

Introduction to the Nigerian (1989) Constitution

- a) their inapplicability;
- b) the question of free education at all levels;
- c) the principle of federal character;
- d) the need for an explicit national ideological position.

FOOTNOTES

- 1. Report of the Constitution Drafting Committee containing the Draft Constitution, Lagos: Federal Ministry of Information, Printing Division, 1976, p. v
- 2. *ibid*
- 3. *ibid* p. (vi)
- 4. *ibid*
- 5. *ibid* p. (vii)
- 6. *ibid*
- 7. *ibid*
- 8. O. Nwobodo, *The Presidential Commission of Nigeria*, London: C. Hurst & Company in association with New York Publishers, 1982, p. 20

Babalemi A. Badejo, 'Fundamental Human Rights' in *Digboye Ogediran, Introduction to the Nigerian Constitution (1989) Constitution*, Lagos: Project Publications Ltd, 1992, pp. 53-72

Fundamental Human Rights

CHAPTER FIVE

Fundamental Human Rights

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Introduction

The modern notion of fundamental human rights is normally located within the post-World War II developments. Of specific importance in this respect is the founding of the United Nations Organisation and the Charter in its Charter certain minimum standards that human beings are to enjoy as living beings. These United Nations provisions which are in Articles 55 and 56 draw inspiration from the preamble to the Charter of the United Nations where the second leg of the objective of the organisation was stated as involving a determination: to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

The Charter was revised in Article 55 of the Charter and has since been concretized in a number of U.N. documents.¹

But then, what are fundamental human rights? Despite the efforts of the United Nations to come up with standardized rights that human beings should enjoy in society, scholars are not agreed on what is to be seen as fundamental rights.²

Nonetheless, running through the ideas would be a set of rights and freedoms that are essential for a living being in order to have a good life in society. Of course, these will include the right to life itself and some other rights that society must as a duty protect in order that living in society may make sense. As the Encyclopaedia of Public International Law puts it human rights are "those liberties, immunities and benefits which by accepted contemporary values, all human beings should be able to claim as of rights of the society in which they live."³

Ess categories these rights into five sub-headings:

civil, political, social, economic and cultural. Expanding further, he lists a number of concerns that are harboured under Civil and Political rights, on the one hand and those considered under Social, Economic

and Cultural rights on the other.¹

Most nations that came out of colonialism have always included fundamental human rights provisions in their constitutions. Nigeria has not been an exception in this respect. All post-independence Nigerian Constitutions have included provisions on fundamental human rights and the 1989 Constitution is no exception in this regard. We must hasten to note, however, that the focus for Nigerian Constitutions, has (apart from concern for the protection of the right to private property) been limited to espousals on civil and political rights. Furthermore, there is hardly any difference in the provisions on the civil and political rights contained in Sections 30-41 of the 1979 Constitution when compared with sections 32-44 of the 1989 Constitution. Nonetheless, we will now highlight some of the provisions in the new Constitution.

Right to Life

This is the most fundamental right that an individual can have. Section 32 of the 1989 Constitution guarantees every Nigerian a right to life. In this respect, "no one shall be deprived intentionally of his life, ...". This provision protects the individual against intentional killing. Aside from other exceptions that we will consider shortly, it follows that such guarantee to life does not and cannot stretch to unintentional killings like accidents. More importantly, however, the state could lawfully deprive a citizen his right to life under some exceptions contained in Section 32, sub-sections (1) and (2).

Under sub-section (1), the state in execution of the sentence of a court in respect of a criminal offence for which an accused had been found guilty can take the life of such an accused. The various capital offences like murder, treason and armed robbery could constitute the basis for a lawful denial of the right to life.

The Constitution in sub-section (2) provides instances in which the death of an individual will not be considered as a deprivation of his right to life. If the circumstances are such that a death occurs during the reasonable use of force in defence of one's person or property, then the situation will not be a denial of right to life. If the process of effecting lawful arrest or prevention of the escape of a lawfully detained person, leads to death, such death shall not be a denial of right to life. The state is also granted right to deprive someone his rights to life if the purpose of so doing is to suppress a riot, insurrection or mutiny.

A new addition to the 1989 Constitution is the provision in sub-

sections (2) (a), (b) and (c) of section 32, a judicial inquiry to determine cause of death must be held within one month of such death. And sub-section (3) adds that a judicial inquiry will include a coroner's inquest. What comes out clear from section 32 is that the right to life is not absolute. The reasonableness in the application of force leading to loss of life is an issue for the courts to resolve.²

The Constitution, like its 1979 counterpart is not concerned with the quality of life of the person once he can stay alive. The attempt to incorporate such concerns as "suitable and adequate shelter, minimum living wage, old age care and pension and unemployment benefits etc." into the equivalent provisions in 1979 got scuttled.³ There was no debate this time at the floor of the Constituent Assembly as to whether there is much to a right to life when the means of living is not guaranteed.⁴

