

## Protection of Human Rights in Nigeria: Legal, Constitutional and Democratic Issues

By

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### Abstract

*Human rights are those fundamental and inalienable rights which are essential for life as a human being. These rights cannot be sold, mortgaged, donated, forfeited or transferred, and should therefore not be taken away by any other person or state. As a result, steps must be taken within each and every society to protect them. This is because, human rights affirm that all individuals, solely by virtue of being human, have moral rights which no society or state should deny. This idea has its classic source in seventeenth and eighteenth century theories of natural rights. This article examines the present state of human rights in Nigeria. It first identifies certain international human rights instruments adopted and incorporated into Nigerian law. With the aid of constitutional provisions and judicial decisions, the article highlights certain fundamental and procedural human rights norms in the Nigerian Constitution to see the extent to which human rights are safeguarded in the country. The conclusion is that although the protection of human rights had suffered a tremendous setback during the military regimes, the advent of democracy has brought great relief and hope to all Nigerians.*

Key words: Human rights, inalienable rights, fundamental rights, democracy, fair hearing.

### 1. Introduction

The protection of human rights by nations occupies a centre stage in present day political, legal, social and economic realities the world over. A nation's human rights record has become the yardstick by which its democratic status in the world is measured.<sup>1</sup> Unfortunately, however, for 35 of the 53 years of Nigeria's existence as an independent sovereign state, the country was ruled by different military regimes.<sup>2</sup> During this period, constitutional governance was kept in abeyance and the military leadership wielded both executive and legislative powers.<sup>3</sup> Even the judiciary was not spared the ordeal. Its powers were crippled and vitiated by ouster clauses which precluded it from entertaining certain actions that were otherwise justiciable.<sup>4</sup> Citizen's

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<sup>1</sup> T. Simma, & P. Alston, "Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles" *Australian Yearbook of International Law* (1992) 84; and P. Alston, (ed.) *Human Rights Law* (New York: University Press, 2000) 3.

<sup>2</sup> Military rule began in Nigeria in 1966 and democracy was finally restored in 1999.

<sup>3</sup> B. Nwabueze, *Military Rule and Constitutionalism in Nigeria* (Ibadan: Spectrum Books Ltd., 1992) 65.

<sup>4</sup> Ajibola "Human Rights under Military Rule in Africa: The Nigerian experience." Bello & Ajibola (eds.) *Essays in Honour of Justice Taslim Elias* vol 1 380-1. However, according to Oguntade JSC in *Ubani v Director SSS* (1999) 11NWLR146 par B-E, even during the military regime, "there can be no doubt that several courts in Nigeria, depending on the judicial personnel who manned them, did a Yeoman's job in the attempt to wrest judicial authority from the military rulers."

rights were trampled upon and the violation of human rights reached an alarming crescendo.<sup>5</sup> Since military rule and human rights are opposed to each other,<sup>6</sup> the painful experience of Nigerians further confirmed the popular saying that “power tends to corrupt, and absolute power corrupts absolutely.”<sup>7</sup>

Given the above scenario, it can, therefore, safely be said that there was an absence of democracy, the rule of law and respect for human rights in Nigeria for 35 years.<sup>8</sup> The situation improved remarkably when democracy returned to the country in 1999.<sup>9</sup> Democracy has provided a fertile ground for human rights to germinate and blossom.<sup>10</sup> Although the situation has radically improved, there are still challenges that must be overcome in order to further entrench democratic culture and respect for human rights in the country.<sup>11</sup>

## 2. Instruments Adopted by Nigeria for the Protection of Human Rights

The instruments adopted by Nigeria for the protection of human rights are hereunder examined. The overall effect of these instruments in bringing about justice to every individual in Nigeria, will determine the extent to which they have gone in the protection of human rights in

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<sup>5</sup> Nwabueze, *op cit.*, at p. 65. The effect of military rule on the civil society in Nigeria included the erosion of the rule of law, violation of personal liberties, interference with personal property, denial of the community’s right to serve government, restriction on organised politics and other associated rights, replacement of ordinary courts by special tribunals, enactment of punishment and penalties disproportionate to offences etc. See also Ajibola, *op cit.*, at p. 385.

<sup>6</sup> *Ibid.*, at p. 380. See also Jinadu, “Fundamental Human Rights, the Courts and the Government, Particularly in Military Regime in Nigeria,” in Bello & Ajibola, *ibid.*, at pp. 485-495.

<sup>7</sup> This is a famous saying by Lord Acton (1830-1902) an English historian. See the *New Dictionary of Cultural Literacy*, 3rd ed. (2002) 563. www.bartleby.com.

<sup>8</sup> During the dark days of military rule in Nigeria, civil society organisations (NGOs) became very vibrant and dynamic in the protection of human rights. They took up the functions of ombudsmen, acted as watchdogs, and took legal actions whenever or wherever the rights of ordinary citizens were violated or were about to be violated. Such civil organizations included the Civil Liberties Organizations (CLO), Amnesty International, United Action for Democracy (UAD) etc., to name but a few. See e.g., Oliomogbe, “CLO urges Pope to address Nigeria’s burning issues” *The Guardian* of March 20, 1998, at p. 6; Ameh, “CLO alleges extra-judicial killing of 20 detainees” *Punch* of December 2, 1998. See also Olofintila, Oliomogbe, Osunde & Djebah, “Groups Chide Police over Rally, see “Agbakoba’s Release” *The Guardian* of March 5, 1998, at p. 1.

<sup>9</sup> C. Heyns, (ed) *Human Rights Law in Africa* (Martinus Nijhoff Pub, 2004) pp. 1388-89.

