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ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE JURISPRUDENCE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS

By

AHMED RABIU*

ABSTRACT

This article examines the jurisprudence of the African Commission on Human and Peoples' Rights with a view to assessing its contributions to the implementation of the Economic, Social and Cultural Rights' provisions of the African Charter on Human and Peoples' Rights. The article traces the historical development of the rights to development part of the second generation of rights, which consists of the economic, social and cultural rights. It then argues that given the integrated approach of the African Charter to human rights system generally and the wide interpretive powers conferred on the Commission it is sufficiently equipped to adopt violations' approach to Economic, Social & Cultural Rights as opposed to progressive realization recommended in the International Human Rights System. After thorough exploration of the relevant provisions of the Charter and the Commission's Jurisprudence on the same the article concludes that radical pioneering precedents have been set by the Commission's jurisprudence in this regard, although much is still needed to be done to ensure proper implementation, by way of developing systematic enforcement mechanism of the Charter's provisions on Economic, Social and Cultural Rights within the African Continent.

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INTRODUCTION

In 1981, the OAU adopted the African Charter on Human and Peoples' Rights, which was a milestone in the evolution of human rights protection at the regional level in Africa. The Charter is seen by some as "the newest the least developed or effective, the most distinctive and the most controversial of the regional human rights regimes"[1]. The Charter was the first major African contribution to the global human rights discourse. It represents an attempt to defeat the "efforts by votaries of sovereignty and the domain reserve to shield abuse of human rights by state officials through the argument that how a state treats its nationals was its exclusive business."[2]

The second-generation rights are claims to social equality, consisting of economic, social and cultural rights. They are positive rights in that they enhance the power of the government to do something for the person to enable her or him in some way. They display a highly social orientation in the sense that they evolve to temper the equally highly individualistic orientation of first-generation rights[3]. They are, however, generally interpreted as programmatic clauses, obligating governments and legislatures to pursue social policies, but do not create individual claims. They require the affirmative action of government for their implementation[4].

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1 Henry J Steiner & Philip Alston. 'International Human Rights in Context.'(1996) page 689

2 Akin Oyebode, 'U.N and the Protection of Human Rights in Africa' Africa and the U.N system: the first fifty Years (G.A Oblozor & A. Ajala eds. (1998).

3 N. J Udombana, Human Rights and Contemporary issues in Africa (2003) Malthouse Press Limited Lagos, page 48.

4 See Claude Welch jr. "Human Rights as a Problem in Contemporary Africa," in Human Rights and Development in Africa 11, 24 (Claude, Welch & Ronald I. Meltzer eds., 1984). The UDHR implies that every government and society should act for individual members to enable them to enjoy certain social and economic rights and benefits pertaining to social security, employment, housing, education, health care and the general standard of

These distinguishing characteristics stem from the drafters' intention that the Charter reflect and emphasize the influence of African traditions-to take "as a pattern, the African philosophy of law" and designed to "meet the needs of Africa"[5]. As was declared at one of the final drafting meetings, "As Africans, we shall neither copy, nor strive for originality, for the sake of originality. We must show imagination and effectiveness"[6].

With this normative framework, the African Commission on Human and Peoples' Rights, the Institutional organ of the Charter, is thus placed at a vantage position to "adopt a violations approach to the implementation of economic, social and cultural rights"[7]. as opposed to progressive realization benchmark required by the ICESCR. As a region with high level of poverty and under development, the Charter made a point of enshrining economic, social and cultural rights. This, potentially, places the Commission in a position to develop a corpus of pioneering jurisprudence on the protection of economic, social and cultural rights.

In this article, an attempt will be made to examine the Commission's application of the economic, social and cultural rights of the Charter, with a view to assessing the extent to which it is taking advantage of the Charter's integrated approach to human rights. An overview of the provisions of the Charter on these rights will be summarily given, then their interpretation within the

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living. See International Covenant on Economic, Social and Cultural Rights, G.A Res.2200A (XXI) U.N GAOR, 21ST Sess., Supp. No. 16, at 49, UN Doc. A/6316 (1966) (ICESCR)

5. "Meeting of Experts for the Preparation of the Draft African Charter on Human and Peoples' Rights." At 1, OAU Doc. CAB/LEG/67/3/Rev. quoted by N.J. Udombana 'Human Rights and Contemporary Issues in Africa' (2003) Malthouse, Lagos 121
6. *Ibid*
7. Odinkalu, C.A. Implementing Economic, Social and Cultural Rights, at 197

Commission's jurisprudence will be explored and finally conclusion and observations will be drawn from there.

AN OVERVIEW OF THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICAN CHARTER

The Charter, designed to function within the institutional framework of the OAU, (Now the African Union AU) establishes a system for the protection and promotion of human rights. Its provisions, reflecting the influence of U.N human rights instruments, have a stronger resemblance to the international Bill of Rights than to either the European or Inter- American Conventions on Human Rights.[8] The Charter is radically different from the European and Inter-American human rights systems in several ways: the Charter recognizes duties as well as rights; it codifies Peoples' as well as individual rights; and protects economic, social and cultural rights in addition to civil and political rights[9]

Therefore, the African Charter on Human and Peoples' Rights' integrated approach to codification of human rights marks a radical departure from the traditional bifurcation of international human rights into civil and political rights, on the one hand, and economic, social and cultural rights, on the other. The first generation rights are negative rights[10] , or immunity claims by citizens towards the State, in the sense that they limit the power of a government to

8. See Theo van Bovan, 'The Relations Between Peoples' Rights and Human Rights in African Charter' 7 Human. Right. L. J 183,186-90 (1986).

9. See O. Okere 'The protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: Comparative Analysis with European and American Systems' 6 Human Rights Quarterly 141(1984) Weston et al., 'Regional Human Rights Regimes: A Comparison and Appraisal,' 20 Vand. J Transnat'L. 585 (1987)

10. The terms "negative" and "positive" as used here are not value statements. Negative rights imply the states have to refrain from certain actions, and positive rights imply that they have to take certain actions. See N. J Udombana. Human Rights and Contemporary issues in Africa (2003) Malthouse Press Limited Lagos, page 47.

protect peoples' rights against its power. They relate to the sanctity of the individual and his rights within the socio-political milieu in which he is located[11]. They imply that no government or society should act against individuals in certain ways that would deprive them of inherent political or personal rights, such as the rights to life, liberty and security of person, freedom of speech, press, assembly and religion.[12]

The African Charter assumes a unique status among all the existing human rights instruments – regional and international – by incorporating all categories (generations) of rights into one single document[13], thereby providing an eloquent expression to the indivisibility and inter-dependence of human rights norms.[14] The

11. *ibid*
12. See e.g Universal Declaration of Human Rights Arts. 1-21, G.A. Res 217A(111), U.N GAOR 3d Session., UN Doc. A/RES/810, at 71 (1948). (Universal Declaration on Human Rights UDHR) International Covenant on civil and political Rights. G. A Res. 2200A(XX1). U.N GAOR. 21ST Session., Supp No.16. U.N Doc. A/6316 (1966) (ICCPR).
13. See Mutua, M. The Banjul Charter: The Case of an African Culture Fingerprint, in An Na'im, A. (ed): Cultural Transformation and Human Rights in Africa. (London, Zed Books Ltd. 2002) pp.68-71; Murray, R. The African Commission on Human and Peoples' Rights & international law (Oxford, Hart Publishers, 2000), pp. 10-11; Ankumah, E. The African Commission on Human and Peoples' Rights: Practice and Procedures (The Hague, Martinus Nijhoff Publishers, 1996) p. 59; Ouguergouz, F. The African charter on Human and People' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa (The Hague, Martinus Nijhoff Publishers, 2003) pp. 55-56; Odinkalu, C A Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights, in Evans and Murray (eds): The African Charter on Human and Peoples' Rights: The system in Practice, 1986 -2000 (Cambridge, Cambridge University Press, UK, 2002) at P. 188.
14. The need to treat human rights norms as indivisible was expressed in GA Res. 32/130 of 16th Dec.1977, which states: "All human rights and fundamental freedoms are indivisible and interdependent". This was further reiterated in GA Res. 41/117 of 4th Dec. 1986 & it was re echoed by the Vienna World Conference on Human Rights, 1993, vide paragraph 5 of Vienna Declaration, which provides that "All human rights are universal, indivisible, and interdependent and interrelated..."

Charter was one of the very few multilateral human rights treaties to recognize the indivisibility and interdependence of negative and positive rights. For example, the preamble to the Chatter provides:

> It is henceforth essential to pay a 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.[15]

These distinguishing characteristics stem from the drafters' intention that the Charter reflect and emphasize the influence of African traditions-to take "as a pattern, the African philosophy of law" and designed to "meet the needs of Africa."[16]

The economic, social and cultural rights provisions of the Charter are contained in Articles 14 to 18. The Rights guaranteed under these provisions range from rights to property, work, health, education to the right to protection of family.

Article 14 guarantees individuals right to property, which could only be encroached upon in the wider public interest and in accordance with the appropriate laws[17]. Notwithstanding the terseness of this provision and its subjection to "claw back" clause, it could be given the desired effect through the Commission's wide

15. African Chatter on Human and Peoples' Rights,June 27, 1981 OAU Doc. CAB/LEG/67/3/Rev5.21 I.L.M 58.
16. "Meeting of Experts for the Preparation of the Draft African Charter on Human and Peoples' Rights." At 1, OAU Doc. CAB/LEG/67/3/Rev. quoted by N.J. Udombana 'Human Rights and Contemporary Issues in Africa' (2003) Malthouse, Lagos 121
17. African Charter on human and Peoples' Rights Article 14

interpretative power[18] which enables it to draw from the jurisprudence of other human rights bodies[19].

Article 15 deals with the right to work in equitable and satisfactory conditions. Inadequacies of this provision, besides its brevity, include failure to extend protection to unemployed persons and to guarantee non-discrimination for equal pay based on gender[20]. Though it is acknowledged that the equal pay stipulated by the provision presupposes non-discrimination on any account, but since equality of workers of different sexes is not always,[21] the case especially in African context it would have been a good idea to lay emphasis on gender equity in this regards. Furthermore, the phrase, "equitable and satisfactory" working conditions, is very subjective and no precise definition is provided for it, as does Article 7 of ICESCR.[22]

Article 16 incorporates the right to health. This Article, taking a cue from its ICESCR[23] counterpart, comes in two parts the first part deals with the statement of the right while the second contains the states' obligation of the measures to be adopted for the realization of the right.

Article 17, on the other hand, makes provision for the right to education and to freely partake in the cultural life of the community. This Article is bereft of any detail apart from its proclamation of states' duty to promote and protect "morals and traditional values recognized by the community."[24] This is in contrast to elaborate

18. See generally Articles 45(3), 60, 61.
19. Murray, R. The African Commission on Human and Peoples' Rights & international law (Oxford, Hart Publishers, 2000), at 25
20. Ouguergouz, F. The African charter on Human and People' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa (The Hague, Martinus Nijhoff Publishers, 2003) at 183
21. *Ibid*
22. The rights to work have been covered in Article 6-9 of ICESCR, 1966, where detailed guaruntees were provided, from conditions of work to the right to strike. See generally Ouguergouz, id. at 184
23. ICESCR, Article 12
24. African Charter on Human and Peoples' Rights, Article 17

provisions made by the ICESCR on the right to education, which covers a wide range of issues, from free primary education to the protection of intellectual property and scientific creativity[25]

Article 18 provides for the right to protection of family and certain categories of persons. This Article seems to be the most detailed of all the provisions of the charter dealing with the economic, social and cultural rights. It guarantees the protection of family, women and children, the aged and disabled persons[26] respectively.

The foregoing provisions of the African Charger form the core and the basis of the economic, social and cultural rights; these provisions are not spared of criticisms as they were described as "significant letdown from the promise of the preamble."[27]

Most of these criticisms ignore the wide interpretative latitude the Charter conferred on the African Commission,[28] as remarked by Judge K. Mbaye thus:

> The relatively simple wording of the Articles was thus designed to permit degree of flexibility in the application and subsequent interpretation by future users of the legal instruments, *the task of adding to the Charter being left to human protection bodies*[29] (Emphasis added)

25. See ICESCR, Article 13,14 & 15
26. The African Charter, Article 18(2), (3) & (4)
27. Oloko-Onyago,J. Beyond the Rhetoric: Reinvigorating the struggle for Economic and Social Rights in Africa, California Western International Law Journal, 26 (1995) at 51
28. Odinkalu, C.A. Implementing Economic, Social and Cultural Rights, supra, at 193
29. Keba Mbaye, J. the Chairman Committee of Experts who produced the Charter, made this remark at the 1st Ministerial Conference in Banjul, 9-5 June 1980, cited in Ouguergouz, F, op cit, at 199

Whether the African Commission has taken up this challenge, in taking the lead on this crucial aspect of human rights norms is what we are going to explore in the proceeding paragraph.

THE COMMISSION'S JURISPRUDENCE ON ECONOMIC, SOCIAL & CULTURAL RIGHTS

The Banjul Charter created the African Commission on Human and Peoples' Right with the mandate to "promote human and peoples' rights and ensure their protection in Africa"[30] through the promotion, protection and interpretation of the provisions of the Charter[31]. The Commission was inaugurated on November 2, 1987[32]. The Commission consists of eleven members, each elected for six-year renewable terms[33]. These members are elected by secret ballot by the AU Assembly of Heads of State and Government, from list of persons nominated by States parties to the Charter[34]. Each member serves in her or his personal capacity[35], while not more than one national of the same African State may serve on the Commission at any one time.[36]

The Commission has three primary functions; to promote, to protect and to interpret the provisions of the Banjul Charter. In terms of promotion, the Commission is empowered to collect

30. African Charter on Human and Peoples' Rights, June 27, 1981 OAU Doc. CAB/LEG/67/3/rev.5 21 I.L.M. 58 (1982) entered in to force Oct. 23 1986. Article 30
31. Article 45
32. The commission adopted rules of procedure in 1988, revised them 1995 "in order to fill some gaps, remove some bottle-necks and correct some mistakes" See U.O Umozurike, The African Chater on human and peoples' rights 26 (1997)
33. See Article 31, 36.
34. See Article 33 persons nominated are to be " from amongst African personalities of the highest reputation, known for their high morality, impartiality and competence in matters of human and peoples' rights" See Article31(1)
35. See Article 31(2)
36. See Article 32.

documents, undertake studies and research, organize seminars and symposia, disseminate information, and make recommendations to governments, encourage national and local human rights institutions, enunciate principles and rules, and cooperate with other African and international human rights institutions[37].

Secondly, the Commission is empowered to interpret the provisions of the Banjul Charter whenever it is so requested by "a State party, institution of the AU, or an African Organization recognized by the AU"[38]. Similarly, pursuant to Article 60 and 61 of the Charter, this interpretation must be undertaken in light of international human rights law, such as that enshrined in other African human right instruments, the U.N Charter, the AU Charter, the UDHR, and other specialized conventions ratified by States Parties

Finally, the Commission has the protective mandate to "ensure the protection of human and peoples' rights under conditions laid down by the Charter"[39]. To protect these rights, the Charter provides for the reception of "communication" (i.e. complaints) of human right violations by both States Parties to the Charter and private individuals, including NGOs[40]. Following consideration of a complaint, the commission is required to prepare a report stating the facts and its findings and transmit that report to States concerned and to the Assembly of Heads of State and Government[41]. Thereafter the fates of the reports are left to the competence and conscience of Heads of State and Government.[42]

Although the number of cases decided by the African Commission on human and peoples' Rights, on this aspect of the Charter, is relatively few at the beginning; the jurisprudence it

37. See Article 45
38. See Article 45(3)
39. See Article 45(2)
40. See Article 47-51
41. See Article 52
42. N.J. Udombana *op cit* note 4

developed in the process, constitutes a radical pioneering precedent in this field. Furthermore, with passage of time this has transcended and developed into a more comprehensive number of cases. The creativity of the Commission in reading some rights into the economic, social and cultural provisions of the Charter is quite encouraging as it expands the frontiers of these rights, as will be seen in some of the cases below.

In *Union Interafricaine des Droits de l'Homme et al v. Angola*[43], the Commission was called upon to consider a violation of a range of rights enshrined in the Charter by Angola in respect of its collective expulsion of other West African nationals. The Commission held, albeit *obiter*, thus;

> Mass expulsion of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations, 'constitutes a special violation of human rights.' This type of deportations calls into question a whole series of recognized and guaranteed rights in the Charter: such as the right to property, the right to work, the right to education..."[44]

In yet another case of *Media Rights Agenda and Constitutional Rights Project v. Nigeria*,[45] the Commission had an occasion to consider the measures taken by the Nigerian Government against the

43. Communication 159/96, Eleventh Annual Activity Report 1997-1998, vide Compilation of the Decisions on Communications of the African Commission on Human and Peoples' Rights: Extracted from the Commission's Activity Reports, 1994 – 2001 (Banjul, The Gambia, Institute for Human Rights and Development, 2002)p.10

44. Id, p.31-32 at paragraphs 16-17, where the Commission found violation of Articles 14,15,17 and 18 of the Charter.

45. Communications 105/93, 128/94, 130/94 & 152/96: Twelfth Activity Report, 1998-1999,id at 286

press, in the wake of the annulment of June 12, 1993 elections. The 'measures' which, *inter alia*, include sealing up of two magazines premises and seizures of their copies, for criticizing government, were held to amount to violation of Article 14. In reaching this conclusion the Commission reasoned thus,

> The right to property necessarily includes a right to have access to property of one's own....The Decrees which enables these premises to be sealed up and for publications to be seized cannot be said to be 'appropriate' or in the interest of the public or the community in general. The Commission holds violation of Article 14. In addition the seizure of the magazines for reasons that have not been shown to be in the public need or interest also violates the right to property."

Dr. Ouguergouz[46] commends the creativity of the commission in placing restrictive interpretation on the limitation clauses of the Charter for better protection of individual's rights. Similar decision, circumventing the limitation clause, was reached in *Huri-Laws v. Nigeria*[47] Similarly, in the consolidated cases of Mauritania,[48] the Commission found violation of Article 14, among others on the Mauritanian eviction of Blacks from their homes.

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46. Ouguergouz, F. op cit, at 155
47. Communication 225/98, 14th Activity Report, 2000-2001, paragraphs 52-54, supra, , at 300
48. Communication 54/91,61/91,98/93,164/97 & 210/98, Malawi African Association: Amnesty International: Ms Sarr Diop, Union Interafricaine des Droit de l'Homme and RADDHO; Collectif des veuves et Ayants-droits: Association Mauritanienne des Droits de l'Homme v. Mauritania, thirteen Annual Activity Report, 1999-2000, Addendum

On the right to work the *locus classicus* is the Cameroonian case of *Annette Pagnoulle (on Behalf of Abdoulaye Mazou) v. Cameroon*[49] where the Government of Cameroon's removal of a magistrate from his job and his illegal detention and refusal to reinstate him after his release was held to amount to violation of his right to work under satisfactory and equitable conditions as stipulated by Article 15 of the Charter. In the same token, the Commission found violation of this Article in the Angolan case[50] of mass expulsion of West African nationals.

On the right to health, the Commission found violation of Article 16 in four (joined) Zairian cases of; *Free Legal assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v. Zaire.*[51] In these communications allegation of mismanagement of public funds, which led to the failure to provide of basic services, medicine and other infrastructures on the part of Government, was made against Zaire. The commission in its finding of violation against the Government held that the

> [F]ailure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16.[52]

In a Nigerian Case where allegation of denial of access to medical care to a detained journalist was made, the Commission held thus:

49. Communication 39/90, Eighth Activity Report, 1994-1995; Tenth Annual Activity Report, 1996-1997, paragraph 30, Compilation, supra, at 62
50. Communication 159/96, supra, at 10
51. Communication 25/89,47/90,56/91 & 100/93, 9th Annual Activity Report, 1995-1996, at 358
52. *Ibid*, paragraph 47

> The responsibility of the government is heightened in cases where the individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the activities of the authorities. To deny a detainee access to doctors while his health is deteriorating is a violation of Article 16.[53]

Similar findings of violation of Article 16 of the African Charter were made by the commission in the Malawian[54] and Mauritanian cases respectively. Allusion of violation of this right was also made in the case of *Ken Saro-Wiwa Jr.*[55]
On Article 18, the commission's decision in the oft-referred case of Angolan mass deportation[56] is very instructive. It held thus:

> This type of deportation ... results in the violation by the state of its obligation under Article 18 paragraph 1, which stipulates, "the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health." By deporting the victims, thus, separating some of them from their families, the Defendant State has violated ... the letter of this text.

In related facts in the case of *Amnesty international v. Zambia*[57] in which the Government of Zambia deported two prominent opposition politicians to the neighboring state of Malawi, the Commission held that:

53. Media Right Agenda, *et al.* v. Nigeria, supra.
54. *Ibid*, paragraph 88
55. Communications 54/91,61/91,98/93,164/97 & 210/98, supra.
56. Communications 137/94,139/94,15/96 & 161/97; Twelfth Annual Activity Report, 1998/1999
57. Communication 212/98, Twelfth Activity Report, 1998 - 1999

> The forcible expulsion of Banda a Chinula by the Zambian government has forcibly broken up the family unit, which is the core of society there by failing in its duties to protect and assist the family as stipulated in Article 18 (1) and Article 18 (2) of the Charter.[58]

The Commission also held that "arbitrary detention" amounts to violation of Article 18, in the case of ***Malawi African Association, et al v Mauratania***[59] in the fallowing terms:

> ...,holding people in solitary confinement both before and during the trial, and during such detention, which is, on top of it all arbitrary, depriving them their right to a family life constitutes a violation of Article 18(1)

In John k. Modise v. Bostwana[60] the Respondent State rendered the complainant stateless by canceling his nationality and deporting him to a strip of land on its border with South Africa, known as "no-man's land". The Commission held this to be a violation of the dignity of human being, under Article 5 and offends the right to family life.

Further more, the Commission handed down a landmark decision in the case of *Social and Economic Rights Action Centre/Center for Economic and Social Rights v. Nigeria*[61] where it read a number of fundamental rights into the Charter, such as right to food, housing and clean environment. The

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58. Id, paragraphs 50 - 51
59. Communication 54/91, 61/91, 98/99, 164 – 196/97 & 210/98, supra
60. Communication 93/97, Tenth Activity Report, 1996 – 1997, ibid at pp. 17 - 23
61. Communication155/96, (caseNo.ACHPR/COMM/A044/1), available at http://www.umn.edu/humanrts/africa/comcases/allcases.html, last visited April 7, 2013

Commission found violation of the above fundamental rights holding that "when housing is destroyed, property, health and family life are adversely affected."[62]

In a much more recent development regarding the Commission's interpretations of the Charter's provision on economic, social and cultural rights the previous position of the Commission was further upheld and re – iterated. Some of these decisions include the followings:

In 2010 the Commission in *Kenneth Good v Republic of Botswana*[63] found the Republic of Bostwana in violation of Article 18 of the African Charter on Human and Peoples Rights when the applicant's teaching job at the University of Botswana was terminated after his expulsion from the country. The Complainant was declared by the Government of Botswana as "undesirable inhabitant" in the country and thus deported him thereby separating him from his family. In that case Mr. Kenneth Good, an Australian national on 31 May 2005. It is submitted that in February 2005, in his capacity as Professor of Political Studies at the University of Botswana, he co-authored an article concerning presidential succession in Botswana. The article criticized the Government, and concluded that Botswana is a poor example of African presidential succession. The Complainants submit that, on 18 February 2005, the President of Botswana, exercising the powers vested in him by section 7(*f*) of the Botswana Immigration Act, decided to declare the victim an undesirable inhabitant of, or visitor to, Botswana. The victim was not given reasons for this decision, nor was he given any opportunity to contest it. On 7 March 2005, the victim launched a constitutional challenge in the Botswana High Court. On 31 May

62. Shelton, D., International Decisions: Decision Regarding Communication 155/96 (*Social and Economic Rights Action Centre/Centre for Economic and Social Rights v. Nigeria*), 96 A.J.I.L. 937 (Oct. 2002)

63. Communication 313/05 *28th Activity Report of the African Commission on Human and Peoples' Rights*, ***Executive Council Seventeenth Ordinary Session 19 – 23 July 2010 Kampala, Uganda*** Ex.CL/600(Xvii) Annex Iv

2005, the High Court dismissed the application ruling that Section 7 (f) of the Botswana Immigration Act relates to what the President considers to be in the best interest of Botswana, and Sections 1(6) and 36 of the same Act make the President's declaration unassailable on the merits. On 31 May 2005, the victim was deported from Botswana to South Africa.

In the case of *Purohit and Moore v. The Gambia*[64] The Complainants are mental health advocates, submitting the communication on behalf of patients detained at Campama, a Psychiatric Unit of the Royal Victoria Hospital, and existing and 'future' mental health patients detained under the Mental Health Acts of the Republic of The Gambia. The Commission found the Republic of The Gambia in violation of Articles 2, 3, 5, 7 (1)(a) and (c), 13(1), 16 and 18(4) of the African Charter and strongly urged the Government of The Gambia to -:

> (a) Repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in The Gambia compatible with the African Charter on Human and Peoples' Rights and International Standards and Norms for the protection of mentally ill or disabled persons as soon as possible;
>
> (b) Pending (a), create an expert body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release;

64. Communication 241/2001, Sixteenth Annual Activity Report of The African Commission on Human and Peoples' Rights 2002 – 2003 adopted at the 23rd Ordinary Session of the Commission. The Sixteenth Annual Activity Report covers the 32nd and 33rd Ordinary Sessions of the African Commission respectively held from 17th to 23rd October 2002 in Banjul, The Gambia and from 15th to 29th May 2003 in Niamey, Niger.

(c) Provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia.

Furthermore in ***Bah Ould Rabah Vs. Mauritania***[65] the Communication alleged that in November 1975, four years after the death of his mother, Mr. Bah Ould Rabah, a Mauritanian national (the plaintiff) and his family were forcefully expelled from their ancestral domicile by the man named Mohamed O. Bah on the grounds that the mother of the plaintiff, the late Aichetou Valle, was his slave and that subsequently, the house bequeathed to her descendants and the whole estate around it became legally his

Property the alleged "owner" of the deceased. When the plaintiff approached them, the local authorities and the courts decided in favour of his opponent and the Supreme Court upheld this decision. The plaintiff wrote to the highest authorities, including the President of the Republic, to contest this decision, which he qualifies as "flagrant support of the Government to the illegal institution of slavery". To date, however, he has received no reply. Based on the foregoing facts:

a) The African Commission considers that the dispossession of the plaintiff of part of his mother's heritage, through a donation without well-substantiated reasons, constitutes a violation of

65. Communication 197/1997 – Bah Ould Rabah/Mauritania, held at the 35th Ordinary Session held in Banjul, The Gambia from 21st May to 4th June 2004.

Article 14 of the African Charter on Human and Peoples' Rights.

b) The African Commission recommends to the Government of the Islamic Republic of Mauritania to take the appropriate steps to restore the plaintiff his rights.

However in ***Association Pour la Sauvegarde de la Paix au Burundi /Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia***[66] The communication was submitted by the *Association Pour la Sauvegarde de la Paix au Burundi* (ASP-Burundi, Association for the Preservation of Peace in Burundi), a non-governmental organisation based in Belgium. The communication pertains to the embargo imposed on Burundi by Tanzania, Kenya, Uganda, Rwanda, Zaire (now Democratic Republic of Congo), Ethiopia, and Zambia following the overthrow of the democratically elected government of Burundi and the installation of a government led by retired military ruler, Major Pierre Buyoya with the support of the military.

The Communication complained, *inter alia*, that the embargo violates -:

- Article 17 (1) of the African Charter, because the embargo prevented the importation of school materials;
- Article 22 of the African Charter, because the embargo prevented Burundians from having access to means of transportation by air and sea;

The Commission found that the Respondent States are not guilty of violation of the African Charter on Human and Peoples' Rights as alleged bearing in mind of the entry into force of the Burundi Peace and Reconciliation Agreement, alias Arusha Accords, and

66. Communication 157/1996 - *Association Pour la Sauvegarde de la Paix au Burundi vs Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*

that the Respondent States in the communication are among the States that have sponsored the said Accord.

Similarly the Commission noted the efforts of the Respondent States aimed at restoring a lasting peace, for the development of the rule of law in Burundi, through the accession of all Burundian parties to the Arusha Accord. It also welcomed the entry into force of the Constitutive Act of the African Union in 2000 to which the Republic of Burundi and all the Respondent States are now party, and which also provides for the promotion and respect of human and peoples' rights and the explicit censure of States that "comes to power by unconstitutional means"[67].

This radical position, as interestingly depicted by the various decisions of the Commission pertaining to the provisions of the Charter on economic social and cultural rights appears to be sound and encouraging. This has immeasurably improved on the awareness of the citizens, and strengthened the social and economic will of the African populace on the justiceability of these rights. This is notwithstanding the tagging of those Rights, by the Constitution of the Federal Republic of Nigeria 1999[68] as mere Fundamental Objectives and Directive Principle of State Policy, which are presumably unenforceable by the Nigerian courts.

CONCLUSION

The astute identification of the rich and overwhelming Jurisprudence of the African Commission on the economic, social and cultural rights does not seem to completely settle the dust on the initial difficulties of the non-justiceability of these Rights by the citizens under the municipal law. In fact, it was submitted[69] that in the area of protection of human rights, the Commission stands a

67. This decision was done at the 33rd Ordinary Session held in Niamey, Niger from 15th to 29th May 2003
68. Chapter II
69. N. J. Udombana op cit page 125

toothless bulldog. The Commission can bark-it is, in fact, barking. It was not, however, created to bite. Despite its seemingly broad mandate and powers, the Commission suffers from many structural deficiencies. The power of the commission to "protect" human rights in the region is crippled by the commission's lack of enforcement power or any remedial authority. Those decisions of the Commission in relation to the Economic, Social and Cultural Rights may still be entangled given the absence of a systematic enforcement mechanism within the African Charter.

Therefore, the decisions of the Commission remain merely declaratory. We can see in all the cases involving these economic social and cultural right, there is still no process on the ground to ensure compliance by the appropriate authorities because of the absence of enforcement mechanism. More therefore is still needed to be done on this issue so that the gains of the identification of the rights and 'judicial' pronouncements on them by the Commission may be consolidated.

ENVIRONMENTAL JUSTICE IN THE NIGER DELTA AND CORPORATE ACCOUNTABILITY FOR TORTS: *KIOBEL* AS IMPETUS FOR THE ENACTMENT OF PETROLEUM INDUSTRIES LEGISLATION IN NIGERIA

By

RUFUS AKPOFURERE MMADU*

ABSTRACT

The search for Environmental Justice in the Niger Delta and Corporate Liability for Tort is the focus of this paper. It examines the concept of corporate accountability for tortuous acts and faults the recent judgment of the United States Supreme Court in Kiobel vs. Royal Dutch Petroleum Co. et al, No. 06- 4800, 2010 U.S. App (Kiobel). The paper through expository methodology, argues that the US Supreme Court decision is a miscarriage of justice against a people so callously and criminally oppressed. The Court's pronouncement that corporations cannot be held liable for egregious abuses under international law is not only alien to its past decisions, but also a mockery of the global war against environmental injustice. The paper finds that the United States posture in Kiobel is aimed at avoiding a situation where foreigners would invade its jurisdiction as a platform for outsourcing of justice. The paper concludes that Nigeria as a nation cannot continue to shy away from its problems and looking up to foreign jurisdictions for rescue. Kiobel, rather than weaken the fight for environmental justice should be seen as a wake-up call for Nigeria to enact petroleum industries legislations that would ensure justice to the Niger Delta people for any act of environmental degradation or wrong.

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INTRODUCTION

Does Justice have a boundary? Is Justice territorially jurisdictional in scope? Is it true that the philosophical notion of 'good' and 'bad' is relative from society to society, or has it not been said that what is good for the goose is also good for the gander? It is not surprising therefore that the dust raised by the United States Supreme Court majority decision in *Kiobel v. Royal Dutch Petroleum Co,*[1] *(Kiobel)* that dismissed an Alien Tort Statute[2] (ATS) case against Shell and its Nigerian subsidiary in September 17, 2010 for lack of subject matter jurisdiction is yet to settle among legal scholars and environmental activists.[3] The court held that corporations are not

1. *Kiobel v. Royal Dutch Petroleum Co. et al.*, No. 06- 4800, 2010 U.S. App. LEXIS 19382, at 1 (2d Cir. Sept. 17, 2010). Nigerian plaintiffs filed *Kiobel* in 2002, alleging that Royal Dutch Petroleum Company and Shell Transport and Trading Company, through a subsidiary, collaborated with the Nigerian government to commit human rights violations to suppress lawful protests against oil exploration in the Ogoni region of the Niger Delta. In 2006, the district court granted in part and denied in part the defendants' motion to dismiss the suit. In particular, the district court granted the motion to dismiss for the claims of aiding and abetting extrajudicial killing, forced exile, property destruction, and violations of the rights to life, liberty, security, and association, holding that customary international law did not define these violations with the specificity required by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
2. The Alien Tort Statute reads: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States' - 28 U.S.C §1350 (2010). The Alien Tort Statute is a well known tool that grants U.S. federal courts jurisdiction over civil suits brought by aliens for torts committed in violation of international law. The statute has been used for the past three decades to hold perpetrators of human rights abuses accountable in U.S. courts.
3. Ho, Virginia Harper, 'Theories of Corporate Groups: Corporate Identity Reconceived,' *Seton Hall Law Review*: Vol. 42 Issue 3 (2012); available at <http://erepository.law.shu.edu/shlr/vol42/iss3/2 > accessed 20 September 2013. See also Erin Foley Smith; 'Right to Remedies and the Inconvenience of *Forum Non Conveniece*: Opening U.S. Courts to Victims of Corporate Human Rights Abuses'. 146 *Columbia Journal of Law and Social Problems'*, 44:145; Angela Walker, 'The Hidden Flaw in *Kiobel* Under the Alien Tort

proper defendants under the Alien Tort Statute.[4] It noted that customary international law defines those who are subject to human rights norms and establishes who can be liable for violating those norms and that since no corporation has ever been liable for human rights torts in an international tribunal, the corporate defendants in *Kiobel* could not have committed a 'violation'. The Court held that corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide.

For the past two decades, plaintiffs' lawyers have used the US Alien Tort Claims Act (ATCA), to file lawsuits against multinational oil and gas corporations among other, alleging serious human rights abuses including environmental degradation. The ATCA which passed as part of the Judiciary Act of 1789 is a jurisdictional statute that creates no causes of action.

It grants the United States' Federal Courts the right to accept private claims for a reasonable number of international law violations under Federal Common Law. The statute provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the Law of Nations or a treaty of the United States.

It is axiomatic that the human rights regime – as it relates to corporate responsibilities in Nigeria is somewhat rudimentary. For example, although globalization has provided massively profitable opportunities to oil companies in the Niger Delta region, and together with other multinationals, the opportunity to operate legally and abuse weak regulatory structure so as to maximize profit, the native inhabitants frequently continue to suffer.

Statute: The *mens rea* Standard for Corporate Aiding and Abetting is Knowledge', *Northwestern Journal of International Human Rights* (2 0 11) vol: 10:2; Tyler Giannini and Susan Farbstein; 'Corporate Accountability in Conflict Zones: How *Kiobel* Undermines the Nuremberg Legacy and Modern Human Rights', *Harvard International Law Journal*', Online Volume 52 Article Series 2010.

4. 621 F.3d 111, 120 (2d Cir. 2010).

The theory of corporate responsibility for human rights protection is now a seminal part of international law. Building upon the traditional notion whereby international law generally places duties on states, and more recently, individuals and corporations.

Although the United States and other developed countries recognise human rights protection due to corporate unethical activities, the Nigeria's government continues to argue that the duty to protect against human rights violations by third parties rests with the state.

The government has frequently failed to meet its obligations to respect, and protect human rights in the Niger Delta, while providing security to the oil industry, because of its importance to the economy. Protest by host communities and interest groups have been severally met with stiff resistance including sometimes the use of the Police to intimidate innocent protesters thereby leaving this paper with the conclusion that the oil companies enjoy protections from the government at the pain of victims of environmental abuse. The government and the courts have consistently discouraged the institution of these law suits, hence the filing of the much celebrated Nigerian case of *Kiobel v. Royal Dutch Shell et al*[5] in the US Federal District Court of New York.

The Petitioners are Nigerians who were residents of Ogoni land, an area of 250 square miles located in the Niger Delta, and populated by roughly half a million people. Petitioners filed an ATCA action alleging that after concerned residents of Ogoni land began protesting the environmental effects of Shell's practices, respondents enlisted the Nigerian Government to violently suppress the burgeoning demonstrations – beating, raping, killing, and arresting residents and destroying or looting properties. Petitioners further allege that respondents aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation as well as by allowing the

5. *Kiobel v. Royal Dutch Petroleum Co. et al, supra* n 1.

Nigerian military to use respondents' property as a staging ground for attacks.

The US Supreme Court in its decision held that the ATCA is generally presumed not to apply to conduct occurring in the territory of another country. However, the Court suggested that if the 'claims touch and concern the territory of the United States ... with sufficient force,' the presumption against extraterritorial application might be displaced. What claims may be brought under the ATCA after the *Kiobel* decision and legal remedies for potential claims against oil majors in Nigeria remain an open question?

Has the *Kiobel* decision put a stop to ATCA actions by parties alleging human rights abuse in foreign countries such as Nigeria? What impact does *Kiobel* has in the search for environmental justice in Nigeria's Niger Delta Region? What hope have victims of environmental degradations against oil multinational for torts committed by them? What is the nexus between corporate political speeches granted corporations in *Citizens United*[6] and the concept of corporate liability? To what extend can the global war against environmental degradation be fought and possibly be won when the indexes of achieving justice are daily been caged in web of technicalities?

No doubt God saw that all that was created was beautiful and he gave man dominion over every other creature including his environment.[7] But today, what an ironical world we live in! Man

6. See *Citizens United v. Federal Election Commission, No. 08-205. Citizens United* held that the Bipartisan Campaign Reform Act of 2002 violated the First Amendment, which declares that Congress shall make no law infringing the freedom of speech. They agreed that their decision was contrary to the *Austin vs. Michigan Chamber of Commerce* precedent, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and the *McConnell vs. Federal Election Commission* precedent, a 2003 decision that upheld the part of the Bipartisan Campaign Reform Act of 2002. They therefore overruled those decisions as well as repealing a century of American history and tradition.

7. See the Holy Bible, Genesis Chapter 1 verse 31.

inhumanity to man in the name of industrialization! How can a man be free and happy when his environment is abused and degraded? When the quality of air he breathes is fouled and unhealthy. The water he drinks is impure and contaminated by chemical, toxic and hazardous substances? The food he eats is contaminated with toxic, hazardous and carcinogenic substances? Above all, he is daily confronted with the threat of environmentally-related diseases characterized by dengue fever, bird flu, SARS, HIV/AID, malaria, among other things. This is the picture of the world in which humankind by his own activities has undertaken a voyage of self-destruction in the guise of development.[8]

Research has shown that the Niger Delta of Nigeria is one of the world's most sensitive ecological areas.[9] It is one of the world's largest wetlands, the largest in Africa. It encompasses 20,000 square kilometres.[10].

Crude oil was first discovered in commercial quantity in 1957 in Nigeria at Oloibiri in the River State and the first export made in 1958.[11] There has been no looking back since then. In fact, for example, Nigeria had a production figure of 2.04 million barrels per day.[12]

By its admission, Shell produces 50 percent of Nigeria's oil output, records an average of 221 spillages a year.[13] Most of the spillages arose from aging and obsolete facilities, malfunctioning equipment and poor operational standards.

Part 2 of this paper examines the degradations and impact of exploration activities in the Niger Delta Region of Nigeria. From

8. Amokaye O.G., *Environmental Law and Practice in Nigeria* (Lagos, Unilag Press, 2004) Chapter 15 at p. 661.
9. *ibid.*
10. See Human Rights Watch, *The Price of Oil* (New York: Human Rights Watch, 1999), p. 53.
11. See Olisa M.M, *Nigeria Petroleum Law and Practice* (Ibadan: Fountain Books Ltd., 1987), p.2.
12. See The Guardian, February 19, 1998, p. 21.
13. Amokaye O. G., *supra* n. 8.

Ogoni in Rivers State to River Ethiope in Sapele of Delta State, the story is the same – massive destruction and degradation of the environment sometimes leading to loss of lives including aquatics lives and wide lives. Part 3 takes a look at human rights that benefits sustainable environment and attempts a chronicle of the search for environmental justice. Part 4 examines the international dimension to the search for environmental justice in Nigeria focusing on the effect of the recent US decision in *Kiobel*. The paper attempts a critic of the ratio decidendi of the *Kiobel's* case and questions the correctness of the judgment. In Part 5, the article is concluded and recommendations made.

DEGRADATIONS AND IMPACT OF EXPLORATION ACTIVITIES IN THE NIGER DELTA

Spillage pollutes the surrounding creeks and mangrove forests killing aquatic life, plants and animals. The industry's total annual spillage is estimated by the World Bank to release 2,300 cubic meters of oil into the environment every year.[14] Mangrove forest is particularly vulnerable to oil spills. There, the soil soaks up the oil and releases it every rainy season.

Surveys are usually done to determine the availability and location of oil deposits. The thick mangrove forest has to be cut open to lay seismic lines. Holes are drilled at points where the lines meet and dynamites are put into these holes. These are exploded at the same time. With the destruction of vegetation and the resultant loose soil, erosion sets in due to denudation.[15]

The environment is also degraded by the discharging of oil-contaminated water into inland and coastal waters. For Nigeria's one million barrels of oil per day, two million barrels of

14. Shell, again by its own admission, has not cut 120,000 kilometres of tracks in the Delta in the last 40 years.
15. See Ray Onyegu, 'Legal Framework for the Protection of Oil Producing Communities in Nigeria', 2:2 *Living_1*, 7 (April - June 1998).

contaminated water are discharged into the environment.[16] The gas is also flared which adversely affects flora and fauna around the site. This depletes the ozone layer which protects the earth's surface from the sun's radiation.[17]

According to Uchegbu:

> Oil pollution has a deleterious effect on human beings and marine life. It constitutes a hazard to organisms. As the oil producing states are usually reverine, oil spills contaminate their water which is their main source of survival and makes unfertile the little land they have.[18]

In August 2011, the United Nation Environmental Programme (UNEP) requested an initial $1 billion to clean up the area – a task that will take an estimated 25-30 years.[19] In response to the UNEP report, Shell insisted that the majority of the oil spills in Nigeria are caused by sabotage, theft and illegal refining and urge the Nigerian authorities to do all they can to curb such activity, and that they would continue working with their partners in Nigeria, including the government, to solve these problems and on the next steps to help clean up Ogoniland.[20] But the sad reality on ground in the Niger Delta is that oil companies have largely bought out the Nigerian government to turn the other way to environmental and human rights abuses. Graft and corruption are unbridled. Those who will

16. Amokaye O.G., *supra* n. 8.
17. See Moffat Ekoriko, 'More Evidence of Oil Devastation' 2.5 *Africa Today* 30 (Sept. /Oct. 1996).
18. Uchegbu A., 'Legal Framework for Oil Spill and Clean-Up Liability and Compensation in Nigeria', in *The Petroleum Industry and the Nigerian Environment* (Proceedings of the 1983 International Seminar, NNPC, Lagos, 1984), p. 33.
19. <http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentofOgonilandreport/tabid.> accessed 20 September 2013.
20. *Ibid.*

are be bought are considered enemies of the state, and this is what largely appeared to have happened to the 'Ogoni Nine'.[21]

This paper finds that oil exploration has been a curse on the Niger Delta region. The lot of the people of this area has not improved notwithstanding the several billions of dollars generated from oil exploration. There are no good roads, no good drinking water, and no health and social facilities. The injustice is being underlined by the huge profits extracted from their land by the international oil prospectors. The prospectors around live in 'paradise', complete with all sophisticated modern day facilities, while the host communities cannot boast of even a basic need like electricity. The oil bearing areas are merely beast of burdens with their farms and fishing grounds damaged. They seem marked out for extinction. Today's situation in the Niger Delta is comparable to the then apartheid South Africa or the ethnic cleansing going on in the former Yugoslavia. This comparison is not far from reality, for their results are similar.

A feature of multinational corporations is their double standard. One standard is to concentrate on productive investments in their countries of origin while the other is to invest mainly in extractive industries in the developing countries. They ship their profits away to their respective countries. This practice cast doubts on the usefulness of multinational corporations in developing countries.[22]

A recurring patterns of environmental abuses that sparks human rights abuse is one in which outside interest, generally multinational corporations, are exploiting mineral resources, timber and other natural resources, in the developing countries. Repression of local communities including indigenous people appears to be the most convenient way to pursue 'development' in frontier lands. This contrast with what obtains in their home countries. A well-known

21. <www.oilprice.com> accessed 30 May 2013.
22. See Arthur A. Nwankwo, *Can Nigeria Survive?* (Enugu: Fourth Dimension Publishers, 1981) p.5.

example is Ken-Saro Wiwa who was hung by late General Sani Abacha's government in 1996 along with several other activists, for raising environmental concerns about oil exploration by Shell Petroleum Development Company in their native Ogoni land.

Thus at the community level, the companies are faced with increasing protest directed at oil company activities and the lack of development in the delta. These have included incidents of hostage taking, closures of flow stations; sabotage, and intimidation of staff. The Niger Delta has for some years been the site of major confrontation between the people who live there and the Nigerian government security forces, resulting in extra-judicial executions, arbitrary detentions, and draconian restrictions on the rights to freedom of expression, association, and assembly.[23]

In addition, environmental degradation often implicates the peoples' right to property. Indigenous people are particularly vulnerable to environmental threats as they are often completely dependent on their immediate environment for survival. To the traditional people, environment and more particularly land, is the essence of human-self-definition, economic and cultural survival; destruction of which is considered a threat to the society.[24] They till the land for farming; depend on the water bodies for water and fish, and the air for survival. For them, the environment and the constituent elements are not merely a possession and a means of production, but an intrinsic part of their social, economic, political and spiritual survival. Land as a species of the environment is, therefore, not to be abused or degraded, but a material element to be cherished, preserved and enjoyed by present and future generation.

23. Human Rights Watch, 'The Price of Oil', (New York: Human Watch, 1999).
24. Elias once remarked that the relation between group and the land they hold is invariably complex since the rights of individuals and the group with respect to the same piece of land often co-exist within the same social context. See, T. O. Elias, *Nigerian Land Law*, (Sweet and Maxwell, London 4th edn, 1971) p. 73.

HUMAN RIGHTS AND THE SEARCH FOR ENVIRONMENTAL JUSTICE.

Environmental Rights under International Treaties

Nigeria is a signatory to several international human rights instruments aimed at promoting fundamental human rights and securing quality life including healthy environment for the Nigerian people.[25] Environmental rights, as reasoned by the liberal human right scholars such as Karl Polanyi and J.G. Merquior can be derived from the following rights: the right to life,[26] the freedom from interference with a person's privacy, family, home or correspondence,[27] the right of every one to an adequate standard of living for himself and his family,[28] the right of every one to the enjoyment of the highest attainable standards of physical and mental health.[29] They expanded and reinterpreted the civil and social rights in the Universal Declaration of Human Right (UDHR),[30] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[31] and other human right instruments[32] and reasoned that

25. International Covenant on Civil and Political Rights (hereinafter referred to as 'the ICCPR') and International Covenant on Economic, Social, and Cultural Rights (hereinafter referred to as 'ICESCR') adopted by the General Assembly Resolution 2200 A (XXI) of 16 December 1966. Nigeria has also ratified and domesticated the African Charter on Human and Peoples' Rights.
26. Article 6, ICCPR.
27. Article 17, ICCPR.
28. Article 11, ICESCR.
29. Article 12, ICESCR.
30. United Nations Declaration on Human Rights, GA Res. 217A (III). Available at <www.unhchr.ch/htm/menu3/b/69.html> accessed 20 May 2013.
31. International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 193 UNTS 3 (1966).
32. Inter-American Convention on Human Rights, Art. 4; European Convention for the Protection of Human Rights and Fundamental Freedom, Nov. 4, 1950, Art. 3, 312 UNTS. 143; African Charter on Human and Peoples' Rights, Art. 4, 1988 Additional Protocol to the American Convention on Human Rights,

the right to a clean and healthy environment is an integral part of the fundamental human rights of every citizen.

