of morality as furnished by the general community. That means even if publication is ludicrous or obscene, its prohibition will not be justified if such a publication is of some value to the society. This liberal test may not be acceptable to the courts of a country which has tradition rooted in religion. Any publication that is defamatory or libelous may be prohibited because section 45 provides that restrictions may be imposed to protect the right and freedom of others.

5.3.4 RESTRICTION ON THE FREEDOM OF ASSEMBLY AND ASSOCIATION

The right of assembly and association may be restricted on the grounds specified under section 45. The section conferred the right to assemble freely. Persons may assemble together for any purpose or for advocating any cause. The authorities however will be justified in taking precautions requiring those organizing the assembly to take prior permission to lay down certain conditions for the assembly that may be relevant for any purpose of the above mentioned section 45. The restrictions must be reasonably justifiable in a democratic society.

In *CHERANCI V CHERANCI*[43] a law was passed by the Northern Region legislature prohibiting the use of children in

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[43] *(1961) NRLNLR 24* cf *OLAWOYIN V ATTORNEY GENERAL (1960) NRNLR 53*

difficult to be so free with children and young persons. Consequently the restrictions is reasonably justifiable.

In the case *of ERAMUS OSAWE V REGISTRAR OF TRADE UNION*[44] involved the registration of a trade union. The Trade Union Amendment Act 1978 provides that no trade union shall be registered to represent workers or employers in a place where there already exist a trade union. In this case the Registrar refused registration on the ground that there was already a trade union of non-academic staff. This Act was challenged on the ground that it denied the right to form a trade union to persons who do not belong to an existing trade union or disagree with the way that union was being run or functioning.

The Supreme Court held the Act as constitutional on the ground that the restriction was in the interest of public order because prior to 1978 there was proliferations of some 800 different trade unions with valid objectives and aspirations. To correct this situation and to bring sanity to organization of trade unions,the then federal military government enacted this law in order to maintain public order and good government. In justifying the conclusion the Supreme Court relied upon *CHIKE OBI's CASE*.

With utmost respect to the Supreme Court this decision is not satisfactory because the court did not seem to advert its

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[44] *(1985) N.S.C.C. (Vol. 16 pt II) 766*

mind to the concept of a single union being inconsistent with the tenants or mainstay of democracy. The question here is: can there be rival union with the same objectives and aspirations engaged in healthy competition on principles without creating public order problems? The answer to this question is more political than legal.

Furthermore the Court was wrong in holding that the giving of notice by the Registrar to the applicant before deciding on the application was not mandatory. If the court had held that the giving of the notice of hearing to the applicant is mandatory, then it would have been possible for those wanting to establish rival trade union to satisfy the Registrar that the existing trade union either does not cater for their needs or that it is not functioning effectively in furtherance of the objectives of the trade union.

5.3.5 RESTRICTION ON FREEDOM OF MOVEMENT

This freedom may be restricted by a law which is reasonably justifiable in a democratic society on the following grounds:

1. The movement of a person may be restricted in order to prevent him from leaving the country if he has committed an offence or is reasonably suspected to have committed an offence.
2. A person may be expelled form Nigeria or sent out of the country for the purpose of undergoing punishment in another country if he has committed an offence, tried and found guilty

here or to make person stand trial in another country for the offence he has committed there, provided in this respect there is a reciprocal agreement between Nigeria and that other country.

3. Restriction may be imposed as provided in section 45 in the interest of public defence, safety, order, morality etc and for the purpose of protecting the rights and freedom of others.

In view of the serious difficulties encountered in the determination of the meaning of the term "reasonably justifiable" as used under section 45 it is necessary to chronicle some of the cases in which the phrase came up for determination with the view to ascertaining the attitude of the courts towards employing the phrase by the legislature to restrict some of the guaranteed rights.

It appears that while the courts actually recognized the necessity of protecting the individual rights against possible erosion by the legislative or executive arm in the name of "societal interest",the problem of the objective standard of balancing these two competing interests remained. Section 45 says that such legislation must be "reasonable justifiable in a democratic society".The Nigerian courts in a number of cases under the 1961 and 1963 Republican constitution had to grapple with the difficulty of determining the meaning of the phrase.

In *CHIKE OBI's case*, Brett, F.J. observed that,

> "It is right that the court should remember that their functions to decide whether a restriction is reasonably justifiable in a democratic society, not to impose their own view or what the law ought to be"[45]

In the case of *SERIKE PAWA & ORS V AKANNGBE*[46] the court held that incidents of custom under which the Head of all Hausa in Oyo is appointed and allowed renumerations on each cow sold by Hausa cattle dealers were held as being reasonably justifiable in a democratic society in Oyo. It was also held that the custom was in the interest of public order in that society with the relevant provisions of the constitution.

In CHERANCHI V. CHERANCHI[47] sections 33,34 and 35 of the *Children and Young Persons Law* 958 of Northern Nigeria barring young persons under the age of 15 from membership of political parties was challenge as void and inconsisteht with the provisions of constitution guaranteeing the right to freedom of association. The court held that the prohibition imposed by these sections were reasonably justifiable in the interest of both public morality and public order.

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[45] *Supra*

[46] *(1960) NNLR 24*

[47] Supra

The term reasonably justifiable is submitted that essentially constitute two elements:

1. Rationality or reasonableness, there must be a real and substantial link between the law and the public purpose in issue. Even where the law is rational with respect to the public purpose it is necessary to satisfy a further requirement that,
2. The law would nonetheless be justifiable in a democratic society.

In the case of *PATELS V A.G. ZAMBIA*, Magmus J, observed as follows:

> "I think it is necessary to adopt the objective test of what is reasonably justifiable, not in a particular society, but in any democratic society. I accept the argument that some distinction be made between a developed society and one which is still developing, but I think one must be able to say that there ar certain *MINIMA* which must be found in any society, developed or otherwise below it cannot go still to be considered a democratic society.[48]

It is submitted that the wording of section 45 seem to shift the emphasis from liberty to the state authority to interfere with it. It failed to emphasize clearly that the liberty is the rule and governmental interference the

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[48] *Supra*

exception. It seems to place on the individual the onus of showing that an intertering law is not reasonably justifiable in specified public interest rather than on the state to show that it is. If failed to strike a balance in favour of liberty which is the true test of a free society.

For instance section 1 of the *Canadian Chapter of Rights and Freedoms: 1982* set out in it subject only to such reasonable limits prescribed by law as can be demostratingly justified in a free and democratic society. The Supreme Court of Canada held that the provision required was that the objective to be obtained by the abridgement of a guaranteed right must be important, and the means chosen to attain it must be reasonable.[49]

From the foregoing discussion certain basic principles could be discerned. They include:

a) Restrictions should maintain a balance between the freedom guaranteed and social control imposed. Thus the limitation imposed on a person on the enjoyment of the right should not be arbitrary or in excess of what is require in the interest of the public. In short the restriction must not be greater than the mischief to be prevented.

b) The substance of the restriction and procedure of enforcement must be fair and just.

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[49] See the case of *R V. OAKES (1986) 26 DLR (4th) 200*

c) Restrictions which are imposed for securing the objects which are enjoined by the fundamental objectives and directive principles of state policy may be regarded as reasonable.

d) A restriction would be unreasonable if it does not comply with the principles of natural justice.

e) A balance must be struck between the exercise of these fundamental rights on the one hand and the protection of the interest of the state and freedom of other persons on the other hand.

Apart from this difficulty another thorny issue was the matter of emergency or national security especially as to the permissible limits to be placed upon the fundamental rights in such a difficult situation. Although such issue rarely came up before our courts we shall take recourse to other jurisdictions to assist us in ascertaining the scope of what to be imposed in such situations especially in relation to the fundamental rights.

5.4 HUMAN RIGHTS AND EMERGENCY POWERS

Section 5(1)(b) of the 1999 Constitution expressed the scope of the executive powers of the President to extend " to the execution and maintenance of the constitution, all laws made by the national assembly..." This power is of vast potentiality and potency because what is to be executed and maintained is not just abstract concept on parchment. The

constitution must be viewed as a living charter by which a government with full amplitude of instrumentalities, powers and rights, is created for the administration of public affairs.

The government established by the constitution presupposes a community of people of differing individual interests but bound together by a common desire for stability and security of society as a nation. The maintenance of the constitution implies the powers to preserve, protect and defend it. What is to be maintained is not simply a document or the writings but the rights, powers and instrumentalities created for the administration and management of the people. The power must therefore be construed to mean the power to protect the government, its agencies, functionaries and property.

In Nigeria the constitution has made it mandatory for the President to be sworn in or administered an oath prescribed in the Seventh Schedule in which he swears to, "... *PRESERVE, PROTECT AND DEFEND* the constitution... and devout myself to the service and well being of the people of Nigeria..."Impliedly the continued existence of the constitution is *sine qua non* to the exercise of the powers granted under it. It is necessary, whether or not the oath demands it, of the executive authority to protect and maintain

it. In the Australian case of R.V. *HUSH EX PARTE DEVANNY,* Rich, J held that,

> "That survival of the constitution appears to me to be a matter most incidental to the execution of the powers under it."

In view of the enormity of the executive powers and the legal obligation imposed upon the President to ensure the continues existence of the state it is imperative to examine the lawful and constitutional perimeter such powers could be exercised in derogation to the fundamental rights. Generally the exercise of such powers comes in the character of emergency powers garbed perhaps in matters of law and order. Every modern state is usually granted by the constitution special powers to arm itself, employ that power under special circumstances to ensure its continued existence and protection. It is a settled legal principle that constitutionalism is limited by exigencies of emergency since emergency portends a state of danger to public safety and public order and the constitutional framework may be insufficient to deal with the matter. The preservation of state, observed Nwabueze, is an imperative necessity, which should override the necessity for limited government."[50]

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[50] *Constitutionalism in the Emergent States p.174.*

Accordingly all constitution which imposed limitations upon government authorized the limitation to be exceeded in times of emergency. Nonetheless it has to be accepted that emergencies posed a serious threat to constitutional government. The power given to the President for the preservation of the nation is perhaps the greatest source of his power.[51] This principle of self preservation has been recognized judicially in the United States. In the case of *CHAE CHAN PING V UNITED STATES*[52], the Supreme Court observed that, "...to preserve its independence and give security against foreign aggression and encroachment is the highest duty of every nation and to attain these ends nearly all other considerations are to be subordinated."

