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Adjudicating Human Rights in Transitional Contexts: A Nigerian Case-Study, 1999-2009

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**Adjudicating Human Rights in Transitional Contexts:
A Nigerian Case-Study, 1999-2009**

Basil Emeka Ugochukwu

**A Dissertation submitted to the Faculty of Graduate Studies in Partial
Fulfillment of the Requirements for the Degree of
Doctor of Philosophy**

**Graduate Program in Law, Osgoode Hall Law School
York University, Toronto, Ontario**

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Abstract

While transitional justice and democracy literature bristles with the expectation that human rights conditions would improve with the progression from the “darkness” of a dictatorship to the “light” of democratic rule, Nigeria’s transition to civil rule in 1999 would seem to provide a sobering contra-reality. Democracy does not seem to have produced a better human rights environment in the post-transition Nigerian context. This dissertation answers the question why the restoration of civil rule in Nigeria has not translated to results in human rights practices that come close to matching the expectations of its citizens and the predictions of transitional justice literature? It investigates, however, only the extent to which human rights violations correlates with the lack of effective judicial protection of those rights between 1999 and 2009.

The methodology is mostly interdisciplinary. The discussion is organized around doctrinal legal reasoning and case-law analysis. First analyzed were cases decided prior to 1999 to show the slippery provenance and inadequacy of the current rights-based adjudication standards. Cases decided since 1999 were then evaluated to measure the claim that the judiciary is failing in its duty as guardians of human rights post-transition. To that extent, the dissertation has not limited itself to a single theoretical model.

It was found that some of the biggest problems afflicting human rights adjudication in Nigeria are historically defined. A major challenge is the apparent lack of a clear standard for reviewing laws and actions against the constitutional requirement that they be reasonably justifiable in a democratic society. This creates a culture where human

rights cases are approached on an *ad hoc* case-by-case basis such that contradictory decisions are possible from cases with similar facts. Dealing with this challenge is not helped by the country's legal history and the doctrines of the British legal system that a colonial relationship fostered after independence. The current approach is therefore still orientated towards British administrative law principles which did not demand the standard of intense scrutiny required for the effective protection of human rights norms. The dissertation therefore recommends a reformed system of legal education with strong comparative approaches to change this orientation.

Dedication

To the Memory of my father
SYLVANUS UWAIKE UGOCHUKWU
Who had very little education himself, yet recognized its capacity to liberate

And

To the Memory of
PA JOB OKORIE NWAJIUBA
For an hour of blessings and a classic suit jacket.

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My gratitude extends to Mrs. Yemisi Dina, my Osgoode Hall Law School reference Librarian who ensured that the resources I needed to do my work were readily available. I started the doctoral program at a time of significant physical re-structuring at the Law School. The library had been moved to a different location and most of the book collections were in deep, deep storage. Regardless, Mrs. Dina worked ever so hard to provide all the materials I needed. As well, in the course of my program, I had the good fortune of studying under some of Osgoode’s most outstanding scholars. Many thanks to Professors Allan Hutchinson, Shelley Gavigan and Peer Zumbansen for their mentorship and helpful encouragement along the way.

I shared significant portions of this dissertation (while work on it progressed) at a variety of academic forums. I am grateful to the Osgoode administration for sponsoring me to two sessions of the AGORA Doctoral Workshops of the Association of Transnational Law Schools (ATLAS). I had my first experience in the summer of 2010 at the New York University Law School and received very helpful feedback from colleagues and friends, including Tawanda Mutasah, Sujith Xavier, Karen Loevy, Nerit Ferencz, Guy Sinclair, Jose Ramon Canedo, Magda Karagiannakis, Naiara Arriola, Jaclyn Neo, Paula Angulo and Nourit Zimmerman. I also attended the 2012 forum at the Bar Ilan University Law School in Tel Aviv. Lisa Kerr, Jonathan Kolieb, Sirius Kashefi, Nicholas Leger-Riopel, Yaniv Rosnai, Orly Stern and Professor Itay Bar-Siman Tov were also very generous with their comments and suggestions. I am grateful as well to peers at Yale Law School for inviting me to participate in their 2012 Doctoral Scholarship Conference and to Radidja Nemar, Yoon Jin Shin, Mohsin Alam, Ryan Thoreson, and Joanna Noronha for warmly receiving and commenting on my presentation.

I made many friends at Osgoode whose encouragement and support I needed from time to time to scale the pain threshold. I owe them a great debt of gratitude for being ever so kind and holding me close to their hearts. You know yourselves. However, I must mention past and current fellows at the Osgoode Critical Research Laboratory in Law and Society and fellow doctoral students with whom I shared many stimulating academic engagements especially in the Emerging Scholars and Graduate Work-in-Progress Workshops. This is for you Sujith Xavier, Igor Gontcharov, Colleen Matthews, Sheila Jennings, Ruba Ali Al-Hassani, Vanisha Sukdeo, Marsha Cardogan, Natasha MacLeod,

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Thanks for your friendship and all the wonderful times together Ifeanyi & Chizo Okorie, Mike Habicher and Michelle Kisluk, Iloh & Nkeiru Nzekwe-Akubuo, Professor Ikechi Mgbeoji, Stella Igwenazor and Martin & Nkem Ezeudu. Sir Jonah Nwajiuba, please accept a heartfelt gratitude for starting me off on a strong footing and Professor Chinedum Nwajiuba for giving me belief. I am indebted to my wife, Nkechi for the sacrifices she had to make and to my kids – Justice, Chimdiya and Chizaram – for making home sweet and rough in equal measure. I thank my mother Cecilia, brothers Joseph, Chikaodi, and Onyekachi and sisters Grace and Chinyere for their prayers. I cannot possibly forget the Canadian people whose taxes meant that I could concentrate on reaching for my dreams.

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Chapter One

Constructing the Democratic Transition and the Human Rights Adjudication Problematique

1.1 Introduction

It is reasonable and intuitive, within a liberal normative and institutional framework, to expect that human rights conditions would improve when a country makes the transition from authoritarian government to democratic rule. There are substantial hints, for example, that transitional regimes,¹ in contrast to their autocratic and abusive predecessors, are much more committed to human rights, democracy and the rule of law.² It has further been contended that “just after a successful revolution every member of the society and citizens feel that they deserve their goals for which they fought.”³

In the Nigerian context, as the struggles of the people made clear and as symbolized by the blood of those who died in the process, one of the obvious goals for which its people fought, was for the restoration of human rights (including civil, political, economic and social rights) previously repressed by military decrees.⁴ But the goal has

¹ See Guillermo O’Donnell, Philip Schmitter & Laurence Whitehead, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986) at 6 (describing transition as “the interval between one political regime and another.”). See also Christine Bell & Johanna Keenan, “Human Rights Nongovernmental Organizations and Problems of Transition” (2004) 26 Hum Rts Q 330 at 331 (arguing that in transitions “The new arrangements for holding power in some cases are aimed at moving from a failed state or an undemocratic state to coherent and accountable political structures.”); Elin Skaar, *Human Rights Violations and the Paradox of Democratic Transition: A Study of Chile and Argentina* (Bergen: Chr. Michelsens Institute, 1994) at 10 (stating: “Maximalists and minimalists alike agree that the form or mode of transition will have an impact on the resulting type of democracy. Although the outcome of transition may in principle be any kind of political regime, we are primarily concerned with the transition process from an authoritarian regime to a democratic regime.”). It is in Skaar’s sense in particular that the term “transition” will be used in this study.

² David Gray, “An Excuse-centered Approach to Transitional Justice” (2006) 74 Fordham L Rev 2621.

³ Apurba Khatiwada, “Constitutionalism of Transition” (2008) 1 Kathmandu L Rev 41 at 45.

⁴ See Philip C Aka, “Nigeria Since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations under President Olusegun Obasanjo” (2003) 4 San Diego Int’l L J 209 at 211 (stating that “because army rule between 1983 and 1999 was characterized by massive human rights violations, the return to civil rule left renewed hope for improved human rights”).

arguably not been optimally realized in the country which restored civil rule in 1999 after many years of military dictatorship but which has not shown as much progress as might be expected in positively altering its human rights standing.

Evidence from several local and international reports on the human rights situation in Nigeria indicate continuing human rights violations under a democratic constitution in which human rights guarantees (contained in the Constitution itself and international agreements that Nigeria signed into) are prominently prioritized, at least on paper. Nigeria is a large country with a large economy and massive developmental obstacles. These challenges were exacerbated by military dictatorship up to the 1999 transition. Like most similarly situated countries, it grapples with questions about the human rights practices of its government and especially its internal security forces. What separates these challenged and transitioning countries from more stable ones is therefore the prevalence of human rights violations and the unlikelihood that those responsible could be held accountable. In Nigeria's case, therefore, while it is true to say that those accused of human rights violations are taken to justice on some occasions, this happens rather sporadically in a non-institutionalized fashion and often only after public protests and pressure. Thus, in its report for 2010 on the state of human rights around the world, Human Rights Watch (HRW) stated in the section on Nigeria that:

More than halfway through his term of office, President Umaru Yar'Adua and his administration have done little to improve Nigeria's poor human rights record. Bloody sectarian clashes claimed hundreds of lives in late 2008 and 2009, while the government failed to investigate, much less hold accountable members of the security forces implicated in numerous incidents of extrajudicial killings, torture, and extortion.⁵

⁵ Human Rights Watch, *World Report 2010: Events of 2009* (Human Rights Watch, 2010) at 142; See also United State Bureau of Democracy, Human Rights and Labor, *Nigeria: Country Reports on Human Rights Practices, 2003* online: <<http://www.state.gov/g/drl/rls/hrrpt/2003/27743.htm>> (“The Government's human rights record remained poor, and the Government continued to commit serious abuses. Elections held during the year were not generally judged free and fair and therefore abridged citizens' right to change their government. Security forces committed extrajudicial killings and used excessive force to apprehend criminal suspects, and to quell some protests. There were several politically-motivated killings by unknown persons during the year. Security forces regularly beat protesters, criminal suspects, detainees, and

The main question in this research is: why has the restoration of civil rule in Nigeria not translated to results in human rights practices that come close to meeting the expectations of its citizens and the predictions of transitional justice literature? In 2000, a survey covering Nigeria's six informal geopolitical regions and 22 of the country's 36 states was conducted. In the report issued thereafter an overwhelming 80.9 percent of the respondents stated that democracy is preferable to any other system of government. When asked to state their understanding of democracy, "nearly two-thirds of respondents offered definitions that emphasized political freedoms and procedures, including 'government by the people.'"⁶ I will examine an aspect of the above question by investigating the degree to which human rights violations in Nigeria correlate with the lack of effective judicial protection of those rights. My focus is however restricted to the

convicted prisoners; however, there were fewer reported incidents of torture by security agents than in previous years. Impunity was a problem. Shari'a courts sentenced persons to harsh punishments including amputations and death by stoning; however, no amputation or stoning sentences were carried out, and one of the judgments was dismissed on appeal during the year. Prison conditions were harsh and life-threatening, and those conditions contributed to the death of numerous inmates. Security forces continued to arbitrarily arrest and detain persons, including for political reasons. Prolonged pretrial detention remained a serious problem. The judicial system often was incapable of providing criminal suspects with speedy and fair trials. Government authorities occasionally infringed on citizens' privacy rights. The Government at times limited freedom of speech and press. The Government continued placing limits on freedom of assembly and association, citing security concerns. Some state governments placed limits on some religious rights, and some government programs discriminated between religious groups. The Government occasionally restricted freedom of movement for security reasons in areas of unrest and used lethal force at checkpoints."); the report for 2008 did not indicate any positive changes as the Bureau noted that "The government's human rights record remained poor, and government officials at all levels continued to commit serious abuses. The most significant human rights problems included the abridgement of citizens' right to change their government; extrajudicial killings by security forces; the use of lethal and excessive force by security forces; vigilante killings; impunity for abuses by security forces; torture, rape, and other cruel, inhuman or degrading treatment of prisoners, detainees, and criminal suspects; harsh and life-threatening prison and detention center conditions; arbitrary arrest and prolonged pretrial detention; executive influence on the judiciary and judicial corruption; infringement on privacy rights; restrictions on freedom of speech, press, assembly, religion, and movement; domestic violence and discrimination against women; female genital mutilation (FGM); child abuse and child sexual exploitation; societal violence; ethnic, regional, and religious discrimination; trafficking in persons for the purpose of prostitution and forced labor; and child labor." Online: <<http://www.state.gov/g/drl/rls/hrrpt/2008/af/119018.htm>>.

⁶ Peter Lewis & Michael Bratton, "Attitudes to Democracy and Markets in Nigeria" (Michigan State University, Working Papers on Political Reform in Africa, Afrobarometer Paper 3, 2000) at 5-6.

ten-year time period commencing from 1999 when civil rule was restored and ending in 2009.

I am persuaded that this time period is sufficient for the civilian regime to have dealt with major transitional justice issues as well as given a satisfactory indication of its inclination towards sound human rights practices. The time period fits into certain estimates as well, particularly Backer's. He believes that "transitional justice issues in postconflict settings often entail processes that will and should unfold over an extended period of time – a decade, if not considerably longer."⁷ He states further that "In many cases, measures are implemented piecemeal or progressively in stages. In others, initial steps are limited, halted or even reversed, but are occasionally revisited at a later time..."⁸

By choosing to focus attention on the judiciary, I am merely underscoring that institution's role as a major forum for the delivery of remedies for human rights violations. By no means will I argue that a lack of effective judicial remedies or what seems to be the failure of the courts to hold human rights violators to account is the only reason that democracy is yet to meet the expectation that crime suspects will not be tortured in detention, that they will not be coerced to pay to be admitted to bail, that those charged would be granted expeditious trial and that citizens would not be repressed for holding political views or expressing them. Instead my contention is that while there may be many factors accounting for the apparent limited realization of the dreams of improved human rights practices in a democratic Nigeria, it pays to focus on the judiciary which is a major institution charged by the constitution with reversing this trend.

In conducting this investigation, I will pursue two related lines of inquiry. First, I will discuss substantive legal, adjudicatory and procedural practices which hinder the

⁷ David Backer, "Watching the Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa" (2010) 4 Int'l J Transitional Just 443 at 444.

⁸ *Ibid.*

courts from effectively protecting human rights notwithstanding clear constitutional provisions guaranteeing those rights. Secondly, I will relate the shortcomings demonstrated through the first line of inquiry to the politics of human rights and judging, and as well the socio-political context in a pluralist society like Nigeria.

While not arguing, as I earlier indicated, that lack of effective judicial protection is the only reason human rights violations remain relatively endemic in Nigeria, I will identify it as a major contributing factor. Nor do I assert that the human rights situation has been identical under civil rule as under the military. Compared to the many years that the military dominated the political landscape, some changes indeed have taken place. The claim here is that those changes have been marginal and have not significantly addressed the more systemic and institutionalized manifestations of human rights abuse. To a large extent, this study covers conditions specific to Nigeria that may have undermined the capacity of the courts to effectively redress human rights violations. My discussion covers as well, but only to a limited extent, the distortion brought by military involvement in the politics of the country, which had only negative effects on human rights and the institutional standing of the courts.⁹

Beneath the main thesis question mentioned above, the following sub-questions have been addressed as well:

- What informs the manner in which the courts approach the resolution of human rights cases in Nigeria? What do the courts actually do as opposed to what they claim to do in treating those cases? In addressing these questions, I emphasize more the textual, legal justifications for judicial decisions (i.e. written judgments

⁹ Abiola Ojo, “The Search for a Grundnorm in Nigeria – The Lakanmi Case” (1971) 20 Int’l & Comp L Q 117; Akinola Aguda & Oluwadare Aguda, “Judicial Protection of some Fundamental Rights in Nigeria and in the Sudan before and during Military Rule” (1972) 16 J Afr L 130; Okechukwu Oko, “Confronting Transgressions of Prior Military Regimes towards a more Pragmatic Approach” (2003-2004) 11 Cardozo J Int’l & Comp L 89.

in law reports). To a lesser degree I will underscore through an analysis of secondary materials some external influences not immediately accessible to the reader from text but which nonetheless provide essential context for understanding the reasoning in human rights cases.

- Is the performance of Nigerian courts reflective of their colonial origins? Are they hampered because of their strong British colonial roots marked by parliamentary sovereignty coupled with high deference to legislative authority? If so, does this orientation not diverge from the opposite doctrine requiring both justification of human rights restrictions as well as a broader understanding of judicial responsibility in limiting governmental, and in particular, legislative as well as executive power?¹⁰
- Have Nigerian appellate courts adopted an analytical standard or standards for reviewing human rights cases comparable to those in other constitutional jurisdictions? If a standard is in place, how consistently is it applied in actual litigation? If there is no standard, what might be the reason for this?
- Are the courts hampered because they have to choose among several human rights norms, some of them being domestic, (state versus federal), others regional, and yet others international? Though the Supreme Court has apparently

¹⁰ Hakeem Yusuf, “The Judiciary and Political Change in Africa: Developing Transitional Jurisprudence in Nigeria” (2009) 7 Int’l J Const L 654 at 664 (stating: “The minimalist interpretative approach of the Court is rooted in its history. The attitude from which it has rarely departed is that it is beyond the purview of the judiciary to embark on wholesale striking down of legislation. The Nigerian legal and judicial system, though a hybrid of customary, Islamic, and common law, is in its operation and outlook essentially dominated by its colonial heritage of the British legal system”).

established a hierarchy of legal norms,¹¹ controversies persist over whether the court took the best possible path in Nigeria's peculiar context.¹²

In the subsequent sections of this chapter, I examine the overall context of the research by way of secondary literature review. I start by discussing how past human rights practices, particularly under a dictatorial dispensation could impact human rights adjudication during a transition from that period. I also look at the peculiar challenges that courts face during transitions and how they might respond to those challenges. Further down the road I look at the triangulation of transitional democracy, law and human rights. After briefly stating the conception of human rights that animates my research, I will analyze the significance of law and the legal strategy as a method for the protection of human rights. In addition, I look at the factors that could trigger human rights abuses both historically and in contemporary times. As importantly, I will explain the role that courts perform in human rights cases and the obsession which the controversy over this role has unleashed on the legal academy. Even so, I will also discuss the practical manner in which courts in different jurisdictions carry out this function of reviewing human rights cases. Following this, I will make recommendations towards redressing shortcomings in the current practice of human rights adjudication in Nigeria.

1.2 Human Rights: Tracking from the Past to the Present

Between 1983 and 1999 Nigeria was ruled by military regimes. That period was largely characterized by rampant repression and abuse of human rights.¹³ The military tortured

¹¹ See the Supreme Court decision in *Registered Trustees of National Association of Community Health Practitioners of Nigeria & Others v Medical and Health Workers Union of Nigeria*, [2008] 2 NWLR (Pt 1072) 575 [Ng Sup Ct].

¹² AO Enabulele, "Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?" (2009) 17 Afr J Int'l & Comp L 326.

¹³ See for example Clement Nwankwo, Basil Ugochukwu & Dulue Mbachu, *Human Rights Practices in the Nigerian Police*, (Lagos: Constitutional Rights Project, 1994) (A publication of which discusses how police practices endangered human rights in Nigeria); Also Josephine Effah, *Modernised Slavery: Child Trade in Nigeria* (Lagos: Constitutional Rights Project, 1996) (discussing trafficking in children); Osaro Odemwingie, *A Harvest of Blooms* (Lagos: Media Rights Agenda, 2000) (reporting human rights atrocities against the media in Nigeria in 1999); Chukwuemeka Gahia, *Human Rights In Retreat: A Report Of Human Rights Violations Of The Military Regime Of General Ibrahim Babangida* (Lagos: Civil Liberties

its opponents, took political prisoners, and in some extreme cases carried out massive extra-judicial killings. The impunity of that period provided incentive for the police and other internal security forces to routinely violate the civil and political rights of the citizens.¹⁴ The pre-trial rights of prison detainees, for example, deteriorated throughout this period.¹⁵ Many of the remand prisoners could not be promptly put to trial and often stayed in detention awaiting trial for far longer than would have been warranted were they convicted of the offences alleged.¹⁶

The constitution was for the most part suspended under military decrees which generally prohibited the courts from questioning their implementation by means of several oppressive ouster provisions.¹⁷ Much as the courts toiled to bring the military under the rule of law, they did not achieve much in this regard. In fact their ambivalence

Organization, 1992) (a publication chronicling human rights violations committed by the military regime headed by Babangida from 1985 to 1992). Also Civil Liberties Organization, *Annual Report on Human Rights in Nigeria* (1990 – 1996) (Yearly reports of violations of various human rights in the country); Other human rights organizations had similar reports. See for example Committee for the Defence of Human Rights, *1997 Annual Report On The Human Rights Situation In Nigeria* (1998).

¹⁴ Obiora Chinedu Okafor, “Modest Harvests: On the Significant (but limited) Impact of Human Rights NGOs on Legislative and Executive Behaviour in Nigeria” (2004) 48 J Afr L 23 at 27; Basil Ugochukwu, “The State Security Service and Human Rights in Nigeria” (1996 - 1997) *Third World Legal Stud.* 71; Philip C Aka, “Prospects for Igbo Human Rights in Nigeria in the New Century” (2004 – 2005) 48 *Howard L J* 165; Tunde I Ogowewo, “Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria’s Democracy” (2000) 44 J Afr L 135; Julius Ihonvbere, “Where is the Third Wave? A Critical Evaluation of Africa’s Non-Transition to Democracy” (1996) 43 *Africa Today* 343.

¹⁵ It is a notorious fact that at least the rights of prisoners in Nigeria to satisfactory health conditions are often put to great risk by the very fact of incarceration. See for example M. A. Lawal, *et al* “Tuberculosis in a Nigerian Medium Security Prison” (2009) 11 *Benin J Postgraduate Medicine* 1. See also “Mission to Nigeria” UN Commission on Human Rights, 62nd Sess Item 11(b) of the provisional agenda, UN Doc./E/CN.4/2006/53/Add.4 (2006) at 17; Osaze Lanre Ehonwa, *Behind the Wall: A Report on Prison Conditions in Nigeria and the Nigerian Prison System* (Lagos: Civil Liberties Organization, 1996); Chukwuma Innocent, “The Legal Structure of the Police and Human Rights in Nigeria” (1996-1997) *Third World Legal Stud* 41 at 49.

¹⁶ For instance though the total capacity of Nigeria’s 148 prisons is 25, 000 inmates, they often hold far more than this number. The overall prison population was at one time put at 48, 899 of which 25, 579 or 52.3 per cent were awaiting trial. See Mark Eze & Emeka E Okafor, “The Prison as an Instrument of Social Reformation and Rehabilitation: A Study of Nigerian Prisons (Medium) Kiri-kiri, Lagos” (2007) 4 *Pakistan J Soc Sci* 23 at 25.

¹⁷ Okechukwu Oko, “Lawyers in Chains: Restrictions on Human Rights Advocacy under Nigeria’s Military Regimes” (1997) 10 *Harv Hum Rts J* 257. For a list and discussion of those decrees see Niki Tobi, “Development of Constitutional Law and Military Regimes in Nigeria” in Emmanuel G Bello & Bola A Ajibola, eds., *1 Essays in Honour of Judge Taslim Olawale Elias* (Dordrecht: Martinus Nijhoff, 1992) 673.

in upholding the rights of individuals during military rule was noted.¹⁸ On the one hand, in the case of *Nwosu v. Imo State Environmental Sanitation Authority*,¹⁹ a judge of the Nigerian Supreme Court advised victims of human rights violations to look elsewhere other than the courts for redress. According to Justice Modibbo Alfa Belgore regarding court litigation to redress human rights violations under the military “legal practice will attract more confidence if administrative avenues are pursued rather than journey of discovery [sic] inherent in court action in such matters.”²⁰

Yet on the other hand there were cases like *Barclays Bank of Nigeria Limited v Central Bank of Nigeria*,²¹ where the court appeared to guard its power to intervene on behalf of the victims of human rights violations notwithstanding any law purporting to oust that jurisdiction. In this case, the Supreme Court held that when a law seeks to deny a person’s right to access the courts, its language would be watched to ensure it does not extend beyond its onerous meaning. In other words, that law would have to be construed strictly.

It was therefore generally anticipated that a return to civil, constitutional rule would limit human rights violations. This has not quite happened even though the country has practiced civil rule for over ten years now.²² Instead, the civilian regimes continue to use in most cases the same style used by the military used while in power. For example, the repressive tactics of a supposedly democratic government seeking to crush or diffuse mass action led by the labor movement in Nigeria between 1999 and 2007 has also been

¹⁸ Hakeem Yusuf, “The Judiciary and Constitutionalism in Transitions: A Critique” (2007) 7 *Global Jurist* (Advances, Art. 4) at 11.

¹⁹ [1990] 2 NWLR (Pt 135) 688 [Ng Sup Ct].

²⁰ *Ibid.* See also Chinonye Obiagwu & Chidi Anselm Odinkalu, “Nigeria: Combating the Legacies of Colonialism and Militarism” in Abdullahi An-Na’im ed., *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2003).

²¹ [1976] 6 Sup Ct 177.

²² Human Rights Watch, “*World Report 2009: Events of 2008* (Human Rights Watch, 2009) at 93; Akeem Akinwale, “Repression of Press Freedom in Nigerian Democratic Dispensations” (2010) 35 *Afr Dev* 47.

well documented in the literature.²³ The government has in addition been implicated in the denial of the right to life,²⁴ and several other constitutionally guaranteed rights. According to the International Commission of Jurists:²⁵

[n]otwithstanding the return to democratic rule since 2002 civil freedoms have remained in a mixed and contrasting state of enjoyment. While the atmosphere is certainly freer [some would say much freer] than under the military rule on the exercise of some civil rights, repression and other forms of human rights violations continue to take place.²⁶

The relationship of democratic transition, the protection of human rights, and the role of the courts in this regard, is particularly salient. Transitions and the clamor for democracy often happen against the background of repression. In many instances the social mobilization needed to stop and remove autocracy is met with equal resolve to remain in power, causing it to apply even more repression. Therefore, the social call for democracy is entwined with the goals of the human rights movement - the latter being only a naïve hope until the former is realized. While Petman sees “the struggle for human rights [as] part of a grander fight for progressive causes,”²⁷ Mutua submits that “A political democracy built on the protection of the liberal constitution is the best guarantee for the enjoyment of a wide gamut of human rights.”²⁸ Upon completion of a transitory cycle, an improvement should occur between the practices of the old order and the promises of the

²³ Obiora Chinedu Okafor, “Remarkable Returns: The Influence of a Labor – led Socio-Economic Rights Movement on Legislative Reasoning, Process and Action in Nigeria, 1999 – 2007” (2009) 47 J Modern Afr Stud 241 at 263.

²⁴ Reference is often made to the towns of Odi in Bayelsa state and Zaki-Biam in Benue state where armed troops opened fire on defenseless civilians, killing them in their hundreds, and in which Odi in particular was flattened with every single house demolished from the foundation or set on fire. See Aka, *supra* note 4 at 253-254.

²⁵ International Commission of Jurists, ICJ Report *Attacks on Justice: Federal Republic of Nigeria* online: International Commission of Jurists <<http://www.icj.org/IMG/NIGERIA.pdf>>.

²⁶ *Ibid* at 2.

²⁷ Jarna Petman, “Human Rights, Democracy and the Left” (2006) 2 Unbound 63.

²⁸ Makau Mutua, “The Iraq Paradox: Minority and Group Rights in a Viable Constitution” (2006) 54 Buffalo L Rev 927 at 940.

new one. This is so for the simple reason that democracy is assumed to be more facilitative of a satisfactory human rights regime than under any other political form.²⁹

Yet, Aidoo cautions against the uncritical assumption that democracy necessarily guarantees human rights protection directly or substantially. He says that while the process of democratization could provide an environment conducive to the realization of human rights, it would by no means guarantee it. Though his claim may be over-generalized, Aidoo offers Africa as an example where “human rights are routinely and systematically violated”³⁰ and in which “whether a country is democratic [or not] does not make a significant difference.”³¹ Secondly, he argues that to accept that democracy immediately leads to favourable human rights conditions has implications for the human rights movement at the national level. He asserts that “[t]he idea that human rights would be almost automatically guaranteed if there is democracy logically leads to a conceptual devaluation of the cardinal importance of human rights organizations under democratic conditions.”³²

Aidoo’s claims are cogent and persuasive at some level. But they are not properly contextualized. For one, he does not clarify his understanding of a “democratic” government. It is well known that democracy appeals to all ideological leanings, even to those who would misappropriate this appeal to non-democratic ends. There are at once “strong” democracies and “weak” ones.³³ According to Fareed Zakaria, half of the “democratizing” countries in the world are illiberal democracies.³⁴ He uses “illiberal” in contrast to “liberal” which he describes as “a political system marked not only by free

²⁹ Joseph K. Young, “State Capacity, Democracy, and the Violation of Personal Integrity Rights” (2009) 8 J Hum Rts 283 at 284 (contending that “Democracy is asserted to be one of the most important structural factors that reduce human rights violations. Most quantitative studies find a strong association between democracy and respect for human rights.”)

³⁰ Akwasi Aidoo, “Africa: Democracy without Human Rights” (1993) 15 Hum Rts Q 703 at 707.

³¹ *Ibid.*

³² *Ibid.*

³³ See Allan Hutchinson, “A ‘Hard Core’ Case Against Judicial Review” (2008) 121 Harv L Rev F 57.

³⁴ Fareed Zakaria, “The Rise of Illiberal Democracy” (1997) 76 Foreign Affairs 22 at 24.

and fair elections, but also by the rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion, and property.”³⁵

Therefore, while Aidoo’s claims would fit more properly into democracies that could be described as illiberal, marked out only by formal and functional attributes of that system of government (like routine elections whether or not they are free and fair), they may not fit democracies of the more liberal and, therefore, substantial category. In making this claim, however, I am mindful that many so-called liberal democracies have been shown to tolerate various human rights violations especially of those living in poverty or belonging to other marginalized social categories.³⁶ It would be more useful therefore to discuss degrees and the availability of recourse mechanisms than whether or not abuses are present in the first place.

It is also valuable to stress that the way a regime more specifically or a state more generally treats human rights is usually contingent upon its understanding and/or perception of democracy. This is the view of Louis Henkin who also states that different histories can give two countries different perceptions of rights, democracy and the relation between them.³⁷ He uses the experiences of France and the United States to demonstrate the distinct ways in which the two countries received both rights and democracy into their systems after the Second World War. According to him:

France came into the post-War period without a living tradition of constitutional rights, but with a living tradition – rudely interrupted – of political rights and of rights-through-law. Rights were realized *through* [his emphasis] democracy; freedom was by law, not from law. Rights were granted and protected by a democratic parliament, and even today Parliament continues to be the principal source and basis of rights in France. Law was not a limitation on freedom but the articulation and

³⁵ *Ibid* at 22.

³⁶ See for example with regard to Canada, Bruce Porter, “Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights” (2000) 15 *JL & Soc Pol’y* 117; for the United States see John T Cook & Deborah Frank, “Food Security, Poverty, and Human Development in the United States” (2008) 1136 *Annals New York Academy Sci* 193.

³⁷ Louis Henkin, “Revolutions and Constitutions” (1988-1989) 49 *La L Rev* 1023 at 1051.

safeguard of freedom. In the United States, rights came first, government later; rights came first, democracy later. Democracy came through the idea of rights, and rights limited democracy: ‘Congress shall make no law.’³⁸

1.3. On a Jet-Plane: Courts in Transition

For the purposes of this study, there is great value in understanding the relationship that exists among: the transition from dictatorship (which was the case with Nigeria), the promise of democracy and human rights, and the role of the courts. Establishing this relationship would perhaps provide an appropriate response to Ruti Teitel’s terse but profound query: “What, if any, is the relation between a state’s response to a repressive past and its prospects for creating a liberal order?”³⁹ In Nigeria’s case, as I have already noted, the repressive past belonged to the military while the liberal order is the civil governance now in place. For this study, Teitel’s question cannot but be apt in the sense that, as is the case in Nigeria, the same courts which tended to serve the needs of the old dictatorial regime are looked upon to support the liberalism promised by the new democratic order. It is not impossible therefore, for the courts to be in the same dilemma as the other branches of government, and even the larger public, about how to discharge this role. Dyzenhaus, reflecting on courts’ role in promoting justice in a context of historical and present injustice, broadened Teitel’s concerns when he asked:

How does a society produce a stable and just political order out of a state of instability and injustice? Is it better for a society composed of groups which have done terrible things to each other in the past to confront as fully as possible past atrocities or to suppress the memory of the atrocities and get on with the job of living together? If the past is confronted, should

³⁸ *Ibid.*

³⁹ Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation” (1996-1997) 106 *Yale L J* 2009 at 2011; Jeremy Sarkin, “The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the *Gacaca* Courts in Dealing with Genocide” (2001) 45 *J Afr L* 143 at 144 (asserting that “knowing about the abuses of the past and acknowledging them seems to be the crucial issue in a transitional process. Ignoring history leads to collective amnesia, which is not only unhealthy for the body politic, but is essentially an illusion – an unresolved past will inevitably return to haunt the citizens.”). See generally Diane F Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” (1990-1991) 100 *Yale L J* 2537.

the confrontation be a formal one in the court room or are other means of confrontation more effective?⁴⁰

An important question that arises in the aftermath of any political transition is whether judicial systems which may have served dictatorial causes in the past are suitable centres for the new role of giving a traumatized society a fresh liberal beginning. It is ostensibly in this sense that Dyzenhaus perceives “curious, perhaps even paradoxical”⁴¹ problems for judges in transitions. He therefore identifies three factors which complicate the task of judges in achieving the independence upon which rests their authority in transitional situations.

First, it is likely that many of the judges will be those who served the old regime and so are thought to be deeply compromised from the start.⁴² Second, many of the newly appointed judges are likely to be appointed for the same reason that qualifies the new political leaders which is their record of opposition as “political” and “human rights” lawyers.⁴³ Third, judges in a transition are often faced with deciding deeply political matters, which force the issue of their authority and their independence to the surface. This might arise from the usual efforts to use the law to deal with past wrongs. It may also involve judges interpreting new constitutions. “They will do this in a society unaccustomed to a culture of constitutional judicial review; so that they might have to consider striking down as invalid a statute of the very popular new regime.”⁴⁴

But while Dyzenhaus appears to sympathize with courts that have found themselves in this difficulty, Yusuf thinks that to earn the legitimacy they would need to

⁴⁰ David Dyzenhaus, “Judicial Independence, Transitional Justice and the Rule of Law” (2001-2004) 10 *Otago L Rev* 345 at 345-346.

⁴¹ *Ibid* at 347.

⁴² *Ibid*. See also Gray, *supra* note 2 at 2626 (arguing: “Transitions also must face the reality that many of those who could carry out criminal trials are tainted by the past. If these officials are forced to step down there are even fewer prosecutors, *judges*, [my emphasis] clerks, jailers, investigators, and defense attorneys available to conduct prosecutions. But if tainted officials are left in place transitions must be concerned that former agents of abuse cannot be relied upon to blame their cohorts, much less themselves.”)

⁴³ *Ibid*.

⁴⁴ *Ibid*.

overcome the challenges of transition, courts and judges need to come clean with their own past as well. He urges that the same accountability procedures applied to the other branches of the past autocratic regime be extended to the judges who functioned under them.⁴⁵ Yusuf disclaims the assumed “self-limiting factor” of the judiciary [that courts do not initiate the process for the exercise of their powers].⁴⁶ Rather than seeing the judiciary either as an insignificant player in the previous dictatorship or as another victim of the past repression (which is very true of the Nigerian situation), Yusuf says judicial decisions have impact well beyond the parties involved in litigation.⁴⁷

Court judgments, he continues, affect the wider society and “in some cases dictate outright the course of political, cultural, and economic development.”⁴⁸ In this manner, he contends, the judiciary shares in the burdens of governance, the nature of this role constituting it as a major element of the machinery of the state as well as a participant in political decision-making.⁴⁹ If this thesis is accepted, it means that the judiciary cannot then escape scrutiny in a transition by simply claiming not to have participated in decisions taken during the repressive period.

In addition to the above, Yusuf offers an even more compelling reason why the courts should account for their performances throughout an authoritarian period. He asks: why do military usurpers sack the executive and legislature but leave the judiciary intact? First, he says, the courts are crucial to legitimizing the regime of the usurpers. Tayyab supports this theory as well. Like Yusuf he states that “[u]surpers appear to recognize that

⁴⁵Hakeem Yusuf, “Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria” (2008) 30 Law & Pol’y 194 at 198.

⁴⁶*Ibid* at 195.

⁴⁷*Ibid* at 196.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*. See also Lee Epstein, Jack Knight & Olga Shvetsova, “The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government” (2001) 35 Law & Soc’y Rev 117 at 119. These authors noted that some comparativists had persistently neglected the role of courts in governance, perhaps reflecting “a belief that judiciaries are separate from or ‘above’ ordinary political processes and, as such, must be studied as independent entities.” Yet they contended that all “explanations of politics are incomplete unless they incorporate courts”.

judicial pronouncements about the nature and merits of the change and quantum of their legislative capacity have an impact on the legitimacy of the new regime... securing judicial recognition [therefore] appears to be the key to gaining political legitimacy.”⁵⁰ And second, because the military does not possess the skills required to administer the judicial function, there is doubtless incentive to retain that institution in governance during a dictatorship.

Without doubt, the judiciary bears an unusually critical responsibility in transitional situations especially where the old order from which the society is transiting was characterized by severe human rights abuses. This duty exists whether or not the new regime decides to take institutional steps to address those prior abuses.⁵¹ The judiciary could still find itself called upon to examine those past abuses as the victims seek to obtain redress under a newer, more liberal environment. How the courts respond to these demands would go a long way in establishing or disproving the liberal credentials of the new order. Jennifer Widner identifies one such response as what she calls a “signaling” technique. Through it, judges in transitions demonstrate “their receptiveness to new kinds of cases or new lines of argument in their decisions.”⁵² Where human rights atrocities had

⁵⁰ Mahmud Tayyab, “Jurisprudence of a Successful Treason: Coup *d’etat* & Common Law” (1994) 27 Cornell Int’l L J 49 at 103-104.

⁵¹ One such way has been the establishment of Truth Commissions. See Kieran Mcevoy & Lorna McGregor, “Transitional Justice from Below: An Agenda for Research, Policy and Praxis” in Kieran McEvoy & Lorna McGregor eds., *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford & Portland, Oregon: Hart Publishing, 2008) at 2; Paul van Zyl, “Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission” (1999) 52 J Int’l Affairs 647; Ruti Teitel, “Transitional Justice Genealogy” (2003) 16 Harv Hum Rts J 69 at 78; Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court” (2003) 14 Eur J Int’l L 481; J. Shola Omotola, “Democratization, Good Governance and Development in Africa: The Nigerian Experience” (2007) 9 J Sustainable Dev Afr. 247 at 260. Another way of dealing with past human rights abuses under a new regime is through the process of “lustration” popularized in Central Europe following the demise of Communism. It refers to “the screening (or vetting) of candidates for holders of important public offices to eliminate (usually bar for a certain period) former secret police collaborators.” See Maria Los, “Lustration and Truth Claims: Unfinished Revolutions in Central Europe” (1995) 20 Law & Soc Inquiry 117 at 121; see also Roman David, “Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in Czech Republic and Poland (1989-2001) (2003) 28 Law & Soc Inquiry 387 at 388.

⁵² Jennifer Widner, “Courts and Democracy in Postconflict Transitions: A Social Scientist’s Perspective on the African Case” (2001) 95 Am J Int’l L 64 at 73.

been committed prior to transition, even if the institutional mechanisms to address them are not established, the courts through their decisions would need to show that they are sensitive to the changed legal situation and its consequences.

1.4. Compulsory or Elective Triangularity? Democracy, Law, and Human Rights

Human rights protection and the law have a very strong and intimate intersection. The rise of a new form of constitutionalism following the demise of communism, one party dictatorships and military regimes in different parts of the world in the late 1980s and early 1990s has increased scholarly interest in this area of law. The world has since become fertile for written constitutions,⁵³ complete with bills of rights, special courts – specifically Constitutional Courts – to implement them, and an ever expanding culture of not only traditional judicial review but also the judicialization of democratic politics. This means the involvement of courts in deciding various aspects of the democratic and political process.⁵⁴

To understand how the judicial protection of human rights works in practice, it is without doubt important to suggest an understanding of the concept that would animate my research. This attempt at clarification is constrained to a large extent by the fact that

⁵³ Various reasons have been offered for this shift towards democracy. A writer argues, for example, that “As with any large-scale social phenomenon, many forces have helped produce the democratic wave – a technological revolution, growing middle-class wealth, and the collapse of alternative systems and ideologies that organized society. To these grand systemic causes add another: America. The rise and dominance of America - a country whose politics and culture are deeply democratic - has made democratization seem inevitable.” See Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W.W. Norton & Company, 2004) at 14-25.

⁵⁴ Leslie Friedman Goldstein, “From Democracy to Juristocracy” Book Review of “*From Democracy to Juristocracy? The Power of Judges: A Comparative Study of Courts and Democracy*” by Carlo Guarneri & Patrizia Pederzoli, “*Governing with Judges: Constitutional Politics in Europe*” by Alec Stone Sweet & “*Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*” by Ran Hirschl, (2004) 38 *Law & Soc’y Rev* 611; Ran Hirschl, “The Struggle for Hegemony: Understanding Judicial Empowerment through Constitutionalization in Culturally Divided Polities, (2000) 36 *Stan J Int’l L* 74; Ran Hirschl, “The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions”, (2000) 25 *Law & Soc Inquiry* 91; H. Kwasi Prempeh, “A New Jurisprudence for Africa” (1999) 10 *Journal of Democracy* 135; K.D. Ewing, “A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary” (2000) 38 *Alta L Rev* 709.

this dissertation is not framed as a theoretical debate about human rights. But perhaps because a generally acceptable meaning of “human rights” has polarized legal scholarship and defied the most intense debate the necessity for such a conceptual clarification is the more compelling. As Fields and Narr explain, “[w]ithout an adequate conceptualization, we can never be sure what human rights are and if they are indeed being respected.”⁵⁵ I would add that understanding the nature of human rights makes it easier to explain how those rights might be protected in practice and what role, if any, there is for the courts in that process.

In their most popular understanding, human rights are described as inherent and inalienable entitlements attaching to human beings for the simple reason of their humanity.⁵⁶ They are not a gift from any government nor do they become attached to persons because of constitutional statements. This notwithstanding, I am more persuaded by Fields and Narr who argue that human rights are not just ideology but constitute a socially constructed fight⁵⁷ and that they “become realized only by the struggles of real people experiencing real instances of domination.”⁵⁸ They add further that the world is a field of struggle over rights without any guarantees of success.⁵⁹ I should caution that it is only in the description of human rights as the object of an on-going struggle that I agree with these authors and not in their other claim that people are not born with human rights but may only have the potential for rights. This view is too positivistic and would seem to

⁵⁵ A. Belden Fields & Wolf-Dieter Narr, “Human Rights as a Holistic Concept” (1992) 14 Hum Rts Q 1.

⁵⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (New York: Cornell University Press, 2003); Aka, *supra* note 4 at 212; John Ayotunde Bewaji, “Human Rights: A Philosophical Analysis of Yoruba Conceptions” (2006) 37 Cambrian L Rev 49 at 50.

⁵⁷ Petman, *supra* note 36.

⁵⁸ See Fields & Narr, *supra* note 53 at 5.

⁵⁹ *Ibid.* Another scholar divides conceptions of human rights into four different schools of thought. The first school comprises “Natural scholars who conceive human rights as *given*. The second or “Deliberative scholars” who view them as *agreed upon*. “Protest scholars” believe human rights are *fought for*. Finally, the “Discourse scholars” see human rights as *talked about*. The author says that “For the protest school, human rights are realized through a perpetual fight for their realization. They conceive of human rights not so much as tangible but as a utopia or a project always in the making (and reversible).” See Marie-Benedicte Dembour, “What are Human Rights? Four Schools of Thought” (2010) 32 Hum Rts Q 1. See also Chidi Anselm Odinkalu, “Why More Africans Don’t Use Human Rights Language” (2000) 2 Hum Rts Dialogue 3 (“Throughout history, the protection of human rights has been won by struggle...”).

make human rights contingent upon factors outside the specific human qualifications of the claimant, even though some form of struggle is required to realize them. If human rights are accepted as involving some struggle, the courts in turn form one of the open forums where it might be waged, and in which the level of success or otherwise would depend on the existence of certain objective social conditions that are part of the subject of this study. Stammers therefore emphasizes the importance of social action to the construction of human rights.⁶⁰

In my view, by looking at how the judiciary operates as an institution for the protection of human rights we can understand one of the many ways that the very concept itself could be appropriately conceptualized as a struggle. Human rights guarantees, whether conceived as natural and inalienable or as positive entitlements in constitutional texts can only have meaning within the context of remedies available when they are violated. Even though those rights may be important symbols and goals in their declaratory state, they take more concrete shape and acquire greater meaning when a violation occurs and a remedy is applied to redress it.

But for various reasons and in many legal regimes across the world the mere fact that a human rights violation has taken place does not mean that the victim would obtain redress. Judge D. Re distinguishes human rights as ideology or goals from human rights that are realizable in practice and can be vindicated by effective remedies. He said the question “should no longer be whether there is a right not to be tortured. The question

⁶⁰ Neil Stammers, “Social Movements and the Social Construction of Human Rights” (1999) 21 Hum Rts Q 980 at 981. (Stating: “To say that human rights is [sic] socially constructed is to say that ideas and practices in respect of human rights are created, re-created, and instanced by human actors in particular socio-historical settings and conditions. It is a way of understanding human rights which does not require them to have any metaphysical existence (for example, through nature or God), nor does it rely on abstract reasoning or logic to ground them. The emphasis on the potential creativity of human actors in this understanding of social constructivism also stands in contrast to forms of structuralist explanation that reduce the role of social actors to nothing other than bearers of structural determinations.”). See generally Neil Stammers, *Human Rights and Social Movements* (London: Pluto Press, 2009).

today is: How can the victim obtain an effective remedy?"⁶¹ It is therefore the effort mobilized towards getting redress in these situations that give the human rights idea the character of a struggle.⁶²

It is relevant here to ask: why is this so? The victim of a human rights violation is often ranged against both the state and established political order. Though governments might claim to respect human rights, such claims sometimes turn out to be deceitful especially in those cases where for the government what is at stake is a choice between protecting rights - which sometimes could be a question on the legitimacy of power - and stabilizing the political *status quo*. In an African context Aidoo contends:

Political movements and parties are by nature more concerned with organizing of periodic national elections than with the defense of universal human rights per se. The evidence in Africa so far is that rights are of importance to parties only in so far as they impinge most directly on the questions of political power and electoral contests. Indeed only in very few of the programs and manifestoes of existing political parties does one notice any ample concern with working for human rights. Rather, political leaders often attempt to coopt well-known human rights activists into leading positions of political parties. Too often, these activists are regarded as agents of external forces.⁶³

To victims of human rights violations in this political context, the search for protection against abuses becomes a struggle in an experiential sense when, relying on dry affirmations of rights by the political regime, they apply to courts for remedies. The struggle takes different shapes. If the victim is not sufficiently enlightened about rights and confused about going one way or the other, he/she would first have to seek and

⁶¹ Judge Edward D Re, "Human Rights, Domestic Courts, and Effective Remedies" (1993) 67 St John's L Rev 581 at 592.

⁶² Beth Simmons, however, offers a cautionary dimension to the debate on litigation and remedies. She argues: "...much research suggests that litigation's power resides not so much in its ability to provide every victim with a decisive win in court. Litigation is also a *political* [her emphasis] strategy, with the power to inspire rule revision and further to mobilize political movements. It can often be used strategically not only to win cases, but also to publicize and mobilize a cause." See Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009) at 132. On the same point see also Douglas NeJaime, "Winning through Losing" (2011) 96 Iowa L Rev 941.

⁶³ See *supra* note 29 at 708.

obtain helpful information. He/she has to think through the financial implications of mounting a legal challenge against the injury to his/her rights. Competent lawyers do not come cheap and sometimes the administrative cost of filing complaints discourages even the most straightforward claims. But more importantly, the victim has to factor in the prevailing social and political conditions. What is the character of the regime in power? Are the courts free and independent to decide in favor of rights without unpleasant repercussions to their personnel? How long might it take from the time a claim is filed until a final decision is rendered? Would judgment be timely or would it be delayed for so long as to amount to a denial of justice?

For all the above reasons and more, some scholars have discussed the limitations of using the courts and the legal strategy for the enforcement of human rights.⁶⁴ Meydani and Mizrahi cite the example of Israel to support the theory that turning to the courts as forum for the defence of human rights may, for various reasons, prove ineffective in the long term.⁶⁵ According to them, the situation would have been mitigated were it only about just the courts and human rights organizations. But the human rights project often includes relations among politicians, bureaucrats and the public. Secondly, they argue, Israeli political culture favors the bottom-up rather than top-down relations between citizens and politicians. “Thus, directing all human rights strategies towards an elitist institution such as the Supreme Court may bear results in the short run but in the long run attitude change as well as policy decisions towards defending human rights are likely to emerge due to demands from society.”⁶⁶ Lastly, they assert that by empowering courts and discounting other avenues of mass mobilization towards more effective rights protection, human rights organizations disconnect the issues from the people, thereby discouraging belief. Thus, some of the limitations to the use of courts for human rights

⁶⁴ Abdullahi An-Na'im, “The Legal Protection of Human Rights in Africa: How to do More with Less” in Austin Sarat & Thomas R Kearns, eds., *Human Rights: Concepts, Contests and Contingencies* (Michigan: University of Michigan Press, 2002) 89 at 105.

⁶⁵ Assaf Meydani & Shlomo Mizrahi, “The Politics and Strategies of Defending Human Rights: The Israeli Case” (2006) 39 *Isr L Rev* 39.

⁶⁶ *Ibid* at 40

protection could be political, others institutional, and yet others economic.⁶⁷ There might be in fact a cross - fertilization of internal and external conditions that inhibit the capacity of courts to accept rights-based cases let alone provide remedies for violations.⁶⁸

The institutional constraints on using law for human rights protection are first analyzed here. In doing so, I adopt the distinction which Cross makes between the role of law *per se* on the one hand, and legal institutions (of which the courts are part) on the other in the protection of human rights.⁶⁹ Courts do not exist in a vacuum. They exist for some important public reasons the major one being to apply the law and mediate concrete situations in which legal disputes have arisen. The law's independent existence is only to the extent that persons whose actions it constrains are willing to live within those constraints. The courts and other institutions of the state intervene when those persons step outside the legally prescribed boundaries. The same applies to the human rights situation where the courts get called in to mediate in cases where one party alleges abuse from the other. According to Cross, it may be plausible that the law is deemed meaningless or viewed as a formality absent the cultural or economic incentives for it to implement and enforce itself. But this is not self-evident and could even be reversed.⁷⁰ Would the state of law, for example, correlate with human rights protection only because a third factor produced both the law and the regime for protection? He does not think so and instead maintains that:

⁶⁷ Mirna Adjami, "African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?" (2002) 24 Mich J Int'l L 103; Dakas CJ Dakas, "Confronting the Poverty and Tyranny of Judicial Passivity in Nigeria: Bolstering up the Case for Judicial Activism with Reference to Jewish Law" (1998) 10 Sri Lanka J Int'l L 63; Donald Horowitz, "The Judiciary: Umpire or Empire?" (1982) 6 Law & Hum Behavior 129; Jeremy Cooper, "Poverty and Constitutional Justice: The Indian Experience" (1992) Mercer L Rev 611; Nicoline Ambe, "A Legal Analysis of the Domestic Enforcement of International Human Rights Law: The Rule of Law Imperative" (1998) 47 UNBLJ 109; Donald Horowitz, "The Courts as Guardians of the Public Interest" (1977) 37 Pub Admin Rev 148; Judy Fudge, "What Do We Mean by Law and Social Transformation?" (1990) CJLS 47; Frank B Cross, "The Relevance of Law in Human Rights Protection" (1999) 19 Int'l Rev L & Econ 87.

⁶⁸ Chidi Anselm Odinkalu, "Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa" (2003) 47 J Afr L 1.

⁶⁹ Cross, *supra* note 65 at 87.

⁷⁰ *Ibid* at 88

The law and legal institutions might explain the measures of economic human welfare and/or unrest that have been correlated with human rights protections. Economists increasingly emphasize the important role of legal institutions to economic growth, so it is surely reasonable to believe that such institutions could affect human rights. Those who bother to draft constitutions obviously consider the documents important, as does the plenitude of constitutional law scholars inhabiting law schools.⁷¹

Abdullahi An-Na'im on his part discussed the dilemma of using courts as the primary centres for the protection of human rights in Africa.⁷² His argument simply is that African societies should do more for the implementation⁷³ of human rights with less reliance on the legal strategy. While admitting that it might sound heretical at first, his approach acknowledged both the importance of legal protection of human rights and the inability (not simply the unwillingness) of the post-colonial African state to provide adequate legal protection for human rights.⁷⁴ His belief is that an implementation strategy will more appropriately address human rights violations in Africa if it is aimed at countering the structural, cultural and other root causes of violations. This will deal with violations more comprehensively than a legal strategy which only seeks redress for violations on a case-by-case basis.⁷⁵

An-Na'im argues that the lack, or weakness, of the legal protection of human rights may indicate broader structural and institutional inadequacies of the legal system as a whole. Given that access to effective legal remedies is itself a human right, its absence is by implication a violation of human rights. Secondly, he states that the lack or weakness of legal enforcement could be symptomatic of other problems such as executive interference with the courts or the failure to comply with judicial decisions. He continues:

⁷¹ *Ibid.*

⁷² An-Na'im, *supra* note 62 at 89.

⁷³ He defines "implementation" broadly to mean "a proactive deployment of a variety of measures and policies to achieve the actual realization of human rights" while to him "protection" signifies "the application of legal enforcement methods in response to specific violations of human rights norms in individual cases."

⁷⁴ *Ibid.*

⁷⁵ *Ibid* at 90.

Problems with the legal enforcement of human rights may be due to underlying cultural and institutional difficulties with the rule of law or evidence of a lack of public confidence in the ability of the courts to vindicate rights that is a reflection of other problems. In other words, one expects weak legal protection of human rights in situations of political instability, economic underdevelopment, institutional incapacity, and the unwillingness or inability of the public at large to resort to the courts for the enforcement of their rights.⁷⁶

To conclude this section, it is obvious that whether speaking about regular or transitional situations, the interaction among democracy, the rule of law, and human rights is a normative imperative rather than an optional one. They are all positive values and mutually re-enforcing. Democracy is hollow without the rule of law while human rights protection is impossible without both. There is therefore the likelihood that the judiciary would be more effective in protecting human rights when democracy is present and the rule of law thrives. But while these values provide the structure upon which to build a strong system of respect for human rights, there is also the role of human agency in the process. These values, in and of themselves, cannot dent arbitrariness if there is a lack of human agents who believe in them and are willing to let them flourish. This will therefore make moot the debate on whether it is the legal or political strategy that is better for human rights enforcement. In reality, there has to be a balance between both strategies.

1.5. Paradoxes: Failing on the Promises of Democracy and Human Rights

While the Nigerian constitution of 1999 like all similar constitutions in other countries in transition contain several human rights guarantees which courts are empowered to enforce in theory, in practice that expectation often hangs in the balance. The difficulty of balancing human rights practice with its theory is perhaps the reason the subject is among the most contested in domestic and international law. Many reasons could account for this. The capacity of courts to deliver human rights remedies may be affected by the

⁷⁶ *Ibid* at 91-92

range and gravity of human rights violations that are placed before them for adjudication. Might it not be that the courts are ineffective because their resources are stretched and they are overwhelmed by the sheer volume of cases brought before them that are directly related to the level of human rights violations taking place within the society? It could be argued that constitutional provisions are mere words that do not amount to much. And that it is human agents in the legislature, executive and courts that should take the blame when constitutions fail to deliver on their often lofty promises. This is a valid concern that will be accounted for in the analyses that follow.

Nigeria is a developing country with a colonial past. Attention has usually been accorded in the literature to the specific characteristics of “developing” and “post-colonial” states that make them the centres of widespread human rights violations.⁷⁷ What is clear from those writings is that in much of Africa as elsewhere in the world, the form of government – whether a “democracy” or “dictatorship” – is of limited significance because human rights abuses occur to some degree in both forms of government.⁷⁸ Since the early 1990s a wind of democracy has blown through much of sub-Saharan Africa with new constitutions incorporating bills of rights. There is, however, much skepticism about “whether these constitutional reforms can improve human rights protection for citizens in the region.”⁷⁹ In fact, a study covering the period 1976 to 1997 established little correlation between rights-friendly constitutional

⁷⁷ Henry F Carey, “The Postcolonial State and the Protection of Human Rights” (2002) *Comp Stud South Asia, Afr & Middle East* 59.

⁷⁸ See Aidoo, *supra* note 29; Wiktor Osiatynski, *Human Rights and their Limits* (Cambridge: Cambridge University Press, 2009) at 97 (“There exists a common assumption that democracy will protect people against abuses of power. When constitutional rights are neglected or abused in a democracy, it holds, one can use the democratic process and vote out those in power ... This is a rather naïve belief. Although it may reflect the bargaining power of well-organized minorities, it hardly applies to individual victims of abuse or to weak minorities and vulnerable groups with little social support. Without traditions of limited government and strong institutions enforcing such limitations, democratic mechanisms, on their own, are insufficient to protect individual rights against encroachment by the majority or by state officials”).

⁷⁹ Linda Camp Keith & Ayo Ogundele, “Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences on Human Rights” (2007) 29 *Hum Rts Q* 1065 at 1066.

provisions and states' abuse of personal integrity in the region.⁸⁰ So apart from investigating why human rights violations occur to the level that they do, it is also worth asking why constitutional provisions guaranteeing human rights appear insufficient to discourage those abuses.

Colonialism is generally implicated in the prevailing unsatisfactory human rights situation in much of Africa. And this had to be because the process of colonization itself was a violation of human rights⁸¹ and it was therefore impossible for a culture of human rights to develop alongside it. Carey agrees that colonial influences still animate current human rights practices in the post-colonial state but only indirectly.⁸² By contrast An-Na'im asserts that colonialism and its aftermath burdened those states with structural obstacles that impeded their progress towards constitutionalism and democracy.⁸³ Carey himself writes that colonial socialization was impelled by subjugation and hypocrisy and that colonialism "prematurely introduced quasi-liberal institutions, which were generally undeveloped, whose institutions were designed more for economic exploitation than 'civilizing' the population."⁸⁴ Therefore, the constitutional recognition of rights was often belated and tended to protect the European expatriate population's rights over the native majority's rights.⁸⁵ It was hardly surprising that the states delivered at independence in

⁸⁰ *Ibid.* See also Linda Camp Keith, "National Constitutions and Human Rights Protection: Regional Differences and Colonial Influences" in Sabine Carey & Steven Poe, eds., *Understanding Human Rights Violations* (Aldershot: Ashgate Publishing Ltd, 2004).

⁸¹ See Aka, *supra* note 4 at 220 (asserting that "by far the most serious of the human rights atrocities Britain perpetrated on Nigerians was the fact that it lumped together, by fiat, without any consultation whatsoever, a multiplicity of diverse peoples who until 1914 had never lived together under one governmental roof or even closely interacted with one another").

⁸² Carey, *supra* note 76 at 62.

⁸³ Abdullahi An-Na'im, "The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Countries" (1997) 11 *Emory Int'l L Rev* 29. See also El-Obaid A El-Obaid & Kwadwo Appiaagyei-Atua, "Human Rights in Africa – A New Perspective on Linking the Past to the Present" (1995-1996) 41 *McGill L J* 819 (stating that "Acknowledging [the changes brought by colonialism] is a *sine qua non* for any successful conceptualization of human rights in Africa").

⁸⁴ Carey, *supra* note 76 at 65.

⁸⁵ Claude E Welch, *Human Rights and Development in Africa* (State University of New York Press, 1984) at 13. See also Mary Dudziak, "Working toward Democracy: Thurgood Marshall and the Constitution of Kenya" (2006) 56 *Duke L J* 721 at 739.

much of Africa had no culture of human rights to fall back on. In the event, indigenous human rights violators only took the baton from the departing colonial powers.⁸⁶

In some countries, including Nigeria, military interruption of civil rule further complicated an already tough situation. In the period covered by this study, Nigeria was transiting from one such long era of military interregnum. Generally, military regimes are believed to be more likely to resort to repression as the primary means of control and coercion.⁸⁷ When they do leave the political scene, it takes some time before a liberal orientation overtakes the repression of the immediate past. Stohl, *et al* suggest that “within a state which has an ‘efficient’ repressive apparatus, state repression seems to radiate an ‘after-life’ which lingers and has effects for some time after the observable use of coercion by state agents.”⁸⁸ Continuing, they state that “[t]he threat remains implicit because a general learning process has taken place. In essence, the behavioral terror process has become a part of the political structure ...”⁸⁹

An important insight to this section of my study is offered by Davenport who conducted empirical research into the correlation between the provisions of national constitutions and how governments treat their citizens.⁹⁰ His intention was to find out whether national constitutions affect the manner in which governments restrict political and civil rights or whether the content of national constitutions is generally irrelevant to how governments behave. According to Davenport, what the literature on repressive behavior yields are three factors that account for variance in government use of

⁸⁶ Amani Daima, “Challenges for Emerging African Democracies” (1998) 10 *Peace Rev* 57 at 59 (arguing that colonialism did not build a climate conducive to constitutionalism. It rather produced states that were and still remain “totalitarian, oppressive, and exploitative” and only supported the “colonial purpose of dominating African peoples and exploiting their resources”).

⁸⁷ Camp Keith & Ogundele, *supra* note 77 at 1075.

⁸⁸ Michael Stohl *et al.*, “State Violation of Human Rights: Issues and Problems of Measurement” (1986) 8 *Hum Rts Q* 592

⁸⁹ *Ibid* at 595.

⁹⁰ Christian A Davenport, “Constitutional Promises and Repressive Reality: A Cross-National Time-Series Investigation of why Political and Civil Liberties are Suppressed” (1996) *The Journal of Politics* 627.

repression: system type, political conflict and economic development.⁹¹ The system type consideration explores the relationship between the character of the government in place (is it democratic or dictatorial?) and its willingness or reluctance to apply political repression. The second variable is that repression heightens in societies experiencing political conflicts. Finally, if a country is going through significant economic development, there is the tendency for political repression to be consequential.⁹²

Davenport's contribution to this debate takes on added significance when he analogizes his theory to two arguments, the one of "constitutional promises" and the other of "constitutional threats."⁹³ The constitutional promise paradigm theorizes that when particular rights are mentioned in a constitution, it is evidence of great concern for them by government and therefore less likelihood that it will restrict them. On the other hand the constitutional threat argument states that mentioning those rights in the constitution is not evidence of government commitment to them at all. It is rather an indication of government's sensitivity to those rights, and the likelihood that it will restrict them. I might add that it could also relate to the people's sensitivity to those rights if they were involved in drafting the constitution.

Davenport noted the results of two earlier studies on this issue with interesting results. In the first study, "greater acknowledgment of rights in constitutions was found to result in lower actual enjoyment of (those) rights."⁹⁴ The second study suggested that four variables determined the possibility that constitutional guarantee of rights would discourage repression. These are: [1] constitutional guarantee of an independent

⁹¹ *Ibid* at 628.

⁹² Neil J Mitchell & James M McCormick, "Economic and Political Explanations of Human Rights Violations" (1988) 40 *World Politics* 476 at 478 ("The poorest countries, with substantial social and political tensions created by economic scarcity, would be most unstable and thus most apt to use repression in order to maintain control ... the poorer the country, the greater the probability of human rights violations as the government seeks to maintain some semblance of order").

⁹³ *Ibid* at 632.

⁹⁴ Kathleen Pritchard, "Comparative Human Rights: An Integrative Explanation" (1986) 15 *Pol'y Stud J* 110 at 120.

judiciary, [2] the constitutional guarantee of a federal system of government, [3] the actual independence of the judiciary, and [4] the actual decentralization of government operations.⁹⁵ Davenport summarized the findings of this study as follows:

First, constitutional provisions are not found to significantly influence repressive practices. This finding ... is in support of the null hypothesis that constitutions do not matter. Second, it was found that the structure of the political system (i.e., the independence of the judiciary and the decentralization of government operations) did affect the use of repression at statistically significant levels. Both factors examined increased the respect for political and civil rights. Third, and last, constitutional guarantees were found to indirectly affect political repression through their influence on the structure of the political system.⁹⁶

Nigeria is at a stage in its development where all the factors capable of increasing political repression are present. This would be a concern both in terms of the level of human rights abuses as well as the inability of the courts to effectively address them. None of the three factors that Davenport says the literature identifies as largely influencing the use of repression (regime type, political conflict and economic development) are favorably accounted for in the Nigeria legal system. The country is under civil rule, which many prefer to the past military regimes. But several basic ingredients of democracy, like the rule of law, are still lacking. Political conflicts (partisan, ethno-religious, economic) have remained intractable for the most part and the government occasionally uses the economic development justification as cover to protect economic capital at the expense of rights.⁹⁷ Notwithstanding, the judiciary is not

⁹⁵ Gerald Blasi & David Cingranelli, "Do Constitutions and Institutions Help Protect Human Rights?" in David Cingranelli ed., *Human Rights and Developing Countries* (Connecticut: JAI Press, 1996).

⁹⁶ Davenport, *supra* note 88 at 634-635.

⁹⁷ See for example Obiora Chinedu Okafor, "The Precarious Place of Labour Rights and Movements in Nigeria's Dual Economic and Political Transition 1999-2005" (2007) 51 *J Afr L* 68. See also Megan J Ballard, "The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil" (1999) 17 *Berkeley J Int'l L* 230; Bruce Baker, "When the Bakassi Boys Came: Eastern Nigeria Confronts Vigilantism" (2002) 20 *J Contemp Afr Stud* 223; Rotimi Suberu, "Religion and Institutions: Federalism and Management of Conflicts over Sharia in Nigeria" (2009) 21 *J Int'l Dev* 547; Andrew U

sufficiently independent to mediate these tensions. There is, therefore, a visible culture of impunity and lack of accountability which not only discourages litigation to enforce rights, but also has a likely demoralizing effect on those seeking to use the courts to confront the system. The next section takes a closer look at the justifications and methodology of court intervention in human rights litigation.

1.6. The Heart of the Matter: Courts and Human Rights

What is the nature of the tasks that courts perform when they hear complaints of human rights abuses with a view of redressing them? Legal scholarship identifies this task first as “judicial review” of legislative, executive and administrative actions. Courts could be reviewing legislation to assess their compliance with constitutional provisions but especially those provisions enshrining human rights and freedoms. This is even more so where the application of such legislation may have implications for human rights guarantees. Courts could be reviewing the exercise of executive or administrative authority against the same standards. Higher courts could also be calling to question the activities of inferior courts or tribunals to ensure that they have not acted in excess of their powers. Rawlings describes judicial review as a “slippery concept,” yet defines it (at least in terms of England and Wales) as “a supervisory – inherent – jurisdiction directed on grounds of legality to the decisions and other public functions of public bodies.”⁹⁸ Take note that the use in this description of the word “inherent” clearly reflects, in my view, the English common law understanding of the concept in the absence of a written constitution.

Historically, Fitzgerald writes, “judicial review in the United Kingdom was confined to restraining the exercise of executive or administrative discretion in excess of

Iwobi, “Tiptoeing through a Constitutional Minefield: The Great Shari’ah Controversy in Nigeria” (2004) 48 J Afr L 133; Rose C Uzoma, “Religious Pluralism, Cultural Differences, and Social Stability in Nigeria” (2004) BYU L Rev 651; Frieder Ludwig, “Christian-Muslim Relations in Northern Nigeria since the Introduction of Shari’ah in 1999” (2008) 76 J Am Acad Relig 602.

⁹⁸ Richard Rawlings, “Modelling Judicial Review” (2008) 61 Curr Legal Probs 95.

the authority granted by legislation.”⁹⁹ This is what O’Cinneide typifies as the traditional understanding of judicial review¹⁰⁰ and for which Seidman provides a pithy description. He says “In Britain, the doctrine of parliamentary supremacy¹⁰¹ combined with an unwritten constitution... meant that the judiciary... had, in theory, no role in reviewing the validity of legislation.”¹⁰² The clearest understanding of this principle, in my view, is that provided by Wellington to the effect that:

We tend to think of courts at common law as acting because the legislature has not and as making law the legislature can unmake. When statutes are involved, we see [the] courts either effectuating legislative will or, through an occasional misreading of legislative intent, as producing an incorrect decision that can be remedied easily by a legislative reform.¹⁰³

Therefore, judicial review in classical English constitutionalism concerned only executive and administrative actions. Such judicial evaluations were eschewed in relation to legislation. This in effect represents the understanding of judicial review in countries applying the unwritten model of constitutionalism.

As opposed to this model, O’Cinneide identifies a different variant that he calls “rights review.” This alternative establishes “a form of judicial scrutiny that could review democratically derived decision-making by public authorities for compliance with a set of recognized basic rights.”¹⁰⁴ According to this model, parliament is no longer supreme.

⁹⁹ Peter L Fitzgerald, “Constitutional Crisis over the Proposed Supreme Court for the United Kingdom” (2004) 18 Temp Int’l & Comp L J 233 at 245.

¹⁰⁰ Colm O’Cinneide, “Democracy, Rights and the Constitution – New Directions in the Human Rights Era” (2004) 57 Curr Legal Probs 175 at 176.

¹⁰¹ Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1996) at 37- 38 (where he described parliamentary sovereignty as “the dominant characteristic of our political institutions” and meaning “neither more nor less than this, namely, that Parliament ... has, under the English constitution, the right to make and unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament”).

¹⁰² Robert B Seidman, “Judicial Review and Fundamental Freedoms in Anglophone Independent Africa” (1974) 35 Ohio St L J 820 at 826.

¹⁰³ Harry H Wellington, “The Nature of Judicial Review” (1981-1982) 91 Yale L J 486 at 487.

¹⁰⁴ See *supra* note 98 at 176. This corresponds as well to what another scholar calls “constitutional adjudication.” See Michel Rosenfeld, “Constitutional Adjudication in Europe and the United States:

The constitution pre-empts that position and since in the nature of things legislation ordinarily precedes adjudication, the judiciary comes to pass upon the validity of legislation after parliament has acted. This role thus impresses final authority on the matter upon the courts.¹⁰⁵ In Seidman's view, judicial review of legislation takes place in either of two ways. It could be that the action of the administration is within the scope of a particular statute, but that the statute on its face or as it has been construed is unconstitutional.¹⁰⁶ Alternatively, the claim could be that while the statute under which action is claimed to be taken may not in most cases permit unconstitutional activity, in this case the particular action taken was *ultra vires* or in other words, beyond the powers granted by the statute or constitution.¹⁰⁷ While in the first the courts exercise control powers over the legislature in the latter the judiciary controls the executive branch.

But more significant is the parallel that Stone draws between what she refers to as "rights-based review" and "structural judicial review."¹⁰⁸ While recognizing judicial rights review in the same manner that O'Conneide does, she still noted that judges in countries with written constitutions, apart from enforcing rights, also interpret and enforce those provisions of the constitution that establish the basic structure of government. This she called "structural judicial review," encompassing "the

Paradoxes and Contrasts" (2004) 2 Int'l J Const L 633; Heinz Klug, "Introducing the Devil: An Institutional Analysis of the Power of Judicial Review" (1997) 13 S Afr J Hum Rts 185 at 187 (suggesting that judicial review is the same as "constitutional review."); See also David S Clark, "Judicial Protection of the Constitution in Latin America" (1974-1975) 2 Hastings Const L Q 405 at 416 (accepting Henry Abraham's definition of judicial review as "the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon law, and any other action by a public official that it deems ... to be in conflict with the Basic Law."). See as well Henry Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France* (London: Oxford University Press, 1998); LWH Ackermann, "Constitutional Protection of Human Rights: Judicial Review" (1989-1990) 21 Colum Hum Rts L Rev 59 (defining judicial review as "the right and duty conferred on a court or particular courts of a country to interpret authoritatively the constitutionality of laws, executive and administrative acts, and, in appropriate cases, to declare such laws and acts invalid and unenforceable when they conflict with the country's constitution").

¹⁰⁵ See Seidman, *supra* note 101 at 826.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Adrienne Stone, "Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review" (2008) 28 Oxford J Legal Stud.1 at 2.

interpretation and enforcement of the division or powers that is part of federal constitutions as well as the enforcement of those provisions establishing the basic institutions of government.”¹⁰⁹

Jeremy Waldron’s perspective is as well crucial to this debate. He distinguishes two forms of judicial review: judicial review of legislation and judicial review of executive action or administrative decisionmaking.¹¹⁰ He admits that the argument in favor of judicial review applies to the executive (which “has some elective credentials of its own with which to oppose decisionmaking by judges”)¹¹¹ as well as the legislature. He adds that “it is almost universally accepted that the executive’s election credentials are subject to the principle of the rule of law, and as a result, that officials may properly be required by courts to act in accordance with legal authorization.”¹¹² The same proposition as it relates to the legislature, he says, is essentially contested and is the main ground for the polarization that the debate about judicial review of legislative enactments has engendered.

Secondly, Waldron makes a further distinction between what he calls strong judicial review and weak judicial review.¹¹³ In a system of strong judicial review, according to him, courts have the authority to decline to apply a statute in a particular case (even though the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage). Courts here also have the authority to establish as a matter of law that a given statute or legislative provision will not be applied, so that as a

¹⁰⁹ *Ibid.*

¹¹⁰ Jeremy Waldron, “The Core of the Case Against Judicial Review” (2006) 115 Yale L J 1346 at 1353. In fact he adds a third: judicial review of judicial action in note 20; See also Seth Kreimer, “Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s” (1997) 5 Wm & Mary Bill Rts J 427.

¹¹¹ *Ibid* at 1354.

¹¹² *Ibid.*

¹¹³ See David S Clark, “Judicial Protection of the Constitution in Latin America” (1974-1975) 2 Hastings Const L Q 405 at 421 (mentioning the variations as “weak,” “effective” and “powerful” judicial review).

result of *stare decisis* and issue preclusion a law that they have refused to apply becomes in effect a dead letter.¹¹⁴ He cites some European courts as possessing this authority and stating that though it looks like American courts do not; the real effect of their authority is not much short of it.¹¹⁵

In jurisdictions that apply the weak version of judicial review, courts may scrutinize legislation for its conformity to individual rights but may decline to apply it because rights would otherwise be violated.¹¹⁶ Waldron gives as an example of this the practice in the United Kingdom since the enactment of the *Human Rights Act*, 1998 under which courts may review a legislation with a view to issuing a ‘declaration of incompatibility’ if the court finds that the provision under review is incompatible with a right protected under the *European Convention on Human Rights* (hereinafter, the European Convention). Under the *Human Rights Act*, such declaration of incompatibility “does not affect the validity, continuing operation or enforcement of the provision in respect of which it was given; and ... is not binding on the parties to the proceedings in which it is made.”¹¹⁷ Yet the declaration may have the effect of causing a minister to initiate legislative procedure to ameliorate the incompatibility.

This study does not treat judicial review in the classical English sense. My interest is with judicial review in cases where the violation of human rights is alleged whether arising from the application of statute or the exercise of executive and administrative functions. This focus notwithstanding, I would make appropriate references to the British model while mapping the trajectory of the concept in Nigeria’s constitutional and human rights jurisprudence. I should state that this is the case because Nigeria at independence had a written constitution with a bill of rights and therefore from that very beginning was not suited for British style judicial review. Yet for various reasons that would also form

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* at 1355; See also Mauro Cappalletti & John Clarke Adams, “Comment, Judicial Review of Legislation: European Antecedents and Adaptations” (1966) 79 Harv L Rev 1207.

¹¹⁶ *Ibid.*

¹¹⁷ *Human Rights Act United Kingdom*, 1998, c 42, s 4(2), (6).

part of later analysis, the British tradition still exerted an intense influence on the Nigerian practice. This study is also not concerned with Stone's structural judicial review except in so far as human rights might be impacted as a result of the court interpretation and enforcement of constitutional provisions detailing governmental structure or institutions. One area that this is prominent is in those circumstances where state governments and individuals in those states as well invoke cultural or more frequently religious observances to oppose clear constitutional principles.

1.7. Tower of Babel: The Birth of an Academic Obsession

Judicial review has engendered perhaps one of the most polarizing debates ever known to legal scholarship. The issue is surrounded by controversies from all possible approaches. The least of these debates perhaps concerns its origins. Much more divisive, however, is the disputation about the consequences of judicial review in a constitutional democracy. While English-style judicial review valorized parliamentary supremacy, judicial review under a written constitution as practiced in the United States, for example, handed the judiciary extensive jurisdiction to meddle in majoritarian decision-making. In 1962, Alexander Bickel described judicial review as "a deviant institution in the American democracy."¹¹⁸ He also famously declared that "[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive; it thwarts the will of the representatives of the actual people of the here and now."¹¹⁹

This view constitutes in brief outline what has been described in constitutional theory as the "counter-majoritarian difficulty."¹²⁰ To Friedman, the question which judicial review poses in a democracy is: "to the extent that democracy entails responsiveness to popular will, how [do you] explain a branch of government whose members are unaccountable to the people [meaning the judiciary], yet have the power to

¹¹⁸ Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale: Yale University Press, 1986).

¹¹⁹ *Ibid* at 16-17.

¹²⁰ Mark A Graber, "Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power" (2006) 65 Md L Rev 1.

overtake popular decisions?”¹²¹ Thus, Klarman describes judicial review as the “courts heroic Counter-majoritarian function.”¹²² But before analyzing whether this difficulty does indeed exist from available literature, let me first deal briefly with the question of the origins of judicial review.

It is customary to relate the early history of judicial review in the American sense with the decision of that country’s Supreme Court in the now famous case of *Marbury v. Madison*.¹²³ But Mary Bilder has a more intriguing account of its origins. She claims that the practice arose from “a longstanding English corporate practice under which corporation’s ordinances were reviewed for repugnancy to the laws of England.”¹²⁴ Continuing, she states:

¹²¹ Barry Friedman, “The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy” (1998) 73 NYU L Rev 333 at 335; Samuel Issacharoff, “Constitutionalizing Democracy in Fractured Societies” (2003-2004) 82 Tex L Rev 1861 (equating judicial review with constitutionalism which “exists in inherent tension with the democratic commitment to majoritarian rule. At some level, any conception of democracy invariably encompasses a commitment to rule by majoritarian preferences, whether expressed directly or through representative bodies. At the same time, any conception of constitutionalism must accept pre-existing restraints on the range of choices available to governing majorities”).

¹²² Michael J Klarman, “Rethinking the Civil Rights and Civil Liberties Revolutions” (1996) 82 Va L Rev 1 at 2; See also Ronald Dworkin, *Taking Rights Seriously* (Harvard: Harvard University Press, 1977); Jeremy Waldron, “The Core of the Case Against Judicial Review” (2006) 115 Yale L J 1346; Hutchinson, *supra* note 30 57; Allan Hutchinson & Joel Colon - Rios, “What’s Democracy Got to do with it?: A Critique of Liberal Constitutionalism” (Osgoode Hall Law School, 3 (4) Comparative Research in Law & Political Economy, CLPE Research Paper 29, 2007) online: <<http://ssrn.com/abstractid=1017305>>.