<sup>10</sup> See, for instance, E. Okoye, “Nigeria’s Human Rights Prospects have Improved, says Israel Parliamentarian.” *The Guardian* May 9, 2000, at p. 9.

<sup>11</sup> In 2000 the US Country Report on Human Rights highlighted a series of human rights violations in the country with particular reference to police brutality, detention without trial, invasion of people’s privacy, affront to the press, denial of fair trial and the persistent unrest in the Niger Delta. It also noted that the police, army and other security forces continued to commit extra judicial killings and used excessive force to quell civil unrest and ethnic disturbances. The report released by the American State Department’s Human Rights Report for 2004, apart from enumerating these violations, also mentioned harsh judgments delivered by the Sharia Courts, life threatening prison conditions, prolonged pre-trial detentions, restrictions on religious rights, massive and pervasive corruption at all levels of government etc. See A. Obari, “US Accuses Nigerian Security Agents of Right Abuses,” *The Guardian* March 13 2000 at p. 80. In its 2008 World Human Rights Report, Amnesty International alleged secret killings of civilians by the police and the army. It also alleged that during the year under review, about 1628 people were arrested, while 785 people were illegally killed in Nigeria. See Y. Oshodi, “World Human Rights Report: Amnesty Alleges Secret Killings of Civilians by Police, Army,” *Punch* January 6, 2008, at p. 1. The government has always denied these allegations. See G. Amefulu, “FG Faults Human Rights Report on Nigeria,” *Punch* May 6, 2008, at p. 9.

the country. The first of the instruments to be considered are international instruments. It will be determined which of them have been incorporated into the Nigerian law and whether they have set the required standard expected.

### 3. International instruments for the protection of human rights in Nigeria

Several international instruments have been adopted and incorporated into Nigerian law for the protection of human rights. Multilateral human rights law developed under the auspices of the UN. It evolved as a result of the monstrous violations of human rights and the immense suffering witnessed during the Second World War.<sup>12</sup> As a result, the UN was formed, with the aim of promoting respect for human rights and fundamental freedoms as one of its cornerstones.<sup>13</sup>

Nigeria has ratified several international human rights instruments and has incorporated some of them into its legal system.<sup>14</sup> The main UN human rights instruments ratified by Nigeria include the Convention on the rights of the child CRC (1989);<sup>15</sup> Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. (1984);<sup>16</sup> Convention on the Elimination of all Forms of Discrimination Against Women (1979);<sup>17</sup> Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968);<sup>18</sup> International Covenant on Civil and Political Rights (1966);<sup>19</sup> International Covenant on Economic, Social and Cultural Rights (1966);<sup>20</sup> International Covenant on the Elimination of All Forms of Racial Discrimination (1965);<sup>21</sup> Supplementary Convention on the Abolition of Slavery,

<sup>12</sup> K. Malan, "The Nature Of Human Rights Treaties: Minimum Protection Agreements to the Benefit of Third Parties" *De Jure* (2008) 82.

<sup>13</sup> The concern for human rights is reflected in the UN Charter. Under the auspices of the UN numerous international instruments were concluded and many resolutions and declarations on human rights were adopted. Under the UN Charter, each State party pledges to respect and enforce the observance of human rights and fundamental freedoms of their citizens. Arguments for the international protection of human rights are therefore based on the concept that every nation has an obligation to respect the human rights of its citizens, and that other nations and the international community have a right to protest if this obligation is breached. In other words, states are obliged to respect human rights of their citizens, incorporate the human rights agreements they signed into their municipal legal system, and implement their international human rights obligations so incorporated. See arts 1(3) 4 & 55 of the Charter.

<sup>14</sup> Although the ICCPR and the ICESCR were both ratified by Nigeria in 1993, they are yet to be incorporated into Nigerian law. The implication of this is that by virtue of s.12 of the Constitution Nigerian citizens may not be able to invoke the provisions of these treaties for the diplomatic protection of their human rights. See Ladan "Should all Categories of Human Rights be Justiciable?" in Law, Human Rights and Administration of Justice in Nigeria Ladan (ed) *Essays in honour of Hon Justice Mohamed Lawal Uwais* (ABU, Zaria) (2001) 92. The ACHPR has, however, been domesticated into Nigerian law. This has nevertheless ameliorated the situation because it has enabled Nigerians to invoke its provisions for the protection of their rights. See [www.unhchr.ch](http://www.unhchr.ch) (accessed on December 22, 2012)

<sup>15</sup> Ratified on April 1991. Source: [www.unhchr.ch](http://www.unhchr.ch) (as at December 2002).

<sup>16</sup> Ratified on June 2001 *Ibid.*

<sup>17</sup> Ratified on June 1985 *Ibid.*

<sup>18</sup> Ratified Dec. 1970 *Ibid.*

<sup>19</sup> Ratified July 1993 *Ibid.*

<sup>20</sup> Ratified July 1993 *Ibid.*

<sup>21</sup> Ratified Oct 1967 *ibid.*

the Slave Trade, and Institutions and Practices Similar to Slavery (1956);<sup>22</sup> Convention on the Political Rights of Women (1952);<sup>23</sup> Protocol Relating to the Status of Refugees (1966);<sup>24</sup> and Convention Relating to the Status of Refugees (1950).<sup>25</sup>

An important UN Convention not yet ratified by Nigeria is the Convention on the Rights of Migrant Workers and the members of their Families (1990). Others are the Optional Protocol to the International Convention on Civil and Political Rights; Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at the abolition of the death penalty; Convention on the Nationality of Married Women; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and Convention on the Prevention and Punishment of the Crime of Genocide.

