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# AN ANALYSIS ON THE PRACTICALITY OF THE NIGERIAN FREEDOM OF INFORMATION ACT 2011

by

Flora Ogbuitepu<sup>\*\*</sup>

## Abstract

*This article traces the right to freedom of information to the Finnish city of Kokkola and Sweden respectively. It thereafter discusses the Nigerian Freedom of Information Act 2011 and commends the effort of Nigerians' struggle to have a Freedom of Information Act. It highlights the provisions of the Freedom of Information Act which are worthy of emulation particularly by African Countries which are yet to have a Freedom of Information Law and generally by other countries in the world at large. Similarly, the article points out the provisions of the Freedom of the Information Act which has the tendency to affect the effective implementation of the Freedom of Information Act. The article suggests ways by which the controversy surrounding the Freedom of Information Act can be resolved with a view towards its successful implementation in all states of the Federation. The article takes a peep into the actual implementation of the Freedom of Information Act in the Courts to appreciate its passage into law in Nigeria. Finally, the article attempts a comparison of some key provisions of the Freedom of Information Act to the United Kingdom Freedom of Information Act. The article concludes by stating that the Nigerian Freedom of Information Act has a lot of beautiful provisions, but all members of the society must work hard at promoting the effective implementation of the Freedom of Information Act.*

*We must never forget that the free flow of information is essential to democratic information<sup>1</sup>*

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1. <http://ls.huntingdon.edu/~lewis/FOIA/FOIAquotes.htm> (accessed on the 13 September 2011 at about 2.00pm).



## Introduction

The origin of Freedom of Information Act in the world can be traced back to the age of enlightenment, which is also known as the 18<sup>th</sup> century.<sup>2</sup> The champion on the fight for the right to freedom of information is Anders Chydenius, a politician from the Finnish city of Kokkola.<sup>3</sup> The major achievement of the world's first Freedom of Information Act (Sweden's Freedom of the Press Act 1766) was the eradication of political censorship and public access to government records.<sup>4</sup>

Presently, at the international sphere the right to freedom of information has become an established human right. The right to freedom of information originated from the right to freedom of expression and opinion. The major international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration on Human Rights provided for the right to freedom of expression. Article 19(2) of the ICCPR specifically states as follows:<sup>5</sup>

*"Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally or in writing or in print, in the form of art or through any other media of his choice"*

A careful study of the above article reveals the right to freedom of information in the right to freedom of expression. Accordingly, the right to freedom of information includes the right of everyone to

2. Ed Juhani Mustonen 'The world's first Freedom of Information Act, Anders Chydenius.

3. As above.

4. As above.

5. International Covenant on Civil and Political Rights 1966, <http://www2.ohchr.org/english/law/ccpr.htm> (accessed on 27 July 2011 at about 4.00pm).

request for information (freedom to seek) and the right of every one to access information (freedom to receive). From the above, it can be said that the right to freedom of expression and the right to freedom of information are expressly linked in the ICCPR.

The right to freedom of information has been in existence for over 200 years and is still evolving to meet the current trend in the world.<sup>6</sup> For instance Sweden was the first country to adopt the world's first freedom of information legislation in 1766.<sup>7</sup>

Narrowing down our discussion to Nigeria, it must be pointed out that the first draft of the Freedom of Information Act was prepared in 1994 by Tunde Fagbohunlu,<sup>8</sup> and was subsequently passed into law in 2011 after seventeen (17) years from its origin. Accordingly, Nigeria can be counted amongst over 85 countries in the world with a freedom of information law.<sup>9</sup>

This paper analyses the practicality of the Freedom of Information Act which was passed into law on the 28<sup>th</sup> of May 2011. The paper is divided into two sections, the first section discusses the merit, challenges and implementation of the Freedom of Information Act, while the second section attempts a comparative analysis of some provisions of the Freedom of Information Act with the United Kingdom Freedom of Information Act. The paper concludes by commending the Nigerian Freedom of Information Act, while urging every member of the society to work towards the effective implementation of the Act.

6. Freedom of Information around the world 2006, A global survey of access to Government information laws <http://www.freedominfo.org>, (accessed on 23 August 2011, at about 11.00am)
7. The world's first freedom of information Act, Anders Chydenius' legacy today, <http://www.access-info.org>, (accessed on 15 September 2011 at about 3.00pm)
8. Tunde Fagbohunlu is now a Senior Advocate of Nigeria and was assisted by the late Bankole Aluko as well as Chidi Anselm Odinkalu. See understanding the freedom of information Act (FOIA) 2011 Series 10 myths about the FOI Act by Chidi Anselm Odinkalu
9. See Freedom of Information legislation <http://en.wikipedia.org/wiki> (accessed on the 29 September, 2011 at about 12.00pm)



### **The era of the freedom of information Act in Nigeria: Merits, Challenges & Its Implementation**

Nigeria is among the two countries in the West African region to adopt a comprehensive law on the right to freedom of information.<sup>10</sup> Thus, West African Countries like Ghana, Sierra Leone and Senegal<sup>11</sup> who are on the brink of adopting a comprehensive law on the right to freedom of information can tap into the praise worthy provisions of the Nigerian's Freedom of Information Act.

Section 1 of the Freedom of Information Act 2011 (FOI Act) gives 'any person' the right to access information. The term 'any person' covers all citizens, juristic persons, non-juristic persons, a group of individuals, male, female, children, persons with disability to mention a few. This is a laudable provision in the Freedom of Information Act as it promotes equality and non-discrimination.

Section 1 of the FOI Act defines the wide scope of information for which a person can request by stating that it is irrelevant that the information is not in a written form. According to the FOI Act, the term information means '...all records, documents and information stored in whatever form including written, electronic, visual images, sound, audio recording.' Further to this expansion of the scope of freedom of information in the FOI Act, individuals (which also include corporations and groups of persons) are given a wide range of powers to request for information. For instance, the person requesting for the information from a public institution needs not disclose any definite interest in the information so requested.<sup>12</sup> This provision safeguards against the denial of one's right to freedom of information on the sole ground that the person does not have any

10. Nigeria -Freedom of Information Act: A ray of hope for democracy, Article 19, <http://www.article19.org>. Nigeria and Liberia are the only two West African countries that have adopted a comprehensive law on the right to freedom of information while Niger has adopted a comprehensive legislation on access to information.

11. Nigeria -Freedom of Information Act: A ray of hope for democracy, Article 19, <http://www.article19.org>

12. Section 1 (2) of the FOI Act 2011.

specific interest or that the person is not affected in any way by the information being requested. In furtherance to the protection of the right to freedom of information, it can be rightly said that the legal maxim *'for every right, there is a remedy; where there is no remedy there is no right'* is apposite. The FOI Act gives any person the right to institute proceedings in the Court of law in cases where he/she has been denied the right to freedom of information by a public institution. Thus, an individual under the FOI Act has the right to apply to a court with the aim of compelling a public institution to comply with the provisions of the FOI Act.<sup>13</sup>

The FOI Act also encourages transparency and accountability in the public sector by making it mandatory for a public institution to keep records and information of its activities, operations and businesses.<sup>14</sup> In addition, a public institution is mandated to organize the information in its custody in such a manner as to enable easy access to the information by any person.<sup>15</sup> While this is a laudable provision, it also raises several queries as to the ease of access to information by any person. Queries ranging from; whether the information that can be easily accessible, whether the Act is only applicable to the information that came into existence at the commencement of the Act; whether given the state and nature of our public institutions, it is practicable to organize and maintain certain information that can be easily accessed by the public; whether the culture of corruption has not eaten deep into public institutions that it becomes impracticable to organize and maintain information in its custody for public consumption.

The right of any person to freedom of information applies to public institutions and public institution has been defined by section 2(7) of the FOI Act 2011 as:

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13. Section 1(3) of the FOI Act 2011.

14. Section 2 of the FOI Act 2011. See also section 9 of the FOI Act 2011.

15. Section 2(2) of the FOI Act 2011.



*"all authorities whether executive, legislative or judicial agencies, ministries and extra ministerial departments of the government together with all corporations established by law and all companies in which government has a controlling interest, and private companies utilizing public funds, providing public services or performing public functions"*

The implication of this provision is that the term public institution also covers private companies who provide public functions or utilizes public funds. Thus, access to information is not just restricted to government owned corporations. The exercise of the right to freedom of information does not apply to private companies which are not utilizing public funds or providing public services or performing public functions. Access to public records aids knowledge and dialogue by members of the public, it also safeguards against mismanagement and fraud.<sup>16</sup> Accordingly, the essence of the FOI Act is to make public information easily and readily accessible to the members of the public.

The end result of easy access to public information by members of the public is to enhance the culture of accountability in government as well as guarantee transparency. The FOI Act has been described by a representative of Civil Liberties Organization as one out of the three necessary Acts for the fight against corruption and promotion of good governance.<sup>17</sup> The other two Acts which are yet to go through the huddles of a bill before becoming law are: 'Ethics in Government and Openness in Government.'<sup>18</sup> Thus, the

16. David Banisar, Freedom of Information, International Trends and National Security. <http://www.humanrightsinitiative.org>. (accessed on 15 September 2011 at about 2.30pm).

17. Town hall meeting held: Deepening the Freedom of Information Act, 20 July 2011, it was stated by a representative of Civil Liberties Organization that the FOI Act is meant to be implemented side by side with Ethics in Government and Openness in Government laws.

18. Town hall meeting held: Deepening the Freedom of Information Act, 20 July 2011.

FOI Act can be described as a tool to good governance. The definition of good governance most suitable for this discourse is that proffered by the World Bank. According to the World Bank, good governance involves sound public sector management, (which encompasses efficiency and effectiveness) accountability, exchange and a free flow of information (which encompass accountability) and a legal framework for development (which encompass justice, respect for human right and liberties).<sup>19</sup>

The FOI Act advocates for justice and a remedy in the event of the flagrant failure of a public institution or a public officer to grant access to the information in his custody to any person who has so requested for it. The combined effect of section 7(5) and section 10 of the FOI Act is to the effect that where a person has been wrongfully refused access to information or where a public officer or head of a public institution has destroyed the information in his custody, such a person is said to have committed an offence under the FOI Act. The stunning attribute of the above provision is the degree of penalty that will be awarded to the offender. In the case of section 7(5), the offender shall be liable to a fine of five hundred thousand naira (N500, 000.00) for wrongful denial of access to information. Section 10 on its part, prescribes a minimum of one year imprisonment penalty for a public officer (irrespective of the rank) who willfully destroys or alters any information in his/her custody. Although, due to the nature of proof required in criminal cases, it may prove impracticable to convict an offender for the destruction or alteration of a document. For instance, if an individual requests for information from a public institution without knowledge of the contents of the information, such information can be successfully altered by the public officer or the head of the public institution. The slightest suspicion on the part of the individual who requested the information on the true nature of the information will

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19. United Nations Economic and Social Council: Committee of Experts on Public Administration, Fifth Session. Definition of basic terminologies in governance and public administration. E/C. 16/2006/4.



mention a handful.<sup>23</sup> In other words, a public institution may deny an application for information when the information falls under the above mentioned category.

The question arises as to what constitutes public interest and when the interest of the public can be said to outweigh the harm that will be occasioned by the disclosure of the above mentioned information. In addressing the first leg of the question, it must be pointed out that the FOI Act did not define the term public interest. This omission on the part of the FOI Act serves as a roadblock to the effective implementation of the affected provisions of the FOI Act. This is in view of the fact that the term public interest becomes vague as it relates to the FOI Act. Generally, public interest has been defined by Webster New World Dictionary as 'the people's general welfare and well being, something in which the populace as a whole has a stake'.<sup>24</sup>

The FOI Act also took cognizance of the fact that to be effective, public awareness and training are critical factors, by providing that public institutions should guarantee the training of public officers on the right to freedom of information.<sup>25</sup> Another merit of the FOI Act is the recognition of information which are protected by the Evidence Act and other Acts as privilege communication or information.<sup>26</sup>

The FOI Act also took note of the time factor in the request for access to information by providing that a public institution shall within 7 days of the receipt of the application grant access to a request for record.<sup>27</sup> A striking feature of the FOI Act is the time limit within which an applicant can apply to a court of law where his request to access information has been denied by the public

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23. See section 12 of the FOI Act 2011. See also section 14, 15 & 19 of the FOI Act 2011.

24. Public Interest. <http://en.wikipedia.org>. (accessed on 6 September, 2011 at about 3.00pm)

25. Section 13 of the FOI Act 2011.

26. See section 16 of the FOI Act 2011.

27. Section 4 of the FOI Act 2011.



institution. The applicant has a right to bring an application before a court of law within 30 days of the denial of his request.<sup>28</sup> Further, the absence of an express denial by the public institution does not affect the applicant's right to bring an application before a court of law as the denial of access to information can be inferred if there's no response to the applicant's request. The FOI Act recognizes the cumbersome nature of the Nigerian judicial system by making it mandatory for applications to court for the review of the denial of a person's request to be heard summarily. Hence, the roadblocks that could have been erected by the various shortcomings of the Nigerian judicial system have been addressed by the FOI Act's provision directing speedy disposal of a case instituted further to the Act.

The FOI Act provides for the protection of public officers against criminal or civil proceedings for the disclosure of information notwithstanding the provisions of the draconian laws which prevents the disclosure of such information.<sup>29</sup> More so, the recipient of the information is protected from civil and criminal proceedings.

The functions placed on the Attorney General of the Federation are of such magnitude that it becomes impracticable for the Attorney General to meet up with the stipulated deadlines in the Act.<sup>30</sup> One also wonders how the Attorney General would live up to his/her functions in terms of making available to members of the public hard copies of reports from institutions. It is the view of this writer that taking the realities of this clime into consideration, the FOI Act should have directed that hard copies be made available upon the request of any person.<sup>31</sup>

28. Section 20 of the FOI Act 2011.

29. Section 27 of the FOI Act 2011, See the Officials Secrets Act 1962 and the Criminal Code Act 1916.

30. See for example section 29(7) of the FOI Act 2011 on the submission of annual report to the National Assembly on or before April 1 of each year.

31. See for example section 29(3) of the FOI Act 2011 which is on the availability of hard copies of the report of public institutions to members of the public. Nigeria is a country with a population of about 140 million, the publication of 140 million reports for each and every Nigerian is ridiculous.

The question of whether the FOI Act has actually been applied by the Nigerian Judicial System can be deduced from the first case ever brought further to the Act. Justice Binta Nyako of the Federal High Court, Lagos in suit no FH/L/CS/784/2011 granted an *ex parte* application for leave to Mr. Olasupo Ojo of Committee for the defense of human rights (CDHR).<sup>32</sup> The prayer of the applicant Mr. Olasupo Ojo was for an order of mandamus compelling the Economic and Financial Crimes Commission (EFCC) to disclose the source of information that fifty two million naira was received by him and the CDHR to smear the name of EFCC. Although, the case brought before the court is a very commendable development, but the facts of the case leaves more to be desired. The FOI Act did make provisions for a public institution to deny a request for information if it will unavoidably disclose the identity of a confidential source.<sup>33</sup> The essence of this provision is to protect whistle blowers from harm. In addition, under section 12 of the Act, exceptions are made to when this exemption would be inapplicable and this brings to light the complexity of balancing the issue of public interest on the one hand and the harm which would be caused by the disclosure of such information on the other hand. Accordingly, compelling EFCC to reveal the source of its information is tantamount to requesting EFCC to reveal the confidential source of its information.

One of the challenges to effective implementation of the FOI Act is the controversy surrounding the application of the FOI Act in the 36 states of the federation and the FCT, Abuja. This is in view of the fact that it has been argued by some scholars that the FOI Act is inapplicable to state government, agencies and institutions. Proponents of this argument rely solely on the 1999 Constitution of the Federal Republic of Nigeria in reaching this conclusion.

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32. FOI: Court orders EFCC to release information, 19 July 2011 Vanguard, <http://www.vanguardngr.com>, (accessed on 15 August, 2011 at about 5.00pm)

33. Section 12 of the FOI Act 2011.



According to them, information is contained in the concurrent legislative list of the 1999 Constitution, thus the legislative competence to legislate on information is shared between the federal legislature and state assemblies.<sup>34</sup>

Opponents of the above proposition however argue that that despite the absence of an express provision in the FOI Act to make it applicable in the states of the federation, the FOI Act is applicable in states on the strength of the argument below:

That the doctrine of covering the field enables the applicability of the FOI Act to state government, institutions and agencies as well as the federal government, institutions and agencies. In support of their assertion, they relied on the case of *A.G. Ogun State v. Aberuagba*.<sup>35</sup> In that case the Supreme Court held that a law enacted by a state house of assembly may be void due to its inconsistency with the laws enacted by the National Assembly or on the basis of covering the field where the state has enacted an identical legislation with that of the National Assembly on the same subject matter, in that instance the Federal government's legislation shall over ride the state's legislation.<sup>36</sup>

Kinsley Amaku,<sup>37</sup> (one of the opponents ) stated that by virtue of section 4 of the 1999 constitution and second schedule part 2 as well the doctrine of covering the field, the FOI Act is applicable to states as well as government institutions. Kinsley asserted that a detailed examination of the FOI Act depicts that it is a very pervasive legislation that it can hardly co- exist with a similar law. Hence, the FOI Act applies to both state and federal institutions since the FOI Act did not make a distinction as to state records or federal records. Thus, at best states can develop a framework to examine compliance of state institutions through the Attorney

34. Kinsley Amaku 'FOI Act: No Provision for State Legislation,' *This day*, 28 June 2011.

35. *A.G. Ogun State v. Aberuagba* (1985)1 NWLR (Pt 3) 395.

36. *Sec A.G of Ogun State v A.G of the Federation* (1982)3 N.C.L.R 166@ 179.

37. Kinsley Amaku of legislative and policy arm of streamflow & Kolin.



General of the State to prepare periodic compliance report to the state house of assembly.

The argument put forward by the opponent that the FOI Act does not apply to only federal institution but to state institutions as well seems to be quite concrete and more tenable. However, in practice some states have enacted a freedom of information law while some states are in the process of doing likewise. A good example of a state that has enacted its freedom of information law is Ekiti State.<sup>38</sup> Ekiti State can be said to be the first state in Nigeria which has enacted its freedom of information law.<sup>39</sup> Going by the above explanation on the doctrine of covering the field, does it mean that the Ekiti State government and its state house of assembly has carried out the exercise of enacting its own freedom of information law in futility? While not outrightly condemning the effort of the Ekiti State house of Assembly, it would be most suitable if the law enacted by the Ekiti State house of assembly or any other state house of assembly in Nigeria addresses the shortcomings of the FOI Act, but not contradicting the freedom of Information Act. This suggestion serves as a bridge to both sides of the argument on the presence or absence of provision on the applicability of the FOI Act on state institutions. In other words, the enactment of a state freedom of information law does not shut the door on the applicability of the FOI Act on state institutions in that state, in fact where the freedom of information law enacted by a state addresses the shortcomings of the freedom of information Act, it would give room for more transparency. However, where a state has failed to enact a freedom of information law, it does not in any way restrict people's rights to access state records as the FOI Act can be used to access public information within the domain of state institutions and agencies.

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38. Town Hall meeting held: for the Public Purpose Deepening the Freedom of Information Act, 20 July 2011.

39. As above.

There is also the concern on the lack of effective implementation of the FOI Act, if the Nigerian Security forces do not utilize the Act to investigate and reveal acts of corruption against individuals and institutions.<sup>40</sup> Another concern raised on the implementation of the FOI Act is the time limit for the provision of information as provided in the FOI Act. It has been argued that seven working days is impracticable to provide information taking into consideration the state of public records in Nigeria.<sup>41</sup>

The words of Suzanne Legault (Information Commissioner of Canada) make this section come alive when she said 'the law is an architect's plan to build a house and the actual implementation of the law is the actual building of the house.'<sup>42</sup> Thus, the FOI Act just like every other good law has its merits and is a welcome development in Nigeria, however the challenge lies in the proper implementation of the law.

#### **A comparative analysis of the Nigeria Freedom of information Act with the United Kingdom freedom of Information Act.**

All states tailor out laws to suit their economic, legislative, judicial and executive structure. It is therefore difficult to find a law on the same subject matter that is completely identical to another state's law, except in the case of an International Convention which is domesticated in a dualist state.<sup>43</sup> It is against this background that the Nigerian Freedom of Information Act would be comparatively examined below on certain constant subjects with the United Kingdom's Freedom of Information Act 2000. The United Kingdom's freedom of Information Act seems to be more detailed

40. Daniel Ohi and Heshola Majekodunmi 'FOI Act is not an end in itself' Business Day, 2 August 2011.

41. As above.

42. Town hall meeting held: For the Public Purpose Deepening the Freedom of Information Act, 20 July 2011.

43. Dualism means the process of incorporating an international law in the national law of the state. Monist is the opposite of dualism, the act of ratifying an International law immediately incorporates the law into national law.



or should one say cumbersome in comparison to the Nigerian Freedom of Information Act.

### **Fees**

In the Nigerian Freedom of Information Act, it is stated that fees shall be restricted to standard charges for document duplication and transcription where necessary.<sup>44</sup> The Act did not shed more light on the implications of failure to pay the prescribed fee where necessary. Section 9 of the United Kingdom's freedom of information Act made the provision of information by a public authority conditional upon the payment of a fee. Further, the amount to be charged as fee is determined by the Secretary of State unlike the Nigerian Freedom of Information Act where the fees are restricted to standard charges.

### **Time**

The time limit allowed under the Nigerian Freedom of Information Act for the grant of a request to information is seven days and is quite commendable taken into consideration the twenty days provided for in the United Kingdom Freedom of Information Act. Thus, the Nigerian Freedom of Information Act seems to have a higher standard with regards to the speed in accessing information requested. Further, the Nigerian Freedom of Information Act provides a period of 3 days for the institution where the information has been requested to transfer the request to another institution where it discovers that the institution is in the custody of that information.<sup>45</sup> In cases where the information requested is in a large number, an additional seven days is granted to the public institution by the Freedom of Information Act.<sup>46</sup> The United Kingdom's Freedom of Information Act only made provision for exemption of

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44. See section 8 of the FOI Act 2011.

45. See Enonche, E, *10 salient features of the FOI Act 2011* Right To Know, page 3.

46. As above.



computation of time, where the fees notice has not been paid. In other words, the twenty working days does not include the day on which the fees notice was issued and only counts after the payment of the fees notice.<sup>47</sup>

### **Conclusion**

In conclusion, it is not in doubt that the right to freedom of information is a human right and has been in existence for years. Thus, the FOI Act is a refreshing development to democratic governance in Nigeria, this is in view of the fact that the miraculous FOI Act only became law after seventeen (17) years its bill was originated. The struggles of the proponent of the Freedom of Information Bill must not be forgotten. Hence, the enactment of the Freedom of Information Act is just one step in the right direction on the fight for good governance in Nigeria. The practicability of the Freedom of Information Act also reveals the journey of Nigeria in promoting good governance and transparency. However, based on the shortcomings discovered in the Freedom of Information Act, it becomes necessary for Nigerians to ponder on the loopholes with a view to making the Freedom of Information Act, one of the world's finest both in its provisions and in its implementation. An attempt at comparing the Freedom of Information Act with the United Kingdom's Freedom of Information Act in two major areas has revealed that the Nigerian Freedom of Information Act has outstanding provisions. But the practicality of some of its provisions such as the 7 days requirement for the production of information in the custody of a public institution or the definition of the term public interest are notable issues which may impede seamless and effective implementation of the Act.

Finally, it is recommended that Human rights organizations, Media practitioners and other everybodly should utilize the FOI Act in order to promote transparency in the Country as well as test the provisions of the law which have not been implemented.

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47. See section 10 of the United Kingdom Freedom of Information Act 2000.

# CONSTITUTIONAL CONSTRAINTS TO THE REALISATION OF THE RIGHT TO THE DIGNITY OF THE HUMAN PERSON

by

Ngozi Udombana (Mrs.)\*

## Introduction

Nigeria is enormously endowed. It is a country with almost one million square kilometers of land, more than 60% of which is cultivatable for a variety of soil and vegetation determined crops as well as livestock production. Its coastal and inland water bodies form an additional asset. It is the eight highest producer of oil and contains the sixth deposits of gas worldwide. It has 44 exportable commodities and 34 solid minerals. Its estimated 150 million people, comprised of about 400 ethnic groups, rank it as the largest market in Africa.<sup>1</sup>

It is, therefore, irksome that with such enormous endowment and potential for greatness, Nigeria is still a groping "Giant of Africa." Viewed against all the indices of development Nigeria has fared badly. It currently ranks 142<sup>nd</sup> out of 169 countries on the Human Development Index (HDI)<sup>2</sup>, way behind other African countries such as Mauritius (72<sup>nd</sup>), Tunisia (81<sup>st</sup>), Algeria (84<sup>th</sup>), Gabon (93<sup>rd</sup>), Egypt (101<sup>st</sup>), Namibia (105<sup>th</sup>), South Africa (110<sup>th</sup>),

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1. Sen Y., "Challenges and Prospects of Nigeria's Development at 50", Golden Jubilee Symposium Paper at Carleton University, Ottawa, Canada, 30 September 2010, available at <http://www.simplynigeria.com/content/challenges-and-prospects-nigeria-development-50-0>, accessed 19 October 2011 at 12.45pm, citing Northern Union, 2007.
2. "Nigeria ranks 142nd on Human Development Index", available at <http://www.nigeriannewsservice.com/nns-news-archive/news-blocks/nigeria-ranks-142nd-on-human-development-index>, accessed 19 October 2011 at 1.05pm.



Morocco (114<sup>th</sup>), Equatorial Guinea (117<sup>th</sup>), Cape Verde (118<sup>th</sup>), Congo (126<sup>th</sup>), Sao Tome and Principe (127<sup>th</sup>), Kenya (128<sup>th</sup>), Ghana (130<sup>th</sup>), Cameroon (131<sup>th</sup>) and Benin Republic (134<sup>th</sup>). Life expectancy in Nigeria is 48.4 years while Gross National per capita income is \$2,156. This also falls short of that of several other African countries such as Mauritius – 72.1 years and \$13,344 and even Cameroon – 51.7 years and \$2,197.<sup>3</sup> Additionally, based on analysis and estimates by the United Nation's Office on Drugs and Crime there is a possibility of Nigeria losing about US\$500 billion from her wealth due to corruption from 1960 to date. Again, only seven (7) Nigerian universities are included among the best 100 universities in Africa. The first among these seven is University of Ilorin which ranked 55<sup>th</sup> but on the global list, it ranked 5,484<sup>th</sup>. University of Nigeria, which is the seventh Nigerian university among the best 100 in Africa ranked 7,170 globally. August 23 and 30, 2010 Newsweek Magazine's determination of 100 best countries based on certain criteria places Nigeria as the 99<sup>th</sup> just below Burkina Faso.<sup>4</sup>

Section 34 of the Constitution<sup>5</sup> guarantees the fundamental right to the dignity of the human person in Nigeria. The section provides in part "Every individual is entitled to respect for the dignity of his person." The Constitution, which is the supreme law of the land, defines the structures and features of the Nigerian State. Any other law whose provisions are inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, null and void.<sup>6</sup>

Consequently, the guarantee in section 34 of the right to the dignity of the human person, which is enshrined in Chapter IV of the 1999 Constitution captioned "Fundamental Rights", is the most secure guarantee Nigerian citizens could ever get in that regard. The right to the dignity of the human person belongs to what is commonly referred to as the first generation right of civil and

3. *Ibid.*

4. Sen. *supra* note 1

5. 1999 Constitution of the Federal Republic of Nigeria, Cap. C23 Laws of the Federal Republic of Nigeria (LFN) 2004.

6. S. 1(1) and (3) *ibid.*



political rights, which are also enshrined in other international and regional instruments such as the Universal Declaration of Human Rights<sup>7</sup> (UDHR), International Covenant on Civil and Political Rights<sup>8</sup> (ICCPR), the African Charter on Human and Peoples' Rights<sup>9</sup> (ACHPR), European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>10</sup>, the Inter American Convention on Human Rights<sup>11</sup>, among others.