¹²³ [1803] 5 US 137; Gordon S. Wood, “The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less” (1999) 56 Wash & Lee L Rev 787; Dean Alfange Jr., “*Marbury v Madison* and the Original Understandings of Judicial Review: In Defense of Traditional Wisdom” (1993) Sup Ct Rev 329.

¹²⁴ Mary S Bilder, “Corporate Origins of Judicial Review” (2006-2007) 116 Yale L J 503 at 504; See as well Miguel Schor, “Mapping Comparative Judicial Review” (2008) 7 Wash U Global Stud L Rev 257 at 261-262 (contending that “The origin of judicial review in the United States is not well understood because it has become the stuff of myth. *Marbury v Madison* is remembered today as establishing judicial review and as the fountainhead of judicial protection of individual rights. Neither belief is well founded”). See also TRS Allan, “The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry” (2002) 61 Cambridge L J 87; Andrew Halpin, “The Theoretical Controversy concerning Judicial Review” (2001) 64 Mod L R 500; Bradley Selway, “The Principle Behind Common Law Judicial Review of Administrative Actions: The Search Continues” (2002) 8 Adel L Rev 1; Naomi Sidebotham., “Judicial Review: Is there still a Role for Unreasonableness?” (2001) 8 Murdoch UEJL 1.

This English corporation law subsequently became a transatlantic constitution binding American colonial law by a similar standard of not being repugnant to the laws of England. After the Revolution, this practice of bounded legislation slid inexorably into constitutional practice, as the “Constitution” replaced the “laws of England.” With the Constitution understood to embody the supreme authority of the people, the judiciary would void ordinary legislation repugnant to this supreme law. Over a century later, this practice gained a new name: judicial review. The widespread acceptance of this name eventually obscured the degree to which the origins of the practice lay in older practices regarding the delegated nature of corporate and colonial authorities, rather than in a new constitutional theory of judicial power.¹²⁵

But in spite of Bilder’s position, the very idea that it is possible for courts to invalidate acts of Parliament belonged to Sir Edward Coke. A renegade of sorts, Coke lived possibly well ahead of his time, being perhaps the first English judge to question the omnipotent law making powers of the British Parliament. Why Coke’s exertions take the cake is simply because they were happening at a period of absolute parliamentary supremacy. Allen Dillard Boyer in his interesting narration of Coke’s judicial involvements notes that “One of Coke’s most important contributions to the history of the law grows out of the energy of the Elizabethan courts. This contribution is judicial review, the idea that judges may invalidate statutes passed by the legislature.”¹²⁶ Even though Coke’s reputation was already well-established in the British realm at that time, it was his decision in the *Bonham’s Case*¹²⁷ that further solidified it. In that case, Coke entered the famous opinion:

And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or

¹²⁵ *Ibid.*

¹²⁶ Allen Dillard Boyer, “Understanding, Authority, and Will”: Sir Edward Coke and the Elizabethan Origins of Judicial Review” (1997-1998) 39 BC L Rev 43 at 73; See also Theodore Plucknett, “Bonham’s Case and Judicial Review” (1926-1927) 40 Harv L Rev 30; David Deener, “Judicial Review in Modern Constitutional Systems” (1952) 46 Am Pol Sci Rev 1079.

¹²⁷ [1610] 8 Co Rep 114.

repugnant, or impossible to be performed, the common law will control it, adjudge such act to be void.¹²⁸

However, Boyer said the judicial review that Coke authored was dead by the end of the Seventeenth Century, a period coinciding with the emergence of Sir William Blackstone on the horizon.¹²⁹ While recognizing the precedents that Coke had laid out, Blackstone had a totally divergent view of their utility and of judicial review more generally. He was of the opinion that even if parliament positively enacted an unreasonable thing to be done, “I know of no power ... to control it.”¹³⁰ He rejected the very notion that courts had powers to reject statutes whose main objects were unreasonable, “for that were to set the judicial power above that of the legislature, which would be subversive of all government.”¹³¹

1.8. Stalemate: Judicial Review in Action

From the time of both Coke and Blackstone until more recently, and only to a very limited extent, the British had no document containing its constitution. It always came up first among countries operating unwritten constitutions.¹³² Separation of powers did not feature much in its constitutional practices. The Crown headed both the executive and legislative arms of government and the most prominent members of the judiciary also belonged to the legislature. And apart from the brief spell when Coke seemed to irritate the system, British courts were forbidden to invalidate legislative acts; their judicial review powers being only restricted to the actions and omissions of administrative bodies.¹³³ This is despite Lakin’s contention that rather than parliamentary sovereignty, the British constitution actually rests on “the ideal government under law or the principle

¹²⁸ *Ibid* at 118a.

¹²⁹ See Dillard Boyer, *supra* note 125 at 89.

¹³⁰ Sir William Blackstone, *Commentaries 1* (London: University of Chicago Press, 1979) at 91.

¹³¹ *Ibid*.

¹³² See Seidman, *supra* note 101 at 826.

¹³³ Suri Ratnapala, “Bills of Rights in Functioning Parliamentary Democracies: Kantian, Consequentialist and Institutional Scepticisms” (2011) 34 *Melb U L Rev* 592.

of legality.”¹³⁴ Even so, it often was the case that judges claimed that judicial review is concerned not with the substantive decision of the administrative body itself but with the decision-making process that it adopted.¹³⁵

The American war of independence was waged in part on the basis of what were seen as the shortcomings of the British system.¹³⁶ This was pointed out in the *Federalist Papers* mostly relied upon by those who negotiated the American constitution. In the *Federalist Papers* No. 47, it was asserted:

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority ... All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depository of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.¹³⁷

Yet upon its promulgation, the American constitution avoided the two main issues that were later to raise controversy in the understanding of judicial review. It contained no Bill of Rights and did not so much as mention the power of the courts to invalidate

¹³⁴ Stuart Lakin, “Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution” (2008) 28 Oxford J Leg Stud 709.

¹³⁵ Jeffrey Jowell, “Beyond Wednesbury: Substantive Principles of Administrative Law” (1988) 14 Commw L Bull 858 at 859.

¹³⁶ See The American Declaration of Independence of 3 July 1776 in which they included the following charges against the British King: “He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries” online: <<http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=005/lljc005.db&recNum=102>>.

¹³⁷ Alexander Hamilton, James Madison & John Jay, *The Federalist Papers* (London: Oxford University Press, 2008) at 240.

legislation inconsistent with its provisions. While the Bill of Rights became entrenched through the Constitution's First Amendment, the decision of the Supreme Court in *Marbury v. Madison* is generally believed to have laid the foundation for judicial review in the manner it is understood in American constitutional theory even though this is by no means the only view on this matter.¹³⁸

The most significant portion of the *Marbury* decision for my purpose is where Justice Marshall held that if any law is inconsistent with the constitution, it is the duty of the court to not only pronounce on that inconsistency but to resolve it in favor of the constitution. According to him, "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on."¹³⁹

Friedman contends that two different positions are embedded in the power of courts to review governmental action. At once there is a "threat" and as well a "hope" in judicial review, he says.¹⁴⁰ It is perhaps by understanding how both the threat and hope clash against one another that one could contemplate one of longest running debates in contemporary legal scholarship. Friedman postulates that when judicial review is viewed as a threat, it is basically because it contains the tendency to diminish or interfere with democratic governance. This is usually identified as the countermajoritarian role of courts.¹⁴¹ Yet judicial review viewed as hopeful or optimistic is conceived to perform "an

¹³⁸ See for eg Edward S Corwin, "*Marbury v. Madison* and the Doctrine of Judicial Review" (1914) 12 Mich L Rev 538 (accepting the view of some legal historians 'who represent judicial review as the natural outgrowth of ideas that were common property in the period when the Constitution was established.');" see also Davison M Douglas, "The Rhetorical Uses of *Marbury v Madison*: The Emergence of the 'Great Case'" (2003) 38 Wake Forest L Rev 375.

¹³⁹ *Supra* note 121.

¹⁴⁰ Barry Friedman, "The Politics of Judicial Review" (2005-2006) 84 Tex L Rev 257 at 309.

¹⁴¹ See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 4-5; Waldron, *supra* note 120, Hutchinson, *supra* note 32; Hutchinson & Colon - Rios, *supra* note 120; Michael Klarman, "Rethinking the Civil Rights and Civil Liberties Revolution" (1996) 82 Va L Rev 1; David A Strauss, "Common Law Constitutional Interpretation" (1996) 63 U Chi L

admirable function – ensuring that government adheres to constitutional commands.”¹⁴² He believes strongly in the proposition that “judges enforcing the Constitution will protect minority rights and enforce constitutional safeguards.”¹⁴³ Most scholars therefore defend judicial review on the grounds that it is necessary to protect individual rights and protect those minority groups who ordinarily lack the wherewithal to protect themselves and thus at the mercy of the impulse of the majority to politically self-perpetuate.¹⁴⁴

Just like Justice Marshall alluded to in the case of *Marbury v. Madison*, there are two views in contention in this debate. The first is the power of the legislature to enact laws. Those who view judicial review as being countermajoritarian hold that since the legislature is a representative body, its lawmaking powers should not be subjected to the whims and caprices of an unelected judiciary. The other is the check placed on those powers by the provisions of the constitution, most notably those guaranteeing individual rights. Adherents of this view believe that when there is a written constitution containing a bill of rights, it places a constraint on legislative powers. And since legislative

Rev 877 at 889 (“American constitutional law is preoccupied, perhaps to excess, with the question of how to restrain judges, while still allowing a degree of innovation; the common law has literally centuries of experience in the use of precedent to accomplish precisely these ends” and “any approach to constitutional interpretation must explain how it restrains the officials responsible for implementing the constitution and prevents them from imposing their own will... A theory of constitutional interpretation for our society also ought to be able to explain how the institution of judicial review – judicial enforcement of the constitution against the acts of popularly elected bodies – can be reconciled with democracy”).

¹⁴² Friedman, *supra* note 139 at 309.

¹⁴³ *Ibid.*

¹⁴⁴ Ruth Gavison, “The Role of Courts in Rifted Democracies” (1999) 33 *Isr L Rev* 216 at 222 (“First, it may be said that the power of courts to review decisions of the other branches is itself based on a deeper preference of the majority, reflected in a constitution, or in a deeper level of social values, which the courts enforce upon the political branches... In particular, courts may be the mechanisms to defend democracy itself against the tendency of government to perpetuate its own power.”); Wellington, *supra* note 101 at 487 (“Moreover, the majoritarian prerogatives allegedly infringed by judicial review may, for reasons unrelated to judicial power, be weaker than is commonly supposed. Our government system - quite apart from its judicial branch – is itself designed to temper and check the power of majorities.”); Thomas I. Emerson, “Toward a General Theory of the First Amendment” (1963) 72 *Yale L J* 877 at 906 (“The position that utilization of judicial review... is undemocratic is based upon the assumption that democracy is pure majoritarian and ignores the wide acceptance of judicial review in the United States as a crucial element in maintaining those mechanisms of the democratic process which safeguard the rights of individuals and minorities against the majority.”); Klarman, *supra* note 120 (“It is common wisdom that a fundamental purpose of judicial review is to protect minority rights from majority over – reaching”).

majorities are only interested in self-perpetuation, they cannot possibly be relied upon to redress the adverse consequences of their legislative judgments; hence the courts are presumed better placed to perform that role. The courts are typically said to be engaged in representation reinforcement¹⁴⁵ while carrying out this protective role. This has been described by one writer as “the most widely accepted normative account of constitutional judicial review...”¹⁴⁶

There is no debate in the Nigerian context that the courts are empowered to review laws and actions that infringe on constitutional provisions, especially those enshrining basic constitutional rights. The Nigerian constitution of 1999 in its Supremacy Clause provides for the absolute priority of the constitution over all other laws which if they are inconsistent with any provisions of the constitution are void to the extent of that inconsistency.¹⁴⁷ Nigerian courts are generally recognized as the only institution that has powers under the constitution to keep an eye on all laws and governmental actions to ensure that they do not transgress the provisions of the constitution. That the courts could invalidate laws inconsistent with the constitution is accepted practice. The widely believed countermajoritarian impact which legal scholarship ascribes to judicial review while useful as an issue in the Nigerian context may not have the same resonance as in other jurisdictions. I will return to this point much later in this study.

¹⁴⁵ See Anita S Krishnakumar, “Representation Reinforcement: A Legislative Solution to a Legislative Process Problem” (2009) 46 Harv J on Legis 1; John Hart Ely, “Toward a Representation-Reinforcing Mode of Judicial Review” (1978) 37 Maryland L Rev 451.

¹⁴⁶ Christopher Elmendorf, “Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?” (2007-2008) 35 Hastings Const L Q 644 at 650. Using the right to vote as an example, this author described representation reinforcement in these terms: “When one political party uses its position of control over the legislative and executive branches of government to enact voting requirements that the other major party regards as a ploy to deter its constituents from exercising the franchise, the need for representation reinforcing [judicial] review would seem to have reached its apogee.”

¹⁴⁷ *Constitution of the Federal Republic of Nigeria 1999*, s 1(3).

1.9. The Importance of the Study

Ruth Gavison identifies two strategies for defending human rights: the primarily legal and the predominantly political.¹⁴⁸ These broad categories can be further broken down into multiple sub-categories. Those who act through the courts or other legal decision-makers to achieve human rights protection apply a strategy much narrower than that applied by those who use instead the political channel. This is an opinion shared by other scholars.¹⁴⁹ But these strategies are not mutually exclusive as sometimes the same actors could deploy both political and legal strategies. It could in fact be argued that often litigation is a component of a broader political strategy.

As Gavison contends, where there is a lack of public consensus regarding the importance of human rights, the legal strategy may be ineffective.¹⁵⁰ This fact notwithstanding, I shall in this dissertation devote significant attention to the legal strategy, especially the role of the courts, in spite of the acknowledged challenges to deploying that strategy as the only or major one for the improvement of human rights situations. The importance of the legal process for the protection of human rights is

¹⁴⁸ Ruth Gavison, “Human Rights” in Ruth Gavison & H. Shneidor eds., (1991) *1 Human Rights And Civil Liberties in Israel – A Reader*, 25 – 34.

¹⁴⁹ Abdullahi An-Na’im, “The Legal Protection of Human Rights in Africa: How to do More with Less” in Austin Sarat & Thomas R. Kearns, eds., *Human Rights: Concepts, Contests and Contingencies* (Michigan: University of Michigan Press, 2002) 89 at 90 (differentiating *protection* which “signifies the application of legal enforcement methods in response to specific violations of human rights norms in individual cases” from *implementation* “referring to a proactive deployment of a variety of measures and policies to achieve the actual realization of human rights”). For a starker differentiation see Julio Rios-Figueroa, “Sociolegal Studies on Mexico” (2012) 8 *Annu Rev Law Soc Sci* 307 at 316 stating: “Many, perhaps most, social movements and organizations still prefer to march down *Paseo de la Reforma* (one of the main avenues in Mexico City) or mount a hunger strike in the *Zocalo* rather than sue the government or legally challenge violations of their rights. Often, the leaders of such movements and organizations do not even realize that they can channel their demands through the courts.”

¹⁵⁰ See Gavison, *supra* note 143 at 216; See also Jack Balkin, “What Brown Teaches about Constitutional Theory” (2004) 90 *Va L Rev* 1537 at 1546 (contending that “reform movements are well advised not to rely primarily on courts to push their agenda. Relying wholly on courts is usually unsuccessful, and any court decision in one’s favor are likely to meet with considerable popular resistance. Conversely when litigation is one part of a larger strategy that includes direct action and legislative reform, the reform movement is more likely to be successful and to make progress more quickly”).

generally acknowledged and need not be over-stressed.¹⁵¹ As a leading authority on British administrative law observed, “There is something particularly exasperating about broad affirmations of human rights [without] giving them legal protection”¹⁵²

An important issue which is generally overlooked in the literature concerning using the law courts to expand human rights protection in Nigeria is the relationship between the historical characteristics of her courts dating all the way back to colonialism and the extraordinary changes made through various post-independence constitutions to the texture of human rights norms and the demands which those, at times, revolutionary provisions placed on the courts. As Nwabueze noted,¹⁵³ though appearing to be one of the major reasons for the apparent ambivalent posture of the courts in protecting human rights in the country, this issue has suffered both insufficient theorization and a lack of satisfactory academic scrutiny. The works of Okere,¹⁵⁴ Dakas,¹⁵⁵ Okonkwo¹⁵⁶ and Nwauche¹⁵⁷ reflected some of the concerns covered in my research, but discussed the issues from specific thematic positions, and in a manner different than the approach I propose to adopt in my research.

Okere discusses the competing theories of judicial interpretation of the constitution where the declaratory theory enjoins courts simply to declare the law as opposed to the constitutive variant which is more purposive in nature. Dakas’ piece is similar to Okere’s as it also discusses the proper role of courts in constitutional interpretation. He made a similar distinction between mere declaration of the law and

¹⁵¹ An-Na’im says, for example, that court involvement in human rights protection is not just for the “judicial enforcement of these rights as legal entitlement, but also to sustain the efficacy and credibility of all other mechanisms and processes relevant to their implementation” *supra* note 62 at 91.

¹⁵² SA de Smith, *Constitutional and Administrative Law* (London: Penguin Education, 1971) 440 cited in Gibson Kamau Kuria & Algeisa M. Vazquez, “Judges and Human Rights: The Kenyan Experience” (1991) 35 J Afr L 142 at 144.

¹⁵³ Ben Nwabueze, *The Judiciary as the Third Estate of the Realm* (Ibadan: Gold Press Ltd, 2007) at 9.

¹⁵⁴ See B Obinna Okere, “Judicial Activism and Passivity in Interpreting the Nigerian Constitution” (1987) 36 Int’l & Comp L Q 788.

¹⁵⁵ See Dakas, *supra* note 66 at 64.

¹⁵⁶ R Chude Okonkwo, “The Legal Basis of Freedom of Expression in Nigeria” (1978) 8 Cal W Int’l L J 256.

¹⁵⁷ ES Nwauche, “The Dubious Distinction between Principal and Accessory Claims in Nigerian Human Rights Jurisprudence” (2008) 52 J Afr L 66.

interpreting in a manner that averts injustice in all cases where mere declaration will lead to that end. Okonkwo on his part examines the legal framework for the practice of the right to freedom of expression in Nigeria. He also highlighted the shortcomings of the Nigerian rights limitation regime. Nwauche was more concerned in his piece with the troubling distinction that the Nigerian Supreme Court established between “main” and “accessory” claims in human rights litigation.

Significant as these interventions are, they did not go far enough in interrogating the Nigerian ideology of human rights adjudication especially from a comparative standpoint. This is a major concern of this research. A proper contextualization of this concern is perhaps appropriate at this juncture. At independence Nigeria had the Westminster parliamentary model of democracy.¹⁵⁸ Yet the constitution contained an elaborate Bill of Rights with clear guidelines for its application in the courts. This suggested some form of rights-based judicial review and striking down of laws inconsistent with the contents of the Bill of Rights. Under English common law which had prevailed prior to independence, individual rights availed only against the executive but not against the legislature. As one writer noted, “Courts in the common law jurisdiction have never countenanced the view of individual liberty as embodying eternal reason, unalterable by the legislature.”¹⁵⁹ Britain which colonized Nigeria at that time “had no constitutional bill of rights, its judges [were] remarkably conservative, and its legal culture greatly [favored] parliamentary sovereignty to the nearly complete exclusion of judicial creativity.”¹⁶⁰ Reconciling a rights-based approach to judicial review with parliamentary supremacy was therefore bound to stir up a methodological conflict, which it certainly did.

¹⁵⁸ John Ademola Yakubu, “Trends in Constitution-Making in Nigeria, (2000) 10 *Transnat’l L. & Contemp. Probs.* 424; James S. Read, “The New Constitution of Nigeria, 1979: “The Washington Model”?” (1979) 23 *J Afr L* 131 at 136.

¹⁵⁹ B O Nwabueze, *A Constitutional History of Nigeria* (London: Longman Inc., 1982) at 118.

¹⁶⁰ Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago & London: The University of Chicago Press, 1998) at 111.

I will demonstrate in this study that in resolving this conflict, Nigerian courts did take the path of least resistance. They have over the years favored a more conservative, rights-constraining attitude suited to the early British tradition¹⁶¹ over and above the dynamic, rights-expanding process more widely applied in the American tradition even after Nigeria abandoned the British parliamentary system for the American presidential model of government.¹⁶² This attitude seems therefore to have stifled the creative capacity of the courts in developing this area of law and probably accounts for why they have not done as much as they could have to develop definite analytical standards in human rights cases. This appears to me to be one explanation for why the courts appear to have not been very effective in redressing widespread abuses even under the supposed democracy that has been in effect in Nigeria since May 1999. Sadly, this subject is evidently under-researched within the Nigerian legal academy. In fact I could go so far as to say that the problem has persisted because of this apparent lack of scholarly interest. While an explanation for this lack of interest is outside the boundaries of this dissertation, I suggest that it might be a useful theme for further research.

Given this scenario, my dissertation proposes that Nigeria's constitutional and judicial review practices pertaining to human rights violations warrants a considerably different trajectory. I am also hopeful that my study will positively alter current methods for the teaching of constitutional and administrative law in Nigerian universities. This stems from my belief that the seemingly unhelpful attitude of the courts to human rights litigation in Nigeria is directly related to the exposure of the judges to a particular regime of education and training. The emphasis has been on British constitutional and administrative law practices going back several decades. In contrast, I argue that the

¹⁶¹ Lionel Brett, "The Role of the Judiciary in a Federal Constitution with Particular Reference to Nigeria" in *Constitutional Problems of Federalism in Nigeria* (Lagos: Times Press, 1961) at 21(stating that "The courts throughout the British Commonwealth have traditionally regarded questions of policy as outside their scope").

¹⁶² See *United States v. Caroline Products*, [1938] 304 U.S. 144 at 152 where the U.S. Supreme Court held that "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments [Bill of Rights] ..."

Nigerian human rights adjudication regime should follow more the practices of legal environments that operate written constitutions and rights-based judicial review which is the model that obtains presently in Nigeria.

1.9.1. Methodology

My approach is a combination of interdisciplinarity (including such other disciplines as political science, economics and sociology), doctrinal and legal reasoning as well as case-law analysis. I will apply forms of legal and social science analytical methods. Some parts of my analysis will also take the character of historical narratives. I will consult secondary sources to evaluate previous literature on the subject, contextualize it, map its limits and establish a framework. These sources shall include books and journal articles treating broadly the human rights theme, adjudication of human rights cases and how these are impacted by a transitional situation. I will also apply reports of human rights organizations working within and outside Nigeria if only to show the state of human rights protection or lack of it in the country.

Since case-law evaluation will form an essential component of the research, I will use doctrine, legal reasoning, analysis and jurisprudence of human rights cases decided in Nigeria prior to 1999 to show the slippery provenance and inadequacy of current rights-based adjudication while applying those decided since 1999 to measure the claim that the judiciary is failing in its duty as guardians of human rights. I will also apply primary information and legislation, including the constitution and international treaties to which Nigeria is a state party. In doing so, I will discuss the nature of legal obligations that Nigeria undertakes by acceding to international agreements and what impact this has on domestic human rights adjudication.

Because it was impossible to cover all the cases of a human rights nature decided by all the courts in Nigeria during the period that my research covered, I will limit my choice of cases for analysis to those decided by the Nigerian Supreme Court and the Court of Appeal, and especially those cases that were commenced by the Fundamental Rights (Enforcement Procedure) Rules. My primary means of case selection will be by

consulting the major law reports published in Nigeria, particularly the Nigeria Weekly Law Reports published by the Nigeria Law Publications Limited. I will also locate some cases by consulting the websites of Nigeria's Supreme Court and Court of Appeal.

I will pay special attention to decisions of the Supreme Court and Court of Appeal in case selection because they are the ones with widest jurisprudential impact in Nigeria's precedent-based legal system. Because lower courts are under obligation to follow decisions of the Supreme Court and Court of Appeal, it was evident that I should place more emphasis on the judgments of those courts. My case sampling method would therefore be more purposive than arbitrary. This will enable me to capture a broader range of cases that fit within the research agenda. In analyzing the cases, I will test those selected for the outcome of the litigation, jurisprudential rigor as well as for consistency with previous judgments. Where contradictions or inconsistencies were evident, I will draw them out. Overall, the Nigerian constitution was the major legal document for case analysis.

In addition to the jurisprudence of Nigerian courts, I will utilize as well those of comparative jurisdictions. For this reason, my analysis will be substantially comparative.¹⁶³ It will be an opportunity for me to explain how other national legal systems approach issues similar to the ones I am investigating with respect to Nigeria. More specifically, I will support my analysis with accounts from United Kingdom whose legal traditions continue to influence Nigerian practices due to its colonial history, as well as the United States whose presidential constitutional system Nigeria has been operating since 1979. To a lesser degree, I will also refer to South African practices and jurisprudence in my analysis.

¹⁶³ John C. Reitz, "How to do Comparative Law" (1998) 46 Am J Comp L 617. T Koopmans, "Comparative Law and the Courts" (1996) 45 Int'l & Comp L Q 545. WJ Kamba, "Comparative Law: A Theoretical Framework" (1974) 23 Int'l & Comp L Q 485. Max Rheinstein, "Comparative Law – Its Functions, Methods and Usages" (1968 – 1969) 22 Ark L Rev 415.

1.9.2. Scope of Study and Outline

It is important to sufficiently constrain my research so as to limit it to its identified focus. I do not have the liberty of discussing human rights from all of possible angles that it could have been approached. Doing so would detract from my fundamental goals and possibly hamper my inquiry. Though I have already offered an understanding of the concept of human rights that animates this work, it does not follow that I was engaged in any detailed philosophical or conceptual debate about the subject. As well, the information provided about the actual state of human rights in Nigeria and the manner in which their violations is intended not to distract focus but to provide a nuanced background and insight to the major issues that this study deals with.

Furthermore, because my concern was to evaluate the performance of Nigerian superior courts in human rights adjudication for the stated period, I will not limit the cases generated for analysis to those in which the decisions of the courts left very much to be desired but also will include those where the decisions were positive for the litigants. Discrepancies in the position of the courts will be highlighted on a case by case basis and the probable reasons for those discrepancies were offered.

The dissertation is divided into seven chapters this one included. This chapter puts the entire study in its proper context. It sets out its goals, the problem it investigated and its overarching social, legal and political background. It also contains the review of secondary literature and the methodology adopted. The chapter as well constrains the study by mapping out its limits, especially with regards to those issues that it did not cover.

In chapter two I address the theoretical and conceptual concerns of enforcing human rights through the courts. After explaining why a single theoretical approach may not be suitable for discussing the research questions in the Nigerian context, I will identify theories that might be in contention including those taken from other disciplines

with which the law and human rights adjudication might have more than casual connection.

The third chapter discusses human rights in Nigeria from historical and cultural perspectives. The chapter is a vehicle for understanding social and political events and incidents that occurred in the country's past and how they shaped and influenced contemporary developments. This chapter also traces the process of constitutionalizing human rights in Nigeria as well as the impact of military rule in the development of human rights in the country.

Chapter four of the study discusses the analytical standards for the review of human rights cases from a comparative standpoint. After evaluating the various standards used across different jurisdictions, I situated them alongside the dominant approach adopted by Nigerian courts in human rights cases. This helps us to assess whether Nigerian courts operate according to comparable standards to those evaluated and if not to offer some insights as to why this is the case.

The fifth chapter takes a look at Nigeria's human rights architecture. It first discusses the various sources through which the norms applied in Nigerian courts are derived. These will include the constitution, international law and other municipal sources. I will also discuss how domestic human rights norms interact with international norms. In this chapter as well, I will treat Nigeria's court structure and jurisdictional issues in human rights cases.

Chapter six of the research is the major portion of the study because it will examine the work of Nigerian appellate courts pertaining to human rights cases from 1999 to 2009. But before that analysis and by way of a background, this chapter also discusses analytical and doctrinal attitudes of the courts to human rights cases for the period following the adoption of the independence constitution in 1960 and the demise of the country's second republic in 1983. I will analyze changes to the constitutional framework, if any, introduced by the 1999 constitution as well as how that framework

governed judicial determination of cases brought through it. In this chapter, I will test and apply the theoretical approaches and threads earlier identified in the study to the court cases and as well to the judicial orientation that may have informed them.

The seventh chapter is no less important because it discusses major challenges and constraints to the judicial enforcement of human rights in Nigeria. Some of the issues this chapter addresses are procedural (like issues of standing) and others are political. The chapter also discusses structural shortcomings such as the weakness of the rule of law regime and judicial independence.

The last chapter concludes the study and offers some recommendations.

Chapter Two

“Hello, what are you looking for?” Theorizing Human Rights Adjudication in Transitions

2.1. Introduction

Theories are helpful for the purposes of understanding and unpacking phenomena as well as explaining individual and group behavior in different fields and contexts. They are often abstract generalizations about specific research engagements and the social realities that give them character. The objective of this chapter is to identify theoretical models suitable for the subject area that could be used to test human rights decision-making and where those models could apply with reference to Nigerian courts. In accomplishing this task, I will briefly discuss an understanding of adjudication in its broadest sense and not as restricted to human rights decision-making. Thereafter, I will tease out specific theories of adjudication that could apply to the judicial function more generally and how those theories could apply to the human rights reasoning and decisions-making of Nigerian courts in transition more specifically.

From the discussion on the role of courts in transitions, it is obvious that the judiciary is perhaps the most durable institution of political governance. Neither the violent civil revolutions in the former Communist countries of East and Central Europe in the late 80's and early 90's nor military seizure of power in parts of Africa and Latin America for substantial periods in the course of the Twentieth century led to any displacements of the judiciary as an organ of government. Rather we saw how each and every unpopular regime relied on the courts for much needed legal legitimacy. Dictators are in most cases worried by the prospects of an independent judiciary and therefore generally attempt to muzzle that arm of government. But they always stop short of

completely proscribing it as an institution of government.¹⁶⁴ There must be some important reasons why the judiciary as an institution is generally considered essential to the functioning of government during periods of relative peace, at war times, during periods of repression or conflicts and even more so at those periods when the society is passing through a transitional phase.

The reason the judiciary is considered durable is not so much because it fits much of the character depicted above but more so because its personnel pass through more elaborate, rigorous and focused training that makes them the only ones suited to perform the function that society assigns to them. The judiciary is the guardian of the law.¹⁶⁵ Judges are not supposed to be respecters of persons and are meant to stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law.”¹⁶⁶ Courts may be the mechanisms to defend democracy itself against the tendency of government to perpetuate its own power¹⁶⁷ or they are the bulwark of individual rights.¹⁶⁸ It is also the understanding in most societies that courts should develop and adapt the law in line with changing social

¹⁶⁴ An example that readily comes to mind is the experience of Pakistan in 2007 under the regime of Pervez Musharraf. Just days before the country’s Supreme Court was to rule on his re-election as President, and fearing that the judgment would go against him, he imposed emergency rule. The Supreme Court quickly convened and issued an interim order against the declaration of emergency and ordered the Pakistani armed forces not to obey illegal orders. In response, Musharraf dispatched soldiers to the Supreme Court who arrested the judges. Because of these events, some judges refused to take oath to serve under Musharraf and left their offices altogether. Yet he did not achieve a complete proscription of the judiciary as an arm of the Pakistani government. See Jane Perlez, “Musharraf Declares State of Emergency” *New York Times* (3 November 2007) online: <<http://www.nytimes.com/2007/11/03/world/asia/04pakistan.html>>; “Musharraf Suspends Pakistan’s Constitution: State of Emergency Declared, Chief Judge Replaced and Communications cut in Capital” online: <<http://www.cbsnews.com/stories/2007/11/03/world/main3448594.shtml>> Matthew J Nelson, “Pakistan in 2008: Moving Beyond Musharraf” (2009) 49 *Asian Survey* 16; Mohamed A El Khawas, “Musharraf and Pakistan: Democracy Postponed” (2009) 20 *Mediterranean Q* 94; Gretchen Helmke & Frances Rosenbluth, “Regimes and the Rule of Law: Judicial Independence in Comparative Perspective” (2009) 12 *Annu Rev Pol Sci* 345.

¹⁶⁵ See Nwabueze, *supra* note 152 at 3.

¹⁶⁶ Per Lord Atkins in *Liversidge v Anderson*, [1942] AC 206.

¹⁶⁷ See Gavison, *supra* note 143 at 222.

¹⁶⁸ See Henkin, *supra* note 36 at 1052.

circumstances.¹⁶⁹ These notwithstanding, several significant aspects of the judicial function remain essentially contested. In no other area is this perhaps even more so than in the field of judicial responsibility for the enforcement of human rights. There are as many questions hanging over what the courts should do in this area as there are over how they should do it.

In putting this aspect of my study through a theoretical exploration, one caveat is necessary. The role expected of courts in any society extends well beyond the narrow parameters of enforcing the human rights of individuals. That role includes enforcing private contracts, punishing tortious acts, hearing criminal cases, settling family disputes, and so on.¹⁷⁰ Though human rights questions may not too infrequently arise from these categories of cases, they are not my concern in this study. A better way of understanding this dimension of my inquiry might be therefore to take to heart Perry's distinction between "human rights understood as a category of moral rights" as opposed to those other "legal rights" that are not of a human rights nature.¹⁷¹ While all human rights would most often qualify as legal rights, local contexts permitting, the opposite claim cannot be true of the other legal rights. Most of them are not human rights.

Hartney provides a more persuasive explanation of the difference between legal and moral rights. With regard to legal rights he states that:

Law differs from ordinary life or more discourse in that the truth of any legal statement depends ultimately on the acts of certain *authorities*. [His emphasis] Whatever is legal or illegal is so because it was *made so* [His emphasis] by legal authorities. The ultimate touchstone therefore of all

¹⁶⁹ Allan C Hutchinson, "Heydon' Seek: Looking for Law in all the Wrong Places" (2003) 29 Monash U L Rev 85 at 91.

¹⁷⁰ Tunde I Ogowewo, "Self-Inflicted Constraints on Judicial Government in Nigeria" (2005) 49 J Afr L 39 at 41 (identifying those roles as "ensuring government accountability, protecting fundamental rights, assuring certainty in commercial transactions, protecting property rights and dispensing justice efficiently").

¹⁷¹ Michael J Perry, "Protecting Human Rights in a Democracy: What Role for the Courts?" (2003) 38 Wake Forest L Rev 635 at 638.

legal statements (and of the meaning of legal terms) is therefore the acts (and especially the utterances) of these legal authorities.¹⁷²

As it concerns moral rights on the other hand, this scholar, invoking in part Dworkin's conception of rights as trumps against the larger interest of the public, contended as follows:

Not all goods or interests generate rights; it is only when there is a particularly important moral reason for protecting the good or interest in question that we speak of there being a right to it. This idea is expressed in Dworkin's well-known claim: "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."¹⁷³

Therefore, my concern in this study is the nature of the judicial function when what is at stake is the enforcement of human or moral rights. In other words, those rights constitutionally protected and in which constitutional provisions entrenching those rights are cited shall be the main focus of this research.

There is a great meshing of factors that may make undesirable any effort to put human rights adjudication through a single theoretical lens. Human rights concerns implicate law and politics as well as economics and history. Those concerns happen at ordinary times, in times of crises and conflict as well as in transitional moments. At the point where all these historical, social, political and economic realities intersect, therefore, different theoretical justifications are most likely to be in contention. The judiciary as an institution of government functions in different societies at various stages

¹⁷² Michael Hartney, "Some Confusions Concerning Collective Rights" (1991) 4 Can JL & Jur 293 at 301; See also Patrick Grim, "The 'Right' to a Fair Trial" (1978) 2 J Libertarian Stud 115 (where he differentiates "legal" from "ethical" rights).

⁹³*Ibid* at 303.

of development. Economic and sociological conditions are hardly uniform across all regions and legal jurisdictions. In fact, legal systems vary in ways that they function and those ways in turn shape the orientation of the courts. What works in one system may not necessarily produce similar results in another system. Even in systems claiming the same historical legal heritage, diversities remain most times obvious.

An example is that the English and American legal systems are grouped together within the common law legal system. Yet as was clear from my earlier discussion, the attitude of their courts to judicial review, for one, had for years been at roughly opposite tangents. Nigeria also belongs to the common law family but operates in a different social, political and economic context from, say the United States or United Kingdom. Even in those countries which recognize wide powers of judicial review, marked differences exist in the forms of the review.¹⁷⁴ In addition, though in Western liberal democracies where constitutional theory is dominated by the disagreement as to which institution between the courts and the legislature is better able to fulfill the aims constitutional government, Ramraj suggests that when context is factored into the discussion and it takes place on a broader frame, this obsession should be at the periphery and not the core of the discussion.¹⁷⁵

While in the more developed democracies there is an assumption on the part of the legal and political elite of an enduring commitment to constitutionalism, the presence of strong, stable public institutions, and an entrenched legal culture that makes possible the realization of substantial constitutional values, this is not always the reality in other contexts.¹⁷⁶ On the contrary, Ramraj cited the example of the Southeast Asian process where legal institutions are weak and the legal culture is not conducive to

¹⁷⁴ See Ackermann, *supra* note 103 at 60.

¹⁷⁵ Victor Ramraj, "Constitutional Tipping Points: Sustainable Constitutionalism in Theory and Practice" (2010) 1 *Transnat'l Legal Theory* 191 at 192.

¹⁷⁶ *Ibid.*

constitutionalism as support for his theory that the legislative-judicial divide should be at the margins and not at the core of constitutionalism discussions.¹⁷⁷

With the above orientation in mind, applying the same theoretical justifications of how courts function uniformly across the many existing legal divides would most likely produce opaque results. It is in appreciation of this diversity among legal systems that one is cautioned against any attempt to uniformly theorize on the role of courts but more specifically regarding their attitudes in human rights adjudication. Instructively, as well “[a]ny attempt, then, to understand constitutionalism by examining judicial decisions in constitutional cases in a purely acontextual way is unlikely to shed much light on the true state of constitutionalism...”¹⁷⁸

It is therefore very clear that the duty of the courts in government and how they go about fulfilling that duty is an issue of passionate public concern. This concern is exemplified by the fact that lawyers (or those with legal training) and, as well, persons in other fields and professions have persistently shown interest in explaining judicial behavior using analytical tools taken from those diverse backgrounds. These fields have ranged, apart from law, to sociology, economics and political science. At the beginning of the Twentieth Century, for example, Roscoe Pound questioned the atomization of jurisprudence which he said did not account for law in action as it did law in the books. He admonished the legal experts of that period to:

Let us not be afraid of legislation, and let us welcome new principles, introduced by legislation, which express the spirit of the time. Let us look the facts of human conduct in the face. Let us look to economics and sociology and philosophy and cease to assume that jurisprudence is self-sufficient.¹⁷⁹

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Roscoe Pound, “Law in Books and Law in Action” (1910) 44 Am L Rev 12 at 35-36; See also G Edward White, “From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America” (1972) 58 Va L Rev 999.

Pound's counsel has been put into practice. Discussions about law and how it is implemented through adjudication have passed through the lenses of different fields of scholarship. If the idea was to unpack law from strict rules and principles and to impart a new thinking that "effective judicial performance came not from obeisance to such principles but from an awareness of the social context of adjudication,"¹⁸⁰ then it is already happening.

Therefore, in carrying out this section of my research, I will start by providing a general description of the judicial function that covers not just what judges and courts do when faced with human rights cases but more so as it relates to adjudication as a general theme. Secondly I will consider scholarship from disciplines outside law that seek to explain how factors taken from studies in those non-legal areas could be applied to understand judicial behavior, and what, if any, differences would result from applying those theories specifically to human rights adjudication. In particular, I will discuss theories taken from economics, political science and sociology. Thirdly, I will treat theories related to the functioning of the judiciary as an institution as well as how its role in governance is affected by institutional characteristics, social context realities and the political environment. I will proceed further to analyze theories about how the individual character of judges, their training and socialization influence their adjudicatory choices.

2.2. First things First: Adjudication as Norm Creation

This study, as I have already mentioned, engages the question of the judicial function in society. Adjudication is at the core of that function. That process is understood in the opinion of Stone-Sweet and Matthews to involve a "reductive theory of third party dispute resolution (TDR)" or in other words a triadic two-against-one governance principle."¹⁸¹ Fuller agrees with this conception of adjudication in its broadest sense. But

¹⁸⁰ White, *Ibid* at 1007.

¹⁸¹ Alec Stone Sweet & Jud Matthews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Colum J Transnat'l L* 72 at 81 ("When two parties in dispute ask a third party for assistance, they build, through a consensual act of delegation, a node of social authority, or mode of governance. By 'mode of

in his specific elaboration, Fuller says the function includes [a] “adjudicative bodies which owe their powers to the consent of the litigants expressed in an agreement of submission,” as well as [b] “tribunals that assume adjudicative powers without the sanction either of consent or of superior governmental power, the most notable example being the court that sat in the Nuremberg Trials.”¹⁸²

But while Fuller’s [a] above fits perfectly into Stone Sweet and Matthews’ consensual TDR, his [b] stands at an extreme that the two authors never even considered. In reality, Fuller’s categorization did not therefore mention Stone Sweet and Matthews’ own version of the compulsory TDR, though I suspect that it lies somewhere in between the two extremes in his own categorization.

However, Fuller’s most illuminating contribution to the debate about the true nature of adjudication lies in his belief that any notion of “true adjudication” runs heavily against the grain of modern thought. He therefore set out early to accept A.D. Lindsay’s thesis that “it is scarcely possible to talk intelligently about social institutions without recognizing that they exist *because* and *insofar as* [all the emphases are his] men [and women] pursue certain goals or ideals.”¹⁸³ Therefore while noting the futility of chasing an absent “true” model of adjudication, Fuller still conceded that “it is only with the aid of this nonexistent model that we can pass intelligent judgment on the accomplishments of adjudication as it actually is.”¹⁸⁴

Even though it is customary to view adjudication in terms of settling disputes and controversies, Fuller conceives it more fundamentally as a form of social ordering of which there are two basic forms: organization by common aims and organization by

governance’ we mean a process a process through which the rule systems (norms, law) in place in any society are applied and adapted, on an on-going basis, to the needs and purposes of those who live under them. The theory focuses on the dynamics and political consequences of moving from the dyad (cooperation, conflict, dispute settlement between two parties) to the triadic context, and moving from consensual TDR to compulsory TDR”).

¹⁸² Lon L Fuller, “The Forms and Limits of Adjudication” (1978-1979) 92 Harv L Rev 353 at 354.

¹⁸³ AD Lindsay, *The Modern Democratic State* (London: Oxford University Press, 1943) at 42.

¹⁸⁴ Fuller, *supra* note 181 at 357.

reciprocity. While organization by reciprocity envisages participants wanting different things, organization by common aims requires that participants want the same thing or things.¹⁸⁵ He considers government as a highly formalized variety of organization by common aims. And because the proper province of organization by reciprocity lies in an area where divergent human objectives exist, Fuller says it comes into play where an exchange or something equivalent to it may enrich both parties. A good example is one giving out twenty cents to a grocer in exchange for a loaf of bread.¹⁸⁶

Fuller's understanding of adjudication also differs from that offered by Stone Sweet and Matthews in another sense. While the latter scholars analyzed the practice by overt reference to the position of the disputing parties to the TDR, Fuller offers a different distinguishing factor: the role of the disputants in the process. He states that

[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself.¹⁸⁷

Fuller also discussed the limits of adjudication by which he examined the kinds of tasks that are inherently unsuited to adjudication. First he said, courts cannot carry out "polycentric" tasks. He gives as an example of such a task, a wealthy lady who willed a miscellaneous collection of paintings to two different organizations in equal shares but indicating no particular apportionment. Fuller says this task is polycentric for a court because "the disposition of any single painting has implications for the proper disposition of every other painting."¹⁸⁸ He also stated that if the proper apportionment were set for argument, there would be no clear issue to which either side could direct its proofs and

¹⁸⁵ *Ibid* at 358.

¹⁸⁶ *Ibid* at 359.

¹⁸⁷ *Ibid* at 364.

¹⁸⁸ *Ibid* at 394.

contentions. He, however, sees little merit in views that adjudication is limited to declaration of rights and duties or that the courts cannot undertake an affirmative direction of affairs.¹⁸⁹

My analysis thus far makes apparent the fact that the framework for the analysis of adjudication developed by Stone-Sweet and Matthews and that discussed by Fuller could well apply to any individual or body called upon to decide upon a dispute. They are not restricted to the courts as an institution of government. But my concern in this study is with courts in the sense of an arm of government charged specifically with hearing and resolving disputes whether between individuals *inter se* or between individuals and the government. My discussion, relative to the courts, will therefore fit more into Stone-Sweet and Matthews' compulsory TDR model as well as Fuller's understanding of adjudication as a form of social ordering and not so much as a means of settling individualized disputes.

I understand that while human rights adjudication by courts might involve settlement of individual disputes in a variety of conditions, a majority of human rights cases are filed against government institutions. In that case, the outcome of those cases generally has the possibility to bind persons and institutions that may not have participated in the immediate case. Further, at least one of the parties to the case would not have voluntarily appeared in court but have to do so at the behest of the other party with the possibility of legal sanctions for failure to appear. And having disposed of this dimension to my inquiry, I now turn to the theoretical consideration of the role of courts in both individual dispute resolution and in social ordering.

¹⁸⁹ *Ibid* at 404. See further Robert G Bone, "Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation" (1995) 75 BU L Rev 1273; Owen M Fiss, "Foreword: The Forms of Justice" (1979) 93 Harv L Rev 39; Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv L Rev 1281.

2.2.1 What Judges Do: A Positivist View of Adjudication?

Discussions on the role of judges in society and how they perform those roles take positivism as the major point of departure. It is the one model that provides safe haven for all judicial comers; the temperate and abusive as well as the scrupulous and those lacking proper discretion. It is a formalist understanding of the functioning of law, according to Bourdieu, which sees law as “an autonomous and closed system whose development can be understood solely in terms of its ‘internal dynamic.’”¹⁹⁰

Positivism inevitably glorifies the position whereby law and adjudication are constrained by rules, principles and doctrine; where judges are involved only in the mechanisms of identifying those factors and applying them to the case at hand. Conceived in this manner, White observes, law is obsessed with “ineluctable rules, principles and axioms..., judges began their decisions by making verbal distinctions, defining concepts in useful ways. They then pronounced their definitions as axiomatic. From then on it was a rush downward to the result: the axiom was applied to the facts of a case, certain things ‘inevitably’ followed.”¹⁹¹

Spaeth calls this the legal theory of judicial action. He describes this conception as the justification of judicial decisions on the basis of the facts of the case interacting with one or more of four different considerations. These considerations are (1) the language of the applicable law, (2) the intentions and motivations of those who made the law, (3) precedent established in previously decided cases, and (4) a balancing of societal interests.¹⁹² It is also called the positivist or traditional view of law and adjudication in which law is “a system of settled and certain rules from which it is possible to deduce by logical operations ‘the law’ applicable to any given set of facts.”¹⁹³

¹⁹⁰ Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” (1987) 38 *Hastings L J* 814.

¹⁹¹ White, *supra* note 178 at 1001.

¹⁹² Harold J Spaeth, “The Attitudinal Model” in Lee Epstein ed., *Contemplating Courts* (Washington DC: Congressional Quarterly Inc., 1995) at 296.

¹⁹³ AH Campbell, “Courts on Trial” (1950) 13 *Mod L Rev* 445.

There are clear reasons for this understanding of law and how it functions. To claim that there are other considerations besides rules, doctrine and precedent by which judges arrive at their decisions would be to rid those decisions of their objectivity. It had to be stated quite plainly that judges are constrained by these factors in their decision-making activities in which case the losing parties to litigation would have to blame those factors as applied to the facts of the case for their losses and not the individual judge who made the decision.¹⁹⁴ The tendency is to isolate the judiciary and its work though part of the government from political decision-making and to prevent courts from morphing into theatres for the deployment of political judgment and rhetoric.¹⁹⁵ This, it seems, is the major goal of positing adjudication as an objective and rationally-bounded process, in stark contrast to the non-rational, and often arbitrary/self-interested, character of political decision-making.¹⁹⁶ For this reason, in most countries, judges are not elected unlike those who occupy executive and legislative positions.¹⁹⁷

This model fits into my research because it is perhaps the favorite of the Nigerian judicial establishment. In the portions of this research that follow, I will show through case-law how Nigerian courts often justify their judgments on the basis of laws, rules, doctrine and precedent and their disavowal of extraneous considerations in their

¹⁹⁴ Horowitz, *supra* note 66 at 148 (stating that “Judicial opinions state results in terms of reasons. Judges and juries are insulated from extraneous influences. They are shielded from the clash of opposing interests and the process of ‘give-and-take’ that are supposed to constitute integral parts of the other governmental processes. The courts take pride in their ability to work their way through the tangle of ‘special interests’ and to handle issues ‘on their merits’... The assumption of the judicial process is that, where reason resides, the public interest will emerge”).

¹⁹⁵ Henk Botha, “Freedom and Constraint in Constitutional Adjudication” (2004) 20 S Afr J Hum Rts 249 at 250 (“These statements express confidence in the ability of judges to avoid political controversy and to decide cases in accordance with the law, rather than their own political convictions. The court, it seems, regards itself as constrained by legal materials even in the face of bitter political controversy and division over social issues, and even where the Constitution itself contains only vague norms to guide decision-making.”)

¹⁹⁶ Allan C Hutchinson & Patrick J Monahan, “Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought” (1984) 36 Stan L Rev at 202.

¹⁹⁷ The United States is an exception in this regard. Some judges are elected and often Judges to the Supreme Court are appointed on the basis of their political ideology which perhaps accounts for why there are more analyses of the political content of judgments of US courts than that of any other country in the world. See generally Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Anchor Books, 2007, 2008); David S Law, “How to Rig the Courts” (2011) 99 Geo L J 779.

decisions. This is against the common understanding that when courts review actions of other branches of government, that task engages policy at a high threshold. It therefore gives the courts considerable latitude to not just influence the policy choices of the government but to actually shape those choices in very significant ways.¹⁹⁸ In the sections that follow, I will explore insights from other disciplines and even within the legal field by critical theorists that have risen to challenge the positivist view that law and adjudication are conditioned by only doctrine, rules and precedent.

2.2.2. *The Politics of Adjudication*

Courts do not operate in a political vacuum.¹⁹⁹ All around us, the impact of politics on law and *vice versa* is very stark that it cannot be ignored. Hutchinson, in fact, describes adjudication, a major component of the judicial function as “inescapably political and non-objective.”²⁰⁰ The judiciary is the third arm of government and operates under the shadow of politics as it cooperates with more representative branches of government to create a stable society. Yet being a part of the government does not make the courts or judges practitioners of politics of the traditionally partisan kind. Judges are not elected²⁰¹ and so do not compete for votes. But every so often, cases that come before courts contain political ingredients or may lead to crucial political consequences. How extensive

¹⁹⁸ See Maurice Adams & Gehard Van Der Schyff, “Political Theory Put to the Test: Comparative Law and the Origins of Judicial Constitutional Review” (2010) 10 *Global Jurist* (Article 8) 1.

¹⁹⁹ *Ibid* at 206, (They credit Critical Legal Scholars with the theory that “Law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society. Legal doctrines not only does not, but also cannot, generate determinate results in concrete cases ... Legal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes.”); Jack M Balkin, “What *Brown* Teaches us about Constitutional Theory” (2004) 90 *Va L Rev* 1537 at 1538 (stating that, “Political scientists have long argued that the Supreme Court is part of the national political coalition, that Supreme Court decisionmaking is strongly influenced by national political majorities and national public opinion, and that the Supreme Court tends to impose values of national majorities on regional majorities”).

²⁰⁰ Allan C Hutchinson, “Judges and Politics: An Essay from Canada” (2004) 24 *Legal Stud* 275.

²⁰¹ Barring some states in the United States where judges are elected. See Stephen B Bryant & Patrick J Keenan, “Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases” (1995) 75 *BU L Rev* 759; Nathan S Heffernan, “Judicial Responsibility, Judicial Independence and the Election of Judges” (1996-1997) 80 *Marq L Rev* 1031.

is the impact of politics on the work that judges do? How should judges treat cases that show traces of political sensitivity? Is it possible to separate politics from judging?

These concerns relate as well to pure partisan politics as they do in the world of the contemporary phenomenon known as political judicialization by way of judicial empowerment through the constitutionalization of rights. This process allows hegemonic elites possessing a disproportionate access to influence upon the legal arena to contrive the constitutional entrenchment of rights so that power is transferred to the courts.²⁰² This is more so in divided, mostly transitional societies of which Nigeria makes a near perfect fit. However, while under this model the hegemonic elite seeks to milk the “judiciary’s public reputation for political impartiality and rectitude,”²⁰³ it is in this sense that it departs from providing a complete account of the Nigerian scenario where the courts do not enjoy that level of public affirmation.²⁰⁴ But the model’s relevance to that scenario is maintained to the extent that it describes a process by which the partisan political branch of the hegemonic elite cedes control to its judicial branch under pressure from those described as “peripheral groups.” In a sense therefore, whether or not the judiciary enjoys a high credibility rating within the society, the results achievable remain the same.

The questions asked earlier and the concerns highlighted above provide focus for some of the issues that have historically agitated political science scholars and which they have tried to capture in some coherent theory. My intention here is not to analyze the growing judicialization of politics and global expansion of judicial power which allows the courts to have the final word in several generally contentious political dilemmas. My immediate concern at this point is to provide an analysis of adjudication from a political science perspective. In this regard, David Robertson identifies three distinct models by

²⁰² Ran Hirschl, “The Struggle for Hegemony: Understanding Judicial Empowerment through Constitutionalization in Culturally Divided Polities” (2000) 36 *Stan J Int’l L* 73 at 75.

²⁰³ *Ibid.*

²⁰⁴ See for example Basil Ugochukwu, “The Pathology of Judicialization: Politics, Corruption and the Courts in Nigeria” (2011) 4 *Law & Dev Rev* 58; Wen-Chen Chang, “Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences” (2010) 8 *Int’l J Const L* 885.

which political science characterizes the judicial role. These are the realist, class and orthodox models.²⁰⁵

He associates the realist model with American traditions following such works as Jerome Frank's *Law and the Modern Mind* and Karl Llewellyn's *The Bramble Bush* which assume broadly that "legal decisions are never determined in any firm way by the rules, precedents and arguments in the court. Rather a judge does, and must, come to his decision intuitively, and then only rationalize it by the legal material."²⁰⁶ This might be characterized as a very strong version of realism. The class model argues that "discretionary problems in law are solved by judges consulting their own notion of 'public interest', which is made up of a belief that the State must be protected from danger, including 'moral' danger, that legislation should be limited in its effects on property and other 'bourgeois' freedoms, and that a general political philosophy associated with the Conservative party should prevail."²⁰⁷ Secondly, this model assumes that "judges in so acting, are acting out of class-conditioned perspective, as agents of a dominant socio-economic group. Thus, it is not so much the private and perhaps idiosyncratic intuitions of judges unprovided with determinate law, but the deliberate and systematic protection of a particular class that characterizes discretionary judgments."²⁰⁸

Finally, the orthodox model Robertson says is hard to describe. Yet he identifies three different assumptions upon which it is raised [1] Discretion does exist, because statutes are sometimes vague, or precedents missing or conflicting. [2] Most judges most of the time will try hard to stick within clear meaning of the statute or the guidance of precedent. Some will from time to time try to develop the law to fit modern needs, but this "public policy horse" is dangerous, to be ridden seldom and cautiously. [3] Where 'difficult cases' do crop up, some judges will act from personal idiosyncrasy, but these

²⁰⁵ David Robertson, "Judicial Ideology in the House of Lords: A Jurimetric Analysis" (1982) 12 Brit J Pol Sci 1.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid* at 2

²⁰⁸ *Ibid.* See also Glendon Schubert, *Political Culture and Judicial Behavior: Subcultural Analysis of Judicial Behavior: A Direct Observational Study* (Maryland: University Press of America, 1985); Thomas A Cowan, "Group Interests" (1958) 44 Va L Rev 331.

are mainly self-cancelling unsystematic quirks, not representing an intrusion of class ideology, and too limited to fit the realist model of permanent intuition.²⁰⁹

Robertson foresees the difficulty, if not impossibility of testing these models. But he decided to do so using empirical data. He started on the basic premises that judicial decision-making in English Appellate Courts is partly discretionary and that where such discretion exists, an individual judge's voting "will be influenced by his beliefs and attitudes inside a specifically legal and 'professional' ideology. This 'ideology' will vary from judge to judge, and whether it is conservative or not, will be complicated both by individual variation with respect to any one aspect of the ideology, and also by the ideology having several aspects."²¹⁰

But much more than the above, political science research into how in particular the United States Supreme Court arrives at its decisions developed another distinct model, called the attitudinal and associated by Frank Cross with both Jeffrey Segal and Harold Spaeth.²¹¹ This model is confrontational to orthodox legal scholarship on the same subject. While orthodox legal research ascribes judicial decisions to reasoned judgment on the basis of precedent or statute, and a consideration of the role of courts in the legal system, political science theory, built on the attitudinal conception of decision-making holds that "a judge's decision depends primarily upon her individual political ideology and the identities of the parties."²¹² Some even go as far as suggesting that legal goals have essentially no effect on Supreme Court behavior and that jurisprudence is entirely result-oriented.²¹³ Cross puts the stalemate between legal and political science research in this area in context when positing that:

Legal scholars cannot ignore this political science research on grounds of social scientific weakness. To the contrary, political scientists have

²⁰⁹ *Ibid.*

²¹⁰ Robertson, *supra* note 204 at 4.

²¹¹ Frank B Cross, "Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance" (1997-1998) 92 Nw U L Rev 251; see also Spaeth, *supra* note 188; Jeffrey Segal, "Separation-of-Powers Games in the Positive Theory of Congress and Courts" (1997) 91 Am Pol Sci Rev 28.

²¹² *Ibid* at 253.

²¹³ *Ibid.*

produced abundant support for the attitudinal model, far more than legal scholarship have mustered on behalf of more traditional legal models. While legal scholars may ignore political science research because it is inconvenient, its results strike at the central underpinnings of conventional legal research. Ignoring the political science research will not make its results disappear. If legal scholars fail to confront the attitudinal model, the resultant legal research will appear increasingly irrelevant and agennetic.²¹⁴

Deriving from the above concerns, there is a strong likelihood that political considerations may influence human rights adjudication. That possibility is not restricted in time or space and for that reason could also be a concern in the Nigerian context. As an issue of practical significance, the main question in judicial review is the actual government branch - legislative, executive or judicial - that qualifies to issue the last word on specific policy choices. The courts cannot very much run away from the political calculation that answering this question engages. Therefore, this theoretical thread is relevant to my research and I will demonstrate this relevance through case-law in subsequent chapters of this research.

2.2.3. Self-Interest and Adjudication: The Public (Rational) Choice Model

Just as has been done with political science research, similar efforts have been devoted to understanding judicial behavior when applying the tools of economic research. I may not explore all the ramifications of those efforts in this study. Therefore I have chosen for a brief consideration the public (or rational) choice theory popularized by Anthony Downs as the economic theory of political action²¹⁵ as well as Richard Posner's "positive economic theory of judicial behavior."²¹⁶ Downs' theory is relevant only in so far as it took account of shortcomings in previous economic research before his which treated

²¹⁴ *Ibid* at 254.

²¹⁵ Anthony Downs, "An Economic Theory of Political Action in a Democracy" (1957) 65 J Pol Econ 135; see also Rafael Gelly & Pablo T Spiller, "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases" (1990) 6 J Law, Econ & Org 263.

²¹⁶ Richard Posner, "What do Justices Maximize? (The same Thing Everybody else does)" (1993) 3 Sup Ct Econ Rev 1.

government action “as an exogenous variable, determined by political considerations that lie outside the purview of economics.”²¹⁷ His own theory therefore sought to integrate government with private decision-makers in a single general equilibrium theory.²¹⁸ In applying his theory here, courts are viewed (as I have earlier indicated) as being a part of the government whose actions are suitable for consideration using the theory as are all the other branches of government.

Downs’ theory goes something like this: There is an assumption that the proper function of government is to maximize social welfare. There are difficulties associated with defining ‘social welfare’ and discovering the means of maximizing it. Even if it is possible to define social welfare and could agree on the methods of maximizing it, “what reason is there to believe that the men who run the government would be motivated to maximize it?”²¹⁹

Downs would rather the government is treated as part of the division of labor in which every agent has “both a private motive and a social function.”²²⁰ He cited the example of a Coal-Miner whose social function is removing coal from the ground and who is motivated to carry this out by his desire to earn income, not by any desire to benefit others. Similarly, Downs argues, every other agent in the division of labor carries out his social function primarily as a means of attaining his own private ends: the enjoyment of income, prestige, or power. “Much of economic theory consists in essence of proving that men thus pursuing their own ends may nevertheless carry out their social functions with great efficiency, at least under certain conditions.”²²¹

As the public choice theory, Downs’ analysis could also be turned the other way round: “although people acting in the political market place have some concern for others, their main motive, whether they are voters, politicians, lobbyists, or bureaucrats,

²¹⁷ Downs, *supra* note 214 at 135.

²¹⁸ *Ibid.*

²¹⁹ *Ibid* at 136.

²²⁰ *Ibid.*

²²¹ *Ibid.*

is self-interest.”²²² Or put differently, the theory “integrates structural and individual aspects in the sense that the social reality is determined by the acts of individuals who are acting rationally under the influence of structural factors.”²²³ On his part Richard Epstein understands the theory to mean that “self interest rules behavior in public as well as private transactions,”²²⁴ and that “individuals in all their roles act to maximize their individual self-interest under conditions of uncertainty.”²²⁵

Notwithstanding the above, the public choice theory is thought by some scholars not to be appropriate in explaining judicial behavior. According to Epstein, while the theory has achieved important breakthroughs in understanding legislative behavior, it has not achieved similar successes in dealing with judicial behavior.²²⁶ He says that the judiciary presents a special challenge in the context of the self-interest proposition. His reasoning is that if the theory of individual self-interest that grounds public choice is as strong as claimed by its proponents, then it should supply insights into the behavior of all classes of public officials.²²⁷ But all success in the use of the theory has been largely with legislative and other political actors while the judiciary is left out because “judges are typically thought, by conscious constitutional design, to lie in some qualified space outside the political process, immune from the temptations that pervade the legislative and executive branches of government.”²²⁸ The public choice model is therefore considered ill-suited to the analysis of judicial behavior because enough institutional

²²² Jane S Shaw, *Public Choice Theory*, *The Concise Encyclopedia of Economics*, online: <http://www.freeuni.edu.ge/uploads/public_choice_theory_by_jane_s_shaw_the_concise_encyclopedia_of_economics_library_of_economics_and_liberty.pdf>.

²²³ See Meydani & Mizrahi, *supra* note 64 at 44.

²²⁴ Richard Epstein, “The Independence of Judges: The Uses and Limitations of Public Choice Theory” (1990) *BYU L Rev* [i] 827.

²²⁵ *Ibid* at 828.

²²⁶ *Ibid*.

²²⁷ *Ibid* at 831.

²²⁸ *Ibid*. See also Meydani & Mizrahi, *supra* note 64 at 45 (stating that “any policy decision made by a politician is underpinned by the reciprocal relations between the politician and the electorate. This also applies to decisions related to human rights. The public makes demands for a certain policy in relations to human rights and the politician will respond positively solely to those demands that increase his/her benefit, i.e., the alternative which represents the position of the median voter”).

steps²²⁹ are taken to make judges objective and remove any incentive for them to misappropriate their offices to advance personal self-interest. In Epstein's summation,

Judges may well act only out of self-interest, but the system is so organized that they do not face the pressures and temptations necessarily encountered by other political actors. The structure of the 'independent' judiciary is designed to remove judges from the day-to-day pressures and temptations of ordinary political office, and with some qualification it achieves that end. It is a strategy that recognizes the forces of self-interest, regards them as potentially destructive, and then takes *successful* [his emphasis] institutional steps to counteract certain known and obvious risks.²³⁰

In deciding the impact of self-interest on the behavior of judges, and how individual judges could maximize it, Epstein distinguished the two roles that courts ordinarily perform: [1] deciding cases and, [2] judicial administration. In the second role he included such tasks as hiring clerks, appearing before Congress and participating in professional organizations.²³¹ My concern here is not with this second role, which leaves us with how judges might maximize their self-interest while performing the role of deciding cases. In Epstein's view, judging cases is at the core of the judicial function. Judges who err while performing it often attract to themselves powerful sanctions. He adds that judges may not talk about pending business with any outsider, nor reveal privately the decision in any case prior to its disclosure to the immediate parties and to the public.²³² They are not to allow money or connection to influence or appear to

²²⁹ But this is one of the criticisms that could be made of the rational choice theory of judicial action because of the tendency to view individualized attitudes built on such institutional factors at the same level as what Elster identifies as "first-order desires." But it is essential to distinguish between those institutional steps that arise from socialization through, for example, legal education and the experiences gained by belonging to the profession and "second-order" attitudes whereby judges tend to see themselves bound to certain values like those of objectivity and neutrality. According to Elster while "adaptive preferences" are conditioned by the mandate of a superior body "informed preferences" or second-order attitudes "are those of the individual concerned...They are informed in the sense of being grounded in experience, not in the sense of being grounded in the meta-preferences of the individual." See Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (London: Cambridge University Press, 1983) at 113.

²³⁰ *Ibid* at 831-832.

²³¹ *Ibid* at 832.

²³² *Ibid* at 833.

influence the outcome of cases. There are also very strong and unyielding rules barring judges from adjudicating cases in which they have personal or financial interest.²³³

To ensure that judges operate within these restrictions and thus forestall the application of the sanctions, Epstein says “the legal system generates a wide range of prophylactic rules that allow judges to escape even the suspicion of bias.”²³⁴ They can excuse themselves from some cases, avoid socializing with lawyers who have or are likely to have cases before them as well as limit their other activities. They cannot practice law, work in business corporations, or lobby Congress. Their activities outside the courts are therefore limited to writing books, giving speeches and teaching.²³⁵ These institutional constraints, Epstein therefore argues, “offer a good explanation of why hard-nosed public choice analysis loses its force and allure when applied to the judiciary’s ordinary business of deciding cases.”²³⁶ His contention is that since the dominant sources of gain, loss, and influence are closed to judges the incentive for them to be self-interested does not exist.

While not discounting the shortcomings of the public choice model as Epstein has presented it,²³⁷ my view is that his analysis could be faulted on at least one ground. His explanations apply to courts in the United States and most of the institutional constraints on judges that he mentioned, though they could be successfully extrapolated to other contexts, he applied them in the article only to American courts. But it is common knowledge that political contexts and legal cultures vary; what is taken for granted in the United States may prove intractable in a different environment. It is therefore not unlikely that different outcomes could be achieved if the most essential ingredients of his analysis are applied to a different legal system. Thus, I would show later while analyzing the human rights cases decided in Nigeria during the period that this study covers that even though some of the institutional constraints he mentions may be available on paper, the

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid* at 835.

²³⁷ Raymond Boudon, “Limitations of Rational Choice Theory” (1998) 104 *Am J Sociology* 817.

practical reality in most cases is indeed a far cry from the theory. Therefore, most of the reasons Epstein advances for why the public choice theory would not suit an analysis of judicial behavior may in fact prove the appropriateness of the theory in analyzing courts in Nigeria.

Another reason Epstein's position could be challenged is that it failed to account for a particular practice for which the United States is very well known: the fact that some judges are actually elected on political platforms and Supreme Court judges, as I earlier pointed out, are generally appointed on the basis of their policy ideologies. This situation is hardly conducive to the blossoming of rules, prophylactic or not, for the insulation of judges from political or other biases. An elected judge would normally be expected, indeed required, to have a massive self-interest in the next election.

Secondly, suburban judges and those operating in small cities but seeking more prominence and recognition may have an interest in not remaining in the social wilderness by their decisions. Particularly with respect to Supreme Court judges, promotion – and if it comes with appointment, however much this is vetted by the legislature – may depend on judges showing certain ideological leanings depending on their assessment of the likelihood of that increasing their chances of elevation. On the other hand, judges in some countries outside of the United States, including those in Nigeria, may in fact be constrained by a desire not to be too liberal or “activist” if that is going to reduce their chances of elevation within the judicial hierarchy.²³⁸

²³⁸ At the time of writing up this study, the Nigerian judiciary was thrown into crisis mode when its two highest ranked officials squabbled openly in what was generally seen as doing dirty laundry in the open. Their disagreement could not be more apt for the constraint that expectations of elevation would have on the adjudicatory dispositions of a judge. There was a disagreement between the Chief Justice of Nigeria (CJN) and President of the Court of Appeal (PCA). While it was generally believed that the CJN was sympathetic to the ruling Peoples' Democratic Party (PDP), the PCA had given some judgments that did not go down well with that party. This led to suggestions that the PCA was beholden to one of the opposition political parties. Meanwhile the country's President who belonged to the PDP was having his election questioned in the court. By the way the constitution allocated jurisdiction, the election case would first be heard at the Court of Appeal with the PCA likely presiding over it. The PDP government and the CJN in particular appeared not to want that possibility. Thus while the CJN and PCA were embroiled in their personal quarrel, the CJN saw a window of opportunity to remove the PCA from the Court of Appeal thereby nipping in the bud the possibility of the PCA sitting over the election case. He suggested at a

Posner supports this viewpoint through what he calls a positive economic theory of judicial behavior. His is, however, a limited intervention because he makes the analysis only with regard to appellate judges like those of the United States Federal Court of Appeals and the Supreme Court even though he says the model could be extended to elected judges, Continental European judges, jurors and even legislators. Posner's basic argument is that "the effort to insulate judges from significant economic incentives, through devices such as life tenure and stringent conflict of interest rules, has not rendered judicial behavior immune to economic analysis."²³⁹ He generally agrees with Epstein that economists have had a hard time crafting their own theory of how judges act. In his words, "The economic analyst has a model of how criminals and contract parties, injurers and accident victims, parents and spouses – even legislators, and executive officials such as prosecutors – act, but falters when asked to produce a model of how judges act."²⁴⁰ Continuing, he states that:

Politics, personal friendships, ideology, and pure serendipity play too large a role in the appointment of federal judges to warrant treating the judiciary as a collection of genius-saints miraculously immune to the tug of self-interest. By treating judges and Justices as ordinary people, my approach makes them fit subjects for economic analysis; for economists have no theories of genius."²⁴¹

Posner's conclusion is that judges operate rationally and pursue instrumental and consumption goals of the same kind and in the same general way that private persons do.²⁴²

Does the self-interest theory apply to human rights adjudication in Nigeria and therefore relevant to this research? It is unlikely judges would contemplate the relevance

meeting of the authorities concerned that the PCA be promoted to the Supreme Court. Contrary to long-standing practice, the PCA was not informed about this idea of "promoting" him. He rejected the Greek gift, and in the process compounded the bad blood already existing between him and the CJN. For more on this see Paul Odenyi, "Why Salami Should be Re-instated, Uwais C'ttee Report" *Vanguard* online <<http://www.vanguardngr.com/2012/02/why-salami-should-be-reinstated-uwais-cttee-report/>>.

²³⁹ See Posner, *supra* note 215 at 1.

²⁴⁰ *Ibid* at 2.

²⁴¹ *Ibid* at 4.

²⁴² *Ibid* at 39.

of this theory to their human rights adjudicatory work. For them to say otherwise would clearly undercut any claim to disinterestedness they may make in carrying out their functions. But outside judicial circles and having regard to the institutional procedures governing appointment, promotion, and discipline of judges, it is possible to conclude that as Posner argues above, Nigerian judges are as personally interested in their work as other persons in society pursuing rational goals.

2.2.4. Adjudication in aid of Global Capital: Upendra Baxi's TREMF Theory

The orthodox view of human rights captured in fine print by the Universal Declaration of Human Rights (UDHR) is that the values thereby enshrined “were designed for the attainment of dignity and well-being of human beings and for enhancing the security and well-being of socially, economically and civilizationally vulnerable peoples and communities.”²⁴³ But Baxi claims that the UDHR understanding of human rights is being steadily, but surely supplanted by a new one: a trade-related, market friendly (TRMF) paradigm.²⁴⁴

Obiora Okafor articulates the major strands of this TRMF human rights theory in four related propositions.²⁴⁵ [1] The emergent TRMF paradigm (unlike the UDHR paradigm) insists on promoting and protecting the collective human rights of various formations of global capital mostly at the direct expense of human beings and

²⁴³ Upendra Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2002) at 132; See also Upendra Baxi, “Market Fundamentalism: Business Ethics at the Altar of Human Rights” (2005) 5 Hum Rts L Rev 1.

²⁴⁴ *Ibid.* See also Mitchell & McCormick, *supra* note 90 at 479 (Noting Chomsky and Herman’s argument that the balance of terror in human rights violations appears to have shifted to the West and its clients, with the United States setting the pace as sponsor and supplier. “This shift is systematically linked to the economic interests of the United States and other advanced capitalist countries, and to their efforts to maintain favorable conditions for investment in the third world. Such efforts include the containment of reform (e.g., the formation of trade unions) and the prevention of revolution. Consequently there is an increase in human rights violation by countries that are more involved with external capitalist interests. In other words, the greater the economic association with the United States or other advanced capitalist countries, the greater the degree of human rights violations”).

²⁴⁵ Obiora Chinedu Okafor, “Assessing Baxi’s Thesis on an Emergent Trade-Related Market-Friendly Human Rights Paradigm: Recent Evidence from Nigerian Labor-led Struggles” (2007) 1 Law, Soc Justice & Global Dev J 1.

communities.²⁴⁶ [2] Much more than in the past, the progressive state – or at least the progressive “Third World” state – is now conceived as one that is a good host state to global capital; as one that protects global capital against political instability and market failure, usually at the significant cost of the most vulnerable among its own citizens. Such state is one that is in reality more accountable to the International Monetary Fund (IMF) and the World Bank (WB) than to its own citizens.²⁴⁷ [3] A progressive state is also conceived under this theory as one that is market efficient in suppressing and delegitimizing the human rights-based practices of resistance of its own citizens and that is also capable of unleashing a reign of terror on some of its citizens, especially those of them that actively oppose its excessive softness toward global capital.²⁴⁸ [4] The UDHR paradigm of human rights which assigned human responsibilities to states to construct progressively, and within the community of states, a just social order, and that will meet the basic needs of human beings is being pushed aside in favor of the TREMF paradigm which denies any significant redistributive role to the state; calls upon the state to free as many spaces for capital as possible, initially by pursuing the three Ds of contemporary globalization: deregulation, denationalization, and disinvestment.²⁴⁹

Okafor applies the TREMF theory to discuss the determination of the Nigerian government between 1999 and 2005 to implement the neo-liberal socio-economic plan and the resistance of Nigerians to it, led primarily by the labor union. This centered largely on government insistence on the removal of what it called the subsidy on petroleum products leading to the steep rise in price of vehicle fuel prices by up to 250 per cent between May 1999 and August 2005.²⁵⁰ Considering that the major means of

²⁴⁶ *Ibid* at 3.

²⁴⁷ *Ibid* at 4.

²⁴⁸ *Ibid*.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid* at 5; see also Sani Musa, “The Nigerian Political Economy in Transition” (Friedrich Ebert Stiftung, 2006) at 7 online: <<http://library.fes.de/pdf-files/iez/03522.pdf>>; Kenneth C Nwoko, “Trade Unionism and Governance in Nigeria: A Paradigm Shift from Labour Activism to Political Opposition” (2009) 2 *Inf Soc’y & Justice* 139 at 149; Obiora C Okafor, “Remarkable Returns: The Influence of a Labour-led Socio-Economic Movement on Legislative Reasoning, Process and Action in Nigeria, 1999-2007” (2009) 47 *J Mod Afr Stud* 241.

movement in the country is by road transportation, this had great implications for the economic well-being of the vast majority of the population. The Nigerian Labour Congress (NLC), the umbrella body of all labor organizations in Nigeria provided leadership and several segments of Nigeria's civil society rallied behind it to resist these price hikes.

A supposed democratic regime in Nigeria offered repression in return, and key Western governments appeared complicit in this behavior by their silence. Or instead, Okafor says that the attitude of the West signified either studied ignorance or willful acceptance of the crackdown on the labor-led coalition. The Government used public appeals, *obtained court rulings* [my emphasis], and often ordered – or at least tolerated – the harassment, assaults, detentions, and killings perpetrated by the Nigerian Police Force on labour and allied activists, as well as ordinary citizen protesters.²⁵¹ Not always did the judges dance to the tune the government called.²⁵² But it is instructive still that some judges were mobilized along with other government institutions in the effort to break the mass resistance to the unacceptable economic policies. By so doing, certain elements in the judiciary acted in concert with those other institutions to actualize an unpopular policy which violated basic human rights without considering its role as the guardian of individual liberties.

In the course of this study, it will become clearer with the aid of some cases decided by Nigerian courts during this period that the judiciary did not play much of an even-handed role in some of the cases arising from the entire saga. Rather than remain open-minded and examine litigation arising from the government crackdown on the basis of their legal legitimacy, the judicial institution, in some of those cases, took the position of bastion of political stability by deploying its powers in support of the impugned policies.

²⁵¹ *Ibid* at 7.

²⁵² Obiora Chinedu Okafor, "Between Elite Interests and Pro-Poor Resistance: The Nigerian Courts and Labour-led Anti-Fuel Price Hike Struggles (1999-2007)" (2010) 54 J Afr L 95.

Yet this is by no means a concern peculiar to Nigeria or indeed the developing world. The issues may not play out similarly across legal contexts, but sometimes, the parallel in how they happen make them so obvious it is ridiculous not to take notice. Judy Fudge and Harry Glasbeek reached a somewhat similar conclusion regarding socio-economic rights litigation under the Canadian Charter of Rights even though they did not do so under the TREMF explanation.²⁵³ But this is of little moment given that their analysis ties well into the Baxian theory without saying so in distinctly clear words. They noted the frustration of persons without property who seek to translate liberal Charter rights into substantive rights without much success.²⁵⁴ They argued further that:

Precisely because the entrenched rights are abstract and universal and only bind the state, they tend to reinforce those aspects of the Canadian polity which need to be challenged: libertarian individualism and the commodification of everything. The business classes are able to translate their economic desiderata into valid liberal rights claims under the Charter because its implicit acceptance of the Adam Smithian ideology of the free market makes the right of individuals to do as they like with their private property *politically* [their emphasis] sacrosanct. Fetters on owners in respect of speaking about their private property, dealing with it whenever they want to do so, through whatever vehicles they like, in association with whomever they like, are easily translatable into claims of freedom of speech, religion, corporate participation in politics, the right to be presumed innocent until proved guilty beyond reasonable doubt, the right to association with other property owners, etc.”²⁵⁵

In terms of how courts go about deciding cases presented before them, two variables are traditionally at play. The first variable is how decisions reached are shaped by the nature of the adjudicatory task itself. The theories I have analyzed thus far address this portion of the variable. The second dimension is the impact that the individual qualities of those who perform judicial functions and their real life experiences have on how they perform that task. It is to this variable that I now turn.

²⁵³ Judy Fudge & Harry Glasbeek, “The Politics of Rights: A Politics with Little Class” (1992) 1 *Social & Legal Stud* 45.