The main OAU human rights treaties ratified by Nigeria include the African Charter on Human and People's Rights (ACHPR) 1981,<sup>26</sup> the OAU Convention Governing Specific Aspects of Refugee Problems in Africa 1969,<sup>27</sup> and Protocol on Women's Rights in Africa 2005<sup>28</sup> The OAU human rights treaty incorporated into Nigerian municipal law is the ACHPR. Following the coming into force of the treaty in 1981, the Nigerian parliament was the first parliament in Africa to enact it into Nigerian law in 1983 as the African Charter on Human and People's Rights (**Ratification and Enforcement Act 1983**).<sup>29</sup>

The examination that follows determines the category of rights protected in Nigeria by these instruments and assesses whether they are justiciable under Nigerian law and to what extent. The focus of attention is, however, mainly on those core rights called fundamental rights which are not derogable even in times of national emergency and procedural rights which are of great practical importance to the individual in the society. The fundamental human rights examined here include the right to life, the right to be free from torture, cruel or inhuman treatment or punishment and the right to be free from discrimination. The procedural rights examined include the right to fair hearing, the right to presumption of innocence and the right to be tried within a reasonable time.

#### 4. Categorisation of human rights under the Nigerian Constitution

The Nigerian Constitution expressly outlines certain "fundamental rights" which must be enjoyed by all in Nigeria. Chapter 4 of the 1999 Constitution clearly provides for "fundamental

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<sup>22</sup> Ratified June 1961 *ibid.*

<sup>23</sup> Ratified Nov 1980 *ibid.*

<sup>24</sup> Ratified Jan 1988 *ibid.*

<sup>25</sup> Ratified Oct 1967 *ibid.*

<sup>26</sup> Ratified Oct 1983. See the cases of *General Sani Abacha v Chief Gani Fawehinmi* (2000) 6 NWLR 283; and *Fawehinmi v Abacha* [1995] 9 NWLR 7.

<sup>27</sup> Ratified on October 1970.

<sup>28</sup> Ratified 16/12/04

<sup>29</sup> **Cap 10** Laws of the Federation of Nigeria 1990. See also Heyns *op cit.*, at p. 319.

rights”<sup>30</sup> and the means and processes of safeguarding, protecting, and promoting the enjoyment of those rights.<sup>31</sup> Akpamgbo J, has remarked that:

There is a distinction between human rights and fundamental rights. In fact this distinction has been judicially recognized. It is important to make this point because there is no provision under the 1999 Constitution dealing with human rights properly so-called. What we have are sections dealing with fundamental human rights. This is so notwithstanding that certain basic rights and freedoms described as inalienable to man now form part of Nigeria’s municipal law as received by the African Charter on Human and People’s Rights (Ratification and Enforcement) Act.<sup>32</sup>

With due respect to Akpamgbo J, it is submitted that this comment is capable of rekindling and fuelling the much heated debate on the hierarchy of legal norms generally, and the nature of human rights norms in particular.<sup>33</sup> The difference between “human rights” properly so-called and “fundamental rights” is a question of degree or emphasis. It has been said on several occasions that human rights are universal, equal, indivisible, interdependent and interrelated.<sup>34</sup> That issue need not be revisited.

With this “equal” and “universal” concept of all human rights in mind, it is noted that the categorisation of human rights in Nigeria discussed here is only for purposes of analysis. It is not an expression of any belief in a hierarchy of human rights norms as such. The first right to be discussed is the right to life. The right to be free from torture and discrimination will then be discussed, followed by procedural rights in Nigeria.

## **5. Fundamental Rights**

### *i. The right to life*

Section 33 of the Nigerian Constitution provides for the right to life. It stipulates to the effect that every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria

^ The right to life is one of the “fundamental” rights designated for examination in this article. In relation to Nigeria, the right to life is also a fundamental right under section 33 of the Constitution. Nigerian courts, like courts in other jurisdictions, are very protective of this right.

<sup>30</sup> Not “human rights” or “Bill of Rights”.

<sup>31</sup> See Chapter IV of the Nigerian Constitution.

<sup>32</sup> Akpamgbo “Democracy, Human Rights and Administration of Justice,” in Ladan (ed) *op cit.*, at p. 13. On the nature of human rights in Nigeria see the dictum of Kayode Eso JSC in *Ransome Kuti v Attorney General of the Federation* (1985) 2 NWLR 211 230.

<sup>33</sup> T. Meron, “On the Hierarchy of International Human Rights Norms” (1986) 80 *Am. J. Inter'l Law*, 1-23 where he distinguishes between “fundamental” rights and “mere” human rights.

<sup>34</sup> See for example the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993.

In *Re Oduneye*,<sup>35</sup> which involved the death of a prominent journalist and human rights activist in Nigeria through very violent means, the court gave currency to the sanctity of human life when it said *inter alia* that, “It is a universal concept that all human beings are brothers and assets to one another. The death of one is a loss to the other, whether by natural or felonious means.”<sup>36</sup>

The importance of the right to life was again stressed in the civil case of *Mustapha v Governor Lagos State*,<sup>37</sup> where the court said *inter alia*, “The right to life is common to all human beings. It is a human right attaching to man as man because of his humanity.”<sup>38</sup>

A further demonstration of the attitude of the Nigerian courts to the right to life can be found in the criminal case of *Bello v Attorney General Oyo State*.<sup>39</sup> In that case, one Nassiru Bello, who had been convicted and sentenced to death for the offence of armed robbery by the Oyo State High Court of Justice in 1980, appealed against his conviction to the Court of Appeal. However, while his appeal was still pending, he was executed by order of the Oyo State Governor on the recommendation of the Attorney General of Oyo state. Aggrieved by his execution, the deceased’s dependants instituted an action against Oyo state claiming damages for his death. Both the court of first instance and the Court of Appeal dismissed the claim as disclosing no cause of action.<sup>40</sup> But the Supreme Court allowed the appeal.<sup>41</sup> It was held that the Governor of a state could not lawfully order the execution of a convict who had appealed against his conviction, before his appeal had been finally determined. Their Lordships said, *inter alia*,

The premature execution of the deceased by the Oyo state Government, while the deceased’s appeal against his conviction was still pending, was not only unconstitutional, but also both illegal and unlawful. By it, the deceased has lost both his right to life and his right to prosecute his appeal. Also, his dependants have been deprived of the benefit of the life of their breadwinner.