The duty of the President to preserve the government and the nation must clearly imply a certain measure of power to act in such situation of extreme danger or emergency to the state and to the nation until the legislature intervenes with appropriate legislation. The extent of the executive power to be asserted depends however on actual situation, its nature, eminence and seriousness whether it is industrial action affecting essential service and supplies, widespread rioting,

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[51] *See Nwabueze, B.O.* (1984) *Presidentialism in Commonwealth Africa, p.298.*

[52] *130 US 181 cf PAKISTAN V SHAH The supreme court observed that, "it is a doctrine of law that in an emergency imperiling public security, the safety of the state and the nation is the supreme law."*

inresûrrection, armed rebellion, aggression from outside or other public danger. This principle is known as *SALUS POPULI EST SUPREMA LEX.*[53]

By this supreme law of necessity, the organs of the state are entitled in the face of such grave danger to take all appropriate actions, even in deviation from the expressed provisions of the constitution, in order to safeguard law and order and *PRESERVE THE STATE AND SOCIETY*. The doctrine does not operate outside the law but is implied as an integral part of it. While it is necessary to ensure the continues existence of the state it is equally important that declaration of emergencies and exercise of such powers must be for the common good of the society, state or nation. It is in this context that a respected judge warned Asian countries which equally rings true of African nations that,

> "We in the Asian countries, lived in troubled world with many threats to the security and well begin of our society threats external as well as internal. Smatter nations are being used as ploys or playthings by superpowers in the name of security and conflicts between different ideologies within a country is seeking to tear apart the political fabric of the society and there are also sometimes destabilizing forces working within a country. In such an atmosphere there is often

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[53] *See YOUNGSTOWN SHEET & TUBE CO. V SAWYER, 342 US 579 SCt 691 - 692.*

> a tendency to advocate draconian measures to protect the society against real or imagine ills. The necessity for such measures can frequently appear plausible even to well intentioned citizens and be activated by high negative emotions,uncertainty, fear and anger. They may be tempted to advocate the principle, of the end justifies the means. It is sufficient to point out that history is replete with disastrous, consequences of the smothering and suppression of human rights by the dictates of expediency..."[54]

It is crystal clear from the foregoing that while emergency powers may be evoked under certain circumstances, it is equally important to restrict the circumstances under which they could be exercised because of their corrosive effects on the fundamental rights and freedom of the citizens. Section 305 of the 1999 constitution empowers the President to proclaim an emergency in certain clearly define circumstances enumerated under subsection 3. What is emergency? The term has been defined by Nwabueze to mean "some events, usually of a violent nature endangering or threatening public order or public safety" The 5th Republic French Constitution which vested in the President the power to dissolve the National Assembly and rule by decree in times of emergency define an emergency as,

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[54] *Justice Bhagwati, P.N. Ibid*

"a clear and present danger threatening the institutions or independence of a nation, the integrity of its territory, or the carrying out of its international undertaking or any other situation when the regular functioning of governmental authority is interrupted."[55]

From the above definitions, which I entire agree with, the for the declaration of any emergency is an impending doom to public order or the threat to the orderly existence of the society. Consequently the issue of emergency raises the question of public order, public security, public safety of the people, society or the nation. In view of the unholy purpose for which emergency powers could be employed at the expense of the individual rights, the constitution not only restricts the grounds upon which such declarations could be made but also vested in the National Assembly the supervisory powers. These could be broadly divided into two:

a) The powers of the National Assembly under the defence and public order.

b) The implied power of the National Assembly under section 45(2) of the constitution.

While the President could declare an emergency under section 305 of the 1999 Constitution subject to the provisions of subsection 3 such declaration must be approve immediately by a 2/3 majority resolution of the National Assembly. The

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[55] *See section 208*

use of the word "immediately "did not conceive any delay and must be interpreted literally. This was meant to ensure that no time or period was allowed for the President to start enforcing the declaration whose utility or desirability has not been sanctioned by the National Assembly. The urgency with which such approval was required is explicit vide section 265 subsection 6 which imposed 2 days time frame if the Assembly is in session or 10 days if it is in recess. Where the required resolution was not passed within the stipulated time or 2/3 majority endorsement was not mastered, the proclamation lapsed or ceased to have effect. Subsection 6(c) by its wordings established that the ultimate control of emergency powers lies in the hands of National Assembly and not the President.

It is interesting to note that the resolution revoking the proclamation requires a simple majority of members of the National Assembly not the 2/3 as required for the declaration. This was meant to make it easier to lift the emergency because emergency situation are unusual times and therefore an exception and not a general rule. The National Assembly's power to "make law for peace, order and good government..." is the anchor upon which almost all other important powers were predicated. Item 17 of the Exclusive legislative List includes "defence"as a subject matter. The scope of defence power

includes, but not limited to, legislation for the protection of the constitution against its overthrow by either external forces or internal subversives and treasonable elements. This item must be read alongside item 67 as part of the incidental and supplemental powers of the government.

In the case of *R. V KIDMAN*[56] Issac, J. Observed that, the commonwealth carries with it all necessary powers to protect itself. This principle was reemphasized 35 years later in the case of *AUSTRALIAN COMMUNIST PARTY V THE COMMONWEALTH*[57] that, the defence powers in Australia extend to legislation for the protection of government against subversive and treasonable activities.

There are two schools of thought on the application of principle of emergency and the doctrine of necessity. The first proposition was given a judicial recognition in the Zambian case of *KAUHASU V A.G. ZAMBIA*[58] by Blagden, C.J (as he then was) that,

> "The state must have sufficient power to preserve itself... the safety of the nation is the supreme law. The rights of the individual depends for their existence and implementation upon the continuance of the organized

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[56] *(1915) 20 CLR 425 AT p.444*

[57] *(1950/51) 43 CLR 1 at p.141*

[58] *(1967) H.P/273*

political society i.e. the ordered society established by the constitution. The continuance of that society depends upon the national security for without it any society is in danger of collapse or overthrow. National security is thus paramount not only in the interest of state but also in the interest of each individual member of the state; and measures designed to achieve and maintained that security must come first; and, subject to the provision of the constitution must override, if need be, the interest of the individuals and of minorities with which they conflict."

With the utmost respect to the Zambian Supreme Court the test laid down here is too broad and loose and likely to be abused. The Court has not laid down any standard or procedure to necessitate the evoking of this awesome power of the state. This tilted the balance of power in favour of the state to the disadvantage of the individual rights. Further the test still left unanswered the question that; should every threat to the peace and security of the state, whether real or imaginary justify encroachment upon the right of the individual? The answer to this crucial question lies in the second school of thought approach as laid down by the United States Supreme Court's decision in the Civil war case of *Ex Parte MILLIGAN*[59] decided in 1866 wherein it held that,

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[59] *4 Wall 2 (1966)*

> "The constitution of the United States is the law for the recourse and the people, and equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under any circumstances. No doctrine involving more pernicious consequences, was ever invented by the wit of man then that any of its provisions can be suspended during any of the exigencies of the government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the constitution has all the powers granted to it which are necessary to preserve its existence."[60]

The main thrust of this decision was that a government has within the constitution all lawful and legal authority and power it requires to address all forms of threats of emergency situations. Contrary to the Zambian decision the U.S. Supreme Court in fact insisted that it was in times of grave exigencies that individual liberty required to be more protected to prevent abuse of unlimited power. In any case the Court observed that, "a nation preserved at the sacrifice

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[60] at pp.120-121.

of the cardinal principles of liberty is not worth the cost of preservation."

For any exigency to justify interference with the individual liberty it must not only be real but also grave and immediate e.g. war (foreign or domestic) civil strife which will be comparable or amounts to insurrection or defiant act that of a government or disruptive of public peace. This power is only available or limited to duration of the act, once the acts were suppressed then the power must cease.

Article 1 section 9 of the United States Constitution authorizes suspension of the writ of *habeas corpus* in an invasion or rebellion if the public safety requires it. The executive power to decide what the public safety requires arises only if an invasion or rebellion exist as a judicially ascertainable fact. In rejecting the argument that in times of war, state necessity justifies the assumption by a military commander of absolute power to suspend all civil rights and their remedies and to subject civilians as well as soldiers to the rule of his will the court laid down the test,

> "Martial law cannot arise from a threatened invasion. The necessity must be *actual, present,* the invasion *real,* such as effectively closes the courts and deposes civil administration... if, in foreign invasion or civil war, the courts are actually closed and it is impossible to administer criminal justice according to law, then on

> the theater of actual military operations where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown to preserve the safety of the army and society; and as no power is left, but the military, it is allowed to govern by martial rule until the law can have free course. As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a great usurpation of power. Martial law can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[61]

This stringent test laid down by the Supreme Court was meant to protect the rights of the individual against unjustifiable and sometimes unlawful interference in the name of necessity or emergency. By this test nothing short of the complete overthrow of the civil authority including the courts will justify evoking this power and once civil authority was restored the power ceased to exist. This narrow interpretation of the scope of emergency power severely restricts the latitude upon which the government, especially the executive

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[61] *MILLIGAN'S CASE (Supra) at p.27. The same court reaffirm this principles of "open court" in 1945 in a series of cases arising from the second world war. The court rejected the argument that the open court rule might have been suite din 1864 but is unsuitable in modern warfare which opens the possibility of long range attack. the court held that "civil liberty and "This kind of marital law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish."*

arm, will employ in order to temper with the rights, liberties or freedom of the citizens.[62]

The approach of advanced democracies to the concept of emergency powers vis-a-vis the individual rights must be predicated on the principle of "true liberalism." True liberalism must combine the guarantee to individual liberty with the securing of the good of the whole people, the securing of common will, the elimination or amelioration of wretchedness and misery among the people. A state is not a chanced aggregation of the people but a multitude united in the common purposes of securing this common good, and that can mean nothing less then the individual good of all, not some of its members...[63]

5.5 PUBLIC ORDER AND PUBLIC SAFETY OF THE STATE/COMMUNITY

Section 11 (1) of the 1999 constitution provides that,

> "The National Assembly may make laws for the federation or any part thereof with respect to the maintenance and securing of the public order and securing such supplies and service as may be designated by the National Assembly as essential supplies and services."

To property understand the scope of this power the provision must be read alongside section 45(1) which also

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[62] *See LIVERSIDE V. ANDERSON (1942) AC 206 Lord Atkin, by way obiter observed, "in England, admits the class of arms the law are silent. They may be changed, but they speak the same language in war as in peace."*

[63] *McIlmiwain, C.H. (1939) Constitutionalism and the Changing World, p.285.*

vests in the National Assembly the power to make law to restrict or derogate from the fundamental rights, in the interest of public order, public safety and public defence ...etc. This important power of regulation was vested in the National Assembly. There are two arms of this power in the context of section 11 subsection (1) of the constitution.

a) Maintenance and securing of public order.

b) Maintenance and securing of essential supplies

What is the meaning of the word "public."? The term "public" was defined as, "referring not only to all persons within Nigeria, but also to persons inhabiting or using any particular place or any number of such persons and also to such indeterminate persons as may happened to be affected by the conduct with respect to which such expression is used."[64]The word "public" in the term "public safety and public order "embraces both the governments (federal and states) and the people or substantial number of them. Public safety and public order has two aspects:

1. Maintenance and protection of the constitution and its instrumentalities together with their powers, rights and property which has been discussed earlier.

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[64] *Criminal Code CAP 42 Laws of the Federation of Nigeria.*

enough to justify the use of the term "public" in referring to them. The issue is the maintenance of the community's safety.

In conclusion the question whether state of emergency could be used as a basis of derogation of the fundamental rights and the procedure and scale to be used is largely and generally left to the judicial discretion of the courts. One can however discern some basic principles in the exercise of such powers. These includes:

1. There must be or exist an imperative necessity from an eminent and extreme danger affecting the safety of the state or the society.
2. Action taken to meet the exigency must be inevitable in the sense of being the only remedy.
3. It must be proportionate to the necessity i.e it must be reasonably warranted by the danger which it was intended to avert.
4. It must be of a temporary character limited to duration of the exceptional circumstances or until the legislature is able to enact the necessary legislation.

Finally having considered the guaranteed rights, their exceptions and the scope of their restrictions and permissible limits of derogation including emergency powers. It is important to examine the enforcement mechanism employed by the courts to ensure either their protection or enforcement.

5.6 ENFORCEMENT OF THE FUNDAMENTAL RIGHTS

The word "enforcement" originates form the word "enforce" which was defined by the *Longman Dictionary of Contemporary English to mean*, "...to cause (a rule of law) to be obeyed or carried out effectively..." Literary enforcement of human rights must be understood simpliciter to mean either "securing or protection" of these rights against actual or possible violations by the state or its agencies. This raised two important questions:

1. What are the institutions vested with the power of ensuring compliance?
2. What are the instruments or mechanism employed to ensure their compliance?

The answers to these questions are the main focus for discussion in this segment of the chapter. Generally the courts under section 6 subsection 1 of the Constitution are vested with judicial powers. These Courts are specified under subsection 5. The scope of judicial powers was described as extending to "all inherent powers and sanctions of a court o law... to all matters between person, 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 that person..."

The constitution has not only declared and guaranteed the fundamental rights which we have examined, it equally provides for their enforcement. The rights are not mere pious declarations. Section 46(1) of the 1999 Constitution is the pillar upon which this power of enforcement is predicated and it provides that,

> "Any person who alleges that any provision of this chapter (i.e fundamental rights), has been, is being or likely to be contravened in any state in relations him may apply to a high court in that state for redress..."

