

## Human Rights under the Nigerian Constitution: Issues and Problems

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### Abstract

*Human rights have enjoyed tremendous attention and expansion at the global level. To concretize and energise human rights protection at national level, virtually all national constitutions embody human rights either in their preamble or substantive provisions. In Nigeria, human rights are embodied in two separate chapters, encapsulating both the civil and political rights and the economic, social and cultural rights. This paper undertakes a critical content analysis of the provisions of human rights in the 1999 Nigerian Constitution. It raises pertinent issues and problems in some provisions which negate and undermine human rights goal and jurisprudence. It argues against the retention of the identified provisions and set a roadmap for reforms.*

### 1. Introduction

Today, human rights issues have not only become a global concern but remarkable interest aimed at protecting and promoting universal respect for, and observance of, human rights has continually been shown at the international, regional and national levels.<sup>1</sup> Indeed “the issue of human rights, in the recent past, has penetrated the international dialogue, become an active ingredient in interstate relations and has burst the sacred bounds of national sovereignty.”<sup>2</sup>

The formation of the United Nations Organisation<sup>3</sup> and the promulgation and adoption of the Universal Declaration of Human Rights<sup>4</sup> provided a firm foundation for the historical developments and globalisation of human rights. The Universal Declaration of Human Rights, 1948 represents a bold attempt by the UN to elaborate on and give concrete and authoritative expression to the imprecise and ambivalent definition of human rights contained in the UN Charter.<sup>5</sup> The UDHR has served as a template for subsequent human rights instruments and has had a positive impact on the legal, political, and cultural evolutions of nations and remains the mirror by which “every individual and every organ of society” reflects on human rights.<sup>6</sup> Since the adoption and promulgation of the UDHR 1948, the United Nations has not wavered in its commitment to the promotion and protection of human rights.

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<sup>1</sup> Justice Haleem has also argued that, “the quest for human rights and human dignity is a phenomenon of contemporary life of universal dimensions and immense significance “see, Justice Haleem, “The Domestic Application of International Human Rights Norms”, in *Developing Human Rights Jurisprudence, The Domestic Application of International Human Rights Norms* London: Commonwealth Secretariat, 1988 at 93.

<sup>2</sup> T.W. Wilson Jnr; “A Bedrock Consensus Of Human Rights Dignity”, in *The Internationalisation Of Human Rights* ed Alice H. Henkin, Newyork; Aspen Institute For Humanistic Studies, 1979 at 47. Omo, J.S.C, [as he then was] extra-judicially declared that “human rights is now a very important subject both nationally and internationally. It is also a fact that no governance in the world is now acceptable without an observance of human rights. Even a powerful nation such as China has had its membership of the World Trade Organisation [WTO] delayed for several years because of violation of human rights in its domain” Uche Omo J.S.C “The Role of The National Human Rights Commission in the Promotion of Human Rights in Nigeria” in *Current Themes in the Domestication of Human Rights Norms*, ed C.C. Nweze E.O.Nwankwo, Enugu, Fourth Dimension publishing co, Ltd, 2003 at 2. See also H. J. Steiner & P. Alston, *International Human Rights in Context, Law, Politics, Morals*; Oxford, Clarendon press, 1996 at v.

<sup>3</sup> UNO Charter, 1945.

<sup>4</sup> Adopted and proclaimed by General Assembly resolution 217 A (111) of 10 December, 1948

<sup>5</sup> R. Schifer, Forty Years of the Universal Declaration of Human Rights, Bulletin of Human Rights, UN., New York, 1988 at 92.

<sup>6</sup> See generally, Reflections on Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology (Barend Heijden & Bahia Tahzib-Lie eds, 1998.

This explains the subsequent numerous resolutions, declarations<sup>7</sup> and conventions<sup>8</sup> which have been passed in the area of human rights. So important is the issue of human rights that virtually all constitutions, the world over, make provisions for human rights either in the preamble or in the substantive provisions.<sup>9</sup> In Africa for instance, except for Tanzania, where reference to human right<sup>10</sup> is to be found in the preamble to the constitution, and Malawi<sup>11</sup> where human rights provisions embodied in substantive provisions of the independence constitution were replaced by generalised references to human rights in the “Fundamental Principles of Government” section on the adoption of the Republican Constitution of 1966, most African constitutions include in their substantive sections provisions for human rights.<sup>12</sup>

In Nigerian Constitutions, beginning from the post-independence constitution, due attention has always been given to the issue of human rights. In the 1960 independence Constitution,<sup>13</sup> 1963 Republican Constitution<sup>14</sup> and 1979 Constitution,<sup>15</sup> provisions were made for human rights protection. Further, in the 1999 Constitution (as amended) two Chapters,<sup>16</sup> spanning 26 (twenty six) sections are devoted to human rights subject.<sup>17</sup> The need for constitutional provisions for human rights cannot be over-emphasised because, it is the state, with its various institutions which is primarily responsible for guaranteeing the implementation and enforcement of these rights in respect of its citizens and all those coming under its jurisdiction.<sup>18</sup>