²⁵⁴ *Ibid* at 55.

²⁵⁵ *Ibid*.

2.2.5. Judging in Social Context

Courts operate in plural and diverse legal, social and political environments. Those who use their services are often not socially homogenous. They typically belong to different racial groups, speak different languages, are at diverse locations on the socio-economic ladder, belong to different gender, may have distinct sexual orientations, belong to different political groups and adhere to different religions. At the same time, law and its operation is often related to its sociology as a discipline. This is especially relevant considering Emile Durkheim's particular emphasis upon the professions, including law, as representing "intermediate bodies" between the individual and the state.²⁵⁶

Durkheim's view was that "in the context of increased division of labour and related social and political upheaval, such groups embodied the social forces which were required to prevent a breakdown in moral authority."²⁵⁷ The formal view of law is that its goals are served when it is applied objectively in dealing with this wide-ranging social diversity. A judge before whom a case is brought is not to account for factors lying outside the law as applied to the facts of the specific case in reaching a decision. Nor is the judge permitted to consult his/her own prejudices in deciding the case. This view was greatly criticized by other disciplines as I have already stated. In this part of the study, I present the sociological riposte to the formal, positivist conception of law as well as the increasing role of social context considerations in the contemporary understanding and application of law.

Therefore, I will approach the discussion of the sociological milieu of adjudication from two points. First I will examine what Bourdieu refers to as "field" structure and the socially patterned practices of the juridical field as it is disciplinarily and professionally defined and understood. Secondly, I will consider the importance of understanding social context for those who use the courts, including litigants and to a

²⁵⁶ Kieran McEvoy & Rachel Rebouche, "Mobilizing the Professions: Lawyers, Politics, and the Collective Legal Conscience" in John Morison, Kieran McEvoy & Gordon Anthony eds., *Judges, Transition and Human Rights* (Oxford: Oxford University Press, 2007) at 280.

²⁵⁷ *Ibid.* See also Emile Durkheim, *Professional Ethics and Civic Morals* (New York: Routledge, 1996).

lesser extent lawyers. I will give lawyers a lesser degree of prominence here because they will be discussed along with judges from the first point in terms of professional formation.

In Terdiman's introduction to the Bourdieu piece and writing from the perspective of one who translated it from French into English language, he states that "field" and "practices" occupy distinct worlds in the author's usage. He said if one wanted to understand the "field" metaphorically, its analogue would be a magnet: like a magnet, a social field exerts a force upon all those who come within its range.²⁵⁸ Continuing, he asserts that those who experience these "pulls" are generally not aware of their source and that as is true with magnetism, the power of a social field is inherently mysterious. Therefore Bourdieu's piece aimed to explain the invisible but forceful influence of the juridical field upon patterns of behavior in the legal world.²⁵⁹

Bourdieu recognized the formalist or positivist theory that I had mentioned earlier which he contrasted with an instrumental viewpoint that tends to conceive law and jurisprudence as direct reflections of existing power relations, in which economic determinations and, in particular, the interests of dominant groups are expressed, which is a view of law as an instrument of domination.²⁶⁰ Dismissing these two perspectives as antagonistic, one from within the legal field the other from without, Bourdieu stated that they both ignored the existence of an entire social universe, which is in practice relatively independent of external determinations and pressures.²⁶¹ Further, he argues that:

The social practices of the law are in fact the product of the functioning of a "field" whose specific logic is determined by two factors: on the one hand, by the specific power relations which give it its structure and which order the competitive struggles (or, more precisely, the conflicts over competence) that occur within it; and on the other hand, by the internal logic of juridical functioning which constantly constrains the range of

²⁵⁸ Richard Terdiman, "The Force of Law: Toward a Sociology of the Juridical Field - Translator's Introduction" (1987) 38 *Hastings L J* 805 at 806.

²⁵⁹ *Ibid.*

²⁶⁰ Bourdieu, *supra* note 189 at 814.

²⁶¹ *Ibid* at 816.

possible actions and, thereby, limits the realm of specifically juridical solutions.²⁶²

Bourdieu's theorizing leads him to construct the concept of "*habitus*." He states that the juridical field tends to operate like an "apparatus" to the extent that the cohesion of the freely orchestrated *habitus* of legal interpreters [that is judges] is strengthened by the discipline of a hierarchized body of professionals who employ a set of established procedures for the resolution of any conflicts between those whose profession is to resolve conflicts.²⁶³ In terms of the understanding of *habitus*, it tends to suggest that practices within the legal universe are strongly patterned by tradition, education, and the daily experience of legal custom and professional usage.²⁶⁴

They operate as learned yet deep structures of behavior within the juridical field... They are significantly unlike the practices of any other social universe. And they are specific to the juridical field; they do not derive in any substantial way from the practices which structure other social activities and realms. Thus, they cannot be understood as simple "reflections" of relations in these other realms. They have a life, and a profound influence, of their own. Central to that influence is the power to determine in part what and how the law will decide in any specific instance, case, or conflict.²⁶⁵

There is no denying that Bourdieu's account is sitting well with the practices of the legal field in most jurisdictions, including Nigeria. He is absolutely on point when he values the impact of training and socialization in the legal field over doctrine, rules the constitutional texts. An issue that recurs with interesting regularity throughout this study is the fact that tendencies acquired by Nigerian courts mostly through training and indoctrination since the country gained independence in the 1960s continue to repress judicial dynamism even though the political and legal contexts have changed many times over. It is therefore safe to wager that only training, for instance, can account for the insistence of post-independence Nigerian courts upon following the pathway of English

²⁶² *Ibid.*

²⁶³ *Ibid* at 818 – 819.

²⁶⁴ Terdiman, *supra* note 257 at 807.

²⁶⁵ *Ibid.*

jurisprudence in constitutional matters even though the English system has little to offer by way of insights into the constitutional model chosen for Nigeria at independence.²⁶⁶ I will elaborate more on this in the third chapter.

Further to the above sociological consideration of law and its uses, the theory is also gaining ground that recognizing social diversity is now a critical factor in understanding the functioning of law. It is also suggested that being well-rounded in education about social contexts is now, or should be, integral to the most basic qualifications of a modern judge.²⁶⁷ Lawyers who argue cases before judges are also being encouraged to “understand contemporary social contexts, and appreciate the need to acquire the knowledge and skills that make competent practice within them possible.”²⁶⁸ Accepting the relevance of this kind of education to judges, Devlin asks: “When judges make pronouncements, do they tap into popular legal consciousness or shared community standards of morality, or do they rely on the coercive fiat of their

²⁶⁶ See for example Haim Sandberg, “Legal Colonialism: Americanization of Legal Education in Israel” (2010) 10 *Global Jurist* (Article 6) 1 in which the author refers to American influence arising from the increased training of more and more Israeli jurists in the United States as some form of “legal colonialism.” The author asserts as a result that “These phenomena have negative influences on the interaction of academy and legal practitioners in Israel. Moreover, theories that emerged in an American environment are percolated from the academic world to policy makers and judges. These policies have been applied as a solution for local and unique Israeli problems. The unique characteristics of the Israeli situation are neglected.”

²⁶⁷ According to the National Judicial Institute of Canada, their Social Context Education Project, (SCEP) is established on the philosophy that “judges become better judges when they are more knowledgeable.” See “National Judicial Institute, Canada: The Social Context Education Project” online: <http://www.nji.ca/nji/internationalforum/SCEP_summary.pdf> The project itself, according to the Institute was intended to assist judges to [1] understand the nature of diversity, the impacts of disadvantage and the particular social, cultural and linguistic issues that shape the persons who appear before them; [2] explore their own assumptions, biases and views of the world with a view to reflecting on how these may interact with judicial process; [3] examine relevant research and community experience in order to enhance processes of judicial reasoning and [4] to provide jurisprudential and analytical tools to enable judges to examine the underlying basis of legal rules and concepts to ensure that they correspond with social realities and conform to the constitutional guarantee of equality; See also Rosemary Cairns-Way, “What is Social Context Education?” (1997) 10 *National Judicial Institute* at 5 (suggesting that Social Context Education “is intended to provide information about the social backdrop against which and out of which particular issues and particular litigants come before the courts”).

²⁶⁸ Rose Voyvodic, “Lawyers meet the Social Context: Understanding Cultural Competence” (2005) 84 *Can Bar Rev* 565 at 567.

word?”²⁶⁹ He answers his own query by stating that every act of judgment no matter at what level it is constructed takes place in the context of a larger set of judicial practices and conventions. He concludes that only a portion of these practices and conventions is ever articulated while much of it is “internalized through acculturation to a particular judicial environment.”²⁷⁰

In the specific instance of Nigeria and other developing societies, in which social divisions are pervasive and widespread poverty is a reality of everyday existence, it was suggested long ago by Taslim Elias, a Nigerian jurist that law must acknowledge this context and therefore be useful as an instrument of economic development. Elias envisaged a situation in which the law is in continuous dialogue with the society.²⁷¹ But to achieve this he said, lawyers in terms of their ideology must be more than positivist, utilitarian or social engineers; they must be “something of each.”²⁷² Law in context proponents, like Elias, canvass the use of law as an instrument of economic and social development.²⁷³

It is not difficult to fault social context education. Its utility in the administration of justice should therefore not be overstretched. Even where there is no conscious policy of increasing judges’ understanding of the social context in which they work, their recognition of such in their duties may be of negative consequence to the attainment of justice. The ideal that every legal system aspires is to enforce justice on the basis of a fair opportunity for the parties concerned to present their cases without pre-empting their outcome by any preconceived notions.

²⁶⁹ Richard F Devlin, “Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education” (2001) 27 Queen’s L J 161 at 165; see also Suki Goodman & Joha Louw-Potgieter, “A Best Practice Model for the Design, Implementation and Evaluation of Social Context Training for Judicial Officers” (2012) 5 Afr J Leg Stud 181.

²⁷⁰ *Ibid* at 168.

²⁷¹ Taslim Olawale Elias, *Law in a Developing Society* (Benin City: Ethiope Publishing, 1972) at 5.

²⁷² *Ibid*.

²⁷³ Ahunwan Boniface, “Contextualizing Legal Theory: Economic Analysis of Law and Jurisprudence from the African Perspective” (2000) Afr J Int’l & Comp L 240 at 244.

For the above reason, the symbol of justice is the picture of a maiden in blindfolds, holding a scale in one hand and the sword in the other. The philosophy of justice which this symbol signifies, therefore, is that the adjudicator needs not have prior knowledge of the parties to a suit or their particular circumstances. The adjudicator's only concern is with the facts and the law when applied to it. This picture of neutrality that is presented of justice is defeated were a judge to probe into or recognize the background of the parties in dispute to be able to reach a decision. Otherwise, the judge is at risk of being accused of deciding not on the basis of facts or law but on grounds of extraneous considerations. This might even be more complex in societies like Nigeria where ethnic and religious feelings run at an all-time high.

This image of legal impartiality built on objectivity and neutrality is often criticized by some theoretical branches within the legal field. American critical feminist and race theorists in particular are disturbed by accounts of law as a neutral phenomenon.²⁷⁴ But non-Americans like Nedelsky also happen to fall into this category. To her, only those completely unaware of their own understanding that experience, education and culture are the starting points of decision-making can rely on such dated principles as neutrality in legal power relations. She argues that we "can observe that things that seem self-evident, natural or beyond dispute to one group are perceived very differently by people from a different background."²⁷⁵ In other words, she is stating that judgment which one set of individuals would ordinarily consider fair and impartial may be interpreted as inappropriate and unfair by persons of a different social or cultural background. Those who favor social context awareness suggest that to deal with

²⁷⁴See Derrick Bell, "Diversity's Distractions" (2003) 103 *Colum L Rev* 1622; Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 *Harv CR-CLL Rev* 401.

²⁷⁵ Jennifer Nedelsky, "Embodied Diversity and the Challenges of Law" (1997) 42 *McGill L J* 91 at 106; Angela P Harris, "Race and Essentialism in Feminist Legal Theory" (1989-1990) 42 *Stan L Rev* 581; Catharine A MacKinnon, "Pornography, Civil Rights, and Speech" (1985) 20 *Harv CR-CLL Rev* 1; Denise Reaume, "What's Distinctive about Feminist Analysis of Law?" (1996) 2 *Legal Theory* 265; Susan H Williams, "Feminist Legal Epistemology" (1993) 8 *Berkeley Women's L J* 63. For a non-feminist view on this see Sanford Levinson, "Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity" (1993) 14 *Cardozo L Rev* 1577.

situations that present this way might require having a judiciary that reflects the full range of the diversity of the society in question.²⁷⁶ Nedelsky then asks:

[...] how can any given person be guaranteed a judge who shares her experiences, assumptions and affective starting points? And were we to have such a judiciary, how would the judges manage to reason together and deliberate with each other given their different affective starting points?²⁷⁷

To answer these queries, Nedelsky falls back to Hannah Arendt's theory of the genuine subjectivity of judgment.²⁷⁸ By this she understands judgment to refer to matters about which no objective truth-claim can be made. It is not therefore arbitrary or simply a matter of preference but rather valid for the judging community.²⁷⁹ There is thus a difference between making a judgment and stating a preference. Unlike when stating a preference, forming judgments is in fact persuasive in nature.²⁸⁰ Arendt therefore sees impartiality as not a stance taken above the fray, but the characteristics of judgments made by taking into account the perspectives of others in the judging community.²⁸¹ Bearing all of this in mind, Nedelsky rebuts the claims of those who believe that a social context-sensitive judiciary would destroy the autonomy of judges. She argues instead that:

To understand judicial impartiality we must ask who judges are, and with whom they imagine themselves to be in conversation as they make their judgments. Whom do they imagine persuading and on whom do they make claims of agreement? If their attention is turned only to a narrow group..., then judges will surely remain imprisoned in their limited perspective. But if the faculties and student bodies of law schools, the practicing bar as well as the judiciary actually reflected the full diversity of society, then every judge would have had long experience in exercising judgment, through the process of trying to persuade (in imagination and

²⁷⁶*Ibid* at 107; see also David B Wilkins, "The New Social Engineers in the Age of Obama: Black Corporate Lawyers and the Making of the First Black President" (2010) 53 *Howard L J* 557 at 594.

²⁷⁷ Nedelsky, *supra* note 274.

²⁷⁸ Ronald Beiner ed., *Hannah Arendt Lectures on Kant's Political Philosophy*, (Chicago: University of Chicago Press, 1982).

²⁷⁹ Nedelsky, *supra* note 274 at 107.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

actual dialogue) people from a variety of backgrounds and perspectives. This would better prepare judges for judging situations about which they had no first- or even second-hand knowledge. It would vastly decrease the current likelihood of a single set of very limited perspective determining the judgment.²⁸²

Nevertheless, while the above understanding of social context theory in adjudication is limited perhaps to institutionalizing social context knowledge and making it integral to the system of judicial decision-making, Grossman offers a slightly different variant of it. His own analysis covers those situations in which a judge's own personal experiences, and not just his knowledge of surrounding social issues, are critical to her/his decision-making ideology.²⁸³ Grossman acknowledges earlier insights, which he described as rudimentary, into the relationship between process and policy outcomes. However, he proclaimed them inadequate for neglecting "that portion of the process in which personal values inputs allegedly derived from background experiences are translated into policy outcomes."²⁸⁴ To mitigate this inadequacy and advance the theory, he consults three different concepts - conversion, consensus and rationality.

Grossman describes *conversion* as the process by which background experiences and derivative values influence decisions. He identifies three problems within this concept. First is the assumption "without further delineation and exploration" that certain values can be attributed to certain background characteristics. He suggests that this

²⁸² *Ibid* at 107-108. See also Jennifer Macleod, "Resistance to Diversity among Judges is misguided" *The Guardian* Online: <<https://apps.facebook.com/theguardian/law/2011/nov/03/resistance-diversity-judges-misguided>> ("As in every profession, increasing access and diversity to the top of the profession ensures that those who reach the top are the best for the job. Unless one believes that not one lawyer of ethnic minority and only one female lawyer has ever matched the academic caliber of the remaining justices of the House of Lords and the supreme court, then it becomes clear that our appointed justices throughout history, with respect, have simply not been the best possible in terms of traditional, intellectual merit").

²⁸³ Joel B Grossman, "Social Background and Judicial Decisions: Notes for a Theory" (1967) 29 *The Journal of Politics* 334; See also Glendon Schubert ed., *Judicial Behavior: A Reader in Theory and Research* (Rand McNally & Co., 1964) ("Why do judges differ in their attitudes? Judges differ in their attitudes because they have come to accept some beliefs, and reject others, as the result of their life-experience. What a judge believes depends upon his religious and ethnic affiliations; his wife; his economic security and his social status; the kind of education he has received, both formally and informally, and the kind of legal career he has followed before becoming a judge").

²⁸⁴ *Ibid* at 335

factual assertion is in need of demonstration.²⁸⁵ Second is that no distinction is made between background characteristics and actual individual experiences “although common sense and common knowledge warn us of the danger in such reasoning.”²⁸⁶ Finally, Grossman says, some theorists fail to account for the impact of on-the-bench socialization processes. He argues that old values frequently change, and prior experiences take on new meanings in the light of newer involvements. “By treating values derived from background characteristics as constants, an unnecessary element of rigidity is inserted into the theoretical structure.”²⁸⁷

The notion of *consensus* in Grossman’s theory is only useful in collegial courts. It plays a negative role and within it, “background experiences are seen as relevant and explored only in those decisions in which the courts are divided.”²⁸⁸ Where there are polarized opinions among judges, this is blamed on contrasting background experiences. On the other hand, where there is unanimity, the assumption is that background factors were either not present or marginal to the outcome of the dispute. Finally, Grossman states that judicial decision-making could also be explained in terms of *rationality* of choice. According to this notion, “each case presents each judge with a clear choice of value alternatives, one of which best expresses his own policy preferences.”²⁸⁹ It assumes that each judicial vote represents an explicit value choice of comparable intensity and that judicial decisions are no different from other political, economic and social decisions.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid* at 336.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

2.2.6. Moving with the Times: A “Transitional” Theory of Human Rights Adjudication

There is little debate that human rights adjudication is considerably important in the legal processes of a country going through a transition. This is simply because of the different calculations that often form part of the transitional agenda and the need to not put the transition at risk by taking an overly rigid or dogmatic view of those calculations. A country recovering from internal insurrection, civil war or moving from authoritarianism to a democracy is often concerned more about holding together a fragile peace to prevent a relapse to the past it is recovering from than with plain rule of law considerations. As is clear with the example of several countries fitting this context, legal calculations alone would not suffice in such situations. Other factors often residing at the realm of pure pragmatism and politics, or even stark compromise generally overshadow all pretensions to ordinary legality.

Judicial behavior in times of political transformation provides the single most potent bedrock for this theory of adjudication. The South African case of *The Azanian People’s Organization & Others v The President of the Republic of South Africa & Others*²⁹⁰ best illustrates this theory. In this case, the applicants challenged various provisions of the South African Promotion of National Unity and Reconciliation Act No. 34 of 1995 (otherwise known as the Peace and Reconciliation Act). In particular, they impugned the constitutionality of section 20(7) of the Act which prohibited civil or criminal liability for persons who had been granted amnesty under its provisions. In their claim, the applicants submitted that various agents of the South African state acting within the scope of their powers and in the course of their employment killed and maimed leading activists during the apartheid era. They argued that they had “a clear right to insist that such wrongdoers should properly be prosecuted and punished, [and] that they should be ordered by the ordinary courts of the land to pay adequate civil

²⁹⁰ CCT/96.

compensation to the victims or dependants of the victims.”²⁹¹ They also requested an order requiring the South African state “to make good to such victims or dependants the serious losses which they have suffered in consequence of the criminal and delictual acts of the employees of the state.”²⁹²

In terms of principle, it is very clear that the applicants in this case presented an important constitutional question. Were those who committed atrocious acts under apartheid to be allowed easy escape from the justice warranted by their actions or should they be held accountable before the law? The court had to answer this question in a pragmatic fashion recognizing the choice it had to make between deepening reconciliation as part of the transitional process and providing remedies to individual victims that might endanger rather than enhance the transition. The South African Constitutional Court showed sufficient presence of mind to mark and delimit the decisional issues it faced in this case. The court stated in its judgment:

Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedoms invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims.²⁹³

²⁹¹ At 10 para 8.

²⁹² *Ibid.*

²⁹³ *Ibid* at 17 para 17.

Against this background, the court saw only a “difficult, sensitive, perhaps even agonizing, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future...”²⁹⁴ It also saw its responsibility in this case as requiring it to resolve the tension “between encouragement to wrongdoers to help in the discovery of truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new.”²⁹⁵

The court described the exercise as one of “immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations.”²⁹⁶ The fact it did not mention law or legality as one of the considerations at play in its calculations shows it was less inclined to factor this in but rather felt overwhelmingly drawn towards achieving a political outcome fitting the overall transitional goal that it identified. It therefore came as no surprise that the court concluded that the epilogue to the South African constitution “authorized and contemplated an ‘amnesty’ in its most comprehensive and generous meaning so as to enhance and optimize the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future.”²⁹⁷

The most important development in this decision is the willingness of the court to interpret its duty in such contexts of transition as discovering the overarching objective of the transition and to fulfill it. As is clear from carefully scrutinizing this decision, not all morally and ethically supported claims arising from the history of impunity can succeed in such situations if granting those claims would complicate rather than facilitate the transition. States going through similar transformational seasons design transitional mechanisms suited to their contexts which the courts are then called upon and obliged to facilitate and help deliver. In the particular context of Nigeria, much of chapter seven of this study is devoted to analyzing how the role of the courts in protecting human rights

²⁹⁴ *Ibid* at 21 para 21.

²⁹⁵ *Ibid*.

²⁹⁶ *Ibid*.

²⁹⁷ *Ibid* at 44 para 50.

after her transition from military to civilian rule interacted with the kinds of political and social calculations so painstakingly identified in the above discussed South African case.

2.2.7. The Face of Janus: Courts - At once "Activist" and "Restrained"

How courts are able to apply their discretionary powers is presumably also influenced by the willingness or reluctance of judges to be "activist" or "restrained." Because most constitutional provisions that courts interpret while deciding human rights and other cases are couched in indeterminate language, this increases the operational latitude and range of choices available to them. In this case, the orientation that judges approve depends solely on their personal dispositions though we saw earlier that this could interact with factors taken from the broader legal and political environment. The activist theory holds that judges are not just robots applying the law or politicians on the bench acting either to stabilize the political system or safeguarding the state "against the machinations of the individual."²⁹⁸

According to Okere, activism is based on the liberal and teleological theory of the judicial function which assumes that every law made by parliament has a purpose; that the constitution is a social charter of a dynamic society based on certain ideological and philosophical presuppositions. Thus, an activist judge in interpreting the constitution "seeks to ascertain the underlying principles to give effect to them recognizing that giving effect to the ultimate goal of the constitution is the essence of the interpretative effort."²⁹⁹ Conversely, he sees restraint or passivism as based on the declaratory theory of the judicial function which assigns a passive role to the courts, namely to declare what the law is, not to make it, and strictly in accordance with the doctrine of separation of powers.³⁰⁰

²⁹⁸ Olufemi Taiwo, "The Legal Subject in Modern African Law: A Nigerian Report" (2006) 7 Hum Rts Rev 17 at 29.

²⁹⁹ See Okere, *supra* note 153 at 788.

³⁰⁰ *Ibid.*

Kermit Roosevelt III says the United States Supreme Court, for example, has been called activist by good politicians and bad ones, and by “those whose judgment history would vindicate, and those whose views are now marginal and discredited.”³⁰¹ Most critics of judicial activism, he argues, start out by saying that the decisions they call activist are wrong, but that activism is more than error.³⁰² Justice Heydon is perhaps among those who view activism with suspicion. He describes it as “using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case. It means serving some function other than what is necessary for the decision of the particular dispute between the parties. Often the illegitimate function is the furthering of some political, moral or social programme...”³⁰³

In Nigeria, however, it is the government establishment that is often afraid of activist courts. The argument between activism and passivity does not have the same ideological and sometimes political polarization as in the United States. Many theorists believe that what Nigerian courts require in the area of human rights decision-making is a generous dosage of activism rather than the current passivity that seems to characterize their work.³⁰⁴

³⁰¹ Kermit Roosevelt III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Heaven: Yale University Press, 2006) at 14.

³⁰² *Ibid* at 15.

³⁰³ Dyson Heydon, “Judicial Activism and the Death of the Rule of Law” (2001-2004) 10 Otago L Rev 493 at 495.

³⁰⁴ See Dakas, *supra* note 66 at 75.

Chapter Three

One Step Forward, then Several Backward: Historicizing the Constitutional Protection of Human Rights in Nigeria

3.1. Introduction

This chapter will discuss human rights in Nigeria from a historical context. It will briefly treat human rights in pre-colonial Nigeria and inquire whether the various cultural practices rooted in the lives of the people prior to colonization contained any substantive human rights ingredients. I will then discuss the state of human rights in Nigeria during the period of colonization and the impact of the colonial constitutional system on judicial practices. Thereafter, I will examine the efforts that went into constitutionalizing human rights norms before Nigeria's independence as well as the enduring nature of the imbibed colonial practices on the legal system.

Following from the above, I will take a close look at the disruption of civil rule by the military and how this affected overall human rights conditions. In particular, I will explain how this disruption undermined both respect for human rights and judicial intervention to provide redress for victims of abuse. This would include a discussion of the military political process and its unusual law making procedures. It will be clearer at the conclusion of the chapter the nature of the relationship between a society, its laws and legal professionalization. This question feeds my interest in connecting the historical account of Nigeria's long-standing human rights adjudication culture to the British origins of the legal system and the process through which legal professionals are trained and recruited.

3.2. Human Rights Practices in the Colony

It is useful to situate the development of human rights in Nigeria in its historical context because this furthers the reflection upon one of the sub-questions dealt with in this research. That question is whether the performance of the courts in human rights cases does not owe in part to the country's colonial experiences. As an extension of that inquiry, I will also examine in this chapter the social and political events that shaped the constitutionalization of human rights in the country on the eve of its independence as well as the impact of military intervention on the judicial enforcement of human rights in Nigeria.

Generally speaking, human rights are a form of social expression. They are often described as universal in both character and application.³⁰⁵ What this implies is that human rights exist in all places at all times and that specific local factors constitute no barriers to their recognition. Yet the question whether human rights resonate in equal measure and in a universal sense notwithstanding culture and creed is essentially an unsettled one.³⁰⁶ While on the one hand the impact of human rights both nationally and internationally necessitates efforts to universalize their norms and practices, some opinions tend to question such efforts, and in the process they seem to relativize the very

³⁰⁵ It appeared to be the main goal of the Universal Declaration of Human Rights of 1948 to proclaim the inevitability of this assertion. See Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law (1995-1996) 25 Ga J Int'l & Comp L 287; Mary Ann Glendon, "Knowing the Universal Declaration of Human Rights" (1997-1998) 73 Notre Dame L Rev 1153.

³⁰⁶ David Kinley, "Human Rights, Globalization and the Rule of Law: Friends, Foes or Family?" (2003) 7 UCLA J Int'l L & Foreign Aff 239, Robert Sloane, "Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights" (2001) 34 Vand J Transnat'l L 527, Jack Donnelly, "Cultural Relativism and Universal Human Rights" (1984) 6 Hum Rts Q 400, Rhoda Howard, "Cultural Absolutism and the Nostalgia for Community" (1993) 15 Hum Rts Q 315, Bonny Ibhawoh, "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State" (2000) 22 Hum Rts Q 838, Jason G Morgan-Forster, "Reverse Moderate Relativism Applied: Third Generation International Human Rights from an Islamic Perspective" (Bepress Legal Series, Paper No. 235, 2004) Online: <<http://law.bepress.com/expreso/eps/235>>, Sonia Harris-Short, "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child" (2003) 23 Hum Rts Q 130.

dialogue about rights.³⁰⁷ Yet others think it is only through a multi-cultural understanding that the universalism of rights can acquire a more global resonance.³⁰⁸

If we agree that the colonial administration met local structures on the ground even if they were underdeveloped when colonial rule was first introduced in Nigeria, the next line of inquiry relevant to this research is whether those local structures had ingredients paralleling what is known in newer times as human rights and fundamental freedoms. There is no agreement in the literature regarding this as well. While some scholars insist that human rights as it is known today is alien to African indigenous legal mechanisms,³⁰⁹ others hold a contrary opinion, contending instead that human rights and other notions of justice did exist in various African cultures prior to colonization.³¹⁰

However, the manner in which colonization was conducted and its disruptive impact on indigenous social, political and legal systems³¹¹ repose some salience on these opposing views. They also have implications for colonial attitudes to human rights as

³⁰⁷ Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Human Rights Conceptions" (1982) 76 Am Pol Sci Rev 303; Rhoda Howard & Jack Donnelly, "Human Dignity, Human Rights and Political Regimes" (1986) 80 Am Pol Sci Rev 80. For a critique of their position see Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1994-1995) 35 Va J Int'l L 339 at 356.

³⁰⁸ Nsongurua Udombana, "Human Rights, Eurocentrism, and Africa: Towards a Multicultural Dialogue" in Chima C Nweze et al., *Beyond Bar Advocacy: Essays in Honour of Anthony Mogboh*, SAN (Lagos: Odede Publishers, 2010).

³⁰⁹ Donnelly, *supra* note 306. See further Rhoda Howard, "Group Versus Individual Identity in the African Debate on Human Rights" in Abdullahi An-Na'im & Francis M Deng eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington DC: Brookings Institution Press, 1990).

³¹⁰ Mutua, *supra* note 306. See also Tunji Abayomi, "Continuities and Changes in the Development of Civil Liberties Litigation in Nigeria" (1991) 22 U Tol L Rev 1036 at 1037 ("...some African social and political scientists, scholars, human rights activists, and lawyers have come up with an African concept of human rights which flows from the culture and values of Africa. This group posits that the immateriality of individual rights in Africa exists because of Africa's predominantly communal culture. Africans, they argue, readily subject themselves to the dictates of the community which they generally voluntarily accept as controlling over individuals.") Yet not all African scholars share this view of a "rather romantic view of the existence and protection of human rights in traditional African societies" which languished under feudalism and the penetration of Islamic religion. The question was therefore asked where one can find "the right to life when stealing the goods of the Lord could be sanctioned by death born under feudalism and Islam." Osita Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: Nigeria Institute of International Affairs & Macmillan Nigeria Publishers Limited, 1984).

³¹¹ See James Q Whitman, "Western Legal Imperialism: Thinking about the Deep Historical Roots" (2009) 10 Theoretical Inquiries in Law 305.

well as the factors justificatory of their recognition in the constitutions with which political independence was established in Nigeria and elsewhere in Africa. What is undeniable is that several indigenous customs and practices which the colonial authorities said were inconsistent with the “civilization” that they intended for the colonies were abolished. Where this was not the case, the continued application of such customs was made contingent upon their passing some stringent validity tests.³¹²

The question whether human rights practices were observed in pre-colonial Nigeria or whether their origins derive from the culture of the colonizing power, as is claimed in some quarters,³¹³ seems to be a postcolonial one too. Because assuming human rights originated from the culture of Britain there was little evidence of that in the conduct of the colonial regime nonetheless. Colonialism itself was antithetical to the very notion of human rights. According to Howard “There were absolutely no guarantees of fundamental human rights in the colonial period.”³¹⁴ Not only was the practice viewed as deleterious in this manner, in addition, the way the colonial government conducted its

³¹² In British Africa, the most prominent of those tests was the one requiring that customary law which was repugnant to natural justice, equity and good conscience or incompatible either directly or by implication with any written law for the time being in force shall not be observed by any court. Such customary law could also be struck down if contrary to public policy. See for example Section 18(1) of the High Court Law of Anambra State 1987. Nigerian courts have not been hesitant in striking down customs that they consider repugnant. In *Okonkwo v Okagbue*, [1994] 12 NSCC at 40 the Supreme Court held that a custom, which allowed the surviving sisters of a man who died 30 years earlier to marry a wife for him and raise issues in his name, was repugnant to natural justice equity and good conscience. Similarly in *Eugene Meribe v Joshua Egwu*, [1976] 3NSCC at 23 the court decided that it was repugnant to natural justice, equity and good conscience for a woman to be married to another woman. See generally Uche Ewelukwa, “Posthumous Children, Hegemonic Human Rights and the Dilemma of Reform – Conversations across Cultures” (2008) 19 Hastings Women’s L J 211.

³¹³ Jack Donnelly, *Universal Human Rights in Theory and Practice* (New York: Cornell University Press, 1989) at 79 where he argues that “Recognition of human rights simply was not the way of traditional Africa” and that “human rights are centrally linked to ‘modernity’ and have been (and remain) specially connected to the political rise and practices of ‘the West.’” See also Donnelly, *supra* note 306 at 303.

³¹⁴ Rhoda Howard, “Legitimacy and Class Rule in Commonwealth Africa: Constitutionalism and the Rule of Law” (1985) 7 Third World Q 323 at 325.

rule removed whatever doubts may have existed that it was ambivalent to the very idea of human rights within the colonized territories.³¹⁵

There is an abundance of evidence in the literature that the practices of the colonial power in Nigeria did enormous violence to the pretense that [1] they had a civilizing mission and [2] that they were coming from a liberal culture. None of these two claims could be supported by happenings on the ground throughout the colonial period. Rather the abuse to which the colonial administration put its powers in Nigeria as well as elsewhere in Africa and even beyond is very well documented.³¹⁶

The colonial authority disdained dissent and crushed every protest of the natives with brutal force.³¹⁷ They did not respect freedom of expression either and imprisoned without charge or deported those whose views threatened the colonial establishment.³¹⁸

³¹⁵ See Carey, *supra* note 76 at 65 where he states that socialization in colonial territories was “impelled by colonial subjugation and hypocrisy.” See also Nsongurua Udombana, “Mission Accomplished? An Impact Assessment of the UDHR in Africa” (2008) *Hamline J Pub L & Pol’y* 335 at 346 (arguing that “Colonialism altered the traditional balance of power, created ethnic divisions and introduced a cultural dichotomy detrimental to African natives”).

³¹⁶ In Kenya like in Nigeria, the colonial government imposed emergency conditions at the drop of the hat under which pretext it detained anti-colonial agitators without trial or bail. See for example Mary Dudziak, “Working toward Democracy: Thurgood Marshall and the Constitution of Kenya” (2006) 56 *Duke L J* 721 at 738. In India “The British deprived the colonial subjects of basic political and economic rights, the independence of the country was lost and its economy was mortgaged to the needs of British Industrial development. It was inevitable for the Indians to fight for their rights.” Justice BN Srikrishna, “Pre British Human Rights Jurisprudence” (2010) 3 *NUJS L Rev* 129 at 130. See also Satish Kumar, “Human Rights and Economic Development: The Indian Tradition” (1981) 3 *Hum Rts Q* 47.

³¹⁷ Robert Seidman, “Administrative Law and Legitimacy in Anglophone Africa: A Problem in the Reception of Foreign Law” (1970) 5 *Law & Soc Rev* 161 at 168 (“The other face of imperial rule was brute force. When available resources did not permit its actuality, its illusion acted as surrogate. The lonely British Resident in Northern Nigeria had to maintain his position by constant reminders of the mailed fist behind his back. Pomp and circumstance-grandly accoutred governors, fife and drum corps, the deliberate creation of a vast gulf between the cantonments and the African town-played surrogate to legal-rational legitimacy”).

³¹⁸ John W Skelton Jr. “Standards of Procedural Due Process under International Law Vs. Preventive Detention in Selected African States” (1979-1980) 2 *Hous J Int’l L* 307 at 314. See also Howard, *supra* note 309 at 325 where she stated that “preventive detention and exile were used by the British whenever it was felt necessary... Sedition laws were routinely used in order to control political protest, especially in the press, and were much more restrictive in Africa than in Britain itself.”

Segregation was as well vigorously pursued by the colonial government.³¹⁹ In some areas the best and most fertile lands were seized from the natives and given to foreigners who turned to local labor extorted through brutality to cultivate them.³²⁰ The colonial regime, to enhance the penetration of its authority either destroyed or undermined indigenous governance structures and imposed “quasi liberal institutions, which were generally underdeveloped, whose institutions were designed more for economic exploitation than ‘civilizing’ the population.”³²¹ As a result:

The quasi-democratic institutions – supported by authoritarian coercion used to impose ultimate colonial control – posed such problems as double sovereignty, dual legal systems, and cultural misunderstandings. The establishment of European-style, colonial legal systems generally resulted in two legal (and political) cultures operating concurrently, a European... system imposed on the pre-existing or modified, indigenous legal system. Neither [of the two] really communicated or integrated with the other in a coherent or comprehensible way.³²²

In Nigeria’s case, the position of the colonial authority was no less untenable as Britain which colonized the country signed to be bound by the European Convention on Human

³¹⁹ Lord Frederick Lugard, first Commissioner of the Northern Nigeria Protectorate and upon the amalgamation of Southern and Northern Nigeria in 1914, the country’s first Governor-General justified colonial segregation in the following words: “On the one hand the policy [of segregation] does not impose any restriction on one race which is not applicable to another. A European is strictly prohibited from living in the native reservation, as a native is from living in the European quarter. On the other hand, since this feeling exists, it should in my opinion be made abundantly clear that what is aimed at is a segregation of social standards, and not a segregation of races. The Indian or the African gentleman who adopts the higher standard of civilization and desires to partake in such immunity from infection as segregation may confer, should be as free and welcome to live in the civilized reservation as the European, provided, of course, that he does not bring with him a concourse of followers. The native peasant often shares his hut with his goat, or sheep, or fowls. He loves to drum and dance at night, which deprives the European of sleep. He is skeptical of mosquito theories. ‘God made the mosquito larva,’ said a Moslem delegation to me, ‘for God’s sake let the larva live.’ For these people, sanitary rules are necessary but hateful. They have no desire to abolish segregation.” Lord Frederick Lugard, *The Dual Mandate in British Tropical Africa* (London: Routledge, 1965) at 149-150.

³²⁰ Dudziak, *supra* note 315 at 739. See also Seidman, *supra* note 316 at 170 (“In addition, the administration had to allocate land for the benefit of British interests. In East and Central Africa, the best land was sold to settlers without very much to the interests of Africans”).

³²¹ Carey, *supra* note 76 at 65.

³²² *Ibid.*

Rights and Fundamental Freedoms which was adopted in Rome on November 4, 1950 but came into force in 1953.³²³ Britain's position was awkward because at the same time that Europe produced this Convention to improve the human rights situation in the countries of that region, it ranked among several European countries that practiced colonialism which was understood in different parts of the world at that time as constituting gross and systematic abuse of human rights of native populations.³²⁴

According to Heyns, “[A]frica and the other parts of the colonized world were far away, and it was felt that if adherence to the Convention was perceived to interfere too much with the control of States Parties over their colonies, it would impede on the wide acceptance required to achieve the objectives of the Convention in Europe”³²⁵ To avoid this possibility, the Convention contained what has been described as the “Colonial Clause”³²⁶ which allowed a ratifying state the discretion, by a declared notification, to extend the Convention to all or any of the territories for whose international relations it was responsible,³²⁷ but with due regard to local requirements.³²⁸

The United Kingdom actually filed a declaration under this article allowing the Convention to apply to most of its colonies in Africa in the 1950s and 1960s, thereby “undertaking a legally binding obligation to bring the legal systems of most of its African territories into conformity with the Convention, and could be subjected to inter-state complaints before the European Commission if it did not do so.”³²⁹ But this development did not have much impact on the human rights situation in the territories concerned.³³⁰

³²³ ETS 5, 213 UNTS 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which *entered into force* on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

³²⁴ Christof Heyns, “African Human Rights Law and the European Convention” (1995) 11 S Afr J Hum Rts 252 at 254.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ Art. 63(1)

³²⁸ Art. 63(3)

³²⁹ Heyns, *supra* note 323 at 255.

³³⁰ *Ibid.* In this regard, Nwabueze's postulations would seem therefore very strange and unsupportable. He acknowledged that the encroachment upon private rights under British colonial administration in Nigeria

Rather there was an intensification of brutality on the native populations whose political leaders, on their part, were not indifferent to the collective yearning for change.

The decision of the British colonial government to grant Nigeria political independence in 1960 therefore followed several Constitutional Conferences held in London. One of such conferences was held in 1953 where the issue of incorporating a Bill of Rights for Nigeria was raised for the first time.³³¹ At that time, the Secretary of State for Colonies was Oliver Lyttelton (later Lord Chandos). The Action Group (AG) which controlled the government of Western Nigeria at the time sought to accelerate Nigeria's progress towards independence and therefore withdrew its support for the Macpherson Constitution of 1951.³³² The party's action plunged the country into a political crisis, prompting the scheduling of the 1953 Conference to resolve it.³³³

That Conference dealt with two major issues: the form of government for Nigeria and the timetable for independence. Integral to the discussion on form of government, particularly with their preference for the federal system, the AG and the National Council of Nigeria and the Cameroons (later National Council of Nigerian Citizens) (NCNC) proposed the inclusion of a bill of rights in the constitution. According to Parkinson,

The impetus for the bill of rights came from Awolowo [leader of the AG], a teacher and trade union leader who studied law in London before returning to Nigeria to practice law and pursue a political career. The Action Group's federal proposal anticipated directly elected seats in the

did not go "beyond what the exigencies of administering a colonial territory demanded." Therefore, "the law of sedition, for example, has had to be made harsher and be more rigorously enforced than in Britain in order to guard against the possibility that the relatively small politically articulate section of the population might exploit the natural resentment against colonialism to incite the populace to disaffection." His next line that "apart from such cases it might be said that civil liberties were up to the time of internal self-government no less ample in many of the British dependencies than in Britain itself" is open to question, at least with reference to Nigeria. See Nwabueze, *supra* note 158 at 119.

³³¹ Charles Parkinson, *The Emergence of Domestic Human Rights Instruments in British Overseas Territories* (London: Oxford University Press, 2009) at 135. Also available online: <<http://www.oxfordscholarship.com/oso/private/content/law/978019...>>

³³² *Ibid.*

³³³ *Ibid.* See also Solomon Ukhuegbe, *Human Rights Decision-Making in Emergent Courts: The Supreme Court of Nigeria, 1961-2000* (PhD Dissertation, Osgoode Hall Law School, 2009, 138) [unpublished].

federal legislature based on population, meaning that half of the seats would be in the Northern Region. Awolowo had the ambition to be leader of Nigeria and he knew that to attain this position he had to win a proportion of Northern electorates. But the Northern People's Congress actively restricted other political parties campaigning in the North. Awolowo, a skilled lawyer who used the law as a weapon to be employed for political advantage, saw the bill as a mechanism that would allow the Action Group to campaign freely in the North.³³⁴

Lord Chandos refused to allow a discussion of the proposal to include a human rights provision in the constitution and there is no record of this in the official report of the Conference.³³⁵ In fact, his recollection of those events showed how trivially he had handled that proposal. In his own words:

...[A] member representing a not very important group asked that the Charter of Human Rights should be incorporated in the constitution. I replied by saying that they could put 'God is Love' into the constitution if they so wished, but not while I was in the chair. I had the prestige of Nigeria too much at heart to wish that general ethical aspirations should be attached to the laws and constitution... If the constitution appeared to subscribe to the idea that freedom was absolute and unlimited it would merely make Nigeria look ridiculous, which I would not stomach.³³⁶

³³⁴ *Ibid* at 136

³³⁵ Ukhuegbe, *supra* note 332 at 138. See also *Report by the Conference on the Nigerian Constitution held in London in July and August, 1953* Cmd 8934 (London: HMSO, 1953). Tekena Tamuno, "Separatist Agitations in Nigeria since 1914" (1970) 8 *J Modern Afr Stud* 563.

³³⁶ *Ibid*. There are perhaps two main reasons the agitation for the incorporation of a Bill of Rights in the Constitution did not appeal much to the colonial government. In the first instance, doing so would undercut its *raison d'être* and provide important incentives for pro-independence agitators. Secondly, the British did not have a written constitution and therefore no tradition of written bill of rights. In fact what is well known is the derision with which English lawyers and legal experts of that era regarded written bills of rights or other documents to similar effect. The most popular among them perhaps was Jeremy Bentham's riposte to the French Declaration of the Rights of Man issued by revolutionaries that brought down the French *ancien regime*. In Bentham's words: "Look at the letter, you find nonsense – look beyond the letter, you find nothing...Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of the pretended natural rights is given, and those are so expressed as to present a view of legal rights." Similarly, the Simon's Commission on the Indian Constitution which treated similar calls for the inclusion of human rights guarantees in the Indian constitution contained the following: "Many of those who came before us have urged that the Indian Constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all

It is a fact well settled by historical accounts that human rights were first constitutionalized in Nigeria because of fears expressed by minority ethnic groups about the risk to them in a post-colonial Nigeria in which the majority groups were already jostling for domination.³³⁷ The agitation of the minorities became noticeable at the 1957 Constitutional Conference. It was then dressed up as a demand for new states for the minority ethnic groups. Their thinking was that with their own states, they could participate actively and without fear in the affairs of an independent Nigerian state.

It was, however, realized by participants at that Constitutional Conference that this particular solution may protract minority fears rather than address them satisfactorily. In fact, “It was realized... that it would be impossible, in view of the heterogeneous nature of the Nigeria society to meet all these fears by the creation of new states because irrespective of the number of states created, minorities would always remain”³³⁸ The Conference instead resolved that a Commission be established to look into the fears of the minorities and recommend ways of allaying them.³³⁹

The Commission, chaired by Sir Henry Willink, recommended the entrenchment of fundamental human rights in the proposed constitution to counteract those minority fears. At the same time, the Commission’s justification for this suggestion betrayed its misgivings about its overall efficacy when it said “Provisions of this kind in the

citizens. We are aware that such provisions have been inserted in many constitutions, notably in those European States formed after the War. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective.” See generally SA de Smith, “Fundamental Rights in the New Commonwealth (1)” (1961) 10 Int’l & Comp L Q 83 at 84-85. See also Godfrey Amachree, “Fundamental Rights in Nigeria” (1965) 11 Howard L J 463 at 476.

³³⁷ See Nwabueze, *supra* note 158 at 117. Ken Saro-Wiwa, *Genocide in Nigeria: The Ogoni Tragedy* (Port Harcourt: Saros International, 1992) at 22. Philip C Aka, “Prospects for Igbo Human Rights in Nigeria in the New Century” (2004) 48 Howard L J 165 at 175. David Lavan Grove, “The ‘Sentinels’ of Liberty? The Nigerian Judiciary and Fundamental Rights” (1963) 7 J Afr L 152. Okonkwo, *supra* note 155; Aka, *supra* note 4.

³³⁸ SA Oretuyi, “The Nigerian Attempt to Secure Legal Representation by a Bill of Rights: Has it Achieved its Objective?” (1975) 17 Malaya L Rev 149 at 150.

³³⁹ *Ibid.*

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 those whose rights are infringed.”³⁴⁰

This solution to the fears of the minorities stands to reason, admittedly, not because it lacked justification but because it provided the minorities no protection that is not available to the majorities as well. Its goal seems clearly similar to that ascribed to Article 27 of the International Covenant on Civil and Political Rights³⁴¹ which ostensibly was inserted to address the rights of minorities within national borders but which Anghie says “purports to protect the rights of minorities, [but] is based, significantly, on the rights of individuals belonging to minorities and, does little to protect minorities as a collectivity”³⁴² In fact the human rights provisions suggested for inclusion in the constitution by the Willink’s Commission as with Article 27 provided little more than the rights which those provisions say are available to everyone, majority and minority alike, in effect endorsing the assimilation of minorities into the “universal state”³⁴³

As it transpired, human rights provisions were incorporated into the Nigerian constitution in 1958 and were retained in both the Independence Constitution of 1960 and

³⁴⁰ *Report Of The Commission Appointed To Inquire Into The Fears Of The Minorities And The Means Of Allaying Them* Cmd 505 (London: HMSO, 1958). The Terms of Reference given to the Commission included the following: (1) To ascertain the facts about the fears of minorities in any part of Nigeria and to propose means of allaying those fears, whether well or ill founded; (2) To advise what safeguards should be included for this purpose in the Constitution of Nigeria; (3) If , but only if, no other solution seems to the Commission to meet the case, then as a last resort to make detailed recommendations for the creation of one or more new States, and in that case:- (a) to specify the precise area to be included in such State or States; (b) To recommend the Governmental and administrative structure most appropriate for it; (c) To assess whether any new State recommended would be viable from an economic and administrative point of view and what the effect of its creation would be on the Region or Regions from which it would be created and on the Federation.

³⁴¹ International Covenant on Civil and Political Rights GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, U N Doc A/6316 (1966).

³⁴² Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 206.

³⁴³ James Crawford, “The Right to Self-Determination in International Law: Its Development and Future” in *People’s Rights* 24 (Philip Alston ed., 2001).

the Republican Constitution of 1963. The guarantees were in sixteen sections including the interpretative section.³⁴⁴ Under those provisions, the following rights were protected: the right to life,³⁴⁵ freedom from torture and from inhuman or degrading treatment or punishment,³⁴⁶ freedom from slavery or servitude³⁴⁷ and the right to personal liberty.³⁴⁸ Others were the right to fair trial,³⁴⁹ right to private and family life,³⁵⁰ freedom of conscience and religion,³⁵¹ the right to freedom of expression,³⁵² the right to peaceful assembly and association³⁵³ and the right to freedom of movement.³⁵⁴ Equally protected were the right to freedom from discrimination³⁵⁵ and the prohibition on compulsory acquisition of personal property except on the fulfillment of certain conditions.³⁵⁶

These provisions contain the seeds upon which a truly stable, just and functioning state could be built. But political independence brought with it challenges which could not be dealt with using mere idealistic constitutional promises. The provisions in the constitution guaranteeing fundamental human rights had to confront a peculiar society and its social and political context. In resolving the question of harnessing a fragile society and keeping alive the potentials for progress in post-Independence Nigeria, the country had to engage with the skepticism imagined by the Simon's Commission on the Indian Constitution which is captured in its view that "Abstract declarations [of human rights] are useless, unless there exists the will and the means to make them effective."³⁵⁷

³⁴⁴ ss 18 – 33.

³⁴⁵ s 18

³⁴⁶ s 19.

³⁴⁷ s 20.

³⁴⁸ s 21.

³⁴⁹ s 22.

³⁵⁰ s 23.

³⁵¹ s 24.

³⁵² s 25.

³⁵³ s 26.

³⁵⁴ s 27.

³⁵⁵ s 28.

³⁵⁶ s 29.

³⁵⁷ Parkinson, *supra*, note 330. See also Aldo Zammit Borda, "Constitutional Law in the Commonwealth: A Brief Comparative Analysis" (2009) 18 *Commonw Lawyer* 37. The author here says the failure to translate

3.3. Human Rights Practices in the Post-Colony

The question that engages my attention at this juncture is how the newly independent Nigerian state applied lessons derived from this socio-political background to deal with everyday human rights complaints immediately after independence. In particular, how challenging was it to move from colonialism which denied human rights to a post-colonial period that gave those rights constitutional prominence? If there were challenges at all, what was the nature of those challenges?

It is quite clear that there were challenges to human rights protection immediately following Nigeria's independence. For one, there did not seem to be the will or the means to translate human rights guarantees in the 1960 Independence Constitution into tangible and effective safeguards in practice. Several contradictions linked to the peculiar social and political character of the country that had been carefully overlooked in the desperate efforts to achieve independence rose up quickly to challenge a very fragile post-independent state. But more importantly, the nature of the constitutional regime delivered at independence, which model was applied in all the African British colonies played into the hands of the political and legal elite that replaced the departing colonial powers. This resulted in what seemed like a stark unpreparedness of the said elite for the challenges of post-colonial government reconstruction. These challenges, and even more, persisted well after the promulgation of the 1963 Republican Constitution that repeated those human rights guarantees in a wholesome fashion.

Steven Pfeiffer provides a detailed treatment of some of the challenges in question.³⁵⁸ Though his intervention was set on similar events as they unfolded in British East Africa (comprising Kenya, Tanzania and Uganda), it could actually also be extrapolated to the same events as they occurred elsewhere in Africa, especially Nigeria.

fundamental rights in constitutions to subsidiary legislation enforceable by the courts is accounted for by three major factors: the lack of political will, the lack of capacity/resources and lack of awareness.

³⁵⁸ Steven B Pfeiffer, "The Role of the Judiciary in the Constitutional Systems of East Africa" (1978) 16 J Modern Afr Stud 33.

It accounts for both the paradoxes and incongruities³⁵⁹ of the constitutional system bequeathed to these countries by British colonial authorities at independence and how those would go on to shape the future situation of those issues in the latter histories of the countries studied.

The first issue addressed by Pfeiffer is that of the exact location of human rights in the constitutional framework of the newly independent post-colonial states. There already existed at the time when the countries he studied became independent two possible templates that could be adopted to deliver human rights guarantees and regulate their enforcement. The first was to have a “written, justiciable, fundamental human rights in the constitution, as in the United States”³⁶⁰ while the second was to have fundamental human rights “protected by the free expression of the national political will in parliament, as in the United Kingdom.”³⁶¹ In all the countries of interest, including Nigeria, the colonial government opted for the first template as their independence constitutions contained guarantees of fundamental human rights.

By Pfeiffer’s account, this threw up “basic and numerous” differences in both opinion and the practice of constitutional law. The first and perhaps most fundamental was that the British which had ruled throughout colonization did not have any history of constitutionalized rights or a history of judicial review while in the United States system, “almost every national political issue becomes to some extent a question of interpretation by the federal courts...”³⁶² Thus Britain maintained her own constitutional arrangement for the former colonies but now in written form, otherwise known as the ‘Westminster model’ export. The system was so-called because notwithstanding the insertion of human rights in written constitutions of the post-colonies, it still “established legislative,

³⁵⁹ *Ibid* at 36.

³⁶⁰ *Ibid* at 33

³⁶¹ *Ibid*. Pfeiffer laments the failure of those responsible for this constitutional process in the late 1950s and early 1960s to look hard enough for alternative constitutional arrangements among those existing in non-Western industrial or traditional African societies.

³⁶² *Ibid* at 34

executive, administrative, and judicial institutions along lines roughly equivalent to those in England.”³⁶³ This left the post-colonial states in a situation where the courts took on roles that they had not performed throughout the colonial period. Rather than bend always to the will of the legislative majority as under colonialism, courts in the post-colonial state became “structurally positioned to occupy a position of substantial political significance at the apex of national government.”³⁶⁴

For the courts, this was an unusual break in orientation. While they were given a constitutional status and role unlike that of federal courts in the United States after the Supreme Court decision in *Marbury v Madison*, they were thoroughly imbued with the formal conservatism of the legal and judicial culture of England, and manned by individuals who believed that the separation of the courts from politics was a very important value indeed.³⁶⁵ Howard offered insights corroborative of this view and identified the training received by Commonwealth African lawyers as a major factor. She argues that most of the lawyers had been steeped in the British tradition whose major distinguishing characteristic is that “while lawyers respect and advocate judicial review and the rule of law, they do not take a legally ‘activist’ position. British-trained lawyers and judges tend to defer to the legislature and executive in matters of legal substance.”³⁶⁶

Besides training, the post-colonial judiciary also carried over personnel who had served the colonial regime with insuperable zeal.³⁶⁷ In that case, my earlier discussion of the relevance of the role of judges from one regime to another and the position of judges

³⁶³ *Ibid* at 35

³⁶⁴ *Ibid*.

³⁶⁵ *Ibid* at 36. See also Chief FRA Williams, “Fundamental Rights and the Prospect for Democracy in Nigeria” (1966-1967) 115 U Pa L Rev 1073 at 1083 where he states that “The courts in Nigeria, deriving their tradition from the role of the British judiciary, naturally tend to take a restricted view of their function in regard to the enforcement of fundamental rights and the Constitution of Nigeria.”

³⁶⁶ See Howard, *supra* note 313 at 336.

³⁶⁷ In fact because of the dearth of local personnel, the Nigerian judiciary after independence continued until many years thereafter to be dominated by British judges who were required to operate a written constitution with a Bill of Rights though Britain had no history or practice that it could refer to in that direction.

in the process is very useful here. Not only were a disproportionate majority of the judges in Nigeria at independence non-Nigerian, they were mostly the same judges that had helped the colonial government in implementing all of its objectionable laws and policies. As with latter day transitional arrangements in which it is unprofitable to invest much hope in judges that had helped authoritarianism in the past to immediately reverse that tradition, this feeling held true for Nigeria's immediate post-colonial judges. Their colonial adjudicatory philosophy continued to inform their decisions after independence. In Nigeria and Kenya at independence, for instance, "the courts and legal systems became closer to English common law than they had been under British colonial rule."³⁶⁸

Further, however much training, personnel and legal tradition negatively influenced the conduct and attitude of post-colonial Nigerian judges to constitutional interpretation and response to textualized human rights, other factors were also implicated. A significant one concerned politics and ethnic relations, particularly the latter, which though it had been noticeable throughout the period of the struggle for independence had been successfully kept in the background while the country presented a united front to thwart colonialism. The political elite which took over at independence continued papering over the cracks but only for a short while.

Clearly, the immediate post-colonial regime in Nigeria had both political (often mixed up in ethnic) rivalries as well as intolerance of the political opposition in ample proportions. In fact, to deal with the menace of the political opposition immediately after independence, the governing elite had no qualms whatsoever reaching back to the tactics of the departed colonialists. In doing so, that elite also exploited to dubious advantage many of the anti-democratic laws passed during the colonial period which nevertheless

³⁶⁸ Sandra Fullerton Joireman, "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy" (2001) 39 *J Modern Afr Stud* 571 at 577. See also Matthew Lange, "British Colonial Legacies and Political Development" (2004) 32 *World Dev* 905; John R Schmidhauser, "Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems" (1992) 13 *Int'l Pol Sci Rev* 321 at 331.

had remained in the statute books.³⁶⁹ Not uncharacteristically, various extraneous political considerations began to intrude into judicial decision-making. For example, a fragile post-colonial Nigeria had to be stabilized. And if this presented huge costs to individual rights and democratic principles, so be it.³⁷⁰ As a result, the need to make the country stable trumped whatever libertarian pretensions that may have heralded independence.

This was a period of extreme turmoil in other parts of Africa as well. Most of the other Commonwealth African states that attained independence at the same period as Nigeria passed through teething nation-building challenges of their own.³⁷¹ Though it is uncertain by how much and to what extent these developments interacted, and the level to which what transpired in one country impacted happenings elsewhere, it is unarguable that those events actually influenced one another. Not only did clear and present political realities dictate the course of those events, the narrative also included the emergent rhetoric of “African socialism” which was used to disengage human rights from nationalism and national constitutions.³⁷² One of the major claims of this new

³⁶⁹ See for example Chris Ogbondah & Emmanuel Onyedike, “Origins and Interpretation of Nigerian Press Laws” (1991) 5 Afr Media Rev 59 (describing the colonial roots of the Public Officers (Protection Against False Accusation) Decree No 4 of 1984.) Such laws also included the Official Secrets Act, No 29 of 1962 and s 31 of the *Southern Nigeria Criminal Code Act*, 1990 and s 416 of the *Northern Nigeria Penal Code*, 1990. These two sections criminalize sedition.

³⁷⁰ See Karen Mingst, “Judicial Systems of Sub-Saharan Africa: An Analysis of Neglect” (1988) 31 Afr Stud Rev 135 at 138 (“To achieve national integration, many African leaders urged the establishment of a precise, albeit detailed, constitution. Fearing disorder and disintegration, they created safeguard clauses to insure order and derogation clauses abrogating basic human rights in times of national disorder. The maintenance of order was the responsibility of the executive, not the judiciary; legal safeguards could be usurped by the executive and judicial remedies by-passed. Thus, at independence, instead of the judiciary developing its own legitimacy, executive-inspired and defined political necessities took precedence”).

³⁷¹ James CN Paul, “Some Observations on Constitutionalism, Judicial Review and Rule of Law in Africa” (1974) 35 Ohio St L J 851 at 855 (where the author states that “Most independence [African] constitutions did not last long. They were soon formally scrapped or amended.”). Between January 1956 and December 2001 a report showed that 80 successful *coups d’etat* had taken place in Africa. Over the same period there were 108 failed attempts as well as 139 reported attempts to violently overthrow a legitimate government. A good number of those incidents occurred between 1960 and 1970. See Patrick J. McGowan, “African Military Coups d’Etat, 1956-2001: Frequency, Trends and Distribution” (2003) 41 J Modern Afr Stud 339.

³⁷² El-Obaid & Appiagyie-Atua, *supra* note 83.

nationalism was that “African society needed a new framework for government, faithful to its traditional values, often referred to as African socialism”³⁷³

The rhetoric was typically incoherent as was to be expected from politicians driven less by the demands of responsible leadership and more by the imperatives of political survival. This catchphrase was defined to be “democratic socialism as conceived by Africans in Africa, evolving from the African way of life and formulated in particular terms as the continuing examination of the African society”³⁷⁴ Expectedly, in specifying its dimensions and especially what this brand of democracy meant, the leaders who coined it chose what meanings appealed to them. Julius Nyerere, the late President of Tanzania, for instance called it *ujaama* or familyhood in Swahili.³⁷⁵ The objective of this socialism, he said, was “To build a society in which all members have equal rights and equal opportunities; in which all can live at peace with their neighbors without suffering or imposing injustice, being exploited, or exploiting; and in which all have a gradually increasing basic level of material welfare before any individual lives in luxury.”³⁷⁶ But the philosophy had detractors in equal measure who claimed that it was diluted as the years passed by. A writer alleged that “Ujaama was intended to be pursued politically, through the education and mobilization of peasants; instead it conforms with [sic] the interests and methods of the bureaucratic bourgeoisie.”³⁷⁷

On the other hand, Kwame Nkrumah, the equally late and iconic Ghanaian leader called it *consciencism* which focused “on the necessary reconstruction of identity after colonization”³⁷⁸ Other variations ranged from black African consciousness and pan –

³⁷³ Isaak I Dore, *Constitutionalism and the Post-Colonial State in Africa: A Rawlsian Approach*, (1996-1997) 41 St Louis U L J 1302 at 1306.

³⁷⁴ See El-Obaid & Appiagyie-Atua, *supra* note 83 at 825.

³⁷⁵ *Ibid.*

³⁷⁶ Julius Nyerere, “*Ujaama – The Basis of African Socialism*” in *Freedom and Socialism* (London: London University Press, 1968) at 170-171.

³⁷⁷ PL Raikes, “Ujaama and Rural Socialism” (1975) 3 Rev Afr Pol Econ 33.

³⁷⁸ Nkiruka Ahiauzu, “Naming Struggles: African Ideologies and the Law” (2007) 1 Afr J Legal Theory 24.

Africanism to negritude and *ubuntu*.³⁷⁹ While one could understand the need to forge Afrocentric systems that spoke to the continent's peculiarities, the lack of clear consensus on the way forward persisted. And rather than these ideologies being built on popular support, a major outcome of this brand of nationalism was the crystallization of dictatorship across the continent. In Nigeria specifically, political fragility soon gave way to the instability that the elite most feared.

At independence the country's major political parties were organized mostly along ethnic lines. As if the fears earlier expressed by the minority ethnic groups and which led to the inclusion of human rights in the constitution had not existed at all, each of the three major ethnic groups in the country (Hausa, Igbo and Yoruba) controlled the political party that ruled its region. This development paralleled to a great extent Nagel and Olzak's competitive theory of ethnic mobilization in which the Nigerian groups reached down to their ethnic levers to organize their groups in pursuit of collective political ends.³⁸⁰ The stiff competition among these various groups characteristically became a threat to the stability and legitimacy of the Nigerian state.

But while the majority ethnic groups took political spoils from a competitive environment, the minority groups in turn faced their worst nightmares and clutched at political straws to remain relevant in the unfolding events. A lack of clear parliamentary majority for any of the three main political parties enabled an uneasy coalition between the Northern People's Congress (NPC) which controlled the Northern Region and the National Council of Nigeria and the Cameroons (later National Council of Nigerian Citizens)(NCNC) which held sway in the Eastern region.³⁸¹ A third party, the Action Group (AG) which controlled the Western Region was the main opposition.

³⁷⁹ *Ibid* at 26.

³⁸⁰ Joane Nagel & Susan Olzak, "Ethnic Mobilization in New and Old States: An Extension of the Competition Model" (1982) 30 Soc Probs 127.

³⁸¹ Edward Feit, "Military Coups and Political Development: Lessons from Ghana and Nigeria" (1968) 20 World Politics 179.

The AG would later become a thorn in the flesh of the governing coalition for which its leaders were marked out for political oppression. Crippling the party thus became an obsession for the government in power which imposed movement restrictions on its leaders and later would charge the main opposition leader with treason. When general elections were held in 1964, that region boiled with violence because its citizens rose up against alleged efforts to rig the election's outcome.³⁸² The protests led to a total breakdown of law and order in the region, giving a partisan federal government the pretext to impose emergency rule in the region.³⁸³ But by this time the violence had taken an almost irreversible course. All attempts to quell it failed woefully and this, coupled with overall public disapproval of the behavior of the post-independence politicians, provided the Nigerian military with the justification to intervene for the first time in the country's politics.

How the immediate post-independence Nigerian judiciary responded to the claims of those alleging that their human rights had been violated and seeking vindication under the constitutional guarantees of human rights throughout that period is treated separately while introducing the sixth chapter. The military offered some reasons for their intrusion into the political arena. This included allegation that the political elite had been corrupt.³⁸⁴ There was no direct reference by them to the judiciary as being part of the elite whose collective conduct had become objectionable. But that intervention was to prove costly both to the country's political and democratic development and to the establishment of a sustainable national human rights culture.

3.4. Introducing the Devil: The Nigerian Military and Human Rights

Along the same historical trajectory, I would in this section turn my attention to the events that led to military intervention and what in real terms was the cost of that political

³⁸² Obiagwu & Odinkalu, *supra* note 20 at 215.

³⁸³ Larry Jackson, "Nigeria: The Politics of the First Republic" (1972) 2 J Black Stud 277; Oye Ogunbadejo, "Conflict Images: Colonial Legacy, Ethnicity, and Corruption in Nigerian Politics, 1960-1966" (1979) 4 Utafiti 85; Brian Smith, "Federal-State Relations in Nigeria" (1981) 80 Afr Affairs 355.

³⁸⁴ Samuel Decalo, "Military Coups and Military Regimes in Africa" (1973) 11 J Modern Afr Stud 105.

rupture on the human rights project. A lot has already been written about the events that culminated in the military overthrow of the civilian administration in Nigeria. Read identified “Ethnic particularism fuelled [by] the crises which arose over the national Census of 1962 and 1963-64 and the General Election of 1964”³⁸⁵ as the immediate cause of the overthrow. Apart from the violence then sweeping through many parts of the country, legal controversies played no small part in maintaining the crises. According to Read, disputes from the 1964 elections brought to the surface a different crisis over the powers of the President under the 1963 Constitution because though the executive authority of the Federation was vested in him and he was the Commander-in-Chief of the armed forces “yet he was essentially a constitutional, not an executive head of state who exercised his powers generally on the advice of Ministers.”³⁸⁶ He continues,

Yet in January 1965 a trial of strength developed, the then President, Dr. Azikiwe, indicating his reluctance to appoint a Prime Minister on the basis of an election which had proved abortive due to partial boycotts in certain regions. Similar uncertainty about the proper role of a constitutional head at a time of crisis had arisen earlier at regional level, when the Premier of the Western Region had been removed by the Governor: ensuing events provoked Federal intervention by the declaration of an emergency. On that occasion the imprecision of the “Westminster Model” of executive government was demonstrated in the subsequent litigation in which the validity of the Governor’s action was denied by the Federal Supreme Court, recognized on appeal by the Judicial Committee of the Privy Council and immediately rejected, with retrospective effect, by the Regional and Federal legislatures.”³⁸⁷

On January 15, 1966 a section of the Nigerian military staged a violent *coup d’état*.³⁸⁸ They killed some prominent politicians including the then Prime Minister (a

³⁸⁵ James S Read, “The New Constitution of Nigeria, 1979: ‘The Washington Model’” (1979) 23 J Afr L 131 at 132.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*

³⁸⁸ Adewale Ademoyega, *Why We Struck: The Story of the First Nigerian Coup* (Ibadan: Evans Brothers, 1981). Ben Gbulie, *Nigeria’s Five Majors: Coup d’Etat of 15th January 1966, First inside Account*

northerner) as well as that region's Premier. The soldiers also shot to death the Premier of the western region. Though the coup was led by mainly officers from the eastern Igbo speaking parts of the country, no prominent politician from that region was killed.³⁸⁹ The specter of ethnic domination was given new impetus especially as the new leader who emerged following the coup also came from the Igbo ethnic group and some of the early actions he took further alienated him from the section of the country most aggrieved by the consequences of the military action.³⁹⁰

Barely six months after the first coup, military officers mostly from the northern parts of the country, staged a counter-coup that rivaled the scale of killings in the first one. The counter-coupists killed the head of state installed after the first coup and several officers of Igbo origin. But this time, the pent-up ethnic animosities already smoldering following these events got instant expression through a general uprising in the north where persons belonging to the Igbo ethnic group were the main targets. Thousands of them were killed while those lucky enough to escape fled in their thousands to their own ethnic enclave. On May 29, 1967 the military administrator of the eastern region declared a separate Republic of Biafra, precipitating a 30-month civil war that could only end January 1970.

3.5. Parodying Sanity: The Military Constitution

The political events narrated in the last section took Nigeria to the door of unprecedented legal and constitutional developments. The Republican Constitution of 1963 did not contemplate its supplantation by any other kind of supreme law, martial or otherwise. So there were no prior legal mechanisms to address the emergency brought

(Onitsha: Africana Educational Publishers, 1981). Richard L Sklar, "Nigerian Politics in Perspective" (1967) 2 *Government & Opposition* 524.

³⁸⁹Abdul Raufu Mustapha, "The National Question and Radical Politics in Nigeria" (1986) 13 *Rev Afr Pol Econ* 81; Paul Anber, "Modernisation and Political Disintegration: Nigeria and the Ibos" (1967) 5 *J Modern Afr Stud* 163; Ladipo Adamolekun, "Introduction: Federalism in Nigeria" (1991) 21 *Publius* 1; Pradeep P Barua, "Ethnic Conflict in the Military of Developing Nations: A Comparative Analysis of India and Nigeria" (1992) 19 *Armed Forces & Soc'y* 123.

³⁹⁰Olu Oguibe, "Lessons from the Killing Fields" (1998) 77 *Transitions* 86; EA Keay, "Legal and Constitutional Changes in Nigeria under the Military Government" (1966) 10 *J Afr L* 92.

about by the intervention of the military. But there had been “revolutions” in other regions of the world in the past which had led to the overthrow of constitutional governments in the places where they occurred and their replacement by others not contemplated under the old order. Did the military action in Nigeria qualify as such a “revolution”? If so, what were its legal and constitutional consequences?

The first law promulgated by the military immediately it took over government was the Constitution (Suspension and Modification) Decree (No.1) of 1966. This decree contained enough ingredients indicative of the military’s view of their relationship to the law. First was that the decree suspended the 1963 constitution, but left unaffected its provisions on fundamental human rights. The decree itself was made retroactive to January 17, 1966. Second it prescribed a novel law-making procedure for the country. Rather than through debates and discussion, section 4 of the decree granted the military authorities power to make laws by means of Decrees signed into law. Third, in complete disregard to the principle of separation of powers the legislative and executive powers of government were fused in the same body, the Supreme Military Council. Fourth, the validity of the decree was placed beyond the reach of judicial review in section 6. As it turned out, this was good enough notice from the military that it was not going to respect the rule of law as these ingredients coupled together eroded any notions that law was going to be supreme. But yet a fifth character of military laws pointing to their discomfort with the rule of law only became apparent much later into their reign and in a real-case situation.³⁹¹

Military constitutionalism, if there ever was anything like it, was baptized with fire in the case of *Lakanmi v Attorney General (Western Nigeria)*.³⁹² The Western region

³⁹¹ See Abayomi, *supra* note 310 at 1051.

³⁹² (1969) 1 U Ife L Repts [Pt II] 201.

government had established by edict³⁹³ a Tribunal of Inquiry to investigate the private assets of certain individuals, including the plaintiff in this case. The tribunal immediately placed an order preventing the plaintiff and others similarly being investigated from dealing in their properties without the authorization of the region's Military Governor. The tribunal also ordered rents accruing from the property to be paid into the treasury of the region. The plaintiff applied to the High Court for an order of *certiorari* to quash the orders of the tribunal. He contended that the order violated sections 22 and 31 of the 1963 constitution respectively protecting private and family life as well as the powers of the High Court to intervene when infringements are alleged.

While the case was still pending in court, the military government passed another decree. It validated all the actions of the tribunal, ousted the jurisdiction of the court from dealing with claims arising from the activities of the tribunal. It also made the constitutional guarantees of human rights inapplicable to the work of the tribunal. This underpinned the fifth character of that decree that constituted it into an attack on the rule of law. Rather than a law of general application, this decree was directed at specific individuals. It was therefore not just simply *ad hominem*; it also, so long as it seemed to pass on the guilt or otherwise of the persons against whom it was directed ahead of any criminal indictment, amounted to a legislative judgment.

This suit raised several questions covering the entire spectrum of constitutional characteristics of the new military regime. Some of the questions raised included: whether the military interruption of civilian rule qualified as a revolution, on the hierarchy of legal norms in Nigeria at that time, which between the retained provisions of the constitution and a military decree was higher on the ladder, what if the norm was contained in an edict. Did human rights guarantees speak the same language under the military as they did under civilian rule? What impact did the decree passed while Mr.

³⁹³ Under the military, laws made at the federal government level were called Decrees while those made at regional or state levels of government were called Edicts. In this case the edict in question was Western Region of Nigeria Edict No 5 of 1967.

Lakanmi's suit was already pending have on it and what were the implications of the decree on the rule of law and good administration of justice?

The High Court dismissed the suit, citing its lack of jurisdiction. The plaintiff took it further to the Court of Appeal. It was during the appeal that the new decree was issued. The Court of Appeal upheld the decree's validity and also cited its own lack of jurisdiction for throwing out the appeal. It stated further that the fundamental rights provisions in the constitution that the plaintiff relied upon for the case were no longer justiciable because the decree had said so. But still undeterred, the plaintiff appealed further to the Supreme Court.

A major question that faced the Supreme Court was whether the military government, given the circumstances of its emergence, was a constitutional interim government still bound to honor constitutional norms or whether its powers derived from a revolutionary occurrence. In a judgment that would be described later as "an extraordinary challenge to the power of the military government,"³⁹⁴ the court ruled that the military regime was only a constitutional interim government and therefore bound to uphold the principles of the constitution.³⁹⁵ It was the Supreme Court's view that

...though unprecedented in history, the invitation by the Council of Ministers (which validly met) in January 1966 to the armed forces, which was duly accepted, was to form an interim military government, and that it was evident that the government thus formed was expected to uphold the constitution and could only suspend certain sections thereof as the necessity arose.³⁹⁶

The Supreme Court also deplored several provisions of Decree No. 45 promulgated while the plaintiff's legal claim was pending and therefore precisely aimed at overreaching it. The court frowned in particular on the express naming of the plaintiffs in the schedule to

³⁹⁴ See Abayomi, *supra* note 310 at 1053.

³⁹⁵ See Yakubu, *supra* note 158 at 445.

³⁹⁶ *Ibid.*

the Decree which made it “clear that the object of the legislature was directed to the [plaintiffs] while their appeal was pending.”

The military was however in no mood to brook such judicial audacity. They made their indignation known in the strongest manner possible immediately after this judgment was rendered by quickly promulgating the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970. In it the military regime declared itself a revolutionary one and nullified the decision in the *Lakanmi's* case. The immediate aftermath of this latest military action was to ask troubling questions about the place of the courts as guardians of individual rights in a military situation. Abayomi says the decree “injected a degree of timidity and uncertainty into the powers of the Nigerian courts to protect human rights under military governments,” and that this uncertainty and timidity lingers to the present day.³⁹⁷

Legal scholars expended much intellectual energy debating these events³⁹⁸ in the course of the next several years. Such discussions centered on the impact of military government in Nigeria on human rights generally and on the judicial function in particular. Yet it was clear the military through decree 28 had crossed the Rubicon of arbitrariness. Judicial protection of individual rights became an intense struggle of which the judiciary as an institution lacked the political capital to wage. The bookmark of this season was the apparent triumphalism of Austinian positivism in which the law was emptied of all moral content. To little avail, Nigerian judges were urged to “break loose from what some...considered to be maximum prison into which Austinian positivism has confined them.”³⁹⁹

³⁹⁷ Abayomi, *supra* note 310 at 1054.

³⁹⁸ DO Aihe, “Fundamental Human Rights and the Military Regime in Nigeria: What did the Courts Say?” (1971) 15 J Afr L 213.

³⁹⁹ TA Aguda, “The Challenge of Nigerian Law and the Nigerian Lawyer in the Twenty-First Century” cited in CN Okeke, “Judges and the Politics of Jurisprudence” in TO Elias & MI Jegede, *Nigerian Essays in Jurisprudence* (Lagos: MIJ Publishers Limited, 1993) 99 at 101.

3.6. Human Rights Practices of the Military Regimes

I will dwell much later in my research on how Nigerian courts handled human rights questions addressed to them throughout the period that the military wielded political power. What I do in this section is to give a brief account of how the military itself as an institution impacted individual and collective enjoyment of those rights during that period. It is trite to also state that the cases which the courts were called upon to adjudicate at this time arose from the complaints of those challenging how the military power holders had treated them.

Once the military used a decree promulgated by it to overrule a validly entered judgment of the Nigerian Supreme Court in the *Lakanmi Case*, the institution came to acquire absolute powers. The message that the military sent out was that those powers were beyond the reach of judicial review. Yet the judiciary was the only institution that could have placed any kind of limits to the assumption of unreviewable powers by the military. But seeing that they had crushed that possibility early on, the military proceeded to tamper generally with most of the fundamental human rights hitherto enjoyed and rendered constitutionally enjoyable by Nigerians prior to military intervention. Even though military power extended to all those powers, civil and political rights were the most substantially rolled back during that era spanning January 1966 to October 1979 and then again December 1983 to May 1999.

Because it is outside the general outline of this study to cover all possible instances of human rights violations carried out by the military during this period, I will only cite some situations to exemplify the narrative that is being presented. Even though military practices affected all human rights one way or another, the impact on those rights was not to a uniform degree. Some rights bore more of the brunt of military heavy-handedness than others. Since the military showed unusual sensitivity to press freedom and rights of expression, I will start with instances of how those rights suffered under the military.

If the Nigerian military were to succeed in fulfilling their dictatorial aspirations, it was important that the popular media was placed on a short leash. Throughout the period that they were in power, they used different strategies to carry out this design. One important strategy was to arbitrarily detain and torture individual journalists. Such journalists would typically be accused of placing socio-political harmony in danger through their writings.