Right to Dignity of the Human Person

Section 33 of the 1989 Constitution protects against inhuman treatments. It specifically guarantees that no person shall be subject to any form of torture or inhuman or degrading treatment. Slavery, servitude or forced or compulsory labour are also outlawed by this section. However, in the case of forced labour, there are exceptions under section 33 (2). In this respect, forced labour in pursuance to a court sentence or order of court, labour required of members of the armed and police forces, any labour required in an emergency or calamity threatening the life of the community shall be an exception to the general right in the constitution. Furthermore, any labour that forms part of normal communal or civil obligation, compulsory service in the armed forces following an Act of the National Assembly or such compulsory national service that forms part of the education and training of the citizens as may be prescribed by an Act of the National Assembly shall not be forced labour.⁵

This section protects the citizen from such "punishment that denies a person status as a human being or which degrades his personality as a human being." While what is inhuman is not defined, Nwabueze suggests from an analysis of United States decisions that the concern will be on the inherent nature of a particular punishment, its length or severity and the mode of execution of the punishment.⁶ In this regard Jore and Igweke as well as Akande⁷ agree that such practices as inflicting corporal punishment is degrading especially the *haddi* lashes which

is meant to disgrace the person being punished. And with respect to the exceptions to forced labour, the proviso clearly covers such Act of the National Assembly that puts into place the National Youth Service Corps.

Right to Personal Liberty

The right to liberty has been a cardinal aspect fundamental human rights. Either in the principles of the French Revolution or the American Declaration of Independence, one finds adequate attention being focussed on right to liberty.

It is important, however, to note that the Nigerian Constitution is not emphasizing liberty in general but personal liberty. This restricted sense, Abankue, following Dicey constructs as "the right not to be subjected to imprisonment, arrest and any other physical coercion in any manner that does not admit of legal justification."¹⁴

Section 34 (1) provides circumstances in which a person may legally lose his right to personal liberty. These exceptions include the carrying out of an order of a court when such court has found an accused guilty of the commission of a criminal offence; failure to comply with an order of a court with respect to an obligation that has been imposed upon the person losing his personal liberty; the arrest of a person with the intention to bring him before a court or prevent him from the commission of a criminal offence. The other exceptions are deprivation of personal liberty for the educational or welfare advancement of a child that is less than 18 years; the confinement of people with infectious or contagious diseases, persons of unsound mind or drugs or alcohol addicts for the purpose of treating them or protecting the community. Finally, deprivation of personal liberty in the case of preventing someone from unlawfully entering Nigeria or prior to the expulsion of someone being lawfully removed will not contravene the constitution.

Under section 34 (2), a person detained has the right to remain silent until after he might have consulted with a legal practitioner or any other person of his choice. And he must be informed in writing within 24 hours, (in a language he understands) of the reasons for his detention. When detention is for the purpose of bringing an accused before the court, a maximum of two days has been set as a reasonable time when there is no magistrate court within 40 kilometres. If there is a court of competent jurisdiction within that range of space, the person must be

brought before the court within 24 hours.¹⁵

Furthermore, if the person is not tried within two months from the date of his arrest or detention (in the case of a person in custody or not entitled to bail) or three months from the date of his arrest or detention (in the case of a person who has been released on bail), such a person shall be released unconditionally or upon such conditions that are necessary to ensure his appearance for a trial at a later date. Of course this provision is generally ignored in practice and that is why many unpardonable cases are in our various courts pending trial for years with the accused being denied bail.

It is important, however, that anyone that is unlawfully denied of his right to personal liberty shall be entitled to compensation and public apology. But as Joyce and Igweike noted on the 1979 Constitution, the constitution remains silent on who actually pays the compensation.¹⁶

Section 34 (7) makes it clear that the liberal provisions to ensure the liberty of the accused will not stretch to people arrested or detained on the suspicion of having committed a capital offence. Furthermore, the law that grants detention powers beyond three months to officers in the Armed Forces and security agencies shall be invalidated by the constitutional provisions under section 34 (4).

The provision in section 34 (8) is new. It is meant to reinforce the position that children and young persons are to be kept away from hardened criminals.¹⁷ In this regard, the sub-section emphasizes the reformatory principle behind the confinement of juveniles in reformatory homes or reformatory centres.

Right to Fair Hearing

The constitution in section 35 provides an elaborate procedure to ensure that a person that is before the court either in a civil or criminal matter obtains fair trial. These provisions are a codification of certain common law principles that are now meant to provide constitutional guarantee for an impartial and independent trial as well as ensure equality before the law.

The question of independence and impartiality of any court or tribunal is guaranteed by section 35, sub-section (1). Of importance here are the principles of *audi alteram partem* which maintains that the other side to an action must be heard before judgement is given and the principle of *nemo iudex in causa sua*. The latter principle is to the effect

that one should not be a judge in his own cause. It is meant to prevent bias by an interested party that equally sits as a judge in a particular matter.¹⁹

Sub-section (2) provides that a law shall not be invalidated just because it confers on any government or authority power to determine questions arising from that law on the grounds that it affects a person's civil and political rights once the person has opportunity to make representations to the deciding authority before a decision is reached. Also such a law cannot be invalidated once the law does not make the decision of the government agency or authority final. In effect, the right to appeal to the court cannot be circumscribed by such a law that grants any government or authority the right to determine an issue.