Often, the primary institutions, the legislature, the executive and the judiciary are set up in the constitution.<sup>19</sup> Indeed, it has been observed that: “any protection system presupposed recognition of human rights in the basic texts which reflect the constitution of each state. When incorporated in the highest –ranking national legal instrument, human rights and the principles governing them enjoy the greatest authority and security in both their definition and their guaranteed observance”.<sup>20</sup>

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<sup>7</sup> Some of the Declaration are, Declaration on the Elimination of All forms of Intolerance and Discrimination Based on Religion or Belief, adopted 25 Nov. 1981. G.A. Res 36/55, 36 UN GAOR, Supp (No. 5+) UNDOC. A/36/51 at 171 1981; Declaration on the Elimination of violence Against Women adopted 20<sup>th</sup> Dec, 1993 GA Res 48/104, UNDOC. A/48/29; Declaration on the Right of Child, adopted 20 Nov. 1959, GA Res 1386 (XIV), 14 UN GAOR, Supp. (No. 16) UN Doc. A/4334 at 19(1959) Declaration on the Right to Development, adopted 4 Dec, 1986, GA Res 41/28.

<sup>8</sup> Notable Conventions which have been passed by the United Nations include, The International Convention on the Prevention of the Crime of Genocide; the International Convention on the Elimination of All Forms of Racial Discrimination., The International Convention Relating to the Status of Refugees, the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment; The Convention on the Right of the Child; the Convention Concerning the Abolition of Forced Labour. The Convention on the Political Rights of Women; The Convention on The Nationality Rights of Women; Convention on the prevention and punishment of the Crime of Genocide, etc.

<sup>9</sup> For example, the French Constitution of 1958 refers in its preamble to the 1789 Declaration of the Right of man and of the citizen. Most newly independent countries refer directly to, or even incorporate, basic international texts’ such as the Universal Declaration of Human Rights, 1948. This is true of the Nigerian Constitution and Indian Constitution. Part 111 of Indian Constitution incorporated virtually all the rights contained in UDHR. See, Jean –Bernard Marie, ‘National Systems for the Protection of Human Rights’ in *Human Rights International Protection, Monitoring, Enforcement*, Januz Symonides ed. Aldershot Hants: Ashgate, UNESCO Publishing, 2003 at 258.

<sup>10</sup> See Interim Constitution of Tanzania, 1965 as amended by An Act to amend the Interim Constitution of Tanzania, Act No. 8 of 1975.

<sup>11</sup> See James S. Read, ‘Bills of Rights in The Third World’, Some Commonwealth Experiences, *Verfassung und Recht in Ubersee*, H. Kruger (ed) 1 Heft 1 Quartal, 1973 at 21.

<sup>12</sup> O.C. Eze; *Human Rights in Africa, Some Selected Problems*, Lagos; Nigerian Institute of International Affairs, 1984 at P. 27.

<sup>13</sup> Chapter ii, 1960 Constitution

<sup>14</sup> Chapter ii, 1963 Constitution from section 18 to 40

<sup>15</sup> Chapter iv, 1979 Constitution from section 30 to 39

<sup>16</sup> That is chapters 2 and 4, 1999 Constitution. Although the provisions of chapter 2 dealing with fundamental objective and directive principles of state policy are not justiciable, they are nonetheless not without any utilitarian value as they serve as aid to interpretation of the other sections.

<sup>17</sup> These provisions are virtually, a *verbatim et literatim* reproduction of the 1979 Constitution, The 1963 Constitution however had no provisions comparable with chapter 2 of the 1979 and 1999 Constitutions; but made provisions for human rights in sections 18 to 33.

<sup>18</sup> Jean –Bernard Marie, *op’ cit.* at 257.

<sup>19</sup> In Nigeria for instance, sections 4,5 and 6 of the 1999 Constitution make provisions for these organs of government.

<sup>20</sup> Jean-Benard Marie, *op. cit.* at 258.

The protection of human rights in any national constitution is a recognition and part fulfilment of the international obligation of the State to take joint and separate action in cooperation with the UN for the achievement of universal respect for, and observance of, human rights and fundamental freedoms.<sup>21</sup> While the need for the guarantee and protection of human rights in national constitutions cannot be doubted, it is important to do a critical content-analysis of these constitutional provisions with a view to seeing their real value against the concept of universality, interrelatedness and interdependence of human rights. The primary role of this paper therefore is to examine to what extent the provisions of the constitution on human rights energize, invigorate, and galvanise human rights goals in Nigeria? Essentially, it is proposed to examine salient issues and problems in the extant Nigerian constitution which, arguably, deconstruct or undermine traditional human rights jurisprudence and goal. In the first part of this paper, it is proposed to skeletally examine Nigerian's Constitutional development as it relates to human rights. The second part will be devoted to the examination of the provisions of the constitution guaranteeing human rights. Part three will deal with the issues and problems in human rights provisions of the Constitution. It is to be noted that reference to the Nigerian Constitution unless otherwise specifically stated is reference to the 1999 Constitution as amended since that is the current Nigeria Constitution.

## Part 1

### Brief Constitutional History

Before Nigeria attained nationhood in 1960 and was consequently admitted as the 100<sup>th</sup> member of the United Nations, it passed through a series of constitutional developments. Professor Ajomo<sup>22</sup> captured Nigeria's constitutional development as follows:

“Since the emergence of the geographical entity known as Nigeria, it has had several constitutions introduced into its legal archives. Some of these were foisted on her by the colonial government while others were fashioned out with the participation of diverse interests in Nigeria...