Despite the certainty of the guarantee of this right, however, the same Constitution contains provisions that have literally made its realisation impossible. A combination of the provisions of section 6(6)(c), which makes the violation of the provisions of Chapter II of the Constitution on Fundamental Objectives and Directive Principles of State Policy non-justiciable, and section 308 of the Constitution, which confers immunity from prosecution on the executive during their tenure of office, have stripped section 34 of the force of implementation ordinarily attached to a constitutional provision. The executive whose responsibility it is to ensure the realisation of this right has consequently, despite the enormous wealth with which Nigeria is endowed, practically abdicated this responsibility and rather significantly embarked on a spree of treasury looting and reckless spending, which have impoverished the citizens thereby robbing them of their human dignity.

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7. Adopted 10 December 1948 by the United Nations General Assembly (UNGA). See UN Doc. A/811, Arts 4 and 5.

8. UN Doc. No. 2200A (XXI), adopted 16 December 1966 and entered into force on 23 March 1976 in accordance with Art 49, available at <http://www2.ohchr.org/english/law/ccpr.htm>, accessed 11 October 2011 at 10.00am, Art. 8.

9. Adopted by the 18th Ordinary Session of the Assembly of Heads of States and Government of the Organisation of African Unity (now African Union) on June 27, 1981 and came into force on October 21, 1986, OAU Doc. OAU/CAB/LEG/67/3/Rev. 5 registered with the United Nations (UN) on September 10, 1991, No. 26363, Art. 5.

10. Rome 4.XI. 1950, Arts 3 and 4.

11. San Jose (Costa Rica), 22.XI. 1969, Art 5(1) and (2).

This paper examines the implication of the foregoing provisions on the realisation of the right to the dignity of the human person in Nigeria. It makes a case for the review of section 308 of the Constitution and proffers suggestions as to how the challenges of sections 6(6)(c) can be overcome so as to provide an opportunity for Nigerian citizens to attain a dignified human existence. The paper thus, apart from the Introduction, analyses the right to the dignity of the human person and how non compliance with the provisions of Chapter II of the Constitution negatively impacts the realisation of this right in Part II. In Part III it deals with the concept of immunity and its implications on accountability of the affected public office holders while Part IV makes a case for a review of section 308 and proffers suggestions as to how the aspirations of Chapter II of the Constitution can be realised. Part V concludes the paper.

### **The Right to the Dignity of the Human Person and Impact of Non Justiciability of Chapter II**

The notion of human dignity plays a central role in human rights discourse. The Universal Declaration of Human Rights recognises the inherent dignity and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.<sup>12</sup> The International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights state that all human rights derive from the inherent dignity of the human person.<sup>13</sup> The right to dignity, which comes under the wider classification of the right to physical and mental integrity,<sup>14</sup> belongs to the most widely recognised category of rights known as the civil and political rights, which are guaranteed in Chapter IV of the 1999 Constitution. In fact it has been asserted that nowadays the

12. Art. 1

13. Preamble. See also Kretzmer D. and Klein E., "The Concept of Human Dignity in Human Rights Discourse", available at [http://books.google.com/books/about/The\\_concept\\_of\\_human\\_dignity\\_in\\_hu.html?id=8cbahWUqYAgC](http://books.google.com/books/about/The_concept_of_human_dignity_in_hu.html?id=8cbahWUqYAgC), accessed 10 October 2011 at 1.55pm

14. See Atsenuwa A. et al, *Human Rights Made Easy*, 3rd ed. (Lagos: Legal Research and Resource Development Centre, 1999), p. 3.



right to the dignity of the human person is accepted as "the highest human right", "the source of rights".<sup>15</sup>

It must, however, be admitted that despite the wide recognition which this right enjoys, its exact meaning is neither universally concrete nor consistent as it is variously conceptualised in different cultures. According to Lee<sup>16</sup>

Despite its prominent status in international law and many domestic constitutions, it does not have a concrete meaning or a consistent way of being defined. The lack of precision often leads judges to introduce their own moral standards amid competing claims of rights each of which has a plausible case of human dignity violation. The elusive nature of human dignity spells even greater challenges when it is evaluated across cultures.

Thus, Lee<sup>17</sup> further opines –

Human dignity becomes a value behind different ways of life as societies describe their own conceptions about

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15. Segado F. F., *Godność człowieka jako najwyższa wartość porządku prawnego w Hiszpanii*. // *Godność człowieka jako kategoria prawa*. Pod red. Krystiana Complaka. Wrocław. 2001. S. 179, cited in Habil Alfonsas Vaišvila, "Human Dignity and the Right to Dignity in Terms of Legal Personalism", available at [http://www.google.com/url?sa=t&source=web&cd=1&ved=0CDMQFjA-A&url=http%3A%2F%2Fwww.mru.edu.pl%2Fmru%2Fdokumentai%2Fkatedra%2Fteises%2Ffilosofijos%2Fpublikacijos%2FHuman%2520dignity%2520and%2520the%2520right%2520to%2520dignity.doc&ret=j&q=right%20to%20the%20dignity%20of%20the%20human%20person&ei=1jOUT1PuHOHx0gG7yNjBw&usq=AFQjCNE\\_5lvjB1-hcQncPXXKC7HhTeesWtw](http://www.google.com/url?sa=t&source=web&cd=1&ved=0CDMQFjA-A&url=http%3A%2F%2Fwww.mru.edu.pl%2Fmru%2Fdokumentai%2Fkatedra%2Fteises%2Ffilosofijos%2Fpublikacijos%2FHuman%2520dignity%2520and%2520the%2520right%2520to%2520dignity.doc&ret=j&q=right%20to%20the%20dignity%20of%20the%20human%20person&ei=1jOUT1PuHOHx0gG7yNjBw&usq=AFQjCNE_5lvjB1-hcQncPXXKC7HhTeesWtw), accessed 10 October 2011 at 1.30pm.
16. Lee K., cited in Monslave V. B. and Román J. A., "Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law", *sur international journal of human rights* v. 6. n. 11 Dec. 2009, p. 39.
17. *Ibid.* at 43.



how humans should relate to one another. While people in Western style democracies in general regard liberalism as the cornerstone of worthy human existence, in many Asian cultures, the rights and freedoms of individuals are intertwined with their duties and roles as determined by religion or convention.

This has been described as the tension between the universal and individual character of the right to dignity.<sup>18</sup> One of the questions posed by Monslave and Román in their paper in which they examined the various schools of thought on the issue but for which they took no particular stand, is whether human dignity is an abstract value or one that can be defined in relation to concrete aspects of human life?<sup>19</sup> I am of the firm view that it can indeed be defined in relation to concrete aspects of human life. It is not just a notion that attaches to human beings *qua* human beings irrespective of how they are treated or the circumstances in which they live for what dignity is there to respect in a person whose dwelling place is under the bridge or one who cannot afford a daily meal? Thus, by implication, notwithstanding that human dignity is an attribute attached to human beings by virtue of their humanity, it is an attribute of which a person can be robbed by circumstances as has become the lot of a good many Nigerians today.

Human dignity, it has been argued, presupposes that each human being is considered as an end in himself/herself, and is not a mere instrument to enhance the values of some higher entity, for example a state or dictator. To facilitate the respect for human dignity, there must be respect for the human rights, honour and identity of persons. Furthermore, human dignity presupposes that individuals can enjoy the income, goods, services, health, safety

18. *Ibid.* at 40. Others are – the tension between the natural or consensual character of dignity and the tension between the abstract or concrete character of dignity all of which are discussed on pp. 41–43.

19. *Ibid.* at 40 and 42–43

and comfort arising from their existence in the society.<sup>20</sup> To be meaningful, therefore human dignity is an attribute that must have a practical content; the idea of human dignity is one which must go along with the idea of "living well", "well being" or "good life". Howsoever viewed though, as Monslave and Romón argue, "appealing to the respect for human dignity today is a positive strategy for the defence of human rights."<sup>21</sup>

Section 34(1) of the 1999 Constitution provides -

Every individual is entitled to respect for the dignity of his person, and accordingly -

- (a) no person shall be subjected to torture or to inhuman or degrading treatment;
- (b) no person shall be held in slavery or servitude; and
- (c) no person shall be required to perform forced or compulsory labour

Sub-section (2) further provides that "forced or compulsory labour" does not include - (a) any labour that is required in consequence of the sentence or order of a court; (b) any labour required of members of the armed forces of the federation or the Nigerian Police Force in pursuance of their duties as such; (c) in the case of persons who have conscientious objections to service in the armed forces of the federation, any labour required instead of such service; and (d) any labour required which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community; or (e) any labour or service that forms part of (i) normal communal or other civic obligations for the well-being of the community, (ii) such compulsory national service in the armed forces as may be prescribed by an Act of National Assembly

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20. Ujomu P. O., "National Security, Social Order and the Quest for Human Dignity in Nigeria: Some Ethical Considerations", *Nordic Journal of African Studies* 10(2) (2001), 247, citing Bertsch *et al* (1991), available at <http://www.njas.helsinki.fi/pdf-files/vol10num2/ujomu.pdf>, accessed 23 October 2011 at 9.40pm.

21. Monslave and Ramon, *supra* note 16 at 55.



or (iii) such compulsory national service which forms part of the education and training of citizens of Nigeria as may be prescribed by an Act of the National Assembly.

From the foregoing provision, except in circumstances specified in subsection (2) into which a minute percentage of the country's population may fall at any point in time, every Nigerian citizen is guaranteed the right to be treated with respect and not to be subjected to such dehumanising treatment as specified in subsection (1).

The Constitution does not define "torture", "inhuman", "degrading treatment", "slavery" or "servitude." It does not also define what constitutes forced or compulsory labour. Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>22</sup>, however, defines "torture" as an act which can only be carried out at the instigation or support of a public official or any other person acting in an official capacity. According to the Article, "torture" is -

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

22. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") was adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46). The Convention entered into force on 26 June 1987 after it had been ratified by 20 States.



The implication of this is that the torture which the Convention prohibits is one which is carried out only for official purposes.

In *Uzoukwu v Ezeonu II*<sup>23</sup> the Court of Appeal had occasion to define the above words in section 31(1) of the 1979 Constitution which provisions are equivalent to those of section 34(1) of the 1999 Constitution. According to the Court –

“dignity”, as used in the section, “conveys the meaning or connotation of being degraded at least in ones exalted estimation of his societal status or societal standing”. This is as opposed to the state of being dignified: elevated in rank or place of work; or even a *grandeur of mien*<sup>24</sup>

““torture” etymologically means to put a person to some form of pain which could be extreme. It also means to put a person to some form of anguish or excessive pain ..., which could be physical brutalization of the human person. It could also be mental torture in the sense of mental agony or mental worry. It covers a situation where the person’s mental orientation is very much disturbed that he cannot think and rationally do things, as the rational human being that he is. He lives in perpetual fear of an enemy attack.”<sup>25</sup>

“inhuman”, means “the opposite of human.” Consequently, “an inhuman treatment is a barbarous, uncouth and cruel treatment; a

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23. (1991) 6 NWLR (Part 200) 708

24. *Ibid.* Per Niki Tobi, JCA at 777, para H.

25. *Ibid.* at 778, paras D-E

treatment which has no human feeling on the part of the person inflicting the barbarity or cruelty."<sup>26</sup>

For "degrading treatment", the Court stated that it is one that has the element of lowering the social status, character, value or position of a person; a form of treatment capable of making the victim develop some form of complex which is not dignifying at all.<sup>27</sup>

"Slavery" is the state of being held as a slave. It also conveys the institution of ownership of slaves; a state of being in drudgery whilst "servitude" conveys generally similar meaning. It also means subjecting a person to compulsory labour or subjecting a person to irksome conditions like a slave'.<sup>28</sup>

"A forced or compulsory labour is a labour which the person has not the physical power or strength to opt out. It is a labour which the person must perform whether he likes it or not. In the context of section 31(1), the individual has no choice than to perform the labour."<sup>29</sup>

The foregoing definitions of the Court seems to lend credence to Murdoch's<sup>30</sup> opinion that the distinction between "torture",

26. *Ibid.*, paras E-F. See also *Alhaja A. Mogaji & Ors. v. Board of Customs and Exercise & Anor.* (1982) 2 NCLR 552 at 560 where Adefarasin, CJ held "the actions of the officials of the Board of Customs and Exercise aided by police officers and soldiers to descend on market women with guns and horse whips and to seize goods arbitrarily in an atmosphere of gun shots and horse whipping is out of step with the law and offends s. 31(1)(a) of the Constitution as being inhuman and degrading treatment."

27. *Ibid.*

28. *Ibid.* at 778, paras F-G

29. *Ibid.*, paras G-H

30. Murdoch J., "Liberty and Security of a Person in a State under the Rule of Law" being the text of a paper delivered at the British-Nigeria Law Week

"inhuman" and "degrading treatment or punishment" lies in the difference in the intensity of suffering and assessment of state purpose as determined by contemporary standards. The distinction would then appear to be a function of the degree or quantum of pain or suffering inflicted on a person. The important point to note however, is that howsoever viewed, they are actions that either chips away at or completely strips a person of his dignity as a human being.

The African Charter's provision on the right to the dignity of the human person is slightly different from the provision in the Constitution. It provides "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." In other words, every individual is entitled to legal recognition as a dignified human being who should not to be treated in a way that is capable of demeaning that status.

The provisions of Chapter II of the Constitution on the Fundamental Objectives and Directive Principles of State Policy closely capture the ideals set out in several international, regional and national instruments guaranteeing economic, social and cultural rights<sup>31</sup>—these are rights the realisation of which gives substance and meaning to human existence and enhances the dignity of the human person. They are, however, couched not as rights but as duties of State. Thus, one of the tragedies of modern constitutional experiments in Nigeria has been the consignment of the fulfilment

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held on 23-27 April, 2001 Abuja, Nigeria, cited in Livinus Ifeanyi Chukwu Uzoukwu, "Constitutionalism, Human Rights and the Judiciary in Nigeria" Ph.D Thesis submitted to the University of South Africa (UNISA), June 2010, available online at <http://wwwuir.unisa.ac.za/bitstream/handle/10500/3561/thesisuzoukwu1.pdf?sequence=1>, accessed 15 April 2011 at 10.30am.

31. Such as the International Covenant on Economic, Social and Cultural Rights 1966 and the African Charter.



of these socio-economic obligations to the non-justifiable, aspirational provisions of this Chapter of the Constitution by section 6(6)(c) of the Constitution, which provides –

The judicial powers vested in accordance with the foregoing provision of this section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter II of this Constitution.<sup>32</sup>

The realisation of economic, social and cultural rights has often been undermined, particularly within national spheres. Those most guilty of this are the developing countries, to which Nigeria belongs. The main argument for their failure to implement socio-economic rights is the so-called state of their underdevelopment. They believe that, unlike the developed countries, they do not have sufficient economic resources to implement the various aspects of socio-economic rights. As such they lack the political will needed to effectively implement and monitor compliance with provisions guaranteeing such rights. In fact various provisions of domestic constitutional law deny legal enforceability to these rights in many developing countries.<sup>33</sup>

This is notwithstanding the fact that the long recognised basic needs of man have always been social and economic as opposed to civil and political<sup>34</sup> to which more prominence and attention are

32. The origin of this provision is the 1979 Constitution.

33. See Oueh J., "The Challenge of Socio-Economic Rights Litigation in Nigeria: Hurdles and Prospects" in Yemi Osinbajo, Olayinka Balogun and Bankole Olubamise eds., *Economic, Social and Cultural Rights: Developing a Training Agenda for Nigeria* (Lagos: Legal Research and Resource Development Centre (LRRDC), 1998), p. 10.

34. See Ladan M. T., "Should all Category of Human Rights be Justiciable?" in M. T. Ladan ed., *Law Human Rights and the Administration of Justice in*

often given. Economic, social and cultural rights are aimed for human well being, namely, the material and moral satisfaction of the needs of the individual, since the attainment of well being is an essential condition for exercising civil and political rights.<sup>35</sup> In other words, economic, social and cultural rights form part of the body of claims necessary to realise human dignity. They cover such issues as shelter, healthcare, education, cultural development, food, employment, and social security. It is true that man shall not live by bread alone;<sup>36</sup> but it is equally true that man cannot live without bread.

The irony is that Nigeria has signed and ratified a number of international human rights instruments that protect social, economic and cultural rights.<sup>37</sup> These acts create, for Nigeria, "an obligation of consequence, deriving from the customary principle *pacta sunt servanda*. It consequently has the duty to adjust its legislation to harmonise it with its international obligations".<sup>38</sup>

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*Nigeria, Essays in Honour of Honourable Justice Muhammad Lawal Uwais* (Zaria: Dept. Of Public Law, Faculty of Law, A. B. U., 2001), pp. 73-74.

35. See Baricako G., "The African Charter and the African Commission on Human and Peoples' Rights: A Mandate to Promote and Protect Economic, Social and Cultural Rights in Africa" in International Commission of Jurists, *Report of a Regional Seminar on Economic, Social and Cultural Rights* 45, 50 (1998). See also para. 13 of the Proclamation of the International Conference on Human Rights in Teheran, Iran, as quoted in *Developing Human Rights Jurisprudence*, Commonwealth Secretariat, 1988, p. 62 (stating "Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political liberties without the enjoyment of economic, social and cultural rights is impossible.")

36. See, e.g., Matthew 4:4.

37. Nigeria, e.g., acceded to the ICESCR on 28 July 1993, ratified it on 28 Oct. 1993; the same for the ICCPR; it acceded to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on 15 Oct. and ratified it on 3 Jan. 1969; it ratified the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) on 12 June 1985 and the Convention on the Rights of the Child on 19 April 1991.

38. African Commission in Communications 54/91—*Malawi African Association v. Mauritania*; 61/91—*Amnesty Int'l v. Mauritania*; 98/93—*Ms. Sarr Dialop*,



Fundamental Rights guaranteed in Chapter IV include the right to life<sup>39</sup>; the right to dignity of the human person<sup>40</sup>, which is the focus of this paper; the right to personal liberty<sup>41</sup>; the right to fair hearing<sup>42</sup>; the right to private and family life<sup>43</sup>; the right to freedom of thought, conscience and religion<sup>44</sup>; the right to freedom of expression and the press<sup>45</sup>; the right to peaceful assembly and association<sup>46</sup>; the right to freedom of movement<sup>47</sup>; the right to freedom from discrimination<sup>48</sup> and the right to acquire and own immovable property anywhere in Nigeria.<sup>49</sup> Even though these rights are political and civil in nature, a number of them—including the right to life, the right to the dignity of the human person and the right to acquire and own immovable property anywhere in Nigeria—cannot be fully realised without a fulfilment of the economic, social and cultural rights.<sup>50</sup>

Despite Nigeria's obligation to fulfil the socio-economic rights of Nigerians as shown above, successive Nigerian leaders have

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*Union Inter africaine des Droits de l'Homme and RADDHO v. Mauritania*; 164/97 a 196/97—*Collectif des Veuves et Ayants-droits v. Mauritania*; and 210/98—*Association Mauritanienne des Droits de l'Homme v. Mauritania*; [hereinafter collectively "Malawi African Association et al case"]; see also *Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999-2000* [hereinafter "Thirteenth Report"]. AHG/222(XXXVI), Annex V, 102, 114.

39. See 1999 Const., S. 33.

40. *Ibid.* S. 34.

41. *Ibid.* S. 35.

42. *Ibid.* S. 36.

43. *Ibid.* S. 37.

44. *Ibid.* S. 38.

45. *Ibid.* S. 39.

46. *Ibid.* S. 40.

47. *Ibid.* S. 41.

48. *Ibid.* S. 42.

49. *Ibid.* S. 43.

50. See the Preambles to the ICCPR and ICESCR, both of which recognise that "In accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if concessions are created whereby everyone may enjoy his economic, social and cultural rights as well as civil and political rights."



continuously abdicated this duty. Nigerian citizens wallow in abject poverty. Most Nigerian roads are death traps and on daily basis news of road accidents claiming several precious lives make the rounds.<sup>51</sup> Power supply is so epileptic that the cost of doing business due to investment of funds in diesel and petrol for running generators has become astronomic whilst a good many businesses, which could no longer meet up with the high cost, have folded up.<sup>52</sup>

The health sector is in shambles. There has been a gross underfunding and inadequate management of health services leading to a rapid fall in quality of health infrastructures in our hospitals. Yearly capital allocation to health and other social services is minimal compared to allocations to other subsectors.<sup>53</sup> Consequently, most often, hospital patients not only have had to buy drugs but have also had to supply needles, syringes and suture threads, in addition to paying for bed space. This unfortunate situation and the prevailing unsatisfactory conditions of service have resulted in many Nigerian doctors migrating abroad. Abdu<sup>54</sup>, while painting a poignant picture of this sector, also highlighted the incongruence in government budgetary allocation –

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51. Igbokwe A. O., "Sanusi Lamido Versus the National Assembly: Strip them of all the Financial Excesses", available at <http://nigeriaworld.com/columnist/uzokwe/121010.html>

52. It is estimated that over 70% of Nigerians get less than two (2) hours power supply daily and almost every business operating in the country depends on generator. See Abdu H., "An Analysis of the Proposed Government Budget of 2010", available at <http://www.modernghana.com/newsp/255360/1/pagenum3/an-analysis-of-the-proposed-federal-government-bud.html#continue>, accessed 19 October 2011 at 1.30pm.

53. For instance, the proposed budgetary allocation to health in year 2010 was ₦161.8billion (4.0% of total budget for the year) and ₦154.5billion in 2009 (5.0% of total budget) as opposed to ₦232billion (5.7%) for defence in 2010 and ₦223billion (7.2%) in 2009 and ₦249billion (6.1%) for education in 2010 and ₦224.6billion (7.2%) in 2009; see *ibid.*

54. *Ibid.*

*"About four million of Nigerian population is living with HIV; these people depend on sporadic Foreign Donors efforts for Anti Retroviral Drugs (ARVs), care and support. Millions of pregnant women still have to pay to have babies delivered and in the process 800<sup>55</sup> out of every 100,000 die as a result of inability to afford necessary healthcare cost to prevent or avert such deaths; under five children still die from preventable diseases. And almost all community health infrastructure have either collapsed or converted to other use. The total health allocation is still less than 15% Abuja Declaration and HIV is still given less than 5%. Interestingly, the National Hajj Commission has an allocation of N1,067,470,875, the state house is using about 500 million Naira to purchase Treated Vehicles, while scandalously the National HIV response as anchored by National Agency on HIV and AIDS has a mere 701,938,135."*

Most alarming is the fact that a significant percent of Nigerian children suffer from malnutrition and its damaging consequences. According to UNICEF, all available evidence shows that hunger and malnutrition are prevalent in Nigeria, as over the years Nigeria has graduated from an exporter of food items to a net importer of same.<sup>56</sup> Annual budgetary allocation to the education sector is still paltry and continuously declining in overall percentage.<sup>57</sup> This is despite the fact that education is key to the transformation of the

55. The UNDP puts the figure at 840, see "International Human Development Indicators – United Nations Development Programme", available at <http://hdrstats.undp.org/en/countries/profiles/NGA.html>, accessed 19 October 2011 at 1.00pm.

56. See Udomhama N., "The Justiciability of Economic, Social and Cultural Rights in Nigeria: the Role of Courts, *Nigerian Current Legal Problems*, Vol. 6, 2005, p. 7 citing the Committee on Economic, Social and Cultural Rights Consideration of Report submitted by Nigeria in 1998.

57. 8.2% in 2007, 7.8% in 2008, 7.2% in 2009 and 6.1% in 2010 as opposed to the United Nation's benchmark of 26%.



lives of the ordinary people and the development of the society; it is an essential guaranteed right of every individual for a civilised and meaningful livelihood. But unfortunately the sector has been left to decay over the years. The consequences of this have been incessant strikes by the Academic Staff Union of Universities (ASUU) and sundry unions and associations within the sector<sup>58</sup>; gross inadequacy and decay of existing infrastructure and, of course, fallen standard of education, which has placed the future of the present generation in jeopardy. Sadly, despite this general underfunding of the sector, the state governments are not making the most effective use of available resources for as Abdu<sup>59</sup> noted -

*"Nationwide, there is certainly huge under spending in the education sector, especially as regards increasing capital budgets so as to reclaim and refurbish dilapidated public schools. This shortfall is evident in the fact that the Federal Government's component of the UBE fund is still under drawn because states are not meeting the requirements for which monies are being released to them."*

Quite disheartening too is the disdain with which the leaders hold the citizens and their tendency to capitalise on the handicap of the citizens, a handicap which the leaders have either created or maximised, for their selfish purposes. This is evident in the reaction of the then Governor of Bornu State, Alhaji Ali Modu Sheriff, who clearly asserted that high illiteracy rate in his state had made him less sensitive to negative press report. According to him "A lot of falsehood has been published over the years in newspapers about my government and I never lose sleep over them. Because less than five

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58. An occurrence which has its own incidental consequences for millions of students some of whom, out of frustration, have gotten themselves into problems with the law or even lost their lives in an attempt to preoccupy themselves otherwise. "An idle mind is the devil's workshop", as the saying goes.

59. Abdu, *supra* note 52.



percent of Bornu people can read and understand what is written in newspapers."<sup>60</sup>

Unemployment is equally rampant in Nigeria. Thousands of graduates produced yearly by higher institutions are without jobs either because they are unemployable due to grossly fallen standard of education or the jobs are just not available. Government, itself, at various levels have placed embargo on employment, without providing the necessary physical infrastructure that will encourage private investors to create the needed jobs.

There are a great number of homeless people due to acute housing problem; decent housing is scarce and relatively expensive. The urban poor, especially women and children, are forced to live in makeshift cheap dumps or shelters in appalling and degrading conditions representing both physical and mental illnesses hazards. Safe treated pipe-borne water is unavailable in many cities in the country, a situation which often results in the outbreak of water borne diseases like guinea worm and cholera. According to 2009 Nigerian Human Development Report, only 49.1% of Nigerians have access to portable water. Though an improvement on the position in 1998 when it was only 39%<sup>61</sup>, more than 70million Nigerians still do not have access to improved drinking water. This leaves much to be desired since "[w]ater is essential to sustaining life and the Right to Water is enshrined in the Right to Life and Dignity, as set forth in the International Bill of Human Rights."<sup>62</sup>

Poverty<sup>63</sup> is rife in Nigeria and most of government's efforts at improving the situation have been half hearted and marginally result

60. See *Missile "Sheriff to Journalists"*, THIS DAY Newspaper, Thursday, December 14, 2006, back page.

61. See The Committee on Economic, Social and Cultural rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Nigeria, 1998. Available at <http://www1.umn.edu/humanrts/esc/nigeria1998.html> (Hereinafter "Ecosoc Committee.")