Section 35 sub-sections 3-11 covers procedural matters with respect to criminal trials that are geared towards the ensurance of fair hearing. Sub-section (3) maintains that a person shall be entitled to a hearing within a reasonable time when a charge is preferred against such a person. But then, what is reasonable time for an accused to have a charge hang over his head is not stipulated. It is probably left to the courts to come up with an idea of reasonable time. The present situation whereby trials drag on for years before judgement is eventually given constitute a denial of fair trial.

The constitution in section 35 sub-section (4) also reinforces a cardinal aspect of the criminal justice system in Nigeria which is to the effect that an accused is presumed innocent until he is proved guilty. This automatically shifts the burden of proving the guilt of an accused on the prosecution. However, the proviso to this sub-section is to the effect that an accused can be asked to prove particular facts. This proviso may have the effect of providing cover for a law like the Recovery of public property (Special Military Tribunal) Decree No. 3 of 1984 under which an accused could be asked to prove that a property he claims to own which is suspected to be a result of corrupt enrichment lawfully belongs to him.

By virtue of sub-section 5, an accused is entitled to prompt information on the nature of the offence he has committed in the language he understands. If necessary, an interpreter is to be procured without cost to the accused for the purpose of making sure he understands the charge against him. In addition, he is to be given adequate time and facilities to prepare his defence either by himself or a legal practitioner of his choice. A legal practitioner of his choice must be one that does not suf-

For any circumstances with respect to being able to practice in Nigeria and must be in Nigeria.²⁰ And more importantly, such choice, it must be understood may be limited by the purse of the accused. For where an accused may desire a Senior Advocate of Nigeria as his choice he cannot be constitutionally guaranteed the services of such a lawyer if he cannot pay.

Subsection 6 of section 35 of the constitution makes it mandatory for the court to keep records of proceedings whenever any person is tried for a criminal offence. And the accused or any person authorised by him shall be entitled to obtain copies of the judgement in the case within seven days. It is however, doubtful if this provision in the case within given the environment within which the Nigerian judiciary presently operates.

By virtue of sub-section 7 of section 35, the constitution provides a double protection for citizens against *ex post facto* laws. These are punitive laws that are made retrospective with either the intention of punishing people for acts that were not offences when the acts were carried out or if the acts were offences, the intention could to punish offenders beyond the punishment stipulated at the time the offence was committed. Retrospective laws have been associated with the various military governments in Nigeria. But the idea of retrospective punitive laws is repugnant to natural justice. This is more so when it is rightly stated in sub-section (11) that a person shall not be convicted of a criminal offence unless the offence is defined and the penalty is prescribed in a written law.²¹

Save when a retrial is ordered by a higher court, no person that has been tried and convicted or acquitted for an offence can be retried for the same offence once the ingredients of the charge and the evidence required are the same.²² By the same token, no person that has been pardoned for a criminal offence shall again be tried for that same offence.²³ The protection offered in Section 35 (8) against the continuous trial of an alleged offender that has once been convicted or acquitted is generally referred to as the rule against double-jeopardy. The basic idea behind the protection is well put by Mr. Justice Black when he noted:

that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and

ordered and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.²⁴

However, it is important to note that an actual trial before a competent court leading to a conviction or an acquittal (not a discharge) must have taken place before one can invoke the provisions of section 35 (9). It further offences based on the same act.

Section 35 (10) offers protection against anyone under trial for a criminal offence being compelled to give evidence. In this case, it is a rule against self-incrimination.

Nwabueze suggests that by this rule, a person cannot be compelled to give evidence against himself in his trial.²⁵ This means he can give incriminating evidence against himself in some other person's trial. However, unlike the case in the Fifth Amendment to the American Constitution, a Nigerian under this provision cannot be compelled to give any evidence at all whether incriminating, culpatory or neutral.²⁶ The American provision is limited to incriminating evidence but in this situation it is with respect to any criminal trial.

Nwabueze has also argued that a compelled evidence is not limited to oral evidence in court and to that extent, an accused cannot be compelled to produce a written evidence at his trial under compulsion. And this provision equally reinforces the general position against the admissibility of statement of the accused that is obtained by the police by coercion or compulsion.²⁷

Finally, with respect to the constitutional guarantee of fair hearings, sub-section 12 makes clear that in the large part, the trial and the pronouncement of the decision of the trial court shall be in public. This provision as Nwabueze points out is to guide against the sort of manipulation that a secret trial could be subjected to.²⁸ The court, however, can exclude other persons other than the interested parties and their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons below 18 years of age, protection of the private lives of the parties or other circumstances in which the court is of the opinion that publicity will be against the interests of justice.²⁹ Furthermore, if a Federal Minister or a State Commissioner satisfies the court that a particular evidence is sensitive and would not be

in the public interest, then the judge can make arrangements for private hearing.³⁰