To adequately ensure the protection of the constitution the right of access to the court was equally made a fundamental right and for its amendment a large majority of 4/5 in the National Assembly is required. The above section makes available the enforcement of the rights in the High Court which could lead to the Court of Appeal and finally the Supreme Court. The essence of the section is that whenever and wherever a person's fundamental rights under Chapter IV has been, is being or is likely to be violated, he can apply to the high court in the state complaining about the violation and sought for the enforcement of his right(s).

Section 46(2) provides that,

> "Subject to the provisions of the 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 purposes of enforcing or securing the enforcement within that state of any right to which a person may be entitled under this chapter."

From this provision all matters relating to the infringement of the fundamental rights must commence or originate, as constitutional requirement, from the High Court. The subsection vested in the courts the power to receive and determine any application so made i.e. the High Court was empowered to decide whether a person's fundamental rights has been violated. Furthermore the Court was empowered to make such orders, issued such writs, and make declarations as it may consider appropriate for the enforcement of the right which has been, violated, is being violated or protection of those likely to be violated.

Subsection 3 further empowered the Chief Justice of Nigeria to make Rules of Procedure and Practice for the High Courts for the enforcement of the fundamental rights.[66] Equally the National Assembly has been given the power to confer additional power to the high court for securing the effective enforcement of the fundamental rights, to provide financial assistance to the citizens of Nigeria whose rights

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[66] *It was in pursuance of similar powers, the then Chief Justice enacted the Fundamental Rights (Enforcement Procedure) Rules 1981.*

had been violated to enable him to engage the services of a legal practitioner.

The application under section 46 can be made by the person in relations to when the provisions of chapter IV have been violated. Subject to certain exceptions only such person can make application under section 46(1). As to the *locus standi* on constitutional matters, the Supreme Court by a majority has taken the view in *ADESANYA' CASE*[67] that a person must show that he is directly affected by the act complained of before he is heard. A general interest common to all or some members of the public is not a litigable interest to accord him a *standing.* There must be assertion of a right by such person peculiar or personal to him and that right must have been infringed or that there is a threat of such infringement. Two other justices took a liberal view of standing. This decision has become a very controversial one but as far as the principle of *locus standi* laid down by the majority it is the law.

In the *case of ATTORNEY GENERAL (KADUNA STATE) V. HASSAN*[68] the Supreme Court gave standing to a father of a murdered son to seek the determination of the Attorney General's powers

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[67] *(1981) 5 SC 112*

[68] *(1985) 2 NWLR (Part8) 460*

under Section 191 of the 1979 Constitution under which the Solicitor General had wrongly terminated the prosecution.

The application under section 46 can be made not only when a person's right has been violated but also when he feels the danger of his right is likely to be violated. In *BISHOP OKOGIE's* case the Lagos State Government had only issued a circular declaring its intention to take over all private schools in the state. The government contended that the applicant's rights were not at all violated at the time and hence the action was not maintainable under section 42 (similar to Section 46 of the 1999 Constitution) of the 1979 Constitution.

The Court rejected the government's contention and held that under section 42 it is not necessary for the plaintiff to await the happening of an event before applying to the high court for redress. The right can be exercised as soon as there exist a threat or likelihood of infringement of the fundamental rights. The Court concluded that the application was not premature as there was a real likelihood of the applicant's rights being violated.

The application under section 46(1) will be made to the High Court in the state where the violation took place. This raises the question as to which high court is competent to entertain the application particularly when the complaint is

against a federal action or authority or agency. In *SHUGABA's* case the application was against the Federal Attorney General but made in the state High Court at Maiduguri. The government contended that Section 42 of the 1979 Constitution did not use the word state high court of a state but says high court in a state and this should be interpreted to mean the Federal High Court. In rejecting the argument the court held that once the applicant has a standing and a state High Court assumed jurisdiction then it can determine whether the alleged violation of the fundamental right is true or not. If it is true then the power given to the High Court is very wide. They are not restricted in anyway. The courts can make such orders, issue such writs as they may consider necessary for enforcing the fundamental rights.

It is a matter within the discretion of the High Court to decide what order, writ or direction is appropriate and in doing so, the applicant can insist that the High Court issues of particular order by which alone he hopes to get full redress either of preventing the violation of the fundamental rights or such other incidental orders that may help the person in reinstating himself to the earlier position.

In SHUGABA's case the question was raised as to an application under section 42 whether the person can claim damages of compensation for the redressable injury caused to

him by violating the fundamental rights. The High Court and the Court of Appeal have held that action for damages and compensation may be entertained by the High Court provided on the record in the case it is possible for the court to assess and compute damages and compensation.

In MOGAJI's case the Lagos High Court did not grant relief by way of damages and compensation for the applicant because the material evidence before the court was not sufficient to assess damages. The court advised the parties to take appropriate separate proceedings in another competent court for such recovery.

The application under section 42 is a right and not left at the discretion of the state. In the case of *LADEJOBI V ATTORNEY GENERAL (FED)* where the government relied upon the Petition of Rights Act for contending that an application under section 42 against the government cannot be entertained by the High Court unless the Attorney General has granted permission. The court rejected the contention and held the Petition of Rights Act as unconstitutional because it denies an individual his fundamental rights under section 42 i.e. an unimpeded access to the courts.

For the enforcement of the fundamental rights it is for the high court to decide what type of order or write to make or issue. At common law on such matters against the government

or authorities the High Court issues particular types of writers, orders or directions. These are writ of *habeas corpus , mandamus, certiorari etc.* These writs are called prerogative writs. In addition to these are declaratory orders and injunctions which could also be issued by the courts. If the courts finds that there are other types of orders required in a given case the High Court has the power. If the court finds that any of these writs or orders cannot be made or is not appropriate, then it cannot reject the application on that ground because its powers extends to making any order or giving any direction that may be appropriate on the facts of the particular case. It is intended to examine few of these writs as mechanism of enforcing these rights.

5.7 MECHANISM FOR ENFORCING FUNDAMENTAL RIGHTS

5.7.1 Habeas Corpus:

Habeas corpus is the most expeditious remedy known to law that determines the legality of any arrest or detention. The word is a *Latin* word which literary translated means, "produce the body." By this writ the superior court directs the authority or person who has the custody of an individual to produce him or his body and show under what authority of law he is being detained or kept in prison. The legality of arrest or detention in this context is determine by the superior court on the basis of the application of the person

arrested or his family or his friends, the return filed by the authority having custody of the person and if necessary of the authority which had ordered the arrest and detention of such person. If the arrest or detention is found to be illegal, the court can order the release of the person there and then if the person is in court. Otherwise the detaining authority is directed to immediately release the person.

5.7.2 Mandamus

Mandamus is an order issued by a superior court directing an authority or person to perform its or his public duty specified by law. The order could be issued against any authority which excises administrative or statutory power except the courts. The order can be issued when a public authority is under a public duty to do a particular thing or act in a particular manner. When such an authority failed to act whether negligently or willfully mandamus will issue to direct or compel such authority to act as required of it by law.

The order of mandamus will not issue against an authority that has a discretion to act or not to act. By mandamus the authority cannot be compel to exercise the discretionary power one way or the other where it does not or refuse to exercise the discretion. Mandamus is granted only at the discretion of the court. It is not a matter of right but at court's

discretion. The court will refuse to grant mandamus if the person has an alternative remedy under the law. Mandamus can only be applied by the person who has a right or interest in the performance of the public duty by the authority concerned. It is usually granted when the court feels that its intervention is a must in order to make the authorities comply with the law. Mandamus can be positive as well as negative i.e. by it, the authority may be directed to do a particular act or directed to refrain from doing particular act. The negative aspect is not being used because the court can issue an order of injunction instead.

5.7.3 Certiorari or Prohibition

Certiorari and prohibition are common writs in many respects. They are both issued to judicial and quasi-judicial authorities. By these writs the illegality committed by these judicial and quasi-judicial authorities are quashed. They differ in that prohibition is issued by the superior court during the course of the proceedings. By prohibition the authority is directed not to act in an illegal manner. Certiorari is issued by the superior court to the subordinate court or other judicial or quasi judicial authorities to correct or quash their decisions. By this writ the records of the subordinate authority were called to determine whether the proceedings and the decision are strictly according to law.

Earlier on the court have taken a very rigid view that only courts and authorities that have a duty to act judicially are subject to certiorari. This view was gradually changed and now any authority judicial or administrative having the legal authority to determine issues or matters that could affect the rights or interest of a person shall be amenable to certiorari. The distinction between judicial and non judicial function is now almost extinguished. Certiorari is issued in three cases:

1. When the authority has exceeded its jurisdiction or has acted *ultra vires* i.e. without jurisdiction.
2. When the authority has acted in violation of the principles of natural justice; and
3. When the superior court finds that there is an error of law on the face of the records.

The principles of natural justice the violation of which attract certiorari are two:

a) The right to hearing

b) The authority must not be bias

Right to hearing means, notice, representation, knowing the case and evidence of the other side and to submit one's own evidence. The authority must not be bias in that it must have no interest either in the parties or the subject matter of the case. If any of these are violated the decision of the

authorities can be quashed by certiorari. The error apparent on the face of the records means such an error which is obvious and can be readily inferred from the records and the decision of the authority. If the error of law is so obvious, then the decision is clearly illegal and the superior court can immediately quash the decision without waiting for any detailed argument on the illegality committed. If the illegality committed cannot be discovered unless the matter is fully investigated and only after detailed arguments by the parties, that is not and will not be regarded as error of law apparent on the face of the records.

By certiorari the superior court quashed the decision of the authority and perhaps send the same case back to the same authority to act and decide it according to the law. Certiorari does not make the superior court to sit itself as an appeal court and review the decision of the authority in all its detail. And the superior court cannot substitute the authority's decision with its decision.

Prohibition is issued while the matter is still pending before the authority takes a final decision, but somehow acted illegally whether by assuming a jurisdiction it does not however exceed its jurisdiction or violates any of the principles of natural justice. In such a case a party does not have to wait until the final decision is given by the

authority. In the middle of the proceedings, the illegality may be corrected by issuing the writ of prohibition.

5.7.4 Injunction

The order of injunction is made by a court when any authority, administrative or judicial commits an illegal act or is about to commit an illegality. By this order the concerned authority or person is directed to refrain from acting in a manner illegally affecting the rights or interest of the person concerned. If the authority had already acted illegally affecting the rights or interests, it is directed to undo the effects of that illegal action.

5.7.5 Declaratory Judgement or Order

Declaratory orders are made to determine the rights and obligations of the persons and authorities who asked for such a determination of a court. The parties involved in a particular case may not come to wait until such a time they come to fight each other in court. Before acting one way or the other they will like to know the scope, limits of their powers, rights, claims and obligations. A request is made to the courts to declare exactly what their position is in accordance with the law.

In the case of *BISHOP OKOGIE* the declaratory order or judgement was made only when there was a real case on hand and not when the question is hypothetical or a subject of academic

debate between the persons concerned. The parties applying for that order must show that they have an interest in the determination of question of law and facts that such determination is immediately necessary for them to adjust their legal relationship.

5.7.6 Quo Warranto

Quo warranto is issued to a person holding a public or statutory office to show under what authority of law he is holding the office. The writ is justified on the ground that it is better for the legality of a person holding a public office is determined at the earliest. Otherwise if his holding the office is illegal, then all his acts and decisions being illegal the public will come to suffer quite considerably because after a long time if his holding the office was declared illegal, all the parties affected by his decision will suffer irreparable injury. The standing in *quo warranto* is given to any member of the public to whose interest and rights were affected by the decision of such an official.

5.8 CONCLUSION

In conclusion these writs and orders cannot be taken as exhausive for the purpose of enforcing the fundamental rights once they high court determines that a person's fundamental rights has been violated or in danger of being violated then

the court has the power to select any of these writs and orders singly or combining one or more, or may even make other order not confining itself to those discussed above, that the court consider as a appropriate for effectively enforcing the rights. This shows how wide is the power given to the high courts for enforcing the fundamental rights.