The Constitutions operated in Nigeria prior to independence were designed to achieve specific political objectives of the colonialists without any formal or conscious attempt by the colonial government to safeguard human rights in its entirety. This could not have been otherwise as colonialism was antithetical to human rights protection. Although pre-independence Constitutions did not specifically guarantee human rights promotion and protection, it is significant to note that successive pre-independence constitutional conferences dating back to 1953 recognised and advocated the need for the inclusion of certain fundamental rights in the future constitution. Yet, the eventual adoption of a bill of right by Nigeria in its Independence Constitution in 1960 was informed by and predicated on the need to allay the fear of domination of the over 100 ethnic nationalities by the three major tribes.<sup>23</sup> Ajomo succinctly made the foregoing point as follow:

[T]he heterogeneous nature of the country was the factor that led to the inclusion of the tenets of human rights in our constitutions. This resulted from the fears of minorities for their development in a country that was gradually marching to self determination.<sup>24</sup>

The inclusion of a bill of right in the Independence Constitution, 1960 was not only important but remarkable because it was a departure from the position adopted by Britain, Nigeria's colonial master which at the time as now did not have a bill of rights as such.

According to Professor Nwabueze,<sup>25</sup> the absence of a Bill of right in Britain serves to ensure that “liberty is not legally protected against British Parliament” Rather, the individual is protected from the infractions of his liberty by the executive.

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<sup>21</sup> The Charter of the United Nations, Articles 55 and 56.

<sup>22</sup> M.A. Ajomo, “Human Rights under the Nigerian Constitutions” in *Democracy and the Law*, Y. Osinbajo & A. Kalu, eds; Eagos: Federal Ministry of Justice Law Review Series, 1991 at 106-107.

<sup>23</sup> Ajomo, op. cit. at 109

<sup>24</sup> Ibid. In 1958, a Royal Commission headed by Sir Henry Willink was appointed to investigate the problems of the minorities. The Committee observed that one solution to the fears of minority groups would be the provision of a scheme of fundamental human rights in the Constitution, fashioned after the European Convention for the Protection of Human Rights: For a fuller account, See, T.O. Elias *Nigeria; The Development of its Laws and Constitutions*, Stevens, 1967 at 142.

<sup>25</sup> B.O. Nwabueze, *Constitutional History of Nigeria*, London: Longman, 1962 at 120.

It is significant to note that, since the introduction of a bill of right in the Independence Constitution in 1960, subsequent Constitutions, starting with the Republican Constitution, 1963 to the 1979 Constitution, have not failed to incorporate these rights in their provisions.<sup>26</sup> Thus, it has been observed that:

in spite of the traumatic experiences of the political crises, including the period of civil war of 1967 to 1970, the rights have remained the same” i.e they have not been extinguished by any regime be it military or civilian. That does not mean that they have not been assaulted and threatened; the truth is that they have remained in our statute books ever since even if for cosmetic purposes.

From the foregoing historical sketch, it becomes clear that human rights have always commanded a pride of place in the Nigerian constitutions. Nevertheless, it is imperative to examine the content of human rights in the extant constitution.

## **Part II**

### **Constitutional Provisions on Human Rights.**

It can be rightly asserted that one of the greatest objectives of the post independence Nigerian Constitutions is the protection and promotion of human rights. The preamble to the 1999 Constitution unmistakably set the tone<sup>27</sup> by dedicating itself to promote “good government and welfare of all persons on the principles of freedom, equality and Justice”. Apart from the preamble, chapters two and four of the Constitution extensively deal with human rights issues. While chapter two is captioned, Fundamental Objectives and Directive Principles of State Policy, chapter four is entitled, “fundamental rights”. Under the Fundamental Objective and Direct Principles of State Policy, the second generation rights, consisting of economic, social and cultural rights are extensively set out in sections 13 to 21. These rights are predicated on the necessity for the material well-being of the citizenry with the state playing a pivotal role. These rights which are essentially equalitarian and egalitarian in character are rooted on the belief that the attainment of certain level of social and economic standard is a necessary condition for the enjoyment of the civil and political rights. Accordingly, these rights require affirmative governmental action for their enjoyment.<sup>28</sup> It is not considered imperative to discuss or set out the full text of the rights guaranteed under the Chapter. Accordingly, the rights will merely be spotlighted. First however, it is significant to note that the obligation of the state towards the effectuation and realization of the rights is fully captured by section 13 which provides that:

It shall be the duty and responsibility of all organs of government, and of all authorities and persons exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of, (the fundamental objectives and Directive Principles of State Policy).

In *Attorney-General of Ondo State vs. Attorney-General of the Federation & 35 ors.*,<sup>29</sup> the Supreme Court held that the foregoing section does not only impose a solemn duty to observe the mandate contained in Chapter two on all organs of government and all authorities and persons exercising legislative, executive or judicial powers, but also on private individuals as well. The court rejected the argument that the section applies only to government officials and held that the argument “does not take account of the undeniable fact that those organs do not operate entirely within their official cocoons. They do not, in performance of their duties act in isolation of the public”.<sup>30</sup>

The first fundamental objective enacted in chapter 2 is the political objective which is that Nigeria shall be a state based on the principles of democracy and social justice.<sup>31</sup> An important section to the present exercise is section 16, which entrenches the economic objectives of the nation.