Right to Private Life

Section 36 is a simple guarantee and protection offered to private individuals on the sanctity of their homes, correspondence, telephone conversations and telegraphic communications. It is interesting that the side note to the similar provision in the 1979 constitution read "Right to Private and Family life."³¹ The 1989 Constitution in the side-note has dropped family. Though side-notes do not go into the legal interpretation of a constitution, this simple act might be an attempt to suggest that the invention of the founders of the present constitution is not to preach the sanctity of family life in the face of obvious realities. But of importance to us are the guarantees against the state when it comes to the breach of the privacy of the individual with the assistance of modern technology. While such a protection is welcomed, the practical import of it may be negligible given the level of sophistication with which state security apparatuses can achieve their aims when it comes to the violation of the privacy of the individual. But then, this section is actually subject to the vague provisions in section 43 under which the state can make any law that is reasonably justifiable in a democratic society.

Right to Freedom of Thought, Conscience and Religion

The freedom of belief is guaranteed under section 37. Under this provision, every person is entitled to freedom of thought, conscience and religion either as an individual or in community with others. This constitutional provision not only grants the right to manifest one's belief but also guarantees the propagation of such belief in practice. It also covers the right to change one's belief. The fact that the constitution protects one in changing one's belief is important in the case of some religious practices that prescribe stiff penalty for apostasy.

However, no person shall be required to partake of a religious instruction or ceremony other than his own or that of his parents in any place of education.³² It is important, nonetheless that the freedom granted under this sub-section is limited to educational institutions that are partly or wholly funded by the public.³³ The Constitution does not prevent a religious community that wholly funds its own educational institution from prescribing religious instructions for pupils of that com-

manity.

Section 37 sub-section (4) derogates from the general right granted under the section when it comes to being a member of a secret society. For it states that "nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society." What constitutes a secret society is not defined as was the case in the 1979 constitution. So the ball is now in the court of the courts to come up with a definition of what society is secret society.

Right to Freedom of Expression and the Press

Freedom of expression and the press is guaranteed under the constitution in section 38. Sub-section (1) reads: "Every person shall be entitled to freedom of expression including freedom to hold opinions and to receive and impart ideas and information without interference." As Nwabueze argues, this is an important right.⁵⁵ In fact Nwabueze goes to the extent of asserting that it is more important than the right to life itself because it is the freedom that ensures the right to participate in government or self-government which signifies the life of the community as a whole.⁵⁶

Man is a gregarious animal that is always expressing himself. The protection that the constitution guarantees is not so much of protection against the suppression of man from speaking, but protection from unreasonable punishment as a result of the expression of a person.⁵⁷ With respect to press freedom, the protection is not so much protection for the individual journalist, but for individuals to have access to the medium for the dissemination of information and ideas. And of course, the right to disseminate information and ideas through the press and operate any medium for the dissemination of information and ideas.

It is obvious that the ideas of any medium goes beyond just the printed tabloid of newspapers. Press freedom will embrace such other medium like pamphlets, handbills, books and even schools as was decided in the case of *Archbishop Okogie V. Attorney-General of Lagos State* where it was held that the abolition of private secondary schools will infringe the right of the plaintiff to disseminate ideas through a medium of his choice.⁵⁸

However, the right to own a medium and the right to speech are not absolute. The constitution itself in a proviso to sub-section (2) limits the

ownership or operation of a television or wireless broadcasting station to the Federal or State Government or any other person or body authorised by the President. Sub-section (3) in addition stipulates that nothing in the whole section will invalidate any law reasonably justifiable in a democratic society for preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephone, wireless broadcasting, television or the exhibition of cinematograph films; or any law imposing restrictions on former government officials at all levels and the Armed Forces and Security Agencies.

Furthermore, the general laws on sedition are not invalidated by the provisions of section 38 of the constitution. This has been the position since the case of *DPP V. Chibie Ohi*.⁵⁹

On the question as to whether this constitutional right protects the individual journalist from disclosing his source of information, the position in common-law is that he is not so protected.⁶⁰ The issue did not come up for decision in *Tony Momoh V. State* but various pronouncements of American courts on the issue and had consistently rejected the position that a journalist can refuse to disclose his source of information.⁶¹

Right to Peaceful Assembly and Association

The right to peaceful assembly is an important fundamental human right. It is this right that makes it possible for human beings to protect their individual interests in concert with others as a collectivity. Given the importance of collective action in a democratic set up, it is salient that section 39 of the 1989 constitution accords every person the right to assemble with other persons in this respect, the constitution further guarantees every person the right to form or belong to any political party, trade union or any other association for the protection of his interests.

This right, however, is not absolute. With respect to political associations, the right to freedom of association is subject to the right granted to the National Electoral Commission (NEC) under the constitution to accord recognition to associations.⁶² So no citizen can claim to form or belong to any party that the NEC does not recognise. Furthermore, Section 37 (b) of the 1979 constitution has been re-written as section 39 (b) of the 1989 constitution. However, the latter form is different from the sense of the former. While section 37 (b) of the 1979 constitution

prevented an independent candidate from declaring for a political party after election, section 39 (b) of the 1989 constitution prohibits someone elected to a legislative house on the platform of a party from joining or declaring to be a member of the other political party until the next general election following his initial election. The thrust of this proviso is to reinforce the two party system under the Constitution and prevent independent candidates from seeking elective office. In addition, the proviso has the import of checking the carpet-crossing of the first Republic or de-camping as it was called in the second Republic, a situation whereby legislators switched parties just on their whims and caprices.