Again, in the case of *Ohuka v The State*,<sup>42</sup> the Supreme Court re-emphasized the sanctity of human life and the right to continued existence pending an appeal and the final determination of a convict’s conviction.

(a) Limitations to the right to life in Nigeria

It must, however, be pointed out that the right to life is not an absolute right but a qualified right under the Nigerian Constitution. Derogations and limitations are allowed under certain

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<sup>35</sup> (1987) 4 NWLR 72.

<sup>36</sup> Per Obaseki JSC at 67.

<sup>37</sup> (1987) 2 NWLR 539.

<sup>38</sup> At 585.

<sup>39</sup> (1986) NSCC vol 17 11; (1986) 5 NWLR 123.

<sup>40</sup> At 829

<sup>41</sup> SC 104/1985

<sup>42</sup> (1988) 1 NWLR 539.

circumstances.<sup>43</sup> This qualification can be found under section 33(2) of the Constitution. Thus, the subsection provides:

A person shall not be regarded as being deprived of his life in contravention of this section if he dies as the result of the use to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary – (a) for the defence of any person from unlawful violence or for the defence of property. (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) For the purpose of suppressing a riot.

Hence, in the case of *Adenji v The State*,<sup>44</sup> it was held that the right to life prescribed under section 30(1) of the Nigerian Constitution is clearly a qualified right. It is not unqualified.<sup>45</sup> In *Adenji*,<sup>46</sup> the question was whether the deprivation of life prescribed under section 30(2) of the 1979 Constitution was contrary to the provisions of section 306 of the Criminal Code? The section provides that, “It is unlawful to kill any person unless such killing is authorized or justified by law.” It was pointed out that the death penalty prescribed under section 319(1) of the Criminal Code cannot be said to be inconsistent with the Constitution.<sup>47</sup> It can also not be said that the provision is invalid or unconstitutional.<sup>48</sup> Thus, if, for instance, an executioner carries out the killing of a condemned criminal, he is simply carrying out a lawful duty. By the same token, the killing of a person in self-defence under the circumstances enumerated under section 33(2)(a)-(c) of the Constitution, does not amount to a violation of the right to life.<sup>49</sup>

Under section 33(2)(a), therefore, if a person is killed in self-defence, or in defending any other person against violence, the right to life is not violated. The killing of an assailant in self-defence during a brawl, does not also amount to unlawful killing. The right to life is also not violated where the act is committed to preserve the life of another.<sup>50</sup> This confirms the right to self-defence as a fundamental right.<sup>51</sup>

Under section 33(2) (a) of the Nigerian Constitution, the right to life is also not violated where the deprivation of life occurs in defence of property. This constitutional provision reinforces section 282 of the Criminal Code, which provides that, “A person in peaceable possession of a dwelling house may use such force as he believes to be reasonable, to prevent the forcible breaking in and entry of the house with intent to commit a felony or misdemeanour.”

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<sup>43</sup> See s 33(2).

<sup>44</sup> (2000) 2 NWLR 114.

<sup>45</sup> That is, the 1979 Constitution. At 361 par G-H.

<sup>46</sup> (*Supra*)

<sup>47</sup> At 125.

<sup>48</sup> See also *Kalu v The State* (1998) 13 NWLR 531.

<sup>49</sup> At 125.

<sup>50</sup> See *R v Rose* (1884) 15 Cox CC 540 where it was held that the accused, a boy of 21 who killed his father to save the life of his mother who was in danger of being killed by him should be acquitted of murder.

<sup>51</sup> Self-defence is said to be the first law of nature. See Hobbes *Leviathan*, pt. 197.

Thus in *R v Ebi*,<sup>52</sup> it was held that the accused person who had killed a person to protect his dwelling house which was under an attack by rioters for two days was not guilty of murder.

Under section 33(2)(b), the right to life is not violated where a person is killed in the course of effecting a lawful arrest or preventing the escape of a person lawfully detained. Thus, if either a peace officer or police officer is lawfully proceeding to arrest a person, with or without a warrant, for an offence and the person takes to flight, it is lawful for that officer to use such force as may reasonably be necessary to prevent the escape. Likewise, the right to life is not violated if a person in lawful custody escapes, and reasonable force which results in his death is used to apprehend him.<sup>53</sup>

Furthermore, for purposes of suppressing riots, insurrections or mutinies a limitation on the right to life is imposed under section 33(2)(c) of the Nigerian Constitution. This provision brings to mind the vexed issue of police brutality in Nigeria. Over the years, the Nigerian police have been accused of brutality, high-handedness and of using excessive force in the suppression of riots, ethnic violence, and even peaceful demonstrations.<sup>54</sup>

The security forces often justify their actions by relying on this constitutional provision in defence of their actions.<sup>55</sup> It is submitted that, instead of employing brutal or excessive force to crack down on peaceful demonstrators, it would better serve the interest of the community, humanity, and the human rights project, if humane strategies are adopted under such circumstances.