<sup>26</sup> M.A. Ajomo, ‘Fundamental Human Rights under the Nigerian Constitution’, in *Perspectives on Human Rights*, A.U. Kalu & Y. Osinbajo eds; Lagos : Federal Ministry of Justice Law Review Series vol. 12. 1992 at 79.

<sup>27</sup> Comparable declarations existed in both the 1963 and 1978 Constitutions.

<sup>28</sup> For further reading, see, K.Kartasshkin, “Economic, Social and Cultural Rights” in *The International Dimensions of Human Rights*, K. Vasak (ed) UNESCO, Paris Greenwood press, Westport Connecticut, 1982 at 111-133.

<sup>29</sup> (2002)9 NWLR (pt 772)222 S.C., See especially the judgment of Uwaifo, J.S.C. at 381.

<sup>30</sup> Ibid at 381, per Uwaifo J.S.C

<sup>31</sup> Sections 14 and 15.

It guarantees, among others, the right to any person to participate and engage in any economic activities, subject to necessary restrictions, and obliges the government to protect the right of every citizen to engage in any economic activities outside the major sectors of the economy. The section further provides that the state shall direct its policy towards ensuring; among others – “that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.”

By Section 17, the state is obliged to “direct its policy towards ensuring that all citizens, without discrimination whatsoever have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment. Further, the state is obliged to ensure that the conditions of work are just and humane and that there are adequate facilities for leisure and for social, religious and cultural life and that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused. Government policy is also required to ensure that there are adequate medical and health facilities for all persons and that there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever. By section 18, Government is obliged to direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels and Government shall as and when practicable provide free, compulsory and universal primary education, free university education and free adult literacy programme. Section 21 which deals with cultural rights provides that the state shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives provided for in the constitution.

It may be noted that by section 6(6)(c) of the Constitution, the foregoing” rights are not justiciable”. Consequently, no action may lie to enforce compliance. Unlike chapter ii, chapter iv of the 1999 Constitution, guarantees a catalogue of enforceable fundamental rights. The fundamental rights guaranteed under chapter iv are essentially, the civil and political rights guaranteed in major international human rights instruments. The civil and political rights form the bedrock of the first Generation Rights. These rights are libertarian in character as they relate to the sanctity of the individual and his rights within the socio-political milieu in which he is located. The rights seek to protect and safeguard the individuals, whether alone or as a group, against the abuse of power, especially by political authority.<sup>32</sup> Since what is involved is comparable with the rights guaranteed in the UDHR and International Covenant on Civil and Political Rights 1966, it will suffice to simply enumerate these rights without amplification as follows:

- Right to life,<sup>33</sup>
- Right to dignity of the human person,<sup>34</sup>
- Right to personal liberty<sup>35</sup>
- Right to fair hearing;<sup>36</sup>
- Right to private and family life;<sup>37</sup>
- Right to freedom of thought, conscience and religion;<sup>38</sup>
- Right to freedom of expression and the press;<sup>39</sup>
- Right to peaceful assembly and association<sup>40</sup>;
- Right to freedom of movement<sup>41</sup>;
- Right to freedom from discrimination<sup>42</sup>;
- Right to acquire and own immovable property anywhere in Nigeria<sup>43</sup> and

<sup>32</sup> See, K. Vasak, “A 30-Year Struggle: the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights” *UNESCO Courier*, November, 1977, Paris, at 29.

<sup>33</sup> Section 33

<sup>34</sup> Section 34

<sup>35</sup> Section 35

<sup>36</sup> Section 36

<sup>37</sup> Section 37

<sup>38</sup> Section 38

<sup>39</sup> Section 39

<sup>40</sup> Section 40

<sup>41</sup> Section 41

<sup>42</sup> Section 42

Right to receive prompt compensation for compulsory acquisition of property.<sup>44</sup>

Finally, to give concrete expression to the rights, section 46 empowers any person who alleges that any of the rights has been, is being or is likely to be contravened in relation to him to seek redress in any High Court and the court has the jurisdiction to make an appropriate order and issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the rights. Indeed, the earlier constitutions also made provisions for the judicial enforcement of these rights.<sup>45</sup>

It is important to note that many of these rights are not cast in absolute terms. Permissible derogations are recognised in three situations provided for in section 45 are follows:

1. Where the interest of defence, public safety, public order, public morality or public health so demands;
2. For the purpose of protecting the rights and freedom of other persons;
3. Where an Act of the Legislature curtails the right during a “period of emergency”.

## **Part 111**

### **Issues and Problems**

Without doubt, there are a number of pitfalls in the content and application of human rights and the provisions for their enforcement<sup>46</sup> under the 1999 Constitution. The pitfalls not only serve as impediment to the promotion and protection of human rights but undermine and derogate from the global conception of human rights. It is now proposed to examine these pitfalls under different headings.