Article 17 of the ICESCR, for example, guarantees respect for private and family life and home. Also, Article 11(1) of the ICESCR recognizes the rights of everyone to an adequate standard of living and to the continuous improvement of living conditions. Furthermore, Article 12 of the ICESCR recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This paper argues that the right to health is inextricably interwoven with the right to life itself and it is a precondition for the exercise of freedom. The right implies the negative obligation not to practice any act, which can endanger one's health. It also imposes a positive obligation to take all appropriate measures to protect and preserve human health including measures of prevention of diseases.[33] In articulating the steps to be taken in the realization of the right to health, Article 12(2) of the ICESCR imposes obligation on the States to improve all aspects of environment and industrial hygiene. Churchill observed that the obligation to improve living conditions in Article 7 imposes an obligation on States to ensure less pollution of the atmosphere and water, reduce exposure to noise pollution.[34] Also the right to life enshrined in human rights instruments[35] further imposes an

Art 11, 28 I.L.M (1989); 1989 Convention on the Right of the Child, Art. 24(2)(c), 28 I.L.M. 1448 (1989).

33. See Churchill R.R., 'Environmental Rights in Existing Human Rights Treaties', in *Human Rights Approaches to Environmental Protection*, ed. Boyle and Anderson (New York: Oxford University Press, 1996). See also Cancado Trinidade, 'Environmental Protection and the Absence of Restrictions on Human Rights' in K. E. Mahoney and P. Mahoney(ed), *Human Rights in the Twenty-first Century*, (Kluwer Academic Publishers, Netherlands, 1993) at pp. 562-563.

34. *ibid* pp.101-102.

35. See Article 6 of the international covenant on civil and political rights 1966, Article 2 of the European Convention on Human Rights, 1950, and Article 4 of the African Charter on Human and Peoples Rights, Article 3 of Universal

obligation on the States not to take life intentionally or negligently and in extreme cases the right might be invoked by individuals to claim compensation where death results from some environmental disaster in so far as the state is responsible.[36] Churchill further reasoned that the fundamental right to privacy may be invoked by an individual whose home or property is affected by various forms of pollution or other environmental degradation.[37]

Also, the Human Rights Committee has taken the view that the right to life in the ICCPR does involve the state taking positive measures to protect life and that it would in particular be desirable for states to take all possible measures to reduce infant mortality and to raise life expectancy.[38] States are under an obligation to avoid serious environmental hazards or risks to life, and to set in motion 'monitoring and early warning systems' to detect serious environmental hazards or risks and 'urgent action systems' to deal with such threats. From this expanded perception of the right to life, the right to a clean environment is seen as an extension of the right to life.[39] This approach received judicial recognition in *Power and Rayner v. The United Kingdom*[40] and *Lopez-Ostra v. Spain.*[41] In *Rayner's Case*, the European Commission for Human Rights was confronted with the issue of whether Article 8 of the Convention could be invoked to vindicate violation of environmental right arising from noise pollution. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, provides that 'everyone has the right to respect for his private and

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Declaration of Human Rights, 1948. Article 4 of the American convention on human rights. 1969.

36. Churchill R.R., n.33 p.89.
37. *ibid* p.92.
38. *ibid* p. 90.
39. Cancado Trindade n. 33 p. 575.
40. Series A, Vol. 172, European Court of Human Rights. The case is discussed in Churchill R.R. n. 33 pp. 92-93.
41. *Lopez-Ostra v. Spain* 16798/90 [1994] ECHR 46 (9 December 1994)

family life, his home and his correspondence'.[42] In that case, the complainant had complained about excessive noise emanating from aircraft using the Heathrow Airport which he argued violates his right to privacy guaranteed under Article 8 of the European Convention. In its decisions on admissibility of the complaints, the European Commission for Human Rights observing that Article 8 covered not only direct measures taken against a person' home but also 'indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals', found that there had been a breach of Article 8(1).

However, Article 8(2) allows for deviations by laws necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Thus the Commission was of the view that the running of Heathrow Airport was justified under Article 8(2) as necessary in a democratic society for the economic well-being of the country. This means that noise from aircraft would be justifiable if, in accordance with the principle of proportionality, it did not 'create an unreasonable burden for the person concerned,'[43]

Again, in *Lopez-Ostra v. Spain,*[44] the European Court of Human Rights held that there had been a breach of Article 8 after observing that there is a positive duty on the state to take reasonable and appropriate measures to secure the applicants rights under Article 8(1) or in terms of an interference by a public authority to be justified in accordance with paragraph 2.

Generally, states are unwilling to accept that the right to environment imposes an absolute legal obligation on them to protect the environment rather they are more contented with proposals and declarations which lack force and impose no legal obligation on the

42. The provision is similar to the provision of article 17 of the ICCPR.
43. *Lopez-Ostra v. Spain supra* n 41.
44. *ibid.*

states as illustrated by many UN Declarations.[45] Again since environmental right is also a secondary generation social, economic and cultural right whose full implementation cannot be fully ensured without economic and technical resources, education and planning, the gradual reordering of social priorities and, in many cases, international co-operation, States will be unwilling to assume such obligation because of the financial commitments involved.

Environmental Law under the Nigerian Law

controversial as other debates concerning new or emerging rights such as right to development and indigenous right in Nigeria. The controversy is exacerbated by absence of clear provisions in Chapter IV of the 1999 Constitution proclaiming individual's right to clean environment. However, in the Fundamental Objectives and Directive Principles of the State (FODPS) enshrined in Chapter II and section 20 of the same Constitution, the State is directed to 'protect and improve the environment and safeguard the water, air and land, forest and wildlife in Nigeria'. The issue is whether the scope of Section 20 could be invoked by Nigerian citizens to vindicate environmental wrongs in cases of State's inaction or to compel the federal, state and local governments to initiate law and measures to protect Nigerian environment.

In practice, this is not necessarily so. Firstly, enforcement of fundamental human rights pursuant to special procedure made under Section 42 of the 1979 Constitution does not admit of any right not enshrined in Chapter IV of the 1999 Constitution.[46] Second, the ability of Nigerian citizens to invoke the provision of Section 6(6)(c) of the Constitution, which clearly excludes judicial powers to decide

45. Principle 1, Declaration on the human environment, report of the UN conference on the human environment (New York, 1973), UN Doc. 48/A/CONF14/Rev. 1; Principle 1, declaration on environment and development, right of the united nations conference on environment and development, (new York 1992) UN Doc A/CONF.15/26/Rev. 1.

46. *Uzochukwu & Ors v. Ezeonu II* (1991) 6. N.W. L. R. (Pt. 200) 708.

in 'issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the FODPSP set out in Chapter II of the Constitution'. In *Okogie v. Lagos State Government,*[47] the plaintiff's application challenging a circular issued by the Lagos State Government purporting to abolish private schools in the State on ground that the circular infringed on the constitutional rights of Nigerians to receive and impart education guaranteed under Section 36 of the 1979 Constitution; was dismissed by the Court of Appeal hold that the directive principles of State Policy in Chapter II of the Constitution is non-justiciable and must conform to and run subsidiary to fundamental rights. The court held, in effect, that an individual could not rely on FODPSP to assert any legal right.

It is pertinent to note that the decision in *Okogie's* case[48] was greatly influenced by an earlier Indian case of state of *Madras v. Champakam.*[49] Incidentally, the Indian courts appeared to have made a turnaround despite their initial hesitation. They have set a new standard in the field of environmental litigation when the gravity of environmental hazards become increasingly perceptible, in spite of the fact that India is still a developing economy, India courts felt the need for strict enforcement of environmental legislation. By invoking the power under Articles 32[50] and 48[51] of the Indian Constitution, the Indian Supreme Court disregarded the traditional concepts of locus standi to entertain new genre of litigation and allowed private attorneys to institute actions to protect deterioration, proceeded on the premise that a clean and wholesome

47. (1981) 2 NCLR 337.
48. *Supra.*
49. (1951) SCR 252.
50. Article 32 empowers the Supreme Court to enforce the rights conferred under the constitution and to issue directions or orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari for the enforcements of any rights conferred under the constitution.
51. Article 48 provides: The state shall endeavour to protect and improve the environment and to safeguard the forest and wild life of the country.

environment is a prerequisite to enjoying the right to life enshrined in the Indian Constitution as a fundamental right of all persons. The decision in *Rural Litigation and Entitlement Kendra v. State of U.P.*[52] blazed this trail. In that case, the petitioner, the Indian Council for Enviro-Legal Action brought this action to stop and remedy the pollution caused by several chemical industrial plants. The Supreme Court ordered major part of the quarrying activities to be closed.

Thus, in M.C. *Mehta v. Union of India*[53] the petitioner, a legal practitioner, filed a writ at the Supreme Court for the prevention of nuisance caused by the pollution of the River Ganga by the discharge of effluents by tanneries and chemical industries on the banks of the river, at Kampur. The Supreme Court ordered its office to serve notice of the suit on all industries concerned and, after hearing both sides, ordered those tanneries not having pre-treatment plants approved by the pollution control board to stop their discharge of trade effluents.

In Philippine, the Supreme Court reached a similar decision in *Minors Oposa v. Secretary of the Department of Environment and Natural Resources,*[54] and upheld section 16, Article II of the 1987 Constitution of Philippines, which recognizes the right of people to a balanced and healthful ecology, the concept of generational genocide in criminal law, and the concept of man's inalienable right to self preservation and self-perpetuation embodied in natural law.

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52. (1996) A.I.R. SC. 1057. This was followed by the decision in *M.C. Mehta v. Union of India* (1987) AIR 965 a case concerning the closure of a chlorine plant at Oleum due to leakages of hazardous gas.

53. (1987) AIR 1806. In *Indian council for Enviro-legal Action v. Union of India*, (1987) AIR 1086 where the sludge, a lethal waste, left out in a village for years after the chemical industries were closed, caused heavy damage to the environment, the supreme court ordered that remedial action be taken and compensation be given for the silent tragedies in line with the 'Mehta Absolute Liability Principle'.

54. 33 I.L.M. 173 (1994).

The Court also referred to section 15, Article II of the Philippine Constitution, which obliges the state to 'protect and promote the right to health of the people and instil health consciousness among them'. It made ground-breaking pronouncements concerning the right to a clean environment thus:

> While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation aptly and fittingly stressed by the petitioners the advancement of which may even be said to pre date all governments and constitutions. As a matter fact, these basic rights need not even be in written Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well founded fear of its framers that unless rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come, generation which stand to inherit nothing but parched earth incapable of sustaining life. The

> right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment.

From the above analysis, it is obvious that the decision in *Okogie's* case[55] should no longer been good law particularly as it relates to environmental protection and sustainable use of resources. Unfortunately, the Supreme Court in *A.G. of Ondo State v. Attorney General Federation*[71] maintained that the provisions of FODPSP in Chapter II of our Constitution remain non-justiciable. They are mere declarations that lack the force of law and cannot be enforced by legal process except translate or elevated to the status of law by legislation. This paper argues that Section 33(1) of the Constitution[72] and Article 24(1) of the African Charter,[73] entrenched right to clean environment in our statutes from which Nigerian lawyers can draw inspiration to advance the right of citizens to cleaner environment.[56]

Although the interpretation of Article 24 of the African Charter has not been called into question by Nigerian courts, if and when the situation arises, the courts may be called upon to resolve one or more questions to wit: (1) whether the provision of Article 24 imposes any duty on the State to improve the environment or a mere direction to the State in the formulation of state's policy on environment, or (2) whether the provision of Article 24 is self-executory to justify private action to compel the government to promote environmentally sound policies and by extension enforce public violation of environmental law in cases of state's inaction? In the event of such a case arising, the court may take one of the two possible options. The first option is to hold that the environmental right envisioned under Article 24 like those contained in the State Directives are non-justiciable rights and therefore, individuals

55. *supra.*
56. See, Amokaye O.G., *Environmental Law and Practice in Nigeria*, (Lagos, Unilag Press, 1994) at chapter 15.

cannot compel the State to act or institute actions to challenge infraction of public environmental wrongs. The second option is to hold that the provision of Article 24 is self-executory as it establishes and guarantees environmental rights that are enforceable by the courts without any executive or legislative interventions.[57]

In the *Social and Economic Rights Action Centre and the Centre Economic and Social Rights v. Nigeria,*[58] where the applicant non-governmental organizations (NGOs), filed a complaint against the Government of Nigeria and SPDC for violating the rights of Ogoni people at the African Commission on Human and Peoples' Rights, the interpretation of section 24 of the Charter became imperative. A major implication of these cases is that the right of the People[59] to clean environment and general satisfactory environment favourable to their development engraved in Article 24 is judicially legitimized. The people can invoke the provision of Article 24 to trigger State action in the formulation and implementation of sound national environmental policies. Provisions of Articles 5 (3) and 34 (6) of the Protocol establishing African Court of Human and People Rights (hereinafter 'African Court') further strengthen this position.[60] The Court guarantees direct access to individual and NGO litigants to bring applications for enforcement of their rights where the municipal courts fail to effectively apply the provisions of the Charter. Articles 5(3) and 34(6) of the Protocol confer direct access to individuals and relevant NGOS with observer status to institute an action for violation of the Rights in the Charter; a fact openly

57. *ibid.*
58. Fifteenth Annual Activity Report of the African Commission on Human and peoples' Right 2001-2002, available at <http://www.achpr.org/15thAnnualReportAHG.pdf> accessed 20 September 2013.
59. Churchill R.R., 'Environmental Rights in Treaties et...' in M. Anderson and A.E. Boyles (eds), *Human Rights Approaches to Environmental Protection* (Oxford, 1996) 174.
60. See Udombana N.J., 'Toward the African Court on Human and Peoples' Rights: Better Late Than Never', 3 *YIHRDLJ* (2000) 101-165.

acknowledged by the Commission in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria.*[61] The major defect of the Protocol is that access to court is subject to the discretion of the Court and State party to submit to adjudication.

ENVIRONMENTAL JUSTICE AND CORPORATE ACCOUNTABILITY: GREEN LIGHT FOR MULTINATIONAL HUMAN RIGHTS ABUSES.

The Domestic Front

Closely related to environmental information is the issue of access to environmental justice. In the absence of a well-defined constitutional right to clean environment, a private lawsuit to bring about compliance with public environmental law is confronted with and constrained by a number of difficulties.[62] First, the law has clearly designed environmental authorities or agencies with the sole power to enforce environmental laws and standards. The appropriate authorities in this case are the Environmental Protection Agency, relevant Ministries and Departments of Government involved in environmental matters. Secondly, the power of private litigants to vindicate environmental interests and to secure judicial review of government's action in the implementation of domestic

61. *supra.*

62. See Ogunewo T. I, 'Wrecking the law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria', vol. XXVI (2) *Brooklyn J. Int'l*, 527 529 (2000) and accompanying notes (noting the incongruity and confusion by Nigerian courts in the application of locus standi rule in Nigeria); Cramton & Boyer 'Citizen Suit in the Environmental Field. Peril or Promise', 2 *Eco. L.Q* 407 (1972); F. Brown, 'The Role of Private Citizens in the Enforcement of Environmental Law' J.A. Omotola (ed.); W. Estey, 'Public Nuisance and Standing to Sue' 10 *Osgoode Hall L.J.* 563 (1972); J. K Bentil, 'Environmental Suit Before the Court – The Prospects for Pressure Groups', *J. Plan & Ent'l L.* 325 (1981); G.O. Oyudo, 'The Locus Standi Syndrome in Nigerian Public Law', 2(3) *JUS J. R.* (1991).

environmental laws is constrained by the ancient rule of locus standi.[63] The traditional courts, untrained in environmental affairs, are hesitant to respond to such individuals or NGOs for want of 'personal injury.'

If as earlier argued, Article 24 is recognized as creating environmental rights, going by the decisions in *Sani Abacha v. Fawehinmi*[64] and *The Social and Economic Rights Action Centre and the Centre for Economic and Social Right v. Nigeria*[65] respectively, it would not be out of place to assert that the environmental right enshrined in Article 24 of the African Charter in favour of Nigerians is a justiciable legal right which upon infringement or threat of infringement confers standing on the individuals or NGOs to protect it. A contrary interpretation will produce absurdity as this will be tantamount to recognition of a right without remedy. The rule is *ubi jus, ibi remedium* – (where there is a right, there is a remedy).

In *Douglas v. Shell Petroleum Ltd.*,[66] plaintiff's action challenging defendant's failure to comply with the Environmental Impact Assessment Decree of 1992, was dismissed for lack of locus standi as plaintiff failed to prove that his personal right was affected by the defendant's failure to comply with the environmental law.

However, liberating locus standi on environmental litigation with a view to promoting environmental justice is undoubtedly a worthy objective. Such private suits are critical to ensuring optimal enforcement of environmental statutes and regulations. To make our environment cleaner, healthier and safer for all generations, our environmental statutes should be amended to encourage private actions to remedy public environmental wrongs.

63. The term 'locus standi' is often used interchangeable with terms such as 'standing to sue' or 'entitled to sue'.
64. *Ugo v. Obiekwe* (1989) 1 N.W.L.R. (pt. 99) 566; *Oloriode v. Oyebi* (1985) 5 S.C. 1 at 24-25; *Thomas v. Olufosoye* (1986) 1 N.W.L.R. (pt. 18) 669 at 682; *Ladejobi v. Shodipo* (1989) 1 N.W.L.R. (pt. 99) 599.
65. *Supra*.
66. (1999) 2 N.W.L.R. (pt. 591) 466.

This paper argues that locus standi should be accorded to group of individuals, communities and NGOs to bring class action to secure substantial compliance with public environmental law in cases of State's inaction or in cases of under-regulation by the officials of environmental protection authority.[67] Judicial activism in the context of environmental justice in Nigeria will require the courts to liberally interpret the provisions of Article 24 of the African Charter to empower individual citizens and NGOs to challenge public environmental wrongs.

Two things America is known for—its love of lawsuits and its delight in meddling in the affairs of other countries—led to a form of litigation in which foreigners bring suits in U.S. courts against other foreigners, for human rights violations in foreign countries. The 9-0 Supreme Court ruling in *Kiobel* has finally put an end to this litigation. Human rights groups complain that the decision means that foreign governments and corporations will be able to violate human rights with impunity. In more than 30 years of litigation involving hundreds of cases akin to *Kiobel*, hardly any money went to victims. The Supreme Court got rid of a popular but unworkable idea that U.S. courts can be used to police behaviour around the world.

The International Arena and the Sword of Kiobel

In 2002, Esther Kiobel, a U.S. resident and the wife of deceased Dr. Barinem Kiobel, filed a lawsuit, *Kiobel v. Royal Dutch Petroleum*[68] along with other Ogoni asylees against Shell Corporation. Her lawsuit was filed under the Alien Tort Statute (ATS), a 200-year-old law that has been interpreted by the Supreme

67. R. v. Inspectorate of Pollution & Anor, ex parte Greenpeace Ltd (No. 2) (1994) 4 All E.R. 329 (locus standi was granted to the applicant, an international NGOs, to stop the testing of nuclear and radioactive waste in U.K.).

68. *supra*.

Court to allow federal lawsuits for modern-day egregious international law violations. The Ogoni plaintiffs allege that Shell planned, conspired, and facilitated the Nigerian government's extrajudicial executions, crimes against humanity, and torture against the Ogoni people. Shell argues that corporations cannot be sued under the ATS. In *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit became the first court of appeals to substantively analyze whether the ATS imposes corporate liability.[69]

Amicus briefs in support of the litigants were filed on both sides. The U.S. government, Joseph Stiglitz, international law and legal history scholars, and human rights advocates (including the U.N. High Commissioner for Human Rights) wrote in favour of the Ogoni plaintiffs. Shell's position was supported by another group of international law scholars, several foreign governments, and a dozen of the world's largest multinational corporations.

The Kiobel action, like other ATS cases over the past 17 years, sought to litigate notorious injustices. Many of the defendants have been involved in extractive industries such as ExxonMobil in Indonesia, Occidental in Colombia, Talisman in Sudan, Shell in Nigeria, Unocal in Burma, and Rio Tinto in Papua New Guinea.[70] Other ATS suits have alleged that Pfizer conducted medical experiments on Nigerian children without consent, and that Nestle used child labour to work cocoa plantations in the Ivory Coast.[71] Even al-Qaeda, has been sued under the ATS.[72] The cases illustrate

69. 621 F.3d 111, 131-45 (2d Cir. 2010).
70. *Ibid* at n. 69.
71. *Ibid* at n. 69.
72. *In re* Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765, 784 n.16, 785 n.19, 826 (S.D.N.Y. 2005) (allowing ATS claims to proceed against al Qaeda and two alleged 'fronts' for that 'organization'). See also *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); Juli Schwartz, *Saleh v. Titan Corporation*: The Alien Tort Claims Act: More Bark Than Bite? Procedural Limitations and the Future of ATCA Litigation against Corporate Contractors, 37 *RUTGERS L.J.* 867 (2006); *see also Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009).

significant goal of ATS plaintiffs: to expose human rights violations by trying them in the court of public opinion. Thus, when in 2010 *Kiobel* was dismissed against Shell, the divided Second Circuit panel made headlines, and the sweep of the ruling gained immediate attention.[73] It was the first appellate[74] decision to hold that the ATS could not be used against corporations.[75]

The position taken by the majority appeared to gain steady ground in lower courts since the decision was issued in September 2010.[76] An Indiana district court, for example, dismissed an ATS claim against a corporation, solely on the persuasiveness of *Kiobel*.[77] One week later, the same court disposed of a similar case, this time on the merits rather than for want of jurisdiction.[78] Within the Second Circuit, one post-*Kiobel* dismissal did not even generate a written opinion.[79]

The majority decision has a long reach: *Kiobel* does not merely stand for the principle that corporations cannot be sued on a tort theory of aiding and abetting. Rather, it finds that corporate entities

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73. Bob Van Voris and Patricia Hurtado, *Nigeria Torture Case Decision Exempts Companies from U.S. Alien Tort Law* (Sep. 17, 2010), *available at* <http://www.bloomberg.com/news/2010-09-17/u-s-corporations-aren-t-subject-to-alientort- law-appeals-court-rules.html. > accessed 20 September 2013.
74. A district court in California reached this same conclusion one week before the *Kiobel* decision was filed. *See Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1132–45 (C.D. Cal. 2010). (The practice of forced child labour in cocoa fields in Mali was not actionable because of defendant's corporate nature).
75. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 151 note * (2d Cir. 2010) (Leval, J, concurring).
76. *E.g., Viera v. Eli Lilly & Co.*, No. 09-495, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010); *Mastafa v. Chevron Corp.*, 759 F. Supp. 2d 297 (S.D.N.Y. 2010); *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810 (S.D. Ind. 2010).
77. *Viera*, 2010 WL 3893791 at 2
78. *Flomo*, 744 F. Supp. 2d at 817
79. *Mastafa*, 759 F. Supp. 2d at 298–301 (noting that ATS claims were dismissed in open court).

cannot violate customary international law because they are not subject to it. The majority's discourse on subjects of international law indicates a narrower definition of the word 'violation'. A violation is not merely breaking a rule. Rather, a person or entity is only subject to a rule if he can reasonably expect sanctions for noncompliance.

What the decision means is that corporations have no obligations under international law and are not subject to that law. The majority opinion is also an exercise in legal formalism in that it avoids and even admonishes policy considerations that might favour the plaintiffs. For the majority, strict adherence to established principles of customary international law is an end in itself. There is no discussion of the evils addressed by the modern line of Alien Tort Statute jurisprudence.

Contrary to the majority opinion in *Kiobel*, the ATS does not require the court to look to international law to determine its jurisdiction over ATS claims against a particular class of defendant, such as corporations.

The first step of statutory construction analysis is uncontroversial: the plain language of the statute does not exclude any defendant. Secondly, the legislative history indicates no Congressional intent to exclude corporate defendants, and the words would not have been understood to exclude such defendants at the time of its enactment. Finally, another federal statute does enumerate exclusions for foreign sovereigns from ATS claims. These well-settled exclusions should inform the more nebulous status of corporate defendants.

CONCLUSION

This paper discussed the nexus between human rights and environmental protection from the legal perspective. It examined the question of corporate liability for torts under the international law regime and the sweeping effect of the US Supreme Court decision in *Kiobel*. It contends that the Nigerian people have some measures

of environmental rights under the Nigeria law but the realization of these rights is constrained by absent of legally enforceable procedural rights to prosecute environmental crimes. The situation is worsened by the reluctance of the court to expand the frontier of law to accommodate collective actions by NGOs and community to prosecute offenders.

The paper also calls for amendment of environmental statutes and liberal interpretation of Constitutional provisions to empower individual citizens to prosecute public violation of public environmental law. The Indian liberal approach in interpreting legislations and constitutional provisions aim at protecting the environment should be emulated.

The *Kiobel* majority misinterpreted the Alien Tort Statute. An ATS claim need not 'arise under' international law *or* federal law. By the terms of the statute, an action may be heard when an alien plaintiff claims an injury caused by a *jus cogens* violation and committed by a defendant who is subject to personal jurisdiction in a U.S. court. In 1991, Congress reauthorized the ATS by upholding international human rights law. The modern Congress intended the ATS to provide a unique and powerful means of vindicating human rights abuses that occurred overseas.

Though Congress understood that the application of the ATS to this purpose might cause some friction in U.S. foreign relations but believed that such tension was 'a small price to pay' for justice of this magnitude. Furthermore, since corporations can be ATS plaintiffs, they cannot effectively argue that they should be barred from being ATS defendants. Neither the ATS, *Sosa,* nor any other federal law 'requires' that international law extend liability to a corporate entity before the ATS will do so.

The ATS does not incorporate, as the majority claims, the personal jurisdiction of international tribunals into the subject-matter jurisdiction requirements of the ATS. What's more, the majority's result, as a matter of policy, allows potential tortfeasors to escape

liability simply because the wrongs were committed under the auspices of a transnational corporation. It would be preferable for potential tortfeasors to escape liability because a trier of fact finds that they were not responsible for the alleged torts.

Even if the majority is correct in assuming that the silence of the ATS regarding defendants indicates a gap to be filled by international law principles, the majority was wrong to conclude that international law has never extended liability to a corporation. Even if the majority is correct that these precedents do not establish a universally recognized custom subjecting transnational corporations to human rights principles today, this paper submits that from the very nature of law as a dynamic tools for social engineering, the law must move with development and break new grounds if that is what is needed to savage mankind from the destructive effect of environmental degradation and pollution. To uphold *Kiobel* is to give a gratuitous licence to transnational corporation to operate unchecked and hold out their heads high as been above the law for the simple reason that they are international corporations. If corporation had been held to have a voice deserving to be heard to enrich political debate, then as a matter of logic and policy, corporations must be held liable for torts committed by them whether locally or international. To hold as the majority decision did is to cage environmental justice to the locality of domestic remedies on the one hand, while these transnational corporate hide under the toga multinational to carry out their criminal acts of environmental degradation and pollution. If this continues, then the people of the Niger Delta sooner than later, would be extinct from the surface of the earth.

In *Kiobel* the Second Circuit overrules numerous prior decisions and contradicts sister circuits, finding that corporate liability in international law is not a sufficiently specific norm to support a finding of liability under the Alien Tort Statute. That decision is clearly erroneous. *Kiobel* violates the general principle of legality, immunizing corporate conduct from liability even in

cases where States would be liable for violating jus cogens norms and thus also violates the principle of sovereign equality of States due to principles of comity and the res judicata effect of the decision. *Kiobel* is also abnegation by the United States of U.S. obligations under international law. While no state is obliged to remedy jus cogens violations, each state is obliged to respect them. Because *Kiobel* reflects a deep and significant split at the circuit courts, because it concerns U.S. international legal obligations, because the stakes, in human and financial terms are high, because it was so obviously wrongly decided, the split that *Kiobel* represents has reached the U.S. Supreme Court. Thus this Paper explains precisely why the court's decision in *Kiobel* misapprehends the structure and sources of international law and consequently reaches the wrong result for the wrong reasons.

In my view the court in *Kiobel* erred in ascribing a general principle of non-imputation of any liability to corporations under international law from the fact of non-imputation of criminal liability to corporations in domestic law of jurisdictions following the German model of civil law. The court in *Kiobel* erroneously decided that the law of nations indicates only customary international law. But the *Kiobel* court's wilful blindness to international treaty law (jus inter gentes) is contrary to the black letter law of the Alien Tort Statute (ATS) itself. The Act provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations (i.e. jus gentium) or a treaty of the United States (i.e. jus inter genres). The ATS is tort law: criminal liability is irrelevant to it. However, even if criminal law were relevant, numerous treaties, many of which the United States has signed, impose civil or criminal liability on corporations.

After ignoring the black letter of the ATS and excising U.S. Treaties as a basis for liability under the ATS, the court in *Kiobel* determined that customary public international law does not impose

criminal liability on corporations and that as a consequence the ATS could not impose civil liability on corporations. This Paper finds that both corporate civil and criminal liability are consistent with international law. Furthermore, the common law recognizes corporate criminal liability; thus the extraterritorial application of common law subjects foreign corporations to criminal liability which constitutes a state practice of imposing corporate criminal liability internationally. The existence of this state practice shows that there is no international customary law against imposing criminal liability on corporations. Having decided an irrelevancy (the issue is civil, not criminal liability) wrongly (international law can, and does, impose and permit imposition of punitive and not merely restitutionary sanctions on corporations), the *Kiobel* court reached the absurd result that public international law does not impose civil liability on corporations, when in fact corporate liability is a universal state practice. The Kiobel court reached this clearly erroneous result because individual rights and duties of physical persons are recognized only exceptionally in public international law. As a general rule, states are the sole addressees of international law, though there are exceptions, notably jus cogens and certain treaties which are intended to have direct effect, such as self-executing treaties. The ATS gives effect both to customary international law and treaty law. International treaty law unequivocally imposes civil liabilities and even permits imposition of criminal liabilities on corporations. The decision of the court in *Kiobel* that the law of nations does not impose civil liability on corporations is a reversible error.

Against the background of the unwillingness of the Courts in foreign jurisdiction to extend corporate liability beyond their national jurisdictions, the Paper call for a legislative rethink to make provision for the criminal liability of corporations which results in death and injuries arising from exploration activities of these companies. Such company could be prosecuted and held accountable as it is obtainable in developed nations such as the United Kingdom.

The government on its part must be proactive to end a pattern that devalues human lives by irresponsible organisations. Such a law will send a strong message to the corporate world that there is 'criminal responsibility' for criminal acts of misconduct.

The paper reasons that the remedy for these claims lies in local jurisprudence. Establishing a legal and regulatory framework requiring the regulation of corporations rather than states or individuals, is necessary to address the nature of corporations as actors in the human rights field.

In a nutshell, the draft Petroleum Industry Bill (PIB) before the National Assembly contains provisions that will address allegations raised in *Kiobel*. Consequently, a speedy passage of the PIB becomes absolutely necessary.

Clause 198 – 298 of the draft PIB provides for environmental protection in the Nigerian petroleum industry. These provisions cover motley of assortment of global petroleum industry good practices including; protection of health, safety, environmental quality management, gas flaring penalties, financial contributions for remediation of environmental damages, pipeline safety, abandonment, decommissioning and disposal.

Specifically, section 198(1) provides that in the course of upstream operations, no person shall injure or destroy a tree which is of commercial value, or the object of veneration to the people resident in the area of the lease or license. If they do so (2) they are required to pay fair compensation to those directly affected.

Furthermore, Section 118 proposes the establishment of the Petroleum Host Community Fund – requiring a detailed and transparent financial distribution system to ensure that host communities benefit directly from petroleum activities. It provides for direct financial transfer of 10% net profit – adjusted profit less Nigerian hydrocarbon tax and company income tax, derived from upstream petroleum operations in onshore areas and shallow waters areas to the community and littoral states.

Even without the salutary lessons of several industry reforms, it is self-evident that the PIB however detailed, well intentioned or structured cannot effectively address the issues raised in *Kiobel* unless implemented fairly, transparently, and in the national interest.

The National Assembly should amend Clause 118 to ensure that the10% of oil profits should include robust safeguards to ensure that all members of the community benefit. It will be readily apparent from the foregoing discussions that with the passage of the PIB, the need for the ATCA in the Nigerian context will become unnecessary.

It is worrisome that prohibiting ATS claims that do not touch and concern the United States will be a devastating blow to the human rights movement. Other multinationals with litigation pending will be eyeing this optimistically, not the least Exxon Mobil Corporation for its actions in Indonesia. Exxon is being sued by 15 Indonesian villagers for the death and torture of people in Aceh province between 1999 and 2001. The plaintiffs claim that Exxon hired Indonesian soldiers who had committed past abuses to guard their natural gas facility. In July 2011, a US federal appeals court ruled that the case could go forward and has placed Exxon's request to review this decision on hold while the Nigeria-*Kiobel* case was still being heard. For now, it remains unclear what the implications of the Shell ruling will be for the Exxon-Indonesia case.

I note that while international criminal tribunals were created to address many of the above mentioned issues, criminal prosecutions in international tribunals are infrequent, slow, and inefficient. The International Criminal Court has tried and convicted only few cases in its existence. If the United States, which is at the vanguard of foreign human rights stops allowing these claims, there will be no other countries who will want to step in and fill that void.

The big picture in the human rights movement is, after all, about small groups of individuals. It is people like those in Ogoniland, and minorities groups in general, who are most in need

of an instrument to seek justice. Even if we achieve improvements in human rights in the long run without the ATS, the Ogoni people now are still without their homes, families, and livelihoods. The human rights movement, at its core, is meant to stop the abuses of the few. So we must not forget about the few by proclaiming that one of the only avenues of recourse available to them (the ATS) is without great value. The *Kiobel* decision closed the shop for foreign plaintiffs suing foreign defendants for alleged torts committed abroad. *Ubi jus ibi remedium,* so the law says but with *Kiobel,* the paper submits that environmental wrongs may forever remain without remedies while perpetrators smile to the banks with their foreign corroborators.

KILLING THE GOOSE THAT LAYS THE GOLDEN EGGS: *KIOBEL* AND CORPORATE ACCOUNTABILITY FOR TORTS: WHITHER THE SEARCH FOR ENVIRONMENTAL JUSTICE?

By

RUFUS AKPOFURERE MMADU*

ABSTRACT

God has been blunt in blessing the people of the Niger Delta - arable farmlands, oil deposits, fishing lakes, aesthetic environment and the list goes on. Oil deposits have attracted international oil companies to extract and explore oil in the areas as far back as 1956. Ordinarily this should be a blessing but the reality today is that Nigeria's oil wealth had turned somewhat a course to the Niger Delta people. The environment is destroyed and the people die in score from pollution and oil exploration related diseases. The focus therefore of this article is the concept of corporate accountability for tortuous acts and its underpinning in the search for environmental justice in Nigeria. The article faults the recent judgment of the United States Supreme Court in Kiobel vs. Royal Dutch Petroleum Co. et al, No. 06- 4800, 2010 U.S. App (Kiobel). The Court's pronouncement that corporations cannot be held liable for egregious abuses under international law is not only alien to its past decisions, but also a mockery of the global war against environmental injustice. The article warns that Kiobel could foster situations in which corporations could become immune from liability for human rights violations on the flimsiest excuse that they are foreign companies. Kiobel might incentivise states to abdicate power to corporate actors, which would then use the corporate form as a shield from civil liability and a means of protecting illicit profits. The article advised that Kiobel must be rejected if the global campaign for sustainable environment is to be achieved. The article employed expository and analytical methodologies in the discus.

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INTRODUCTION

From Oloibiri in present day Bayelsa State to Ogoni in Rivers State, Ijesse in Delta State to the creeks of the Ilaje Communities of Ondo State; the story is the same - oil spill, environmental pollution and degradation, destruction of landscape, unemployment, socio-economic-political instability, endemic corruption and pervasive poverty ravage the inhabitants of these communities. Their sin - oil is discovered in their land in commercial quantity! The Environment is destroyed and the future is bleak. Life remains one long unbroken chain of wants and pain reducing the inhabitants of the oil-producing communities to destitute in their own lands by the collaboration of oil companies and oligarchic few in corridor of power. Legal suits are struck out at the flimsiest technicality thus dampening the peoples' believe that the judiciary is the last hope of the common man. To the *Kiobels* and Ken Saro-Wiwas of this world, the maxim *ubi jus ibi remedium* with its auditory nicety remains an empty expression branded about in lawyers' dictionary.

At the domestic as well as the international levels, victims of human rights violation arising from tortuous acts of oil corporations are confronted with many difficulties in their search for justice. Issues such as *locus standi* and jurisdiction on the one side, and poverty on the other had painfully been exploited to deny victims of environmental pollutions justice.

In many countries, especially those with weak and non-independent justice systems and where the government is either the violator or is complicit in human rights violations committed by corporations, the only remedy and the only deterrent is the risk of being held accountable in another country. The practice is consistent with a clear trend in international law that not only establishes a baseline of universal human rights, but also recognizes that there are no rights without a remedy and that human rights violators may not hide behind the cloak of sovereignty.

But in the United States today, all that appear to have been swept away by the Supreme Court majority decision in *Kiobel v.*

Royal Dutch Petroleum Co.[1] (*Kiobel*). In that case, the U.S Supreme Court dismissed an Alien Tort Statute[2] (ATS) case against Shell and its Nigerian subsidiary in September 17, 2010 for lack of subject matter jurisdiction which decision has attracted scathing criticisms from legal scholars and environmental activists.[3] The court held that corporations are not proper defendants under the

1. *Kiobel v. Royal Dutch Petroleum Co. et al.*, No. 06- 4800, 2010 U.S. App. LEXIS 19382, at 1 (2d Cir. Sept. 17, 2010). Nigerian plaintiffs filed *Kiobel* in 2002, alleging that Royal Dutch Petroleum Company and Shell Transport and Trading Company, through a subsidiary, collaborated with the Nigerian government to commit human rights violations to suppress lawful protests against oil exploration in the Ogoni region of the Niger Delta. In 2006, the district court granted in part and denied in part the defendants' motion to dismiss the suit. In particular, the district court granted the motion to dismiss for the claims of aiding and abetting extrajudicial killing, forced exile, property destruction, and violations of the rights to life, liberty, security, and association, holding that customary international law did not define these violations with the specificity required by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
2. The Alien Tort Statute reads: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States' - 28 U.S.C. §1350 (2010). The Alien Tort Statute is a well known tool that grants U.S. federal courts jurisdiction over civil suits brought by aliens for torts committed in violation of international law. The statute has been used for the past three decades to hold perpetrators of human rights abuses accountable in U.S. courts.
3. Ho, Virginia Harper, 'Theories of Corporate Groups: Corporate Identity Reconceived,' *Seton Hall Law Review*: Vol. 42 Issue 3 (2012); available at <http://erepository.law.shu.edu/shlr/vol42/iss3/2 > accessed 04 April 2012. See also Erin Foley Smith, 'Right to Remedies and the Inconvenience of *Forum Non Convenience*: Opening U.S. Courts to Victims of Corporate Human Rights Abuses', 146 *Columbia Journal of Law and Social Problems*', 44:145; Angela Walker, 'The Hidden Flaw in *Kiobel* Under the Alien Tort Statute: The *mens rea* Standard for Corporate Aiding and Abetting is Knowledge', *Northwestern Journal of International Human Rights* (2 0 11) vol: 10:2; Tyler Giannini and Susan Farbstein; 'Corporate Accountability in Conflict Zones: How *Kiobel* Undermines the Nuremberg Legacy and Modern Human Rights', *Harvard International Law Journal*', Online Volume 52 Article Series 2010.

Alien Tort Statute.[4] It noted that customary international law defines those who are subject to human rights norms and establishes who can be liable for violating those norms and that since no corporation has ever been liable for human rights torts in an international tribunal, the corporate defendants in *Kiobel* could not have committed a 'violation'. *Kiobel* held that corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide.

This decision so severely limited a law that has for decades been a beacon of hope for victims of gross human rights violations. The United States has been a leader in the fight against impunity, but this decision cuts a hole into the web of accountability. Human rights abusers may be rejoicing today, but this is a major setback for their victims who often look to the United States for justice when all else fails. Now what will they do? What impact does *Kiobel* have in the search for environmental justice in Nigeria's Niger Delta Region? What hope have victims of environmental degradations against oil multinational for torts committed by them? What is the nexus between corporate political speeches granted corporations in *Citizens United*[5] and the concept of corporate liability? To what extend can the global war against environmental degradation be fought and possibly be won when the indexes of achieving justice are daily being caged in web of technicalities?

4. 621 F.3d 111, 120 (2d Cir. 2010).
5. See *Citizens United v. Federal Election Commission, No. 08-205. Citizens United* held that the Bipartisan Campaign Reform Act of 2002 violated the First Amendment, which declares that Congress shall make no law infringing the freedom of speech. They agreed that their decision was contrary to the *Austin vs. Michigan Chamber of Commerce* precedent, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and the *McConnell vs. Federal Election Commission* precedent, a 2003 decision that upheld the part of the Bipartisan Campaign Reform Act of 2002. They therefore overruled those decisions as well as repealing a century of American history and tradition.

No doubt God saw that all that was created was beautiful and he gave man dominion over every other creature including his environment.[6] But today, what an ironical world we live in! Man's inhumanity to man in the name of industrialization! How can a man be free and happy when his environment is abused and degraded? When the quality of air he breathes is fouled and unhealthy. The water he drinks is impure and contaminated by chemical, toxic and hazardous substances? The food he eats is contaminated with toxic, hazardous and carcinogenic substances? Above all, he is daily confronted with the threat of environmentally-related diseases characterized by dengue fever, bird flu, SARS, HIV/AID, malaria, among other things. This is the picture of the world in which humankind by his own activities has undertaken a voyage of self-destruction in the guise of development.[7]

Research has shown that the Niger Delta of Nigeria is one of the world's most sensitive ecological areas.[8] It is one of the world's largest wetlands, the largest in Africa. It encompasses 20,000 square kilometres.[9]

Crude oil was first discovered in commercial quantity in 1956 in Nigeria at Oloibiri in the River State and the first export made in 1958.[10] There has been no looking back since then. In fact, for example, Nigeria had a production figure of 2.04 million barrels per day.[11]

By its admission, Shell produces 50 percent of Nigeria's oil output, records an average of 221 spillages a year.[12] Most of the

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6. See the Holy Bible, Genesis Chapter 1 verse 31.
7. Amokaye O.G., *Environmental Law and Practice in Nigeria* (Lagos, Unilag Press, 2004) Chapter 15 at p. 661.
8. *ibid.*
9. See Human Rights Watch, *The Price of Oil* (New York: Human Rights Watch, 1999), p. 53.
10. See Obsa M.M, *Nigeria Petroleum Law and Practice* (Ibadan: Fountain Books Ltd., 1987), p.2.
11. See The Guardian, February 19, 1998, p. 21.
12. Amokaye O. G., *supra* n. 7.

spillages arose from aging and obsolete facilities, malfunctioning equipment and poor operational standards.

Part 2 of this paper examines the degradations and impact of exploration activities in the Niger Delta Region of Nigeria. From Ogoni in Rivers State to River Ethiope in Sapele of Delta State, the story is the same – massive destruction and degradation of the environment sometimes leading to loss of lives including aquatics lives and wild lives. Part 3 takes a look at human rights that benefits sustainable environment and attempts a chronicle of the search for environmental justice. Part 4 examines the international dimension to the search for environmental justice in Nigeria focusing on the effect of the recent US decision in *Kiobel*. The paper attempts a critic of the ratio decidendi of the *Kiobel's* case and questions the correctness of the judgment. In Part 5, the article is concluded and recommendations made.

DEGRADATIONS AND IMPACT OF EXPLORATION ACTIVITIES IN THE NIGER DELTA.

Spillage pollutes the surrounding creeks and mangrove forests killing aquatic life, plants and animals. The industry's total annual spillage is estimated by the World Bank to release 2,300 cubic meters of oil into the environment every year.[13] Mangrove forest is particularly vulnerable to oil spills. There, the soil soaks up the oil and releases it every rainy season.

Surveys are usually done to determine the availability and location of oil deposits. The thick mangrove forest has to be cut open to lay seismic lines. Holes are drilled at points where the lines meet and dynamites are put into these holes. These are exploded at the same time. With the destruction of vegetation and the resultant loose soil, erosion sets in due to denudation.[14]

13. Shell, again by its own admission, has not cut 120,000 kilometres of tracks in the Delta in the last 40 years.
14. See Ray Onyegu, 'Legal Framework for the Protection of Oil Producing Communities in Nigeria', 2:2 *Living* 1, 7 (April - June 1998).

The environment is also degraded by the discharging of oil-contaminated water into inland and coastal waters. For Nigeria's one million barrels of oil per day, two million barrels of contaminated water are discharged into the environment.[15] The gas is also flared which adversely affects flora and fauna around the site. This depletes the ozone layer which protects the earth's surface from the sun's radiation.[16]

According to Uchegbu:

> Oil pollution has a deleterious effect on human beings and marine life. It constitutes a hazard to organisms. As the oil producing states are usually reverine, oil spills contaminate their water which is their main source of survival and makes unfertile the little land they have.[17]

This paper finds that oil exploration has been a curse on the Niger Delta region. The lots of the people of this area have not improved notwithstanding the several billions of dollars generated from oil exploration. There are no good roads, no good drinking water, and no health and social facilities. The injustice is being underlined by the huge profits extracted from their land by the international oil prospectors. The prospectors around live in 'paradise', complete with all sophisticated modern day facilities, while the host communities cannot boast of even a basic need like electricity. The oil bearing areas are merely beast of burdens with their farms and fishing grounds damaged. They seem marked out for extinction. Today's situation in the Niger Delta is comparable to

15. Amokaye O.G., *supra* n. 7.
16. See Moffat Ekoriko, 'More Evidence of Oil Devastation' 2.5 *Africa Today* 30 (Sept. /Oct. 1996).
17. Uchegbu A., 'Legal Framework for Oil Spill and Clean-Up Liability and Compensation in Nigeria', in *The Petroleum Industry and the Nigerian Environment* (Proceedings of the 1983 International Seminar, NNPC, Lagos, 1984), p. 33.

the then apartheid South Africa or the ethnic cleansing going on in the former Yugoslavia. This comparison is not far from reality, for their results are similar.

A feature of multinational corporations is their double standard. One standard is to concentrate on productive investments in their countries of origin while the other is to invest mainly in extractive industries in the developing countries. They ship their profits away to their respective countries. This practice cast doubts on the usefulness of multinational corporations in developing countries.[18]

A recurring pattern of environmental abuses that sparks human rights abuse is one in which outside interest, generally multinational corporations, are exploiting mineral resources, timber and other natural resources, in the developing countries. Repression of local communities including indigenous people appears to be the most convenient way to pursue 'development' in frontier lands. This contrasts with what obtains in their home countries. A well-known example is Ken-Saro Wiwa who was hung by late General Sani Abacha's government in 1996 along with several other activists, for raising environmental concerns about oil exploration by Shell Petroleum Development Company in their native Ogoni land.