The first major incident which became an issue of significant public concern and marker for subsequent military dealings with the media was the 1973 case involving Minere Amakiri who then worked for the *Nigerian Observer*, a state newspaper. Mr. Amakiri was said to have been picked up by military authorities “from his lunch table, [they] unevenly shaved his head and beard, physically tortured him, and then locked him up in a military guardroom for more than 24 hours.”⁴⁰⁰ He was also beaten twenty four times with a stick across his back. The military offered no justification for an action well considered a “watershed” and “epochal” in the annals of civil/military relations in Nigeria.⁴⁰¹ It set the stage for such arbitrary military interferences with the ability of Nigerian journalists to carry out their duties without fear or threats of intimidation. The Amakiri incident was followed by similar instances culminating in the arbitrary arrest and detention of journalists across the length and breadth of Nigeria.⁴⁰²

Some of the arrests and detentions were the consequences of the use of completely different strategy by the military to muzzle the media, that is, the use of military decrees. Under one such decree in 1984 two editors with *The Guardian*, a daily newspaper published in Lagos, Tunde Thompson and Ndukar Irabor were arrested and

⁴⁰⁰ Chris W Ogbondah, “The Pen Is Mightier than the ‘Koboko’: A Critical Analysis of the Amakiri Case in Nigeria” (1991) 8 Pol Comm & Persuasion 109.

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid* at 110 to 111 (The author showed a catalogue of arrests of journalists, both print and electronic up to 1990).

tried under a military tribunal for allegedly publishing “false statements.”⁴⁰³ Some of the decrees prescribed harsh registration guidelines for media institutions.⁴⁰⁴ Where that failed, recalcitrant media houses were closed down and prevented from publishing.⁴⁰⁵ If they beat the embargo and managed to print, circulation was aborted as the police and military chased vendors about the streets, snatching copies.⁴⁰⁶ At least on one occasion, a popular magazine editor-in-chief, Dele Giwa of *Newswatch* died when a bomb delivered to his breakfast table by security agents exploded.⁴⁰⁷

Similar to the travails of the media during the military era was the stifling of political views deemed offensive by the military and harassment of the individuals conveying such views. Detention and torture of political activists occurred persistently under the military. Where detentions were not considered effective, the military murdered those activists or caused them to disappear. Several examples of politically induced detentions⁴⁰⁸ could be given as could instances of political and judicial assassinations.⁴⁰⁹

⁴⁰³ *Ibid* at 111. See for example Offensive Publications (Proscription) Decree No 35 of 1993 which authorized the military President to ban or otherwise sanction any publication at his absolute discretion. See also Tokunbo Ojo, “The Nigerian Media and the Process of Democratization” (2007) 8 *Journalism* 545.

⁴⁰⁴ See for example Newspapers Decree No 43 of 1993 which prescribed very stringent requirements including payment of huge sums of money before newspapers could be allowed to publish. See also Chris Ogbondah, “Press Freedom in West Africa: An Analysis of one Ramification of Human Rights” (1994) 22 *J Opinion* 21.

⁴⁰⁵ See Chris Ogbondah, “Media Laws in Political Transition” in Goran Hyden, Michael Leslie & Folu Ogundimu eds., *Media and Democracy in Africa* (New Jersey: Transaction Publishers, 2003) at 64. See also Augustine Ikelegbe, “The Perverse Manifestation of Civil Society: Evidence from Nigeria” (2001) 39 *J Modern Afr Stud* 1.

⁴⁰⁶ Ayo Olukotun, “Authoritarian State, Crisis of Democratization and the Underground Media in Nigeria” (2002) 101 *Afr Affairs* 317 at 321

⁴⁰⁷ Mercy Ette, “Agent of Change or Stability? The Nigerian Press Undermines Democracy” (2000) 5 *Harv Int'l J Press/Politics* 67 at 68. Akwasi Assensoh, “African Writers: Historical Perspectives on their Trials and Tribulations” (2001) 31 *J Black Stud* 348 at 353.

⁴⁰⁸ Akin Ibidapo-Obe, *Essays on Human Rights Law in Nigeria* (Lagos: Concept Publications, 2005) at 105; see also Karl Maier, *This House has Fallen: Nigeria in Crisis* (London: Penguin Books, 2000) at 3.

⁴⁰⁹ The Ken Saro-Wiwa affair stands out as an example of using judicial cover to settle a political question as he was killed along with several other Ogoni activists after a sham trial by a military tribunal. See Johan Graafland, “Profits and Principles: Four Perspectives” (2002) 35 *J Business Ethics* 293 & 294; Marion Campbell, “Witnessing Death: Ken Saro-Wiwa and the Ogoni Crisis” (2002) 5 *Postcolonial Studies* 39. Abiola Ojo, *Constitutional Law and Military Rule in Nigeria* (Ibadan: Evans Brothers Ltd, 1987) 252-287. M A Ajomo, “Human Rights under the Nigerian Constitutions” in Awa Kalu & Yemi Osinbajo, eds., *Perspectives on Human Rights* (Lagos: Federal Ministry of Justice, 1992) at 105. Augustine Ikelegbe,

Lawyers also were prevented sometimes from practicing their profession.⁴¹⁰ To obstruct the internationalization of the domestic discontent with military repression during this time, travel documents of specific persons were routinely seized at the airports. This was done to stop them from traveling outside and drawing attention to the brutality of the military governments.⁴¹¹ Political and other civic gatherings were frequently broken up, their organizers brutalized.⁴¹²

The judiciary was not spared the agonies of that era as well. By using executive impunity to overrule court decisions that it disagreed with the military severely undercut judicial authority and eroded the institution's powers.⁴¹³ Though noting that the judiciary was the sole government institution that preserved an autonomous existence through decades of military rule, Lewis states nevertheless that the flagrant manipulation of that institution, particularly during the 1993 electoral impasse, critically tarnished its reputation.⁴¹⁴ Under the military, judicial tenure hung on the whim of those who exercised executive power. The fear of removal from office therefore cautioned judicial behavior to a great extent.⁴¹⁵ The question therefore was: how could the courts protect the rights of Nigerians when judges were intimidated by extra-legal forces?⁴¹⁶ In a magazine report published 1986, then Chief Judge of Plateau state stated that the fear of removal

“Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle” (2001) 39 J Modern Afr Stud 437.

⁴¹⁰See Oko, *supra* note 17.

⁴¹¹ See *Olisa Agbakoba v The Director, State Security Services & Anor*, [1999] 3 NWLR (Pt 595) at 314; *Chima Ubani v The Director, State Security Services*, [1991] 11 NWLR (Pt 625) 129 [Ng Ct App]; Obiora Chinedu Okafor, “The Fundamental Right to a Passport under Nigerian Law: An Integrated Viewpoint” (1996) 40 J Afr L 53.

⁴¹²Sola Akinrinade, “Nigeria’s lingering Political Crisis: Internal Combustion, International Inaction” (1998) 87 The Roundtable: Commw J Int’l Aff 313; Chris W Ogbondah, “Political Repression in Nigeria, 1993-1998: A Critical Examination of One Aspect of the Perils of Military Dictatorship” (2000) 35 Afr Spectrum 231.

⁴¹³ See for example Peter Lewis, “Endgame in Nigeria? The Politics of a Failed Democratic Transition” (1994) 93 Afr Affairs 323 at 326 (referring to the invocation of a military decree to overrule a judicial decision pertaining to the 12 June 1993 presidential election).

⁴¹⁴ *Ibid* at 332.

⁴¹⁵ See generally Richard Akinola, *Salute to Courage: The Story of Justice Yaya Jinadu* (Lagos: Nigeria Law Publications, 1989).

⁴¹⁶ Ogbondah & Onyedike, *supra* note 369 at 68.

and strict control through “back stairs influences” constituted major factors that stifled judges’ initiative and morale.⁴¹⁷

In the seventh chapter as forming part of the discussion of the various factors that negatively impact the judicial enforcement of human rights in Nigeria, I will explain how most of the hurdles mentioned above established the military on a foundation of lawlessness. This would have repercussions for the rule of law environment that rapidly spread through different periods including after the restoration of civilian rule. But the judiciary did not simply lie down and accept wholesale destruction of its very essence in the society even under the military. While it was always a struggle to exert effective judicial influence on the famished plain of dictatorial and authoritarian impunity, the courts as institutions of the government attempted nonetheless. Its most defining struggle would, however, be against military decrees containing provisions (ouster clauses) prohibiting judges from examining how those decrees had been applied, especially where the fundamental rights of citizens had been affected.

The courts though adopting the posture of subservience and holding themselves powerless to intervene in cases of clear and unambiguous application of those decrees still left some room to have a say in the most egregious cases of abuse. In the case of *Barclays Bank of Nigeria Limited v Central Bank of Nigeria*,⁴¹⁸ the court held:

In considering whether or not a court has jurisdiction to entertain a claim, it is our view that while a person’s right of access to the Courts may be taken away or restrained by statute, the language of any such statute will be watched by the courts and will not be extended beyond its onerous meaning unless clear words are used to justify the extension. That is how it is well established that a provision in a statute ousting the ordinary jurisdiction of the court must be construed strictly.

⁴¹⁷ *Ibid.*

⁴¹⁸ [1976] 6 Sup Ct 177. See also *Chima Ubani v Director of the State Security Service*, *supra* note 411 where the Court of Appeal held that a military decree with an ouster provision was ineffectual to prevent a court from assuming jurisdiction in a case alleging a violation of the African Charter on Human and Peoples Rights enacted as Chapter 10 of the Laws of the Federation of Nigeria.

Apart from strictly construing Decrees that ousted their jurisdiction or purported to do so, the courts as well claimed jurisdiction to scrutinize such Decrees to confirm that indeed their jurisdiction had been ousted. The court could also check to see if the military was taking powers that it should not exercise such as supplanting the judiciary itself.⁴¹⁹ Even though the latter claim to judicial authority did not pass beyond token posturing by the courts, it served the useful purpose of impressing on the military authorities that it was possible to actually call to question their law-making authority, for whatever that effort was worth. In fact the period 1980-1990 has been identified as perhaps the most productive years of the Nigerian Supreme Court in terms of standing between the military government and the Nigerian citizen.⁴²⁰

That period had undoubtedly the highest constellation of judicial titans who disavowed any encumbrance on their judicial role to do justice and enforce rights in spite of the arbitrary authoritarian context under which they performed their job. Yet as events later unfolded, it became rather clear that the relative progress made in that era owed more to the character and quality of the individual judges who dominated the court at that time and had less to do with a conscious institutional or ideological adjudicatory choice. And nothing demonstrates this more eloquently than the fact that at the same time the Supreme Court was bent on side-stepping boundaries on its authority to retrieve endangered rights from the clutches of a military so committed to denying and destroying them, a section of the judiciary still hung to the belief that such courageous efforts were

⁴¹⁹See *Guardian Newspapers Limited & Ors v Attorney General of the Federation & Anor*, [1995] 5 NWLR 703 online: <<http://www.worldlii.org/int/cases/ICHRL/1995/36.html>> where the Court of Appeal held that the concept of the rule of law presupposes that the court within the framework in which it can still operate in Nigeria can examine any military Decree with a view to determining whether an ouster clause contained in it seeks to preserve something otiose such as the military government's assumption of judicial powers. See also Omoba Oladele Osinuga, "The Impeachment Process, Ouster Clauses, Non-Justiciable Provisions and the Interpretation of Nigeria's Constitution" online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658921>.

⁴²⁰See Ade Ajayi & Yemi Akinseye-George, *Kayode Eso: The Making of a Judge* (Ibadan: Spectrum Books, 2002); Itse Sagay, *A Legacy for Posterity: The Work of the Supreme Court, 1980-1988* (Lagos: Nigeria Law Publications, 1988).

worthless.⁴²¹ This ambivalent posture was not lost on the legal system and did provide a tempting alternative to judges who believed that their interests were best served by reinforcing arbitrary rule than safeguarding human rights.

To conclude this chapter it has to be stated that on the basis of clear evidence provided, the transition from colonial to post-colonial Nigeria was not smooth. And that is speaking in human rights terms. It was wishful to expect that the tradition of human rights denial integral to colonialism would dissipate by mere dint of flag independence especially with all the structures that enabled colonial human rights violations still in place. The police institution remained essentially an ordering force. The judiciary had a disproportionate number of English judges or those trained in the British legal tradition. In the circumstances, the constitutionalization of human rights though commendable could not translate to better human rights conditions. Moreover, the military intervened politically to further heighten the prevalence of violations. As the next chapters would should, the country never really recovered from these foundational challenges.

⁴²¹ Note for example *Nwosu v Imo State Environmental Sanitation Authority*, *supra* note 18 where a Justice of the Supreme Court advised victims of human rights violations to explore administrative channels for remedy rather than court litigation which he described as “journey of discovery.”

Chapter Four

Adjudicating Constitutional Human Rights: Comparative Standards of Analysis

4.1. Introduction

In the last chapter, I looked at the evolution of human rights in Nigeria. After carefully identifying strands of arguments for and against the claim that human rights principles were present in the course of social interaction in Nigeria's cultural settings prior to colonization, I examined the state of human rights throughout the colonial period. Thereafter I presented a narrative of the nationalistic agitations for the inclusion of human rights in Nigeria's independence constitution and how human rights guarantees were thereby constitutionalized. In addition, I looked at the state of human rights in the immediate post-colonial era as well as the factors that led to the initial intervention of the military in Nigerian political life. As significantly, I also analyzed the travails of human rights under the military and how the practices of that era exerted negative impact on the tradition of judicial enforcement of human rights in Nigeria.

A major claim made in that chapter is that there was a huge break in judicial orientation following the constitutionalization of human rights prior to independence. This not only derived from judicial culture but also from deep-rooted practices and values fostered through professional education and training as well as the pool from which judicial personnel were appointed. In this chapter, I will extend the discussion by identifying the nature of that break in orientation. I will do so by discussing the standard doctrinal or analytical approach adopted by Nigerian courts in reviewing human rights and comparing it with practices of other jurisdictions.

This inquiry responds to one of the sub-questions posed earlier in this research which is: whether Nigerian appellate courts have developed definite standards for the review of human rights cases. I will present a historical account of the constitutional and

judicial practices of three countries – the United Kingdom, United States and South Africa – to illustrate a significant divergence in methodology and evolution in this regard. After analyzing the principal pillars of the three systems and their differences, I will use them as standards to examine the tradition of Nigerian courts and highlight what similar or distinct methods, if any, they (Nigerian courts) apply. My goal is therefore not to conduct an inquiry into how Nigeria’s human rights limitation regime compares to other systems with similar constitutional texts for which the jurisprudence of the European Court of Human Rights would have been an appropriate comparator. My concern is more with how the constitutional models and legal systems chosen developed standards for substantive human rights review and specifically the role their courts played in that process.

I have chosen the United Kingdom because of her relationship with Nigeria in the colonial context. There is still significant influence of British legal traditions on the Nigerian legal system. And while it will be seen that the British standards for human rights review have evolved over the course of history, the Nigerian system which borrows a lot of doctrine from that system has not shown a similar level of dynamism. The British system classically illustrates how judges in a regime without a written constitution were not only able to formulate standards of review but kept those standards relevant to different historical periods. The United States system is analyzed as well to show how a system with a written constitution like Nigeria’s approached similar concerns and again how the role of the courts was central to the development of that system. South Africa is included because it is an African country like Nigeria and has a human rights review system that is probably the most developed on the African continent.

In introducing this chapter, I have to state clearly at the onset that two principal objectives are in contention in the entire agenda of enforcing human rights whether through the judicial system or otherwise. The first is the entitlement of individuals to human rights in their various forms which they can claim against governments or other entities as the case may be. The second is the powers of the government to preserve

social balance by ensuring that in their enjoyment of human rights, individuals do not become dangers to others or to the society at large. It is beyond question that these are two very significant societal objectives which have to be carefully weighted and balanced one against the other.

4.2. Why Limit Rights?

To state that human rights are limitable is actually to state the obvious. Nwabueze states how very obvious and trite this claim is when he argues that “rights cannot be guaranteed in absolute terms if for no other reason than to protect the rights of other persons.”⁴²² Acting otherwise, that is enshrining rights without qualification, he adds, is to guarantee license and anarchy.⁴²³ On another occasion and in a different text, Nwabueze noted that Bills of Rights in Commonwealth African constitutions (that of Nigeria inclusive) on the one hand and that of the United States on the other faced essentially the same problem: that of “reconciling liberty with authority [and] of trying to strike a reasonable balance between them.”⁴²⁴ However, by using the word “liberty” in this statement, Nwabueze narrowed the extent of judicial involvement in such cases to civil rights only. But in contemporary times, his idea is apt to be questioned because it deals with just one aspect of the powers that courts exercise. Judicial powers are no longer limited to enforcing limitations on government encroachments upon civil liberties, but include the protection of several economic, social and cultural rights.⁴²⁵

Crucially therefore, the governmental authority often legally charged to undertake the task of balancing rights against authority is the judiciary. This chapter examines the various techniques and doctrinal approaches adopted by courts in a range of legal systems to implement this competence. In countries with written constitutions, the jurisdiction of

⁴²² Nwabueze, *supra* note 159 at 117.

⁴²³ *Ibid.*

⁴²⁴ Nwabueze, *supra* note 153 at 9.

⁴²⁵ Issa Shivji, “Constructing a New Rights Regime: Promises, Problems and Prospects” (1999) 8 Soc & Leg Stud 253 at 262 (highlighting the developmental component of the human rights agenda and the fact that “no rights discourse, even at a more practical level of judicial activity, can remain passive to the fundamental societal goals of equity, social justice and economic democracy...”).

the courts to enforce constitutional limits as well as protect human rights is written into the text of the constitution. In countries without written constitutions or which operated under the common law, this power as well belongs to the courts but only in an inherent sense.⁴²⁶

The kind of constitutionalism that a country operates is as well significant for how the power of the courts in this regard is exercised and its implications. Where parliament is absolutely supreme as in the United Kingdom before the coming into effect of the 1998 Human Rights Act, parliament has the final word on individual rights.⁴²⁷ Under common law, legislation could trump recognized and protected rights.⁴²⁸ On the contrary where human rights are constitutionally entrenched (as in the United States or Nigeria) and the courts have competence to strike down legislation incompatible with them, it could be taken for granted that those rights would override legislative authority and that the final word belongs to the judiciary. Between these two alternatives, according to Justice John Marshall, there is no middle ground. “The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.”⁴²⁹

⁴²⁶ Lord Wright is credited with the view that the common law was developed “from case to case,’ like the ancient mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science.” See Lord Wright, “The Study of Law” (1938) Law Q Rev 185 at 186.

⁴²⁷ See Epp, *supra* note 160 at 114 (stating that “In AV Dicey’s classic discussion (which has had a revered, yet contested, place in British legal culture) Parliament alone is sovereign. Dicey’s view of parliamentary sovereignty has two elements: first, Parliament is omniscient, in that it may create or undo any law it wishes; and, second, Parliament has a monopoly of legitimate law-making power, in that no subordinate governmental body may legitimately create law. The role of courts is limited to applying the common law (so long as Parliament has not superseded it by legislation) and ensuring that administrative officials act no more broadly than authorized by parliamentary statute...”).

⁴²⁸ John Doyle & Belinda Wells, “How Far can the Common Law Go towards Protecting Human Rights?” in Philip Alston, ed., *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, (New York: Oxford University Press, 1999) 17. For an analysis of how parliamentary sovereignty impacts the rule of law see generally Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010). It has also been stated that parliamentary sovereignty ceased to be a feature of the British legal system in 1991. See NW Barber, “The Afterlife of Parliamentary Sovereignty” (2011) 9 Int’l J Const L 144.

⁴²⁹ *Marbury v Madison*, *supra* note 123.

However, where no such middle ground was in existence in Marshall's time, Gardbaum says one was created between 1982 and 1998. It was the period when

[E]ach of the Commonwealth countries of Canada, New Zealand, and the United Kingdom – countries that were previously among the very last democratic bastions of traditional legislative supremacy – adopted a bill of rights in a form that self-consciously departed from the American model by seeking to reconcile and balance the rival claims, to create a middle ground between them rather than adopt a wholesale transfer from one pole to the other.⁴³⁰

Thus, instead of constitutional supremacy built on entrenched bills of rights and the grant to judges of an unreviewable power to nullify incompatible legislation, this middle ground model only granted courts the power to protect rights as well as decoupled “judicial review from judicial supremacy by empowering legislatures to have the final word.”⁴³¹ Note that rather than a strict rejection of the American model, these three Commonwealth jurisdictions were more concerned with rendering “the protection of a bill of rights consistent with their traditional conceptions of democracy and parliamentary sovereignty, [each of the countries] does so in a different way and thus occupies a different position on this continuum between the two poles.”⁴³²

While in Canada, for example, the Charter of Rights and Freedoms “authorized judges to overturn administrative practices *and laws* [author's emphasis] that are found to be inconsistent with its principles,”⁴³³ in the United Kingdom even with the coming into

⁴³⁰ Stephen Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 49 Am J Comp L 707 at 709.

⁴³¹ *Ibid.*

⁴³² *Ibid* at 710.

⁴³³ See Epp, *supra* note 160 at 171. This power is however not absolute because the Canadian Parliament is capable of insulating a law from judicial override by specifying that the law's provisions shall apply notwithstanding any contrary judicial decision. See Section 33(1), *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), c 11. S. P. Sathé, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2002) at 2. See also Peter W Hogg, *Constitutional Law of Canada (Student Edition)* (Toronto: Thomson Carswell, 2005) at 854 (“Through the use of this override power, the Parliament or a Legislature is enabled to enact a statute limiting (or abolishing) one or more of the rights or freedoms...”). See also Sonja Grover, “Democracy and the Canadian Charter notwithstanding Clause: Are they Compatible?” (2005) 9 Int'l J Hum Rts 479.

force of the Human Rights Act of 1998 the courts do not have powers to nullify such legislation. Instead, Section 1 of this Act enumerates and defines the rights and freedoms contained in the European Convention on Human Rights and Fundamental Freedoms (except Articles 1 and 13) which it calls “Convention Rights.” Section 3 of the Act requires courts to interpret and give effect to primary (as well as secondary) legislation in a manner that makes them compatible with those convention rights “so far as it is possible to do so.”⁴³⁴

However, under section 4, if a High Court is satisfied that it is impossible to apply primary or secondary legislation in such a manner as to render it compatible with convention rights, it has only one option which is to make a formal declaration of that incompatibility. Gardbaum affirms that:

“...under Section 4(6), notwithstanding such a declaration, no court has the power to set aside or disapply such legislation, which continues to have full effect and validity. Once a declaration has been made, HRA creates no legal duty on either parliament or the government to respond in any way, but it does empower the relevant minister to make a ‘remedial order’ under Section 10 and Schedule 2. This ‘fast track’ procedure permits a minister to amend incompatible legislation by order laid before and approved by both Houses of Parliament.”⁴³⁵

Mark Tushnet places the Canadian “notwithstanding” model of review and the United Kingdom “pure interpretative” style at the same level. He says that they establish a weak

⁴³⁴ Gardbaum, *supra* note 430 at 733.

⁴³⁵ In Australia, for example, debates for a Human Rights Act analogous to the United Kingdom document have been on-going for years. Constitutionally modeled after the UK system prior to the enactment of its own Human Rights Act in 1998, Australia does not have a Bill of Rights in its constitution. Twice in 1973 and 1985 attempts were made to introduce statutory Bills of Rights in the constitution. Both attempts were defeated for different reasons. At the territorial level, however, the Australian Capital Territory enacted in 2004 the Human Rights Act as did the State of Victoria in 2006. These two legislations achieved for their respective territories the constitutionalization of Bills of Rights in the manner that the larger Commonwealth of Australia had failed to do. The result in both cases was that the Acts required “statute law to be interpreted, where possible, consistently with the human rights set out in the Act[s]...the Act would also require that where a statute was found by a Court to be incompatible with a human rights then the Court would make a declaration of that incompatibility. Upon such a declaration being made, the relevant Minister would be required to inform Parliament of what he or she proposed, if anything, to do in response to the declaration.” See generally Robert French, “Protecting Human Rights without a Bill of Rights” (2010) 19 *Commonw Lawyer* 28.

form of judicial review.⁴³⁶ He further suggests that those accustomed to strong-form judicial review as in the United States may be attracted to view weak-form review as “fundamentally a sham, [or] parliamentary supremacy parading under the guise of effective judicial review.”⁴³⁷

Where does Nigerian human rights judicial review practices fit into prevailing comparative praxis? The country has a written constitution with an elaborate bill of rights. The constitution provides that any law which is inconsistent with its provisions shall be null and void to the extent of that inconsistency.⁴³⁸ It also provides that any person with a claim that any of the rights enshrined in the constitution has been, is being or would likely be infringed with reference to him or her could apply to the court for redress.⁴³⁹ The judicial powers of the Nigerian government are also constitutionally entrenched and extend to such competencies as “all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.”⁴⁴⁰

There is nowhere in the constitution where it is written in explicit terms that the courts are granted powers to invalidate legislation that infringes constitutionally guaranteed rights. However, when one reads the constitution’s Supremacy Clause together with the judicial powers of the government and the fundamental human rights enshrined in the constitution, only one conclusion is possible. A legislation which detracts from any of the rights guaranteed under the constitution cannot be consistent with it and a court before which a claim to enforce such constitutionally protected right is presented would be acting within its powers to invalidate the law in question. This is the posture generally adopted by Nigerian courts and makes them act in ways similar to the courts in India, South Africa and the United States. But as I will show in latter parts of this research, though the courts in

⁴³⁶ Mark Tushnet, “New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries” (2003) 38 Wake Forest L Rev 813 at 824.

⁴³⁷ *Ibid* at 827.

⁴³⁸ Constitution of the Federal Republic of Nigeria, 1999 c I, s 1(3).

⁴³⁹ *Ibid* c IV s 46.

⁴⁴⁰ *Ibid* c I s 6(6)(b).

Nigeria do in fact have such powers to declare invalid legislation contrary to human rights guarantees; it is one which they seem to apply in reluctant fashion and with a very high degree of caution.

4.3. “Concrete” or “Abstract” Judicial Review?

Aside the above particular stricture in the discussion of judicial review which concerns the exact ambit of the powers of courts to pronounce on the validity or otherwise of legislation, there is also the question of when this power is exercised. It is generally the case that different legal jurisdictions operate distinct practices on the “when” of judicial review and not just the “how”. In some state jurisdictions like the United States and South Africa, judicial review is limited to legislation that has passed through parliament and already forms part of the law of the land. In such jurisdictions what usually triggers the operation of the judicial review process is the application of the law in question to a concrete “case or controversy.” Because it involves the application of legislation to a real case scenario, this is known as concrete or collateral⁴⁴¹ judicial review.

Despite the silence of the American constitution on the issue of judicial review and standing, concrete judicial review is claimed to derive its history from that country’s constitutional tradition and is often associated with the provisions of Article III of its constitution which confers jurisdiction on the courts only over “cases” and “controversies” that arise under the “Constitution” and the “Laws.”⁴⁴² Here, “the parties raise claims of constitutional rights as a defense to the actual or threatened enforcement of law against them by the state or by other private parties or they assert a right against the state based on the violation of their constitutional rights.”⁴⁴³ Therefore, American courts inferred from Article III of the constitution the requirements of direct injury, traceability and

⁴⁴¹ Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989) at 14.

⁴⁴² Alec Stone Sweet, “Why Europe Rejected American Judicial Review: And Why it May Not Matter” (2003) 101 Mich L Rev 2744.

⁴⁴³ John Reitz, “Standing to Raise Constitutional Issues” (2002) 50 Am J Comp L 437.

redressability⁴⁴⁴ and are supposed to deny standing to parties that fail to show some degree of direct interest in the review of a public act...⁴⁴⁵

The American system is often contrasted to the French and some aspects of German constitutional traditions. In the two latter countries, their highest courts could pronounce on the validity and applicability or otherwise of statute without necessarily there being a case or controversy at stake. This is called judicial review in the abstract and is aimed at obtaining “early and authoritative rulings on all aspects” of a law before it is applied to a concrete case.⁴⁴⁶ Therefore, when the French *Conseil Constitutionnel* is ruling on constitutional questions, it

[i]s not solving particular disputes between parties, but ruling in abstract on the validity of a *loi* that will affect a variety of future cases. It is said to judge a text, not litigants. In addition, the *Conseil* recognizes its responsibility for creating constitutional doctrine, a doctrine far more unsettled than private, criminal, or administrative law. In its decisions the *Conseil* has tried, therefore, to set out general principles of constitutional law, rather than simply to make specific rulings relating only to the particular *loi* under discussion.

German constitutional jurisprudence as well accommodates abstract review on requests for such lodged before the Constitutional Court by the Federal or State government or by a third of the entire members of the federal parliament (Bundestag). The main issue before the court in such proceedings is the validity of the law in question. A decision against its validity renders the law null and void.⁴⁴⁷ It should be noted, however, that German practice seems to distinguish constitutional review (*Verfassungsstreitigkeit*) from judicial review (*richterlichesPrufungsrecht*). Kommers states that at the time in German history when its constitutional thought pivoted on the concepts of state and sovereignty, “constitutional review provided the mechanism for defining the rights of sovereign states

⁴⁴⁴ *Ibid* at 441.

⁴⁴⁵ Stone Sweet, *supra* note 442 at 2770.

⁴⁴⁶ John Bell, *French Constitutional Law* (Oxford: Oxford University Press, 1992) at 48.

⁴⁴⁷ Kommers, *supra* note 441 at 15. Abstract review “is typically defended as a supplemental guarantor of constitutional justice, since it can succeed in eliminating unconstitutional legislation before harm has been done.” See also Stone Sweet, *supra* note 442 at 2770.

and their relationship to the larger union which incorporated them.”⁴⁴⁸ On the other hand, current conception of judicial review is as a device for protecting individual rights,⁴⁴⁹ an understanding which already animates this study.

There are also comparative differences on the timing of judicial review cases across various legal jurisdictions. Under French practice, for example, legislation can only be challenged after it had been enacted but not yet implemented which is called *a priori* review. On the contrary, it is *a posteriori* review when the review is conducted after a particular legislation is not just enacted but has already taken effect as in the United States.⁴⁵⁰

Nigeria, barring the specific examples given below, operates to a large extent the concrete form of judicial review and especially in situations where fundamental rights entrenched in the constitution are implicated. A person presenting a complaint of human rights violation would have to show that in relation to him/her, the right in question has been actually violated, is continuing to be violated or is threatened to be violated.⁴⁵¹ It is in analyzing the kinds of cases that could trigger the jurisdiction of the courts in this

⁴⁴⁸ Kommers, *supra* note 441 at 5.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ See Gardbaum, *supra* note 430 at 717.

⁴⁵¹ See *supra*, note 438 above. In the case of *Uzoukwu v Ezeonu II*, [1991] 6 NWLR (Pt 200) 708 [Ng Ct App], the Nigerian Court of Appeal interpreted s 42 (1) of the Constitution of the Federal Republic of Nigeria, 1979 which is similar to s 46 of the 1999 Constitution. The court divided the provision into three main limbs. “The first limb is that the fundamental right in chapter 4 has been physically contravened. In other words, the act of contravention is completed and the plaintiff goes to court to seek for redress. The second limb is that the fundamental right is being contravened. Here the act of contravention may or may not be completed. But in the case of the latter, there is a sufficient overt act on the part of the respondent that the process of contravention is physically on the hands of the respondent and that the act of contravention is in existence substantially. In the third limb, there is likelihood that the respondent will contravene the fundamental right or rights of the plaintiff. While the first and second limbs may ripen together in certain situations, the third limb of the subsection is entirely different. By the third limb, a plaintiff or applicant need not wait for the completion or last act of contravention. It might be too late to salvage the already damaged condition. Therefore the limb gives him the power to move to court to seek for redress immediately he senses some move on the part of the respondent to contravene his fundamental rights. But before a plaintiff or applicant invokes the third limb, he must be sure that there are enough acts on the part of the respondent aimed essentially and unequivocally towards the contravention of his rights. A mere speculative conduct on the part of the respondent without more cannot ground an action under the third limb.”

regard that the relationship between whether review is actually concrete and the standing of aggrieved persons to lay complaints become very apparent. This is so because Nigerian courts previously denied standing to those who cannot show a personal interest in having a particular actual or threatened human rights violation redressed.⁴⁵² However, the new Fundamental Rights (Enforcement Procedure) Rules issued in 2009 appear to have amended this provision. In chapter six, I will analyze the impact of the new rules on human rights enforcement as well as show how the old rigid standing requirements undermined effective human rights litigation.

Further, Nigeria does not operate on the basis of *a priori* review as all cases of human rights nature directed against the application of statutes must reveal actual laws fully enacted and not those yet to be enacted. In fact, a litigant complaining about a specific legislation or some other person or institution acting on that litigant's behalf is obligated to show how the application of that law has adversely impacted his/her person. Thus, merely alleging that a law is unconstitutional without showing how its enforcement has led to that conclusion would not avail a litigant. Therefore unlike in *a priori* review where litigation could be commenced to challenge a law not yet passed by the legislature, in Nigeria any such complaint must relate to a law that has passed through normal lawmaking processes.

It is important at this point to qualify my earlier assertion that judicial review in Nigeria is generally concrete. Though most of the human rights cases that come before courts present actual controversies in which a violation of one or more of the constitutionally entrenched rights is alleged, it is possible also to present cases where the violation has not taken place but only anticipated. This follows the wording of section 46 of the constitution which covers not only violations that have been completed and those

⁴⁵² Tunde I Ogowewo, "Wrecking the Law: How Article 111 of the Constitution of the United States led to a Discovery of a Law of Standing to Sue in Nigeria" (2000) 26 Brook J Int'l L 527 at 536. See also ES Nwauche & JC Nwobike, "The Judicial Enforcement of Human Rights in Nigeria" (2002) 12 Caribbean L Rev 45 at 76.

still being carried out but includes threatened (but not yet commenced or completed) violations as well. A party who anticipates a violation would therefore be within his or her rights to apply to court to stop it from happening. This may be by way of injunction, declaration or prohibition; remedies none of which is mentioned as such in the constitution but may fall under the general rubric of “inherent powers and sanctions of a court of law.”⁴⁵³

On its face value this could be considered as review in the abstract sense. However, on closer scrutiny it becomes clear that it is not the case. To understand where the difference lies, it is important to draw a distinction between the law being questioned in judicial review litigation and the action that constitutes the human rights infringement alleged. In those countries where concrete judicial review is prevalent, when a law is passed no individual can rely on it as basis to lodge a human rights complaint until it has been applied against such as person. A person who insists on questioning a law not yet applied against his/her person would first deal with the question of standing. It is therefore the application of that law to an individual that gives rise to a case or controversy. Notice in this case that the law has already gone through the natural course of promulgation.

The situation anticipated in the Nigerian “threatened” violation scenario is that the alleged violator places reliance on an already passed law to threaten a constitutionally protected right. It does not matter much that the violation is yet to be consummated. What is abstract or speculative in this case is the threatened act of violation and not the law under which the threat is being issued. We can thus contrast this with abstraction in the French tradition where what makes the review abstract is the fact that the law is not yet passed before it becomes the subject of litigation.

⁴⁵³ s 6(6)(a) *Constitutional of the Federal Republic of Nigeria, 1999.*

This claim has support under American constitutional practice which may have much more than extrapolatory significance in the Nigerian context given that both countries operate substantially similar constitutional and judicial systems. According to Stone Sweet, the above described Nigerian practice covers one of the situations under which abstract review might also occur under American constitutionalism. He claims that “under certain circumstances, plaintiffs may seek declaratory or injunctive relief by a judge that, if granted, suspends the application of the law in question pending judicial determination of its constitutionality.”⁴⁵⁴ In such situations, plaintiffs file such applications immediately after the statute has been signed into law by the appropriate authority.⁴⁵⁵

The second form that abstract review takes in American practice may also have resonance in Nigeria though to what extent remains decidedly uncertain. American courts in the course of developing their First Amendment jurisprudence established a doctrine by which it is possible for a litigant to challenge a law on its face and plead the rights of third parties.⁴⁵⁶ In *Thornhill v Alabama*,⁴⁵⁷ that country’s Supreme Court held that a statute which extends government authority to activities protected by the First Amendment is presumptively overbroad, and therefore unconstitutional on its face regardless of whether, or how, the statute has been applied in concrete situations. The court adopted a unique model which “views the normal methods of constitutional adjudication – which allegedly proceeds on a case-by-case basis and enables the judicial branch to correct the law overtime, with reference to problems raised as a result of the law’s application – to be inappropriate for adjudicating violations of the First Amendment.”⁴⁵⁸

Where the above doctrine derives from judicial authority, in Nigeria one could argue that it is covered by constitutional text. Section 315(3) of the Constitution provides

⁴⁵⁴ Stone Sweet, *supra* note 442 at 2772.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

⁴⁵⁷ [1940] 310 US 88.

⁴⁵⁸ Stone Sweet, *supra* note 442 at 2773.

that “Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law...” Thus a court could invalidate the provision of any existing law in conflict with the provision of (a) any other existing law (b) a Law of a House of Assembly (c) an Act of the National Assembly; or (d) any provision of the Constitution itself. What is less clear, however, is whether this power could only be exercised in a concrete controversy or whether as in the American situation, the court could abstract this authority from a real litigation and pronounce against the impugned law on its facial value.

Contemporary studies and jurisprudential traditions in comparative constitutionalism within the narrow area of human rights enforcement through the judiciary have also centered to some extent on the court structure. Specifically, attention is often paid to what courts within a particular legal system are empowered to enforce human rights. As with my previous analysis on differences in practices from one jurisdiction to the other on the “whys” and the “when” of judicial review, there is no uniform tradition across jurisdictions concerning what courts are empowered to resolve cases of a human rights nature.

For my purpose, the nomenclature of the courts empowered to entertain human rights claims is not as important as the reach of their powers and how diffuse this power is across the judicial hierarchy. At first, it might appear unimportant what hierarchy of courts carry out this responsibility within a legal system and what names they go by. However, this could have major consequences for how accessible the courts are to the citizenry. At the same time it could indicate the extent to which major judicial functionaries (and not just an inconsequential proportion of them) are comfortable handling human rights litigation.

Two major traditions are in contention with regard to the above. They are represented by a system of concentrated jurisdiction that dominates most of continental

Europe and a more diffuse and decentralized system of which the United States and Nigeria are clear examples. The concentrated system is also known as the “European” or “Austrian” model.⁴⁵⁹ Here, only one court in the legal system – usually termed the Constitutional Court – is granted the power of judicial review.⁴⁶⁰ Hans Kelsen is credited with instigating the establishment of constitutional courts as a pillar of the European model of constitutional review. This has been described by one commentator as the most significant experiment in constitutional review in pre-World War II Europe.⁴⁶¹

Kelsen’s prescription seemed to flow from the way in which he conceived the constitution and what role it fulfills in the political system. In a 1928 article, he argued that “the integrity of the legal system, which he conceived as a kind of central nervous system for the state, would only be assured if the superior status of the constitution, atop a hierarchically ordered system of legal norms, could be guaranteed by a ‘jurisdiction,’ or a ‘court-like’ body.”⁴⁶² Judges shouldering this huge responsibility of so stamping the authority of the constitution, according to Kelsen, ought to be of the highest quality. He therefore:

[U]rged that constitutional courts should look as much as possible like “judicial” bodies. He insisted that professional judges and law professors be recruited to the court and emphasized that “members of parliament or of government” be excluded; because the court would play a legislative role, he also proposed that elected officials should appoint the court’s members. Kelsen suggested that the Court be given jurisdiction over constitutional controversies brought forward through litigation in the judiciary, as a means of securing the superiority of constitutional law, and so as to link the Court’s work with formal judicial processes.”⁴⁶³

⁴⁵⁹ See Gardbaum, *supra* note 430 at 717.

⁴⁶⁰ *Ibid.*

⁴⁶¹ Stone Sweet, *supra* note 442 at 2766.

⁴⁶² Hans Kelsen, “La Garantie Jurisdictionnelle de la Constitution” (1928) 45 *Revue De Droit Public* 197 cited in Stone Sweet, *supra* note 442 at 2765; see also Hans Kelsen, “Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitutions” (1942) 4 *J Pol* 183.

⁴⁶³ Stone Sweet, *supra* note 442 at 2768.

The European model of review therefore has four components, according to Stone Sweet. These components highlight the model's distinctness from the American variant. In the first instance, constitutional judges alone exercise the power to review laws for their unconstitutionality. Therefore, ordinary judges (meaning those who do not sit in the constitutional courts) are precluded from invalidating norms or acts on the grounds of their unconstitutionality. Secondly, the jurisdiction of Constitutional Courts is restricted to the resolution of constitutional disputes only. Those courts therefore do not participate in the resolution of ordinary litigation or appeals arising from them which remains within the purview of the ordinary judges. Thirdly, Constitutional Courts have links to both the larger judiciary and the legislature but are detached from them. "They occupy their own 'constitutional' space, one that is neither 'judicial' nor 'political,' as those terms are commonly used..."⁴⁶⁴ Finally, most Constitutional Courts are empowered to determine the constitutionality of statutes without respect (or even prior) to their application, usually upon referral by opposition legislators or other elected officials.⁴⁶⁵

With this information in mind, one might be confused about the existence of "Constitutional Courts" elsewhere outside Europe that do not meet this traditional conception of their role in human rights enforcement. A prominent example of such courts that comes to mind is the South African Constitutional Court. Section 166 of the South African Constitution puts the country's Constitutional Court at the apex of the judicial system and makes it the highest court in all constitutional matters.⁴⁶⁶ High courts in South Africa could also hear constitutional matters except those which only the Constitutional Court may decide upon.⁴⁶⁷

In terms of matters allocated to it in the South African Constitution, the Constitutional Court of South Africa may decide the following: [a] disputes between organs of state in the national or provincial sphere concerning the constitutional status,

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ s 167(2)(a).

⁴⁶⁷ s 169(a)(i).

powers and functions of any of those organs of state, [b] on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121 of the Constitution,⁴⁶⁸ [c] applications envisaged under section 80 or 122.⁴⁶⁹

4.4. Putting Rights and Interests on the Balance

I will now turn to what courts do when they evaluate human rights complaints. Earlier in the chapter I pointed out that two values are in contention in the entire enterprise of protecting human rights. The first value is that persons are entitled to certain rights and freedoms that are outside the controlling powers of the state, organizations and others in the society. When those rights and freedoms come under attack, those victimized have a legitimate right to seek judicial protection.

The second value is that the state can impose limitations on those rights and freedoms to the extent that it can show that those limitations are necessary for overriding public or societal objectives. Among those objectives may be to protect the rights of others from violation, to preserve overall public health, safety or morality or to carry out a court judgment. What I am concerned with in this section is the strategies that courts in different jurisdictions utilize to organize this act of balancing personal rights and freedoms against the interests of the public at large.

Expectedly, a country's constitutional system would be central to how its courts carry out this balancing exercise. However, for the purposes of this research, I have

⁴⁶⁸ Under section 79 the National Assembly must reconsider a Bill if the President withholds an assent to it. After such a reconsideration if the said Bill accommodates the President's reservations, the President must either assent to it or if still unsatisfied refer the question of its constitutionality to the Constitutional Court. If the Constitutional Court decides upon reference to it thereafter that the Bill is constitutional, the President is left no other choice than to assent to and sign it into law. Section 121 makes similar provisions for the provincial level of government.

⁴⁶⁹ Section 80 provides that at least one third of the Members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional. Such application must be made within 30 days of the date on which the President assented to and signed the Act. Such an application could also be presented to the Constitutional Court by at least 20 per cent of the members of a provincial legislature.

chosen the constitutional and judicial practices of three countries – the United Kingdom, United States and South Africa – to illustrate a significant divergence in methodology. After analyzing the principal pillars of the systems and their differences, I will examine the tradition of Nigerian courts to highlight what similar or distinct methods, if any, they adopt. I consider this part of my inquiry as strongly crucial to an understanding of Nigeria’s human rights jurisprudence and any inconsistencies that might be present in judicial treatment of human rights cases.

But before analyzing those systems of balancing, let me first clarify the doctrine. Balancing could apply to all arenas where the resolution of conflict is the major issue, according to Aleinikoff.⁴⁷⁰ He states that:

In almost all conflicts, especially those that make their way into a legal system, there is something to be said in favor of two or more outcomes. Whatever result is chosen, someone will be advantaged and someone will be disadvantaged; some policy will be promoted at the expense of some other. Hence it is often said that a “balancing operation” must be undertaken, with the “Correct” decision seen as the one yielding the greatest net benefit.⁴⁷¹

For the purposes of this research, however, I agree with Aleinikoff when he claims reference to “theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests.”⁴⁷² He speaks about a “balancing opinion” which means a judicial opinion that analyzes a constitutional question by identifying interests engaged by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests.⁴⁷³ Shrifin on his part sees balancing as no more than “a metaphor for the accommodation

⁴⁷⁰ T Alexander Aleinikoff, “Constitutional Law in the Age of Balancing” (1987) 96 Yale L J 943.

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid* at 945.

⁴⁷³ *Ibid.*

of values.”⁴⁷⁴ While all legal disputes warrant some form of balancing (for example the case of party A against party B in ordinary criminal or civil litigation⁴⁷⁵ to work out their resolution), as a constitutional doctrine, balancing has an unusual resonance in constitutional theory and adjudication. It is, however, in the process of analyzing how the doctrine applies in different constitutional systems, that divergences become obvious.

I had earlier identified the interests that courts are balancing in human rights cases. I have therefore answered the question “what” courts are called upon to balance that is embedded in the doctrine. The next question is the “how” one. What is being considered in this arm of the inquiry is the very method that courts adopt in carrying out the balancing act.

4.5. United Kingdom: From *Wednesbury* “Unreasonableness” to Proportionality Analysis

It has been stated several times already in this study that the British do not operate a written constitution. Therefore, rather than constitutional law, they were more inclined to speak in terms of administrative law.⁴⁷⁶ But in so far as both branches of law are concerned with evaluating the actions of “public authorities”⁴⁷⁷ that have implications for

⁴⁷⁴ Steven Shriffin, “The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment” (1983) 78 Nw U L Rev 1212 at 1249.

⁴⁷⁵ Wallace Mendelson, “The First Amendment and the Judicial Process: A Reply to Mr Frantz” (1963-1964) 17 Vand L Rev 479 at 481 (“Moreover, balancing would seem to be implicit in an adversary system which inevitably contemplates at least two sides to every case...”).

⁴⁷⁶ An English writer could therefore talk about the “Europeanization of English Administrative law” rather than its constitutional law. When people therefore discussed British Constitutional law in the past, it passed for no more than a misplacement of terms. See Chris Hilson, “The Europeanization of English Administrative Law: Judicial Review and Convergence” (2003) 9 Eur Pub L at 125. See also PP Craig, *Administrative Law* (London: Sweet & Maxwell, 1989) at 3 where he had this to say about Administrative Law: “For some it is the law relating to the control of government power, the main object of which is to protect individual rights. Others place greater emphasis upon rules which are designed to ensure that the administration effectively performs the tasks assigned to it. Yet others see the principal objective of administrative law as ensuring governmental accountability, and fostering participation by interested parties in the decision-making process.”

⁴⁷⁷ David Jenkins, “Common Law Declarations of Unconstitutionality” (2009) 7 Int’l J Const L 183 at 184.

human rights, the distinction may therefore be a redundant one from a strictly human rights standpoint. The British also did not have, until the coming into force of the 1998 Human Rights Act, (HRA) any document containing a list of rights to which their citizens were entitled. However, what they accomplished through the enactment of the HRA was the domestication of the European Convention on Human Rights.⁴⁷⁸

The fact that the British had no written constitution or a bill of human rights did not, however, mean that the rights of its citizens were not legally protected. At common law, the courts developed over time adjudicatory principles and standards by which the exercise of public powers could be tested against rights that had been similarly developed as well by common law processes. But unlike in those jurisdictions where constitutionally entrenched rights checked legislative authority, in Britain parliament was supreme and had powers to use legislative means to interfere with those rights developed by common law.⁴⁷⁹

In reviewing actions deemed to have violated human rights under British law, there seemed to be an alternation between the principles of “unreasonableness” enunciated in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*⁴⁸⁰ and “illegality, irrationality and procedural impropriety” as laid down in the case of *Council of Civil Service Unions v Minister for the Civil Service*.⁴⁸¹ In the earlier case a local authority had power to grant licenses for cinematograph performances under the Cinematograph Act 1909 and could grant a licensed place permission to be open and used on Sundays, subject to such conditions as the authority might think fit to

⁴⁷⁸ *Ibid* at 183, (the author arguing that with the enactment of the Human Rights Act “Parliament ‘incorporated’ rights enshrined in the European Convention on Human Rights... giving them effect in domestic law”).

⁴⁷⁹ *Ibid* at 184.

⁴⁸⁰ [1948] 1 KB 223; see Itzhak Zamir, “Unreasonableness, Balance of Interests and Proportionality” (1992) 11 Tel Aviv U Stud L 131; J Warren Jones, “The Healthcare Professional and the Bolam Test” (2000) 188 Brit Dental J 237 at 238; Allan C Hutchinson, “The Rise and Ruse of Administrative Law and Scholarship” (1985) 48 Mod L Rev 293.

⁴⁸¹ [1985] AC 374; see Adam Tomkins, “In Defence of the Political Constitution” (2002) 22 Oxford J Legal Stud 157.

impose. The authority granted the plaintiffs in this case leave to perform on Sundays subject to the condition that no children under fifteen years of age should be admitted to such Sunday performances with or without an adult. The plaintiffs sued on the ground that the condition was unreasonable. The court held that the local authority had not acted unreasonably or *ultra vires* in imposing the condition. The court interpreting what was meant by unreasonableness in this circumstance stated that:

It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.⁴⁸²

This traditional principle of English public law was the only one that the system embraced for the purposes of substantive review but not in the absence of context since *Wednesbury* “[un]reasonableness” meant different things in different situations.⁴⁸³ Therefore in applying the standard, distinct judicial formulations of it contested for the open spaces.⁴⁸⁴

In some latter judicial decisions, the *Wednesbury* principle, in fact was made to stand in relative contrast to some newer articulations of it. While Lord Greene’s formulation considered an unreasonable decision to be “something so absurd that no

⁴⁸² *Per* Lord Greene, MR.

⁴⁸³ Mark Elliot, “The HRA 1998 and the Standard of Substantive Review” (2002) 7 *Jud Rev* 97 at 100.

⁴⁸⁴ *Ibid.* See also Jeffrey Jowell, “In the Shadow of *Wednesbury*” (1997) 2 *Jud Rev* 75.

sensible person could ever dream it lay within the powers of the authority”, or “a conclusion so unreasonable that no reasonable authority could ever have come to it” Lord Cooke would later suggest that a decision would be unreasonable simply if it were “one which a reasonable authority could [not] reach.”⁴⁸⁵ Elliot, however, stated that although Lord Cooke’s formulation is as reliant as Lord Greene’s on the rather vague criterion of reasonableness, the two tests are very different in character.⁴⁸⁶

Wednesbury was also criticized for other reasons apart from its apparent vagueness. Not only was it historically presented as a monolithic standard of review, it was not as structured as some other standards while at the same time engaging a higher threshold public interference with human rights.⁴⁸⁷ These were very significant complaints. *Wednesbury* flexibility would later give expression to a more structured concept of unreasonableness which, according to Elliot, was classically illustrated by reference to the divergent modes of substantive review operating in the distinct contexts of human rights and economic policy cases.⁴⁸⁸ While on matters of economic policy which are “not justiciable” or “less justiciable” the courts will intervene with the substance of the decision only in extraordinary circumstances,⁴⁸⁹ when decisions affect human rights, the courts were more willing to review administrative decisions.⁴⁹⁰

⁴⁸⁵ *R v Chief Constable of Sussex ex p International Trader’s Ferry Ltd*, [1999] 2 AC 418 at 452.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ Chris Hilson, *supra* note 476 at 132.

⁴⁸⁸ Elliot, *supra* note 483 at 101.

⁴⁸⁹ *R v Secretary of State for the Environment ex p Hammersmith and Fulham London Borough Council*, [1991] 1 AC 521 at 597 (Per Lord Bridge that the formulation and implementation of national economic policy “is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity. Both the constitutional propriety and the good sense of this restriction seem to me to be clear enough. The formulation and the implementation of national economic policy are matters depending essentially on political judgment. The decisions which shape them are for politicians to take and it is in the political forum of the House of Commons that they are properly to be debated and approved or disapproved on their merits. If the decisions have been taken in good faith within the four corners of the Act, the merits of the policy underlying the decisions are not susceptible to review by the courts and the courts would be exceeding their proper function if they presumed to condemn the policy as unreasonable”).

⁴⁹⁰ *Ibid.*

While appearing to contain a single foundation for substantive review, Elliot argues that *Wednesbury* instead concealed a range of different standards.⁴⁹¹ As noted above, he substantiates this claim by reference to the scale of divergence between the kinds of substantive review envisaged between, for example, economic policy cases and human rights cases. While economic policy cases involve “an unstructured and highly deferential form of review,” human rights cases involved the courts in a “more structured and intensive mode of review.”⁴⁹² Elliot therefore contends as does Hilson that it was inaccurate to suppose that English law through the *Wednesbury* test adhered to a single principle of substantive review. Instead he states that *Wednesbury* reasonableness embraced diversity both in the level of structure and the level of intensity with which different types of decisions are reviewed.⁴⁹³

Widespread recognition in certain quarters that *Wednesbury* reasonableness did not properly prescribe satisfactory standards for the review of administrative powers under British law became more noticeable with the coming into effect of the European Convention on Human Rights and the acceptance by the British to be bound by its provisions. The British are the bastion of dualism as the form for the reception of international law into domestic practice.⁴⁹⁴ However, in *Brind*⁴⁹⁵ it was the opinion of the court that even though unincorporated international treaties are not part of British law, yet where either statute or common law is uncertain or ambiguous, the courts may have legitimate resort to such treaties in order to resolve the uncertainty or ambiguity.⁴⁹⁶

This dualist ideology played quite a significant role in the procedure through which European human rights norms and jurisprudence would permeate the British system of human rights review. The historically dualist zealotry of the courts in the

⁴⁹¹ *supra* note 483 at 102.

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

⁴⁹⁴ See generally Anthony Bradley & Keith Ewing, *Constitutional and Administrative Law* (Pearson Longman, 2007).

⁴⁹⁵ *R v Secretary of State for the Home Department, ex p Brind*, [1991] 1 AC 696.

⁴⁹⁶ Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart Publishing, 1998) at 127.

United Kingdom defies debate. It came to be metaphorized by the image of “back-door incorporation” which the court railed very much against in the case of *Chundawadra v Immigration Appeal Tribunal*.⁴⁹⁷ In that case the court rejected an attempt to invoke the administrative law doctrine of legitimate expectation, describing it only as the “back door” by which the claimants sought to introduce the European Convention on Human Rights into English law.⁴⁹⁸ In particular the tribunal held that the extent to which the European Convention was relevant or not could be used in interpreting the law if there was any ambiguity or doubt, but that it could not provide a proportionality test as an alternative to *Wednesbury* unreasonableness where the domestic legislation was perfectly clear. Such statements Hunt states “inspired little confidence that England’s highest courts were capable of responding with imagination to what [at the time] could scarcely still be called English law’s ‘new dimension.’”⁴⁹⁹

Though the above scenario presented only discouraging possibilities, it was also the case that not a few experts in the British system retained the healthy expectation that if international treaties could be used as aid in statutory interpretation, their potential use in administrative law was enormous still.⁵⁰⁰ Hunt again asserts that they seemed to offer a constraint on the exercise of wide statutory discretions, which were notoriously difficult to challenge by way of judicial review due to the inherently deferential *Wednesbury* standard applied by the courts when reviewing such discretions.⁵⁰¹

⁴⁹⁷ [1988] 1mm AR 161 at 174.

⁴⁹⁸See for example David Dyzenhaus, Murray Hunt & Michael Taggart, “The Principle of Legality in Administrative Law: Internationalization as Constitutionalization” (2001) 1 OJLJ 5. See also Michael Taggart, “Legitimate Expectation and Treaties in the High Court of Australia” (1996) 112 Law Q Rev 50; Elizabeth Handsley “Legal Fictions and Confusion as Strategies for Protecting Human Rights: A Dissenting View of *Teoh’s* Case” (1997) 2 Newcastle L Rev 56; Margaret Allars “One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh’s* Case and the Internationalization of Administrative Law” (1995) 17 Sydney L Rev 204.

⁴⁹⁹ Hunt, *supra* note 496 at 160.

⁵⁰⁰ *Ibid* at 134.

⁵⁰¹ *Ibid*.

The literature demonstrates that even prior to the passage of the Human Rights Act, and apparently pushed in that direction by jurisprudence from the European Court of Human Rights (ECHR), the courts in the United Kingdom were already looking beyond *Wednesbury* as standard for substantive review. This happened at a time when the courts had as well developed a new enthusiasm for interpreting domestic law in the light of the European Convention on Human Rights.⁵⁰² In the event, English courts felt obliged, as Hilson expertly articulates it, to view “an old principle through a new human rights filter.”⁵⁰³ It occurred with minimal flourish in *R v Ministry of Defence, ex parte Smith*⁵⁰⁴ when the English Court of Appeal again in Hilson’s words attempted “to adapt the traditional *Wednesbury* basis to provide a standard more in line with the proportionality test used in the ECHR jurisprudence.”⁵⁰⁵ According to Sir Thomas Bingham in that case:

The court may not interfere with the exercise of an administrative discretion on substantive grounds save if the court is satisfied that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.⁵⁰⁶

Although contested among scholars, the above case was positively reviewed for bringing *Wednesbury* closer to ECHR proportionality. Hilson provides two justifications in support of this viewpoint even though he comes to the same conclusion as Elliot that *Wednesbury* is a variable rather than a monolithic standard of review. First, he said, the

⁵⁰² *Ibid* at 139; see also Margit Cohn, “Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom” (2010) 58 Am J Comp L 583 at 607 (The author found that since 1948, more than 2500 decisions in the United Kingdom have cited *Wednesbury* and used the term “unreasonable,” but of these, 2160 – more than 85% - were delivered after January 1, 1990 (1545, or 61%), were delivered after January 1, 2000.

⁵⁰³ Hilson, *supra* note 476 at 131.

⁵⁰⁴ [1996] QB 517.

⁵⁰⁵ *Ibid*.

⁵⁰⁶ *Supra* note 504 at 554.

test in *Smith* above consists of a more structured exercise than conventional *Wednesbury* because it invites the courts to engage in a balancing exercise between individual rights and competing policy justifications. Secondly he points to the heightened standard or intensity of review in human rights cases.⁵⁰⁷

Elliot however maintains that to assume that following *Smith*, proportionality has replaced *Wednesbury* only supports what he sees as the false premise that a single new principle of substantive review may replace one existing principle. He argues that to structure the discourse in this manner “fails to acknowledge the established tradition of diversity in this area: the ‘reasonableness or proportionality?’ question overlooks the existing domestic context into which the proportionality test is being introduced.”⁵⁰⁸ Continuing, he submits further that once the diversity in the pre-existing context is appreciated, the focus of inquiry shifts from the question whether proportionality may replace reasonableness, to the relationship between those concepts and especially the way in which the former complements the latter by extending the range of options open to the reviewing courts.⁵⁰⁹

4.6. United States: Balancing, Rational Basis Review, Strict Scrutiny

At the time of its promulgation, the United States constitution contained very minimal reference to human rights guarantees in it.⁵¹⁰ Some writers therefore argued that this conformed to the thinking of its Framers that the Constitution is essentially designed to protect individual rights which did not require a different act of textualization.⁵¹¹ Ides and May contend that “many of the Framers believed that the political structure created by the Constitution was the primary and essential vehicle through which to protect the liberty of

⁵⁰⁷ Hilson, *supra* note 476 at 132.

⁵⁰⁸ *Supra* note 483 at 102; see also Mark Elliott, “The Human Rights Act 1998 and the Standard of Substantive Review” (2001) 60 Cambridge L J 301.

⁵⁰⁹ *Ibid.*

⁵¹⁰ Gerald Gunther, *Constitutional Law* (New York: The Foundation Press, Inc., 1985) at 406 “There were relatively few references to individual rights in the original Constitution: its major concern was with governmental structure.”

⁵¹¹ Allan Ides & Christopher May, *Examples and Explanations: Constitutional Law Individual Rights* (New York: Aspen Publishers, 2010) at 1.

the people.”⁵¹² A textual reference to limitations on the authority of state in the Constitution is, however, commonly traced to Article IV (the Privileges and Immunities Clause) as well as Article 1, paragraph 10 (the Contracts Clause). This is aside the prohibition placed on state bills of attainder and *ex post facto* laws.

But later in its development and having regard to the peculiar conditions of that period, specific human rights guarantees were added to the constitution by way of amendments in 1791. However, unlike the current understandings of those rights, where they had to be qualified by overriding public interests, the amendments seemed to have granted those rights in absolute terms without any mitigating possibilities. For example, the First Amendment which established the freedom of religion, speech and assembly provided that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

This provision seemed not to leave any room for the legislature to control or place limitations on the enjoyment of the rights guaranteed. “Congress shall make no law...” could therefore legitimately be interpreted, given its unambiguous mandatory appearance, as absolutely prohibitive of any legislative regulation of the freedoms mentioned. The analysis I shall make in this section is not however limited to the First Amendment alone. It will include subsequent amendments incorporating what is commonly referred to as the American Bill of Rights which Black describes as “any document setting forth the liberties of the people.”⁵¹³ By this Bill, Black claimed to refer to all provisions of the original Constitution and Amendments that protect individual liberty by barring government from acting in a particular area or from acting except under certain

⁵¹² *Ibid.*

⁵¹³ Hugo L Black, “The Bill of Rights” (1960) 35 NYU L Rev 882.

prescribed procedures.⁵¹⁴ Among these, he mentions provisions that safeguard the right of *habeas corpus*; those that forbid bills of attainder and *ex post facto* laws; those that guarantee trial by jury, and strictly define treason and limit the way it can be tried and punished.⁵¹⁵

Does the Bill of Rights contain absolute or qualified rights? How this question is resolved will have obvious consequences for how the courts would approach their enforcement by judicial means. At the time that Black wrote, he recognized “a sharp difference of views as to how far its provisions should be held to limit the lawmaking power of Congress.”⁵¹⁶ While one tendency (the “non-absolutists,” “balancers,” or “operationalists”)⁵¹⁷ saw in the constitutional prohibitions mere admonitions which Congress need not always observe, the other, of which Black himself was an important interlocutor, believed that “there are ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be ‘absolutes.’”⁵¹⁸ With such divergent viewpoints, it will be understandable why others believed the First Amendment to be ambiguous.⁵¹⁹

The text of the First Amendment when coupled with the differing interpretations they were given would only make the job of the courts heavier in responding to claims of violations of the amendment principles. If the absolutist argument prevailed, it meant that

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid* at 866.

⁵¹⁷ Alexander Meiklejohn, “The First Amendment is an Absolute” (1961) *The Sup Ct Rev* 245 at 248. Justice Harlan rejects the absolutist theory in the case of *Konigsberg v State Bar*, [1961] 366 US 36 at 49-50 wherein he stated: “At the outset we reject the view that freedom of speech and association..., as protected by the First and Fourteenth Amendments are ‘absolutes,’ not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk...”

⁵¹⁸ *Ibid* at 867.

⁵¹⁹ Wallace Mendelson, “On the Meaning of the First Amendment: Absolutes in the Balance” (1962) 50 *Cal L Rev* 821. See also Laurent B Frantz, “Is the First Amendment Law? – A Reply to Professor Mendelson” (1963) 51 *Cal L Rev* 729.

the legislature had no powers to curtail rights that in themselves could not be curtailed. The courts therefore had no balancing roles to perform. If the non-absolutists had the upper hand, the courts would be called upon to perform the same duty of balancing rights against higher societal interests as befits all those situations where the two interests are in contention. But even if that duty existed, the Constitution itself quite significantly, did not provide any guide or clues to the courts as to how it could be performed.

Fair enough, the courts did not have much to do at those early stages because as important as the absolutist and non-absolutist debate was, a different controversy raged among the interlocutors on the spread of the principles enunciated in the amendments within the peculiar U.S. federal structure. The question here was whether the provisions of the Constitutions and the amendments on individual rights limited the powers of the state governments as it did those of the federal government. It was widely accepted in the 19th century that the bill of rights did not limit the power of the states.⁵²⁰ This view was given a judicial stamp of approval in the case of *Barron v Baltimore*.⁵²¹

However, with the passage of the Fourteenth Amendment in 1868 there was opportunity to extend the application of the bill of rights to the states. This expectation was scarcely met because according to Epp “the Fourteenth Amendment remained notoriously unclear, for the amendment referred only in relatively vague terms to the privileges or immunities of the citizens of the United States, life, liberty, or property, due process and equal protection of laws.⁵²² An acceptable interpretation of these broad terms could not be agreed upon by the courts and was disputed well into the 20th century.⁵²³

In addition to these controversies, neither the constitution nor the bill of rights contained in the amendments provided the courts with any procedural resources that could be used to scrutinize official actions impacting human rights with a view to

⁵²⁰ See Epp, *supra* note 160 at 30.

⁵²¹ [1833] 32 US 243.

⁵²² See Epp, *supra* note 160 at 30.

⁵²³ *Ibid.*

offering protection to the victims. It was therefore left to the courts to develop standards for substantive analysis.⁵²⁴ Historically speaking, though the equal protection clause of the Fourteenth Amendment to the U.S. constitution was important in articulating that country's rights tradition, it had only very limited utility for a very long time after it was passed. Pettinga states that during the first eighty years after its enactment, the Supreme Court believed that it protected only racial and ethnic minorities from discrimination through overt or covert classifications which disadvantaged them.⁵²⁵ Continuing, he argues:

Because the Court believed the scope of protection was so narrow, it interpreted the equal protection clause as scarcely limiting state power. State governments were essentially free to benefit or burden groups within their borders in any way they saw fit. At times, the equal protection clause hardly protected anyone; ethnic and racial minorities could rarely get relief from discrimination with an equal protection challenge, and other groups could never get relief at all.⁵²⁶

This situation would later give way in the late 1930s and early 1940s, Pettinga says, starting with the famous Footnote Four of Justice Stone in the case of *United States v Carolene Products Co.*⁵²⁷ In that case Justice Stone called for a more searching judicial inquiry to protect discrete and insular groups that do not have the ordinary protection of democracy and therefore are incapable of any meaningful or effective engagement with that process. But in the *Carolene* case, the court considered the constitutionality of a piece of economic regulatory legislation which it held was entitled to a presumption of constitutionality. Stone's court also decided that the legislation in question should be upheld so long as the government could show a rational basis for enacting it. In situations

⁵²⁴See for example Ernest A Young, "Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law" (2012) 75 Law & Contemp Probs 157.

⁵²⁵ Gayle Lynn Pettinga, "Rational Basis with Bite: Intermediate Scrutiny by any other Name" (1986-1987) 62 Ind L J 779 at 780.

⁵²⁶ *Ibid* at 781.

⁵²⁷ *Supra* note 162; See also Lewis Powell Jr, "Carolene Products Revisited" (1982) 82 Colum L Rev 1087 at 1088 (describing footnote four as "the most celebrated footnote in constitutional law"). See also Bruce Ackerman, "Beyond Carolene Products" (1985) 98 Harv L Rev 713.

like this where there is a presumption of constitutionality, the onus is on the person challenging the law or action to show that there was no rational basis for it.

This led to the development of what has been described as “suspect classification” in American constitutional practice. By this classification, “all legal restrictions which curtail the civil rights of a single racial group are immediately *suspect* [and] courts must subject them to the most rigid scrutiny.”⁵²⁸ Through the doctrine, the courts “concentrate on devising complex categories and subcategories for identifying the kinds of rights infringement that merit constitutional review and the level of scrutiny that should apply to each one.”⁵²⁹ Therefore the suspect classification doctrine presumed a law unconstitutional if it used certain classifying traits.⁵³⁰ And unlike in rational basis analysis, in suspect classification cases, the legislation or action questioned if it must survive such rigid or strict judicial scrutiny must be necessary to the accomplishment of a compelling state interest.⁵³¹ Furthermore, the onus is on the government in such cases to show how that legislation or action furthers a compelling interest.

Legislation that demanded strict scrutiny, Gunther states, require a far closer fit between classification and statutory purpose than the rough and ready flexibility traditionally tolerated by the old equal protection.⁵³² In his words:

⁵²⁸ *Korematsu v United States*, [1944] 323 US 214.

⁵²⁹ Moshe Cohen-Eliya & Iddo Porat, “American Balancing and German Proportionality: The Historical Origins” (2010) 8 Int’l J Const L 263 at 264.

⁵³⁰ Margaret Bichler, “Suspicious Closets: Strengthening the Claim to Suspect Classification and Same-Sex Marriage Rights” (2008) 28 B C Third World L J 167 at 170 (“Racial classifications have consistently been regarded as suspect because racial minorities have historically been disenfranchised from the political process and have a signifying trait (skin color) that is immutable and readily visible”). See also Joseph Tussman & Jacobus TenBroek, “The Equal Protection of the Laws” (1949) 37 Calif L Rev 341 at 344; R Richard Banks, “Race-based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse” (2001) 48 UCLA L Rev 1075.

⁵³¹ Elizabeth S Anderson, “Integration, Affirmative Action, and Strict Scrutiny” (2002) 77 NYU L Rev 1195; John Galotto, “Strict Scrutiny for Gender, via ‘Croson’” (1993) 93 Colum L Rev 508.

⁵³² Gunther, *supra* note 510 at 588; see also Otis H Stephens Jr & John M Scheb II, *American Constitutional Law (Volume II): Civil Rights and Liberties* (Belmont, CA: Thomson Wadsworth, 2008) at 29.

[M]eans had to be shown “necessary” to achieve statutory ends, not merely “reasonably related” ones. Moreover, equal protection became a source of ends scrutiny as well: legislation in the areas of the new equal protection had to be justified by “compelling” state interests, not merely the wide spectrum of “legitimate” state ends.⁵³³

The U. S. Supreme Court with Earl Warren as Chief Justice would soon kick-start an ambitious policy of identifying new areas appropriate for strict scrutiny. The court did so by searching for two major characteristics: the presence of the old suspect classification or the impact of legislation on fundamental rights and interests.⁵³⁴ While racial discrimination maintained its significance as ground for intervention based on old-rule suspect classification, and fundamental rights could be identified by recourse to the amendments to the Constitution, what constituted fundamental interests were far less clear. While the list of such interests added by the Warren court were modest to say the least (including voting, criminal appeals and the right to interstate travel⁵³⁵), commentators searched for justifications to include analogous situations of which “welfare benefits, exclusionary zoning, municipal services and school financing came to be the most inviting frontiers.”⁵³⁶

Yet there were those who reasoned that the Supreme Court’s analytical position in human rights cases defied an easy categorization into situations requiring rigid scrutiny and those warranting only deferential rational basis considerations. Such persons argued that a variety of standards had been applied to resolve equal protection cases. One of such persons was Justice Marshall. In *San Antonio Independent School District v Rodriguez*⁵³⁷ he rendered a dissenting opinion, arguing that:

The Court apparently seeks to establish [that] equal protection cases fall into one of two neat categories which dictate the appropriate standard of review – strict scrutiny or mere rationality. But this Court’s [decisions] defy such easy categorization. A principled reading of what this Court has

⁵³³ *Ibid.*

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid.*

⁵³⁷ [1973] 411 US 1.

done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.”⁵³⁸

Such thinking later produced a third standard described as “intermediate” level scrutiny or “rational basis scrutiny with a bite.” This is a standard clearly more intensive than the deferential or rational basis review yet less demanding than the rigidity of strict scrutiny.⁵³⁹ This level of scrutiny protecting persons within a quasi-suspect classification has been associated with sex discrimination cases of which *Craig v Boren*⁵⁴⁰ is a clear example. In that case, the court majority held that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.”

Pettinga identifies three major reasons that the Court created this third category. First, he says, was that many scholars criticized the human rights doctrine. Secondly, growing public awareness of discrimination against groups other than racial groups had increased the demands for judicial protection. Finally, the advent of legal aid for the disadvantaged constituencies influenced the development of creative judicial intervention on behalf of indigents.⁵⁴¹ Under this analytical standard, the court is permitted to look more closely at the ends and means of the challenged statute, instead of merely pronouncing it valid or invalid under traditional analysis.⁵⁴² “The court does not accept every goal proffered by the state, and if an alternative means exists which does not

⁵³⁸ Justice White adopted this position in, for example, *Vlandis v Kline*, [1973] 412 US 441 (stating that “it is clear that we employ not just one or two, but, as my Brother Marshall has ably demonstrated, a ‘spectrum of standards’”).

⁵³⁹ See Pettinga, *supra* note 525 at 784.

⁵⁴⁰ [1976] 429 US 190.

⁵⁴¹ *supra* note 525 at 784.

⁵⁴² *Ibid.*

disadvantage the protected group, the Court can prompt the legislature to employ the alternative means by invalidating the legislation.”⁵⁴³

What is clear from comparing the British and American standards of review as applicable today is that while the British practice supposes proportionality (though they are loathe to so describe it), in the United States the standard tilts towards balancing. Is there a real difference between “proportionality” and “balancing” or is it just a question of semantic quibbling? To the extent that under both systems serious efforts are made to actually strike a balance between individual rights and governmental interests, one might conclude that no real difference exists between the two. In both systems, when governmental action affects human rights of individuals, governmental interest warranting such effect must be shown to be compelling and the means chosen must be necessary to achieve that purpose.

But Choudhry believes there is actually a difference between American balancing and British proportionality by reference to what he calls “decisional deference” particularly in the context of American practice. He notes that in most jurisdictions (particularly those applying the proportionality model), rights adjudication consists of a two-stage process that determines first whether a right is violated and second whether that violation is justified according to a proportionality analysis. In these systems, he continues, rights are generally given a broad interpretation, and countervailing interests are addressed exclusively under the rubric of proportionality.⁵⁴⁴ This contrasts to “definitional balancing” as he calls it in the context of the American system. This, he says, is a mere one-stage approach “which conflates the scope of a right with its strength.”⁵⁴⁵

⁵⁴³ *Ibid* at 785.

⁵⁴⁴ Sujith Choudhry, “After the Rights Revolution: Bills of Rights in the Postconflict State” (2010) 6 *Ann Rev Law Soc Sci* 301.

⁵⁴⁵ *Ibid* at 314.

4.7. South Africa: Limitation of Rights through Text and Purpose

Unlike in the United Kingdom where human rights analysis has moved from *Wednesbury* to a semblance of proportionality even though the courts did not call it by that name and the United States where courts themselves demarcated acceptable latitude for restricting human rights from the scratch, in South Africa (and as we will later see with Nigeria), the Constitution offers a guide for analyzing the limitation of human rights. Section 36 of the South African Constitution provides:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose
- (2) Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

This provision is supplemented by section 39 thereof which provides:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

What the South African Constitution has done is to provide the courts with a ready outline of how to approach the analysis of laws and governmental actions that restrict human rights while rendering what exact meanings to attach to the words used in the provisions discoverable by the courts. The South African Constitutional Court has held that section 39(2) of that country's constitution creates a mandatory canon by which all statutes are to be interpreted. In *Investigating Directorate Services Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit*,⁵⁴⁶ the Court explained that section to mean that all statutes must be interpreted through the prism of the Bill of Rights.

But short of declaring a statute invalid, some constitutional experts suggest that this section actually enables courts to read down legislation so that it conforms to the dictates of the Bill of Rights.⁵⁴⁷ The Constitutional Court took similar position in *S v Bhulwana*,⁵⁴⁸ when it held that a court may save a legislative section which is "reasonably capable" of a more restrictive, but still constitutional interpretation. Further in *Zimbabwe Township Developers v Lou's Shoes Ltd*,⁵⁴⁹ the court suggested what might be the wrong way of "reading down" a statute which is "to interpret the Constitution in a restricted manner in order to accommodate the challenged legislation" when the better method would have been to first properly interpret the Constitution and then to examine the challenged legislation to see whether it can be interpreted to fit into the framework of the Constitution. The court then laid down a two-part test for "reading down" as follows: (1) an assessment by the court of the ambit of the right or rights in question, and (2) a determination of whether the impugned statutory provision limits the right or rights so interpreted.

⁵⁴⁶ [2001] 1 SA 545 at 588 (CCSA).

⁵⁴⁷Stuart Woolman, "Application" in Stuart Woolman & Michael Bishop, *Constitutional Law of South Africa* (Cape Town: Juta Law, 2002) at 88 online: <http://www.closa.co.za/featured/chapters/chap31_closa.pdf>.

⁵⁴⁸[1996] 1 SA 388 (CC).

⁵⁴⁹[1984] 2 SA 778 at 783 (SCA).

There is consensus perhaps that in terms of controlling the exercise of governmental power in South Africa there are two requirements. There is a general rule of law demand which prohibits the government from acting arbitrarily or capriciously. Secondly, there is the requirement that the exercise of governmental powers conform to the human rights provisions of the Constitution.⁵⁵⁰ While the Constitutional Court has grappled with setting the ambit of a general rule of law imperative, on the question of human rights, its job expectedly has been narrowed to receiving justification for infringements on the basis of the limitation provisions in section 36 of the Constitution.

In *The Affordable Medicines Trust & Others v The Minister of Health of the Republic of South Africa & Another*,⁵⁵¹ the Constitutional Court decided that the exercise of legislative and executive power is subject to two constraints, namely the minimum threshold requirement of rationality [the action should not be arbitrary or capricious] and that such action must not infringe any of the rights contained in the Bill of Rights. Where the exercise of the right negatively engages any of the constitutionally guaranteed rights, it must in addition, pass the test of limitation in section 36(1). In coming to a determination whether or not the said action passes the test of limitation, the court applies the proportionality principle in which the necessary questions leading to a considered determination are those stated in section 36(1).

What is significant about this provision is how it captures in constitutional text the traditional elements of balancing/proportionality analysis used by a range of constitutional systems. This analytical framework usually consists of a three-stage

⁵⁵⁰ Heinz Klug, "South Africa: From Constitutional Promise to Social Transformation" in Jeffrey Goldsworthy ed., *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006) 266 at 278.

⁵⁵¹[2006] 3 SA 247 (CC); L du Plessis, "The Status and Role of Legislation in South Africa as a Constitutional Democracy: Some Exploratory Observations" (2011) 14 Per 92 online: <<http://www.ajol.info/index.php/pelj/article/viewFile/68747/56817>>; Jonathan Berger, "Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education" in Varun Gauri & Daniel M Brinks eds., *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008) at 38.

process all of which conform to the rationality, necessity and balancing or strict proportionality standards. In the rationality question the court is asking whether the means applied to limit a constitutional right actually furthers a legitimate governmental end. The necessity component disposes of the question whether the means adopted by government is the least restrictive one to further that end. In the strict proportionality component, the question is whether the benefits of the governmental objective are proportionate to the violation of the constitutional right in question.⁵⁵² The courts in South Africa would reach the same results when answering similar questions under section 36(1) as with those in the traditional test that I have already mentioned.