#### **1. Doctrinal relationship between international human rights instruments and the Domestic Law.**

The first issue is the doctrinal relationship-between the international human rights instruments and the domestic (municipal) law; which includes the constitution. On this issue, two principal schools of thoughts have emerged, viz Monism and Dualism. While the former asserts that international law and municipal law form part of a universal legal order, the latter holds that international law and municipal law are two distinct legal orders.<sup>47</sup> In Nigeria, the theory of dualism holds sway. The gravamen of the law forming the foundation upon which the status of treaties (including human rights treaties) can be assessed within the Nigerian legal order is section 12 of the Constitution which provides that:

No treaty between the federation and any other country shall have force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

This provision clearly adopts the Blackstonian doctrine of transformation. The theory essentially states that international conventions or treaties are not directly enforceable in national legal systems unless provisions of such treaties or conventions have been re-enacted, by municipal legislative authority, into domestic law. Simply, the implication of the above provision is that the efficacy of a treaty is dependent and predicated on its “domestication”.

The Supreme Court had a rare occasion to give judicial interpretation to the foregoing provision in the celebrated case of *General Sani Abacha vs Gani Fawahinmi*.<sup>48</sup> In its construction and articulation of the implication of the provisions of section 12, the Supreme Court held *inter alia* that:

An international treaty to which Nigeria is a signatory does not *ipso facto* become a law enforceable as such in Nigeria. Such a treaty would have the force of law and therefore justiceable only if the same has been enacted into law by the National Assembly...

On the issue of primacy between international law and domestic law, the court made a distinction between the status of the constitution on the one hand and other domestic legislation on the other hand with international instruments.

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<sup>43</sup> Section 43

<sup>44</sup> Section 44

<sup>45</sup> Section 42, 1979 Constitution.

<sup>46</sup> Guobadia, op’ cit. 70

<sup>47</sup> See, M.O.U. Gasiokwu, *ECOWAS: Problems of Citizenship and Free Movement*, Mono-Expressions Ltd, 1988 at 239. D.J. Haris, *Cases and Materials on International Law* 5<sup>th</sup> ed: London: Sweet & Maxwell, 1998 at 67.

<sup>48</sup> (2000)FWLR (pt 4) 533 at 585-586.

It held that while the Constitution has primacy over treaties, treaties enjoy equality and parity of status with domestic legislation. However, specifically referring to the African Charter on Human and People's Rights (Ratification and Enforcement) Act,<sup>49</sup> the court declared that:

It is a statute with international flavour. Being so... if there is a conflict between it and another statute its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation... The Charter possesses "a greater vigour and strength" than any other domestic statute but that is not to say that the charter is superior to the constitution.<sup>50</sup>

The court then unequivocally condemned the attempt by the Court of Appeal to elevate the African Charter, as domesticated, to a higher pedestal vis – a – vis other laws in the Nigerian legal system, describing the attempt as "totally absurd, untenable and unwarranted"<sup>51</sup> By the provision of section 12 as interpreted in the foregoing case, the Constitution can limit, restrict, circumscribed and abridge international human rights treaties to which Nigeria is a party. This being the case, the 1999 Nigerian Constitution like its predecessor constitutes a formidable clog to the international jurisprudence and goals of human rights. The provision has the potency to encourage and validate the breach by the Nigerian Government of its international obligation contained in the international human rights instruments to which it is a party.

It may be noted that members of the international community adopt different approaches on the issue of relationship between treaties and national laws, including the constitution. The different approaches are:

- i. To make human rights instruments part of the Member State's Constitution
- ii. To make human rights instruments superior to statutory law.
- iii. To make human rights instruments have equality and parity with statutory law<sup>52</sup> and
- iv. To make human rights instruments lacking internal legal validity unless domesticated.<sup>53</sup>

It is the view of the present author that since human rights are no longer a matter within the exclusive domestic jurisdiction of States, national constitutions ought to be subject to and be circumscribed by international human rights instruments. This way, the rights expressed in the international instruments will be better protected.

## 2. Dichotomy Between Human Rights

The Nigerian Constitution makes unmistakable distinction between civil and political rights<sup>54</sup> on the one hand and economic, social and cultural Rights<sup>55</sup> on the other hand. Undoubtedly, this approach is not strange or inconsistent with what obtains at the international level. For instance, the UDHR, recognises the two sets of human rights<sup>56</sup>. In the hierarchy of human rights, civil and political right have taken primacy being usually referred to as the "first generation rights" and the economic, social and cultural rights constitute the second generation rights.

However, in transforming the Declaration's provisions into legally binding obligations, the United Nations adopted two separate International Covenants,<sup>57</sup> which, taken together, constitute the bedrock of the international normative regime in relation to human rights.<sup>58</sup> The problem with the dichotomy created in the Nigerian Constitution between the rights, is that while the provisions of chapter iv containing the civil and political rights are justiciable, the provisions of chapter 11 dealing with social, economic and cultural rights are declared non-justiciable by the Constitution.<sup>59</sup>

<sup>49</sup> Cap 10 LFN, 1990 (now Cap A9 LFN 2004).

<sup>50</sup> The Court referred to the United States, case of *Chae Chin Ping vs United States*, 130 US 181 where it was held that "Treaties are of no higher dignity than acts of congress, and may be modified or repealed by congress..."

<sup>51</sup> Per Okey Achike, JSC (as he then was) at 614.