Nigeria has not abolished the death penalty. She has also not ratified the second Protocol to the ICCPR, which calls on signatory States to abolish the death penalty.<sup>56</sup> Although it was said in *Adeniji v The state*<sup>57</sup> that the imposition or execution of the death sentences in Nigeria is not subjected to any form of arbitrary, discriminatory or selective exercise of discretion on the part of the courts or any other quarter whatsoever, it would better serve the purpose of human rights if the death sentence is abolished in Nigeria as has been done in many other countries of the world.<sup>58</sup> Since the right to life is the most sacred of all rights, its violation, particularly its gross violation, is more likely than the violation of other “fundamental” rights to engender or trigger international condemnation. However, since the death penalty is lawful in Nigeria, even a mass killing, if judicially determined, is not a violation of the right to life.

<sup>52</sup> (1986) NSCC 17 (1986) 5 NWLR 123.

<sup>53</sup> The Criminal Code s. 271 goes even further to provide that such a person may be killed if the offence he has committed is punishable by imprisonment for seven years or more. See the case of *R v Aniogo* (1943) 9 WACA, 62.

<sup>54</sup> Particularly student demonstrations.

<sup>55</sup> C. Ifejeh, “State security and human rights.” *Thisday*, of August 11, 2000, at p. 9. See also “Soldiers and Rights Abuse.” *Punch* of May 17, 2007 at p. 16.

<sup>56</sup> The Second Optional Protocol to the ICCPR was adopted on December 15, 1989, entered into force on July 11, 1991 and has 60 state parties. See 1642 UNTS 414. See also H. Steiner, P. Alston, and R. Goodman, *International Human Rights in Context – Law, Politics, Morals* (Oxford University Press, 2008) 1467.

<sup>57</sup> (*Supra*).

<sup>58</sup> L. Chenwi, *Towards the Abolition of the Death Penalty: A human Rights Perspective* (Pretoria: University Law Press, 2007) 200-210.

ii. *Freedom From Torture, Cruel or Inhuman Treatment or Punishment*

Section 34(1) of the Nigerian Constitution provides that, “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.”

The right to be free from torture, cruel and inhuman treatment or punishment is linked to the right to the dignity of the human person under the Nigerian Constitution. In the case of *Alhaji Abibatu Mogaji v Board of Customs & Excise*,<sup>59</sup> Adefarasin C.J<sup>60</sup> declared that the raid carried out under brutal circumstances by customs officers in a Lagos market using guns, horse whips, and teargas to make arbitrary seizure of goods, thereby causing injuries to the custodians of those goods, was “illegal and amounted to inhuman and degrading treatment.”<sup>61</sup>

Again in *Peter Nemi v Attorney General of Lagos State and Another*,<sup>62</sup> the Court of Appeal held *obiter* that a convicted prisoner awaiting execution retains the right to be treated with dignity.<sup>63</sup> As such, he may not be deprived of food or medical treatment where such is necessary. However, in *Kalu Onuoha v The State*,<sup>64</sup> it was held that the constitutional provision guaranteeing the right to freedom from torture, inhuman and degrading treatment and the right to life, could not be read so as to render nugatory the express constitutional permission of the death penalty.<sup>65</sup> In that case, the appellant was convicted of murder by the High Court of Lagos State, and sentenced to death pursuant to the provision of section 319(1) of the Criminal Code. After an unsuccessful appeal to the Court of Appeal, the appellant further appealed to the Supreme Court.<sup>66</sup> In the Supreme Court, the appellant raised the issue of the constitutionality of the death penalty as a mandatory punishment for the offence of murder in Nigeria. The question raised was whether the provisions of section 319(1) of the Criminal Code which prescribes death penalty in relation to the offence of murder was not contrary to and inconsistent with section 31(1)(a) of the 1979 Constitution and therefore unconstitutional.<sup>67</sup> Although section 31(1)(a) prohibited torture, inhuman or degrading treatment, the Supreme Court was of the opinion that the right to life provision<sup>68</sup> was a relevant provision in determining whether the death penalty was a constitutionally valid and recognized form of punishment in Nigeria.<sup>69</sup> The Supreme Court used the word “save” as the key to construing the right to life provision. The court noted that although the right to life was fully guaranteed under the Constitution, it was nevertheless subject to the

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<sup>59</sup> (1982) 3 NSLR, 552.

<sup>60</sup> As he then was.

<sup>61</sup> At 561-562. See also *Rasak Osayide v Joyce Amadin* (2001) 1 CHR 459 and *Alabo v Boylesr* (1984) 3 NCLR 830, where the court held that beating, pushing and submerging a person’s head in a pool of water constituted inhuman treatment.

<sup>62</sup> (1996) 6 NWLR 587.

<sup>63</sup> At 596.

<sup>64</sup> (1998) 13 NWLR 531.

<sup>65</sup> At 556.

<sup>66</sup> At 534.

<sup>67</sup> *Idem* 575 & 585.

<sup>68</sup> S. 30(1).

<sup>69</sup> *Idem* 587.

execution of a death sentence of a court of law in respect of a criminal offence of which one was found guilty in Nigeria.<sup>70</sup>

It is significant to note that although there is no qualification, derogation, or limitation to the right spelt out under section 34(1)(a) of the Constitution,<sup>71</sup> the crucial words “cruel” and “punishment,” often attached to situations of torture in most, if not in all human rights instruments,<sup>72</sup> are missing from the Nigerian constitutional provision. It may therefore be asked whether this is because cruelty is not recognized under Nigerian law, or because there is no clear difference between the terms “treatment” and “punishment” under that law?<sup>73</sup> Perhaps, the draftsmen of the Constitution considered that the two terms convey one and the same meaning and that it would be tautological to provide for “cruel treatment or punishment” in the Constitution which means the same thing.