4.8. Nigeria: Struggling for Justification; Inverting the *in Favorem Libertatis*

While it is clear that in both the United Kingdom and United States, the courts applied judicial tools to appropriately demarcate rights and other societal interests, and weigh them on the balance, South Africa and Nigeria as earlier stated, adopted a different approach. Rather than allow the courts to strike the balance from scratch, the constitutions of both countries provided a rather rough outline of how the courts could perform that function. In section 45 of the 1999 Constitution, it is provided that:

45(1) Nothing in sections 37 [privacy], 38 [conscience, thought and religion], 39 [expression], 40 [assembly] and 41 [movement] shall invalidate any law that is reasonably justifiable in a democratic society –
(a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons

⁵⁵² Cohen-Eliya & Iddo Porat, “Proportionality and the Culture of Justification” (2011) 59 Am J Comp L 463; See also Moshe Cohen-Eliya & Iddo Porat, “American Balancing and German Proportionality: The Historical Origins” (2010) 8 Int’l J Const L 263 at 267 (“Wherever the proportionality test has been introduced, it has the same basic two-stage structure. The first stage is to establish that a right has been infringed by governmental action. In the second stage, the government needs to show that it pursued a legitimate end and that the infringement was proportional. The proportionality requirement comprises three subtests: first, the means adopted to advance the governmental end must be appropriate for furthering that goal (suitability); second, the means adopted must be those that least infringe on the right of the individual (necessity); and third, the loss to the individual resulting from the infringement of the right must be proportional to the governmental gain in terms of furthering the governmental goal (proportionality in the strict sense”).

(2) An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergency, of measures that derogate from the provisions of section 33 or 35 of this Constitution; but no such measures shall be taken in pursuance of any Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:

Provided that nothing in this section shall authorize any derogation from the provisions of section 33 of this Constitution, except in respect of death resulting from acts of war or authorize any derogation from the provisions of section 36(8) of this Constitution.

The above is the general limitation of the human rights provisions that the Constitution contains. One thing noticeable is that the limitation applies to specifically highlighted guarantees. This justifies the proposition that it does not apply to all the rights that the constitution enshrines. In addition, some of the guarantees contain independent limitation clauses. For example, while section 33(1) of the Constitution guarantees the right to life in general terms (save in the execution of a death sentence),⁵⁵³ sub-section (2) thereof qualifies the right by mentioning situations in which the right to life shall not be regarded as having been violated. Such situations include defending another person from unlawful violence or for the defense of property, death arising while someone is carrying out a lawful arrest or to prevent the escape of a person lawfully detained or for the purpose of suppressing a riot, insurrection or mutiny.

It is equally worth noting that the limitation clause is not applicable to section 34 of the Constitution which places absolute prohibition on the use of torture and other inhuman or degrading treatment. The section also disallows slavery and servitude absolutely as well as the performance of forced and compulsory labor barring the exceptions highlighted. Furthermore, the right to liberty is guaranteed under section 35

⁵⁵³ Nigeria is among several African countries where the death penalty is still applied as a criminal sanction. However, some countries on the continent such as South Africa have abolished the practice. See Dirk van Zyl Smit, "The Death Penalty in Africa" (2004) 4 Afr Hum Rts L J 1; Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (Cape Town: ABC Press, 2007).

which also specifies the circumstances and procedure under which that right could be tampered with. Where such circumstances and procedure for derogation are invoked, the Constitution also contains ample provisions for securing the humane treatment of the persons involved including prompt and expeditious trial, the right to silence and legal consultation, a right to written details of any reasons for arrest or detention, and the right to bail.⁵⁵⁴

Finally, from the clear provisions of section 45, the right to fair hearing in section 36 is placed outside the reach of the general limitation or any specific limitation for that matter. Not even emergency considerations could place this guarantee at risk. Rather the proviso to section 45(2) captured in text the well-known principle of *nullum crimen sine lege* – that only offenses in existence at the time of an accused person’s offending action would suffice (that is, there should be no retroactive criminalization) and that no heavier punishment should be imposed than was in force at the time the alleged offence was committed.

One could notice that the rights recognized under the Constitution for purposes of analyzing the limitations are grouped into three distinct categories. The first category are not made subject to all the restrictions that might be imposed by the state in the interests of defense, public safety, public order, public morality, public health or the protection of the rights and freedoms of others persons. In this category are freedom from torture and those similar to it. The other category consists of those rights that could be restricted for all those justifications but only in times of emergency. The rights captured here are life, freedom from forced labor, personal liberty and freedom from discrimination. Rights in the third and final category are those that could be derogated from at all times by the state for all those justifications of public order, morality health, etc.

⁵⁵⁴ s 34(2)-(7).

As in other jurisdictions already examined, the role of Nigerian courts in cases alleging human rights abuses is to read the guarantees relied upon in those cases and to find out if the abuses complained of could be justified under any of the limitations allowed by the Constitution. It is by no means a light duty. When constitutional terms are as open-textured as they often are, courts interpreting them face anxious scrutiny as to whether they are liberal (in favor of rights i.e. acting *in favorem libertatis*) or conservative (expanding the limitations to the detriment of rights). Apart from the words of the constitution itself, the Nigerian courts are not provided with any further resources that could guide their interpretative ideology. This lack of analytical resources makes Okonkwo to observe that the Nigerian bill of rights differs essentially from the rest of the constitution because it is a statement of principles that involves the application of non-legal criteria.⁵⁵⁵

Continuing, he argues that when interpreting the human rights provisions, the courts will have to consider the reasonableness and justifiability of legislative and executive acts. This, he says, compels a subjective, rather than a purely objective approach that adheres to strict statutory construction. Therefore, he asserts, the subjective approach involves the measurement of reasonableness and justifiability in terms of the historical setting, the local political and social conditions and local standards of acceptability.⁵⁵⁶ Though writing in the context of the human rights provisions of the Nigerian Independence Constitution of 1960 and the Republican Constitution of 1963, Okonkwo's piece is, however, also appropriate for any analysis of the human rights behavior of the courts with reference to the 1999 Constitution. The human rights provisions in Nigerian constitutions since 1960 have been similar as have been the manner in which the limitations under consideration here are placed in the text.

⁵⁵⁵ Okonkwo, *supra* note 156 at 265.

⁵⁵⁶ *Ibid.*

Therefore, regarding the general limitation clauses in the Constitution, Okonkwor, as did Nwabueze too, described them as manifestly vague and flexible.⁵⁵⁷ This is ostensibly because it cannot be stated with any degree of certainty what the Constitution describes generally as “reasonably justifiable in a democratic society.” This would seem to be the bane of all efforts to expand judicial protection of human rights in Nigeria. Yet it has not elicited as much academic attention as is seriously needed. One would notice therefore how different the Nigerian limitation regime is from the South African one. The Nigerian Constitution does not have the equivalent of section 36(1) of the South African Constitution that could point it towards the development of standards of human rights adjudication analogous to proportionality balancing.

The Nigerian rights limitation clause is too open-textured and vague. It does not make available to the courts a structure that aids the development of clear and precise standard steps that are necessary for effective balancing of rights against governmental interests. This makes the courts read the Constitution in literal fashion. When this literal tradition is coupled with this limitation regime, effective judicial affirmation of rights is rendered illusory.⁵⁵⁸ This is not only true of situations where the courts deliver positive judgments in human rights cases but also in those cases where the outcomes are negative. In the absence of clear standards and tests for justifying governmental intrusions on rights, the reasoning is very ad hoc and only increases the possibility for inconsistent and contradictory decisions to be frequently rendered by the courts.

In the circumstances, the distinction that Alexy draws between the construction of rights as rules and the construction of rights as principles is especially relevant to the Nigerian practice.⁵⁵⁹ Rather than construct rights as principles, the dearth of analytical resources equivalent to what is available to the South African courts has foisted on their

⁵⁵⁷ *Ibid*; see also Nwabueze, *supra* note 159 at 118.

⁵⁵⁸ Cohen-Eliya & Porat, *supra* note 552 at 266 suggest that the balancing mechanism which in more ways than one resembles proportionality analysis was devised by the United States Supreme Court to overcome an excessively literal reading of the constitutional text.

⁵⁵⁹ Robert Alexy, “The Construction of Constitutional Rights” (2010) 4 Law & Ethics Hum Rts 20.

Nigerian counterparts a situation in which all rights are construed merely as rules. According to Alexy, rules are norms that require something definitively. They are *definitive commands* (his emphasis) of which their form of application is subsumption.⁵⁶⁰ “If a rule is valid and applicable, it is definitively required that exactly what it demands be done. If this is done, the rule is complied with; if this is not done, the rule is not complied with.”⁵⁶¹

On the contrary, principles, according to Alexy, are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities at hand. These, he argues, are *optimization requirements* (his emphasis). “They are characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible.”⁵⁶² Alexy argues that when human rights are conceived as rules rather than principles, balancing is eschewed. Of this situation, which he refers to rather pejoratively as “freedom from balancing” there is positivist quantity which makes all questions connected with the application of constitutional rights resolvable only by traditional canons of interpretation. This is by appealing to the wording of the constitutional rights provisions, the intentions of those who framed the Constitution, and the systematic context of the provision being interpreted.⁵⁶³

Applied to the Nigerian context, Alexy’s double-headed theories of subsumption and optimization have stark significance. While those provisions in the constitution that contain non-derogatory rights could be interpreted as rules, those rights to which the limitation provisions are applicable would be construed as principles. The first category of rights contains rules because they express imperatives that are boundless and limitless. For example the constitutional prohibition of torture and other cruel and inhuman

⁵⁶⁰ *Ibid* at 21.

⁵⁶¹ *Ibid*.

⁵⁶² *Ibid*.

⁵⁶³ *Ibid* at 22.

treatment can only be implemented by an absolute prohibition of those practices. The prohibition is either honored or it is not. There are no two ways and no short cuts. There is therefore no room for the application of balancing and proportionality or in Alexy's view the freedom from balancing applies. Nothing is available to balance or to render proportional.

On the other hand, those constitutional provisions that are derogable contain principles to the extent that they could be limited by government or other justifiable action. What the constitution mandates regarding this category of rights is that they be protected or as Alexy would argue optimized to the greatest extent possible. For the simple reason that in this case there are two competing values – the rights of individuals and restrictions on them by government for overriding public good – a balancing process is warranted. What the proportionality doctrine accomplishes in this regard therefore is to ensure that only a fair balance is struck between these two values and especially that the means used to restrict the right in question is not more than is necessary to accomplish the stated governmental objective.

Majority of the rights enshrined in the Nigerian constitution fall within the latter category. They should all attract the application of the balancing scheme. But the words “reasonably justifiable in a democratic society,” are far too vague to provide an objective guide for balancing. Nwabueze also claims that the introductory phrase “Nothing in this section shall invalidate any law...” seems to imply a presumption in favor of the validity of a law imposing a restriction.⁵⁶⁴ His position is shared by other commentators as well.⁵⁶⁵ That phrase when it interacts with the presumption of constitutionality of laws

⁵⁶⁴Nwabueze, *supra* note 159 at 118.

⁵⁶⁵ Okonkwo, *supra* note 156; see also Kenneth Robert-Wray, “Human Rights in the Commonwealth” (1968) 17 Int'l & Comp L Q 908 at 922. This author particularly noted that the Nigerian human rights provisions had been informed largely by the European Convention on Human Rights and Fundamental Freedoms. He states: “The point has more than once been made that Articles 8 to 11 of the [European] Convention, which corresponds to sections 23 to 26 [sections 37 to 40, 1999 constitution] of Nigeria's Constitution, permit such qualifications as are ‘*necessary* in a democratic society’; and that by substituting ‘reasonably justifiable’ for ‘*necessary*’ the Constitution permits greater latitude. It does. What is

and regularity of government actions seems to cast the onus on the person challenging a law imposing restriction to show that the said law is not reasonably justifiable rather than the other way round. Nwabueze therefore suggested instead that the Constitution could have been more in favor of rights and placed more demands by way of governmental justification if it had read instead: “any law derogating from a guaranteed right shall be invalid unless it is reasonably justifiable...”⁵⁶⁶

Nwabueze’s suggestion here accords substantially with the position that Taiwo holds on the same issue. The latter notes that framers of successive Nigerian constitutions have always seen that clause fit to include in the text and leads to a conclusion that “such clauses express attitudes that cut across time periods and individual preferences among the framers.”⁵⁶⁷ He therefore asks the question that the constitutional provision points inexorably to but only in reverse order: “Do Nigeria’s constitutional framers mean to suggest that a democratic society, so-called, may interfere with an individual’s right to [for example] respect for his private and family life, home and correspondence, if such interference is ‘in the interest of defence, public safety, public order, public morality, public health or economic well-being of the community?’”⁵⁶⁸ Taiwo surmises that if this question yields a positive answer, then that is a sure sign that the framers of the constitutions did not take rights seriously, [and] left no room for doubt that they were aware of the many philosophical conundrums that their proposal might generate and seemed to have adopted a crude utilitarian approach in which the rights of an individual may be bartered away for the welfare of the many.⁵⁶⁹

‘reasonably justifiable’ may not be ‘necessary.’ Article 15 (emergencies) is even tighter; the relevant words being ‘strictly required’; and Article 1 (the right to life) goes even further with ‘absolutely necessary,’ whereas section 18 of the Constitution dilutes this to ‘reasonably justifiable.’ But in my submission, if the validity of measures adopted by Parliament or the Government is liable to be canvassed in a court of law, this change of wording is, to say the least, most desirable.”

⁵⁶⁶ *Ibid.*

⁵⁶⁷ See Taiwo, *supra* note 298 at 24.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*

Taiwo's position in my view is of a more radical category. His is too broad a brush that tarnishes all domestic and even international human rights instruments permitting the restriction of rights on grounds of public order, health, etc. We have only to consider the alternative position – rights without limitations – to know how problematic his prescription is. The question really is not whether or not to permit derogations on rights. It is that of degree of derogations to be allowed as well as measures that ensure a fair balance between rights and what legitimate derogations could be imposed upon them. That is where the challenge facing the Nigerian model is located.

One of the first cases that readily come to mind when analyzing the attitude of Nigerian courts to what it means for a legislation to be reasonably justifiable in a democratic society is that of *Cheranci v Cheranci*.⁵⁷⁰ It is important to note that this was a decision of the Northern Region of Nigeria High Court written by a non-Nigerian judge, Justice Bates. In his judgment, Justice Bates stated that there was a presumption that every law made by parliament was constitutional and that the courts should bear this in mind, and therefore apply restraint in determining whether a particular law is reasonably justifiable.⁵⁷¹ He seemed to suggest that judges “should not lightly disregard

⁵⁷⁰ [1960] NRNLR 24.

⁵⁷¹ It is unclear how this presumption of constitutionality differs from the doctrine of parliamentary sovereignty. Canada, for example, which also practiced the British system prior to adopting a Charter of Rights in 1982 knew better than continuing with the British human rights tradition once the Charter was promulgated. In the words of one Canadian author “Our *Constitution Act 1867* states in its preamble that Canada is to have a Constitution ‘similar in principle to that of the United Kingdom.’ Of course, the anchor of the Constitution of the United Kingdom is the principle of parliamentary supremacy. That principle was also central to the Canadian Constitution for 115 years. Moreover, the courts adopted principles of interpretation which tended to respect the role and laws of government – e.g. the presumption of constitutionality, the principle of strict construction, the aspect doctrine and functional concurrency. Those principles are simply irrelevant in *Charter* litigation. Government lawyers now must expect to defend their laws on the merits. In so doing, they must be prepared to argue civil liberties doctrine at a sophisticated level and to articulate candidly and persuasively the policy factors underlying the challenged law. Moreover, in some aspects of the Charter analysis, there is a presumption against the government. For example, when a law has been found by a court to violate a *Charter* right, the onus shifts to the government to demonstrate that it should be saved as a ‘reasonable limit...’” See Hon. Justice JC Macpherson, “The Impact of the Canadian Charter of Rights and Freedoms on Executive and Judicial Behaviour” in Gavin W Anderson ed., *Rights & Democracy: Essays in UK-Canadian Constitutionalism* (London: Blackstone Press Limited, 1999) at 131-132.

the voice of the people expressed through their legislators.”⁵⁷² Justice Bates also held that to be reasonably justifiable, a restriction on a fundamental right must be necessary for the relevant purposes (as led down in the Constitution) and must not be excessive or out of proportion to the objects which it is sought to achieve; and that the presumption places the burden on the complaining party of showing that the law was not reasonably justifiable.⁵⁷³

As an initial concern, it might appear unhelpful dwelling too long on this judgment because it was delivered by a regional High Court and therefore of insignificant precedential value in Nigeria’s common law setting. Yet it is an important decision because had the structure it laid out been maintained by the Nigerian courts, there could have been better prospects for a more effective judicial approach to the enforcement of rights and conception of acceptable limitations to those rights in the country. It is observable that there are two parts to the court’s reasoning in the case above. On the one hand is the presumption of constitutionality of every law passed by parliament. On the other hand the judgment set forth a structure which it held applicable to every decision whether or not a particular law restricting constitutionally guaranteed rights is reasonably justifiable in a democratic society. I will proceed by examining the justification that has been offered for the presumption of constitutionality and later by showing why the court’s approach to reasonable justifiability held out a yet to be realized opportunity for expanded human rights protection.

The one justification offered for the presumption that the legislature always acts constitutionally is that law-making is a policy function and that elected representatives are better placed to decide matters of policy than an unelected judiciary. In other words this assertion relates back to the counter-majoritarian argument which was discussed extensively in the first chapter of this study. According to Roberts-Wray, the primary

⁵⁷² Roberts-Wray, *supra* note 565 at 924.

⁵⁷³ *Ibid.*

responsibility for governing the country rests with the legislature and the executive, and it is neither the function nor, one must assume, the wish of the judiciary to hinder or interfere more than necessary.⁵⁷⁴ He argues further that if the law imposes upon the courts the duty to review Acts passed and administrative action taken by virtue of discretionary powers, it should not make it incumbent on judges to substitute their own view of how the discretion should be exercised for the views of those primarily responsible, provided that what has been done is reasonably justifiable.⁵⁷⁵ He then set up the following scenario:

Let us suppose that a particular situation warrants legislative derogation from, say, the freedom of assembly and that it is generally agreed that one of two courses, A or B, will meet the case. Debate ensues as to which is the better; perhaps which is the more just or the more effective; possibly one is more rigorous than the other and the issue is whether it is essential in the circumstances. Parliament in its wisdom chooses course A. If the judges are of opinion that course A, though reasonably justifiable, was not really necessary because course B, or indeed an entirely different course C, would have met the situation, should it be within their province to say so and hold that the Act passed by the elected representatives of the people to give the force of law to course A is invalid? In my opinion the answer is “no” – with the probable exception for any qualification on the protection of life. They would be interfering unnecessarily in a matter of policy.⁵⁷⁶

Therefore, as in the case of *Cheranci v Cheranci*, the court in *Director of Public Prosecutions v Chike Obi*⁵⁷⁷ came to the conclusion that the mere fact that a law has been made with the approval of the legislature, representing the people, is sufficient to trigger judicial restraint. In furtherance of this restraint, the courts adopt a practice that has been variously characterized. Yusuf and Ogbu-Nwobodo call it a “plain fact” jurisprudential

⁵⁷⁴ *Ibid* at 922.

⁵⁷⁵ *Ibid*.

⁵⁷⁶ *Ibid*.

⁵⁷⁷ [1961] 1 All NLR (Pt 2) 186.

approach.⁵⁷⁸ Okere refers to it as literalism or mechanistic interpretation borne out of political expediency.⁵⁷⁹ Concerning the Nigerian Supreme Court, its approach to human rights adjudication has been described as austere and equally as discounting the normative force of the explicit language of the human rights guarantees of the Constitution.⁵⁸⁰ This writer, in particular, seemed to suggest that the court hardly considers the general or specific context or structure of the Bill of Rights.⁵⁸¹

This in part is traceable to the history of the court as well as the training and process of recruiting the judges. It is worth reiterating the total lack of a reasonable opportunity for Nigerian courts to develop a human rights adjudicatory philosophy suitable to her specific constitutional history. British practice, although in many respects divergent from the constitutional course Nigeria chose at independence, continues to lurk in the background to the courts' responsibilities like a dead hand from the past. Therefore, in those cases where human rights are engaged, Nwabueze observes how handicapped the judges are by their English education and the thereby acquired English law techniques that insulate them from the values and needs of their own people.⁵⁸² He asserts that:

Their [Judges'] minds have become imbued with ideas about the unquestionability of parliamentary legislation under English law and about the perfection and symmetry of the common law as to render them almost incapable of performing effectively the more creative role demanded of them by constitutional adjudication under a written constitution. They are unfamiliar with the constitutional decisions of courts in the U.S. and with the vast literature of American constitutional law, which have greater relevance to the problems that are presented to them than the English decisions which are their stock-in-trade.⁵⁸³

⁵⁷⁸ Yusuf, *supra* note 45 at 212; Samuel Ogbu-Nwobodo, "Pluralism in the Nigerian Constitutional Framework: A Comparative Study of United States of America and Republic of India" in Chima Centus Nweze, ed., *Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Christian Nwachukwu Okeke* (Lake Mary: Vandeplass Publishing, 2009) at 347.

⁵⁷⁹ Okere, *supra* note 154 at 803.

⁵⁸⁰ Ukhuegbe, *supra* note 333 at 349.

⁵⁸¹ *Ibid.*

⁵⁸² Ben O Nwabueze, *Judicialism in Commonwealth Africa: The Role of Courts in Government* (London: C Hurst, 1977).

⁵⁸³ *Ibid* at 311.

I now turn to my view that the decision in *Cheranci v Cheranci* if it had been consolidated upon by the courts could have made for a more robust and effective judicial protection of human rights in Nigeria. My position is informed by not only the fact that it is the first Nigerian court decision that offered the most expanded definition and explanation of “reasonably justifiable in a democratic society” but also because it clearly introduced the element of balancing and proportionality that is now the hallmark of acceptable reviews of laws and actions that restrict human rights. Surprising as it turns out that the judgment was written by an English judge, if continued, it would have been a departure from dependency on unhelpful English case-law and practice and the development of jurisprudential principles flowing directly from the very text of the Constitution.

There is a relationship between this failure to consolidate on the *Cheranci* decision and the persistence of what I had earlier identified as “plain factism” and “literalism” as the dominant method adopted by Nigerian courts in human rights cases. While not agreeing with the component of the decision which suggests that the limitation provision in the Constitution apparently places the burden on the individual challenging a law or executive action of proving that such law or action is not reasonably justifiable in a democratic society,⁵⁸⁴ if the decision in *Cheranci v Cheranci* had been built upon, it is unlikely such notion could have been formulated in the first place.

Proportionality analysis and the balancing of rights and interests usually proceeds in stages with specific questions asked at each stage. One of the major questions that is usually asked on the proportionality/balancing matrix is: what legitimate governmental objective is a particular restriction on a constitutionally guaranteed right serving? It would appear improper to place the burden of identifying the objective and justifying it

⁵⁸⁴ Okonkwor, *supra* note 156 at 263 where he argues that the words “nothing in this section shall invalidate any law...” seem to be tilted in favor of the derogatory law, which thereby shifts the onus to the challenging person to prove that the law is not reasonably justifiable.”

on the party challenging the restriction. The rationale for this position is simple: who better than the government to convince the court about what legitimate goal a challenged law or other governmental action is out to achieve and in the context of Nigeria how such law or action could be reasonably justified in a democratic society.

The failure to stand by the *Cheranci* formula has only led to a hazy and fragmented judicial landscape in which courts take positions without offering any coherent explanations for doing so. In the event, the legal problems are dealt with on a case-by-case basis often with the instant case benefitting little or nothing from previous ones by way of a structured process. Two cases illustrate this situation. In *Williams v Majekodunmi (No. 3)*,⁵⁸⁵ the plaintiff who happened to be a prominent lawyer challenged a restriction order placed on him by the government. While he argued that the order was not reasonably justifiable, the government argued otherwise. In its judgment, the Supreme Court held that nothing showed that the restriction order was reasonably justifiable. While interpreting the words “reasonably justifiable in a democratic society,” the court stated:

Those words...must be read in the context of the Constitution, and more particularly in the context of Chapter III in which they occur. The Chapter confers certain fundamental rights which are regarded as essential and which are to be maintained and preserved; and they are to serve as a norm of legislation under majority rule, which is the form or rule pervading the constitutions. If they are to be invaded at all, it must be only to the extent that is essential for the sake of some recognized public interest, and may not be farther.⁵⁸⁶

Quite surprisingly, in *Adegbenro v Attorney General of the Federation*,⁵⁸⁷ which arose from similar facts as the Williams’ case, the Supreme Court upheld the restriction order

⁵⁸⁵ [1962] 1 ALL NLR 413.

⁵⁸⁶ *Ibid* at 426.

⁵⁸⁷ [1962] 1 ALL NLR 431.

placed on the plaintiff which it held to be reasonably justifiable. The court in this case reasoned as follows:

It seems to me that there has in this case before us been shown to be ample grounds for the restriction placed on the movements of the plaintiff in the interest of peace and avoidance of bloodshed as deposed to by the defendant's witness. We have it before us that before the purported appointment of the Plaintiff there was a Premier of the Western Region who is alleged to have been removed from office; that as a result there were two factions in the party in power in that Region; that the plaintiff's attempt to hold a meeting of the House of Assembly...sparked off the disturbance which has led to the restriction order served on the Plaintiff; and finally, that the plaintiff desires to return to the duties of Premier of that Region. In my judgment the steps which have been taken are reasonably justifiable as a preventive measure to attain peace and order.⁵⁸⁸

I do not quite agree with the argument advanced elsewhere that the court was right to reach two contradictory judgments in two cases having similar facts, especially where what the author furnished by way of rationale was a couple of British authorities.⁵⁸⁹ While the distinct facts of both cases may have played a part in the position adopted by the court, the judgment, especially in the latter case, can be rightly questioned. In both cases the court appeared more desperate to justify the restriction than strike the balance between the restriction and the rights of the individuals concerned.

Even while ruling in favor of the challenger in the earlier case, the court did not develop any helpful standard that could have benefitted the latter litigation. To all intents and purposes, the court simply said that the restriction was not reasonably justifiable. A critic of the court's position could reach for the opposite point of view much in the same manner as the court. That is why justification is crucial. And it does not look likely that any such justification could be advanced without at least attempting some balancing activity. It is such balancing process that leads to the development of a structure and therefore a standard. Thus, absent any clear structure from which justification could be

⁵⁸⁸ *Ibid* at 439.

⁵⁸⁹ Kaniye S A Ebeku, "Constitutional Guarantee of Personal Liberty and Preventive Detention in Nigerian Law" (1995) 7 Afr J Int'l & Comp L 620 at 637.

deduced in logical fashion, it was not quite surprising that the court in the second case reached for the opposite extreme than in the earlier case.

Karibi-Whyte, a retired Judge of the Nigerian Supreme Court offers what would seem to be an insider's explanation for the ambivalent posture of the court. He states:

In coming to these decisions the ordinary rules of construction of statutes were applied. The provisions construed were regarded as indeed they were, ordinary statutes of the imperial Parliament or the local legislature as the case may be. No special emphasis was laid on the fact that the liberty of the citizen was involved and that in such cases any benefit of doubt in a decision between the executive and the citizen should be given to the citizen. The court in construing the provisions of such statutes should in all cases lean towards the liberty of the subject but careful not going beyond the natural construction of the statute. The question that was being asked in all cases was what Parliament meant by the words used? It did not appear that there was at any time any anxiety to safeguard the liberty of the subject.⁵⁹⁰

This is significant indication that a balancing scheme is not in place. This is the major characteristic which differentiates how Nigerian courts approach human rights and the practices of the other jurisdictions analyzed in this study. I have shown how American balancing looks generally similar to proportionality analysis that is a feature of both British and South African constitutional culture of the times. In those jurisdictions, the courts have developed standards of analysis that could guide any court faced with a human rights case no matter the nature of the right involved. In all of them the questions asked at each stage of the analysis resemble themselves. It is, however, difficult to point to similar standards in the practices of Nigerian courts. This has telling consequences for uniformity in court culture as well as with the objectivity of decisions rendered. It has to be clear that the approach of the courts is uniform otherwise precedent would be of

⁵⁹⁰ Adolphus G Karibi-Whyte, *The Relevance of the Judiciary in the Polity – in Historical Perspective* (Lagos: Nigerian Institute of Advanced Legal Studies, 1987) at 58-59. The Nigerian practice parallels to a great extent what, in the context of South Africa has been described as “outcome-based decision-making [lacking] analytical rigor.” See Stu Woolman, “The Amazing, Vanishing Bill of Rights” (2007) 124 S Afr L J 762; Tshepo Madlingozi, “The Constitutional Court, Court Watchers and the Commons: A Reply to Professor Michelman on Constitutional Dialogue, ‘Interpretive Charity’ and the Citizenry as *Sangomas*” (2008) 1 Const Ct Rev 63 at 67.

minimal benefit and there will be increased chances of courts faced with similar facts reaching contradictory decisions as we have seen above.

4.9. Why Nigeria Needs the Proportionality Standard

Given the points I have made in the earlier sections, it seems the Nigerian judiciary cannot much more run away from a proportionality-based system of constitutional rights review. Not only is this imperative because the constitutional provision that governs the limitation of human rights in Nigeria warrants doing so, but also because the system has many inherent advantages which makes it the analytical procedure more widely adopted by constitutional regimes across the world in contemporary times.⁵⁹¹ It is used by among several other jurisdictions the European Court of Human Rights,⁵⁹² the United Kingdom,⁵⁹³ South Africa,⁵⁹⁴ India,⁵⁹⁵ South Korea,⁵⁹⁶ Germany,⁵⁹⁷ Canada,⁵⁹⁸ New Zealand,⁵⁹⁹ and Brazil.⁶⁰⁰ It could be seen that the proportionality principle does not

⁵⁹¹ See for example Stone Sweet & Matthews, *supra* note 181; David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 159; Stephen Gardbaum, “Limiting Constitutional Rights” (2007) 54 UCLA L Rev 789; David S Law, “Generic Constitutional Law” (2005) 89 Minn L Rev 652; Francis G Jacobs, “Recent Developments in the Principle of Proportionality in European Community Law” in *The Principle of Proportionality in the Laws of Europe* Evelyn Ellis ed., (Oxford: Hart Publishing, 1999) at 1.

⁵⁹² Cohen-Eliya & Porat, *supra* note 522.

⁵⁹³ Julian Rivers, “Proportionality and Variable Intensity of Review” (2006) 65 Cambridge L J 174; Margit Cohn, “Legal Transplant Chronicles: The Evolution of Substantive Review of the Administration in the United Kingdom” (2010) 58 Am J Comp L 583.

⁵⁹⁴ *S v Zuma & Others*, [1995] (2) SA 642; Richard Goldstone, “The South African Bill of Rights” (1997) 32 Tex Int’l L J 451.

⁵⁹⁵ *SR Bommai v Union of India*, [1994] 2 SCR 644; Gary Jeffrey Jacobson, “*Bommai* and the Judicial Power: A View from the United States” (2008) Indian J Const L 38.

⁵⁹⁶ Kyung S Park, “Korean Principle of Proportionality, American Multi-leveled Scrutiny, and Empiricist Elements in U.S. – Korean Constitutional Jurisprudence” (2001) 1 J Korean L 105.

⁵⁹⁷ Susanne Baer, “Equality: The Jurisprudence of the German Constitutional Court” (1998) 5 Colum J Eur L 249; T Jeremy Gunn, “Deconstructing Proportionality in Limitations Analysis” (2005) 19 Emory Int’l L Rev 465.

⁵⁹⁸ *R v Oakes*, [1986] 1 SCR 103; see also Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence” (2007) 57 UTLJ 383; Sujit Choudhry, “So what is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*’s Section 1” (2006) 34 Sup Ct L Rev (2d) 501; Lorraine Weinrib, “Canada’s Charter of Rights: Paradigm Lost?” (2002) 6 Rev Const Stud 119.

⁵⁹⁹ *Ministry of Transport v Noort*, [1992] 3 NZLR 260; Jan Stemplewitz, “Section 6 of the Bill of Rights Act 1990: A Case for Parliamentary Responsibility for Human Rights Protection” (2002) VUWL Rev 14.

⁶⁰⁰ Alonso Reis Freire, “Evolution of Constitutional Interpretation in Brazil and the Employment of Balancing ‘Method’ by Brazilian Supreme Court in Judicial Review” online:

discriminate in terms of the legal systems to which it could apply. This conclusion is justified given that the above mentioned countries comprise common law as well as the civil law jurisdictions. The proportionality principle has also been shown to be useful not only in the domestic legal arena but as well in the judicial activities of transnational courts and institutions.⁶⁰¹

Furthermore, it applies equally to countries whose constitutional traditions allow the courts to discover the limitations of rights through practice and experience as for example the United States⁶⁰² and United Kingdom in contrast to other jurisdictions like South Africa and India where the constitutions prescribe the range of permissible limitations to constitutionally enshrined human rights. Therefore, were Nigeria to adopt the proportionality standard, it would be for the simple reason that it offers a more consistent mechanism for justifying governmental abridgment of human rights and also because it is being embraced by large numbers of states and Nigeria would not be doing anything extraordinary in looking that direction as well.

The adoption of a proportionality mechanism by Nigerian courts would also obviously free the courts from the rules-against-principles difficulty that Alexy identified.

<<http://www.enelsyn.gr/papers/w15/Paper%20by%20Prof%20Alonso%20Reis%20Freire.pdf>>; Vlad Perju, "Proportionality and Freedom: An Essay on Method in Constitutional Law" Boston College Law School Paper Series, 7-1-2011 online: <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1363&context=lsfp&sei-redir=1&referer=http%3A%2F%2Fscholar.google.ca%2Fscholar%3Fstart%3D20%26q%3Dproportionality%2Banalysis%2Bin%2Bbrazil%2Bconstitutional%2Blaw%26hl%3Den%26as_sdt%3D0%2C5#search=%22proportionality%20analysis%20brazil%20constitutional%20law%22>.

⁶⁰¹ Axel Desmedt, "Proportionality in WTO Law" (2001) 4 J Int'l Econ L 441; Carol Harlow, "Global Administrative Law: The Quest for Principles and Values" (2006) 17 Eur J Int'l L 187; Benedict Kingsbury, "The Administrative Law Frontier in Global Governance" (2005) 99 Am Soc'y Int'l L Proc 143.

⁶⁰² Although balancing and proportionality are sometimes viewed as distinct standards, some scholars see the difference between them as that between six and half a dozen. See for example Gregoire CN Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23 Can J L & Juris 179 (To claim that constitutional law has entered the age of balancing – that it embraces discourse and practice of balancing – is no exaggeration. Indeed, constitutional law is now firmly settled in this age: for example the Canadian scholar David Beatty maintains that proportionality is an 'essential, unavoidable part of every constitutional text' and 'a universal criterion of constitutionality'; German scholar Robert Alexy, for his part, maintains that balancing 'is ubiquitous in law' and that, in the case of constitutional rights, balancing is unavoidable because 'there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right').

With a balancing regime in place, there will be less reliance by the courts on traditional constitutional canons of interpretation that Nigerian courts have hitherto used but which have in no way deepened the understanding and enforcement of rights in the country. Such practices would also have significance for uniformity in judicial approach to the construction of rights and certainty in the outcomes achievable. Moreover, a proportionality-based system of rights review seems more impartial and neutral⁶⁰³ than the current standard-free mechanism that Nigerian courts operate. It offers a more coherent justification of court judgments because there would have been opportunity in the balancing process to weigh all the values implicated rather than just reach a decision in capricious fashion.

Acting in that manner has consequences for the courts and the judge as Wechsler expertly articulated it several decades ago.⁶⁰⁴ He was of the view that both the judges who decide human rights cases and non-judges who criticize their judgments are under obligation to indicate the standards by which they arrive at their choices and positions. Wechsler's position bears being reproduced extensively:

If courts cannot escape the duty of deciding whether actions of the other branches of the government are consistent with the Constitution, when a case is properly before them in the sense I have attempted to describe, you will not doubt the relevancy and importance of demanding what, if any, are the standards to be followed in interpretation. Are there, indeed, any criteria that both the Supreme Court and those who undertake to praise or to condemn its judgments are morally and intellectually obligated to support? Whatever you may think to be the answer, surely you agree with

⁶⁰³*Ibid* at 188. This author also underscores one of the major contentions of proportionality proponents: that the system “attempts to depoliticize rights by purporting to turn the moral and political evaluations involved in delimiting a right into technical questions of weight and balance” though he questions the contention when arguing that “the attempt to evade the political and moral questions inherent in the process of rights reasoning is futile [because] identifying the interests that are to count and determining their weight cannot proceed apolitically and amorally.” See also Stavros Tsakyrakis, “Proportionality: An Assault on Human Rights?” (2009) 7 Int'l J Const L 468 at 469. Here, the author stated that “balancing, in the form of proportionality, is nothing but a manifestation of the perennial quest to invest adjudication with precision and objectivity.” Further, Aharon Barak, “Proportionality and Principled Balancing” (2010) 4 Law & Ethics Hum Rts 1; Michael Taggart, “Proportionality, Deference, *Wednesbury*” (2008) New Zealand L Rev 423; Paul P Craig, “Proportionality, Rationality and Review” (2010) New Zealand L Rev 265.

⁶⁰⁴ Herbert Wechsler, “Toward Neutral Principles of Constitutional Law” (1959) 73 Harv L Rev 1.

me that I am right to state the question as the same one for the Court as for its critics. An attack upon a judgment involves an assertion that a court should have decided otherwise than as it did. Is it not clear that the validity of an assertion of this kind depends upon assigning reasons that should have prevailed with the tribunal; and that any other reasons are irrelevant? That is, of course, not only true of a critique of a decision of the courts; it applies whenever a determination is in question, a determination that it is essential to make either way.⁶⁰⁵

Wechsler did not end it there, though. He said a judge's decision should not "turn on the immediate result"⁶⁰⁶ because that would then imply that "the courts are free to function as a naked power organ, that it is an empty affirmation to regard them...as courts of law."⁶⁰⁷ This only leads to what he therefore describes as "*ad hoc* evaluation" [of the kind that I think Nigerian courts are guilty] which he recognizes as posing the deepest problem of American constitutionalism "not only with respect to judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics."⁶⁰⁸

In spite of its global appeal though, proportionality analysis is often criticized as well. Among these criticisms is lack of clarity as to "what is weighed (interests, principles, rights, considerations); how it is weighted (with what metric); and who is doing – or should do – the balancing (judges or legislators)".⁶⁰⁹ It has also been argued that the goal of human rights is to protect certain individual fundamental interests from arbitrary state power but also from collective interests.⁶¹⁰ This follows that any document for the protection of human rights already gives priority to rights. This, it is further argued, already reflects a balance, the outcome of which must be that human rights are to

⁶⁰⁵ *Ibid* at 10-11.

⁶⁰⁶ *Ibid* at 12.

⁶⁰⁷ *Ibid*.

⁶⁰⁸ *Ibid*.

⁶⁰⁹ Tsakyrakis, *supra* note 602 at 470; see also Timothy Endicott, "Proportionality and Incommensurability" University of Oxford Legal Research Paper Series No 40, 2012 online:

⁶¹⁰ *Ibid* at 475.

be protected before other interests are even taken into consideration.⁶¹¹ “If that is so, what does it mean to say that the issue is to strike a further balance between the general interest of the community and individual rights?”⁶¹²

Significant as this question is, it ignores a very important fact with which comparative constitutional rights enforcement is grappling. The understanding of the value of rights in a constitutional system is not uniform across all jurisdictions. While in some jurisdictions it is taken for granted that rights would always prevail over governmental and collective interests; and that the individual deserves protection from the invasive activities of these social actors, in other jurisdictions, like Nigeria, the reverse tends to be the case. Not only are individual rights more often than not subordinated to governmental and collective interests, in fact it often is the case that some in society believe that it is the government that should be protected from the individual in spite of its awesome powers. Societies like this cannot run away from the imperative of balancing and proportionality because the level of tension between the interests involved suggest no better or more appropriate means of resolving of them.

4.9.1. Human Rights and Constitutional Exegesis

Given the above background it is equally important to develop a relationship between the status of a constitution within a country’s legal system, the interpretative approach adopted by the courts in construing its provisions and the possibility that the constitution, even if containing a Bill of Rights, may not be effectively utilized to advance those rights. Karibi-Whyte above states the obvious with reference to Nigeria. Nigerian courts generally interpret the Constitution like they do ordinary statutes and other legal instruments. They pay very close attention to the ordinary meaning of the words used and apply those ordinary meanings even where doing so would negatively engage fundamental rights enshrined in the Constitution. In *Victor Ndoma-Egba v Chukwuogor*

⁶¹¹ *Ibid* at 476.

⁶¹² *Ibid*.

& *Ors.*,⁶¹³ the Nigerian Supreme Court spoke in glowing terms about the literal rule of interpretation, describing it as the “golden meter wand” of interpretation when the words used in a statute are plain and unambiguous. The court went further to assert that

It requires that such words should be given their ordinary plain meaning. In such circumstance, it is not permissible for the courts to refrain from the meaning of such plain words even though it gives unreasonable or unfair result, by going outside what the words themselves actually convey, in attempt to consider what other things they ought to be capable of meaning.

What is, however, troubling about the Nigerian judiciary and an issue to which I keep returning to every now and then is that the Supreme Court shows its ambivalence above by contradicting an earlier position on its approach to interpreting the constitution. In the earlier case of *Nafiu Rabiu v The State*,⁶¹⁴ it held that:

[...] the function of the Constitution is to establish a framework and principles of government, broad and general in the terms intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic, society, and therefore mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution... It is my view that the approach of this court to the construction of the Constitution should be and so it has been one of liberalism... I do not conceive it to be the duty of this court so as to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve...⁶¹⁵

So on the one hand the Nigerian Supreme Court valorized the literal interpretation of constitutional texts in the first case while on the other hand favoring a liberal meaning to

⁶¹³ [2004] 6 NWLR (Pt 869) 382 [Ng Sup Ct].

⁶¹⁴ [1981] 2 NCLR 293 at 326; MA Ajomo *Human Rights and the Administration of Criminal Justice in Nigeria* (Lagos: Nigerian Institute of Advanced Legal Studies, 1991); Sunday Edeko, “The Legality of the Constitution versus the Dictates of Military Power in a State of Revolution” (2011) 1 *Sacha J Pol’y & Strategic Stud* 137 at 147.

⁶¹⁵ See also, *Bronik Motors Ltd v WEMA Bank*, [1983] 6 Sup Ct 158. In that case the Supreme Court held that “a Constitutional instrument should not necessarily be construed in a manner and according to rules which apply to Acts of Parliament. Although the manner of interpretation of a Constitutional instrument should give effect to the language used, recognition should be given to the character and origins of the instrument. Such an instrument should be treated as *sui generis* calling for principles of interpretation of its own suitable to its character...”

the text in the second. There is no indication as to what “liberal” in the second case stands for or which tendency trumps the other in the practices of the court, at least from the court’s perspective. It is also unclear whether “liberal” is necessarily progressive. There is, however, little doubt that the court favors the more literal interpretative model. This allows the court to avoid involvement in politically volatile cases because it could then explain its decision away as having been constrained by the words used in the Constitution. In other words the court hangs on to a formalistic and orthodox view of its function as discussed in Chapter 1. Additionally, the court could explain such decisions in terms of deference to representative decision-making bodies, in other words eschewing any role in the formulation of governmental policy. This attitude flies in the face of what is more widely acknowledged which is that when courts are given constitutional powers to review the policy choices of the other arms of government, this makes them less of a disinterested institution for applying the law and more of a formidable political player.⁶¹⁶

But the Constitution is not like any other statute. To favor literalism against the background of a transition from authoritarianism while at the same time purporting a commitment to a new order would not allow the courts the kind of responsiveness essential to curtailing impunity at the transition’s immediate aftermath and even into the future. There is clear engagement here with the ideology which informs constitutional interpretation because if the constitution is interpreted merely as any other statute would, the tendency for it to enhance the protection of human rights would be minimized. In this respect, Udombana’s very relevant and effectual comment on the judicial approach to the enforcement of human rights warrants detailing. According to him:

Constitutional rights must be interpreted in such a way that they trump governmental interests, for the simple reason that human rights protect not only the individual in a democracy but democracy itself. A constitutional court must not be very positivistic or legalistic in its attitude, but must go to the spirit of the law in the defence of human rights and human beings.

⁶¹⁶Samuel Issacharoff, “Judging Politics: The Elusive Quest for Judicial Review of Political Fairness” (1992-1993) 71 *Tex L Rev* 1643; Martin Shapiro, “The New Constitutional Politics of Europe” (1994) 26 *Comp Pol Stud* 397; Paul R Brace & Melinda Gann Hall, “The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice” (1997) 59 *J Pol* 1206.

Although a court should seek logical consistency and the symmetry of the legal structure and should not lightly sacrifice certainty, uniformity, order and coherence on the altar of judicial dexterity, it is incorrect to assert that judges can extract the meaning of constitutional provisions from legal materials alone. Human rights are not merely legal rights; they are also moral rights, and moral decisions do not admit of mathematical certainty. A constitutional court may be, in the words of Hans Kelsen, ‘a negative legislator,’⁶¹⁷ but it is a legislator nonetheless and it must look for openings and create jurisprudence – through a creative interpretation of constitutional rights.⁶¹⁸

Even though this research has only limited connection to constitutional theory or theories of constitutional interpretation as such, because of the insight which an inquiry along that line provides for a better understanding of the issues at hand, I will dwell a little on it here. This is especially necessary because of the benefits of making a comparison between Nigeria’s practices with those of other jurisdictions. Two questions arise from any attempt to theorize constitutional interpretation. The first question is the ideology that dominates the attitude of judges to all cases coming before them whether they are constitutional or not. The second is the approach that the judges adopt in adjudicating constitutional questions *per se*.

I addressed the first question in Chapter 1 as a general concern in dealing with all adjudicatory problems whether or not they arise within a constitutional context. I do not intend to repeat the points I stated then. That leaves us with the second question. In treating it, I should point out that how judges approach the interpretation of constitutional texts would depend to a large extent on their understanding of the constitution as a document and its position on the normative hierarchy of a given legal system. A process or interpretivist theorist would view the text of the constitution as given and settled,

⁶¹⁷ See Kelsen, *supra* note 462 (“To annul a law is to assert a general [legislative] norm, because the annulment of a law has the same character as its elaboration—only with a negative sign attached. . . . A tribunal which has the power to annul a law is, as a result, an organ of legislative power. But if constitutional judges make law, they do not do so freely, since the judges’ decision-making is ‘absolutely determined by the constitution’. A constitutional court is therefore only ‘a negative legislator.’)

⁶¹⁸ Nsongurua Udombana, “Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies” (2005) 5 Afr Hum Rts J 47 at 57.

requiring only passive enforcement.⁶¹⁹ The alternative viewpoint belongs to substantive or non-interpretivist theorists who believe that the constitution contains some abstract moral principles which a judge is obliged to interpret as containing substantive moral rights. Proponents of the latter persuasion enjoin judges to understand their role in constitutional interpretation as including shaping its text to fit prevailing social conditions.

As Aharon Barak formerly of the Israeli Supreme Court notes, judicial interpretation is more than filling in a gap; it gives meaning to the text. He says that all interpretative systems struggle with generalizations and limitations of language. The different systems must, however, resolve the relationship between the text and context and between the written word (*verba*) and its spirit (*vountas*).⁶²⁰ He adds that the Constitution is a unique legal document and its uniqueness must inform how it is interpreted. He concludes by asserting that

One should take both the subjective and objective elements into account when determining the purpose of the Constitution. The original intent of the framers at the time of drafting is important. One cannot understand the present without understanding the past... The intent of the constitutional authors, however, exists alongside the fundamental views and values of modern society at the time of interpretation.⁶²¹

⁶¹⁹ Ely, *supra* note 141 at 1 where he describes interpretativism as “indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution...” See also SK Asare, “Accounting for Judiciary Performance in an Emerging Democracy: Lessons from Ghana” (2006) 4 Botswana L J 57 at 69. The author contends: “Courts can take a narrow formalistic view of fundamental rights and constitutional principles, often by starting and ending their analysis with the dictionary meaning of words. This approach tends to burden fundamental rights by shifting the burden of persuasion to the one alleging a violation of rights as long as the government establishes that its conduct does not offend the constitutional or legislative words. Au contraire, courts who take a broad purposeful view of fundamental rights consider any infringement of fundamental rights with heightened suspicion and will put the onus on the government to justify the alleged violation. The broad purposeful approach also starts the analysis with the dictionary meaning of words but resorts to distilling and upholding the underlying values that the law seeks to protect. In any conflict between law and justice, the mechanistic approach upholds the law and sacrifices justice while the broad purposeful approach puts the pursuit of justice above the law.”

⁶²⁰ Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2008) at 123.

⁶²¹ *Ibid* at 129.

It is not open to contest that when the constitution is placed on its proper pedestal within the legal system, it will be better suited to achieve its goals including the goal of being a catalyst for the effective protection of human rights.

Chapter Five

Nigeria's Contemporary Constitutional and Human Rights Architecture

5.1. Introduction

In this chapter I will discuss normative and doctrinal foundations for human rights litigation and adjudication in Nigeria. I will first detail the major sources of the human rights norms applied in Nigerian courts. As a significant component of this analysis as well, I will show how domestic norms interact with international norms. This concern in particular would respond to one of the sub-questions raised in the overall research, that is, whether the fact that human rights norms come from plural sources necessarily hinders the adjudication of human rights cases.

I will also be providing an extensive insight into how Nigerian courts interpret the country's obligation to uphold international human rights norms. In addition, an analysis of Nigeria's court structure will be undertaken especially in relation to the question of the category of courts with jurisdiction to resolve human rights cases. Apart from the already stated purpose for this line of inquiry, it also will show the 1999 constitution as the foundation upon which rests normative and procedural human rights questions in Nigeria. Along this specific line, I will look briefly at other forms in which human rights questions could be presented in court such as constitutional reference. Doctrinally, my analyses would look at concepts and practices developed by the superior courts to give effect to norms.

In terms of the norms, the 1999 constitution identifies the various rights which if they are violated could lead to a legitimate legal claim for redress as well as the procedure for pursuing such claims. Looking at the constitution, it is plain what rights are protected and when the violation of those rights could entitle a victim to redress. There is

also provision as to the procedure the said victim could adopt for presenting such a claim in court.

While the constitutional dimensions of these rights appear settled at first brush and seem to suggest that the constitution alone is the repository of human rights norms, this happens not to be the case upon closer observation. Granted that the constitution asserts supremacy over several issues, including those related to human rights, it allows sufficient room for an externalization of its norm creating and generating capacity. The constitution recognizes, for instance, that Nigeria operates in a globalized context and that the country is not a self-sufficient island whose circumstances permit no external influences. A substantial part of the analyses in this chapter will therefore examine those external sources that contribute to the generation of human rights norms. I will also discuss the level of interaction between constitutional norms and those generated externally.

Similarly, Nigeria's federal structure presupposes a plurality of norm-generating tiers of the political government. Like the external contributors to the generation of human rights norms, the other levels of government in Nigeria's federal framework, of which the state governments are the clearest examples, also generate at their levels norms that have implications for human rights enforcement.⁶²² In the latter parts of this chapter I will provide examples of such state laws that contribute to the production of human rights norms. The analyses that follow will also include a critical examination of the relationship between the constitution and these other human rights norm generating sources. I will in addition identify areas of tension where they exist among the various norm-generating sources as well as the strengths and weaknesses of the constitution in mediating those tensions.

⁶²² For an analysis of the relationship between federalism and human rights practices see Paul Chen, "Federalism and Rights: A Neglected Relationship" (1999) 40 S Tex L Rev 846; G Alan Tarr, "The Past and Future of the New Judicial Federalism" (1994) 24 *Publius* 63; Ellis Katz & G Alan Tarr, "Introduction" in Ellis Katz & G Alan Tarr, eds., *Federalism and Rights* (Lanham, Md: Rowman & Littlefield, 1996).

5.2. The Constitution as Source of Human Rights Norms

The Nigerian constitution of 1999 is the primary source of all human rights norms in the country. But it is by no means the only source for the generation of human rights norms. What is true of the 1999 constitution in this regard is also true of all previous constitutions that the country had operated starting with the 1960 Independence Constitution. Chapter IV of the 1999 constitution⁶²³ comprising sections 33 to 46 guarantees specific human rights and freedoms, identifies the courts with jurisdiction over human rights cases, stipulates who may present a complaint of human rights violation, and provides for the manner in which rules of procedure for the enforcement of human rights are to be made. The constitution as a human rights norm-creating source stands on a distinct pedestal compared to other sources. Its Supremacy Clause⁶²⁴ leaves no room for doubt about its pre-eminent position in comparison to other norm-generating sources. In addition, all human rights claims must be rooted in the constitution as every single claim of violation must directly relate to a right specifically protected under the constitution.⁶²⁵

The last claim may seem controversial when viewed in relation to norms from other sources that may not necessarily have constitutional recognition. In this sense, the example that quickly emerges is with regards to social and economic rights which under the Nigerian constitution could be said not to be justiciable (at least not in the same sense as civil and political rights) but are guaranteed under international law in somewhat similar terms as the latter set of rights.⁶²⁶ The question of justiciability of social and economic rights under domestic law is a hotly debated one and will be given a separate analytical treatment in the course of this study. Without prejudice to the result of the

⁶²³ Comprising sections 33 – 46.

⁶²⁴§ 1(3).

⁶²⁵§ 46(1).

⁶²⁶Edwin Egede, “Human Rights and the Environment: Is there a legally enforceable Right of a Clean and Healthy Environment for the ‘Peoples’ of the Niger Delta under the Framework of the 1999 Constitution of the Federal Republic of Nigeria?” (2007) 19 Sri Lanka J Int’l L 51 at 65; Obiajulu Nnamuchi, “Kleptocracy and its many Faces: The Challenges of Justiciability of the Right to Healthcare in Nigeria” (2008) 52 J Afr L 42.

proposed analysis, that this challenge is possible would seem to imply that when human rights norms grow from a plurality of sources there might be collateral consequences for effective enforcement.⁶²⁷

It is important to also stress that some of the well-known common law prerogative remedies in existence before specific human rights became constitutionalized in Nigeria have some common characteristics with some human rights norms. Such remedies include *habeas corpus*, *mandamus*, *certiorari* and prohibition. One could be tempted to ascribe normative qualities to these remedies. But in reality most of their elements are more procedural than normative. For example, *habeas corpus*, has become integrated as a remedy into the human rights mechanism but only in terms of facilitating the realization of the right to personal liberty.⁶²⁸ The normative/procedural divide is arguably also applicable to *certiorari*, *mandamus* or prohibition.⁶²⁹

With respect to *certiorari*, it seems to correspond substantially with some aspects of other specific human rights norms. For example, some components of a claim based on *certiorari* are very difficult to distinguish from one to enforce the fundamental right to a fair hearing. Under Nigerian law, *certiorari* could be granted on the grounds that the rules

⁶²⁷See for example Rebecca Zahn, “Human Rights in the Plural Legal System of Nigeria” (2009-2010) 1 *Edinburg Student L Rev* 66 at 81; Iyabode Ogunniran, “The Child Rights Act versus Sharia Law in Nigeria: Issues, Challenges & a Way Forward” (2010) 30 *Child Legal Rts J* 62.

⁶²⁸ The Constitution does not use the terms *habeas corpus*. However, it is coupled to the protection of the right to personal liberty under section 35 of the Constitution. This is accomplished through the procedure for human rights enforcement prescribed by subsidiary legislation, in this case the Fundamental Rights (Enforcement Procedure) Rules 2009 issued by the Chief Justice of Nigeria under powers granted to him under section 46(3) of the Constitution. This is present in Order 4 Rule 3(iii) which authorizes a court before which an application to enforce a right is presented to, among other powers, order the production of such applicant before the court if the allegation is for unlawful detention. The court could also order the person detaining the applicant to release him/her from such detention.

⁶²⁹ OY Abdul, “Prerogative Remedies of *Certiorari* and Prohibition within the Nigerian Legal System” (2002) 1 *UDUS L J* 178. The author groups remedies that may be applied to redress human rights violations into three categories: Constitutional remedies available through a combination of Sections 42 and 46 of the 1999 constitution, ordinary private law remedies including damages, injunctions and declarations and the prerogative remedies of *certiorari*, prohibition and *mandamus*. While some of these remedies may provide only for procedure through which human rights claims could be carried out, others may have normative as well as procedural significance.

of natural justice had been breached by the court against which that remedy is invoked. The common law principle of natural justice with its twin elements – *audi alterem partem* and *nemo iudex in causa sua* – is therefore integral to the constitutional guarantee of the right to a fair hearing.⁶³⁰

The Nigerian Court of Appeal has held that an application for *certiorari* in fact is similar both in character and procedure to an application to enforce a fundamental human right, notably the right to fair hearing. In the court’s words, “An application for *certiorari* is similar to and has the same procedure with an application for the enforcement of fundamental rights under the Fundamental Rights (Enforcement Procedure) Rules.”⁶³¹ It is also in this sense that the claim to enforce some human rights implicates as well remedies that are available in the field of administrative law.⁶³² One could therefore argue that the components of certain rights constitutionally enshrined in Nigeria have common law origins. That being the case, the courts when faced with interpreting those rights or some components of them would most likely not depart from the treatment they had received at common law.⁶³³

5.3. International Law as a Source of Human Rights Norms

Nigeria as a member of the global community is among countries whose sovereignty and the power to create laws must coexist with the intrusion of international law. Since the end of the Second World War the Westphalian conception of international law⁶³⁴ has

⁶³⁰See PP Craig, *Administrative Law* (London: Sweet & Maxwell, 1989) at 199.

⁶³¹*National Electric Power Authority v Akinola Arobieke*, [2006] 7 NWLR 245 [Ng Ct App].

⁶³²Craig, *supra* note 630 at 381.

⁶³³*Sadau v The State*, [1968] 1 All NLR 124. This case turned on how the court should treat evidence that had been obtained illegally. The Nigerian Supreme Court, following an English authority on how the common law treated similar evidence held that if the evidence was relevant to the case it was admissible and it didn’t matter how it was obtained. This was obviously in clear subversion of the constitutional guarantee of everyone’s private life, home and correspondence. See also Pontian N Okoli & Chinedum I Umeche, “Attitude of Nigerian Courts to Illegally Obtained Evidence” (2011) 37 Commonwealth L Bull 81.

⁶³⁴A Claire Cutler, “Critical Reflections on the Westphalian Assumption of International Law and Organization: A Crisis of Legitimacy” (2001) 27 Rev Int’l Stud 133; David Kennedy, “A New Stream of

since given way to a system that permits more international influence on how different countries treated their citizens given that that war was started in part by how German authorities treated their own citizens. Beth Simmons underlines the profundity of the present assumption under international law that individuals have internationally protected rights that states are not at liberty to disregard in the name of sovereignty.⁶³⁵ Since the passage of the Universal Declaration of Human Rights and adoption of the complementary International Bill of Human Rights,⁶³⁶ the world has witnessed a proliferation of international human rights documents that bind those countries signing and ratifying them.

Nigeria is not left out in this process and is State party to several such international instruments generating several distinct human rights norms, including some that are as well enshrined in the Constitution.⁶³⁷ Among international human rights treaties that Nigeria has either signed or ratified are the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶³⁸ the International Covenant on Civil and Political Rights (ICCPR),⁶³⁹ the Convention against Torture,⁶⁴⁰ the International Convention on the Rights of the Child,⁶⁴¹ the International Convention on the Elimination of All Kinds of Discrimination against Women,⁶⁴² among several others. Some of the international agreements affirm norms already recognized under the domestic legal regime. A good example is the ICCPR which guarantees several rights also covered

International Law Scholarship” (1988) 7 Wis Int’l L J 14; Andreas Osiander, “Sovereignty, International Relations and the Westphalian Myth” (2001) 55 Int’l Org 251.

⁶³⁵ Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009) at 24.

⁶³⁶*International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) and the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁶³⁷ Edwin Egede, “Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria” (2007) 51 J Afr L 249.

⁶³⁸Ratified 29 July 1993.

⁶³⁹Ratified 29 July 1993.

⁶⁴⁰Signed 28 July 1988, ratified 28 June 2001.

⁶⁴¹Signed 26 June 1990, ratified 19 April 1991.

⁶⁴²Signed 23 April 1984, ratified 13 January 1985.

under the Nigerian constitution. Some of the agreements create new norms that domestic systems are then called upon to adopt. In Nigeria's case the International Covenant on the Rights of the Child will exemplify such agreements.

Apart from treaties signed or ratified by Nigeria at the level of the United Nations and its various bodies, the country has also bound itself to uphold human rights norms recognized under the African Charter on Human and Peoples Rights and its protocols.⁶⁴³ Through this Charter Africa was responding to its own obligations to ensure that human rights practices constrain state behavior across the continent as is the case in other sub-regions of the world. In doing this, the Charter took into account Africa's place in world affairs and especially its historical experiences. But with specific reference to this Charter, Nigeria did not just sign or ratify it but went further to domesticate its provisions.⁶⁴⁴ Later in this part of my research I will dwell more on this as well as show the place of the domesticated Charter on the architecture of human rights in Nigeria.

Suffice it to mention though that human rights norms generated locally, including through the constitution, and those obtained from external sources have different legal characteristics. International law as a human rights normative platform is often criticized especially for its non-self-executing nature in certain contexts. This is unlike domestic norms that are immediately applicable with further ceremony. For this reason, it appears, Simmons asserts that international human rights law "has raised expectations as well as overpromised; it has aspired to universality yet still reflects some of the hegemonic ideas of the most powerful actors in the world polity."⁶⁴⁵ Thus, international human rights law cannot much be removed from the broader context within which international law as a general field operates, including but not limited to questions often asked as to its

⁶⁴³*African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982)(entered into force 21 October 1986).

⁶⁴⁴*African Charter on Human and Peoples' Rights (Ratification and Enforcement) Procedure Act 1990*.

⁶⁴⁵ Simmons, *supra* note 635 at 23.

enforceability.⁶⁴⁶ In the opinion of some scholars, while international law could be a normative hatching machine for all they cared, this cannot mask the reality that the site for the struggle to enthrone human rights remains the domestic arena.⁶⁴⁷

Here, it is trite to pinpoint as emblematic of this viewpoint Jack Donnelly's often cited theory that the struggle for human rights will be won or lost at the national level.⁶⁴⁸ According to him,

Unless we [i.e. international human rights scholars] begin to study such struggles, we will neither understand the most important issues nor be able to make the most effective possible contribution to the realization of internationally recognized human rights⁶⁴⁹

As well, concerns surround the viability of some of the human rights norms generated at the international level, necessitating calls for some degree of quality control in the production of such norms.⁶⁵⁰ In terms of the procedure for their production, norms growing out of international law often face harsh scrutiny as well. International law, for all its popularity, is considered less suited to addressing domestic challenges the same way domestic laws are. It is argued that this is the case because international law is made

⁶⁴⁶ See Jack Goldsmith & Daryl Levinson, "Law for States: International Law, Constitutional Law, Public Law" (2009) 122 Harv L Rev 1791 at 1792 ("Measured against the benchmark of domestic law, international law seems different and deficient along each of these dimensions. International law has no centralized legislature or hierarchical court system authorized to create, revise, or specify the application of legal norms, and as a result is said to suffer from irremediable uncertainty and political contestation. Out of deference to state sovereignty, international law is a "voluntary" system that obligates only states that have consented to be bound, and thus generally lacks the power to impose obligations on states against their interests.")

⁶⁴⁷ *Ibid.*

⁶⁴⁸ Jack Donnelly, "Post Cold-War Reflections on the Study of International Human Rights" in Joel H Rosenthal ed, *Ethics and International Affairs: A Reader* (Washington DC: Georgetown University Press, 1995) 236 at 252. See also Obiora Chinedu Okafor & Shedrack Agbakwa, "On Legalism, Popular Agency and 'Voices of Suffering': The Nigerian National Human Rights Commission in Context" (2002) 24 Hum Rts Q 662 at 663.

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Philip Alston, "Conjuring up New Human Rights: A Proposal for Quality Control" (1984) 78 Am J Int'l L 607; Philip Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" (1982) 29 Neth Int'l L Rev 307.

outside the procedure stated for enacting domestic laws and also lacks input from domestic legislatures.⁶⁵¹ In addition, it has also been argued that it is appropriate to query a system that entrusts national law making powers to international institutions that are not directly accountable to the people, and further that “treaty making often takes place behind closed doors with little outside input.”⁶⁵²

There might be much recommending these criticisms especially with respect to international agreements that have not met the threshold number of ratifying states. But the criticisms could extend to agreements that have met that threshold and therefore are in force is a different concern. In many countries, especially those with the dualist method for the reception of international treaties, though the prerogative of entering into such treaties belongs to the executive, the legislature does play some role in facilitating the signing and ratification process. If this is the case, rather than a lack of input as it is argued above, the legislature actually performs some role in that process.

The criticism of international law is, however, mitigated by some positive evaluations of its helpful role in interpreting constitutional texts. There is a feeling that international law when applied in domestic adjudication, places the courts in more solid foundation both as an interpretative device and for the creation or conferment of substantive rights.⁶⁵³ This claim is instantiated when some constitutional provisions in Africa are considered. In certain African constitutions, the courts are enjoined to have recourse to international law in constitutional adjudication.⁶⁵⁴ Moreover, it is as well

⁶⁵¹ Richard Frimpong Opong, “Re-imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa (2007) 30 *Fordham Int’l L J* 296 at 340.

⁶⁵² *Ibid.*

⁶⁵³ *Ibid.*

⁶⁵⁴ For example section 39(1)(b) of the South African Constitution provides that “when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.” As well Article 9(4) of the Constitution of Ethiopia provides that “All international agreements ratified by Ethiopia are an integral part of the law of the land.” Preambular article 3(b) of the Nigerian Fundamental Rights (Enforcement Procedure) Rules of 2009 provides: “For the purpose of advancing but never for the purpose of restricting the applicant’s rights and freedoms, the Court shall respect municipal, regional and international bills of

significant that the interaction between international and domestic law has potential to inspire the reform of aspects of domestic law. Opong therefore states that an awareness of, and reliance on, international human rights law has in fact led to reforms in many aspects of African customary law. The patriarchal and communal tendencies of customary law are coming under attack from the egalitarian and individualistic teachings of human rights.⁶⁵⁵

But again, what is unclear here is the context for the use of the terms “egalitarian” and “individualistic” by the scholar. While he seems to suggest that both terms are mutually inclusive and reinforcing, it is hardly the case always that individualism is a prelude to egalitarianism. In fact I would argue differently. In my view excessive individualism could be an affront to egalitarian values. And there is not a better way of demonstrating this than by looking closely at the contestation between the belief in neo-liberal capitalism with the individual at its centerpiece and a social welfare consciousness that could be deployed to secure the well-being of a broader segment of any given society.⁶⁵⁶

While the above analysis covers international law expressed in the form of treaties binding on state parties to them, I cannot but also make reference to the increasing penetration of transnational law and governance and the emergence in particular of what is known as transnational human rights and as well global administrative law. The latter refers to:

The vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection,

rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions...”

⁶⁵⁵ See Opong, *supra* note 651 at 333.

⁶⁵⁶Some scholars actually associate laissez-faire capitalism with “limited government and economic individualism.” See Stanley Feldman & Marco Steenbergen, “The Humanitarian Foundation of Public Support for Social Welfare” (2001) 45 Am J Pol Sci 658 at 659.

banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees.⁶⁵⁷

Transnational administrative bodies not subject to the direct control of national governments, domestic legal systems or in the case of treaty based regimes, the state parties to the treaty, are now the vogue.⁶⁵⁸ Their regulatory decisions may be implementable directly against private parties by the global regime or, more commonly, through implementing measures at the national level.⁶⁵⁹ They produce norms of their own which may be favorable to human rights protection or subversive of them. Multinational corporations could fall within such category of regulatory actors. They participate in international law making and enforcement.⁶⁶⁰ By so doing, they contribute to the “inherent heterogeneity of modern partnerships in international law-making and international law adjudication.”⁶⁶¹ The role of multinationals also extend to the promotion of what is commonly referred to as “global public goods”⁶⁶² such as the protection of human rights and the environment as well as core labor and social standards.⁶⁶³

When all factors are carefully considered, it is undoubted that these regulatory regimes have become a part of the international legal system and like international law at the more general level confront the sovereignty of states as well as shape state behavior. Those regimes, as Slaughter declares, have rendered the state “out of fashion, or at least

⁶⁵⁷ Benedict Kingsbury, Nico Krisch & Richard Stewart, “The Emergence of Global Administrative Law” (2005) 68 *Law & Contemp Probs* 15 at 16.

⁶⁵⁸ *Ibid.* See also Natakani Yoshikazu, “State and Democracy Besieged by Globalization” (2010) 7 *Ritsumeikan L Rev* 1 at 4.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ Karsten Nowrot, “Reconceptualizing International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities” (2006) 80 *Philippines L J* 563.

⁶⁶¹ Pierre Marie Dupuy, “Proliferation of Actors” in Rudiger Wolfrum & Volker Roben eds., *Development of International Law in Treaty Making* (Berlin: Springer-Verlag, 2005) 537 at 541.

⁶⁶² Inge Kaul, Isabelle Grunberg & Marc Stern, “Defining Global Public Goods” in Inge Kaul et al eds., *Global Public Goods: International Cooperation in the 21st Century* (London: Oxford University Press, 1999). Peter Drahos, “The Regulation of Public Goods” (2004) 7 *J Int'l Econ L* 321.

⁶⁶³ Nowrot, *supra* note 660 at 564.

out of focus.”⁶⁶⁴ At a time of pervasive presence of non-governmental actors at the global level, she states that parts of the state have been conscripted, “from regional, provincial, and even local government to regulatory agencies, courts, and legislative committees, all interacting with their foreign counterparts in ways that challenge our very conception of the state.”⁶⁶⁵ The result is what she describes as government networks through which global rule of law norms are increasingly being constructed through transgovernmental legal relations, “primarily among courts and administrative agencies. National courts are participating in transgovernmental judicial networks to an even greater degree, both informally and through regional judicial organizations.”⁶⁶⁶

The transnational character of human rights is based on the understanding that human rights norms and processes are not simply statist. They are not unique to any one state or national legal system but could migrate globally in a web of shared values and physical or virtual interconnectedness. It falls within the rubric of what Epp calls the “rights explosion”⁶⁶⁷ which has become central to the phenomenon of globalization.⁶⁶⁸ Its core could be understood not only by looking at non-treaty based cooperation among states but also through the activities of multifarious transnational institutions that generate human rights norms. Even where such transnational institutions are established by states, the norms that they generate are not necessarily expressed in treaty form to

⁶⁶⁴ Anne-Marie Slaughter, “Breaking Out: The Proliferation of Actors in the International System” in Yves Dezalay & Bryant Garth eds, *Global Perspectives: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor: The University of Michigan Press, 2002) at 15. Yet other scholars believe that the view about the demise of the state as an international actor is certainly exaggerated. See Begona Aretxaga, “Maddening States” (2003) 32 *Annu Rev Anthropol* 393.

⁶⁶⁵ *Ibid.*, at 13

⁶⁶⁶ *Ibid.*, at 18. While she cites as an example the Organization of Supreme Courts of the Americas, I will point to a more informal arrangement involving the Commonwealth Secretariat which in 1988 led to a colloquium of Commonwealth Judges leading to the establishment of what became known as the Bangalore Principles on the Domestic Application of International Human Rights Norms and on Government under the Law online: <http://www.genderandtrade.org/shared_asp_files/uploadedfiles/%7BA2407AAC-A477-491D-ABA4-A2CADF227E2B%7D_BANGALORE%20PRINCIPLES.pdf>; see also Maria Rosaria Ferrarese, “When National Actors become Transnational: Transjudicial Dialogue between Democracy and Constitutionalism” (2009) 9 *Global Jurist* 1.

⁶⁶⁷ Epp, *supra* note 160.

⁶⁶⁸ Heinz Klug, “Transnational Human Rights: Exploring the Persistence and Globalization of Human Rights” (2005) 1 *Annu Rev Law Soc Sci* 85 at 87.

influence the behavior of those states. They could come in the form of what is known in current parlance as “soft law.”⁶⁶⁹

Referring specifically to Nigeria and how these transnational institutions affect her domestic practices, we have to look no farther than such mechanisms as the New Partnership for Africa’s Development,⁶⁷⁰ the Commonwealth of Nations⁶⁷¹ and certain principles adopted by organs of the Economic Community of West African State (ECOWAS).⁶⁷² In the case of ECOWAS especially, at least one of its mechanisms typifies the situation where a “framework” draws extensively from diverse sources for its normative constitution.⁶⁷³ It has established since 2001 the ECOWAS Community Court through its Protocol on the Community Court of Justice as well as the provisions of

⁶⁶⁹See Hartmut Hillgenberg, “A Fresh Look at Soft Law” (1999) 10 Eur J Int’l L 499.

⁶⁷⁰ Alex De Waal, “What’s New in the ‘New Partnership for Africa’s Development’?” (2002) 78 Int’l Affairs 463 at 464 (Describing NEPAD with its Peer Review Mechanism component at “both a ‘big idea’ and an umbrella for best practices” incorporating development partnership on the basis of good governance). Among major NEPAD documents is as well the “Declaration on Democracy, Political, Economic and Corporate Governance” which commits African governments “to promote and protect democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participative governance at the national and subnational levels.” See Prempeh at 486.

⁶⁷¹Kimberly Proust, “International Cooperation: A Commonwealth Perspective” (2003) 16 S Afr J Crim Just 295; Anne-Marie Slaughter, “A Global Community of Courts” (2003) 44 Harv Int’l L J 191; “Judicial Globalization” (2000) 40 Va J Int’l L 1103.

⁶⁷² Enyinna S Nwauche, “Regional Economic Communities and Human Rights in West Africa and the African Arabic Countries” in Anton Bosl & Joseph Diescho eds., *Human Rights in Africa: Legal Perspectives in their Protection* (Windhoek: Macmillan Education, 2009) at 319.

⁶⁷³ The ECOWAS Conflict Prevention Framework enacted 16 January 2008 draws heavily from such instruments as the 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, the 2001 Supplementary Protocol on Democracy and Good Governance, as well as the 2000 Constitutive Act of the African Union, and the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union. See Thelma Ekiyor, “ECOWAS Conflict Prevention Framework (ECPF): A New Approach to an Old Challenge” WACSI Op-ed (2008) online: <<http://www.wacsi.org/wacseries/785vc7691r2u3h68594OP-ED.pdf>>. See also Ademola Abass, “The New Collective Security Mechanism of ECOWAS: Innovations and Problems” (2000) 5 J Conflict & Sec L 211 (stating that the mechanism empowers ECOWAS to intervene in the internal conflicts of member states in situations of massive human rights violations or the breakdown of the rule of law).

Articles 6 and 15 of its revised treaty of 1993 which sets forth its jurisdiction and rights of access.⁶⁷⁴

5.4. Human Rights Norms from Municipal State Laws

I now turn to the non-constitutional sources for the generation of human rights norms in domestic context. Nigeria is a federation of 36 states and a Federal Capital Territory.⁶⁷⁵ In addition to the federal (central) and state governments, the Nigerian constitution also recognizes local governments. Law making power is shared among the three tiers of government; each has limits set on its competence to pass laws and regulations. The constitution itself allocates these law making powers. While the federal government makes laws covering the entire federation and the federal capital territory and over issues set forth in the exclusive legislative list, it also shares concurrent law making powers with the state governments over certain matters.⁶⁷⁶ Issues outside the exclusive and concurrent lists which are described as residual, belong to the states' legislative competence. In addition, the states are granted powers for the regulation of local government administration.⁶⁷⁷ Often, disagreements arise as to the proper dimensions of these legislative competencies and are adjudicated upon by the courts.⁶⁷⁸

Nigerian governments have come to recognize that human rights as an issue is too important to be left in the hands of the federal government alone. State governments in particular have also come to appreciate that notwithstanding the clear wordings of constitutional human rights guarantees, local legislative support is crucial to breathing

⁶⁷⁴ The Protocol establishing the Court was signed in Abuja, Nigeria on 6 July 1991 and entered into force on 5 November 1996. See Ani Comfort Chinyere, "Access to Justice in Nigerian Criminal and Civil Justice Systems" in Epiphany Azinge & Bolaji Owasanoye eds., *Rule of Law and Good Governance* (Lagos: Nigerian Institute of Advanced Legal Studies, 2009) 375 at 383.

⁶⁷⁵ s 2(2) and s 3(1).

⁶⁷⁶ s 4(4)(a), schedule 2, part II.

⁶⁷⁷ s 7(1), schedule 4.

⁶⁷⁸ See for example *Attorney General of Ondo State v Attorney General of the Federation and others*, [2002] 2 SC (Pt 1) 1 [Ng Sup Ct]; *Attorney General of Abia State v Attorney General of the Federation and others*, [2006] 7 NILR 1 [Ng Sup Ct]; *Attorney General of Lagos State v Attorney General of the Federation and others*, [2003] 6 SC (Pt 1) 24 [Ng Sup Ct].

life into those constitutional texts. As importantly on this point, state governments seem better placed to identify specific human rights concerns relevant to their peculiar contexts and therefore better suited to make laws to address them satisfactorily. It has therefore become common in Nigeria for state governments to pass laws aimed at redressing particular human rights problems. Several such laws were passed in various Nigerian states in the period covered by this research.⁶⁷⁹

Ordinarily, the human rights guarantees contained in the constitution seem broad enough to anticipate various kinds of human rights denials. The laws passed by the states therefore tend to support rather than supplant the constitutional provisions. But the major reason such state laws are necessary is because most of the concerns to which they are addressed are rooted in local customary practices and are often perpetrated by individuals or communities. What the states therefore do in such situations is to pass laws that reinforce constitutional provisions, absolve the state involved of complicity in the perpetuation of those abuses and hold those responsible accountable within the law.⁶⁸⁰

It is perhaps for the above reasons that state laws passed in this manner are generally composed in criminal terms. What this means is that those responsible for the perpetuation of those abuses identified in those laws are required to refrain from their behavior or face criminal sanctions should they persist. The state assumes responsibility for the prosecution of those persons for their breaches of that law. This is very different from the procedure adopted under the constitution for enforcing human rights which

⁶⁷⁹See for example the *Jigawa State of Nigeria Child Rights Act No 5 of 2007*; *Enugu State Prohibition of a Widow's and Widower's Fundamental Rights Law No 3, 2001*.

⁶⁸⁰ This is particularly significant given the controversial nature of the public/private division in human rights enforcement and the question whether or not human rights are horizontally enforceable as they are vertically. Even in jurisdictions that have accepted the "horizontal effect" of human rights norms, the language of each norm has to be carefully scrutinized before a definitive position could be taken that it could apply horizontally or not. For exploration of the debate and competing viewpoints on it see generally John H Knox, "Horizontal Human Rights Law" (2008) 102 *Am J Int'l L* 1; Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights" (2003-2004) 102 *Mich L Rev* 387; Gavin Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?" (1999) 62 *Mod L Rev* 824; Richard S Kay, "The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law" (1993) 10 *Const Comment* 329.

rather entitles victims of human rights abuses to launch civil litigation to redress the violation committed against them. It could therefore be seen from the above that rather than *norm creation* in strict terms, the state governments referred to are (in general) only engaged in what I would rather refer to as *norm reinforcement*. They are generating no new human rights norms but are only exploiting norms already in existence to expand the safeguards available to victims and would-be victims of specific human rights practices.