CHAPTER SIX

HUMAN RIGHTS AND MILITARY RULE

6.1 INTRODUCTION

The Military in Nigeria have held political power for the most part of the country's nationhood. The first military intervention occurred on 15th January, 1966 and midwifed a transition to constitutional democracy between 1975 - 1979 which culminated in the birth of the Second Republic on the 1st of October, 1979. Barely four (4) years later, precisely on the 31st December, 1983 the military interfered for the second time in the nation's political arrangement and terminated the second trial to constitutional democracy. The military again ruled until May 29, 1999 which ended another transition to democracy which ushered in a new democratic dispensation headed by a one time military ruler Olusegun Obasanjo.

Between 1983 to 1998 there were a lot of political upheavals or turmoil which the nation witnessed like General Babangida's elongated, over-bloated, costly and the long drawn out transition which led to his waterloo and a still-born Third Republic, demise of the 1989 Constitution that was never put into operation, and the near total disintegration of the country following the annulment of the June 12, 1993 Presidential election. With the establishment of the Interim National Government (hereinafter referred to as I.N.G)the political stakes were raised to an unprecedented height never before taken and the very foundation of the nation's corporate existence was questioned from some quarters. The I.N.G., as a stop gap arrangement ,conveniently paved the way for General Sani Abacha to use it as a vehicle to realize his long held ambition of leading this country. The Abacha's period 1993 - 1998 unleashed a reign of terror on a near comatose nation

which in fact never recouped until the demise of the dictator on July 6, 1998. Until this divine intervention a new terminology was about to be added to the country's political lexicon in the name of "self succession."

From the foregoing it is apparent that no serious study or research on any aspect of Nigeria constitutional experiences could ever be complete without, at least a part of that study, devoted to the military rule. It is intended in this Chapter to examine, the general background that usually lead to military intervention in most developing countries and the justification advanced in Nigeria to defend such take over. The method or manner of establishing such governments shall also be considered. The features military governments assumed especially in the context of the laws they promulgated shall be part of the examination of issues. The emphasis shall be specifically on the administration of General Ibrahim Babangida because ,of the last four (4) military administrations, his lasted for 8 years out the total of 16 years. In fact he was the second longest serving leader (either civilian or military) that the country ever had following General Yakubu Gowon who served for nine (9) years i.e from 1966-1975.

The chapter shall analyze the traditional and general concept of the rule of law as understood today and consider the effects of military rule on it. In other words attempt shall be made to consider the thorny question of whether the rule of law obtains under the military governments in Nigeria and the related issue of fundamental rights enforcement under military rule. This necessarily makes it possible to examine the factors, if any, that in practical terms militate against the enforcement of these rights. It is conceded that it is difficult to consider all aspects of the various legislations

or decrees that might fall into this category therefore it is intended to use only few of them as illustrations.

6.2 BACKGROUND TO MILITARY INTERVENTION

From the early 1960s when most of the colonies in Africa and Asia including older Republics in Latin America Military intervention until recently assumed a frightening dimension or connotation. In these countries "military rule" was used to mean a system of government headed by a military *junta* who forcibly sized power from the civil authority or even another military authority before it and which government seeks to perpetuate itself in power indefinitely until pushed out by a *putsch* or revolution.

It is conceded that while a particular rule may be described as "military rule" the expression may in fact be misleading especially if viewed in the context that the functioning of such governments which to a large extent depends upon the massive infusion of civilians and civil institutions e.g. the ordinary courts.[1] Generally in most advanced democracies of the western countries with a highly developed and sophisticated political structures, the military only exerts influence over the making of national security policy. The military in these countries are not interested in replacing the civil authority but are contented to playing a key role in making the national security policy. The professional soldier restricted their ambitions by accepting and allowing the institutional constraints on his demands even in shaping a security policy.[2]

On the other hand the military in a poorly

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1 See generally Feit, E. (1973) *The Armed Bureaucrats*, Houghton Co. Boston p.1.

2 Perlumutter A. & Bennettee, V.P. (ed) (1980) *The Political Influence of the Military: A Comparative Reader)* Yale Univ. Press, New Haven p.13.

institutionalized political systems like in Nigeria, will put up a still resistance to the subordinated to higher civil political authority. In the words of a respected scholar,

> "The officers in such countries need not be restrained by the rebuff of civilian leaders when they are convinced that military rule will be far more salutary for society than civilian government. They seek to exercise their authority over the entire political process rather than limiting themselves to a single aspect of policy making. Indeed, officers in the third world nations turn the political system as the arena in which to maximize their influence; the government itself in the prize sought by the military. Politicians in those countries tear the activism of these officers but lack the physical power to prevent the military from replacing them. This explains the frequent phenomenon of military interventionism in the third world countries of the middle east, Africa, Latin America and Asia. In these areas military intervention frequently outweighs the electoral process as a means of regime change. The military challenged civilian legitimacy while offering a new type of political authority."[3]

The nature of military intervention in these countries may vary from one country to another but basically three types of such intervention are easily identifiable. They are:-

1. The military may intervene through influence, pressure or even blackmail in order to push some of its policy decisions into effect. This method of military intervention essentially takes place behind the scene and is generally a characteristic of countries with developed political culture where the systems are highly institutionalized.
2. Military interventionism by violence and seizure of power by armed personnel leading to the displacement or supplanting the

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[3] Ibid at p.13

civilian authority. This is a direct military intervention which is the characteristics of the third world countries experiences.

3. A kind of military intervention by the revolutionary soldier who seeks somehow to operate independent of the civilian regime and therefore sees his movement as co-equal to the civilian authority e.g. in Uganda and Mozambique. Various reasons had been advanced in different countries to justify direct military intervention in the political process. We shall however reconsider only briefly the Nigerian experience in the recent past.

6.3 JUSTIFICATION FOR MILITARY INTERVENTION

Following the 1963 Republican constitutional experience in which critics alleged "corruption and mismanagement" by the First Republic politicians, the first military intervention which terminated constitutional democracy occurred on January 15, 1966[4] The justification being that it was obvious that the civilian government was weak and unable to tackle the crisis that besets the country between 1962 - 1965. This makes the intervention an inevitable outcome of such inertia. In fact the then Acting President was reported to have made a statement to the effect that," *the Council of Ministers had unanimously decided to voluntarily hand over the administration of the country to the armed forces in order to ensure peace and stability*". In the same vein the then General Officer Commanding the Nigerian Army claimed that the army was "invited", to take over the administration of the country, by the politicians in order to help restore peace and order in the country. In other words the military intervened in

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[4] See generally Oyediran, O. (ed) *Nigerian Government and Politics under Military Rule 1966-79* (1979) pp.1 - 25.

politics to help restore law, order and political stability and to wipe out official corruption.

In December 1983 a new military administration of Major General Muhammadu Buhari shot its way into power and was strangely publically hailed by the people. The intervention was justified on the following grounds,

> "The change became necessary in order to put an end to the serious economic predicament and the crisis of confidence now afflicting our nation."

On the type of politics being played since the handover of power from the military to the politicians in 1979, he had this to say,

> "The last Federal Military Government drew up a programme with the aim of handing over powers to the civilians in 1979. The programme was implemented to the later and the 1979 constitution was promulgated. However little did the military realized that the political leadership in the Second Republic will circumvent most of the checks and balances in the constitution and bring us to the present state of general insecurity ... the premium of political power become so exceedingly high that political contestants regarded victory at an election as a matte of life and death struggle..."[5]

Apart from the political problems used to justify take over by the military the second most popular reason generally advanced in the recent past was " economic mismanagement by the politicians".[6] Buhari in his maiden broadcast maintained that," *the economic mismanagement of the politicians has led to government dependence on domestic and external borrowing to*

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[5] *New Nigerian Newspaper* Monday January 2, 1984 p.3

[6] Whether Nigerianswill ever accept such reasoning again remain to be seen especially when considered against the background of recent disclosure of Abacha - Gwarzo - Dalhat Scam.

execute most projects. This, has in turn, led to the devaluation of our currency and the fall in the standard of life of our people."

The third reason advanced was corruption and undiscipline. General Buhari lamented that,

> "While corruption and undiscipline have been associated with our state of underdevelopment, there twin evil in our broadly politics have attained unprecedented height in the past four years. The corrupt, inept and insensitive leadership in the last four years have been the source of immorality and impropriety in our society."

He concluded with a stern warning that,

> "This government will not tolerate kickbacks, inflation of contracts, and over invoicing of contracts... nor will it condone foray, fraud, embezzlement, misuse and abuse of office, illegal dealing in foreign exchange and smuggling..."[7]

Strangely in 1985 there was another coup by General Babangida which he justified equally in the following words,

> "When in December, 1983 the former military leadership headed by Major General Muhammadu Buhari assumed the reigns of government with the most popular enthusiasm accorded to any government in the history of this country, with the nation at the mercy of political misdirection and on the brink of economic collapse, a new sense of hope was created in the mind of every Nigerian."

He continued,

> "... since January, 1984 however, we have witnessed systematic denigration of that hope. It was stated then that mismanagement of the economy, lack of public accountability, insensitivity of the political leadership and a general deterioration in the standard

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[7] Ibid p.23.

of living ... were reasons for intervention. Nigerian have since been under a regime that continued with those trends ... the last 20 months have not witness any significant changes in the national economy ..."[8]

In retrospect one wonders whether all these accusations leveled against Buhari regime by Babangida could be substantiated in any way. In fact one could venture to say that Babangida's regime worsened the already bad situation on all aspects of the Nigerian life which he highlighted. Babangida's military government initially adopted what it called an "open door" policy and a "human rights" posture. Whether a military regime is benevolent or adopted a human rights posture or policy and expresses an intention to rule with the consent of the people does not absolve it from its true nature; that is, an abnormal regime, and a regime of force for that matters.

Military governments are unconstitutional governments, they are not representative and most often they described themselves as "*corrective regime.*" This assertion is no doubt debatable especially in the context of our recent past experiences. Military governments are politically illegitimate. "Legitimacy" has been define as the capacity of a political system to engender and maintain the belief that existing political institutions as the most appropriate or proper ones for the society. It is imperative to consider how military governments were established and the manner they secure legitimacy.

6.4 ESTABLISHMENT OF MILITARY GOVERNMENTS

All military governments came to power by illegal and unconstitutional means namely *coup d'etat.* Even in those cases where the civil authority "invites" the army to take

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[8] *New Nigerian Newspapers* August 29, 1985 p.5.

over, this is still unconstitutional. The fact that the civilian political leadership acquiesced to a military intervention does not make it legal. The military, in most cases, needed politicians more then the politicians needed them to secure recognition and obedience from the ruled. Otherwise they could be regarded by the people as usurpers and an illegitimate government. That being so, the military rulers can only maintain themselves by increasing its reliance on coercion and transforming might into right. It is therefore necessary at this juncture to consider the mechanism which some of the military governments in Nigeria employed or adopted to establish themselves and impose their authority thereby securing legitimacy. In view of the fact that the general pattern is the same, there is actually no need to examine the "*modus operandi*" of all or each government.

On seizing power, the military usually promulgates a Decree No.1 generally refers to as *CONSTITUTION (Suspension and Modifications) DECREE*[9] . The purpose and effect of the decree is to suspend some provisions of the constitution, modify others, while allowing the continues operations of the remaining provisions subject to such modifications as may be made from time to time. For instance Decree No.1 of 1984 provides under Section 1 subsection 1 that,

> "The provisions of the Constitution of the Federal Republic of Nigeria mentioned in Schedule 1 to these Decree are hereby suspended".

Sub-section 2 further provides that,

> "Subject to this or any other Decree, the provisions of the said constitution which are not suspended by subsection (1) above shall have effect subject to such modifications specific in schedule 2 to this Decree.