It must be noted, however, that section 43 (1) of the 1989 constitution also provides enough latitude for government to make laws that may restrict freedom of association and peaceful assembly. The only condition being that such laws be reasonably justifiable in a democratic society in the overall public interest.

The courts have had opportunities to consider instances where arguments on the infringement of the freedom of association had been made. For instance, the High Court of Northern Nigeria held that even though juveniles as persons have the freedom of association, a law prohibiting juveniles from participating in politics by joining political parties or attending meetings is justifiable in the interest of public order.⁴¹ However, in *Adeleke and Others V. Yakande and Others* a Lagos High Court held that a circular by the State Government which sought to abolish fee paying primary institutions circumscribes the right of association of children who would want to attend such schools.⁴²

Nonetheless, it is important to stress that *peaceful* assembly is important under the right to freely associate. And the discretion as to whether an assembly is peaceful or likely to threaten public peace is left largely in the hands of the police.

Right to Freedom of Movement

Section 40 (1) of the 1989 Constitution grants all Nigerians right to move freely within the length and breadth of Nigeria. This fundamental right is significant for the enjoyment of other rights under the constitution. Also the sub-section makes it clear that a Nigerian citizen can neither be expelled from Nigeria nor denied entrance into Nigeria. A criminal or someone reasonably suspected of having committed a crime

can be prevented from moving around under the law. In addition, Section 40 (2), (b), (c) and (ii) provides that a Nigerian can be extradited to another country for trial for any criminal offence or removed from Nigeria to undergo imprisonment outside Nigeria in execution of a court sentence of a crime for which he has been found guilty.

The attempt of the Minister of Internal Affairs under the Shagari government to expel a Nigerian under the claim that he was a Chadian National was resisted under this section. The Maduguari High Court held that Alhaji Shagaba was a Nigerian and could not be expelled.⁴³ Generally, however, a reasonably justifiable law in a democratic society in the interest of public order etc. can constitute a ground for the restriction of an individual. This was the case in *Adegbenu V. Attorney-General of Federation and Others* where the court held that the restriction of Alhaji Adegbenu (whose contention for the position of the Premiership of the former Western Nigeria with Chief Abinola had led to frays in the Western House of Assembly) was validly made under the Emergency Powers Act for public safety and public order.⁴⁴

Right to Freedom from Discrimination

The 1989 Constitution protects Nigerian citizens from discrimination on certain stated grounds. Thus a citizen shall not just because he belongs to a particular community, ethnic group, place of origin or on the basis of the circumstances of his birth, sex or his religion or political opinion "be subjected either expressly / by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, circumstance of birth, sex, religious or political opinions are not made subject" or by the same token be accorded any privilege or advantage not accorded to others on the grounds stated earlier.⁴⁵

Section 41 (2) places additional emphasis on circumstances of birth by stating that "no citizen of Nigeria shall be subjected to any disability or deprivation merely reason of the circumstances of his birth." What circumstances of birth is not explained and the judiciary has not had the opportunity to interpret this sub-section yet. However, on the basis of the debates on the making of the 1979 constitution, it is generally assumed that "circumstances of birth" refers to the issue of whether a child is born within or outside wedlock.⁴⁶

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This section is absolute unlike some of the earlier sections for it is not subject to "any law that is reasonably justifiable in a democratic society." The only exception to the absolute position is as stated in section 41 (3) wherein it was stated that "nothing in sub-section (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the state or as a member of the armed forces of the Federation or a member of the Nigeria Police Force or other government security services established by law."

The section provides for reaching protection to Nigerian citizens against discrimination. That the constitutional provision is limited to Nigerian citizens and the far-reaching protection it offers differentiates it from the American Fourteenth Amendment which provides for equal protection of the laws.⁴⁷ The section in one sweep took care of the problem of discrimination against women, illegitimate children who suffer for offences they themselves did not commit and were not accomplices in—under the Sharia Law and some Customary Laws. In addition, discrimination of the basis of ethnicity etc. were prohibited.

While there have been cases in the United States of America and India on similar provision to this one, the first case in Nigeria is yet to be finally decided upon by the courts.⁴⁸ This was the case of the 11 year old girl Aderinka A. Badejo who sued through her father for the enforcement of her rights against discrimination on the basis of place of origin under section 39 (1) (a) and (b). In this case, the girl had sat for a common entrance examination into Federal Government Colleges. And on the basis of an administrative policy, cut-off points were set for different pupils on the basis of their states of origin in the Federation. Thus, while those she performed better than from other states were invited for interview for placement, she was not.