62. Abdu, *supra* note 52.

63. Total poverty head count rose from 27.2% in 1980 to 65.6% in 1996, an annual average increase of 8.83% in the period. Between 1996 and 2004, however, it declined by 2.1% annual average to 54.4%. See "Nigeria: New

oriented.<sup>64</sup> All of these deprivations have made life virtually unbearable for the average Nigerian citizens who have been forced to wallow in darkness and hopelessness. Anxiety over how to survive each day has robbed them of their human dignity and reduced them to a state of servitude. Many are ready to descend so low as to do anything for money just to keep body and soul together. Many have fallen prey to the antics of the same politicians who have impoverished them and use them as thugs. Inordinate as it is, many more have turned into hired assassins and kidnappers as a means of survival. What can be more dehumanising than being deprived of essential food items, primary health care, basic shelter, clothing, and the most basic forms of education? The mental torture and frustration of a degree holder who roams around for years seeking the ever elusive job can only be imagined for those who have had the fortune of not experiencing such. Even the senior citizens are not spared. The dehumanising treatment they suffer due to marginalisation by the government is often heart rending. Those who worked in the public sector and are entitled to pensions are improperly treated. Not only are their pensions too meagre to adequately cater for their needs, they are not paid regularly; gratuities are not also paid until after undue delays. In addition they are subjected to periodic, hectic and improperly conducted verification and registration exercise, which are so tasking that some

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Human Development Report", AfricaFocus Bulletin, March 5, 2010, available at <http://www.africafocus.org/docs10/nig1003b.php>, accessed 19 October 2011 at 1.23pm

64. Budgetary allocation to Poverty Alleviation Programme in 2010, for instance, was a paltry sum of N3.9billion out of which only N1.65billion was earmarked for real projects whilst the balance of N2.25billion was for the administration of the Fund and recurrent expenditure. See also 2010 HDI, a standard means of measuring the well being of countries globally through a comparative measure of life expectancy, literacy, education and standards of living for countries, which places Nigeria in the 142nd position out of 169 countries.



of them lose their lives in the process. For those not entitled to pension no social security is provided.<sup>65</sup>

### The Concept of Immunity

The concept of immunity has its foundation in the common law. Immunity is the exemption of a person or body from a duty, liability or service of process, especially such as is granted to a public official.<sup>66</sup> It originated from the English practice of exempting crown officers from liability from their actions on the notion that "the King can do no wrong"<sup>67</sup>, an expression which originally meant that "the King was not allowed to do wrong"<sup>68</sup> as he was meant to be a shining example to his subjects. The doctrine was also based on the fact that the King was judge over all matters.

The 1999 Constitution, nevertheless, confers constitutional immunity on holders of certain offices. Our concern in this paper is with section 308 of the Constitution, which confers executive immunity on the President and the Vice-President of the Federal Republic of Nigeria as well as the Governor and Deputy-Governor of each state of the Federation. The section provides –

- (1) Notwithstanding anything to the contrary in this constitution, but subject to subsection (2) of this section:
  - (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;

65. Ajomale O., "Elder Abuse: the Nigerian Experience", available at [http://www.inpea.net/images/YinkaPaper\\_ElderAbuse\\_Nigeria\\_Dec07.pdf](http://www.inpea.net/images/YinkaPaper_ElderAbuse_Nigeria_Dec07.pdf), accessed 23 October 2011 at 8.30pm.

66. See *Black's Law Dictionary* (1999) 7th Ed. 752-753.

67. Williams T. C., "Jones v. Clinton: Reconsidering Presidential Immunity", *The Richmond Journal of Law and the Public Interest*, 1996 (Williams School of Law, University of Richmond) available at <http://rjoli.richmond.edu/archive/Volume 1 Issue 1.pdf>, accessed 13 October 2011 at 3.09pm. See also R.J. Gray: "Private Wrongs of Public Servants" (1959) 47 *Cal. L. Rev.* 303.

68. Jaffe L. quoting Ehrlich, *Proceedings Against the Crown 1216-1377*, in 6 *Oxford Studies in Social and Legal History*, 1921, p. 42.



- (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
- (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

- (2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
- (3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.

From the foregoing, the immunity granted to the officers mentioned in the section is personal and not official. It covers them in their private capacity but does not extend to (1) Civil proceedings against any of them in his/her official capacity and (2) Civil or criminal proceedings where he/she is only a nominal party.<sup>69</sup> It is also an absolute immunity, which covers all criminal and civil claims against the beneficiary during his/her tenure in office. The import of this is that – no civil or criminal action can be instituted or maintained against any of the office holders in his/her private capacity during his/her tenure in office; neither can they be compelled to testify in any judicial proceedings as witnesses in their

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69. *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt. 660) 228.

private capacity.<sup>70</sup> In *Attorney-General Federation v. Abubakar*<sup>71</sup> the Court of Appeal in reference to section 308 of the Constitution observed –

*"[I]mmunity under the section prohibits every criminal and civil proceedings against the President, Vice President, Governor and Deputy Governor notwithstanding and regardless of the court where the prosecution takes place, whether it is before a court of law established by section 6(5) of the Constitution or a tribunal established by paragraph 15(1) of the 5<sup>th</sup> Schedule to the Constitution, with the features of a court and performing the duties of a court".*

Since Nigerian leaders have continuously failed to be shining examples to their subjects as the "King who can do no wrong", which is the original basis for the conferment of immunity, such breach of trust demands a reconsideration of the retention of section 308 of the Constitution. Whatever the avowed justification for section 308<sup>72</sup>, the experience of Nigerians can no longer accommodate such justifications. The situation demands either the complete removal of the immunity clause or such modification as would give room for the prosecution of its beneficiaries in certain specified cases of infraction such as corruption and other forms of fraudulent activities that jeopardise the economic and social well being of the citizenry. Drastic situations demand drastic solutions in deed. Besides, he who comes to equity must come with clean hands.<sup>73</sup>

70. See *Arishe*, *supra* note 70 at 288 (stating also that this is despite section 155(1) of the Evidence Act, Cap. E14 LFN 2004 and the powers of the court to compel attendance of witnesses in judicial proceedings.)

71. (2007) 8 NWLR (Pt. 1035) 117 at 154, per Aboki, JCA. See also *Inspector General of Police v. Fayose* (2007) 9 NWLR (Pt. 1039) 263 at 272.

72. See *supra* notes 82 and 83.

73. Even ex-President Umaru Musa Yar'Adua, himself a beneficiary of immunity, observing in Davos, Switzerland, that the clause has provided cover for public officers while they loot the treasury and the harm this has done to the country unequivocally endorsed its removal from the



## **Tackling the Constraints of Non-Justiciability of Chapter II**

If indeed as the Constitution provides "the security and welfare of the people shall be the primary purpose of government"<sup>74</sup> and it is "the duty and responsibility of all organs of government and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter [II] of the Constitution"<sup>75</sup>, then it implies that Nigerians are right-holders to the duties and obligations of government contained in Chapter II of the Constitution. This accords with the Hohfeldian jurist postulate of duties being correlatives of rights.<sup>76</sup> This being the case Nigerian leaders should be held accountable to the people for their stewardship in upholding the provisions of the Constitution, and specifically Chapter II, which they have sworn to do both in the Oaths of Allegiance and Oath of Office.<sup>77</sup>

It is ironic that the government could easily opt out of its "duty and responsibility" by making the provisions of Chapter II unenforceable. Notwithstanding, this drawback, there are two other means that could be employed to ensure a realisation of socio-economic rights and by extension the right to the dignity of Nigerians.

### **A. Judicial Activism**

Despite the provisions of section 6(6)(c) of the Constitution, Nigerian courts could through a proactive interpretation of the provisions of the Constitution aid the implementation of Chapter II. It is illogical to draw any distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on

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Constitution. See Lesser H., writing for VOA, "Nigeria to Expunge Immunity Clause for Governors", available at <http://www.africanloft.com/nigeria-to-expunge-immunity-clause-for-governors/>, accessed 24 October 2011 at 11.07am.

<sup>74</sup> Section 14(1)(b) 1999 Constitution

<sup>75</sup> Section 13 *ibid*.

<sup>76</sup> See generally Hohfeld W. N., *Fundamental Legal Conceptions* (1964).

<sup>77</sup> Seventh Schedule, 1999 Constitution. Also section 5(1)(a) &(b), (2)(a)&(b).



the other—except for theoretical, academic analysis. In practice, these rights are indivisible and interdependent. For example, the right to life guaranteed in the Constitution<sup>78</sup> is meaningless without the necessary material support that makes life worth living. In fact, the right to life could be interpreted as giving an emergency claim on society for assistance.<sup>79</sup> Incorporating economic, social and cultural rights into interpretation of fundamental rights is a practice championed by the Indian courts through the ingenuity and relentless efforts of Justice Bhagwati, its chief proponent. According to him—

*"[W]hile interpreting and applying the human rights in our respective Constitutions, we can certainly take into account economic and social rights and interpret and apply the specifically enumerated human rights in such a manner as to advance and achieve economic and social rights. The scope and ambit of the specifically enumerated human right can and must receive colour from economic and social rights (such as those set out in Articles 6, 7 and 10), which can be spelt out from the specifically enumerated human rights and thus become enforceable by the judiciary. Everything depends on the creativity, valour and activism of the judge deciding the particular case".<sup>80</sup>*

The Indian courts have, to their credit, put to very good use the principle enunciated here by Justice Bhagwati as evidenced in the case of *Maneka Ghandi v. Union of India*<sup>81</sup> where the right to life was interpreted as meaning the "right to live with dignity". This doctrine was further enlarged by the Supreme Court in the case of

78. Cf. Art. 4, African Charter, *supra* note 9 (providing that "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.")

79. Udombana, *supra* note 56 at 158

80. Justice P. N. Bhagwati, "Fundamental Rights in their Economic, Social and Cultural Context" in *Developing Human Rights Jurisprudence*, Vol. 2, Commonwealth Secretariat.

81. (1978) 1 SCC 248

*Francis Coralie v. Union Territory of Delhi*<sup>82</sup> where the court stated that the fundamental right to life is the most precious human right and forms the arc of all other rights. It must therefore be interpreted in a broad and expansive spirit in order to invest it with an enduring significance and vitality, thereby enhancing the dignity of the individual and the worth of the human person. The right to life, the Court said, includes the right to live with human dignity and all that goes along with it, that is the bare necessities of life, such as adequate nutrition, clothing and shelter over the head.

Also in the case of *Mohini Jain v. State of Karnataka and Ors.*<sup>83</sup> for example, the Indian Supreme Court found a constitutionally protected right to education in the right to life and held that "the 'right to life' is the compendious expression for all those rights that the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct that the individual is free to pursue. The right to education flows directly from the right to life. The right to life under Article 21 [of the Constitution of India] and the dignity of an individual cannot be assured unless the right to education accompanies it. The state government is under an obligation to provide educational facilities at all levels to its citizens".<sup>84</sup>

Human rights in the current millennium are primarily in the hands of the trendsetters, the judges.<sup>85</sup> The Nigerian Courts

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82. (1981) A. I. R. 746.

83. (1992) 3 S.C.R. 658.

84. *Ibid.* at 669, per Kuldip Singh J; see also *Tellis and Ors v. Bombay Municipal Corporation and Ors* (1987) L.R. C\*Wealth 351, 368-69, in which the Indian Supreme Court derived a right to livelihood from the right to life; *Shantisar Builder v. Narayan Khimlal Totame*, A.I.R. (1990) S.C. 630, finding a right to shelter in the right to life;

85. The United Nations Press Release, Workshop for Judges on the Justiciability of Economic, Social and Cultural Rights in South Asia, New Delhi, 17-18 November 2001, STATEMENT OF CONCLUSIONS. Available at [http://www.unhcr.ch/hurricane/hurricane.usf\(Symbol\)/OHCHR.STM.01.77.E.n/](http://www.unhcr.ch/hurricane/hurricane.usf(Symbol)/OHCHR.STM.01.77.E.n/), cited in Udomhama, *supra* note 57 at 137



must, therefore, rise to the challenge of helping to realise economic, social, and cultural rights. This calls for a liberal and realistic interpretation of the human rights instruments to which Nigeria is a party just like the Supreme Court did in the case of *Attorney-General of Ondo State v. Attorney-General of the Federation and Ors*<sup>86</sup>, where it gave effect to an Act<sup>87</sup> enacted by the National Assembly pursuant to Item 60(a)<sup>88</sup> on the Exclusive Legislative List and the provisions of section 15(5) under the Fundamental Objective and Directive Principles of State Policy. Section 15(5) provides that "The State shall abolish all corrupt practices and abuse of power". The Court rejected the argument that the provisions of Chapter II of the Constitution are not justiciable and as such cannot be subject of any enactment or law. It also rejected the argument that these provisions stand alone in the Constitution and should not therefore be read with other provisions of the Constitution. According to the Court, "Weighty as that submission may be, it must be rejected... To accede to that submission is to fly in the face of the settled principles of Constitutional interpretation that the duty of the Court is to read and construe together all the provisions of the Constitution, unless there is a very clear reason that a particular provision of the Constitution should not be read together."<sup>89</sup> The Court also acknowledged the

86. (2002) F. W. L. R. (Pt. 111), p. 1972.

87. The Corrupt Practices and Other Related Offences Act, 2000.

88. It provides for the power of the National Assembly to establish and regulate authorities for the Federation or any part thereof "to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution."

89. *Supra*, note 115 at 2208. See also *Okojie v. Attorney-General Lagos State*, *supra* note 119 at 338 where the Court held that "The true meaning of the words used and the intention of the legislature in any statute and particularly in a written constitution can best be properly understood if the statute is considered as a whole. It is a single document and every part of it must be considered as far as relevant in order to get the true meaning and intent of any particular portion of the enactment."



*fundamental usefulness of Directive Principles in the  
governance of a country".<sup>90</sup>*

It is submitted that such a forward looking approach to the provisions of Chapter II of the Constitution should be extended to the rest of the provisions of the same Chapter, which are aimed at the realisation of economic, social and cultural rights of Nigerians, for as the court has said, "all the Directive Principles need not remain mere or pious declarations."<sup>91</sup> According to the Court, apart from section 15(5), there are other provisions of Chapter II, which can be made enforceable by legislation depending on which of them demands urgent and pressing national attention. "It is for the Executive and the National Assembly, working together, to give expression to anyone of them through appropriate enactment as occasion may demand."<sup>92</sup> The court, which is the last hope of the severely deprived and downtrodden common man, must therefore at all times be willing to adopt this forward looking approach with respect to the provisions of Chapter II of the Constitution.

Indeed special principles of interpretation apply to constitutional and, *a fortiori*, human rights instruments. The background of a Constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Besides, the concepts used in a Constitution are often

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90. *Ibid.* at 2142. Also asserting that the Republic of Ireland, China, Former U. S. S. R. and Germany have one form of Directive Principles or another inserted in their Constitutions and that they all acknowledged such Principles to be non-justiciable but that nevertheless, the courts cannot altogether ignore their existence. Consequently, under the Irish Constitution, it has been suggested that the Courts in deciding cases relating to the subject matter of the declarations, "are bound to take cognisance of the general tendency of these declarations, even while legislative effect has not yet been given to them." See *Commentary on the Constitution of India* by Basu, 5th Edition, Vol. 2, p. 312.

91. *Ibid.* at 2144.

92. *Ibid.* at 2138 and 2144

very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect, in accordance with their conscientiously held views of what such principles entail.<sup>93</sup>

Furthermore, a guaranteed right does not have to attain the status of "fundamental" and guaranteed in the "Constitution" to deserve enforcement. This much can be deduced from the decision in *Abacha vs. Fawehinmi*.<sup>94</sup> It has equally been observed, and rightly too, that even though the Constitution has made socio-economic rights non-justiciable, "it is still possible to hold government functionaries responsible for non-compliance with the provisions of Chapter II. If the essence of any right lies in its enjoyment and compliance with the same, then their non-justiciability has not substantially abridged the rights so conferred except to the extent that they cannot be specifically enforced and enforced as in Chapter IV of the said Constitution."<sup>95</sup>

#### ***B. Through the African Charter on Human and Peoples Rights***

This is a unique instrument among all the instruments guaranteeing human rights. It is a combination of civil and political as well as economic, social and cultural rights and peoples' rights, all of which are treated as indivisible.<sup>96</sup> The Charter's preamble underscores the importance of this combination by providing that "it is hereafter

93. See *Matadeen v. Poinu* [1998] 3 WLR 18, at 25 G-H, PC, per Lord Hoffmann. Similar views were expressed in *James v. Commonwealth of Australia* [1936] AC 578, at 614, PC, per Lord Wright MR; see also *Walsby v. Halsbury's Laws* (4th ed.), para. 1221 (stating that "[t]he main significance of classifying an Act as a constitutional Act lies in the nature of the interpretive criteria which then apply to it. In particular, the rights conferred, having the quality of constitutional rights, will be regarded by the courts as fundamental and not to be displaced except by clear words").

94. *Supra* note 77.

95. Gye-Wado O., "Fundamental Human Rights and Corresponding Obligations under the 1999 Constitution" in I. A. Ayua et al. eds., *Issues in the 1999 Constitution* (Lagos: Nigerian Institute of Advanced Legal Studies, 2000), p. 191.

96. See Murray R., *The African Commission on Human and Peoples' Rights and International Law* (Oregon: Hart Publishing, 2000), p. 11.



essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.<sup>97</sup>

This instrument has been domesticated in Nigeria and therefore forms part of our municipal laws.<sup>98</sup> Consequently, the Supreme Court has held that, "like all other laws courts must uphold it."<sup>99</sup> The Charter provides for the right to property,<sup>100</sup> the right to work under equitable and satisfactory conditions and fair wages,<sup>101</sup> the right to enjoy the best attainable state of physical and mental health,<sup>102</sup> and the right to education and to participate in the cultural life of the community.<sup>103</sup>

It is worthy of note that the Charter, unlike most other international human rights instrument, does not contain a derogation clause. The implication of this is that emergencies and special circumstances cannot justify any limitations placed by States Parties on the rights and freedoms guaranteed by it.

The only caveat to the enjoyment of these rights and freedoms provided by the Charter is that "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."<sup>104</sup> This has been interpreted by the African Commission to imply that the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages, which follow. A limitation may not, therefore, erode a right to the extent that the right itself becomes

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97. See the African Charter, *supra* note 9 pmbl.

98. See Cap. A9 LFN 2004.

99. *Abucha v. Fawehinmi* *supra* note 77 at 248.

100. Art. 14, similar to Art 17 of the UDHR.

101. Art. 15. Cf. Art. 6(1) of the ICESCR, which extends the right to work to include the opportunity to gain a living.

102. Art. 16(1).

103. Art. 17

104. Art. 27(2)



illusory.<sup>105</sup> There is thus, no room for arbitrary limitation of these rights by State Parties.

It should be noted also that though the Charter did not specifically provide for the right to housing, the African Commission in the case of *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAC) v. Nigeria*<sup>106</sup> pronounced that:

*"Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. ... the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated."*<sup>107</sup>

According to the Commission, the State's obligation to respect the rights to housing requires it as well as its organs and agents to refrain from carrying out, sponsoring or otherwise tolerating any practice, policy or legal measures that violate the integrity of the individual or infringes upon his or her freedom to use the materials or other resources available to them in a way that is most appropriate to satisfy individual, family, household or community housing

105. See Udombana N. J., "Weighed in the Balances and Found Wanting: Nigeria's Land Use Act and Human Rights" in I. O. Smith ed., *The Land Use Act - Twenty Five Years After* (Lagos: Dept. of Private and Property Law, Fac. of Law, University of Lagos, 2003), p. 76, citing *Constitutional Rights Project, Civil Liberties Organisation, and Media Rights Agenda v. Nigeria* Comm. Nos. 140/94, 141/94, 145/95, para. 338, 1999-2000 Afr. Ann. Act. Rep. Annex V (hereinafter *CRP et al. case*)

106. Comm. 155/96, 2001-2002 Afr. Ann. Act. Rep., Annex V.

107. *Ibid.* at para. 60. See also Udombana, *supra* note 134 at 76.

needs.<sup>108</sup> This is indeed a remarkable decision<sup>109</sup> from which our courts could draw inspiration in enhancing the realisation of economic, social and cultural rights in Nigeria.

*Abacha v. Fawehinmi*<sup>110</sup> is the *locus classicus* on this issue. In it the Supreme Court held –

*"Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (ie domestic) law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990"*<sup>111</sup> (hereafter is referred to simply as Cap 10), it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts. By Cap 10 the African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it. The Charter gives to citizens of member states of the Organisation of African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution."

No doubt Cap 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provision will prevail over those of that other

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108. *Ibid.* at para. 61.

109. Even though the decisions of the Commission are not binding as its power is only limited to promotional activities and the making of recommendations to the Assembly of Heads of States of the African Union.

110. *Supra* note 77.

111. Cap. A9 LFN 2004.



statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.<sup>112</sup>

### Conclusion

Democracy thrives under the authority of leaders seen by their followers to be reliable, dependable and of impeccable character and who are ready to serve and not to be served.<sup>113</sup> But Nigeria, a democratic country, has been in deep economic depression for several years now. *Per capita*<sup>114</sup> income<sup>115</sup> has fallen uncontrollably over the years. The irony is that the country is so blessed with oil and other mineral and human resources, such that it has the potential to become one of Africa's leading economies. Yet years of mismanagement of the country's economy have crippled this supposedly giant of Africa. An economy that is suffering from structural vulnerability—governance problems, in particular, corruption; volatile oil prices; ethnic and religious tensions; political thuggery; attendant abuse of human rights – has significantly resulted in a degeneration of the quality of life of the Nigerian people and thus a depreciation of their human dignity. Ensuring day-to-day survival has virtually become the principal pre-occupation and nightmare of the majority of Nigerians.<sup>116</sup>

Successive Nigerian leaders have failed to honour the progressive fulfillment of the socio-economic rights of Nigerians. This failure has been boosted by the constitutional provisions, which makes the provisions of Chapter II of the 1999 Constitution,

112. Per Ogundare, JSC, available at <http://www.chr.up.ac.za/index.php/browse-by-subject/412-nigeria-abacha-and-others-v-fawehinmi-2001-ahrhc-172-ngsc-2000.html>, accessed 1 November 2011 at 8.00pm.

113. Idowu A. A., "Human Rights, Democracy and Development: the Nigerian Experience", *Research Journal of International Studies* - Issue 8 (November, 2008), p. 36, available at [http://www.eurojournals.com/rjis\\_8\\_03.pdf](http://www.eurojournals.com/rjis_8_03.pdf), accessed 17 October 2011 at 8.33pm.

114. *Per capita* means per head of population for each person. See the *New Lexicon Webster's Dictionary of the English language*, Deluxe Encyclopaedic Edition (New York: Lexicon Publications, Inc.) p. 745.

115. See *supra* note 2.

116. Udombana, *supra* note 56 at 138.



epitomising socio-economic rights, non-justiciable as well as section 308 of the Constitution on executive immunity from civil and criminal liability. As we have argued, a combination of these two provisions has endangered the realisation of the right to the respect for the human dignity of Nigerians, thus subjecting them to a life of destitution and hopelessness in the midst of abundance.<sup>117</sup>

It is, therefore, suicidal for a nation whose Human Development Index is so bad<sup>118</sup>, one so blessed with human and natural resources and yet held hostage by irresponsible and corrupt leaders, who have continuously refused to cater for the essential needs of its citizens thereby thoroughly rubbishising their guaranteed right to respect of their human dignity, to still retain the immunity clause wholesale and continue to accept the mundane excuse of insufficient resources to honour their socio-economic rights.

The courts must also through a proactive interpretation of constitutional provisions do all it can to promote a realisation of the socio-economic rights of Nigerians. Legal practitioners should equally endeavour to resort to the provisions of the African Charter, which has been domesticated in Nigeria, in this regard. A combination of these efforts will doubtless assist in the restoration of the human dignity of the citizenry.

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117. See "SERAP drags FG to UN Human Rights Committee over jumbo pay", available at <http://www.serap-nigeria.org/cover/serap-drags-fg-to-human-rights-committee-over-jumbo-pay/> (stating that wanton wastage and siphoning of resources has resulted in Nigeria's inability to ensure the immediate fulfilment of the minimum contents of economic and social rights and failing to guarantee a life of dignity and the minimum conditions for subsistence for millions of its citizens).

118. A fact admitted by the Minister of National Planning who is quoted as saying "People say that our situation is so bad. Yes, it is bad..." See Nigeria ranks 142nd on HDI, *supra* note 2

# ELECTRICITY ACCESS, POVERTY REDUCTION AND HUMAN RIGHTS IN NIGERIA

by

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## Introduction

The Vision 20:2020 envisions Nigeria as one of the more developed States in the near future.<sup>1</sup> This is expressed as "to propel Nigeria into the league of the best twenty economies in the world by year 2020."<sup>2</sup> This vision is however hampered by the poverty of a large percentage of her population.<sup>3</sup> Poverty reduction is especially important in the circumstances. Since electricity access enables self employment by providing the facilities to enhance productive capacities, a combination of electricity access and poverty reduction policies and programmes could work to enhance productivity and reduce poverty. Generally, no nation has been able to reduce its poverty level without the use of energy, especially electricity.<sup>4</sup> This is because all poverty reduction policies and programmes have

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1. Vision 20: 2020, is a home grown development plan for Nigeria. It is ambitious in the sense that it sees Nigeria as one of the 20 developed countries by 2020, nine years from now. The latest development indices do not however support this. Thus although it is among the fastest growing economies in Africa in 2010; (See the 2011 UNECA Report), In terms of development the various development reports have it still lagging behind other countries in terms of poverty and development.
2. Vision 20:2020; Report of the Human Development Working Group, (2009), p.4.
3. Ebong, M.O., "The Structure of Urban Poverty in Nigeria: The Calabar Municipality experience," *GeoJournal Springer Netherlands*, Volume 12, Number 1 (January, 1986), p.65.
4. "The Jo'burg Memo - Fairness in a Fragile World." Memorandum for the World Summit on Sustainable Development (WSSD), presented by the Heinrich Boll Foundation, Second edition 2002. pp. 29-30. See also ESMAP 2002 (a) p. 2.

aspects which are dependent on electricity access. The Energy Sector Management Assistance Programme (ESMAP) notes:<sup>5</sup>

Modern forms of energy such as electricity, natural gas, clean cooking fuels, and mechanical power are necessary to increase the productivity of agriculture and labor, improve the health of the population, lower transaction and transport costs, and reduce risks through better information. They therefore serve as a foundation supporting a virtuous cycle of growth.

This is the rationale of advocating a right to electricity access to the poor as a poverty reduction mechanism.

### **Electricity and Poverty Reduction**

As noted above electricity is an essential input for socio-economic development.<sup>6</sup> The institutional and infrastructural incapacity affecting the electricity sector in Nigeria however results in chronic electricity undersupply and inadequate electrification especially for the poor.<sup>7</sup> Thus despite the increasing growth indices in the country,<sup>8</sup> poverty is a major feature of the nation's economic profile. Holistic national development can however only be achieved

5. Energy Services for the Millennium Development Goals; UNDP ESMAP/ World Bank. [www.esmap.org](http://www.esmap.org), 2005, (9/10/10).
6. Sihag A R, Misra Neha and Sharma Vivek, (2002) "Impact of Power Sector Reform on Poor: A Case Study of South and South East Asia", *Energy Policy Journal*, Volume 30, Issues 11-12, 54-73.
7. GDP per capita, current international dollars (PPPs) (World Bank estimates), UN data World Bank, Data and Statistics, WDI, GDI, & ADI Online Databases,[37]. See also NEEDS II, at 29.
8. Although there is still a focus on oil for development, recent economic data suggest that the economy is diversifying with the Telecoms sector overtaking the Oil and Gas sector which is now in sixth place according to NBS 2010 statistics. Although the economy is in a growth mode this has however not reduced the national poverty profile substantially. This discrepancy can be attributed to the focus of development data on the macro indices of the economy. See generally, NBS Social Statistics data for 2009.



by uniting both the infrastructural aspects of the State as well as the productive ability of the citizens,<sup>9</sup> and the singular resource that can provide this merger is electricity. The electricity supply shortage has however curtailed the industrialization process which would have provided employment. It also affects the poor segments of the society directly by limiting their productivity which can be obtained through self employment; both of these issues worsen national poverty. To address these issues the government is presently addressing electricity supply shortage through the new economic direction of the State; this is based on sectoral reform which is to transform the sector from a public one to private providers of electricity service via privatization. It is expected that this will improve the problems of the sector, especially electricity supply and access to all Nigeria.