<sup>52</sup> Article 55 of the French Constitution.

<sup>53</sup> Britain and Northern Ireland are other examples of Countries which adopt this model.

<sup>54</sup> Chapter ii

<sup>55</sup> Chapter iv

<sup>56</sup> For instance Articles 3-21 provides for civil and political rights while Articles 22-28 guarantee Economic, Social and Cultural Rights.

<sup>57</sup> International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

<sup>58</sup> H.J. Steiner and P. Alston, *International Human Rights in Context Law, Politics, Morals Text and Materials*, Oxford: Clarendon Press, 1996 at 256.

<sup>59</sup> Section 6(6).

It is important to recall that Nigeria is not only a signatory to the African Charter on Human and Peoples Rights but greatly energized the process leading to its birth.<sup>60</sup> In addition, Nigeria has also domesticated the Charter by enacting the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, 2004.<sup>61</sup> This Charter makes no distinction between the Civil and Political rights on the one hand and Economic, social and cultural rights on the other hand. Earlier the primacy of the Constitution over international human rights treaties, whether domesticated or not, has been established. Consequently, in the event of deliberate and systematic violations of the economic, social and cultural rights, the citizens are powerless to seek legal redress, since the Constitution declares the rights non-justiciable.

The further implication of this dichotomy is that Nigeria is indirectly constitutionally empowered to evade the international obligations voluntarily undertaken by it upon its ratification of the various international human rights instruments, especially, the social economic or cultural right. It is this dichotomy which has made the economic, social and cultural rights, a neglected category of human rights in Nigeria. Nigeria is a country blessed with abundant human and natural resources and is not plagued by the numerous natural disasters like flood, tornado, wild-fire and earthquake which have devastated many nations of the world and rendered them prostrate. Regrettably, Nigeria has remained peripheral in the community of nations, with many of its citizens living in intolerable abject poverty and deprivation. The realisation of the economic, social and cultural rights has thus remained a mirage. It is appreciated that the obligation of State Parties in the implementation of economic, social and cultural rights is to take steps to the maximum of their available resources with a view to achieving progressively, the full realization of the rights. However, if human rights are declared to be inter-dependence and interrelated, this dichotomy must be dismantled and demolished. This has become particularly important and urgent because the civil and political rights cannot be meaningfully enjoyed in a state of economic and social deprivation.

As Justice Bhagwatti<sup>62</sup> incisively noted:

Both categories of human rights are equally important. There is a close inter-linkage between the two categories of human rights because all human rights and fundamental freedoms are indivisible and interdependent and each category of human rights is indispensable for the enjoyment of the other. Hence, it is axiomatic that the promotion of respect for and enjoyment of one category of human rights cannot justify the denial of the other category of human rights.

Odinkalu<sup>63</sup> will add that, “realising human rights in Africa is an economic and political project of eliminating poverty, disease and their adverse consequences and liberating the citizens and inhabitants of the continent to realise their fullest potentials. It is significant to echo a learned author that: The general Assembly decided upon the adoption of two distinct Covenants – one dealing with economic, social and cultural rights, the other with civil and political rights – it did so essentially because of the different nature of the implementing measures which would generally be involved, and not so as to imply any divisibility or hierarchy among the rights concerned. Indeed, both Covenants, in their preamble begin by recognizing that human rights can be achieved only in conditions where the enjoyment both of economic, social and cultural rights and of civil and political rights is ensured.

Arguably, it is for the foregoing reason that economic, social and cultural rights now occupy an increasingly important place in the legal systems and political aspirations of different countries of the world. They also enjoy prominent attention in the activities of the United Nations and other international organisations. Human rights have been repeatedly declared to be “universal, indivisible, and interdependent and interrelated.”<sup>64</sup> This universalistic and indivisibility character can be destroyed by a scheme of “categories” or “priorities” which a learned author refers to as “invidious dichotomies within human rights discourse”...<sup>65</sup>

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<sup>60</sup> Cap A

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<sup>62</sup> Bhawatti, op’ cit. xxii.

<sup>63</sup> Odinkalu, op’ cit at 2.

<sup>64</sup> Vienna Declaration and Programme of Action UNGAROR World Conference on Human Rights 48<sup>th</sup> Session 22<sup>nd</sup> Plenary Meeting Pt. J art. 5 UN DOC.A/Conf. 157/24 (1993) Reprinted (1993)321 LM 1661.

<sup>65</sup> C.A. Odinkalu, Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa” (2003) JAL1 – 37 at 1.



Before its enactment into law by the National Assembly, an international treaty had no such force as to make its provisions justifiable in our courts.<sup>66</sup>

By this unambiguous interpretation, no international human rights treaty ratified by Nigeria, becomes effective, or enforceable in Nigerian until it is domesticated. Consequently, unless so domesticated, no one can rely on or seek to enforce the provisions of any international human rights treaties to which Nigeria is a party unless such treaties have been part into law and become part of the corpus of Nigerian Laws.