The issue before the court is whether such an administrative policy violates the spirit of section 39 of the 1979 constitution which has now been re-enacted as section 41 of the 1989 constitution. With the Court of Appeals reversal of the High Courts argument that the girl lacks *locus standi*, one can expect that this section will be one of the most controversial sections before the courts under the 1989 constitution.

Freedom from Compulsory Acquisition of Property

The 1989 constitution protects the third leg of the Lakken rights

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...the right to Estate. This important right for private enterprise is enshrined in section 42 of the constitution. Under this provision the individual is protected from any compulsory acquisition of a moveable or immovable property in which he has any interest "except in the manner and for the purposes prescribed by a law that, among other things:

- (a) requires the prompt payment of compensation thereof; and
- (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria".⁴⁹

This unbridled right to accumulate and keep property is subject to: any general law meant to impose or enforce tax, rate or duty; penalties or forfeitures resulting from the breach of any law under civil process or upon conviction for an offence; rights accruing to another party as a result of contractual obligations like leases, tenancies, mortgages, charges etc.; vesting and administration of the property of a bankrupt, person of unsound mind, deceased persons and artificial persons like companies when being wound-up; the execution of the order of a court; any property deemed to be dangerous to human, animal or plant life; enemy property; trusteeship arrangements; limitation of actions; proceeds vested in corporate bodies established by statute; temporary taking of possession of property for the purpose of any examination, investigation or enquiry; the purpose of carrying out work on land for the purpose of soil conservation and the execution of public utilities like water, sewerage etc. for which adequate compensation shall be promptly paid.⁵¹ However, the general principle that what is on the land and attached to it or under it is bridged with respect to all minerals, mineral oils and natural gas under or upon any land in Nigeria, under or upon Nigeria territorial waters and Exclusive Economic Zone of Nigeria all of which shall vest in the Federal Government of Nigeria.⁵²

Despite the vesting of such things as minerals on government and other exceptions stated earlier, the right to private property is a fundamental right that is adequately preserved under the constitution. The Nigerian provision is similar to the Fifth Amendment to the Constitution of the United States of America which makes just compensation essential if acquisition of private property is to take place for public use. And just compensation in the United States has been conceived as "fair and perfect equivalent in money" of the property taken from the owner

as to part him in as good a position pecuniary as he would have occupied if his property had not been taken."⁵³ The Indian provision is like the Nigerian one where "just" is not an adjective for compensation. But even there the courts have suggested that "what is determined as payable must be compensation that is just equivalent to what the owner has been deprived of."⁵⁴

Restrictions on and Derogations from Fundamental Human Rights

We have earlier referred to section 43 sub-section (1) of the 1989 Constitution which makes laws justifiable in a democracy derogate from the right to private life; right to freedom of thought, conscience and religion; right to freedom of expression and the press; right to peaceful assembly and association and right to freedom of movement for the protection of public interest or the right of another person.⁵⁵

Even then, sections 32 and 34 can be suspended by an Act of the National Assembly during a period of emergency that is properly declared by the President in exercise of the powers conferred on him under section 317 of the constitution. Thus, the elaborate provisions on the right to liberty and the right of life can be circumscribed. However, death with respect to right to life can only be as a result of acts of war. And under no circumstance is section 35 (7) to be circumscribed under the constitution. The provision here is to the effect that "no person shall be held guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed."⁵⁶

Enforcement of Fundamental Human Rights

As in the 1979 Constitution, the jurisdiction for the enforcement of fundamental human rights when it has been, is being or is likely to be contravened is conferred on the State High Court in that area. And in Abuja, on the Federal High Court in the Federal Capital Territory, Abuja.⁵⁷

The Chief Justice of Nigeria is expected to make rules of practice and procedure for the High Court for the enforcement of fundamental human rights.⁵⁸ The National Assembly is also empowered to confer additional powers that it may feel necessary for the enforcement of fun-

damental human rights.⁵⁹ Furthermore, the National Assembly is expected to make provisions for the aid of indigent citizens whose rights may be transgressed.

Conclusion

It is no longer in doubt that fundamental human rights are essential for the survival of human beings in society. Thus, the fact that the provision of Chapter IV of the 1979 Constitution have been largely re-enacted in the 1989 Constitution is not surprising. In fact, Nigeria's treaty obligations require that she puts some positive laws on civil and political rights into place. In this respect, it is noteworthy that Nigeria ratified the Universal Declaration of Human Rights 1948; the African Charter on Human and Peoples Rights 1981; the International Convention on the Elimination of all Forms of Discrimination against Women and the Convention and Protocol Relating to the Status of Refugees, amongst others.

However, economic, social and cultural rights are largely ignored by the Nigerian Constitution except for the protection of private property clause. Thus, right to: work; fair remuneration; education; adequate standard of living etc. are not the concerns of the Constitution. So, the right to life is not contravened if as a result of unemployment and inability to pay for health services one starves to death or dies of simple ailments.