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[9] See *Decree No.1 of 1966 and Decree No.1 of 1984 and Decree No.107 of 1993.*

Accordingly Schedule 2, Part B of this Decree modified Section 1 subsection (1) of the 1979 Constitution to read thus,

> "This constitution *AS AMENDED BY THIS OR ANY OTHER DECREE IS SUPREME* and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."[10]

Essentially what is saved or preserved in the existing constitution remains in force only at the will of the federal military government and as a supplement to any other decree which was subsequently issued by that body. In effect under military governments constitutional supremacy gives way to legislative supremacy.

Generally the initial action of every military governments that seized power from a constitutional government is to ban politics and political parties,[11] dissolve all existing democratic structures or institutions[12] and establish a legal basis of their existence. The Constitution (suspension and modifications) Decree confers unlimited legislative and executive powers on the Federal Military Government. For instance by virtue of section 2(1) of Decree No.1 of 1984 as amended the Federal Military Government was vested with the *"power to make law for peace, order and good government of the Federal Republic of Nigeria or any part thereof with respect of to ANY MATTER WHATSOEVER"*. Regrettably the term "*Federal Military Government*" that was vested with this enormous powers was not defined by the decree. This vacuum created made it possible for the Head of State or the President, who under the

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[10] Emphasis supplied.

[11] See for instance S.1(1) *Political Parties (Dissolution)* Decree 1993.

[12] See *S.1(1) of Decree 109 ING (Dissolution) Decree and Decree 110 State Executive etc (Dissolution) Decree*

decree was vested with the powers of signing decrees, to make law in any manner, on any matter and to whatever extent he desires. Since the scope of the powers of the federal military government was described to extend to "any matter whatsoever," the expression does not seem to conceive of any limitations either substantive or procedural to the powers. The scope of the power must therefore be interpreted to include the power of amending the constitution since constitution could be amended by any decree in the spirit of section 1(1) of the Decree No.1 of 1984.

To further reinforce or buttress the argument Decree No.1 prohibits expressly the Head of State or the President from delegating the powers of signing decrees. The executive powers vested in the Head of State or the President could be exercised by him directly or indirectly by any delegate. Although attempts was made to curtail part of this power by providing that the exercise of the executive powers of the federation shall be done in "consultation" with the Armed Forces Ruling Council. This attempt was however, undermined by the proviso that, *"No question as to whether the exercise of the executive power by the Head of State or the President was done in consultation with the AFRC, could be entertain by any court of Law".*

6.5 STRUCTURE AND CHARACTERISTICS OF MILITARY GOVERNMENTS

The structure of military governments from 1966 until the last one which terminated May 29, 1999 essentially remained the same notwithstanding some few variations. It is intended to examine principally the structure of General Ibrahim Babangida's military government without prejudice to making some passing references to some earlier or later military administrations.

Prior to the July 29, 1975 coup the structure of the

military government was simple. The Supreme Military Council (hereinafter referred to as S.M.C) was at the apex of the institutional structures as the highest policy making body for the country. The Head of State was the Chairman of the S.M.C. and the regional or State Governors including service chiefs were members. The Federal Executive Council which consists of the Federal Commissioners as the Ministers were then styled) was chaired by the Head of State and include the Chief of Staff (Supreme Headquarters) and his deputy as members. Directly deputizing for the Head of State in the S.M.C. is the Chief Staff Supreme Headquarters, then the regional military governors. Following the 1975 coup *Decree No.1 Constitution (Suspension and Modifications) 1966* as amended established new institution called the Council of States which consists of the states military governors. The Governors were no longer members of the Supreme Military Council. The Supreme Military Council was reorganized to consist of the Chief of staff Supreme Headquarters, the Service Chiefs, all the General officers Commanding the various divisions (both in the Army, Air Force and Navy), each member representing these forces and the Inspector General of Police.

Essentially this structure remained until the August 27, 1985 coup which brought General Ibrahim Babangida to power. The first noticeable change was when he styled himself as "President" instead of the Head of State and his deputy as Chief of General Staff instead of Chief of Staff Supreme Headquarters. The S.M.C was replaced by the Armed Forces Ruling Council. The President was the Chairman of the Armed Forces Ruling Council, Council of Ministers and the Council of States. He enlarged the membership of the Council of States to include former Heads of States, some prominent or selected traditional rulers and former Presidents of the Senate.

The military governments, even though sometimes appeared to decentralized authority, the reality is that military governments tend to be monolithic, characterized by concentration of powers. A formal tripartite structure may be established at the federal level, yet the actual organization of government exhibits more of concentration then separation of governmental powers.[13]

The Armed Forces Ruling Council which had often erroneously been described as the "highest law making body" has no civilian membership.[14] This clearly established that the military government is conditioned by a unified and hierarchical structure of the military. The entire power generally revolved around General Babangida as President. In fact the manipulation of the apparatus of power by him was legendary. A respected weekly publication has this to say about him,

> "Perhaps no Nigerian leader to date (as at 1990) has gestated for so long in preparation for power. Certainly few have had understanding of state power, its usage, its abusage, its crudity and its near subliminal application..."[15]

NEWSWATCH magazine equally held the view that

> "... the General who came smiling into power can be likened to a grandmaster whose deft moves leave both the opponents and the audience bewildered. Like a veritable chess expert, President Babangida appears to understand that the fundamental idea of power is gaining absolute control on the chess board..."

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[13] See Nwabueze, B.O. (1962) *A Constitutional History of Nigeria,* London pp. 220 - 226.

[14] In fact the Inspector General of Police and Attorney General who initially were made members of Abacha led military government were subsequently dropped.

[15] *The African Guardian* January 15, 1990 p.20 as quoted by *Civil Liberties Organisation's Human Rights in Retreat.*

In this regards the Civil Liberties Organisation concluded that,

> "The frequent, almost erratic, changes of personnel in the Army and the government by Babangida were, no doubt, all aimed at consolidating his position. The power structure he designed is not based on any formal organ of the state and to which he was not accountable, shows how total his authority was. He played completely alone, and unchallenged in the field..."[16]

On February 6, 1989 President Babangida took the unprecedented step of dissolving and reconstituting the Armed Forces Ruling Council. This clearly established that almost all organs of the state, including the so-called highest ruling body, was subordinated to the President. In fact the President determine its membership and perhaps even its powers. It is unlikely that such a body could control the exercise of the powers of the President. This makes it imperative to undertake a reflective discourse into some of the decrees relating to the structure and powers of Babangida's military government.

The combined effects of *Decree No.1 of 1984 as amended by Decree No.17 of 1985* and the *Federal Military Government (Supremacy and Enforcement of Powers) Decree No.13 of 1985* is to make the F.M.G. supreme , or the *grund-norm* of the country and not the constitution. Commenting on the implications of a cabinet reshuffle of December 29, 1989, a weekly magazine correctly observed that,

> "The most obvious thing about the administrative restructuring is the further concentration of power in the hands of one man; the President demonstrated this

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[16] Civil Liberties Organisation *Human Rights in Retreat* p.20

much control over the nation.."[17]

The magazine further observed that the changes led to,

"... a very formidable nucleus of authority to which is tied all the strings of control, giving the president a complete hold on the nation."

General Babangida wielded so much power, it was felt that, he indeed, was the *grund norm*. *Section 6(1) of Decree No.1 of 1984* as amended required the President to exercise his executive power in consultation with the AFRC. Also a subsection stipulated that "*the question whether there was any consultation with the AFRC with respect to the exercise of any executive power by the president SHALL NOT BE INQUIRED INTO BY ANY COURT OF LAW*. This means that the country could be run by the President single handedly for two reasons. The President has according to the decree the "*exclusive responsibility* "of signing decrees which power he cannot delegate.

Secondly the executive powers of the federation was vested in him and since the courts were barred from enquiring into the exercise that power is beyond judicial review. These combined both legislative and executive powers in the President and judicial power still could be exercised but subject to the legislation powers. This state of affairs was further reinforced by Decree No.17 of 1985 which conferred on the President the "exclusive responsibility" of appointing the Chief of General Staff, Minister of Defence and Chairman Joint Chief of Staff, the Service Chiefs, Inspector General of Police, Director General State Security Service virtually all the important members of the AFRC.

The AFRC was established under Decree No.17 of 1985 which

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[17] *THIS WEEK* (a defunct weekly Magazine) January 15, 1990, p.8.

amended Decree No.1 of 1984. The AFRC inherited the powers of the National Assembly by virtue of Section 2 subsection (6). It was equally vested with the "exclusive Responsibility' to "determine national policies and to handle security matters and the exclusive responsibility of appointing the president, military governors of the states, ministers".In view of the enormous powers exercise or conferred by the various decrees on the military governments it is intended to examine the principle of the rule of law under military government and seek to answer the question whether it operates or otherwise.

6.6 RULE OF LAW UNDER MILITARY GOVERNMENTS

To properly address or examine the complex question of whether rule of law operated or was obtainable under military government, it is necessary to first determine the meaning of the term "rule of law" in the context of its historical evolution and subsequent development before venturing into whether it operates under military governments. A.V. Dicey was the first person to systematically analyze the concept and reduce it into three (3) principal formulations and/or propositions. These are:

1. That no man is punishable or can be made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of law . In this sense, the rule of law is contrasted with every system of government based on the exercise of persons in authority of wide arbitrary or discretionary powers devoid of constraint.[18]
2. Secondly the rule of law means that no man is above the law, but that here every person whatever his rank or condition is subject to the realm and amenable to the jurisdiction of the

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[18] See Dicey, A.V. (1885) *An Introduction of the Study of the Law of the Constitution. (Reprinted in the 10th ed.), with Introduction by Wade, E.C.S.* pp.187-188.

ordinary tribunals.

3. The general principles of the English constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

It is clear that much of Dicey's expositions of the rule of law is based on the view of the British Constitution which to many people is outdated. However Dicey's analysis no doubt had a profound and important influence upon the development of the British and indeed global constitutional law. While Dicey's rule of law has been subjected to serious criticism[19] which will not be the main thrust of our discussion here, it is however intended to take a brief discourse into the modern development of the rule of law.

In the wider sense, the rule of law means a system of government which expresses preference for law and order rather than anarchy, warfare and constant strife. This no doubt presupposes that everyone in the community is secure in his rights and property so that should anyone violate the rights or property ,the aggrieved person can move to the appropriate authority for their enforcement. For law and order to be consistent with the rule of law, there must be some form of democratic polity where the individuals is allowed to bring about a change of government should the people so decide periodically as may be provided by law.

Secondly rule of law means a system of government according to law. This entails that the organs of government operates through law. Thus any governmental action which is not in accordance with a law should be open to being challenged, in the courts or any other authority independent of the government. The law itself must provide the remedy for

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[19] For criticism of his views on the Rule of Law see Wade et el (1982) *Constitutional and Administrative Law* pp.87-89.

its breach by the individual or by the government or its agencies and such remedy must accord full redress to the aggrieved person. The rule of law will be satisfied if effective sanctions such as declaring the acts of public authorities null and void if they are against the law, or if the aggrieved party is awarded compensation.

Government according to law means that the executive must act according to law. It also means that the legislature must pass laws which conforms to the higher laws or values of the society. The laws should not be annihilative of the basic rights of the citizens.

Thirdly rule of law requires that laws which the executive are supposed to administer are not merely of legal form, they must also have a moral content. Thus the rule of law must also take into consideration the higher and moral values of society by the legislature while making laws. In this way the laws so made will be efficacious and more useful to the society the citizens will not need coercion to obey the law.

Fourthly rule of law has become a subject of international debate. It finds support in the Universal Declarations of Human Rights, as examined in the earlier Chapters, which determines in a universal way the basic human rights that an individual must possess wherever he is. There were further developments in the forms of Regional Conventions and International Private Organizations like the International Commission of jurists (I.C.J). The I.C.J. concerns itself mainly with trying to formulate the rule of law as a basic idea to inspire legal practitioners from varied backgrounds to improve their own national legal systems.[20]

At its New Delhi Conference of 1969 the lawyers from 53

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[20] *International Commission of Jurist* held its Conference in New Delhi 1959 and Lagos in 1961 etc.

countries formally declared that rule of law is of dynamic concept which should be employed to safeguard and advance the civil and political rights of the individual in the society. The congress emphasized that rule of law should bind the legislature and the executive and each system should ensure protection of individual rights and freedom and providing remedies for their violations.