Thus at the community level, the companies are faced with increasing protests directed at oil company activities and the lack of development in the delta. These have included incidents of hostage taking, closures of flow stations, sabotage, and intimidation of staff. The Niger Delta has for some years been the site of major confrontation between the people who live there and the Nigerian government security forces, resulting in extra-judicial executions, arbitrary detentions, and draconian restrictions on the rights to freedom of expression, association, and assembly.[19]

In addition, environmental degradation often implicates the peoples' right to property. Indigenous people are particularly

18. See Arthur A. Nwankwo, *Can Nigeria Survive?* (Enugu: Fourth Dimension Publishers, 1981) p.5.
19. Human Rights Watch, 'The Price of Oil', (New York: Human Watch, 1999).

vulnerable to environmental threats as they are often completely dependent on their immediate environment for survival. To the traditional people, environment and more particularly land, is the essence of human-self-definition, economic and cultural survival; destruction of which is considered a threat to the society.[20] They till the land for farming; depend on the water bodies for water and fish, and the air for survival. For them, the environment and the constituent elements are not merely a possession and a means of production, but an intrinsic part of their social, economic, political and spiritual survival. Land as a species of the environment is, therefore, not to be abused or degraded, but a material element to be cherished, preserved and enjoyed by present and future generation.

HUMAN RIGHTS AND THE SEARCH FOR ENVIRONMENTAL JUSTICE.

Environmental Rights under International Treaties

Nigeria is a signatory to several international human rights instruments aimed at promoting fundamental human rights and securing quality life including healthy environment for the Nigerian people.[21] Environmental rights, as reasoned by the liberal human right scholars can be derived from the following rights: the right to life,[22] the freedom from interference with a person's privacy,

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20. Elias once remarked that the relation between group and the land they hold is invariably complex since the rights of individuals and the group with respect to the same piece of land often co-exist within the same social context. See, T. O. Elias, *Nigerian Land Law*, (Sweet and Maxwell, London 4th edn, 1971) p. 73.

21. International Covenant on Civil and Political Rights (hereinafter referred to as 'the ICCPR') and International Covenant on Economic, Social, and Cultural Rights (hereinafter referred to as 'ICESCR') adopted by the General Assembly Resolution 2200 A (XXI) of 16 December 1966. Nigeria has also ratified and domesticated the African Charter on Human and Peoples' Rights.

22. Article 6, ICCPR.

family, home or correspondence,[23] the right of every one to an adequate standard of living for himself and his family,[24] the right of every one to the enjoyment of the highest attainable standards of physical and mental health.[25] They expanded and reinterpreted the civil and social rights in the Universal Declaration of Human Right (UDHR),[26] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[27] and other human right instruments[28] and reasoned that the right to a clean and healthy environment is an integral part of the fundamental human rights of every citizen.

Article 17 of the ICESCR, for example, guarantees respect for private and family life and home. Also, Article 11(1) of the ICESCR recognizes the rights of everyone to an adequate standard of living and to the continuous improvement of living conditions. Furthermore, Article 12 of the ICESCR recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This paper argues that the right to health is inextricably interwoven with the right to life itself and it is a precondition for the exercise of freedom. The right implies the negative obligation not to practice any act, which can endanger one's health. It also imposes a positive obligation to take all appropriate measures to protect and preserve human health

23. Article 17, ICCPR.
24. Article 11, ICESCR.
25. Article 12, ICESCR.
26. United Nations Declaration on Human Rights, GA Res. 217A (III). Available at <www.unhchr.ch/htm/menu3/b/69.html> accessed 20 March 2013.
27. International Covenant on Economic, Social and Cultural Rights. December 16, 1966, 193 UNTS 3 (1966).
28. Inter-American Convention on Human Rights, Art. 4; European Convention for the Protection of Human Rights and Fundamental Freedom, Nov. 4, 1950, Art. 3, 312 UNTS. 143; African Charter on Human and Peoples' Rights, Art. 4, 1988 Additional Protocol to the American Convention on Human Rights, Art 11, 28 I.L.M.(1989); 1989 Convention on the Right of the Child, Art. 24(2)(c), 28 I.L.M. 1448 (1989).

including measures of prevention of diseases.[29] In articulating the steps to be taken in the realization of the right to health, Article 12(2) of the ICESCR imposes obligation on the States to improve all aspects of environment and industrial hygiene. Churchill observed that the obligation to improve living conditions in Article 7 imposes an obligation on States to ensure less pollution of the atmosphere and water, reduce exposure to noise pollution.[30] Also the right to life enshrined in human rights instruments[31] further imposes an obligation on the States not to take life intentionally or negligently and in extreme cases the right might be invoked by individuals to claim compensation where death results from some environmental disaster in so far as the state is responsible.[32] Churchill further reasoned that the fundamental right to privacy may be invoked by an individual whose home or property is affected by various forms of pollution or other environmental degradation.[33]

Also, the Human Rights Committee has taken the view that the right to life in the ICCPR does involve the state taking positive measures to protect life and that it would in particular be desirable for states to take all possible measures to reduce infant mortality and to raise life expectancy.[34] States are under an obligation to avoid serious environmental hazards or risks to life, and to set in motion

29. See Churchill R.R., 'Environmental Rights in Existing Human Rights Treaties', in *Human Rights Approaches to Environmental Protection*, ed. Boyle and Anderson (New York: Oxford University Press, 1996). See also Cancado Trinidade, 'Environmental Protection and the Absence of Restrictions on Human Rights' in K. E. Mahoney and P. Mahoney(ed), *Human Rights in the Twenty-first Century*, (Kluwer Academic Publishers, Netherlands, 1993) at pp. 562-563.
30. *ibid* pp.101-102.
31. See Article 6 of the international covenant on civil and political rights 1966, Article 2 of the European Convention on Human Rights, 1950, and Article 4 of the African Charter on Human and Peoples Rights, Article 3 of Universal Declaration of Human Rights, 1948, Article 4 of the American convention on human rights, 1969.
32. Churchill R.R., n. 29 p.89.
33. *ibid* p.92.
34. *ibid* p. 90.

'monitoring and early warning systems' to detect serious environmental hazards or risks and 'urgent action systems' to deal with such threats. From this expanded perception of the right to life, the right to a clean environment is seen as an extension of the right to life.[35] This approach received judicial recognition in *Rayner's Case*[36] *and Lopez-Ostra v. Spain.*[37] In *Rayner's Case*, the European Commission for Human Rights was confronted with the issue of whether Article 8 of the Convention could be invoked to vindicate violation of environmental right arising from noise pollution. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'.[38] In that case, the complainant had complained about excessive noise emanating from aircraft using the Heathrow Airport which he argued violates his right to privacy guaranteed under Article 8 of the European Convention. In its decisions on admissibility of the complaints, the European Commission for Human Rights observing that Article 8 covered not only direct measures taken against a person' home but also 'indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals', found that there had been a breach of Article 8(1).

However, Article 8(2) allows for deviations by laws necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Thus the Commission was of the view that the running of Heathrow Airport was justified under Article 8(2) as necessary in a democratic society for the economic well-being of the country. This means that noise

35. Cancado Trindade n. 29 p. 575.
36. The case is discussed in Churchill R.R. n. 29 pp. 92-93.
37. *Lopez-Ostra v. Spain* 16798/90 [1994] ECHR 46 (9 December 1994)
38. The provision is similar to the provision of article 17 of the ICCPR.

from aircraft would be justifiable if, in accordance with the principle of proportionality, it did not 'create an unreasonable burden for the person concerned,'[39]

Again, in *Lopez-Ostra v. Spain,*[40] the European Court of Human Rights held that there had been a breach of Article 8 after observing that there is a positive duty on the state to take reasonable and appropriate measures to secure the applicant's rights under Article 8(1) or in terms of an interference by a public authority to be justified in accordance with paragraph 2.

Generally, states are unwilling to accept that the right to environment imposes an absolute legal obligation on them to protect the environment rather they are more contended with soft law and declarations which lack force and impose no legal obligation on the states as illustrated by many UN Declarations.[41] Again since environmental right is also a secondary generation social, economic and cultural right whose full implementation cannot be fully ensured without economic and technical resources, education and planning, the gradual reordering of social priorities and, in many cases, international co-operation, States will be unwilling to assume such obligation because of the financial commitments involved.

Environmental Law under the Nigerian Law

The right to a safe and healthy environment is as controversial as other debates concerning new or emerging rights such as right to development and indigenous right in Nigeria. The controversy arose out of absence of clear provisions in Chapter IV of the 1999 Constitution proclaiming individual's right to clean environment.

39. *Lopez-Ostra v. Spain supra* n 37.
40. *ibid.*
41. Principle 1, Declaration on the human environment, report of the UN conference on the human environment (New York, 1973), UN Doc. 48/A/CONF14/Rev. 1; Principle 1, declaration on environment and development, right of the united nations conference on environment and development, (new York 1992) UN Doc A/CONF.15/26/Rev. 1.

Champakam.[45] Incidentally, the Indian courts appeared to have made a turnaround despite their initial hesitation. They have set a new standard in the field of environmental litigation when the gravity of environmental hazards become increasingly perceptible. In spite of the fact that India is still a developing economy, Indian courts felt the need for strict enforcement of environmental legislation. By invoking the power under Articles 32[46] and 48[47] of the Indian Constitution, the Indian Supreme Court disregarded the traditional concepts of locus standi to entertain new genre of litigation and allowed private attorneys to institute actions to protect deterioration, proceeded on the premise that a clean and wholesome environment is a prerequisite to enjoying the right to life enshrined in the Indian Constitution as a fundamental right of all persons. The decision in *Rural Litigation and Entitlement Kendra v. State of U.P.*[48] blazed this trail. In that case, the petitioner, the Indian Council for Enviro-Legal Action brought this action to stop and remedy the pollution caused by several chemical industrial plants. The Supreme Court ordered major part of the quarrying activities to be closed.

Thus, in M.C. *Mehta v. Union of India*[49] the petitioner, a legal practitioner, filed a writ at the Supreme Court for the prevention of

45. (1951) SCR 252.
46. Article 32 empowers the Supreme Court to enforce the rights conferred under the constitution and to issue directions or orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari for the enforcements of any rights conferred under the constitution.
47. Article 48 provides: The state shall endeavour to protect and improve the environment and to safeguard the forest and wild life of the country.
48. (1996) A.I.R. SC. 1057. This was followed by the decision in *M.C. Mehta v. Union of India* (1987) AIR 965 a case concerning the closure of a chlorine plant at Oleum due to leakages of hazardous gas.
49. (1987) AIR 1806. In *Indian council for Enviro-legal Action v. Union of India*, (1987) AIR 1086 where the sludge, a lethal waste, left out in a village for years after the chemical industries were closed, caused heavy damage to the environment, the supreme court ordered that remedial action be taken and compensation be given for the silent tragedies in line with the 'Mehta Absolute Liability Principle'.

nuisance caused by the pollution of the River Ganga by the discharge of effluents by tanneries and chemical industries on the banks of the river, at Kampur. The Supreme Court ordered its office to serve notice of the suit on all industries concerned and, after hearing both sides, ordered those tanneries not having pre-treatment plants approved by the pollution control board to stop their discharge of trade effluents.

In Philippines, the Supreme Court reached a similar decision in *Minors Oposa v. Secretary of the Department of Environment and Natural Resources,*[50] and upheld section 16, Article II of the 1987 Constitution of Philippines, which recognizes the right of people to a balanced and healthful ecology, the concept of generational genocide in criminal law, and the concept of man's inalienable right to self preservation and self-perpetuation embodied in natural law. The Court also referred to section 15, Article II of the Philippines Constitution, which obliges the state to 'protect and promote the right to health of the people and instil health consciousness among them'. It made ground-breaking pronouncements concerning the right to a clean environment thus:

> While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation aptly and fittingly stressed by the petitioners the advancement of which may even be said to pre date all governments and constitutions. As a

50. 33 I.L.M. 173 (1994).

> matter fact, these basic rights need not even be in written Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well founded fear of its framers that unless rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come, generation which stand to inherit nothing but parched earth incapable of sustaining life. The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment.

From the above analysis, it is obvious that the decision in [illegible]'s case[51] should no longer be good law particularly as it relates to environmental protection and sustainable use of resources. Unfortunately, the Supreme Court in *A.G. of Ondo State v. Attorney General Federation*[71] maintained that the provisions of FODPSP in Chapter II of our Constitution remain non-justiciable. They are mere declarations that lack the force of law and cannot be enforced by legal process except translate or elevated to the status of law by legislation. This paper argues that Section 33(1) of the Constitution[72] and Article 24(1) of the African Charter,[73] entrenched right to clean

51. *Supra.*

environment in our statutes from which Nigerian lawyers can draw inspiration to advance the right of citizens to cleaner environment.[52]

Although the interpretation of Article 24 of the African Charter has not been called into question by Nigerian courts, if and when the situation arises, the courts may be called upon to resolve one or more questions to wit: (1) whether the provision of Article 24 imposes any duty on the State to improve the environment or a mere direction to the State in the formulation of state's policy on environment, or (2) whether the provision of Article 24 is self-executory to justify private action to compel the government to promote environmentally sound policies and by extension enforce public violation of environmental law in cases of state's inaction? In the event of such a case arising, the court may take one of the two possible options. The first option is to hold that the environmental right envisioned under Article 24 like those contained in the State Directives are non-justiciable rights and therefore, individuals cannot compel the State to act or institute actions to challenge infraction of public environmental wrongs. The second option is to hold that the provision of Article 24 is self-executory as it establishes and guarantees environmental rights that are enforceable by the courts without any executive or legislative interventions.[53]

In the *Social and Economic Rights Action Centre and the Centre Economic and Social Rights v. Nigeria,*[54] where the applicant non-governmental organizations (NGOs), filed a complaint against the Government of Nigeria and SPDC for violating the rights of Ogoni people at the African Commission on Human and Peoples' Rights, the interpretation of section 24 of the Charter became imperative. A

52. See, Amokaye O.G., *Environmental Law and Practice in Nigeria*, (Lagos, Unilag Press, 1994) at chapter 15.
53. *ibid.*
54. Fifteenth Annual Activity Report of the African Commission on Human and peoples' Right 2001-2002, available at <http://www.achpr.org/15thAnnualReportAHG.pdf> accessed 13 March 2013.

major implication of these cases is that the right of the People[55] to clean environment and general satisfactory environment favourable to their development engraved in Article 24 is judicially legitimized. The people can invoke the provision of Article 24 to trigger State action in the formulation and implementation of sound national environmental policies. Provisions of Articles 5 (3) and 34 (6) of the Protocol establishing African Court of Human and People Rights (hereinafter 'African Court') further strengthen this position.[56] The Court guarantees direct access to individual and NGO litigants to bring applications for enforcement of their rights where the municipal courts fail to effectively apply the provisions of the Charter. Articles 5(3) and 34(6) of the Protocol confer direct access to individuals and relevant NGOS with observer status to institute an action for violation of the rights in the Charter; a fact openly acknowledged by the Commission in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria.*[57] The major defect of the Protocol is that access to court is subject to the discretion of the Court and State party to submit to adjudication.

ENVIRONMENTAL JUSTICE AND CORPORATE ACCOUNTABILITY: THE FLAW IN *KIOBEL*

The Domestic Front

Closely related to environmental information is the issue of access to environmental justice. In the absence of a well-defined constitutional right to clean environment, a private lawsuit to bring about compliance with public environmental law is confronted with

55. Churchill R.R., 'Environmental Rights in Treaties et...' in M. Anderson and A.E. Boyles (eds), *Human Rights Approaches to Environmental Protection* (Oxford, 1996) 174.
56. See Udombana N.J., 'Toward the African Court on Human and Peoples' Rights: Better Late Than Never', 3 *YHRDLJ* (2000) 101-165.
57. *supra.*

and constrained by a number of difficulties.[58] First, the law has clearly designed environmental authorities or agencies with the sole power to enforce environmental laws and standards. The appropriate authorities in this case are the National Environmental Standards and Regulations Enforcement Agency, relevant Ministries and Departments of Government involved in environmental matters. Secondly, the power of private litigants to vindicate environmental interests and to secure judicial review of government's action in the implementation of domestic environmental laws is constrained by the ancient rule of locus standi.[59] The traditional courts, untrained in environmental affairs, are hesitant to respond to such individuals or NGOs for want of 'personal injury.'

If as earlier argued, Article 24 is recognized as creating environmental rights, going by the decisions in *Sani Abacha v. Fawehinmi*[60] and *The Social and Economic Rights Action Centre and the Centre for Economic and Social Right v. Nigeria*[61] respectively, it would not be out of place to assert that the environmental right enshrined in Article 24 of the African Charter in favour of Nigerians is a justiciable legal right which upon infringement or threat of infringement confers standing on the individuals or NGOs

58. See Ogowewo T. I, 'Wrecking the law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria', vol. XXVI (2) *Brooklyn J. Int'l.* 527 529 (2000) and accompanying notes (noting the incongruity and confusion by Nigerian courts in the application of locus standi rule in Nigeria); Cramton & Boyer 'Citizen Suit in the Environmental Field: Peril or Promise', 2 *Eco. L.Q* 407 (1972); F. Brown, 'The Role of Private Citizens in the Enforcement of Environmental Law' J.A. Omotola (ed.), W. Estey, 'Public Nuisance and Standing to Sue' 10 *Osgoode Hall L.J.* 563 (1972); J. K Bentil, 'Environmental Suit Before the Court – The Prospects for Pressure Groups', *J. Plan & Env't L.* 325 (1981); G.O. Oyudo, 'The Locus Standi Syndrome in Nigerian Public Law', 2(3) *JUS J. R.* (1991).

59. The term 'locus standi' is often used interchangeable with terms such as 'standing to sue' or 'entitled to sue'.

60. *Ugo v. Obiekwe* (1989) 1 N.W.L.R. (pt. 99) 566; *Olariode v. Oyebi* (1985) 5 S.C. 1 at 24-25; *Thomas v. Olufosoye* (1986) 1 N.W.L.R. (pt. 18) 669 at 682; *Ladejobi v. Shodipo* (1989) 1 N.W.L.R. (pt. 99) 599.

61. *Supra.*

to protect it. A contrary interpretation will produce absurdity as this will be tantamount to recognition of a right without remedy. The rule is ubi jus, ibi remedium – (where there is a right, there is a remedy).

In *Douglas v. Shell Petroleum Ltd,*[62] plaintiff's action challenging defendant's failure to comply with the Environmental Impact Assessment Decree of 1992, was dismissed for lack of locus standi as plaintiff failed to prove that his personal right was affected by the defendant's failure to comply with the environmental law.

However, liberating locus standi on environmental litigation with a view to promoting environmental justice is undoubtedly a worthy objective. Such private suits are critical to ensuring optimal enforcement of environmental statutes and regulations. To make our environment cleaner, healthier and safer for all generations, our environmental statutes should be amended to encourage private actions to remedy public environmental wrongs.

This paper argues that locus standi should be accorded to group of individuals, communities and NGOs to bring class action to secure substantial compliance with public environmental law in cases of State's inaction or in cases of under-regulation by the officials of environmental protection authority.[63] Judicial activism in the context of environmental justice in Nigeria will require the courts to liberally interpret the provisions of Article 24 of the African Charter to empower individual citizens and NGOs to challenge public environmental wrongs.

The issue of *locus standi* therefore will ordinarily not present a problem to a person whose property interests have been damaged in the course of and due to environmental pollution or natural resources depletion. Yet, such a person may very well decide not to

62. (1999) 2 N.W.L.R. (pt. 591) 466.

63. R. v. Inspectorate of Pollution & Anor, ex parte Greenpeace Ltd (No. 2) (1994) 4 All E.R. 329 (locus standi was granted to the applicant, an international NGOs, to stop the testing of nuclear and radioactive waste in U.K.).

sue for any number of reasons. If regulatory agencies are not then informed or where they fail to act there may well be irredeemable damage to the environment, or the offender may go unpunished and similar behaviour undeterred.

However, a group of citizens or environmental NGOs have a crucial role to play as monitors of environmental activities, public educators, motivators, and defenders of the environment and are highly organized to mount environmental litigation.[64] They may because of an inability to show a direct interest other than that of their special environmental consciousness and common interest in the environment with other citizens be faced with a barrier of standing to sue.[65]

A review through cases in Nigeria shows a common pattern. The trend of case law is that in order to have standing to sue, the plaintiff must exhibit 'sufficient interest', that is 'an interest which is peculiar to the plaintiff and not an interest which he shares in common with general members of the public.' The judicial attitude in Nigeria is that a plaintiff who sues for damages arising from an environmental abuse must show that he suffered damages.[66] In *Shell Petroleum Development Company Nig. Ltd v Chief Otoko and Others,*[67] the respondents who were plaintiffs at the Bori High Court in Rivers State claim the sum of N499, 855.00 as compensation payable to the defendants (appellants herein) for injurious affection to and deprivation of use of the Andoni Rivers and creeks as a result

64. See *Linda M.A.* and *Scott P.*, Defending the Environment: - Civil Society Strategies to Enforce International Environmental Law (2004), Transnational Publisher Inc., New York, USA.
65. *Ibid* at pp. 205-222.
66. Ladan, M.T., 'Biodiversity Conservation in Nigeria: Issues, Problems and Challenges in Implementation'. A Paper presented at a 5 day Second African Regional Seminar on Environmental Law, Natural Resources and Poverty Reduction, organized by UNEP, Nairobi, Kenya in Collaboration with the Ugandan National Environmental Protection Agency held at Imperial Beach Resort Hotel, Entebbe, Uganda, between 25-28 September, 2006.
67. (1990) 6 NWLR (pt. 159-693).

of the spillage of crude oil. The action was brought in a representative capacity. The Court of Appeal held that: (a) It is essential that the persons who are to be represented and the person(s) representing them should have the same interest in the case of matter; (b) Given common interest and a common grievance a representative suit would be in order if in addition to the relief sought it is in its nature beneficial to all whom the plaintiff purposes to represent. The Court rejected the purported representative action.

In another case of *Adediran and Anor v. Interland Transport Ltd.*[68] the appellants as residents of the Ire-Akari Housing Estate, Isolo, *inter alia* brought an action for nuisance due to noise, vibrations, dust and obstruction of the roads in the estate. The Supreme Court dealt with the common law restrictions on the right of a private person to sue on a public nuisance. The Court held that in the light of section 6(6)(b) of the 1999 Constitution, a private person can commence an action on public nuisance without the consent of the Attorney-General, or without joining him as a party.

The approach of the Supreme Court in the above case by abolishing the first problem of *locus standi* in Nigeria is commendable. But the second problem of the rule remaining is that the public or group cannot sue by representation and claim special damages for individuals when they do not suffer equally. In *Amos v. Shell BP P.D.C. Ltd,*[69] the plaintiffs sued the defendants in a representative capacity claiming special and general damages. It was alleged that the 2nd defendants as contractors to the first, had in the course of oil mining operations built a large earth dam across the Plaintiffs' creek. As a result, farms were flooded and damaged; movement of canoes was hampered, and agriculture and commercial life was paralyzed. One of the issues was whether special damages could be claimed in a representative action, when the plaintiffs suffered unequal losses, or whether the plaintiffs as general public

68. (1991) 9 NWLR (pt. 214) 155.
69. (1974) 4 ECSLR 48.

could claim for losses suffered by them individually. It was held, dismissing the claim:

> That since the creek was a public waterway, its blocking was a public nuisance and no individual cold recover damages therefore unless he could prove special damage peculiar to himself from the interference with a public right. That since the interest and losses suffered by the plaintiffs were separate in character and not communal, they could not maintain an action for special representative capacity.

In *N.N.P.C. v. Sele,*[70] the plaintiffs sued for massive spillage of crude oil from the defendant's pipeline, which polluted and ravaged economic trees and crops, fishing ponds, fishing contrivances, local gin distilleries, and fresh water wells over a very wide area. They claimed 20,000,000.00 as fair and adequate compensation for their losses. At the conclusion of the trial the trial court entered judgment for the respondents and awarded N15,329,350.00 as special damages and N3,000,000.00 as general damages.

One of the points taken on appeal was that the trial court was wrong to grant leave to the respondents to sue in representative capacity. In his lead judgment Muntaka-Coomassie JCA referred to the following dictum of Olatawura JSC. in *Adeniran v. Interland Transport Ltd:*

> While in this case it has been shown that they have common interest, the grievance of individuals is separated and distinct

70. (2004) ALL FWLR (pt. 223) 1859 CA.

consequently a representative action taken as in this case must fail.

The appeal failed because, on the particular issue, it was held that the respondents did disclose common grounds and interest in the suit and there were no individual claims. This would reduce the valuable Court time devoted to proving all the material issues over and over in each individual action.

It has been argued against the problem posed by the above decision that "unlike the non-communal English society in which the rule as to public nuisance was developed, in Nigeria people live in communities, especially in the Niger-Delta region where the worst incidents of environmental pollution occur. So how they share the proceeds of special damages awarded, which is the true worry informing the dichotomy of who sues in respect of public nuisance, is not the business of anybody."[71] Consequently, if this matter ever went on further appeal, the decision of the Supreme Court would be interesting indeed.

More recently, Justice C.V. Nwokorie of the Federal High Court Benin City of Nigeria in *Jonah Gbemre v. Shell PDC Ltd and Ors (2005)*[72] granted leave to the applicant to institute these proceedings in a representative capacity for himself and for each and every member of the Iweherekan Community in Delta State of Nigeria, an to apply for an order enforcing or securing the enforcement of their fundamental human rights to life and human dignity as provided by sections 33 (1) and 34(1) of the 1999 Constitution of Nigeria, and reinforced by Articles 4, 16 and 24 of the African Charter on Human an Peoples' Right.[73] The Court held that these constitutionally guaranteed rights inevitably include the

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71. Checkey W.A. (Justice), 'Judgement and Remedies in Environmental Cases'. A paper presented at the Judicial Training Workshop Organized by UNEP and NJI, Abuja, between March 28-30, 2006, at p.41a.
72. (2005) Suit No. FHC/B/CS/53/05.
73. Cap. A9 Vol.1, LFN 2004.

rights to clean, poison and pollution-free healthy environment. The Judge further declared that the actions of the respondents (Shell PDC and NNPC) in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's Community are a violation of their fundamental rights. Furthermore, the judge ruled that the failure of the companies to carry out an Environmental Impact Assessment in the said community concerning the effects of their gas flaring activities is a clear violation of the E.I.A. Act and has contributed to a further violation of the said environmental rights. The judge's order restrained the respondents from further gas flaring and to take immediate steps to stop the further flaring of gas in the community. The Judge advised that the Attorney General should ensure the speedy amendment, after due consultation with the Federal Executive Council, the Associated Gas Re-Injection Act to be in line with Cap.4 of the Constitution on Fundamental Human Rights. But the Judge made no award of damages, costs or compensation whatsoever.

This is a landmark judgment in the sense of application of fundamental human rights to an environmental case for the first time in Nigeria, consistent with the trend in other jurisdictions like India and South Africa.[74]

The trend in other jurisdictions can be seen in the following instances. In the USA for instance, individuals and groups have generally been able to meet the requirement if they show an injury to their aesthetic, conservation or recreational interests.[75] In France, the administrative tribunal of Rouen held that an association for the promotion of tourism and the protection of nature could present evidence of a sufficient interest, given its object as defined in its statutes, to contest an authorization for a waste treatment plant. The court also found that labour union, notably of companies concerned

74. See Dean M., 'The Revolution in Indian Environmental Jurisprudence', Review Essay (2000) *Asia Pacific Journal of Environmental Law*, Vol.5, Issue 3, Kluwer law International at pp. 291-303.

75. See, SCRAP v U.S., 412 U.S 669 (1973).

with chemical industries whose interest were to maintain the authorization, also had the right to he heard. Tribunal adminsratif deRouen, 8 June 1993, Association Union touristique des amis de la nature et autres,[76] an appellate court recognized that a nature protection association has standing to intervene in a case seeking the annulment of an authorization permitting the operation of a uranium mine. However without a showing of material harm, the association could not seek damages.

Where injury is shown, it does not matter the plaintiffs are only a few among many similarly affected. See *Kajing Tubfk & Other v. Ekran Biid & Others,*[77] three individuals among a community of 10,000 are not deprived of standing or relief because of their limited number.

In some jurisdictions, traditional property doctrines have served to expand standing. In *Abdikadir Sheika Hassan and Others v Kenya Wildlife Service,*[78] for example, the court permitted the plaintiff of his own behalf and on behalf of his community to bring suit to bar the agency from removing or dislocating a rare and endangered species from its natural habitat. The Court observed that according to customary law, those entitled to use the land are also entitled to the fruit thereof, including the fauna and flora; thus the applicants had standing to challenge the agency action.

Cases that are characterized as involving infringements of basic rights also generally afford broad standing to affected persons. See *Festo Balegele and 749 Other v. Dar es Salaam City Council* (Civil Cause No. 90/1991, High Court Tanzania)(allowing residents of a neighbourhood to sue the City Council to halt an illegal dump site that was found to deliberately expose their lives to danger).

Governments, too, must demonstrate that they have standing. In Gray Davis et al. v. U.S. EPA (9th Cir. July 17, 2003), the federal government argued that California lacked standing to challenge EPA

76. R.J.E. 1994/1, p. 61.
77. High Court, Kuala Lumpur (1996).
78. High Court of Kenya, Case 2059/1996.

action denying a waiver from some regulations on air quality. The Court held that California was acting to protect its own interests and that furthermore, the Governor and state agency had acted in their official capacities with proprietary interests in the land, air and water of the state. This the court held to be sufficiently concrete to give them standing.

Where numerous individuals are harmed, as is often the case with environmental damage, many jurisdictions allow class actions to be filed by one or more members of the group or class of persons who have suffered a similar injury or have a similar cause of action. The class action is essentially a procedural device to quickly and efficiently dispose of cases where there are a large number of aggrieved persons. It helps ensure consistency in judgments and awards of compensation, as well as prevents proliferation of separate and individual actions. Petitioners file on behalf of themselves and others of their class, representing the others and subsequently others are asked to join in. Often public notices are put out asking interested persons to join the case. To be maintainable, class actions usually must be permitted under the procedural rules of the country, as in the U.S. and in India. Class actions may also be permitted, even recommended by courts, as a means to enforce the constitutional right to a healthy environmental when the specific facts threaten to violate the rights of an undermined number of people. *See Jose Cuesta Novoa and Miciades Ramirez Melo v. the Secretary of Public Health of Bogota.*[79]

Environmental statutes and regulations allowing citizen suits, either against an administrator for failure to perform a required act or against a person who is allegedly in violation of an environmental regulation or standard, have served to enlarge the standing of citizens to seek redress through the courts. Broad laws have been drafted, for example, in New South Wales, Australia, to allow 'any person' to commence an action against any other person alleged to

79. (May 17, 1995), Const. Ct., Colomba; Minors Oposa, Sup. Ct. Philippines.

be in violation of a permit, standard, regulation, condition, requirement, prohibition, or order under the law. Similar legislation has been adopted in India and the United States. Courts must decide how broadly to read the term 'any person.' In particular they must determine whether the individuals must have some interest adversely affected or whether the law was intended to open the doors to all persons taking an interest in the matter, acting as private prosecutors.

In South Africa, courts have looked to a number of factors to determine whether a member of the public has *locus standi* to prevent the commission of an act prohibited by statute:

- Did the legislature prohibit doing the act in the interests of a particular class of persons or was the prohibition merely in the general public interest.
- In the former instance, any person belonging to the class of protected persons may interdict the act without proof of any special damage.
- For legislation of general interest, the applicant must prove that he or she suffered or will suffer special damage as a result of the doing of the act.

Applying these tests to the Environmental Conservation Act of 1989, a court in Durban found it to be in the general interest requiring proof of special harm, but allowed applicant to proceed on a nuisance claim if she could prove that the management and operation of the site in question constituted such nuisance.[86]

Some courts have called for re-examining traditional rules of standing in environmental matter involving the state, in order to adapt such rules to the changing needs of society. In *Wildlife Society v. Minister of Environment,*[87] the Court held that a group whose main aim is to promote environmental conservation should have standing to apply for an order to compel the state to comply with its

86. *Verstappen v. Port Edward Town Board & Others,* Case 4645/93 Durban & Coast Local Division (South Africa).
87. Transkei Supreme court 1996.

statutory obligations to protect the environment. Should access to the courts be abused, the judiciary may impose appropriate orders of costs to discourage frivolous actions. Cases filed by the Secretary General of the Bangladesh Environmental Lawyers Association similarly led the Supreme Court to hold that any person other than an officious intervener or a wayfarer without any interest in the cause may have sufficient interest in environmental matters to qualify as a person aggrieved, e.g *Dr. Mohiuddin Farooque v. Bangladesh*[82] represented by the Secretary Ministry of Irrigation, Water Resources and Flood Control and Others.

The International Arena and the Sword of Kiobel

In 2002, Esther Kiobel, a U.S. resident and the wife of deceased Dr. Barinem Kiobel, filed a lawsuit, *Kiobel v. Royal Dutch Petroleum*[83] along with other Ogoni asylees against Shell corporation. Her lawsuit was filed under the Alien Tort Statute (ATS), a 200-year-old law that has been interpreted by the Supreme Court to allow federal lawsuits for modern-day egregious international law violations. The Ogoni plaintiffs allege that Shell planned, conspired, and facilitated the Nigerian government's extrajudicial executions, crimes against humanity, and torture against the Ogoni people. Shell argues that corporations cannot be sued under the ATS. In *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit became the first court of appeals to substantively analyze whether the ATS imposes corporate liability.[84]

Amicus briefs in support of the litigants were filed on both sides. The U.S. government, Joseph Stiglitz, international law and legal history scholars, and human rights advocates (including the U.N. High Commissioner for Human Rights) wrote in favour of the Ogoni plaintiffs. Shell's position was supported by another group of

82. 48 DLR 1996, SC Bangladesh, 1996.
83. *supra.*
84. 621 F.3d 111, 131–45 (2d Cir. 2010).

international law scholars, several foreign governments, and a dozen of the world's largest multinational corporations.

The Kiobel action, like other ATS cases over the past 17 years, sought to litigate notorious injustices. Many of the defendants have been involved in extractive industries such as ExxonMobil in Indonesia, Occidental in Colombia, Talisman in Sudan, Shell in Nigeria, Unocal in Burma, and Rio Tinto in Papua New Guinea.[85] Other ATS suits have alleged that Pfizer conducted medical experiments on Nigerian children without consent, and that Nestle used child labour to work cocoa plantations in the Ivory Coast.[86] Even al-Qaeda has been sued under the ATS.[87] The cases illustrate significant goal of ATS plaintiffs: to expose human rights violations by trying them in the court of public opinion. Thus, when in 2010 *Kiobel* was dismissed against Shell, the divided Second Circuit panel made headlines, and the sweep of the ruling gained immediate attention.[88] It was the first appellate[89] decision to hold that the ATS could not be used against corporations.[90]

85. ibid.
86. ibid.
87. *In re* Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765, 784 n.16, 785 n.19, 826 (S.D.N.Y. 2005) (allowing ATS claims to proceed against al Qaeda and two alleged 'fronts' for that 'organization'). See also *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); Juli Schwartz, *Saleh v. Titan Corporation*: The Alien Tort Claims Act: More Bark Than Bite? Procedural Limitations and the Future of ATCA Litigation against Corporate Contractors, 37 *RUTGERS L.J.* 867 (2006); *see also Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009).
88. Bob Van Voris and Patricia Hurtado, 'Nigeria Torture Case Decision Exempts Companies from U.S. Alien Tort Law' (Sep. 17, 2010), Available at <http://www.bloomberg.com/news/2010-09-17/u-s-corporations-aren-t-subject-to-alientort- law-appeals-court-rules.html. > accessed 20 September 2013.
89. A district court in California reached this same conclusion one week before the *Kiobel* decision was filed. See *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1132–45 (C.D. Cal. 2010). (The practice of forced child labour in cocoa fields in Mali was not actionable because of defendant's corporate nature).
90. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 151 note * (2d Cir. 2010) (Leval, J, concurring).

The position taken by the majority appeared to gain steam ground in lower courts since the decision was issued in September 2010.[91] An Indiana district court, for example, dismissed an ATS claim against a corporation, solely on the persuasiveness of *Kiobel*.[92] One week later, the same court disposed of a similar case this time on the merits rather than for want of jurisdiction.[93] Within the Second Circuit, one post-*Kiobel* dismissal did not even generate a written opinion.[94]

The majority decision has a long reach: *Kiobel* does not merely stand for the principle that corporations cannot be sued on a tort theory of aiding and abetting. Rather, it finds that corporate entities cannot violate customary international law because they are not subject to it. The majority's discourse on subjects of international law indicates a narrower definition of the word 'violation'. A violation is not merely breaking a rule. Rather, a person or entity is only subject to a rule if he can reasonably expect sanctions for noncompliance.

What the decision means is that corporations have no obligations under international law for tortuous act committed abroad and are not subject to that law. The majority opinion is also an exercise in legal formalism in that it avoids and even admonishes policy considerations that might favour the plaintiffs. For the majority, strict adherence to established principles of customary international law is an end in itself. There is no discussion of the evils addressed by the modern line of Alien Tort Statute jurisprudence.

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91. *E.g., Viera v. Eli Lilly & Co.*, No. 09-495, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010); *Mastafa v. Chevron Corp.*, 759 F. Supp. 2d 297 (S.D.N.Y. 2010); *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810 (S.D. Ind. 2010).
92. *Viera*, 2010 WL 3893791 at *2
93. *Flomo*, 744 F. Supp. 2d at 817.
94. *Mastafa*, 759 F. Supp. 2d at 298–301 (noting that ATS claims were dismissed in open court).

Contrary to the majority opinion in *Kiobel*, the ATS does not require the court to look to international law to determine its jurisdiction over ATS claims against a particular class of defendant, such as corporations.

The first step of statutory construction analysis is uncontroversial: the plain language of the statute does not exclude any defendant. Secondly, the legislative history indicates no Congressional intent to exclude corporate defendants, and the words would not have been understood to exclude such defendants at the time of its enactment. Finally, another federal statute does enumerate exclusions for foreign sovereigns from ATS claims. These well-settled exclusions should inform the more nebulous status of corporate defendants.

For example, there is good reason that the international system can sanction entities such as I.G. Farben for their role in egregious violations of international law. To do otherwise, as in *Kiobel*, creates perverse incentives for actors in conflict zones to collude with one another at the expense of human rights protections for civilians and communities. As Judge Leval notes, if left to stand, *Kiobel* would represent a major setback for international law and the respect of fundamental human rights:

> The majority's rule offers to unscrupulous businesses advantages of incorporation never before dreamed of. So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy - all without civil liability to victims.[95]

95. *Kiobel*, 2010 U.S. App. LEXIS 19382, at 114–15 (Leval, J., concurring).

In essence, the majority's rule would have permitted the German state to privatize the gas chambers with the result that a company like I.G. Farben would then have been able to exterminate millions of people for profit with impunity. This stark example illustrates how the *Kiobel* court's rule might incentivize states to abdicate power to corporate actors, which would then use the corporate form as a shield from civil liability and a means of protecting illicit profits. In contrast, when it passed Control Council Law No. 9 dismantling I.G. Farben, the Allied Control Council intended exactly the opposite result - to demonstrate that corporate collaboration with regimes like Nazi Germany is not acceptable and that perpetrators will be held accountable.

This article notes that consideration of incentives is particularly important in conflict zones like the Niger-Delta where unscrupulous actors are often present. The UN Special Representative of the Secretary-General on Business and Human Rights, Professor John Ruggie, has written about the need to create proper incentives for actors - states and corporations, to respect, protect, and promote human rights.[96] Although the state has the duty to protect human rights under international law,[97] other actors still have significant responsibilities, especially when, for example, a corporation acts with the state or has temporary control over state-like activities.[98]

96. The Ruggie Process is based on a framework that: (1) states have a duty to protect their citizens from abuse by third parties, such as corporations, (2) corporations have a responsibility to respect human rights, and (3) affected individuals have the right to access remedies for violations of human rights. See generally Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights', U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

97. See, e.g., *id.* p18. (2010) 'How Kiobel Undermines the Nuremberg Legacy & Modern Human Rights'.

98. See, e.g., *id.* p24; see also Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 'Business and Human Rights: Further Steps Toward

Ruggie's framework has been carefully developed to avoid the situation where states can abdicate their human rights obligations to corporations. Yet Ruggie has also recognized that poor governance zones, such as conflict areas, present particular challenges for managing and regulating corporate behaviour and protecting human rights.[99] Ruggie has stated that, the worst corporate-related human rights abuses occur amid armed conflict over the control of territory, resources or a government itself where the human rights regime cannot be expected to function as intended and illicit enterprises flourish.

Kiobel's majority opinion creates the wrong incentives for preventing abuse in such situations. In extreme circumstances, it may encourage states or armed groups to abdicate all responsibility to corporations and foster situations in which corporations essentially act as *private* states, immune from liability for human rights violations. In other instances, collusion between powerful players in a conflict (government, insurgents, and corporations) could work to the detriment of local civilians and the environment. It is easy to imagine a situation similar to the facts underlying *Kiobel* in which the state, insurgents, and a corporation might agree to extract oil or minerals that would require displacing a civilian population. As local environmental defenders try to protest, the corporation would have the incentive to eliminate the resistance knowing that the other actors, the state and opposing armed groups would be satisfied because the shared goal of profits from the extraction would be achieved. Such unscrupulous behaviour is exactly what the international community sought to discourage in the wake of World War II by dismantling I.G. Farben and prosecuting its employees. It is submitted that legal decisions should not exacerbate state's conflict.

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the Operationalization of the 'Protect, Respect and Remedy' Framework', pp 44, 62–65, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

99 *Id.* pp. 44, 66–67.

CONCLUSION

This paper discussed the nexus between human rights and environmental protection from a legal perspective. It contends that the Nigerian people have some measures of environmental rights under the Nigeria law but the realization of these rights is constrained by absence of constitutional recognition as such right is reduced to mere fundamental objectives and directive principles of government and declared non-justiciable by the Constitution. The situation is worsened by the reluctance of the court to expand the frontier of law and fundamental rights such as right to live to include right to clean environment and also to accommodate collective actions by NGOs and community to prosecute offenders.

The paper also calls for amendment of environmental statutes and liberal interpretation of Constitutional provisions to empower individual citizens to prosecute public violation of public environmental law. The Indian liberal approach in interpreting legislations and constitutional provisions aimed at protecting the environment should be emulated.

The *Kiobel* majority misinterpreted the Alien Tort Statute. An ATS claim need not 'arise under' international law *or* federal law. By the terms of the statute, an action may be heard when an alien plaintiff claims an injury caused by a *jus cogens* violation and committed by a defendant who is subject to personal jurisdiction in a U.S. court. In 1991, Congress reauthorized the ATS by upholding international human rights law. The modern Congress intended the ATS to provide a unique and powerful means of vindicating human rights abuses that occurred overseas.

Though Congress understood that the application of the ATS to this purpose might cause some friction in U.S. foreign relations, it believed that such tension was 'a small price to pay' for justice of this magnitude. Furthermore, since corporations can be ATS plaintiffs, they cannot effectively argue that they should be barred from being ATS defendants. Neither the ATS, *Sosa*, nor any other

federal law 'requires' that international law extend liability to a corporate entity before the ATS will do so.

The ATS does not incorporate, as the majority claims, the personal jurisdiction of international tribunals into the subject-matter jurisdiction requirements of the ATS. What is more, the majority's result, as a matter of policy, allows potential tortfeasors to escape liability simply because the wrongs were committed under the auspices of a transnational corporation. It would be preferable for potential tortfeasors to escape liability because a trier of fact finds that they were not responsible for the alleged torts.

Even if the majority is correct in assuming that the silence of the ATS regarding defendants indicates a gap to be filled by international law principles, the majority was wrong to conclude that international law has never extended liability to a corporation. Even if the majority is correct that these precedents do not establish a universally recognized custom subjecting transnational corporations to human rights principles today, this paper submits that from the very nature of law as a dynamic tool for social engineering, the law must move with development and break new grounds if that is what is needed to savage mankind from the destructive effect of environmental degradation and pollution. To uphold *Kiobel* is to give a gratuitous licence to transnational corporations to operate unchecked and hold out their heads high as being above the law for the simple reason that they are international corporations. If corporation had been held to have a voice deserving to be heard to enrich political debate, then as a matter of logic and policy, corporations must be held liable for torts committed by them whether locally or internationally. To hold as the majority decision did is to cage environmental justice to the locality of domestic remedies on the one hand, while these transnational corporations hide under the toga multinational to carry out their criminal acts of environmental degradation and pollution. If this continues, then the people of the Niger Delta sooner than later, would be extinct from the surface of the earth.

In *Kiobel* the Second Circuit overrules numerous prior decisions and contradicts sister circuits, finding that corporate liability in international law is not a sufficiently specific norm to support a finding of liability under the Alien Tort Statute. That decision is clearly erroneous. *Kiobel* violates the general principle of legality, immunizing corporate conduct from liability even in cases where States would be liable for violating jus cogens norms and thus also violates the principle of sovereign equality of States due to principles of comity and the res judicata effect of the decision. *Kiobel* is also abnegation by the United States of U.S. obligations under international law. While no state is obliged to remedy jus cogens violations, each state is obliged to respect them. Because *Kiobel* reflects a deep and significant split at the circuit courts, because it concerns U.S. international legal obligations, because the stakes, in human and financial terms are high, because it was so obviously wrongly decided, the split that *Kiobel* represents has reached the U.S. Supreme Court. Thus this Paper explains precisely why the court's decision in *Kiobel* misapprehends the structure and sources of international law and consequently reaches the wrong result for the wrong reasons.

Again the Paper opined that the court in *Kiobel* erred in ascribing a general principle of non-imputation of any liability to corporations under international law from the fact of non-imputation of criminal liability to corporations in domestic law of jurisdictions following the German model of civil law. The court in *Kiobel* erroneously decided that the law of nations indicates only customary international law. But the *Kiobel* court's wilful blindness to international treaty law (jus inter gentes) is contrary to the black letter law of the Alien Tort Statute (ATS) itself. The Act provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations (i.e. jus gentium) or a treaty of the United States (i.e. jus inter genres). The ATS is tort law: criminal liability is irrelevant to it. However, even if criminal law were relevant, numerous treaties,

many of which the United States has signed, impose civil or criminal liability on corporations.

After ignoring the black letter of the ATS and excising U.S. Treaties as a basis for liability under the ATS, the court in *Kiobel* determined that customary public international law does not impose criminal liability on corporations and that as a consequence the ATS could not impose civil liability on corporations. This Paper finds that both corporate civil and criminal liability are consistent with international law. Furthermore, the common law recognizes corporate criminal liability; thus the extraterritorial application of common law subjects foreign corporations to criminal liability which constitutes a state practice of imposing corporate criminal liability internationally. The existence of this state practice shows that there is no international customary law against imposing criminal liability on corporations. Having decided an irrelevancy (the issue is civil, not criminal liability) wrongly (international law can, and does, impose and permit imposition of punitive and not merely restitutionary sanctions on corporations), the *Kiobel* court reached the absurd result that public international law does not impose civil liability on corporations, when in fact corporate liability is a universal state practice. The Kiobel court reached this clearly erroneous result because individual rights and duties of physical persons are recognized only exceptionally in public international law. As a general rule, states are the sole addressees of international law, though there are exceptions, notably jus cogens and certain treaties which are intended to have direct effect, such as self-executing treaties. The ATS gives effect both to customary international law and treaty law. International treaty law unequivocally imposes civil liabilities and even permits imposition of criminal liabilities on corporations. The decision of the court in *Kiobel* that the law of nations does not impose civil liability on corporations is a reversible error.

Against the background of the unwillingness of the Courts in foreign jurisdiction to extend corporate liability beyond their

national jurisdictions, the Paper call for a legislative rethink to make provision for the criminal liability of corporations which results in death and injuries arising from exploration activities of these companies. Such company could be prosecuted and held accountable as it is obtainable in developed nations such as the United Kingdom. The government on its part must be proactive to end a pattern that devalues human lives by irresponsible organisations. Such a law will send a strong message to the corporate world that there is 'criminal responsibility' for criminal acts of misconduct.