### 3. Discriminatory human rights guarantee.

Another perplexing issue in the Nigerian Constitutional guarantee of human rights relates to the discriminatory provisions in it. Some of the rights are guaranteed to Nigerian citizens only. For instance, the right to private and family life under section 37 is evidently granted to Nigerian citizens only. Similarly, by sections 41 and 43 of the Constitution, the right to freedom of movement and the right to acquire and own immovable property anywhere in Nigeria are respectively guaranteed to Nigerians only. Section 43 did not attempt to hide its discriminatory intent when it unequivocally provides that:

[S]ubject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.<sup>67</sup>

There is no separate section or clause where comparable right is granted to non-Nigerians living in Nigeria. The question is, can these discriminatory provisions be justified against the garb of universality in which human rights are clothed?

Major international human rights instruments contain and convey the universal character of human rights. For instance Articles 2 of the UDHR, 1948, which Nigeria has subscribed to provides that:

Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The right to freedom of movement which is guaranteed only to Nigerians in section 41 of the Constitution is guaranteed without qualification on ground of nationality to everyone by Article 12 of the International Covenant on Civil and Political Rights as follows:

“Everyone lawfully within the territory of a state shall, within that territory have the right to liberty of movement and freedom to choose his residence.”<sup>68</sup>

From the foregoing, it is submitted that the constitutional provisions which limits the enjoyment of certain rights to Nigerians are unreasonable and unjustifiable. It is the view of the present author that there is nothing about the rights under consideration to justify or warrant limiting their enjoyment to Nigerian citizens only.

### 4. Issue of *Locus Standi*

It is a notorious fact that human rights violations still occur across the globe with disturbing frequency, regularity and gravity. In Nigeria, the picture is not less disturbing which was why a learned author was constrained to lament that “at one time or the other in our national history, we had observed the tenets of human rights more on paper than in practice”.<sup>69</sup> To redress human rights infractions, the constitution empowers “any person who alleges any infraction “in relation to him” to apply to the High Court for redress. The implication of the foregoing is that *locus standi* is a *sine qua non* to the institution and sustainable prosecution of human rights violations. While it is conceded that the requirement of *locus standi* will prevent meddlesome interlopers who have only “remote, hypothetical or no interest”<sup>70</sup> to sue, it nonetheless represents a formidable impediment to the goal of human rights, which is to protect and promote universal respect for human rights.

<sup>66</sup> In coming to the above conclusion, the court found reliance on the Privy Council case of Higgs & Anor vs Minister of National Security & Ors, The times, December, 23, 1999, which is quoted with approval.

<sup>67</sup> Similarly, the right freedom from discrimination on the ground of ethnicity, place of origin, sex, religion or political opinion is granted only to Nigerian citizens by section 42 of the Constitution.

<sup>68</sup> Comparable provisions are made in respect of other rights which are abridged for non nationals in the Nigerian Constitution, See Article 17.

<sup>69</sup> Ajomo, op’cit. at 105.

<sup>70</sup> *Attorney General of Kaduna State v Hassan supra* at 524-525.

It is a notorious fact that many people have suffered or continued to suffer human rights infractions. Regrettably, they are unable to seek redress either because they are indigent or ignorant. Although the Constitution makes provision requiring the National Assembly to make law for rendering of financial assistance to any indigent citizen where his right has been infringed to enable him engage the services of a lawyer to prosecute his claim, this provision has remained dead letters. The National, Assembly has not made any meaningful provision in this regard as the Legal Aid Programme in existence is not only weak but ineffective. Consequently, public interest litigations ought to be encouraged especially because a major deficiency in the development of human rights is one of enforcement.<sup>71</sup>

## 5. Derogation Clauses

Permissible derogations contained in the constitution are too wide and in some cases, nebulous and antithetical to the cause of human rights. For instance section 33 of the 1999 Constitution guarantees right to life in a widely qualified manner when it sets out in sub-section (2) four grounds upon which a person may lawfully be deprived of his life. Of particular concern is the provision which excuses and justifies deprivation of life in defence of property, in order to effect lawful arrest, or to prevent the escape of a person from lawful custody. By this provision therefore, a person who is accused of any offence no matter the nature may be extra-judicially, yet lawfully killed in an attempt either to arrest him or prevent his escape from lawful custody. Similarly, a person may be justifiably killed in defence of property. The Constitution fails to define the quantum of property which will justify such killing. In any case, ascribing or placing the value of property over and above that of human life is preposterous. It is nothing but needless retention of the old common law dogma in twenty century legislation. A learned author<sup>72</sup> has reasoned that “the exceptions erected by the Constitution to the right to life amounts to utter derogation therefrom.<sup>73</sup> Continuing, the learned author rightly queried that:

Why should the police kill in defence of property? What kind of property is worth human life? For us, this is unduly protective of the capitalist ethos and is totally alien to African tradition. It could also provide a blank cheque for wanton killing by police who, on the grounds of protecting private or public property may kill.

This insightful observation cannot be objectively discounted.