The Congress also emphasized the need for legal systems to strive to strike a balance between individual rights on the one hand and social interest on the other. The congress also related the concept with the establishment of social, economic, educational and cultural conditions under which the individual may realize his legitimate aspirations. The question here is, does the rule of law operate under the 1979 constitution which the military overthrow?

Notwithstanding our examination of the concept above, the rule of law as a philosophical and political concept has generated a lot of controversy between scholars as to its precise meaning. For instance a respected scholar observed that, ".. in more recent years the meaning of the term rule of law has become a matter of less certainty."[21] Perhaps a little examination of these divergent views could illustrate the point better. Friedman define rule of law, "as any ordered structure of norms set and enforced by an authority in a given community... It is free from any particular ideological content ad encompasses tyrannous as well as liberal humanitarian orders."[22] Another scholar identified three indispensable attributes of the rule of law as being,

"Every person whose interest will be affected by a

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[21] Aguda, A.T (1986) *The Crisis of Justice*, p.46.

[22] Friedman, W. (1971) *The State and the Rule of Law in a Mixed Economy*, p.94.

judicial or administrative decision has the right to representation and the deciding officers shall be independent in the full sense... day to day decisions shall be reasoned, rationally justified."[23]

The answer to the question whether rule of law obtains under the 1979 constitution can best be answered by reference to some of the judicial pronouncements of the courts in resolving certain issues. In the case of *LAGOS STATE V. OJUKWU*[24]Oputa, JSC pointed out that, the rule of law presupposes the followings:-

1) That the state including the Lagos State Government is subject to law.
2) That the judiciary is a necessary agency of the rule of law.
3) That the government (including the Lagos State Government) should respect the rights of the individual citizens under the rule of law.
4) That to the judiciary is assigned our constitution the determination of all actions and proceedings relating to matters in dispute between persons or between government or an authority and any person in Nigeria.

In the same case, commenting on the relationship between the 1979 Nigerian Constitution and the rule of law Obaseki, JSC said,

"The Nigerian constitution was founded upon the rule of law the primarily meaning of which is that everything must be done according to law. It means also that the governments should be conducted within the framework of recognized rules and principles which restricts discretionary powers ... the rule of law means that disputes as to the legalities of acts of governments are to be decided by judges who are wholly independent of

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[23] Jones, J.H., *The Rule of Law and Welfare State as quoted by Aguda A.T.* op. cit. p.52.

[24] (1986) 1 NWLR 621 at 647

the Executive."[25]

Essentially rule of law for our purpose could be reduce to two principal formulations:

1) Exercise of states power including all its agencies.
2) Independent judiciary to enforce the limitations or restrictions and safeguard the rights of the citizens.[26]

Do these standards apply under military governments in Nigeria? The successive military regimes in Nigeria strived to rule according to law. They passed decrees to back date most of their actions even though they suspended some portion of the constitution including fundamental rights in order to realize the objectives of their legislation. The military took measures which were generally against the rule of law such as detaining people without trial and passing draconian laws with stiff punishments prescribed.

The military in power may indeed claim to be observing the rule of law but do they? In fact when they seized power from politicians they often claimed that they wanted to restore law and order in the society, and also to rehabilitate the economy of the country. These ideas are indeed in consonance with the rule of law principles. But no sooner had they assume political leadership, then they military transgressed from the duty of restoring law and order. They used their power to intimidate and harass the common man.

They passed law to enable them violate the fundamental

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[25] *Cf Oputa, JSC in a Lecture entitled Human Rights in the Political and Legal Culture of Nigeria delivered on November 26, 1986 at UNIBEN Second Idigbe ,J. Memorial Lecture p.90.*

[26] *From the above discussion, it is clear that it is not possible to formulate a simple and clear cut statement of the rule of law as a broad political dynamic concept and as society develops the task of government increases. There are however certain irreducible minimum and the important thing is that the state power which is the greatest antagonist against which the rule of law must forever be addressed.*

rights of the citizens with impunity. It must however be conceded that it is difficult to give a balance critique of the application and/or operation of the rule of law under the military regimes without first recognizing the abnormality of the regime. The military regime is a "coercive" one and sometimes also described as "corrective" one.

Although Decree No.1 of 1984 as amended preserved a substantial part of the fundamental rights and subsequent decrees actually eroded these rights. The decree retrospectively restricts the right to personal liberty guaranteed under Section 32(1) of the 1979 Constitution (which now corresponds to section 34(1) of the 1999 Constitution). The decree suspends completely the accused person's right to be informed in writing within 24 hours reasons of arrest and detention and the provision requiring an expeditious trial for a person accused of a crime.

Secondly *Decree No 2 State Security (Detention of Persons) Decree 1984* as amended by Decree No.12 of 1986, Decree No.30 of 1988 and Decree No.3 of 1990 have had the most corrosive effects on the rights to personal liberty. The last decree vested in the Chief of General Staff the special powers to detain persons "for acts prejudicial to state security or for acts which contributed to the economic adversity" of the nation. He may equally order the detention of persons "who are in preparatory stage of the proscribed acts or who instigated the commission of such acts." The decree vests the exercise of this powers to the absolute discretion of the Chief of General Staff who only need "to be satisfied that any person is, or has recently been concerned in acts prejudicial to state security." Unfortunately the decree failed to define the type, nature or even the features of those acts. In other words the C.G.S has the absolute discretion of determining

whether a particular act has fallen within the purview of the decree or not. In addition, reasons need not to be given to the detained person. Furthermore proceedings against "any person for anything done or intended to be done" under the decree are excluded, and fundamental rights provisions are "suspended for the purposes of the decree."

While Decree No.1 appears to have preserved the right of fair hearing under Section 33 (now section 36) subsequent decrees have seriously eroded this right. Encroachment has taken the form of diversion of trials from regular courts to military or other special tribunals,[27] retroactivity provisions,[28] ouster clauses,[29] and exclusion of the right of appeal from tribunal decisions[30].Suffice to say that most of the tribunals created under the military violated the provisions of section 33(2) of the 1979 Constitution relative to the non-finality and non-conclusiveness of the tribunal's decisions.

From the foregoing discussion it is clear that the powers of the military government both the executive and the legislative were not subject to any form of restrain. Also the fact that they could temper with all the rights with impunity clearly closed the argument as to wether they are subject to the rule of law. One need to examine the

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27 See for example *Recovery of Public Property Tribunal set up under Decree No.3 of 1984, The Public Officers Against False Accusation Tribunal set up under Decree No.4 of 1984, Robbery and Firearms Tribunals Decree No.5 of 1984 ad Miscellaneous offences Tribunal Decree No.20 of 1984.*

28 See *Exchange Control (Anti-Sabotage) Decree No.7, 1984, Decree 20 of 1984, Counterfeit Currency Special Provisions Decree 22 of 1984.*

29 See *Section 4 of Decree No.1 of 1984 & S.2 of Decree 2 of 1984 as amended.*

30 See *S.12(6) Decree 3 of 1984; Decree 4 of 1984 S.8(4) S.9(4) Decree 5, Decree 6, 1984, S.5(2), S.11 Decree 7, 1984, S.1(2) Decree No.2 of 1984.*

enforcement of human rights under the military governments.

6.7 ENFORCEMENT OF THE FUNDAMENTAL RIGHTS UNDER MILITARY RULE

The word "enforcement" has been defined by the concise Oxford Dictionary as "... compel observance of law..." while Chambers 20th Century Dictionary prefers "giving effect to". Central to these definitions is the actualization of whatever becomes the subject of enforcement. Therefore the word enforcement here connotes the "mode, methods or means" through which human rights could be given effect. There is basically a single requirement to be satisfied in the determination of whether rights could be enforced under any legal, political or constitutional system. The simple question to be considered in ascertaining the requirements is whether the system codified *constitutionalism* as a basis of governance. Constitutionalism in the context simply means two things:

1. A form of codified restrain to curb arbitrariness in the exercise of governmental powers.
2. A function of legitimacy i.e. government should be responsible to the governed and derive its existence from the consent of the governed.

Generally military governments are anti-constitutionalism, because of the complete absence of these two requirements of constitutionalism.[31] Thus it could be seen that constitutionalism is a way of preventing arbitrariness and

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[31] *Constitutionalism has been define as, "Legal Limitation son government, it is the anti-thesis of arbitrary rule, its opposite is despotic government, the government of will instead of law." C.H. Mclwain, constitutionalism: Ancient and Modern (1974) ed. P.21 Also MCJ, Ville observes that, "The greatest theme of the advocates of constitutionalism in contrast either to theorist of Utopianism or of absolutism of the right as of the left, has been the frank acknowledgment of the role of government in the society linked with the determination to bring that government in the society linked with the determination to bring that government under control and place limits on the exercise of its powers." Constitutionalism and the separation of powers (1967) p.1.*

operating the government within the law. Totalitarianism, fascist or despotic governments are anti-constitutionalism, because such governments are absolute and arbitrary since they are not conducted according to known and predetermine rules. The rule of law and constitutionalism demand that government should operate under the supremacy and primacy of law and there should be no exercise of arbitrariness. Under the military rule the most perversive encroachment on the fundamental rights by the military administration is ouster by clauses. These comes essentially in 3 basic categories:

1. Those prohibiting any challenge to the legislative competence of the military government.[32]
2. Those barring the challenge of administrative, executive or other derivative action.[33]
3. Those limiting the operation of the fundamental rights provisions under the 1979 constitution.

The first merely affirms the legislative supremacy of the federal military government. This clearly established that the powers of the F.M.G. was derived from somewhere other then the constitution of the Federal Republic of Nigeria. It is not open to the courts to declare a decree or edict as *ultra vires* for non compliance with the constitution.[34]

The military regimes is not bound by the constraints of the

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[32] See section 5 of Decree No.1 of 1984. It provides this, "*No question as to the validity of this or any other Decree or Edict shall be entertained by any court of law in Nigeria.*

[33] See section 4(1) Decree No.2 of 1984 which provides thus, "*No suit or other legal proceedings shall be instituted against any person for anything done in pursuance of the Decree.* cf Decree 3 of 1984 S 13(1).

[34] See *ADAMOLEKUN V COUNCIL UNIVERSITY OF IBADAN and LAKANMI & ANO V. A.G. (West) & Ors* (1971) U.I.L.R. 201

pre existing constitution[35] In fact Decree No. 13 Federal Military Government (Supremacy and Enforcement of Powers) 1984 in its preamble stated that,

> "Whereas the military revolution which took place on 31st December, 1983 effectively abrogated the whole pre existing legal order in Nigeria except what is preserved under Constitution (Suspension and Modifications) Decree 1984 ..."

This first category of ouster clauses merely prohibits judicial inquiry into the legality of legislative acts of the military government, the second category purports to bar inquiry into the validity of acts done or purported to be done under any legislative authority. This type of provision seeks to cover all executive acts done by the military government beyond the scope of the power of judicial review. This constituted far more greater danger to the encroachment of the fundamental rights then the first set.

The third category relates to the provisions excluding all or specific forms of fundamental rights.[36] These are actually complimentary to those of the first two categories. Despite the express suspension of fundamental rights under the various decrees practically all of them specifically reserved some aspects of the rights of fair hearing.[37]

It is clear that the power of the judiciary to check the

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35 See *Nigerian Union of Journalist V Attorney General (Fed)* (1984) NCL Rev. 16.