I will examine as specific practical illustration the Enugu State Law No. 3 of 2001 known as “The Prohibition of Infringement of a Widow’s and Widower’s Fundamental Rights Law.”⁶⁸¹ This law was passed by the Enugu State House of Assembly on March 8, 2001 and describes itself as “A Law to make it unlawful to infringe the fundamental rights of widows and widowers, and for other related matters.” By way of background, it is very well known in those parts of Nigeria where Enugu State is situated that widows and widowers are compelled by custom to carry out what are called widowhood rites. Such rites could include shaving the hair, being made to sleep alone with the dead body of a spouse, being compelled to re-marry a relative of the dead spouse and being forced to drink water used in washing the corpse of the dead spouse, etc.

The Enugu state law therefore came into force to prohibit and criminalize these practices and more. In its recital, the law recognized that the fundamental right to life is entrenched in the Nigerian constitution as well as the rights to dignity of the person, personal liberty and the freedom of association and assembly. Having this in mind, therefore, the law provides that “Anybody who contravenes, conspires, aids, counsels, procures, assists another person to contravene the provisions of sections 4 and 5 of this Law shall be guilty of an offence and liable on conviction to a fine of N5, 000.00 (Five Thousand Naira [US\$33.3]) or two years imprisonment or both.”

⁶⁸¹ See Gbenga Ariyibi, “Ekiti passes Gender-based Violation law” *Vanguard* Online: <http://odili.net/news/source/2011/nov/8/304.html>.

In spite of the wide disparity between the fines prescribed and the prison term that could be imposed, this is one major way by which state laws reinforce constitutional human rights guarantees. Absent this law, victims of the practices that it criminalizes could exploit the human rights provisions in the Constitution to protect their rights as has been the case in fact previously.⁶⁸² Yet what the Enugu state government has done here is to reinforce the constitutional guarantee in penal terms. By so doing, the state government absolves itself of any responsibility in the perpetuation of the practices that its legislation has outlawed. In the next section, I will examine the relationship between international and domestic human rights norms in the Nigerian legal system. Given that this study is about human rights adjudication, I will as part of this analysis also discuss how the courts respond these different normative sources. In particular, I will discuss the normative weight assigned to the norms generated by these different sources.

5.5. Domestic and International Human Rights Norms

Nigerian courts in resolving human rights cases presented before them obviously have to apply norms from both domestic and international sources. It would be correct to state that these various norms, be they expressed in the form of treaties, “soft law,” constitutional texts or other legislation, are aimed at achieving the same objective: to improve human rights conditions. But they are almost useless on paper if they cannot be translated into concrete protection in practice. How to achieve the goal of translating human rights instruments from text to reality is a major challenge in the efforts to abolish or ameliorate human rights violations.

Constitutions (like the Nigerian 1999 constitution) often prescribe how the normative guarantees enshrined in them could be enforced in practice. Whether this is actually done is most frequently a controversial question. Domestic human rights laws are enforceable by the units in a federal structure the same manner as all other laws. Since as I stated earlier protection could come sometimes in the form of criminal laws,

⁶⁸²See *Onwo v Oko*, [1996] 6 NWLR (Pt 456) 584 at 595 [Ng Ct App].

the strength of law enforcement or otherwise might determine success or failure in the long run. However, when it comes to translating international agreements into domestic practice, the question of which domestic institution has overall responsibility to enforce them is often a challenging one.

The judiciary plays a central role in shaping either satisfaction or derailment in the implementation of human rights norms at the various levels that they are generated or reinforced. This is a theme that resonates throughout this research. While there are challenges for that institution in applying norms from the sources identified above, those challenges are demonstrated more clearly in the context of particular kinds of norms. Significantly therefore, while enforcing human rights under the constitution or through other domestic laws may be hampered by contextualized factors, the domestic implementation of international human rights norms could create even bigger challenges. An exploration of what those challenges entail and how they might manifest is one that merits immediate and closer scrutiny and analysis. It is to that question that I turn next.

The important issue that I examine is: how do domestic judicial forums like Nigerian courts use international norms in the protection of human rights and how do those norms interact with domestic norms within the organic legal system? Nigeria operates the dualist mode of international law implementation as opposed to its monist variant.⁶⁸³ Dualism presupposes that treaties, including those dealing with human rights, cannot be applied domestically unless they have been incorporated through domestic legislation.⁶⁸⁴ Section 12(1) of the 1999 constitution provides that no treaty between the federation and any other country shall have force of law except to the extent to which such treaty has been enacted into law by the Nigerian National Assembly. A treaty incorporated by means of domestic legislation therefore becomes part of Nigeria's

⁶⁸³Patrick Thaddeus Jackson, "Foregrounding Ontology: Dualism, Monism, and IR Theory" (2008) 34 Rev Int'l Stud 42; Francisco Francioni, "International Law as a Common Language for National Courts" (2001) 36 Tex Int'l L J 587; JG Collier, "Is International Law Really Part of the Law of England?" (1989) 38 Int'l & Comp L Q 924.

⁶⁸⁴Egede, *supra* note 637 at 250.

municipal laws. Before identifying the force accorded such domesticated treaties by Nigerian courts, it is necessary to locate them on the country's normative hierarchy.

In the case of *Abacha v Fawehinmi*⁶⁸⁵ one of the questions that the court was called upon to answer was the status of laws domesticated under the provisions of Section 12(1) of the constitution in relation to other domestic laws.⁶⁸⁶ In that case, the Nigerian Supreme Court held that a domesticated treaty cannot trump the constitution but takes precedence on the normative hierarchy over other domestic laws for the simple "reason that it is presumed that the legislature does not intend to breach an international obligation."⁶⁸⁷ Because the domesticated international agreement in question was the African Charter on Human and Peoples Rights, the court stated further that "the Charter possesses 'a greater vigor and strength' than any other domestic statute."⁶⁸⁸ The court also held that the Charter is not superior to the Constitution, "nor can its international flavor prevent the [Nigerian] National Assembly...[from] removing it from our body of municipal laws... by repealing [it]."⁶⁸⁹

Nigeria's practices in this regard parallel that of several other countries especially those operating the common law tradition.⁶⁹⁰ While one might consider the stand of the Supreme Court in the above case laudatory, it falls far short of expectation when

⁶⁸⁵ [2000] 4 NWLR (Pt 660) 228 [Ng Sup Ct].

⁶⁸⁶ Egede, *supra* note 637 at 251.

⁶⁸⁷ *Abacha v Fawehinmi*, *supra* note 685 at 289.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ *Ibid.* This decision represents the current position of Nigerian law on the matter and has been followed in subsequent cases. See for example *Medical and Health Workers Union of Nigeria v Minister of Labor and Productivity & Others*, [2005] 17 NWLR (Pt 953) 120 [Ng Ct App] ("An international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. Before its enactment into law by the National Assembly, an international treaty has no such force of law as to make its provisions justiciable in Nigerian courts. Where, however, the treaty is enacted into law by the national assembly, it becomes binding and our courts must give effect to it like other laws falling within the judicial powers of the court.")

⁶⁹⁰ See for example Chilenye Nwapi, "International Treaties in Nigeria and Canadian Courts" (2011) 19 Afr J Int'l & Comp L 38; see also Gib van Ert, "Canada" in David Sloss ed., *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (New York: Cambridge University Press, 2009) at 166; A Kodzo Paaku Kludze, "Constitutional Rights and their Relationship with International Human Rights in Ghana" (2008) 41 Isr L Rev 677.

appropriately placed in perspective. One might agree with the court in being reluctant to place domesticated treaties above the constitution, yet placing such treaties under the constitution, a document which in the case of Nigeria is still hotly contested and alleged to have been illegitimately made, may not serve much public purpose. Raising the sovereignty argument may make sense as justification for prioritizing the constitution above all other legal norms, but it is a claim that may only be effective in circumstances where the constitution has come through a sincere participatory production process and represents the will of the majority of a country's population.

There is also an objection that may be put forward against Nigeria placing her constitution above ratified international treaties. It happens to be the case that the constitution itself contains some anti-democratic provisions that are contradictory to internationally accepted best practices.⁶⁹¹ In such situations where the constitution as the supreme law of the land cannot be counted upon to protect citizens from abusive state practices, it may be appropriate to rely on international norms than constitutional norms as protection for the citizenry. But for this to happen, the domestic legal system must be up to the task of invoking and enforcing international legal obligations.

With the above a background, one may ask what the real import of signing and ratifying international instruments is if the country concerned has no intention of honoring the obligations thereby imposed on its behavior. When a country signs an international treaty, that process of signing should stand for *prima facie* evidence that it intends to honor the obligations thereby undertaken. That is the real import of the international law concept of *pacta sunt servanda* – which holds that freely undertaken international obligations are solemn and meant to be honored. In the preamble to the

⁶⁹¹See for example s 215(5) which contains a provision ousting the jurisdiction of the courts to entertain certain questions relating to law enforcement. Such clauses were widely used but very unpopular under the military because they undermined the rule of law and effective resolution of civil disputes. On the question why states abide by international commitments see Oona A Hathaway, "Why do Countries commit to Human Rights Treaties?" (2007) 51 J Conflict Res 588; Olga Avdeyeva, "When do States comply with International Treaties? Policies on Violence against Women in Post-Communist Countries" (2007) 51 Int'l Stud Q 877.

1969 Vienna Convention on the Law of Treaties, the State parties recognized “the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems.” They also noted that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.” In addition the Convention provides that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁶⁹² There can be no better proof than these provisions combined that when States subscribe to international treaties, they hold themselves bound by their content.⁶⁹³

A natural enlargement of this argument is that when a country like Nigeria signs, ratifies or accedes to an international agreement, it has a responsibility to ensure that the agreement achieves its objectives within her domestic jurisdiction. Where, as in Nigeria’s case, the constitution requires further parliamentary activity to domesticate such agreement, that action ought to be taken. It should be a self-executing procedure. If otherwise, then the country in question would be in breach of the obligation imposed by that agreement. There is thus a contradiction when a country signs an international agreement yet avoids the responsibility that it imposes by hiding under domestic legal justification. This is exactly the situation with Nigeria which stands engaged by Maluwa’s conclusion that countries that have provisions similar to Section 12(1) of the Nigerian Constitution only aim at “preventing the courts from invoking norms of international law contained in a treaty which has not been specifically transformed into [domestic] law through a legislative enactment.”⁶⁹⁴

⁶⁹² Article 27 of *The Vienna Convention on the Law of Treaties* 1969, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁶⁹³ *Ibid* art 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”)

⁶⁹⁴ Tiyanjana Maluwa, “The Incorporation of International Law and its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey” (1998) 23 S Afr Y B Int’l L 45 at 64. See also Gerhard Erasmus, “The Namibian Constitution and the Application of International Law” (1989-1990) 15 S Afr Y B Int’l L 81 at 93. Compare the Nigerian provision with Section 233 of the 1996 South African

Given Nigeria's practice in this area, it is not surprising that many international instruments signed or ratified by the country do not have the desired degree of impact on government behavior given that they do not form part of the domestic legal order, having not been enacted as such by parliament. This also gives sufficient rationale for the government to be ambivalent on the matter. Even international agreements that have been domesticated *de jure* in Nigeria lack sufficient legal bite in practice. I can illustrate this with two contradictory positions taken by the Nigerian government in two cases involving how to effectively apply the African Charter on Human and Peoples Rights which Nigeria has domesticated. Both cases were filed by the Socio-Economic Rights and Accountability Project (SERAP) a Nigerian non-governmental organization. One case was brought forward before the African Commission on Human and Peoples Rights while the other is currently pending before the Federal High Court in Abuja.

The case before the African Commission complained that the Nigerian state had condoned egregious corruption leading to "serious and massive violations of the right to education, among other rights, in Nigeria." The allegations made in this regard included failure of government to train teachers and the gross under-funding of the educational institutions. In response to this complaint the Nigerian government argued that social and economic rights are not justiciable under the Nigerian constitution but that the African Charter Act empowers Nigerian courts to enforce or give remedies under the provisions of the Charter which enshrines social and economic rights. However, because of the failure to exhaust domestic remedies, the Commission declared the complaint inadmissible.

Constitution ("When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law," and section 39(1) ("When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.") Relevant here as well is section 144 of the Namibian Constitution ("Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.")

What is relevant here is the position argued by the Nigerian representatives. The government recognized that under the Constitution, social and economic rights could possibly not be enforced except by some dynamic stretch of legal arguments. Nevertheless the field was covered by the African Charter already adopted as domestic legislation. According to this argument, the African Charter is Nigerian law and therefore its provisions could be enforced the same way other domestic laws are enforced. This is a dynamic position to take because it corresponds to the obligations that Nigerian undertook in not only ratifying the charter but also domesticating it.

In the case pending before the Federal High Court SERAP seeks an order of *mandamus* to compel the Nigerian government to publish the report of the Pius Okigbo Panel concerning how the government spent \$12.4 billion said to have accrued from a sudden jump in the price of crude oil between 1988 and 1994. Earlier in 2009 the Chief Justice of Nigeria in exercise of powers granted him under the constitution to make rules for the enforcement of human rights promulgated the Fundamental Rights (Enforcement Procedure) Rules 2009. In Rule 3(b) it was provided that:

For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or from parts of larger documents like constitutions. Such bills include (i) The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system.

As well unlike in the past when the courts frowned at public interest litigation and applied an inflexible standing model, the new rules opened the gates of the courts through a more liberal standing regime, allowing persons acting in the public interest to present human rights cases. But in responding to this case, the Nigerian government expressed annoyance at the new rules, asserting that in making them the Chief Justice of Nigeria exceeded his powers. Specifically the government raised objection to the new standing

regime as well as the inclusion of the African Charter on Human and Peoples' Rights in the Rules.⁶⁹⁵

One will notice that the position adopted by the Nigerian government in the first case is different than that taken in the second one. What could be responsible for these contradictory postures? If the Nigerian government argued in the first case that the African Charter is Nigerian law, why would it be offended that its provisions were included in the Fundamental Rights (Enforcement Procedure) Rules in a latter case? I will later return to the import of the new rules when discussing expanded standing as a requirement for effective human rights protection. I have raised it here, however, to point out how averse the Nigerian government is to being called upon to fulfill international obligations that it has freely undertaken. This, to me, is an untenable position built on sinking sand. Nigerians would be justified to look towards international law where domestic law is either lacking or provides only ineffective protection for their rights. The courts would be shirking their duties if they fail to recognize this fact. Having examined the sources of human rights norms in the Nigerian legal system and the significance of the norms from the various sources, I turn in the next section to the problem of jurisdiction in human rights adjudication.

5.6. The Human Rights Adjudication Forum: Nigeria's Diffuse Model

The issue I address here is the jurisdictional question in human rights cases. What court or courts have the constitutional responsibility of pronouncing on human rights cases? This matter was touched in parts in Chapter four while considering models of human rights review adopted in different jurisdictions. I identified two prominent models prevalent in this field. The first is the concentrated model in which one court, usually the

⁶⁹⁵*Registered Trustees of Socio-Economic and Accountability Project (SERAP) and others v Attorney-General of the Federation and another*, Suit No FHC/ABJ/CS/640/10. See also <http://www.saharareporters.com/news-page/babangidas-124bn-oil-windfall-looting-agf-cbn-fault-former-cjn-over-rights-rules>.

Constitutional Court,⁶⁹⁶ is given sole jurisdiction to decide on all constitutional questions, including those concerning human rights. The alternative model addresses the same questions only this time to various courts on the judicial hierarchy and is therefore otherwise a more diffuse and decentralized arrangement. Rather than one forum in this latter model, there are several forums across the court pyramid often beginning with the lowest level to the highest with graduated degrees of value accorded to case-law precedents generated at the various levels.

Nigeria is among the countries where a specific procedure is enacted for the presentation of human rights cases. Section 46 of the Constitution which has been referenced earlier grants alleged victims of human rights violations permission to present their claims before the High Court in the state where the alleged violation occurred. Section 46(3) of the Constitution, in addition, enables the Chief Justice of Nigeria to make rules with respect to the practice and procedure of the High Court for the purpose of allowing victim-litigants to enforce or secure the enforcement of their rights. These provisions were similarly contained in the 1979 Constitution from which the text was actually lifted in exactly the same words.⁶⁹⁷

The 1979 Constitution was the first to prescribe this specific procedure for human rights enforcement. The procedure was set forth in the Fundamental Rights (Enforcement Procedure) Rules of 1979. Even after the military toppled the 1979 Constitution, the rules continued to be used in those few cases where military impunity allowed victims to as much as approach the courts for remedy. However, after the restoration of civil rule in 1999, the Chief Justice of Nigeria did not immediately re-enact the procedure as mandated by the new Constitution. In the absence of new rules, litigants were initially confused as to whether to wait for their enactment before presenting their cases or to continue using the 1979 rules as default procedure until a new one was enacted. If

⁶⁹⁶See generally Andrew Harding & Peter Leyland, *Constitutional Courts: A Comparative Study* (London: Wildy, Simmonds & Hill, 2009).

⁶⁹⁷s 42(3) *Constitution of the Federal Republic of Nigeria* 1979.

litigants had to wait for the new rules to become operative before presenting their cases, that would have led to a massive legal quandary as the new rules were not promulgated until 2009, a period of ten years after civil rule was restored.

Expectedly, defendants whose actions were questioned by way of human rights complaints post the May 1999 transition sought to avoid legal responsibility by arguing that no new rules had been issued by the Chief Justice for human rights enforcement. Quite rightly, in my view, the courts demurred to buy into such objections and ruled that in the absence of the new rules, those made under the 1979 Constitution continued to regulate human rights cases.⁶⁹⁸ The 1979 rules therefore continued to be used for the enforcement of human rights until 2009 when the incumbent Chief Justice of Nigeria issued the Fundamental Rights (Enforcement Procedure) Rules, 2009.

Under the new procedure, as under the 1979 rules, High Court for the purposes of human rights enforcement was defined as the Federal High Court, a State High Court or the High Court of the Federal Capital Territory, Abuja.⁶⁹⁹ Though this definition has generated legal controversies of its own, the courts have largely settled for the position that Federal and State High Courts bear concurrent jurisdiction in human rights cases.⁷⁰⁰ However, the 1999 Constitution introduced a novel element in the jurisdictional arena that was not there in the 1979 Constitution. Section 251 of the 1999 Constitution provides that

- (1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal

⁶⁹⁸ Eva Brems & Charles Olufemi Adekoya, “Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria” (2010) 54 J Afr L 258 at 260; Basil Ugochukwu, “Advancing Human Rights Using the Fundamental Rights (Enforcement Procedure) Rules” in Basil Ugochukwu ed, *Update on Human Rights Litigation in Nigeria* (Lagos: Legal Defence Centre, 2003) at 32. See also *Ugwumadu v University of Nigeria*, [2001] 13 WRN 181 [Fed Hg Ct].

⁶⁹⁹ Order 1 r 2

⁷⁰⁰See *Nwokorie v Opara*, [1999] 1 NWLR (Pt 587) 389 [Ng Ct App]; *Federal Ministry of Commerce and Tourism and Another v Eze*, [2006] 2 NWLR (Pt 964) 221 [Ng Ct App].

High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters –

- (q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;
- (r) any action or proceedings for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies...

This provision is of a military origin. It was first introduced into the Nigerian legal system by the dictatorship of the late Sani Abacha. It initially was incorporated into the Decree that formed the foundation for the establishment of Abacha's regime.⁷⁰¹ The Abacha regime offered no explanation for introducing the provision. It is, however, theorized that it was included in order to keep cases against the federal government or its agencies relating to the kinds of issues covered by the provision (interpretation of the Constitution, declaration, injunction) within the purview of that section of the judiciary that the federal government has direct and total control over. As a background, prior to Abacha seizing power, Federal High Courts and High Courts in the various states had rendered contradictory decisions in disputes arising from the June 12, 1993 presidential election. While Federal High Courts tended to favor the military authorities in their decisions, state High Courts (especially those in the western parts of the country)

⁷⁰¹ In particular the provision was enacted as Section 230(1)(q) and (s) of the Constitution (Suspension and Modification) Decree No. 107 of 1993 and was greatly criticized upon promulgation by the courts and civil society as well. See *Ali v Central Bank of Nigeria*, [1997] 4 NWLR (Pt 498) 192 where the Court of Appeal held: "This amendment is likely to have adverse effects on the smooth administration of justice in the country. While the amendment is likely to be oppressive on the part of some litigants, particularly the servants and employees of the Federal Government and its agencies, like the appellants in some states of the federation that do not have a Federal High Court, it also most certainly would result in the increase of burden of the cost of litigation." See also The Committee for the Defence of Human Rights, *Annual Report of the State of Human Rights 1997* (Lagos: CDHR, 2008).

generally leaned towards the presumed winner of that election.⁷⁰² This provision achieved the result of barring state High Courts from exercising jurisdiction over such disputes in the future following its promulgation.

This provision therefore introduced a controversy of a different kind to the question of jurisdiction in human rights cases. Such cases could be seeking declarations that the actions questioned are unconstitutional or injunctions to prohibit the person or authority carrying out such actions to stop. To some litigants, given the concurrent jurisdiction granted Federal and State High Courts in human rights cases, any of those courts could be petitioned for redress irrespective of the status or official designation of the individual or authority whose actions are challenged. This is quite different from the strict approach that the courts have adopted on this issue.

In *Sunday Omotesho & Others v Abubakar Abdullahi & Others*,⁷⁰³ the Court of Appeal, interpreting an apparently non-existent similar provision in the 1979 Constitution,⁷⁰⁴ held that there was no blanket requirement that any action against the Federal Government or any of its agencies must be instituted at the Federal High Court. The court also held that jurisdiction is not determined by parties but by the subject matter of litigation. Accordingly, the court went further, to confer jurisdiction exclusively on the Federal High Court, the legal dispute must arise from or be seeking participation or role in administration, management and control of the Federal Government or any of its

⁷⁰²Ian Campbell, "Nigeria's Failed Transition: The 1993 Presidential Election" (1994) 12 J Contemp Afr Stud 179; Ajayi Ola Rotimi & Julius Ihonvbere, "Democratic Impasse: Remilitarization of Nigeria" (1994) 15 Third World Q 669.

⁷⁰³ [2008] 2 NWLR (Pt 1072) 527.

⁷⁰⁴ It is important to note that this case was filed long before the coming into force of the 1999 Constitution and therefore the legal authority that governed the proceedings was Section 230 of Decree 107 of 1993 and not Section 230 of the 1979 Constitution as the court indicated because even though there is a Section 230 in the 1979 Constitution, it did not go into such details as similar section in Decree 107 or Section 251, the equivalent section in the 1999 Constitution. For the avoidance of doubt the most relevant portion of Section 230 of the 1979 Constitution relevant for this analysis provides that "(1) Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have jurisdiction – (a) in such matters connected with or pertaining to the revenue of the Government of the Federation as may be prescribed by the National Assembly; and (b) in such other matters as may be prescribed as respects which the National Assembly has power to make laws." Therefore the Court of Appeal's reference to Section 230 of the 1979 Constitution in the context in which that section was invoked in this case was clearly misleading.

agencies. “The matter must arise from the operation and interpretation of the Constitution. The process must also disclose an action or proceedings for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.” Therefore the court concluded that the mere naming of the Federal Government or any of its agencies as party to litigation would not automatically confer jurisdiction on the Federal High Court.⁷⁰⁵

Contentions over the proper parameters of the Federal High Court jurisdiction in human rights cases produce not too infrequently controversial outcomes like in the case of *Nwokorie v Opara*.⁷⁰⁶ The applicants had been charged with armed robbery before a magistrate court. They were denied bail whereupon they appealed to the Federal High Court in Kano to enforce their fundamental right to bail. Even though the application for bail is purely of a human rights nature, the Court of Appeal on further appeal came to the conclusion that because the Federal High Court lacked jurisdiction to decide upon the crime of armed robbery, it therefore was incompetent to entertain the application for bail even though couched in terms of application to enforce fundamental rights.

This decision seems to defy the logic of fundamental rights enforcement prescribed by the constitution and the applicable rule. The right to bail is a component of the right to personal liberty enshrined in section 35(5) of the Constitution. At the time the applicants applied to the Federal High Court for bail the only charges against them were before a magistrate court that had no jurisdiction over the alleged crimes. Given the concurrent nature of jurisdiction that both State and Federal High Courts had in fundamental rights cases, the applicants had discretion which High Court to present their application. The Court of Appeal would have been justified in the conclusion it reached had the charges against the applicants been already presented before a competent State High Court in which case it would have been questionable for them to not present their application before that court in preference to a Federal High Court. What this decision

⁷⁰⁵*Ibid.*

⁷⁰⁶*Supra* note 700.

illustrates is that though the jurisdictional question in human rights cases appears fairly well settled, it is in reality often contested.

Having addressed the question of the forums from which cases seeking the enforcement of human rights could originate I move to the next question. Assuming a party involved in litigation before a High Court is dissatisfied with the decision rendered, where else does he or she turn to? The answer could be found in the Constitution as well. The Court of Appeal which is Nigeria's intermediate court is by virtue of Section 240 of the 1999 Constitution granted exclusive jurisdiction to determine appeals from the Federal High Court, the High Court of the Federal Capital Territory and the High Court of a State.⁷⁰⁷ Under Section 241(1) (d) an appeal shall lie from decisions of the Federal High Court or any other High Court to the Court of Appeal as of right where what are at stake are decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution [the Bill of Fundamental Human Rights] has been, is being or is likely to be contravened in relation to any person. Similar jurisdiction is conferred on the Court of Appeal where the liberty of a person or the custody of an infant is concerned.⁷⁰⁸

In the event that after the hearing of appeals concerning human rights litigation at the Court of Appeal any of the parties thereto remains aggrieved, such party could take the matter further to the Supreme Court which is Nigeria's final court. Decisions of the Supreme Court cannot be appealed any further.⁷⁰⁹ The Supreme Court has exclusive jurisdiction over appeals from the Court of Appeal in several specific contexts including in relation to decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of the Constitution has been, is being or is likely to

⁷⁰⁷ The Court of Appeal under the same provision also entertains appeals from Sharia Court of Appeal of the Federal Capital Territory, the Sharia Court of Appeal of a State, Customary Court of Appeal of the Federal Capital Territory, Customary Court of Appeal of a State and from decisions of a Court Martial or other tribunal as may be prescribed by an Act of the National Assembly.

⁷⁰⁸ s 241(1) (i).

⁷⁰⁹ s 235.

be violated in relation to any person.⁷¹⁰ That said, in the next section I examine the “constitutional reference” procedure as one that could be utilized to resolve human rights cases that also raise significant constitutional questions.

5.7. Human Rights Cases and Constitutional Reference

Apart from those situations in which human rights litigation are commenced in Nigeria through the rules enacted for that purpose, the questions that such cases raise could also be engaged in other contexts. One such context is the reference of questions of law having high constitutional significance. This jurisdiction to refer constitutional questions is one that cuts across the entire judicial hierarchy and includes those inferior courts whose competence falls outside the constitutionally prescribed rule for presenting human rights cases. Yet it is important to mention this jurisdiction because the questions it is possible to refer in this manner may relate to those involving the application and enforcement of human rights.

Section 295(1) of the Constitution is one of such provisions allowing for constitutional questions to be referred. It provides:

Where any question as to the interpretation or application of this Constitution arises in any proceedings in any court or law in any part of Nigeria (other than in the Supreme Court, the Court of Appeal, the Federal High Court or a High Court) and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any of the parties to the proceedings so requests, refer the question to the Federal High Court or High Court having jurisdiction in that part of Nigeria...

The High Court to which such a question is referred could further refer the question to the Court of Appeal if it is of the opinion that a substantial question of law has been raised.⁷¹¹ However where such court is of the view that no substantial question of law is disclosed, it must send the case back to the court making the reference with directions as to how

⁷¹⁰ s 233(2)(c).

⁷¹¹ s 295(1)(a).

such a court should dispose of the question.⁷¹² So even though those inferior courts do not have jurisdiction over human rights cases, matters brought before them could still involve human rights questions by way of constitutional interpretation. And they are under constitutional obligation to refer them as prescribed above.

Where such substantial constitutional questions arise in proceedings before the Federal High Court or the High Court of a state, these courts shall refer the questions to the Court of Appeal which shall give its decision on that question. Following that, the court making the reference shall dispose of the case from which that constitutional question arose in accordance with how that constitutional question was answered by the Court of Appeal.⁷¹³ Where such a question arises from a suit at the Court of Appeal, that court is obligated to make a reference to the Supreme Court.⁷¹⁴ The Supreme Court shall give a decision on that question and give such directions to the Court of Appeal on it as it deems appropriate.⁷¹⁵

While the provision on constitutional reference is present in the constitution, it is rarely used by the courts to deal with human rights cases. From all indications, there is sufficient grounds for a proposition that the High Courts which are the base courts for the commencement of human rights litigation are more than capable of resolving any constitutional questions those cases may throw up without referring them to courts higher up the judicial hierarchy. The same perhaps may not be said of all other inferior courts below the level of the High Courts. However, it is unlikely such cases as would warrant a reference are ever commenced in those inferior courts given the near total absence of any cases where such courts ever made use of the reference procedure.

It is also worth noting that Nigeria's reference regime has similar features as in comparative legal jurisdictions, particularly South Africa. While deciding constitutional matters within their powers, South African courts (mainly the Supreme Court of Appeal,

⁷¹² s 295(1)(b).

⁷¹³ s 295(2).

⁷¹⁴ See for example *Olafisoye v Federal Republic of Nigeria*, [2004] 4 NWLR (Pt 864) 580 [Ng Sup Ct] where the Court of Appeal referred several constitutional questions to the Supreme Court for resolution.

⁷¹⁵ s 295(3).

High Courts or other courts of similar status) could declare any law or conduct that is inconsistent with the Constitution as invalid to the extent of that inconsistency.⁷¹⁶ Where such a court makes such order of constitutional invalidity it has powers to grant a temporary interdict or other temporary relief to a party in the litigation. It could also adjourn the proceedings pending a decision of the Constitutional Court on the validity of that law or conduct.⁷¹⁷ But unlike in Nigeria where the Constitution itself settles the referral issue, the South African Constitution requires national legislation to provide for referral of an order of constitutional invalidity to the Constitutional Court.⁷¹⁸

In this chapter, I answered questions related to the normative sources of human rights in Nigeria, their relationship one to the other and the questions of jurisdiction in human rights questions. In the next chapter, I will advance the discussion further from theory to practice. I will examine the extent to which the superior courts in Nigeria applied those norms to redress complaints of human rights violations from 1999 to 2009. I will also look at possible theoretical possibilities prominent in the reasoning in those cases.

⁷¹⁶ *Constitution of the Republic of South Africa*, 1996 s 172(1)(a).

⁷¹⁷ s 172(2)(b).

⁷¹⁸ s 172(2)(c).

Chapter Six

Reconciling Theory and Praxis: Human Rights Adjudication in Nigeria, 1999-2009

6.1. Introduction

The previous chapter was devoted to identifying the sources of human rights norms enforceable in Nigerian courts. In that chapter I also looked at the interaction among the various normative sources and how the courts weigh and assign adjudicatory salience to them. In this chapter I will be reviewing the work of the Nigerian Supreme Court and Court of Appeal pertaining to how they handled human rights cases from 1999 to 2009. This is perhaps the most significant component of this study. As part of the analysis and evaluation carried out in this chapter, I will be discussing the framework for the judicial enforcement of human rights under the 1999 Constitution followed by a consideration of how the courts responded to demands upon them to enforce the various rights guaranteed by the Constitution.

This chapter addresses one of the major concerns animating this research. The main question answered in this chapter therefore is whether, in dealing with human rights cases, the identified courts have lived up to the responsibilities imposed on them under the 1999 constitution. I will also evaluate possible theoretical insights foregrounding judicial attitude to human rights cases in Nigeria for the research period. This is accomplished not only through an examination of the text of decisions but also by looking at more covert external influences on judicial decision-making. In doing so, I will group the cases in clusters according to their theoretical and doctrinal rationale. And having regard to the different theoretical possibilities already identified and discussed in the second chapter, my analysis will proceed by reference to either a single theoretical approach for a group of cases or a combination of different approaches to particular cases. However, to provide a helpful background to the analysis that would follow, it will be useful to track back to the judicial culture of Nigerian courts in human rights

adjudication prior to 1999. I will do this by discussing the adjudication of cases from independence in 1960 until the military intervention of 1966 and then from the restoration of civil rule in 1979 until the military struck again in 1983. This historical analysis is helpful because as I will ultimately argue, the culture of Nigerian courts in human rights case was laid out during this period and it has endured.

6.2. Nigerian Courts and the Culture of Restraint

My goal in this section is to show how Nigerian courts approached the interpretation of constitutional provisions enshrining human rights as well as how they applied those provisions towards the protection of human rights during the periods of civil rule from independence in 1960 to the end of the Second Republic in 1983. I have removed from the analysis the periods that the military were in power. Those periods have been sufficiently covered in the latter parts of the third chapter and further will be dealt with in significant portions of the seventh chapter. My goal in this section is to show how the adjudicatory habits of Nigerian judges evolved as well as how those habits have endured and continue to drive judicial culture in this area.

Given that in chapter four I discussed in parts the doctrinal standard adopted by Nigerian courts in dealing with cases presented before them at that historical time, I will concentrate in this section on how the courts approached the enforcement of some specific human rights guarantees. I will also capture the impact that the courts' standards had on the effectiveness or otherwise of their institutional intervention to remedy human rights situations that came before them.

The manner in which the courts dealt with human rights cases during the period being reviewed would have no doubt been affected by some of the factors that I discussed in Chapter three. It occurred against the background of Nigeria's newly attained independent status. The local judiciary had a dominant representation of English judges. The few indigenous judges present had all received their trainings in the United Kingdom. Though the country while under direct British suzerainty had been exposed to

only British style parliamentary government in which courts lacked any real powers to review legislative enactments, the Constitution adopted prior to Nigeria's independence was built on an entirely different constitutional model. It had a Bill of Rights with clear suggestions that the courts now had powers to review laws passed by parliament for their conformance to the constitutional provisions on human rights. Where those laws failed the human rights test, the courts could nullify them in principle.

Obviously flowing directly from all or some of these factors, and others discussed in Chapter four, the practice of the courts regarding human rights cases immediately after independence was of the mixed bag variety. There appeared to be no clear jurisprudential direction in the path chosen by the courts and an ambivalent posture apparently took root. In addition, political independence did not mean the country had been completely rid of its colonial shackles, especially in terms of the organization of the judicial system. The Advisory Committee of the Privy Council continued to be the final forum for deciding all cases coming out of Nigeria like all other British colonial territories. This would later change in 1963 with the adoption of a Republican Constitution and the creation of a Supreme Court for Nigeria. This latter development did not, however, have much of an effect on the human rights enforcement regime. For my purpose here, the main change made by the 1963 constitution was that final appeals from Nigerian courts no longer went to the Privy Council. They now terminated at the newly established Supreme Court.

Civil rule was disrupted by the military in 1966. Therefore the first period for my consideration of the judicial activities of the courts in relation to the enforcement of human rights under the Constitution lasted only six years, that is, 1960 to 1966. Cases decided by the courts during this time covered a broad spectrum of the rights enshrined in the constitution including the right to movement, freedom of thought conscience and religion, freedom of expression and the right to personal liberty. As stated earlier, this was the period that heralded uncertainty and a clear lack of direction in the attitude of the courts in human rights enforcement cases. It did not really matter at this time whether a court's decision had been favorable to the litigant or the claim for remedy had been denied. The lack of consistency in judicial pronouncements as well as absence of any

reasonable standard by which the decisions were derived left a completely confusing picture. A couple of cases are presented below to exemplify the situation.

The question in the case of *Ojiegbe & Another v Ubani & Another*⁷¹⁹ was whether holding elections on a Saturday denied the applicants who belonged to the Seventh Day Adventist Church their voting rights. The court was also requested to determine if this action infringed on the applicants' rights to freedom from discrimination and freedom of conscience and religion. The applicants had claimed that the traditions of their church prohibited them from voting on a Saturday which is the church's day of worship. However, the Federal Supreme Court surprisingly was more interested in how the outcome of the election in question disposed of the applicants' rights rather than provide answers to the issues raised in the suit on their merits.

The court held that even if all the six to seven thousand members of the Seventh Day Adventist Church had voted in the election, the result would still not have been affected. The materiality of this reasoning to the rights alleged by the applicants to have been violated in fact defies elementary logic. The court seemed to hold that where the alleged violations had no effect on the outcome of the election, the rights of the complainants had, for that reason, been rightly sacrificed. The court also queried the procedure that the applicants adopted in presenting the case. The applicants had presented the suit by way of an election petition rather than as a human rights complaint.

The attitude of the court in this case could not be deemed helpful from the point of view of articulating a durable judicial culture. This is an inevitable conclusion because the court made a mistake when it relied rather heavily on the result of the election which at best was only marginal to the questions that the litigants placed before it. Given the constitutional provisions that arose for determination, the court would have been better placed to resolve them more effectively by asking the simple question whether the law mandating elections on a Saturday was "reasonably justifiable in a democratic society." It is possible the court may still have come to the same conclusion denying the application

⁷¹⁹ [1961] 1 All NLR 277.

if it had chosen this path. It could in fact have been far easier for it to raise residual policy reasons for such a position given that in a multi-religious country like Nigeria, singling out particular religious groups for preferential treatment as the applicants demanded in this suit would likely have set off an unmanageable scenario.

Why did the court take the course that it took in this case? It is difficult to say and one can only speculate. The first reason it probably relied upon was that the applicants adopted the wrong procedure because rather than present a complaint of human rights violation they had filed an election petition. The court said as much. One could also fall into the tempting proposition that the court was not well informed or lacked the skill to ask the right questions. If there ever was any doubt that Nigerian courts did not have the capacity or presence of mind to navigate the kinds of questions posed in human rights litigation at this very time, this decision would have totally dispelled it. While it may be helpful to definitively resolve the question of why the court adopted the posture it did in this case, decisions of this nature actually took the courts off-course and diminished any possibility that they could effectively deal with the kinds of questions that arose in human rights cases.

Such bad examples will go on to shape the tradition of the courts and impede their development of sound human rights adjudicatory standards. Decisions like that in the *Ojiegbe* case also established a weak foundation for Nigerian courts in human rights cases, granting them a huge incentive to produce often contradictory and non-standardized decisions. I captured some of those cases in the previous chapter while discussing the standard used by Nigerian courts in disposing of human rights cases.

The next cases relevant for my purpose here dealt with movement restriction in the aftermath of the imposition of emergency rule in the Western region of the country by the Federal government. Two such cases stood out prominently: *Williams v Majekodunmi (No.3)*⁷²⁰ and *Adegbenro v Attorney General of the Federation*.⁷²¹ The cases had basically

⁷²⁰ *Supra* note 585.

⁷²¹ *Supra* note 587.

the same facts but the court delivered two conflicting judgments. I discussed those cases and how the court arrived at its decisions in chapter four. What is significant about these two decisions is that it is impossible to discern with any degree of conviction the reason two opposing decisions were delivered on two cases having almost exactly the same facts. No such reasons are yielded even by the most careful reading of the two judgments.

As with developments in most other countries in Commonwealth Africa, the sedition cases as well featured prominently in the human rights jurisprudence of the Nigerian courts in the period under consideration. Similar to *Director of Public Prosecutions v Chike Obi*⁷²² which I have already referred to, there was the case of *Amalgamated Press of Nigeria Limited v The Queen*⁷²³ that also challenged the validity of the sedition law. This law which had colonial origins stood in direct opposition to the Supremacy Clause of the independence constitution while also affronting the freedom of expression provision of that constitution. The major question in both cases was whether the provisions of the Nigerian Criminal Code dealing with sedition could coexist with the provision of the constitution guaranteeing freedom of expression.

The then Nigerian Federal Supreme Court though correctly calling the question presented by both cases – whether the sedition law could be considered reasonably justifiable in a democratic society – held that neither the constitution’s Supremacy Clause nor the freedom of expression guarantee had actually abrogated the law of sedition. While recognizing itself as the sole arbiter of whether any law is reasonably justifiable, the court reasoned that it is justifiable to take reasonable precautions to preserve public order and that this may involve the prohibition of acts which, if unchecked or unrestrained, might lead to disorder, even though those acts would not themselves do so directly.⁷²⁴ Expectedly, the court leaned more favorably towards the challenged law than the rights it violated. It did not consider how critical press freedom is to an open and

⁷²²*Supra* note 577.

⁷²³[1961] 1 All NLR 199.

⁷²⁴*Ibid.*

democratic society and especially whether the government could explore other options to check the disorder it feared rather than cripple constitutionally recognized rights.

The above two cases notwithstanding though, on some occasions, the court upheld the constitutional rights in question.⁷²⁵ But without establishing any clear standards by which those judgments were reached, there was always the danger that they would be as creatively reversed as they had been arbitrarily delivered. This orientation did not change until the military intervened in the governance of the country in 1966. With the military in power, the legal mechanism for human rights enforcement took an entirely different turn. I have already discussed the military approach to the protection of human rights in chapter three. This remained the situation until the restoration of civil rule in 1979 under a new constitution having similar guarantees of human rights as under the 1960 and 1963 constitutions. The civilians, however, ruled only for four years before the military again intervened and imposed rule by military decrees.

Even though the courts during that four-year period between 1979 and 1983 were more inclined to recognize and enforce the constitutional human rights guarantees in the constitution, they still could not formulate any clear and objective standards for those judgments. The question often presented before the courts was, as under the previous constitutions, whether a challenged action or law was reasonably justifiable in a democratic society. But unlike for the immediate post-independence years when the adoption of the parliamentary system of government caused a not too clear demarcation between the powers of parliament and the judiciary, the same was not the case under the 1979 constitution. Under this constitution, the country established a Presidential system of government with obvious inspiration from the American tradition in this regard. The system was “expected to be the showcase for an American style democracy in Africa and to provide an example for the rest of the continent.”⁷²⁶

⁷²⁵See *Gokpa v Police*, [1961] All NLR 423 regarding the right to be represented by an attorney; *Olasoji and another v Attorney General of Western Nigeria*, [1965] NMLR 111 dealing with the right to a fair hearing.

⁷²⁶Michael P Seng, “Democracy in Nigeria” (1984-1986) 9 Black L J 113.

As it turned out, the 1979 constitution readopted, and in some cases made more specific, the fundamental rights first enshrined and incorporated in the Nigerian constitution just before independence in 1959.⁷²⁷ It also retained the limitations provision which required that rights could only be contravened if the contravention is reasonably justifiable in a democratic society. For the first time also, the constitution looked to the Indian constitution from which it borrowed the fundamental objectives and directive principles of state policy. Those objectives contained provisions similar to social and economic rights in the contemporary understandings of those terms. Under the constitution, such objectives are not justiciable before the courts.⁷²⁸

According to Seng, most of the major human rights abuses in the Nigerian Second Republic seem to have occurred as a result of attempts by the majority political parties to stifle the political opposition.⁷²⁹ It was therefore not strange that one of the most celebrated human rights litigations of that era would involve an attempt by the ruling National Party of Nigeria (NPN) to illegally deport to Chad Republic Shugaba Darman, leader of the majority Great Nigeria Peoples Party (GNPP) in the Borno state House of Assembly. His deportation was based on the claim that he was not a Nigerian. While his mother had been born in Nigeria, his father was allegedly born in Chad. Following his deportation, Mr. Darman found his way back into Nigeria and launched a suit alleging the violation of his human rights to personal liberty, privacy and freedom of movement within Nigeria.⁷³⁰ The court upheld the suit and awarded damages to the applicant.

Three of such cases disposed of by the courts at this time dealt with media freedom and the rights of citizens to receive information and impart ideas. The issue in *Nwankwo v Nwobodo*,⁷³¹ was whether the Sedition Act remained valid notwithstanding the provisions of the 1979 Constitution guaranteeing press freedom. In other words, the

⁷²⁷ *Ibid*, at 155

⁷²⁸ See Obinna Okere, "Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution" (1983) 32 Int'l & Comp L Q 214.

⁷²⁹ *Ibid*.

⁷³⁰ *Shugaba Abdulrahman Darman v Minister of Internal Affairs*, [1982] 2 NCLR 915.

⁷³¹ Unreported Suit No FCA/E/111/83 (Ng Ct App).

applicant resubmitted to the court for its decision the same questions that had been unsuccessfully raised in the case of *Chike Obi v Director of Public Prosecutions*⁷³² under the 1960 independence Constitution. Arthur Nwankwo had published a book in which he criticized then governor of Anambra state, Jim Nwobodo. He was charged with sedition and sentenced to 12 months imprisonment with hard labor. Further publication of the offending book was banned while members of the public who had already bought copies were warned to surrender those at the police station nearest to them. The Court of Appeal reversed the conviction, holding that the Sedition Act was inconsistent with the freedom of speech guaranteed by the Constitution.

The two other press freedom cases engaged the privilege of journalists to protect their sources of information from public disclosure. In *Momoh v Senate*,⁷³³ a journalist had written an editorial on corruption and influence peddling in the Nigerian legislature. The law makers set up an investigation Committee which sought to compel the journalist in question to disclose the source of his information. The court held that confidentiality requirements would not permit that course of action and that to uphold the fundamental right to press freedom, information sources for journalists had to be protected. Similarly in *Oyegbami v Attorney General*,⁷³⁴ the court held that the police could not compel a journalist to disclose the source of her information.

These cases show clearly that for this period, the Nigerian judiciary was very much alive to its duty of enforcing appropriate limitations on the exercise of governmental power. That said though, it is also evident that the courts as with the immediate post-independence judiciary did not much appreciate the need for a structured analysis of the balance between the rights enshrined and the limitation placed on them by means “reasonably justifiable in a democratic society.” Expectedly, this stemmed from the fact that the courts hardly commenced their interpretative role by asking the necessary questions that would inevitably lead to the balancing of rights and interests.

⁷³² *Supra* note 577.

⁷³³ [1981] 1 NCLR 105.

⁷³⁴ [1981] 1 NCLR 895.

But overall, a shift was noticeable in the willingness of the courts to take a more hardline position against government encroachment upon human rights from 1979 to 1983. Two factors could have accounted for this. Firstly, the country had adopted a presidential system of government. With its emphasis on executive power and recognition of stricter separation of powers among the branches of government meant the courts were freer than under the previous parliamentary period. More significantly, the Supreme Court in particular was perhaps beginning to have its most accomplished collection of judges at this time. But the military soon intervened to abort further progress. Having made this historical clarification, I now proceed to the next section which covers the period that this study is most concerned with.

6.3. Post Transition Adjudication, 1999-2009: Way-Picking through a Minefield

This is the section where I evaluate human rights cases decided by the Supreme Court and Court of Appeal from 1999 and 2009. I also provide an analytic critique of them according to their possible theoretical orientations. In chapter two I identified the various theoretical models that could fit an analysis of human rights adjudication in post-1999 Nigeria. I did argue in favor of using various approaches because of the unlikelihood that a single theory could possibly account for judicial orientation for all the cases decided by the two courts throughout this period. While this is the case still, both the discussion of standard of review used by the courts for human rights cases in chapter four and the historical culture of the courts discussed earlier in this chapter give an early indication of what this analysis might produce. The cases decided under civilian regimes from independence until 1983 also indicate certain prior orientations. Part of the objectives of this section is therefore to show whether any changes in judicial orientation has occurred overtime, including whether the mere fact of a transition to civil rule in 1999 in any way affected adjudicatory tradition in human rights cases.

Having reviewed the cases obtained during research that are relevant to the objectives of this study, I can conclude that not all the identified theories applied to the cases to similar levels of intensity. While some theories were overt or could be implied in judicial decisions as circumstances warranted, others were less so. By way of recap, I will now summarize the various theories that I mentioned in chapter two. The first theory I highlighted is positivist or formal orthodoxy. By virtue of this theory rules, principles and doctrine are the only determinants of adjudication. However, critical scholars both from law and political science disagree with positivism and claim instead that law is just politics clothed in rule-based and doctrinal justifications. This gave rise to a second theory discussed under what I termed the politics of adjudication.

I also identified self-interest or a rational choice model which argues that judges are as self-interested in their decisions as all other rational social actors. Where this is not the case, Baxi's TREMF theory would make a correlation between judicial decisions and the penetration of private capital often at the expense of human rights. More significantly, I also looked at the social context for human rights adjudication and identified in the process Bourdieu's *habitus* as well as the incipient movement toward social inclusion in the legal process by way of what is known as social context education. I made a case for a transitional theory of human rights adjudication while in addition examining the activism/passivism divide. I will now turn to an analysis of the cases researched on the basis of how present or absent each of these theoretical orientations is in the cases. Some of the cases would engage with more than one theoretical thread simultaneously. But rather than separating the threads in those cases, what I have done is to isolate and analyze them together. I will start by looking at the more formal or orthodox traditions of the courts.

6.3.1. Orthodoxy Reinforced: Literalism, Formalism, Plain-factism

As a tendency in judicial decision-making, positivist rule-based orthodoxy is very prevalent in Nigeria. This is not only true with regard to human rights cases but to all litigation in general. This tradition is established first on the bases of a stubborn fidelity

to rules. Such rules could be in the nature of statutes, procedural regulations or previously enunciated judicial precedents. This orthodoxy could also emanate from the interpretation of words used in legislation. The custom of Nigerian courts is to never lightly depart from established practices and to assign only natural meanings to words used. The existence of this tradition was affirmed in the previously cited opinion of a former Supreme Court judge⁷³⁵ as well as by contemporary decisions like the one rendered in the case of *Victor Ndoma Egba*'s case.⁷³⁶ It is further reinforced in some of the cases I will now evaluate.

The case of *Fred Egbe v Babatunde Belgore*⁷³⁷ for example, underscores both the positivist orientation of the courts and the presence of subtle political calculations in their decisions on some occasions. In this case, the court leaned in favor of a literal and plain-meaning interpretation of constitutional human rights provisions. It arose from criminal proceedings that were initiated against the appellant, a well-known government critic under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree of 1994. He was arrested, detained, arraigned and admitted to bail. He challenged the validity of his arrest in court but the suit was thrown out on technical grounds. He then commenced proceedings at the Federal High Court (FHC) to enforce his fundamental rights against the Attorney General of the Federation. He was granted an interim order barring his prosecution until his human rights application was disposed of.

The Attorney General raised an objection to the human rights suit and also applied to have the case moved to a different judge than the one already handling it. But this latter application was denied whereupon the respondent who was the Chief Judge of the FHC intervened of his own discretion and transferred the case to another judge. As the country prepared to restore civil rule, the military regime issued a new decree which abolished the Failed Banks Tribunal and transferred its jurisdiction to the FHC. Acting

⁷³⁵*Supra* note 590.

⁷³⁶*Supra* note 613.

⁷³⁷[2004] 8 NWLR (Pt 875) 336 [Ng Ct App].

under this decree, the respondent directed the arraignment of the appellant at both the Federal High Courts in Abuja and Ilorin.

The appellant was aggrieved by these directives and applied again to the Lagos High Court to enforce his fundamental rights. He alleged violations of sections 34(1)(a) dealing with right to dignity, 36(1) protecting fair hearing and 44(1) protecting right to both moveable and immoveable property under the constitution. The trial court granted him the leave to enforce his rights but dismissed the main application at the conclusion of hearing. Appellant took the matter to the Court of Appeal. The court dismissed the appeal, holding that the appellant suffered no wrong at all. It further held that where the words used in a statute being interpreted are clear and unambiguous, the court, while interpreting such situations, must ascribe to the words their ordinary meaning so that the import of such a statute must ordinarily evolve within the context of the ordinary meaning of the clear and unambiguous words that make them.

While the court's approach here may appear grounded at the superficial level, it nevertheless masks its contextual undercurrents when scrutinized more closely. The appellant here was a well-known critic of the government. He was arrested at a time when the said government was at its most intolerant and repressive. The appellant had also personally alleged that his ordeal before the Failed Banks Tribunal, in addition, derived from his criticism of a previous judgment of the Nigerian Supreme Court.⁷³⁸ So apart from the political motives that could be ascribed to what the appellant saw as persecution, the judiciary became also implicated. And one could see how the political and the judicial interacted to produce the outcome in this case which then seemed to be dressed up in literal legal justification.

From the facts, not only did the Attorney General representing the regime in the case apply to have the appellant's substantive application dismissed, he also requested for

⁷³⁸ Innocent Anaba, "Why the Nigerian Nation is not making Progress, by Fred Egbe" online: <<http://news.biafranigeriaworld.com/archive/2003/nov/21/0169.html>>.

the case to be tried by a different judge. When these requests were rejected, the Chief Judge of the court, appointed by the regime's head intervened nevertheless and transferred the case to another judge. The said Chief Justice therefore took by administrative means that which had been legally and judicially denied. In so doing, he obviously lent the regime a helping hand in its alleged crusade against the appellant. So even though the Court of Appeal's decision rested on adherence to strict interpretation of unambiguous words used in a statute, it only conferred judicial legitimacy on a judgment that may have been politically motivated. At the same time it could be speculated that the arbitrary transfer of the case to another judge could stand for the effectuation of a private interest by the Chief Judge who carried it out.

In a sense therefore, this is a clear case where a single decision engages three different theoretical possibilities. On the one hand there was the political interest of the regime in power to target one of its critics. When it seemed that the court would not lend a helping hand in this, we saw the rational choice theory in play when the Chief Judge (and the regime's appointee) took matters in his own hands and transferred the case to another judge who delivered the hoped for kind of judgment. But ultimately the appeal decision overlooked these deep underlying factors in favor of a literal, plain-meaning justification.

In addition, where literal application of rules means that courts cannot add to constitutional and statutory provisions even where applying them literally produces absurd outcomes, this is hardly always the case. Sometimes therefore the court's approach to literalism is both curious and contradictory. For example, in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*,⁷³⁹ a member of the Jehovah's Witness Christian denomination whose belief forbids members receiving blood transfusion rejected a medical doctor's suggestion along those lines. The doctor apparently overruled him. In an application to enforce his right to freedom of religion, the

⁷³⁹[2001] FWLR (Pt 44) 542 [Ng Sup Ct].

Supreme Court held that the medical doctor could not validly overrule the patient's rejection of blood transfusion based on his religious belief. While interpreting what it identified as a "public interest" element in the case, the court agreed that the duty of the government to prevent or curb an epidemic could qualify as public interest, which would only be so if the failure to act puts the general public in danger. If, however, the direct consequence of that failure is to be borne by only the competent individual involved, that could not trigger the public interest.

In deciding the final appeal from this case, the Supreme Court proposed a framework through which the right to freedom of religion could be analyzed and enforced. The court speaking through Ayoola JSC in a unanimous decision agreed that:

The right to freedom of thought, conscience or religion implies a right not to be prevented without lawful justification from choosing the course of one's life, fashioned on what one believes, and the right not to be coerced into acting contrary to one's belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy... Law's role is to ensure the fullness of liberty when there is no danger to public interest. Ensuring liberty of conscience and freedom of religion is an important component. The courts are the institutions society has agreed to invest with the responsibility of balancing conflicting interests in a way to ensure the fullness of liberty without destroying the existence and stability of society.⁷⁴⁰

Some of the choice words that the court deployed in this decision deserve closer scrutiny. First it refers to "lawful justification" and then to its (the court's) role in "balancing conflicting interests." This shows some level of appreciation by the court of its duty whenever individual human rights clashes with the governmental power to restrict them. Government has to justify the restriction and this would involve the court in some balancing task.

Not always is this duty clear enough to Nigerian courts. Additionally, the court in the above quote throws in the doctrine of the "public interest." Neither in the specific

⁷⁴⁰*Ibid* at 588.

limitation of section 38 nor in the general limitation in section 45 of the constitution is this “public interest” clause used in the same manner as the court in this case. Nevertheless, it has been argued elsewhere that the court’s lack of any reference to the section 45 limitation does not preclude “public interest” as used by it from referring “to all or any of the grounds mentioned therein [that is section 45].”⁷⁴¹ This is open to debate. It does not answer the question why the court introduced the clause in the first place. Was the provision ambiguous and thus the clause was needed to furnish a clearer understanding? Assuming this is the case, does it not detract from the court’s philosophy of sticking by the exact terms used in the constitution? This is where the element of curiosity comes in.

The next case also centred on the right to freedom of religion and similarly arose from the beliefs of members of the Jehovah’s Witness sect. In that case⁷⁴² a child who belonged to the sect sued through his mother to reverse an order by a magistrate court mandating blood transfusion for the said child. He had experienced a shortage of blood because of a severe infection. The doctor recommended blood transfusion but the child’s mother withheld consent on the grounds of her religious belief. The police were called in who obtained a magisterial order for the hospital to do everything necessary to save the child’s life as required under the Lagos State Child Rights Law of 2007.

The hospital carried out the transfusion which led to a rapid improvement in the condition of the child. He was subsequently discharged from hospital. His mother applied to the magistrate court for a reversal of the order for blood transfusion on the ground that it was made fraudulently. That application was denied. She then applied to the High Court for an order of judicial review. That request was similarly dismissed leading to this appeal. Though this case was not commenced under the Fundamental Rights

⁷⁴¹See Enyinna S Nwauche, “Law, Religion and Human Rights in Nigeria” (2008) 8 Afr Hum Rts L J 568 at 571.

⁷⁴²*Esanubor v Faweya*, [2009] FWLR (Pt 478) 380 [Ng Ct App].

(Enforcement Procedure) Rules, it is significant for the court's peculiar approach to the question.

In its judgment dismissing the appeal, the Court of Appeal sided with the magistrate court and held that it was right to have issued an order that ultimately preserved the life of the child. The basis for the court's ruling was that the child in question was incapable of giving a valid consent to die on the basis of religious belief. In fact, the court was of the view that the child's right to life took precedence over the mother's right to freedom of religion. It went further to characterize the mother's choice of attempting to sacrifice her child's life for her religious freedom as both "illegal and despicable."⁷⁴³

Before turning to the model that could have been adopted by the court in this case, let me first look at its reasoning which I consider no less important and may have in fact informed that approach. The judgment of the Court of Appeal has been criticized for not recognizing that "the child had a right to refuse the transmission."⁷⁴⁴ But while there may be merit in giving consideration to the interest of the child as this writer suggests, a lot of caution is still demanded in a situation like this where the child is thought not old enough to appreciate the implications of the choice he is making. Discretion is especially compelling in this case which involves the right to life. The right cannot be recalled once it is lost. On the flip side, if the law recognizes that a child is incapable of making as significant a decision as in this case, and transfers the right to a parent, should that parent's decision not be honored?

There is a valid assumption in law that unlike the right to life, the right to freedom of religion can only be exercised by persons with full capacity to appreciate the consequences of their choices. Therefore until a child reaches this capacity he/she cannot give valid consent of the kind required in this case. Therefore in a choice between the child's right to life (which he/she is entitled at all times whether as a child or in old age)

⁷⁴³*Ibid* at 397.

⁷⁴⁴Enyinna Nwauche, "You may not refuse a Blood Transfusion if you are a Nigerian Child: A Comment on *Esanubor v Faweya*" (2010) 10 Afr Hum Rts L J 309 at 311.

and a parent's personal freedom unrelated to the child's right to life, the court was right in this case to prioritize the child's right to life over the mother's freedom of religion.

The overall approach of the courts in this case and the one before it and the reasoning behind them only supports my earlier assertion. At least in terms of overall outcome there does not seem to be any observable weaknesses upon which they could be faulted. In the first case, the courts focused directly on the words used in the constitution and justified their decisions on the basis of those words. In the second case, the court introduced in a discretionary manner a clause not used in the constitution. This produced a result that could be described as satisfactory. But when justifications shift arbitrarily and the court could overthrow its own traditions in this manner, there is room to doubt the judges' motives.

To further substantiate the positivist inclination in a discretionary manner of the courts, I now turn to the case of *Mojekwu v Iwuchukwu*.⁷⁴⁵ It had been commenced in the first instance court as *Mojekwu v Mojekwu*.⁷⁴⁶ The names of the parties changed prior to the Supreme Court decision because one of the original parties Caroline Mojekwu died while it was still pending and was replaced by her daughter, Mrs. Iwuchukwu. In the case, the appellant Augustine Mojekwu pleaded the *Ili-Ekpe* custom of Nnewi town in southeastern Nigeria which he claimed entitled him to inherit Mrs. Caroline Mojekwu's late husband's property. Under the custom in question, if a man died without male surviving children, even if he had daughters, they could not inherit his property. Instead the deceased's closest male relative would inherit them.

The Court of Appeal had an opportunity when the case went before it to filter customary law relating to inheritance through the human rights lens. Not only did it find the *Ili-Ekpe* custom repugnant to natural justice, equity and good conscience, it also struck it down for being contrary to the constitutional prohibition on discrimination. On further appeal to the Supreme Court, that court upheld the portion of the judgment

⁷⁴⁵[2004] 4 Sup Ct (Pt 1) 1.

⁷⁴⁶[1997] 7 NWLR (Pt 512) 283 [Ng Ct App].

allowing a widow to inherit her deceased husband's estate. However, the court condemned as too sweeping the Court of Appeal's opinion on the repugnancy of the *Ili-Ekpe* custom. According to the court, per Uwaifo JSC:

I cannot see any justification for the court below to pronounce that the Nnewi native custom of '*Oli-ekpe*' was repugnant to natural justice, equity and good conscience...The learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi '*oli-ekpe*' custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against all customs which fail to recognize a role for women. For instance the custom and traditions of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities.

The decision of the Supreme Court in this case seems rather ambivalent and detracts significantly from the positive chord that the Court of Appeal had struck in its own judgment that triggered the appeal. On a progressive note, the court was willing to strike down the local custom which precluded females (including widows) from inheriting from deceased male relatives. This a huge step forward in the efforts to curtail customary practices that discriminate against women.

Yet there is also a negative consequence from this decision: the Supreme Court's reluctance to extend its force to all customs that fail to recognize the "role" of women. Even though the court used the word "role", I believe it should more appropriately be read as "right" since what was at stake in this case was not just a role for women but their right to inherit from deceased husbands or other male relatives. Instead the court was willing to anticipate the views of those communities that do not permit women to be natural rulers or family heads. Ordinarily, a court ought to deem these practices discriminatory without much ceremony. It is because of cases like this that public interest litigation is considered useful in the sense that the decision in a single litigation could

have ripple consequences across the legal system. The court's reluctance to allow this to happen suggests that it might be sympathetic to such customs that clearly go against the anti-discriminatory stance of the constitution.

This judgment therefore fits into the orthodox model because of the court's determination to give a fair hearing to other communities not represented in this specific litigation. Besides, it also engages the social context viewpoint that diversifying the judiciary is essential to the promotion of justice on the basis of equality. Equally present in the decision are traces of the rational choice model. In the analysis that follows, I will show how each of these models is reflected in the decision.

On its surface, the court's insistence that the rule regarding fair hearing be respected looks to be a legitimate concern. But when further scrutinized, it seems to create the impression that in human rights litigation, the court has to anticipate the opinion of all who may be affected by its decision. If the standard set in this case is adopted, the court in fact has to postpone decision until those quarters make their opinions known. This could lead to an unmanageable situation. The court's duty in each suit should be to ascertain the constitutionality of laws and actions complained of. If any law or action is found to be unconstitutional, no individual or institutional opinion can reverse that unconstitutionality. Applied to the decision in this case, if the *Ili-ekpe* custom is found to be discriminatory, of what use to this finding would be the opinion of communities with similar practices?

The court's decision might be explained on the basis of the rational choice model as well. Nigeria's traditional patriarchal setting makes this suggestion a particularly appropriate one. The society is overly male dominated. As an example, the Nigerian Supreme Court has always been male dominated. Only in the last few years were the first female justices appointed to that court. Women were therefore not represented in the court at the time of this decision. Its first female head was only recently appointed

allegedly against a quiet opposition.⁷⁴⁷ Among the charges claimed to have been made against her was that she is a single mother! This judgment seems therefore to allow the male custodians of traditional values to keep advantages they have always arrogated to themselves. The judges being men themselves would therefore seem to have an underlying interest to see that this is done. In that sense, the rational choice model seems to apply to the extent that the all-male court might have been maximizing some interests in a patriarchal society.

Therefore, law in this environment as the likes of Nedelsky would argue is not and should not be interpreted as a neutral force.⁷⁴⁸ The experience of judges and the culture that produced them are therefore quite grounded in their decision-making. When they pronounce judgments as such, they do so using not just the language of law but also that of power. This includes secular power marked by male political dominance as well as cultural power highlighted by the history of patriarchy still evident in most African, nay Nigerian societies. In this sense therefore, the failure of the Supreme Court to strike down the *Ili-Ekpe* custom fits an understanding of human rights adjudication within a specific social context, in this case a male dominated Nigerian society.

Further insight into the courts' positivist orthodox orientation could be gleaned from the case of *Nigeria Deposit Insurance Corporation v. O'Silvawax International Ltd.*⁷⁴⁹ The questions here were whether a claim arising from an ordinary business relationship between a bank and its client could give rise to a human rights claim and

⁷⁴⁷See Taiwo Adisa, "How Jonathan sidelined Forces against new CJN" *Nigerian Tribune* online <<http://tribune.com.ng/index.php/news/44320-how-jonathan-sidelined-forces-against-new-cjn#:UAUCO6GNbMQ.facebook>>. On the cultural background to this debate see Uche U Ewelukwa, "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies" in Bert B Lockwood ed, *Women's Rights: A Human Rights Quarterly Reader* (Maryland: The John Hopkins University Press, 2006) 152; Uche U Ewelukwa "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies" (2002) 24 *Hum Rts Q* 424; Phil Okeke, "Reconfiguring Tradition: Women's Rights and Social Status in Contemporary Nigeria" (2000) 47 *Afr Today* 49.

⁷⁴⁸See Nedelsky, *supra* note 275.

⁷⁴⁹[2006] 7 NWLR (Pt 980) 588 [Ng Ct App].

under what circumstances an otherwise legal action could be considered unconstitutional. The facts were that 2nd respondent who was the Managing Director of the 1st respondent, a corporate entity, had obtained a loan from the Cooperative and Commerce Bank Limited. As security for the loan, respondents deposited the customary right of occupancy in respect of a building. However the mortgage could not be executed because first the Chair of the local council where the property was situated could not give consent and second because the 2nd respondent did not deliver his tax certificate.

The respondents failed to repay the loan with interest. The bank went into distress and therefore commenced an aggressive drive to recover all outstanding loans to its customers, including the respondents. In the process the bank seized three cars belonging to the respondents. The 2nd respondent therefore filed an application before the Federal High Court to enforce his human right to property. The bank objected on the ground that the court lacked jurisdiction to hear the case. Meanwhile, the bank was eventually liquidated whereupon the Nigeria Deposit Insurance Corporation (NDIC) assumed its position in the litigation. The court rejected the notion that it lacked jurisdiction. The NDIC appealed.

The Court of Appeal held that the bank was justified in seizing the cars belonging to the respondents because the Anambra State Torts Law of 1986 qualified as a general law within the meaning of section 44(1) of the constitution. It held that the law on the one hand offered a defence to the appellants to take property by way of distress to recover a loan. On the other hand it also offered protection to the respondents to recover damages for detinue or trespass if their property is adjudged to have been wrongfully seized. From every indication, the appeal court followed a literal reading of the Anambra State Torts Law without necessarily considering the impact of that reading in the context of a human rights complaint.

The facts of the above case are similar to those in *Ikem v Nwogwugwu*⁷⁵⁰ arising from a claim alleging a violation of the right to freedom of movement. In *Nwogwugwu*, the main question before the court was whether respondent's confiscation of appellant's vehicle as satisfaction for appellant's unfulfilled obligations arising from an overdraft facility from the respondent amounted to a violation of the appellants fundamental right to movement. The right was guaranteed by section 38 of the 1979 constitution which is similar to section 41 of the 1999 constitution. The facts were that 3rd Respondent-bank had advanced several overdraft facilities to the appellant. The appellant secured the facility with a car. When it had matured, the appellant failed to redeem it. The respondents therefore impounded the car that was used to secure it. The appellant filed this suit claiming an infringement of his constitutional rights to movement.

The Court of Appeal in my view correctly held that a clear reading of sections 38(2)(a) of the 1979 Constitution shows that a citizen's right to free movement is not absolute but could be restricted by any reasonably justifiable law. The court also found correctly that when a person is accused to having committed a crime, that person's right to movement could be lawfully curtailed. But to what extent this could be done, the court offered no indication. And what followed from the court thereafter cannot, in my view, stand up to legal scrutiny. It had noted that a contract existed between the parties and that this justified the restriction placed on the appellant's right to move freely through the seizure of his property.

It is hard to support the reasoning of the court. This was a contractual dispute and though the appellant may have breached the terms of the contract, could that breach possibly justify the respondent's resort to extra-legal measures? The mere existence of a contract which creates rights and obligations cannot amount to a constitutional justification for extra-judicial interference with the appellant's rights. While it is true that the constitution limits and modifies the rights enshrined in it, every such modification or

⁷⁵⁰[1999] 13 NWLR (Pt 633) 140 [Ng Ct App].

limitation has to be justified on the basis of its reasonableness in a democratic society. The limitation in this case has not been imposed by law but by the self-help action of an individual outside the ordinary lawful channels for dispute resolution. Clearly therefore respondent's action could not, in my opinion be deemed reasonably justifiable in a democratic society.

Though the facts of the *NDIC case* is similar to those in *Nwogwugwu*, the court resolved it on the basis only of its private law elements without examining the human rights complaint raised by the other party. This appears to be improper as well given that private law principles cannot possibly take priority over constitutional human rights guarantees. That the court did not recognize this fact therefore only enhances its orthodox, positivist characteristics. But even at that the constitutional guarantees which it ignored could have fitted perfectly into its approach in this case but with a more balanced result.

In both cases, the court left the impression that an individual could act lawlessly to redress a perceived private legal wrong. If an ordinary business or contractual agreement is breached by a party to it, the court has given a license for the party aggrieved to take laws into both hands. This would be taking literalism to a whole new level that supports individual impunity. It is a call to anarchy. Notwithstanding that in the *NDIC case*, the Torts Law of Anambra state seems to condone this invitation to self-help; it may not answer for the constitutional consequences of its application. The court ought to have taken this into consideration. In fact these are two cases that bring into sharp focus the dangers of applying legal provisions in literal fashion especially where the results are absurd.

The next case⁷⁵¹ amplifies this difficulty even further. The respondent was employed as a Service Engineer by the appellant. Appellant dismissed him from the employment because of his insistence on joining the National Union of Petroleum and

⁷⁵¹*Sea Trucks (Nigeria) Limited v Payne*, [1999] 6 NWLR (Pt 607) 514 [Ng Ct App].

Natural Gas Workers, (NUPENG) as of right. The appellant company believed the proper union for the respondent to be not NUPENG but the Nigerian Union of Seamen and Transport Workers. Respondent therefore brought this suit claiming that his fundamental right under the constitution to join a trade union of his choice had been contravened. The trial court upheld respondent's claim whereupon the appellant filed this appeal.

The court held that by virtue of Section 37 (Section 40, 1999) of the Nigerian constitution of 1979 every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interest. In the court's view, the phrase "for the protection of his interest" does not give the citizen an unrestrained freedom to join any association. It is not a freedom at large but rather, one that is certainly restrictive. If it were the intention of the makers of the Constitution to make the right of association unfettered or unrestrained, it would have used the words "of his own choice" as was done in section 33(6)(c) of the same constitution on the right of a citizen to be represented by a counsel of his own choice.

Continuing, the court decided also that a person proposing to join an association must show how that association would protect his interest. In this regard, section 37 of the constitution must be interpreted in a manner that would give effect to the intention of parliament to avoid lending support to unrestricted access to association at the fancy of individuals and not necessarily to protect any known interests. It held that the respondent in this case cannot rely on section 37 to insist on a right to join the NUPENG instead of the Nigerian Union of Seamen and Transport Workers to which he rightly belongs because the appellant, his employer is not engaged in oil business.

Yet again there are obvious gaps in the court's reasoning in this case. First is the court's attempt to suggest the choice of words that ought to have been used for this right in the constitution instead of those actually used. This is rather contradictory to the court's previously held position that constitutional texts are sacred and that when faced

with their interpretation, courts should restrict themselves to the actual words used and no more.⁷⁵² Secondly, how is it the court's duty to pick an association for an individual particularly when that individual insists on not belonging to such an association? Is the right not negated if the choice of association is not made by the individual concerned? As importantly, who is more suited to decide upon what is in the best interest of the individual seeking to join an association, the judge or the individual in question? If the court had continued with its literal tradition, the case may well have produced a better outcome for the respondent. The court took the opposite course.

The case of *Victor Ndoma-Egba v Chukwuogor and Others*,⁷⁵³ as well fits into what would seem to be the courts' literal/positivist anxieties. The main questions in the case were how statutes that expropriate property of citizens should be interpreted and whether the Abandoned Property Act of 1990 was discriminatory in its effects. The facts were that 1st respondent, an Igbo man resident in Ikom, Cross River state leased property from the Etayip community of Ikom. On the leased property he erected houses and used other parts for a farm. Some of the houses were rented out to tenants. His family and employees lived on the others.

In August 1967 when Nigeria was at war, 1st respondent traveled outside Ikom to his own region of the country to check on his businesses. But he could not return to Ikom because war hostilities had led to the destruction of a bridge through which he must return. He therefore stayed in his home town until the war ended in 1970. While he was away, his tenants remained on the property while an agent appointed by him collected rent on his behalf. At the end of the war, 1st respondent returned to Ikom only to discover that his property had been declared abandoned by the then South Eastern state

⁷⁵²*Global Excellence Communications Limited v Duke*, [2007] 16 NWLR (Pt 1059) 22 [Ng Sup Ct] ("The duty of the courts is simply to interpret the law or constitution as made by the legislature or the framers of the Constitution. It is not the constitutional responsibility of the judiciary to make laws or to amend the laws made by the legislature. Courts cannot amend the Constitution, neither can they change the word used in it.")

⁷⁵³*supra* note 613.

Abandoned Properties Implementation Committee which sold the property to the appellant and the 3rd and 4th respondents.

First respondent filed a suit contending that his property could not be declared abandoned because his tenants remained on it and he had an agent collecting rent from them on his behalf. He also argued that the Etayip community from which he leased the property could not be said to have deserted their own land. The trial court held that 1st respondent abandoned his property and dismissed the suit. The Court of Appeal reversed the judgment prompting appellant to take the case to the Supreme Court.

In its decision, the Supreme Court held that in interpreting a statute which encroaches on a person's proprietary right, the courts should adopt the principle of strict construction *fortissime contra proferentes*, which leans in favor of the citizen whose property rights are denied and against the interest of the lawmaker. The court held therefore that where the statute provides a procedure for divesting a citizen of his property, the court must construe the provisions of the statute to ensure that the stated procedure is adhered to or complied with in exercising the compulsive powers. In this case the court found that the procedure prescribed for exercising the expropriatory powers of the statute had not been followed.

With specific reference to the Abandoned Property Act, the court agreed that any law which seeks to punish a class of people in society is a law that could destroy the whole fabric of a nation if such a law is not struck out the statute book. Pats-Acholonu JSC speaking for the court asserted that:

I make bold to state that strict adherence by the law courts to the Austinian Theory of legal positivism was what brought about the Second World War where a villainous and devilish dictator succeeded in emasculating the courts and the people by spewing out laws that had horrendous effects not only on the Germans but more particularly on the Jews.⁷⁵⁴

⁷⁵⁴*Ibid.*

The judge's reference to Austinian positivism showed the court grappling with its own prior traditions at least in the context of this specific case. A judicial bastion of legal positivism appeared to be disavowing one of its most significant ideological roots. And the decision shows that were this to happen more frequently, victims of human rights abuses would in all likelihood be better treated by the court system. There does not seem therefore to be any valid basis to dispute either the overall decision in this case or the court's reasons for rendering it. The concern is that there is not enough consistency in keeping to such bold affirmations of principle. There is a strong appreciation by the court in this case that positivist orthodoxy does not always produce the most elegant results. There is also an indication that the court is willing to examine better alternatives if only it could summon the will to do so. The court's strict interpretation of the expropriatory statute emphasizes its tradition of reading laws literally. But in this case, there is at least evidence that such literal readings could sometimes benefit litigants complaining that their human rights had been violated.

But more than the above, there also seems to be a personal interest element within the rational choice theory in this decision. I had offered this in the second chapter as a possible explanation for judicial orientation in Nigeria. In this case, it could be argued that Justice Pats-Acholonu, himself an Igbo may have had a personal interest in the subject matter of this suit. Most Igbos are embittered by the entire "abandoned property" episode.⁷⁵⁵ Giving judicial traction to that bitterness would perhaps be justified. But to say this was the case would be to perhaps give Justice Acholonu more power than he actually possesses. Because the Supreme Court is collegial, he obviously had the support of other judges to deliver the majority opinion. While his personal interest may have been served no doubt, its impact on the judgment is diluted by the fact that without the support of other non-Igbo judges, his singular opinion could not have carried him very far.

⁷⁵⁵Philip C Aka, "Nigeria: The need for an effective Policy of Ethnic Reconciliation in the New Century" (2000) 14 *Temple Int'l & Comp L J* 327 at 340.

To explain this further, Downs specifically stated that all government officials (judges included) participate as agents in a division of labor that has both a private motive and social function.⁷⁵⁶ For judges like Pats-Acholonu, this social function is hardly in doubt. It is to arbitrate private and public disputes in order to keep society within acceptable legal boundaries. But the private motive that could intrude into this public function is less clear-cut. For this reason, applying the private interest motive to explain judicial inconsistency or reflexivity could, as in this case, be fraught with challenges. Where lies the evidence that would support this claim?

It would be unusual (if not absurd) for Justice Pats-Acholonu above to confess that he had been motivated by personal interest in resolving this case. Yet the challenge of proving the personal interest of judges may not detract from the possibility that such personal motivations do in fact exist. Where it is possible to rely on circumstantial proof of such personal interest motivations, none would seem more useful in showing such than that reasons for decisions are unstable and rationalizations are arbitrary. In the Nigerian context where the appointment, promotion and tenure of judges is overly politically controlled, judicial officers who desire promotion and secure tenure know better than rule against political office holders with powers to influence their careers in significant ways. The same could therefore be true in this specific case where a judge may have been on a subtle crusade to redress a perceived historical wrong.

Finally on the orthodox/literal traditions of the courts is the case of *Mbanefo v Molokwu and Others*.⁷⁵⁷ The main question in that case was as to the dimensions of the right to freedom of association under the 1999 constitution. The appellant and the respondents were all members of the *Agbalanze* society of Onitsha, Anambra state. At a meeting of the society held in 2004 the appellant was ostracized from the group apparently for committing an abominable act. The appellant commenced a suit at the High court of Anambra state alleging a breach of his right to freedom of association and

⁷⁵⁶*Supra* note 215.

⁷⁵⁷[2009] 11 NWLR (Pt 1153) 431[Ng Ct App].

the right to fair hearing. The trial court dismissed the claim and the appellant filed this appeal.

The Court of Appeal held with respect to the freedom of association portion of the claim that the right given under section 40 is not absolute as same can be tampered with under a law or circumstance reasonably justifiable in any democratic society. Thus where a person voluntarily joins a political party and the party makes rules governing the conduct of its members (its constitution) which infringes on a member's right to associate with another political party; such a member cannot challenge his party's directive as a breach of his constitutional right. This is the position in a political party. *Agbalanze Onitsha* is a voluntary association to which the appellant belonged. It is entitled under its constitution to decide for itself what it wants and to organize itself and a court cannot tell such a voluntary association how it must be organized. If a member of such an association does not like its decision it is open to such a member to resign.