Be that as it may, the right to be free from torture and its allied vices stands out as a shield against the physical, mental and spiritual dehumanization of the individual.<sup>74</sup> Its breach is also considered to be a breach of *jus cogens*,<sup>75</sup> and is condemned by the international community,

### iii. *Right to be Free from Discrimination*

Section 42(1) of the 1999 Constitution provides:

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 or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious 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

<sup>70</sup> *Idem* 537 & 587. The court looked at the jurisprudence from other jurisdictions like India, (*Bacan Singh v State of Punjab* (1983), Tanzania (*Mbushuu*) (1994) and South Africa (*Makwanyane*) (1995) on the question of the death penalty in relation to the right to life. These showed that if the right to life provision is qualified, the death penalty was in most of the decisions held to be constitutional; if unqualified, the death penalty was held to be unconstitutional. The court concluded that the right to life under section 30(1) of the 1979 Constitution was clearly a qualified right, and thus the death penalty could not be said to be inconsistent with the Constitution.

<sup>71</sup> That is, the right to be free from torture, cruel, or inhuman treatment or punishment.

<sup>72</sup> See the UDHR art 5; the ICCPR art 7; and the ACHR, art 5(2).

<sup>73</sup> Chenwi *op cit.*, at p. 106 for a discussion of this problem in the constitutions of other countries.

<sup>74</sup> N. Jayawickrama, *Judicial Application of Human Rights Law – National, Regional & International Jurisprudence* (Cambridge University Press)(2002) 298.

<sup>75</sup> See the case of *Filartiga v Pena Irela supra* 630 F 2<sup>nd</sup> 876 (1980) United States Court of Appeals (Second Circuit) 169 where the US Court of Appeals held *inter alia* that “In light of the universal condemnation of torture in numerous international instruments, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world the prohibition is clear and unambiguous and admits of no distinction between treatment of aliens and citizens.” Jayawickrama *ibid* at p. 299 maintains that the right to freedom from torture has attained the status of a peremptory norm of International law.”

privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.

It was held in the case of *Adamu v Attorney General Borno State*<sup>76</sup> that the right to non-discrimination on the basis of religion was breached where a local authority undertook the cost of providing Islamic religious studies, while leaving parents to bear the cost of providing Christian religious studies. Again in *Mojekwu v Mojekwu*<sup>77</sup> the Igbo<sup>78</sup> customary law disentitling a female from sharing in her father's estate, was held to be discriminatory, unconstitutional and, therefore, could not be enforced.<sup>79</sup>

The right to freedom from discrimination was also the subject for determination in *Muojekwu v Ejikeme*.<sup>80</sup> It was decided that a rule of custom that requires a rite to make a female child become a male in order to sustain the lineage along male lines and to enable her to inherit her father's estate, sustains discrimination against women, and therefore violates their human dignity.<sup>81</sup>

Furthermore, it was held in *Alajemba Uke v Albert Iro*<sup>82</sup> that any law or custom which sought to relegate women to the status of second-class citizens was unconstitutional.<sup>83</sup> It was further held that a custom which precludes women from being sued or being called upon to give evidence in relation to land subject to customary rights of occupancy was unconstitutional.<sup>84</sup>

## 6. Procedural Rights

### *i. The Right to Fair Trial/Fair Hearing in Nigeria*

Procedural rights are those rights which ensure the preservation of substantive rights. They include the right to a fair hearing/trial, the right to access to courts, *et cetera*.

Section 36 of the Nigerian Constitution declares to the effect that a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.<sup>85</sup> The Supreme Court of Nigeria has held, in a plethora of cases,<sup>86</sup> that the concept of "fair hearing" as used in the Nigerian Constitution encompasses the concept of natural justice in the narrow technical sense of the twin pillars of justice – *audi alteram partem* and *nemo iudex in sua causa* as well as in the

<sup>76</sup> (1996) 8 NWLR 17.

<sup>77</sup> (1997) 7 NWLR 403.

<sup>78</sup> A Nigerian tribe.

<sup>79</sup> See also *Gladys Ada Ukeje v Lois Chituru Ukeje & Enyinnaya Lazarus Ukeje* [2001] 27 WRN 142.

<sup>80</sup> [2000] 5 NWLR 403.

<sup>81</sup> At 425.

<sup>82</sup> [2001] 17 WRN 172.

<sup>83</sup> At 182.

<sup>84</sup> *Idem* 185.

<sup>85</sup> S. 36(1).

<sup>86</sup> See for example, *Bill Construction Co. v I & S/s.T. Ltd* (2007) 7 WRN 152; *UBA Plc v Okonkwo* (2004) 5 NWLR 445.; *Josiah v The State* (1985) 1 NWLR 125; *Ika Local Gov. Area v Mba supra*; *Leaders & Co Ltd. v Kusamotu* (2004) 4 NWLR 519; *Jonason Triangle Ltd v C.M. & Partners Ltd, (1999)*, 1 NWLR 555, and *Nigeria-Arab Bank Ltd. v Comex. (1999)* 6 NWLR 648.

broad sense of what is not only right, but is fair to all.<sup>87</sup> In the case of *Ori-Oge v Attorney General for Ondo State*<sup>88</sup> for instance, the court gave a succinct interpretation of this Latin phrase when it said that, “Natural justice implies two cardinal principles – namely that no person shall be condemned unheard, and that none shall be a judge in his own cause.”<sup>89</sup> This requirement must be complied with in any adjudication between people. The result of non-compliance with or breach of the fair hearing/trial requirement in Nigeria is to vitiate such proceedings, with the overall effect of rendering same null and void.<sup>90</sup>