36 For example Section 4(2) of Decree No.2 of 1984 provides that, "*Chapter IV of the Constitution ... of 1979 is hereby suspended for the purposes of this Decree and any question whether any provision thereof has been, is being or would be contravened by anything done or purported to be done in pursuance of the Decree shall not be inquired into any court of law.*" cf S.18(1) of Decree 9 of 1984, "*The provision of the Decree shall apply notwithstanding anything to the contrary in any enactment including he constitution of the Federal Republic of Nigeria.*"

37 Decree 9 S.14 etc.

government suffered considerable derogation through decrees and ousting the jurisdiction of the courts in actions involving abuse or violations of the fundamental rights. Court orders whenever it was possible to obtain them against the government were frequently ignored. In the words of Civil Liberties Organization,

> "The judiciary for obvious reasons, fell under the federal repression of the regime (Babangida). This came, primarily, in the subversion of its autonomy and thus its power to compel the submission of the regime to established legal and constitutional restraint ... the judiciary and the constitution were rendered ineffectual by decrees. They were further emasculated through the use of tribunals to usurp court's powers, non-compliance with courts orders and habitual display of executive lawlessness."[38]

The independence of the judiciary as a bulwark against tyranny and violations was seriously eroded during military regimes by the increased use of military tribunals, appointments and removal of judges. The tribunals were characterized by illegalities like hasty trials, shifting the burden of proof on the accused, of life and death, and there was also no appeal from the decisions of most tribunals. Where avenue of appeal was provided, it was to an all military body like the AFRC. A scholar observed that the implications of the above scenario are:

1. The tribunals have retarded the development of the law.
2. The decisions of the tribunals are useless since they cannot serve as precedent.
3. It violates the principles of separation of powers.
4. Increasing use of tribunals erodes the people's confidence in

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[38] *Human Rights in Retreat* op. cit p.95.

the judiciary.[39]

Human rights and its enforcement under the military is generally illusory and its categories of erosion includes extra judicial killings, unlawful detention, harassment of journalists, illegal seizure of Newspapers, crackdown on government critics, proscription of trade unions etc.[40]

The military has been arrogant and irresponsible in the administration of governmental affairs. It was known generally for executive lawlessness, disobedience to court orders, disregard and disruption of administration of justice, by interfering or meddling with the judiciary in matters of appointment and removal of judges. It must however be pointed out that some judges were at some point bold and courageous for standing up against the military by making strong pronouncement in defence of the rule of the law and civil liberties of the people. A few examples here is actually necessary to illustrate this assertion.

In the case of *LAKANMI V. A.G. (WEST) & ORS* the Supreme Court nullified Edict No.5 of 1967 and Decree No.45 of 1968 for being *AD HOMINEM* and violating the provisions of the 1963 Constitution. Similarly in *MINERE AMAKIRI V. IWOWAKI*[41] The judge in castigating the State Military Governor for dehumanizing and detaining the plaintiff, a journalist, held that,

> "We are not in a police state, so the rule of law in the country should not be trampled upon. Any person who

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39 *Borokoni, A.A. The Military and Constitutionalism, an unpublished paper presented at 32nd Annual NALT confidence of May 10, 1994 held at NIALS UNILAG*

40 *For a comprehensive study of such violations see HUMAN RIGHTS IN RETREAT (CLO 1993).*

41 *Ibid*

uses his power arbitrarily would not be spared."

Also in the case of *OJUKWU V. LAGOS STATE GOVERNMENT*[42] The Supreme Court of Nigeria held that,

a) Executive lawlessness tantamount to a deliberate violation of the constitution and it is much more serious and profound if such lawlessness takes place in a military administration.

b) The fact that Section 6 of the 1979 Constitution is left intact by the military administration is the closest indication against the rule of tyranny, by sheer force of arms against prescription, subjecting the nation to the rule of might as against the rule of right.

c) In a military government the onus is on the government to demonstrate clearly that it prefers the rule of right to the rule of might.

d) The essence of the rule of law is that it should never operate under the rule of force or fear.

e) *NO ONE INCLUDING THE GOVERNMENT IS ENTITLED TO TAKE THE LAW INTO ITS OWN HANDS."*[43]

Further in the case of *OBEYA MEMORIAL SPECIALIST HOSPITAL AND ANO. V. A.G. (FED) & ORS*[44] The Supreme Court ordered the Benue State Government to obey the rule of law, and thus relinquish possession of a private hospital to its owners. The government had earlier on forcefully taken possession of the hospital. The court by way *obiter* observed that,

> "The seizure of hospital building by heavily armed army and airforce personnel from unarmed law abiding citizen should not be encouraged or applauded in a society such

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42 *(Unreported) Suit No. PHC/22/73 of 4th April, 1974*

43 *Ibid at p.626.*

44 *(1987) 3 NWLR (PART 60) 325*

as ours where the rule of law reigns. it is more honourable to follow the due process of law..."

On the issue of *locus standi* as a basis of enforcement of the fundamental rights, the courts had given a good account of themselves by adopting a fairly liberal approach in their construction e.g. in the case of *HASSAN V. A.G. (KADUNA STATE)*[45] a father whose son was murdered was allowed by the Supreme Court to challenge the Solicitors General's *nolle prosequi*.

In the case of *GANI FAWEHIMI V. AKILU & ANO.*[46] Fawehinmi was granted *locus standi* by the Supreme Court to prosecute privately a suspected murderer of his friend Dele Giwa.

On the issue of illegal detention the courts have performed admirably. In *ZEKHOME & ORS V PRESIDENT FEDERAL REPUBLIC OF NIGERIA*[47] Segun, J, granted *standing* to the plaintiff's legal practitioner for the purpose of releasing the plaintiff from detention. The judge declared that the rule of law existed under a military regime and that the government was bound to obey its own laws.

In *NOAH & 7 ORS V. A.G. (FED)*[48] Onalaja J, rejected the argument that the ouster clause in Decree No.2 of 1984 as amended had ousted his jurisdiction. Also in the case of *BELLO V. A.G. (OYO STATE)*[49] the Court of Appeal and the Supreme Court invoked the maxim *ibi jus* Amagolu, J put the matter bluntly thus,

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45 (1985) 2 NMLR 483

46 (1989) 1 NWLR (Part 102) 122.

47 (1990) 2 WBRN 58

48 Unreported Suit No. ID/33M/90/ of May 2, 1990

49 (1986) 3 NWLR (Pt 45) 825

"The brutal incidence has bespattered the face of the Oyo State Government with the paintbrush of shame".

A fearless judiciary to enforce the rule of law is the necessary condition ensuring that the forces of constitutionalism triumph over that of absolutism and despotism.

> "Military regimes generally have practiced three types of executive lawlessness. These includes refusal to comply with court orders, court; the tendency to take certain actions which are potentially illegal and which were later regularized retroactively by decree; and actions which unquestionably have no basis in law..."[50]

In the same manner Justice Afolabi Adeyinka of the Lagos High Court once remarked that,

> "If citizens, whose rights to federal government now seeks to protect, follow the government's bad examples and refuse to obey court orders ,it will lead not only to the disruption of the administration justice... but also to does, anarchy and ultimate dismemberment of the Federal Republic of Nigeria."

In a remark on the ruling of an application for an extension of a temporary injunction against the NBA brought by the Attorney General and Minister of Justice: The same government in the same case had refused to obey a court order to release from custody five (5) prominent persons who were detained.

On March 9, 1990 Shagamu High Court restrained the state military government from installing one Mike Sonariwo as Akarigbo of Shagamu. The government countered the ruling by promulgating an Edict which overturned the high court order. In an editorial *THE GUARDIAN* Newspaper said,

> "What the Ogun State government did was contemptuous of

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[50] *Human Rights in Retreat* op. cit. p.99.

the judiciary. Where a party to a dispute disagrees with the decision of any court of competent jurisdiction, it has the right to an appeal recognizes and entertain urgent matters. By flouting the order of the High court with its own legislation, the Ogun State government merely demonstrated lack of fair hearing in the rule of law..."

Following a lot of criticism by the local and International Human Rights Organisations, most especially after the trial and execution of Ken Siro-Wiwa, the then Federal Military Government set up the National Human Rights Commission. It is my considered view that the setting up of the Commission was more as a reaction to the pressure of various allegations and condemnation of the military government human rights record then the desire of the government to now respect human rights in its dealings with the citizens. This view can be justified on the basis that even after the establishment of the Commission the military government continue pas legislation which derogates from the fundamental rights e.g retroactive legislation, outer clauses, non-appellable decisions etc

6.7.1 THE NATIONAL HUMAN RIGHTS COMMISSION

The National Human Rights Commission was established under Decree no. 22 of 1995 ostensibly to promote and protect human rights in Nigeria after a sustained campaign of criticism and condemnation of the local and international organisations of the Nigeria's human rights record. The preamble to the Decree explained the philosophical basis of establishing the Commission .The Decree recognised the United Nations Charter and the provisions of the 1979 Constitution based on the principle, *inter alia* of the dignity and equality of all human beings ,promotion and respect for human rights and freedoms without any form of distinction or discrimination.

One of the major objectives of the Commission was to facilitate Nigeria's implementation of its various treaty obligations including but not limited to the United Nations Declarations of Human Rights, African Charter of Human and People's Rights and other Conventions to which Nigeria was a signatory.

The creation of this Commission, one could argue, falls squarely within the ambit of Section 46 in which power was vested in the National Assembly to assist in the promotion and protection of human rights. The military government claimed to create the commission in its desire to provide for an extra-judicial mechanism for the protection, recognition and enforcement of all rights enshrined in the 1979 Constitution and other laws. One of the most interesting objectives in the preamble provides that,

> " in furtherance of the above objectives and in its determination to provide a forum for public enlightment an d dialogue on and to limit controversy and confrontation over allegations of human rights violations by public officers and agencies and to reaffirm the sacred and inviolable nature of human and other fundamental rights"

The controversy and confrontation over human rights violations mentioned above was an oblique reference to the pressure mounted by the multiple human rights organisations operating in the country actively funded by some foreign governments and voluntary organisations in their periodic publications cataloging various human rights abuses committed by the security agencies which in many instances, which regrettably resulted in loss of innocent lives and possibly properties. Let us consider some few aspects of the functions of the Commission with a view to assessing their efficacy.

Section 1 (1)of the Decree established the National Human Rights Commission and section 2 (1) provides for a Governing Council. According to the Decree the Governing Council shall

be responsible for the discharge of the functions of the Commission. It is difficult to understand what the word "discharge"means .This ambiguity raised many questions: Is the Governing Council a policy making body or an executive body ? A careful examination of the entire Decree and the manner it has been operating since its establishment suggests that the Governing Council was a policy making body while the Executive Secretary execute its laid down policy.

The composition of the Council under subsection 2 includes the Chairman, who must be a retired Judge of a Superior Court, one representative form Ministries of Internal Affairs, Foreign Affairs, and Justice, three representatives of registered human rights organisations in Nigeria, two legal practitioners of not less the 10 years post call, three representatives of the media, at least two of whom must be from private section ,three other persons to represent variety of interests and the Executive Secretary .

The Head of State and Commander in Chief of the Armed Forces of the Federal Republic of Nigeria appoints all members of the Commission on the recommendations of the Attorney General of the Federation. A member of the Governing Council could be removed by the Head of State "in public interest".In other words the continues stay in office of the members of the Council was at the pleasure of the Head of State and Commander in Chief of the Federal Republic of Nigeria. The members of the Council do not enjoy any security of tenure. This situation could be buttress by the summary removal of former Executive Secretary in October,2000, a clear two years before the expiration of his five-year appointment.

The absence of any clause in the Decree guaranteeing the tenure of members call into question the sincerity of the government in their professed desire to protect or, at least,

respect human rights. The government ,being the potential violator of human rights the Commission needed a protection against its might since it could be an interested party in a potential dispute.