The court of appeal achieved two milestones with this decision, one positive and the other negative. In the first place, it extended the ambit of laws and actions reasonably justifiable in a democratic society that could override constitutional rights. It held this to include not just government laws or action but also the internal rules of voluntary associations. This in itself is a commendable posture. It means the same rule of justifiability applicable to government laws and actions are applicable as well to the regulations of voluntary associations. This conforms to the contemporary understanding that human rights norms have vertical as well as horizontal application.⁷⁵⁸

⁷⁵⁸Danwood Mzikenge Chirwa, "In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights" (2008) 8 Afr Hum Rts L J 294; Johan Van Der Walt, "Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neo-Colonialism" (2003) J S Afr L 311; John H Knox, "Horizontal Human Rights Law" (2008) 102 Am J Int'l L 1; Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights" (2003-2004) 102 Mich L Rev 387 at 388; Gavin Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?" (1999) 62 Mod L Rev 824; Richard S Kay, "The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law" (1993) 10 Const Comment 329.

Secondly, the court removed from judicial oversight the internal organization of voluntary associations, including political parties. If a section of such association's membership is oppressed by the majority or their leadership contrary to their regulations, the court cannot intervene on their behalf. This is not the correct understanding of the right to belong to an association. It also contradicts the court's initial position above that before they can override constitutional rights an association's rules must be reasonably justifiable in a democratic society. Such rules even if they pass the test of reasonable justifiability are of no use if the members of such associations cannot be protected under them.

The right to associate should not be just about deciding which association one should belong to. There should be a component of that right protecting members of an association within it once the choice is made. To hold that an individual has a right to join an association but loses all other rights once he/she has joined, defeats the entire purpose of the right. This cannot be the intention of the framers of the constitution. The court arrived at this reasoning due to its literal reading of constitutional provision. It was more concerned with the nature of the right in abstract terms and not its substance. Were the court willing to move beyond the provision's literal surface, it would have better appreciated the absurdity of its decision as well as its implications for the future.

6.3.2. In the Womb of Habitus

Apart from the literal/positivist tradition, a different judicial orientation that so clearly has had substantial impact in Nigeria human rights adjudication takes the law in social context pathway. In chapter two as well, I discussed how Pierre Bourdieu's concept of *habitus* would seem to have a significant resonance in this regard. As a theoretical thread, *habitus* captures the practice of law within specific social and political contexts. It looks at the impact of education, training and professional socialization on the decision-making habits of judges. This is a particularly relevant point to reflect upon in the Nigerian context. It is already clear in various parts of this study that the Nigerian legal system is

under the hangover of its colonial history. British legal concepts and traditions continue to dominate legal education and training in the country. Expectedly, these traditions have seeped into the consciousness of judges and continue to define not just their approach to human rights adjudication but the judicial function in a more general sense. In most of the cases already analyzed under the formalistic/literal rubric, there was obvious evidence of judicial habituation to a specific mindset. To add to that in the next line of cases, I discuss the manner that this theoretical model is further reflected in more of the cases covered in this study.

The first case is that of *Ukegbu v National Broadcasting Commission and Others*.⁷⁵⁹ At a press conference on November 30 2004 the Director General (DG) of the National Broadcasting Commission (NBC) directed all terrestrial broadcast stations in Nigeria which re-transmitted live foreign news and news programs to stop doing so immediately. The reason this became necessary, he said, was because of the foreign perspectives of the news and the danger such broadcasts posed to Nigeria's national interest. The same order also noted persistent broadcast of unverifiable claims of miraculous healings on radio and television stations. The DG insisted that all stations should ensure that their religious programmes conformed to the requirements of the Broadcasting Code.

Appellant brought this action seeking a declaration that the DG's directive was illegal, unconstitutional and a breach of his right to receive information guaranteed under section 39(1) of the 1999 Constitution and Article 9 of the African human rights Charter. He also claimed a breach of his right to freedom of religion with regard to the portion of the directive on unverifiable miraculous healings. The trial court after upholding the appellant's *locus standi* to present the suit dismissed it on its merits because, according to

⁷⁵⁹[2007] 14 NWLR (Pt 1055) 551 [Ng Ct App].

it, the directive was justifiable in accordance with section 39 of the Constitution. The appellant appealed that decision.

In disposing of the appeal, the Court of Appeal recognized that the rights guaranteed by section 39 of the 1999 Constitution are not absolute rights but could be regulated with regards to wireless broadcasting, television or films. It went further to hold that no country conscious of its security and existence can ever have a codeless broadcasting environment that allows foreign news to be relayed live and directly into it. The court held that the trial judge was right when deciding that the NBC Code is justified within a democratic society and therefore not contrary to the Constitution. This portion of the judgment in particular seemed to suggest that the court actually scrutinized the dangers that the government feared before concluding its reasoning. But other than declaring the code “justified” in a “democratic society,” the court did not indicate by what standard it came to that conclusion.

As in many previous cases, this decision turned on the willingness of the court to protect what it perceived to be the government interest. In this case that interest was to prohibit direct foreign news broadcasts. The government only claimed it had an interest in controlling the direct entry into the country of such news. It did not state the exact nature of that interest that would be sufficient to deny persons in Nigeria the right to enjoy the free flow of news and information. Yet Nigerian courts which lived through the nightmare of military rule ought to be aware of the old tendency (similar to the one evident in this case) for those in power at the moment to conflate their personal interests in banning contrary opinion with the interest of the state as an entity.

The duty placed upon the court in this case was to strike a balance between the so-called government interest to prohibit direct news and the rights of the appellant and other Nigerians to receive and impart information. It could have fulfilled this duty by asking some critical questions. How compelling was the state interest involved? What would be the implication of sacrificing the constitutional right to information on the

shrine of an over-broadly defined state interest? Were other means available to the state that could accommodate its interest without negatively engaging the rights involved? If the court had paid attention to questions like these, answering them would have involved it in some process of putting these competing interests on an imaginary weighting scale and assigning to them the salience that they merited.

This decision, in my view, engages not just a literal reading of the constitutional text concerned but also (and more significantly) the Bourdieuan theory of *habitus*. It reflects more the in-built traditions of the judicial system which is overly sensitive to “national interest” considerations however ill-articulated. There is enough from this decision to suggest that the court aborted further inquiry as in the *Asari Dokubo v Federal Republic of Nigeria*⁷⁶⁰ case that I will discuss later, once the government waved the “national interest” flag. This in my view is more a function of the judges reinforcing the view of law in the specific Nigerian context as an authoritarian phenomenon. It valorizes the broad nature of governmental power that often dissolves to cold impunity. Such an experience for the judges would mostly have been cultivated during the years of military as much as for other reasons.

This philosophy is further emphasized by other prior influences on the choices that judges make. I discussed some of those influences in the third chapter but even more so in the fourth. British legal traditions historically built upon the concept of legislative supremacy were and remain to a large extent the bedrock of Nigerian legal education and experience. When judges submit to arguments based on unsubstantiated dangers to “state security” as in the above case, they create an atmosphere in which the ideology that government always knows best holds sway in public life. The courts’ position would seem to be that the state needs to be protected against its own citizens rather than the other way round. This decision shares obvious similarities with the earlier discussed

⁷⁶⁰[2006] 11 NWLR (Pt 991) 324 [Ng Ct App].

cases of *Chike Obi* and *Amalgamated Press* in terms of how the courts readily sacrificed constitutional rights for at best hazy state interest considerations.

Under the military as shown in the third chapter, alleged state security concerns often justified gross of human rights infractions. Because of the peculiar constitutional character of the military, the judiciary struggled to provide remedy for victims. Under a constitutional democracy, things ought to work out differently. Judgments like the one above only demonstrate that there is yet a long way to that desired change. It also shows that an important issue to negotiate towards that change is the culture of the judiciary itself. There has to be changes at the level of education, recruitment, training and professional socialization among judges. Otherwise prior tendencies would continue to hold back the promises of the new dispensation.

The case of *Yusuf and another v Obasanjo and others*⁷⁶¹ in fact provides further evidence of why this change has to be seen immediately. It arose in the context of an electoral dispute but has consequences for the protection of the right to movement under the constitution. It raised two major constitutional questions. The first was whether it is constitutional for the Independent National Electoral Commission (INEC) to place restrictions on the movement of persons on days set aside for elections. The court was also called upon to answer the question whether breaches of the constitution could be raised in an electoral dispute. The facts were that the appellant and his political party vied for the office of President of Nigeria in the 2003 elections and were declared to be among the losers. He challenged the election on several grounds including what he termed the unconstitutional restriction of individual movement on election days and the deployment of military and paramilitary personnel in the course of the elections to enforce the restriction.

⁷⁶¹[2005] 18 NWLR (Pt 956) 96 [Ng Ct App].

While holding that breaches of the constitution are not recognized in an election dispute, the Court of Appeal also decided that the restriction placed on the movement of people on election days by the INEC is unconstitutional. It said that the restriction amounts to an infringement on the individual right to freedom of movement enshrined in Section 41 of the Constitution of 1999. Therefore, the court concluded, the contents of the manual for election officials restricting movement of people on election days is not law, and not being a law cannot have the force of suspending any constitutional provision. In other words the constitutional guarantee of right to movement trumped the election manual which restricted public movement on election days.

The court perhaps reached the correct decision when nullifying the restriction placed on the right of people to move freely on election days. That there is an election, the court reasoned, is insufficient reason to shut down individual lives. Yet the premise upon which the court started its conclusions is too sweeping and a little over-generalized. I think it is improper to excuse any court or tribunal from examining breaches of the constitution regardless of the context within which those breaches occurred. The constitution should bind every court and tribunal in a legal system. Nigerian courts and tribunals should be no exception. It would have been more appropriate, in my opinion, if the court had reasoned that allegations of human rights violations are not addressable by way of election petition. This is because the constitution recognizes specific courts and a specialized procedure for enforcing human rights which do not fit into the procedures of election tribunals.

It is instructive though that this decision has not stopped the practice of restricting human and vehicular movement in Nigeria on election days which speaks volumes for the socio-political context for the operation of law in the country. It also confirms the disconnection between the theory and practice of law. And as with the penultimate case analyzed above, the possibility that the government could take liberty with portions of the law that it does not favor only establishes the environment for impunity. That this has continued as a practice under a civil regime as under the military only indicates that those

responsible for putting this judgment to effect are de-sensitized to the opportunity of a different course in a transitional situation. This would have implications for consolidating the rule of law as I would discuss in the next chapter.

The next case decided in 2001⁷⁶² dealt with a problem which is of concern to many Nigerian communities which is how to balance local customs with constitutional norms. It had been filed while the military held political power. The main questions here were first whether compulsory levy can be imposed on a citizen of Nigeria under the guise of community development and second what is the relationship of custom to the provisions of the constitution protecting the human rights of citizens? Appellant, a member of the Jehovah' Witness religious sect and respondent belonged to the same local community. Appellant's religious beliefs, he claimed, did not allow him to participate in community development activities. Respondent sought to make appellant's wife join the association of women in their community and also contribute to on-going developmental activities. When the appellant refused to do any of those biddings, respondent enlisted the assistance of armed soldiers who used force to extract the levy and fine from appellant. At the high court, the Judge ruled in favor of the community represented by respondent, leading to this appeal.

The appeal court held that much as development projects are desirable in the community, there must be caution to ensure that the fundamental rights of a citizen are not trampled upon by popular enthusiasm. This is because these rights have been enshrined in a "legislation that is the Constitution", which enjoys superiority over local custom. In this regard, any customary law or practice that sanctions the breach of an aspect of the rule of law as contained in the fundamental rights provisions guaranteed to a Nigerian citizen in the Constitution is barbarous and should not be enforced by the courts.

⁷⁶²*Okoroafor Nkpa v Jacob Nkume*, [2001] 6 NWLR (Pt 710) 543 [Ng Ct App].

Only such lawful practices that encourage community development should be encouraged.

There are two different angles from which this decision could be analyzed. The appeal court was right in condemning the community's resort to self-help to compel compliance with its customs. But it was wrong on every other score in my view. Its description of community development as barbarous is condescending and unjustified. How, for example, could participating in community development activities violate a religious belief? Is this practice barbarous only because it is coming from a community and not the secular government which also imposes various kinds of taxes and dues on the citizenry? Would the appellant not benefit from the development projects envisaged in this case as a member of this community? There is no indication in the case that participation in this community development activity affected the appellant's religious beliefs in any way. There therefore does not seem to be any valid reason for the judgment the court reached.

Like all the other previous cases already analyzed in which there is the interplay between law and society, the court in this case reached back to acquired or borrowed morality to judge a typical African setting. By this I mean the belief that an African version of modernity is synonymous with throwing away all the cultural habits of its people. The concept of *habitus* and theory of habituation are therefore relevant for understanding the choice that the court made in this case. It leaned in favor of beliefs that had been formed through education and training that while English practices are good, African customs are barbarous. This belief builds upon the traditions of the system that dominates the educational and professional formation of a typical Nigerian judge (in this case based on the English legal system) while at the same time suppressing the alternative cultural reality of the society that this system governs.

6.3.3. Politics versus Rights: When the Clash Counts

I did discuss in chapter two the relationship between law and politics, and the critique of adjudication that flows from that relationship. This critique stands for an understanding of the political calculations that affect adjudication. As a theory, it factors politics into the judicial function since courts do not operate in a political void. This is especially so in transitional situations. In such unstable moments, Ginsburg argues that “courts find themselves in more risky positions, but also may be called upon to perform essential governance functions when other institutions are weak or ineffective.”⁷⁶³ A host of roles are therefore opened to the courts when those unstable moments call. They could be “gadfly or scapegoat, regime supporter or opponent, protector of minorities or tool of majority rule.”⁷⁶⁴ A human rights complaint could easily be at issue in any such situation that may warrant judicial intervention. As the cases below would show in relation to Nigeria, when regime political interests are at stake, the courts tend to be more regime supporter than protector of those aggrieved.

The case of *Dokubo Asari v Federal Republic of Nigeria*⁷⁶⁵ arose against the background of skirmishes between the Nigerian government and youths of the oil-rich Niger Delta region who were agitating for more local control of the region’s oil resources. The appellant was previously a leader of the Niger Delta Peoples Salvation Front. But at the time of his arrest had become the leader of the Niger Delta Peoples Volunteer Force. He and others were accused of signing a communiqué castigating the government at the various levels for looting resources belonging to the people and aggrandizing corrupt officials. This, they alleged, left the Nigerian people in a state of neglect and abject poverty. They also included the hike in the pump price of gasoline to the list of their grievances. As a result, they threatened to take up arms against the government as well as revealing plans to cause civil disorder that would lead to the

⁷⁶³Tom Ginsburg, “Courts and New Democracies: Recent Works” (The University of Chicago Law School Public Law and Legal Theory Working Paper No. 388, June 2012) at 2.

⁷⁶⁴*Ibid* at 4.

⁷⁶⁵*Supra* note 760.

overthrow of the federal government. Appellant was arrested and charged with conspiracy to commit felony, treasonable felony and forming, managing and assisting in managing an unlawful society. His application for bail was denied by both the trial court and the Court of Appeal.

On further appeal to the Supreme Court, that court commenced by holding that the right to personal liberty guaranteed by section 35 of the Constitution of 1999 is not an absolute right and that the personal liberty of an individual within the contemplation of section 35(1) of the Constitution is a qualified right which permits restriction on individual liberty. It also held that a person's liberty can also be curtailed in order to prevent him from committing further offence(s). More than these though the court took a cliché straight out of the military template when it further held that where national security is threatened or there is the real likelihood of it being threatened, human rights or individual rights of those responsible would take second place. It concluded that the human rights or the individual rights must be suspended until the national security can be protected.

The logic of this judgment is that once government pleads national security in any case involving the denial of personal liberty, the dispute is effectively settled in favor of not upholding that constitutional right. The military used this to great effect for the period they were in power both to control the opposition and gag the press.⁷⁶⁶ A claim that national security or interest is in danger therefore forecloses any need to evaluate the allegation, holding it up to close scrutiny and establishing its truthfulness. Conceived in this manner, it is a catch-all claim that could endanger free speech as well as the freedom of movement and assembly. This has the potential of only giving effect to political rather than legal judgments in such cases as often the allegation of threatening national security is made by the ruling government against its political opponents. Though Dokubo could

⁷⁶⁶Chris Ogbondah, "Political Repression in Nigeria, 1993-1998: A Critical Examination of one Aspect of the Perils of Military Dictatorship" (2000) 35 Afr Spectrum 231; Osita Agbu, "Political Opposition and Political Transitions in Nigeria, 1985-1996" in Adebayo Olukoshi ed., *The Politics of Opposition in Contemporary Africa* (Stockholm: Elanders Gotab, 1998) at 242.

not be considered a politician, his travails more than illustrate the attitude of the courts to cases that may have political overtones. The political issues brought to question in this case included the nature of Nigeria's federal structure and how to deal with minority agitations. These are all sensitive political questions striking at the heart of the country's political and economic stability.

The scenario of this case in fact ties effectively into its volatile background. It arose from government's pacification activities in the Niger Delta region of Nigeria necessitated by a need to preserve the peace to enable natural resource exploitation, particularly crude oil. Such efforts were intended to enforce peace and remove the threat to government budget that the crisis in that region was causing. First it engages all the previous points already made about courts being *habituated* to an ideology that in all cases lofts national security above individual rights. But more than that, it also shows how regime political interests could be conflated to national security demands that are unreviewable once pleaded.

As effectively articulated by Kapiszewski, judges are principally balancing six different considerations when faced with politically sensitive cases. They could be following their own individual ideologies or the interests of the judicial institution. They could be protecting the interests of the elected branches of government or perhaps be concerned about the possible economic and political consequences of their decision. Finally, they could be swayed by public opinion regarding the case or be driven by plain law and legal considerations.⁷⁶⁷ In the *Dokubo case*, the court claimed legal considerations which are without doubt the easiest justifications to put out in the open. This is not surprising because of all the six factors that Kapiszewski identified; only the law and legal one could be somehow objectively stated. The rest are heavy on residual subjectivity. In this particular case, though unstated in the court's reasoning, there were

⁷⁶⁷Diana Kapiszewski, "Tactical Balancing: High Court Decision Making on Politically Crucial Cases" (2011) 45 Law & Soc Rev 471 at 472-473.

more economic and political considerations involved than the court was willing to acknowledge.

The cases of *Chukwuma and Others v Commissioner of Police*⁷⁶⁸ and *Inspector General of Police v All Nigeria Peoples Party and Others*⁷⁶⁹ are also very relevant for my purposes here. They both deal with situations in which an incumbent regime could use the law to suppress political opposition and the role of the judiciary in such situations. The law in question here was the Public Order Act of 1990 which prohibits the holding of public assemblies except with a police permit. This law was made during the colonial era and had remained the Nigerian statute books ever since. In these two cases, the question was whether it was constitutional, given the guarantee of the right to association and assembly under the 1999 Constitution, for the Public Order Act to require a police permit to properly and peacefully conduct public assemblies, meetings and processions. Both were decided by the Court of Appeal though at two different divisions.

The police in the first case had invaded the venue where some Nigerian citizens who all belonged to a socio-cultural organization were gathered for a meeting. The law enforcement officials broke up the gathering which was already in progress. They then sealed off the venue on the pretext that no police permit had been obtained to organize the gathering. The venue was a private hotel. The Court of Appeal held that the police were right to disband the meeting because the organizers did not obtain any permit for the assembly. In its judgment, the court did not even as much as consider the constitutional right to assemble and its relationship to the Public Order Act, particularly with regard to balancing the right against the social good of maintaining public peace.

In the second case, twelve registered Nigerian political parties commenced the action by way of an originating process requesting the court to answer the question whether a police permit or any other similar written official authority is required to hold a

⁷⁶⁸[2005] 8 NWLR (Pt 927) 278 [Ng Ct App].

⁷⁶⁹[2007] 18 NWLR (Pt 1066) 457 [Ng Ct App].

rally or procession in any part of Nigeria. They also sought to know whether the provisions of the Public Order Act which prohibit the holding of rallies or processions without a police permit is not illegal and unconstitutional having regard to the guarantee of the right of assembly under section 40 of the 1999 Constitution.

In this case, the court, in my opinion correctly called the main question that it had to answer: whether the provisions of the Public Order Act, particularly that which required conveners of meetings or political rallies to obtain police permits in the exercise of their constitutional rights to freedom of assembly and expression, could be held to be reasonably justifiable in a democratic society.⁷⁷⁰ The Court of Appeal here came to the conclusion that the requirement of police permit cannot be used as camouflage to stifle the fundamental rights of citizens. It held several sections of the Public Order Act to be inconsistent with the Constitution and declared them null and void.

In the latter case, the court (though it referred to the former) was ambiguous whether or not it was overruling that older judgment. It attempted to distinguish both but in a manner that is, to me, harmful of the right rather than protective of it. It is “harmful” because the court in the latter case, after recalling that the earlier one had preserved the Public Order Act, then stated:

[T]he court never decided that the Inspector General of Police [IGP] was empowered to issue police permit or disrupt any public gathering for which no license has been issued by the Governor of a state or his authorized agent. Superior police officers referred to under section 4 of the Police Order Act means the Commissioner of Police or any of the senior police officers under the state police command. The [IGP] has no statutory backing to usurp the powers of the governor to issue license for public meetings or delegate such powers to the Commissioner of Police. The appellant has failed to appreciate the trend in all democratic countries whereby the right to hold meetings and assemblies is no longer subject to the whims and caprices of the government or security agents.⁷⁷¹

⁷⁷⁰ *Ibid* at 183.

⁷⁷¹ *Supra* note 769 at 490.

The above reasoning of the court shows a lot of hesitation at both ends of the justification spectrum. It did not overrule the earlier decision. Yet it did not preserve it in the manner it was initially rendered. The court's difficulty here appears to arise from a reluctance to act decisively by overruling the earlier decision. In drawing a distinction between IGP and the Commissioner of Police in terms of who has overall competence over the issuance of licenses for meetings and assemblies, it avoided the larger question whether the Public Order Act could possibly co-exist with the rights enshrined under the constitution. And though the court in this case reached the correct verdict overall, its failure to reject and nullify the *Chukwuma* verdict makes for too much uncertainty in jurisprudence.

But more than the contradiction in the overall outcome of both cases there is the larger issue of an absence of any structured justification for each of the decisions. This further strengthens the finding in the fourth chapter that there is a lack of clear judicial standards for justifying intrusions on constitutionally protected rights in Nigerian law. Let us even assume for once that the court in the earlier case created a structure or standard from which its decision was derived. It would be well-nigh impossible for the same court in the latter case to take a totally different route. This again reflects the Bourdieuan nightmare. The court could not very much avoid its historical shadow. While struggling to act within "objective constraints"⁷⁷² (as in interpreting the Public Order Act closely), the court nonetheless fell into some subjective "forms of consciousness"⁷⁷³ created by the English legal culture that rules the adjudicatory system.

Both cases dealt with interpretation of the Public Order Act. This is a colonial law that was applied for the complete subordination of the colonized by the colonizers. After independence, it should have been repealed. But it was not; apparently because its objective fitted also the oppressive inclinations of the post-independence regime. This decision also marked a moment of crass reflexivity in judicial attitude that I already

⁷⁷²Diane Reay, "Feminist Theory, Habitus, and Social Class: Disrupting Notions of Classlessness" (1997) 20 *Women's Stud Int'l Forum* 225 at 226.

⁷⁷³*Ibid.*

mentioned elsewhere in this study. The decision is emblematic of the tendency to leave open-ended rationalizations of the judgments which makes it hard to pin the courts to any discernible reasoning pattern. Could this be a deliberate ploy by judges to create a fluid environment in which justifications shift arbitrarily? If this is the case, what reasons could be adduced for it?

The answer to this question may not be too far removed from the context for these cases, especially the *ANPP case*. The party was the main opposition to the one in power at this time. The government applied the Public Order Act to prevent its members from organizing what they had called “mass action” to protest alleged rigging of the 2003 general elections. But that ended up being the case where the court perhaps reached the correct verdict in terms of outcome. This in fact is what makes the judgment puzzling; especially if my argument that the courts tend to favor the government in cases similar to this is applied to it. The court completely blew that argument out the water but without offering any strong justification for doing so. In other words, it may seem that not always are the courts swayed by simple political calculations. But it nonetheless confirms the courts’ “one step forward-two steps backward” character which is not good for the stability of judicial orientation.

The case of *Medical and Health Workers Union of Nigeria v Minister of Labor and Productivity and Others*⁷⁷⁴ provides evidence of the gate-keeping mindset of the courts on matters relating to trade union formation. The third respondent in that case (Registered Trustees of Nigerian Association of Community Health Practitioners) applied to the Nigerian Minister of Labor for registration as a trade union. The Minister referred the application to the office of the Registrar of Trade Unions, the second respondent in the appeal. Upon 2nd respondent’s recommendation, 1st respondent denied the application for registration. Third respondent therefore filed an action for judicial review of the decision to deny the application. Before this application could be determined on its merits

⁷⁷⁴[2005] 17 NWLR (Pt 953) 120 [Ng Ct App].

the appellant in this suit applied to be joined in it as a co-defendant, a request that the court did not hesitate in granting.

Upon hearing 3rd respondent's application for judicial review, the court decided in their favor. It held the decision to deny 3rd respondent request for registration to be invalid and unconstitutional because it violated the right to associate and to belong to a trade union recognized by the constitution, the African Charter on Human and Peoples' Rights and the International Labor Organization (ILO) Convention to which Nigeria is a signatory. The appellant was dissatisfied with the decision and appealed. 3rd respondent was also not happy with the court decision joining appellant as a co-defendant in the action and appealed that portion of the court judgment.

In its judgment, the Court of Appeal reiterated that the right to freedom of association granted by section 40 of the 1999 Constitution is not absolute but subject to the limitation provisions of section 45. The court then concluded, without attempting any balancing effort, that the provisions of sections 3 and 5 of the Trade Unions Act, cap 437 containing the conditions to be met by an applicant before it could be registered as a trade union are not inconsistent with the provisions of the 1999 Constitution.

At the time this dispute arose, the relationship between the government and the organized labor movement had deteriorated significantly. As shown further below, government and labor were at odds over certain government economic policies that labor said undermined the interests of workers. Government was concerned about what it thought to be exceedingly excessive clout of the labor movement and sought through various ways, especially registration and legislation, to cut the body to size. Denying the appellants in this case the opportunity of registration would seem to enhance this goal. The court was willing to lend a helping hand as would be the case in many other instances where government and labor tangled in dispute. Not only was the government's political or economic objectives fulfilled, the judges stood to benefit as well by avoiding confrontation with government.

6.3.4. Transitional [De] Sensitivities

A thread of thinking that animates this research is my belief which is shared by transitional justice theorists that political transition should be much more than a change from one regime type to another. If democracy is considered to be a better form of government than say, military rule it is often because certain legal and political values could be more easily realized under the former regime type than the latter. But if despite the transition, the realization of those values still remains illusory, it follows that the transition itself could not be described as successful. The extent to which human rights that were repressed under an authoritarian context are realizable under a resulting democratic transition is among several ways of assessing the success or failure of that transition. Therefore in dealing with human rights complaints post-political transition, courts ought to take into account the altered legal context and factor this change into their decisions. To what extent could it be said that this has happened since the Nigerian transition of 1999? This is the issue that I examine in this section.

In the next chapter, I will argue that there has not been sufficient clarity in the attitude of Nigerian courts to human rights complaints since the conclusion of transition from military rule. I blame this on the lack of adequate “signalling” from the other political branches. But while ordinarily this apparent lack of “signalling” could be viewed as a major constraint upon the courts, Ginsburg rather sees it as an opportunity for innovation that the courts should grasp.⁷⁷⁵ The next line of cases takes a close look at some of the decisions emanating from Nigeria’s superior courts that engages this question and how the courts responded to them.

In the case of *Ekanem v Assistant Inspector General of Police (Zone 6)*⁷⁷⁶ the appellant was a witness to a beating carried out by a mob of about 50 able-bodied, armed men. They were attending a village meeting when this mob showed up in three vehicles and started beating one ACP Inyang once they had identified him. The mob tried to force

⁷⁷⁵*Supra* note 763 at 2.

⁷⁷⁶[2008] 5 NWLR (Pt 1079) 97 [Ng Ct App].

Inyang into one of their vehicles but he resisted with the assistance of some village youths. Inyang reported the assault on him to the police. Appellant was called as someone who had witnessed the beating. After making a statement to the police, he was promptly arrested and detained. He brought a suit to enforce his fundamental rights, claiming the violation of his right to personal liberty as well as inhuman and degrading treatment. Not only had he been detained, the police also denied him sleeping materials. Therefore in detention, appellant slept while standing most of the time or slept on the bare floor. The trial court declined jurisdiction to hear the case. The judge suggested instead that the case should be taken to Akwa Ibom state where the criminal case was with the police and not in Calabar where the appellant was being detained. The appellant appealed this abdication.

The appeal court correctly ruled on the first limb of the claim that to hold the appellant in detention for about two weeks without charge or bail was a violation of his right to personal liberty. The court also held that suspicion that a person had committed a crime even where based on reasonable grounds is not justification for detention in anticipation of a criminal charge. Moreover, the court held that in this case the suspicion upon which the appellant was detained was uncertain. But on the second leg of the application dealing with the denial of sleeping materials, the court took a rather contestable course when seeming to describe this request as “utopian.” It relied for this conclusion on “the Nigerian context” in which this kind of denial is routine whether the victim was detained by the police or held in prison. The judge who wrote the majority decision concluded in these words:

I am also of the view that the relief sought is not justiciable. Fundamental rights are in the realm of domestic law and they are fundamental because they have been guaranteed by the constitution... I do not know of any guaranteed right to be provided on arrest with a bed to sleep on though it is practicable to expect a detained person to sleep. Where he lies on before he sleeps is another matter. Every human is entitled to a fundamental right only when he is not subject to any constitutional disability. A person who is detained from an offence within the law is subject to a constitutional disability.

There might be benefit in taking a closer look at the reasoning in this case. The court's position furnishes additional evidence of reflexivity in the approach of Nigerian courts to human rights complaints. It is standing on very weak legal foundation but has far reaching implications because courts lower on the hierarchy than the Court of Appeal in Nigeria are bound by it. What the court did in this case was to decouple the right to liberty and freedom from arbitrary arrest/detention (that is the right not to be arrested or detained except there is legal justification) from the right to the dignity of the human person (in other words the right to be treated humanely and in a dignified manner when in detention).

The logic of this judgment therefore is that the right to dignity is abolished in the case of any individual whose right to liberty is legitimately curtailed. In other words, if as in this case a suspect is arrested and detained as part of an on-going criminal process (or what the court refers to as "constitutional disability"), the arrest and detention would actually justify holding the said suspect in less than dignifying conditions. This conclusion lacks any clear legal justification. The right to personal liberty and the right to dignity are separate rights recognized under the constitution. None should count more than the other in an ideal situation. Both rights deal with constitutional guarantees to ensure that the human rights of persons being processed through the criminal justice system are respected. In fact, it might well be that the right to dignity of the person is recognized specifically for the benefit of such persons knowing the natural tendency to treat persons suspected of criminal behavior with little regard for their human dignity.

This portion of the decision could as well have been given under the military regime without consequences. In those days there was no constitution to guide courts (it had been nullified by decrees) and judges therefore negotiated such cases with extreme caution. While under the dictatorship detainees could be treated without regard to their dignity, the same ceased being the case after the transition. Or so it should have been. The "Nigerian context" that the court referenced to justify its reasoning was actually that of the military. It belonged to the past. Yet the court showed a lack of sensitivity to this

fact. This is therefore what I would describe as “de-sensitivity” of the kind that ignores the transition from the military to a democracy or a change from authority to justification through constitutionality.

The case of *Abacha v Fawehinmi*⁷⁷⁷ was among the most important cases dealt with by the Supreme Court in the early months after the transition to civil rule. It had in fact meandered its way through the years and the entire judicial structure while the military were in power before ending up at the Supreme Court as civil rule was restored. The first issue contested in the case was whether the African Charter on Human and Peoples’ Rights was applicable in Nigeria. The second was whether an international treaty rule incorporated into Nigerian domestic law prevailed over another conflicting domestic statute. The case revolved around the right to personal liberty.

In that case, Chief Gani Fawehinmi, a Lagos lawyer was arrested on 30 January 1996 by the State Security Services for actions deemed contrary to national security. An application for the enforcement of his fundamental rights was immediately lodged by his attorney with the Federal High Court in Lagos. In the application, Chief Fawehinmi argued that his arrest and continued detention without charge violated his rights under the 1999 constitution and the African Charter on Human and Peoples' Rights (‘African Charter’), as incorporated in Nigerian legislation. The respondents, General Sani Abacha (at the time military President of Nigeria), the Attorney-General of the Federation, the State Security Service, and the Inspector-General of Police filed an objection with the High Court. They contended that Fawehinmi had been detained pursuant to an order signed by the Inspector-General of the Police under the provisions of the State Security (Detention of Persons) Decree No 2, 1984 (‘Decree No 2’) (as amended). They argued that the Court therefore had no jurisdiction to hear the action as its jurisdiction had been ousted by the Decree.

⁷⁷⁷*Supra* note 685.

The High Court, after hearing arguments on the objection, held that its jurisdiction was ousted by the Decree. Chief Fawehinmi appealed, and the Court of Appeal ruled partly in his favor, remitting “the case back to the trial Court to consider the issue of the detention for the four days of the (detention of the appellant) which is apparently not covered by the order.” Both sides in the case appealed the judgment of the Court of Appeal to the Supreme Court. The principal issues raised in this case were very significant for the times within which they occurred. But far more substantial were collateral issues that the case explored in its wake.

For example, apart from the personal liberty issue raised in this case, the court’s decision had implications as well for the manner in which international agreements to which Nigeria is a state party become laws of the land. I dealt with this in great detail in chapter five. I will not repeat the points I made then. That leaves me with the personal liberty portion of the judgment to deal with. On that, the cross-appeal by Chief Fawehinmi was upheld. The Court found no evidence that Chief Fawehinmi had been detained pursuant to a detention order under Decree No 2. It therefore remitted the case to the Federal High Court for trial of his claims.

The relevance of this case in this section is not so much for the verdict reached as with the fact that the court was silent on the issue of transition within which the case was caught up. Here was Fawehinmi who had engaged in a long-running test of will with the military and suffered series of detentions in the process. His case had survived the military regime and that is not an insignificant fact. While it is unclear what impact the transition had on the case and particularly whether the court took the change in political environment into consideration in reaching its decision, not stating so, to my mind, is a serious omission. As shown in the South African case of *AZAPO*⁷⁷⁸ earlier discussed under the transitional justice theory of adjudication, there is always a one-off opportunity for the highest court in a transitioning society to demonstrate its sensitivity to the

⁷⁷⁸*Supra* note 290.

transitional moment. This case was such an opportunity for the Nigerian Supreme Court. The court clearly did not utilize it effectively.

6.3.5. Rational Choice Dilemmas: What Interests are Nigerian Judges Maximizing?

In this section, I return again to what private interest motivations might be engaged when Nigerian judges render decisions in specific human rights cases. My goal here is to show whether or not such interests could be said to have been at play in decisions reached by Nigeria's superior courts in human rights cases for the period that the study covers. The relevant paradigm which I earlier identified as likely to be implicated is the rational choice theory. It posits that judges, like all rational actors in society, decide cases only in ways that would most probably maximize their self-interest. Kapiszewski extends this a little further by suggesting that the considerations at play could be a judge's particular ideology (social, political, religious or cultural) or the interests of the judiciary as an institution. This happens to be the case especially when political sensitivity undergirds judges' own personal interests.

As Robertson theorized, most court decisions involve the judges in the exercise of a certain level of discretion. And where this discretion is available to judges,⁷⁷⁹ they tend to exercise them according to their personal beliefs and attitudes. In the Nigerian context, such attitudes could be formed through professional, social or political connection. In terms of political exposure, it could be argued that though the judiciary is a distinct branch of government, it still has to collaborate with the other branches to formulate and implement broad governmental policies. Some form of bureaucratic connection is of course unavoidable against this background. This could also fit the personal interest of the judges to enter (and remain in) the good books of the government whose help they may need to advance professionally. This would therefore place their attitude within the

⁷⁷⁹Robertson, *supra* note 205.

rational choice or self-interest theory of adjudication discussed in chapter 2. On the contrary, in some other cases that do not engage the interest of the government as a threshold dilemma, the courts tend to be freer to make choices that conformed to the strength of the cases that the parties presented.

I will illustrate this judicial challenge with some decided cases. In *Provost, Lagos State College of Education and Others v Kolawole Edun and Other*,⁷⁸⁰ the question was about how private property could be validly acquired for public purpose and what statutory requirements must be fulfilled for the acquisition to be effective. Respondent in that case claimed to have bought a piece of land in 1972 and entered immediate possession. He established a poultry farm on the land. The appellants claimed that the Lagos State government in the same 1972 acquired the same piece of land for public purpose.

When the appellants entered the land in 1982, they found the respondent's poultry on it and immediately issued encroachment notices against the respondents. The respondents then petitioned the Lagos state government. But while waiting for the outcome of this petition, agents of the 1st appellant entered the land, fenced it off and destroyed all structures and property belonging to the respondents. Action filed by the respondents at the High Court was dismissed. The Court of Appeal reversed the judgment and found in favor of the respondents.

On further appeal, the Supreme Court reaffirmed the principle of *fortissime contra preferentes* which permits expropriatory statutes to be construed strictly against the acquiring authority and in favor of the citizen whose proprietary rights are being impeded. The court held the view that the provision of section 25 of the Public Lands Acquisition (Amendment) Edict 1976 did not offend the equivalent sections of the 1979 Constitution under which that litigation was commenced and which provided for the compulsory acquisition of property upon payment of prompt compensation.

⁷⁸⁰[2004] 4 NWLR (Pt 870) 476 [Ng Sup Ct].

On grounds of bare facts, this case ought to have produced similar outcome as in *Victor Ndoma Egba*⁷⁸¹ above. Both cases involved expropriation and the application of a specific doctrine. But they produced contradictory decisions. The only difference is that in the latter case, state government was one of the parties. It is a little difficult to assign any theoretical justification to this decision. The rational choice theory may have been appropriate. But the decision was delivered by the Supreme Court and rather than the federal government only a state government was involved. To apply this theory effectively to the case one would need to isolate what personal benefits the Supreme Court judges stood to derive from a state government that exercises absolutely no powers over them. This is an enormous challenge indeed. This notwithstanding, there is still something to be said about the contradiction in the two decisions. It would seem to suggest that to the courts, government is government whether at the state or federal government. And since there would seem to be private benefits for judges to be more sensitive to government concerns, applying the rational choice theory to this case may in fact be appropriate.

6.3.6. Economic Stability versus Rights: Applying Baxi's TREMF Thesis

In this section I turn to a different theoretical model that I suggested could be used to understand human rights adjudication in Nigeria from 1999 to 2009. I mentioned Baxi's trade-related market friendly human rights paradigm as representative of this model. The model suggests a displacement of the UDHR human rights paradigm by a new one that emphasizes the needs of neoliberal markets. It simply postulates that contemporary state developmental progress is measurable only by looking at how good a host that state is to global capital. To make this possible, the TREMF model favors deregulation and the migration of government away from the commercial arena. In essence it denies any economic redistributive role for the state. Human rights concerns are secondary in such a state and could be delegitimized to make the environment more conducive to the interests

⁷⁸¹*Supra* note 613.

of global capital. This is an issue of concern to transitioning states, including those in Africa (of which Nigeria is one). The reason is that often political transition occurs contemporaneously with economic transformation. Because of its very nature, the TREMF paradigm would more relate to economic issues than otherwise.

Not always is it clear where the boundaries between political stability and economic development could be drawn. Nor is it certain how human rights adjudication could be a factor in that process. Almost all the cases that I have analyzed dealt with violations of civil and political rights. This is obviously because the legal status of social and economic rights is contested in Nigeria both with regard to their placement in the constitution and their interpretation by the courts. But this notwithstanding, situations have arisen in which the interpretation of some domestic statutes placed simultaneous attention on certain elements of socio-economic rights.

An area that this occurred sporadically was with regard to the right of workers to strike as an extension of the right to work. Though the right to work is as fraught in the Nigerian context as several other socio-economic rights, some domestic laws such as the Trade Disputes Act, 1990 protect the rights of workers to collective bargaining and to strike in order to protect that and other rights. As exemplified by some cases that I discuss below, the few instances when it appeared socio-economic rights are engaged in litigation during the review period have invariably been in the area of right of workers to strike. This is not surprising given the collision that often exists between the rights of workers and the interests of profit-motivated businesses in deeply deregulated transitional environments.

Among those few cases is *Bureau of Public Enterprises v National Union of Electricity Employees*.⁷⁸² The questions before the court were as to what qualified to be described as a trade dispute and whether the action taken in this case by the government

⁷⁸²[2003] 13 NWLR (Pt 837) 382 [Ng Ct App].

body charged with privatizing public corporations which was aimed at preventing a strike was a trade dispute within the meaning of the Trade Disputes Act, 1990. The facts of that case were as follows. The appellant is the government agency charged with privatizing government corporations while respondents were employees of the National Electric Power Authority (NEPA), one of the corporations marked out to be privatized. Respondents threatened a strike action should the appellant proceed with its plans to privatize NEPA. Appellant filed the suit to forestall the planned strike action. Respondents objected to the suit on grounds that appellant lacked *locus standi* to institute it because there was no relationship of employer/employee involved. After a hearing on the objection, the court ruled that the suit belonged to the National Industrial Court and struck it out. Appellants contended on this appeal that no trade dispute was disclosed and therefore the High Court had jurisdiction to decide the case. Respondents also filed a cross-appeal.

In its judgment the Court of Appeal held that by virtue of section 47(1) of the Trade Disputes Act 1990, “trade dispute” is defined as any dispute between the employers and workers or between workers and workers which is connected with employment or non-payment or the terms of employment and physical conditions of work of any person. It found that the case before it did not indicate a trade dispute within the meaning of the statute since it was neither between the employer and employees, nor employees and employees. On this basis, the court concluded that if there was no trade dispute within the meaning of the statute, the High Court and not the National Industrial Court had jurisdiction to hear it.

Before analyzing this decision within the context of the TREMF paradigm, let me first dispose of a preliminary issue. This decision turned only on the question of which court had jurisdiction over the case. It had nothing to do with whether or not the threatened strike action could be legally justified. But this particular point (that a proposed strike is not in order) is implied in the court’s reasoning that since there was not a trade dispute within the meaning of the Act, then the main question could be answered.

Interestingly, the dispute arose from a plan to privatize a corporation that had been run by government for several decades. It is understandable why the workers were reluctant to buy into the privatization plan: jobs are always the initial casualties in the corporate post-privatization agenda.

The fact that the court did not answer the major question arising for consideration in this case reduces the opportunity to apply the TREMF thesis to its decision. But the court's rather dim view of what could amount to a trade dispute would seem to suggest it possessed a mindset more favorable to the privatization scheme. The court was not willing to recognize the Bureau of Public Enterprises as the employer within the meaning of the Act. This is notwithstanding that the Bureau had powers under the law to sell off NEPA, which in the courts view would be the employer. But the alternative view would seem more persuasive. It is that whoever had powers to fire the employer is actually the putative employer.

But when this decision is placed beside the new government's single minded determination to see through its privatization agenda, it would make sense if viewed through the TREMF filter. The government trumpeted the position that to attract foreign capital in the form of direct investments, monopolies like NEPA had to be broken and businesses needed to be competitive.⁷⁸³ Government had to withdraw from commercial activities and settle into the simple role of creating the right business environment. The labor movement had disagreed with this position and had challenged it at every turn. Cases like this prove that organized Labor's complaints were also framed in legal and litigatory terms. The courts had to state clearly on whose side they were. As will be shown below, they were ambivalent in their posture though the superior courts tended to side with the government and private capital.

⁷⁸³Ebenezer Ugorji, "Privatization/Commercialization of State-owned Enterprises in Nigeria: Strategies for Improving the Performance of the Economy" (1995) 27 *Comp Pol Stud* 537; Afeikhena Jerome, *Privatization in Nigeria: Expectations, Illusions and Reality* (Ibadan: Ibadan University Press, 1996); Afeikhena Jerome, *Privatization and Enterprise Performance in Nigeria: Case Study of some Privatized Enterprises* (Nairobi: African Economic Research Consortium, 2008).

The decision of the court in the case above may be as questionable as it was predictable. But the same could also be said of some cases taken to the courts in the wake of a particular government policy that the organized labor movement in Nigeria considered harmful to their members. From 1999 to 2007 or thereabout, the labor movement waged a relentless battle to resist the policy of the government hiking the pump price for gasoline across the country.⁷⁸⁴ In early 2004, the Nigerian government decided to impose another price hike on this essential commodity. Each time this hike had taken place previously, retail prices, transportation costs and cost of other goods/services often spiraled out of control, causing great economic hardship to the most vulnerable segments of the population.

In response to the proposed government action, the labor movement served a notice on the government threatening to launch a strike in protest against the price increase.⁷⁸⁵ The government then commenced this action seeking an injunction restraining the labor movement from going on strike. Like in the other case discussed above, the government hinged its claim on the contention that the strike notice was not in contemplation of or in furtherance of a trade dispute. It further argued that the labor movement lacked standing to challenge the political and economic decisions of the government on such a platform. On its part, the labor movement argued that the price hike was illegal and unconstitutional. It also contended that the government could not validly implement the price hike policy without a law passed to that effect by the National Assembly. The High Court ruled in favor of the government, holding that the price hike did not qualify as a trade dispute entitling the labor movement to carry out strikes to oppose it. A dissatisfied labor movement appealed the decision.

⁷⁸⁴Obiora Chinedu Okafor, “Between Elite Interests and Pro-Poor Resistance: The Nigerian Courts and Labor-led Anti-Fuel Price Hike Struggles (1999-2007)” (2010) 54 J Afr L 95; see also Daniele Obono, “Trade Unions as Social Movements and Political Actors in Nigeria (1994-2004)” (2011) 20 *Stichproben. Wiener Zeitschrift für Kritische Afrikastudien* 95; Obiora Chinedu Okafor, “What should Organized Human Rights Activism in Africa Become? Contributory Insights from a Comparison of NGOs and Labor-led Movements in Nigeria” (2010) 16 *Buff Hum Rts L Rev* 113.

⁷⁸⁵*Adams Oshiomhole and Another v Federal Government of Nigeria and Another*, [2007] 8 NWLR (Pt 1035) 58 [Ng Ct App].

As with the BPE case earlier examined, the Court of Appeal in its judgment held that the dispute in order to come with the Trade Disputes Act must involve trade as distinct from a political dispute. It reasoned that what the labor movement set out to achieve in this case (including calling out its allies such as market women and school children and causing the permanent cessation of all vehicular movement and shutting down of airlines) did not fall within the meaning of the Act. This, the court further held, was the case because “one cannot put these other persons [market women, school children, etc.] within the employment covered by the trade unions being used.”⁷⁸⁶

The court’s reasoning in this case has attracted some negative commentary. Okafor decries its approach and describes it as “much too cursory and far too unsystematic to provide much insight into the logic that underpins it.”⁷⁸⁷ On the question whether a hike in the price of gas could trigger a trade dispute, he further questioned the court’s reasoning in these words:

For one, the court devoted barely two double-spaced pages to its own reasoning concerning this pivotal and highly consequential aspect of its decision (much of which was in any case taken up by a paraphrase of the relevant legislative provision). The court offered no analysis at all of the elements of the definition of a trade dispute on which it relied. These elements were simply reproduced from the relevant legislation. The court made no attempt systematically and carefully to relate this definition to the facts of the case. The reader is thus left in the dark as to what exactly it is about the NLC’s fuel pricing dispute with the government that disqualifies from meeting the definition of a trade dispute.⁷⁸⁸

In the same piece, Okafor did refer to at least one decision that seemed to uphold the position of the labor movement. That case⁷⁸⁹ had been filed earlier in 2004 and was adjudicated before the latter case that ended up at the Court of Appeal. The main issue in

⁷⁸⁶*Ibid.*

⁷⁸⁷Okafor, *supra* note 784 at 109.

⁷⁸⁸*Ibid* at 109-110.

⁷⁸⁹*Federal Government of Nigeria and Another v Adams Oshiomhole and Another*, Suit No. FCT/CV/350/2004 [FCT Fed High Ct].

this case was not much different from the one canvassed in the case analyzed above. The Federal government asked the court to declare that mass protests and strikes, or any other form or manner of protests as the defendants, the NLC decided or may decide to embark upon is illegal, unlawful and is contrary to peace and order of the nation. It also urged the court to declare that the NLC is not entitled to embark on any protests or strikes in respect of any matter not within the purview of the Trade Union and Trade Disputes Acts.

The High Court in this case decided that Nigerian law does not bar workers (whether or not they are associated with the NLC) from striking over issues that concern their interests. According to the court, the word “interest” had not been clearly defined and cannot therefore be limited only to matters regulating the terms and conditions of employment of workers as stipulated in the Trade Unions Act. But whatever benefit could have been derived from this decision is relatively diminished because it is only a High Court decision with limited precedential value. With the latter Court of Appeal decision in the case already discussed above, it could be reasonably concluded that this very judgment is impliedly overruled. I have therefore mentioned this decision neither because it represents the current formal legal position nor even that it fits within the level of cases that I am discussing in this study. It is only indicative that alternative tendencies did exist within the judiciary in general at the time in question.

Baxi’s TREMF paradigm is no doubt relevant to the assessment of these decisions. The Nigerian Court of Appeal at least on one occasion in these labor-inspired cases seemed to have been an enthusiastic ally in the realization of shift towards a TREMF reasoning. In *Adams Oshiomhole’s* case, it held that the rights of the members of the Nigeria Labor Congress to assemble or express themselves cannot be at the expense of the public good. The court shied away from defining what this public good is. One could thus conclude on the basis of events leading to this litigation that “public good” amounted to no more than keeping the peace so that private capital could thrive. It did not matter that government embodied this undefined “public good” or that the human rights of Nigerians to assemble, associate and express themselves freely were being sacrificed

at its shrine. Because this particular judgment has not been overturned, it represents the law on the subject at least for the time being.

6.3.7. Analytic Summary

To summarize this chapter, it is not in doubt that the approach of the courts to the cases analyzed in this study supports my overall argument as to their possible theoretical underpinnings. The reasoning in the judgments considered clearly oscillated along several ideological trajectories. There is a palpable lack of consistency while reflexivity was at the heart of the decisions. As a result, contradictions occurred rather frequently. Against this background, I would have been justified in refusing to pin the courts down to any particular theoretical tradition. That said, however, it is also evident that some paradigms featured more significantly than others in the overall court culture.

There is a sense in which it could be argued that judicial orientation acquired through exposure to the British legal education system dominates judicial consciousness in Nigeria. That would be an important argument to make because it is that theoretical background that predominantly structures the country's judicial praxis. This orientation appears to (in one form or another) taint almost all the cases considered in this study. It could also account for the difficulty that the courts face in constructing objective standards for the review of human rights cases. Invariably, however much the judges would want to present their decisions from an analysis of law as an object (that is incorporating objective standards), there seemed to be more value instead in understanding them as flowing from experience. As Cotterrell argues,

When jurists were recruited from a single stratum of the social, their subjective views of the meaning and character of law could appear objective. Now, the jurisprudence of difference shows that what law is 'in

reality' depends on the standpoint from which it is seen, and the way it is experienced.⁷⁹⁰

Difference as used by Cotterrell could be based on class, gender, race or other minority viewpoint. But I use it here to refer to the particular difference existing between the culture of a dominant legal system (as in the empire or the colonial) when it is imposed on a subordinate culture (of the colonized or subaltern). It also incorporates the process by which this experience is cultivated and nourished.

Thus, *habitus* in its original Bourdieuan formulation seems to be the most dominant theory for understanding the human rights adjudicatory traditions of Nigerian courts. It holds that the traditions of the legal profession in practical and judicial terms cannot escape cultivated experiences or the process through which the legal field forms its members. Education, training and socialization are all integral to this process of professional formation. They mostly inform legal practice and adjudication as individuals can only apply knowledge that have been thus acquired and internalized. It is from the pressures of the legal *habitus*⁷⁹¹ that orthodoxy and literalism become manifest. In other words literal/formalistic orthodoxy is being fed the crops of the legal *habitus*.

As old habits really die hard, to create a new paradigm, and therefore a different *habitus*, would require the same process of teaching, learning and internalization of values. Applied to this study, and having regard to the preceding analyses, for Nigerian courts to give up their British traditions would require a different kind of legal education. For example, to move from mere orthodoxy to something different, the legal *habitus* would need to be transformed. But for the present, it may not be empirically stated that there is a strong connection between the ambivalence of the courts and on-going human rights abuses. Yet if lack of legal accountability fuels impunity and encourages human rights violators, holding them accountable through legal means would most likely have

⁷⁹⁰Roger Cotterrell, "The Struggle for Law: Some Dilemmas of Cultural Legality" (2008) 4 Int'l J Law in Context 373 at 376.

⁷⁹¹Menachem Mautner, "Three Approaches to Law and Culture" (2010-2011) 96 Cornell L Rev 840.

the opposite effect. It could therefore be concluded that effective judicial intervention is necessary to ensure legal accountability and ameliorate impunity.

Chapter Seven

Post-Transition Blues: Challenges, Constraints, Opportunities

7.1. Introduction

In the preceding chapter, I discussed and evaluated the performance of Nigerian courts in the enforcement of human rights from 1999-2009 and how judicial activities in this area were shaped by the framework established under the 1999 Constitution. I examined the attitude of the courts when confronted with a variety of human rights claims. In doing this, I applied certain theoretical threads to the work of the courts as a way of understanding the orientation and ideology of their decisions. I concluded that the work of the courts is not being helped by internalized attitudes of the judicial system which needs to transform through education and training to form a new legal habitus.

In this chapter I shift attention to the other challenges that may have impeded the courts in human rights enforcement during the period that this research covers. My analysis in this chapter will therefore respond to the second component of the overarching question in this research. The conclusion from the last chapter would seem to be that the courts have not quite lived up to their roles since the transition. If this happens to be the case, it could be safely concluded that this fact may have contributed to on-going impunity and abuse of human rights. The question then is why this has been the case. What factors in addition to those already discussed may have been implicated in this? Are there opportunities to redress the situation?

For a start, it is all too easy to hold the courts to standards that are incompatible with the legal and social realities under which their constitutional responsibilities are discharged. The judicial institution is (as I have sometimes done in this research) often attacked for alleged failure to live up to its constitutional duties especially in the area of

human rights enforcement.⁷⁹² While those attacks could be sometimes justified, most of the time they show lack of appreciation for the limits placed on judicial performance by structural as well as legal limitations.⁷⁹³

Different segments of the third and fifth chapters identified Nigeria's colonial history and particularly the impact on legal education and training as a major factor in the development of Nigeria's foggy human rights adjudication culture. This has fostered a system ill-suited to the country's constitutional model. The lack of an objective standard for the review of human rights cases is an important offshoot of this culture. That is therefore a substantial part of the challenges to effective judicial intervention in human rights cases. I have analyzed it in great detail as such. There is no need to return to arguments already advanced in that regard. Therefore, other challenges and limitations engage my attention in the rest of this chapter. When looked at closely, the factors that I discuss below could also relate to some of the theories of human rights adjudication that I identified in the second chapter and applied to this research in the sixth one.

7.2. A Broken Transition: Getting Away with Impunity

The first factor that I discuss is related to the link between the present (civil rule) and the past (military dictatorship) in the Nigerian context. My initial argument is that civil dispensation cannot be secured without properly accounting for the use of power during the military era. To do otherwise, would be to condone past impunity which could then come back to haunt the present.

⁷⁹²In a recent interview, for example, the head of a Nigerian non-governmental organization which petitions the courts often to advance economic, social and cultural rights blames the courts in part for lack of effective human rights enforcement. He alleged that the judges possess an "acrobatic tradition" in this regard. See Olayinka Adesina, "Nigerian Lawyers don't have in-depth Knowledge of Rights Laws" Nigerian Compass online <http://www.compassnewspaper.org/index.php?option=com_content&view=article&id=3956%3Anigerian-lawyers-dont-have-in-depth-knowledge-of-rights-laws&catid=90%3Afront-page>.

⁷⁹³See AA Olowofoyeku, "The Beleaguered Fortress: Reflections of the Independence of Nigeria's Judiciary" (1989) 33 J Afr L 55 at 62; Ade Adesomoju, "Lack of Independence of State Judiciary dangerous – CJN" *Punch* online <<http://www.punchng.com/news/lack-of-independence-of-state-judiciary-dangerous-cjn/>>.

Before now, I had pointed out how the Nigerian judiciary struggled to assert its authority during the long period of military rule. In that period repression wore the guise of military laws (known either as decrees at the federal level or edicts at the state level) and the courts were required to implement those laws.⁷⁹⁴ While some Nigerian judges were zealous in lending their high offices to the self-serving objectives of the military,⁷⁹⁵ a good number of them showed uncommon courage and hesitated to bow to the dictates of authoritarian rule.⁷⁹⁶ Some of them paid extraordinarily high prices for their show of moral strength. On the one hand, to have such courageous judges kicked out of office was routine throughout that period.⁷⁹⁷ On the other hand, those judges who stood on the side of a repressive junta were “rewarded” for the positions that they took.⁷⁹⁸

At the time when civil rule was restored in 1999, it was imperative that the dictatorial reflex which the courts had acquired throughout the time that the military was in power had to give way to judicial orientation more suited to a democratic and constitutional dispensation. And in no area did this understanding cry more for fulfillment as in the area of protection of human rights. With a constitution that enumerated several human rights guarantees, it was expected that the courts which had

⁷⁹⁴ Basil Ugochukwu, *Repression as Law: The Arbitrary Use of Military Decrees in Nigeria* (Lagos: Constitutional Rights Project, 1994).

⁷⁹⁵The human rights jurisprudence of Justice Babatunde Belgore who for almost two decades was Chief Judge of the Federal High Court has been analyzed along these lines. See Ibidapo-Obe, *supra* note 408 at 66.

⁷⁹⁶ Oyelowo Oyewo, “The Judiciary in Periods of Political Crisis and Conflicts in Nigeria” (1998) 10 Afr J Int’l & Comp L 507 at 512 where the author provided evidence of the reluctance of the Supreme Court to validate the abuse of power by the military regime.

⁷⁹⁷ Under the dictatorship of General Muhammadu Buhari in April 1985 about 32 Judges were summarily purged from the judiciary making a legal scholar to conclude that “with the exception of [a] few judges..., the AFRC [Armed Forces Ruling Council] may remove summarily, without consultation and without giving any reasons, any judge who the government does not wish to continue in office.” Olowofoyeku, *supra* note 793 at 62.

⁷⁹⁸ Lewis, for instance, noted what he called “the flagrant manipulation of the judiciary during the [1993] transition impasse” when the judge responsible for granting an order for the June 12, 1993 presidential election not to hold “was mysteriously transferred to the Abuja High Court from an obscure provincial bench only weeks before the [ultimately annulled] presidential poll.” See Peter Lewis, “Endgame in Nigeria? The Politics of a Failed Democratic Transition” (1994) 93 Afr Affairs 323 at 332.

ostensibly been freed from their shackles would more readily seize the initiative and step up on behalf of a citizenry still recovering from the trauma of military rule.

However, since the courts do not operate in a vacuum, their position had to align properly with that taken by the other branches of the government in the resulting transition. Yet any expectation that the courts would take a trajectory completely opposed to that of the other political constituencies amounted to mere wishful fantasy. Any observable improvement in orientation from the military era did not have to start and end with the courts. That there had been a change from military to civil rule, for example, did not mean that the courts had become completely detached from political control. Rather, the more the judiciary tried to assert its independence and authority even under a civil democratic setup, the more dependent on them the other branches of government tried to make it. If this situation had to change, it required from the very beginning of the transition period an important effort on the part of those charged under the new civil dispensation to signal the dawn of a new legal order. Unfortunately, this did not seem to be the case.

There is often general public expectation that the courts would act proactively after a transition to remedy at once all the ills of the prior era. The context for such judicial intervention would, however, have to be carefully weighted especially in “divided societies,”⁷⁹⁹ those that have had difficult political histories or are “conflicted.”⁸⁰⁰ In the specific task of enforcing human rights, while what is better known

⁷⁹⁹ Sujit Choudhry, “Constitutionalism in Divided Societies” (2007) 5 Int’l J Const L 573. Nigeria was mentioned as belonging to such societies that form a collective which are not just “ethnically, linguistically, religiously, or culturally diverse. What particularly identifies a divided society is that these differences are politically salient – that is, they are persistent markers of political identity as well as bases for political mobilization. Political claims are refracted through the lens of identity, and, thus, political conflict can become synonymous with conflict among ethnocultural groups.”

⁸⁰⁰ Fionnuala Ni Aolain & Colm Campbell, “The Paradox of Transition in Conflicted Democracies” (2005) 27 Hum Rts Q 172 at 176. The authors here defined “conflicted democracy” in terms of a two-part test both elements of which must be met. “First, there must be a deep seated and sharp division in the body politic, whether on ethnic, racial, religious, class, or ideological grounds... Second, this division must be so acute, and the political circumstances such as to have resulted in or threaten significant political violence.”

is the “checking” character of judicial review, Alexander Bickel urges an understanding of a “legitimizing” quality as well.⁸⁰¹ Quoting Black,⁸⁰² he states that judicial review “means not only that the Court may strike down a legislative action as unconstitutional but also that it may validate it as within constitutionally granted powers and as not violating constitutional limitations.”⁸⁰³ Which tendency the judiciary adopts after (or during) a transition will set the tone for how human rights guarantees would be made effective or otherwise.

Bickel’s “legitimizing” role of the courts in judicial review parallels to a large extent Mureinik’s concept of “justification” as it relates to transitional human rights adjudication.⁸⁰⁴ Mureinik was writing against the background of South Africa’s progression from apartheid white minority rule to a multi-party constitutional democracy. He noted that apartheid had been characterized by a culture of authority, where unjust laws were enforced not because of their content, but because of the power wielded by those who made them. He saw the future of democratic South Africa in a movement from the culture of authority to one of justification. This model warrants constitutional justification for every exercise of governmental power as well as an environment in which “the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.”⁸⁰⁵

For this reason ostensibly, Prempeh contends that the mere grant of judicial review power, even under conditions of judicial independence, offers no assurance that the power will be employed in the cause of constitutionalism.⁸⁰⁶ He adds that “the fate of

⁸⁰¹ Bickel, *supra* note 118 at 29.

⁸⁰² Charles L Black, *The People and the Court* (New York: Macmillan, 1960) at 34.

⁸⁰³ *Ibid.*

⁸⁰⁴ Etienne Mureinik, “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 S Afr J Hum Rts 31.

⁸⁰⁵ *Ibid.* See also Michael Bishop, “Why must I Cry? Justification, Sacrifice, Loneliness, Madness and Laughter in Post-Apartheid Judicial Decision-Making” (2007) 1 Pretoria Stud L Rev 33.

⁸⁰⁶ H Kwasi Prempeh, “Africa’s ‘Constitutionalism Revival’: False Start or New Dawn?” (2007) 5 Int’l J Const L 469 at 504.

constitutionalism, where it must depend primarily on judicial review, will hinge crucially on the set of values, norms, and assumptions that informs judicial reasoning and decision making, especially when it comes to interpreting and applying open-textured constitutional provisions.”⁸⁰⁷

Transition or “political transformation” as Teitel describes it carry significant legal consequences for the society transitioning or being transformed. She argues that in such situations, the problem of legality is distinct from the problem of the theory of law as it arises in established democracies in ordinary times.⁸⁰⁸ Questions often arise (as it did in Nigeria) about the role of the transitional judiciary as well as about the overall legitimacy of the new regime.⁸⁰⁹ And “[T]he choice of principles of adjudication implies a related question about where, as an institutional matter, the work of transformation should lie: judiciary or legislature?”⁸¹⁰

Often, as was the case with Nigeria, resolving this problem lie only at the margins of the transitional process. The major objective that propelled the Nigerian transition was the exit of one kind of regime (military) and its replacement with another (“civil”, “democratic”, and “constitutional”). The mood of the public and politicians as well seemed to be that such institutional questions as the one Teitel identifies would ultimately be resolved once the military departed, their immediate departure, on hindsight, being considered more important than finding solutions to any institutional problems. However, the haste to see off the military without close attention to institutions, and especially those with capacity to alter the existing culture of irresponsible power and impunity, would prove detrimental to the entire transitional exercise.

Because human rights had been diminished under the military, it was important that the new dispensation made an attempt to distance itself from that legacy. The

⁸⁰⁷ *Ibid.*

⁸⁰⁸ Ruti Teitel, “The Role of Law in Political Transformation” (1997) 106 Yale L J 2009 at 2030.

⁸⁰⁹ *Ibid.*

⁸¹⁰ *Ibid.*

military throughout the period of its rule dealt unkindly with human rights as already noted in this study. In addition to the blanket suspension of the constitutional provisions enshrining human rights, the military also passed decrees directed at specific human rights guarantees.⁸¹¹ In a sense therefore, military rule did not have uniform impact on all human rights. Rather some rights suffered more than others in that dispensation.

Democratic constitutionalism during a transitional period should offer a different outlook. However, a lot would depend on the nature and depth of the transition. Often the question faced is: what should the constitution be doing for the polity in transition. Teitel again says the construction of new constitutional arrangements in periods of radical political change is informed by a transitional conception of constitutional justice.⁸¹² She argues that constitutional law is commonly conceptualized as the most forward-looking form of law. But it is ambivalent in the directions that it takes. While what she calls “the revolutionary generation” views the content of principles of constitutional justice as relating back to past injustice, the transitional perspective views as contextual and contingent that which is considered constitutionally just.⁸¹³

Further, Teitel believes that studying constitutionalism in periods of political change suggests that transitional modalities vary in constitutional continuity. In its “codifying” modality, constitutionalism expresses existing consensus, rather than transformative purpose. In its transformative modality, however, the successor constitution explicitly reconstructs the political order associated with injustice.⁸¹⁴ Transitions therefore often are a meshed balance of law (and the constitution) with political reality on the ground. In fact, law and justice in the context of political transformation “straddles the middle ground between law and politics; it is a politicised

⁸¹¹See Ugochukwu, *supra* note 794.

⁸¹² Teitel, *supra* note 808 at 2057.

⁸¹³ *Ibid.*

⁸¹⁴ *Ibid.*

form of law involving the application of judicial processes in the context of what...is politically possible in the circumstances of a particular transition.”⁸¹⁵

That Nigerians had long been fatigued by authoritarian rule and wanted the military out of power did not allow for the kind of negotiations necessary to define a proper transitional agenda. It was unclear what would happen once the military were gone from the stage. The country had two options open to it in this regard if the prevailing practices of dealing with the movement from authoritarianism to democracy in Africa offered any guide. The country could have chosen to do nothing and “to seek to wipe the slate of the past clean by resort to one or more of such devices as blanket amnesties or self-conscious bouts of national amnesia, and/or a deliberate exercise in the rewriting of history.”⁸¹⁶ Or it could have settled for the approach that involved “the winners arresting or rounding up the losers – or a sample of the losers – and subjecting them to some form of sanction.”⁸¹⁷

The military institution which over the years had demonstrated its political astuteness did not sleep on guarantees that were either speculative or uncertain. They therefore used their almost total control of the transition to manipulate it to an outcome favourable to their members. They allowed only a perfunctory debate of the transitional constitution yet contrived to decree a not so popular document such that more than a decade after the transition, Nigerians are still clamoring for what they call a peoples constitution.⁸¹⁸

The military also conducted their own version of the “vetting” or “lustration” procedures; but only in reverse. As such while it was possible for the transition to throw

⁸¹⁵ John Daniel & Marisha Ramdeen, “Dealing with Africa’s Post-Independent Past: Truth Commissions, Special Courts, War Crimes Trials and other Methods” in Roger Southal ed., *South Africa’s Role in Conflict Resolution and Peacemaking in Africa* (Cape Town: HSRC Press, 2006) 191 at 192.

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid.*

⁸¹⁸ Basil Ugochukwu, “Pin in the Haystack: Tracking Process and Discovering Nigerian Values in the Nigerian Constitution” online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1528468>.

up persons supportive of the objectives of the military institution, those with the dimmest hint of dislike for it were weeded out of the process. It was therefore not surprising that the new post-transition power brokers were either retired military personnel or those who had benefited from the military establishment in the past and therefore sympathetic to its cause. The transition in essence threw up a system that Ebohon refers to as a “praetorian democracy,”⁸¹⁹ that is essentially a ‘post-military order navigated with civil command; driven by authoritarian culture and psychology.’⁸²⁰ According to him, the organizing ideology of praetorian democracy “recognizes the need for accommodation of democratic structures even in their distorted forms... it seeks to accommodate a large gamut of the social forces and sectors of society without altering the command culture inherent in the praetorian absolutist order.”⁸²¹

The above conclusion was further emblemized by the underwhelming efforts of the new civil regime in Nigeria to investigate and discover the truth about those found to have been responsible for the most severe cases of human rights atrocities committed prior to the restoration of civil rule in 1999. The failure of that truth-seeking process and the role the courts played in it had the possibility of fostering impunity across the social and political spectrum. That failure also passed on the unwanted message that it was profitable for the business of human rights repression to continue under the civilian regime as under the military that it replaced.

To be sure, there are no easy choices for transitional regimes caught at these crossroads. Orentlicher expertly articulates the dilemma of such regimes thus: “With a

⁸¹⁹ S I Ebohon, “Post-Militarism: Provenance of Praetorian Democracy in Nigeria, 1999 – 2007” (2009) 8 *Global J Soc Sc* 129 at 131.

⁸²⁰ *Ibid.*

⁸²¹ *Ibid.* He states that the praetorian absolutist model applied in the context of military regimes “acknowledges that the military rules in an environment that has other multiple actors and interests. Its praetorian identity derives from the fact that the military is not only dominant, military interests are also super ordinate... The unique character of this model is that, while recognizing other interests, it violates the constitution and elevates the military to the status of major consumer of fiscal resources of states.” at 130-131.

tenuous grip on power, some of the fledgling democracies have been presented with a Hobson's choice between their very survival and the principles upon which their existence was founded."⁸²² It is an uneasy balance or what Oko calls "a major challenge"⁸²³ as such between the demands of justice and the continued dangers posed to the system by those individuals and institutions responsible for past transgressions.⁸²⁴

Two weeks after his inauguration on May 29, 1999, the newly elected Nigerian President Olusegun Obasanjo announced the establishment of the Human Rights Violations Investigation Commission which later became popular as the "Oputa Panel." It was so named after the Commission's Chairperson, Justice Chukwudifu Oputa, a well-respected and retired judge of the Nigerian Supreme Court. Although the Nigerian Commission is considered by many to be equivalent in scope and mandate to the South African Truth and Reconciliation Commission which investigated apartheid era violations in that country, the manner of their establishment and the results that they achieved differed substantially.

Unlike in South Africa and elsewhere in Africa,⁸²⁵ for instance, the Nigerian commission from the outset stood on sinking sand. It was not accommodated under the constitution. Worse still, it was not established under a specific law. Instead the President Olusegun Obasanjo, himself a retired army general reflexively announced the setting up of the Commission under a law passed only a few years after independence in 1960. There did not seem to have been any consultations or discussions within the government before the commission was established. Nothing could have been more demonstrative of Obasanjo government's *a priori* subversion of the Commission than the fact that rather than by legislative authority, the Commission was established by executive pronouncement. It did not matter much that Obasanjo referenced the Tribunals of Inquiry

⁸²² See Orentlicher, *supra* note 39 at 2539; see also Diane Orentlicher, "Settling Accounts' Revisited: Reconciling Global Norms with Local Agency" (2007) 1 Int'l J Transitional Justice 10.

⁸²³ See Oko, *supra* note 9 at 92.

⁸²⁴ *Ibid.*

⁸²⁵ *Ibid.*

Act⁸²⁶ initially promulgated on June 2, 1966 as the legal framework for the Commission's task.⁸²⁷ But even more worrying was that at the same time the Commission was required to seek out the truth and reconcile perpetrators with their victims, the Obasanjo regime rounded up only a tiny fraction of the violators and put them on criminal trial. As it turned out, this was an unclear step and further poisoned a tense atmosphere.⁸²⁸

It is, however, understandable why Obasanjo chose a cocktail of executive discretion and a dated law as the pillars on which to build such an important transitory institution. It is very unlikely that the establishment of the Commission would have materialized had he chosen the option of opening its establishment up for parliamentary debate. To expand on a point earlier made, a transition could represent any of two possibilities. The first possibility is one built on a commitment to the rule of law and a clear understanding of what happened prior to the transition and the assigning of accountability for any atrocities that may have taken place. Because of the new orientation that this entails, it is important here to ensure that those who had participated in previous abuses are not only brought to justice but also are prevented from wielding substantial power in the post-transition period.⁸²⁹

To permit such individuals major opportunities to retain power post the transition, will be incentivize them to subvert whatever procedures are put in place to hold them

⁸²⁶ *Laws of the Federal Republic of Nigeria*, c 447.

⁸²⁷ See Elizabeth Knight, "Facing the Past: Retrospect Justice as a Means to Promote Democracy in Nigeria" (2003) 35 Conn L Rev 867 at 890.

⁸²⁸ As of the time of writing this dissertation some of those rounded up in 1999 for committing human rights atrocities were still on trial. While some had been released by the courts, none had been convicted for the most serious abuses. See NAN, "Politicians urge FG to Release Al-Mustapha" *Next* online: <<http://234next.com/csp/cms/sites/Next/News/Metro/Politics/5737697-146/story.csp>>; Innocent Anaba, "Abdulsalami wanted OBJ Killed – Al-Mustapha" *Vanguard* online: <<http://www.vanguardngr.com/2011/08/abdulsalami-wanted-obj-killed-al-mustapha/>>.

⁸²⁹ Oko, *supra* note 9 at 93 (wherein the author identifies a bouquet of strategies that could fall under this rubric, including "criminal prosecutions either before domestic courts or an International Criminal Court; forgiving transgressors either through a blanket amnesty that bars future prosecutions of offenders or through inaction; establishing a fact-finding tribunal, often called 'Truth Commission,' to investigate and document abuses and make non penal recommendations to the government; lustration whereby citizens who engaged in violations are stripped of their official positions and barred from holding positions in government; and civil remedies.")

accountable for their actions while in power. The second possibility is to inadvertently or with full knowledge wipe the slate clean, ignore the experiences of the past and close all ears to the cries of abused victims of the prior era. In simple terms, the post-transitional regime acquires the peculiar disease called “inaction.”⁸³⁰ Whichever choice a transiting society makes between these two possibilities would have consequences for how the post-transitional period plays out.

Some scholars view the path to transitional justice as a political decision.⁸³¹ Citing Huntington,⁸³² Oduro states that a country’s dealings with the past has little to do – practically speaking – with moral and legal considerations because the “torturer problem” is shaped by politics, the nature of the democratization process, and the distribution of political power during and after the transition.⁸³³ In fact, Huntington distinguishes between “replacement transition” and “transplacement” transition. In the former, the transition represents a complete collapse of the previous authoritarian government while in the latter, democratic transition is achieved through negotiation or is imposed by the existing powers.⁸³⁴ While dealing with abusers in “replacement” transition, for example, through criminal prosecutions is possible, under the transplacement model, this is difficult or unattainable.⁸³⁵ Nigeria falls squarely into to this latter model hence both the attempt to find out the truth about the past with the Commission as vehicle and to criminally hold those responsible for abuses accountable were both frustrated.

⁸³⁰ *Ibid.*

⁸³¹ Franklin Oduro, “Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana’s National Reconciliation Initiative” (2005) 9 Int’l J Hum Rts 327 at 331.

⁸³² Samuel P Huntington, “Third Wave: Democratization in the Late Twentieth Century” in Neil J Kritz, ed., *Transitional Justice*, Vol 1 (Washington DC: USIP Press, 1995) at 72.

⁸³³ Oduro, *supra* note 831 at 331.

⁸³⁴ *Ibid.* See also Lydia Kemunto Bosire, “Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa” (2006) 5 SUR – Int’l J on Hum Rts 71 at 75 (stating that most transitional regimes in Africa implemented the transitional justice measures “following negotiated transitions, without a clear break with the past and/or with ongoing conflicts.”)

⁸³⁵ *Ibid.*

In the country's peculiar context, it was not clear during the planning of the transition how those responsible for past human rights violations were to be treated after the transition. In that event, persons who had been part of the past human rights atrocities either actively participated in elections forming part of the transition or loomed large in the background as substantial power brokers and kingmakers. Because of the funds such individuals had stashed from the public treasury while in power, they had all the necessary financial resources to leverage themselves and/or their cronies into powerful positions after the restoration of civil rule. This provided the background for the establishment of the Oputa Commission. As such Obasanjo would have been frightened at the prospects of seeking legislative approval for the Commission's introduction especially given that most members of the then National Assembly were either personally involved or somewhat connected to those responsible for the abuses to be investigated. The lack of a satisfactory legal framework for the task of the Commission, among several other factors, eroded its credibility from the very beginning.

The other factors at play included Obasanjo's own personal interest in how the Commission executed its work. At the beginning, he limited the Commission's mandate to the period December 31, 1983 to May 29, 1999 when military generals Muhammadu Buhari and Sani Abacha were in power. However, perceptive Nigerians were quick to point out that human rights atrocities in the country neither started nor ended within the period covered. They also noted that Buhari and Abacha were not the only past rulers of the country to whom human rights atrocities could be attributed. They pointed in fact to Obasanjo's own transgressions when he was military Head of State between 1976 and 1979 as well as those committed by the military when they organized the first ever military coup in 1966. These Nigerians were of the view that if Nigeria was serious about investigating the past, the process had to go back in time so that no perpetrator or victim was left out.

Obasanjo responded to these concerns by amending the mandate of the Commission to now cover from the time of the first military coup in 1966 until 1999.⁸³⁶ But even that did not do much to erase public skepticism regarding the Commission nor nurture its overall acceptance. The major question remained: what did the government intend to achieve by instituting the Commission? Would investigation yield accountability for transgressors through criminal prosecutions? Was the government only interested in knowing the truth and therefore bound to commit itself to a general amnesty for those who feared punishment but would otherwise be willing to let out the truth? What form/forms of redress would victims whose injuries are acknowledged receive? Absent clear answers to these questions, it stood very much to reason how much success the Commission would achieve.

The mandate of the Commission was to:

- [1] ascertain or establish the causes, nature and extent of human rights violations or abuses with particular reference to all known or suspected cases of mysterious deaths and assassinations or attempted assassinations committed in Nigeria between January 15, 1966 and May 28, 1999;
- [2] identify the person or persons, authorities, institutions or organizations which may be held accountable for such mysterious deaths, assassinations or attempted assassinations or other violations or abuses of human rights and determine the motives of the violations or abuses, the victims and circumstances thereof and the effect on such victims or the society generally of the atrocities;
- [3] determine whether such abuses or violations were the product of deliberate state policy or policy of any of its organs or institutions or whether they arose from

⁸³⁶ While the original document establishing the Commission was Statutory Instrument No 8 of 1999, when the mandate was expanded, it was through an amendment to the original document, that is, Statutory Instrument No 13 of 1999. See also *Gani Fawehinmi & Anor v Ibrahim Babangida & Ors*, Ng Sup Ct 360/2001, [2003] CHR 1 at 2.

abuses by State Officials of their office or whether they were acts of any political organizations, liberation movements or other groups or individuals;

[4] recommend measures which may be taken whether judicial, administrative, legislative or institutional to redress the injustices of the past and prevent or forestall future violations or abuse of human rights; and

[5] make any other recommendations which are, in the opinion of the Judicial Commission, in the public interest and are necessitated by the evidence.