### **Access to Electricity in Nigeria**

Access is not defined in the Electric Power Sector Reform Act (EPSRA), although Part III, Section 32 (1) (b) enjoins the National Electricity Regulatory Commission (NERC)<sup>10</sup> "to maximize access to electricity services, by promoting and facilitating consumer connections to distribution systems in both rural and urban areas."<sup>11</sup> However access as defined in the Oxford Advanced Learners Dictionary<sup>12</sup> is the opportunity or 'right' to use something. Electricity access in effect is the convergence of both the right and opportunity to use electricity. This right to use and opportunity by way of proximity are determined or estimated via the electrification,

9. The problem of development in Nigeria is that there has been a concentration on big projects without addressing the issue of who are the people that would use such projects. This disconnect sees the establishment of unsustainable white elephant projects, which are useless to the people and are a drain on resources, while not contributing to the growth of the society.
10. An independent electricity regulatory institution established under Part III of the EPSRA (2005).
11. However the National Economic Empowerment and Development Strategy (NEEDS) notes that Nigeria requires to increase electricity supply and access to all. See NEEDS at p.62.
12. 7th edition.

in the form of proper connection to the public grid supply and the affordability aspect which together constitute access. To enable electricity access enhance poverty reduction programmes, the poor must have electricity access at the same time as such poverty reduction intervention is made. Addressing the right to electricity access will involve the electrification and affordability aspects:

### **Electrification**

Electrification is the physical connection of the consumer to the public grid system. It reflects the opportunity via proximity that the potential consumer enjoys relative to the facilities. The percentage of electrification of the State is the total number of connections (both domestic and non-domestic) that are carried out in a given time frame. Electrification can be an important aspect of development for the State, as it is one of the concrete evidence of the growth of the State. According to Guant;

Despite differences in some details, it appears generally assumed that electrification benefits development by contributing to improved education and health and supplying the services that bring customers into the formal economy through improved production.<sup>13</sup>

Electrification is usually dependent on adequate statistics for planning. The electrification policy in the National Electric Power Policy (NEPP),<sup>14</sup> details the provision of electricity access to all citizens to enhance national development.<sup>15</sup> According to Tully, pro-poor electrification strategies could be in the form of connection or coverage targets in operating agreements, or liberalizing operator entry to areas not yet electrified as well as fiscal incentives to the

13. Guant C.T., "Electrification Technology and Processes to meet Economic and Social Objectives in Southern Africa," unpublished Ph.D Thesis, Department of Electrical Engineering University of Cape Town (May 2003), p. 234.

14. Section 7 Policies of the Federal Government of Nigeria, 1999-2007, pp. 207-253.

15. This is referred to as "National access."



operator to expanded infrastructure.<sup>16</sup> Apparently Nigeria operated an indirect electrification policy, since there was no direct requirement for the State to provide electricity to citizens. This old policy was based on indirect electrification as there was no articulated policy, nor any compulsion to electrify, only that it was expected that no potential customer was rejected. This implies a discretionary implementation of electrification on the part of the National Electric Power Authority (NEPA) the monopoly electricity provider under a general national access policy due to importance of the sector as expressed in the Chapter II of the Constitution.<sup>17</sup> The present electrification policy encompasses all these and is also national in scope, with the special problems of the poor and disadvantaged rural poor recognized under the Rural Electrification Fund (REF).<sup>18</sup> It is assumed that the electrification policies properly implemented will reduce the national 80% demand/supply electricity gap and 40% urban electricity gap.<sup>19</sup> According to the World Bank,<sup>20</sup> in a country with over 130 million people, (other demographic indices from 2004 to 2010, say 140, 150 or 159 million),<sup>21</sup> the Power Holding Company of Nigeria (PHCN) had only 4.6 million customers in 2004!<sup>22</sup> This however increased to

16. Tully, S R., "The Contribution of Human Rights to Universal Energy Access." *Journal of International Human Rights*, Volume 4, Issue 3, (2006), p. 525. See also Sihag A R, et al., "Impact of Power Sector Reform on Poor: A Case Study of South and South East Asia". *Energy Policy Journal*, Volume 30, Issues 11-12, (2002), p 522.

17. See *infra*.

18. Established under Part XI of the EPSRA (2005).

19. "Country Analysis Brief, Nigeria." Energy Information Administration, US Department of Energy, January 2002, available at <http://www.eia>.

20. Lucy Baker, "Critical voices on the world bank and imf Facilitating whose power? IFI policy influence in Nigeria's energy sector." At Issue available at [www.brettonwoodsproject.org](http://www.brettonwoodsproject.org). (5/4/ 2008).

21. See CIA FactBook, Nigeria, NBS Social Statistics Data (2009) and UNDP Country Statistics.

22. About 1.5 million of these are unmetered or have defective meters. See Restral Survey *op cit*, pp. 22-23.



4.77 million homes<sup>23</sup> in 2008.<sup>24</sup> The new connections in the first quarter of 2008 were placed at 133,055 and 74,836 in the second quarter.<sup>25</sup>

### *Affordability*

The second component of electricity access is affordability, which relates to tariffs and pricing.<sup>26</sup> The cost of connection to the grid is part of the affordability of the electricity and is directly related to access, as without connection to the grid there cannot be access. The cost of producing electricity in developing States is generally high due to importation of infrastructure and technology. There are also fewer consumers to spread the cost to. In addition privatization further increases the cost of electricity services.<sup>27</sup> The implication is that this increase can harm the interest of the poor.<sup>28</sup> In addition, since generally electricity tariffs are determined by the cost of generation and supply, where this is high, the price of the electricity will also be high; meaning more price escalation. Although at present the MYTO<sup>29</sup> includes a subsidy provided by the State to ensure the affordability of electricity; under the reform, this will however be withdrawn gradually with the progress in the

23. "An Assessment of the Private Sector in Nigeria" Regional Program on Enterprise Development, Africa Private Sector Department Small and Medium Enterprise Department. (RPED). p. 17

24. Undated Document titled "NERC Scorecard 2008," p. 3. These figures are however contradicted by the NREP statistics which put the electrification rate in 2004 at 2.5 million. See also "An Assessment of the Private Sector in Nigeria" Regional Program on Enterprise Development, Africa Private Sector Department Small and Medium Enterprise Department. (RPED). *ibid.*

25. *Ibid.*

26. Section 76 EPSRA.

27. Section 76(2)(1)(a) EPSRA.

28. From Social Contract to Private Contracts: The Privatization of Health, Education and Basic Infrastructure. Martin Luther Out, Public Agenda. (25/8/2003) Accra, at [http://www.socialwatch.org/en/noticias/noticia\\_33.htm](http://www.socialwatch.org/en/noticias/noticia_33.htm) (11/8/09).

29. Multi Year Tariff Order.

privatization schedule for the electricity sector, making the price of the commodity higher than it is presently.

### Access to Electricity for the Poor

Access to adequate services such as electricity enhances the wellbeing of all the citizenry, reducing unemployment and increasing productivity. This improvement is more obvious in the case of the poor, who live a marginal lifestyle. In recognition of the importance of electricity to development, electricity was declared as one of the heights of the economy within the Constitution.<sup>30</sup> This was also reiterated in the Second National Development Plan of 1974. Thus over the years the federal government has been solely responsible for the electricity sector although the states<sup>31</sup> are also empowered to make laws and provide electricity in areas of their states not covered by the national grid system.<sup>32</sup> The access regimen operated what was can be referred to as a national access programme. There has however been insufficient capacity which retards general access to electricity,<sup>33</sup> thus the Nigerian Renewable Electricity Policy (NREP) had noted in respect to access to electricity in Nigeria that:

Access to electricity services is low. About 60 percent of the population - Over 80 million people are not served with electricity. Per capita consumption of electricity is approximately 100kWh against 4500kWh, 1934 kWh and 1379kWh in South Africa, Brazil and China, respectively. Under a business-as-usual scenario, the proportion of Nigerians without access to

30. This is under the policy of 'commanding heights of the economy' enunciated in Section 16 (4) (a) of the 1999 Constitution.

31. 'State' in initial capitals refer to country while if is written with a small letter it refers to the states within the country; as in Edo state.

32. Sections 13 and 14 of the second Schedule of the Constitution confer rights in respect of electricity legislation and provision for the federal and states respectively.

33. NBS Social Statistics Data (2009), p. 277-296.

electricity services will continue to increase over time.

<sup>34</sup>

This implies that the poor must be addressed directly to enable them have access to electricity for an inclusive development process. With respect to the rural poor the rural electrification boards (REB) have traditionally been the platform on which they have been provided electricity access.<sup>35</sup> These have however also deteriorated in supplying electricity to the rural areas as NEPA took over the responsibility to provide electricity under the national access policy. The assumption in the case of the urban poor is that since the urban areas have electricity infrastructure then the poor in the urban areas have electricity. However the existing situation is that the urban poor also lack adequate electricity services, due to policies which focus on Maximum Demand (MD) customers in the urban rich enclaves also called Government Reserve Areas (GRA) and the industrial areas. Thus while being surrounded by the electricity infrastructure the poor areas, which do not yield much revenue are mostly relegated to enjoying 'Brownouts' or 'half current' as it is colloquially referred to, if they are supplied electricity at all.<sup>36</sup>

### **Development/Poverty Reduction Rights and Electricity Access as a 'Right'**

An important aspect of the right to development and poverty reduction on the international scene is the Millennium Development Goals (MDGs). The United Nations General Assembly Resolution on the United Nations Millennium Declaration (2000)<sup>37</sup> which set up the MDGs reflects the joinder of economics and human rights and addresses specific issues of development. It was adopted in September 2000 and states *inter alia* that;

The Millennium Development Goals commit the international community to an expanded vision of

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<sup>34</sup> Nigerian Renewable Electricity Policy Guidelines. (NREP), (2006). p 5.

<sup>35</sup> It should be noted that these are also not very functional.

<sup>36</sup> It is only fair to note here that the nations poor electricity capacity affects all Nigerians, although the poor suffer more.

<sup>37</sup> Millennium Development Declaration, <http://www.MDGt> (3/2/06).



development, one that vigorously promotes human development as the key to sustaining social and economic progress in all countries, and recognizes the importance of creating a global partnership for development. The goals have been commonly accepted as a framework for measuring development progress.<sup>38</sup>

The Agreement compels developing States to implement remedial programmes to ensure that their poor are co-opted into the development process. To ensure that these programmes are complied with by the implementing States, it incorporates a review mechanism. The major aim of the MDG's was to address some of the effects of poverty on the poor and vulnerable segments of society.<sup>39</sup> Although not couched in the language of Human Rights, the goals are nonetheless to be implemented by States.

This is made possible as the MDG's consists of some measurable human development indices<sup>40</sup> to be achieved by a target date of 2015. The most important objective being; to halve the proportion of people living on less than \$1 a day by 2015 and achieving significant improvement in the lives of at least 100 million slum dwellers by 2020.<sup>41</sup>

38. *ibid.*

39. Issues connected to poverty include, high incidence of HIV/AIDS as a result of vulnerability coupled with risky behaviour; lack of health care due to exposure to diseases and inability to buy drugs; frequent pregnancies from lack of birth control and consequent maternal and child mortality; Non education of girls due to lack of money which leads to making a choice to send the male child to school, due to gender preference and high dropout rates for slum based children; provide employment through enablement, among other things, are addressed by the MDG's and are directly impacted by electricity access.

40. Electricity is considered to be infrastructural development not human development perhaps this is why it was not included in the MDGs.

41. "Halving world poverty by 2015: economic growth, equity and security; How can world poverty be halved by 2015?" Authors: DFID Publisher: Department for International Development, UK, 2001 at <http://dfid.gov.uk/pub/file/tspconomic.pdf>

The eight goals of the MDGs address specific development issues relating to poverty eradication.<sup>42</sup> The goals have been institutionalized by incorporating them into the Medium Term Expenditure Framework (MTEF) of Nigeria; in the Nigerian Poverty Reduction Strategy Paper (PRSP)<sup>43</sup> as well as in the National, state and local government versions of the National Economic Empowerment Development programme (NEEDS), this is the NEEDS 1 (2001) and NEEDS 2 (2004). They have also been tied to access to international funding, thus increasing the likelihood of their being achieved.<sup>44</sup> Implementation of the goals in Nigeria is coordinated by the Office of the Senior Special Assistant to the President on the Millennium Development Goals, (OSSAP).<sup>45</sup> Due to the capital and technology intensive nature of electricity the International Development Partners (IDP's) are assisting Nigeria with electricity access especially to the rural areas.<sup>46</sup> This is implemented in association with programmes such as the Nigerian Energy Development Programme (NEDP) and the Environmental and Social Management Framework (ESMF), an ESMAP programme also implemented by the World Bank for electricity access. Others include the 'Global Energy-Poverty Fund' disbursement of 250 – 500 million dollars per annum to leverage 3-5 billion dollars per annum till 2030 to provide universal access to

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42. Millennium Development Declaration. *ibid.*

43. Poverty Reduction Strategy Papers (PRSPs) depict the country's macroeconomic, structural, and social policies for growth and poverty reduction. They also include details of sources of external funding and specific project financing. They are prepared by member countries with wide consultation with stakeholders and staff of the development partners, the IFI's. They are reviewed annually and are updated every three years.

44. Rijal, K., "Securing Energy Access for the Poor: Is it Feasible and Attainable?" Policy Paper (Policy Advisor on the Sustainable Energy Programme Environment and Energy Group/BDP UNDP). New York 20 August 2007.

45. The MDG's are also included in the other national plan documents such as NEEDS, SEEDS and LEEDS.

46. Rijal, K. *ibid.*



modern energy services for all;<sup>47</sup> and the UNDP 'Energy Access Capacity Development Facility' aimed at assisting countries in mainstreaming the Poor's energy access considerations into MDG-based National Development Strategies and Poverty Reduction Strategies and budgetary processes.<sup>48</sup> Some individual donor countries are also involved in providing funding for electricity access for the Poor. An example is the Department for International Development (DFID) assistance in respect of electricity access for the poor.<sup>49</sup> However these programmes do not perceive electricity access as human rights although interestingly enough, all the goals of the MDGs depend on electricity for optimum achievement.<sup>50</sup> Thus despite its recognition as a facilitator of development, electricity was not captured in the MDG's.<sup>51</sup> This oversight affects the provision of electricity infrastructure and services as part of the attainable goals and development indices of the MDGs to be measured in 2015.

Apart from the international aspect of electricity access, it is necessary that the State provides electricity to the poor. Thus it is advocated that electricity access rights will enable the State assist the poor even though it can no longer provide employment for all directly.<sup>52</sup> This kind of preferential treatment for the poor is reiterated in Section 76 (5) of the EPSRA which says;

47. *Ibid.*

48. *Ibid.*

49. DFID: Bringing Power to Nigeria's people (Case study). <http://www.dfid.gov.uk/Media-Room/Case-Studies/2009/Nigeria-power-sector/16/6/2010>.

50. See generally; "Energy Services for the Millennium Development Goals." UNDP ESMAP/ World Bank. [www.esmap.org](http://www.esmap.org), 2005, (21/11/09).

51. Energy provision has been recognized as a right in some international documents, it is however not specified in the MDG's as such.

52. Karekezi, Stephen, Kimani, John and Onguru, Oscar, "Draft Report on Energy access among the Urban and Peri-Urban Poor in Kenya." Prepared for Global Network on Energy for Sustainable Development (GNESD) "Urban and Peri-Urban Energy Access" Working Group - (Thematic Study) By Energy Environment and Development Network for Africa (AI/REPREN/IFWD).at 42.



Notwithstanding subsection (2) (e) of this Section, in establishing tariff methodologies the Commission may differentiate among consumers on the basis of differences in total electricity consumption, the time periods on which electricity is consumed, load factors, power factors, voltage levels, location within the country and other such criteria as may affect the cost of providing a service and may allow a lifeline tariff for some consumers.

This is a comprehensive provision and is in line with recommendations that there should be a differential consumer treatment of lower rates for the poor and subsidies for their electricity consumption or connection.<sup>53</sup>

### **Electricity as Human Right?**

Apart from the fact of electricity access as a requirement for poverty reduction and development, electricity access has been addressed as a human right in international law.<sup>54</sup> While it is difficult to classify the resource in the category of political 'Rights' it may be termed a socio-economic right or even a development<sup>55</sup> right. In fact the Jo'burg Memo<sup>56</sup> is of the view that energy (electricity) is one of the facilitators of an empowered life. Accordingly, energy/electricity rights can also be placed in the category of what are termed 'Livelihood Rights' which are to assist in eradication of poverty, by empowering the poor to live a

53. Tully, S R., "The Contribution of Human Rights to Universal Energy Access." *Journal of International Human Rights*, Volume 4, Issue 3, (2006), p. 525. See also Sihag A R, et al., "Impact of Power Sector Reform on Poor: A Case Study of South and South East Asia". *Energy Policy Journal*, Volume 30, Issues 11-12, (2002), p 522.

54. See generally, Tully, S.R. *ibid*.

55. Rijal, K. *ibid*.

56. "The Jo'burg Memo - Fairness in a Fragile World," Memorandum for the World Summit on Sustainable Development presented by the Heinrich Boll Foundation, Second edition 2002. pp. 29-30.

Although electricity rights have not been specifically guaranteed by many countries, there are however such countries as France,<sup>61</sup> Laos,<sup>62</sup> India and South Africa,<sup>63</sup> as well as the Association of South Eastern Asian Nations (ASEAN) States,<sup>64</sup> which couch their electricity provision as an implicit right to the citizens. In Nigeria, although the Constitution in Chapter II has enunciated some social rights for the citizens of Nigeria, however these rights are not justiciable. This means that they cannot be enforced by the members of the society.<sup>65</sup> The Nigerian courts have also shied away from imposing on the State a duty to provide amenities to its citizens.<sup>66</sup> This is a distinction from the way the Indian and Pakistani courts have perceived the operation of their Constitution's which are similar to that of Nigeria. While the Indian and Pakistani

61. Article 1 of the French Electricity Act (2000).

62. Preamble to the Laos Electricity Law. No.02/97/NAL 2/4/ (1997).

63. 164 Electricity Act 41 of 1987 § 10(1) (1987) (S. Afr.). See also the South African Electricity-for-All programme, which is connected with the States political conversion from apartheid to a democracy in the eighties. The objectives of the National Electrification Forum were incorporated into the National Electrification Programme in 1994. Guant, *op cit* p.234. This right has been recognized by the South African Constitutional court in the case, Government of the Republic of South Africa v Grootboom (11) BCLR, 1169 and by the South African High Court in Mazibuko v City of Johannesburg *et al*, Case no.06/13865, High Court of South Africa.

64. See the Asian Development Bank, Energy for All Document.

65. Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria as first defendant and the Universal Basic Education Commission (UBEC) as second defendant; in Suit No: ECW/CCJ/JUD/07/10, at first instance and ECW/CCJ/APP/12/07/10 at appeal. In the judgment of November 30, 2010 the Community Court of Justice of ECOWAS has however held that the right to education as included in Article 17 of the African Childs Rights Act, Section 15 of the Nigerian Childs Rights Act (2003) and Section 15 of the Universal Basic Education Act 2004, is binding on Nigeria. It remains to be seen if the other non-justiciable rights in the Constitution can similarly be imported into the nation's judicial landscape through this means.

66. The recent case of Jonah Gbemre v Shell Petroleum Development Company (SPDC), FHC/B/CS/3/05 (unreported), however seems to point to the shift in realization of the Nigerian courts that rights in Chapter II of the Constitution are of import.



Constitution's also did not make social rights justiciable, however this has not stopped their courts from entertaining aggrieved Indian<sup>67</sup> and Pakistani<sup>68</sup> citizens from claiming their social rights. Perhaps the background of the Nigerian States experience of revenue incapacity is the basis of this outlook. The South African approach was via a direct and expansive State-wide National Electrification Programme<sup>69</sup> led by the State owned electricity utility ESKOM. Electricity rights have not been specifically guaranteed by in Nigeria, however in section 71(4) of the EPSRA, NERC is empowered to impose on the operator a condition to electrify certain areas. Although as noted earlier, electricity access connotes a right; however the conflict post privatization, is that electricity is perceived as a national development right as opposed to individual access right. The problem is that this right which can be located with Chapter II of the extant Constitution cannot be individually enforced in Nigeria, unlike in other jurisdictions.<sup>70</sup>

A major problem of a State wide individual electricity access rights programme in Nigeria is the cost implication, which limits the States capacity to fund such a programme. This situation is compounded by the lack of political power of the poor who are unable to ensure that programmes benefiting them are implemented by the State. However, countries have in the light of the negative qualities of their ongoing privatisation/reform programmes made attempts to ensure that there are provisions which carefully ensure that the poor are provided for within the framework of the various reform programmes that are being implemented. Thus the implication of reform is that there is a shift from human/social

67. See: *Minerva Mills v Union of India* [1930]; *MC Mehta v Union of India* [1989] All India Report (AIR) SC 1086-India;

68. *Shela Zia v Water and Power Development Authority (WRAPA)* PLA 1994 S.C A16;

69. Guant, *op cit* at 22. It was called the 'Electricity for All' Programme and commenced in 1991.

70. ASEAN countries and South Africa refer to electrification as a right under their 'Electricity for All' programmes. In addition Pakistan and Indian Courts allow citizens to right to sue the State under their own Fundamental Directives Chapters of their Constitutions; See xxxx.



rights approach to access which requires that the State implement the right; to a consumer right which is to be enforced by the independent regulator, NERC, in this particular instance. To be fair however, the EPSRA incorporates both a rural and consumer assistance fund i.e. The Power Consumer Assistance Fund (PCAF) and the Rural Electrification Fund (REF), to remedy problems faced by some categories of poor customers in accessing electricity. These consumer rights oriented funds are to be administered by NERC. This however falls short of electricity access rights in the mould of the Laos Electricity Law for instance.

In the view of Socialwork, the privatisation of electricity and other general services is a failure of the social contract that requires the State provides for its citizens. Thus when the State privatizes it effectively abandons its duty to provide these services and consequently abandons its citizens to private sector service providers who view them in terms of profit and loss. They note in this wise that:

...Current policy trends suggest that the social contract or even the potential for a future social contract is being replaced by private contracts between governments and providers. Citizens with rights to demand accountability are being transformed into mere consumers who are, at best, indirect parties to contracts. *The implications for access and affordability put private provision at the heart of the debate over human rights.*<sup>71</sup>

This is a cardinal lapse within the reform programme that can only be redeemed by the State using alternative means to ensure that the poor are adequately provided for. Although there are presently subsidies in the electricity power sector, these subsidies are however not clearly stipulated as being pro-poor as they are enjoyed by all

71. Emphasis mine. 2003/08/25 From Social Contract to Private Contracts: The Privatisation of Health, Education and Basic Infrastructure. Martin Luther Out, Public Agenda (Accra) at [http://www.socialwatch.org/en/noticias/noticia\\_33.htm](http://www.socialwatch.org/en/noticias/noticia_33.htm) accessed on 11/8/09

### **Conclusion**

The failure of institutional and infrastructural capacity of NEPA/PHCN has affected electricity supply to all Nigerians. However this scarcity of electricity affects the poor more. Thus even their proximity and connection to the grid is no guarantee of electrification or access to electricity. The issue of non-electrification of the poor is also political in nature, as the State has refused to make provisions in the law on electricity access for all Nigerians or even just those that are poor. In addition electrification and access are limited due to unavailability of adequate statistics for planning for electrification for particular segments of the society such as the poor.

The reform of the electricity sector adversely affects the provision of electricity to the poor due to the concentration on profit by the private operators. Although the international community is assisting in the funding of the electricity reform and access programmes, there is still limited electricity supply to all Nigerians, especially the poor. Although the old policy for access was indirect in nature, it advocated national access rights even though this could not be enforced by the citizens directly. The new policy under the EPSRA is access through the new operators as a consumer right and not human right. This will require that the NERC as the sector regulator is able to enforce the standards as enunciated in the EPSRA.

However in Nigeria despite the overarching need to ensure that there is better electricity supply and the provisions in the Constitution on economic rights, there is evidently no provision in any law that the poor can rely on as providing them electricity access. Although the reform programme also provides subsidies through the MYTO, this will be withdrawn at the completion of the reform. In addition the provisions in the EPSRA on consumer protection although important are not extensive enough. A better option however is to ensure that the country perceives electrification as a right to the citizens especially the poor as is done in other countries. Although this has a serious implication for cost, it is advocated that the cost could be offset by the existing REF and

PCAF as established in the EPSRA. Finally, it is noted that the intention of the State to develop will clearly be retarded by the non-provision of electricity to a large segment of the population-the poor and disadvantaged, if no direct intervention is made on their behalf by the State.





# EXEMPTIONS AND THE PUBLIC INTEREST UNDER THE FREEDOM OF INFORMATION ACT, 2011

by

Prof. Deji Adekunle\*

## Introduction

The right of access to information derives from the guarantees of freedom of expression found in Article 19 of the Universal Declaration on Human Rights (1948), and in the case of Nigeria is to be found in Section 39 of the Constitution of the Federal Republic of Nigeria, 1999<sup>1</sup>. Implementation calls for all public institutions to take have secure records in easily accessible format.

After more than a decade of legislative horse-trading and bickering, the Freedom of Information Act 2011 (FoIA) was passed by the National Assembly in February 24 2011. It was assented to by President Goodluck Jonathan less on May 28 of the same year. The FoIA seeks to engender the culture of transparency and accountability in the business of government. Under the Act the Attorney General of the Federation and Minister of Justice is primarily entrusted with the responsibility for ensuring that the provisions of the Act are observed by all public institutions.

The FoIA can also be seen in the context of transparent and accountable governance. The concept of freedom of information has a strong link with anti-corruption strategies. Thus Article 10 of the UN Convention against Corruption<sup>2</sup> states that:

“... to combat corruption, each (member State) shall, in accordance with the fundamental principles of its domestic law, take

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1. 1999 Constitution reprinted as Cap C 23 LFN 2004

2. The United Nations Convention Against Corruption (UNCAC) was adopted by the United Nations General Assembly by resolution 58/4 of 31 October, 2003. It entered into force on 14 December, 2005, and is the first legally binding international anti-corruption instrument.

such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes and take measures for:

- (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;
- (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and
- (c) Publishing information, (including) periodic reports on the risk of corruption in its public administration.

Section 1 of the Freedom of Information Act guarantees a right of access to information whether written or not which is in the custody of a public agency or official. An applicant under the Act need not demonstrate any specific interest in the information being applied for and the right is enforceable by summary proceedings in court.

### **Disclosure Regime**

The obligation to disclose is both proactive and responsive. Section 2 of the Act for instance, requires that a public institution shall organise its records in a manner that makes them accessible to the public as well as publishing information using multimedia formats (i.e print, electronic and online). With regard to the responsive mandate, an institution is by virtue of section 4 of the FOIA obliged to provide information within 7 days of receiving an application from any member of the public requesting information under the control or custody of the institution. The wrongful refusal of access is an offence punishable with a fine of N500, 000.00.

Such information relates to administrative, management and operational records e.g -

- (a) a description of the organization and responsibilities of the institution including details of the programmes and functions of each division, branch and department of the institution;
- (b) a list of all manuals used by employees;
- (c) a description of documents containing final opinions including concurring and dissenting opinions as well as orders made in the adjudication of cases;
- (d) documents containing –
  - i. statements and interpretations of policy which have been adopted by the institution,
  - ii. the names, salaries, titles, and dates of employment of all employees and officers of the institution;
  - iii. the name of every official and the final records of voting in all proceedings of the institution;

Public institutions are all authorities whether executive, legislative or judicial agencies, ministries, and extra-ministerial departments of the government, together with all corporations established by law and all companies in which government has a controlling interest, and private companies utilizing public funds, providing public services or performing public functions. These provisions reinforce the concept that open government is the cornerstone of democracy.

### **Exemptions and the Right of Access**

Clearly a lack of will on the part of public officers to shift from a culture of secrecy under the Official Secrets Act<sup>3</sup> to one of transparency is an obvious constraint. The Official Secrets Act, (OSA) and the FoIA have different objectives. The former is concerned with securing public safety by restricting the disclosure of classified or security related information while the latter seeks to make public records and information more freely available, in a

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3. Cap O3 LFN 2004



manner consistent with the public interest and the protection of personal privacy. Any inconsistency between the FoIA and the OSA should ordinarily be resolved in favour of the FoIA in accordance with the well known canon of statutory interpretation that a latter statute prevails where there is inconsistency between two statutes. This is put beyond controversy by virtue of sections 1, 27 and 28 of the FoIA.