6.7.2 POWERS AND FUNCTIONS OF THE NATIONAL HUMAN RIGHTS COMMISSION

Part II of the Decree provides for the powers and functions of the Commission. Section 5(a) vested in the Commission the power to *deal* with all matters relating to the protection of human rights as guaranteed by the 1979 Nigerian Constitution , the African Charter of Human and People's Rights, the United Nations Charter and the Universal Declarations of Human Rights and other International Treaties on human rights to which Nigeria was a signatory. The word "Deal" may be a verb but in this context it is an ambiguous one. For instance what is the meaning of the word deal? This can be appreciated if one considers the fact that the Commission is neither a Law Enforcement Agency nor a Court. How does an organisation in its ,at best, formative stage with no identifiable structure in place nor the personnel or the resources be vested with such enormous task ? How can it deal with the complex issues of human rights violations at different levels of governance nationwide? What are the legal instruments available to the Commission capable of realising these goals?

The Commission also has the power to "*monitor and investigate*" all alleged cases of human rights violations in Nigeria and make appropriate recommendations to the Federal Government for the prosecution and such other actions as it may deem expedient in each circumstances. This provision is fraught with difficulties of practical utility. Firstly,"*monitor and investigate all human rights violations*" is an extremely big task which requires a network of trained

personnel and professionals fully employed and paid for. In a complex country of geographical spread and a large population like Nigeria it could take a number of years and an enormous amount of resources for such an organisation to be properly established and fully functional. The Decree failed to to establish any framework for the Commission's relationship with security agencies who are likely to be the bodies it will constantly have deal with especially where the issue involved human rights violations.

Furthermore after the Commission's investigation its powers was restricted to ONLY making recommendations to the Federal Government for either prosecution or other actions as appropriate in the circumstances of the case. The question is :what about a situation where the government was the violator of the right? Prosecution in this case is completely out of question. What about where the government wilfully refused or rejected such recommendations?

In addition the Commission has an obligation to assist victims of human rights abuses and seek appropriate remedies or redress on their behalf. The problem here is who determines whether any person was legally a victim of human right abuse? Is it the Courts or the Commission? What is the nature of the assistance the Commission will render? Is it mere filing of a case for the victims in court? Or assist in financing the legal cost of the case or prosecuting the case itself? How does the Commission relates to the Attorney Generals of both the Federation and the States on these issues? Our judicial process being slow and cumbersome process, does the Commission has the time and the resources to which may literary lasted for years with no guarantee of success at the end.

The remaining part of the functions of the Commission are generally straight forward enough to be executed. They ranged

from organising a local or international seminar or participating in them, publications, cooperation with other international organisations etc. The Commission was obliged to submit under section 16 to the Federal Executive Council through the Attorney General of the Federation Annual Reports on the activities of the Commission and its administration in the preceding year. Regrettably however the provision did not impose on the Commission the obligation to publish at those aspects which it handled. This would have assist the public to assess whether the commission was achieving its objectives. Although section 5(e) provides that the Commission shall publish, from time to time ,reports on the state of human rights in Nigeria. It be pointed out here that the most important thing was actually what the Commission did in respect of these issues rather then reporting or documenting them.

In conclusion one may note that while the Decree and the Commission may not be the most perfect arrangement it is however a step in the right direction . What is necessary is to now make the Commission a constitutional body where appointment and removal of members is subject to the approval of the Senate. Secondly the Commission's relationship with security agencies especially when it is investigating or monitoring of human rights issues must be clearly spell out. Finally the governments will assist the Commission in its task if they minimize the human rights violations perpetrated by their agents.

6.8 CONCLUSION, OBSERVATIONS AND RECOMMENDATIONS

The examination of the various perspectives of human rights from the domestic realm to the International dimension it is absolutely clear that matters of human rights are in forefront of the international political agenda. Morever the

distinction between the domestic domain with the international aspects is at best blurred. In the course of this research it was established that the human rights culture in Nigeria has a long way to go in the sense that that the rude intervention of the military has always had a negative impact on the development. It must be pointed out that while it may be easy to establish the necessary legal framework for the development of human rights the key its success or otherwise depends on the active role played by the Courts in the actualisation of these ideals and values. This requires judicial activism of the Courts in the interpretation and application of the various human rights provisions of the Constitution. The Nigerian Courts must take cognisance of the fact that issues of constitutional interpretations must be guided by the political ,social, economic and cultural considerations rather then a strict legalistic approach which appears to be their guiding principle. One can appreciate the fact that we have a British colonial heritage but that should never be used as a drawback. It is submitted that perhaps the rapid development of the American judicial and legal system could not be unconnected with the approach adopted in the sense of fashioning out a system which though was based on the English Common law but minus its rigidity.

Both the National Assembly and the Executive arm appears to be interested in reviewing the 1999 Constitution. They have established different committees to actualized these objectives. The Constitution Review Committee set up by the President had long commenced sittings and it is hoped that the exercise will in the final analysis be a worthwhile venture or will succeed. This is because of the Nigerian attitude of generating controversy on issues that are simplistic in nature e.g all these efforts did not seem to satisfy the Yorubas who

are still calling for the so-called Sovereign National Conference without telling us how we can go about it under the present democratic dispensation.

It is submitted that the Review Committee will address most, if not, all the amendments to the various provisions considered in different parts of this research. The Committee had gone round the country to collate and collect opinions ,recommendations and views from well meaning Nigerians, eminent scholars, labour leaders before proposing the amendments to the government. The major problem appears to be that the Constitution has nowhere provides for "review" but rather for an "amendment".Whether the review or amendments will be examine or passed in one swoop or that the process will be taken up in a piece meal process remained to be seen.

6.9 THE OPUTA COMMISSION ON HUMAN RIGHTS VIOLATIONS

Finally the Executive set up what is popularly referred to as the Oputa Panel or Commission and it will certainly be in order to briefly consider this panel and its mandate since its major assignment has to do with human rights.

The terms of reference merely requires the Panel to investigate the various and glaring cases of human rights violations of the past military regimes and identify whether they were the products of state policy or abuses by the officers who acted on behalf of the state. They were further required to make recommendations which in the opinion of the Commission is in the public interest necessitated by the evidence received. From the lacuna embedded in the terms of reference critics of the Commission wondered what it was set up in the first place to achieve especially if considered in the context that there is no guarantee that its recommendations would be implemented.

Secondly critics that to make the Commission effective in

the prevailing circumstances the decision of the Commission should have the status of a judgement which could be enforceable. Other criticism includes that the Commission of Human rights Violations should have been fashioned along the line of the South African Truth And Reconciliation Commission (TRC)in respect of the judgements and enforceability of decisions especially in terms of awarding damages, restitution and grant of amnesty.

Bogged down by the inability of the Commission to not only to bark but also to bite , the Chairman, Justice Oputa, had cause to lash at witnesses who appear before the Commission to tell lies. According to him, for true reconciliation to be achieved, witnesses should be honest enough to admit their fault and mistakes. But to appear before the Commission without remorse to tell it lies would instead of achieving reconciliation rather exercebate acrimony to as those who felt aggrieved would find it impossible to forgive.

In spite of its shortcomings the timing of the Commission's birth may have endeared Nigerians to it. At the time the Commission was born on June 14,1999 there was the need for it. After the vicious regime of General Sani Abacha, the Country was literary bleeding. The injury suffered by those who were brutalised and victimised was still fresh while the ghost of those who were killed still hunt the nation. For these reason there was the need to take a retrospective look.

In his pre public hearing address, the Chairman of the Commission explained that the commission had to go through over 10,000 petitions addressed to it by aggrieved Nigerians as a necessary preliminary step that would enhance its success. The Panel, according to him ,had to first of all determine the petition which fell within its brief and those which will go to other bodies with relevant jurisdiction.

Originally the Commission had only 90 days from the date of its first public sitting or within such extended period which may be authorised by the President to submit its reports. Due to certain logistics problems the Commission took 16 months before commencing its public sitting. The Commission would sit in five centers had already concluded sitting in Lagos and Port Hacourt.

From the Commission's proceedings in the two centers, it has become glaring that to make it effective and result oriented to achieve the necessary reconciliation its mandate has to be extended to at least make for payment of compensation. Several victims of human rights violations in these two centers have asked to be compensated .Late playwright Ken Saro-Wiwa's father refused to testify. Probably had the Commission made for compensation , he may have testify and forgive the killers of his son.

The South African Truth and Reconciliation Commission was able to achieve a lasting reconciliation partly because it compensated victims. After its conclusion of its public sitting the TRC asked parliament for $500 million(Five Hundred Million Dollars) to distribute among the estimated 20,000 victims and their relatives who suffered human rights abuses. The Oputa Commission can ,at least, ask for expansion of its mandate to empower it to compensate victims of human rights abuses in the country. But without empowering the Commission, it would remained a toothless bulldog and serve only as a drain to the country's resources.

SELECTED BIBLIOGRAPHY

(A) BOOKS

(1) Ian Browlie (ed.)(1971) Basic Documents on Human rights

(2) Fisher,S.G (1897) The Evolution Of the Constitution of the United States

(3) Burdict,C.K, (1922) The Law of the American Constitution: Its Origin and Development

(4) Andrews,C.M (1924)The Colonial Background of the American Revolution

(5) Furgusson, J.H(1953) American system of Government, McGraw Hill

(6) Ferrand,M (1940)The Framing Of the United States Constitution

(7) Beard,C.A (1913)An Economic Interpretation of the United States Constitution

(8) Elliot,J (1968)Debates in the Several States Convention on the Adoption of the Federal Constitution

(9) Holland(1937) Jurisprudence ,Oxford Univ. Press

(10)Kolakwoski,K(1983)Marxism and Human Rights

(11)Doment, L.(982)A Modern View of Our Origin: The Christian Begining of Modern Individualism

(12)Osita ,E(1988)Human Rights in Africa: Selected Essays

(16)Lord Denning (1979) The Idea of Law

(18)Will,K (1990)Contemporary Political Philosophy:An Introduction

(19)Ganji (1962)International Protection of Human Rights

(20)Ezejiofor (1964)Protectionof Human Rights Under the Law

(21)Odumosi,I.O(1963)Nigerian Constitution: History and Development

(23)Nwabueze,B.O(1974)Presidentialism in Commonwealth Africa, Sweet and Maxwell

(24)Nwabueze,B,O(1993)Ideas and Facts In Constitution Making, Spectrum

(24)Nwabueze,B.O (1982)Presidential Constitution Of Nigeria

(25)Nwabueze,B.O(1974)Constitutionalism in the Emergent States,

Sweet and maxwell
(26)Nwabueze,B.O(1962)A Constitutional History of Nigeria
(27)Nwabueze,B.O(1983)Federalism in Nigeria Under the Presidential Constitution, Sweet and Maxwell
(28)Nwabueze, B.O (1993)Military Rule and Social Justice in Nigeria, Specrum
(29)Mcllwain, C.H(ed.)Constitutionalism, Ancient and Modern
(30)Dicey,A.V (1885)An Introduction to the Study of the Law of the Constitution With Introduction by Wade,E.C.S
(31)Aguda,A.T(1986)The Crisis of Justice
Human Rights
(33)Chukkol,K.S(1988)The Law of Crimes in Nigeria
(34)Bryce,J.(1920)Modern Democracies
(35)Hayek,F.A(1944)The Road to Serfdom
(36)Neil Reimer et el(1986) Creating the American Constitution
(37)Wade et el(1982)Constitutional and Administrative Law

(B) JOURNALS

(1) Mac Intyre,A(1981)After Virtue, Notre Dame, Univ. of Notre Dame
(2)Kamenka,K(1978)The Anatomy of Arnold, Ideas and Ideologies in Human Rights
(3)Human Rights : Real and Supposed in Raphel(ed.)(1979) Practical Theory and the Right of Man
(4)Marx On Jewish Question in Tucker(ed.) The Marx-Engel Reader 24(1972)

PHAMPLETS

(1)Osibanjo,Y(1999)Economic,Social and Cultural Rights: Developing a Training Agenda for Nigeria,LRRDC,Lagos
(2)Oputa,J (1988)Human rights in the Political and Legal Culture of Nigeria