THE FREEDOM OF INFORMATION ACT OF 2011: INCENTIVE FOR SECRECY

By

AIGBOKHAN PRESIDENT, Esq.*

ABSTRACT

Access to information has moved to the centre of global thoughts and compassion, seeing that same is analogous to participatory governance. Statute promulgated to permit access to information has turned out to conspire with other file proof legislations. In practice, the content of the Act rattles access to information in every detail, hence the limitation analysis. The paper with effort generates the limit of privacy of public official within the ambit of the Constitution of Federal Republic of Nigeria and the Oath Act. The factors to be put into consideration in determining whether there was a breach of privacy include oath of office, public interest, volume of information in question and corruption. The author uses Johannesburg Principles and similar judicial pronouncements to establish legitimate grounds for using security as a reason for withholding vital information. It went further to state what the affidavit evidence of party seeking to rely on security reason to withhold information must contain. No doubt, the Act is bogged down in a legal morass and whoever wants to see record of public officer has to sue to get it. The paper as part of recommendation admonishes the court to allow access to assets of public officers as food not drugs.

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INTRODUCTION

Freedom of Information Act 2011 (hereinafter referred to as the Act) was promulgated to promote access to information. The Act leaves much to be desired as it bars access to some official information about elected or appointed public officer including political office seekers[1]. It did not cure the privity or secrecy that has bedeviled government record in the past. The paper argues that the Act rattles access to information in every detail. The primary purpose of the Act which is to make available to the press and public all possible information concerning the operations of government or its officials may have been defeated. The Act did not expressly abrogate statutes stalling access to official information in Nigeria, particularly Official Secret Act.[2] In a freedom of information regime, the flow of information from official sources is fraught with lists of prohibition. The overall effect is that a culture of secrecy prevails in all government institutions, nurtured and given legal effect to by our legislation.

DEFINITION OF TERMS

Freedom of information or right to disclosure is a right ensured by legislation which guarantees access to information held by government or some of its officials. It is the legal right[3] to access every personal or public data in official or private custody without compromising the integrity of same. The primary purpose of the Act is to make available to the public, possible information concerning the architectural operations of government or its officials. The right to know must be exercised by legal process established by related legislation.[4] It is the right to disclose to the

1. Section 14 (1) (b) FOIA
2. Section 1 (1) and 27 (1) of the Official Secret Act; NO.29 Laws of Federation of Nigeria (LFN) vol. 13 CAP3 (2004)
3. Section 1 (1)
4. Murad M; "Improving Transparency Through Right to Information and E-Governance: A Bangladesh Perspective" OGJ (2010). Vol. 6 Issue 1: 3, 2010.

public and the public right to express it. Defining the public's right to disclose necessitates an examination of the general purpose of the entire FOIA since the Act as a whole was designed to serve the public's right to know.[5] On the other hand, *Warren & Brandeis*[6] define privacy right is the right to be let alone. For *Moreham*, it is a state of desired in [-] access.[7] It is no doubt a right tied to fundamental freedom and values of contemporary societies.

FREEDOM OF INFORMATION ACT 2011: LIMITATION ANALYSIS

(1) Information relating to the expenditure of public funds *Section 2 (3) (d) (v) of the Freedom of Information Act*, provides that a public institution shall cause to be published information relating to the receipt or expenditure of public or other funds of the institution. Additionally, *section 2 (3) (e) (iii) of the FOI Act* provides that a public institution shall cause to be published materials containing information relating to any grant or contract made by or between the institution and other public institution or private organization. The summary therefore is that information or materials explaining the expenditure of public fund can be accessed by the public.

Hypocritically, the Act also states that an application for information relating to expenditure on building construction which will compromise security should necessitate the turning down of such disclosure.[8] By the Act, self acclaimed security reason is sufficient to turn freedom of information to privacy of information.

Available from www.openjournal.org/article/download/6107/4278, accessed on 1st June, 2011 @ 8:00pm

5. Rosefield F; " The Freedom of Information Act's, Privacy Exemptions and The Privacy Act of 1974" HCL. Rev. vol. 11, 596, [1976] 597-630
6. Warren S. D and Brandeis. L.D; " The Right to Privacy" HLR (1890), vol.4, pp.193-220
7. Moreham, N.A; "Privacy in Common Law" (2005) 121 LQR. 628
8. Building constructed partly or wholly with public funds, is not to be disclosed to the public where it will compromise security. See Section 19 (1) (b) of the FOIA

An abuse flowing from national security and counter-terrorism policies is a clog in the wheel of freedom of information and expression. In *Kenedi v. Hungary*, an expert in history of secret service applied for original documentary sources of the Hungarian secret service. It was held that the domestic authorities had violated the applicant's right, and that access to such sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression.[9]

FOIA is sturdy-security coverage of relevant information. By *Johannesburg Principles*[10] there are legitimate grounds for using security as a reason for withholding vital information. One of the principles states that, restriction sought to be justified on national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country existence or its territorial integrity against the use of threat of force, whether from an external source such as military threat or internal threat like incitement to violent overthrow the government. Similarly, *principle 15* provides that where public interest to have the information outweighs the harm from disclosure, same must be disclosed. [11] The onus is on the State seeking to justify a restriction based on grounds of national security to state the specific threat.[12] The court shall for the purpose

9. Judgment delivered on May 26, 2009 reported at (2009) ECHR 786; (2009) BHRC 335; (2009) 53 EHRR.
10. Johannesburg Principles: National Security, Freedom of Expression and Access to Information; Article 19: (London: 1996), Available from: hhtp://www.article19.org/docimages/511.html.
11. The Federal agencies are proper party defendants in FOIA litigation. The onus is on them to sustain their defence as in this case the proof of the specific threat and lay precise definition to safeguard abuse. See Klass & Ors v Federal Republic of Germany (Series A. No28, 1979-80) 2 EHRR 214 delivered on 6th September, 1978, Abraham & Rose v United States 138 F. 2d 1075, 1078 (6th Cir. 2004)
12. See *Jong- Kyu v FRG*, (Series A, No. 28) 1979-80) 2 EHRR 214, 6 September 1978. The onus of proof of fundamental rights infringement is on the state or the infringing authority. The onus is them to state that the denial of rights was justified by law. See *SSS v Agbakoba* (1999) 3 NWLR (pt. 595) 314, *Ejefor v OKeke* (2007) NWLR (pt.665) 363

of advancing and never for the purpose of restricting the applicant's rights and freedom, respect municipal, regional and international bills of rights and protocols in African regional and the United Nations human rights system.[13] The domestic application of international laws by municipal court is replete in history of Nigeria jurisprudence.[14]

The essence of these principles is to stall unattractive national threat question devoid of substratum[15]. Security reason can only stand to oppose an application for information if the affidavit evidence contains materials suggesting the involvement of the applicant in insurrection and also that the information requested for will aid the applicant in further perpetuating threat to national security.[16] Agree that future harm in the counter affidavit is speculative; the court will weigh up and evaluate the competing values and interest in the affidavit in contrast and comparison with the circumstance and context.

Privacy or confidentiality which is intended only for the purpose of security is much abused. Citizens' interest in tracing the

13. See Paragraph 3 (b) of the preambles to the Fundamental Human Right Rules (FHRR) 2009. The overriding objectives of the Fundamental Human Right Rules is to expand the Constitution of Federal Republic of Nigeria 1999 especially Chapter IV for the purpose of interpretation and application with a view to advancing and realizing the rights, freedoms and protection contained in them and also affording the protection intended by it.
14. See the cases of *Oguaga v State* (1996) 9 NWLR (Pt. 336) P.1; LCDC Ltd V AGF (2002)14 NWLR Pt. 786, P. 1; *Orum Anam LG v. Ikpa* (2003) 12 NWLR (Pt. 835) 558; *Nemi v AG Lagos* (1996) 6 NWLR (Pt. 452) 42 @55; *SSS v. Olisa Agbakoba* (1998) NWLR (Pt. 595); *G.O.K Ajayi v. AGF* (1998)1 HRLRA 373, 378 Ratio 5.
15. The security concern must contain details of the classified status of the disputed record in the counter affidavit. See *Miller v Casey* 73d F.2d 7731776 (D.C. Cir. 1984). The court must accord substantial weight to an agencies affidavit concerning the details. See *Wolf v CIA* 473 F. 3d 370, 373 (D.C. Cir. 2007). The court is warned not to act in vacuum or fill same.
16. See *Asari Dokubo v FRN* (2007) 12 NWLR PT. 1048 P. 320 @ 354- 360; *R v Secretary for Home Department Ex Parte Jahromi* (1995) the Times, 6th July 1995; cited in Barnett H; 'Constitutional and Administrative Law', Cavendish Publishing Limited: London, 3rd Edition; 2000, p. 875.

common wealth is at its lowest ebb, accounted for principally by security alarm. The Supreme Court of Costa Rica has held that the Central Bank's refusal to disclose a report of the International Monetary Fund, requested by a newspaper, violated the constitutional right to information to the detriment of all Costa Rican citizens. The Court reasoned that the State must guarantee that information of a public character and importance is made known to the citizens and, in order for this to be achieved, the State must encourage a climate of freedom of information. In this way, the State is the first to have an obligation to facilitate not only access to this information, but also its adequate disclosure and dissemination, and towards this aim, the State has the obligation to offer the necessary facilities and eliminate existing obstacles to its attainment.[17] In reaching its decision, the Costa Rican Court relied emphatically on the symbiotic relationship between the right to information and the rights of democratic participation. A law like FOIA that stimulates indifference cannot fight unquenchable appetite for fraudulent acquisition. If a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains. Any omissions should be clearly indicated.[18]

REPORTS, PUBLICATION OR STUDIES PREPARED FOR OR BY THE INSTITUTION

The Act allows reports,[19] studies, publication prepared for or by the institution[20] to be publicly accessible. The same Act provides that a result of environmental test by or on behalf of any public institution shall not be publicly available.[21] The Act has placed privacy concern

17. Navarro Gutiérrez v. Lizano Fait, Judgment of April 2, 2002, as translated in the 2003 Report of the Special Rapporteur for Freedom of Expression, p. 161.
18. Article 6.2 of American Convention
19. Factual or inspection report
20. Section 2 (3) (d) (iv) and (e)(ii) of the Act
21. Section 15 (2) of the FOIA

over environmental reports. In 2008, *National Oil Spill Detection and Response Agency (NOSDRA)* commissioned *United Nations Environment Programme* (UNEP) to study the nature and extent of oil contamination in and around Ogoni in River state.[22] The environmental report states thus;

> ".....the most serious case of ground water contamination is at Nisisioken Ogale, in Eleme Local Government Area close to a Nigerian National Petroleum Company product pipeline where an 8cm layer of refined oil was observed floating on the groundwater which serves the community wells.... "[23]

The report further state that the people of Nsisioken Ogale Community have for several years being drinking water contaminated with benzene.[24] It is ridiculous that the *FOIA* forbids the people from accessing environmental report of this nature, so that they can be guided against eminent harm. Since the Act bars the citizen from a mere report, it therefore means that white paper on environment is a classified report. Ironically, even under the Official Secret Act, an environmental report enjoys no such umbrella. In *Marcel Claude Reyes & Ors v Chile*[25] where the Chilean Committee on Foreign Investment reneged on the release of information about deforestation project for evaluation to requesting organizations. The petitioner argued that deforestation project is

22. One of the oil producing communities covered by the report is Nsisioken Ogale Community, Eleme Local Government Area, Rivers State.
23. Report of United Nations Environmental Programme; "Environmental Assessment of Ogoniland" 2010 Executive Summary. p.3
24. A known carcinogen at levels over 900 times above the World Health organization level
25. Case 12.108, Report No. 60/03. Available from http://www1.umn.edu/humanrts/cases/60-03.html. Accessed on October 1st, 2011 @ 7:30pm

related to the activities of fundamental public interest and thus requires direct citizen participation in their oversight. The respondent insisted that the information is classified and confidential. While dismissing the submission of the respondent, the Inter- American Commission in granting the relief of the applicant emphasized that in a democratic ambience, information request is greater than legitimate confidentiality particularly when "the refusal occurred without the State providing any valid justification under Chilean Law". [26]

Similarly, in *Guerra v. Italy*[27], the Court held that *Article 8 of European Court of Human Rights* imposed on the authorities a positive obligation to inform individuals living near a chemical factory about the risks of potentially devastating accidents. Failure to do so had left the applicants unable to assess the risks and make informed decisions about living near the hazardous facility.[28]

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26. International bar Association (IBA) Media Law Committee "case of Claude *Reyes et al v Chile*", available from http://www.milfoe.org/Article/Details.aspx? Accessed on 15th December 2012 @4:00 am.
27. (1998) ECHR 7 delivered on 19th of February 1998
28. The Court found that similar positive obligations existed in *McGinley & Egan v. United Kingdom* (Case no: 10/1997/794/995-996), Judgment of June 9, 1998; available from www.hrcr.org/safrica/access_information/ECHR/mcginley_egan.html). Accessed on 3rd of August 2012 @ 3.16 am.
involving refused access to records regarding the potential hazards resulting from nuclear radiation tests to which the applicants had been exposed while serving in the British army. In this case the applicants who are retired military officers participated in Christmas Island nuclear tests. The document containing the environmental radiation levels and the fact that they have been treated for radiation – related condition shortly after the detonation was kept at the Atomic Weapons Research Establishment. The applicant needed the document before the Pension Act Tribunal (PAT) to establish that there was a link between their health problems and their exposure to radiation. The State objected on the ground that local remedies espoused in Rule 6 of *Pension Act Tribunal* have not been exhausted. The rule provides that applicant has an opportunity to apply to the President of PAT for direction requesting the disclosure by State any relevant document. The court held that if a procedure

Environmental data access is regulated in the United Kingdom by *Environmental Information Regulations 2004* implementing the *Aarhus Convention*[29] specified in s.4 that a public authority shall in respect of environmental information in its custody progressively make the information available to the public by electronic means which are easily accessible and take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.

FILES CONTAINING DETAILS OF CONTRACT, BIDS OR AGREEMENTS

There is freedom to access files containing details of contract, bids or agreements under FOIA.[30] The same Act prohibits details of contract agreement where the interest of the third party will be affected.[31] In a similar vein, proposal and bids for contract was also bared where the information will frustrate procurement or give advantage to any person.[32] One wonders why the Act speaks volume of privacy than the access it was meant to secure. The Act like other established file proof legislation,[33] virtually choked off all access to government files. The denial of information limits popular influence and participation in governance. In Nigeria, an average voter is too far from governance

was specified for the disclosure of documents which the applicants failed to utilize, it cannot be said that the State prevented him from gaining access to relevant information or evidence. The merit of the request was highlighted but the application failed.

29. "Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters" done at Aarhus, Denmark, on 25 June 1998. Available at http://www.unece.org/env/pp/treatytext.htm, accessed on 17th of May 2011 @ 10:06 pm
30. Section 2 (3) (e) (i) of the FOIA
31. Section 15 (1) (b) (op. cit)
32. Section 15 (1) (c) (Op. cit)
33. Official Secret Act NO.29 Laws of Federation of Nigeria (LFN) vol. 13 CAP3 (2004), Code of Conduct Bureau and Tribunal Act 2004, Penal and Criminal Code. By section 1 of the Official Secret Act all information are prohibited from being transmitted except expressly permitted by the government.

For this reason the people have been stripped of their national assets by political servants and unpatriotic bureaucrats under the guise of secrecy. No society can progress were leaders not only abdicate their basic state requirements to citizens but also deny them reasons or mechanism to appreciate otherwise.

STUDIES PREPARED BY INSTITUTION

The Act allows access to studies prepared by the institution,[34] and the same Act prohibits access to research conducted by faculty members.[35] Research is the raw information upon which better understanding and knowledge is based.[36] A research material becomes difficult or impossible to access where faculty members' papers cannot easily be gleaned. This information which will add value to knowledge is painstakingly shredded in secrecy. A law that places privacy coverage on the pages of scholarship is prone to instigate violation of morality required for intellectual revolution. It is ethically correct that anyone comfortable in secrecy cannot lay claim to decency. Above the murmur and storm of privacy, publicity of studies improves research, learning and breathes down the incidence of mediocrity. Freedom of expression is the public's right to open access to information and to know what governments or officials are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.[37] Such access to intellectual materials is certainly to be

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34. Section 2(3) (d) (iv) of the Act
35. Section 17 of the Act
36. Leith, P; " Current Issues in Research Access to Public Register Databases" EJLT Vol. 2, No.2, 2011
37. Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media, November 26, 1999. See also the 2004 Joint Declaration of the three mechanisms, adopted on December 6, 2004, which affirms that "[t]he right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation...."

welcomed – giving much support to the idea that government should provide data for analysis, enquiry and further discuss.

PERSONAL INFORMATION

Financial, medical, social, educational, information or profile of students, clients, individual, residents, is personal information that cannot be applied for. Private information that should not be accessed by members of the public falls within the scope of privacy interest.[38] Personal information of public officers and applicants[39] or prospective public officers is prohibited from release.

It is my candid position that privacy right of public official may be invaded for the satisfaction of the general public. This is because, they disembowel the legitimacy given by the people with fantasy in their display of gruesome official thievery swept under the constitutional right of privacy. Generally, in a freedom of information regime, every citizen becomes a watchdog in possession of a watch list rather than leaving the cumbersome task at the mercy of sluggard representatives who have weaken their own ability to

38. By section 14 (1) of FOIA (2011), an application for under listed information must be denied:
"(a) files and personal information maintained with respect to clients, patients, residents, students or other individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from public institutions;
"(b) personal files and personal information maintained with respect to employees, appointees or elected officials of any public institution or applicants for such position
"(c) files and personal information maintained with respect to any applicant, registrant or licensee by any government or public institution cooperating with or engaged in professional or occupational registration, licensure or discipline
"(d) information required of any tax payer in connection with the assessment or collection of any tax unless disclosure is otherwise required by the statute, and
"(e) information revealing the identity of persons whose file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime.

39. Section 14 (b) *(op. cit)*

function as the legitimate representative of the excluded citizens. Privacy rule in a democratic setting is unacceptable and the uppermost standard is an open register. Freedom of access to private records of public officers is important because of the following reasons;

1. it inures administrative and moral justice between the public and public officers
2. it encourages legal or regulatory processes by promoting conclusive facts or evidence devoid of speculation
3. As a public delegate it is important for the citizen to know the properties and liability of trustees before and after the period of representation because secrecy comes before stealing.
4. it will melt down the incidence of conflict of interests
5. it enhances public trust and credibility
6. it is platform of reviewing services to appraise stewardship
7. lasting loyalty and goodwill thrives only in a transparent government.
8. It is part of a trustee responsibility to release any available information on the request of the people.
9. removing the veil of privacy from a public officer promotes humility and emptiness and so denies the incidence of rush for public office.

Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a

democratic State.[40] The right to information is also a precondition for the exercise of the basic rights of political participation and representation, guaranteed inter alia, by *Article 23 of the American Convention on Human Rights*.[41] Access to information which is also an expression of information held by the government agencies permit peoples participation in public governance by virtue of the social oversight that can be exercised through such access with minimal blockade.

Freedom of information legislation is as old as currency. The *Swedish Freedom of the Press Act of 1766*, the world's first access to information law, provides that every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information. The United Nations General Assembly decided, in one of her militastic resolutions, that freedom of information is a fundamental human right and the touchstone of all the freedoms to which the UN is consecrated.[42] Fundamental right of access to information is a corollary of freedom of expression. *Article 9 of African Charter on Human and Peoples' Rights*[43] stated that everyone has a right to receive information, right to express it and disseminate it within the law. Courts around the world have similarly determined that the right to receive information, including information held by the government, is a central and separate element of freedom of expression. The *European Court of Human Rights*, for example, has repeatedly held that *Article 10 of the European Convention* guarantees not only the right of speakers to impart information and ideas, but also the right of the public to be

40. *Gupta v. Union of India* [1982] AIR (SC) 149, at 232.
41. Which secures the right of every US citizen to take part in the conduct of public affairs, directly or through freely chosen representatives.
42. UN General Assembly Resolution 59(1) of 14 December 1946.
43. Article 9 of African Charter on Human and Peoples' Rights 1990 (Ratification Enforcement) Act (Cap. 10) Laws of the Federation of Nigeria 1990

properly informed.[44] In a modern democracy, a significant part of the totality of public information a citizenry requires is in the hands of the state. The government should be subject to a general obligation to make it available, save when a compelling public interest dictates otherwise. The right of access to state's information is a widget of democratic praxis aimed at combating corruption, abuse of office and conflict of interest.

Certain criteria determine the scope of privacy of public officers;[45] the court is required to take judicial notice and apply it as statutory standard or custom,[46] devoid of any definite guidelines. The category of citizens expected to declare assets and take oath of office have no cause to beckon on privacy. In the case of *INEC v Musa & Ors*,[47] the Supreme Court said that no public officer shall begin to perform the function of his office until he has declared his assets and subscribed to oath of office. There are different species and grade of oath of office.[48] Those who by oath of office is bestowed the duty of trust must allow *cestui que trust* to review stewardship. An academic rendering of the Constitution[49] and Oath Act[50] is that a public officer is a trustee and under obligation to place public interest above personal interest. Open personal profile is a duty of care owned by trustee to beneficiaries.

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44. *Sunday Times v. United Kingdom* (Series A. No. 30) European Court of Human Rights (1979/1980); (1979) 2 EHRR 245 Judgment of April 26, 1979.
45. Democratic participation, Oath of office, trusteeship, visibility among others
46. Section 122 (2) (L) of the Evidence Act 2011 (as amended)
47. (2011)12 NWLR (pt. 1262)
48. Executive Oath of office administered by the Chief Judge; legislative oath of office administered by Clerk, Judicial Oath administered by the Chief Judge, Oath of allegiance, Oath of Office, etc
49. See section 26(1) (C), section 27 (2) (F), section 52 (1), section 94, section 140, section 149, section section185 (1), section 187 (2), section 194, section 196 (4), section 209, section 290 of the Constitution
50. 1st Schedule to the Oath Act of 1963 (LFN Vol. 12, 2004) states;
"3. I will always place service to the public above selfish interests, realizing that a public office is a trust. I will in the performance of my official duties eschew and expose corruption and will also not corrupt others or aid or abet corruption in any of its facet in and outside the public service."

There are instances where officialdom requires us to following a course of action which differ from the one most preferred according to personal view of the matter. The ethical standard required by both official oath taking and assets declaration ritual is the maintenance of high standard of honesty and public trust so as to secure confidence and citizens' respect for their government. It therefore means that public officers under oath of office has a duty to improve the mindset or confidence of the general public which may likely and rightly Judge government by such display. By the oath taking, a public officer elected or appointed is a trustee and under a contract agreement to abhor corruption. The state of profligacy has generated a lot of crack in the marriage contract. A private individual that has a service or representative contract with the public has a moral and legal duty to publish his assets profile for the benefit of the public as against the secrecy proposed by section *14 (1) (b) (e)* of the FOIA. No public officer is paid to act her personal agenda as an agent of the public. Even a private company that has a contract with a public institution or utilizing public fund risk a chance of barring right of access to records.[51]

The refusal of government agency to publish assets of public officers[52] and the failure of FOIA to cultivate access to private information of public officers constitutes far more injustice than privacy invasion.

Another candid test of privacy was as propounded in the case of *Campel v MGN Ltd*[53] where Lord Nicholas held that whether or not information is private, depends on whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy. There is a public perception that most of the people who battle to get into public office do so for self-enrichment and not

51. Section 2 (3)(e)(iii) and (7) of the FOIA. In the case of *U.S. v Casas* 376 F. 3d 20122 (It Cir. 2004), it was held that a private company is not an agency and not subject to FOIA.

52. Code of Conduct Bureau. See Code of Conduct & Tribunal Act (CCTA) Cap C15, LFN 2004

53. (2004) UKHL 22; [2004] 2 A.C. 457

service hence the need for the sovereignty wielder to see what a public officer has bought while in office. Election or appointment into public office is celebrated as an opportunity for the officer and his family, friends and kinsmen to help themselves to public resources.[54] The designed shield for personal criminal liability is no longer impregnable. Since FOIA was passed to serve the public right to know, public interest becomes a ground of invasion of privacy.

Additionally, courts can order disclosure of any file which does not contain vast amount of personal information, even though the invasion will cause an unwarranted invasion of personal privacy.[55] A major factor in determining whether a claimant has a reasonable expectation of privacy of personal information in a public place is the nature of the claimant's activity.[56] ***Moreham*** in his paper "privacy in public places" has argued that people should have greater expectation of privacy in places where only few people can see them.[57] The more conspicuous, the more the volume of invaders.

There is strong evidence that income and asset disclosure has a measurable anti-corruption impact. For example, Latvia, which now has one of the most comprehensive financial disclosure systems in Europe, has experienced a significant decline in public perception of corruption.[58] In the case of *Casas Chardon v Ministerio De Transpotery Communicacionesy Otro,*[59] the Constitutional Tribunal of Peru on 28th of September 2009, expanded public access to the assets declaration of government

54. Ekpu .A. O; "Curbing Corruption in Nigeria, the Role of Code of Conduct Bureau", Benin City: JPL vol. 2: 68, 2004.
55. See *Ditlow v Shultz*, 517 F.2d 166, 17 (D.C. Cir.1975)
56. Moreham N; "Privacy in Public Places" CLJ. Vol 65, 2006, p.473-635
57. *(Ibid)* 622
58. Available from http://media.transparency.org/imaps/cpi2009/. accessed on December 28, 2011 @ 02:00am
59. Available from: www.soros.org/initiative/justice/litigation/vargas/amicus-submission-20100225.pdf. accessed on December 12, 2011@ 12:00am

officials. The court stated that upon request by the public, assets declaration should be disclosed including real estate and moveable property interests recorded in a public register. The court added that any person in a public office has lost his right to privacy on transit.

In Brazil, there is no general, legal requirement that salaries of government officials be made public. However, in June 2009, the Mayor of Sao Paolo, in furtherance of transparency measures implemented by the City, ordered the disclosure on a special website of the names, positions, and precise salaries of all of the 147,000 employees and other 15,000 persons contracted by the City. Two associations of civil servants challenged the City's decision on personal privacy and security grounds. On appeal, the Supreme Court of Brazil, after weighing the competing rights and interests involved, held that the public interest in the disclosure of the information at issue should prevail. The Court noted that the advent of the Internet has transformed the ability of the public to monitor social expenditure.[60]

Access to assets declared is an oversight responsibility of citizens' over representatives. The Hungarian Constitutional Court ruled in 1992 that freedom of information is a fundamental right essential for citizen oversight.[61] The publicity and accessibility of data of public interest is a fundamental right guaranteed by the Constitution. Free access to information of public interest promotes democratic values in elected bodies, the executive power, and public administration by enabling people to check the lawfulness and efficiency of their operations. Because of the complexity of the civic sphere, the citizens' sway over administrative decisions and

60. SINESP & Ors v. City of Sao Paolo, Judgment of July 8, 2009.
61. *Tarsasago v Hungary* (1992) available from www.hudoc.echr.coe.int/sites/eng/pages/serach.asp. accessed on 9th September 2013@ 04.00pm

the management of public affairs cannot be effective unless public authorities are willing to disclose pertinent information.[62]

I submit that allegation of corruption[63] is a matter of public interest and should be sufficient to compel assets publication. The right to personal liberty[64] guaranteed under the Constitution is not absolute. No right is absolute[65] and almost all rights can and sometimes should be limited if the exigencies of the situation so require. Fair interception of personal information does not infringe on the right to privacy granted by the Constitution.[66] In 2000, the Inter-American Commission on Human Rights expressly recognized that access to information held by the state is a fundamental right of every individual.[67] A converse explanation of *section 168 of Evidence Act* is that a public officer shall be compelled to disclose information made to him in official confidence where public interest demands. In other words, it would be fatal for democratic openness if public figures could censor public debate on the basis that the information sought was private data which cannot be disclosed without consent. It requires us to make hard choices between the welfare of the general community and the protection of an individual who may want to harm that community; between the certainty of individual suffering and the potential of great

62. Decision 32/1992 (V.29) AB, at 183-184 (as translated by the Office of the Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information). In 1994, the Hungarian Court struck down a State secrets law, ruling that it imposed impermissible restrictions on the right to information. In so doing, the Court found that free access to data of public interest, including those held by the state, is one of the preconditions for the exercise of the right to free expression. Decision 34/1994 (VI.24) AB.
63. List of cases of public interest include corruption, poverty, rigging or human rights abuse.
64. *Dokubo Asari v FRN* (2007) NWLR pt. 1048
65. See *Uzeokwu v Ezeonu II* (1991) 6 NWLR pt. 200, P. 708 @ 765
66. Section 37 of the Constitution of Federal Republic of Nigeria 1999
67. Inter-American Declaration of Principles on Freedom of Expression, adopted at the Commission's 108th regular session, October 19, 2000.

suffering.[68] What would determine the violation or the guarantee of human rights, especially in a crisis-ridden and poverty –stricken continent like Africa, is the extent to which socio-economic contradictions are resolved.[69]

FORECLOSING THE COURT FROM DISCLOSING INFORMATION

Although the Act is meant to assist public to reach needed information yet the Act restricts the court from disclosing information that would not ordinarily be disclosed to the applicant.

For this purpose, issue relating to disclosure under the FOIA is held in camera.[70] It must be noted that the Constitution[71] listed public morality, public order amongst others as the specific circumstance to carry out trial in camera. Therefore cases arising from failure to declare assets when held in public will not distort public morality or order. In the case of *NAB Ltd v Barri Eng. (Nig) Ltd*[72] the court held that any act of secrecy, however desirable it might seem detracts from the aura of impartiality, independence, publicity and unqualified respect which enshrouds justice given without fear or favor. The court held further that secret trials whether civil or criminal are not normal norms of a democratic society. The Vaughn index allows the court to make a judgment on the validity of the claimed exceptions without having to conduct an in camera review of each document.[73]

The stealth inherent in privacy related trial protects the accused to such a degree that will act against the public interest. The strict

68. Linga. P; "Balancing National Security and Human Rights" (2006) 20, Lagos: NIALS.
69. Ihonvbere. J; "Is Democracy Possible in Africa? The Elites, the people and civil society". Quest: Philosophical Discussions, vol. VI, No. 2: 104, 1992.
70. See section 23 of the Act
71. Section 36 (3) & (4) (a) of the Constitution
72. (1995) 8 NWLR (PT.413) 276, See section 36 (3) of Constitution 1999
73. See Marks, A. N; "Freedom of Information Act: developing a record for appellate review" GWL. Rev, vol. 67: 1033, 1999.

defined exceptions[74] do not cover the cases of privacy concern in the Act. In *Lagunju v Olubadan -In- Council*[75] the defunct West Africa Court of Appeal held that in spite of the fact that the Governor was vested with the power of a "sole judge" under section 2 (2) *of the Appointment and Deposition of Chiefs Ordinance*, his action was invalid as no due inquiry was made by him to investigate the allegation made against the 1st Respondent. My submission is that secret hearing in the Act cannot fight the constitutionally guaranteed public hearing where rights are involved.

PUBLIC INTEREST LITIGATION UNDER THE ACT

The FOIA prohibits the disclosure of personal and 'national interest' information except it can be argued that such refusal will endanger a public interest. Public interest is the general welfare of the public that warrants recognition and protection. Black Law Dictionary[76] defines it as something in which the public has a stake especially an interest that justifies governmental regulation.[77] Public interest litigation is an issue, will or question of considerable public importance that is brought before the court. This kind of litigation springs from widespread dissatisfaction with government recklessness generated by personal rather than broad public demand they ostensibly elected to serve. In this contest, the phrase "public interest litigation" enunciates an unlimited court cases that will evolve a balancing of interest between the official secrecy, necessary public scrutiny and the preservation of public rights to know.

The court is an agent of good governance via her ruling, judgment, review and orders. A citizen denied right to information

74. Section 36 (4) (a) Constitution
75. 12 (WACA) 233
76. Bryan A. Garner (ed); Black's Law Dictionary; 8th Edition USA: Thompson West, 2004 p.1266
77. *(Ibid)* p.1266

is entitled to seek judicial remedy in accordance with the provisions of the constitution and other laws.[78] Public interest litigation in corruption related cases in Nigeria have high social and cultural acceptance and this is where liberal posture of the court is needed.

The beauty of the Act is that any agency that refuses to disclose information risk being sued by the party who requested for the file[79]. However, the 'right' to disclose must be distinguished from the power to "force" that is granted by the FOIA.[80] A request for information ought to be granted by the agency and not the court. Where all information, is forced through the throat of the court, then the main essence of the Act is defeated and the sole of the Act becomes an incentive for secrecy. The FOIA prohibits the disclosure of personal and 'national interest' information except it can be argued that such refusal will endanger a public interest. The court should emphasize that governments have an obligation not to impede the flow of information on matters of public concern.

The power to review the decision to withhold information can be instituted by the applicant at the Federal High Court. Once documents were released, there exists no case or controversy sufficient to confer subject matter jurisdiction on the Federal High Court.[81] Jurisdiction must first be determined before review. The

78. See section 6 (6), 46 of the Constitution, and section 20 of Freedom of Information Act

79. Agencies open themselves to possible liability for refusing to honour a request that the court may find as having a greater public interest. Public officers who arbitrarily and capriciously withheld information may be subject to disciplinary action. See *Thomas v FAA*, No. 05-2391, 2007 WL 219988 @ 3 (D.D.C. January 25th 2007.)

80. See Rosenfield F; "The Freedom of Information Act's, Privacy Exemptions and the Privacy Act of 1974" HCL. Rev. vol.11, 596 (1976) @ 606

81. *Sham v Harris*, 445 U.S. 169, 182 (1980); *Bloom v SSA*, 72f. Appx 733, 735 (10th Cir. 2003); See section 31 of FOIA, section 251 (1) (r) Constitution 1999. The Court may not have the power to decide whether the information released is complete. Inquisition as to the accuracy of the information cannot come by way of originating summons but writ summon and it is the subject matter that determines the jurisdiction.

court may consider both opposing interests under the privacy exemptions and must look broadly at the importance of the defendant's keeping of the file against public need of the information. If both the privacy interests and the public interests are to be considered, disclosure should be made available to the applicant. In the United States of America (USA), the agency does this by preparing a Vaughn index for the court.[82]

VAUGHN INDEX FOR EXCEPTIONS

The court has the power to order any institution to disclose information or part of it to the applicant if the interest of the public is greater.[83] If any agency invokes one of the exceptions, it bears the burden of showing that the claimed statutory exemptions applies,[84] and explain why it is relevant.[85] In ***Vaughn v Rosen***[86] the D.C. Circuit remanded a FOIA case to the district court in order for the court to develop a sufficient record to support its order of summary judgment for the court. In so doing, the court created a *Vaughn index* requiring withholding agency to sub-divide the document[s] under consideration into manageable parts, cross-referenced to the relevant portion of the government's justification.

It allows the reviewing court to examine each item and rule individually on each claimed exceptions. The main essence is to prevent the government from claiming a blanket exemption for all sought after documents and by so doing, ease FOIA review for appellate court.

82. See Vaughn v Rosen, 484 F.2d 820,827 (D.C.Cir.1973)
83. Section 25 FOIA
84. See Summer v Department of Justice 140 F.3d @1078 (D.C. Cir. 1998)
85. Founding Church of Scientology v Bell, 603 F.2d 945,949 (D.C. Cir. 1979)
86. *Ibid*

CONCLUSION

The crux of this paper is that the sun has long set over secrecy of information. Privacy right of public official must be invaded for the satisfaction of the general public. Positions of trust, particularly, if it is a paid office or attended with profit automatically render the holder to disclose profit and loss. Trustees are afraid of privacy invasion than death which is explained by primordial bureaucratic thievery. Unprotected privacy status of trustee will propel the masses to pensively address corruption with knowledgeable finesse.

The rot in the judiciary which has pulled out the blindfold on the lady of justice cannot abdicate her of the pristine responsibility. Our judges have to interpret the law, such that, it makes sense to our citizens in distress and assures them of equal freedom and justice[87] in the on-going case of the Nigerian people versus corruption. The court must pronounce on principle that access to information is to be placed above secrecy in the face of allegation of corruption.[88] This will prevent agencies from withholding items whose informational value outweighs privacy concern.[89] Privacy of public officers must be broken into before they break confidence[90] entrusted to them by the public.

Public interest is a wholly inconclusive phrase which requires the court to apply statutory standard without any definite guidelines. The court must attempt to find a satisfactory definition for the term if an acceptable balance is to be struck between the need to protect privacy and the need to permit unrestricted access to vital official

87. Oputa.C; "Judicial Activism: A catalyst for political stability", Guardian Newspaper of Tuesday 16 September, 2003. pg7.
88. This golden and straight path of law should be followed as opposed to uncertain and crooked cord of discretion.
89. Section 12(2), section 14(3), section 15(4), section 19 (2), section 25 (1) (C) of FOIA
90. Staut. G. M; 'The Costs of Grand Corruption in 3rd World Development' (1994). Human Development Report prepared for the UNDP, Berlin: Transparency International. p.14

records. The court is a public institution and now that the ball is with her, she must assist public interest to outweigh mere courtesy. Government is adopting information as a means of interaction and thus making it the back bone of governance of the world. Nigeria is no exception. Our zealous electorate [91] should not be left out.

Other factors in favor of disclosure that should be considered include legitimate concerns about corruption or mismanagement. Right to receive government or private information is a basic political right and absence of it is a social death and, like the right to impart information and ideas,[92] an actual prerequisite for the meaningful exercise of other fundamental rights in a modern democracy peculiarly a Nigerian state. Furthermore, there is a clear trend in the democratic world to consider free access to disclosure records as essential to ensuring the integrity and credibility of the government *because* public office and shouldering public trust require this. For the FOIA to be given its true sense, public officials must accept the glory that the citizens shed on their way.

This can only be compensated for by doing good will, with trust and obedience, not as a burden to bear, not as a sorrow to share, not a grief, not a loss, not a frown, not a cross but share obedience and a fairest of trustee commitment to beneficiaries. From now, let the courage to disclose, rise against the potential threat of privacy and danger of invasion.

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91. Who at times serve as voters, commentators and even agent of election rigging
92. Generally referred to as freedom of expression. See section 39 of the Constitution of Federal Republic of Nigeria 1999

GOOD GOVERNANCE IN NIGERIA AND 'THE RIGHT OF THE PEOPLE TO KNOW' IN A DEMOCRACY: AN APPRAISAL OF THE NIGERIAN FREEDOM OF INFORMATION ACT 2011.

By

LYDIA NIMO MMADU*

ABSTRACT

Good governance remains the hallmark of Democracy the world over. This includes quality representation, political participation, accountability and unimpeded access to public or government information and documents. To this end, the Nigerian Constitution guarantees the right to freedom of expression and the press which today, had been amplified by the enactment of the Nigeria's Freedom of Information Act 2011. This paper explored the right of the people in a democracy to seek and access information necessary to effectively monitor and criticize government policies and decisions to achieve good governance in Nigeria. The paper undertook a comparative analysis of Freedom of Information Legislations and allied regulations on a global view and juxtaposed them with what was obtainable in Nigeria before the passage of the Freedom of Information Act 2011. The impediments and limitations to accessing information in Nigeria was reviewed against the background of the Freedom of Information Act 2011 to discover whether the Act in practical terms, dismantled these hindrances and limitations in Nigeria's quest for good governance. The paper found that the Freedom of Information Act 2011 though a welcomed beginning in the agitation for unimpeded access to information in Nigeria, particularly in the promotion of press freedom and the practice of journalism and activities of civil societies in Nigeria, some of its provisions leave much to be desired and are actually bubby traps to information seekers. The paper warns that Nigerians should be cautious in celebrating the dawn of the Act. It recommends areas for reforms to bring the Act in tandem with practices in advanced democracies through radical legislative rethink else Nigeria's search for good governance will remain an illusion.

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INTRODUCTION

Self government and the rule of law remain the twin pillars of modern democracy today through which channels the people participate via their elected representatives in the governance of their country. There can be no progress if man is not in a condition that affords him the freedom to search for the truth, in an environment in which the exchange of ideas is not unduly impeded by the state or the society. Democracy calls for an open society. It assumes progressive improvement in the human condition in tandem with enhancements in knowledge.[1] According to Nwabueze, free speech and free press are instruments of self-government by the people because they enable the people to be informed and educated about affairs of government.[2]

Governance on the other hand implies the efficient management of state institutions and steering society and the state towards the realization of collective goals. Edigin and Otoghile[3] clearly argued that the term good governance is a logical deduction from the term governance. They averred that since governance is carried out in the interest of the generality of the people, then good governance implies putting the people first in governance carried out in accordance with legal and ethical principles. Taken in this sense therefore, it is not out of place to say that good governance refers to a system of government based on good leadership, respect for the rule of law and due process and the accountability of the political class to the electorate and transparency in government.[4] They

1. Osita N. O., *Human Rights Law and Practice in Nigeria: An Introduction*, (Enugu: CIDJAP Press, 1999), 181.
2. Nwabueze B.O., *Presidential Constitution of Nigeria* (London: C. Hurst & Company, 1981), 458.
3. Edigin, L.U. and A. Otoghile, 'Good governance and democratic dividends in Nigeria: The nexus.' *Pak. J. Soc. Sci.*, 8(1): 23-26, 2011.
4. Mukoro, A., 'Contending Issues in Governance and Democracy at the Local Government Level in Nigeria: Some Reflections on the Niger Delta Question'

argued further that since democracy is about the people, their wishes and aspirations, then the dividends of democracy is simply how democracy can bring about development in the society through good governance.[5]

This paper draws from Ogundiya's[6] submission that good governance forms the philosophical foundation upon which democracy and democratic theories are built. Similarly, respect for the rule of law has been identified as an essential element of achieving good governance in a democracy. Indeed it has been observed that good governance requires fair legal frame works that are enforced impartially. It also requires full protection of human rights, impartial enforcement of laws, an independent judiciary and an impartial and incorruptible police force.[7] One can say that central to having democracy and good governance is the rule of law. Without the rule of law we can neither talk of democracy nor good governance. In the words of Landell-Mills and Serageldin,[8] 'Good governance depends on the extent to which a government is perceived and accepted as legitimately committed to improving the public welfare and responsive to the needs of its citizens, competent to assure law and order and deliver public services, able to create an enabling environment for productive activities and equitable in its conduct.'

On the above note, this paper reiterates that access to information in a democracy remains a cardinal pillar for the

in: Victor O., (Ed.), *Contending Issues in the Niger Delta Crisis of Nigeria*, (JAPSS Press INC, Houston, 2009), 54-94.

5. Edigin, L.U. and A. Otoghile, n 3 at 26.

6. Ogundiya, I.S., 'Democracy and good governance: Nigeria's dilemma', *Afr. J. Polit. Sci. Int. Relation*, 4(6): 201-208, 2010.

7. Victor, O.O., E.K. Atu-Omimi, et al, 'An assessment of Good Governance in Promoting Agricultural Sector in the Nigerian Economy', *Int. J. Econ. Dev. Issues*, 9(1-2): 12-23, 2010.

8. Landell Mills Pierre and Ismail Serageldin 'Governance and the External Factor' In the Proceedings of the World Bank Annual Conference on Development Economics, 1991 p. 310.

realization and sustenance of democratic values and good governance in Nigeria. A timid and uninformed citizenry is as good as dead - zombies following slavishly and sheepishly without a voice, the ideas and deceits of those entrusted with political powers. As aptly captured by Colin Powell:[9]

> You cannot grow democracy that does not have opposing points of views! People must be allowed to organise a political organizations that argue, that shout, that fight with each other not in the battle field but in the field of ideas. When a ruling party thinks there is no need for the other party's view, then you are already out of democracy and back into tyranny.

The Press has remained the watchdog of government. But in the exercise of this noble role through access to information and dissemination to the public, it has been treated as enemy of the state sometimes leading to the proscription of newspapers and prosecution of journalists. The Press scuttled the third term agenda[10]

9. Oteniva R.A., 'Reflection on Democracy and Good Governance', *The Hir* Monday 04, 2012. Available at http://www.google.com.ng/search?q=Oteniva+R.A.%2C+%E2%80%98Reflection+on+Democracy+and+Good+Gov.(Last visited 28 September 2013.)

10. Emmanuel Aziken, 'How Obasanjo Used Govs, Ministers for 3rd Term Project', *The Vanguard*, (April 9, 2012). At the eve of the tenure of former President Olusegun Obasanjo of Nigeria in 2007, while acting in concert with some unscrupulous politicians, Obasanjo tried to amend the Nigerian Constitution to allow him contest the 2007 Presidential election for a record third term in office. The Constitution guarantees two terms of four years each. This Plan was however, scuttled when the Nigerian National Assembly threw out the Constitution Amendment Bill amid commendation by Nigerians. Former presidential aide and member of the House of Representatives, Dr. Usman Bugaje, and another former House member, Ms. Terri Harriman, narrated how governors and key officials of the Obasanjo administration were mobilised and intimidated to coerce the lawmakers to adopt the proposal. At a

The paper in Part II reviews the background factors that led to agitations for the law pinpointing the desirability of a law in regulating access to information with a view to enthroning good governance in Nigeria. It examines access to information and the freedom of the Press before the birth of the Freedom of Information Act in Nigeria. Part III takes a holistic look at the Act pointing out the ills and inadequacies militating against access to information, particularly information concerning government expenditures and policies - the focus of the Act's remedial provisions. The Act is espoused on a global comparative vista to bring out areas of inadequacies and lacunae while at the same time streamlining judicial responses to the Act. The paper reasons that though the birth of the Nigerian Freedom of Information Act 2011 marked a watershed in the annals of the struggle for better legislative policy on access to information in Nigeria, more still needs to be done in areas of its practical implementation and needless exclusions of certain categories of information as 'no-go areas'. Part IV of the paper offers suggestions and recommendations for reform. It calls for strong institutions and demonstrative judicial activism to give bite to the provisions and intention of the Act. Nigeria as a democracy will be better for it if information on governmental actions and the policies of custodians of political powers are made readily available for public scrutiny and discuss.

LITERATURE REVIEW AND FOUNDATION OF FREEDOM OF INFORMATION LEGISLATION IN NIGERIA.

Literature on Freedom of Information Act in Nigeria does not almost exist since the law is relatively new. However, various legislation and discussions about the Act are discussed by some researchers. A number of local, regional and international instruments provide the legal foundation for the FOI Act in Nigeria. At the local level, sections 22 and 39 of the 1999 Nigerian Constitution implicitly provides for access to information. Section

22 provides the agencies of the mass media with the freedom to 'uphold the responsibility and accountability of the government to the people' and section 39(1) entitles every person 'to freedom of expression, including freedom to hold opinion and to receive and impart ideas and information without interference.'

At the regional level, this right is similarly guaranteed in Article 9(1) of the African Charter on Human and Peoples' Rights which is part of Nigeria's domestic law, having been domesticated. The Charter entitles 'everyone to access information held by public bodies' and to 'access information held by private bodies which is necessary for the exercise or protection of any right.' At the international level, the Nigerian drive for securing freedom of information draws support from a number of provisions and conventions which include resolution 59(1) of the UN General Assembly passed in December 1946, Article 19(2) of the International Covenant on Civil and Political Rights, reports of the UN Commission on Human Rights, declarations by the Commonwealth Summits and also laws and decisions of courts in different countries of the world. The 1946 UN General Assembly resolution is perhaps the most authoritative enunciation of the right to information. It provides that the Freedom of Information is a fundamental human right and the touchstone of all freedoms to which the United Nations is consecrated. It implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such, it is an essential factor in any serious effort to promote the peace and progress of the world.[16]

Freedom of Information has grown to be a global entitlement to which every government without exception claims commitment. The Universal Declaration of Human Rights states that, 'Everyone has the right to freedom of opinion and expression. The right includes freedom to hold opinion without interference and to seek, receive

16. Article 19.

and impart information and ideas through any media and regardless of frontiers'.[17]

The cumulative effect of these provisions is that it is fundamental in any civilized society to guarantee the rights of every person to express himself or herself not only in respect of matters of individual nature but also in respect of issues of public interest. The right to speak one's mind and write down one's thought constitute two basic elements of freedom of expression. Since man is a political animal he would necessarily be interested in events that happen around him and if he is so interested, he has the right to inform others or the public at large.[18] Freedom of expression therefore relates to the liberty of pen discussion without fear of restriction or restraint.[19]

Sebina[20] examined access to information and their enabling legislation and identified that freedom of information Acts present challenges, prospects and opportunities for records managers. In the opinion of Sebina: 'constitutional guarantees of access to information would be fruitless where good quality records are not created, where access to them is difficult, and where procedures are lacking on records disposal.' In the same vein, Hazzel, et al[21] examined the benefits, limitations and difficulty of the Freedom of Information Act brought in by the Blair administration in 2000.