Section 1 in particular establishes the right of any person to access or request information which is in the custody of any public official or institution notwithstanding anything contained in any other Act. It further provides that an applicant under the Act need not demonstrate any specific interest in the information being applied for and that the person has a right to institute proceedings in the Court to compel any public institution to comply with the provisions of the FoIA. One of the ways by which MDAs can effectively manage the disclosure regime is to designate information units and officers tasked with the responsibility to receive and respond to requests in addition to overseeing the proactive duties of the relevant agency.

This chapter however focuses on the nature of exemptions permitted under the Act and the fear that they can be used to frustrate legitimate requests. One of the most controversial aspects of FOI law relate to exemptions. Exemptions seek to prohibit disclosure of information that may compromise important interests such as national security, confidential business information, personal information and the internal deliberative process of government agencies before final decisions are reached. While there is no doubt that exemptions are necessary, the unprincipled use of exemptions can effectively undermine the objective of FOI law, particularly, where they are too broad or confer too much discretion on agencies.

### **The Exemptions**

Exemptions under the FoIA are generally of two types – absolute and qualified, thus by virtue of section 26 the Act does not apply to-

- (a) Published material or material available for sale to the public
- (b) Library or museum material made or acquired and preserved solely for public reference or exhibition purposes; or
- (c) Material placed in the National Library, National museum or non-public section of the National Archives of Nigeria on behalf of any person or organization other than government or a public institution.

Sections 11 - 19 of the FOIA outline the following qualified exemptions

- (a) injury to International affairs and the defence of Nigeria (s.11)
- (b) protection of ongoing or proposed law enforcement measures, investigations and proceedings (s.12)
- (c) protection of personal information save where the person to whom the information relates consents or where the information is in the publicly available. (s. 14)
- (d) protection of commercial interests e.g. trade secrets, third party interests in negotiation environmental surveys or tests or bids for a tender (s. 15)
- (e) Preservation of professional and other privileges under the law (s.16). the public institution has a discretion to deny or disclose (s. 16)
- (f) Research or course materials prepared by faculty members (of an educational institution?) (s. 17)
- (g) Exemption in relation to certain records e.g. test questions or examination or scoring scheme; building plans of private or designated security installations; library circulation (s. 19)

In all cases of qualified exemptions the public institution shall disclose the information requested for if (i) disclosure would be in

the public interest and (ii) if the public interest in the disclosure clearly outweighs the injury to any of the interests outlined in sections 11 – 19 of the Act. Where the public institution determines that disclosure will not be in the public interest or that the public interest in favour of disclosure does not sufficiently outweigh the public interest to safeguard the interests outlined in any particular case covered by the above provisions, it may:

- (a) Refuse the request in accordance with section 7 of Act; or
- (b) Consider whether there is some non-exempted part of the information covered by the request which can be severed from the exempted part.

The decision of the public institution is not final as section 20 provides that an applicant may apply to court for judicial review of the decision within 30 days. The onus of proving that information falls within any particular exemption rests on the public institution.

### **What is involved in determining Public interest?**

The term "public interest" is not defined in the Act. This seems to be a feature in many FOIAs and owe much to the fact that public interest is "an inherently dynamic concept" which is grounded in practice and decisions of government. It however remains a vague concept and as Lord Hailsham observed more than 30 years ago, "the categories of public interest are not closed<sup>4</sup>." In Nigerian jurisprudence the term "public interest" has attracted judicial comment in at least four respective areas which however offer little assistance in the context of FOI disclosures. These areas are –

1. In terms of revocation of a right of occupancy for overriding public interest under the Land Use Act<sup>5</sup>
2. Exercise of the constitutional powers of the Attorney General of the federation or a state over public prosecutions for crime in the public interest<sup>6</sup>

4. See *D vs National Society for the prevention of Cruelty to Children* [1978] AC 171 at 230.

5. Cap L5 LFN 2004



3. The consideration of the public interest in the removal of an appointee; and
4. The concept of public interest Human rights litigation as a response to the concept of locus standi?

As the jurisprudence of the FOIA is still very much in its infancy guidance on the key attributes of public interest can best be gained by how these matters have been dealt with in other climes with similar legislation. The UK Freedom of Information Awareness Guidance No. 3<sup>8</sup> provides some parameters in evaluating what disclosures are or are not in the public interest.

The first point to note under the exemptions scheme of the FOIA is that there must be some public interest element in the disclosure. This has been explained as carrying some benefit to the public as distinct from arousing public curiosity or amusement. Thus while it is in the public interest for example that hospitals are evenly spread the fact that a local celebrity is receiving treatment in a hospital is probably not. The second point is that there can be no room for generalizations. Every case has to be determined on the peculiar circumstances and the conflicting interests weighed. The issue requires delicate balancing of the public interest in favour of disclosure and the public interest against it.

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6. See section 174 1999 Constitution of FRN
  7. See paragraph 3 (e) of the Fundamental Human Rights Enforcement Rules 2009 issued pursuant to the powers conferred on the Chief Justice of Nigeria by section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999; Public interest includes the interest of Nigerian Society or any segment of it in promoting human rights and advancing human rights law- See Order 1 Rule 2, 2009 Rules. Public interest litigation was popularized by the epistolary jurisdiction of the Indian Supreme court: for a discussion of some of these cases see Adekunle, Deji: "Justiciability of Socio-economic rights in the Constitution and the Political Question Doctrine" in Azinge Epiphany and Owasanoye Bolaji. (Eds) *Justiciability and Constitutionalism: An Economic analysis of Law* (2010) NIALS p. 60
  8. April 2006 Published by the UK Information Commission.

Secondly the competing interests to be considered are the public interest favouring disclosure against the public (rather than private) interest favouring the withholding of information. There will often be a private interest in withholding information which would reveal incompetence on the part of or corruption within the public authority or which would simply cause embarrassment to the authority. However, the public interest will favour accountability and good administration and it is this interest that must be weighed against the public interest in not disclosing the information. Of course, there will be many occasions when public and private interests coincide. Even where private interests are being protected as in section 14 of the Act there is clearly a public interest element involved i.e. that individual rights within the framework of constitutional order be protected.

It may sometimes be argued that information is too complicated for the applicant to understand or that disclosure might misinform the public because it is incomplete (for instance because the information consists of a policy recommendation that was not followed). Neither of these are good grounds for refusal of a request. If an authority fears that information disclosed may be misleading, the solution is to give some explanation or to put the information into a proper context rather than to withhold it.

Consider also in relation to section 12(1) (a) of the Act (which relates to exemption in the interest of effective law enforcement) a request for:

- (a) The names and number of citizens under detention for suspected terrorist activities
- (b) The names and number of citizens under investigation for terrorist activities
- (c) The banks in which funds suspected to be terrorist funds have been frozen

In our view information or disclosure officers should in rendering a decision on a request, demonstrate that they have considered and carefully weighed these interests before coming to a

decision. In this regard it is desirable that every decision should show:

- (a) All the circumstances that have been considered
- (b) The specific public interest against disclosure in the particular case and the weight accorded it
- (c) The specific public interest in favour of disclosure and the weight accorded it
- (d) The considerations given to the timescales in terms of necessity and proportionality and whether there are circumstances for severance

What are the factors in favour of disclosure? It is not enough at this stage to glibly rely on general notions of accountability and democratic stability. The particularity of disclosure is just as cogent as that for non disclosure, although the Act leans in favour of disclosure. The following have been identified as public interest factors that would encourage the disclosure of information and which have to be balanced against the considerations of public interest captured in the exemptions:

- (a) Furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority. Thus in the Australian case of *C. Wealth of Australia vs Fairfax Ltd*<sup>9</sup> the court said "it is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enabled the public to discuss review and criticize government's action"
- (b) Promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned

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9. (1981)32 ALR 485



explanations for decisions made will improve the quality of decisions and administration.

- (c) Promoting accountability and transparency in the spending of public money. The public interest is likely to be served, for instance in the context of private sector delivery of public services, if the disclosure of
- (d) Information ensures greater competition and better value for money that is public. Disclosure of information as to gifts and expenses may also assure the public of the personal probity of elected leaders and officials.
- (e) Allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.
- (f) Bringing to light information affecting public health and public safety. The prompt disclosure of information by scientific and other experts may contribute not only to the prevention of accidents or outbreaks of disease but may also increase public confidence in official scientific advice.

### **Conclusion**

The provisions on exemptions can be abused in the absence of clear rules and guidance. By the combined effect of sections 7 and 24 the burden of proving justification for any decision to deny access rests on the public institution making the decision. There is need therefore to establish rules and guidance for MDAs on when it will be in the overriding public interest to make a disclosure even in cases where a case for exemption under sections 11 – 12 and 14 – 19 of the Act ordinarily exists. Unfortunately while the FoIA gives the Attorney General of the Federation and Minister of Justice overarching responsibility for ensuring that the provisions of the Act are observed by all public institutions, it does not provide adequate enforcement powers such as specific powers to make regulation and apply sanctions. The Act also lacks an institutional filter that can articulate administrative procedures and give guidance on complex situations. The provisions that give ready access to the courts may

more counter-productive given the well known challenges the average Nigerian encounters in accessing formal courts.

# HIV/AIDS AND WORKPLACE DISCRIMINATION IN NIGERIA: TOWARDS STEMMING THE TIDE OF PREJUDICE, STIGMATIZATION AND LEGAL SHENANIGANS AGAINST PEOPLE LIVING WITH HIV/AIDS

by

*Professor Dakas CJ Dakas, Ph.D\**

## ***I*ntroduction**

Workplace discrimination in Nigeria on the basis of HIV/AIDS status raises troubling issues that are steeped in prejudice, stigmatization and legal shenanigans. This paper explores these challenges, documents the author's intervention in response to an asylum application by a Nigerian living with AIDS in the United States of America, and charts a course of action consistent with the imperative of bolstering the framework for the prohibition of discrimination against people living with HIV/AIDS (PLWHA), especially in the context of labour relations.

## **A Practical Illustration: A Nigerian AIDS Patient in Distress and My Intervention by Way of Expert Testimony**

On March 7, 2011, I received an e-mail from an attorney based in Los Angeles, California, USA, part of which reads as follows:

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\* Head of the Department of International Law, Nigerian Institute of Advanced Legal Studies (NIALS); Visiting Professor (International Human Rights Law), Osgoode Hall Law School, York University, Canada, 2007; Governing Council Member, International Association of Law Schools (IALS), Washington DC, USA, 2008-2011; former Attorney-General and Commissioner for Justice, Plateau State; [dakasdakas@yahoo.com](mailto:dakasdakas@yahoo.com); being a modified/updated version of a paper presented by the author within the framework of the sub theme "Labour and Fundamental Human Rights: Is 'Discrimination Law' Doing the Job it is Supposed to Do?", as part of the general theme of the International Association of Law Schools (IALS) Conference on "Labour Law and Labour Markets in the New World Economy", held at Milan, Italy, from May 20-22, 2010.



I represent a Nigerian woman in a *pro bono* case. I am assisting her in her application for asylum in the United States... My client has AIDS and currently resides in a homeless shelter in California. Part of her asylum claim is that she has a well-founded fear returning to Nigeria because she will face intense stigmatization...on account of her status as a person living with AIDS. Specifically, she fears three things: (1) she will be denied access to antiretroviral medicines that she needs to survive with AIDS; (2) she will be unable to find employment because of her HIV/AIDS status; and (3) that she will be socially ostracized and shunned by her family in particular and by Nigerian society in general.

The attorney proceeded to indicate that in the course of his research, he came across one of my writings on the plight of PLWHA in Nigeria, especially in the context of labour relations, and requested me to provide expert testimony, by way of a declaration, on the issue in the context of the asylum proceedings. I accepted the offer, at no cost, and acted as requested.

I allayed his - and his client's - fears in relation to access to antiretroviral (ARV) drugs, given that the Nigerian government, through the National Agency for the Control of AIDS (NACA) and its state and local government equivalents, makes provision for and facilitates access to ARV for PLWHA. However, I cautioned that some unscrupulous and corrupt officials and medical staff undermine this initiative by, *inter alia*, creating artificial scarcity and extorting money from PLWHA by illegally charging so-called "administrative charges", thereby denying access to ARV for some PLWHA. On the other hand, I corroborated the second and third concerns.

On May 12, 2011, I was delighted to receive another mail from the attorney, part of which reads as follows:

I am happy to tell you that the Asylum Office granted asylum to [XYZ]...She is ecstatic and we both thank you for the time and effort that you contributed to her application. Your declaration was instrumental in obtaining a positive result because it added to her credibility... Because of your help, [XYZ] now has permanent legal status in the United States and can take advantage of benefits available to asylees, including job assistance, cash benefits, employment authorization, medical insurance, and eventually, a green card. These will go a long way to changing her life for the better. I deeply appreciate your diligence and generosity over these past few months.

In the discourse that follows, I set out in greater detail the rationale underpinning my corroboration of the attorney's – and his client's – second and third concerns, after which I chart an agenda for action.

### **HIV/AIDS and Non-Discrimination under Nigerian Law**

Nigeria's constitutional scheme engenders a bifurcated regime of human rights, pursuant to which provision is made, on the one hand, for "Fundamental Rights" (which are predicated on civil and political rights and are expressly made justiciable) and, on the other hand, for "Fundamental Objectives and Directive Principles of State Policy" (which should ordinarily constitute the fulcrum of economic, social and cultural rights but are expressly made non-justiciable). However, the Fundamental Objectives and Directive Principles of State Policy, in the words of Justice Uwaifo of the Nigerian Supreme Court, "need not remain mere or pious declarations".<sup>1</sup> As Justice Bhagwati of the Indian Supreme Court further points out:

1. *Attorney-General of Ondo State v Attorney-General of the Federation & Ors* (2002) FWL R (Part 111), 1972, at 2144.

Fundamental rights are no doubt important and valuable in a democracy, but there can be no real democracy without social and economic justice to everyone, which is the theme of Directive Principles. It is the Directive Principles which nourish the roots of our democracy, provide strength and vigour to it and attempt to make it a real participatory democracy which does not remain a political democracy but also becomes a social and economic democracy with Fundamental Rights available to all, irrespective of power, position or wealth. The dynamic provisions of Directive Principles fertilise the static provisions of Fundamental Rights. The object of Fundamental Rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate? ...Fundamental Rights, though precious and valuable have no meaning for the poor, downtrodden and economically backward classes of people who unfortunately constitute the bulk of the people...and the only way in which Fundamental Rights can be made meaningful for them is by implementing the Directive Principles.<sup>2</sup>

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2. Justice Bhagwati, in *Minerva Mills v Union of India* (1980) AIR SC. 1789 at



In addition to the constitutional framework of human rights, Nigeria has domesticated the African Charter on Human and Peoples' Rights<sup>3</sup>, whose provisions encapsulate justiciable economic, social and cultural rights, including the right to work.

In the specific context of non-discrimination, section 42(1) of the Nigerian Constitution provides as follows:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –

- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive and administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
- (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

This provision generates several critical issues. First, its provisions are restricted to Nigerian citizens. Sections 15, 16 and 17, though expressly made non-justiciable, provide in similar terms.<sup>4</sup> Second,

1843.

3. African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, Laws of the Federation of Nigeria, 2004.

4. Section 15(2) prohibits discrimination "on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties"; section 16(1)(b)

there is no specific reference to non-discrimination on the basis of HIV or other health status. Indeed, in the Nigerian case of *Festus Odaife & Ors v Attorney-General of the Federation and Ors*<sup>5</sup>, the Court expressly held that Section 42(1) *does not* protect PLWHA. In that case, some prisoners were denied medical treatment because of their HIV+ status. The prisoners sued to enforce the provisions of Section 42(1), arguing that it covers PLWHA. The Court held that Section 42(1) does not apply to PLWHA because "the right to freedom from discrimination as enshrined in Section 42(1) of the Constitution [does] not cover discrimination by reason of illness, virus or disease." Third, while the phrase "in the practical application of...any law in force in Nigeria" appears to cover the public and private realms, the phrase "or any executive or administrative action of the government", literally construed, targets only discrimination in the public realm. Thus, from a human rights prism, the Nigerian Constitution does not meet the minimum core requirements of a general equality clause. However, the African Charter complements the Nigerian constitutional regime on human rights and addresses some of its limitations in the context of non-discrimination. For instance, Article 3 is to the effect that "[e]very individual shall be equal before the law" and that "every individual shall be entitled to equal protection of the law." Additionally, Article 5 guarantees the right of "every individual" to "respect of the dignity inherent in a human being" and forbids "[a]ll forms of exploitation and degradation of man particularly...cruel, inhuman or

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requires the State to ensure "equality of status and opportunity"; under section 17(1), "[t]he State social order is founded on ideals of Freedom, Equality and Justice"; in furtherance of the social order, subsection (2)(a) provides that "every citizen shall have equality of rights, obligations and opportunities before the law"; pursuant to subsection 3(a)(e), the State shall direct its policy towards ensuring that "all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment" and that "there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever."

5. (2004) AHRLR 205.



degrading punishment and treatment...”, while Article 15 guarantees “the right to work under equitable and satisfactory conditions and...equal pay for equal work.”

Having regard to the foregoing, the ensuing discourse examines, in brief, the bizarre circumstances surrounding the plight of Citizen Ahamefule, the first Nigerian to seek legal redress before a Nigerian court against workplace discrimination on the basis of HIV/AIDS status.

### **Victimising the Victims of HIV/AIDS: The Plight of Citizen Ahamefule<sup>6</sup>**

In Nigeria, workplace discrimination on the basis of HIV/AIDS status is shrouded in secrecy, primarily because people living with HIV/AIDS are constrained to suffer in silence, when their employments are terminated for no other reason than their health status, rather than seek legal redress and risk stigmatization and ostracization. Regrettably, they suffer triple jeopardy – health challenges; loss of their means of livelihood; and stigmatization/ostracization. Tragically, a large segment of the society continues to victimize the victims of HIV/AIDS. It is against the backdrop of this reality that the case of Mrs Georgina Ahamefule stands out.

Mrs Georgina Ahamefule, was, until the year 2000, an auxiliary nurse in the employment of Imperial Medical Centre, Lagos, Nigeria. However, in that year, her employer terminated her five-year old employment on the ground of her HIV-positive status. The termination letter indicated that the hospital management could not compromise the facility or its patients by exposing them to the risks associated with her health status. Mrs Ahamefule suffered additional injuries when, apparently owing to the trauma associated

6. See, for instance, “‘I am Still Alive’, says Georgina Ahamefule...A Case of Continued Prejudice Towards People Living with HIV/AIDS”, Serac @ Work, Electronic Newsletter, Vol. 1, Issue 2, January-July, 2009, <http://www.serac.org/.../E-Newsletter%20Volume%201,%20Issue%202.pdf> (Site accessed on March 20, 2010).



with the treatment meted out to her, she spontaneously had a miscarriage. Yet, the hospital proprietor, Dr Alex Molokwu, is alleged to have refused to carry out the requisite medical operation that he had prescribed as indispensable in order to alleviate her post-abortion plight.

In an unprecedented move, Mrs Ahamefule dared to speak truth to power. On July 14, 2000, with the assistance of Social and Economic Rights Action Centre (SERAC), a Nigerian NGO, she sued the Imperial Medical Centre and its proprietor challenging, *inter alia*, the unlawful termination of her employment. She predicated her claim on relevant provisions of the Nigerian Constitution, the African Charter and other international instruments which are binding on Nigeria.

In a bizarre turn of events, counsel to the defendants, objected to the presence of Mrs Ahamefule in court to give evidence in support of her case, on the ground that her presence could endanger the lives of others. Remarkably, on February 5, 2001, Justice Caroline O. Olufawo of the Lagos High Court upheld the contention of the defendant's counsel, on the ground that life has no duplicate and must be guarded jealously. The judge then ordered for expert opinion on the propriety, from a safety prism, of the plaintiff testifying in court.

A decade later, at the time of writing, the matter is still pending before the trial court, as the defendants continue to deploy all sorts of obstructionist tactics to frustrate the case, including an outrageous false deposition by a staff of the defendant's counsel, Professor ABC Adesanya, SAN, on April 22, 2009, that the plaintiff had died! To their utter consternation, the plaintiff appeared in court, about a month later, on May 27, 2009! Regrettably, the judicial process is being manipulated and the course of justice subverted. For Citizen Ahamefule, justice remains, for now, an illusion.

### **Looking Ahead: Agenda for Action**

The plight of PLWHA in Nigeria generates several issues which require urgent attention. From a legal prism, which is the major thrust of this paper, these include the initiatives discussed next.

#### **A. *The Imperative of Legislative Intervention***

Given the decision of the Court in the *Festus Odaife* case, there is urgent need for legislative intervention. This could take the form of constitutional amendment to expressly include HIV/AIDS status (and other health challenges) among the prohibited grounds of discrimination and/or the enactment of a specific anti-discrimination legislation at both the federal and state levels. Such legislation should build on the ongoing collaboration between NACA and Nigeria's labour unions to develop and engender HIV/AIDS policies in the workplace, draw from foreign and international laws on the subject and enshrine global best practices.

#### **B. *Capacity Building of the Nigerian Judiciary, Lawyers and other Stakeholders on the HIV/AIDS Pandemic***

The plight of Citizen Ahamfule, and others similarly situated, underscores the imperative of capacity building of the Nigerian judiciary (and other stakeholders in the Nigerian justice system) on the HIV/AIDS pandemic. This, in turn, requires a coordinated framework of sustained education and enlightenment, institutional linkages and networking on best practices.

Flowing from the above, the decision of the South African Constitutional Court in *Hoffmann v South African Airways*<sup>7</sup> is pertinent. It would be recalled that in September 1996, the appellant, Mr Hoffmann, applied for employment as a cabin attendant with South African Airways (SAA). At the end of the selection process, the appellant, together with eleven others, was found to be a suitable candidate for employment. This decision, however, was subject to a pre-employment medical examination, which included a blood test for HIV/AIDS. The medical examination found him to be clinically fit and thus suitable for employment. However, the blood test showed that he was HIV

7. CCT 17/00, judgment delivered on September 28, 2000.



positive. As a result, the medical report was altered to read that the appellant was "H.I.V. positive" and therefore "unsuitable". He was subsequently informed that he could not be employed as a cabin attendant in view of his HIV positive status.

The appellant challenged the constitutionality of the refusal to employ him in the High Court, alleging that the refusal constituted unfair discrimination, and violated his constitutional right to equality, human dignity and fair labour practices. Consequently, he sought, *inter alia*, an order directing SAA to employ him as a cabin attendant.

SAA denied the charge, asserting that the exclusion of the appellant from employment had been dictated by its employment practice, which required the exclusion from employment as cabin attendant of all persons who were HIV positive. SAA justified this practice on safety, medical and operational grounds.

It is instructive that on the medical evidence placed before the High Court, it was not established that the appellant posed the risks asserted. None the less, the High Court agreed with SAA, on the grounds that SAA's practice was based on considerations of medical, safety and operational grounds; did not exclude persons with HIV from employment in all positions within SAA, but only from cabin crew positions; and was aimed at achieving a worthy and important societal goal. The High Court noted that if the employment practices of SAA were not seen to promote the health and safety of its passengers and crew, its commercial operation, and therefore the public perception about it, will be seriously impaired. On SAA's claim that its competitors apply a similar employment policy, the Court reasoned that if SAA were obliged to employ people with HIV, it would be seriously disadvantaged as against its competitors. The High Court, therefore, concluded that SAA's practice did not unfairly discriminate against persons who are HIV positive and that even if it did, such discrimination was, in the circumstances, justifiable.

On appeal, the South African Constitutional Court underscored the fact that at the heart of the prohibition of unfair discrimination is



the recognition that all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. This is particularly so that society has responded to the plight of people living with HIV with intense prejudice. They have been stigmatized, marginalized and subjected to systemic disadvantage and discrimination. As the present case demonstrates, they are denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This, in turn, deprives them of the help they would otherwise have received. It is, therefore, beyond dispute that people living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. Undoubtedly, the impact of discrimination on HIV positive people is devastating, particularly in the context of employment given that it denies them the right to earn a living.

The Court established that neither the purpose of the discrimination nor the objective medical evidence justified such discrimination. In the view of the Court, and rightly so in our respectful view, the fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify the exclusion from employment as cabin attendants of *all* people who are living with HIV. Were this to be the case, people who are HIV positive would never have the opportunity to have their medical condition evaluated in light of current medical knowledge for a determination to be made as to whether they are suitable for employment as cabin attendants. On the contrary, they would be vulnerable to discrimination on the basis of prejudice and unfounded assumptions.

The Court acknowledged that legitimate commercial requirements are, of course, important considerations in determining whether to employ an individual. However, it is

important to guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests.

The Court further expressed recognition of the need to promote the health and safety of passengers and crew. However, fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Accordingly, the Court rightly reasoned, our treatment of people who are HIV positive must be based on reasoned and medically sound judgments; they must be protected against prejudice and stereotyping; and we must combat erroneous, but nevertheless prevalent, perceptions about HIV.

On the whole, the Court found in favour of the appellant and directed SAA to employ him.

We heartily commend the decision of the South African Constitutional Court and urge all stakeholders in the Nigerian justice system to learn from its constructive, incisive and informed analysis. In this vein, the plight of PLWHA in Nigeria could be alleviated, in part, through a community reading of relevant provisions of the Nigerian Constitution (especially those which prohibit cruel, inhuman and degrading treatment and punishment and its non-discrimination provisions) and the African Charter on Human and Peoples' Rights (as domesticated), against the backdrop of Nigeria's international human rights obligations, with the benefit of insights from comparative jurisprudence. We further enjoin judges to reckon with Justice Uwaifo's insightful admonition to the effect that:

...[n]ovel cases of human rights claims may arise in difficult situations and upon strange facts. It is all well a challenge to the judiciary... But the judiciary would hardly be able to cope, going by the circumstances of the time in which it operates, if on the mere reflection behind dim light, and sighting the shortened form of their silhouette the judges readily concluded that they had a diminutive stature which made it too impossible or difficult for them to attempt



the job of solving human rights ... [cases] of an unusual type.<sup>8</sup>

### C. Role of the National Human Rights Commission (NHRC)

The National Human Rights Commission has a significant role to play in addressing the plight of PLWHA. Given that workplace discrimination primarily engages second generation rights (which are economic, social and cultural), it is instructive to note that the Committee on Economic, Social and Cultural Rights is emphatic that:

...national [human rights] institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions.<sup>9</sup>

It is worthy of note that the National Human Rights Commission (Amendment) Act 2010 enhances the status, independence and mandate of the Commission. For instance, under Section 5, the Commission is empowered to, *inter alia*, "deal with all matters" relating to the promotion and protection of human rights in Nigeria; "monitor and investigate all alleged cases of human rights violation" in Nigeria; "assist victims of human rights violations and seek appropriate redress and remedies on their behalf"; and "undertake studies on all matters pertaining to human rights and assist the Federal, State and Local Governments...in the formulation of appropriate policies on the guarantee of human rights." The Commission is further empowered to "receive and investigate complaints concerning violations of human rights and make

8. *Peter Nemi & Others v The State* (1994) 10 S.C. N. J. 1; reported as *Ogugu & Ors v The State* in (1994) 9 N. W. L. R. (Pt. 366) 1.

9. Committee on Economic, Social and Cultural Rights, General Comment 10,



appropriate determination as may be deemed necessary in each circumstance"; "examine any existing legislation, administrative provisions and proposed bills or bye-laws for the purpose of ascertaining whether such enactments or proposed bills or bye-laws are consistent with human rights norms"; and, with leave of court, "intervene in any proceeding that involves human rights issue[s]." In a radical departure from the limited status and mandate of the Commission at its inception, the 2010 amendment introduces a new Section 22 pursuant to which "[a]n award or recommendation made by the Commission shall be recognized as binding and... shall, upon application in writing to... [a High Court], be enforced by the [C]ourt."