But even then, with respect to the guarantees given under civil and political rights, words of constitution cannot enforce themselves. In this regard, the prevalence of the rule of law becomes a *sine qua non* for the enjoyment of the minimal rights. And this is why an impartial judiciary becomes significant. If the courts under the 1979 Constitution failed it may not be as a result of a inability to uphold the principles guaranteed in Chapter IV of the 1979 Constitution. The main problem then will be the extent to which the courts under the 1989 Constitution can live up to the protection of civil and political rights if their interpretation of the right to life will not stretch to the right to have an adequate means of livelihood.

Aside from the problem of enforcement, it is important to note that the current world-wide concern⁶⁰ for the special rights of the child is hardly reflected in the 1989 Constitution. We noted, earlier on, the protection the Constitution gives to all children against discrimination on

the basis of the circumstances of birth. This, we suggested, is a protection for children born outside wedlock. Except for this provision, no other clause in the Constitution is geared towards the specificity of the protection of the child's rights.

It is erroneous to assume that the child's rights are covered by the varying clauses in the Constitution on fundamental human rights. As a matter of fact, the child's freedom of association can be circumscribed under this Constitution as we pointed out earlier on. Furthermore, it is important that children are specially protected from socio-economic exploitation in whatever form. This may necessarily involve programmes that are geared towards the alleviation of mass poverty amongst Nigerian families.²⁹ There is also the need to guarantee the child's right to education and freedom from cruel treatment.

In effect what we are suggesting is a re-alignment of the 1989 Constitution in line with the United Nations Charter and the U.N.'s various conventions as well as positions of the African Charter on Human and Peoples Rights on the special problems of the child. The drafting of the 1989 Constitution remains poor if the general civil and political rights granted by the Constitution can be easily abridged by the courts or by administrative fiat when the rights of the child are at issue.

As Ebohe Ukpang put it in the *Guardian*

What the Nigerian child expects '... is a fair opportunity to grow into an adult too, as a matter of right, with an adequate standard of living. He wants also to rightly inherit tomorrow, which rightly is his but which has been mortgaged by the adults without his consent. The Nigerian child must not be sacrificed to let his parents live, rather he should be supported to grow above his parents' shoulder.³⁰

NOTES

1. Office of Public Information, *Charter of the United Nations and Statute of the International Court of Justice* (New York: United Nations, 1961) p. 1
2. These include: The Universal Declaration of Human Rights; The International Covenant on Civil Political Rights; and the International Covenant on Economic, Social and Cultural Rights.
3. On this, see a review in Sunday B. Ajulo, "The Human Rights Issue in Lome Convention," paper presented at the 18th Annual Conference of the Nigerian Society of International Law, held at the Nigerian Institute of International Law, Lagos, Friday 12th January, 1990 pp. 4-19 and Osta C. Eze, *Human Rights*

4. *in Africa: Some Selected Problems* (Lagos: Nigerian Institute of International Law, 1984), pp. 1-22.
5. Quoted in Ajulo, *op. cit.*, p. 5
6. Eze, *op. cit.*, pp. 5-6
7. Section 32 (1) of the 1989 Constitution.
8. For a more detailed treatment, see B. O. Nwabueze, *The Presidential Constitution of Nigeria* (London: C. Hurst & Co. (Publishers) Ltd., 1982), pp. 409-410
9. For the 1979 debate, see E. Michael Joye and Kingsley Igweike, *Introduction to the 1979 Nigerian Constitution* (London: The Macmillan Press, Ltd. 1982), p. 294
10. Author's Interview with Prof. Abiodun - a member of the Constituent Assembly.
11. See, Section 33 (2) of the 1989 Constitution.
12. See, Nwabueze, *op. cit.*, 412
13. *Ibid.*
14. See Joye & Igweike *op. cit.*, p. 296, Nwabueze, *ibid.*, see also, Jadesola O. Akande, *Introduction to the Nigerian Constitution* (London: Sweet & Maxwell, 1982), p. 31.
15. *Ibid.*, p. 32
16. Section 34 (3) of the 1989 Constitution.
17. Section 34 (5) of the 1989 Constitution.
18. See Joye & Igweike, *op. cit.*, p. 300.
19. Many a time, juveniles are put into the same cells with hardened criminals. See for example, The Civil Liberties Organisation 1985 Report on "Violation of Human Rights in Nigeria" n.d., p. 7.
20. The case of *Dr. Alakija V. Medical Disciplinary Committee* (1959) 4 FSC 38 is normally used as illustration where the Registrar of the Medical Disciplinary Committee who was the prosecutor of Dr. Alakija the appellant took part in the deliberations of the Committee in the absence of the appellant and his legal representative. The trial was held to violate natural justice by the Federal Supreme Court. See also, David M. Jembetoc, *An Introduction to the Theory and Practice of Military Law in Nigeria* (Lagos: Friends Foundation Publishers Ltd., 1989) for various accounts of violations of this principle under military law. See in particular, footnote 10 on p. 117. A very recent case on the issue is *The Legal Practitioners Disciplinary Committee V. Fagbenmifunmi* (1982) 2 NWLR 300.
21. *Awolowo V. Federal Minister of Internal Affairs* (1962) LLR 177.
22. See *Akoko V. Fagbenmifunmi* (1961) 1 ALNLR 400 where this provision was used by the High Court to quash the sentence on a woman by a customary court for the customary offence of adultery.
23. Section 35 (8) of the 1989 Constitution.
24. Section 35 (9) of the 1989 Constitution.
25. Mr. Justice Black as quoted in *Joye and Igweike, op. cit.*, pp. 311-312.
26. Nwabueze, *op. cit.*, pp. 442-443.
27. *Ibid.*
28. *Ibid.*, p. 438.
29. See Section 35 (12) (a) of the 1989 Constitution.
30. Section 35 (12) (b) of the 1989 Constitution.
31. Section 37 (2) of the 1989 Constitution.