The manner in which the Commission was constituted and carried out its task has been described as a case study in how not to run such a commission.⁸³⁷ In fact the Nigerian public expected far more than it was possible for the Commission to deliver given the several factors that assailed it from the commencement of its work. Though those who commented on its work often dressed it up as a Truth Commission, the instrument establishing it called it a Judicial Commission of Inquiry.⁸³⁸ It “had no legal authority to compel witnesses to testify, nor did it have any inducements (like the possibility of amnesty as in the South African case) with which to entice those ‘with something to say.’”⁸³⁹ In addition, the Commission’s composition seemed remarkably oblivious to the ethnic and religious sensitivities of Nigeria. The Commission was understaffed and under-resourced. Its budget could not be passed for seven months, paralyzing the early stages its activities. At the end, of the more than 10, 000 complaints placed before it, the Commission dealt with only 200.⁸⁴⁰

When the Commission eventually commenced examination of those individual complaints, it didn’t take too long for the entire exercise to turn showy and dramatic.

⁸³⁷ Daniel & Ramdeen, *supra* note 815 at 195

⁸³⁸ Scott Pegg, “Human Rights in Nigeria’s Niger Delta” (2001/2002) 4 Indiana Int’l Hum Rts L Bull 5 (The author states quite authoritatively that “Nigeria launched its equivalent of South Africa’s Truth and Reconciliation Commission (TRC) called the Human Rights Violations Investigations Commission (HRVIC)”).

⁸³⁹ Daniel & Ramdeen, *supra* note 815 at 196.

⁸⁴⁰ *Ibid.*

According to Pegg, while some of the victims' families in South Africa were critical of the country's TRC for granting amnesty to those who confessed their atrocities and for not bringing them to trial, that process at least served the beneficial purpose of bringing the truth to light in many cases.⁸⁴¹ But in the case of Nigeria, Pegg continues, this did not happen. Instead what resulted was a "fatally flawed process which I characterize as 'reconciliation' without truth or justice. South Africans might have had reconciliation without justice, but at least they got some truth. Nigerians were denied even truth and subjected to a process that routinely descended into a farce."⁸⁴²

Where the public hearings did very little to enhance the Commission's public perception, it suffered its most severe setback through judicial intervention which struck at both its validity and legal status.⁸⁴³ At the center of the case were three past military rulers and the process itself came as no surprise to some Nigerians. Gani Fawehinmi, a Lagos lawyer had waged a one man war to expose those responsible for killing the journalist Dele Giwa through a parcel bomb in 1986.⁸⁴⁴ Up to the time of setting up of the Oputa Commission, all his efforts had been fruitless. With the Commission's establishment, he saw another window of opportunity to obtain information from the

⁸⁴¹ Pegg, *supra* note 838 at 5.

⁸⁴² *Ibid.* See also Mike Ikhariale, "The Oputa Reports: An Unfinished Job" online: <http://nigerdeltaworldcongress.org/articles/oputa_reports.pdf>. See also Greg Campbell, "Days of Atonement: Searching for Justice in Nigeria" online: ... ("If you want to draw a comparison, the difference I saw with the South African example is that the participants actually came out and confessed. In the Nigerian example what we saw was like a circus. Nobody ever came out and said 'I did this'. That is the contrast and failure for me. No one pleaded reconciliation for their sins.") It seems therefore that what happened in Nigeria is not seriously regarded both within and outside the country. For example from 15-19, September, 2008 the International Center for Transitional Justice (ICTJ) in partnership with the Japan International Cooperation Agency (JICA) organized in Cape Town, South Africa a Workshop under the general theme of Transitional Justice and Development in Africa. There were twenty seven participants and Speakers drawn from ten African countries. None of the participants or Speakers came from Nigeria. My conclusion is that the organizers did not think there was anything to learn from Nigeria's failed process. Similarly, the Ugandan truth-telling process is generally written off as sub-standard much like the Nigerian variant. See report of the Workshop online: <http://ictj.org/static/Publications/ICTJ-JICA_TJandDevelopment_rp2008.pdf>.

⁸⁴³ Nlerum S Okogbule, "The Abortion of Transitional Justice Mechanisms in Nigeria: The Oputa Panel in Perspective" (2009) 15 East Afr J Peace & Hum Rts 441 at 444.

⁸⁴⁴ Dele Olojede & Onukaba Adinoyi – Ojo, *Born to Run: The Story of Dele Giwa* (Ibadan: Spectrum Books, 1987).

leader of the regime that many Nigerians believed caused Giwa's death. In Fawehinmi's petition before the Commission, he accused Ibrahim Babangida, Nigeria's military ruler at the time of Giwa's death, Halilu Akilu, former Director of Military Intelligence under Babangida and Kunle Togun who at the time was the Deputy Director of the State Security Services (SSS) of responsibility in the assassination of Giwa.

To enable them answer to this allegation, the Commission served them summons to appear before it. They ignored the Commission and instead filed a case in court questioning the competence of the Commission to compel their attendance of its hearings. The Nigerian Supreme Court⁸⁴⁵ held that the Tribunals and Inquiry Act, 1966 promulgated by the military for the entire country qualified as an existing law under section 315 of the 1999 Constitution and is deemed an Act enacted by the National Assembly for the Federal Capital Territory, Abuja only as well as a law enacted by a State House of Assembly under the residual powers of both legislatures.

The court therefore concluded that the Nigerian National Assembly had no powers under the Constitution to enact a general law on Tribunals of Inquiry to have effect throughout the country.⁸⁴⁶ The court also held that as an existing law, the Act covered only the Federal Capital Territory alone and therefore not operative throughout Nigeria. If this were the case, it meant the Commission lacked powers to issue summons to be served outside the Federal Capital Territory for the appellants to appear before it.

Though this judgment was only on the narrow issue of the extent of the Commission's powers to summon witnesses before it, not a few people saw it as a major setback in the Commission's work. It gave the Commission away as a toothless institution and set the stage for how it was generally perceived by Nigerians thereafter. Nevertheless, the Commission put that blow behind it, plodded on and was able to ultimately deliver a report. While making the presentation, the Commission's

⁸⁴⁵ *Gani Fawehinmi & Anor. v Ibrahim Babangida & Ors*, *supra* note 836.

⁸⁴⁶ *Ibid.*

chairperson, Justice Oputa reported that the greatest offenders and gross violators of the rights of fellow Nigerians were the military dictatorships and their over-zealous security outfits.⁸⁴⁷ In receiving the report, Obasanjo did deliver an apology to all Nigerians in general and to the direct victims of the human rights atrocities. He also announced the formation of a Committee to coordinate the implementation of the Commission's recommendations.⁸⁴⁸

But irretrievable damage had already been done to the Commission. Was it established so that such a blanket offer of apology as Obasanjo directed at Nigerians could be accomplished? If that was its main objective, it would only amount to an unserious and reductionist framing of its work. Even so, more disappointments lay in store. Quite significantly, the government after receiving the report failed to make it public, further muddying the transition waters. Not publishing the report therefore dampened the Commission's work and apparently nullified any possibility that its recommendations would ever be implemented as indeed turned out to be the case.

After waiting patiently for months on the government to release the report and issue a White Paper on it to no avail, a section of the Nigerian civil society published it instead. And that marked the end for a Commission that promised so much yet delivered very little. To date, none of its recommendations had been implemented. The promised reconciliation did not materialize. The country has since moved on as if that past never happened. This then leads me to the next factor, a crisis in the rule of law situation, which is nourished appropriately by the many mixed signals of the transitional process.

⁸⁴⁷ Knight, *supra* note 827 at 896. Continuing, Oputa had stated: "But they are not the only culprits. We wounded one another in communal clashes and religious riots. We are all therefore equally guilty. While the powers that be have all to apologise to Nigerians, we the citizenry have also to apologise to one another."

⁸⁴⁸ *Ibid.* at 897

7.3. Symptom of a Deeper Rule of Law Crisis

In this section, I look at how the failure of the truth-telling and reconciliation process only compounded a pattern of erosion of legal standards. I will also show how this anomaly as would be expected undermined the role of the judicial institution. In a sense, rather than go the length of establishing the Oputa panel and pouring resources down the drain in the process as the Obasanjo regime did, it could have decided instead to take the perpetrators of those atrocities to justice and applied the laws in force against their actions. But the futile truth-telling and reconciliation efforts, as they turned out, only provided a bird's eye view of deeper rule of law challenges that had dogged Nigeria and which only a transition from arbitrary military rule could accentuate.

The human rights regime forms part of the larger legal system. That system is institutionalized to ensure the smooth application of laws. The law itself occupies an important position in social, political and economic organization. It must operate unhindered and undiluted if the goals of society, whether they are social, economic, political or cultural, are to be achieved. In other words, to reach its objectives, a given politically ordered society must allow the rule of law to reign. I intend to show in this part of my analysis that effective human rights protection will be illusory under conditions of disregard for the rule of law. This is even more so in a transitional situation where respect for the law and its processes is sought to be promoted in contrast to the impunity and arbitrariness of the pre-transitional era.

This concern connects excellently to the failure of the Nigerian post-transitional truth-seeking and reconciliation efforts. There is no need to recast some of the earlier points canvassed in this regard. However, it is important to demonstrate how the failure of that process provides evidence of and justification for, continuing impunity and rule of law travails since the restoration of civil rule. When persons who were responsible for abuse of power and violations of human rights are allowed to bury the truth, escape effective scrutiny and, worse still, command strategic political positions in the aftermath of those atrocities, the efficacy of law as a means of social control is called into question.

But as earlier discussed, transitional justice is a controversial, often painful, engagement. This is especially so when it is examined through a rule of law optic.

Where law (with a commitment to “pure legal justice”⁸⁴⁹) and transitional politics (arising out of a “transitional necessity”)⁸⁵⁰ converge as is often the case in transitional situations, Teitel observes the tendency to suspend criminal accountability in order not to put the transition into peril.⁸⁵¹ On the other hand, what is downplayed or ignored, according to McAuliffe, is the “long-term impact on the administration of justice in the transitional state of the tendency of transitional responses to past human rights abuses to readily depart from the core values we associate with the rule of law.”⁸⁵² Continuing, he notes that

Notwithstanding our intuitions about the link between the rule of law and transitional accountability, the experience of transitional justice in countless post-conflict states successfully mediated the passage from repression or conflict to peace has often been partly (and sometimes paradigmatically) contradictory to what is ordinarily understood as the rule of law.⁸⁵³

McAuliffe seems to argue that the anxiety to suspend accountability so as not to endanger a transition is not a phenomenon peculiar to Nigeria. Because this is not a research on the rule of law as a concept, I will not delve much into its theoretical characteristics especially given that it is very much a contested concept.⁸⁵⁴ However, for my purpose, I will adopt largely the understanding of the concept promoted by Thomas Carothers. According to him, the rule of law consists of a system in which the laws are public

⁸⁴⁹ Padraig McAuliffe, “Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?” (2010) 2 HJRL 127 at 129.

⁸⁵⁰ *Ibid.*

⁸⁵¹ Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2000) at 224.

⁸⁵² McAuliffe, *supra* note 849 at 129.

⁸⁵³ *Ibid.*

⁸⁵⁴ See Richard H Fallon, “The Rule of Law as a Concept in Constitutional Discourse” (2007) 97 Colum L Rev 1 at 6; Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida) (2001) 21 Law & Philosophy 137; Adriaan Bedner, “An Elementary Approach to the Rule of Law” (2010) 2 HJRL 48.

knowledge, are clear in meaning, and apply equally to everyone.⁸⁵⁵ Those laws enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century.⁸⁵⁶ He then proceeds to outline the major attributes of societies applying the rule of law:

...anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.⁸⁵⁷

While one could evaluate Nigeria's post-transitional practices regarding compliance or non-compliance with each of the above identified components, I will be more concerned with the idea of government's embeddedness in a legal framework and its commitment to be law abiding. One of the most essential responsibilities of government is to enforce the law and prevent anarchy. However, government loses all moral authority to exercise this responsibility if it operates outside legal boundaries, or to put it more directly, it is lawless. Not only does this undermine government capacity to maintain order, it also ripples through the entire social fabric with dire consequences.

Sadly, impunity, abuse of power and plain lawlessness has characterized government behavior in Nigeria starting from colonial times. This worsened with the intrusion of the military into the arena of governance. But while allowance could be made

⁸⁵⁵ Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington DC: Carnegie Endowment for International Peace, 2006) at 4.

⁸⁵⁶ *Ibid.*

⁸⁵⁷ *Ibid.* See also Thomas Carothers, "The Rule of Law Revival" (1998) 77 *Foreign Affairs* 95 at 96. For other perspectives on the concept see Guillermo O'Donnell, "Why the Rule of Law Matters" (2004) 15 *Journal of Democracy* 32; Jeremy Waldron, "Is the Rule of Law an Essentially contested Concept (in Florida)?" (2002) 21 *Law & Philosophy* 137; Robert Summers, "A Formal Theory of the Rule of Law" (1993) 6 *Ratio Juris* 127; Jeremy Waldron, "The Rule of Law in Contemporary Liberal Theory" (1989) 2 *Ratio Juris* 79.

for such behavior under the military, its perpetuation after the restoration of civil rule could hardly be justified. Abuse of power and impunity has manifested in various ways in Nigeria since 1999 when the military relinquished power to civil politicians. While all the dimensions of this practice may not be captured in this study, I will nevertheless highlight and exemplify one of the ways in which it has been expressed the most: government disobedience of lawfully entered court orders.

Though this is behavior more associated with military regimes in Nigeria as stated above, it has somehow outlasted the military and become a vice of the civilian governments as well. Under the military, governments disregarded court proceedings and disobeyed court orders in what a judge of the Supreme Court would refer to as “executive lawlessness.”⁸⁵⁸ Judicial summons and court orders were simply ignored while in some cases the executive military government disregarded due process of law in carrying out actions affecting the fundamental rights of citizens.⁸⁵⁹

The behavior has been carried over to the democratic dispensation for the simple reason that old habits die hard. Early in 2006 (that is seven years after the restoration of civil rule) the then Chief Justice of Nigeria in an action more reminiscent of the defunct military era had to publicly slam the civilian administration for its penchant for disregarding court judgments.⁸⁶⁰ More recently, participants at a conference to find solutions to government disobedience of court orders in Nigeria similarly rebuked the government for endangering the rule of law by such behavior. According to Joseph Daudu, President of the Nigeria Bar Association (NBA) unless the judgments and orders of courts are enforced, the adjudicatory system tends to be useless. Continuing, he states:

⁸⁵⁸ Obiagwu & Odinkalu, *supra* note 20 at 232.

⁸⁵⁹ *Ibid.* See also Basil Ugochukwu & Chijioko Ononiwu, *Review of the Rule of Law and Administration of Justice in Nigeria, 1998* (Lagos: Legal Defence Centre, LDC, 1999).

⁸⁶⁰ Fatula Olugbemi Arsikhia, “Weighing the Travails of Justice and Human Rights in Nigeria” (2009) 15 East Afr J Peace & Hum Rts 451 at 459.

Enforcement of court orders and judgments in Nigeria is an integral part of our adjudicatory system. When parties submit themselves or are brought before an adjudicatory body, the end result is not the sentence, judgment or order or award made by the body. The process can only be described as concluded when there is compliance, enforcement or execution of the judgment or order of the adjudicatory body.⁸⁶¹

The practice of not honoring court decisions is unacceptable to the extent that it strikes at the very root of political legality and judicial legitimacy. It encourages resort to self-help even among private citizens for the settlement of disputes. This is notwithstanding that non-compliance with court decisions does not usually occur in the context of court-ordered resolution of disputes involving private individuals.⁸⁶² The coercive power of the state generally usually stands behind such judgments to ensure they are carried out. Things, however, become more complicated when the order in question is addressed to the government when, rather than live by example, the same government summons those coercive powers to thwart the court order and prevent its enforcement against it.

This has numerous implications for the individual judge whose order is flouted and as well the judiciary as an institution. The fear that its order may be disregarded by the government often is prior restraint and has a chilling effect on a court's decision-making capacity however much that court might wish to dispense justice regardless of such fears. In Nigeria where the ability of the courts to meaningfully intervene in human rights cases is constrained by a more restricted adjudicatory ideology, the fear of rendering judgments that would be ultimately ignored further erodes the capacity for courage so direly needed by judges when faced with difficult choices. Obviously, this is especially so in cases where the government is one of the parties to litigation. Therefore, conscious of acting in vain and calling their powers to question, judges frequently rather

⁸⁶¹ Patience Ogbo, "Disregard of Court Rulings Worries Lawyers" *Next* (12 July 2011) online: Next Newspapers < http://234next.com/csp/cms/sites/Next/Home/5730623-146/disregardfor_court_rulings_worrieslawyers_.csp>.

⁸⁶² *Ibid.*

sidestep difficult situations even where individual liberties are at stake or become more sensitive to the feelings of government in such cases.

This situation is as worrying for would-be litigants as it is to judges. When the government is capable of getting away with about any action no matter how illegal, such government develops the persuasion of omnipotence. When this is the case, persons who fall victim to illegal actions of the government tend to believe it is useless to try to hold the institution accountable for such actions. This is a significant scenario from a rule of law perspective. The whole essence of law is to find within it answers to social, economic and political problems notwithstanding the status or office of the litigants. Its potency in this regard is weakened if citizen apathy to law's authority brings to the surface its legitimacy as a controlling and ordering mechanism. Such could be the very recipe for lawlessness and social tension.⁸⁶³

It also engages the ability of the courts to assert their independence. An important pillar of the rule of law is that the courts be left independent and unfettered in resolving disputes brought before them. This independence suffers erosion where courts have to worry whether or not their judgments would be enforced. There is therefore the important need to, as a matter of practical importance, secure the institutional security⁸⁶⁴ of the courts as part of the larger rule of law enterprise. In Nigeria, the courts have fewer such institutional security measures. They practically cannot do much if the government decides not to enforce their judgments. Even though on paper they can invoke their powers to cite transgressors for contempt of their orders, putting the mechanism in place

⁸⁶³ MAO Aluko, "Sociological Dimensions of Human Rights Violations in Nigeria" (2003) 7 J Soc Sci 161 at 169 ("Human rights violations makes [sic] people lack respect for the rule of law as people are forced into a situation where they take the laws into their own hands because justice could no longer be got through the normal channels. Again, this makes the courts to be relegated to the background in the polity whereas the judiciary is one of the arms of government").

⁸⁶⁴ This has been defined as "the court's capacity to resist real or threatened attacks on its independence." See Theunis Roux, "Principle and Pragmatism on the Constitutional Court of South Africa" (2009) 7 Int'l J Const L 106 at 108.

depends, for example, essentially on the police which as an institution are also not free from governmental control.

Until recently, the executive and legislative arms of government could undermine the judiciary by reducing its budget or with-holding its funds. At the present, the judicial budget still hangs on the judgment of the legislature though once the appropriation is made, the funds are chargeable as a first line on the Consolidated Revenue of the federation.⁸⁶⁵ This has not solved the challenge of funding as a fundamental one for the Nigerian judiciary yet it has removed some of the limitations that the prior system placed on that institution. Understanding these issues is therefore perhaps crucial to knowing what interests Nigerian judges maximize according to the rational choice theory. Because they have to balance job security against public expectations, they are frequently left with very difficult choices. These are all structural challenges that the judicial institution must contend with. The next category of obstacles could be institutional or procedural in nature. I start with the question of access to courts and the duty of would-be human rights litigators to show their standing.

7.4. Throwing away the Key to Access: Standing and other Procedural Issues

The question of legal standing to present legitimate human rights questions in court is critical to judicial intervention in such cases. In the fourth chapter, I intimated that until the passage of the Nigerian Fundamental Rights (Enforcement Procedure) Rules of 2009, an individual needed to show a personal injury to be able to present a valid human rights complaint. If such an individual could not show such personal injury, the doctrine of *locus standi* barred her/him from presenting the case.

This doctrine was strictly interpreted by the courts as I would presently show. It discouraged public-spirited institutions or individuals from intervening on behalf of

⁸⁶⁵*Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010* s 6 which amended the *Constitution of the Federal Republic of Nigeria, 1999* s 81 to include the judiciary among government institutions whose yearly budget shall be a First Line charge item on the Consolidated Revenue of the Federation.

others for violations which those institutions or individuals may not have suffered personally. Because poverty often discourages human rights litigation, access to the courts because of this strict standing rule was only open to those with the financial muscle to pursue their claims. The weakest and most vulnerable members of the society were priced out of the system. Yet it is important from a rule of law perspective for all citizens to, as much as possible, find answers to their alleged victimization within the confines of law. Therefore in several societies, those who are too poor to be able to take advantage of legal processes often have socially activist organizations becoming their voices and fighting their legal battles for them.

This challenge speaks essentially to the need to establish flexible rules of access to enhance what is known generally as *locus standi*.⁸⁶⁶ Nigeria is one of many jurisdictions where the impact of activist social groups acting on behalf of the poor and deprived had long been blunted by a rigid regime of legal standing. The Nigerian Constitution as earlier stated is very clear that before a person could challenge an alleged action violating one or more of the human rights that it enshrines, the challenging party must show how the alleged action affected him/her personally.⁸⁶⁷ Clearly, the Constitution did not make allowance for what is known generally as public interest

⁸⁶⁶Hardly do legal scholars define this concept. When they do, they often leave too many gaps to fill in the understanding offered. For example “standing” has been defined as the “entitlement to seek judicial remedy apart from questions of the substantive merits and the legal capacity of the plaintiff.” This scholar offers further a narrower definition in which standing means “the interest of the plaintiff in the matter to be decided.” See Thomas A Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 7. For this reason, and speaking in historical terms, the concept is most popular for its fluidity and the controversy that it generates. It was described as “a hodge-podge of special instances and contradictions.” Louis Jaffe, “Standing to Secure Judicial Review: Private Actions” (1961) 75 Harv L Rev 255 at 258. It was argued also that “the law of standing lacks a rational conceptual framework, [it] is little more than a set of disjointed rules dealing with a common subject. ‘Standing’ has no meaning unless the particular doctrines grouped together under that name are identified and then appropriately applied.” Mark Tushnet, “The New Law of Standing: A Plea for Abandonment” (1977) 62 Cornell L Rev 663. In Nigeria, the courts considered it “troubling” while scholars viewed it as a “perennial problem.” See Tunde Ogowewo, “The Problem of Standing to Sue in Nigeria” (1995) 39 J Afr L 1.

⁸⁶⁷ *Attorney General, Adamawa State v Attorney General, Federation*, [2005] 18 NWLR (Pt 958) 581 at 604 where the Supreme Court held: “It is not enough for a plaintiff to merely state that an Act is illegal or unconstitutional. He must show how his civil rights and obligations are breached or threatened.”

litigation.⁸⁶⁸ Therefore, public interest litigators had to present their cases in the names of actual victims of the alleged violations or their actions would be barred for want of *locus standi*. I will show later on how this orientation is changing in Nigeria since the promulgation of new fundamental rights enforcement rules in 2009.

In the field of human rights and litigation around the subject in Nigeria, *locus standi* used to be (and could very well still be) a contested and often controversial issue. It presented the first refuge for the judge whose interest might be to sidestep the application to redress a violation of human rights. This is more so in cases where the question whether the claimant has standing could not be answered in an unequivocal manner. Lawyers representing government officials and institutions alleged to have been involved in human rights abuses often held it as shield from the very beginning. Victims of those abuses and their lawyers loathed the unscrupulous use to which the principle of *locus standi* was frequently put to deny them access to the courts. According to Ogowewo:

Ever since the standing rule was assumed to have been discovered by the Nigerian Supreme Court in *Adesanya v President of the Federal Republic of Nigeria*, the law reports have become littered with cases on the standing rule. Consequently, the rule has attracted considerable academic ink. Its prominence even extends beyond legal circles. Nigerian newspapers are replete with stories of cases being thrown out of court for lack of standing. For this reason, the term “*locus standi*” have even entered the lexicon of the layperson in Nigeria.⁸⁶⁹

⁸⁶⁸ Scott L Cummings & Deborah L Rhode, “Public Interest Litigation: Insights from Theory and Practice” (2009) 36 *Fordham Urb L J* 603; Jayanth Kumar Krishnan, “Public Interest Litigation in Comparative Context” (2001-2002) 20 *Buff Pub Interest L J* 19; Louis G Trubek, “Crossing Bondaries: Legal Education and the Challenges of the ‘New Public Interest Law’” (2005) 2005 *Wisc L Rev* 455; Tunji Abayomi, “Continuities and Changes in the Development of Civil Liberties Litigation in Nigeria” (1990-1991) 22 *U Tol L Rev* 1035; Raymond Atuguba, “Human Rights and the Limits of Public Interest Law: Ghana’s Reaction to a Messy World Phenomenon” (2008) 13 *UCLA J Int’l L & Foreign Aff* 97; Eva Brems & Charles Olufemi Adekoya, “Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria” (2010) 54 *J Afr L* 258.

⁸⁶⁹ Ogowewo, *supra* note 452 at 528-529.

Prior to 1999 when the new constitution took effect (and even several years thereafter) Nigerian courts organized their *locus standi* jurisprudence in the most stringent and restrictive incarnation. The courts generally denied standing to all except those whose direct legal rights are affected by the resolution of the substantive legal questions presented for determination. As the court set it out in the Adesanya case:⁸⁷⁰

[If] a legislative enactment appears to be *ultra vires* the Constitution or an act infringes any of its provisions dealing with Fundamental Rights, who has *locus standi* to challenge its constitutionality? Does any member of the public have the right to sue? Or should *locus standi* be confined to those persons whose vested legal rights are directly interfered with by the measure ... or to persons whose interests are liable to be specially affected by its operation?

In answering this question, Bello JSC formulated a test that would for many years shape the understanding of the *locus standi* doctrine in Nigeria. According to him, “standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.”⁸⁷¹

However, the majority judgment of Fatayi-Williams CJN amply demonstrated the court’s anxieties in that case. He first reasoned that a member of an organized society believing that there has been an infraction of any of the provisions of its constitution or that any law passed by its legislature is unconstitutional should not be denied access to a court to air his/her grievance. To do otherwise on the grounds of a lack of sufficient interest, he continued, would “provide a ready recipe for organized disenchantment with the judicial process.”⁸⁷² Further, the CJN said:

Any person, whether he is a citizen of Nigeria or not, who is resident in Nigeria or who is subject to the laws in force in Nigeria, has an obligation to see to it that he is governed by a law which is consistent with the provisions of the Nigerian Constitution. Indeed, it is his civil right to see that this is so. This is because any law that is inconsistent with the

⁸⁷⁰*Adesanya v President of the Federal Republic of Nigeria and Another*, [1981] 1 All NLR 1 [Ng Sup Ct].

⁸⁷¹*Ibid*, at 39. See also Ogowewo, *supra* note 866; LA Atsegbua, “Locus Standi: Beyond Section 6(6)(b) of the 1979 Constitution of Nigeria: A Comparative Study” (1990) 2 Afr J Int’l & Comp L 314.

⁸⁷²*Adesanya*, *supra* note 870 at 20.

provisions of that Constitution is, to the extent of that inconsistency, null and void...⁸⁷³

Where this reasoning should have yielded recognition of the plaintiff's standing to present this claim, the court concluded otherwise. It held that the plaintiff lacked standing because he had participated in the process (a senatorial confirmation hearing) from which his complaint arose. Ogowewo notes that this conclusion is "at complete odds with [the Judge's] reasoning"⁸⁷⁴ because the court conflated remedial discretion which judges possess in declaratory applications and the justiciability component of the standing principle. The court also made indirect reference to the possibility of opening the floodgates of litigation if it expanded the standing corridor more than it had done in this case.⁸⁷⁵

Thus, for many years after this judgment, Nigerians, in order to be granted standing, had to show exceptional burden on them from the application of any law or action that they felt aggrieved by. Such burden had to be far and above that which other Nigerians also experienced. In other words if it was a general law or action affecting all persons, to be able to merit legal standing to challenge the law or action, a person needed to prove a personal interest beyond that which all other persons have in redressing the grievance. This effectively nullified the possibility of public interest litigation as almost all cases litigated on this basis invariably stumbled at the standing barrier. Expectedly, *locus standi* restrictions featured prominently on the list of impediments to effective human rights litigation throughout that period.⁸⁷⁶

This continued to be the case after the promulgation of the 1999 constitution and some ten years thereafter. In 2009 the Chief Justice of Nigeria issued new rules of procedure for the presentation of human rights claims otherwise known as the

⁸⁷³*Ibid* at 24-25.

⁸⁷⁴Ogowewo, *supra* note 866 at 7.

⁸⁷⁵*Ibid* at 8.

⁸⁷⁶Enyinna Nwauche, "The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria" (2010) 10 Afr Hum Rts L J 502 at 507.

Fundamental Rights (Enforcement Procedure) Rules 2009. Apart from the standing question, the rules made under the 1979 constitution for the legal enforcement of human rights provisions lacked in other areas as well. For example, a human rights application had to be presented no more than one year after the completion of the action giving rise to it. Any period beyond that time-frame would have to be accounted for by the applicant to the satisfaction of the court for it to retain its jurisdiction over the suit.⁸⁷⁷

Further, in *Ladejobi v Attorney General of the Federation*,⁸⁷⁸ the court decried gaps in the rules. It wondered whether the court dealing with litigation could apply its own rules whenever it noticed those gaps. As well in *Bonnie v Gold*,⁸⁷⁹ the appeal court identified deficiencies in the 1979 rules. It singled out committal proceedings as a specific controversial area. In addition to the above shortcomings, the 1979 rules were also criticized for duplicating the process of commencing human rights applications and dichotomizing jurisdiction between the Federal and State High Courts.⁸⁸⁰ These were compounded by the needless differentiation between principal and accessory claims which is discussed later in this chapter.⁸⁸¹

It was because of these long-standing complaints about the old rules that there arose a pressing need to redress them by establishing new ones. The new rules came in the shape of the 2009 proclamation of the Chief Justice of Nigeria which expectedly dealt with most of the procedural shortcomings in the 1979 rules. The new rules contain an

⁸⁷⁷*Fundamental Rights (Enforcement Procedure) Rules*, 1979 Order 1, Rule 3(1) “Leave shall not be granted to apply for an order under these Rules unless the application is made within twelve months from the date of the happening of the event, matter, or act complained of, or such other period as may be prescribed by any enactment or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the Court or Judge to whom the application for leave is made.”

⁸⁷⁸[1982] 3 NCLR 563 [Lag Hg Ct].

⁸⁷⁹[1996] 8 NWLR (Pt 465) 234 [Ng Ct App].

⁸⁸⁰Abiola Sanni, “Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples’ Rights in Nigeria: The Need for Far-reaching Reform” (2011) 11 Afr Hum Rts L J 511 at 516-517. See also Dakas CJ Dakas, “Judicial Reform of the Legal Framework for Human Rights Litigation in Nigeria: Novelties and Perplexities” in Epiphany Azinge & Dakas CJ Dakas eds., *Judicial Reform and Transformation in Nigeria* (Lagos: Nigerian Institute of Advanced Legal Studies, 2012) 334.

⁸⁸¹*Ibid* at 518.

expansive preamble laying down its broad objectives and the role of judges and lawyers in ensuring that they are achieved. Not only does it require the courts to interpret the constitution, and in particular its human rights provisions in an expansive and purposeful manner, it also enjoins them to respect domestic, regional and international human rights instruments called to their attention.⁸⁸²

Moreover the new rules encourage enhanced access to justice for all classes of litigants but especially the poor, illiterate, uninformed, vulnerable, incarcerated and unrepresented. To further affirm this objective, the rules require courts:

[t]o encourage and welcome public interest litigation in the human rights field. In particular human rights activists, advocates or groups and non-governmental organizations may institute human rights actions on behalf of any potential applicants. No human rights case may be dismissed or struck out for want of *locus standi*.⁸⁸³

By this specific provision, the new rules appeared to revolutionize the regime of legal standing in human rights litigation in Nigeria. In addition the rules as could be observed responded to almost all of the much highlighted lapses of the 1979 rules.

Unlike previously when the courts insisted that human rights litigation must be initiated by specific originating procedures, the new rules would accept any originating process for the commencement of action.⁸⁸⁴ There is, for instance, a departure from strict personal service of court documents on the parties to litigation. A respondent could now be served through an agent and that would be recognized as effective personal service.⁸⁸⁵ The new rules also abolished the old requirement that human rights complaints be commenced within a year of the completion of the violation alleged. Finally, rather than previously when a human rights case could only be commenced through an *ex parte* application for leave of court which if granted then opened the door for the responding

⁸⁸²*Fundamental Rights (Enforcement Procedure) Rules*, 2009 para 3(b) of the preamble.

⁸⁸³*Ibid*, para 3(e) of the Preamble.

⁸⁸⁴*Ibid*, appendix A.

⁸⁸⁵*Ibid*, order V r II.

party to be notified of the complaint, under the new rules only the latter application sufficed. The *ex parte* component was abolished altogether.⁸⁸⁶

Without a doubt, the 2009 rules did significantly meet public yearnings to the extent that it seemed to address prior identified shortcomings. But while those past concerns may have been exorcised sort of, the rules triggered new ones in their wake. The major concern with the 2009 rules is also the most substantial: did the Chief Justice exceed his constitutional powers when articulating the rules? Some commentators already think that this question should yield a positive answer. It would seem that the Chief Justice has dressed normativity up in the garb of procedure. In essence, some portions of the new rules actually amount to amendments of the 1999 constitution by implication. Yet the power to amend the constitution resides with the National Assembly and not the Chief Justice by any stretch of the imagination.

Sanni, for example, insists that the power of the Chief Justice under the constitution to regulate human rights litigation is limited to the issues of practice and procedure.⁸⁸⁷ He seemed to suggest that under the guise of the new rules, the Chief Justice usurped the powers of the National Assembly “to confer additional powers on the High Court for the purpose of enabling the court to exercise its jurisdiction more effectively.”⁸⁸⁸ He takes particular issue with the new rules’ requirement that Nigerian courts “respect” international instruments in dealing with human rights cases. According to him, this would seem to be at variance with the provision of section 12(1) of the constitution requiring such instruments to have first been domesticated by parliament before they could apply in the Nigerian legal system.⁸⁸⁹ Yet he remains cautionary because such a conclusion is not very self-evident given the choice of words used in the

⁸⁸⁶*Ibid*, order II r I.

⁸⁸⁷Sanni, *supra* note 880 at 526.

⁸⁸⁸*Ibid*.

⁸⁸⁹*Ibid* at 527.

2009 rules. The word “respect” would seem to require a persuasive rather than obligatory deference on the courts in applying those international instruments.⁸⁹⁰

What is true of the above analyzed provisions of the 2009 regulation is substantially true also of its impact on the Nigerian *locus standi* regime in human rights cases. From every indication, the standing doctrine had previously been established on the provisions of section 6(6)(b) of the 1999 constitution. This section required complainants in such cases to show how the law or action being questioned violates their “civil rights and obligations.” The question arising from the interaction between this old position and the new rules is whether the constitution could be amended to expand standing by a subsidiary law made under powers derived from it. Without a doubt the answer to this question is negative. Section 9(1) of the constitution is very clear that only the National Assembly is competent to alter any of its provisions. In one case at least, the Nigerian government has objected to the expansion of the standing requirement under the new rules, albeit unsuccessfully.⁸⁹¹

The categorization of principal and accessory human rights claims was included as one of the shortcomings of the 1979 rules. I do not think this should have been the case because the 1979 rules make no provision to that effect. As would be shown below, this dichotomy is a distinctly judicial formulation without any constitutional, legislative or regulatory provenance. It is therefore not surprising that the 2009 rules did not address it. What this indicates is that if this dichotomy was a challenge for human rights litigation under the 1979 rules, the same remains the case under the 2009 rules. Because of its antecedents as a formulation of the courts, it seems futile to expect that this problem could be addressed by means of procedural proclamations. It might therefore require a rethinking of its jurisprudential underpinnings by the judiciary as an institution to remove it as an impediment to effective human rights litigation.

⁸⁹⁰*Ibid* at 528.

⁸⁹¹*Supra* note 880.

7.5. Jurisdictional Questions and the Challenge of Decentralization

In this section, I examine questions of concurrent jurisdiction as well as a decentralized judicial model as factors that could negatively impact judicial intervention in human rights cases. I stated already that in terms of judicial involvement in human rights cases and the overall practice of judicial review of governmental action, Nigeria adopted a decentralized model in which no one court on the judicial hierarchy has exclusive jurisdiction to decide constitutional matters and by extension human rights cases. This attitude has certain factors recommending it as well as some disadvantages that it brings to the table. In this section, I intend to discuss some of the challenges posed to the judicial system when several courts within the hierarchy are involved in the subject matter of constitutional interpretation and enforcement as opposed to when a distinct court deals with such questions.

On the positive side, this kind of decentralization brings with it the possibility that more judges would be exposed to thinking seriously about, and acting on, the issue at stake, which in this case is the question of how to better and more satisfactorily adjudicate human rights complaints. This would have the tendency to spark the development of a large pool of judicial personnel having the required level of competence, awareness and experience in dealing with such cases. When this happens, human rights consciousness permeates the entire legal system. Even judges at the early stages of their judicial careers become acquainted with the subject and its ramifications so much so that when they progress through the ranks, there is always confidence in the knowledge that they already have the exposure and competence required to effectively navigate such constitutional questions when raised before them.

In addition to the above, decentralization also engages the problem of access. It would allow the courts to be closer to the population that they serve. This is particularly pertinent in the developing world where there is often uneven development between the cities the rural communities. Where a specialized court is exclusively mandated to answer

all constitutional questions, the tendency would be for such a court to be cited in one of the bigger cities in the country in which case a general accessibility to it would be hampered by both cost and distance. When this is the case, there is real likelihood that majority of the citizens who live in the poor rural communities would have little incentive to use such a court however much they would want to.

Yet, notwithstanding the above benefits of decentralizing jurisdiction in constitutional cases, it could also come at a heavy price. One of the major advantages of having a distinct court charged with answering all constitutional questions is the certainty, predictability and stability⁸⁹² that the practice brings to the entire legal system. Speaking several decades ago on the practices of judicial review in Austria, Hans Kelsen hinted that the centralization of judicial review of legislation was “highly desirable” if only from the point of view of safeguarding the interest of the authority of the constitution.⁸⁹³ The reason he made this suggestion is very instructive for the insight it provides into the points that I make here. His views merit being reproduced *in extenso*. He states:

It must be added that in Austria, as well as in many other countries of the European continent there were other courts besides the ordinary courts, especially administrative courts which occasionally had to apply the same statutes as the ordinary courts. Hence a contradiction between administrative courts and ordinary courts was not at all precluded. The most important fact, however, is that in Austria the decisions of the highest ordinary court...concerning the constitutionality of a statute or an ordinance had no binding force upon the lower courts. The latter were not forbidden to apply a statute which [the highest ordinary court] had previously declared unconstitutional and which it had, therefore, refused

⁸⁹² Victor Ferreres Comella, “The European Model of Constitutional Review of Legislation: Toward Decentralization”? (2004) 2 Int’l J Const L 461 at 491 (“An important reason traditionally given to justify the European [centralized] model relates to the principle of legal certainty... If all courts were authorized to review the constitutionality of legislation, a divergence of judgments would emerge among them as to the constitutionality of a particular statute. In the United States, this potential for interpretative plurality is neutralized by the doctrine of precedent, which makes decisions that are rendered by the highest courts binding on the lower courts”).

⁸⁹³ Kelsen, *supra* note 462 at 186.

to apply in a given case. The [highest ordinary court] itself was not bound by the rule of *stare decisis*. Accordingly, the same statute which the court had declared in a given case unconstitutional could be declared by the same court as constitutional and be applied in another case.⁸⁹⁴

Though the above is a particularly grim and challenging picture, it does mirror to a large extent the problems associated with a diffuse judicial review system which Nigeria has adopted. It must be recognized though that not all the dimensions of the challenge as Kelsen detailed them are as applicable to the Nigerian as the European or Austrian context. In Nigeria, the doctrine of *stare decisis* is very well rooted in the judicial system and therefore lower courts cannot refuse to apply decisions of the Court of Appeal and Supreme Court.⁸⁹⁵ Even so, courts, though they have the powers to override their earlier decisions do not do so lightly. Even courts on the same hierarchy that under the *stare decisis* doctrine are not bound to apply decisions reached by judges of concurrent jurisdiction still generally defer to the decisions of coordinate courts.

These facts, however, still do not detract from the clear existence of areas of fragility and near permanent stricture in the coordination of judicial practices in this field of law in Nigeria. At least, it is evident from the machinery of the courts in Nigeria that *stare decisis* alone is no fixed guarantee of certainty in judicial pronouncements. The doctrine notwithstanding, it is not unusual to encounter cases where decisions of coordinate courts are contradictory without any clear justification⁸⁹⁶ or in which one coordinate court renders a judgment in a given case without acknowledging an earlier judgment on the same subject matter by another coordinate court. The detrimental impact of this to the smooth administration of justice cannot be overstated. The effect is more

⁸⁹⁴ *Ibid.*

⁸⁹⁵ See for example *Oshinowo v National Bank of Nigeria Ltd*, [1998] 11 NWLR (Pt 574) 408 [Ng Ct App] where the Nigerian Court of Appeal held that “The doctrine of *stare decisis* dictates that a trial judge, even if he finds the decisions of the Supreme Court to be contradictory, should not refuse to apply them and is bound to follow them...even if the Supreme Court’s decisions on a doctrine (on a point) are found to be conflicting...the High Court being a lower court in the judicial hierarchy cannot depart from or refuse to apply them.”

⁸⁹⁶ See Enefiok Essien, “Conflicting *Rationes Decidendi*: The Dilemma of the Lower Courts in Nigeria” (2000) 12 Afr J Int’l & Comp L 23.

debilitating, however, when such decisions are given by superior courts on the judicial hierarchy where courts further down the ladder are not properly guided on which decision to follow.

A very good example for present purposes concerns two cases decided by two different divisions of the Nigerian Court of Appeal which yielded two different decisions even though the facts of both cases were substantially similar at least to the extent that both actions challenged the same legislative enactment. The first case⁸⁹⁷ was decided in 2005 by the Court of Appeal while the second case⁸⁹⁸ was decided two years later by the same court. I discussed these cases in great detail in the previous chapter. A careful reading of them places the problem of jurisprudential inconsistency in clearer perspective.

What makes them quite interesting is that the latter decision did not sufficiently acknowledge the earlier one let alone rely on it. Though it is within its powers to reverse itself in the latter judgment, the Court of Appeal could only do this in clear and unambiguous terms. Cogent reasons had to be offered for the departure from the precedent earlier set. I am reluctant to accept that the court in the latter case deliberately misinterpreted its earlier decision. My inclination is to think that the earlier judgment was only slightly referenced in the latter case based on a mistaken analysis. I pointed this mistake out in the last chapter as well.

This scenario could also be problematic for a totally different reason. I had argued elsewhere that a court faced with the same or similar facts in two different cases that arrives at two contradictory decisions in disposing of them is placed in a difficult situation in terms of accounting for that contradiction.⁸⁹⁹ For precedent to be effective therefore as a means of ensuring the certainty it is expected to bring to the judicial function, there are several factors that deserve serious consideration. Law reporting would have to be regular, comprehensive and accessible. They should be available to

⁸⁹⁷ *Chukwuma & Others v Commissioner of Police*, *supra* note 768.

⁸⁹⁸ *Inspector General of Police v All Nigeria Peoples Party & Others*, *supra* note 769.

⁸⁹⁹ Ugochukwu, *supra* note 204 at 79.

judges and lawyers alike and there should be a mechanism for tracking jurisprudential changes and surrounding legal developments in such a manner that it is possible to actually test whether cases are still valid or have been overruled.⁹⁰⁰ The regularity of reporting court decisions and the necessary integrity of those reports obviously count much more than the number of such reports. There may in fact be many published reports but if they are irregular or are published at cross purposes, not much benefit would be derived however much it is essential to have them.

Nigeria is not lacking in the number and quantity of law reports generated around the activities of her courts at various levels. But while this may be encouraging and positive from precedential standpoint, it does as well present considerable challenges if there is no streamlining of the legal information thereby generated. There must be a way of connecting the reports and the cases they contain so that cases could be assigned proper precedential value. This does not seem to be the case presently in Nigeria. There's what has been described as "a plethora of law reports" in the country some of which strive with some success to meet the essentials of a good law report, while most have adopted the print and dump formula which is to obtain and report cases with minimum editorial attention."⁹⁰¹ This is cause for concern because this commentator further states that:

⁹⁰⁰ It is instructive that information and communication technology has revolutionized law reporting in contemporary times in many jurisdictions across the world. Though law reports continue to be published in book form, the internet has made this task easier and many jurisdictions can now meaningfully track the validity of jurisprudence and know when a case contains useful law or when the law enunciated in a court decision has become obsolete. In Canada, for example, the "noting up" feature in the Westlaw and Quicklaw databases have become very powerful for researching case-law and changes therein. See Shelley Kierstead, Suzanne Gordon & Sherifa Elkhadem, *The Law Workbook: Developing Skills for Legal Research and Writing* (Toronto: Emond Montgomery Publications, 2012) at 162.

⁹⁰¹ See O Ayorinde, "Judicial Precedent, Law Reporting and need for Regulation" online: <<http://www.thenigeriandaily.com/2011/07/19/judicial-precedent-law-reporting-and-need-for-regulation/>>. This author identified the following as reports currently in existence in Nigeria: All Federation Weekly Law Reports, All Nigeria Law Reports, Appellate Courts Landmark Cases, Commercial Law Reports, Constitutional Law Classicus, Criminal Appeal Cases, Customary Law in Nigeria through the cases, Eastern Region of Nigeria Law Reports, Election Petition Reports, Failed Banks Tribunal of Nigeria Law Reports, Federal Reporters, Federation of Nigeria Law reports, Federation Weekly Law Reports, Investment and Securities Law Reports, Judgments of Nigerian Superior Courts (JNSC), Land Law Appeal Cases, Law Reports of Nigeria, Monthly Judgments of the Supreme Court of Nigeria, Nigerian Law

The flooding of the Nigerian legal space with all manner of publications being paraded as law reports is therefore worrisome. This situation has persisted because of the lack of any form of regulation. There is a clear and present danger that practitioners are unduly exposed to badly edited reports. Cases which pass without discussion or consideration are regularly reported. Cases which are substantially repetitions of what is already reported are now to be found in many of our law reports. Not only are such reported cases valueless as precedent, their continuous appearance and re-appearance in these reports tend to bring confusing interpretation of already settled principles of law. The result, therefore, is not only lawyers being unable to clearly state the law but the courts will begin to give conflicting judgments in similar cases⁹⁰²

7.6. Following the Bribe: Corruption and Other Undue Influences

The Nigerian judiciary is often at the center of corruption claims and allegations.⁹⁰³ The institution is seen by many to have in its ranks corrupt judges who not only are influenced in their decision-making roles by considerations based on corruption but have in fact risen to their positions through corrupt means. There is no better or more significant illustration of this than that at the time of this study in 2011, Nigeria's two topmost judicial officials, the Chief Justice of the Federation and the President of the Court of Appeal threw decency to the winds and literally brawled in the open. Allegations of corruption and undue influence provided the background to this big quarrel that placed the judicial institution on the spotlight for all the wrong reasons.

Report, Nigerian Commercial Law Cases, Nigerian Constitutional Law Reports, Nigerian Monthly Law Reports, Nigerian Revenue Law Reports, Nigerian Supreme Court Cases, Nigerian Supreme Court Quarterly Law Reports of Nigeria, Selected Judgments of the West African Court of Appeal (WACA), Sharia Law Reports of Nigeria, Supreme Court Monthly, Supreme Court of Nigeria Judgments, Supreme Court Reports, Telecommunications Law Reports, Weekly Reports of Nigeria.

⁹⁰² *Ibid.*

⁹⁰³ Augustine Nwabuzor, "Corruption and Development: New Initiative in Economic Openness and Strengthened Rule of Law" (2005) 59 *Journal of Business Ethics* 121; Bryane Michael, "What do African Donor-Sponsored Anti-Corruption Programmes Teach us about International Development in Africa?" (2004) 38 *Social Pol'y & Admin* 320; Nlerum S Okogbule, "An Appraisal of the Legal and Institutional Framework for combating Corruption in Nigeria" (2006) 13 *J Financial Crime* 92.

The disagreement between the two top judicial officials started without prior inkling. But it turned out later that it had been in the closet for a while and the two ranking judicial officials had only barely kept straight faces in the open. Their spat had been tightly concealed up to this time to the point of dissembling. But as it blew open, the President of the Court of Appeal, Isa Salami would accuse the Chief Justice, Aloysius Katsina-Alu of attempting to promote him to the Supreme Court without due process. Ordinarily, being elevated from the Court of Appeal to the Supreme Court is the healthy ambition of every judge. Yet not once in the history of the Nigerian judiciary had a sitting Court of Appeal president (who occupies the same hierarchical position as all other Supreme Court judges, bar the CJN) been elevated to the Supreme Court. But in Salami's case, he obviously reasoned that his purported elevation amounted to being served wine in a poisoned chalice. He therefore kicked against it. "I regret to say I am not taken in,"⁹⁰⁴ he stated in a personal letter to Katsina-Alu, adding "I am contented with being the President of the Court of Appeal. Indeed it is common knowledge that I had even in a more auspicious moment declined for good reason to be appointed to the Supreme Court. Nothing has changed since then."⁹⁰⁵

Not surprisingly, politics provided the raw material for the disagreement, with Salami accusing Katsina-Alu of meddling in the appeal involving the 2007 Sokoto state

⁹⁰⁴ Soji Bamidele & Gwong Emakpe, "Politics in the Court's Yard" *Next* online: <<http://234next.com/csp/cms/sites/Next/News/National/5740073-146/story.csp#>> See also Jide Ajani, Abdulwahab Abdulah & Ikechukwu Nnochiri, "As CJN Retires: Leaving the Judiciary in Turmoil" *Vanguard* online: <<http://www.vanguardngr.com/2011/08/as-cjn-retires-leaving-the-judiciary-in-turmoil/>>. See further "Corruption: Obasanjo's Eight Years worse than Abacha's – Ribadu" *Vanguard* online: <<http://www.vanguardngr.com/2011/09/corruption-obasanjo%E2%80%99s-eight-years-worse-than-abachas-ribadu/>> where the report quoted the then Chair of the Economic and Financial Crimes Commission. According to the report "The EFCC czar then commented that despite his overall problems with the judiciary as judges were always being bribed, it had held up democracy more than some of the other government branches. The judiciary and judges here are very corruptible and this corruption has played a role in some of the tribunal cases to date, he commented. Nigeria needs something in its constitution to put a check and balance on the judiciary."

⁹⁰⁵*Ibid*; John Emmanuel Gyong, "Good Governance and Accountability in a Democracy" (2011) 7 *Eur Scientific J* 71 at 82; Abiola Ogunyemi, "Overcoming Governance Handicaps in a Developing Economy" in Charles Despres ed, *Proceedings of the 7th European Conference on Management, Leadership and Governance* (Reading: Academic Publishing Limited, 2012) at 334.

governorship election to pervert its outcome. The Court of Appeal President alleged that Mr Katsina-Alu asked him to compromise the Court of Appeal's verdict on the protracted governorship legal tussle by either disbanding the original panel, which he (Katsina-Alu) believed was about to give a verdict adverse to the state governor's interest or direct the panel to give judgment in the governor's favor.⁹⁰⁶ When Salami refused to do so, it was alleged, the CJN took laws into his own hands. On the basis of claims that he had received petitions against the appeal Tribunal as well as to protect "public peace" he personally "arrested" the Tribunal's judgment. Though Katsina-Alu ultimately got his wish, this would go on to poison his relationship with Salami who apparently felt slighted at the CJN's intrusion into a matter over which neither the Supreme Court as an institution nor the CJN as an individual had any constitutional competence.⁹⁰⁷

Salami had not been free of allegations of wrong-doing himself. He presided in person or established appeal panels after the 2007 elections which reversed victories earlier awarded to the ruling party the PDP in favor of opposition parties. It would later be alleged that he had engaged in unofficial communication with lawyers representing the opposition parties while those appeals were pending, allegedly developing in the process a soft spot for the opposition.⁹⁰⁸ Meantime, the Court of Appeal President was willing to

⁹⁰⁶ *Next, supra* note 904.

⁹⁰⁷ Nigeria's elections usually generate hundreds, sometimes, thousands of legal challenges. The country's 2007 general elections was no exception. Resolving those cases presents the courts with considerable difficulties, not the least of which are claims that judges had taken bribes or had otherwise been inordinately influenced to decide these political cases one way or the other. Sometimes those allegations are confirmed. Often, they are not proved but exist only at the realm of perception. See generally Ugochukwu, "The Pathology of Judicialization" *supra* note 202; Basil Ugochukwu, *Democracy by Court Order: An Analytical Evaluation of the 2007 Election Petition Tribunals in Nigeria* (Lagos: Legal Defence Centre, 2009); Basil Ugochukwu, "Reform of the Electoral Justice System" in Joseph Otteh ed., *Reforming for Justice: A Review of Justice Sector Reforms in Nigeria 1999-2007* (Lagos: Access to Justice, 2007) 144 at 147. See further "Wikileaks Cable: Yar'Adua gave Justices \$57 Million to uphold his Election; Aondoakaa wrote the Verdict" *Sahara Reporters* online: <<http://saharareporters.com/news-page/wikileaks-cable-yar%E2%80%99adua-gave-justices-57-million-uphold-his-election-aondoakaa-wrote-verd>>.

⁹⁰⁸ See Ochereome Nnanna, "GEJ's Judiciary Letdown" *Vanguard* online: <<http://www.vanguardngr.com/2011/08/gej%E2%80%99s-judiciary-letdown/>>.

pursue his claim of victimization against the CJN in court but was prevailed upon to drop the legal action for a more traditional approach to repairing the rift between them.

But the CJN pounced on this opportunity and used his near total control of the National Judicial Council (NJC) to contrive an investigation which culminated in the equally disputed verdict that Salami lied on oath when he claimed that the CJN pressurized him to pervert the course of justice in the Sokoto election appeal. The investigating panel also found that the CJN had truly meddled in the Sokoto appeal but that he had acted in good faith to “arrest” the court’s judgment to prevent a breach of public peace. A second panel recommended that Salami deliver a written apology to the CJN and NJC. For the second time, Salami rebuffed them and headed to the courts. In the interim and while his suit was pending in court, he was suspended and removed from office as President of the Court of Appeal. The NJC has since reversed itself and recommended that Salami be recalled to office. But while the President acted swiftly on his suspension, claiming to be only following the rule of law, he has been less eager to implement his recall.

7.7. A Bolt out of the Blues: The Main/Accessory Claims Dichotomy

The Nigerian judiciary maintains that its duty in human rights cases is served when giving effect to the plain meaning of constitutional provisions that govern that aspect of the law. They eschew and deny any law-making component to that duty. Yet by drawing a distinction between what they call a main claim and an accessory one in the context of solving litigation in human rights cases, the courts seem to have added to the existing law, even if only procedurally speaking. The constitution provides that those who allege that their rights under it have been, are being or will likely be contravened could challenge the contravention in question. However, in terms of the procedure for putting the legal challenge into effect, the courts introduced an element that distinguishes human rights claims from all other kinds of legal claims that a complaining litigant may have. The position which the courts have adopted is that when complaining of a human rights

violation, the person presenting the complaint should make that human rights complaint the main or principal claim. It should not be presented as an accessory or subsidiary to a legal claim of a non-human rights nature.

This doctrine was derived from a case decided during the period of military rule but has continued to control litigation launched after the restoration of civil rule. In terms of its development, the doctrine came nothing less than as a bolt out of the blues. It has been described as “dubious, irrelevant...impossible to make and leads to a miscarriage of justice.”⁹⁰⁹ The writer who made this claim goes further to argue that:

Whatever gains have been made by the constitutionalization of fundamental human rights in the 1979 and 1999 constitutions are gradually being eroded by this principle. Whether it is a principle of jurisdiction as the courts have held, or a principle of justiciability as it appears to be, it is clear that it has led to judicial *avoidance* of key human rights issues, robbing the legal system of the considered opinion of the judiciary very much needed to nurture an emergent human rights culture.⁹¹⁰

The case from which the doctrine emanated was that of *Tukur v Government of Gongola State*⁹¹¹ in which a major question was the extent of the jurisdiction of the Federal High Court in human rights cases. I had stated earlier that jurisdiction in human rights litigation in Nigeria is shared at the first instance stage between the federal and state High Courts. In this case where the subject matter was the deposition of a Chief in the then Gongola state, the Supreme Court held that such a case should have been commenced before a state high court and not a federal one. Taking this hint, the applicant brought forward a fresh action before the Taraba state High Court. At no time in the earlier case did the Supreme Court raise the question of distinction between a principal and an accessory claim.

⁹⁰⁹ See Nwauche, *supra* note 157 at 67.

⁹¹⁰ *Ibid.*

⁹¹¹ [1989] 4 NWLR (Pt 117) 517 [Ng Sup Ct].

Things would however change dramatically and in historically momentous terms when the second litigation got to the Supreme Court as the second *Tukur* case.⁹¹² In this latter incarnation as in the first one, the applicant claimed by way of human rights enforcement procedure that the order deposing him as the Emir of Muri violated his right to fair hearing under the Constitution because he was not given the opportunity of being heard before the order was imposed. In a judgment that was puzzling at the time it was delivered, and that has perplexed lawyers and scholars alike ever since, the Supreme Court came to the conclusion that because the main or principal claim in the case was not the enforcement of human rights, no court jurisdiction existed for its determination under the Fundamental Rights (Enforcement Procedure) Rules. It held that the action should have been commenced by a writ of summons instead. In reaching this conclusion, the court placed great reliance on its earlier decision in the old case of *Madukolu & Others v Nkemdilim*⁹¹³ on the twin issues of jurisdiction and competence to resolve legal issues.

This decision has been criticized on the grounds that it inordinately conflates the general principles of the courts' jurisdiction with their particular jurisdiction in human rights cases and for merging human rights cases with non-human rights complaints without justification.⁹¹⁴ It sometimes may be the case that human rights complaints will arise from a variety of legal relationships in which in fact multiple legal claims could be sustained simultaneously. Some of them may be of human rights nature and others not of such a nature. What should be the attitude of the courts when such cases are presented before them?

⁹¹² *Tukur v Government of Taraba State*, [1997] 6 NWLR (Pt 510) 549 [Ng Sup Ct]. Note that the name of the state involved had changed from Gongola to Taraba state owing to a military-engineered states creation exercise that altered the boundaries of already existing states after new ones were added to their number.

⁹¹³ [1962] 2 SCNLR 34. In this case the Supreme Court held that a court is competent to decide a case when (1) it is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another; and (2) the subject matter of the case is within jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and (3) the case comes before the court initiated by due process of law, and upon the fulfillment of any condition precedent to the exercise of jurisdiction.

⁹¹⁴ Nwauche, *supra* note 157 at 75.

The major aim of the constitutional entrenchment of human rights is obviously to separate them from all other legal claims not of a similar nature. Human rights claims are therefore independent, autonomous claims inuring to the benefit of those challenging abuses meted to them. A litigant faced with a scenario of multiple legal claims should be free to decide which component to pursue first and which forum to initially approach. If all those claims arose from a single transaction, the litigant should in fact be permitted to bundle them all together to save cost and avoid multiplicity of actions.⁹¹⁵ Quite clearly, while the Supreme Court decision above aimed at creating a principal/accessory claim binary, what it achieved in reality was to couple human rights claims to other complaints that may have only tenuous relationship to those kinds of complaints.

The decision is also questionable for a completely different but no less cogent reason. The courts have stated repeatedly that technical considerations should not be allowed to defeat applications for the enforcement of fundamental human rights. In *Sea Trucks Nigeria Ltd v Payne*,⁹¹⁶ the Court of Appeal held that in matters relating to the enforcement of fundamental rights, the courts are less slavish to the rules of court and their application. It, in effect, came to the conclusion that technical rules of procedure used for the ordinary and routine civil cases are inappropriate for human rights litigation. The court offered for this view the justification that the enforcement of human rights often involves questions of life and liberty of the citizen. It is unclear how this view sits with the principal/accessory claim binary because it seems to give the courts away as enforcing technical justice in deleterious fashion.

⁹¹⁵ On the contrary the posture of the courts encourages such multiplicity of claims. In *Sea Trucks Nigeria Limited v Payne*, [1999] 6 NWLR (Pt 607) 514 the Court of Appeal held that “where a set of facts or cause of action gives rise to multiple causes of action including a breach or threatened contravention of a fundamental right under the constitution, the party so affected as plaintiff would have to bring two different actions at the same time. One of such actions by writ of summons according to the provisions of the High Court Civil Procedure Rules and the other by motion ex parte in accordance with the provisions of the Fundamental Rights Enforcement Procedure Rules.”

⁹¹⁶ [1999] 6 NWLR (Pt 607) 514 [Ng Ct App].

The attitude of the courts with which we are already familiar, however, warrants only a cautious acceptance of *dicta* like the one in *Sea Truck*. There is a huge amount of reflexivity in delivering such pronouncements that seems to make them only useful to the case at hand rather than for future purposes. In a legal system whose stability rests on the utility of precedents, this is a rather inappropriate course to take. We have seen this magnitude of inconsistency replayed now and again in various areas of the human rights adjudication process in Nigeria that it cannot any longer be safely dismissed as inconsequential. In comments like the one above on the abhorrence of technicalities the courts raise hopes to high levels about their commitments to substantial justice. They then turn around to erode such expectations in actual practice by their fidelity to existing procedural booby traps as the one on the principal/accessory claim dichotomy.

Notwithstanding the comments in the *Sea Truck case*, the courts have continued to make the distinction between principal and accessory claims. The question is: what formula or standard does the court apply to come to the determination that a particular claim is principal and another accessory or subsidiary? In all the cases that I have seen so far on the issue, there is no formula or standard. The court involved simply bifurcates and labels the claims, (one main, the other accessory), and proceeds to pronounce judgment. In *Nigeria Social Insurance Trust Fund Management Board v Adebisi*,⁹¹⁷ the applicant had alleged that in terminating his employment, the respondents violated his right to a fair hearing. He applied to be reinstated if he could prove this claim. The Court of Appeal held that the principal claim was that of wrongful termination while the allegation of denial of fair hearing was only an accessory claim. It therefore concluded that the action was wrongly commenced by way of fundamental rights enforcement and dismissed it.⁹¹⁸

⁹¹⁷ [1999] 13 NWLR (Pt 633) 16 [Ng Ct App].

⁹¹⁸See also *Nwokorie v Opara*, [1999] 1 NWLR (Pt 587) 389 [Ng Ct App].

In *Sea Trucks Nigeria Limited v Payne*,⁹¹⁹ the Court of Appeal held that a person who complains of unlawful termination of employment should commence litigation by taking out a writ of summons and not approach the court by way of human rights enforcement. But in this case as in the Nigeria Social Insurance Trust Fund case above the plaintiff had filed the action alleging that he was not given a fair hearing before the termination was implemented. Similarly in *Ibrahim Abdulhamid v Talal Akar*,⁹²⁰ the Supreme Court decided that a claim at common law could be joined to a human rights application so long as the said common law claim is only secondary or collateral to the human rights complaint. But where it is the main claim, it has to be commenced by some procedure other than the procedure prescribed for the enforcement of human rights.⁹²¹

These decisions provide sufficient indication that the Supreme Court believes strongly in the dichotomy it has created. But other than a pandering to strict technical and formal procedural requirements, the distinction has not produced any worthwhile benefits to the human rights cause. Instead it has produced an avalanche of cases where the basic claim of the victim of a human rights violation was ignored even as the court searched for unclear and often non-existent reasons to split it up and erode its content. Needless to say, this has added to the burden of would-be litigants in human rights cases. Yet there is no reason for this dichotomy as I have argued.

Anyone familiar with the Nigerian human rights field would know that though these challenges have been identified, the list is by no means an exhaustive one. They are however united on one front: these are problems some of which the courts could have a role to play in addressing them. The courts may be hampered in terms of creating a political environment conducive to the strict application of the rule of law. It is not their

⁹¹⁹*Supra* note 915.

⁹²⁰[2006] 13 NWLR (Pt 996) 127 [Ng Sup Ct].

⁹²¹The following cases turn on this same doctrine: *Sokoto Local Government and Others v Tsoho Amale*, [2001] 8 NWLR (Pt 714) 224 [Ng Ct App], *University of Ilorin v Oluwadare*, [2006] 14 NWLR (Pt 1000) 751 [Ng Sup Ct].

decision or worldview alone that could bring this about. But they could and should be positive in opening up rather than blocking judicial access to human rights victims. They should abolish the unwarranted principal/accessory claims dichotomy. Certainly the courts could incentivize jurisprudential stability by acting less arbitrarily in decision-making and more consistently.

Chapter 8

Conclusion and Recommendations

8.1. Summary of Major Findings

This chapter concludes this study. In concluding it, I will first summarize the key findings contained in the previous chapters. Thereafter I will use the challenges identified in efforts to use the judiciary as a platform for human rights enforcement in Nigeria as background to propose reforms of the human rights adjudicatory system. As the following factual anecdote would indicate, the Nigerian legal system recognizes the judiciary as a critically important institution for the construction and realization of human rights policy. Therefore going forward, the judiciary will need to live up to this reputation.

In 2001, about two years after the restoration of civil rule in Nigeria, the Nigerian government inaugurated the Steering and Coordinating Committees of the National Action Plan for the Promotion and Protection of Human Rights (hereinafter NAP). The country was responding to a recommendation in the Vienna Declaration and Program of Action adopted at the Second World Conference on Human Rights held in Vienna, Austria in 1993. That recommendation enjoined states to “consider the desirability of drawing up a national action plan identifying steps whereby States would improve the promotion and protection of human rights.”⁹²²

The inauguration of the Nigerian Committees in turn followed a series of consultations involving the National Human Rights Commission, the Office of the Attorney General of the Federation and a broad segment of Nigeria’s civil society. These consultations included a working visit to South Africa to study the process that led to the

⁹²²Online: <http://www2.ohchr.org/english/issues/plan_actions/index.htm>.

development of the South African National Action Plan on Human Rights.⁹²³ Following nationwide consultations, the Committees completed their tasks and issued the first NAP in 2006.⁹²⁴ The plan was re-issued in 2009 and covers the period commencing that year and terminating in 2013.⁹²⁵

The drafters of the NAP left absolutely no doubts that if its goals were to be met, the judicial role would be at its core. The plan identified several areas that required effective attention in order to deliver on its objectives. The judiciary was mentioned as a significant role-player for monitoring and implementation in each of those areas. In fact going by the summary contained in the NAP, it is impossible to realize major human rights policy in Nigeria without the involvement of the judiciary.

I started this study by looking at the hope Nigerians had in 1999 that a democratized country would experience less human rights violations than under the departed authoritarian military regime. I suggested that continuing human rights abuses seemed to have betrayed that expectation. The main question of this study therefore is why this seeming betrayal took place and whether it could be linked to judicial performance during the period covered. I examined what it meant to transition from dictatorship and impunity to a new democratic beginning as well as the important role courts play in securing the goals of transformation. I also discussed the difficulties and challenges of using judicial strategies for the protection of human rights and especially how the very process of transition could accentuate those challenges.

The findings of the first chapter occurred at two levels. The initial conclusion is that it is legitimate and valid to expect that legal and political conditions would change for the better after the transition from dictatorship to democracy. However, this

⁹²³See National Action Plan for the Promotion and Protection of Human Rights, 2006 online: <<http://sgdatabase.unwomen.org/uploads/NAP%20for%20promotion%20and%20protection%20of%20human%20rights%20in%20Nigeria%20-.pdf>>.

⁹²⁴*Ibid.*

⁹²⁵See *supra* note 923.

expectation is not always met. This is because societies vary in their political behavior and democratic culture takes a while to nurture. Further, the failings of the judiciary as an institution could be a stumbling block to the consolidation of transition. Yet the judiciary might have doubts cast on its credibility especially if it had through its activities enabled human rights violations committed by the regime from which the society in question is transiting.

In the second chapter I looked at adjudication generally and human rights adjudication in particular. Specifically, I identified various theories that could be used to explain judicial reasoning in human rights litigation especially in transitional societies like Nigeria. I explained how challenging it would be to fit the reasoning method of Nigerian courts in human rights cases into a single theoretical lens. This is apparently because there are far too many calculations that have to be taken into account in the process of resolving every single human rights case. I suggested how this argument complies with Roscoe Pound's counsel to lawyers not to atomize law and jurisprudence but to examine other fields and how their methodologies could be used to understand law and its processes.

The history of human rights constitutionalization engaged my attention in the third chapter. I pointed out how the colonial experience was obviously detrimental to the human rights cause as well as how this fact foregrounded the post-independence human rights agenda. I narrated the reason for discussions that led to the inclusion of human rights guarantees in the Nigerian independence constitution. I also mentioned that the extant British parliamentary system at the time was different from the Bill of Rights model that the independence constitution delivered. Further, I observed that this distinction laid the foundation for persisting incoherence in the adjudicatory practices of Nigerian courts. The major finding of this chapter therefore was that traditions of English law inculcated during colonialism and after independence through the activities of British trained judges stunted the development of an analytical method suited to the post-independence constitutional model that Nigeria adopted.

I expanded on the major finding of the third chapter in the next by comparing the method used by Nigerian courts in reviewing human rights cases with those of other jurisdictions. I first examined the British system because of its colonial consequences in the Nigerian context. I also discussed the American model because of its relative similarity to the constitutional Bill of Rights system used by Nigeria at independence and thereafter. In addition, I analyzed the South African system because like its Nigerian counterpart limitations of rights form part of the text of the constitution. Finally I traced the Nigerian model. The objective of this comparison was to see how similar or different the other systems are to the Nigerian and whether the latter could borrow from the other systems. The conclusion of this chapter is that while in all the other three systems there is a progression towards balancing and proportionality analysis, the system used by Nigerian courts is uncertain and unsystematized. A combination of chapters three and four responds to the questions posed at the outset. The first is whether the colonial origins of Nigerian courts reflect their performance in human rights cases. The second is whether Nigerian courts use a definite standard for reviewing such cases.

In chapter five, I examined what I refer to as Nigeria's human right architecture. I looked first at the sources of human rights norms applied in Nigerian courts. I then examined what the doctrine of "judicial review" means in the Nigerian context for human rights adjudication. In addition, I discussed how human rights norms produced within the domestic legal system interact with international norms. I came to the conclusion that Nigeria operates the concrete kind of judicial review because human rights cases must arise from a clear legal controversy.

I also concluded that the nature of obligation Nigerian assumes when it signs and ratifies international treaties is unclear because of its dualist system for the reception of international law. The question I asked is whether Nigeria after signing and ratifying international instruments could avoid the responsibility they place on it by arguing that they had not been domesticated as mandated under the constitution? This chapter therefore answers the question whether having to choose from a plurality of norms

hampers Nigerian courts in human rights adjudication. These findings indicate that while controversies persist in this area, the challenges they present are ones that the courts can effectively deal with.

In the light of what could be considered an over-generalization with regard to the conclusion drawn in the fifth chapter, the sixth chapter utilizes case analysis to further buttress that conclusion. Here, I applied cases interpreting and enforcing the human rights provisions of the 1999 constitution decided by the Court of Appeal and Supreme Court, and for the period covered by this study. I carefully examined those cases to see if there was consistency in the method of analysis used by the courts concerned. I not only did this with regard to the civil and political rights that are justiciable under the constitution but also as relates to economic, social and cultural rights whose justiciability under the constitution is very much up in the air.

On the basis of the analyses conducted, I concluded that the courts are far too *ad hoc* and unstructured in their approach and that this leads to reflexivity and inconsistency in decision-making as well as instability in jurisprudence. This chapter deals with the question of what informs the approach that Nigerian courts use in human rights cases and justifies a distinction that could be made between what the courts claim to do and what it is that they do in actual practice.

In this chapter as well, I tested the theoretical approaches identified in chapter two to real cases decided by the courts. It was evident from looking at the possible theoretical analysis of individual judgments that the initial decision not to box the courts into a single theoretical optic seems to a large extent justified. However, two different theoretical strands stood out prominently. There was a lot in the decisions by way of a conservative approach built upon the viewpoint that judges should defer to the judgment of constitutional framers and law makers in the legislature. This in turn led to positivist literalism in textual interpretation. In most cases the courts stuck to the ordinary meaning of words used even if they brought about absurd outcomes.

Secondly, the law and society model exemplified by Pierre Bourdieu's *habitus* was also very pronounced. Several court decisions indicated a habituation of Nigerian courts (through education, experience and professional socialization) to a particular thought-model that grew from the colonial imprint on the legal system. The conclusion to be drawn from this chapter is that to break this hold on the legal system requires the choice of a different direction in terms of legal education. In particular there is need to foster a more comparative approach to legal and judicial training.

In chapter seven I discussed more structural challenges that place obstacles on the road to better judicial performance in human rights cases in Nigeria. I looked particularly at the ambivalence of the government regarding the proper direction of the transition from military rule. It was uncertain whether the government wanted to punish previous human rights violators or grant them amnesty or whether it just wanted to discover the truth of what happened prior to the transition and no more. Without such a signal about where the transition was headed, the government and to a lesser degree the courts, seemed to continue business as usual. This had serious consequences for the rule of law and by extension human rights protection.

These were, however, by no means the only problems facing the courts in responding to human rights claims. I also discussed the issue of *locus standi* which for long constrained various aspects of human rights litigation until its apparent amelioration by the 2009 Fundamental Rights (Enforcement Procedure) Rules. I also mentioned problems associated with jurisdiction in human rights cases and how this feeds into questions around the decentralization of judicial competence in human rights cases. I did examine corruption as a challenge to effective judicial protection of human rights as well as the needless dichotomy that the Supreme Court created between what it describes as principal and accessory claims in human rights litigation. There were also more contextual problems like poor infrastructure, lack of secure tenure for judges, lack of financial autonomy and poor remuneration of judges. I concluded that these challenges

would have to be substantially addressed for the courts to live up to expectation in human rights adjudication.

8.2. Recommendations: Peering into the Future

Given the analyses that are contained in this study and the various challenges facing effective judicial approach to human rights adjudication in Nigeria, what should the future of law and jurisprudence in this area look like? The adoption and revision of the NAP as well as the promulgation of new rules for the enforcement of human rights in 2009 might suggest that there is concern at responsible quarters to make human rights protection in Nigeria more meaningful. Those are positive developments that would need to be consolidated. Yet more malignant challenges are identified in this study that if addressed would greatly improve the ability of the courts to respond effectively to human rights claims. The most significant of the recommendations are summarized below.

From all indications, the biggest problem afflicting human rights adjudication in Nigeria is the lack of a clear standard for reviewing laws and actions to see if they could be considered reasonable and justifiable in a democratic society. Granted that having such a standard for judicial decision-making could still be unpredictable and unprincipled, it is still better than the current situation where no specific standard exists. The lack of standard creates a culture where human rights cases are approached on an ad hoc case-by-case basis with the possibility that contradictory decisions could be delivered on cases with similar facts. Because of the lack of objectivity in such decisions, the courts are often accused of having rendered them for less than honorable calculations.

The practices of some comparative jurisdictions discussed in this study indicate that this is a concern that must be grappled with to breathe confidence into any human rights adjudication process. There seems to be a convergence around establishing relatively clear standards for resolving the questions which human rights cases present to a legal system. Such standards could be accomplished through balancing or proportionality analysis. The message which the development of a structured standard of

review delivers should be clear; that the ultimate decision (whether it is negative to the litigant or positive) is not more important than the reasoning process that produced it.

In Nigeria's case, dealing with this specific challenge has not been helped by the country's legal history and doctrines of the British legal system that a colonial relationship fostered after independence. While the British system from which the Nigerian equivalent was based has gone through intensive transformation culminating in the passage of the 1998 Human Rights Act and the movement of British courts towards a substantive standard of human rights review based on proportionality, the Nigerian system remains rooted in the immediate post-independence traditions. It cannot be soon enough for this tradition that has not helped the legal protection of human rights to be reformed. Legal education which inculcates these concerns (and in particular comparative doctrine) is therefore necessary at this point. In this regard, legal education through the development of appropriate curricula is particularly of the essence.

More importantly, the courts cannot act alone in bringing about the changes desired. And here we have to sympathize with the Nigerian judiciary that has to juggle multiple considerations just to resolve a single human rights complaint. Most of these considerations revolve around the rule of law possibility. If the overall government and political system operates outside the boundaries of law, there is little the judiciary could do to alter the situation. As I pointed out in chapter seven, court judgments are not self-executing. They require the support of other government agencies to be implemented. Where those other government agencies are reluctant to perform their own duties, the courts are incapacitated. Often the courts are unwilling to take particularly strong positions in some cases in order not to render judgments that would be ultimately ignored by the powers that be.

Therefore the independence of the judiciary as a government institution is imperative to judicial effectiveness whether in human rights adjudication specifically or

adjudication in a more general sense.⁹²⁶ The tenure of judges has to be secured under law. The judiciary should not continue to be an unequal partner in the relationship among governmental branches. Judges would have to be appropriately remunerated to remove the temptation to be corrupt or unduly influenced. Court infrastructure has to be adequate and their personnel must be well-trained. The courts should specifically be made conducive to the deployment of new technology which reduces the physical burden on judges and judicial staff.

The point I made earlier about judicial training and development of comparative curricula deserves re-iteration. This recommendation hangs alongside that requiring recognition of the colonial origins of current approaches to human rights adjudication in Nigeria and doing something to change it. When one of these is tackled, the likelihood is that the other would be addressed concurrently. The current approach originated almost exclusively from British administrative law principles. Those principles did not demand the standard of scrutiny required for the effective protection of human rights norms. Though constitutional human rights guarantees could also have administrative law components, the standards required to review cases arising from the two fields ought to be different. While the British system evolved to accommodate this understanding, the Nigerian system has remained under administrative law influences.

In administrative law deference to legislative judgment is given priority. On the contrary constitutional human rights guarantees constitute a check on legislative authority. While in the former the temptation is to preserve the law or administrative action, in the latter the goal should be to preserve the right that is being threatened or actually violated. In other words while administrative law gives the benefit of doubt to the challenged law or action, constitutional human rights leans in favor of the victim of the human rights violation.

⁹²⁶Justice Modibo Ocran, “Nation Building in Africa and the Role of the Judiciary” (2008) 2 N Ill U L Rev 169.

These demarcations have to be imbibed deeply at the level of education and training. As things stand presently, Nigerian courts have not moved effectively from the administrative law shackles on human rights adjudication arising from the impact of colonialism. It does not also seem as if the training delivered at faculties of law in Nigerian universities has responded adequately to these concerns. This is the new frontier that needs to be challenged in order to ameliorate a conservative judicial orientation. In fact, the door is now wide open for further research into this and other areas of human rights practices in Nigeria that could be conducted with strong comparative components.

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