17. *Ibid.*
18. Ademola Yakubu, *Press law in Nigeria.* (Lagos: Law Books, Malthouse,1999) p. 3
19. Olowokere Emmanuel Nimbe and Olateru-Olagbegi Ololade. 'A Right to Freedom of Expression and the Press Under the 1999 Constitution'. *European Journal of Social Sciences – Volume 22, Number 1 (2011).*
20. Sebina and Peter, M. 'Access to Information: The Role of Freedom of Information Legislation and Constitutional Guarantees', *ESARBICA Journal: Journal of the Eastern and Southern Africa Regional Branch of the International Council on Archives.* 24: 43-57.
21. Hazell Robert, Worthy Ben, et al, 'The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?' *Palgrave Macmillan.* (August, 2010.)

Ajulo[22] pointed out that the FOI Act in Nigeria faces the challenge of official secrecy. This secrecy is also strengthened by other legislations and acts that tend to hinder the freedom to obtain information when required due to state functions. Coker[23] averred that the FOI Act faces enormous challenges in relation to human capital development. Odigwe[24] examined the FOI Act with its effect on record keeping in public service in Nigeria. Odigwe maintained that FOI better protects the public servant from prosecution especially with regard to dissemination of required information to the public. Ojo[25] explored the FOI Act as it affects media practitioners. The paper submits that the FOI Act has placed a greater responsibility on journalists especially to access and make public necessary information to the general public.

The world over, the press has always operated as the fourth arm of government, acting as watchdog of government policies. According to Uche,[26] in any crisis situation or conflict, the roles that the mass media, especially the newspaper play in coverage of event are very important. These roles include arousing awareness of the crisis and assuming a national leadership identity and integration. To underscore the near total ban on access to information in Nigeria

22. Kayode A., 'A Freedom of Information Act: the challenge of Official Secret Act, (15 August 2011). Available at http://archive.punchontheweb.com/Articl.aspx?theartic=Art20110815124337789 Last visited 11 August 2013.
23. Coker Omolola, 'The emergence of Nigeria's Freedom of Information Act 2011', Available at http://www.internationallawoffice.com/newsletters/detail.aspx?g=e066adf0-c300-496d-b823-30494f0432ff(Last visited 11 August 2013.)
24. Odigwe, B. 'The Freedom of Information Act and its Effect on Record Keeping in the Public Service', *The Delta Bureaucrat. A Bi-Annual Journal of the Delta State Public Service*. 11(1): 24-26, 2011.
25. Ojo Edetaen. 'Freedom of Information: Current Status, Challenges and Implications for News Media' www.unesco.org/new/.../multimedia/.../wpfd2010_background <Last visited 15 August 2013.
26. Uche L., *Mass Media, People and Politics in Nigeria*, (India: Concept Publishing Company, 1989).

particularly during the military regimes, government breathed down the editor's neck and threatened to suffocate, and often did so through detention or dismissal. In order to avert this, some journalists advised that the press had to be partisan when its fundamental interests are at stake.[27]

Before the advent of the current democratic rule in Nigeria in 1999, military dictatorship was one of the major inhibitions to press freedom.[28] The press in Nigeria has suffered hardship and deprivations in the hands of both military and civilian governments. The suffering includes unjust imprisonment and detention of journalists, prohibition of the circulation of some newspapers, censorship, forced closure of media houses and arbitrary arrest and torture of journalists. The press has also suffered heavy penalties of fines and imprisonment of pressmen, heavy award of damages for libelous publications, summary dismissals of editors and journalists.

For example, during the Babangida's regime, the first magazine to go down the cooler was the News Watch Magazine. Through an evening news broadcast on the 6th of April, 1987, the Federal Military Government prescribed the Newswatch Magazine for what it termed irresponsible and illegal action of the management of the magazine.[29]

As succinctly put by Anyaogu[30] in his article on the significance of the United Nation World Press Day of 3rd of May of every year:

> It is a day to celebrate the fundamental principles of press freedom; it is a day to

27. *Ibid* at n 26.
28. Nwabueze B., n 2.
29. Media Rights Bulletin, 'Shutting down the Press: The Practice of Newspaper Closure & Proscription in Nigeria', Volume 1 No 1, June 1995.
30. Isaac Anyaogu, 'The Nigerian Press as Endangered Species' *The Nigerian Voice* (03 May, 2010). Available at http://www.thenigerianvoice.com/nvnews/22121/1/the-nigerian-press-as-endangered-species.html (Last Visited 10 August 2013.

evaluate press freedom, to defend the media from attacks on their independence and to pay tribute to journalists who have lost their lives in the line of duty. Noble ideal, true, but sadly an empty rhetoric in Nigeria. On that day, support for press freedom is chanted like a mantra. Columnists spew bile upon the police for their terrible reputation with press cameras. State House media staff "felicitate with the press". Activists vent their spleen at legislators over their refusal to pass the Freedom of information bill. In the end, it is another factitious attempt to appear in sync with the rest of the sane world. But what really does May 3 mean for the Nigerian journalist? It is the day many remember how Bayo Ohu, Assistant Political Editor of the Guardian Newspaper was slain. It is the day another wreath is laid for Edo Ugbawu, judicial correspondent of The Nation Newspaper in the anguished hearts of friends and family. It is the day we remember Nathan Sheleph Dabak and Sunday Gyang Bwede and the futile fury that has morphed into Jos. It is the day we remember verdant dreams slain by the barrel of a gun. It is also the day I wonder just what I might write to get someone mad enough to send a killer in my trail. They never told you this in journalism school. They never said that to survive as a Nigerian journalist you would need the guile of a viper and the morals of an alley cat. No, the lecturers were vehement in their belief that we were the fourth estate of the political realm. That we have a duty to hold the leaders accountable; that rumours are true

> until proven false. Sartorial and a sanguine mien, their voices dripping with the wisdom of Egyptian sages, we were dumb enough to believe them. So May 3 is the day we seek to validate a faith that sits leisurely upon the quicksand of a lie. On September 4, 2008, the Lagos-based 'Insider Weekly' was invaded by SSS agents in a manner that would have made the Gestapo proud. On September 17 2008, Channels Television was shut down over a story that claimed that Mr. Yaradua would resign as President on health grounds. And this is in a country where Section 39 of her constitution guarantees freedom of the press. That's why I stopped protesting whenever Mama Aduke wraps my akara balls with pages torn off our constitution.

Anyaogu[31] argued that though Nigeria is signatory to the Universal Declaration of Human Rights[32] (UDHR), the International Convention on Civil and Political Rights[33] (ICCPR) and the African Charter on Human and Peoples' Rights[34] (ACHPR) where articles 19 and article 9 respectively guarantee freedom of expression and the press; the country has no law that prevents media censorship but rather it has obnoxious laws that encourage it. Sections 50, 51, 59, 373 - 379 of the Criminal Code Act, LFN 1999; Obscene Publications Act 1961; Official Secrets Act 1962; Newspaper (Amendment) Act 1964; The defamatory and Offensive Publications Decree No 44, 1966 were carefully designed to rein in the press.

31. *ibid.*
32. Universal Declaration of Human Rights 1948.
33. The International Convention on Civil and Political Rights 1966.
34. The African Charter on Human and Peoples' Rights 1981.

According to reports,[35] a journalist's head had been shaved by a state administrator with a broken bottle.[36] Recently, a governor was accused of beating up an activist, flogging a Catholic Priest with horse whip[37] and several other acts of barbarism perpetrated by leaders whose intellect range a little higher than that of an ant. As Fela Anikulapo Kuti would sing - Human right is our property as such no government can claim to have given its citizenry human rights. A free press is not a privilege; it is the right of every nation.

Freedom of Information Act is not unique to Nigeria. In many countries there have been deliberate efforts to implement Freedom of Information laws. It is now fashionable for nations to enact FOI law to grant the members of the public the right of access to information or official documents held by the State. Although the enactment of FOI legislation started in the 1960s, Sweden's Freedom of Press Act of 1766 is considered to be the oldest law in this regard.[38] The principle of FOI is rooted in the 'concept of open and transparent government'.[39] Free access to information preserves

35. Report available at <http://www.thenigerianvoice.com/nvnews/22121/1/the-nigerian-press-as-endangered species.html> Last visited 28 September 2013.
36. Okafor Ofiebor, 'Amakiri, Journalist Shaved With Broken Bottle Dies', *PM News*, (August 20 2011.) Also available at *pmnewsnigeria.com/.../amakiri-journalist-shaved-with-broken. (Last accessed 14 June 2012.)*
37. *Elombah.com, Governor of Imo state, Ikedi Ohakim flogged me - Samuelson. Available at <http://www.elombah.com/index.php?option=com_content&view=article&id=2921:governor-of-imo-state-ikedi-ohakim-flogged-me-samuelson&catid=46:naija-gossip&Itemid=64>Last accessed 15 August 2013.*
38. Katuu, Shadrack. 'Freedom of Information in Kenya--a Knol' (2008). Available at: http://knol. google.com/k/freedom-of-informationininkenyaIntroduction (Accessed 18 March 2013).
39. Adams, M.'Freedom of Information and Records Management in Ghana.' *African Journal of Library, Archives and Information Science*, (2008) 16 (1) 29-38.

democratic ideas,[40] and it is 'an essential element of a vibrant democracy'.[41] According to Millar,[42] It is a significant paradigm shift from secrecy and concealment to openness and transparency. The right of access to information held by the State has become a benchmark of democratic development.[43] The main goal of FOI, as succinctly captured by Mnjama[44] is to ensure that public bodies are more transparent and accountable in conducting the affairs of the State. Successful implementation of FOI legislation itself is achieved under a good records management regime.[45]

The United States of America (USA) FOI Act is one of the earliest FOI legislations, having been signed into law on July 4, 1966 by President Lyndon B. Johnson 'with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded'.[46] The Act was recently

40. Mason, M.K., 'The Ethics of Librarianship: Dilemmas Surrounding Libraries, Intellectual Freedom and Censorship in the Face of Colossal Technological Progression.' (2008) Available at: <www.moyak.com/researcher/resume/papers/ ethics.html> Accessed 14 March 2013.
41. South African History Archive (2003). Freedom of Information Programme. Available at: http://w ww.saha.org.za/about_saha/fredomofinformationprogramme.html> Accessed 14 February 2013.
42. Millar, L. 'The Right to Information--The Right to Records. The Relationship Between Record Keeping, Access to Information and Government Accountability.' (2003) Available at: <www.humanrightsinitiative.org/programs/ai/ articles/record keeping-ai.pdf> Accessed 20 March 2013.
43. Justice Initiative, 'Access to Information Tool: South Africa.' (2003). Available at: http://www. justiceinitiative.org/db/resource2?res id=102366> Accessed 18 March, 2013.
44. Mnjama, N. 'Freedom of Information Legislation in Esarbica States and Its Implication on Records Management Practices.' *African Journal of Library, Archives and Information Science*, (2003) 10(1) 43-54.
45. Mnjama, N. 'Records Management and Freedom of Information: A Marriage Partnership. Information Development', (2003) 19(3) 183-188.
46. SourceWatch, 'Freedom of Information Act (USA).' Available at: <http://www.source watch.org/index.php?title=Freedomof InformationAct> Accessed 18 March 2013.

strengthened by the Open Government Act of 2007 which confers the National Archives and Records Administration (NARA) with 'the authority to establish the Office of Government Information Services (OGIS) to work in cooperation with Federal agencies to promote accessibility, accountability, and openness in government'.[47] In Canada, the FOI was enacted in 1982 and titled 'Access to Information Act'.

South Africa is one of the African countries with FOI legislations having enacted the Promotion of Access to Information Act, 2000. Some of the countries that have adopted various forms of the FOI though still at the bill stages include: Ghana (Right to Information Bill, 2003); Kenya (Freedom of Information Bill, 2005); Liberia (Freedom of Information Bill, 2008); Malawi (Access to information Bill, 2004); Morocco and Mozambique respectively (Right to Information Bill, 2005); Nigeria (Freedom of Information Bill, 1999); Sierra Leone (Freedom of Information Bill, 2006); Tanzania (Right to Information Bill, 2006); and Zambia (Freedom of Information Bill).[48]

Some countries that provide a right to information in their constitutions also have constitutional procedures that enable the right to be directly enforceable by the courts. For instance, in several Latin American countries including Costa Rica, Honduras, Nicaragua, Panama and Peru, the constitutional right to information may be enforced via a habeas data petition. Several courts have interpreted the right to information to be an implicit component of the right to freedom of expression. For instance, South Korea's Constitutional Court ruled that the right to information is implicit in the right to freedom of speech and press, given that free expression and communication of ideas requires free formation of ideas as a

47. Thomas, Adrienne C. (2009). FY 2010 Appropriations for the National Archives and Records Administration. Available at: <http://appropriations.house.gov/witness_testimony/FS/AdrienneThomas051909.pdf> Accessed 30 March 2013.
48. Ojo Edetuen, n 25.

precondition, and that 'free formation of ideas is in turn made possible by guaranteeing access to sufficient information.'[49]

In Canada, the Constitution does not expressly provide for a right of access to information. However, Canadian courts have held that freedom of expression, found in section 2(b) of the Canadian Charter of Rights and Freedoms ('the Charter'), includes the right to receive as well as to convey information. According to the Supreme Court in *Edmonton Journal v. Alberta (Attorney General)*[50], 'listeners and readers, as members of the public, have a right to information pertaining to public institutions and particularly the courts'. Several courts, including the Supreme Court of Canada, have reasoned that Freedom of Information legislation, given its connection with the concept of democracy, has a quasi-constitutional status.[51] For instance, Justice Laforest concurring with the Supreme Court majority judgment on this point, noted in the landmark case of *Dagg vs. Canada (Minister of Finance)*[52] that the overarching purpose of access to information legislation is to facilitate democracy.[53] Thus, the Canadian Courts through judicial activism

49. *Forests Survey Inspection Request Case*, (1989) 1 Korea Constitutional Court Report 176, 88Hun-Ma22 (S. Kor.), available at http://www.ccourt.go.kr/home/english/decisions/mgr_decision_view.jsp?seq=374&code=1&pg=1&sch_code=&sch_sel=&sch_txt=&nScale=15 >Last visited 17 April 2013.
50. [1989] 2 S.C.R. 1326 at 1336.
51. See *MacDonnell v. Quebec (Commission d'accès à l'information)* [2002] S.C.J. No. 71(S.C.C.); *Canada (Attorney General) v. Canada (Information Commissioner)*, 2004 FC 431 (F.C.) at para 194 (Dawson J: 'The investigation is conducted in furtherance of the quasi-constitutional right of access that has as its purpose the facilitation of democracy'); and *Canada (Attorney General) v. Canada (Information Commissioner)*, [2002] F.C.J. No. 225 (Fed. T.D.) (McKeown J: 'I recognize that the Access to Information Act is quasi-constitutional legislation and the Information Commissioner has an important role to play in our society ...'.
52. [1997] 2 S.C.R. 403 (S.C.C.) at 433.
53. *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.) at 433, per La Forest J., (dissenting, but not on this point).

and liberal interpretations of the Constitution, ensures that the citizens are not denied access to information through any shade of official secrecy or privilege.

In South Africa, section 32(1) of the 1996 Constitution of South Africa reads:

> Everyone has the right of access to –
>
> a) any information that is held by the state; and
>
> b) any information that is held by another person and that is required for the exercise or protection of any rights. National Legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Section 32(1)(b) was the first constitutional provision that provided for a comprehensive right of access to privately-held information. Moreover, it is uncontested that the phrase 'another person' includes juristic as well as natural persons.

In the United States, the right to freedom of information is considered central to the concept of democratic accountability. James Madison, a leading figure in the drafting of the US Constitution, eloquently described the importance of an informed citizenry to democratic governance as a popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both.[54]

Nonetheless, most commentators view the Houchins decision[55] as the most decisive ruling in the United States on the question of

54. Letter from James Madison to William T. Barry (4 Aug. 1822), in 3 Letters and Other Writings of James Madison 276 (R. Worthington ed., 1884).

55. In the Houchins case, in an opinion written by Chief Justice Burger, the Columbian Court held that the First Amendment granted no special right of access to the press to government-controlled sources of information. The Court reasoned that the importance of acceptable prison conditions and the media's role of providing information afforded 'no basis for reading into the Constitution a right of the public or the media to enter these institutions and take moving and still pictures of inmates for broadcast purposes'.

whether the right of access to information receives constitutional protection.[56]

Although motivations for freedom of information vary from country to country, the need to engender openness in reaction to endemic corruption and graft often seems to be a fundamental consideration.[57] The purpose of the law, according to the explanatory memorandum of the Nigeria's FOI Act is '... to increase the availability of public records and information to citizens of the country in order to participate more effectively in the making and administration of laws and policies and to promote accountability of public officers.' Not surprisingly however, the FOI Act borrowed most of its provisions from many of the existing FOI laws of other countries, most of which are developed countries, but a growing number of which are developing countries.

The important question which this paper addresses is whether the provisions of the FOI Act is not in serious conflict with existing legislations and rules that had been used since the country's political independence to restrict access to official records and information. In order to answer this question, it is necessary to consider certain provisions of the FOI Act as they relate to corresponding provisions of the Official Secrets Act, Civil Service Rules and the Criminal Code or Act that were reviewed above. The relevant and seemingly contradicting provisions of the FOI Act vis-a-vis the provisions of the Official Secrets Act and the Criminal Code Act shall be discussed in the next part of this work.

THE FREEDOM OF INFORMATION ACT 2011: PROSPECT AND CHALLEGENGES TO INFORMATION SEEKERS?

56. Roy P. and Yoram R., 'The Constitutional Right to Information', vol. 42(2), *Columbia Human Rights Law Review*, pp.375-78.
57. Blanton T.S., 'Global Trends in Access to Information.' Available at http://www.pcij.org/ accessinfo/blanton.html Accessed 14 March 2013.

Freedom of Information legislation comprises laws that guarantee access to data held by the state. They establish a "right-to-know" legal process by which requests may be made for government-held information, to be received freely or at minimal cost, barring standard exceptions. Also variously referred to as *open records* or (especially in the United States) sunshine laws, governments are also typically bound by a duty to publish and promote openness.

The idea of a Freedom of Information law for Nigeria was conceived in 1993 by three different organizations, working independently of each other. The organizations, the Media Rights Agenda (MRA), Civil Liberties Organization (CLO) and the Nigeria Union of Journalists (NUJ), subsequently agreed to work together on a campaign for the enactment of a Freedom of Information Act. The objective of the campaign was to lay down as a legal principle the right of access to documents and information in the custody of the government or its officials and agencies as a necessary corollary to the guarantee of freedom of expression.[58]

It was therefore a deserved celebration in the Nigerian media when the Freedom of Information Act was eventually enacted. It provides citizens with broad access to public records and information held by a public official or institution. It was a landmark achievement of eleven year struggle to pass such a law in Nigeria. The Freedom of Information Bill was first submitted to Nigeria's 4th National Assembly in 1999 but it did not make much progress. It returned to the legislative chambers in the 5th National Assembly in 2003 and was passed by both chambers in the first quarter of 2007 but it was vetoed by President Olusegun Obasanjo.[59] The Bill failed because of the perception that it was a grand agenda

58. http://www.foi.coalation.org/publications/advocacy_foi/background.htm>Last Visited 01 December 2012.

59. Details available at http://www.stakeholderdemocracy.org/index.php?mact=News,cntnt01,print,0&cntnt01articleid=341&cntnt01showtemplate=false&cntnt01returnid=114 >Last accessed 20 March 2013.

of the ethically wayward media to further strengthen itself as a weapon of terror.[60] It returned to both chambers of the 6th National Assembly in 2007.[61] Commendably, the Freedom of Information Coalition established in 2000 to sensitize the public on the merits of the Bill began to broaden its appeal to address the perception that the legislation was simply for the media. The effort yielded fruit; the National Assembly passed the Freedom of Information Bill in 2007, although then President Olusegun Obasanjo withheld his assent on grounds that it did not adequately address some security considerations and once again, the whole process of legislation commenced anew. Thus, President Jonathan's assent of May 28 rekindled hope in Nigeria's commitment to openness in governance.

This paper argues that in providing unimpeded right of access to individuals, procedural step with deliberately created exceptions knowing that no right is limitless make the legislation a good starting point. With a background that considers the most harmful of public information as 'secret,' the new law lifted Nigeria's public information management and record-keeping to all-time radical pinnacles. In the new legislation, the Act expresses the view that all institutions spending public funds should be transparent in their operations and expenditure information on the activities of these public institutions should be made accessible to the citizens. Insider informants otherwise known as whistleblowers should be shielded from sack and other forms of victimization and reprisal attacks from their employers or organizations. In the words of Kadiri,[62] of the Open Society Justice Initiative, the new law will profoundly change how government works in Nigeria. According to him, Nigerians can now use it as oxygen of information and knowledge to breathe life into governance. It will no longer be business as usual.

60. Lanre Idowu, 'Media and Society', *The NEXT* (July 7, 2011).
61. *Ibid.*
62. Open Society Initiative, 'Freedom of Information Act Signals Consolidation of Nigeria's Democracy' (Press Release, May 31, 2011).

In Section 3 of the Act, public institutions are mandated to provide detailed description of their corporate profiles, programs and functions of each division, lists of all classes of records under their control, and related manuals used in administering the institution's programs. They are to provide public access to documents containing final opinions, including concurring and dissenting ones; orders made in the adjudication of cases, and those covering policies, contracts, receipts, or expenditure; and reports and studies conducted by the institutions.

The law directs public institutions to ensure that the public's right of access to information shall not be prejudicially affected by the institutions' failure to publish any information under this subsection. Although Section 12 (1) excludes information that may be injurious to the conduct of Nigeria's international affairs and defense, no application for information shall be denied where 'the public interest in disclosing the information outweighs whatever injury that disclosure would cause.' In other words, the onus is on the public agency to establish why the information should not be released. There are provisions for seeking redress for denied applications and penalty for wrongful denials.[63] In endorsing the

[63] For example, in *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) vs. Petroleum Products Pricing Regulatory Agency & Others* brought Pursuant to section 20 of the Freedom of Information Act 2011: Suit No. FHC/CS/L/221/2011; SERAP a civil society organization had obtained the leave of the Federal High Court sitting at Ikeja in Lagos seeking an order of Mandamus over PPPRA's failure to release records on fuel subsidy. According to the organization, 'The 1st Defendant/Respondent is a public institution, and as such has a binding legal obligation to provide the applicant with the information requested for. The information requested for relates to the details of spending on fuel 'subsidy' in 2011; and this information does not come within the purview of the types of information exempted from disclosure by the provisions of the FOI Act. Up till the time of filing this action, the Defendants/Respondents have failed, neglected and refused to make available the information requested by the Applicant. The Defendants/Respondents have no reason whatsoever to deny the Plaintiff/Applicant access to the information sought for.' See details on <www.serap-nigeria.org >Last visited 12 March 2013.

people's right to know, the Freedom of Information Act acknowledges that sovereignty belongs to them, and that the quality of information available in a community leverages the quality of their participation in public affairs. Extreme secrecy in governance and poor information flow breed suspicion and misunderstanding among the populace and prevent the necessary cooperation for development.

According to Ojo, the signing of the Freedom of Information Bill into law is the clearest demonstration ever of the power of civil society working together to influence public policy and initiate reform.[64]

Agbu,[65] while speaking on 'Using the Freedom of Information Act to Enhance Journalism Practice', said accountability and transparency could only be guaranteed with openness of public officials on the income and expenditure of public funds. While using journalists to explore the advantages of the law, the former editor of Daily Sunray newspaper said it would add value to governance in Nigeria.[66]

The newly enacted Freedom of Information Act 2011:

- Guarantees the right of access to information held by public institutions, irrespective of the form in which it is kept and is applicable to private institutions where they utilize public funds, perform public functions or provide public services.
- Requires all institutions to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act.
- Provides protection for whistleblowers.

64. 'Information Act: Challenges before the Media' Editorial, *The NigerianDaily.Com* (October 24, 2011).
65. Former Vice Chairman (East) of the Nigerian Guild of Editors.
66. Igoniko Oduma, 'Nigeria: NUJ Workshop Unmasks Challenges in Information Act' *Daily Independent* (August 17, 2011).

- Makes adequate provision for the information needs of illiterate and disabled applicants;
- Recognizes a range of legitimate exemptions and limitations to the public's right to know, but it makes these exemptions subject to a public interest test that, in deserving cases, may override such exemptions.
- Creates reporting obligations on compliance with the law for all institutions affected by it. These reports are to be provided annually to the Federal Attorney General's office, which will in turn make them available to both the National Assembly and the public.

The Act further requires the Federal Attorney General to oversee the effective implementation of the Act and report on execution of this duty to Parliament annually.

CHALLENGE OF THE ACT.

The underlying philosophy of the Freedom of Information Act 2011 is that public officers are custodians of a public trust on behalf of a population who have a right to know what they do. This paper raises the fears about the implementation of the Act in Nigeria. It raises the issues of political interference, slow pace of the judicial process, contradiction on the existing laws that give immunity to the President and state governors and cost of funding the implementation of the law, among others.

The foremost challenge to the Freedom of Information Act 2011, is to educate by way of reorientation, the conservative mindsets of the public officers to appreciate the reality that information is a tool for national development that must be accessed without impediments or shredded in greedy secrecy to the advantage of an oligarchic few. The second is to facilitate the administrative machinery to bridge the gap between policy formulation and implementation. Third, considering the fact that the office of the Attorney General is saddled with the responsibility of monitoring compliance of public institutions with the law and informing the

National Assembly annually of progress so made, the personality of the occupant is crucial.

Fourthly, the legislature, media and civil societies have a great role to play in ensuring that the Attorney General, being the appointee of the president, lives up to his constitutional responsibilities and challenges of his office as the custodian of the Constitution. There should be a legislative rethink by making the Attorney General to be more responsive and alert to the law being the number one law officer of the country. The media must perform its role of educating and explaining the provisions of the law to get citizens informed. The media needs to intelligently exploit the law to unleash the best traditions of investigative journalism needed to put both the government and the people on the part of participatory democracy and information sharing.

Fifth, it is correct to say that no tyranny of dictatorship can permanently imprison a determined citizenry, hence the sustained agitation of an organized people can always push through an idea whose time has come. Openness and transparency in promoting good governance are the best requirements in any decent society today. The coalition of interest groups that fought for the Freedom of Information Act has more work ahead, teaching the public how best to utilize the law.

Again, 'public interest' as it appears in the Freedom of Information Act, 2011 should be properly defined else the law would continue to create contradictions in its application. The protection of 'public interest' as contained in the Act is vague because in Nigeria public officials construe public interest to mean their own interest.

Lastly, despite this beautiful victory for transparency, accountability, democracy and integrity, it would seem that it is nothing but Pyrrhic victory! Why? Because legislation called the Official Secrets Act would appear to be taking away with the left hand what the Freedom of Information Act has given with the right!

A plethora of laws prevent civil servants from divulging official facts and figures, notably the Official Secrets Act which makes it an offence not only for civil servants to give out government information - but also for anyone to receive or reproduce such information. The Evidence Act, the Public Complaints Commission Act, the Statistics Act as well as the Criminal Code, contain restriction to access public information. Prior to the passage of the Freedom of Information Act, virtually all government information in Nigeria was classified as top secret. This veil of secrecy made and still makes it difficult to get information from a state agency. It is a common practice in government department to be told that very useful information you need is classified and as such not accessible.

The veil of secrecy that usually surrounds public information in government departments and agencies under the guise of official secrets legislation is not only needless and counterproductive, but entirely undemocratic. Instances abound where civil servants had refused to avail the National Assembly documentation after being asked to do so to enable the legislature carry out its oversight function. Consequently, the journalists are denied access critical information needed for accurate reporting, and unraveling the web of corruption in Nigeria. Public Officers, who have soiled their hands in the pot of corruption, classify information needed to expose and prosecute them as top secret documents. Students also find themselves barred from reading documents necessary for their research. According to Ajulo, 'In the name of official secrets, somebody sits on information that will benefit millions of people. In some other countries, some of (this) classified information would ordinarily be found on the internet'.[67]

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67. Kayode Ajulo. 'FOI Act: The Challenge Of Official Secret Act', A Paper Presented at a Workshop organized by Nigeria Press Council in conjunction with NUJ (2011). Available at <www.transparencyng.com/index.php?...foi-act-the-challenge-of-official-secret-act.kayodeajulo >Last Visited December 24, 2012.

CONCLUSION

Section 1 of Official Secrets Act,[68] makes it an offence for any person to transmit, obtain, reproduce or retain any classified matter. The Official Secrets Act was enacted in 1962, shortly after independence, and government officials, including staff, swear by the Act to keep all government transactions secret. The Official Secrets Act is often blamed for the obscurity in government transactions and ease of corruption in Nigerian government agencies. As submitted by Ajulo,[69] ordinarily the idea behind these laws is to protect vital government information, but the level of secrecy is so ridiculous that some classified government files contain ordinary information like newspaper cuttings which are already in the public domain. This position is emphasized by the dawn of the internet where access to information has been made very easy. In information management, there is hardly any space or wall. So which way forward for the Freedom of Information Act as it relate to the Official Secrets Act? The answer is simple!

It is suggested that the Government should create an enabling environment for the implementation of the Freedom of Information Act by repealing the Official Secrets Act and all other laws in the statute books that inhibit freedom of expression and freedom of speech. On the part of the Nigerian Judiciary, a favourable environment for adjudication on cases pertaining to refusal to disclose information as stipulated in the Freedom of Information Act should be created. To this end, the fuel subsidy suit by SERAP[70] in which the Federal High Court, Ikeja nullified the purported power

68. Cap 03.Law of the Federation of Nigeria 2004.
69. Kayode Ajulo n 67.
70. *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) vs. Petroleum Products Pricing Regulatory Agency & Others* Brought Pursuant to section 20 of the Freedom of Information Act 2011: Suit No. FHC/CS/L/221/2011.

of the Federal Government of Nigeria to deregulate the petroleum products in the country is heartwarming.[71]

Furthermore, the Nigerian Judiciary must display rare courage and judicial activism by rising up to the occasion to declare as null and void any other law or act which is inconsistent with the provision of the Freedom of Information Act, especially given that the Freedom of Information Act has a constitutional flavour rooted in sections 22 and 39 of the Constitution of the Federal Republic of Nigeria. Section 1 (3) of the CFRN 1999 is clear on this that where any enactment is inconsistent with the provisions of the Constitution, the Constitution would prevail and that other law would be null and void to the extent of the said inconsistency.

Moreover, the judiciary had strived to find means and ways of giving purposive interpretation to the Constitution and statutes to the end that societal good is attained and the aim of the drafters of any legislation is not defeated. The attitude is fairly represented by the view that the fundamental rights under Chapter IV of the constitution are sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate section in Chapter IV of the constitution. Indeed, the fundamental rights guaranteed in Chapter IV of the constitution were specifically designed and intended to limit the powers of the executive and the legislature both at the national and state levels. This position has also been borne out by the several occasions when the courts have had to pronounce on 'ouster clauses'. In *Shugaba v Minister of Internal Affairs,*[72] a High Court held invalid section 19(3) of the Immigration Act on the ground that it conflicted with section 38 of 1979 constitution. In view of these judicial precedents, it is safe to submit that the Official Secret Act is obsolete, anachronistic and legally dead for being in conflict and contradiction

71. Note however that the Federal Government has since filed an appeal against the Judgment of the Federal High Court and is currently pending before the Lagos Division of the Court of Appeal.
72. (1981) 1 NCLR 25.

of the constitutional right of freedom of expression. One of the fundamental human rights of the citizens guaranteed by the constitution is the right to comment freely on matters of public interest. It importance to Nigerians and relevance to the rule of advocacy of government underscores how dearly Nigerians treasure it.

The Nigeria Judiciary is enjoined to be persuaded by decisions in foreign jurisdiction in giving judicial bite to the Freedom of Information Act as demonstrated in the Indian case of *State of UP v. Raj Narain and Others,*[73] where A. N. Ray, C.J., A. Alagiriswami, R.S. Sarkaria and N. L. Untwalia, JJ; speaking for the Indian Supreme court held:

> In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be few secrets. The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The

73. [(1975) 4 SCC428].

> responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.

In the recent case of *Secretary, Ministry of Information & Broadcasting, Government of India Vs. Cricket Association of Bengal*[74] the Supreme Court observed that true democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The court held that the right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non information; according to the court; all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchic organizations. This, the court warned, is particularly so in a country where a majority of the population is illiterate and hardly 1½ per cent of the population has an access to the print media which is not subject to pre-censorship.

In another recent case of *Dinesh Trivedi, M.P. and Others V. Union of India and Other*[75] the Court dealt with citizen's rights to freedom of information and observed as under:

> In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare. Democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant.

74. [(1995) 2 SCC 161].
75. [(1997) 4 SCC 306].

There is a practice followed in United States of America, where a candidate contesting election for Senate has to fill a form giving information about all his assets and that of his spouse and dependents. The form is required to be refilled every year; a penalty is also prescribed which include removal from voting. In a public interest litigation filed by Association of Democratic Reforms *Union of India vs. Association for Democratic Reforms & Ann*[76] the Supreme Court directed the Election Commission to require the persons contesting elections to give such information. It was felt that this information would help the people to choose good, sincere and honest persons to the legislatures.

On their part, Nigerian Press organizations, comprising the Nigeria Union of Journalists (NUJ), the Nigerian Guild of Editors (NGE), and the Newspapers Proprietors Association of Nigeria (NPAN) should publicize and enforce the Code of Ethics for Journalists in order to ensure that the Freedom of Information Act now that it has become law, is not abused and that journalists are able to meet the higher standards of accuracy and fairness which is required of them.

Moreover, it is suggested that the provision of the Freedom of Information Act granting power to the Attorney General of the Federation to monitor compliance with the provisions of the Act leave much to be desired. It would amount to being a judge in one's own cause when it comes to ascertaining whether the Attorney General himself complied with the provisions of the Act. Besides, the Attorney General is an appointee of the President and as such raises a big question mark on the sincerity of his loyalty to the President and the political party that formed the government. It is imperative that the section be amended to avoid undue power being at the disposal of the government as the section can be exploited by the ruling party to witch-hunt and silence the opposition.

76. JT 2002 (4) SC 501.

This paper also emphasizes the role of technology in making the [illegible] work in Nigeria. There should be technology to help access information as well as institutional arrangement to facilitate access to information. Journalists, civil society groups and indeed all stakeholders should create the enabling platform to make the law work.

This paper finds that monitoring and implementing the provisions of the FOI Act has its own cost implications. Journalists involved in going to court to compel officials of government and corporations to release information requested incur huge cost in the process and great deal of time is invested in the pursuit. The question is: Who bears the cost? The Reporter, the Editor or the Publisher, even in a situation where salaries of these journalists are not paid as and when due. Ironically, while the media harp on the importance of the FOI Act, the Paper finds that many journalists are yet to study the Act. This paper suggests that copies of the Act should be printed and made available to all working journalists so that they can be guided accordingly.

The Paper finds that concentration on the use of the FOI is on government activities at the centre (Federal level) whereas there is alarming rot at the State and Local Governments level. The general thinking was that the success of the FOI would depend on a thorough scrutiny of all government activities including the councilors.

This observation immediately brings to the fore the issue of domesticating the FOI. The hope is that the State governments will domesticate it. Already, three States have approved it.[77] While

77. Most states of the Federation have failed to put in place the requisite machinery for either implementing the Act or enacting their own State level FOI laws, pursuant to the provisions of paragraph 5 of the concurrent legislative list. For exhaustive discussion, see Communiqué issued at the end of a Two-Day National Conference on the Freedom of Information Act 2011 organised by Right to Know Initiative (R2K), Nigeria on the 30th and 31st of July, 2013 at the new Chelsea Hotel,
Abuja. Available at <http://r2knigeria.org/> accessed 28 September 2013.

encouraging journalists and the civil society not to relent in their efforts to make the law a success, the Paper wants Nigerians to know that the struggle is going to be tough owing chiefly to our long history of military dictatorship and culture of suppression of the freedom of the people to speech and to the press.

Nigeria may be left behind in the search for true democracy and good governance if government businesses and records are continually shredded in secrecy no matter the justification the custodians of such information may have. Democracy is government by participation; as such, the citizenry at all times have the right to know. Our democracy will not work unless we have the zeal for good governance and keep ourselves informed. Now is the time for all good people of our great nation to come to the aid of our young democracy. Education is all we need for the revolution and with judicial activism on the part of our courts, a great deal could be achieved by exploring the provisions of Nigeria's Freedom of Information Act 2011 to put government on its toes through public scrutiny, discourse and debate.

HARMFUL TRADITIONAL PRACTICES THAT MILITATE AGAINST THE RIGHTS AND HEALTH OF WOMEN AND FEMALE CHILDREN IN NIGERIA.

BY

DR. JOEL BARDE, ESQ*

ABSTRACT

Gender-based abuse occurs in all societies of the world, within the home or in the wider community and it affects women and girls. The women folks in Nigeria are generally vulnerable to male perpetrated violence. This work discussed some forms of gender-based Abuse like Domestic violence, Right of women to inherit the properties of their husbands, widowhood practices, Female genital mutilation, early/forced marriage, virginity test and son preference and its implications for the girl-child. The work also discussed the implications of these abuses in the name of traditions on the Human rights and health of women and female children. Ways to abolish such obnoxious practices in Nigeria are suggested.

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INTRODUCTION

In every culture, important practices exist which celebrate like-cycle transitions, perpetuate community cohesion, or transmit traditional values to subsequent generations. These traditions reflect norms of care and behaviour based on age, like stage, gender, and social class while many traditions promote social cohesion and unity, others erode the physical and psychological health and integrity of individuals, particularly women and girls[1].

Discrimination against the female folks has dominated contemporary discussions, world wide, by legal scholars, social commentators and academicians. The predicament of women has attracted global concern that policy actions aimed at wiping out all forms of discrimination and gender inequalities have been initiated. The United Nations General Assembly through the movement for the rights of women initiated the legal framework (known as the Convention on the Elimination of All Forms of Discrimination Against Women) to preserve the dignity of all human beings.

This was followed by the adoption of the convention on the elimination of all forms of Discrimination against women in 1967, ratified in 1979 and came into force in 1981. Nigeria has since ratified this convention.

The Protocol to the African Charter on Human and People's Rights on the rights of women in Africa is also a unique piece of legislation because it takes into consideration the provisions of other international instruments on human rights that touch on women's rights, the need for equality and freedom from discrimination[2]. It also takes into consideration the peculiar circumstances of women in Africa and their vital role in development.

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1. "Giving up Harmful Practices, not culture", *http://www.advocates* for youth web 25 Feb. 2012.accessed 15 Feb. 2012. 10:15AM
2. Emmanuel O.O. "Assessing Women's Rights in Nigeria". *www.pambazuka.org*. visited 15/2/2012. 2.30PM.

By virtue of the protocol, Nigerian women are guaranteed the right to dignity; life; integrity; freedom from harmful practices which negatively affect the human rights of women; equal rights in marriage and in cases of separation & divorce; the right to education and training.

The above legal instruments certainly could have been the keys to a new dawn for Nigerian women, but it is sad to note that Nigerians observe these principles in theory than in practice due to some cultural and traditional beliefs. Gender inequality which is rooted in tradition is so obvious in the Nigerian society that it exists in every facet of the social, economic, political and cultural practices of the country. The cultural practice is such that even the elite members of the society who should be championing the cause of human rights are shying away from this responsibility.

It is pertinent to note that these cultural practices are being perpetrated against rights guaranteed under the Constitution of the Federal Republic of Nigeria 1999 (As amended) The constitution in chapter four provides for equality and freedom from discrimination irrespective of race, tribe or sex. This work seeks to discuss the different types of harmful traditional practices that impinge on the rights and health of the women folk. The effect of such harmful practices on the rights and health of women are also discussed. The study will provide ways on how to get rid of the problem in communities that still engage in such horrible practices.

TYPES OF CULTURAL PRACTICES VIOLATING WOMEN'S RIGHTS

Every social grouping in the world has specific traditional practices, some of which are beneficial to all members, while, others are harmful to a particular group such as women and children[3].

Violence affects the lives of millions of women world wide, in all socio-economic and educational classes. It cuts across cultural

3. Fact sheet N0.23, "Harmful Traditional practices affecting the health of women and children" at *www.chchr.org*, visited 20th Feb. 2012. 9.30AM

and religious barriers, impeding the right of women to participate fully in society[4]. Violence against women takes a dismaying variety of forms, from domestic abuse and rape to child marriages and female circumcision. All are violations of the most fundamental human rights.

DOMESTIC VIOLENCE

The declaration on the elimination of violence against women is the first international human rights instrument to exclusively and explicitly address the issue of violence against women. It affirms that the phenomenon violates, impairs or nullifies women's rights and their exercise of fundamental freedoms. The Declaration provides a definition of gender based abuse, calling it "any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of liberty, whether occurring in public or in private life"[5]

Violence against women in the family occurs in developed and developing countries alike. It has long been considered a private matter by bystanders including neighbours, the community and government. Such private matters have a tendency to become public tragedies.

Reports all over the world on domestic violence, show that men are the perpetrators of this inhuman and degrading treatment against women. In the United States, a woman is beaten every 18 minutes. Indeed, domestic violence is the leading cause of injury among women of reproductive age in the United States. Between 22 and 35 percent of women who visit emergency rooms are there for that reason.[6] The highly publicized trial of O. J. Simpson, the retired

4. "Women and Violence" Published by the *United Nations Department of Public Information* DPI/1772/HR – February 1996.
5. *Ibid*
6. *Ibid*

United States football player, acquitted of the murder of his former wife and a male friend of hers, helped refocus international media attention on the issue of domestic violence and spousal abuse. In peru, 70 percent of all crimes reported to the police involve women beaten by their husbands.[7] It is a notorious fact to state that in most societies in Nigeria, the woman is traditionally looked at as a second class citizen, a property to be inherited or merely seen as an instrument for procreation thereby inhibiting the realization of her rights as enshrined under chapter four of the constitution of the Federal Republic of Nigeria 1999.Wife beating occurs mostly because of the erroneous belief that it is a viable means of checking the excesses of an erring wife.[8] Worse still ,the statutory, religious and customary laws in Nigeria allows for violence against women as they give some provisions in support of such. The Penal Code in section 55(4), applicable in the Northern part of the country, allows the correction of a child, pupil, servant or wife by beating in as much as the beating does not amount to grievous hurt.This encourages wife battering, and diverse forms of violence against women. Most men have taken advantage of this law to inflict grievous bodily harm on the bodies of their wives under the pretext of correction. A few related cases will be highlighted to stress this dehumanizing treatment against women on account of customary beliefs.

A Non Governmental Organization,Women Right Advancement Protection Alternative (WRAPA) sometimes in the year 2001 filed criminal changes against a husband for beating his wife and causing bodily harm because he had accused the wife of bearing all females in six successions without a male to succeed him in the family.[9] One

7. United Nations Department of Public Information DPI/1772/HR-February 1996
8. US Africa: "Violence against women in Nigeria Community: Issues of power and control" *http://www.usafrica.online.com* 10 march 2012 9.30am
9. *Women's Right Advancement and Protection Alternative* Vol. 2. No. 1 April – June 2003 p. 6.

Gloria Egbuji, the Executive Director of Crime Victims Foundation (CRIVIFON), a non-profit crime victims' outfit in Lagos, has called on the government to take urgent measures to stop the increasing cases of domestic violence against women in the country. Egbuji made the call following the arrest of a middle age man, Sylvester Ameri, by the police for allegedly inflicting injuries on his fiance's right eye[10]. The incident happened on October 7 2011 at the suspect's residence in Port Harcourt. The two of them had a quarrel and the suspect allegedly picked up a sharp object and pierced the victim's right eye.

Series of cases in which husbands beat their wives to death are often reported in the media. One Veronica Nwamaka Oronye, a mother of two, died on 22nd January 1999 as a result of serious head injuries she sustained when her husband battered and pushed her over the balcony of their storey building.[11] A 28 year old woman was beaten to death by her husband[12]. Recently, precisely on the 7th of March 2012, a man from Daika in Mangu Local Government Area of Plateau State hacked his wife to death by driving a pick axe into her head from the front of her head to the back. She bled to death.[13] There was also a similar report from Miango in Bassa Local Government Area of Plateau State where a man beheaded his wife for rituals.[14] Wife beating has brought a lot of untold hardships to women subjecting them to psychological and social trauma. Some have even been maimed for life. Several other cases of violence against women go unreported because the victims suffer in silence. Most cultural and traditional belief systems of the various ethnic groups in Nigeria assign an inferior role to women and further

10. "Daily Times" http://dailytimes.com.ng. 10th March 2012 10.15am
11. Ugwu, S. N. "The Agony of a woman" *Academic Trust Fom Datione Pankshin*, 2003 pp.44-45
12. See *Vanguard* 19th May 1990.
13. *The Light Bearer*, March, 2012 PA - 4
14. *Ibid*

promote violence against women. As there are no laws on some very prominent forms of violence against women in Nigeria, most acts of violence against women are justified on the grounds of some women's actions or inactions. Some women, especially in the Northern part of the country, are of the opinion that the husband can punish the wife if she neglects some of her duties such as taking good care of the children or not putting the husband's food on the table in good time.

There is also the omission of marital rape from the definition of rape under the penal legislation applicable in the North as well as under the criminal code applicable in the Southern part of the country. Hence, in every part of the country, marital rape is not recognized by legislation and is therefore not a crime[15]. In order words, sexual abuse and rape by an intimate partner is not considered to be a crime in most countries.[16] A wife is expected to submit. Therefore, women in many societies do not consider forced sex as rape if they are married to, or cohabiting with the perpetrator. The assumption is that once a woman enters into a contract of marriage, the husband has the right to unlimited sexual access to his wife.[17] It is thus very difficult in practice for a woman to prove that sexual assault has occurred unless she can demonstrate serious injury[18].

15. The Nigeria CEDAW NGO COALITION Shadow Report submitted to the 41st session of the United Nations Committee on the Elimination of all forms of Discrimination against women, holding at the United Nations Plaza New York from June 30-July-18, 2008.
16. "Advancing Women's Rights Globally" at *Community.vangardngr.com.* June 2006. Accessed 15 Feb. 2012 10:30AM
17. "Domestic Violence Against Women and Girls" at *www.unicef-ir.org.* June 2000. Accessed 23 Feb. 2012. 10:30AM
18. "United Nations Department of Public Information" DPI/1772/HR-February 1996 at *www.un.org.* Accessed 20 Mar. 2012.

WOMEN'S RIGHTS TO INHERITANCE

"Inheritance" simply means the entry of a living person into the position of a dead person"[19].

Inheritance therefore refers to a title or property or estate that passes by law to the heirs on the death of the owner. The concept "inheritance" is also defined as an estate or property that a man acquired by descent and can be transmitted to his heirs in the same way on his death on intestacy[20]Upon the death of a man, the devolution of his property may be governed either by customary, or English law. The question as to which of the laws is applicable often arises in cases of intestacy: where there is a valid will it leaves no room for uncertainty. Where it is customary law that is applicable, the woman is not entitled to inherit any property depending on the prevailing custom. Various customary laws applicable in different parts of Nigeria deny married women the right to inherit property.[21] The various customary laws operative in most parts of Nigeria treat women as objects or properties and therefore a subject of inheritance.[22] In some customs, the woman is regarded as part of the property owned by her husband and that all properties acquired during the subsistence of the marriage belongs to the husband[23] even where she has contributed to the acquisition and development of the property.