Pursuant to its enhanced mandate, the Commission can alleviate the plight of PLWHA in Nigeria by:

- (a) Addressing complaints of alleged violations of the rights of PLWHA in a manner consistent with Nigeria's domestic and international human rights obligations, having regard to comparative jurisprudence and global best practices;
- (b) Addressing complaints of alleged violations of the rights of PLWHA in a manner devoid of the technicalities that often bedevil judicial proceedings. As Hon. Justice Chukwudifu Oputa, JSC aptly puts it:

The picture of law and its technical rules triumphant and justice prostrate may no doubt have its admirers. But the spirit of justice does not reside in forms and formalities, nor in technicalities, nor is the triumph of the administration of justice to be found in successfully picking one's way between pitfalls of technicality. Law and all its technical rules ought to be but a handmaid of justice and legal inflexibility (which may be becoming of law) may, if strictly

followed, only serve to render justice grotesque or even lead to outright injustice;<sup>10</sup>

- (c) Addressing complaints of alleged violations of the rights of PLWHA expeditiously, particularly given the challenges that HIV/AIDS pose to the life expectancy and/or life span of PLWHA; in consequence of which the axiom "justice delayed is justice denied" warrants a greater sense of urgency in cases involving PLWHA;
- (d) Mainstreaming the plight of PLWHA into the human rights corpus in Nigeria;
- (e) Mainstreaming human rights in general and the rights of PLWHA in particular into the curriculum of educational and vocational institutions;
- (f) Specifically making the plight of PLWHA one of its thematic areas;
- (g) Beaming its research activities on the plight of PLWHA;
- (h) Addressing in its annual reports the extent, if any, to which it has reckoned with the plight of PLWHA;
- (i) Ensuring that it executes and strengthens the provisions of Nigeria's National Action Plan for the Promotion and Protection of Human Rights in Nigeria, 2009-2013, in a manner consistent with the interests of PLWHA;
- (j) Collaborating and networking with domestic and international NGOs whose mandate encapsulates the plight of PLWHA;
- (k) Ensuring that, within the framework of inter-agency collaboration and institutional linkages, it leverages the expertise and specialty of domestic and international agencies concerned with alleviating the plight of PLWHA, such as UNAIDS and NACA;
- (l) Leveraging the liberalised framework for human rights litigation under the Fundamental Rights Enforcement Procedure Rules (which came into force on December 1,

10. *Oputa, JSC, in Bello v Attorney-General of Oyo State* (1986) 5 NWLR (Pt. 450), 828 at 886.

2009) through instituting and bolstering the framework for public (or social) interest litigation and class action law suits on the plight of PLWHA;

- (m) Introducing, either *suo motu* or in collaboration with the Office of the Attorney-General of the Federation and of the States, as well as local government legislative arms, bills on the plight of PLWHA;
- (n) Legislative advocacy with a view to the expedited passage of bills on the plight of PLWHA;
- (o) Pushing for Nigeria's ratification and/or domestication of regional and international human rights instruments on the plight of PLWHA;
- (p) Ensuring that Nigeria complies with its reporting (and other) obligations pursuant to the provisions of regional and international human rights instruments, to which Nigeria is a party, on the subject of PLWHA;
- (q) Filing *amicus* briefs in cases involving the plight of PLWHA; and
- (r) Allocating resources, given the Human Rights Fund enshrined in Section 16 of the National Human Rights Commission (Amendment) Act 2010, in a manner consistent with the imperative need to constructively engage the plight of PLWHA.

#### ***D. NGOs, Public Interest Litigation and Class Action Law Suits***

Non governmental organizations (NGOs) need to raise the bar of their engagement with the challenges of human rights enforcement in Nigeria, especially as it relates to the plight of PLWHA. SERAC's trail-blazing initiative should be emulated, deepened and sustained. From a constitutional prism, NGOs need to optimise the liberal framework for human rights litigation introduced by the new Fundamental Rights Enforcement Procedure Rules, through robust public (or social) interest litigation and class action law suits, and thereby fast track the transformation of human rights from rhetoric to reality for a significant number of Nigerians who, for too long,



have been shut out of the system. There is no disputing the fact that access to justice is critical to the realization of human rights. The deployment of *locus standi* as a *cul de sac* to human rights enforcement has been a recurrent challenge in Nigeria. Thankfully, the strict constructionist posture and/or ambivalence exhibited by the Supreme Court in *Abraham Adesanya v The President of the Federal Republic of Nigeria*<sup>11</sup> has, in recent years, been whittled down by, *inter alia*<sup>12</sup>, the case of *Fawehinmi v Akitu & Anor, in Re Oduneye, Director of Public Prosecutions*.<sup>13</sup> The liberalisation of *locus standi*, especially in the context of human rights litigation, has been further reinforced by the new Fundamental Rights Enforcement Procedure Rules. Under paragraph 3(c) of the preamble to the Rules:

The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates or groups, as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following: (i) Anyone acting in his own interest; (ii) Anyone acting on behalf of another person; (iii) Anyone acting as a member of, or in the interest of a group or class of persons; (iv) Anyone acting in the public interest; and (v) Association acting in the interest of its members or other individuals or groups.

## Conclusion

11. (1981) 2 NCLR 358; (2002) FWLR (Pt. 46) 859.
12. For an incisive analysis of the history, growth and changing attitude of Nigerian courts to the issue of *locus standi*, see the lead judgment of Agube, JCA, in *Governor of Ekiti State v Fakiyesi* (2010) ALL FWLR (Pt. 501), 828.
13. (1987) 4 NWLR (Pt. 66) 797.

PLWHA deserve understanding and the opportunity to earn a decent living, through the productive engagement of their human resources, and not pity, scorn, prejudice, stigmatisation or legal shenanigans.

In addition to the legal initiatives encapsulated in the foregoing agenda for action, the plight of PLWHA in Nigeria underscores the imperative of vigilance and sustained, unwavering struggle. Consistent with this reality, it is worth recalling that the American Declaration of Independence, 1776, proclaims "self-evident" "truths" to the effect that "all men are created equal" and are "endowed by their Creator" with certain "inalienable rights"; yet, it took decades of civil rights struggle, which is continuing on several fronts, to secure a modicum of human rights for women and non-white citizens of the United States. This reinforces the fact that human rights are ultimately tools and products of struggle. In the parlance of liberation struggles, *aluta continua!*

# INTERNATIONAL HUMAN RIGHTS LAW IN THE HANDS OF THE NIGERIAN JUDGE: A CRITIQUE OF CURRENT PRACTICE

by

Solomon T Ebobrah<sup>\*</sup>

## Introduction

Traditionally, 'human rights' was a concept of national or municipal law, which at its barest minimum was developed by the natural law school to place some form of restraint on the law making and governance powers of the modern state. The general idea of the natural law school, *inter alia*, was to assert the existence of a universal and immutable body of law that could be associated with the concept of justice which 'stands for the righting of wrongs and the proper distributions of benefits and burdens within a political community'.<sup>1</sup> In its early days, especially in its character as a struggle for limiting the exercise of governmental powers within the territory of a state, human rights operated outside the ambit of international law. This was because international law was originally developed strictly to regulate the relations and conducts of states towards each other in accordance with the doctrine of sovereign equality of each state. On this understanding, international law had nothing to do with the behaviour of a government within its territorial sovereignty and especially was not concerned with the manner in which a government treated its citizens. In that firmly positivist legal environment 'which viewed the nation-state as the

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1. See Harris J.W., *Legal Philosophies* (2nd edition) Oxford: Oxford University Press (2004) 7. According to Harris, natural law also presupposed the idea of a 'higher' law that stood in a superior position towards man-made law such that it could determine whether 'ordinary laws are morally binding on subjects'.



sole unit of political authority and source of legal obligation' legal concepts such as dualism and sovereignty operated without restraint to exclude the interference of international law in domestic affairs.<sup>2</sup>

The continued restriction of human rights to national law apparently became impossible in view of the atrocities committed by certain states in the wars that took place during the early part of the twentieth century. Thus, even as far back as the era of the League of Nations that was established after the First World War, aspects of international protection of human rights had begun to emerge.<sup>3</sup> However, it was in the aftermath of the Second World War and the consequent founding of the United Nations Organisation (U.N.O or UN) that proper and far reaching internationalisation of human rights occurred. Resulting from what Kelsen refers to as 'direct authorisation or obligation of individuals by international law'<sup>4</sup> a body of norms which has become known as international human rights law has emerged to reinforce the claims that citizens make of their states in the name of human rights. In the wake of the internationalisation of human rights law, the otherwise firm dichotomy between international law and municipal or national law has waned or at least is waning. In fact, Kelsen posits that in this era of internationalisation of human rights, 'the boundary between international law and domestic law evaporates'.<sup>5</sup> This has occurred even in the staunchest enclaves of dualism so that the claim has been made that 'increasingly, legal internationalisation has led to an encroachment of international law on English domestic law' and 'this has been accompanied by blurring of the distinction between international and domestic law'.<sup>6</sup>

2. Grinsburg T, 'Locking in democracy: Constitutional commitments and international law' 38 (2006) *International Law and Politics* 707
3. See Dugard J, *International Law* (3rd Edition) Lansdowne: Juta & Co. (2005) 308
4. Hans Kelsen cited by Neillkaemper A, *National Courts and the International Rule of Law*, Oxford: Oxford University Press (2011) 11.
5. As above.
6. Fatima S, 'Using international law in domestic courts -Part 1: Domesticated treaties' 8 (2003) *Judicial Review* 81.

Despite the acclaimed internationalisation of human rights law, it is not all states that have embraced with open arms, the entry of international human rights norms into their national legal systems. Especially among the so-called dualist oriented states, there is strong evidence of judicial resistance to the perceived invasion of international law in national legal systems. The Nigerian legal system is arguably one of such dualist oriented states that have held out somewhat against the invasion of international human rights law. In the light of constitutional provisions that demand transformation of international treaties into national law in order for such international norms to acquire the force of law under the national systems, national judges are faced with the tough choice between living up to the expectation of international law and fulfilling core obligations under national constitutional law.

In the face of prevailing restrictions, this contribution undertakes a critical assessment of the use of international human rights law in the Nigerian legal system. The central thesis of the paper is that there is greater potential for positive application of international human rights law by Nigerian judges even though this may require more creativity and elastic application of the rules of constitutional interpretation. The paper is divided into eight main sections. This introductory section is followed by an overview of the idea of human rights in the Nigerian legal system. The third section is an analysis of the sources of rights in the Nigerian legal system with emphasis on the adequacy of the sources. Section four evaluates the strength of the case for application of international human rights law in the Nigerian legal system. In section five, a modest analysis of current practice on the application of international human rights law is made. Section six reviews the argument against a more robust influence of international human rights law in the Nigerian legal system. Section seven explores ways to improve the application of international human rights norms in the legal system. This is followed by the concluding section. The paper seeks to find a reconciliatory rather than a confrontational approach to the application of international human rights law in the Nigerian legal system.



### **The Idea of Rights in the Nigerian Legal System**

In spite of allusions to the existence of human rights in pre-colonial societies in the territories that make up modern day Nigeria, it is in the era immediately preceding independence that the idea of human rights in its modern sense can first be located. Human rights scholars and activists agree that in the constitutional conference before independence, the idea of a constitutional bill of rights was introduced by the Action Congress and rejected by the colonial administration of the time.<sup>7</sup> While it did not subscribe to the inclusion of a bill of rights in the colonial constitution, the colonial administration was said to have recommended that such a bill of rights should be part of any Independence constitution.<sup>8</sup> Consequently, it was in the Independence Constitution of 1960 that a bill of rights dedicated to the guarantee and protection of human rights was first incorporated in the Nigerian legal system.<sup>9</sup>

Notwithstanding the relatively recent history of Nigeria's contemporary human rights experience, there are some seasoned commentators who hold the view that the Nigerian legal system can claim to be 'co-heirs to the Magna Carta of 1215 and the Bills of Rights 1689'.<sup>10</sup> Without delving into the correctness or otherwise of the claim, assertions such as this presuppose a link between the Nigerian legal system and the legacy of Britain's human rights tradition. Effectively, a connection is made between the human rights tradition in the British common law – which one author describes as libertarian<sup>11</sup> – and the Nigerian legal system. It is

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7. See Ogbu O.N. *Human Rights Law and Practice in Nigeria*, Enugu: CIDJAP Press (1999) 33. Also see Falana F, *Fundamental Rights Enforcement in Nigeria* (2nd edition) 2010, Lagos: Legal Text Publishing 3

8. As above.

9. See the 2006 National Plan of Action for the Promotion and Protection of Human Rights in Nigeria (available at [http://www2.ohchr.org/english/issues/plan\\_actions/docs/nigeria.pdf](http://www2.ohchr.org/english/issues/plan_actions/docs/nigeria.pdf))

10. Chukwudifu Akumte Oputa (former justice of the Supreme Court) cited by Ogbu (supra n 7)

11. Ogbu (supra n 7) 31.



however, the constitutional human rights legacy that appears to have survived over the years in the Nigerian legal system. Accordingly, the jurisprudential pronouncements on human rights have been basically rooted in the successive Nigerian constitutions.

Whatever else may have emerged from the Nigerian constitutional jurisprudence on human rights, there are two crucial viewpoints (relevant to this paper) that stand out. First, in what appears to be an acceptance of the postulations of the natural law school, it is posited that 'a right ...stands above the ordinary laws of the land and ... is antecedent to the political society itself'.<sup>12</sup> Thus, it is asserted further that the idea of rights is 'a primary condition to a civilized existence and what has been done by our Constitution since independence starting with the Independence Constitution ... up to the present Constitution ...is to have these rights enshrined in the Constitution so that the rights could be "immutable" to the extent of the "non-immutability" of the Constitution itself'.<sup>13</sup>

Arguably, the outstanding feature of the foregoing dicta is that it considers something other than the Constitution -i.e. something other than man made law to be the source of rights. In other words, man made law, including a constitution, is merely declarative rather than constitutive of human rights. By extension, it would be outside the authority of the law maker to take away the rights that citizens enjoy. As controversial as this may appear, it stands as the jurisprudence of the highest court in the Nigerian legal system. It also leaves open the question whether the Nigerian courts can declare the existence of a right outside the boundaries of the Constitution.

A second crucial feature of the rights jurisprudence in Nigeria is the dichotomy that is said to exist between 'human rights' on the one hand and 'fundamental rights' on the other hand. Although the point has been made that both terms 'are always used interchangeably' in the Nigerian context,<sup>14</sup> it is a significant

12. See *Eso JSC in Ransome Kuti v A.G. Federation* (1985) 5 NWLR Pt 10, 211 at 229 - 230.

13. As above.

14. *Falana (supra n 7)* 6.

dichotomy that tries to distinguish international human rights law from the national or municipal human rights law applicable in the Nigerian legal system. This dichotomy was firmly established in the case of *Uzoukwu v Ezeonu II & Ors*<sup>15</sup> where the Court of Appeal per Nasir (P.C.A) stated that:

Due to the development of Constitutional Law in this field, distinct difference has emerged between 'fundamental rights' and 'human rights'. It may be recalled that human rights were derived from and out of the wider concept of natural rights. They are rights which every civilised society must accept as belonging to each person as a human being. These were termed human rights. When the United Nations made its declaration, it was in respect of 'human rights' as it was envisaged that certain rights belong to all human beings irrespective of citizenship, race, religion and so on. This has now formed part of international law. Fundamental rights remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country; that is by the Constitution.

Arguably, the Court of Appeal in the *Uzoukwu* case sought to make the point that 'human rights' as a concept is wider, covers more grounds and hence more rights than 'fundamental rights'. This position of the Court appears to have influenced the making of the Fundamental Rights Enforcement Procedure (FREP) Rules 1979<sup>16</sup> as those Rules defined fundamental rights to mean the rights guaranteed in chapter IV of the 1979 Constitution.<sup>17</sup>

15. (1991) 6 NWLR Pt 200, 708at 761.

16. The FREP are rules made by the Chief Justice of Nigeria pursuant to powers conferred on that office in chapter IV of the Constitution (first in 1979 also in the 1999 Constitution) for the purpose of setting out the procedure for enforcement of the rights guaranteed in that part of the Constitution.

17. For instance, in *Odaga v A.G. Federation* ..., the Supreme Court of Nigeria defined fundamental rights as follows: "fundamental right is a right



Certain conclusions (intended or un-intended) can be drawn from the dichotomy between 'human rights' and 'fundamental rights'. As already alluded to above, there is a positive assertion that 'fundamental rights' in the Nigerian Constitutional Law are narrower in scope and reach than the 'human rights' in international law. Secondly, the life and existence of fundamental rights is tied to the continued operation of the given Constitution whereas the existence of human rights does not in any way depend on the operation of any particular constitution. Thirdly, and perhaps more practical is the point that only fundamental rights are currently enforceable in Nigeria through the FREP rules. This third point is one that enjoys judicial backing. For instance, in *WAEC v Adeyanju*,<sup>18</sup> the Supreme Court per Mohammed (JSC) stated that 'for an applicant to successfully institute an action under the Fundamental Rights Enforcement Procedure Rules 1979, the claim must fall within sections 33 - 44 of the 1999 Constitution being the sections under Chapter IV of the 1999 Constitution'. The FREP Rules appear to have become entrenched as the only procedure by which rights can be ventilated in the Nigerian courts. The effect of this position is that the wider human rights currently have no practical use in the Nigerian legal system as they cannot be enforced in a court of law.

A significant point that needs to be borne in mind in this analysis is that made by the Supreme Court itself when it stated per Muhammed (JSC) that 'Neither the Constitution of 1979 nor that of 1999 has defined the term 'fundamental right'. The Fundamental Rights Enforcement Procedure ... which the Chief Justice of the federation made pursuant to the powers conferred upon him by section 42(3) of the 1979 constitution and section 46(3) of the 1999 constitution assigns the following interpretation to the term: "any of the fundamental rights provided for in chapter iv of the

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guaranteed in the Nigerian Constitution and can be found entrenched in a particular chapter therein i.e. Chapter IV"

18. (2008) 9 NWLR Pt 1092, 270 at 304.



constitution".<sup>19</sup> The Constitution may not have expressly created the dichotomy between fundamental rights and human rights. However, Chapter IV of the Constitution is commonly entitled 'Fundamental Rights' and this may have led to the restricted definition of 'fundamental rights' under the FREP Rules 1979. In the same case of *Fajemirokun v Commercial Bank Nig Ltd*, the Supreme Court went on to point out that the new FREP Rules which 'came into force on May 29, 2008 abrogated the 1979 rules. These rules expand the interpretation of fundamental rights to include the rights stipulated in the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act'.<sup>20</sup>

A few issues emerge for consideration from the foregoing. First, since it is not a constitutional provision that defined the term 'fundamental rights' as distinct from 'human rights', it needs to be asked whether the same judicial authority which put the initial regime in place can also expand the definition of 'fundamental rights' to include rights not specifically itemised in Chapter IV of the Nigerian Constitution. Secondly, it needs to be asked whether the definition of 'fundamental rights' in the FREP Rules and the reinforcement in judicial decisions does not relate to the applicable procedure rather than the justiciability of other 'rights'. In other words, can a right that is conferred by any other law in force in Nigeria be enforceable before the courts if it is brought by a procedure other than the FREP Rules? Ultimately, there may be a need to ascertain the sources of rights in the Nigerian legal system.

### **Sources of Rights in the System: Adequacy Analysis**

Textbooks and other written works on 'human rights' or 'fundamental rights' in Nigeria hardly bother to give any attention to what constitute the sources of rights in the Nigerian legal system. There seems to be an assumption that there is no dispute as to the sources of what is popularly known as 'fundamental rights'. These

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19. *Fajemirokun v Commercial Bank Nig Ltd* (2009) 5 NWLR Pt 1135, 588 at 611.

20. As above.

rights surely, are those contained in the operational constitution. In the 1999 Constitutional epoch, the rights contained in the African Charter Act may be added to the constitutional rights so that together they should be the 'fundamental rights' that are available to the Nigerian citizen. Certainly, this cannot be contested. However, it needs to be asked whether the Constitution of Nigeria (and perhaps read together with the African Charter Act) is the *only* source of 'rights' in our legal system. It also needs to be asked whether the Constitution and the African Charter Act form a single source or two different sources. Assuming that the Constitution (together with the African Charter Act) constitutes *the* source of rights in the Nigerian legal system, does it exclude the existence of other sources and if so, is it adequate as *the* source of rights in the system?

Clearly, the 'prime locus'<sup>21</sup> of fundamental rights in the Nigerian legal system is the Constitution of the Federal Republic of Nigeria. In Chapter IV of the 1999 Constitution<sup>22</sup> some fundamental rights are enumerated. The rights so enumerated are all of the genre categorised as civil and political rights in international human rights law discourse. They include the rights to life, dignity of human person, personal liberty, fair hearing, private and family life, freedom of thought, conscience and religion and freedom of expression and the press. They also include the rights to peaceful assembly and association, freedom of movement, freedom from discrimination, to acquire and own immovable property anywhere in Nigeria and the right to prompt and adequate compensation for compulsorily acquired property. In some legal clime, such rights that are enumerated in the constitution are branded constitutional rights.<sup>23</sup>

21. I have borrowed this term from Julian Rivers..., the translator of Robert Alexy's *A theory of Constitutional Rights* (2010) Oxford: Oxford University Press

22. The equivalent sections in earlier constitutional documents were Chap III of the 1960 and 1963 Constitutions respectively and Chap IV of the 1979 Constitution

23. Alexy (*supra* n 21)



In the same 1999 Constitution, albeit in Chapter II, certain formulations which are akin to economic, social and cultural rights are also enumerated along with other formulations and collectively termed fundamental objectives and directive principles of state policies. Arguably, the contents of Chapter II of the Constitution are not rights because they have never been classified or termed as rights. There has also never been any indication of any intention that the contents of Chapter should confer on citizens any sort of claim even if all organs of government are implored to apply those principles in carrying out their governmental functions.<sup>24</sup> In terms of Hohfeld's formulation on legal relations<sup>25</sup>, no 'logical connections between jural relations' is created out of the contents of Chapter II of the Constitution. If Hohfeld's theory is correct, upon the creation of a legal right in favour of a given A, a correlative duty is imposed on B. Arguably Chapter II of the Constitution neither employs the 'rights language' nor does it envisage the creation of legal relations as between the citizenry and the state. Hence, it is not surprising that section 6(6)(c) denies the existence of any justiciable right in that part of the Constitution. However, the point has to be made that there is nothing in the Constitution that precludes the state from creating and conferring rights through the legislative process out any of the formulations in Chapter II. In fact, item 60 in Part 1 of the Second Schedule to the 1999 Constitution is a positive empowerment of the National Assembly to engage in activities that may lead to the creation of rights out of the contents of Chapter II.<sup>26</sup> If item 60, Part 1 of the Second Schedule to the Constitution really permits the making of legislation for the purpose of creating rights, arguably, the Constitution cannot be the only, even if the prime locus of rights in the Nigerian legal system. Within the context of

24. Hence see secs 6(6)(c) and 13 of the 1999 Constitution

25. Hohfeld W.N., 'Some fundamental legal conceptions as applied in judicial reasoning' (1913/14) 23 *Yale Law Journal* 16 (cited by in Alexy, *supra* n 21, 132-133)

26. See the case of *A.G. Ondo State v A.G. Federation* [2002] FWLR (Part 111), 1972 on this point.



the legal system, the sources of rights ought to coincide with the generally recognised sources of law in the system. Insofar as the Nigerian legal system is concerned, apart from the Constitution, other sources of law include Nigerian legislations, the Common Law and Principles of Equity, English Law received into Nigeria at 1 July 1900 and subsidiary legislation. In that context, 'human rights' or (if that term sounds too strongly related to international law), rights, though not fundamental rights, should be available to the Nigerian citizen in other legislations. In fact, the Labour Act, the Workmen Compensation Act and the Compulsory Free Universal Basic Education Act are examples of Nigerian legislation that contain rights language and create veritable rights that impose correlative duties either on the state or on some other non-state actor. Thus, for instance, section 2 of the Compulsory Free Universal Basic Education Act guarantees the 'right of children to free basic education'. This is a right recognised at international law in the International Covenant on Economic, Social and Cultural Rights yet the Act is not a domestication of that Covenant. The concept of 'free, compulsory and universal primary education' is also one of the formulations in Chapter II of the 1999 Constitution<sup>27</sup> even though that formulation does not create a right. Hence, ordinary local legislations can and do create rights in favour of people in Nigeria. This means that Nigerian legislation is a source of rights in the legal system.

Apart from legislation that are made in the ordinary course of lawmaking, other Nigerian legislation that are a source of rights are those made consciously to domesticate international human rights instruments in accordance with section 12 of the Constitution.<sup>28</sup> Legislations such as the African Charter Act and the Child Right Act<sup>29</sup> which transform international human rights norms into rights

27. See sec 18 of the 1999 Constitution.

28. See 12 of the 1999 Constitution is a rule of recognition in Hartian terminology as it creates the condition upon which an international treaty can acquire the (direct) force of law in the Nigerian legal system.

29. The Act was enacted and assented into law in 2003. It is a domestication of the UN Convention on the Rights of the Child.

within the domestic legal system can be placed in this category. Certainly, following their transformation, these legislations create enforceable rights in favour of beneficiaries and therefore are a source of rights in our legal system.

A less obvious but arguably, equally important source of rights in the legal system is the Common Law which is applicable in the Nigerian legal system as a result of our legal tradition and history. Prior to the entry into force of the British Human Rights Act of 1998, the sources of fundamental rights in the British territory included the Common Law.<sup>30</sup> Hence, the principles of fair hearing and natural justice such as *audi altera partem* arguably confer rights equivalent to fundamental rights in legal climes with written constitutions. Insofar as the principles of Common Law continue to remain a source of law in the Nigerian legal system, the Common Law is also a source of rights in our legal system. In addition, any other rights contained in other subsidiary legislation would make such subsidiary legislation a source of rights in the legal system. Perhaps, the argument could be made that rights not contained in the constitutional documents are not fundamental rights as they remain ordinary legal rights similar to any other legal right that accrues from areas such as the law of contract or torts. However, flowing from the recognition that 'human rights' extend beyond the relatively narrow confines of 'fundamental rights' and such human rights are in fact not only characteristic of civilised societies but are also not dependent on constitutional entrenchment, there is some superior quality in a human rights norm, notwithstanding its formal source.

Having identified the foregoing as sources of rights in the Nigerian legal system, it remains to be determined whether they constitute adequate, comprehensive and exclusive sources of all the rights that can and should be enjoyed in the legal system. Concededly, no clear parameters exist for making the determination

30. Rivers J, 'A theory of Constitutional rights and the British Constitution' in Alexy (supra n 21) xxi makes reference to 'common law fundamental rights'.



whether the rights contained in all the sources already identified are adequate and comprehensive. However, in terms of adequacy, the question may be posed whether given the option, citizens would be unwilling to add to the catalogue of rights that is Chapter IV of the Constitution. Put differently, if all the rights in Chapter IV were completely protected in favour of every citizen, would the dignity of individuals –arguably the essence of the protection of human rights – be completely realised? It is only where the answer is in the affirmative that Chapter IV of the Constitution could be considered to be adequate. The same question could be posed in respect of all other sources of right in the legal system.

From another perspective, in terms of comprehensiveness, the question could be asked whether the expressions of fundamental rights as formulated in the Constitution and in the other national sources are complete norms. In relation to the German Basic Law, Alexy has suggested that ‘constitutional right norms’ are commonly ‘open-textured’ so that they require further elaboration by way of judicial interpretation in order to have practical meaning.<sup>31</sup> Arguably, in such a character, rights norms cannot be comprehensive. Applied to the Nigerian legal system, the question would then be whether fundamental rights or other ‘rights norms’ are comprehensive in the sense that they are applicable without any additional interpretation. In relation exclusiveness as used here, the consideration would whether in addition to adequacy and comprehensiveness, the Chapter IV and the other source exclude any other rights from any other source. From a constitutional perspective, there is no indication that the enumerated fundamental rights constitute an upper limit. Instead, at best, the fundamental rights chapter constitute a lower limit –bare minimum– beyond which the state and its organs will not go. In other words, Chapter IV of the Constitution sets up some constraints on the legislative powers of state to the extent that the rights guaranteed therein cannot easily be abrogated. No equivalent obstacle exists in relation to legislative powers to add to the catalogue beyond the requirement of compliance with law-making procedures. Hence, if it is

31. See *Supra*



established that the existing rights are not adequate, there is no bar to the addition of rights.