Similarly, the provisions of section 37 dealing with right to private and family life; section 38 which guarantees right to freedom of thought, conscience and religion; Section 39 which provides for right to freedom of expression are not granted in absolute terms. Also, the provisions of section 40 and 41, which guarantee right to peaceful assembly and association and right to freedom of movement respectively are constitutionally limited and circumscribed in the interests of defence, public safety, public order, public morality or public health” among others. What these expressions mean are not defined by the Constitution. Another danger is that the ambit of the exceptions is so wide as to constitute a veritable plank for needless curtailment of these rights.<sup>74</sup>

Accordingly, it is hereby advocated that the sections of the constitution which provide limitation clauses be severely limited to promote progressive guarantee of human rights. In acknowledgement of the danger of derogation clauses, Hon. Justice Bhagwati has unequivocally condemned them. For its aptness, we take the liberty to reproduce his advocacy as follows:

We must therefore take care to ensure that in no situation, however grave it may appear, shall we allow basic human rights to be derogated from, because once there is a derogation for an apparently justifiable cause, there is always a tendency in the wielders of power, in order to perpetuate their power, to continue derogation of human rights in the name of security of the state. Effective respect for human rights must place two kinds of restrictions on the forces of derogation.

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<sup>71</sup> C.E. Obiagwu, ‘International Human Rights Framework: A Challenge to Nigerian Courts’ in *Current Themes in the Domestication of Human Rights Norms*, C.C. Nweze & O. Nwankwo (eds), Proceedings of CIRDDICS’ Judicial Colloquium on Domestic Application of International Human Rights Norms. Enugu: Fourth Dimension publishing Co. Ltd 2003 at 59.

<sup>72</sup> Ibidapo – Obe, op. cit. at 313.

<sup>73</sup> Ibid.

<sup>74</sup> For some cases of egregious violations of some of these right under the claim of defence and public order, see *Director State Security Services & anor vs Agbakoba* (1999)3 SCNJ. 1; *Solarin vs IGP & Ors* (1983)1 FNLR 415 and *Shugaba Darman vs Minister of International Affairs & Ors* (1980) FNLR 203.

It must limit the circumstances and specify the procedures under which derogation may be legitimately invoked and it must also identify and reserve certain core human rights such as the right to life or the right to personal liberty or freedom from ex post facto criminal laws which are the most vital from a political science perspective, as absolutely non-derogable.<sup>75</sup>

### Conclusion

In this paper, we have carefully examined human rights provisions in the 1999 Constitution of Nigeria. The irresistible conclusion to draw is that human rights provisions in the Constitution are in significant respect not consistent with the contemporary conception, global goals and aspirations of human rights. It is imperative to note that the place of national constitutions in human rights protection cannot be overemphasised especially when it is appreciated that ultimately, effective protection must come from within the state. As noted by Steiner and Alston<sup>76</sup>, the international human rights system does not place delinquent states in political bankruptcy and through some form of receivership take over the administration of a country in order to assure the enjoyment of human rights. Rather the international system seeks to persuade or pressure states to fulfil their obligations through one or another method – either observing national law (constitutional or statutory) similar to the international norms, or making the international norms themselves part of the national legal and political order.

For this reason therefore, constitutional provisions on human rights are very important. It is however conceded that constitutions vary radically in their practical significance and symbolism as well as content. At one extreme, entire instruments or particular provisions may be meant to be hortatory and inspirational rather than to form part of the state's legal system. Those aspirations may represent genuine goals to be worked toward, or amount to sham and pretense, a shallow disguise of radically different and less admirable state purposes and methods. At the other extreme, constitutional provisions may be judicially enforceable against the government in actions brought by private parties, even to the extent of judicial review- that is, testing legislation against constitutional norms, and invalidating legislation found to violate them. Or it may be understood as an authoritative charter or even solemn covenant between the government and people<sup>77</sup>. In Nigeria, the constitution is the basic law of the land; the *fons et origo* of our jurisprudence. Thus, by section 1(3), the Constitution declares itself to be supreme and any law which is inconsistent with its provisions shall be null and void. It is for this reason that the provisions of the constitution on human rights are very important.

Against the foregoing background, certain reforms are hereby proposed. First, it is suggested that human rights instruments should be excluded from the ambit of the provisions of section 12 of the Constitution which requires the National Assembly to enact treaties to which Nigeria is a party into law before they become binding and enforceable in Nigeria. As earlier noted, the ambit of the permissible derogations contained in the constitution is too wide, nebulous and dangerously susceptible to manipulations by the public officials who may instigate the passage of laws or undertake actions and policies, designed to imperil human rights enjoyment under the guise of protecting national security, or public order. Consequently, as a matter of urgency, permissible derogations must be severely limited and well defined. Again, the dichotomy between the civil and political rights and the economic, social and cultural rights must be dismantled because it encourages egregious violations of the economic, social and cultural rights which have been described as a “neglected category of human rights in Nigeria”.<sup>78</sup> Finally, it is here advocated that the discriminatory provisions by which only Nigerians are entitled to the enjoyment of certain rights like freedom of movement and right to acquire immovable property guaranteed by sections 41 and 43 respectively should be removed as they are not only objectionable but constitute needless negation and deconstruction of global human rights jurisprudence. Without doubt, the institution of these constitutional reforms will enhance human rights protection in Nigeria

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<sup>75</sup> Bhagwath; op. Cit at xxi

<sup>76</sup> Steiner and Alston, op.cit.709

<sup>77</sup> Ibid.

<sup>78</sup> J. A. Dada, & M. E. Ibanga, ‘Human Rights Protection in Nigeria: From Rhetoric to Pragmatic Agenda’ African Journal of law and Criminology vol. 1 No. 2 (2011) at 70 to 81.