This invidious practice affects an Edo woman's status after the death of her husband. Under customary law in all parts of Edo state, a widow cannot inherit in the intestate estate of her deceased

19. Okoli B. "Nigeria: Inheritance Rights and Women" (iii) *http://www.leadership.ng* 18 April 2008 Accessed 20th Mar. 2012.
20. "Women's rights and status under Edo Native Law and custom Myth and Realities" (2) *http://.edoworld.net* accessed 15 Mar. 2012, 10:00AM.
21. The Nigeria CEDAW NGO COALITION Shadow Report. Ibid.
22. "Qualls a women in Nigeria today" *http://www.postcolonialweb.org* last visited 20 march 2012, 9:30PM
23. "Gender Training and Development Network" *http://www.genderdevelopment.org* last visited 10 Feb. 2012, 5:00PM.

husband. The widow is infact considered as part of the estate to be inherited by the son or relative.[24] However, she has the right to remain in her late husband's estate even without consenting to marry an eldest son or even when she has no children surviving although she has no right to dispose of any interest in such house.[25]

The practice is not different in Yoruba land. The Supreme Court in the case of *Akinnubu v. Akinnubu*[26] held that:

> It is a well settled rule of native law and custom of the Yoruba that a wife could not inherit her husband's property. Indeed under Yoruba customary law, a widow under intestacy is regarded as part of the estate of her deceased husband to be administered or inherited by the deceased family. She could neither be entitled to apply for a grant of letters of administration nor appointed as co-administratrix.

Similarly in Igbo society, succession to property of a deceased is by "primogeniture"[27]. This means succession by the first born of the male line that is known as "okpala" or "diokpala". Under this custom, the first son inherits the father's property because he automatically becomes the head of the family. Also, under this custom the woman does not share in the estate of her deceased husband.

The practice of denial of inheritance right has caused untold hardship to woman and girl-children often left destitute and in

24. "Women's Right and Status Under Edo Native Law And Custom: Myth And Realities" (2) http://www.edoworld.net last visited 15th Feb. 2012 8.30pm In *Iweloa Awero v. Raimi Sadipe* (1983) 11 O.Y.S.H.C. (pt.11) 790 States that a widow without issue is part of the property, and liable to be inherited with the other property of the husband.
25. *Ibid*
26. (1997) 2 NWLR 144 (S.C).
27. *WRAPA Newsletter* Vol. 3 No. 3 Sept. 2002 P. 9.

extreme poverty at the death of their husbands or fathers. The rules of customary law is manifestly obnoxious and discriminatory against women when subjected to the full weight of Article 16 CEDAW which requires state parties to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. An abused widow who became a victim of discrimination narrating her experience said:

> I and my children were beaten and kicked out of our house by my brothers-in-law. We live by begging, in continual fear.[28] Again a widow aged 26 years old and mother of one daughter in Enugu State narrating her ordeal said my husband died of TB and probably Aids in August 2003. Since then I have been having terrible difficulties with my in-laws. Although they did not help at all in raising the money needed for his burial. I found on my return from the hospital that my brother-in-law and my husband's younger brother had ransacked my wardrobe and removed my husband's bank passbook and other things from our house. My father-in-law refused to allow me entry into the family compound to collect my personally belongings.[29]

The story portrays the irrepressible male dominance over women in inheritance matters in the southern part of Nigeria. It also confirms the insensitivity of the inheritance laws and practices in

28. Okoli B. "Nigeria: Inheritance Laws And Women Rights" *http://www.leadership.ng* 18 Apr. 2008. Accessed 20th Mar. 2012. 4:00PM.
29. *Ibid*

most parts of Nigeria. Women in most communities in Nigeria are denied rights to land and the provision in the constitution on the land Use Act does not even guarantee equal access of men and women to land.[30] Rather, it reinforces customary and cultural practices that deny women access to land-an important means of production.

The Land Use Act[31] in addressing the issue of devolution of Right of occupancy upon death of the holder provides that in case of a customary Right of Occupancy, the customary law existing in the locality in which the land is situated shall regulate the devolution of the deceased occupier rights. Most customary laws of succession exclude women and female children from inheriting. It will appear therefore that the act further perpetuates perhaps unwittingly the custom, which denies women the right to own and inherit property. It is our view that most cultural practices in Nigeria are truly a violations of human rights. Incidentally, most of these negative practices have come to acquire the force of law as a result of prolonged usage in their various communities.

Women's access to land in Nigeria is especially limited in the southeast and south where cultural norms and traditions forbid a woman to own land.[32] Customary law entitles a woman to the provision of a home by her husband. She remains in the house as long as the marriage lasts. She has no proprietary rights because she cannot hold or dispose of any part of the property. Her marriage does not secure for her the right to inherit property on her husband's death. In *Nezianya v. Okagbue*[33] the court stated that under Onitsha native Law and custom a widow could possess her

30. "Gender Training And Development Network" http://www.genderdevelopment.org last visited 10 Feb. 2012 11.AM
31. *Section 24(a) Laws of the Federation of Nigeria 2004.*
32. "Women's Inheritance Rights in Nigeria One King at a time" http://www.genderacrossbordercom 18 Oct. 2011 last visited 10th March 2012. 11:45 am
33. (1929) 9 Nigerian Law Report 79.

husband's land but no matter how long the possession lasted, she could never be the owner of the land. Oputa JSC (as he then was) put it thus:

> A woman cannot own land in her own right in many village communities, she can only have custody of any piece of land the husband permits her to cultivate or else she holds any piece of land in trust for her male children only.

Under the Ibo customary law, a woman cannot inherit the property (movable or immovable) acquired by her husband. It does not matter whether he acquired the property with the help of the wife.

Section 42 (1) of the 1999 Constitution prohibits discrimination on grounds of sex amongst others and further to that, the Nigerian government has signed and ratified several instruments that frown at inequality and discrimination, and aim at protecting women's rights as human rights. Nevertheless, the right of the woman to freedom from discrimination continue to be in jeopardy due to obnoxious cultural practices. It is our humble view that women should have full inheritance rights everywhere. The practice of denying women inheritance rights is wrong and this is one aspect of our customary law that should change. It is our opinion that women should fight for their rights in court.

In a landmark judgment on inheritance, the supreme court held that "women should not be discriminated against in inheritance practices and ruled that a widow should inherit her husband's property"[34].Similarly, in *Mojekwu v. Mojekwu,* the Nnewi

34. See *Okonkwo v Okagbue* (1994)12 SCNJ 89.See also"Nigeria: Rights of widows to inherit property in a civil marriage where there was neither will no children; inheritor of the property upon her death" http://www.unchor.org 28 Aug. 2000. Accessed 25 Mar. 2012, 8:00AM.

customary law of Olickpe was struck down under the repugnancy principle by the unanimous judgment of the Enugu division of the Court of Appeal. The basis of the decision was that the customary law in question which "permits the son of the brother of the deceased person to inherit the property of the deceased to the exclusion of the deceased's female child" was a clear case of discrimination and hence inapplicable.[35]

It should be noted that, although Islamic law is part of Nigerian customary law but it accords full rights to women to own property and can sell such property without the consent of their husbands or their fathers.[36]

WIDOWHOOD RITES

Widow rites refer to series of practices through which a widow must proceed upon the death of her husband before being able to rejoin her community[37]. Many of these practices are potentially dehumanizing and make women vulnerable to property grabbing[38]. Experience has shown that the practice affects the physical and mental health of widows and infringes their human and reproductive rights.

In most parts of Edo State, the wife of a deceased husband must perform a host of rites. Thus, she is subjected to taking an oath

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See also *Democracy and Governance program in Nigeria*. PANA Feb. 1998.

35. (1997) 7 NWLR (Pt.512) 283 at 300
36. "Nigeria: Fighting for women's Inheritance Rights in Rivers State" http://www.makeeverywomancount.org. 2nd Mar. 2012 last visited 30th February 2012, 4.00PM. "Current Issues, Economic Equality and Inheritance Rights" http://www.wisemushinwomen.org. last visited 26 Mar. 2012. 6:00PM
37. *Emery v. "Women's Inheritance Rights in Nigeria*: Transformative Practices" at www.nigerianlawguru.com. Accessed 15 Mar. 2012. 11:00AM.
38. Okoye P. U, *Widowhood: A Natural or Cultural Tragedy* (Enugu: Nucik Publishers, 1995) at 164.

her involvement in the husband's death.[39] In some rural areas, the oath is administered with insistence that the widow must drink and bathe with water used in washing the husband's corpse. In Igbo land, in particular, a widow must shave all her hairs (both head and public), wear same dress or clothes for a year, sleep on bare floor, eat with broken plates and not wash her hands for a number of days or months.[40] It is most disturbing to say that women are the care takers of the very culture that often discriminate against them[41] and they have been made to believe that they are the custodians of the very laws, rituals and practices that violate their rights[42]. Again in Edo State, the widow, must mourn her husband for seven days, being forced to cry, and washing the dead man's body and drinking the water. In Rivers State, the widow may have to swim across the river and throw herself over the body of the deceased several times.[43] In Ekwusigo Local Government Area of Anambra State (which most of their cultural practices are typical of the Igbo tribe in Southeast Nigeria), the principal dehumanizing widowhood rites and practices include the following:

(a) Drinking washings from husband's corpse to exonerate the wife from accusations of killing her husband.
(b) A widow not having a bath until after eight market days (one month) when she will be led to the river by twelve midnight to bathe.

39. Isibor P. O. "Women's Rights And Status Under Edo Native Law And Custom: Myth And Realities" (2) http://www.edoworld.net visited 14 Feb. 2012 5.00PM.
40. *Ibid*
41. Cassman R. "Fighting to make the Cut: Female Genital cutting studied within the context of Cultural Relativisms" 6 N.W.U.J.*int;/hum.rts.*128 at http://www.law.northwestern.edu/journals visited 10 Mar. 2012 7:00PM.
42. *Ibid*
43. Okoye *Loc. Cit.*

(c) Restriction of the woman's movement to market, church, social events for the one year period of mourning.
(d) Stigmatizing a widow who died within the mourning period and refusing her corpse burial rites.[44]

Instances where women are subjected to untold hardship and physical abuse in the name of culture are many. For instance for Mrs. Amina Nwachukwu, from Kaduna State, getting married to Sylvanus Nwachukwu, an Igbo from the east, was not easy. Her mother refused to give in to her wish to marry a "total stranger", while the father disowned her. Against the wishes of the parents and many relations, Amina had her way. But what happened to Amina after her husband died made her wish she had listened to her parents. As part of the Igbo tradition, she was forced to drink from the water used to wash her husband's corpse. She was also forced to sleep with the corpse to prove that she had no hand in his death.[45] Amina's experience is just one of the many abuses which women suffer in many parts of the country.

Widowhood rituals persists, despite its condemnation for several reasons. First, these practices are linked to a belief that the widow may have been involved in the death of her husband. For instance, amongst the Igbos, where widow rites are particularly strong, there is a belief that any death is not natural, and that the widow must therefore prove her innocence to the family through undergoing rites.[46] In effect, she is under oath during the period of the rites[47]. Second, the widow must rectify the breach in conduct

44. "Evil or Dirty Nigerian Cultures That Should be Abolished-Culture" (9) - Naijaland http://www.naija-land.com visited 3 March 2012. 9.00AM.
45. *Ibid*
46. *Ibid*
47. *Okoye Op. Cit.* at 52. 3

that has caused death in the community.[48] Third, the wife's inability to wash, and her shaved head, may also make her unattractive to her deceased husband and thereby stop him returning as a jealous ghost to dispute his property, including his wife.[49]

It is observed that women are the victims, perpetrators and enforcers of the sanctions. The patrilineal daughters are the key perpetrators and enforcers who most of the time, are prejudiced against their dead relation's wives for past disagreements or misunderstandings. Therefore, they see the widowhood period as a time for vendetta.[50] On the other hand, there are no degrading traditional rites for a widower, rather, his welfare is the paramount concern of both family and friends. In some parts, custom and tradition demand that a widower should not sleep alone but with another woman of his choice until his wife is interred, so that the spirit of the dead wife may not come and disturb his peaceful sleep.[51] They are pampered by the same *Umuada* (Kindred sisters of the men, dead and living) who punish the widows,their fellow women .

It is our stance that these nefarious acts of violence against widows should be stopped immediately. Why should a woman be made to suffer so much and some die as a result of such punishments, because she lost her husband by death? This is a time she deserves much sympathy and empathy and co-operation. Why should it be assumed that the woman killed her husband, while the same assumption is not extended to men when their wives die?In parts of Benue State especially among the Etulo people, the widow cannot go to the town even to get food for the children. She is confined for three months to know whether she is pregnant. Her

48. *Ibid* at 133
49. Okoye *Loc. Cit.*
50. "Evil or Dirty Nigerian Cultures That Should Be Abolished – Culture (9) – Nairaland" *http://www.nairaland.com* last visited 3 March 2012, 9.00am
51. Isibor *Loc. Cit.*

only dress for the three months is called "bento" which has a ritual ascribed to it.[52]The "bento" dress is symbolic of her sexual relationship with her husband and it is meant to deter her from acts of promiscuity before she is culturally freed from the period of the mourning.[53]

In Muslim communities, widows do not typically perform widow rites, but do go through a period of ritual morning followed by a period of purification. For instance, in Plateau and Bauchi States, Muslim women have 40 days of morning, and 30 days of seclusion. In Kano, there is a four month period of mourning followed by two days of *takaba* or seclusion.[54]

In all the above situations, it is clear that widowhood rituals amount to violation of fundamental human rights as guaranteed under section 34 of the 1999 constitution. The practice is also injurious to their health.

WIFE INHERITANCE

In most communities in Nigeria, if a man dies intestate then the property is commonly divided amongst family and the widow's needs are generally not taken into account. As such, if a widow wants to ensure her financial security then she will marry into the family again.[55] There is abundant evidence to support the inheritance of widows as properties among the Igbos, Binis and Esans in Edo State, Tiv, Idoma, Berom etcetera.[56] For example, among the Igbos, widow is either inherited or forced to marry a close relative of her dead spouse, especially, if she is still of child-

52. WRAPA Newsletter Vol. 3 No. 3 Sept. 2002 P. 7
53. *Ibid.*
54. Emery *Loc. Cit*
55. "Nigeria: Rights of widows to Inherit property in a Civil Marriage where there was neither will nor children; inheritor of the property upon her death" *http://www.unucr.org*. visited 20 March 2012 10.00am
56. Aduba J. N. "Some cultural practices that Affect the Enjoyment of Fundamental Human Rights of Women in Nigeria" *New Vistas in Law* Vol. 2 2002 P. 204

bearing age. Among the Binis and Esans as well as the other tribes in Edo, marriage is mainly polygamous – a status which is accepted and revered among the rural folk. The net effect is that many deceased Edo men leave a large number of widows to the whims and caprices of their relations. Therefore the wife or wives of a deceased Edo man may be inherited by his heir or heirs who may be sons or brothers of the deceased.[57]

It has been argued that the practice of widow inheritance is a form of insurance policy designed to ensure that a widow is not left uncatered for after the demise of her husband.[58] Whatever the reason or reasons behind widow inheritance, we submit that such practices amount to inhuman and degrading treatment because the woman's right to choose freely her sexual partner is violated. Where she refuses to be inherited, she is neglected by the husband's family and left to suffer with her children or may even be deprived of her late husband's property. Some are even sent out of their matrimonial homes.[59]

FEMALE GENITAL MUTILATION

Another harmful cultural practices which affect the rights and health of women is female circumcision otherwise known as female genital mutilation. This is seen as one of the most serious forms of violation against women. Inspite of the consistent campaign by organizations across the country against female genital mutilation, this painful practice still flourishes unchallenged in several local communities in Nigeria. Female genital mutilation is a barbaric tradition from the dark and ugly past of some societies in Nigeria

57. Isibor *Loc. Cit.*
58. *Ibid*
59. Juba N. N. et al, Reproductive Health And Rights of Women Lagos. *Baobabwomen.org*. 2007. Accessed 25 Mar. 2012.

and elsewhere in the world which must, by universal acclaim, be abolished.[60]

Female Genital mutilation involves surgical removal of part or all of the most sensitive female genital organs or other injury to the female genital organs[61] for cultural or other non-therapeutic reasons.[62]

Although circumcision may be performed during infancy, during adolescence or even during a woman's first pregnancy, the procedure is usually carried out on girls between ages 4 and 12.[63] There are different types of female circumcision. In the first type, clitoredectomy, part or all of the clitoris is amputated, the second type (commonly referred to as excision) has to do with the removal of both the clitoris and the labia minora. The third type is known as infibulations and the most severe form. After excision of the clitoris and the labia minora, the labia majora are cut or scraped away to create raw surfaces, which are held in contact until they heal, either by stitching the edges of the wound or by tying the legs together.[64]

60. "Nigeria: Female Genital Mutilation" http://www.fgmnet.work.org last visited 15 Mar. 2012 10.45AM

61. "Harmful Traditional Practices". www.kit.ni/net/kit. Accessed 15 Mar. 2012, 3:00PM.

62. "Nigeria: Female Genital Mutilation" www.unicef.org. Accessed 20 Mar. 2012, 6:00PM. "Giving up Harmful Practices Not Culture" http://www.advocatesforyouth.org. visited 17/2/2012. 9.33AM

63. "Female Circumcision: Rite of Passage or Violation of Rights?" *International Family Planning Perspectives Volume 23*, Number 3, Sept. 1997 P. 3. These procedures can take place anytime from a few days after birth to a few days after death. In Edo State, for example, the procedure is performed within a few days after birth. In some communities, if a deceased woman is discovered to have never had the procedure, it may be performed on her before burial in some communities it is performed on pregnant women during the birthing process and accounts for much of the high morbidity and mortality rates. It varies among ethnic groups Report on "Female Genital Mutilation (FGM) or Female Genital Cutting" *http://www.onlinenigeria.com*. Accessed 15 Mar. 2012. 5:30PM.

64. *Ibid*

As the wounds heal, scar tissue joins the labia and covers the urethra and most of the vaginal orifice, leaving an opening that may be as small as a matchstick or pinhead to allow for the flow of urine and menstrual blood.[65] These are the most common forms of female genital mutilation practiced in Nigeria.[66]

The fourth types includes the introduction of corrosive substance into the vagina.[67] This form is practiced to a much lesser extent than the other forms in Nigeria. In Somalia, infibulations is practiced by the entire population, indeed by all ethnic Somalis wherever they are.[68]

REASONS FOR FEMALE GENITAL MUTILATION

In Nigeria, female genital mutilation was and is still practiced in different forms and in different places. A study carried out by the last quarter of 2011, in Amaezu and Obeagu communities both in Ebonyi State, revealed that female circumcision is still practiced there.[69] These communities and others justify the usually harmful custom on the following grounds.

a) That women whose genitals are not mutilated are promiscuous. Therefore the circumcision is done to extinguish sexual sensitivity and pleasure, maintain chastity and virginity

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65. *Ibid*, "WHO, Female Genital Mutilation": *Report of a WHO Technical Working Group*, Geneva, 1996, "Nigeria: Female circumcision: the Good, the Bad and the ugly?" http://www.fgmnetwork.org visited 9 Mar. 2012. 5.30PM.
66. "Nigeria: Report on Female Genital Mutilation or Female Genital Cutting" *http://www.state.gov*, 16 Feb. 2012 10.15AM.
67. "Report on Female Genital Mutilation (FGM) or Female Genital Cutting" (FGC) http://'a.tribalfusion.com 21/5/2005 visited 10 Mar. 2012. 5.30pm
68. Genital and sexual mutilation of females *http://www.heyokamagazine.com*. Assessed 12 March 2012.
69. "Report on Activities of the Development Education Centre (DEC), Enugu, Nigeria, Ending last quarter" 2011 http://decnigeria.com/newsletter. visited 12 Feb. 2012. 4:50PM

before marriage and fidelity during marriage and increase male sexual pleasure.[70]

(b) Among some societies, the external female genitals are considered unclean and unsightly, and so are removed to promote hygiene and provide aesthetic appeal.[71]

(c) To enhance fertility and promote child survival, better marriage prospects and helps delivery of babies.[72]

(d) It is believed that women who are not circumcised make love to spirits in their sleep who, in turn, cause unhealthy appetite for sexual intercourse. It is also said that such women give birth to mermaids and Ogbanjes (outcast).[73]

(e) A large proportion of circumcised women are from rural areas, where uncircumcised women are not socially accepted. Respectable men will never marry an uncircumcised woman, as she will be seen as impure. Therefore uncircumcised woman is labeled unclean, impure, and unfit to marry, bear children, or attain respect in old age.[74]

(f) Female circumcision is shown to be symbolic as a rite of passage to womanhood. When a young girl is about to be circumcised, her mother or other women and girls in her society encourage her, claiming she is becoming a woman and that it will help her stay pure and beautiful.[75]

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70. "Nigeria: Female Genital Mutilation" http://www.fgmnetwork.org. last visited 15 March 2012. 10:45AM
71. "Nigeria: Female Genital Mutilation" http://www.fgmnetwork.org. visited 15 Mar. 2012. 10:45AM
72. *Ibid*
73. "Female Circumcision Still Practiced in Nigeria" http://burinuni.com 26 Mar. 2012, last visited 30th Mar. 2012, 7.30PM
74. *Ozohu v. "Nigeria*: The Place of Female Circumcision in Our Society" http://www.leadership.ng. 29 Apr. 2011 visited 5th Mar. 2012. 10AM.
75. Ibid, "Harmful Traditional Practice" www.kit.ni/net/kit. Accessed 15th March 2012, 3:00PM.

Therefore, with such unwholesome tales, out of fear and possible stigmatization, most mothers make sure that they circumcised their daughters.

EFFECTS OF FEMALE GENITAL MUTILATION

It is our candid opinion that none of the reasons being advocated for doing psychological and bodily harm to a large number of females, especially those between infancy and early adulthood, can hold water. Evidence abounds that the practice has over the years led to untold physiological and physical misery and pain, suicides, permanent disabilities and the deaths of millions of females across the world where it has culturally been practiced.[76] Infact, female genital mutilation imposes on women and the female child a multitude of health complications. The practice violates, among other international Human Rights Laws, the right of the child to the "enjoyment of the highest attainable standard of health", as laid down in Article 24 paras 1 and 3 of the convention on the Rights of the child.[77]

Paragraph 1 is to the effect that every child is entitled to enjoy good health, protection from diseases and proper medical care for survival, personal growth and development. Paragraph 3 urges states parties to take all effective and appropriate measures with a view to abolish traditional practices prejudicial to the health of children. S. 13 of the Child's Right Act 2003 also provide that children shall have the right to such protection and care as is necessary for their well-being.

The Child's Rights Act puts the age of marriage at 18 years, and by virtue of section 21, and 23 of the Act, child marriage and betrothals are prohibited. Most states in Nigeria take various steps

76. "Nigeria: Female Genital Mutilation" *Ibid*

77. "Harmful Traditional Practices Affecting the Health of Women and Children" Fact sheet No. 23 2003. *www.ohchr.org*. 3rd March 2012, 9:00AM.

to reduce under-age marriages, including more advocacy workshops highlighting the negative impact of underage marriage. Some specific measures to combat harmful practices affecting children's health are also found in Sections 21 – 25 of Child's Rights Act seek to address harmful traditional practices such as early marriage/betrothal, tattoos and skin marks.It is observed with dismay that the above provisions have not been complied with as underage marriage is on the increase in Nigeria.

Female genital mutilation does irreparable harm. It can result in death through severe bleeding, pain and trauma and overwhelming infections. To be sure, the practice (FGM) is a serious form of torture. The excruciating pain experienced by those who passed through the operation must be noted. The female genital mutilation in most cases, is still being done by local women, without anaesthesia and sometimes with blunt kitchen knives and bare hands, while some other women forcefully holding down the victims. The operation is performed using tradition as the only justification. The girl is fully aware of the atrocity of the pain under the razor blade or knife. A few examples of some of the victims who experienced pains during and after the operation will suffice. A woman who recalled her experience as very painful and pathetic said:

> The experience is better imagined than said. I was about seven or eight when my mum told me that I have to fulfill our traditional rites as a young girl. I was held by two women while the third with a sharp object cut off my clitoris. Some substance were rubbed on it to reduce the bleeding. I was told it's measure to curb any form of sexual drive when I advance in age.[78]

78. Ozohu *Loc. Cit*

A girl from Djibouti said, "I was under horrible pain when they cut me. All these women around me telling me to bear it. How could I? I screamed for help but nobody save me"[79]. Father, father please save me"[80] cried a 6 year old girl under the knife when she saw that her mother had joined the crowd of women watching her mutilation. "I was afraid to urinate after the initiation. It was so painful" said a girl from Sierra Leone. "For me, it is too late. I have gone through it but nobody will touch my daughter" said a girl from Djibouti.[81] "If I tell you what happened to me during the initiation, my stomach will be blotted and I will die" (A girl from Sierra Leone afraid to talk about the secret practice.[82]

Surrounded by taboos, secrecy, and misconception, female genital mutilation ravages Africa, harming the health and well being of girls.

- Female genital mutilation has dangerous health implications because it is largely done by untrained women with crude implements, no anesthesia or anti-biotics, there is the ever increasing risk of infection, especially tetanus or HIV/AIDs.
- The inability to pass urine due to pain, swelling and inflammation following the operation may lead to urinary track infection abscesses and pain from damaged nerves endings long after the initial wound has healed.[83]
- Infibulation is particularly likely to cause-long-term health problems because the urethral opening is covered, repeated

79. Ras-work B, "The Impact of Harmful Traditional Practices on the Girl Child". *www.un.org*. 2006. Accessed 14th March 2012. 3:33PM
80. *Ibid*
81. *Ibid*
82. Testimonies Collected by the Inter-African Committee, Ras-work B – Mission report to Sierra Leone. As Coordinator of the Working Group on Traditional Practices 1982.
83. "Althaus F. A. "Female circumcision: Rite of Passage or Violation of Rights"? *International Family Planning Perspectives Vol. 23, No. 3.* Sept. 1997 P.3

urinary tract infections are common, and stones may form in the urethra and bladder due to obstruction and infection. If the opening is very small, menstrual flow may be blocked.[84] It can also lead to obstructed labour causing life-threatening complications for both mother and infant. The amputation of the clitoris and other sensitive tissue reduces a woman's ability to experience sexual pleasure and may even make intercourse less satisfying for men as well.

On the whole, female genital mutilation has been proven to be a gross violation of a women's rights. Some of the infringed rights include:

(a) Right to physical and mental integrity
(b) Right to highest attainable standard of health
(c) Right to be free from all forms of discrimination against women (including violence against women).
(d) Right to freedom from torture or cruel, inhuman or degrading treatment.
(e) Rights of the child, and Right to life.[85]

Given the health complications and related consequences of female genital mutilation, one wonders why the practice continues even though it has dwindled drastically due to exposure to western culture and the prohibition of such practice by some state governments.

The reason for its persistence is because most girls and women in developing countries are unaware of their basic rights. This

84. Ibid. See also Idowu A. A. "Effects of Female Genital Mutilation on Human Rights of Women and Female Children: The Nigerian situation" *www.eurojournals.com*. Accessed 10 Mar. 2012 6:40PM.
85. "The Practice of Female Genital Mutilation-Challenges for Health Communicators" *http://www.nigeriavillagesquare.com* 9/12/2010 visited 10th Mar. 2012 6.00PM

ensures the acceptance and the perpetuation of harmful traditional practices affecting their well-being and that of their children.

VIRGINITY TESTING

Virginity testing refers to the exercise of examining young girls to ascertain whether or not they are sexually chaste.[86] The testing tradition is intended to assure the purity of young brides who are required to prove their chastity before their parents and future in-laws settled on an amount to be transferred by the groom's family to the bride's family.[87] In some communities like Kanuri in Borno State, a would-be-bride has to undergo a virginity test to ensure that she is still "intact" for her would be husband, hence it protects women against promiscuity. It is necessary to state that in societies where it is practiced, female virginity is an unconditional prerequisite for marriage and bridal virginity test serves as a proof of chastity. Among the Ijaws for example, the test is conducted in the girls' house. On the appointed day, in a room specially designated for the test, is placed a bed or mat on top of which is laid a white cloth. As soon as the test is over, the members of the sister's family are the first to enter the room to check whether there is blood stain on the white cloth, if possible, there is jubilation and a date is fixed for the payment of the dowry. But if she has been disvirgined, the relationship is abrogated there and then.[88]

This tradition is also prevalent among the Yorubas. In order to confirm that his younger bride was still a virgin, after his first mating with her on the occasion of their wedding, the groom comes

86. Susan Leclerc – Madlala, "Virginity Testing: Managing Sexuality in a Maturing HIV/AIDs Epidemic", *15 Medical Anthropology Quarterly (2001)*.
87. George E. R. "Like a Virgin? Virginity Testing as HIV/AIDs Prevention: Human Right Universalism and Cultural Relativism Revisited". *http://works.bepress.com*. April 2007. Accessed 1st April 2012, 8:00PM.
88. Arebi Y. "Nigeria: Female Circumcision: The Good, the Bad and the Ugly?" http://www.fgmnetwork.org. visited 15 Mar. 2012, 10:45AM

out of his hut to show to the waiting crowd, a blood stained clothe and the crowd shouted with joy.[89]

This practice is degrading and violates human dignity. Not only that the injustice is more profound when viewed against the background that the would-be-husband is not meant to undergo the test because the culture permits that he can be as promiscuous as he can.

EARLY/FORCED MARRIAGE

Early/Forced Marriage is a situation whereby a girl-child or a young adolescent girl is made to marry against her wish and/or consent.[90] It is practiced and justified in the name of tradition, culture, and religion.[91] Therefore in many of these cultures, the tradition of marrying daughters at a young age is common. Female children, already malnourished and undervalued, are often married to much older men. In such marriages, females have little power and sense of self-determination. In others, their consents do not count. For example, under the customary law or Muslim/Islamic law, the marriageable age is between 12 and 14 years for girls and boys respectively. This is usually done because of the customary belief that girls should be given out in marriage before the menstrual cycle starts.[92] This practice has been criticized by many as it has serious health implications for the girl-child. For instance, Senator Sani Ahmed Yarima's marriage to a 13 year old Egyptian girl received condemnation from coalition of Nigeria's groups including the Medical Women Association of Nigerian (MWAN), Women's Rights Advancement and Protection Alternative

89. *Ibid.*
90. Juba N. N. et al *Op. Cit* at 7.
91. Akpan E. O. "Early Marriage in eastern Nigeria and the health consequences of vesico-vaginal fistulae (VVF) among young mothers" *Gender And Development Vol. II, No. 2, Marriage July, 2003* Pp. 70-76
92. Bugudu N. Unfair Practices Against Women Minorities. A Public Ratio of Human Rights ed (2004) P. 37

WRAPA), Global Association of Women Attorney (GAFA) and National Human Rights Commission.[93] Yarima's action is both medically unsafe for the child bride and legally wrong as it will expose a girl child to Vagino-Vesicular Fistula (VVF). It is offensive, because the Child's Rights Act[94] forbids marriage to an under age girl. In most cases, the girls are frequently intimidated, but also abducted, raped and sometimes murdered. A girl or woman who is forced to marry is usually a slave, forced to live and sleep with her husband, and often physically confined indoors.[95] A young divorced girl who was a victim of early/forced marriage said "I never liked my so-called husband because he was forcing me to do things I did not want to, I run away from my family".[96]

The above quoted statement is a confirmation of the fact that girls who are forced to marry at very tender ages are not only ignorant of sexual relationships but are also not physically matured for the rigours of motherhood.

Children run away from rural areas or from their homes because of arranged and early marriages and end up on the street and/or in prostitution. It is our view that forced marriage is a form of human rights abuse, since it violates the principle of the freedom and autonomy of individuals.

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93. Lindaikeji, "Women Protest Yarima'a Marriage to a 13 year old Egyptian girl". *http://www.nigeriafilms.com.* Assessed 28 - 6 – 2012. See also Soniyi T. "Yarima: Courts orders NAPTIP to join suit? *www.thisdaylive.com.* Assessed 28/6/2012 7.00am.
94. Section 21 of the Act provides for up to 5 years jail or N500,000=fine for any one found guilty of violating the law.
95. "Harmful Traditional Practices" *www.kit.nl/net/KIT4* Accessed 15/3/2012, 3:00PM
96. "A documentary Film". Three Sunsets Early Marriage in Ethiopia. Produced by AC; quoted in Ras-work Ibid The impact of harmful Traditional Practices on the Girl-Child. *www.un.org.* Accessed 16th March 2012, 7:00PM.

CONSEQUENCES OF EARLY/FORCED MARRIAGE

Early marriage usually results in early childbearing with severe consequences for the health and lives of young mothers and their babies. For instance, one Zainab Ali, 12-year-old was forced to marry a 55-year-old man chosen by her parents. She got pregnant a few months after the marriage. But could not have a normal delivery because her pelvis was too small. Zainab later died of birth complications resulting from "obstructed labour" after the husband refused to endorse a caesarian operation.[97] These experiences are common occurrences in the country where the woman goes through all forms of physical and mental abuse. Also infants born to teenage mothers are up to 80 percent more likely to die within their first year than are infants born to mothers ages 20 to 29.[98]

Early marriage often result in early pregnancy and Vesico Vagina Festulae (VVF) an abnormal opening between the bladder and the vagina due to prolonged labor resulting in uncontrolled passage of urine, feaces, leading to the continuous production of an offensive odor, social isolation and rejection[99] even by their husbands who caused the problems. This condition is prevalent in the Northern part of Nigeria where premature marriage is mostly practiced. This condition denies young girls their rights to self-determination and is a violation of their sexual and reproductive health rights.

Early marriage robs a girl of her childhood time necessary to develop physically, emotionally and psychologically.[100] When a girl marries early, it usually means the end of her education if she is still

97. "Evil or Dirty Nigerian Cultures That Should be Abolished" *http://www.nairaland.com/*comfort*. 30th Mar. 2012. Last visited 3rd Mar. 2012, 9:00am.

98. McDevitt T. M., Adlakha A, Fowler T. B. et al *Trends in Adolescent Fertility and contraceptive use in the Developing World*. (TPC/95-1) Washington, DC: U.S., Bureau of the Census, 1996.

99. Juba et al Loc. Cit.

100. Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children. *www.chchr.org*. Accessed 3rd March, 2012. 9:00AM

school and the end of her autonomy to make important decisions about work, her health and her well-being. Abuse is common in child marriage. Infact, early marriage inflicts great emotional stress as the young woman is removed from her parents' home to that of her husband and in-laws. Her husband who may be many years older than her will have little in common with her. She is obliged to have intercourse, although physically she might not be fully developed.[101]

Finally, early marriage with or without the consent of the girl, constitutes a form of violence as it undermines the health and autonomy of millions of young girls.

MALE PREFERENCE AND ITS IMPLICATION FOR THE GIRL-CHILD

One of the principal forms of discrimination and one which has far-reaching implications for women is the preference accorded to the boy child over the girl child. In many societies, this is a powerful tradition. This preference manifests itself in neglect, deprivation, and discriminatory treatment of daughters to the detriment of their physical and mental health.[102] In other words, son preference denies the girl child good health, education, recreation, economic opportunity and the right to choose her partner, violating her rights under articles 2, 6, 12, 19, 24, 27 and 28 of the convention on the Rights of the Child.[103]

Male preference begins early in life. In many parts of Nigeria, the birth of a baby boy is received with great joy. The ceremonies are more elaborate with the mother receiving compliments for producing a male child. The father enjoys great pride with the

101. Ibid.
102. "Giving up Harmful Practices, Not Culture" http://www.advocateforyouth.org. Accessed 17/2/2012, 9:33am
103. "Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children" Ibid.

assurance of continuity of the family line and the protection of its property. On the other hand, the birth of a girl does not attract much happiness with reduced value attributed to the mother. The reception ceremony is minimal and less colourful. This may mean that a female child is disadvantaged from birth; it may determine the quality and quantity of parental care and the extent of investment in her development; and it may lead to acute discrimination, particularly in settings where resources are scarce.[104] For example, in most societies, the girl is easily chosen to stay at home while the male child goes to school due to inadequate resources. Following the introduction of school fees in Plateau State between 1982 and 1986, primary school enrolment declined from 97% to 72%. Girls were withdrawn from school to supplement family income through trading, hawking or working in the farms.[105] It is therefore argued that gender bias is the major cause of the widening disparity between boys and girls in education.

According to a report by the National Planning Commission and the UNICEF, Nigeria, in the year 2001, only 59 percent of girls aged 6-15 are enrolled in school compared with 63 percent of boys. This lack of equal educational opportunities for both boys and girls creates female inferiority complex, right from childhood, which influences their aspirations and eventual achievements.[106] On educational objectives, section 18 of the Constitution of Nigeria 1999 provides that "government shall direct its policies towards ensuring that there are equal and adequate educational opportunities at all levels". This includes the provision by the government of free and compulsory education at all level.

Article 17 of the African charter also states that every individual shall have the right to education. In the same vein,

104. *Ibid*

105. Anthony, H. (ed) *Children's and Women's Rights in Nigeria: A Wake Up Call*; Abuja National Planning Commission Abuja and UNICEF Nigeria 2005. P. 169

106. *Ibid*

section 15 of the Child's Rights Act[107] provides for a free, compulsory and universal primary education for every child and the duty to provide such education lies on the government. The parent or guardian of the child also has the responsibility of ensuring that the child attends and completes his primary and junior secondary school.

Section 15 (5) of the Child's Rights Act guarantees female students the opportunity to complete their education in situation where they become pregnant while in school. Section 15(6) makes it a punishable offence for any parent or guardian who prevent a child from attending and completing his/her education.

The Universal Basic Education and Other Related Matters Act 2004, was enacted as part of the efforts to address the barriers to the right of every Nigerian child to education.[108] The Act makes the denial of any child access to education a punishable offence. It is unfortunate that right to education is not guaranteed in the 1999 Constitution. The provisions of section 18 of the Constitution on Education and article 17 of the African charter are not justiceable. Cultural problems such as teenage pregnancy, early child marriage, conservative religious interpretations, domestic responsibilities or gender stereotypes negatively impact on the access of the girl child to education and invariably the equality of results, as the boy child will be at advantage to complete his education.[109] Inspite of the elaborate provisions of the Child's Rights Act 2003 and the UBE Act 2004, the chances of the girl-child furthering her education to secondary or tertiary level in most cases depend on the parents or guardians ability or willingness to support such a child. Although

107. Cap A10 Laws of the Federation of Nigeria LFN 2004
108. The Nigeria CEDAW NGO COALITION Shadow Report submitted to the 41st section of the United Nations Committee on the Elimination of all forms of Discrimination Against Women, holding at the United Nations Plaza New York from June 30 – July 18, 2008.
109. *Ibid*

primary and junior secondary education are free as provided for by UBE Act and CRA, parents are made to pay charges in forms of development fees, examination fees, Parents Teachers Association levies.

The enforcement of the Universal Basic Education Act 2004, Child's Rights Act 2003 and Article 17 of the African charter are important in ensuring free, compulsory and Universal Basic Education in Nigeria.

The dilemma of the girl in early childhood are numerous. She becomes not only a victim of social exploitation but also the abuse of sexuality. She is abused sexually in the school, society or even in the very family she is expected to be relatively secured. For instance in 2011, one Nike Olawo 14-year-old suffered a worse form of abuse while staying with her mother and step father. Nike Olawo who lives in Lagos was repeatedly violated by her step father until she felt sick and was diagnosed to be HIV positive.[110]

Suffice it to say that son preference is universal and not unique to developing countries or rural areas. It is a practice enshrined in the value systems of most societies.[111] It thus dictate judgments, expectations and behaviour of family members.

LEGISLATION AGAINST HARMFUL TRADITIONAL PRACTICES

The 1999 Nigerian Constitution under Chapter IV, and specifically in section 42(1) (a), (b), (2) and (3), provides for non discrimination on the basis of gender, religion, ethnicity, age or circumstances of birth against any citizens including women and children. By this provision, all organs of government are obligated to protect women and children against all forms of discriminatory practices in Nigeria. Thus women and children are entitled to all their rights and can

110. "Evil or Dirty Nigerian Cultures That Should be Abolished – Culture (9) - Nairaland" *http://www.nairaland.com*. Visited 3 March 2012, 9:00AM.

111. "Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children". Ibid.

challenge anybody who attempts to interfere with the exercise of any of the recognized rights in the constitution. For instance, the Court of Appeal's decision in the celebrated case of *Karimatu Bukabu V. Paiko*[112] buttresses this. The court allowed the appeal in favour of a teenage girl on the grounds that her right to consent in marriage and to marry her suitor was of paramount consideration even under sharia family law, not withstanding her father's right to exercise the power of *Ijbar* (compulsion), according to the Maliki School of Law widely followed in the Northern part of Nigeria.[113]

The Nigerian Government has domesticated the convention on the Rights of the child through the passage of the Child's Rights Act 2003. The Act outlines the rights and responsibilities of children in Nigeria and provides for a system of child justice administration, amongst other things. Majority of the states in Nigeria have passed the Child's Rights Act into law.

Apart from these and other national laws, which protect women's and children's rights, Nigeria is a party to many international legal instruments on human rights that reinforce individual rights and also protect and prohibit discrimination against specific groups, in particular women.[114] For instance, the African Charter on Human and People Rights not only prohibit sex discrimination but also requires ratifying states to ensure the elimination of every discrimination against women and also ensure the[115] protection of the rights of the woman and the child as stipulated in international declarations and conventions. The African

112. Unreported Federal Court of Appeal case number CA/K/805/85
113. Convention on the Rights of the Child: Nigeria's 3rd and 4th Country Periodic Report May, 2008. P. 22.
114. "Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children". *http://www.humanrights.com.* Assessed 5 April, 2012, 8.30pm
115. Article 18 paragraph 3.

charter is now part of Nigeria law by virtue of legislative incorporation.[116]

Also ratified is the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in 1993. Ratification of treaties by Nigeria cannot be said to be enough. Nigeria must take a step further by domesticating such laws as it is only when such treaties are domesticated that they are transformed into Nigerian Law. Apart from the African charter and the convention on the Right of the child which have been transformed into Nigeria law,[117] none of the other ratified instruments for example CEDAW have been so transformed.

Despite the above efforts by the government in creating structures for advancement of women, not much has been achieved in terms of defacto equality due largely to customary and religious practices which negatively affect the situation of Nigerian women. The slow process of domesticating the conventions in Nigeria's National Legislation is also delaying women's rightful enjoyment of their human rights. The situation of Nigerian women does not require gradual but fast and radical change. Again, people are bent on protecting their customs and traditions and would not want anything to destroy them. Illiteracy is also a factor responsible for the persistence of some harmful traditional practices against the female folks. People who are unable to read and write, and do not have the opportunity to go to school, may grow up in their traditional societies, glued to their customs, never mixing with people from other societies and, therefore, not ready to forsake their culture and patterns of existence.[118]

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116. African charter on Human and People Rights (RATIFICATION AND ENFORCEMENT ACT CAP 10 LFN 1990.
117. Osita O. "Nigeria Courts and Domestic Application of International Human Rights Instrument" in Akin I. & Yarima T. et al *International Law Human Rights and Development*. Essays in Honour of Professor Oyebode (2004) at P. 92.
118. Idowu A. *Effects of Forced Genital Cutting on Human Rights of Women and Female Children: The Nigerian Situation.*

No wonder, the British saw the oppressive ways of the customary and Traditional Practices, and instituted the Repugnancy Test Clause, as part of the Nigerian Legal System in 1900. It provides for the overriding of any customary and Traditional Law and practice in the courts if it is in conflict with natural justice and equity.[119] Also customary and traditional law should be overridden if they are in conflict with the written and official law, and the rights of women and children.

CONCLUSION

The violation of women's rights cannot be abolished without placing it firmly within the context of efforts to address the social and economic injustice women face the world over. If women are to be considered as equal and responsible members of society, no aspect of their physical, psychological or sexual integrity can be compromised.[120] It is against this backdrop that we make the following recommendations.

Harmful traditions sometimes seem impossible to change. Efforts to alter or eradicate them require the cooperation and understanding of community leaders, policy makers, and the people who have experienced or witness hardships these practices cause. Community education is critical to increasing public awareness of the negative consequences of these practices and changing social norms.

All laws condemning harmful practices must be implemented and enforced. This will go a long way in nullifying most of these cultural practices especially in relation to violence against women and widowhood practices.Specifically, laws on women's property

119. "Evil or Dirty Nigerian Cultures, That Should Be Abolished – Culture (9) – Narialand" *http://www.nairaland.com* 27 June 2012 Assessed 28 June, 2012 10:30am.

120. Taubia N, *Female Genital Mutilation: A Call for Global Action* New (York: RAINBO, 1995) P. 3

rights and all other laws discriminating against women should be reviewed.

There should be adequate budgetary allocations to issue that promote women's rights and bridge gender gaps. The Convention on the Elimination of all form of Discrimination Against Women has not been incorporated into National law which seriously hamper its implementation. We therefore urge the government to fulfill its obligation to women and domesticate CEDAW without further delay. For effectiveness, domestication of these laws should be decentralized and implemented at all levels of government.
Sections 55 and 241 of the Penal Code which encourages wife battery should be repealed.

Government should allocate more money for Legal Aid to improve the access of women to this service to help address the injustice committed against them by their male counterpart before a court of law.

To ensure total eradication of genital mutilation in Nigeria, government must immediately spring into action with a legislation that would automatically abolish the practice. Even before the law comes into effect, a progressive means of educating the people particularly through the media on the destructive effects of female Genital Mutilation should be further intensified across the country, especially in the rural areas where the practice is common. Once the most illiterate rural populace are educated properly on the baselessness of the reasons for female genital mutilation and indeed, of the grave dangers in continuing with it, they will see the light and millions of hapless females would be saved the ordeal of female genital mutilation. This is necessary for stemming the tide of incessant loss of lives, medical complications and gross violation of human rights often engendered by unorthodox method of the practice.

All laws promoting equal opportunities in access to education should be popularized for every Nigerian child to know she or he has the right to educational opportunities and take advantage of it.

As a follow up to the above, government should ensure that all the cultural barriers against the girl-child's right to education are removed so as to bridge the gender gap in access and opportunity to education.

Poor education and ignorance of the law among most rural women prevent them from taking advantage of their rights as prescribed by the Nigerian constitution and other international instruments. We therefore recommend that government should embark on a nationwide project of creating awareness on acts that constitute violence against women.

Violence against women remains the most prevalent form of Human rights violation in Nigeria, ranging from domestic violence, women's right to inheritance, widowhood practices, female genital mutilation, early/forced marriage to son preference. We welcome laws enacted by some of the states in Nigeria to combat certain instances of violence against women, and urge for effective implementation of same. The time to eliminate all form of traditional practices that promote the subordination of women is now.

"HUMAN RIGHT IS HUMAN WRONG" TOWARDS THE JURISPRUDENTIAL STATUS OF RIGHTS OF PERSONS IN CUSTODY

BY

UMOKE JACOB CHUKWUKA

ABSTRACT

Persons in custody are most often treated as though they are sub-humans or second-class citizens. They are being subjected to several degrading treatments and conditions, which in turn, violate their fundamental human rights. These people in the eyes of the law are still human beings who are entitled to the basic protections that are universally accepted.

This paper therefore explores the rights of persons in custody or prisoners as recognised by both international law and municipal laws. In addressing these issues, emphasis will be laid on the meanings of human rights, human wrongs and persons in custody. The paper will also explore the justifications for these rights and critically analyze how human right could be human wrong. The implication of violating the rights of persons in custody will also be highlighted and the attitude of the courts towards human rights' violation will equally be treated. Finally, there will be a conclusion and useful recommendations that will ensure better observance of the rights of persons in custody.