Thus in *Ika Local Govt Area v Mba*<sup>91</sup> the plaintiff sued the defendant in the High Court of Akwa Ibom State claiming the sum of N 295,000.00 being the total sum of the three contracts awarded to him by the defendant. The plaintiff applied to the court to set down the matter in the undefended roll. The matter was then adjourned for hearing. On the day of the hearing, the defendant brought an application for an extension of time within which to enter appearance and file a statement of defence. The trial court, however, dismissed the application and entered judgment for the plaintiff. On appeal, the appellant contended that he was denied the right to a fair hearing by the trial court and that he was excluded from the case by the refusal of the trial court to grant its application for extension of time. The Court of Appeal unanimously allowed the appeal on the basis that by excluding the appellant, the fair hearing provision of the Constitution was breached by the trial court.<sup>92</sup>

Again in *Josiah v The State*,<sup>93</sup> the accused was charged along with two others for armed robbery and murder, both capital offences punishable by death. The two others were represented by counsel and were discharged on the basis of a no case submission by their counsel. The accused was not represented. He gave evidence in his defence and was cross examined. The judge had earlier recorded that “the rights of the accused are explained to him.” He was convicted of the charges and sentenced to death by hanging. On appeal, the Court of Appeal dismissed his appeal. On further appeal to the Supreme Court of Nigeria, it was held that the appellant did not have a fair trial as enjoined by the Nigerian Constitution.<sup>94</sup> A retrial was, however, ordered in view of the circumstances of the case and in the interest of justice.<sup>95</sup>

It must be pointed out, however, that the principle of *audi alteram partem* enshrined in the constitutional provision of fair hearing in Nigeria does not confer on a party an absolute right to be heard in all circumstances. It only confers on the party a right to be given the opportunity to be heard. If he or she does not avail him or herself of the opportunity, he or she cannot thereafter

<sup>87</sup> Per Nnaemeka-Agu JSC in *Kotoye v C BN* (1989) 1 NWLR 419 444.

<sup>88</sup> (1982) 3 NCLR 743.

<sup>89</sup> At 752.

<sup>90</sup> *Ika Local Gov. Area v Mba* (2007) 12 NWLR 677.

<sup>91</sup> *Ibid.*

<sup>92</sup> At 704 par. E-H.

<sup>93</sup> (1985) 1 NWLR 125.

<sup>94</sup> At 140.

<sup>95</sup> Per Oputa, JSC, “Justice is not a one - way traffic. It is not justice for the appellant alone. Justice is not even a two-way traffic. It is a three-way traffic: justice for the appellant, accused of a heinous crime, justice for the victim whose blood is crying to heaven for revenge, and justice for the society at large whose social norms and values had been desecrated by the criminal act”.

complain of a breach of his or her right to fair a hearing.<sup>96</sup> Aspects of the right to a fair hearing discussed will include the presumption of innocence, and the right to be tried within a reasonable time.

*ii. Presumption of Innocence*

Section 36(5) of the 1999 Nigerian Constitution guarantees the right to be presumed innocent. The section stipulates that every person who is charged with a crime must be presumed innocent until he or she is proven guilty. It is both the constitutional duty imposed upon the court and the right conferred on the accused by the Constitution to ensure the purity of criminal justice in Nigeria and to ensure that the presumption of innocence of the accused is maintained inviolate.<sup>97</sup>

Accordingly, even where the breach of this right is not raised by the accused or his or her counsel, it should be taken up by the Court as any proceeding subsequent to the violation of this right and constitutional duty is void.<sup>98</sup> In *Ohuka v The State (No. 2)*<sup>99</sup> the appellants along with three others were arraigned before the Court for the offence of murder. The case for the prosecution was that the deceased and all the accused were together at a drinking party where the deceased was last seen alive. The police conducted an investigation and found different parts of the deceased's body in different places under the control of the fourth and fifth accused persons. Counsel for the accused made no case submissions on behalf of the accused persons. The trial judge overruled the no case submissions and called upon the accused to defend themselves. They refused. They were found guilty and sentenced to death.

Dissatisfied, the accused appealed to the Court of Appeal which dismissed their appeal. They, however, succeeded in a further appeal to the Supreme Court where it was held *inter alia* that evidence that an accused person had an opportunity to commit the offence with which he or she is charged will not suffice to ground a ruling that the accused has a case to answer.<sup>100</sup> Apart from evidence of the opportunity to commit the offence, there was no other evidence implicating the appellants in the crime in question. It was, therefore, held that the trial judge was wrong to have overruled their no case submission.<sup>101</sup>

By virtue of the provisions of section 33(5) of the Nigerian Constitution, an accused person is presumed to be innocent until proved guilty.<sup>102</sup> If such prejudices exist against citizens

<sup>96</sup> See *Jonanson Triangle Ltd v CM & Partners Ltd supra* n 86 and *Leaders & Co. Ltd v Kusamouutu* (2004) 1 NWLR 519.

<sup>97</sup> *Okoro v The State* (1988) 5 NWLR 259.

<sup>98</sup> *Alaba v The State* (1993) 9 SCNJ 109.

<sup>99</sup> (1988) 1 NWLR539

<sup>100</sup> At 545.

<sup>101</sup> At 557.