A last point to be made in this section is a factual one. Records on the making of the 1999 Constitution appears to suggest that the drafters of the Constitution made a deliberate choice to make Chapter IV as detailed and explicit as possible.<sup>32</sup> This was as against the option of simply stating the 'rights in the baldest possible form' and leaving the judiciary to expatiate on the rights through case law and precedent. Having opted for the detailed catalogue of rights, the question remains open whether the constitution drafters have thereby shut the door against any other rights not already included in the catalogue.

### **Strength of the Case for the Application of IHL in the System**

If neither the constitutional bill of rights nor the other loci of rights in our legal system are exhaustive and exclusive, surely, there is room for the application of international human rights law in the system. However, it would then be necessary to establish why international human rights law needs to be applied. This section of the paper addresses the question and thereby makes the case for the application of international human rights law in the Nigerian legal system.<sup>33</sup>

A common feature of relatively new democracies and democratizing societies in the so-called developing world is that governance is still at its infancy and therefore is often still fragile. In that fragile state of democratic governance, it is not uncommon to find either that there is insufficient restraint on the exercise of governmental powers or that officials have no qualms ignoring or

32. Etudiaye & Etudiaye 57.

33. In line with art 38 of the Statute of the International Court of Justice (ICJ), international human rights law as used in this paper refers to all human rights norm that emerge from the known and accepted sources of international law. Accordingly, these would include treaties and conventions, customary international law, General Principles of Law, judicial precedents and (to a lesser extent) the writings of the most highly qualified publicists.

overriding such restraints. This applies to as much as executive powers as it does to legislative powers. In some cases, abuse of power is by or triggered by the army, often even leading to the suspension of constitutionally entrenched fundamental rights. In all these situations, it could be said that fundamental rights are inadequate or ineffective negative restraint on the exercise of governmental powers. On the side of positive obligations of state, several states including Nigeria ensure to avoid creating enforceable rights that may prompt a demand for positive fulfilment. In such cases, national fundamental rights are again impotent against state officials. This is or should be the entry point for international law.

As has been shown earlier through the dicta of the Supreme Court in its case law,<sup>34</sup> unlike fundamental rights which exist because they are so recognised and entrenched in the Constitution, international human rights law owes its existence to some higher force, and if not so, then to the comity of nations and states that have contributed to its adoption or making. The making of international law is not subject to the direct control of state officials. Accordingly, the chances of abusive amendment of the norms of international human rights law are less likely to occur. Thus, international human rights law becomes a necessary prop-up to the frailties of the constitutional or fundamental rights restraint on governmental powers. As Kumm also observes, 'international human rights law norms are more likely to be effective in curtailing or limiting abuse of powers by powerful actors or for providing or reinforcing the 'the checks and balances of a constitutional system'.<sup>35</sup> Against the background that such international norms are less likely to be subject to change according to the whims and caprices of the local politicians, if this is entrenched in the judicial

34. Eso (JSC rtd) in Ransome Kuti's case

35. Matthias Kumm, 'International law in National courts: The international rule of law and the limits of the internationalist model' (2003-2004) 14 *Virginia Journal of International Law* 24-25. Also see Craig Richard Durham, 'International human rights law': A legitimate influence or constraint on sovereign jurisdiction (1997) *Australian International Law Journal* 56.



culture, international human rights law should outlast regimes and their ability to change legislation.

Another justification for the intervention of international human rights law in the national legal system is the potential for ensuring the 'completeness' of fundamental rights norms or for amplifying such norms. As canvassed above, the open-textured nature of rights formulations creates room for judicial interpretation in order for such rights to become complete as norms. Seeing that fundamental rights and most other human rights formulations in national law derive from the wider concept of human rights that is operative in international law, international human rights law (with its rapid development over the last half century) becomes a suitable point for national judges to turn to in order to 'complete' the otherwise 'incomplete' national norms. For scholars like Nolkaemper, 'reference to international allows a court to emphasise the importance or fundamental character of a particular domestic norm, or to confirm the correctness of a legal conclusion drawn from an analysis of domestic law'.<sup>36</sup> In this context, Kelsen's observation of a blurring of the boundary between international law and domestic law becomes more real. National law then benefits from this closer relationship.

Closely linked to its completing role is the potential that international human rights law has to clarify ambiguities and to fill gaps that emerge from domestic rights practice. This role is one that was particularly common in the British legal system prior to the introduction of the Human Rights Act 1998 in England. The intervention of international human rights law on this ground applies where local legislation that is made to directly or indirectly domesticate the international obligations of the state are either not understood or leave lacunae, ambiguities and gaps. In such situations, the logical step for a judicial officer would be to resort to the 'parent' international instrument or to official interpretation.

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36. Nolkaemper (2011) 140.



Zinn@000000)al forum for the purpose of clarifying the ambiguities or gaps. In relation to British case law, Diplock L.J stated in *Salomon v Commissioners of Custom & Excise*<sup>37</sup> that:

I can see no reason in comity or common sense for imposing ... a limitation upon the right and duty of the court to consult an international convention to resolve ambiguities and obscurities in a statutory enactment. If from extrinsic evidence it is plain that enactment was intended to fulfil Her Majesty's government's obligations under a particular convention, it matters not that there is no express reference to the convention in the statute. One must not presume that parliament intends to break an international convention merely because it does not say expressly that it is intending to observe it. Of course the court must not merely guess that the statute was intended to give effect to the particular international convention. The extrinsic evidence of the connection must be cogent.

In the more recent case of *R v Secretary of State for the Home Department ex p. Brind*,<sup>38</sup> Lord Bridge made the point that 'it is already well settled that, in construing any domestic legislation which is ambiguous in the sense that it is capable of meaning which either conforms to or conflicts with the convention, the courts will presume that parliament intended to legislate in conformity with a convention, not in conflict with it. In these two cases, it is evident that the intervention of international human rights law is invoked where the national law was apparently enacted to fulfil the state's international obligation. Often, the connection between the domestic law and the international instrument is established by reference to the instrument in the law. However, as one commentator has noted, 'there are certain cases where courts have utilised treaties in interpreting domestic legislation even where there is no express

37. [1967] 2 QB 116 at 145.

38. [1991] AC 696 at 747.

reference to the treaty in the statute'.<sup>39</sup> The case of *R v Bow Street Metropolitan Stipendiary Magistrates ex p. Pinochet Ugarte* (no 3)<sup>40</sup> where the UN Convention Against Torture was applied is presented as one such instance.

Similar to the situation in the United Kingdom, there is also (albeit limited and even challenged) evidence of this practice in Australia which also lays claim to a common law tradition. One clear example is in the case of *(Newcrest Mining (WA) v The Commonwealth*,<sup>41</sup> where Kirby J opined that '[w]here the Constitution is ambiguous, [the High Court] should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights'. The advantage of this practice is that it operates in a manner that is akin to application of the mischief and golden rules of interpretation that judges are already familiar with. It would ensure that ambiguities are resolved as close as possible to the intentions of the legislator.

A last point to be made in this section is a justification that serves the purposes of both international law and municipal law. If the expectations of an international rule of law are to be served, it needs to be shown that states comply with their international obligations. From the perspective of national law, insofar as fundamental rights and other rights are not exhaustive and their source not exclusive, the option of drawing from international human rights law to complement the municipal law catalogues is or should be attractive. In these regards, the application of international human rights law by national judges can further be justified on the grounds that it would serve to harmonise fundamental rights with the framework of international human rights, encourage compliance with international human rights obligations and allow for enjoyment of rights from an expanded catalogue.

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39. Shabied, part 1 (*supra* n 6) 84.

40. [2000] 1 AC 147

41. [1997] 190 CLR 513



Generally, the operation of separation of powers at municipal law ensures that the judiciary ordinarily has no part to play in the legislating processes at international law and municipal law. Hence, while the executive participates in the making of international human rights treaties, it is the legislature that creates binding rights and obligations at municipal law, even in the area of rights. The often conflicting interests of these two arms of government commonly interferes with the smooth running of governance in a manner that prevents the state from fulfilling its international obligations and in the process denies the citizenry from enjoying the benefits that would result from the transformation of international human rights law into municipal law. In other cases, transformation does not rank high in national priorities so that the resulting violation of international law and denial of benefits to citizens is unintended. Either way, the creative entry of the judiciary into the fray ensures that the state manages to comply with its international obligations and citizens are able to partially enjoy the benefits within the national legal system.

Increasingly, international law recognises and entrenches the right (and perhaps duty) of national courts in the application of international human rights law by insisting on the exhaustion of domestic judicial remedies before access becomes available to international judicial and quasi-judicial fora. As Nolkaemper correctly notes, 'States will continue to be reluctant to subject large parts of their public powers to international judicial review. Domestic courts are a relatively acceptable way of creating a world under law, without creating inter- or supranational institutions that states would find to restrict their sovereignty unduly'.<sup>42</sup> Hence, by directly or indirectly applying international human rights law in their courts, national judges ensure that their states perform their international obligations and thereby rescue the state from international opprobrium. But beyond that, national courts also contribute to 'the determination of the contents of such obligations and may contribute to their development'<sup>43</sup> while at the same time

42. Nolkaemper (2011) 8

43. Nolkaemper (2011) 1



lengthening the catalogue of rights that is available to the citizen. The question whether national courts are suited to this purpose will hopefully be addressed in a later section of this paper. On the flip side, non-application of international human rights law by national courts potentially opens up the state to supranational scrutiny. For these and all other reasons not laid out here, there is clearly a case to be made for the application of international human rights law by national courts.

### **The Case against the Application of International Human Law: Separating the Myths from the Truths**

The case that has been made for the application of international human rights by the Nigerian judge is not without some form of challenge. Over the years, proponents (and in some cases opponents) of the view that international human rights law has little, if any practical value, have also build a case against the application of international human rights law in the absence of a transformative national law. A good number of those arguments apply easily in the Nigerian context. This section of the paper analytically explores some of the most important arguments in order to aid the determination whether such arguments are hinged on myths or on legal truths.

The most important arguments that can be made against the application of international human rights law within the Nigerian legal system are those predicated on the Constitution or more precisely, on the risk of threat to the sanctity of the Constitution. For that reason, it is essential to set out the provisions relating international law in the 1999 Constitution of Nigeria. Section 12(1) of the 1999 Constitution (arguably the most cited section relating to international law in our Constitution) provides that 'no treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'.<sup>44</sup> Section 19(d) of the Constitution for its part, provides that the foreign policy objectives

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44. Sec 12(2) of the Constitution

of the state shall include 'respect for international law and treaty obligations as well as the seeking of settlement of international disputes by ... adjudication'. At the risk of stating the obvious while section 12 is in chapter I of the Constitution and suffers no restrictions, section 19(d) is located in chapter II and suffers the adjudicatory restriction imposed by section 6(6)(c) of the constitution.

Not unexpectedly, section 12 of the Constitution has been the subject of repeated judicial discourse and leaves very little, if any room for speculations. Section 19(d) on the other hand hardly attracts any judicial attention even though by section 13 of the Constitution, it behoves on all organs, arms, institutions and agents of government to observe and apply the said section 19(d). Consequently, it is the implications of section 19(d) and the issues on which the Constitution does not make any active statements that throw up a debate as to the exact nature of the arguments against the application of international human rights law. In this context, the first point to note is that the Constitution, indeed all the constitutions that have been in force in Nigeria have been silent on the relationship of customary international law to the Nigerian legal system. Secondly, there is also no clarity as to the relationship between the clear provisions of section 12 and the equally clear invitation to respect 'international law and treaty obligations' in section 19(d). It is against this background that the analysis in this section is conducted.

### **Loyalty of Judges to the Nigerian Constitution rather than to International Law**

A formulation of the first ambit of the case against the application of international human rights law would be that the loyalty of national judicial officers should be to their national constitution and not to international law. The United States Court of Appeals, D.C Circuit captured this aptly in the case of *United States v Yunis*<sup>45</sup> when it held as follows: 'Yunis seeks to portray international law as a self-executing code that trumps domestic law whenever the two conflict.

45. See *Supra* P.115



*That effort misconceives the role of judges as appliers of international law and as participants in the federal system. Our duty is to enforce the Constitution, laws and treaties of the United States, not to conform the law of the land to norms of customary international law'.<sup>46</sup>* Under the 1999 Constitution, the judicial oath of office in the sixth schedule directs judicial loyalty towards defence of the Constitution. In the words of one commentator, '... courts are not only set up under the specific legal system based on a specific grundnorm, but are also part of that legal system, even the personification of that system, and therefore cannot legally take up a position outside of that system'. This position invites no debate. As Dworkin notes, 'Judges normally recognise a duty to continue rather than discard the practice they have joined'.<sup>47</sup> The question that would then arise is whether there are absolutely no circumstances in which a judge can look outside the confines of the given grundnorm.

The first part of an answer to the question posed above would be straightforward. To the extent that the rules of recognition contained in the constitution permit, a norm that is has its origins in another legal system can be 'adopted' and applied by judges in a legal system. Section 12 could be one such rule and it rightly admits international human rights treaties into the corpus of Nigerian law. The challenge arises where either the requirement for transformation has not been met or the international human rights norm in question is not treaty based but based on some other source of international law. The consequence in the former situation will be addressed subsequently. With regards to the latter, arguably it is the quality of consistency with the constitution that should determine the survival of the 'foreign' norm. In such a case, loyalty to the Constitution cannot be a basis for outright rejection of an international human rights norm without some initial process of analysis. Hence the argument should rather be made to reflect the

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46. *Emphasis mine.*

47. See *supra* p. 117



given type is at the same time prohibited and permitted, or prohibited and prescribed and not prescribed in a given legal order. Or if incompatible ways of conduct are prescribed at the same time... 2) if a concrete conduct appears at the same time to be prohibited and permitted etc in a given legal order'.<sup>49</sup> Taken together, it would mean that a conflict between international human rights law and the Constitution can only be in existence where the Constitution authorises some conduct or omission that international law prohibits. An analysis of conflict has to be a precondition for a judge taking on the duty of protecting the Constitution from conflicting norm. Arguably, the mere fact that a given human rights norm is guaranteed in the one document but not in the other ought not to result in an immediate, unqualified finding of conflict. In other words, the existence of conflict cannot be automatic but ought to be made on a case by case basis.

Another apparent argument against the application of international human rights law is the perception that it would offend the legacy of the national judicial culture that has been inherited from the British. As a result of the subsisting legal tradition which encompasses the nature of legal education in our legal system, judges have been trained to demand transformation which is 'the ultimate bastion of British constitutional law orthodoxy'. As far as the British are concerned, the requirement of transformation can be associated with the concept of parliamentary supremacy which effectively denies the Crown of the powers of legislation. Accordingly, since it is the Crown that enjoys the prerogative of treaty negotiation, the requirement of transformation is justified by the need to insure the people from the imposition of obligations (and rights) without the involvement of the representatives of the people.

In the Nigerian context, the closest to an analogy would be to argue that as only the President and his running mate are elected officials, the non-involvement of elected legislators is also equivalent to the risk that the people in the United Kingdom would suffer if the Crown is allowed to act exclusively to import and

49. Also cited by Vranes (as above).

impose rights and obligations. However, whereas the British only rely on constitutional traditions and principles, the Nigerian constitution provides the framework for excluding unilateral action of the executive aimed at imposing rights and duties. A few countering points need to be borne in mind. First, the nature of international human rights norms differs from the traditional inter-state treaties in the sense that whereas the telos of inter-state treaties was not confer advantages one state and prohibit the other, international human rights norms empower the citizen against the state. In the regard, the treaties aim to favour the citizen rather than open the citizenry up to an invasion from which parliament ought to protect. In the face of such a radical challenge in the purpose of treaty making, there is arguably less compelling motivation for dogmatic adherence to such colonial legacy.

The other point relates to the place of Customary International Law. Ample evidence exists to show that the British legal tradition considers Customary International Law as a part of national law to the extent that it does not conflict with existing national law. In fact, international law is considered to be a part of common law. This has been recognised and accepted by other states such as Australia that have borrowed the British legal tradition. Reliance and adherence to a British legal tradition has to be total and not collective. If that is the case, there is absolutely no justifiable reason for excluding international human rights norm that are based on Customary International Law from the courts in the Nigerian legal system.

### **Current Practice concerning International Human Rights Law: In use or not in use?**

In the face of the arguments for and against the application of international human rights law in the Nigerian legal system, this section of the paper examines important case law in order to critically assess the current practice of the Nigerian courts in this area. While the case law is not exhaustive, it is representative of the practice and provides a basis for evaluation of the attitude of the Nigerian judge towards international human rights law.



It would be recalled that by article 38 of the ICJ Statute, there are three main sources and two subsidiary sources of international law. Of the three main sources, international human rights law is mostly founded on conventions and treaties and to a lesser extent on customary international law. As far as the subsidiary sources go, despite the caveat in article 59 of the ICJ Statute, judicial precedent have become important declarative sources, especially with regards to the definition of rights. The writings of the most highly qualified publicists also count but far less. As already alluded to earlier in this paper, the 1999 Constitution is silent on the status and relationship of all the sources of international human rights law save the conventions and treaties. Thus, the weight of available jurisprudence tilts heavily in favour of conventions and treaties.

### **Domesticated Treaties**

Ordinarily, there ought to be no debate regarding the status and use of domesticated treaties in the Nigerian courts. Insofar as there has been compliance with section 12 of the Constitution, the domesticated treaty acquires the status of a Nigerian legislation albeit a legislation with international flavour.<sup>50</sup> In its character as a domesticated treaty or more precisely, a Nigerian legislation, an international human rights norms catalogue acquires the force of law and becomes applicable only subject to the absence of conflict with the Constitution.<sup>51</sup> However, current practice throws up at least three important questions. First, what amounts to domestication? Secondly, are the courts entitled to decline to apply any part of a domesticated treaty? Does the Constitution prohibit judicial application of certain international human rights norms?

In relation to the first question, the fundamental issue is whether the existence of a national legislation with contents similar to the rights contained in an international instrument is sufficient

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50. *Abacha v Fawehinmi* (2000) 6 NWLR Pt 660, ...at 289

51. The cases of *Abacha v Fawehinmi* (as above); *Ogugu v The State* (1996) 9 NWLR Pt 366 1; *Nemi v The State* (1994) 1 SCNJ 106; *Orok Anom Local Government v Kpa* (2003) 12 NWLR Pt 935, 558 are important examples.



proof of domestication to require judicial application of such an international human rights instrument. In the *Abacha v Fawehinmi* case, Belgore (J.S.C.) opined that 'the fundamental rights in the 1979 Constitution certainly gave effect to the Charter before the federal parliament formally adopted it'. Thus, his Lordship appeared to be making the point that because the rights in Chapter IV of the 1979 Constitution coincide with the contents of the African Charter, the Charter already had effect in the Nigerian legal system even before it was domesticated on 17 March 1983. This position, it would seem, is supported by the words of Lord Hoffmann in the British case of *R v Lyons*<sup>52</sup> when he said, 'Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law'. However, the Supreme Court appears to have taken a categorical stance on this issue when it stated in the case of *The Registered Trustees of National Association of Community Health Practitioners and ors v Medical and Health Workers Union of Nigeria (R.T.N.A.C.H.P.N v M.H.W.U.N)*<sup>53</sup> that section 12 required active transformation into national legislation rather than mere coincidence of contents.

In *R.T.N.A.C.H.P.N v M.H.W.U.N*, the Supreme Court was emphatic in making the point that:

To say that because the words 'shall have the force of law except to the extent' was used in section 12 (1) of the Constitution simply admits that there is a qualification or proviso to the opening part of the provision is a misapprehension. The use of the phrase 'to the extent' does not connote that a person with interest in the provision should fish around for other enactments that contain such provisions in order to make them valid and enforceable. In essence what the legislature intended is that for a treaty to be valid and enforceable, it must have the force of law behind it. It must be supported by a law enacted by the National

52. [2002] UKHL 44.

53. [2008] 2 NWLR Pt 1072, 575.

Assembly, not bits and pieces of provisions found here and there in other laws of the land, but not specifically so enacted to domesticate it, to make it part of our law. To interpret similar provisions as being part of the International Labour Organisation Conventions just because they form part of some other enactments will not be tolerated.

In effect, domestication envisages the making of a legislation to adopt an international instrument into our legal system. On the strength of this position, the Child Right Act 2003 is a domesticated catalogue of rights that ought to enjoy the same status as the African Charter Act. While no blame can lie to judges if Nigerian lawyers have failed to bring matters directly based on the Child Right Act, there is no explanation for including the contents of the African Charter Act as fundamental rights in the FREP Rules 2009 and not according the same status to the Child Right Act.

As far as the second question goes, Nigerian courts have consistently insisted that only fundamental rights that are itemised in Chapter IV of the Constitution bear the quality to be brought under the FREP Rules.<sup>54</sup> It could very well be that this position applies only in relation to actions commenced by the FREP Rules. In which case, it could be said that the focus is on the choice of applicable procedure rather than the justiciability of rights claims based on catalogues other than Chapter IV of the Constitution. This point could be supported by the argument that the definition of fundamental rights to mean only the content of Chapter IV in the FREP Rules 1979 has been overridden by the relatively wider definition under the 2009 FREP Rules which now accommodates the contents of the African Charter Act. However, even this modified definition leaves cause for concern concerning domesticated human rights treaties. For instance, as already argued above, it potentially excludes rights contained in catalogues such as

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54. For instance, see the cases of *WAEC v Adeyanju* (2008) 9 NWLR Pt 1092, 270 at 295 and 304; *WAEC v Akinkunmi* (2008) 9 NWLR Pt 1091, 151 at 167.



the Child Right Act without giving guidance as to how the contents of such other domesticated treaties are to be ventilated in the Nigerian courts.

A far more troubling challenge is the potential for judges to erroneously interpret the definition in the FREP rules to mean that even in the domesticated treaties, only contents that coincide with the rights itemised in Chapter IV of the Constitution bear the quality of justiciability. This is something that may have occurred in the case of *Opi & Others v The A.G. Federation & Others*<sup>55</sup> where in a claim based on the African Charter Act, the learned trial judge at the Federal High Court listed the contents of Chapter and took the view that 'the question is where do the claims of the applicants fall in the rights listed by the 1999 Constitution? He then went on to say that 'my view is that clearly none of the claims could fall under Chapter IV of the 1999 (Constitution)'.<sup>56</sup> While in truth the right of all peoples to 'freely dispose of their wealth and natural resources' in article 21 of the African Charter Act is not one of the more common rights, it is not clear on what basis a court would use Chapter IV of the Constitution to measure the justiciability of the content of a domesticated treaty. The treaty having passed through the rigours of national law-making has arguably satisfied the rule of recognition to qualify as a law of the Nigerian legal system. In the absence of anything to contrary, it is contended that the Nigerian judge has no basis for severing part of a domesticated treaty to enable it reflect and mirror the contents of Chapter IV of the Nigerian Constitution. Nothing in the Constitution, any legislation or even the FREP Rules suggests that such a judicial duty exists.

A third area of interest is the question whether any international human rights norm are necessarily excluded by the Constitution from having effect even after the domestication of a parent international instrument. This question is linked to the immediately preceding question and arises from criticisms that have trailed

55. Unreported case, Suit no FHC/YNG/CS/7/2010 judgement of his Lordship Aikawa J of the Federal High Court, Yenagoa Division delivered on 30 June 2011.

56. See pages 7 - 8 of the judgment (as above).



judicial application of the so-called socio-economic and group rights norms in the African Charter Act.<sup>57</sup> It all began with the case of *Okogie v A.G. Lagos State*<sup>58</sup> when in reaction to a reference based on a claim partly hinged on an alleged violation of section 16 of the 1979 Constitution, the Court of Appeal pointed out the obvious by stating that section 6(6)(c) of that Constitution takes away the jurisdiction of the courts on whether there has been compliance or non-compliance with any of the provisions of Chapter II. That part of the decision in *Okogie's* case became the root of a crusade that socio-economic rights litigation is prohibited in the Nigerian legal system. On the basis of such a dubious interpretation, it is commonly argued that the Constitution prohibits the justiciability of socio-economic rights and any national or international law which seeks to state otherwise is in conflict with the Constitution and therefore falls by virtue of section 1(3).

In order to examine the correctness of this interpretation of section 6(6)(c), the interpretation of the *Okogie* decision and the entire argument that is based on it, certain points need clarification. First, it has to be pointed out that the wordings of section 6(6)(c) are clear. They are to the effect that the judicial powers of the courts 'shall not, **except as otherwise provided by this Constitution**, extend to **any issue or question as to whether any act or omission** by any authority or person or whether any law or any judicial decision *is in conformity with the Fundamental objectives and Directive Principles of State Policy* set out in Chapter II of this Constitution'.

It should be noted that if there is any prohibition, it is not absolute as it can be 'excepted by this Constitution'. That constitutional exception is the one provided by item 60(a) of the Second Schedule to the 1999 Constitution. It empowers the National Assembly to make laws to 'promote and enforce the observance' of the contents of Chapter II. Arguably, once such a law is made, the so-called prohibition in section 6(6)(c) falls off. Arguably, a law

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57. For instance, in *Gbenre v SPDC*,

58. [1981] 2 NCLR 350

made pursuant to section 12 which at the same time creates room for the enforcement of anything which coincidentally is partly captured in any part of Chapter II qualifies as an exception to any such prohibition. Along these lines, the law against corruption stands and can be the subject of litigation in spite of section 6(6)(c) of the Constitution.<sup>59</sup> By extension, section 2 of the Compulsory Free Universal Basic Education Act 2004 which promises the right to free basic education is justiciable notwithstanding the fact that section 18(3) in Chapter II of the Constitution invites the Government of Nigerian to direct its policy towards providing free, compulsory and universal primary education. The exception applies because a law to provide such a right has been made in accordance with the regular law making process. The courts cannot rely on a joint reading of sections 6(6)(c) and 18 of the Constitution to abdicate jurisdiction. Thus, it is contended that even assuming there was a prohibition on the justiciability of socio-economic and collective rights in section 6(6)(c), it ought not to stand in the way of an international human rights norm that has been legislated into local law.

Another angle from which to look at this question is that section 6(6)(c) is a claim prohibition rather than a norm prohibition. A perusal of the wordings indicates that the concern is on questions whether any act or omission is 'in conformity with the Fundamental objectives and Directive Principles of State Policy set out in Chapter II of this Constitution'. Judicial wisdom relating to interpretation has been that insofar as the words are clear, the courts have no business seeking any deeper meaning to those words. These words arguably, are clear to the extent that what is prohibited is any claim which alleges that an act or omission has not conformed to Chapter II. As earlier argued, Chapter II does not create individual rights even though it makes allusions to state duties. In the absence of an individual right, it is understandable that no claim is allowed on the basis of this Chapter. If the interest were to prohibit any norm, then the formulation should have been to that effect. For instance, the Constitution should have clearly stated that 'economic, social and

59. The case of *A.G. Ondo v A.G. Federation* is very instructive in this regard.



cultural rights of any kind can not be the subject of enquiry in any court'. Such a formulation would have made clear that the norm is prohibited as much as the claim is. Accordingly, if a claim is hinged on a domesticated international instrument or any other local statute, the mere fact that the norm in question coincides with certain aspects of Chapter cannot automatically be interpreted as a conflict. Thus, it is contended that if rights of a socio-economic rights norm nature are contained in a domesticated treaty, such norms are enforceable. But assuming without conceding that there exists a conflict, such a conflict between rules can be settled by invoking the exception that section 6(6)(c) itself provides.<sup>60</sup>

One last, though admittedly stretched point that needs to be made on this issue is something that emerges from the *Okogie* case. An important finding of the Court in that case was to the effect that the content of Chapter II of the Constitution could not be the basis for denying a fundamental right (or more precisely, a right in Chapter IV of the Constitution). If the rights in domesticated instruments such as the African Charter Act are defined as fundamental rights, it is contended that the dictum in the *Okogie* case applies to the effect that the Constitution does not envisage that Chapter II should serve as restriction for the enjoyment of fundamental rights.