32. Section 37 (3) of the 1989 Constitution.
33. *Nwabueze, op.cit.*, p. 457.
34. *Ibid.*
35. *Ibid.*, pp. 460-461.
36. *Abubakar Obabemi Obagbe V. Attorney-General of Lagos State* (1981) 1 NCLR 218.
37. *DPP V. Chale Oki* (1961) 1 All NLR 188.
38. *Akande, op.cit.*, p. 37.
39. See *Ibid.*, and *Nwabueze, op.cit.*, pp. 462-465.
40. Section 39(b) of the 1989 Constitution.
41. *Chenani V. Chenani* (1980) NRNLR 29 in that case, the applicant wanted the sections 33, 34 & 35 of the Children and Young Persons Law, 1958, of the Northern Region of Nigeria quashed as void for being repugnant to paragraphs 7, 8, to the Constitution Order of association. (1981) 1 N.C.L.R. 262.
42. See *Shagbiru Dorman V. Ministry of Internal Affairs and Others* (1981) 1 NCLR 25.
43. See *Shagbiru Dorman V. Ministry of Internal Affairs and Others* (1981) 1 NCLR 25.
44. *Alagbhero V. Attorney-General of the Federation and Others* (1962) 2 WRNLR 169.
45. See Section 41 (a) and (b) of the 1989 Constitution.
46. See *Joye and Oyewole, op.cit.*, pp. 330-331 and *Akande, op.cit.*, p. 39.
47. See *Ibid.* and *Nwabueze, op.cit.*, pp. 452-456.
48. See *Ibid.*
49. *Akintuba A. Badji V. Federal Minister of Education and one Unreported Court of Appeal Suit: No. CA5134/6588*. An appeal seeking a retrial at the High Court is pending at the Supreme Court.
50. See Section 42 (a) and (b) of the 1989 Constitution.
51. See Section 42 (2) of the 1989 Constitution.
52. See Section 42 (3) of the 1989 Constitution.
53. *United States V. Miller*, 317 U.S. 369.
54. *State of Benue V. Borno* (1954) SC 170 at 172.
55. Section 43 (a) and (b) of the 1989 Constitution.
56. Section 35 (7) of the 1989 Constitution.
57. See Section 44 (1) and (2) of the 1989 Constitution.
58. *Ibid.*, sub-section (3)
59. *Ibid.*, sub-section (4) (a).
60. *Ibid.*, sub-section (4) (b) (i) and (ii).
61. See some of the account in Onie Gye-Wado, "Human Rights, the Rights of the Child and the African Charter on Human and Peoples' Rights" paper presented at the National Seminar on the Nigerian Child held at the National Assembly Complex, Lagos, September 16-20, 1990.
62. *Ibid.*
63. *The Guardian* (Thursday) October 4, 1960 p. 13.

CHAPTER SIX

The Legislature

It was suggested that legislatures perform three basic activities. These are categorized as policy making activities, representational activities and system-maintenance activities. The degree of the mixture of each of these three categories of activities in any particular legislature depends on a number of factors. A legislature which does not possess the power to initiate policies may informally be in a position to set the parameters within which the policy makers actually operate. A legislature which is weak in articulating the interests of its electorate may be stronger in playing the role of intermediary between citizens and government officials. With respect to system maintenance there are various ways by which a legislature may perform this group of activities - by recruiting and socializing political elites through its management of conflicts, by integrating the national elites and by serving as a major means for mobilising support for government policies.

It has been observed, however, that legislatures are not the only or even the most important institutions which perform these groups of activities.² In some political systems, at certain periods in their development, these activities are performed not by the legislature but by other institutions. In many countries in Africa, particularly since the late 1960s, it has been shown that for effective or efficient functioning of the country, legislatures, as we know them, may not be necessary. They not only exacerbate political conflict, they also may undermine political stability. The important point to note, however, is that whenever legislatures are found to be necessary institutions for governing they do perform these activities in some shape or form.

Legislatures in Nigeria's Political Development

The first legislative Assembly for Nigeria, called the Nigeria Council, was instituted soon after the amalgamation of Southern and Northern protectorates of Nigeria in 1914. It was essentially an assembly of the most senior British colonial officials involved in the administration of Nigeria. Only six of its thirty members were Nigerians nominated by the Governor. It was not until 1923 that a legislature on which four