<sup>102</sup> Again in *Adegbite v COP* [2006] 13 NWLR 252 it was held that since an accused person is presumed to be innocent under the law, the onus rests with the prosecution to show that the accused person should not be granted bail. See also the cases of *Ifejerika v The State* (1999) 4 NWLR (Pt. 583) 59; *Aroyewun v COP*.(2004) 6 NWLR (Pt. 899) 414; *Ugbenyovwe v State* (2004) 12 NWLR 626; *Umana v Attah* (2004) 7 NWLR 63; *Musa v COP*. (2004) 9 NWLR 483. *Osakwe v FGN* (2004) 14 NWLR (Pt 893) 305; *Ikhazuagbe v COP* (2004) 7 NWLR 346, and *Odo v COP* (2004) 8 NWLR 46.

in their own countries, one can then imagine the ordeal often faced by individuals who are not nationals of the countries where they live, who are charged with criminal offences.

### iii. *Right to be tried Within a Reasonable Time*

In accordance with the provisions of section 35(1)(c) of the 1999 Constitution, any person who is arrested or detained shall be brought before a court of competent jurisdiction within a reasonable time.<sup>103</sup> In *Eakang v The State*<sup>104</sup> it was held that what is “reasonable time”<sup>105</sup> depends on the circumstances of each particular case.<sup>106</sup> These include the place or country where the trial takes place and the resources and infrastructure available to the appropriate organ of government in the country.

In *Eakang v The State*<sup>107</sup> the court stated further that the demand for a speedy trial that has no regard to the peculiar conditions or circumstances in Nigeria would be unrealistic and would be worse than an unreasonable delay in the trial itself.<sup>108</sup> It added that it is not enough for an accused to show that there was an unreasonable delay in his or her trial. He or she must go further to show that the unreasonable delay has occasioned a miscarriage of justice.<sup>109</sup>

Thus, in *Godspower Asakitikpi v. The State*,<sup>110</sup> the court distinguished between delay in bringing the accused to court and the right of the accused to be tried within a reasonable time. In that case, although the accused was arraigned before a High Court and taken to court eighteen times, no plea was filed. It was held that his trial period began to run only after the charge was read and explained to him and only then was his plea filed.<sup>111</sup> The period prior to the trial was not computed in determining the delay.

## 7. Enforcement of fundamental human rights in Nigeria

Section 46 of the 1999 Constitution provides for the special jurisdiction of the High Court in the enforcement of fundamental human rights in Nigeria. The section provides that:

any person who alleges that any of the provisions of the Chapter dealing with fundamental rights has been, is being or likely to be contravened in any State in relation to him, may apply to any High Court in that State for redress.

Section 46(3) empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure of a High Court for purposes of this section.<sup>112</sup> In the case of *Jack v Unam*,<sup>113</sup> it

<sup>103</sup> *Adebite v COP (supra)* 102.

<sup>104</sup> [2000] 20 WRN 30.

<sup>105</sup> In relation to the question of whether or not an accused has had a fair trial

<sup>106</sup> At 45.

<sup>107</sup> (*Supra*) p. 1

<sup>108</sup> It is submitted that for the concept of “trial within a reasonable time” to be meaningful, time should start to run from the period the accused is arrested and charged not when he or she is taken to court.

<sup>109</sup> See also *Effiom v The State* ((1995) 1 NWLR 507.

<sup>110</sup> (1993) 6 SCNJ 201.

<sup>111</sup> The same decision was reached in the South African case of *Coetzee v Attorney General Kwazulu-Natal* 1997 (1) SACR 546.

<sup>112</sup> See Fundamental Rights (Enforcement Procedure) Rules 2009.

was held that both the Federal High Court and the High Court of a State have concurrent jurisdiction in matters of the enforcement of a person's fundamental rights. An application may, therefore, be made either to the judicial division of the Federal High Court in the State, or the High Court of the State in which the breach of the fundamental right occurred, is occurring or is about to occur.<sup>114</sup> The process of enforcement of fundamental rights is commenced by an application made to the court as provided for under the Fundamental Rights (Enforcement Procedure) Rules, wherein such application is generally determined on the affidavits, and written statement and addresses filed by the parties.<sup>115</sup>

## 8. Conclusion

It can be seen that the Nigerian Constitution contains enough guarantees for the protection of human rights and that the courts are up to the task of interpreting these constitutional provisions fairly and judiciously. A question however arises as to the relationship between these designated rights and the international human rights instruments. In other words, are the Nigerian human rights norms in compliance with international human rights standards?

The answer is that Nigeria has, to a large extent, complied with international standards. Chapter 4 of the 1999 Constitution shows the clear influence of international human rights conventions. Some of its provisions are modelled on those of the ICCPR, while others are very similar to those of other major international conventions.<sup>116</sup> Unfortunately, however, economic, social and cultural (ECOSOC) rights are not justiciable in Nigeria despite the overwhelming need for this. Section 6(6) of the Constitution renders such rights unjusticiable.<sup>117</sup> That notwithstanding, the conclusion is that although military rule had hindered the protection of human rights in the country in the past, and although ECOSOC rights are not justiciable, democracy is finally here to stay. The Nigerian judiciary has been and still remains the vanguard for the protection of human rights in the country.

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<sup>113</sup> [2004] 5 NWLR 308.

<sup>114</sup> See *Bronik Motors Ltd v Wema Bank Ltd. (1983) 1 SCNL 296* and *Tukur v Government of Gongola State (1989) 4 NWLR 517*.

<sup>115</sup> At 226-227 pars H-B.

<sup>116</sup> Eg the ECHR and the ACHR.

<sup>117</sup> As already indicated, the African Commission has made it abundantly clear that economic, social and cultural rights are justiciable. See *supra* p 259. The question is whether the non justiciability of these rights in Nigeria is a violation of the African Charter? The answer is that the decisions of the African Commission are based on resolutions declarations and case law, not on treaty law. In so far as resolutions and declarations are not binding on state parties, it is submitted that Nigeria is not in breach of the Charter.

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