Clearly, there is no question that at least one domesticated international human rights treaty is in use in the Nigerian legal system. Whether the African Charter is being applied to its maximum potential by the courts is another matter altogether. Similarly, whether other domesticated treaties such as the Child Right Act will be accepted and accepted full in our legal system is yet to be seen. What is clear is that there is very little, if any legal obstacle to their full application by Nigerian judges.

60. In relation to constitutional rights under the German Basic Law, Alexy has persuasively argued that in the event of conflict between two rules, the conflict should be resolved by interpreting one rule as an exception to the other if it so permits. It is further argued that it is only where such an exception does not apply that the stronger rule will invalidate the weaker rule.



### Undomesticated Treaties

In view of the requirement of transformation in section 12, there is need to consider the position of undomesticated human rights treaties in the Nigerian legal system. Although it could be contended that such undomesticated treaties (the vast majority of international human rights instrument fall under this head), have no value, there is high level judicial opinion to the contrary in our case law. Probably founded on equivalent British legal culture, the Supreme Court, in the *Abacha v Fawehinmi* case,<sup>61</sup> cited the case of *Higgs & Anor v Minister of Security & Ors* with approval. That case was to the effect that it is the position in Nigeria that undomesticated treaties 'might have an indirect effect upon the construction of statutes and might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty'.<sup>62</sup> Arguably, not different from the position advocated in the Bangalore Principles, the Court is apparently suggesting that even though an undomesticated treaty lacks the force of law and cannot alter the rights and duties of citizens, they can be employed as aids of interpretation. Undomesticated treaties can also raise expectation of compliance which should lead to, at worst, a judicial perception of an obligation to aim at consistent interpretation of statute with international human rights law. This can be supported by the duty imposed on the courts by section 19(d) to ensure Nigeria's compliance with her international law obligations.

In practice, there is at least one reported case in which this has occurred. In the case of *Asika v Atuanya*,<sup>63</sup> the Court of Appeal was faced with a claim alleging violation of the constitutional right not to be discriminated against on the grounds of sex. In finding that the acts complained of were in violation of the Constitution and the African Charter, the Court went further to invoke the UN Convention on the Elimination of all forms of Discrimination

61. *Supra* n 39

62. Per Ogundare (J.S.C) at pages 288 – 289 in the *Abacha* case (*supra* n)

63. [2008] 17 NWLR Pt 1117, 484

Against Women (CEDAW) and the Universal Declaration on Human Rights (UDHR). According to the Court, per Denton-West (J.C.A) 'It is well founded in article 2(7) of the UN (1979) Convention on the Elimination of all Forms of Discrimination Against Women. This Convention has universal jurisdiction and it is applicable to Nigeria as Nigeria is a party to the Convention. In article 2(7) of the Convention... it is stated *inter alia* that "Government shall take all appropriate measures including legislation to modify or abolish all existing laws, customs or practices which constitute discrimination against women". The Court continued and pointed out that 'Further, under Article 16 of the 1948 UDHR, men and women are entitled to equal rights as to marriage, during marriage and at the dissolution'.<sup>64</sup>

While it could be argued that the international law provisions introduced by the Court were not exactly applied to expand construction of a statute, they were arguably employed to strengthen the Court's understanding and interpretation of the fundamental rights provisions upon which the decision was based. Thus, even though international human rights norms were applied, they were not applied to change the direction that case went. They did not alter the decision of the Court but served to fortify its position and to possibly assure it that it was not acting in isolation as its finding could be sustained at the highest level of human law making. In some way, it could even be seen as reassuring that despite the fact that they have not been domesticated, the expectations raised by the ratification of those instruments by the state have not been dashed. This decision, especially the application of undomesticated treaties and other international soft law instruments can be sustained under the *Abacha* decision.

Perhaps the position would have been different if the finding of violation was on the grounds that an undomesticated treaty had been violated. In the *R.T.N.A.C.H.P.N v M.H.W.U.N* case,<sup>65</sup> the Supreme Court had no difficulty in faulting the application of an

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64. As above, page 516.

65. *Supra* n 55.



undomesticated treaty by the trial court against the background that the finding was that certain acts and omissions were 'unconstitutional, illegal, unlawful and against the provisions of Convention 87 of the ILO'.<sup>66</sup> The Supreme Court was thus critical of the trial decision pointing out that there was a need for evidence of domestication in order for a treaty to acquire the force of law.<sup>67</sup> It is possible to venture that the formulation of the claim by the lawyers involved in the case made the use of undomesticated treaties complicated for the trial judge in the sense that the applicants sought a declaration based on those treaties. Had the declaration been sought on the grounds of a violation of the Constitution or other domesticated treaty and the undomesticated treaties applied as aids of interpretation, perhaps the response of the Supreme Court could have been less critical. Overall, there is currently insufficient application of undomesticated treaties in the approach envisaged in the *Abacha* case.

### **Customary International Law and International Judicial Precedents**

As far as customary international law and international judicial precedence are concerned, there is no evidence of activity by the Nigerian courts. This may well be as a result of the failure of lawyers to throw up the challenge by invoking either customary international law or the case law of international human rights courts. The efficacy of decisions of quasi-judicial bodies such as the African Commission on Human and Peoples Rights before the Nigerian judge is another matter that may need to be resolved. While there is as yet no basis for concrete analysis, the argument could be made that in the absence of any constitutional restriction, customary international human rights law such as the prohibition of torture should be applicable in our courts. The importance of such a determination in spite of its apparent redundancy in view of the fundamental rights against torture is that in the event of a violation of the constitutional order, in the absence of a law to repeal, the

66. As above.

67. As above, at page 614.



readers would have no basis to prevent judges from protecting human rights.

### **The Way Forward**

The analysis in the preceding section suggests that the application of international human rights law in Nigerian courts can be better and more robust. This calls for the articulation of a way forward without necessarily 'inventing the wheel' and recommending the unattainable. Against this background, the following suggestions would hopefully improve the use of international human rights law in our legal system.

A natural starting point is the improved and modified FREP rules. As correctly noted by the Court in *Fajemirokun* case,<sup>68</sup> the expanded definition of fundamental rights incorporates the rights in the African Charter. Ordinarily, this should mean that there ought not to be any dichotomy in the implementation of African Charter rights in our legal system. However, the truth remains that certain portions of the African Charter Act do not lend themselves to domestication adjudication. For instance, the provisions on duties of individuals and the African Commission could not have been intended for domestic adjudicatory purposes. In order to avoid complications that would require judges to sever parts of domesticated treaties, domesticating legislations should be carefully crafted to clearly indicate if any aspects of a treaty are not intended for domestic application. Section 1 of the British Human Rights Act which spells out what it meant by 'Convention Rights' in the domestication of the European Convention on Human Rights is a good example. In the meantime, it is suggested that judges would have to refrain from blanket assumptions of conflict between domesticated international human rights norms and the Nigerian Constitution.

In relation to undomesticated treaties, it will be beneficial for the courts to consider the consequences at international law, for the state's responsibility if judges continue to decline jurisdiction even

68. *Supra* n ... at page 611.

to apply such treaties as aids for interpretation. Considering that the judicial arm is the most stable and longest serving arm of government, there is absolutely no good reason why the judiciary should not play a more prominent role in avoiding international opprobrium that comes with identification of the state as a consistent violator of its international obligations. A change in judicial culture is possible and perfectly within constitutional bounds insofar as it merely serves to hold the executive responsible for obligations that it deliberately takes on at international law. This is even more appropriate where the reason for non-domestication is not legislative opposition to the contents of the human rights treaties, but 'benign neglect' as suggested by Kumm.<sup>69</sup> If judges consider that sovereignty resides in the people and the national interest is not exactly the same as the interest of the political class. The judicial oath should steer the loyalty of judges to the interest of the sovereign right holders. One can venture to say that Nigerians are not so antithetical of human rights, even those initiated at the international level that they would vote out a legislature that transforms international human rights norms for the benefit of the people at the national level. If the judges take the side of the people, they would find no difficulty in shifting to the enthronement of a judicial culture that seeks to creatively interpret the Constitution as favourable to the protection of the human rights of the people, notwithstanding the original source of the norms. While deliberate disregard of constitutional requirements is not being advocated, tools such as 'consistent interpretation' and the expression of 'legitimate expectation' should be applicable to improve judicial attitude to international human rights law. In fact, the case being made is for a transition of a judiciary in favour of human rights. Insofar as customary international law is concerned, there is ample evidence from the UK and from Australia that there is judicial and general acceptance that customary international law is a part of the common law and is directly applicable unless it is expressly overruled by statute or case law. This position is surely familiar to Nigerian judges and can only be the position of the Nigerian legal

69. Kumm, *supra* n ..., 23.



system. The way forward will therefore be to move towards a more robust usage of customary international human rights norm.

### **Conclusion**

In this paper, the case for and against the application of international human rights law in the Nigerian legal system has been analysed. Hopefully, it has shown that the case for a more robust application is as compelling if not more compelling than the case against non or restricted application. The paper has also shown that although the rule of recognition in section 12 of the Constitution regulates the legal force of treaties, no constitutional provision hinders the use of other source of international human rights law. There is therefore good reason for the citizenry to expect a more robust application of international human rights law to their advantage. Even if relation to treaties, Nollkaemper's advice is recommended. He says 'By construing national law in the light of international law, national courts compensate for the refusal of the legislature to give effect to a treaty and can themselves ensure that international obligations are performed'.<sup>70</sup> Judges can take the side of the people.

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70. Nollkaemper, *supra* n 43.



# THE NATIONAL HUMAN RIGHTS COMMISSION (AMENDMENT) ACT, 2010: NEW WINE IN AN OLD SKIN?

by

Oti Anukpe Ovwah<sup>\*</sup>

## **Background**

The National Human Rights Commission was established in 1995. The Commission was established during the dark days of General Abacha's military regime in Nigeria and therefore was viewed with suspicion by the international community and civil society. The Act establishing the Commission<sup>1</sup> (hereafter "the principal Act") gave it wide powers to promote and protect human rights but without the prerequisite power to sanction persons adjudged as violators. Due to this challenge, and many others, the Commission has been aptly referred to as a 'toothless bulldog' over the years.

The various challenges faced by the Commission in the implementation of its mandate, led to consultative and productive discourse on the need for appropriate legislative amendments to strengthen the Commission's enabling Act. Over ten years ago, the National Human Rights Amendment Bill was one of the twelve justice sector reform bills sent to the National Assembly for consideration and passage. The Bills before the National Assembly included the following:- Evidence Act Amendment Bill, Legal Aid Act Amendment Bill, The Police Act Amendment Bill, Prisons Act Amendment Bill, National Human Rights Commission (Amendment) Bill, Bill on Criminal Justice Administration, Administration of Justice Commission Bill, Community Service Bill, Victims of Crime Remedies Bill, Elimination of Violence in Society Bill and a Bill to Amend the Legal Practitioners Act.

After more than ten years and two parliamentary sessions, the National Human Rights Act (Amendment) Bill was passed by the

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1. Decree No 22 of 1995 reprinted as N46 LFN 2004

Senate at the end of 2010. The President and Commander in Chief, Dr Goodluck Jonathan thereafter signed the National Human Rights Commission (Amendment) Bill into law on the 25<sup>th</sup> February 2011. The Explanatory Memorandum to the NIIRC Amendment Act 2010, highlights four key provisions of the new Act to include among other things:-

- a) The independence in the conduct of the affairs of the Commission,
- b) The funds of the Commission to be direct charge on the Consolidated revenue fund of the federation,
- c) The establishment of the human rights fund
- d) The recognition of and enforcement of the awards and recommendations of the Commission as decisions of the high court.

The purpose of this review is to examine these provisions and assess their likely impact on the Commission's mandate.

#### **The Novelty of the Amendments.**

A comparative analysis between the new NHRC Amendment Act 2010 and the Principal Act would be made here and the novel provisions heralding a new lease of life for the Commission would be highlighted.

The preamble to the new NHRC Amendment Act 2010 (NIIRC Act 2010) replaces that in the Principal Act and is in fact broader by referring not only to the rights in the Constitution of the Federal Republic of Nigeria 1999, but also those in International and Regional instruments, as well as those in any other existing legislation. The preamble therefore captures all rights in local, regional and international instruments.

Section 2 of the new NIIRC Amendment Act 2010 replaces that same section in the Principal Act. This section deals with the composition of the Governing Council of the Commission which is responsible for the discharge of the functions of the commission. The new section 2 is innovative in that it seeks to ensure the

observance of democratic principles in the appointment of the members. It provides that the persons to be appointed as members of the Council must be representatives of specific organisations who have a role to play in human rights promotion and protection work, and these persons are also expected to have requisite knowledge and experience in human rights.

Section 2(a)<sup>2</sup> states that the chairperson shall be a retired Justice of the Supreme Court, Court of Appeal or a retired judge of the Federal High Court, State High Court or a legal practitioner with at least 20 years post qualification and experience in human rights. The Principal Act had originally provided for a chairman to be appointed only from retired justices of the Supreme Court, Court of appeal or State high court. The novel additions in the NHRC Act 2010 are retired justices from the Federal high Court and a legal practitioner with at least 20 years post qualification and experience in human rights. It broadens the parameters for the appointment of a chairperson to the Governing Board. The language utilised in the section is also gender neutral in that it talks about the "Chairperson" as distinct from the word "Chairman" used in the NHRC Act 1995.

Section 2(b) lists the specific institutions, agencies, and organisations from which the membership of the Governing Council will be composed. These organisations have a role to play in the promotion and protection of human rights and they are expected to decide whom their representative would be at the Council. They include the following<sup>3</sup>:

- Federal ministries of Justice, Foreign Affairs and Internal Affairs
- Non Governmental Organisations (NGOs) registered in Nigeria
- Nigeria Bar Association (NBA)
- Media
- Organised Labour

2. National Human rights (Amendment) Act, 2010.

3. Sections 2(b), (c), (d), (e), (f) National Human rights (Amendment) Act, 2010.



Section 2(g) specifically ensures the representation of women in the council by providing for the appointment of two women with sufficient experience in human rights issues. This is novel also as it ensures gender representation and participation in the Council membership. The 16 member Governing Council is therefore expected to be made up of the following:-

- The Chairperson of the Governing council.
- 3 representatives from Federal ministries of Justice, Foreign Affairs and Internal Affairs who shall have no voting powers in the Council.
- 3 representatives from the NGO Community.
- 2 legal practitioners to be appointed by the National executive committee of the NBA.
- 3 representatives of the Media -(public & private media)
- 1 representative of organised labour
- 2 women with human rights issues experience
- The Executive Secretary of the Commission.

Though the Principal Act also had 16 Governing council members, the provisions have been improved upon in the NHRC Act 2010, by the specific inclusion of not only representatives of labour, women groups and the NBA but also that the representatives of the three Federal Ministries of Justice, Foreign affairs and Internal affairs must be officers in the Directorate cadre. This is to ensure that discussions on the concerns of the Commission would involve officers who can articulate policy issues at the highest level of government. The old provisions did not specify this and so some representatives came from lower cadre of these ministries.

The Paris Principles<sup>4</sup> recommendations for national institutions are clearly at play in the new section 2 of the NHRC Act 2010. The Paris Principles encourages that the composition and appointment of national institution members shall be through a procedure that

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4. Principles Relating to The Status of National Institutions. Adopted by General Assembly resolution 48/134 of 20 December 1993.

ensures the pluralist representation of the social forces involved in the promotion of human rights in the society.

Section 3(b) of the NHRC Act 2010 provides that the Chairperson and members of the Council shall be appointed by the President, subject to the confirmation of the Senate, while formerly the Principal Act<sup>5</sup> provided for the appointment of the Chairman by the President, Commander in Chief of the Armed Forces, on the recommendation of the Attorney General of the Federation. Democratic principles are certainly also at play here. The rationale for the inclusion of the confirmation by Senate is not farfetched recalling the unceremonious removal of previous Executive Secretaries of the Commission by the Government on account of their critical stand on governance and human rights issues<sup>6</sup>. Likewise, the removal from office of a council member is also to be subjected to confirmation by simple majority of the senate. This new section ensures that tenure of office of members should not be subjected to the whims and caprices of government officials. The section in sub section (4) goes further to provide for a new procedure where the members have to subscribe to an oath of office before starting their duties at the Commission. This is to ensure absolute loyalty to the Commission in the discharge of their duties.

Section 3(3) of the NHRC Act 2010 is also novel in that it specifically stipulates that the Revenue Mobilisation, Allocation and Fiscal Commission is the governmental agency to determine the allowances to be paid to the Council members in the execution of their duties. The Principal Act had simply stated that the allowances may be determined by the Federal Government. The agency is seised with the duty of determining political office holders' salaries and allowances.

### Functions and Powers

5. Section 3 (b), National Human Rights Commission Act 1995
6. For example a former ES Buhari Bello was reportedly removed on account of his criticism of the 3rd term ambition of President Obasanjo and the inhuman and degrading treatment meted out to certain journalists who reported the 3rd term agenda, amongst other issues.

The NHRC Act 2010<sup>7</sup> has expanded and or broadened the functions of the Commission. This has been done through replacing some sections, embellishing others and inserting some completely new functions. Some of these changes are noted as follows:

1. **Section 5(a)**<sup>8</sup> now provides a longer list of more international and regional human rights instruments as well as local laws that the Commission is seized with dealing with issues that arise therefrom.
2. **Section 5(d)** adds state and local governments as tiers of government which the Commission is empowered to assist in policy formulation on human rights issues. This is in contrast to the NHRC Act 1995 that only talked about assisting the Federal government in policy formulation.
3. **Section 5 (e)** adds that the Commission's published reports on the state of human rights in Nigeria should be submitted to the President, National Assembly, Judiciary and State and Local governments. The NHRC Act 1995 only enjoins the commission to publish reports regularly.
4. **Section 5(k)**, empowers the Commission to carry out human rights compliance tests through examining existing legislation, administrative provisions and proposed bills or bye-laws to ensure their compliance with human rights norms.
5. **Section 5(l)**, empowers the Commission to develop and publish appropriate guidelines for the avoidance of acts or practices with respect to the functions and powers of the Commission.
6. **Section 5(m)**, empowers the Commission to promote public discussions of human rights issues in Nigeria.

7. Section 5, National Human Rights (Amendment ) Act 2010.

8. E.g International Convention on Civil and Political rights (ICCPR), International Covenant on economic, social & Cultural Rights (ICESCR), Convention on the Elimination of All forms of Discrimination against Women (CEDAW), Convention on the Right of the Child (CRC), African Charter on human & Peoples Rights (ACHPR) etc.



7. **Section 5 (n)**, empowers the Commission to undertake research and educational programmes for promoting and protecting human rights and coordinate such programmes for Federal, state or local governments on its own initiative or when so requested by any tier of government.
8. **Section 5(o)**, empowers the Commission to either on its own initiative or when requested to by federal, state or local government to report on actions that they should take to comply with the provisions of any international human rights instruments.
9. **Section 5(p)**, empowers the Commission to refer human rights violation matters requiring prosecution to the Federal or State Attorney General.
10. **Section 5(q)**, empowers the Commission's staff to also act as conciliator between parties to a complaint.
11. **Section 5 (r)**, empowers the Commission to intervene with the leave of court as *amicus curae* in any proceeding that involves human rights issues.
12. **Section 6(1)(a)**, empowers the Commission to conduct its investigations and enquiries in any way it considers appropriate.
13. **Section 6(1) (b)**, empowers the commission to file civil actions in court
14. **Section 6(1)(c)**, empowers the Commission to appoint any person as an interpreter in any matter before it to translate documents to it
15. **Section 6 (1) (d)**, empowers the Commission to visit prisons, police cells and other places of detention to assess them and make recommendations to the relevant authorities.
16. **Section 6(1) (e)**, authorizes the commission to make determination regarding damages and compensation payable to victims in relation to human rights violations experienced.
17. **Section 6 (2) (a - e)** gives the Chairperson of the Governing Council wide powers of operation. These

powers seem to suggest that the Chairperson is also operating as an executive chairperson involved in the daily operations of the commission. The sub-section empowers the Chairperson to direct staff of the Commission to obtain a court order whenever there is reasonable cause to suspect that there is evidence of the commission of a crime in any place. The court order would be to either enter upon any land or premises to obtain evidence or information<sup>9</sup>, summon and interrogate any person / authority to appear before it for purposes of public enquiry<sup>10</sup>, issue a warrant to compel attendance of a person who persistently refuses to attend an enquiry<sup>11</sup>, compel any person/ authority to produce any information or document in its custody which is related to a matter being investigated<sup>12</sup> and compel the attendance of witnesses to produce evidence before the Commission<sup>13</sup>.

18. **Section 6(4)(a - d)** specifically creates offences when any person, authority or body - refuses to provide evidence to the Commission, obstructs the Commission from exercising its functions in line with the Act, punishes, intimidates or harasses anyone who cooperates with the Commission and refuses to comply with decisions or findings of the Commission.
19. **Section 6 (5)** provides sanctions for offences created in Section 6(4), and this ranges from 6 months imprisonment or N100,000 fine.

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9. Section 6 (2) (a) National Human Rights (Amendment ) Act 2010  
10. Section 6 (2) (b) National Human Rights (Amendment ) Act 2010  
11. Section 6 (2) (c) National Human Rights (Amendment ) Act 2010  
12. Section 6 (2) (d) National Human Rights (Amendment ) Act 2010  
13. Section 6 (2) (e) National Human Rights (Amendment ) Act 2010

### Financial Provisions

**Financial autonomy:** The new NHRC Amendment Act 2010, has provided new financial provisions for the Commission. Section 12 (2) provides that the Commissions' funds shall be from the Consolidated Revenue Fund of the Federation. This is the first line charge funding provision. With the former NIIRC Act 1995, the Commissions funds were allocated to it by its supervisory ministry, the Federal ministry of Justice. This novel provision would enable the Commission draw funds directly for its operations from the Consolidated Revenue Fund.

**Human Rights Fund:** The new NHRC Amendment Act 2010 has established the Human Rights Fund<sup>14</sup>. This is a novel provision. The fund shall be utilised for the conduct of research on human rights issues and the facilitation of human rights activities in partnership with other human rights organisations. Contributions to the funds shall be monies from Federal, state and local governments, and from national and multi- national public & private companies as well as institutions carrying on business in Nigeria.

**Annual Report & Audited Account of The Commission<sup>15</sup>:** These reports shall be submitted to the President and the National Assembly not later than June of the next year. Reports were formerly submitted to the Attorney General of the Federation. The independence of the commission is also portrayed by this section.

### Other Reforms

**Public Officers Protection Act<sup>16</sup>:** - The new Act extends the Public Officers Protection Act (POPA) to the employees of the Commission as well as the Governing council members in relation to any suits instituted against them.

14. Section 15 National Human Rights (Amendment ) Act 2010

15. Section 17, National Human Rights (Amendment ) Act 2010

16. Section 18, National Human Rights (Amendment ) Act 2010



**Recognition and Enforcement of Awards or Recommendations of The Commission<sup>17</sup>:** Awards, recommendations or decisions made by the Commission are to be recognized as binding, and shall upon application to the court in writing, be enforced by the Federal High Court, FCT High Court or States High Courts. These innovative provisions equate awards of the Commission with decisions of the courts and thus are enforceable through the Court processes.

**Regulations to Implement the Act:** Section 23 provides that the Commission may make regulations deemed fit to give effect to the provisions of the Act.

### **Comparative Legal Framework from other Jurisdictions**

The NHRC amendment Act 2010 has followed the progressive lead in the legal framework of some African National Human Rights Institutions (NHRI). The Human Rights Commission of Sierra Leone Act 2004<sup>18</sup> has some progressive provisions akin to that in the NHRC Act 2010. So does the Uganda Human Rights Commission (UHRC) whose powers are provided under article 53(1) of the Constitution.<sup>19</sup> The UHRC has the power of a court to: summon or order any person to attend before it and produce any document or record relevant to any investigation by the Commission; question any person in respect of any subject matter under its investigation; direct any person to disclose any information within his or her knowledge relevant to any investigation by the Commission, and commit persons for contempt of its orders. Furthermore, the UHRC if satisfied that there has been a violation of human rights or freedom, may order: the release of a detained or restricted person, payment of compensation, or any other legal remedy or redress. However any person or authority dissatisfied with an order made by the Commission has the right to appeal to the High Court.

The Human Rights Commission of Sierra Leone also has progressive quasi judicial powers. Article 8 provides that

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17. Section 22, National Human Rights (Amendment) Act 2010

18. Act No. 9 of 2004

19. Constitution of The Republic of Uganda, 1995

for the purposes of any investigation under the Act, the Commission shall have:-

(a) *such powers, rights and privileges as are vested in the High Court of Justice or a judge thereof in a trial in respect of:*

(i) *enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise; and*

(ii) *compelling the production of documents and other things; and*

(iii) *the issue of a commission or request to examine witnesses abroad; and the rules of court shall, with the necessary modification, apply to the exercise of the powers, rights and privileges of the Commission conferred by this subsection;*

(b) *the power to issue or make orders or directions to enforce its decisions, including measures to protect the life and safety of an individual and free medical treatment where necessary;*

(c) *power to refer to the High Court for contempt any person who refuses, without justifiable cause, to comply with a decision, direction or order of the Commission within a specified time.*

The Commission also has the power to recommend the payment of compensation for victims of human rights violations, their families or legal representatives and also to award costs in appropriate cases. The independence of the Sierra Leone Commission from executive control is clearly captured in Article 14

where it provides that "*Except as otherwise provided in this Act, in the exercise of its functions under this Act, the Commission shall not be subject to the control or direction of any person or authority*".

From the above provisions, it is clear that the Nigerian NHRC Act 2010 is as progressive in its provisions as that of the Uganda and Sierra Leone Acts reflected above. The underlying principle is that national human rights institutions be independent of the executive arm of government so as to be able to carry out its functions and mandate without fear or favour.

## Conclusion

The Amendment Act has greatly expanded the powers of the Commission in order to cope with the new responsibilities therein. The Principal Act was in dire need of amendments to bring it in line with the principles relating to the status of National Human Rights Institutions – (Paris Principles). Under the 1995 Act, the Commission was not compliant with the Paris Principles. It was not independent as the executive through the Attorney General of the Federation frequently meddled in its affairs. It had no power to enforce decisions reached in handling complaints brought before it. The Governing Council members and staff had no security of tenure as the Attorney General could ‘hire’ and ‘fire’ as he deemed fit. This situation led to the deployment of sanctions on the country from the international community in 2006, which led to the Commission being downgraded from status ‘A’ to ‘B’ by the International Coordinating Committee of National Human Rights Institutions (ICC).<sup>20</sup> This year, with the president’s signing of the new Amendment Act, and the nomination of the Executive Secretary and Governing Council members in line with the provisions of the Act, as well as the positive assessment of the Commission’s activities, the Commission has been upgraded back to ‘A’ status by the ICC.<sup>21</sup>

There is still a lot of work to be done to fully operationalize the new provisions in the Act. It is therefore important that the Commission focuses its energy on implementation of the provisions to the maximum. This will surely improve the promotion and protection of human rights of the citizenry in the Country as well as build the confidence of the public in the operations of the commission.

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20. Ulrik Spliid, “The compliance of the constituent documents of West African and Central African National Human Rights Institutions with the Paris principles: A descriptive analysis”, Danish Institute for Human Rights, March 2009, p47.

21. International Coordinating Committee of national institutions for the Promotion and Protection of Human rights: Report and Recommendations of the session of the Sub-Committee on Accreditation (SCA)”, Geneva, 23 – 27 May 2011, p3. <http://rhri.ohchr.org>. 19/11/11 @ 2pm.



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