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INTRODUCTION

Every man, even the half-evolved type has some basic rights which no one is permitted to deny him as long as he/she keeps his own side of the social contract. Persons in custody are men and women, not sub-humans, even if they have been suspected of, found guilty of, or condemned for deliberately engaging in supposedly inhuman and barbaric acts. All human beings have the right to enjoy respect for their liberty and security. It is axiomatic that, without an efficient guarantee of the liberty and security of the human person, the protection of other individual rights becomes increasingly vulnerable and often illusory. Yet, as is evidenced by the work of the international monitoring organs, arrests and detentions without reasonable cause and without there being any effective legal remedies available to the victims concerned, are commonplace. In the course of such arbitrary and unlawful deprivations of liberty, the detainees are frequently also deprived of access both to lawyers and to their own families, and also subjected to torture and other forms of ill-treatment.

The right of man means the entitlements to certain kinds of treatment, based on one's status.[1] The modern Western tradition is one of natural rights, in which each person is born with certain rights as a human being. Other rights are acquired by virtue of contract or ownership.[2]

Completely mindful of the irregularities constantly observed today in police cells, prisons and other detention facilities, these however do not represent the ideal status of the rights of the persons in custody. For instance, persons in custody have been accorded the

1. *"HUMAN RIGHTS AND ARREST, PRE-TRIAL DETENTION AND ADMINISTRATIVE DETENTION"*, Retrieved from: http://www.ohchr.org/Documents/Publications/training9chapter5en.pdf on the 3rd of April, 2013. See also the United Nations doc. E/CN.4/1999/63,Report of the Working Group on Arbitrary Detention
2. Cf."Rights." Microsoft® Encarta® 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008.

right to an environment that guarantees their healthy living. Thus, according to John Howard[3]:

> "The late act for preserving the health of prisoners requires that an experienced Surgeon or Apothecary be appointed to every gaol: a man of repute in his profession. His business is, in the first place, to order the immediate removal of the sick, to the infirmary; and see that they have proper bedding and attendance. Their irons should be taken off; and they should have, not only medicines, but also diet suitable to their condition. He must diligently and daily visit them himself; not leaving them to journeymen and apprentices. He should constantly inculcate the necessity of cleanliness and fresh air; and the danger of crowding prisoners together: and he should recommend what he cannot enforce. I need not add, that according to the act, he must report to the justices at each quarter-sessions, the state of health of the prisoners under his care."[4]

This paper explores the rights of persons in custody or prisoners as recognised by both international law and municipal laws. In addressing these issues, emphasis will be placed on the meanings of human rights, human wrongs and persons in custody. The paper will also explore the justifications for these rights and

3. John Howard (1726-1790), British social reformer, who was instrumental in obtaining the passage by Parliament in 1774 of two penal reform acts that, improved sanitary conditions and health care in prisons. Later, Howard was appointed commissioner of a new penitentiary where prisoners were to be rehabilitated through work and religious teachings.

4. John Howard, *The State of Prisons in England and Wales* p. 29. Cited in RICK LINES' *"The Right To Health Of Prisoners In International Human Rights Law", International Journal of Prisoner Health, March 2008; 4(1): 3_53*

critically analyze how human right could be human wrong. The implication of violating the rights of persons in custody will also be highlighted and the attitude of the courts towards human rights violation will equally be treated. Finally, there will be a conclusion and useful recommendations that will ensure better observance of the rights of persons in custody.

CLARIFICATION OF CONCEPTS

For clarity and better understanding of this research work, some key concepts are given clarifications below.

HUMAN RIGHT

Human rights are the freedoms, immunities, and benefits that, according to modern values especially at an international level, all human beings should be able to claim as a matter of right in the society in which they live.[5]

The rights described in the 30 articles of the *Universal Declaration of Human Rights*[6] include the right to life, liberty, and security of person; to freedom of conscience, religion, opinion, expression, association, and assembly; to freedom from arbitrary arrest; to a fair and impartial trial; to freedom from interference in privacy, home, or correspondence; to a nationality; to a secure society and an adequate standard of living; to education; and to rest and leisure. The declaration also affirms the rights of every person to own property; to be presumed innocent until proven guilty; to travel from a home country at will and return at will; to work under

5. Black's Law Dictionary, 8th Edition, p. 780.
6. A statement affirming the dignity and rights of all human beings, adopted by the United Nations (UN) in 1948. It is based on principles expressed in the UN Charter. The Universal Declaration of Human Rights was prepared by the Commission on Human Rights of the Economic and Social Council (ECOSOC) of the United Nations. Eleanor Roosevelt, social activist and widow of United States president Franklin D. Roosevelt, chaired the commission. French jurist and Nobel laureate René Cassin was the declaration's principal author.

favourable conditions, receive equal pay for equal work, and join trade unions at will; to marry and raise a family; and to participate in government and in the social life of the community.[7]

The rights of every man are universal irrespective of whether any state, individual or organization deliberately, methodically, collectively and maliciously decides to neglect or violate it. Human rights are natural rights that accrue to man by virtue of his biological classification. Aristotle distinguished between two kinds of justice when he stated that: "a rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not; a rule is legal [conventional] that in the first instance may be settled in one way or the other indifferently."[8]

However it is construed, human rights are supposed to be unalienable, that is, no man is to be deprived of his natural rights (human rights). Thus the Americans stated in the preamble to their independence declaration as follows:

> "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."[9]

Much of the international law of human rights consists of rules contained in human rights treaties, which are legally binding only on the states that have become parties to the treaties. But some of the international law of human rights consists of rules that are legally binding on every state, such as the rules pertaining to the

7. "Universal Declaration of Human Rights." Microsoft® Encarta® 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008.
8. Lynch, John Edward. "*Natural Law (ethics).*" Microsoft® Encarta® 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008.
9. Thomas Jefferson (1743 - 1826) U.S. president. *Declaration of Independence*

crime of genocide, crimes against humanity, war crimes, and the crime of aggression. According to the International Bill of Human Rights, then--and also according to the constitutions of many liberal democracies[10], the morality of human rights consists of two connected claims, the first of which is this: *Each and every (born) human being has equal inherent dignity.*[11]

For the purpose of this research, permit me to adopt the natural law approach. Thus, human rights will be construed to be inseparable from moral and natural rights. Hence, I illustrate the concept of human right here using an excerpt from Michael J. Perry in his work entitled "Human Rights as Morality, Human Rights as Law" as follows:

> When talking about rights, including human rights, either as legal or as moral concepts, to say that one has a "right" is to say that one has a justified claim. To say "B has a legal right that A should not do X to him" is to say "B has a justified claim that A's doing X to him is legally forbidden". (To say "B has a legal right that A should do Y for him" is to say "B has a justified claim that A's doing Y for him is legally required".) Similarly, to say "B has a moral right that A should not do X to him" is to say "B has a justified claim that A's doing X to him is morally wrong". Morally "wrong", that is, in the sense of morally forbidden--forbidden by true morality, correctly informed.

10. See David Kretzmer & Eckart Klein, eds., *The Concept of Human Dignity In Human Rights Discourse* v-vi, 41-42 (2002).
11. Michael J. Perry , *HUMAN RIGHTS AS MORALITY, HUMAN RIGHTS AS LAW, Emory University School of Law Public Law & Legal Theory Research Paper Series Research Paper No. 08-45(2008).*

> "B has a justified claim that A's doing X to him is legally forbidden." Such a claim can be translated, and typically is translated, into the language of rights--the language, that is, of legal rights: "B has a legal right that A should not do X to him." (Such a claim can also be translated into the language of legal duties: "A has a legal duty not to do X to B.). Many people talk about human rights not only as legal concepts but also as moral concepts. "B has a justified claim that, because he has inherent dignity, A's doing X to him is morally wrong." That way of talking leads naturally to: "A's not doing X to B is morally right (because B has inherent dignity)." And that way of talking, in turn, leads naturally to: "B has a moral right-a moral human right--that A should not do X to him."[T]he idea of a [moral] human right grew out of a transmutation of the discourse of what is actually [morally] right into the discourse of having a natural right.[12]

From the above definitions, illustrations and authorities, it is evident that the rights to dignity of human person, liberty and freedom are fundamental for the enjoyment of all other rights. It is also evidently clear going by the dictates of the above definitions and authorities that these rights are to be enjoyed by "every human

12. Cf. Michael J. Perry (2008) *"HUMAN RIGHTS AS MORALITY, HUMAN RIGHTS AS LAW" University of San Diego Law School Legal Studies Research Paper Series No. 08-079. This paper can be downloaded without charge from: The Social Science Research Network Electronic Paper Collection: http://ssrn.comabstract=1274728 University of San Diego Law School Legal Studies Research Paper Series No. 08-079*

being", further buttressing my point earlier in the introduction (even the half-evolved type).

HUMAN WRONG

It is a popular legal position that liberty consists in the freedom to do everything *which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights.* These limits can only be determined by law.[13]

A wrong is the breach of one's legal duty: violation of another's legal right.[14] "A wrong may be described, in the largest sense, as anything done or omitted contrary to legal duty, considered in so far as it gives rise to liability.[15]" A wrong is a wrong act – an act contrary to the rule of right and justice. A synonym of it is injury in its true and primary sense of ***injuria*** (that which is contrary to ***jus***).[16]

A wrong may safely be likened to an offence in this discussion in the sense that it offends the rights of man. For the meaning of an offence, I adopt the definition offered by the Criminal Code[17] as follows:

> An act or omission which renders the person doing the act or making the omission liable to

13. Article 4 of the French Declaration of the Rights of Man and of the Citizen 1789.
14. Black's Law Dictionary, 8th Edition, p.1665
15. Pollock, F., *A First Book Of Jurisprudence for Students of the Common Law*, London Macmillan,(1904), Cited in Black's Law Dictionary, 8th Edition as Frederick Pollock, *A First Book Of Jurisprudence 68 (1896)*p.1665
16. John Salmond, *Jurisprudence* 227 (Glanville L Williams ed., 10th ed. 1947). Cited in Black's Law Dictionary, 8th Edition, p.1665
17. Cap C38, Laws of the Federation of Nigeria (LFN), 2004.

> punishment under this code, or under any Act or law, is called an offence.[18]

A wrong may also be viewed as a civil act in the Law of Torts. Thus, *"a tort is a wrongful act that causes injury to a person or property and for which the law allows a claim by the injured party to recover damages (money)".*[19]

Martin Luther King Jr. declared, in the same spirit, that "man's inhumanity to man is not only perpetrated by the vitriolic actions of those who are bad. It is also perpetrated by the vitiating inaction of those who are good.[20]Sometimes we violate a human being not by doing something to hurt her but by refusing to do something to protect her. "Sins against human rights are not only those of commission, but those of omission as well.[21]

The rights of man are known to exist, at least from the plethora of statutory, international, judicial and academic authorities in the legal world. It is therefore my position that human wrong is the absence, intentional deprivation or violation, reflective and meticulous breach of human rights. Some critics might hide under the cloak of necessary evils in the state (doctrine of necessity or emergency) to violate human rights but, it is my contention that there would not be anything like a necessary evil if the rights and the good things are done. Thus, *"there are no necessary evils in government. Its evils exist only in its abuses".*[22]

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18. Section 2 of the Criminal Code, Cap C38, Laws of the Federation of Nigeria (LFN), 2004
19. Werber, Stephen J. *"Tort."* Microsoft® Encarta® 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008
20. Quoted in Nicholas D. Kristof, "The American Witness," New York Times, March 2, 2005.
21. Charles L. Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed(1999). p* 133
22. Andrew Jackson (1767 - 1845) U.S. president. *"Veto of the Bank Bill"*. cited in Microsoft ® Encarta ® 2009. © 1993-2008 Microsoft Corporation.

It is therefore my humble position that human wrong manifests its true identity in the violation or breach of human rights.

CUSTODY

Going by the general definition of Black's Law Dictionary, 8th Edition, custody is the care and control of a thing or person for inspection, preservation, or security. While penal custody is intended to punish criminal offenders and preventive custody is intended to prevent further dangerous or criminal behaviour, protective custody is the government's confinement of a person for that person's own security or well-being, such as a witness whose safety is in jeopardy or an incompetent person may harm others.[23]
In the case of *Miranda v. Arizona*[24], the Supreme Court of the United States of America in a landmark decision stated that "custody" means that a person was "taken into custody or otherwise deprived of his freedom of action in any significant way."Consequently, custody applies to police cells, prisons and all other designated confinement institutions established and/ or recognised by the law.

Custody in this sense is of paramount importance to this discourse. Hence, it is used interchangeably with prison (prison custody). Opara[25] defines prison as a place delimited and declared as such by the law of the state and created to ensure restraint and custody of individuals accused or convicted of violating the criminal laws of the state. Black's Law Dictionary defines a prison as "*a public building or other place for the confinement of persons whether as a punishment imposed by the law or otherwise in the course of administration of justice.*"[26] A prison is a 'total institution'

23. Black's Law Dictionary, 8th Edition p. 434.
24. *384 U.S. 436 (1966),*
25. Opara, A.I (1998) *Criminology and Penology,* Owerri: CEL-BEZ & Co publishers as cited in Emeka Obioha, (2011) *Challenges and Reforms in the Nigerian Prison System.* Pretoria: Kamla ~ Raj.page 2.
26. Black's Law Dictionary, 9th Edition, St. Paul, Minnesota: Thomas Reuters, 2009.

be locked up in a physical, psychological and social sense, a situation in which there is no escape and the prisoner has no control, it denies the individual the rudimentary choices of everyday life.[27]

The Prisons Act[28] and Prisons Decree[29] state as follows:

i. The Minister of Internal Affairs may by order in the federal gazette declare any building or place in Nigeria to be a prison and by the same or subsequent order specify the area for which the prison is established.

ii. Every prison shall include the grounds and buildings within the prison enclosure and any lock-up house for the temporary detention or custody of prisoners newly apprehended or under remand which is declared by the minister by order in the federal gazette to be part of the prison.

It follows that the pronouncements of the minister above are enough to create a prison as far as Nigeria is concerned. As an enclosure for the detention of violators of the law, prison is therefore the main avenue for making individuals pay for their crimes against society. In the words of Frederick Hill, an English prison reformer, each prison should be a 'moral hospital' where prisoners would be 'cured of their bad habits'.[30] Coetzee brings a quirky side to the definition as he described a prison as 'the stomach of the state, a state which stamps Michael K with a number and gobbles him down.'[31]

27. Dambazau, A. (2007) *Criminology and Criminal Justice*. Ibadan: Spectrum Books, p. 199.
28. Section 2(i) and (ii), Prisons Act, CAP 366, LFN 2004.
29. No. 9 of 1972.
30. John Roberts. History of prisons. *World Encyclopedia of Police Forces and Correctional Systems*. George Kurian (Ed.)Vol. 1. 2nd Ed. Pp. 74-86. From Gale Virtual Reference Library. P.7.
31. Coetzee, J.M (1990) *The Life and Times of Michael K. Martins*. Seckers & Warburg. p. 221 as cited in Bamgbose, O.A (2010) *The Sentence, the*

PERSONS IN CUSTODY

Since I have used custody interchangeably for the purpose of this work with prison, let us also use persons in custody as prisoners for easier comprehension of the discourse. The word 'prisoner' is a legal term for a person who is imprisoned. Section 1 of the Prison Security Act[32] defines a prisoner as "any person for the time being in prison as a result of any requirement imposed by a court or otherwise that he be detained in legal custody." Similarly, in a treaty between the government of Great Britain and Northern Ireland and the government of the United Mexican State, a prisoner is defined as "a person who is required to be detained in prison, a hospital or any other institution in the transferring state by virtue of an order made by a court in the course of the exercise of its criminal adjudication"[33]

Section 19 (1) of the Prison Act[34] defines a prisoner as "any person lawfully committed to custody." From the above definition, it is submitted that lawfulness of the committal is an essential constitutive element of the status of the prisoner. Hence, a person who has been illegally committed to prison cannot be described as a prisoner. It has been argued that since 'Awaiting Trial Detainees' are not lawfully committed into prisons; they are not prisoners properly so-called according to this section.

However, for the purpose of this discourse, let us regard awaiting trial detainees as prisoners based on the definition of prisoner by the Black's Law Dictionary[35], which defines a prisoner as "one who is deprived of his liberty, one who is kept against his will in

Sentencer, and the Sentenced: Towards Prison Reform in Nigeria, Inaugural Lecture delivered on 15th July, 2010. Ibadan: Ibadan University Press. P. 52.

32. CAP 25, 1992.
33. Treaty between the Government of Great Britain and Northern Ireland and the Government of the United Mexican State on Enforcement of Criminal Sentences, Mexico, November 2004.
34. CAP 366, LFN 2004.
35. 9th Edition (*supra*).

confinement or custody in a prison, penitentiary, jail or other correctional institutions as a result of conviction of crime or awaiting trial." In the case of *Edmund Okoro & Ors v. Minister of Internal Affairs*[36], the court affirmed that a person becomes a prisoner from the date of his or her admission into prison custody.

In effect, awaiting trial persons are prisoners because they are normally admitted pursuant to a court order; and steps in Regulation 2 of the Prison Act are taken before they are put into prison custody. Consequently, Awaiting Trial Persons (ATP) also known as Remand Prisoners fall into one of the various classes of prisoners. Others are prisoners of war, political prisoners, hostages, convicted prisoners, and so on. The number of awaiting trial prisoners is rising daily, and is a huge embarrassment to the nation.

The recent disclosure by the Minister of Interior, Captain Emmanuel Iheanacho (Rtd.) that Nigeria is faced with the challenge of prison management is correct considering the figure of awaiting trial persons, which was put at 30,000, representing over 65 percent of the estimated prisoners' population of 46,000.[37] By the time the teeming population of suspects in police cells across the country is added, the situation becomes scarier.[38]

RIGHTS OF PERSONS IN CUSTODY

The Supreme Court of Virginia once pronounced in the case of *Ruffin v. Commonwealth*[39] that "*the prisoner as a consequence of his crime not only forfeited his liberty but all his personal rights except*

36. (Unreported) Suit No. FHC/EN/CP/102/200.
37. Aster Van Kregten, amnesty international Nigeria researcher, speaking at a press conference in Abuja. Retrieved on the 1st of August, 2013 from: http://www.africa.upenn.edu/afrfocus/afrfocus022608.html
38. Submission of Mr. Olusola Ogundipe, Rtd Comptroller General of the Nigerian Prison Services at a roundtable conference on prison reforms in Nigeria held on Friday, 10th September, 2010.
39. 62 Va 21 DROTT 790, 796 (1891) Cited in Roger, J. Traynor (1971) Role of the Law in Protecting the Rights of Prisoners, *International Review of Criminal Policy*. No. 29, 1971,p.4.

those which the law in its humanity accords to him. He is for the time being the slave of the state."[40] Completely mindful of, and with profound respect to the dictum of the Apex Court of Virginia above, I humbly contend that prisons are supposed to be rehabilitation centres. Regrettably, it is disheartening that in Nigeria, prisons are death traps.[41] Even more worrisome is the condition of prisoners across the country. It is a pitiable situation that a large percentage of prison inmates have stayed for five to seven years in prison without trial.[42] The living conditions in the prisons are appalling. They are damaging to the physical and mental well-being of inmates and in most cases constitutes clear threats to their health and life. This is clearly contrary to the provisions of Article 24 of the African Charter of Human and Peoples' Rights, which provides *inter alia* that the right to life includes the right to an enabling environment that sustains life. Sadly, Nigeria is party to this treaty.

One of the popular rights of prisoners awaiting trial is the right to be tried fast.[43] This is because the right of the state to remand him in prison before trial might in some cases constitute the wrong of breaching his personal liberty rights.[44] It has been observed that delay in criminal trials is one of the fundamental problems of the Nigerian prisons in particular and Nigerian criminal justice system in particular. These problems[45] in the components of the criminal

40. Emphasis is Mine.
41. Prison Conditions in Nigeria: Urgent Reform Needed. Retrieved on the 1st of August, 2013 from : http://www.africaw.com/forum/f17/prison-conditions-in-nigeria-urgent-reform-needed-t2257/
42. *Ibid.*
43. Section 36 (4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that "whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal."
44. See generally the provisions of section 35 of the Constitution.
45. Inefficiency of the police whose duties are: arresting, investigating and conducting fair and swift trials, and their lack of professionalism; understaffing and underfunding of the court whose primary duty is to do justice coupled with the apparent excessive workload on them; the laziness

justice system lead to the delay in trial and the consequent prevalent increase in the number of awaiting trial prisoners.

According to the Minimum Rules for the Treatment of Prisoners[46], the ideal standard for medical facilities is provided for in Section 22, which states as follows:

> *"At every institution, there shall be available the services of medical officer who should have some knowledge of psychiatry. The medical services should be organised and in close relationship to the general health administration of the community or nation...."*

It also provides that sick prisoners who require special treatment shall be transferred to specialised institutions or to civil hospitals, and that the services of a qualified dental officer *should be made available to every prisoner.*[47] The above provisions sound all well and good, but it is far from the case of the Nigerian prisons where sickbays with only one nurse is all that is provided for in place of a hospital.[48]

The Minimum Standard Rules for the Treatment of Prisoners (*supra*) also provide that prisoners have the right to be given balanced diets irrespective of their status. Thus, Section 20 provides that *"every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well-*

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of some of the judges and the incompetence/unpreparedness of some of the lawyers.

46. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Geneva in 1955 and approved by the Economic and Social Council by its Resolutions 663 (XXIV) of 31st July, 1957 and 2076 (LXII) of 13th May, 1977.
47. Emphasis is mine.
48. Personal observation on a visit to the Nigerian Prison Service, Kirikiri Prison, Lagos.

prepared and served."[49] It is submitted that a prisoner is entitled to healthy food, which will help to guarantee his right to life.[50] Also, even if such a prisoner is a convicted prisoner, who is awaiting hanging, by virtue of the above section, he is still entitled to be fed while he remains alive. This is because death by starvation is not a recognised method of executing death sentence in Nigeria as of today.

Regrettably, the above lofty provisions do not seem to apply in Nigeria as much as the food given to the prisoners are far from being wholesome and are of little or no nutritional value, to the extent that they are sometimes rejected by the prisoners. This was reported in the Punch Newspaper as follows:

> "The conditions of inmates at the Kirikiri Maximum Prison in Lagos may have deteriorated to the level that starving prisoners now allegedly reject the food they are given due to its terrible quality."[51]

Apparently, the situation in Nigeria is far from the ideal. This has been buttressed by the Foreign Prisoners Support Service, which published from its research as follows:

49. Emphasis is mine.
50. This is the import of the decision of the African Court of Human and Peoples' Rights in the case of *Fawehinmi v. Abacha* where the court, while interpreting Article 24 of the African Charter, held that the right to life embodies the right to a favourable environment that guarantees or supports life.
51. Inmates Reject Kirikiri Prison food. Retrieved on the 23rd of April, 2013 from: mobile.punching.com/inmates-reject-prison-food/

Nigerian prisons have no toilet facilities and cells lacked water. Medical facilities were severely limited, food was inadequate, malnutrition and diseases were rampant..."[52]

I discovered to my utmost surprise that the Prison Act provides that every prisoner is entitled to suitable bedding.[53] This provision is in line with the Minimum Rules for the Treatment of Prisoners, which states as follows:

> "All accommodations provided for the use of prisoners and in particular all sleeping accommodations shall meet all requirements of health due regard being paid to climatic conditions and particular cubic content of air, minimum floor space, lighting and ventilation."

Unfortunately, and on the contrary, the state of accommodation and beddings for prisoners in Nigerian prisons is deplorable. Most of the beds are provided without foams, making the night sleep uncomfortable for the prisoners. The sleeping arrangement is nothing to write home about as many are forced to sleep on the ground or to routinely share the available space, due to overpopulation of the prisons. A prisoner at the Kirikiri Medium Security Prison once said:

> "there is a general cell which can contain up to 25 people. We sleep over ourselves on the cold floor with no mat. You cannot turn, you have to stand up to turn; and if you even get a place on the floor to lie on, thank God." He continued, "in this cell, there is no toilet. The men

52. Nigerian Prisons. Retrieved on the 1st of August, 2013 from: www.foreignprisoners.com/prison-nigeria.html
53. Section 26 of the Prison Act.

> defaecate in buckets which are located inside the room. The windows are small, and there is no ventilation."[54]

It is obvious that the accommodation provided for in the Prison Act is best as it is written down but far from actual practice in Nigerian prisons. As a result of the above conditions, mortality rate in Nigerian prisons is high, and the likelihood of contracting diseases is even higher. At this juncture, I am tempted to ask, "are persons in custody automatically deprived of the above rights in Nigeria?" But, by a careful examination of the various definitions of human rights above, it is obvious that persons in custody are humans, and therefore, entitled to these rights.

JUSTIFICATIONS FOR THE RIGHTS OF PERSONS IN CUSTODY

It is recognised that Men are born free and remain free and equal in rights. Social distinctions may be founded only upon the general good.[55] Human dignity comes from God's free gift; it does not depend on human effort, work, or accomplishments. All human beings have a fundamental, equal dignity because all share the generous gift of creation and redemption from God. Consequently, all human beings have the same fundamental dignity, whether they are brown, black, red, or white; rich or poor, young or old; male or female; healthy or sick.[56] Below, I shall be considering some of the

54. Adelaja (2009) as cited in Bamgbose, O.A. (2010), *The Sentence, the Sentencer and the Sentenced*, *Op.cit.* p.55.

55. Article 1 of the Declaration of the Rights of Man and of the Citizen 1789. With this declaration, the French National Assembly addressed many of the French people's grievances with the monarchy and established the ideals of the French Revolution. It remains one of the most important documents in Western political history.

56. See generally, CHARLES E. CURRAN, CATHOLIC SOCIAL TEACHING 1891-PRESENT: A HISTORICAL AND ETHICAL ANALYSIS 132 (2002).

international instruments and municipal laws that guarantee human rights and consequently the rights of persons in custody.

INTERNATIONAL LAW JUSTIFICATION

According to Marvin E. Frankel[57], the concept of International Human Rights owes its beginnings to Nazi dictator, Adolf Hitler. During World War II (1939-1945), the Nazis murdered millions of Jews and hundreds of thousands of others, including Roma (Gypsies), homosexuals, Soviet prisoners of war (POWs), and the mentally ill in gas chambers, by firing squad, and other methods. The world had never faced such monumental crimes, and the Allied forces that were victorious in World War II set out to ensure that such a thing could never happen again. Both the concept and the word *genocide*—coined in 1944 by Polish legal scholar Raphael Lemkin to describe the horror of the Nazi Holocaust—were part of Hitler's legacy.[58]

It is trite international law that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[59] These rights are never to be denied any person based on sex, race, and religion and so on. Thus, the Universal Declaration of Human Rights provides as follows:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour,

57. Marvin E. Frankel is a lawyer and former federal district court judge who has argued numerous cases before the Supreme Court of the United States. He is chairman emeritus of the Lawyers Committee for Human Rights (LCHR) and co-author of *Out of the Shadows of Night: The Struggle for International Human Rights*.
58. Marvin E. Frankel., *Reason for Hope: The International Human Rights Movement at 50. Source: Encarta Yearbook, May 1998.Microsoft ® Encarta ® 2009. © 1993-2008 Microsoft Corporation.*
59. Article 1 of the Universal Declaration of Human Rights.

> sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.[60]

Article 3[61] provides that **everyone** has the right to life, liberty and security of person (emphasis mine). This international law instrument equally provides that **no one shall** be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.[62]

It has been observed that the set of people whose rights are most commonly abused are persons in custody. The nature of such abuse is not unknown. It is noteworthy that the Universal Declaration of Human Rights of 1948 (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) both provide that **no one shall** be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.[63] So many nations and regions of the world have equally adopted these provisions into their constitutions and regional laws. The formulation of the European Convention on Human Rights (ECHR) is very well known[64]: No one shall be subjected to torture or to inhuman or degrading treatment or

60. *Ibid.* Article 2.
61. *Ibid.* Article 3.
62. *Ibid.* Article 4.
63. UDHR, Art. 5; ICCPR, Art. 7
64. Jeremy Waldron. (2008) *Cruel, Inhuman, and Degrading Treatment: The Words Themselves. New York University School Of Law Public Law & Legal Theory Research Paper Series Working Paper No. 08-36. Electronic copy available at: http://ssrn.com/abstract=1278604*

punishment..."[65] South African Constitution has similar provisions.[66] New Zealand Bill of Rights Act[67] shares the same spirit of the laws cited above. The Canadian Charter uses the older language of cruel and unusual[68] treatment or punishment,[69] used also in the US Bill of Rights[70] and (with slight variations) in most US states' Constitutions;[71] this terminology was adapted more or less word-for-word from the English Bill of Rights of 1689.[72]

The UN Convention against Torture (UNCAT) employs[73] the language of cruel, inhuman and degrading treatment in one of its supplementary provisions (supplementary to its main prohibition on torture).[74] Slightly different language is used in the Rome Statute of the International Criminal Court; that statute prohibits not only

65. ECHR, Article 3: .No one shall be subjected to torture or to inhuman or degrading treatment or punishment.. The non-derogation provision, Article 15 (2) that makes the ECHR prohibition on torture absolute also applies to the prohibition on inhuman and degrading treatment.
66. South African Constitution, Art 12 (1): .Everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.
67. New Zealand Bill of Rights Act 1990, section 9: .Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment..
68. Jeremy Waldron, ibid.
69. Canadian Charter of Rights and Freedoms, Art. 12.
70. US Constitution, Eighth Amendment.
71. New York State Constitution, Art. 1, sect. 5 (cruel *and* unusual); Constitution of the State of Texas, Art 1.13 (.cruel *or* unusual.).
72. Bill of Rights, December 16, 1689: .[T]he . Lords spiritual and temporal and commons ... do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare, 10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.
73. Cf. Jeremy Waldron, *ibid.*
74. UNCAT, Art. 16 (1): .Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined...

torture as a crime against humanity but also other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.. It also prohibits as war crimes inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment.[75]

Of great importance to this research are the provisions of the Geneva Convention. Article 3 of the Geneva Convention requires humane treatment for persons taking no active part in hostilities (*including prisoners and detainees*), and it contains a prohibition on cruel treatment and torture and on outrages upon personal dignity, in particular, humiliating and degrading treatment. For Americans the issues of inhuman treatment and outrages on personal dignity come up mainly in relation to the treatment of detainees in the war of terror, but elsewhere in the world the prohibition is oriented towards regular law enforcement. Article 3 of the ECHR, for example, has been mostly used to correct routine police and prison brutality in Turkey, Eastern Europe and former Soviet Union.[76]

Other important international treaties related to human rights include the Convention on the Prevention and Punishment of the Crime of Genocide (1948); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the International Covenant on Civil and Political Rights (1966)[77] and its companion, the Covenant on Economic, Social and Cultural Rights (1966); the Convention on the Elimination of All Forms of Discrimination Against Women (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); and the Convention on the Rights of the Child (1989). These treaties have been widely ratified; the Convention on

75. Jeremy Waldron, *ibid.*
76. *Ibid.*
77. The International Covenant on Civil and Political Rights (ICCPR) guarantees the right to liberty, freedom from Arbitrary arrest or detention and the right to be brought before a judge promptly (see Article 9) and the right to a fair trial (see Article 14), including the right to be presumed innocent until proved guilty.

the Rights of the Child, for example, has been accepted by every country in the world except the United States and Somalia. The treaties have been supplemented by three regional human rights agreements: the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); the American Convention on Human Rights (1969), and the African Charter on Human and Peoples' Rights. The regional agreements and many of the UN treaties allow individuals to bring petitions to regional or global human rights organizations for protection against acts by their governments that violate their rights.[78]

MUNICIPAL LAW JUSTIFICATION

In Nigeria, human rights are recognised and maintained to a large extent. Nigeria is party to many international human rights instruments. *Section 33(1) of the Constitution of the Federal Republic of Nigeria 1999* (as amended, hereinafter referred to as CFRN) provides 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 live must be construed to include a right to a favourable and healthy environment that guarantees it. It is generally accepted that people in prison have a right to a standard of health care equivalent to that available outside of prisons. This "principle of equivalence" is one that enjoys broad consensus among international health and human rights instruments and organizations.[79] The constitution equally provides that every individual is entitled to respect for the dignity of his person[80], and

78. Shelton, Dinah. "*International Law.*" Microsoft® Encarta® 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008.
79. RICK LINES. *(2006). From equivalence of standards to equivalence of objectives: The entitlement of prisoners to health care standards higher than those outside prisons, International Journal of Prisoner Health, December 2006; 2(4): 269_280.*
80. Section 34 (1) of CFRN.

accordingly, no person shall be subject to torture or to inhuman or degrading treatment[81]; no person shall be held in slavery or servitude[82]; no person shall be required to perform forced of compulsory labour.[83] In subsection 2(a) of section 34 however, the constitution puts a proviso as follows: for the purposes of subsection (1) (c) of this section, "forced or compulsory labour" does not include - (a) any labour required in consequence of the sentence or order of a court. Hence, it may be argued that a prisoner or detainee whose sentence by a court of competent jurisdiction involves hard labour is not covered by that provision. But, what about the 'inhuman and degrading treatment' clause? Is forcing prisoners to sleep on the bare floor due to lack of beddings not part of it?

Section 35 of the CFRN also provides that every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law - (a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty; (b) by reason of his failure to comply with the order of a court or in order to secure the fulfilment of any obligation imposed upon him by law; (c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence; (d) in the case of a person who has not attained the age of eighteen years for the purpose of his education or welfare; (e) in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or (f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal

81. Section 34 (1) (a) of CFRN.
82. Section 34 (1) (b) of CFRN.
83. Section 34 (1) (c) of CFRN.

from Nigeria of any person or the taking of proceedings relating thereto: Provided that *a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.* (Emphasis mine).

Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.[84] Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention.[85] Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of - (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or (b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.[86] Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this subsection, "the appropriate authority or person" means an authority or person specified by law.[87]

84. Section 35 (2) of CFRN.
85. Section 35 (3) of CFRN.
86. Section 35 (4) of CFRN
87. Section 35 (6) of CFRN

Section 36 of the CFRN guarantees fair hearing (incorporating principles of natural justice).[88] Section 37 provides for privacy rights.[89] Rights to freedom of thoughts, conscience and religion[90] as well as freedom of expression[91] have been guaranteed in sections 38 and 39 of the CFRN. For freedoms of lawful assembly and freedom of movement see sections 40[92] and 41[93] of the CFRN.

Nigeria is also a party of many international treaties the *African Charter on Human and Peoples' Rights, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights (ICESCR)*[94], *Universal Declaration of*

88. In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.
89. The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.
90. Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.
91. Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.
92. Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests: Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition.
93. Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereby or exit therefrom.
94. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),

Rights[95], United Nations Charter, Protocol to African ...er on Human and Peoples' Rights, Optional Protocol To ...ational Covenant On Civil And Political Rights, etc. Because ... treaties have been domesticated into our municipal laws, they ... become parts and parcel of Nigerian laws which are ...rceable in all Nigerian courts. See section 12 of the CFRN.

...W CAN HUMAN RIGHT BE HUMAN WRONG?

... rights of persons in custody or prisons have been shown to be ...ersally recognised owing to the fact that even prisoners or ...ons in custody are part of the human race. It should be noted ... in as much as the citizens of a country have rights to be ...ected, the state equally has rights to be protected too. According ... Professor Emanuel Gross[96], in its hour of crisis a state is not ...ired to sacrifice itself on the altar of the basic rights and ...doms of its citizens, but is entitled to restrict these rights and ...doms in so far as is necessary to effectively deal with its ...emies.[97] Thus, the court has held as follows:

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which are treaties and as such are binding on the several state parties thereto, were meant, in part, to elaborate the various rights specified in the Universal Declaration. The ICCPR and the ICESCR were each adopted and opened for signature, ratification, and accession by the General Assembly of the United Nations on December 19, 1966. *See* ICCPR, December 19, 1966, 6 I.L.M. 368 (entered into force Mar. 23, 1976); *See also* ICESCR, December 19, 1966, 6 I.L.M. 360 (entered into force January 3, 1976).

The Universal Declaration of Human Rights (Universal Declaration) was adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948

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1. High Court of Justice [H.C.] 320/80 *Kawasma v. Minister of Defence*, 35+3) P.D. 113, 132 (Heb.).

Professor Emanuel Gross, *"The Struggle of a Democracy against Terrorism – Protection of Human Rights: The Right to Privacy versus the National*

> There is no choice—in a democratic society seeking freedom and security but to create a balance between freedom and dignity on one hand and security on the other. Human rights cannot become an excuse for denying public and state security. A balance is needed—a sensitive and difficult balance—between the freedom and dignity of the individual and state and public security.[98]

However, in the midst of the countless grotesque inhumanities of the twentieth century, there is a heartening story, amply recounted elsewhere: the emergence, in international law, of the morality of human rights.[99] The morality of human rights is not new; in one or another version, the morality is very old.[100] But the

Interest – the Proper Balance," Cornell International Law Journal, Vol. 37, pp. 28-93, 2004.

98. Further Hearing [FH] 7048/97 Anon. v. Minister of Defence, 54(1) P.D. 721, 743 (Heb.).

99. *See, e.g.*, Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982); ROBERT F. DRINAN, CRY OF THE OPPRESSED: THE HISTORY AND HOPE OF THE HUMAN RIGHTS REVOLUTION (1987).

100. *See* LESZEK KOLAKOWSKI, MODERNITY ON ENDLESS TRIAL 214 (1990): It is often stressed that the idea of human rights is of recent origin, and that this is enough to dismiss its claims to timeless validity. In its contemporary form, the doctrine is certainly new, though it is arguable that it is a modern version of the natural law theory, whose origins we can trace back at least to the Stoic philosophers and, of course, to the Judaic and Christian sources of European culture. There is no substantial difference between proclaiming "the right to life" and stating that natural law forbids killing. Much as the concept may have been elaborated in the philosophy of the Enlightenment in its conflict with Christianity, the notion of the immutable rights of individuals goes back to the Christian belief in the autonomous status and irreplaceable value of the human personality. Quoted in *A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture* by Michael J. Perry, Emory University School of Law

emergence of the morality in international law, in the period since the end of World War II, is a profoundly important development – a development that makes the moral landscape of the twentieth century a touch less bleak. Although it is only one morality among many, the morality of human rights has become the dominant morality of our time.[101]

The conviction that every human being has inherent dignity – and that therefore no one should deny that any human being has, or treat any human being as if she lacks, inherent dignity – is so fundamental to the morality of human rights that when I say, in this essay, "the morality of human rights," I am referring, unless the context indicates otherwise, to this conviction. For the sake of simplicity, I will say that an action or policy "violates" a human being if the rationale for the action/policy denies that the human being has, or treats her as if she lacks, inherent dignity.[102]Every law has a purpose for which it was enacted to fulfill. When therefore a law begins to deviate from its *teleology*, such a law begins to lose its popularity and essence although it may retain its potency as a weapon in the hands of the state or government.

According to a report from Amnesty International Publications, Nigeria's police have been responsible for large numbers of extrajudicial executions; deaths in custody and cases of torture and other ill-treatment of alleged criminals in custody. The police kill hundreds of people every year with impunity. The Legal Defence and Assistance Project (LEDAP), a Nigerian NGO, estimated that in 2009 at least 1,049 people had been killed by the police. Many are unlawfully killed before or during arrest in the street or at

; University of San Diego - School of Law and Joan B. Kroc School of Peace Studies.

101. Michael J. Perry. *(2005), A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture, Roger Williams University Law Review, Vol. 10, p. 349, 2005* , Emory Public Law Research Paper No. 05-11

102. Michael J. Perry, *ibid.*

roadblocks. Others are tortured to death in police detention. A large proportion of these unlawful killings may constitute extrajudicial executions. In other cases, people disappear from police custody. Chika Ibeku disappeared from police custody in April 2009; the Nigerian Bar Association filed habeas corpus proceedings in May 2009. To date the police have not produced the young man, despite a court order in November 2010.The families of the victims rarely receive justice and are often left with no answers. Few police officers are held accountable. In most cases there is no investigation into deaths in custody, extrajudicial executions or enforced disappearances. Amnesty International receives consistent reports that police routinely torture suspects in order to extract information. Moreover, in many cases the confession extracted by torture is used as evidence in court, contrary to national and international laws.[103]

Human rights of the persons in custody becomes human wrong when the state in the supposedly pretended interest of justice acts or omits to act and thereby violates or breaches any of these inherent human rights. When I say that a government action or policy violates a human being, I mean that the rationale for the action or policy violates a human being; that is, the rationale either denies that one or more human beings have inherent dignity or treats them as if they lack it. What the Nazis did to Jews was embedded in an ideology according to which Jews are pseudo-human; the Nazis denied that Jews have whatever moral status – whatever dignity, whatever worth – true human beings have. (According to the morality of human rights, the moral status that human beings have is inherent dignity.) Whether or not Bosnian Serbs believed that Bosnian Muslims were pseudo-human, Bosnian Serbs certainly treated Bosnian Muslims as if they lacked inherent dignity. How else to understand what Bosnian Serbs did to Bosnian Muslims – humiliation, rape, torture, murder? In that sense, what Bosnian

103. http://www.amnesty.org/en/library/asset/AFR44/014/2011/en/5a1b7540-3afc-43ec-978c-3eab4c10d91f/afr440142011en.pdf. retrieved on the 3rd of May, 2013 by 11:21 am

Serbs did to Bosnian Muslims constituted a *practical* denial – an *existential* denial – that Bosnian Muslims have inherent dignity. [104]

Committing convicted criminals to prisons without adequate medical care to guarantee their right to life is, in itself an attempt to unlawfully deny them their fundamental right to life. Prison environments are not as comfortable as life outside the gaol is but at least, a minimum standard of care should he ensured while dealing with convicted human beings. It is the experience in countries around the world that health problems are more common, severe and complex in prisons than they are in the general population outside of prisons. For example, the rate of tuberculosis (TB) [105]infection among incarcerated populations is as much as one hundred times higher than that found outside of prisons and in many countries is one of the leading causes of mortality among prisoners. Within prisons, the risk of the spread of TB is heightened by poor and overcrowded prison conditions illustrating the relationship between environmental conditions in prisons and the health status of detainees. [106] In Europe, the WHO estimates that as many as 40% of prisoners suffer from some form of mental illness, and, as a result, are up to seven times more likely to commit suicide than are people outside of prisons. [107]

The notion that the State owes a higher duty of care to those it imprisons than it does to those outside of prisons also features in modern human rights law. A good contemporary example is found in the work of the African Commission on Human and People's Rights, the body responsible for monitoring State compliance with the provisions of the *African Charter on Human and Peoples' Rights*. In the case of *International PEN and Others v Nigeria*

104. See note 14 of Michael J. Perry, *ibid.*
105. (International Committee of the Red Cross, 2006)
106. Maher, D., Grzemska, M., Coninx, R., Reyes, H., & Sommaruga, C., *Guidelines for the Control of Tuberculosis in Prisons* . Geneva: World Health Organization and International Committee of the Red Cross. (1998).
107. World Health Organization Europe, no date

(1998), the Commission takes the approach that the State's obligation to fulfill the right to health contained in *Article 16 of the African Charter* "is heightened in cases where an individual is in its custody" because the person's "integrity and well-being is completely dependent upon the actions of the authorities."[108] This articulates a higher standard of care owed by the State to prisoners than to non-prisoners. According to the Commission, "The State's responsibility in the event of detention is even more evident to the extent that detention centres are its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities."[109]

The United States Supreme Court has also found that the Government has an obligation to provide people in prison with access to health services, a duty it does not owe to people outside of prisons. The late Justice Thurgood Marshall, writing the majority opinion in the1976 case of *Estelle v Gamble,* affirmed the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death..." In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.[110]

From the above case, it can be rightly observed that the law is truly an instrument of oppression in the hand of the bourgeois against the oppressed. It did not start today; it is age long[111] and has

108. International PEN and Others v Nigeria (1998). African Commission on Human and Peoples' Rights Comm Nos 137/94, 139/94, 154/86, 161/97.

109. *Malawi African Association and others v Mauritania (2000) African Commission on Human and Peoples' Rights Comm Nos 54/91, 61/91, 98/93, 164/97,196/97 and 210/98.*

110. Estelle v Gamble 429 US 97, 105 (1976).

111. Henry II strengthened the monarchy's control over England by establishing a new centralized system of justice. He declared that crimes such as murder

eaten deep, like corruption, into the fabric of the society. Those who occupy power use the instrumentality of the law most times to hunt down political enemies. When they eventually do and put such perceived enemies in custody or prisons, they refuse to allow the victims any chance to assert his human right.

THE ATTITUDE OF COURTS TOWARDS FLAGRANT VIOLATION OF RIGHTS OF PERSONS IN CUSTODY

You will agree with me that the mere fact that these phrases are used in international, regional and national rights documents means that there is case law all over the world devoted to the question of their meaning. Note however that the definitions of inhuman and degrading treatments are not exhaustive. In the case of *Xuncax v. Gramajo*[112], the court held thus:

> It is not necessary that every aspect of cruel, inhuman or degrading treatment be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law, any more than it is necessary to define all acts that may constitute

and arson were crimes against the king, no matter where in the kingdom they were committed. He ordered local juries to meet in each district every year to name people suspected of such crimes and to bring them before the king's judges. (This is the origin of the American grand jury.) He also set up a system of traveling justices to hear property disputes and other civil cases. By standardizing laws and punishments throughout his kingdom and by putting the law in the hands of royal officials instead of local barons, Henry II began to establish English common law—law that applied to all of England. These changes united England under one set of laws and under one system of justice. This system of justice gave the king not only power and prestige but also money: He collected fines from criminals and fees from civil cases. Twelfth-century English kings were rich. Money flowed to the royal treasury from courts, lands, taxes on cities, knightly aids, and other sources.

112. *886 F.Supp. 162, 180 (D. Mass. 1995)*

> torture in order to recognize certain conduct as actionable misconduct under that rubric....

In 2002, in a case dealing with human rights abuses in Zimbabwe, Judge Victor Marrero in the Southern District of New York, made the point that federal courts have a responsibility to help remedy the definitional indeterminacy of cruel, inhuman or degrading treatment. They should not just cite that indeterminacy as grounds for dismissing a suit. Judge Marrero said that in an area of law where uncertainty persists by dearth of precedent, declining to render decision that otherwise may help clarify or enlarge international practice creates a self-fulfilling prophecy and retards the growth of customary international law.[113]

In interpreting and administering Article3 of the ECHR:"No one shall be subjected to torture or to inhuman or degrading treatment or punishment", the court has held as follows:

> Ill-treatment must attain a minimum level of severity if it is to fall within the scope ofArt.3 of the Convention. The assessment of this minimum level of severity is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim. In considering whether a treatment is "degrading" within the meaning of Art.3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Art.3 though it may be noted

113. *Tachiona v. Mugabe* 234 F.Supp.2d 401 S.D.N.Y., 2002. at 437 (Victor Marrero judge).

> that the absence of such a purpose does not conclusively rule out a finding of a violation. Furthermore, the suffering and humiliation must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, as in, for example, measures depriving a person of their liberty.[114]

Recently, in *Taunoa v Attorney-General*[115], the Supreme Court of New Zealand had to engage itself in the determination of some of these questions of the status of rights of persons in custody. The Court had to determine some difficult questions about the application of the New Zealand Bill of Rights Act to the behaviour modification regime applied in Auckland prison to prisoners whose conduct was violent or disruptive. The regime involved solitary confinement, loss of exercise and other privileges, and constant invasive searches. The question was whether the regime violated the requirement of Section 23 (5) that *"everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person*, and if so, whether it also violated the more serious prohibition in section 9 *on torture or cruel, degrading, or disproportionately severe treatment or punishment*. The Court held unanimously that the former provision was violated but by a 4-1 majority (Chief Justice Sian Elias dissenting) that the latter, more serious prohibition was not.

In the American case of *Furman v. Georgia*[116], Brennan J. concurring, at 270-3 stated as follows:

> At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of

114. *Wainwright v. United Kingdom* (2007) 44 E.H.R.R. 40 at §41);
115. *[2008] 1 NZLR 429*
116. 408 U.S. 238 (1972).

> uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is cruel and unusual, therefore, if it does not comport with human dignity. .The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. .Pain, certainly, may be a factor in the judgment. More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. . The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity. For a similar approach in Canada, see *R. v. Smith*.[117]

It has also been recognised that where an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim's allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Art.3 of the Convention.[118] This is in the spirit of the general principle that in respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes

117. *[1987] 1 S.C.R. 1045.*

118. *Yavuz v.Turkey* (2007) 45 E.H.R.R. 16 at §38.

human dignity and is in principle an infringement of the right set forth in Art.3.[119]

In Nigeria, the courts have been active in enforcing fundamental human rights. In fact, most courts ensure speedy trial of all applications brought before them for the enforcement of fundamental human rights. The Court of Appeal in the case of *Aliyu Ibrhim v. The Commissioner of Police (FCT Command*[120] held as follows:

> Section 34 (a) of the constitution state that: Every individual is entitled to respect for the dignity of person and accordingly- (a) no person shall be subjected to torture or to inhuman or degrading treatment inhuman treatment means any barbarous or relevant or acting without feeling for the suffering of the other. See *Uzoukwu v Ezeomu II* 1991 6 NWLR Pt 200 p 708 at 763-764. Unchallenged affidavit evidence that the appellant was harassed and intimidated and forcefully dragged out of his house, are acts that amount to inhuman treatment. The appellant was subjected to inhuman treatment at the hands of the respondent/agents. It was degrading treatment dearly contrary to the provision of section 34 9a0 of the constitution. Section 37 of the constitution states that: the privacy of citizens, their homes correspondence, telephone conversation and telegraphic administration is hereby guaranteed and protected. The act of the respondent/agent forcefully entering the appellant's home amounts to desecrating the home. The privacy of the appellant to his home was no longer respected. It was thrown away by

119. *Menesheva v. Russia* (2007) 44 E.H.R.R. 56
120. *APPEAL NUMBER: CA/A/115/05.*

the act of the respondents. They had a field day denying the appellant his right to private and family life as guaranteed by section 37 of the constitution. The acts of the respondent's agents are in clear violation of the rights guaranteed every citizen of Nigeria Section 34 (a) and 37 of the constitution.[121]

CONCLUSIONS AND RECOMMENDATIONS

According to the eminent jurist Piet Hein Van Kempen[122], deprivation of liberty to a large extent complicates, restricts or even removes the possibility that individuals can assert their human rights. This certainly does not mean that a person in detention legally forfeits all his rights merely because of his status as a prisoner. That it will not be possible for every detainee to enjoy all human rights also seems obvious, though. In this respect human rights law is even more complicated in respect of prisoners than it already is in relation to free individuals.[123]

121. In The Court Of Appeal Abuja Judical Division Holden At Abuja On Tuesday The 11th Of January 2007 Before Their Lordships: Olufunlola Oyeloa Adekeye Jca; Mary U. Peter Odili Jca; Bode Rhodes-Vivour Jca.

122. Professor of Human Rights Law, Radboud University Nijmegen, The Netherlands, (email p.h.vankempen@jur.ru.nl), and part time Justice in the Court of Appeal, 's-Hertogenbosch, The Netherlands.

123. Piet Hein Van Kempen (2008), Positive Obligations to Ensure the Human Rights of Prisoners *Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family Under the ICCPR, the ECHR, the ACHR and the ACHPR. This publication is a chapter in:Peter J.P. Tak & Manon Jendly (eds), Prison policy and prisoners' rights. The protection of prisoners' fundamental rights in international and domestic law / Politiques pénitentiaires et droits des détenus. La protection des droits fondamentaux des détenus en droit national et international, Nijmegen: Wolf Legal Publishers 2008 (ISBN: 978-90-5850-395-4) (pp. VI + 591).The volume constitutes volume 42 of the Publications of the International Penal andPenitentiary Foundation (IPPF) / Fondation Internationale Pénale et Pénitentiaire (FIPP)*

For many activists and some scholars, the civil rights movement ended in 1968 with the death of Martin Luther King, Jr. Others have said it was over after the Selma march, because after Selma the movement ceased to achieve significant change. Some, especially blacks, argue that the movement is not over yet because the goal of full equality has not been achieved.[124] In the same vein, the oppressed persons in custody or prisoners who have in one way or the other been deprived their basic fundamental rights are not only arguing that the movement is not yet over but also, that the struggles continue with the utmost hope that victory awaits them at last.(*aluta continua, Victoria ascerta.*)

As a way forward, I concur with the sagacious statement that: "we who affirm the morality of human rights, because we affirm it, should do (i.e., we have good reason to do) what we can, all things considered, to prevent government from violating human beings." That is, we should do what we reasonably can to prevent government from taking actions or pursuing policies that deny that one or more human beings have, or treat them as if they lack, inherent dignity.[125] This *is because human rights in the hands of some oppressive governments can be human wrong against the persons in custody and other people that might cross the paths of such government.*

To prevent human rights violations in police custody, a suspect should be brought promptly before a court and have the opportunity to challenge the lawfulness of their detention. However, the police do not bring suspects promptly before a judge or judicial officer. Suspects are often ill-treated in police custody, many are denied

124. Norrell, Robert J. "Civil Rights Movement in the United States." Microsoft® Encarta® 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008.

125. Amartya Sen, (2004): *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 352-53 , cited by Michael J. Perry *supra as* note 1, at 340-42: "Loosely specified obligations must not be confused with no obligations at all."

their right to contact their families or a lawyer, and in some police stations, suspects do not receive any food.

The above international and municipal law provisions should be enforced to prevent arbitrary arrests and detention, and to safeguard the universally recognised fundamental right to liberty. Judges or judicial officers should be empowered to assess whether an arrest is lawful and if pre-trial detention is necessary, as well as providing an opportunity to investigate whether torture has been used, and find out if the suspect has a lawyer which is an ongoing right; according to the ICCPR, anyone deprived of their liberty should have their case reviewed by a court or other authority at reasonable intervals. The judge is tasked with preventing violations of the fundamental rights of the suspect, including torture, ill-treatment and arbitrary arrest.[126]

I call for an urgent ratification of the United Nations Standard Minimum Rules for the Treatment of Prisoners of 30th August, 1955. I sincerely hope that the Prison Reform Bill currently before the National Assembly when passed will incorporate the ingenuity of the United Nations Treaty on Rehabilitation of Prisoners.

Finally, I advocate for an alternative to imprisonment as a form of punishment in Nigeria. According to the Attorney-General of the Federation, Mr. Muhammed Adoke (SAN), "*...poor investigation by the police, awaiting trials and absence of alternatives to prison sentence are some of the impediments to quick criminal justice administration*". This latter part of the Learned Silk's statement is of great importance as even the government recognises the alternative to prisons. Alternatives to prison have been defined as those penalties, which following conviction and sentence, allow an

126. http://www.amnesty.org/en/library/asset/AFR44/014/2011/en/5a1b7540-3afc-43ec-978c-3eab4c10d9ff/afr44014201len.pdf, retrieved on the 3rd of May, 2013 by 11:21 am

offender to spend part or all of his or her sentence in the community or outside the prison establishment.[127]

127. Vass (1990) as cited in Bamgbose, O.A (2010), *The Sentence, the Sentencer and the Sentenced, Op.cit.* p.60.

THE FATE OF HUMAN RIGHTS IN A PERIOD OF A STATE OF EMERGENCY IN NIGERIA

By

PHILIP E. OAMEN*

ABSTRACT

This paper examined the constitutional and legal derogations or limitations to which the enjoyment of Human Rights could be subjected, during a period of a State of Emergency. The article explored the legal procedure for declaration of a State of Emergency in Nigeria and the author contended that the current President of Nigeria may have followed the laid down procedure in his recent proclamation of Emergency Rule in Adamawa, Borno and Yobe States. However, the writer queried the legality of the continued existence of the Emergency Rule in the face of the failure to approve, or rather, the belated approval of the Rule by the National Assembly outside the constitutionally stipulated timeframe. The article discussed what human rights are all about, the approaches or schools of thoughts of human rights, kinds or classes of human rights as well as the fundamental human rights of Nigerians as guaranteed under Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The author argued that while citizens are entitled to the enjoyment of their constitutionally enshrined rights, such rights are however not without corresponding duties and limitations especially in situations where public peace or the corporate existence of Nigeria is threatened. The author concluded by arguing that the Nigerian Army, nay the Nigerian Government cannot hide under the canopy of Emergency Rule in the said states to deny citizens of their constitutional rights except where such denial is reasonably justifiable or necessary to carry out the effective operation of the Rule while it lasts.

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INTRODUCTION

It has gone beyond disputation that the Constitution of the Federal Republic of Nigeria, 1999 (as amended) in Section 305 empowers a sitting President of Nigeria to proclaim a State of Emergency in the Federation or any part thereof, in deserving cases. Over time, some past Nigerian Presidents have invoked the provisions of this special clause[1] in Section 305 in cases where the public peace or corporate existence of Nigeria or any part thereof was threatened. For instance, in 1962, the then Prime Minister, Sir Abubakar Tafawa Balewa declared a State of Emergency in the Western Region following a pandemonium in the Western House of Assembly. Also in May 2004, the then President of Nigeria, Chief Olusegun Obasanjo proclaimed a State of Emergency in Plateau State of Nigeria vide a Presidential Broadcast of 18 May 2004[2]. The Proclamation was subsequently gazetted and transmitted to the National Assembly **(NASS)** for approval, further to Section 305(2) of the Constitution and same was approved by each House of the NASS, though with some minor amendments. Similarly in the year 2006, the same President Obasanjo again wielded the power conferred on him by Section 305 by proclaiming a State of Emergency in Ekiti State[3]. One common feature of Tafawa Balewa and Olusegun Obasanjo's purported exercise of presidential power under Section 305 was the removal of democratically elected State Government officials and replacing them with sole Administrators for the states under Emergency Rule.

Since the year 2009, Nigeria has been combating security challenges in the hands of Boko Haram insurgents who are bent on Islamizing the nation. According to news reports, over 2000 persons

1. Akande, J.O., *Akande: Introduction to the Constitution of the Federal Republic of Nigeria 1999*, (Lagos: MIJ Professional Publishers Ltd, 2000) p. 46
2. See The Guardian, Wednesday 19 May, 2004, p.10
3. Whether the proclamation was done *bona fide* or with political undertone is another matter which is outside the scope of this work.

have been killed by the religious sect which has the North East Nigeria as its major stronghold. On several occasions, the insurgents have overrun the Nigerian security apparatus wherein they have killed many Policemen and members of the Armed Forces. They have invaded Prisons and set free their members held for terrorism charges. The situation became so hopeless that many Nigerians and foreigners began to perceive the nation as a failed state.

On Tuesday 14 May, 2013, and perhaps, in a bid to prove his critics wrong, the current President of Nigeria, Goodluck Ebele Jonathan, in a nationwide televised Presidential Broadcast, invoked the provisions of Section 305 of the Constitution by proclaiming a State of Emergency in three states, namely Adamawa, Borno and Yobe which are flashpoints as far as the terrorist activities of the Boko Haram are concerned.

The major contents of the Presidential Broadcast were the acknowledgment of the fact that the Boko Haram insurgents were determined to undermine the sovereignty and territorial integrity of Nigeria through their overt acts, including the destruction of the Nigerian Flag and in their place, hoisting strange flags, killing of innocent citizens and razing down of public and private buildings by the insurgents as well as the retention of the Governors and other political office holders of the affected states, during the Emergency Rule[4].

It need be stated here that, of particular relevance to this work, vis - a- vis human rights issues, are paragraphs 13 and 14 of the Presidential Speech/broadcast[5] on the State of Emergency wherein the President directed the Chief of Defence Staff to deploy more troops to the states in issue. According to the President, such troops had Presidential orders to take all necessary action which may "include the authority to arrest and detail suspects, the taking of possession and control of any building or structure used for terrorist

4. See The Guardian, Wednesday, 15 May, 2013.
5. *Ibid*

purposes, the lock –down of any area of terrorist operation, the conduct of searches, and the apprehension of persons in illegal possession of weapons" to put an end to the impunity of insurgents and terrorists. The Military, in their characteristic manner of full obedience, have since taken over the said states and have been carrying out the presidential orders. Dusk to dawn curfew has been imposed on Borno and Adamawa States.

This article takes an exploratory view of the procedure for declaring a State of Emergency in Nigeria, meaning, approaches and classes of human rights as well as the constitutional provisions of fundamental human rights as enshrined in Chapter IV of the Constitution. The paper also examines the constitutionality of the invasion of citizens' rights to life, dignity of their persons, personal liberty, freedom of expression, right to peaceful assembly and association, freedom of movement, right to acquire and own immovable property in Nigeria, among other rights in the affected states. We shall contend that though these citizens' rights have been constitutionally flavoured, the same Constitution has however placed limitations on the said rights in situations such as emergency rule situation. We would further argue that the Military can only derogate from the rights of residents of the affected states only to the extent required for restoration of normalcy and in line with the provisions of the Constitution.

PROCEDURE FOR DECLARING A STATE OF EMERGENCY

As noted above, the provisions of Section 305 of the Constitution clearly empower the President of Nigeria to proclaim a State of Emergency throughout the Federation or any part thereof. The President's power in this regard is of wide discretion. In other words, whether the facts of a particular situation fall within the conditions stated in Section 305 – to be examined shortly - to warrant the declaration of a State of Emergency is a matter that falls within the President's discretionary decision which may not be

subject to any judicial review. According to Ademola, C.J.F. (as he then was) in *Williams v. Majekodunmi*[6], *"That a state of public emergency exists in Nigeria is a matter apparently within the bounds of Parliament* [in the instant case, the President], *and not one for the Courts to decide"*[7] However, as much as the Constitution gives the President the power and discretion to declare a State of Emergency, the Constitution does not leave the gate open. Rather, the Constitution clearly lays down the conditions and procedure for declaring a State of Emergency. It is our submission that failure to follow the constitutional procedure outlined hereunder is fatal and the Courts can thus assume Jurisdiction to set aside any purported declaration that runs contrary to the provisions of the Law. It is trite Law that where a statute (let alone the Constitution) provides for a procedure for doing a particular act, compliance with such statute is mandatory[8].

THE PROCEDURE FOR DECLARATION OF STATE OF EMERGENCY

State of Emergency has been viewed as **"something that does not permit of any exact definition. It connotes a state of matters calling for drastic actions**[9]**"** The step by step procedure is as outlined in Section 305 of the Constitution which we have taken the liberty to reproduce *in extenso* below:

Section 305

1) "Subject to the provisions of this Constitution, the President may by instrument published in the Official Gazette of the Government of the Federation issue a

6. (1962) All NLR (Pt. 1) 327 at 335
7. See also *Ningkan v. Government of Malasia* (1970) A.C. 379 at 391 paras C - F
8. See *Abubakar v. Attorney - General, Federation* (2008) All FWLR (pt. 44) 47 at 908 paras A -C
9. *Bhagat Singh v. King Emperor* (1931) L.R.58 1A. 169

proclamation of a state of emergency in the Federation or any part thereof.

2) The President shall immediately after the publication, transmit copies of the Official Gazette of the Government of the Federation containing the proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representatives, each of whom shall forthwith convene or arrange for a meeting of the House of which he is President or Speaker, as the case may be, to consider the situation and decide whether or not to pass a resolution approving the proclamation.

3) The President shall have power to issue a Proclamation of a state of emergency only when-

a) The Federation is at war;

b) The Federation is in imminent danger of invasion or involvement in a state of war;

c) There is actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security;

d) There is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger;

e) There is an occurrence or imminent danger of the occurrence of any disaster, or natural calamity, affecting the community or a section of the community in the Federation.

f) There is any other public danger which clearly constitutes a threat to the existence of the Federation; or

g) The President receives a request to do so in accordance with the provisions of subsection (4) of this section.

(4) The Governor of a State may, with the sanction of a resolution supported by two-thirds majority of the House of Assembly, request the President to issue a Proclamation of a state of emergency in the State when there is in existence within the State any of the situations specified in subsection (3) (c), (d) and (e) of this section and such situation does not extend beyond the boundaries of the State.

(5) The President shall not issue a Proclamation of a state of emergency in any case to which the provisions of subsection (4) of this section apply unless the Governor of the State fails within a reasonable time to make a request to the President to issue such Proclamation.

(6) A Proclamation issued by the President under this section shall cease to have effect:-

a) if it is revoked by the President by instrument published in the Official Gazette of the Government of the Federation;

b) if it affects the Federation or any part thereof and within two days when the National Assembly is in session, or within ten days when the National Assembly is not in session, after its publication, there is no resolution supported by two – thirds majority of all the members of each House of the National Assembly approving the Proclamation;

c) after a period of six months has elapsed since it has been in force
Provided that the National Assembly may, before the expiration of the period of six months aforesaid, extend the period of the Proclamation of the state of emergency to remain in force from time to time for a further period of six months by resolution passed in like manner; or
(d) at any time after the approval referred to in paragraph (b) or the extension referred to in paragraph (c) of this subsection, when each House of the National Assembly revokes the Proclamation by a simple majority of all the members of each House."

From the above constitutional provisions, the step by step procedure for proclaiming or declaring a state of emergency can be summarised below:

i. The President must study the situation and satisfy himself that any of the incidents stated in Section 305 (3) (a) – (g) as quoted above exists. It bears stating here that the incidents are seven in number and they are alternative or disjunctive and not cumulative[10] . In other words, the existence of any of the incidents would ground a Proclamation of a State of Emergency. Although President Jonathan did not state the incident he founded his proclamation upon, it is obvious from the Presidential Broadcast that he relied on paragraphs (c) and (d) of Section 305 (3). We contend here that a community reading of the provisions of Section 305(3) (g),

10 Akande, *Op. Cit.* at 425 - 426

(4) and (5) of the Constitution would reveal that the President did not have the power to declare a state of emergency in the affected states without a formal request from the Governors of those states to do so. Though it can be argued that subsection (5) gives the President the power to so declare where the Governors fail within a reasonable time to make a request for a Proclamation, it is however contended that what amounts to a "reasonable time" in this context is nowhere defined in the Constitution. Moreso, we submit that the President ought to make reference to the Governors' failure to make the requisite request in his Presidential Broadcast. By not making known the fact that the Governors failed to so request, thus empowering him to declare an Emergency Rule in their States, it appears the President has failed to comply with the condition precedent inherent in Section 305 (1) (g), (4) and (5). Lastly on this, we submit that the incident in paragraph (f) is too wide and general and same could be subject to abuse by an overzealous President.

ii. Having satisfied himself with one above, the President shall issue a Proclamation for the declaration of a State of Emergency in the Federation or the affected state(s). Such Proclamation must be published in the official gazette of the Federal Government.

iii. Consequent upon the said publication, the President shall, with dispatch, transmit copies of the aforestated official gazette to the President of the Senate and the Speaker of the House of Representatives.

iv. The Senate President and the Speaker of House of Representatives shall, upon receipt of the copies, convene a meeting[11] of each House of the NASS and each House must

11. Note the use of the word "meeting" instead of "Sitting". This suggests that the members of the NASS may informally meet for the approval, hence , the

in such a meeting either approve or disapprove the President's Proclamation within 2 days or 10 days depending on whether the House is in session or not in session[12]. One therefore questions the legality of the Senate Approval which was given by a resolution that was passed only on Tuesday 21 May, 2013. It would be recalled that the President declared the State of Emergency in Adamawa, Borno and Yobe States on Tuesday 14 May, 2013. By simple mathematics, it took the Senate (not even the whole NASS yet) a whole week to pass the requisite resolution of approval. With all humility, we contend that the belated Senate approval is invalid as same runs foul of the constitutional provisions which state that the approval must be given within 2 days[13] unless it can be shown that the Proclamation was not published in the official gazette until about 19 May 2013. We submit that, it is most unlikely that a Proclamation made on 14 May 2013 on such a critical issue, as security, would take till 19 May to be published. Assuming our argument here is correct, what then is the legal implication of this lazy and belated approval from the NASS vis – a –vis the continued existence of a State of Emergency in the affected states? We dare to submit that the continued existence of Emergency Rule in those states has become illegal. We find anchorage on the provisions of Section 305 (6) (b) of the Constitution which provides:

> Section 305
>
> 6) A Proclamation issued by the President under this section shall cease to have effect :-

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Senate on Thursday 21 May approved the Emergency Rule in a "closed door session".

12. See Section 305(2) and (6) (b)
13. When the NASS is in session. Luckily for this argument, the NASS was and still is in session when the proclamation was made and published.

a) .....

b) If it affects the Federation or any part thereof and *within two days when the National Assembly is in session*[14], or within ten days when the National Assembly is not in session, after its publication; there is no resolution supported by two – thirds majority of all the members of each House of the National Assembly approving the Proclamation.

Therefore, in the eye of the Law, the NASS having not passed a two – thirds majority resolution within 2 days of publication of the President's Proclamation to approve the Emergency Rule in Adamawa, Borno and Yobe States, it is presumed that they did not intend to approve it. Consequently, Section 305 (6) (b) kicks in. That is, the Emergency Rule automatically ceases to exist. The view has been expressed elsewhere that whether or not a State of Emergency Proclamation was subsequently approved by the NASS, it would have lasted for at least 2 days or 10 days as the case may be[15]. We would rather say, with respect, that, under no circumstance should a State of Emergency last beyond 2 days or 10 days, as the case may be, without an affirmatory, confirmatory or approving majority resolution of the NASS in Nigeria.

PRESIDENT'S FAILURE TO REMOVE THE GOVERNORS OF THE AFFECTED STATES

Much concern has been expressed in the media as regards the President's failure or refusal to remove, albeit, temporarily, the Governors of the affected states. The argument is that, the President ought to have relieved all political office holders in Adamawa, Borno and Yobe States of their positions. To the proponents of this view, no much would be achieved by the military troops with the retention of the politicians in offices. They contend that the political office holders would undermine and frustrate the efforts of the

14. Emphasis ours
15. Akande, *Loc. Cit.*

cannot override the clear provisions of the Constitution on the procedure for removal of state elected officers[18].

Interestingly, the provisions of Section 1(2) of the Constitution put the above contention in a good stead when it provides that:

Section 1(2):

> "The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons [including sole administrators during Emergency Rule][19] take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution [such as Sections 105 – dissolution of State House of Assembly, 110 – recall, 188 – impeachment and 189 – permanent incapacity]."

It follows, therefore, that the President cannot proceed under the provisions of Section 305 or under the Emergency Powers Act to remove the democratic structures in a state under Emergency Rule. After all, the Constitution is supreme and all other Acts, Laws and instruments which are inconsistent with it must, of legal necessity, bow to the Constitution[20]. Even the Section 305 that gives the President the power to proclaim a State of Emergency begins with "Subject to the provisions of this Constitution...." Thus, the President's Proclamation power is subject to the various sections (including the ones stated above) of the Constitution relating to the procedure for removal of state elected officers. The "subject to" clause is an expression of limitation.[21]

18. See Sections 105, 110, 188 and 189 of the Constitution on procedure for relieving state Governors (or their Deputies) and legislators of their jobs.
19. The words in bracket are ours.
20. See Section 1(1)& (3) of the *Constitution and Hope Democratic Party v. Obi* (2012) All FWLR (pt. 612) 1620 at 1644 paras F - G
21. Agundi v. Commissioner of Police (2013) All FWLR (pt. 660) 1247 at 1304 paras E - H

From another perspective, it could not have been the intention of the legislature to empower the President to remove or suspend democratic structure during a State of Emergency. This point is buttressed by the fact that Section 305 (3) of the Constitution envisages a situation where the President could declare a State of Emergency in the whole Federation. Can it be said that if that happens, the President would suspend or remove himself and members of the NASS from office? Could that have been the intention of the lawmakers? We dare answer in the negative. Such a situation would create anarchy or pandemonium which would be greater or graver than the one in respect of which the Emergency Rule was declared in the first place. Further, it has been argued that, further to Section 305 (4), no Governor or State House of Assembly would request or sanction the request for a State of Emergency if they know that they or their offices would be swept away when the President accedes to their request[22]. But the critical question is, what is the fate of human rights in all this? To this question we now turn.

FUNDAMENTAL HUMAN RIGHTS IN NIGERIA

The Nigerian Constitution in its Chapter IV enshrines or guarantees about 11 rights to which every citizen or person[23] shall be entitled. These are right to life[24], right to dignity of the human person[25], right to personal liberty[26], right to a fair hearing[27], right to private and family life[28], right to freedom of thought, conscience and religion[29].

22. Alabi, *Op. Cit.* at 12
23. Note that some of the right sections use "citizen" while others use the word "person", thus suggesting that some fundamental human rights do not enure in favour of expatriate residents in Nigeria.
24. Section 33.
25. Section 34.
26. Section 35.
27. Section 36.
28. Section 37.

right to freedom of expression and the Press[30], right to peaceful assembly and association[31], right to freedom of movement[32], right to freedom from discrimination[33] and right to acquire and own immovable property anywhere in Nigeria[34]. We shall examine below these rights and the limitations or derogation placed upon them under the Constitution, especially during a State of Emergency. But before then, we shall first explore the meaning, approaches and classes of human rights, albeit briefly.

MEANING OF HUMAN RIGHTS

The phrase 'human rights", just like Law, defies any precise or commonly acceptable definition. Each author's definition is informed by his perspective or the school of thought he belongs to. However, we shall attempt a working definition herein after reference to some existing definitions by learned authors and jurists. According to Eze, human rights are "Demands or claims which individuals or groups make on societies some of which are protected by law and have become part of *lex lata* while others remain aspiration to be attained in the future."[35] To Ajomo, "human rights are those rights which human being enjoy by virtue of their humanity the deprivation of which would constitute a grave affront to one's natural sense of justice."[36] In the words of Lien, human rights are "universal rights or enabling qualities of human beings as human beings or as individuals of human race, attaching to the

29. Section 38.
30. Section 39.
31. Section 40.
32. Section 41.
33. Section 42.
34. Section 43.
35. Eze, O., *Human Rights in Africa: Some Selected Problems*, (Ibadan: Macmillan Press and NIIA, 1984) p.5
36. Ajomo, M.A., "The Development of Individual Rights in Nigeria: Constitutional History",in M. A. Ajomo & B. Owasanoye(eds), *Individual Rights under the 1989 Constitution* (Lagos: NIALS, 1993), p.1

human being wherever he appears without regard to time, place, colour, sex, parentage or environment."[37] In Onyekpere's view, "Human right is the intrinsic worth, equal and inalienable rights of members of the human family to a dignified existence. Its observance is fundamental to the realization of social progress and better standard of life for all humanity."[38] A learned Senior Advocate of Nigeria (SAN) sees human right as "a specie of legal right that pertain to mankind as a whole or all persons by virtue of their being "moral and rational creatures"."[39] The definition of human rights has over time, also agitated the minds of Jurists. For example, in *Ransome Kuti v. Attorney – General of the Federation*,[40] Kayode Eso, JSC defined human right as "A right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilised existence." In our humble opinion, human rights are those rights which are inherent to man and universally recognized as precondition to a worthy living and the violation of which would render man less human. Thus a learned author has stated elsewhere, and rightly in our view, that without human rights, "man is nothing but a slave to his society."[41]

37. Lien, A., *Fragment of Thoughts Concerning the Nature and Fulfillment of Human Rights*, (London: Greenwood Press, 1973) p.24
38. Onyekpere,O., "Democracy, Human Rights, Dictatorship and the Nigerian Judiciary," Vol. 3, Nos 1, 2 & 3, (1993), *JHRLP*, pp. 51 – 52
39. Idigbe, A., "Overview of Human Rights and their Corresponding Duties in Contemporary Nigeria," Badaiki, A. D. (ed.), *Landmarks in Legal Developments* (Essays in Honour of Justice C.A.R. Momoh, Honourable Chief Judge of Edo State), (Lagos, Nobility Press, 2003), p.239
40. (1985) 2 NWLR (pt. 6) p.211 at 229
41. Shikyil, S.S., "Human Rights and National Development," Badaiki, A.D.,(ed.), *Landmarks in Legal Developments* (Essays in Honour of Justice C.A.R. Momoh, Honourable Chief Judge of Edo State), (Lagos, Nobility Press, 2003), p.180

APPROACHES TO HUMAN RIGHTS

Basically, there are two approaches to the concept of human rights. These are the traditional and socialist approaches.

TRADITIONAL APPROACH

This approach finds its root or support from the works of Thomas Hobbes and John Locke. Essentially, this school of thought or approach sees human rights from the natural law perspective. To the proponents of this approach, human rights are nothing but the rights which are common to every human being notwithstanding his race, sex, creed, social status, political affiliations and other primordial or socio – economic considerations. To them, human rights are fundamental and inalienable and they include right to life, right to personal liberty, right to own property, freedom of thought, conscience and religion as well as freedom of expression and the Press. Thus, according to Nnaemeka – Agu:

> Human right is conceptualized as the new manifestation of the natural law concepts of the ancient and middle ages. Natural law had always envisaged the external natural law conceived as principles of a right law or as patently correct solution to concrete legal questions. It is reported as the law that emanates from God or accords to reason and therefore does not change. It is the law which the Monarch or Parliament itself is bound not to infringe.[42]

To this school of thought, human rights, though mostly contained in the Constitutions of nations, actually predate and are independent of such Constitutions and the nations. A man is imbued

42. Nnaemeka – Agu, P., " The Role of Lawyers in the Protection and Advancement of Human Rights," Vol. 2 Nos 1 & 2, (1992), *JHRLP*, p. 2

with human rights from conception and the rights are universal and natural. It is because of their naturalness and universality that they are referred to as fundamental human rights.[43]

SOCIALIST APPROACH

On the other hand, this approach which is traceable to the works of Karl Marx states that there is nothing natural or divine about human rights. According to this school of thought, human rights and the extent of their enforceability is majorly, if not solely, dependent upon the socio –economic infrastructure or condition in the society the human beings lives in. In other words, the economic infrastructure determines the superstructure of a society which in turn determines the extent to which human rights are guaranteed by the given society to its members. Hence, in Quashieah's view:

> It is the concrete material condition of the society which gives rise to the sort of rights that can be enjoyed. Therefore, there can never be right with divine context derived from the natural law synthesis. From these points of view, what is considered human right in a bourgeois society is the liberty allowed for either the exploitation or alienation of the working class. The very fact of inequitable social relations constitutes a bottleneck in the enjoyment of human rights.[44]

43. Uchegbu, A., "The Concept of Right to Life under the Nigerian Constitution," Omotola (ed.), *Essays in Honour of Justice T. O. Elias*, (Lagos: University of Lagos Press, 1981) p. 127
44. Quashieah, K., "The Philosophical Bases of Human Rights and its Relations to Africa: A Critique," Vol. 2 Nos 1 & 2, (1992), *JHRLP*, p.22

Sundberg also seems to have pitched his tent with this approach when he said, "Rights and freedom of individuals in any state are materially stipulated and depend on socio – economic, political and other conditions of the development of society, its achievement and progress."[45] In the words of Klenner, human rights "...are neither eternal truths nor supreme values....They are not valid everywhere nor for an unlimited time. They are rooted neither on the conscience of the individual nor in God's plan for creation. They are of earthly origin...."[46] It has also been argued elsewhere that, "The attitude of governments to the regimes of rights is determined by a complex set of variables which include economics, ideological polarity, religious and cultural particularism, colonialism, etc"[47]

Despite the divergence of views held by the two different approaches to human rights, one fact is however certain and that is, both schools are agreed that "...human beings are the beneficiaries of human rights. Accordingly, any paradigm which is not cognizant of this axiom wallows in idle fantasy."[48]

CLASSES OF HUMAN RIGHTS

Human rights have been classified into 3 kinds. These are:

a) **Civil And Political Rights:** These are also known as first generation or liberty – oriented rights. They are the earliest recognized rights and they have been enshrined in the

45. Sundberg, J., "What is Human Rights: Universal Declaration", *Acorn Law Review* (1987) p. 587

46. Klenner, H., "Human Rights: A Battle Cry for Social Change or a Challenge to Philosophy of Law," being a paper presented at the World Congress on Philosophy of Law and Social Philosophy, Sydney/Camberra, August 1977, p.8

47. Mamman, T., " Beyond Rhetoric: Challenges for the International and Regional Human Rights Regimes in the New Millennium," Vol. 2, No 1, (January 2004), *Nigerian Bar Journal*, pp. 1 - 2.

48. *Kartashkin, v., "Economic, Social and Cultural Rights"*, Vasak, K & Alston, P.(eds), *The International Dimension of Human Rights*, (UNESCO, 1992), p.111

Constitutions of most countries as justiciable rights[49]. These rights are couched in such a way that they are asserted against the state and in favour of the protection of the liberty of individual members of the state.

b) **Economic, Social And Cultural Rights:** These are also termed second generation or security – oriented rights. Most of them are generally not enforceable or justiciable. For example, these are the rights contained in Chapter II of the Constitution. They include right to work, right to fair and just condition of service, right to form and join trade unions[50],right to social security or welfare, right to protection and assistance to family, right to adequate standard of living, right to education and right to take part in the cultural life of society. It is noteworthy to state that these second generation rights only became prominent in the 20th century when many nations, including the US, Mexico, Germany and other western countries started to incorporate them into their respective Constitutions[51].

c) **Solidarity Rights:** These are also known as third generation rights. They are of most recent prominence compared to the other rights explained above. These are right to development, right to self – determination, right to health, right to healthy and balanced environment, right to benefit from the common heritage of mankind and right to humanitarian assistance.[52]

49. They are contained in Chapter IV of the Nigerian Constitution and they have been outlined above.
50. This is however a justiciable right under Section 40 of Chapter IV of the Constitution.
51. See Dakas, D., "The Implementation of the African Charter on Human and People's Rights in Nigeria," Vol.3, (1986 -1990), *UJLJ*, p. 39.
52. See Idigbe, *Loc. cit*

However, it suffices to say here that, notwithstanding the above classification and the much touted superiority usually ascribed to first generation rights over the other rights, there is no set of human rights that is superior to the other. Each class should be equal to and inter – dependent on the other.[53] In other words, all human rights should be treated equally as they are all indivisible, interdependent and interrelated.[54]

SOURCES OF HUMAN RIGHTS IN NIGERIA

Human rights in Nigeria have domestic, regional and international sources. We will mention some of these sources in passing.

i. The Nigerian Constitution
ii. Universal Declaration on Human Rights of 1948
iii. International Covenant on Civil and Political Rights of 1966
iv. International Covenant on Economic, Social and Cultural Rights of 1966
v. The African Charter on Human and People's Right of 1981

We wish to add here that, the Universal Declaration on Human Rights was the first organised international or global statement on human rights following its adoption by the member – states of the United Nations which was established after the Second World War. Before 1948, ideas about human right, its projection and promotion were carried out within the context and confines of municipal laws.[55] The major municipal instruments then were:

a) Magna Carta – England, 1215
b) Habeas Corpus – England, 1679
c) Bill of Rights – England, 1689

53. See Vienna Declaration, 1993, World Conference on Human Rights
54. Udombana, N. J., "Human Rights Protection and Good Governance in Nigeria", *The Justice Journal* (A Journal of Contemporary Legal Issues), 2nd Ed., (2011), p.34 at 39
55. Mamman, *Op. Cit.* Note No. 46

d) Virginia Bill of Rights – America, June 1776
e) American Declaration of Independence – America, July 1776
f) French Declaration on the Rights of Man – France, 1789
g) French Constitution – France, 1791 and
h) Treaty of Versailles – 1919

The 1948 Universal Declaration did not only recognise human rights, but it also sought to harmonise and universalise human rights. However, as noted under the Socialist Approach above, the extent of the rights enjoyed in any given society is largely dependent on many variables and these rights may expand or reduce as members of the society continue to move their claims from the realm of *lex ferenda* to the realm of *lex lata* (from moral right to legal right) or vice versa.[56]

THE FATE OF HUMAN RIGHTS DURING EMERGENCY RULE

Having identified the various rights available to Nigerian citizens, especially the fundamental human rights enshrined in Chapter IV of the Constitution, we would now examine the fate or status of those rights in a period of a State of Emergency such as is currently in place in Adamawa, Borno and Yobe States of Nigeria. We submit here that the constitutionally enshrined rights are not without limits. They are not unlimited at all times. In fact, the Constitution itself and other laws in Nigeria have created situations where these rights could be derogated from, restricted or limited. What this means is that the fate of human rights in a State of Emergency period could be that of suspension, restriction or limitation. However, before such rights are denied citizens by agents of the state, the law or due process must be followed. Where the public peace or corporate existence of the Nigerian state is

56. Idigbe, *Loc. Cit.*

threatened, as exemplified by the events that led to the Emergency Rule in those affected states, all efforts – which could include the suspension or restriction of human rights – must be taken by the Government to restore normalcy. As Oputa, JSC once said, "Freedom within the Law is good and desirable, but freedom outside the Law is bad and detestable." The Law only recognises ordered freedom[57], not crude or limitless freedom.

We completely agree with Akande that in nearly all constitutional expression of fundamental rights and freedom, qualification or limitations are incorporated with respect to the rights of others and of course, the public interest.[58] As desirable as human rights are, in any given society, such rights must however be balanced against the corresponding duty to cooperate with the state in a period of State of Emergency with a view to ensuring the restoration of peace. Section 24 (e) of the Constitution[59] is germane in this instance. It provides that "It shall be the duty of every citizen to render assistance to appropriate and lawful agencies in the maintenance of law and order." Hence, while the Military in the states under the Emergency Rule are urged to abide by the Rules of Engagement, with the consciousness of not deliberately or unjustifiably invading human rights of the residents of those states, the residents must equally know that some of their rights, such as freedom of movement and peaceful assembly and association would definitely be negatively affected while the Emergency Rule lasts. This would "bring freedom and responsibility into balance to promote a move from the freedom of indifference to the freedom of involvement."[60]. We shall now examine the restrictions or

57. See Amalgamated Press of Nigeria v. R. (1961) 1 All NLR 191
58. Akande, *Op. Cit.* at 115.
59. See also Article 29 (3) of the African Charter which imposes on the citizen the duty not to compromise the security of his state of origin or residence.
60. Ghai, Y., "Rights, Duties and Responsibilities", Caugelin, J., Mayer Koening and Lim, B. (eds), *Asian Values: Encounter with diversity*, (London: Curzon Press)

limitations placed on some selected fundamental human rights by the Constitution and other laws of the land.

RIGHT TO LIFE

This right is guaranteed under Section 33 of the Constitution. This is, unarguably, the most fundamental of all rights. After all, one needs to be alive before one can assert other rights guaranteed under the Constitution or any other law. As important as this right is, the same

Section that gives it also contains some inbuilt derogations from it. Thus, the right to life can be lawfully denied a person where he has been lawfully sentenced to death by a Court of Law[61], where he is killed as a result of self – defence or defence to property against violence from him, where he is killed in the process of trying to escape from lawful arrest or from lawful custody or where he is killed in the process of suppressing riot, insurrection or mutiny. Quite apart from Section 33 – inbuilt derogation in a period of emergency, Section 45(2) of the Constitution also permits agents of the state to, during a period of Emergency Rule, take any reasonably justifiable measure, pursuant to an Act of the NASS, to derogate from this right to life, provided the measure is as a result of acts of war.[62] The recent killing of Boko Haram members by the Military were presumably done pursuant to Sections 33(2) and 45 (2) of the Constitution.

RIGHT TO PRIVATE AND FAMILY LIFE

This right which is guaranteed under Section 37 of the Constitution could also be the subject of derogation or restriction during a period of a State of Emergency. The section guarantees and protects the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic

61. Adeniji v. State (2000) 2 NWLR (pt. 645) p.354. See also Kalu v. State (1998)12 SCNJ p.1

62. It is arguable that the terrorist activities of the Boko Haram amount to acts of war against the Nigerian State.

communications. However, by virtue of Section 45 (1) of the Constitution, this right may be derogated from, pursuant to any law that is reasonably justifiable[63] in a democratic society, in the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting other persons' interest. Little wonder, the Military troops have invaded the homes of residents in the affected states in a bid to arrest suspected Boko Haram members. It is submitted however that such invasion cannot be legally justifiable unless there are concrete reasons to believe that suspects or illegal weapons are being harboured in such homes. Where concrete reasons exist, the private phones of such residents may also be tapped, legally, provided such an action is backed by a reasonably justifiable law in Nigeria.

RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

This is provided for under Section 38 of the Constitution. Of particular interest to this writer is that portion of aforesaid section which states that every person has freedom to manifest and propagate his religion either alone or *in community with others*, in private or *in public*.[64] We submit that by the incidents or nature of Emergency Rule in place in the 3 affected states, wherein curfew has been imposed, it may be difficult, if not impossible to exercise this right in the broad manner envisaged by the Constitution, during the period of the Emergency Rule. Ordinarily, Nigerians are known for their zealous religious inclinations which push them to mosques and churches on Fridays and Sundays. With the curfew in place in the affected states, it is doubtful whether the right to worship in community with others and in public (which is mostly in mosques and churches) is still feasible while the Emergency Rule lasts. It is submitted that Section 45(1) of the Constitution permits derogation from this right, by a reasonably justifiable Law. This derogation, it is submitted, is necessary in the instant case of Emergency Rule in Adamawa, Borno and Yobe States, against the backdrop that the

63. The Constitution is silent as to the meaning of "reasonably justifiable."
64. Emphasis ours

Boko Haram war against the Nigerian state is premised on a religion – based demand: Islamisation of Nigeria[65].

RIGHT TO FREEDOM OF EXPRESSION AND THE PRESS

Section 39 of the Constitution protects this right. As laudable as this constitutional flavour may be, it is subject to abuse, hence the Constitution and other laws have placed restrictions on it. During Emergency Rule, this right would most likely be affected, especially in a situation like the one in the affected states, Adamawa, Borno and Yobe. If this right is not curtailed, Boko Haram leaders would continue to hold their terrorist opinions and impart terrorist ideas and information to innocent or gullible Northerners and others. Such exercise of unrestricted right would worsen the situation for which the Emergency Rule was put in place. It is in order to forestall such a worse scenario that the same Section 38 in its subsection (3) provides for inbuilt limitations to the right to freedom of expression, coupled with the general restriction in Section 45(1) of the Constitution. The said subsection recognises the validity of any reasonably justifiable law which places restrictions on this right. It is in pursuance of similar sections in previous Constitutions of Nigeria that such sections as Section 42 of the Criminal Code Act which criminalises advising the promotion of inter -communal wars in Nigeria find their validity[66]. The civil law on defamation is also a limitation to this right. It has been argued elsewhere, and rightly in our view, that to permit an unfettered freedom of expression would

65. Though it is obvious that the war has some political undertone, the open demand of the sect has always been the islamisation of Nigeria, contrary to Section 10 of the Constitution which forbids the adoption of a particular religion as state religion.

66. Ejembi, P.A., "Freedom of Expression in a democratic society: The latitudes and limits under Nigerian Law", *ABU Journal of Public and International Law*, Vol.1, No3.(2009), 108 at 114

amount to an invitation to anarchy which may be injurious to public moral, with attendant incitement to violence.[67]

RIGHT TO PEACEFUL ASSEMBLY AND ASSOCIATION

This right finds expression in Section 40 of the Constitution which states that every person shall be entitled to assemble freely and associate with other persons , including right to form or join any political party, trade union or other association for the protection of his interest. Obviously, this would be one of the rights that would most likely be derogated from under Section 45 (1) of the Constitution, during a State of Emergency. Because of the delicate or volatile nature of security situation in the Boko Haram prone states, the Military men who are carrying out the Emergency Rule in Adamawa, Borno and Yobe States would definitely view any assembly or association of residents of these states with some elements of suspicion. It is our submission that dispersing such assembly, though generally unconstitutional, is constitutionally excusable under Section 45(1) in the interest of public defence, public safety or public order. Residents' right to peacefully assemble should be subject to the overall interest of the public and it would not be in the best public interest to allow uncontrolled gathering during Emergency Rule.

RIGHT TO FREEDOM OF MOVEMENT

Arguably, this is one of the most radically displaced rights during a State of Emergency. This right is provided for under Section 41 of the Constitution which guarantees citizens' entitlement to move freely throughout Nigeria and to reside in any part of Nigeria without fear of being denied a right of ingress or egress[68]. This right includes the right to hold a Nigerian passport with which the right

67. Amusa, K.O., "Derogations from Fundamental Human Rights enshrined in the Nigerian Constitution", Vol. 7, (2009), *UDUS Law Journal*, p.53 at 88
68. See *Shugaba v. Minister of Internal Affairs* (1981)1 NCLR p.25

of egress can only be possible.[69] Quite apart from the inbuilt derogations in the same Section 41 as regards restriction on the residence or movement of criminals or criminal suspects or their evacuation from Nigeria, the right to freedom of movement may also be derogated from under Section 45 of the Constitution, during a period of Emergency Rule. Only a few weeks ago, the Military imposed a dawn - to - dusk curfew on Borno and Yobe States as part of their operational strategy under the Emergency Rule in those states[70]. We submit that such curfew, though an infringement on the right to freedom of movement, is necessary for the preservation or maintenance of law and order in those states, considering the havoc the Boko Haram sect has so far wrecked on the nation. We contend that the curtailment of freedom of movement in those states is reasonably justifiable in a democratic society as same is both in the interest of the public and the residents respectively. It therefore calls for sacrifice and endurance on the part of the residents, because, in the words of Lord Finlay L.C., "One of the most obvious means of taking precaution against dangers... is to impose some restriction on the freedom of movement of persons."[71]

We however hold the view that it is the duty of Government, at least, a moral duty, to provide food, water and other means of survival to the residents during the pendency of the curfew since they may not be able to go out to carry on their daily business, let alone buy foodstuff.

CONCLUSION

In concluding this work, we contend that the derogation from constitutional rights, as done by the Constitution itself is largely commendable as same would help create a balanced society where

69. See *Director, State Security Service v. Agbakoba* (1999) 3 NWLR (pt. 595) 314
70. As was reported in various Nigerian Television and Radio Stations
71. See *Rex v. Halliday* (1917) A.C. 260 at 269

rights are, in the words of Ghai, "not inherent but earned through good conduct."[72] However, we have one or two observations to make here, One, we call for an amendment to the Constitution wherein an enforceable duty to respect the rights of others and the state would be created and imposed on the citizens. Hence the extant Section 24 of the Constitution may have to be amended by listing same under the justiciable rights and duties recognized under the Constitution. In this wise, the citizens would be conscious not to infringe on other persons' rights. After all, "human rights without the effective enforcement of its [sic, their] corresponding duties, is [sic, are] useless."[73] Two, Section 45 of the Constitution should be amended to set out grounds for determining what is reasonably justifiable in a democratic society vis – a vis laws curtailing human rights. Recourse may have to be had to the provisions of Section 36 (1) of the South African Constitution which embodies the country's derogation from human rights. The section outlines the factors that should be taken into account in deciding whether a law that limits citizens' right is reasonable and justifiable in an open and democratic society. These factors include the nature of the right to be limited or derogated from, the importance of the purpose of the derogation, the nature and extent of the derogation or limitation, the relation between the limitation and its purpose and the less restrictive or limiting means of achieving that purpose. We recommend these and more specific factors for subsequent Constitution amendment instead of leaving what is meant by a reasonably justifiable law at large or for the Courts to decide.[74]

Three, we recommend mass enlightenment campaign on civil rights and civic obligations/duties. In the spirit of "catch them young", civic rights and civic obligations should be introduced into

72. Ghai, *Loc. Cit.*
73. Idigbe, *Loc. Cit.*
74. See *DPP v. Chike Obi* (1961) All NLR 186 where the issue was whether Section 51 of the Criminal Code Act which creates the offence of sedition was reasonably justifiable in a democratic society.

the curriculum of secondary schools across the country. Lastly, the Military should improve or restructure the special training given to the members of the troops that are deployed to states where a State of Emergency has been declared, so as to sensitise them on the need to respect human rights and their right to restrict such rights in reasonably justifiable situations.

General Index

The use of *"et seq."* indicates that the issue concerned continues on subsequent pages. The use of *"passim"* after a page number indicates that the subject is referred to in scattered pages in the script.

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